

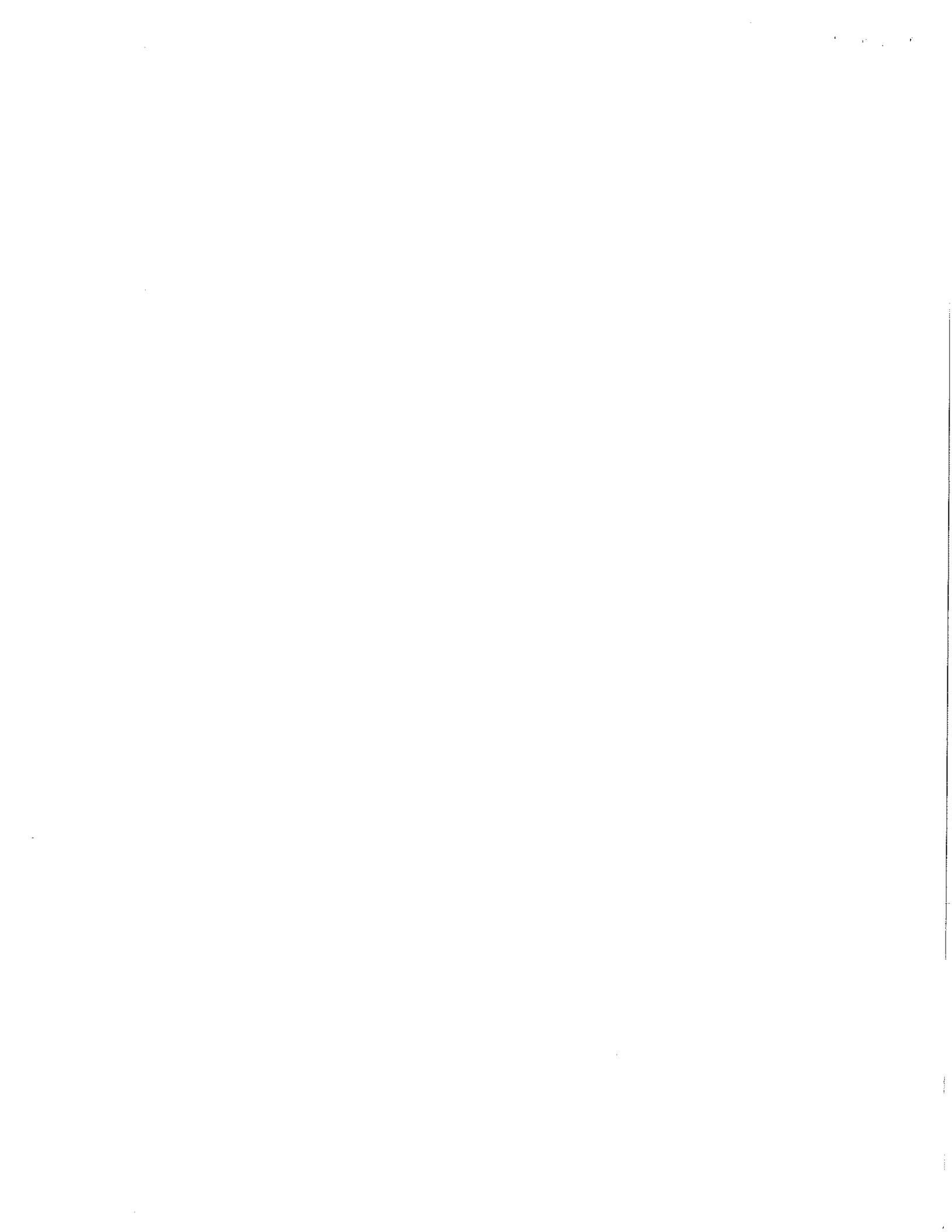
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THE PARADOXICAL ARGENTINA CASES

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I. INTRODUCTION

The Argentine crisis, whose economic and political impact was most strongly felt in 2001-2002, has, over time, generated a sense that the international investment regime is in crisis. The number of investor-state claims produced to date as a result of that crisis – the most ever directed against a single state emerging from the contemporary web of investment protection treaties – along with the ever rising number of arbitral awards issued in their wake, have featured prominently in critiques of that regime.¹ A wide number of commentators have argued that the Argentina awards and other decisions issued to date:

1. Demonstrate that the investment regime produces inconsistent law that undermines the regime's goals of stability and predictability;
2. Are unduly intrusive on national sovereignty and a threat to self-determination insofar as these are insufficiently deferential to national law and the rights of sovereigns to regulate in the public interest (to protect human, labor, or environmental rights, for example);
3. Fail to respect the rights of nations to take necessary emergency action in response to fundamental national threats;
4. Reflect a strong bias in favor of investors-claimants insofar as they view bilateral investment treaties (BITs) as one-

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¹ See, e.g., GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 1-2 (2007).

trick ponies designed only to protect foreign investors at the expense of all other legitimate sovereign goals;

5. Fall on the wrong side of the “public”/“private” divide as they erroneously “privatize” disputes that involve sovereigns as parties, that regulate public functions, and that are governed by and produce (through arbitral caselaw) “public” law implicating “public” concerns;
6. Constitute a form of global administrative or perhaps constitutional law that fail to respect the rule of law values (including transparency and participation) that such forms of governance require for their continued legitimacy.²

These six flaws can be reduced to one: the Argentina cases show that the international investment regime is the enemy of the state. That is certainly the conclusion suggested by the 37 prominent academics around the world, mostly professors of international law, who signed the “Public Statement on the International Investment Regime” issued on August 31, 2010 at Osgoode Hall School of Law.³ The Osgoode Hall Statement sees the investment treaty regime and investor-state dispute settlement as antithetical to the public interest; suggests that states should withdraw from BITs and investor-state arbitration on moral and political grounds, and recommends that governments that are offended by certain investment awards should proceed to ignore them.⁴ It is premised, like much of the

² See, e.g., *id.* Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, in *EL NUEVO DERECHO ADMINISTRATIVO GLOBAL EN AMÉRICA LATINA* 221 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980.

³ See GUS VAN HARTEN ET AL., PUBLIC STATEMENT ON THE INTERNATIONAL INVESTMENT REGIME (Aug. 31, 2010) [hereinafter OSGOODE HALL STATEMENT], available at http://www.osgoode.yorku.ca/public_statement. This is only one example of such public statements. See also AN OPEN LETTER FROM LAWYERS TO THE NEGOTIATORS OF THE TRANS-PACIFIC PARTNERSHIP URGING THE REJECTION OF INVESTOR-STATE DISPUTE SETTLEMENT (May 8, 2012) (enumerating the many flaws the signers saw in investor-state dispute settlement and urging all governments involved in TPP negotiations to follow Australia’s example in rejecting this form of arbitration).

⁴ OSGOODE HALL STATEMENT, *supra* note 3.

underlying critical scholarship, on the proposition that national law – not international law or BITs – should provide the “primary legal framework for the regulation of investor-state relations.”⁵ Its conclusions rest on the premise that fair investment contracts permitting “managed renegotiations” to accommodate the needs of both investors and state regulators, not denationalized arbitration, should be the favored mode of dispute settlement. The contention is that, if claims arising from and impacting sovereign concerns – particularly those that result from a national crisis like the Argentine crisis – have to be formally adjudicated, they should be heard in public forums in which the wider public, including “private citizens, local communities, and civil society organizations” have the right to be heard.

Ten years after the beginning of the Argentine economic crisis, what do we actually find?

A more sober reflection on the Argentina decisions – and the normative ripples that they have produced – suggests that every one of these claims is at best a half-truth. The Osgoode Hall Statement is a caricature of what is a far more complicated picture. The public decisions that we have and the reactions that they have produced (particularly within states) are a story filled with paradox and rich in ironies. It is less graphic novel of good and evil and more complex Shakespearean drama.

This essay provides an interim evaluation of the impact of the Argentine investor-state caselaw in the greater context of evolving BIT and FTA texts. It surveys the relevant awards issued to date, provides an account of the sums awarded, and (to the extent simplistic tables can be deployed in such an enterprise), gives a rough summation (from 20,000 feet up) of the cumulative impact of this caselaw with respect to some of the more salient issues. It also attempts to situate this caselaw within other developments in the international investment regime over the past few years.

The conclusions drawn here are at some distance from those suggested by the Osgoode Hall Statement and other public criticisms of the international investment regime. The Argentina decisions issued to date do not, in our view, justify over-heated

⁵ *Id.*

charges of inconsistent arbitral caselaw, undue sovereign intrusion, blanket disregard for "emergency" action, or pro-investor bias. They also do not provide, in our view, support for the contention that investment arbitration is a wrong-headed effort to "privatize" what should have remained "public" that evinces lack of respect for the rule of law.

These sanguine conclusions are complemented by another: the Argentina "crisis" cases themselves provide evidence that the international investment regime has not stood still over the past ten years. Although most often cited in support of the contention that this regime (or investor-state arbitration) is the enemy of the state, the Argentina "crisis" cases appear, paradoxically, to have contributed to changes within the regime that make it more amenable to the views and needs of states. This is reflected in the legal interpretations reached by the relevant tribunals and annulment committees, particularly but not only with respect to the evolving interpretation of the crucial fair and equitable treatment (FET) provision in the relevant BITs. It is also reflected in the fact that the Argentina claims have helped to spawn a wave of other reactions – by states, NGOs, and scholars – that are "taking the edge off" of all of these criticisms.

The Argentina awards canvassed here suggest that their sharpest critics failed to anticipate that both investor-state arbitrations and the regime as a whole can evolve over time. While one can disagree with the course of that evolution, and particularly with some recent annulment rulings which have exacerbated the risks of inconsistency and instability, the Argentina cases, ironically, have helped to turn once plausible complaints into gross oversimplifications. The investment regime of today – the one that has developed alongside and in reaction to the Argentina cases – demonstrates the considerable and continuing power of states (and investor-state arbitrators on their behalf) to exercise their "exit" and "voice" options.⁶ While it is still too early to make a final assessment, since many of the Argentina claims have not yet been fully resolved and new ones may yet emerge,⁷ for now the threat to sovereignty posed by the

⁶ See ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970).

⁷ This assessment might change if, for example, the jurisdictional decision in *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision

filed after 2002 included complaints based on measures adopted before 2002 (such as *Sempra* and *Camuzzi I*). In addition, a number of these claims are based on Argentina's alleged actions or inactions taken after Argentina's "crisis" was over (at least as determined by relevant awards).¹⁰ Given these facts, categorizing all of these as "crisis" cases is a bit of a simplification and may involve taking sides as between the litigants in some of these cases. Thus, in at least one pending claim, *Sempra II* (a case brought after the *Sempra* annulment decision), the litigants have very different views as to whether most of the damages being claimed are based on Argentina's original emergency measures back in 2001-2002 or result from government actions and inactions since 2003.¹¹

Table 1 - Arbitral Decisions in Investment Treaty Cases in Which Argentina Appeared as Respondent (as of March 18, 2012)

| DECISIONS ON JURISDICTION AND AWARDS UPHOLDING OR DECLINING JURISDICTION (33) | AWARDS ON THE MERITS (17) | DECISIONS ON ANNULMENT (7) | DECISIONS ON STAY OF ENFORCEMENT (7) |
|--|------------------------------|-------------------------------|---|
| <i>Abaclat</i> | | | |
| <i>AES</i> | | | |
| <i>Azurix I</i> | <i>Azurix I</i> | <i>Azurix I</i> | <i>Azurix I</i> |
| <i>BG (Award)</i> | <i>BG</i> | | |
| <i>Camuzzi</i> | | | |
| <i>Camuzzi II</i> | | | |
| <i>CMS</i> | <i>CMS</i> | <i>CMS</i> | <i>CMS</i> |
| <i>Continental Casualty</i> | <i>Continental Casualty</i> | <i>Continental-Casualty</i> | |
| <i>EDF - SAUR*</i> | | | |
| <i>El Paso</i> | <i>El Paso</i> | | |
| <i>Enron I</i> | <i>Enron</i> | <i>Enron</i> | <i>Enron (two decisions)</i> |
| <i>Enron Ancillary Claim</i> | | | |
| <i>Gas Natural</i> | | | |
| <i>Hochtief (w/ separate conc. and dissenting opinion)</i> | | | |

¹⁰ See, e.g., *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability ¶ 228 (Oct. 3, 2006) [hereinafter *LG&E Decision on Liability*], available at http://italaw.com/documents/ARB021_LGE-Decision-on-Liability-en.pdf (determining that Argentina's "factual emergency" ended at the time that President Néstor Kirchner was elected in 2003).

¹¹ This is based on one of the authors' examination of the respective briefs filed in that case.

Argentina "crisis" cases appears to have been more about perceptions than reality. For now, what the Argentina cases tell us is that the international investment regime, including investor-state arbitration, remains more the tool of the state than its enemy. It is not the fundamental threat to "sovereignty" that some had hoped for and that others had feared.

II. EVALUATING THE ARGENTINA CASELAW

A. General

Table 1 identifies the 33 investor-state decisions and awards on jurisdiction in which Argentina appeared as respondent as of March 18, 2012, including the 17 awards on the merits, 7 decisions on annulment, and 7 decisions involving a stay of enforcement.⁸ As this and later tables suggest, a high number of ICSID claims (about 40), were filed against Argentina between 2002 and 2007, while another handful, notably under the United Kingdom-Argentina BIT, were filed under UNCITRAL Rules. After its economic crisis, Argentina became the leading investor-state respondent state, now followed by Venezuela which had 21 ICSID claims filed against it from 2007 through March 2012.⁹ As expected, a substantial majority of the claims filed against Argentina had some connection to the "emergency" measures adopted by Argentina in 2001 or 2002 in response to that nation's economic difficulties and the resulting political effects of that crisis. It is important to remember, however, that some of these claims sought relief for Argentine government measures taken before the crisis in the gas transportation and distribution sector. Indeed, some of the leading Argentine "crisis" cases (*CMS*, *Enron*, and *LG&E*) were actually filed before 2002 and some of the claims

on Jurisdiction and Admissibility ¶ 294 (Aug. 4, 2011) [hereinafter *Abaclat Decision on Jurisdiction*] is affirmed and investor-state arbitrations become vehicles not for 40 or so claims against a state but for thousands of such claims brought through "mass" actions by individual bondholders injured by sovereign defaults.

⁸ These and other tables included in this essay take into account developments only through March 2012.

⁹ See *List of Pending Cases*, International Centre for Settlement of Investment Disputes, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending>.

| | | | |
|---|--|-------------------|-------------------------------|
| <i>Houston*</i> | <i>Houston*</i> | | |
| <i>ICS**</i> | | | |
| <i>Impregilo I (Award)</i> | <i>Impregilo I (w/ two conc. and diss. opinions)</i> | | |
| <i>Lanco</i> | | | |
| <i>LG&E</i> | <i>LG&E (Dec. on Liability and Final Award)</i> | | |
| <i>Metalpar</i> | <i>Metalpar</i> | | |
| <i>National Grid</i> | <i>National Grid</i> | | |
| <i>Pan American & BP</i> | | | |
| <i>SAUR*</i> | | | |
| <i>Sempra</i> | <i>Sempra (w/ partial dissenting opinion)</i> | <i>Sempra</i> | <i>Sempra (two decisions)</i> |
| <i>Siemens</i> | <i>Siemens (w/ separate opinion)</i> | | |
| <i>Suez - AWG</i> | <i>Suez- AWG (Decision on Liability)</i> | | |
| <i>Suez - Interagua</i> | <i>Suez- Interagua (Decision on Liability)</i> | | |
| <i>Telefonica</i> | | | |
| <i>Total</i> | <i>Total (Decision on Liability)</i> | | |
| <i>TSA Spectrum (w/ a concurring and a dissenting opinion)***</i> | | | |
| <i>Vivendi I (Award)</i> | | <i>Vivendi I</i> | |
| <i>Vivendi II</i> | <i>Vivendi II</i> | <i>Vivendi II</i> | <i>Vivendi II</i> |
| <i>Wintershall (Award)**</i> | | | |

* Decisions not available as of March 18, 2012

** Awards holding MFN Clauses cannot be used to avoid 18-month litigation in domestic courts prior to arbitration

*** Award declining jurisdiction based on absence of foreign control of the investment

The influx of Argentine claims diminished after 2007. Only two cases were filed in 2008 (*Alpi* and *Impregilo II*), and only one was filed in early 2009 (*Teinver*). No claims were filed in all of 2010 and 2011. While this would suggest that the wave of claims against Argentina arising from that country's 2001-02 "crisis" is over, this is subject to some caveats. As Table I suggests, a

significant number of decisions on liability remains in the pipeline. Indeed, hearings on the merits in at least four of these cases (*EDF-SAUR*, *SAUR*, *Mobil II*, and *Daimler*) were held only recently. An additional three awards on damages are also expected following the issuance of decisions on liability (*Suez-InterAgua*, *Suez-AWG*, and *Total*). On the other side of the ledger, a significant number of proceedings on annulment can also be expected if Argentina continues its policy of filing requests for annulment with respect to any award ordering the payment of damages. More significantly, any assessment of the Argentina "crisis" cases needs to consider the very significant novel claims arising from three separate groups of Italian bondholders (*Abaclat*, *Alemanni*, and *Alpi*). Table 1 lists only the *Abaclat* jurisdictional decision that has emerged to date based on those claims. All of this means that, despite the substantial number of Argentina awards issued to date, a more complete assessment of the impact of the Argentine crisis on investor-state dispute settlement and the investment regime will require more time.

Table 2 indicates the nine separate BITs (between Argentina and Belgium/Luxembourg Union, Chile, France, Germany, Italy, Netherlands, Spain, United Kingdom, United States) that have generated the cases identified on Table 1. As Table 2 indicates, the Argentina "crisis" cases do not involve disputes between only U.S. investors and Argentina and therefore should not be seen only through the prism of U.S.-Argentine relations. The diverse origins of foreign investment in Argentina have been reflected in the claims filed to date. At the same time, almost all the claims have involved either U.S. or European BITs,¹² and in some cases multiple BITs were considered in the same proceeding. Thus, at least three cases involved multiple BITs (*EDF-SAUR* [2], *Suez-InterAgua* [2], and *Suez-AWG* [3]). This range of BITs means that the Argentina cases have led to the consideration of a number of unusual or atypical BIT provisions, including the measures not precluded clause (Article XI of the United States-Argentina BIT) (see table 11); clauses limiting the consideration of tax measures (as under Article XII of the United States-Argentina BIT) (see table 6); and clauses requiring investors to go to local courts for 18

¹² The *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award ¶¶ 162-4 (Jun. 6, 2008) [hereinafter *Metalpar Award*], (decision, involving the Argentina-Chile BIT, being the exception).

months before obtaining access to international arbitration (and whether MFN clauses can bypass such requirements) (see table 6).

Table 2 - Investment Treaties Involved in Cases in Which Argentina Appeared as Respondent

| BELGIUM/ LUX. UNION (4) | CHILE (1) | FRANCE (6) | GERMANY (3) | ITALY (2) | NETHER- LANDS (1) | SPAIN (4) | UNITED KINGDOM (4) | UNITED STATES (11) |
|-----------------------------------|-----------------|-----------------------------|--------------------------|--------------------|-------------------------|----------------------------------|--------------------------|--------------------------------------|
| <i>Camuzzi I</i> | <i>Metalpar</i> | <i>Total</i> | <i>Hochtief</i> | <i>Abaclat</i> | <i>TSA Spectrum</i> | <i>Gas Natural</i> | <i>BG</i> | <i>AES</i> |
| <i>Camuzzi II</i> | | <i>Vivendi I</i> | <i>Siemens</i> | <i>Impregilo I</i> | | <i>Telefon- ica</i> | <i>National Grid</i> | <i>Azurix I</i> |
| <i>SAUR</i> | | <i>Vivendi II</i> | <i>Winter- shall</i> | | | | <i>ICS</i> | <i>CMS</i> |
| | | | | | | | | <i>Continent al Casualty</i> |
| | | | | | | | | <i>El Paso</i> |
| | | | | | | | | <i>Enron</i> |
| | | | | | | | | <i>Houston</i> |
| | | | | | | | | <i>Lanco</i> |
| | | | | | | | | <i>LG&E</i> |
| | | | | | | | | <i>Pan American & BP</i> |
| | | | | | | | | <i>Sempra</i> |
| <i>Multiple Treaties Involved</i> | | | | | | | | |
| <i>EDF - SAUR</i> | | <i>EDF - SAUR</i> | | | | | | |
| | | <i>Suez - Interagua</i> | | | | <i>Suez - Interag ua</i> | | |
| | | <i>Suez - AWG</i> | | | | <i>Suez - AWG</i> | <i>Suez - AWG</i> | |

How do these cases relate to the power of states to respond to emergencies or crises? Three points are obvious. First, it is clear that the bringing of such a relatively large amount of foreign investor claims against a single respondent, the highest in ICSID's history, has and will continue to generate pressures on ICSID as an institution, and that such pressures may well spill over and have effects on alternative arbitral forums. While these institutional dimensions are outside the scope of this essay, it is clear that the nature, and not merely the volume, of claims pose special questions for an institution like ICSID. That institution now faces questions such as whether it is proper or necessary to provide continuity among the arbitrators appointed to these

cases in an attempt to avoid inconsistent rulings (especially among those involving the same BIT and similar facts) or whether, given the likely common factual issues, the appointed arbitrators should have particular skills (such as facility with the application of economic expert testimony). Second, the Argentine claims prompt predictable concerns that a supranational body will be charged, through these cases, with "second-guessing" states' actions on highly sensitive matters involving what political scientists might call "high politics." Quite apart from the volume of claims, the Argentina cases were (and are) bound to elicit widespread public and scholarly attention – as well as concern among other possible investor-state respondent states – simply because they involve examination of the legality of state "emergency" legislation, including the judgments of national courts. Third, given the nature of the claims, it was also predictable that these claims would prompt arbitral review of rarely invoked defenses such as necessity.

At the same time, the Argentina cases should not be seen as unique claims only possible in the age of BITs. Any historian will recognize that other claims directed at states, including those involving the treatment of investments, have raised comparable "sovereign" concerns both before and after the proliferation of BITs. Comparable concerns were generated by, for example, the U.S. nationals' claims against Mexico that led U.S. Secretary of State Hull to proclaim that prompt, adequate and effective compensation needed to be provided (the so-called "Hull rule") in response to Mexican expropriations in the early 20th century, as well as more recent claims programs against Iran (heard before the Iran-U.S. Claims Tribunal) and against Iraq (resolved in the UN Compensation Commission after the Gulf War). Indeed, the history of foreign investment is replete with "crisis-driven" claims generated in the wake of revolution or other changes in government, as well as other political or economic crises.¹³ The Mexican government's response to Secretary Hull was, after all, comparable to that made by Argentina in the wake of its more recent crisis. In both cases, the FDI host state argued that the

¹³ Thus, the United States Claims Settlement Commission was established precisely to adjudicate the claims of U.S. investors caught in the wave of Communist revolutions and leading to eventual claims settlements between the United States and the respective governments.

actions that it took, whether Argentina's pesification and other "emergency" measures or Mexico's massive agrarian land reform, were required by political exigencies, that is, were needed to protect the public welfare or to maintain peace on the streets.¹⁴ Although some criticisms of the Argentina cases imply that the plight of that country is unique to the age of BITs (or investor-state arbitration), no one can claim surprise if the actions that states take that injure foreign investors in a period of crisis end up being scrutinized for consistency with international law. This has been true for more than a century; at least as long as the concepts of the "international minimum standard" or "denial of justice" have been around.¹⁵

We also need to be careful about the contention that the Argentina "crisis" decisions – since they address a government's reactions to crisis – intrude on the necessary discretion all sovereigns need to take "emergency" action. The oft-heard complaint that these claims – and resulting awards – strike at the very core of sovereignty requires closer scrutiny. The Argentine "crisis" awards rendered to date, even those that have found in favor of the investor to greater or lesser extent, are not efforts to use the law to limit what neither national (and certainly international) law can do little about; they do not deploy arbitration to eliminate the ultimate power of governments to take actions they deem indispensable. These are not misguided arbitral efforts instigated by private parties to limit Carl Schmitt's "law of the exception."¹⁶ None of the claimants sought to prevent a state from taking any action in the course of a crisis. None involved a claim for interim measures to prevent Argentina from taking emergency measures while it faced riots in its streets. These claims were rather attempts to get that government to pay for financial damage allegedly caused to individual claimants.

¹⁴ See, e.g., ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 399 (2002).

¹⁵ This explains the pointed reminders in some of these awards that investor protections are anticipated to apply to situations of economic difficulty. See, e.g., *Enron Corporation et al. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award ¶ 331 (May 22, 2007) [hereinafter *Enron Award*]; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award ¶ 373 (Sept. 28, 2007) [hereinafter *Sempra Award*].

¹⁶ See CARL SCHMITT, POLITICAL THEOLOGY (1922).

Moreover, all these cases considered the possibility of compensatory remedies only after the Argentine crisis, in the views of objective observers, was over. The tribunals for the most part steered away from opining in general terms on whether Argentina's proclamation of an emergency was justified or whether that state was justified in taking some "emergency" measures. To the extent they reached the merits, they engaged in a much narrower inquiry: determining whether specific government actions (*e.g.*, the Argentine government's alleged failure to engage in promised tariff renegotiations with gas producers) caused damage to identifiable investors in violation of a BIT. Nor did these tribunals suggest that "economic" crises were not, as such, sufficient to trigger the measures not precluded clause of the U.S.-Argentina BIT or to be considered a "grave and imminent peril" for purposes of the customary international law defense of necessity. Indeed, most went out of their way to suggest that grave threats to states could originate from economic concerns.¹⁷

As noted above, some of the underlying claims involved consideration of the legality of emergency actions only tangentially, if at all. The claimant in *Sempra II* (the resubmitted case after the *Sempra* annulment decision), for example, is asking that newly constituted tribunal for recompense where it is alleging that the vast proportion of the damages being sought occurred long after the Argentine crisis of 2001-2002. That complaint is based, according to the claimant, on government decisions refusing to engage in tariff renegotiations or to adjust tariffs over the course of the eight years that have passed since the end of the crisis. And in that case, the Argentine government's "necessity" defense seems to be based, in significant part, on the contention that Argentina needs to be able to continue "emergency" actions that it commenced in 2001 even today, when the country enjoys a healthy rate of growth, to prevent a re-occurrence of a crisis like the one it experienced in 2001. In our view, this defense should be greeted with the same disdain as the Bush Administration's much criticized preventive use of force

¹⁷ See, *e.g.*, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award ¶ 359 (May 12, 2005) [hereinafter *CMS Award*]; *LG&E Decision on Liability*, *supra* note 10, at ¶¶ 237-38; *Enron Award*, *supra* note 15, at ¶ 332; *Sempra Award*, *supra* note 15, at ¶ 374.

doctrine, but even if one disagrees with that, it is unlikely that *Sempra II*, whatever the ultimate result, plausibly can be viewed as a frontal assault on a state's ability to respond to ongoing emergencies or crises.

This is not to suggest that the Argentina "crisis" cases do not involve contestations of sovereign acts. All investor-state claims do that. But it is a reminder that the actual claims and defenses made in these cases need to be examined closely before we rush to conclude that they all "second-guess" – with the benefit of 20/20 hindsight and arbitral distance – the quick and sometimes ill-considered decisions sovereigns have to take when responding to serious threats. If one is looking for investor-state claims that more closely scrutinize a sovereign's response to crisis while that crisis is unfolding, one might consider instead the sovereign bondholders' claims in *Abaclat* mentioned above. (Consideration of that claim, whose controversial jurisdictional holding may or may not prove to be an outlier, lies outside the scope of this essay.) Claims growing out of sovereign defaults of its debt, including *Weltover v. Argentina*,¹⁸ may constitute more direct challenges to the "emergency" actions of states than some of the Argentina claims identified in Table 1.

The *Abaclat* case, to the extent that it is harbinger of additional "mass" claims to come, may indeed be a game-changer for the international investment regime.¹⁹ By comparison to that claim (involving some 60,000 claimants), the other investor-state claims directed at Argentina indicated in Table 1 are not "mass" claims even when considered in the aggregate, much less when viewed individually. The roughly 45 claims initially directed at Argentina are not comparable to the tidal wave of claims considered by the UN Compensation Commission after Iraq's invasion of Kuwait, for example. Putting the *Abaclat* jurisdictional decision to one side, the other Argentina awards in Table 1 address specific disputes, albeit many prompted by actions taken by a state in response to a crisis and directed at many investors. Of course, there was no need to adopt any kind of expedited or

¹⁸ *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (rejecting Argentina's claim of sovereign immunity).

¹⁹ See *Abaclat Decision on Jurisdiction*, *supra* note 7.

special type of claims procedures for these claims. For better or worse, each was heard under the usual ICSID or UNCITRAL rules, with no attempt to consolidate claims or create analogues to class actions.

Table 3 surveys the 16 Argentina awards on the merits that we have and, where applicable, the substantive BIT provisions that were found to be violated. It also indicates the award on damages rendered where applicable, along with the decisions rendered on applicable interest rates on any amounts awarded. The table also summarizes when costs and fees were awarded and indicates the status of annulment or vacatur. That table indicates that while successful claimants relied on no less than seven distinct BIT provisions, the most frequently invoked and successful claim was based on alleged violations of FET clauses. Table 4, enumerating the sums awarded by investor-state tribunals against Argentina once annulments and other dispositions are taken into account, belies some of the more extravagant claims made by critics of the investment regime about the impact of these awards on the public fisc. While critics of the investment regime often cited an \$80 billion figure (ostensibly based on the face value of the claims), Table 4 tells a different story. It shows that the over \$1.2 billion initially awarded against Argentina was more than halved in light of later dispositions of these cases, such that at present Argentina owes \$524.1 million (plus interest) to investors – not a paltry sum, to be sure, but nowhere near the approximately \$10 billion, for example, that Argentina repaid to the IMF in 2005.

Table 3 - Awards on the Merits and Damages

| AWARDS ON THE MERITS | BREACHES FOUND | AWARD ON DAMAGES | INTEREST RATE AND PERIOD OF COMPOUNDING | COSTS AND FEES | ANNULMENT/VACATUR STATUS |
|--|---|---|---|--|---|
| <i>Azurix I</i> | FET FPS Arbitrary Measures | \$ 165.2 MM | US 6-month certif. of deposit Comp. semi-annually | Almost all fees and expenses of arbitrators and costs of ICSID Secretariat | Annulment rejected by ICSID Ad-Hoc Committee |
| <i>BG</i> | FET | \$ 185.3 MM | US 6-month certif. of deposit Comp. semi-annually | Costs of arbitration Legal fees and expenses | Vacated by the U.S. Court of Appeals for the District of Columbia Circuit |
| <i>CMS</i> | FET Umbrella Clause | \$ 133.2 MM (plus transfer of shares to Argentina for an additional \$2 MM) | US Treasury Bills Pre-award: Simple Post-Award: Comp. semi-annually | | Partial annulment on finding of breach of umbrella clause |
| <i>Continental Casualty</i> | FET | \$ 2.8 MM | US 6-month Libor plus 2% Comp. annually | | Annulment rejected by ICSID Ad-Hoc Committee |
| <i>El Paso</i> | FET | \$ 43 MM | US 6-month Libor plus 2% Comp. semi-annually | | Pending |
| <i>Enron</i> | FET Umbrella Clause | \$ 106.2 MM | US 6-month Libor plus 2% Comp. semi-annually | | Annulled by ICSID Ad-Hoc Committee |
| <i>Impregilo I (w/ two conc. and diss. opinions)</i> | FET | \$ 21.3 MM | 6% compounded annually | | Pending |
| <i>LG&E (Dec. on Liability and Final Award)</i> | FET Discriminatory Measures Umbrella Clause | \$ 57.4 MM | 6-month US Treasury Bills Compounded | | Pending (suspended) |
| <i>Metalpar</i> | No breaches found | | | | |
| <i>National Grid</i> | FET Protection and Constant Security | \$ 53.6 MM | US 6-month certif. of deposit | 75% of the fees and expenses of | No further legal recourses available in US |

| | | | | | |
|--|---|--|--|--|---|
| | | | Comp. semi-annually | the Members of the Tribunal and the administration costs payable by Argentina | Courts. |
| <i>Sempra</i> (w/ partial dissenting opinion) | FET Umbrella Clause | \$ 128.2 MM (plus contingent payments regarding due subsidies) | US 6-month Libor plus 2% Comp. semi-annually | | Annulled by ICSID Ad-Hoc Committee |
| <i>Siemens</i> (w/ separate opinion) | Expropriation FET Full Protection and Security Arbitrary measures | \$ 217.9 MM (plus delivery of contract performance bond) | US 6-month certif. of deposit Comp. semi-annually | 75% of the fees and expenses of the Members of the Tribunal and ICSID Secretariat costs payable by Argentina | Settlement agreed by the parties and proceeding discontinued at their request |
| <i>Suez- AWG</i> (Decision on Liability) | FET | Award on Damages Pending | | | |
| <i>Suez- Interagua</i> (Decision on Liability) | FET | Award on Damages Pending | | | |
| <i>Total</i> (Decision on Liability) | FET | Award on Damages Pending | | | |
| <i>Vivendi II</i> | FET FPS Expropriation | \$ 105 MM | 6% compounded annually | Reasonable Claimants' costs for the jurisdictional phase (\$ 700 K) with interest payable by Argentina | Annulment rejected by ICSID Ad-Hoc Committee |

"FET" means fair and equitable treatment and, in the case of the France-Argentina BIT, just and equitable treatment.

"FPS" means full protection and security.

**Table 4 - Total of Awards Against Argentina Net of Annulled/
Vacated Awards and Proceedings Discontinued or Suspended**

| AWARD | PRINCIPAL (IN MILLION US\$) | COMMENTS |
|---|--------------------------------|--|
| <i>Azurix I</i> | 165.2 | Annulment rejected by ICSID Ad-Hoc Committee |
| <i>BG</i> | 185.3 | Vacated |
| <i>CMS</i> | 133.2 | Annulment rejected by ICSID Ad-Hoc Committee |
| <i>Continental Casualty</i> | 2.8 | Annulment rejected by ICSID Ad-Hoc Committee |
| <i>El Paso</i> | 43 | Annulment proceeding pending |
| <i>Enron</i> | 106.2 | Annulled |
| <i>Impregilo I</i> | 21.3 | Annulment proceeding pending |
| <i>LG&E</i> | 57.4 | Proceeding suspended |
| <i>National Grid</i> | 53.6 | No further legal recourses available in US Courts. |
| <i>Sempra</i> | 128.2 | Annulled |
| <i>Siemens</i> | 217.9 | Proceeding discontinued |
| <i>Vivendi II</i> | 105 | Annulment rejected by ICSID Ad-Hoc Committee |
| GROSS TOTAL | | NET TOTAL |
| (INCLUDING ANNULLED AND VACATED AWARDS AND PROCEEDINGS DISCONTINUED OR SUSPENDED) | | (NET OF ANNULLED AND VACATED AWARDS AND PROCEEDINGS DISCONTINUED OR SUSPENDED) |
| US\$ 1219.1 MM | | US\$ 524.1 MM |

B. *Decisions on Jurisdiction*

The rest of the tables presented here synthesize the disposition of some of the more important recurrent legal issues raised in the course of the Argentina cases to date. The tables seek, in particular, to get a handle on the critique that the Argentina decisions and awards issued to date have contributed to the increased "fragmentation" of international investment law either with respect to jurisdictional issues or substantive BIT rights.

Table 5 provides a sketch of how relevant decisions disposed of the recurrent jurisdictional defenses raised by Argentina. The six jurisdictional defenses regularly (but not always consistently) raised by Argentina are further explained in the annex to that table. They involved challenges to the meaning of protected "investment," the ICSID Article 25 requirement that claims arise

“directly” from an investment, application of fork-in-the-road and forum selection clauses, application of BIT provisions requiring an 18 month delay prior to arbitration, or assertions that on-going negotiations precluded resort to arbitration. The table indicates that the respective tribunals came to generally consistent holdings with respect to four of these defenses, including with respect to the reasoning as well as the result. Table 5 indicates that, while the tribunals uniformly rejected Argentina’s defense that minority or indirect shareholders could not be included as protected investors or investments under the relevant BITs, their precise reasoning for these rulings differed to some extent.

Table 5 - Recurrent Jurisdictional Issues in Argentine Cases

| INVESTMENT UNDER BIT | COMPLIANCE WITH ARTICLE 25 - INDIRECT CLAIMS | FORK IN THE ROAD | FORUM SELECTION CLAUSES - CONTRACT CLAIMS | 18-MONTHS IN DOMESTIC COURTS | ONGOING NEGOTIATIONS PRECLUDE ARBITRAL JURISDICTION |
|--|---|---|---|------------------------------|---|
| Mostly Consistent in Result | Consistent | Consistent | Consistent | Inconsistent | Consistent |
| <i>Holding</i> | | | | | |
| Shareholdings qualify as investments even if they are: (a) minority; and/or (b) indirect | Claims arise directly out of an investment even if the governmental measures were general or not directed expressly at that investment if they violate specific legally binding commitments | A fork in the road provision is only triggered when there is an identity of parties, object and cause of action | Forum selection clauses in contracts only apply to contractual causes of action and not to claims based on BITs | <i>See separate table</i> | Irrelevant for jurisdictional purposes. Their outcome, if any, may be relevant for the merits phase |
| | Claims based on alleged breaches of a BIT constitute legal disputes | | | | |
| <i>Reasoning</i> | | | | | |
| Definition of investment is very broad and includes shares. | “Directly” in Art. 25 refers to the dispute, not to the investment – and requires a connection of | There are differences between the violation of a contract and the violation of | A contractual cause of action is different from a treaty cause of action. | <i>See separate table</i> | The renegotiation is <i>res inter alios acta</i> – negotiations are often carried by the |

| | | | | | |
|--|---|---|---|---------------------------|---|
| | a sufficient degree of directness between a dispute submitted to ICSID and a claimant's investment | a treaty | (<i>Vivendi Annulment I</i>). Claimants are bringing BIT claims | | parties to a dispute, but they are irrelevant unless the parties agree to suspend or discontinue the proceeding |
| There is no language in the BITs requiring that there be no interposed companies/ the treaty itself clarifies that it protects indirect shareholdings (US BIT) | A dispute exists because a legal issue has been raised which determination has some practical and concrete consequences | | In some cases, reference was made to the fact that the investor himself was not a party to the contract containing the forum selection clause | | |
| | Tribunal shall not examine measures of economic general policy or judge them – only their impact on legally binding commitments. | | | | |
| <i>Cases</i> | | | | | |
| <i>See e.g. LG&E, Metalpar, Siemens, Suez-AWG, Telefonica, Gas Natural, Enron, Azurix, El Paso, Pan American & BP, CMS, Camuzzi I, Camuzzi II, AES, Impregilo, Hochtief, BG.</i> | <i>See e.g. LG&E, Metalpar, National Grid, Siemens, Suez-AWG, Telefonica, Gas Natural, Enron, Azurix, El Paso, Pan American & BP, CMS, Sempra, Camuzzi I, Camuzzi II, AES, Impregilo, Hochtief, Total, BG, Abaclat.</i> | <i>See e.g. LG&E, Siemens, Azurix, Enron I, Pan American & BP, CMS.</i> | <i>See e.g. LG&E, National Grid, Siemens, Suez-AWG, Telefonica, Sempra, Camuzzi I, Azurix, Total, CMS, Camuzzi II, AES, Abaclat, Impregilo I</i> <i>TSA Spectrum</i> (noting that a clear indication in the contract could exclude or limit the application of the treaty) | <i>See separate table</i> | <i>See e.g. LG&E, Telefonica, Sempra, Camuzzi I, Total, CMS, Camuzzi II, AES.</i> |

**Description of recurrent jurisdictional issues in
Argentine cases**

- **INVESTMENT UNDER BIT**
Argentina generally argued that (i) minority; and/or (ii) indirect shareholdings did not constitute a protected investment under the relevant BITs, claiming that only direct, majority shareholders could bring claims.
- **COMPLIANCE WITH ARTICLE 25 - INDIRECT CLAIMS**
Argentina generally argued that investors were complaining about general measures that did not meet the "directness" requirement set forth under Article 25 of the ICSID Convention.
- **FORK IN THE ROAD**
Argentina generally argued that investors had triggered fork in the road provisions of the relevant BITs due to the submission of some sort of dispute to local courts by the investors themselves, or more typically, by the locally-incorporated companies in which they had invested.
- **FORUM SELECTION CLAUSES - CONTRACT CLAIMS**
Argentina generally argued that the existence of forum selection clauses in concession, license or similar contracts entered into between Argentina (or an Argentine Province) and the locally-incorporated companies carrying out activities in Argentina prevented the submission of investment disputes before ICSID or ad-hoc tribunals under UNCITRAL Rules.
- **18-MONTHS IN DOMESTIC COURTS**
Argentina generally argued that investors could not submit their investment disputes to international arbitration without previously submitting the dispute to domestic courts for an 18-month period once the consultation period had elapsed, a requirement established in some Argentine BITs (Belgium-Luxembourg Union, Germany, Netherlands, Italy, Spain, United Kingdom, *inter alia*). Investors generally argued that they should not be required to comply with such 18-month requirement because (a) it was a futile requirement given the fact that

they could not obtain any favorable decision from domestic courts in such timeframe; and/or (b) through the operation of an MFN Clause, they could avail themselves of more favorable dispute settlement clauses contained in other Argentine BITs (typically the BITs with the U.S. and Chile) that did not contain said requirement.

- **ONGOING NEGOTIATIONS PRECLUDE ARBITRAL JURISDICTION**
Argentina generally argued that investors should not be allowed to submit their investment disputes to international arbitration while the process of renegotiation of concession, license or similar contracts entered into between Argentina (or an Argentine Province) and the locally-incorporated companies carrying out activities in Argentina were still ongoing.

Table 6 addresses more specific jurisdictional defenses, raised in a more limited set of decisions: namely Argentina's successful defense that the investor was not "foreign" (in *TSA Spectrum*); three cases involving the application of Article XII of the U.S.-Argentina BIT restricting the application of the BIT standards of protection to tax measures; and four cases involving consideration of a BIT provision requiring "consultations" prior to initiating arbitration. As Table 6 indicates, the relevant holdings on these issues were also generally consistent, although the reasoning offered by the various tribunals on the proper interpretation of a consultation clause differed to some extent.

Table 6 - Specific Jurisdictional Issues in Argentine cases

| FOREIGN CONTROL | TAX MEASURES | CONSULTATION PERIODS |
|------------------------|----------------------|---|
| Only one relevant case | Generally Consistent | Generally Consistent (no difference in the outcome) |

Description of specific jurisdictional issues in Argentine cases

- **FOREIGN CONTROL**
In the *TSA Spectrum* case Argentina (successfully) argued that the ultimate control of the alleged investor was held by an Argentine citizen.

- TAX MEASURES

Article XII of the U.S.-Argentina BIT limits to a certain extent the application of the BIT to tax measures. In the *Enron*, *El Paso* and *Pan American & BP* cases, the Tribunals concluded that: (i) Article XII (1) of the BIT (setting forth that the Contracting Parties shall "strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party") had to be afforded some meaning; and (ii) they had jurisdiction to consider tax claims based on the existence of an expropriation and on the violation of an investment agreement or authorization. However, the *Enron* Tribunal further argued that "once expropriation is invoked, (...) then the connection between Article IV and the standards of treatment under Article II (2) of the Treaty becomes operational, including fair and equitable treatment, full protection and security and treatment not less than that required by international law. In turn, this brings in the meaning of paragraph 1 of Article XII. It is in this context, and not in isolation, that the questions of transparency and the availability of effective remedies also become relevant. And, above all, the whole discussion is then governed by Article VII of the Treaty on the settlement of disputes." (¶ 66)

- CONSULTATION PERIODS

None of the Tribunals deciding investment cases against Argentina has denied its jurisdiction or found claims inadmissible on grounds of a failure to comply with a prior consultation period (not to be confused with the 18-month requirement). However, some of the Tribunals have held that such requirement would constitute a jurisdictional, rather than procedural requirement, (*Enron*), and suggested that the investors must make an adequate and reasonable effort to consult and negotiate (*Pan American & BP*), while others held that the mere lapsing of the consultation period set in the BIT would suffice to allow access to international arbitration (*LG&E*).

As these tables demonstrate, the majority of decisions have allowed investors to obtain direct access to ICSID arbitration but

two (*Wintershall*²⁰ and *ICS*²¹) did not, while three others (*Hochtief*,²² *Impregilo*, and *Abaclat*) produced dissents. Apart from the controversial *Abaclat* decision (which involved the viability of bringing mass claims for sovereign debt or bonds in addition to consideration of an 18 month clause), the one jurisdictional issue giving rise to serious disagreement among the relevant tribunals (and providing the basis for the three dissents) concerned the interpretation or application of BIT clauses requiring an 18 month wait prior to permitting recourse to arbitration. As shown on Table 7, most of the decisions involving an 18 month clause affirmed jurisdiction despite Argentina's invocation of that clause but on the basis of a number of rationales. One (*BG*) affirmed (only to be reversed by the U.S. Court of Appeals for the District of Columbia Circuit) on the basis that the clause was futile to apply,²³ another (*Abaclat*) affirmed jurisdiction on the ground that Argentina had not suffered any actual deprivation of its rights,²⁴ while a third (*TSA Spectrum*) found that application of such a clause would be "highly formalistic" given that a substantial portion of the 18 months had already passed.²⁵ But the largest number of cases affirming jurisdiction despite invocation of an 18 month clause by Argentina did so on the basis that Argentina could not get the benefit of this clause given the application of MFN. By contrast, the *Wintershall* and *ICS* decisions denied jurisdiction on the basis of an 18 month clause, and dissenting arbitrators J. Christopher Thomas, Brigitte Stern, and G. Abi-Saab would have reached similar conclusions in other cases (*Hochtief*, *Impregilo*, and *Abaclat*, respectively).

²⁰ *Wintershall Akktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008).

²¹ *ICS Inspection and Control Services Limited v. Argentine Republic*, Permanent Court of Arbitration Case No. 2010-9, Award on Jurisdiction (Feb. 10, 2012).

²² *Hochtief A.G. v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (Oct. 24, 2011).

²³ *BG Group P.L.C. v. Republic of Argentina*, UNCITRAL Award ¶¶ 156-157 (Dec. 24, 2007) [hereinafter *BG Award*].

²⁴ *Abaclat Decision on Jurisdiction*, *supra* note 7, at ¶¶ 583-584.

²⁵ *TSA Spectrum de Argentina v. Argentine Republic*, ICSID Case No. ARB/05/5, Award ¶¶ 111-2 (Dec. 19, 2008).

Table 7 - 18-month Requirement/MFN Clause Jurisdictional Issues in Argentine Cases

| ACCESS TO INTERNATIONAL ARBITRATION WAS ALLOWED WITHOUT PRIOR 18-MONTH PERIOD LITIGATING IN DOMESTIC COURTS | | | | |
|---|---|---------------------------------------|--|---|
| Without invocation of MFN Clause | | | | |
| Requirement is not an absolute impediment to arbitration | No actual deprivation of rights to Argentina | Highly formalistic | MFN Clause allows by-pass of 18-month requirement | No objection by Argentina |
| <i>BG</i> (UK BIT) [Vacated by the U.S. Court of Appeals for the District of Columbia Circuit] | <i>Abaclat</i> (Italy BIT) | <i>TSA Spectrum</i> (Netherlands BIT) | <i>Siemens, Hochtief</i> (Germany BIT) <i>Gas Natural, Suez-Interagua, Telefonica</i> (Spain BIT) <i>Suez-AWG</i> (Spain and UK BITs) <i>Impregilo, Abaclat</i> (Italy BIT) <i>National Grid</i> (UKBIT) | <i>Camuzzi I, Camuzzi II</i> (Belgium - Luxembourg Union BIT) |
| ACCESS TO INTERNATIONAL ARBITRATION WAS NOT ALLOWED WITHOUT PRIOR 18-MONTH PERIOD LITIGATING IN DOMESTIC COURTS | | | | |
| CASES | <i>Wintershall</i> (Germany BIT) <i>ICS</i> (UK BIT) | | | |
| DISSENTING OPINIONS | <i>Hochtief</i> (Germany BIT - J. Christopher Thomas), <i>Impregilo</i> (Italy BIT - Brigitte Stern) and <i>Abaclat</i> (Italy BIT - G. Abi-Saab) | | | |

Description of references for cases in which no invocation of the MFN Clause was required to allow access to arbitration without prior litigation in domestic courts

- REQUIREMENT IS NOT AN ABSOLUTE IMPEDIMENT TO ARBITRATION**
 The *BG* Tribunal held that the 18-month requirement could not be construed as an absolute impediment to arbitration as a matter of treaty interpretation and that it should not apply where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, because it would otherwise lead to absurd and unreasonable results proscribed under Article 32 of the Vienna Convention. The Tribunal went on to find that Argentina had incurred liability in such unilateral action through a series of measures.

- NO ACTUAL DEPRIVATION OF RIGHTS TO ARGENTINA

The *Abaclat* Tribunal (with a dissenting opinion from Prof. Abi-Saab) held that disregard of the 18-month requirement in itself was not sufficient to preclude access to arbitration. Rather, it reasoned, such disregard, based on its circumstances, had to be deemed incompatible with the object and purpose of the dispute resolution system put in place by Article 8 of the Italy-Argentina BIT. According to the Tribunal, such incompatibility would present if the disregard unduly deprived the host state of a fair and real opportunity to address the issue through its domestic legal system. The Tribunal went on to find that said opportunity "was only theoretical and/or could not have led to an effective resolution of the dispute within the 18 months time frame" and thus it would be unfair to deprive the investor of its right to resort to arbitration based on grounds of the disregard of the 18-month requirement. The reason for this being that such disregard would not have caused any real harm to the Host State, while the deprivation of the investors' right to resort to arbitration would deprive them of an important and efficient dispute settlement means.

- HIGHLY FORMALISTIC

The *TSA Spectrum* Tribunal held that, despite the fact that the investor had initiated ICSID proceedings before the lapsing of the 18-month period (since the investor had filed appeals to the decisions underlying the dispute), it would be highly formalistic to reject the case on such grounds, since that would not prevent the investor from immediately instituting new ICSID proceedings on the same matter.

C. Decisions on the Merits

Tables 8-10 summarize some of the ways that the Argentina cases have addressed the substantive BIT rights regarding expropriation, prohibitions on arbitrary or discriminatory treatment, and umbrella clauses. While, as the tables attempt to indicate, there are some key differences in methodological approaches and reasoning with respect to these standards, the

application of the standards of treatment can be generally reconciled and the results have been largely consistent.

Table 8 - Recurrent Expropriation-Related Issues in Argentine cases

| COMMON GROUNDS | DIFFERENT APPROACHES |
|--|--|
| Neutralization or deprivation of property rights, or removal from the operation and/or management of the investment is required for a finding of expropriation | |
| A mere reduction in value does not amount to expropriation | |
| Termination of public contracts only amounts to expropriation if it implies governmental exercise of sovereign authority | |
| | Legitimate exercise of police powers by governmental authorities: <ul style="list-style-type: none"> (i) Cannot amount to expropriation (<i>Suez, LG&E, El Paso, Azurix</i>) (<i>dicta</i>) (ii) Can amount to expropriation (<i>National Grid, BG</i>) (<i>dicta</i>) |
| An expropriation was only found to have taken place in <i>Siemens</i> * and in <i>Vivendi II</i> ** | |

* In *Siemens*, the Tribunal found that in adopting a series of measures including the termination of the relevant contract "Argentina acted in use of its police powers rather than as a contracting party even if it attempted at times to base its actions on the Contract.

** In *Vivendi II*, the Tribunal found that "the provincial authorities mounted an illegitimate campaign against the concession, the Concession Agreement and the "foreign" concessionaire" resulting in Claimants being "radically deprived of the economic use and enjoyment of their concessionary rights" and leaving them with no choice other than to terminate the relevant Concession contract.

Table 8 summarizes the recurrent expropriation-related issues raised in these cases. It suggests that the expropriation standard has not presented many interpretative difficulties for these tribunals. Unlike other countries in the region, Argentina did not generally resort to overt expropriation or nationalization measures. This has shifted the analysis in these cases to consideration of whether the measures adopted by Argentina could be construed to amount to an indirect expropriation or had an equivalent effect. With the exception of two awards (*Siemens* and *Vivendi II*), this has resulted in rejection of expropriation claims.

With respect to expropriation, both the criteria used and the results achieved in these cases were overwhelmingly consistent. The tribunals generally assessed whether there had been a neutralization or deprivation of property rights. This usually entailed looking at whether there had been a change in ownership of shares or removing the foreign investor from the operation or management of the investment. The tribunals generally noted that a reduction in the value of the investment does not prove that an expropriation occurred and that the termination of public contracts would only amount to expropriation if the government did so through the exercise of its sovereign authority, that is, *qua* government, as opposed to taking any action as would a contractual party. However, some cases went on to hold that the legitimate or reasonable exercise of police powers through governmental authority could not amount to expropriation (*Suez, LG&E, El Paso, and Azurix*), a view that was rejected by dicta in *National Grid*²⁶ and *BG*,²⁷ which opined that the analysis should focus on the effect of the relevant measures, rather than on their nature.

Despite these differences in dicta, expropriation claims produced, as noted, generally consistent results. Only the *Siemens* tribunal found that an expropriation had occurred, through the termination by the government of an information services contract in the exercise of its sovereign powers.²⁸ By contrast, the termination of contracts was found not to be based on such sovereign powers in the *Impregilo*²⁹ (over a dissenting opinion by Arbitrator Brower) and *Suez*³⁰ cases. While the *Vivendi II* tribunal

²⁶ *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award ¶ 147 (Nov. 3, 2008) [hereinafter *National Grid Award*].

²⁷ *BG Award*, *supra* note 23, at ¶¶ 267-268.

²⁸ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award ¶ 271 (Feb. 6, 2007) [hereinafter *Siemens Award*].

²⁹ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award ¶ 283 (Jun. 21, 2011) [hereinafter *Impregilo Award*].

³⁰ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability ¶ 154; and *AWG Group v. Argentine Republic*, UNCITRAL, Award (Jul. 30, 2010) [hereinafter *Suez-AWG Decision on Liability*], *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine*

also found that an expropriation had occurred in connection with measures of the Province of Tucuman leading to the termination of a concession contract,³¹ that claim stemmed from government actions preceding the 2001-2002 crisis and seems completely unrelated to that crisis. In sum, of the remaining 14 awards holding that Argentina had breached a BIT standard of treatment, only one (*Siemens*) found that an expropriation had occurred. Rejection of expropriation clauses might be seen as reflecting these arbitrators' respect for sovereign functions. As the *Sempra* tribunal put it, "judicial prudence and deference to State functions are better served by opting for a determination in the light of the fair and equitable treatment standard."³²

As Table 9 suggests, to the extent BIT provisions banning arbitrary treatment were raised, the results reached and reasoning offered were consistent. The relevant tribunals all took the view that arbitrariness was to be found only where the measures adopted by Argentina did not result from a rational decision-making process or were capricious. In engaging in such analysis the tribunals generally followed the cautionary words of the *Sempra* tribunal which had indicated: "The measures adopted might have been good or bad – a matter which is not for the Tribunal to judge. These measures, although inconsistent with the domestic and Treaty frameworks, were not arbitrary in that they responded to what the Government believed and understood to be the best response to the unfolding crisis."³³ The existence of the Argentine crisis seems to permeate these tribunals' analysis of whether arbitrary treatment occurred. In this connection it is probably not a coincidence that the only tribunals finding a breach on this basis were those in the *Azurix*³⁴ and *Siemens*³⁵

Republic, ICSID Case No. ARB/03/17, Decision on Liability ¶ 143 (Jul. 30, 2010) [hereinafter *Suez-InterAgua Decision on Liability*].

³¹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award ¶¶ 7.5.22, 7.5.33-4 (Aug. 20, 2007).

³² *Sempra Award*, *supra* note 15, at ¶ 301.

³³ *Id.* ¶ 318.

³⁴ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award ¶ 393 (Jul. 14, 2006) [hereinafter *Azurix Award*].

³⁵ *Siemens Award*, *supra* note 28, at ¶ 319.

cases, which were disputes arising within the context of specific contracts that were generally unrelated to the crisis. The *BG* tribunal needs to be seen as a special case. That tribunal found that Argentina had indeed engaged in “unreasonable” (not “arbitrary”) measures, the special term used in the United Kingdom-Argentina BIT.³⁶

Table 9 also surveys the tribunals’ treatment of claims alleging discrimination. As that table indicates, in our view, the awards on point were consistent in outcome, although not always in rationale. *LG&E* is the only case where the claimant found success on this ground.³⁷ As scholars of national treatment would not be surprised to discover, the tribunals differed with respect to the relevant comparator. Some saw “in like circumstances” as licensing a comparison to other investors in the same economic sector, while others thought it relevant to consider, in addition, whether the foreign investor was treated differently based on nationality. The *Enron*,³⁸ *CMS*³⁹ and *Metalpar*⁴⁰ awards adopted the first approach, while the *LG&E*,⁴¹ *National Grid*⁴² and *BG*⁴³ awards, for example, adopted the second. The *El Paso* tribunal, while leaning towards the second approach, distinguished between de jure discrimination (when foreign investors were expressly targeted) and de facto discrimination (when sectors in which there was overwhelming foreign ownership were targeted).⁴⁴ The *Siemens*,⁴⁵ *Impregilo*,⁴⁶ and, to some extent,

³⁶ *BG Award*, *supra* note 23, at ¶ 346.

³⁷ *LG&E Decision on Liability*, *supra* note 10, at ¶¶ 148, 267.

³⁸ See *Enron Award*, *supra* note 15, at ¶ 282.

³⁹ See *CMS Award*, *supra* note 17, at ¶¶ 292-4.

⁴⁰ See *Metalpar Award*, *supra* note 12.

⁴¹ *LG&E Decision on Liability*, *supra* note 10, at ¶ 146.

⁴² *National Grid Award*, *supra* note 26, at ¶¶ 198-201.

⁴³ *BG Award*, *supra* note 23, at ¶¶ 356-359.

⁴⁴ See *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award ¶¶ 306, 308-9 (Oct. 31, 2011) [hereinafter *El Paso Award*].

⁴⁵ *Siemens Award*, *supra* note 28, at ¶ 321.

*Total*⁴⁷ tribunals did not find it necessary to take a definite position since they found for the claimant on other grounds.

Table 9 - Discussion of Arbitrary and Discriminatory Treatment in Argentine Cases

| ARBITRARINESS | DISCRIMINATORY TREATMENT |
|---|--|
| Consistent | Consistent in the outcome, not the standard applied |
| <i>Holding</i> | |
| Measures as arbitrary if they do not result from a rational decision-making process or are capricious. | Two approaches: (i) comparator is the economic sector to which the investors belongs from others in like circumstances; and (ii) in addition to (i), another comparator is treatment to domestic investors (nationality-based) |
| Not an issue of whether measures are good or bad – they are not arbitrary if they respond to what the Government deemed appropriate in the light of the circumstances | |
| <i>Cases</i> | |
| <i>Breached in:</i> <i>Azurix, Siemens (plus BG, though applying the standard of unreasonable measures in the UK BIT)</i> | <i>Breached in:</i> <i>LG&E</i> |
| <i>Not Breached in:</i> <i>See e.g. Enron, Impregilo, LG&E, CMS, National Grid, El Paso</i> | <i>Not Breached in:</i> <i>See e.g. Enron, Impregilo, CMS, National Grid, El Paso</i> |

Table 10 summarizes the tribunals' approach to the application of umbrella clauses. As would be predicted by those who examine investor-state case law outside the Argentina cases, the Argentina cases on point were divided with respect to the proper method to construe umbrella clauses and diverged in terms of both result and rationale. As Table 10 suggests the divergences relate to (i) the types of obligations or commitments covered by umbrella clauses, and (ii) whether the foreign investors need to be the direct beneficiary of such obligations or

⁴⁶ *Impregilo Award*, *supra* note 29, at ¶ 333.

⁴⁷ *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 216 (Oct. 31, 2011) [hereinafter *Total Decision on Liability*].

commitments. *El Paso*,⁴⁸ *BG*,⁴⁹ and the *CMS* Annulment Committee⁵⁰ held that the relevant umbrella clause would only cover obligations arising under contracts. The *Enron*,⁵¹ *LG&E*,⁵² and *Sempra*⁵³ tribunals and the original *CMS* tribunal⁵⁴ found, on the contrary, that obligations arising under laws or regulations would also be covered. As for the second issue, the tribunals in *Azurix*,⁵⁵ *Siemens*,⁵⁶ *BG*,⁵⁷ *El Paso*⁵⁸ and *Impregilo*⁵⁹ rejected the application of the umbrella clause on grounds that the relevant obligations had been assumed vis-à-vis a local subsidiary of the foreign investors but not the foreign investor directly. In *Enron*⁶⁰ and *LG&E*⁶¹, by contrast, the tribunals found that the relevant licenses need not be directly entered into by the foreign investors to enjoy protection under the umbrella clause.

⁴⁸ See *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶¶ 81-5 (Apr. 27, 2006) [hereinafter *El Paso Decision on Jurisdiction*]; *El Paso Award*, *supra* note 44, at ¶¶ 531-2.

⁴⁹ *BG Award*, *supra* note 23, at ¶ 365.

⁵⁰ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Application for Annulment ¶ 95 (Sep. 25, 2007) [hereinafter *CMS Annulment*].

⁵¹ *Enron Award*, *supra* note 15, at ¶¶ 274, 276.

⁵² See *LG&E Decision on Liability*, *supra* note 10, at ¶¶ 172, 174 (clarifying that the umbrella clause would apply to legal and regulatory obligations that were specific in relation to the investment but not to "legal obligations of a general nature").

⁵³ See *Sempra Award*, *supra* note 15, at ¶ 313.

⁵⁴ See *CMS Award*, *supra* note 17, at ¶ 303.

⁵⁵ *Azurix Award*, *supra* note 34, at ¶ 384.

⁵⁶ *Siemens Award*, *supra* note 28, at ¶¶ 204-5.

⁵⁷ See *BG Award*, *supra* note 23, at ¶¶ 214, 363.

⁵⁸ *El Paso Award*, *supra* note 44, at ¶¶ 533-4.

⁵⁹ See *Impregilo Award*, *supra* note 29, at ¶¶ 185-6.

⁶⁰ See *Enron Award*, *supra* note 15, at ¶¶ 274-7.

⁶¹ See *LG&E Decision on Liability*, *supra* note 10, at ¶ 175.

Table 10 - Discussion of Umbrella Clauses in Argentine Cases

| TYPES OF OBLIGATIONS COVERED | DIRECT BENEFICIARY OF THE OBLIGATION |
|---|--|
| Inconsistent | Inconsistent |
| <i>Holding</i> | |
| Two approaches: (i) obligations arising from contracts (e.g.: <i>El Paso, BG, CMS Annulment</i>); and (ii) obligations arising from contracts and laws and regulations (e.g.: <i>Enron, LG&E, Sempra, CMS</i>). | Two approaches: (i) only covers obligations directly assumed vis-à-vis the foreign investor (e.g. <i>Azurix, Siemens, El Paso, BG, Impregilo, CMS Annulment</i>); and (ii) covers obligations directly assumed vis-à-vis the foreign investor and/or a local vehicle (e.g. <i>Enron, LG&E, CMS</i>). |
| <i>Cases</i> | |
| <i>Breached in: Enron, CMS, LG&E</i> | |
| <i>Not Breached in: Azurix, Siemens, El Paso, BG, Impregilo</i> | |

D. The Evolving FET Standard

Those looking for a comparable table to explain how the various tribunals interpreted or applied the most successful vehicle for claimants, the FET clause, will not find one. This is not because the Argentina awards are especially inconsistent with respect to the interpretation or application of this investor guarantee. It is because that fact-specific guarantee does not lend itself to simple tabular summation.

The critical role played by FET clauses in the Argentina cases is, of course, not unique to those cases. Others have noted the ubiquitous nature of FET claims in investor-state arbitration generally, as well as the fact that of all the substantive guarantees in BITs, FET is the most likely to generate positive results for investor-claimants.

One way to summarize how the Argentina decisions have dealt with FET is to run through the cases chronologically, starting with *CMS v. Argentina* (from 2005). *CMS*, the first of the Argentina "crisis" cases to be decided on the merits, set the tone for subsequent tribunals' handling of FET. The *CMS* tribunal's analysis of FET focused on the need to maintain stability and predictability of the legal framework applicable to protected

investments.⁶² That tribunal's tangential but not express reliance on the concept of the legitimate expectations of the investor is suggested by the following statement:

It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.⁶³

The *CMS* tribunal found that CMS had established that it had the right to a gas transportation tariff calculated in dollars, under a framework consisting of different legal instruments, including the specific Gas license entered into by TGN (in which CMS held shares).⁶⁴ It found that violation of this right by Argentina constituted a breach of FET.⁶⁵

The later cases of *LG&E*, *Siemens*, *Sempra*, *Azurix*, *Enron*, and *BG* (from 2006 through 2007) generally followed the blueprint of *CMS*. They too focused on (i) the existence of specific commitments and (ii) the need to protect stability and predictability, as well as legitimate expectations. Those cases involved specific concessions, licenses or contracts establishing key rights for their holders that were found to be disregarded by the Argentine government (or the Province of Buenos Aires, in the case of *Azurix*). The *LG&E* tribunal further elaborated the concept of legitimate expectations by clarifying the conditions that such expectations should meet. It suggested that those expectations should be based on the conditions offered by the host State at the time of the investment, may not be established unilaterally by one

⁶² See *CMS Award*, *supra* note 17, at ¶¶ 274, 276.

⁶³ *Id.* at ¶ 277.

⁶⁴ See *id.* at ¶¶ 138, 144, 151, 161, 275.

⁶⁵ See *id.* at ¶ 281.

of the parties, and could not fail to consider business risk or the regular patterns of the particular industry.⁶⁶

By 2008, when the cases of *Metalpar*, *Continental Casualty*, and *National Grid* came to be considered, a number of the Argentina cases had found violations of the FET clause on mostly consistent grounds. The new set of awards rendered in 2008 introduced new difficulties and approaches. Two of these cases, *Metalpar* and *Continental Casualty*, found that claimants were not relying (for the most part) on any specific commitments made to them but were essentially complaining about the general effect of pesification, that is, Argentina's decision to convert dollar-denominated outstanding obligations into Argentine pesos at a nominal rate. In *Metalpar*, the Tribunal noted this circumstance by distinguishing the claimant's situation in the automobile industry to that of claimants in prior Argentina cases, in all of which there had been specific contracts or bidding processes at stake.⁶⁷

Continental Casualty, which involved investments in the insurance sector, also distinguished the claimant's situation from others,⁶⁸ but also went on to explain in more detail the "abstract concept of reasonable legitimate expectations."⁶⁹ It described different statements or commitments and ascribed to them differing potential to create those expectations.⁷⁰ Like prior tribunals, it affirmed that the specificity of the undertaking allegedly relied upon had to be considered, noting that "political statements have the least legal value, regrettably but not notoriously so."⁷¹ It added that "general legislative statements engender reduced expectations, especially with competent major international investors in a context where the political risk is

⁶⁶ *LG&E Decision on Liability*, *supra* note 10, at ¶ 130.

⁶⁷ *Metalpar Award*, *supra* note 12, at ¶¶ 185-6.

⁶⁸ *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award ¶¶ 259-60 (Sep. 5, 2008) [hereinafter *Continental Casualty Award*].

⁶⁹ *Id.* at ¶ 260.

⁷⁰ *Id.* at ¶ 261.

⁷¹ *Id.*

high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and *ius cogens*.”⁷² Finally, it suggested that there were a third tier of commitments to consider, involving “unilateral modification of contractual undertakings by governments.”⁷³ Such contractual undertakings, it noted, “when issued in conformity with a legislative framework and aimed at obtaining financial resources from investors deserve clearly more scrutiny, in the light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance.”⁷⁴ Finally, *Continental Casualty* enumerated other factors that had to be considered to ascertain fairness, such as “centrality to the protected investment and impact of the changes on the operation of the foreign owned business in general including its profitability; good faith, absence of discrimination (generality of the measures challenged under the standard), relevance of the public interest pursued by the state,” and the existence of “accompanying measures aimed at reducing the negative impact.”⁷⁵ While the tribunal found it unnecessary to apply its criteria to most of the claims in that case (because, as noted below, it found most of those claims precluded by Argentina’s successful invocation of the measures not precluded clause in the U.S.-Argentina BIT),⁷⁶ that tribunal eventually found for the claimant on one of its claims. It concluded that a unilateral restructuring of certain debt instruments by Argentina in December 2004 (after the crisis was over) had breached the FET.⁷⁷

In *National Grid*, there were specific commitments at stake, related to an electricity transportation concession.⁷⁸ The claimant alleged that these had been violated by Argentina. That

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at ¶¶ 263, 266.

⁷⁷ *Id.* at ¶¶ 264-5.

⁷⁸ See *National Grid Award*, *supra* note 26, at ¶¶ 57-8.

Tribunal generally followed the *CMS* line of cases. It too focused on the protection of the investor's reasonable (and legitimate) expectations.⁷⁹ It concluded that the claimant had relied on the key elements of a legal framework that had been subsequently dismantled by the government.⁸⁰ But that tribunal went beyond the prior awards, thereby providing a bridge between the application of FET and Argentina's principal defense in all of these cases, namely that the crisis made it act the way that it did. The *National Grid* tribunal indicated that it could not ignore the context in which the measures in violation of the BIT had been taken and that it was duty bound to take into account all the circumstances, including the crisis that the Argentine Republic had endured at that time.⁸¹ Notably the *National Grid* tribunal stated:

What is fair and equitable is not an absolute parameter. What would be unfair and inequitable in normal circumstances may not be so in a situation of an economic and social crisis. The investor may not be totally insulated from situations such as the ones the Argentine Republic underwent in December 2001 and the months that followed. For these reasons, the Tribunal concludes that the breach of the fair and equitable treatment standard did not occur at the time the Measures were taken on January 6, 2002 but on June 25, 2002 when the Respondent required that companies such as the Claimant renounce to the legal remedies they may have recourse as a condition to re-negotiate the Concession.⁸²

Interestingly, *National Grid's* attention to context occurred in a case governed by the United Kingdom-Argentina BIT, a treaty which does not contain a measures not precluded clause like Article XI of the U.S.-Argentina BIT. Article XI had provided Argentina with a defense that had, by the time *National Grid* was

⁷⁹ *Id.* at ¶¶ 173-4.

⁸⁰ *Id.* at ¶¶ 178-9.

⁸¹ *Id.* at ¶ 180.

⁸² *Id.*

decided, been partially upheld in the *LG&E*⁸³ and *Continental Casualty*⁸⁴ decisions. *National Grid* went on to reject Argentina's defense of necessity under customary international law.⁸⁵ Under the circumstances, it is possible to see *National Grid's* consideration of the "crisis" as part of its FET analysis as serving an equivalent purpose to those prior tribunals' resort to the measures not precluded clause. In any case, in all three cases, the result reduced, but did not wholly eliminate, Argentina's financial liability.

The *Suez* decisions of 2010, dealing with measures affecting and eventually terminating water concessions, emphasized the weight of prior decisions but criticized the tautological formulation of the FET standard as articulated by decisions like that in *MTD v. Chile* (which had interpreted FET to be "just," "even-handed," "unbiased," or "legitimate").⁸⁶ The *Suez* decisions affirmed that such formulations did not lend themselves to application to complex, concrete factual situations.⁸⁷ That tribunal noted that, consistent with prior cases, a finding of breach of FET required finding a breach of legitimate expectations; that is, expectations created by host country laws, reliance on those laws by the investor, and a subsequent sudden change of those laws.⁸⁸ Moreover, that tribunal concluded that the existence of any such expectations had to be analyzed from an objective point of view but needed to be "balanced" with Argentina's right to regulate.⁸⁹

⁸³ *LG&E Decision on Liability*, *supra* note 10, at ¶ 266.

⁸⁴ See *Continental Casualty Award*, *supra* note 68, at ¶¶ 233, 237.

⁸⁵ *National Grid Award*, *supra* note 26, at ¶ 262.

⁸⁶ See *Suez-AWG Decision on Liability*, *supra* note 30, at ¶ 221; and *Suez-InterAgua Decision on Liability*, *supra* note 30, at ¶ 202 (criticizing *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award ¶ 113 (May 25, 2004)).

⁸⁷ See *Suez-AWG Decision on Liability*, *supra* note 30, at ¶¶ 226-7, 231-3 and *Suez-InterAgua Decision on Liability*, *supra* note 30, at ¶¶ 207-8, 212-3.

⁸⁸ *Id.*

⁸⁹ See *Suez-AWG Decision on Liability*, *supra* note 30, at ¶ 236 and *Suez-InterAgua Decision on Liability*, *supra* note 30, at ¶ 216. In his dissenting opinions, Arbitrator Nikken argued that identifying FET with the protection of the so-called "legitimate expectations of the investor" went "beyond the normal

The *Total* tribunal proceeded along the same lines. It also advocated for a balanced approach towards the assessment of legitimate expectations,⁹⁰ but was faced with additional difficulties presented by the facts of that case. Total had investments under (i) the gas transportation sector (similar to *CMS* and *Enron*, for example), involving a specific license with its respective terms and conditions;⁹¹ (ii) the oil and gas upstream sector, subject to concessions coupled with specific laws and regulations;⁹² and (iii) the electricity generation sector (thermal and hydroelectric generation) where in some cases no licenses or concessions were involved.⁹³ Further, some of Total's investments had been made during 2001, just before the outbreak of the crisis but after Argentina's original privatization program.⁹⁴ The tribunal dealt with these complicated facts by parsing the FET provision accordingly.

The *Total* tribunal ruled that specific commitments (*i.e.* made specifically to the particular investor) must exist to create legitimate expectations and that these limit the right of the host state to adapt the legal framework to changing legal circumstances.⁹⁵ But it also found that, even if no such promises exist, changes to the regulatory framework applicable to capital intensive long term investments and the operation of utilities can be considered unfair if they are contrary to commonly recognized financial and economic principles of "regulatory fairness" or

meaning of the terms of the BITs and the intention of the parties," and was at odds with the rules in the Vienna Convention and "that the interpretation that tends to give FET the effect of a legal stability provision had no basis on BITs or international customary rules applicable to treaty interpretation." See *Suez-AWG Decision on Liability*, ICSID Case No. ARB/03/19, Dissenting Opinion of Pedro Nikken ¶ 2; and *Suez-InterAgua Decision on Liability*, ICSID Case No. ARB/03/17, Dissenting Opinion of Pedro Nikken, ¶ 3 (July 30, 2010).

⁹⁰ See *Total Decision on Liability*, *supra* note 47, at ¶¶ 104-5, 117, 119, 309.

⁹¹ See *id.* at ¶¶ 41-59.

⁹² See *id.* at ¶¶ 347-363.

⁹³ See *id.* at ¶¶ 232-278.

⁹⁴ *Id.* at ¶¶ 42-44, 66, 233-5.

⁹⁵ See *id.* at ¶¶ 119, 309.

“regulatory certainty” applied to investments of that type.⁹⁶ It found that *Total* could not rely on the promises made during the bidding process resulting in privatization because these had not been directly addressed to it, unlike other promises made to other investors in prior cases.⁹⁷ Significantly, the *Total* tribunal found its assessment of breach of the FET standard had to take into account the purposes, nature and objectives of the measures challenged, and involved an evaluation of whether these were proportional, reasonable and not discriminatory.⁹⁸ It specifically found that “the changes to the Gas Regulatory Framework brought about by Argentina’s emergency measures ha[d] to be judged in the context of the severe economic emergency that Argentina was facing in 2001-2002.”⁹⁹ In application of this framework, *Total* distinguished the abandonment of U.S. dollar denomination of tariffs and their linkage to the U.S. PPI, which the tribunal found not to be in breach of the BIT in view of their connection to the Convertibility Law and the exceptional crisis of Argentina that led to pesification, from Argentina’s subsequent failure to readjust the tariffs.¹⁰⁰ Only the latter was, in the tribunal’s view, a breach of FET.¹⁰¹

Note that *Total’s* holding was, to this extent, consistent with that in *CMS*. While the *CMS* tribunal’s interpretation and application of FET had been considerably less elaborate and did not expressly consider the crisis conditions under which Argentina had acted, its finding that FET had been violated had also turned on Argentina’s persistent failure to engage in any tariff readjustments.¹⁰²

⁹⁶ *Id.* at ¶¶ 122, 309.

⁹⁷ *Id.* at ¶¶ 145, 148.

⁹⁸ *Id.* at ¶ 162.

⁹⁹ *Id.*

¹⁰⁰ *See id.* at ¶¶ 197-8, 175.

¹⁰¹ *Id.*

¹⁰² *See, e.g.*, José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, in Y.B. ON INT’L INVESTMENT L. & POL’Y. 379, 403-4 (Karl P. Sauvant ed., 2008-2009).

As was the case in *National Grid*, the BIT applicable in *Total* (the France-Argentina BIT) does not contain a measures not precluded clause like Article XI of the U.S.-Argentina BIT. The *Total* Tribunal appeared to acknowledge this difference from the situation in *LG&E* and *Continental Casualty* and referred to the approach used in *National Grid*.¹⁰³

In 2011, the *Impregilo* tribunal essentially followed the lines of previous cases, noting that, within the context of measures affecting a water concession, breaches of FET could only be found to the extent the actions by the government constituted the exercise of sovereign powers, excluding merely contractual acts.¹⁰⁴ The *El Paso* tribunal that same year had to deal, as did the *Total* tribunal, with measures affecting the power generation and oil and gas upstream sectors.¹⁰⁵ It endorsed *Continental Casualty's* analysis of the level of expectations created by different types of governmental actions¹⁰⁶ and shared the *Total* tribunal's view that a breach of FET could result from (i) a disregard of specific commitments; and/or (ii) an unreasonable modification of a framework.¹⁰⁷ It also advocated for a "balanced approach"

¹⁰³ *Total Decision on Liability*, *supra* note 47, at ¶ 181:

[M]any of the previous awards dealing with the same matter, while following a different approach, mitigated the impact of their holdings that Argentina acted in breach of the fair and equitable treatment standard, by giving weight, on different bases, to the emergency situation of Argentina that brought about the pesification of public service tariffs. In this respect, such tribunals have relied on the defense of necessity under customary international law [*LG&E*], or on specific provisions in the relevant BITs [*Continental Casualty*], and have considered that Argentina's breach of the fair and equitable treatment standard did not occur when the measures challenged were taken through the Emergency Law on January 6, 2002, but rather at a later date (such as June 2002), recognizing that the BIT protection could not have insulated an investor completely from the emergency situation of Argentina in 2001- 2002" [*National Grid*].

(footnotes omitted).

¹⁰⁴ *Impregilo Award*, *supra* note 29, at ¶¶ 294, 310.

¹⁰⁵ *See El Paso Award*, *supra* note 44, at ¶¶ 98-110.

¹⁰⁶ *Id.* at ¶ 378.

¹⁰⁷ *See id.* at ¶¶ 364, 370-1, 375, 435.

that we have seen applied in other cases.¹⁰⁸ The *El Paso* tribunal also criticized undue reliance on the concept of stability of the legal framework and rejected the idea that FET requires states to freeze their laws and regulations.¹⁰⁹ Indeed, the *El Paso* tribunal coined the standard of an “acceptable margin of change,”¹¹⁰ suggesting that no FET violations occur when within that margin but also suggesting that government measures can, over time, amount to a violation of FET (thereby introducing the concept of a creeping violation of FET).¹¹¹

Despite its fact-specific nature, the Argentina awards are surprisingly consistent with respect to their treatment of FET. All the opinions on point share certain common assumptions. They all treat FET as a flexible, fact-specific standard. They all also indicate that its meaning can be determined by the object and purpose of the relevant BITs (including their preambles’ typical references to stability and predictability), that it licenses an inquiry into the legitimate expectations of the investor, and that proving intentional bad faith on the part of the state is not required. More specifically, the Argentine tribunals have also agreed that (i) violations of specific commitments are likely to amount to FET violations; (ii) abrupt, unreasonable and far-reaching changes to specific legal frameworks governing an individual sector or activity may constitute violations of FET; and (iii) changes to general laws and regulations should not, in principle, amount to violations of FET. In our view, these are reasonable interpretations of FET clauses that are quite attentive to rule of law values and attempt to strike a fair balance between the needs of investors and those of states.

These cases indicate that repeated arbitral considerations of the same guarantee can produce ever more elaborate *but nonetheless consistent* interpretations of what everyone concedes is the vaguest treaty clause in the BIT canon. To be sure, the Argentina cases on point do not agree (and do not resolve)

¹⁰⁸ See, e.g., *id.* at ¶¶ 358-364.

¹⁰⁹ *Id.* at ¶¶ 365-368, 370-371.

¹¹⁰ *Id.* at ¶ 402.

¹¹¹ *Id.* at ¶¶ 518-519.

contentious questions with respect to the meaning of FET which have bedeviled other investor-state arbitrators outside the Argentina context. The arbitrators in these cases disagree, as do others, with respect to the relationship between FET and customary international law standards, particularly the international minimum standard, for example. The arbitrators in *El Paso*, for example, identified three approaches with respect to this issue, namely suggestions that (1) FET was the equivalent of the international minimum standard (*CMS* and *El Paso* itself);¹¹² (2) FET was an autonomous and generally more demanding standard on the state (*Azurix*);¹¹³ and (3) it was unnecessary to decide insofar as the measures at stake would violate the international minimum standard (*BG*).¹¹⁴

The Argentina cases' evolving interpretation of FET suggest a second conclusion, namely that, over time, the international investment regime, including its arbitrators, have become more responsive to sovereign concerns. In the context of FET, despite the general consistency in their approach and holdings, the trajectory of the Argentina cases suggest a growing consensus among the arbitrators that application of FET licenses a broader examination of *the state's* legitimate expectations and that this is consistent with the object and purpose of BITs generally. This growing sensitivity to state regulatory needs is suggested by more express consideration of the state's right to regulate, references to the "context" in which the sovereign acts, explicit findings that there exists an "acceptable margin of change" in state laws, or applications of forms of proportionality "balancing" or principles of "regulatory fairness." These interpretations of FET build onto that substantive BIT guarantee concerns over protecting states' right to regulate. To this extent, they may displace the need to apply a distinct defense of necessity to satisfy states' regulatory concerns.

¹¹² *Id.* at ¶¶ 332, 336.

¹¹³ *Id.* at ¶ 333.

¹¹⁴ *Id.* at ¶ 334.

E. *The Fragmenting "Necessity" Defense*

Given the extensive writings on point,¹¹⁵ this essay does not attempt a comprehensive analysis of how the Argentina awards and rulings on annulment have dealt with Argentina's defense – deployed in virtually all of these cases – that its actions were "necessary" either under a measures not precluded clause or under the customary defense of necessity. Table 11, taken from one of our prior writings,¹¹⁶ summarizes the state of the "Argentine" law when it comes to the meaning of the "measures not precluded" clause of the U.S.-Argentina BIT (Article XI) or the customary defense of necessity. Unlike the rest of the tables included here, it does not purport to be a comprehensive listing of all the cases that have considered these defenses but only includes a representative sampling.

Table 11: Open Questions Regarding the "Necessity" Defense: Representative Argentina Cases

| Question | | | |
|--|--|--|-----------------------------|
| When a BIT has an "essential security" clause as does the U.S.-Argentina BIT, is that a separate or distinct defense from the excuse of necessity under customary law? That is, does Article XI of the U.S.-Argentina BIT = Article 25 of the Articles of State Responsibility or is it <i>lex specialis</i> ? | <i>CMS, Enron, Sempra</i> | <i>CMS Annulment, Continental Casualty, Sempra Annulment</i> | |
| Does the customary defense of necessity apply when a BIT is silent as to that defense? | <i>BG</i> | <i>National Grid</i> | |
| Assuming that it is applicable, what does the customary defense of necessity require by way of proof in order for it to be successfully invoked? | <i>CMS, Enron, Sempra, BG, National Grid</i> | <i>LG&E</i> | <i>Enron Annulment</i> |
| Assuming that Article XI of the U.S.-Argentina treaty is a distinct defense from the excuse of necessity, what | <i>LG&E</i> | <i>CMS Annulment, Sempra</i> | <i>Continental Casualty</i> |

¹¹⁵ See, e.g., Alvarez & Khamsi, *supra* note 102; José E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina*, in Y.B. INT'L INVESTMENT L. & POL. 2010-2011 (K. Sauvart ed. 2011); JOSE E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 247-339 (2011).

¹¹⁶ ALVAREZ, LAW REGIME, *supra* note 115, at 269.

| exactly does it require in order for it to be successfully invoked? | | Annulment | |
|---|---------------------------|--|-----------------|
| What is the effect of a successful invocation of Article XI? | <i>CMS, Enron, Sempra</i> | <i>CMS Annulment, Continental Casualty, Sempra Annulment</i> | <i>LG&E</i> |

As that table suggests, the caselaw is in total disarray when it comes to the meaning, application, and effects of Argentina's defense that "necessity" made it do it. Despite repeated arbitral consideration of this issue, including by no less than four annulment committees, we are no closer to resolving the five critical (and basic) questions identified in Table 11. We still do not know, first, whether the measures not precluded clause in the U.S.-Argentina BIT constitutes a distinct defense from that codified in Article 25 of the Articles of State Responsibility (namely the customary defense of necessity). While the original *CMS*, *Enron*, and *Sempra* tribunals equated the two defenses, a result affirmed by the *Enron* annulment committee, the *CMS* annulment committee cast grave doubt on this conclusion, and the *Sempra* annulment committee annulled that original award precisely on that ground.

Second, we have no consistent case law indicating whether the customary defense of necessity applies when – as is most often the case when dealing with BITs not based on the U.S. model – a BIT contains no measures not precluded clause or a functional equivalent. Although a number of cases (*e.g.*, *National Grid*, *Total*, *Impregilo*) have found the customary defense to be applicable in such cases, at least one tribunal (*BG*) questioned whether this was necessarily true since the customary defense was based on state practice among states while in the investor-state context the respondent state would be invoking the defense against a private party.¹¹⁷ The *BG* Tribunal found it unnecessary to decide that point since it concluded that Argentina failed, in any case, to satisfy the difficult burden of proof of the customary defense.¹¹⁸

Third, the tribunals appear to differ in how they apply the customary defense of necessity when that defense is deemed

¹¹⁷ *BG Award*, *supra* note 23, at ¶ 408.

¹¹⁸ *Id.* at ¶¶ 411-2.

applicable. Although all appear to agree that Article 25 of the Articles of State Responsibility accurately codifies the requisites of that defense and most of the tribunals that have applied those requisites have applied them strictly (and have found Argentina not to have satisfied one or more of those requisites), *LG&E* may not have applied those requisites as strictly as the codifiers of Article 25 appeared to intend and the *Enron* annulment committee suggested, in overturning that award, that a number of factors (not mentioned in Article 25 and arguably inconsistent with its terms) need to be considered.

Fourth, the tribunals do not agree as to what states or investors must prove to satisfy the requisites of a measures not precluded clause (assuming these are different from those under Article 25 of the Articles of State Responsibility) or even perhaps as to the respective burden of proof. While *LG&E*, for example, appeared to suggest that the interpretation of such a clause, independently of the customary defense of necessity, leads to the same (or even identical) considerations as under the customary defense of necessity,¹¹⁹ both the *CMS* and *Sempra* annulment committees suggested, without deciding, that the two defenses were substantively different.¹²⁰ For its part, *Continental Casualty* – in an opinion which was left undisturbed by an annulment committee – found that Article XI of the U.S.-Argentina BIT imposed the same burdens of proof as those imposed under Article XX of the GATT.¹²¹

Finally, the relevant case law is in total disarray when it comes to determining the effect of a successful invocation of a measures not precluded clause and perhaps the customary defense of necessity. While the original *CMS*, *Enron*, and *Sempra* tribunals suggested in dicta (but did not need to decide) that both the measures not precluded clause in the U.S.-Argentina BIT and the underlying customary defense of necessity did not excuse a state

¹¹⁹ See, e.g., *LG&E Decision on Liability*, *supra* note 10, at ¶¶ 239-42, 257-9.

¹²⁰ *CMS Annulment*, *supra* note 50, at ¶ 130; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Application for Annulment ¶¶ 198-200 (Jun. 29, 2010) [hereinafter *Sempra Annulment*].

¹²¹ See Alvarez and Brink, *supra* note 115. See also *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment ¶¶ 133-5, 232 (Sep. 16, 2011).

from any applicable primary obligations to compensate the injured investor, the *CMS* annulment committee suggested in dicta and the *Sempra* annulment committee specifically found, that to the extent a state successfully invokes Article XI of the U.S.-Argentina BIT, it owes no financial compensation since that article is, unlike the customary defense, a "primary" rule of obligation.¹²² For its part, *LG&E* held that Argentina was not liable for damages incurred during the period of its crisis, but found, as did *Continental Casualty*, that state liable for any actions taken after the crisis is over.¹²³

III. INCONSISTENT CASE LAW?

So what do the Argentina cases in total tell us about the charge that the investment regime cannot produce the reliable, stable case law that all its stakeholders want from it? Ten years on, this charge is both true and false.

It is true to the extent that the Argentina cases have rendered the meaning of the "measures not precluded" clause an untidy mess and, if the *Enron* annulment is any indication, may end up threatening the established understanding of the customary defense of necessity. To this extent, these decisions have indeed "fragmented" international investment law internally and may be driving a wedge between that law and the rest of public international law.¹²⁴ The fact that annulment committees are disagreeing among themselves about the meaning of the measures not precluded clause and perhaps more significantly, about the extent of their scope of review under the ICSID Convention¹²⁵ does not help matters and has generated renewed demands for a full scale appellate process. To the extent this disarray continues and spreads to other matters crucial to

¹²² *CMS Annulment*, *supra* note 50, at ¶¶ 146 and *Sempra Annulment*, *supra* note 120, at ¶¶ 200-201; *see also* ALVAREZ LAW REGIME, *supra* note 115, at 282-84.

¹²³ *LG&E Decision on Liability*, *supra* note 10, at ¶¶ 229, 245, 261, 264. *LG&E* found that the crisis was over when President Néstor Kirchner was elected. *Id.* at ¶¶ 227-30.

¹²⁴ For criticisms along these lines, see José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 247-49 (2011).

¹²⁵ Compare with ICSID Convention, article 52.

deciding jurisdiction or the merits of investor-state cases, this does not bode well for the prospects of harmonious *jurisprudence constante* and may create a serious legitimacy crisis for the regime.

But the charge of inconsistent case law is also demonstrably false. On virtually every other topic discussed in this section – with the exceptions of legal issues that have similarly divided other investment tribunals (such as the scope of the MFN clause or the precise comparator to be used in national treatment or the content of umbrella clauses) – the Argentina cases have been no less consistent than have other investment tribunals – or indeed common law courts, would be after the equivalent brief period in which these issues have been adjudicated. Moreover, as Tables 8-10 suggest, they have generated surprising convergence on the broad outlines of the law as well as specific details, despite all the well-known constraints imposed by the structure of the investment regime (including ad hoc tribunals, arbitrators with different types of expertise, the absence of an appellate mechanism, and textually dissimilar BITs).

The Argentina awards cast doubt on a number of premises. Although we are told that “commercial” arbitrators come from a tradition that ignores prior arbitral decisions and focuses on resolving one dispute at a time,¹²⁶ the single most cited source of authority in the Argentina decisions is – as is the case with respect to other investor-state awards¹²⁷ – other investor-state arbitral decisions. There does not appear to be a difference among the decisions in terms of relative reliance on prior arbitral

¹²⁶ See, e.g., Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 *ARB. INT'L.* 357 (2007).

¹²⁷ One study, by Jeffery Commission, indicates that, whereas in 1990, the average number of citations to prior ICSID awards was .33 per award; by 2006 that was 9.3, an increase of 2818 % – an increase that vastly exceeds any jump that would have been predicted by the greater number of such awards over time. Jeffery P. Commission, *Precedent in Investment Treaty Arbitration*, 24 *J. INT'L. ARB.* 129 (2007). Another study, by Professor Fauchald, found that prior arbitral case law was used as an “interpretative argument” in 92 out of 98 ICSID cases. Fauchald concludes that “most tribunals accept a strong presumption in favour of following longstanding and consistent case law.” Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals—An Empirical Analysis*, 19 *EJIL* 301, 337-38 (2008).

authority, certainly not one traceable to the background of the arbitrators involved. Even the commercially trained arbitrators involved in the Argentina cases do not appear to think differently about the importance of citing to and relying on prior cases. While those deciding the Argentina cases indicate, like their brethren, that they are not formally bound to follow arbitral precedent, they commonly do so in the course of indicating why, nonetheless, it is a good idea to pay due consideration to decisions made by others raising comparable issues of law or fact. The extent to which reliance on and production of *jurisprudence constante* is now a staple of these cases is clear from the extent to which even the dissenters in these cases – such as George Abi Sab in *Abaclat* – rely on the parsing of prior cases to reach their conclusions.

The following three quotations are representative of the respect extended to prior caselaw in the Argentina awards:

ICSID arbitral tribunals are established *ad hoc*, from case to case, in the framework of the Washington Convention, and the present Tribunal knows of no provision, either in that Convention or in the BIT, establishing an obligation of *stare decisis*. It is, nonetheless, a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals. The present Tribunal will follow the same line, especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent.¹²⁸

Nevertheless, the Arbitral Tribunal finds it unfortunate if the assessment of these issues would in each case be dependent on the personal opinions of individual arbitrators. The best way to avoid such a result is to make the determination on the basis of case law wherever a clear case law can be discerned.¹²⁹

Moreover, considerations of basic justice would lead tribunals to be guided by the basic judicial principle that

¹²⁸ *El Paso Decision on Jurisdiction*, *supra* note 48, at ¶ 39.

¹²⁹ *Impregilo Award*, *supra* note 29, at ¶ 108.

'like cases should be decided alike,' unless a strong reason exists to distinguish the current case from previous ones. In addition, a recognized goal of international investment law is to establish a predictable, stable legal framework for investment, a factor that justifies tribunals in giving due regard to previous decisions on similar issues. Thus, absent compelling reasons to the contrary, a tribunal should always consider heavily solutions established in a series of consistent cases.¹³⁰

IV. PRO-INVESTOR/ANTI-STATE BIAS?

What about the contention that investment arbitration is insufficiently sensitive to governments' legitimate needs and overly solicitous of the needs of investors? One's conclusion on this tends to reflect one's priors. The signers of declarations like the Osgoode Hall Statement and defenders of the investment regime differ, one suspects, not only on specific (and perhaps more measurable) questions such as whether investor-state caselaw is consistent. Opponents and defenders of the regime are likely to differ sharply on the central question of whether foreign investors need the protection of treaties and investor state dispute settlement at all. One can disagree about whether investor-state tribunals weigh sovereign concerns insufficiently or (as one of the authors has suggested of the *Sempra* and *Enron* annulment committees)¹³¹ too much, but regardless, what the Argentina cases reveal is that those sovereign concerns certainly are not ignored. Although some investment lawyers will quibble with some of the jurisdictional findings reflected in Tables 5-7 and some may disagree over the application of the 18-month clause, few will find the results or the rationales underlying the decisions to uphold jurisdiction beyond the pale or shocking. It is hardly surprising if BITs with broad definitions of protected investment, for example, are found to encompass indirect shareholders' claims. Similarly, fair minded observers having no established priors on the merits of BITs or investor-state arbitration are not likely to emerge from an examination of the

¹³⁰ See *Suez-AWG Decision on Liability*, *supra* note 30, at ¶ 189 and *Suez-InterAgua Decision on Liability*, *supra* note 30, at ¶ 182.

¹³¹ Alvarez, *LAW REGIME*, *supra* note 115, at 244-50.

holdings and rationales summarized in Tables 8-10 with the view that these decisions are untenable, unreasoned, or ignore the rule of law. Anyone who reads both the majority decisions and those dissents that have been issued in the course of these cases will find it difficult to suggest that the respective positions on these issues were not aired or that the respondent state's views were ignored. There is no apparent difference in the quality of reasoning between these awards and, for example, those issued by the European Court of Human Rights.

Of course, given the fact that states appoint one-third of the arbitrators involved at the tribunal stage and are undoubtedly influential when it comes to the selection of presidents of these tribunals as well as annulment committees, it would be strange if it were otherwise.

Those who examine closely the holdings and rationales concerning the provision that has led to the most investor "wins" among the Argentina cases, namely the FET clause, cannot describe those as insensitive to the regulatory needs of states. On the contrary, successive arbitrators involved in the Argentina cases have found considerable (and perhaps unexpected) discretion in that vague clause to enable them to consider the needs of sovereigns. As the FET provision has been elaborated in the course of these decisions, that clause appears sufficiently capacious to encompass the legitimate regulatory needs of states. This is particularly true (but need not only be true) when the relevant BIT does not include a measures not precluded clause and arbitrators have an even greater motivation to consider the relevance of a "crisis" on whether a government has in fact acted fairly and equitably in the circumstances.

And those who prematurely condemned these awards, and the investor-state system, for "ignoring" Argentina's necessity defense must surely be comforted by how subsequent awards (e.g., *Continental Casualty*) and certainly annulment committees (e.g., *Sempra* and *Enron*, and to some extent *CMS*) have been far more solicitous of Argentina's defense. While some of us have long contended that such sensitivity was always present (including in early decisions such as the original award in *CMS* where the crisis was deemed relevant to the calculation of

damages),¹³² if the *Sempra* and *Enron* annulments are a harbinger of rulings to come, both Article XI of the U.S.-Argentina BIT and the customary defense of necessity may provide more fulsome excuses for respondent states than either the drafters of the measures not precluded clause or the codifiers of the customary defense ever intended.

While one of the authors has criticized these more recent rulings both on their substance as well as for contributing to inconsistent investment law, the inconsistent and evolving interpretations of the "necessity" defense provides yet more evidence of how much (and how quickly) arbitrators and annulment committees adjust to political realities. Some might regard this as a good thing for the regime as a whole, even if it produces occasional incoherence in the underlying law. On the other hand, to the extent future Argentina awards follow the divergent but uniformly pro-sovereign interpretations in *Continental Casualty* or the annulment rulings in *Sempra* and *Enron*, this could give credence to the critique that investor-state dispute settlement has not generated the wholesale "depoliticization" that its advocates anticipated. It may be that arbitrators – like some national and international judges – respond implicitly to the demands of relevant stakeholders, including states, and re-calibrate their interpretations of relevant BIT provisions. This is just as, as noted below, some states are re-calibrating the BITs that they are now concluding and the BIT models from which they negotiate. While commentators might be aghast at how far some annulment committees (*Sempra*, *Enron*) and some recent tribunals (*Continental Casualty*) have deviated from traditional treaty interpretation in order to satisfy the perceived needs (or fears) of states, these developments suggest the extent to which investor-state dispute settlement remains beholden to the states that established the regime, as well as the existence of an awareness on the part of the arbitrators that states' continued consent to the regime remains indispensable.

Of course, as is well known, the adjudication of the Argentina cases has been taking place amidst a greater sovereign and

¹³² Alvarez & Khamsi, *supra* note 102, at 406-07; Alvarez & Brink, *supra* note 115, at 355 and note 184.

scholarly backlash against the international investment regime.¹³³ Some of that backlash has been generated by reactions to the Argentina claims themselves, including fears that, at a time of continued economic crises elsewhere, other states may face investor claims in the wake of “emergency” measures to respond to such crises. Whether in response to the global economic crisis, the threat of sovereign defaults, or other criticisms of the investment regime, a number of states have been re-examining the investment protection treaties that they have been concluding, terminating existing treaties or their acceptance of ICSID, discontinuing their BIT programs, or (as is the case of Argentina) choosing to ignore arbitral awards. While a number of states (including Least Developed Countries – LDCs – among themselves) continue to negotiate BITs as investor-protective in their contents as the U.S.-Argentina BIT, other states (including, among others, China, the United States, and Canada) are negotiating more sovereignty-protective treaties that include all or most of the following features: (1) authority to issue binding treaty interpretations from time to time by their state parties; (2) re-calibrated FET clauses intended to increase sovereign policy space (as through attempt to restrict its scope to customary international law protections); (3) more limited expropriation guarantees that make claims for “indirect” or “regulatory” takings increasingly unlikely; (4) more sovereign-friendly preambles or provisions that ensure respect for other values (apart from investor protections), such as express recognition of labor and/or environmental concerns; (5) narrower definitions of “investment” or “investor” or “investment dispute;” (6) narrower MFN clauses (that exclude, for example, its application to dispute settlement provisions); (7) more express limits on arbitral discretion (as through statutes of limitations on the bringing of claims, exclusions of some categories of disputes (*e.g.*, relating to tax measures), or provisions enabling the parties to get a “first look” at the draft award); (8) greater acceptance that investor-state dispute settlement needs to respect “public” values (as through explicit transparency requirements and permissions for amicus); (9) more fulsome or even self-judging exceptions from investor guarantees (*e.g.*, enabling a state to take all measures “which it

¹³³ See, *e.g.*, MICHAEL WAIBEL, ASHA KAUSHAL, KYO-HWA CHUNG & CLAIRE BALCHIN, EDS., *THE BACKLASH AGAINST INVESTMENT ARBITRATION* (2010). For an example, see the OSGOODE HALL STATEMENT, *supra* note 3.

considers" necessary to protect its essential security or to protect the stability of its financial system); (10) the elimination of certain investor-state rights altogether (from the elimination of an option for investor-state arbitration to elimination of umbrella clauses).¹³⁴

V. CONCLUSION

All of these developments – in BITs and investor-state dispute settlement – suggest that, even if we accept the misleadingly dichotomous “public”/“private” divide that some see between commercial and investment arbitration, even this “privatized” method of dispute settlement is more accepting of and open to public values than some of its critics claim. A new wave of more sovereign-protective investment protection treaties and more sovereignty-protective investor-state awards are two of the ironic by-products of the Argentina line of cases. The Argentina “crisis” cases are, paradoxically, lowering the crisis profile of the investment regime.



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¹³⁴ See, e.g., José E. Alvarez, *The Evolving BIT*, in 3 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 1 (I. Laird & Todd Weiler eds., 2010).

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