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Daniel A. Krawiec

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SEMPRA ENERGY INTERNATIONAL V. THE ARGENTINE REPUBLIC: REAFFIRMING THE RIGHTS OF FOREIGN INVESTORS TO THE PROTECTION OF ICSID ARBITRATION

Daniel A. Krawiec*

ON January 6, 2002, Argentina passed the “Public Emergency Law of 2002” in response to its ongoing economic crisis.¹ Because of this law and its effects on foreign investors,² Argentina has faced a multiplicity of claims³ against it in the International Centre for Settlement of Investment Disputes⁴ (“ICSID”). One such claim was filed by Sempra Energy International (“Sempra”).⁵ Consistently, Argentina has objected to ICSID jurisdiction to hear claims against it. The ICSID has consistently rejected these objections and found that it has jurisdiction to hear the claims.⁶ On May 11, 2005, an arbitral tribunal organized under the auspices of ICSID issued an order rejecting Argentina’s objections to its jurisdiction to hear claims against it by Sempra.⁷ This note explores Argentina’s main objections to jurisdiction in Sempra’s case against it, explains why the tribunal’s determinations in this case are consistent with ICSID precedent and the text and intent of the U.S.-Argentina bilateral investment treaty (BIT),⁸ and suggests that these jurisdictional holdings are an important reaffirmation of the rights of foreign investors to the

* J.D. 2008, University of Miami School of Law; B.A., 2005, University of Michigan, Ann Arbor.

1. Paolo Di Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 47 (2004).
2. *See id.* at 61 and accompanying text (arguing that the Emergency Law and related measures adversely affected foreign investments in Argentina).
3. *See* discussion *infra* Part III.C.
4. *See generally* Convention on the Settlement of Investment Disputes Between States and Nationals of Other Parties, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (hereinafter Convention).
5. *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16 (2005) (decision on objections to jurisdiction) [hereinafter *Sempra I*]; *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16 (2007) (award of the tribunal) [hereinafter *Sempra II*].
6. *See* Di Rosa, *supra* note 1, at 51.
7. *See Sempra Energy Int’l*, ICSID Case No. ARB/02/16, at 44.
8. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, 31 I.L.M. 124 (hereinafter U.S.-Argentina BIT).

protection of ICSID arbitration under the U.S.-Argentina BIT. Furthermore, this note will also explain that the tribunal's later decision on the merits provides American investors with substantial substantive protection under the U.S.-Argentina BIT. A basic understanding of recent Argentine experience, the recent prominence of BITs in international relations, and the ICSID itself, however, will be explained first to put the *Sempra* case in its proper context.

I. A BRIEF HISTORY AND CURRENT STATUS OF BILATERAL INVESTMENT TREATIES

A. THE ORIGINS OF BILATERAL INVESTMENT TREATIES AND THEIR PROTECTIONS

The first BIT was signed by Germany and Pakistan on November 25, 1959.⁹ Since that initial BIT was signed nearly fifty years ago, BITs proliferated rapidly across the globe, including over 800 since 1987 alone.¹⁰ These treaties typically offer investors from each signatory nation an extensive set of substantive protections for their investments within the borders of the other signatory nation, with the hope of increasing bilateral foreign direct investment between the two nations.¹¹ BITs also often include procedural mechanisms for investors to enforce their substantive rights. One such mechanism is arbitration under the rules of organizations like ICSID or the International Chamber of Commerce.¹² Currently, international investors from a variety of nations are protected by the approximately 2,000 BITs in force in the world today.¹³

B. THE LATIN AMERICAN BILATERAL INVESTMENT TREATY EXPERIENCE

Before the advent of the modern BIT, a foreign investor's rights in Latin America were limited by the Calvo Doctrine, which is named after

9. Int'l Ctr. for Settlement of Inv. Disputes, <http://worldbank.org/icsid/treaties/i-1.htm> (follow "Search Listings of Bilateral Investment Treaties" under "Publications"; then follow "Germany" hyperlink).
10. Int'l Ctr. for Settlement of Inv. Disputes, *supra* note 9.
11. See Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have A Bright Future*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 53 (2005). Commonly, these protections consist of "appropriate compensation for expropriation, freedom from unreasonable or discriminatory measures, guarantees of national treatment, assurances of fair and equitable treatment of investments, promises that investments will receive full protection and security as well as treatment no less favorable than that accorded under international law, and a Sovereign's commitment to honor its obligations [sic]." *Id.*; See also Di Rosa, *supra* note 1, at 41.
12. See Franck, *supra* note 11, at 54; see also Di Rosa, *supra* note 1, at 42 (adding that as of 2005 over 140 were party to the ICSID convention).
13. Third World Network, WTO Symposium Debates Investment Issue (June 17, 2003), available at <http://www.twinside.org.sg/title/twninfo29.htm> (last visited Oct. 9, 2006).

Argentine statesman Carlos Calvo.¹⁴ The Calvo Doctrine gave foreigners seeking redress after an investment dispute with their host nation only the rights and access to local courts that citizens of that Latin American nation also possessed.¹⁵ Needless to say, this meant that access to neutral international arbitration was generally unavailable to foreign investors.¹⁶

The current state of affairs in Latin America, on paper at least, paints a much friendlier picture for foreign investors.¹⁷ Beginning in the 1990s, many Latin American nations started to increase the number and scope of their BIT obligations dramatically.¹⁸ This increase was consistent with the greater worldwide proliferation of BITs¹⁹ also occurring at this time²⁰ due to the increasing worldwide trend toward market economies.²¹ As of August 2002, Latin American nations had signed 219 BITs,²² with Argentina itself accounting for 38 of these.²³ Many of these BITs provide foreign investors with the right to arbitrate their grievances with one of several international bodies.²⁴ The United States-Argentina BIT is one such treaty.²⁵

C. THE UNITED STATES-ARGENTINA BIT

On November 14, 1991, the United States and Argentina entered into a BIT, which came into force on October 20, 1994.²⁶ The United States signed this treaty with the intent of eliminating the harm caused to Amer-

14. Bernardo M. Cremades, *Disputes Arising Out Of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues*, 59-JUL DISP. RESOL. J. 78, 80 (2003).

15. *Id.*

16. *See id.* at 79-80. Though the Calvo Doctrine's influence has waned at present, early BITs entered into by Latin American nations sometimes contained Calvo clauses, and some countries, such as Brazil, still do not necessarily grant foreign investors the right to international arbitration of their investment disputes. *See id.* at 80.

17. *But see* Franck, *supra* note 11, at 56 (stating that despite the rise of international arbitration foreign investors face increasing transaction costs, inconsistent arbitration results, and a generally "unpredictable situation.").

18. *See* Raúl Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes Under ICSID: The Latin American Experience*, 8 L. & BUS. REV. AM. 501, 505 (2002).

19. *See supra* notes 7-8 and accompanying text (showing that BITs are a modern development in international relations that have multiplied in number especially during the past two decades).

20. During the eight-year period from 1989-96, on average about 103 BITs were signed each year. Compared to decades past, this was a vast increase. For each ten-year period prior, starting with the period 1959-68, the same statistic was 6 per year, 8.1 per year, and 17.7 per year respectively. *See* Int'l Ctr. for Settlement of Inv. Disputes, <http://worldbank.org/icsid/treaties/i-1.htm> (follow "Search Listings of Bilateral Investment Treaties" under "Publications"; then follow "View Treaties by Year").

21. *See* Vinuesa, *supra* note 19, at 504.

22. Int'l Ctr. for Settlement of Inv. Disputes, *supra* note 9.

23. Int'l Ctr. for Settlement of Inv. Disputes, *supra* note 9 (follow "Search Listings of Bilateral Investment Treaties" under "Publications"; then follow "Argentina").

24. Franck, *supra* note 11 at 53.

25. U.S.-Argentina BIT, *supra* note 8.

26. Practising Law Inst., U.S.-Argentina Bilateral Investment Treaty, 722 PRAC. L. INST. 1431, 1433 (2005).

ican investors by the Calvo Doctrine, and to provide “important protections to investors and . . . [to create a] more stable and predictable legal framework for investment.”²⁷ For its part, Argentina signed this treaty agreeing to offer American investors more protection with the hope of attracting more private capital with which to stimulate its economic development.²⁸ Importantly, Article I of the treaty defines “investment” in the following way:

- A) “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:
- ii) a company or shares of stock or other interests in a company or interests in the assets thereof;²⁹

For these investments, the treaty offers several substantive protections. First, Article IV(1) of the U.S.-Argentina BIT provides investors a right against expropriation; second, Article II(2)(a) mandates fair and equitable treatment; third, Article II(2)(b) bars arbitrary and discriminatory treatment; and fourth, Article II(2)(c) contains a general umbrella clause obligating the host nation to honor its specific arrangement with an investor.³⁰ To give these investment protections teeth in case of a dispute,³¹ the U.S.-Argentina BIT allows investors from either nation three dispute resolution options,³² the most important of which is recourse to binding arbitration under a tribunal established by the ICSID.³³

27. *Id.* at 1435 (quoting letter of submittal by the President); *See also* U.S.-Argentina BIT, *supra* note 8, art. I(1)(a) (defines in part that under the treaty an investment “means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts”).

28. *See* Practising Law Inst., *supra* note 27, at 1438.

29. U.S.-Argentina BIT, *supra* note 8, art. I(1)(a)(ii).

30. Di Rosa, *supra* note 1, at 54 (discussing the aforementioned as potential claims in regards to the multitude of ICSID claims currently outstanding against Argentina).

31. U.S.-Argentina BIT, *supra* note 8, art. VII(1)(a)-(c). The U.S.-Argentina BIT defines an investment dispute as “a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party’s foreign investment authority . . . to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.” *Id.*

32. U.S.-Argentina BIT, *supra* note 8, art. VII(2)(b)-(3)(a)(ii). The other two investment dispute resolution options offered to investors by the U.S.-Argentina BIT are access to the host country’s local “courts or administrative tribunals” or any other dispute resolution procedure previously agreed to by the parties. *Id.*

33. U.S.-Argentina BIT, *supra* note 8, art. VII(3)(a)(i)-(ii). It should be noted that this option is technically only available if the host state is a party to the ICSID Convention; however, at present time both the United States and Argentina are parties to the ICSID Convention. *See* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main> (showing that the United States entered into the ICSID Convention on October 14, 1966 and Argentina on November 18, 1994).

II. ICSID

A. HISTORY

The ICSID is an “autonomous intergovernmental” organization, which facilitates the creation and running of arbitral tribunals to settle investment disputes between certain sovereign nations and international investors.³⁴ ICSID was founded on October 14, 1966, when the Convention of the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the “Convention”) was ratified by twenty countries.³⁵ The number of cases handled by ICSID has grown dramatically in recent years, a phenomenon attributable to the rapid increase in foreign direct investment flows—from about \$25 billion in 1990 to about \$200 billion by 1999³⁶—and the inevitable investment disputes these flows create. A large percentage of ICSID claims currently pending are against Argentina, and these claims came about due to some of this increase in foreign direct investment.³⁷

B. ICSID JURISDICTIONAL BASES

Ratification of the ICSID Convention itself imposes no obligation on contracting states to submit to ICSID arbitration.³⁸ Rather, a contracting state must accept in writing that for a particular dispute or class of disputes it consents to ICSID jurisdiction. Alternatively, a contracting state may give its consent in advance,³⁹ such as the United States and Argentina did in their BIT.⁴⁰ Most ICSID arbitration cases are initiated based upon such BIT jurisdiction clauses.⁴¹ The ICSID’s jurisdiction is limited, so the fact that a state has consented to ICSID jurisdiction does not mean that it may always be sued in an ICSID tribunal.⁴² ICSID jurisdiction is limited to disputes falling under article 25(1) of the ICSID Convention, which reads,

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivisions or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no

34. Roberto Dañino, A Forum for the Resolution of International Legal Disputes Through Arbitration and Conciliation 2 (Nov. 16, 2005), <http://siteresources.worldbank.org/INTLAWJUSTICE/214576-1139604306966/20817156/ParisICSID.pdf>.

35. See Int’l Ctr. for Settlement of Inv. Disputes, Annual Report 2006 12-15, 50 (2006). ICSID’s membership as of the 2006 annual meeting was 143 contracting states. *Id.* at 3.

36. Dañino, *supra* note 35, at 6.

37. See Di Rosa, *supra* note 1, at 42.

38. Dañino, *supra* note 35, at 5.

39. *Id.*

40. See U.S.-Argentina BIT, *supra* note 8 and accompanying text.

41. See Vinuesa, *supra* note 19, at 502.

42. *Id.* at 503 (“[C]onsent of the investor is assumed when the option is expressed on the request for ICSID arbitration.”).

party may withdraw its consent unilaterally.⁴³

Consequently, in the case of a BIT based claim, an ICSID tribunal will look to ensure that consent to jurisdiction is found in the treaty, and that a legal dispute arising out of an investment between a contracting state and a national of another state exists.⁴⁴

A “national of another contracting state” is defined in two ways by the Convention. The first is “any natural person who had the nationality of a Contracting State other than the State party to the dispute.”⁴⁵ The second:

[is] any juridical person which had the nationality of a Contracting State other than the State party to the dispute. . . and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.⁴⁶

On its face, this section states that not only can corporations of a different nationality from the contracting state party with which it has a dispute invoke ICSID jurisdiction, but in some measure so too can a corporation with the nationality of the contracting state party.⁴⁷ It is this section that was at the heart of the jurisdictional dispute in *Sempra Energy Int'l. v. Arg.* In turn, the dispute in itself can be traced back to recent Argentine history and governmental practice.

III. BRIEF HISTORY OF ARGENTINA'S ECONOMIC AND POLITICAL UPHEAVAL

A. HISTORY OF POLITICAL AND ECONOMIC INSTABILITY

Argentina declared independence from its Spanish colonial rulers in 1816, but due to lingering colonial influence Argentina has always preferred strong leaders with a penchant for authoritarian practices.⁴⁸ Historically, this has meant that many of Argentina's leaders have expressed an indifference to the rule of law.⁴⁹ Argentina's elected government was first overthrown by military coup in 1930, and thereafter the nation began a long period of economic and political distress that continues today.⁵⁰ In

43. Convention, *supra* note 4, ch. II, art. 25(1).

44. See Di Rosa, *supra* note 1, at 50.

45. See Convention, *supra* note 4, ch. II, art. 25(2)(a).

46. *Id.* ch. II, art. 25(2)(b).

47. See *Sempra I*, *supra* note 5.

48. See Becky L. Jacobs, *Pesification and Economic Crisis in Argentina: The Moral Hazard Posed by a Politicized Supreme Court*, 34 U. MIAMI INTER-AM. L. REV. 391, 396-97 (2003); see also Keith S. Rosenn, *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 25 (1990) (“[I]n the Latin American colonies, patrimonialism produced widespread corruption, an incredible penchant for bureaucratic red tape, and a highly unpredictable and personal legal system.”).

49. See Jacobs, *supra* note 49, at 397.

50. *Id.* at 397-98.

the midst of one of its darkest hours, however, newly elected Argentine President Carlos Menem began to institute seemingly successful economic reforms and, for brief period of time, the future appeared bright for Argentina.⁵¹

At the time of Menem's election, Argentina's largest economic woes included hyperinflation, a large number of costly, inefficient state-owned enterprises, and currency exchange problems.⁵² Menem's government undertook two main reforms to attack these and other problems: the "Convertibility Law" and the privatization of many of its state owned enterprises.⁵³ The Convertibility Law set a fixed exchange rate of one Argentine peso to one U.S. dollar, and was primarily responsible for curing Argentina's inflation ills.⁵⁴ Argentina's privatization effort was aimed at attracting foreign investment because the government believed that domestic private sector lacked the needed financial resources and technical knowledge.⁵⁵

Using a combination of measures such as the reduction of restrictions on foreign investment, the signing of BITs with other nations, and the help of American investment banking firms,⁵⁶ Argentina began to privatize many sectors, including its energy sector.⁵⁷ The reforms in the energy sector were designed to guarantee a profit, but the value of foreign investors' holdings was still intimately tied to the Argentine government's continuing political discretion.⁵⁸ The energy companies owned by these investors lacked even the ability to set their own rates, which were tied to a politically controlled currency exchange rate.⁵⁹ Ultimately, these controls and the government's ability to alter its policies governing these controls would lead to the claims of Sempra and other foreign energy investors against Argentina.⁶⁰

B. EMERGENCY MEASURES

Despite the initial success of Argentina's reform program,⁶¹ the 1990s eventually brought severe recession to Argentina.⁶² Argentina was una-

51. *Id.* at 398-99. In fact, "Argentina's economy was so strong that the International Monetary Fund and other financial institutions were holding the country up as a model for the rest of South America to follow." Larry Luxner, *Ambassador of Argentina Diego Guelar: Overcoming the Crisis*, THE WASHINGTON DIPLOMAT, http://www.washdiplomat.com/02-04/a8_02_04.html (last visited Oct. 10, 2006).

52. Di Rosa, *supra* note 1, at 44.

53. *See id.*

54. Jacobs, *supra* note 49, at 398-99.

55. Di Rosa, *supra* note 1, at 44-45.

56. *Id.* at 45.

57. *See Sempra I*, *supra* note 5, ¶¶ 18-19.

58. Di Rosa, *supra* note 1, at 45-46.

59. *Id.*

60. *See Sempra I*, *supra* note 5, ¶¶ 18-19.

61. *See supra* note 33 and accompanying text (arguing that initially Argentina's reforms were successful).

62. Jacobs, *supra* note 49, at 399.

ble to control its public spending at this time, and fell deeply into debt.⁶³ Furthermore, Argentine industry became less competitive as the U.S. dollar, to which its currency was pegged, rose in value.⁶⁴ One of the final straws that broke Argentina's back was the spread of the 1998-99 Asian financial crisis to Latin America.⁶⁵ Shortly afterwards, the International Monetary Fund ("IMF") refused to allow Argentina to borrow any additional money to finance its massive budget deficits.⁶⁶ As a consequence of this IMF decision, Argentina's President announced that Argentina would enter "into the largest sovereign default in history."⁶⁷ Cumulatively, these events and others prompted the Argentine government to pass the Public Emergency Law of 2002 ("Emergency Law").⁶⁸

The Emergency Law affected foreign investments in the energy industry greatly.⁶⁹ Foremost among the damaging legal changes for foreign investors under the Emergency Law was the Emergency Law's "pessification" of utility rates.⁷⁰ Under their original concession contracts, Argentine utility companies owned by foreign investors were allowed to calculate their utility rates in dollars, but then had to convert the figure into pesos at an even exchange when billing customers.⁷¹ As long as it was still possible for the utility companies to convert their revenue back into dollars later at the same one peso for one dollar rate, the utility companies were profitable and could both finance their operations and continue to invest in needed infrastructure.⁷² The Emergency law "pessified" utility revenues, by mandating that utility rates continue to be calculated in dollars and converted to pesos under the one-to-one conversion rate, but at the same time the law eliminated the government's one-to-one convertibility guarantee and let the peso's value float on the open market.⁷³

The value of the floating peso would fall as low as a four-to-one ratio against the U.S. dollar.⁷⁴ By comparison, today the exchange rate has recovered somewhat, but still stands at approximately 3.1 pesos to the dollar.⁷⁵ This measure alone cut utility company incomes by two-thirds.⁷⁶ The Emergency Law, however, went even a step further than this. It froze utility rates at their then-current level and, "ordered these compa-

63. *Id.*

64. *Id.*

65. *Id.*; see also Di Rosa, *supra* note 1, at 46.

66. Jacobs, *supra* note 49, at 400.

67. *Id.*

68. Di Rosa, *supra* note 1, at 47; see generally Argentine Law No. 25561, Jan. 6, 2002, [LXII-A] A.D.L.A. 44.

69. See Di Rosa, *supra* note 1, at 47.

70. *Id.*

71. *Id.*

72. See Di Rosa, *supra* note 1, at 48.

73. See *id.*

74. *Id.*

75. Yahoo Finance, <http://finance.yahoo.com/currency/convert?amt=1&from=USD&to=ARS&submit=Convert> (last visited Oct. 11, 2006).

76. Di Rosa, *supra* note 1, at 48.

nies to continue fully to abide by their obligations under their respective concession contracts, and authorized the executive branch to renegotiate the public utility concession contracts.”⁷⁷ Faced with these damaging changes to the profitability of their investments in Argentina and the passage of several years with no relief, a great many foreign investors have decided to try to obtain relief in ICSID arbitration.⁷⁸

C. RECENT WAVE OF ICSID CLAIMS AGAINST ARGENTINA

As of this writing thirty-three of the 105 pending claims, or about 31.4 percent, at ICSID were against Argentina.⁷⁹ While as recently as 2005 the percentage of pending ICSID claims against Argentina was even higher,⁸⁰ claims relating to Argentina still account for a vastly disproportionate amount of pending ICSID claims.⁸¹ Currently the state is facing the second highest amount of ICSID claims, while Ecuador and Mexico face only six each.⁸² The vast majority of these claims against Argentina, including Sempra Energy’s, can be attributed to the effects of the “emergency measures” Argentina implemented in response to its 2001-02 economic crisis.⁸³

IV. SEMPRA V. ARGENTINE REPUBLIC DISCUSSED

A. SEMPRA ENERGY AND ITS CLAIMS

Sempra Energy International is a large, Fortune 500, San Diego, California, based energy company that serves over 29 million utility customers in North America, Asia, and South America.⁸⁴ In the midst of Argentine President Menem’s large-scale privatization plan, Sempra purchased a 43.09 percent share in the Argentine companies Sodigas Sur S.A. (“Sodigas Sur”) and Sodigas Pampeana S.A. (“Sodigas Pampeana”).⁸⁵ The other shareholder in these two companies is Camuzzi Inter-

77. *Id.*

78. *See id.* at 49.

79. Int’l Ctr. for Settlement of Inv. Disputes, <http://worldbank.org/icsid/cases/pending.htm> (follow “List of Cases” under “Cases”)

80. *See Di Rosa, supra* note 1, at 43 n.9 (stating that as of Feb. 28, 2005 41.2% of the pending ICSID cases were against Argentina); *see also* discussion *supra* Part III.B (explaining the events which lead to the passage of Argentina’s Emergency Law and how the law affected foreign investments in Argentina negatively).

81. Int’l Ctr. for Settlement of Inv. Disputes, *supra* note 82.

82. Int’l Ctr. for Settlement of Inv. Disputes, *supra* note 82. Even more telling is that out of a total of forty-one states facing such claims, only thirteen other states face more than one claim and only eight other states face three or more claims.

83. Di Rosa, *supra* note 1, at 42.

84. Sempra Energy, <http://www.sempra.com/aboutUs/about.htm> (last visited Nov. 12, 2006) [hereinafter Sempra Website].

85. *Camuzzi Int’l v. Arg.*, ICSID Case No. ARB/03/2, at 2 (Decision on Objections to Jurisdiction of May 11, 2005). Camuzzi requested, and the tribunal granted, that both Sempra’s claims and Camuzzi’s claims be heard and decided by a single ICSID tribunal. Argentina issued nearly identical objections to jurisdiction in Camuzzi’s case, and in response the tribunal issued an opinion rejecting Argentina’s objections, which was nearly identical to the opinion which it issued in Sempra’s case. *See id.*

national S.A. (“Camuzzi”), a Luxembourg based corporation, which owned 56.91 percent in both Sodigas Sur and Sodigas Pampeana.⁸⁶ “The latter two Argentine companies, in turn, hold 90 percent and 86.09 percent, respectively, of the shares in Camuzzi Gas del Sur S.A. (“CGS”) and Camuzzi Gas Pampeana S.A. (“CGP”), each of which, in its capacity as “Licensee” is a natural gas distribution company.”⁸⁷

On September 11, 2002, Sempra filed a request for ICSID arbitration under the U.S.-Argentine BIT, alleging that Argentina had modified its regulatory framework in a way that “severely [and adversely] affects Sempra’s investment in [these] two natural gas distribution companies” in violation “of the guarantees granted by the Argentine Republic pursuant to law and the licenses,”⁸⁸ and consequently, the BIT.⁸⁹ Specifically, Sempra complained that these regulatory changes violated the U.S.-Argentina BIT because such changes amounted to expropriation, a denial of fair and equitable treatment, violation of the treaty’s umbrella clause, arbitrary and discriminatory treatment, and failure to give full protection and security,⁹⁰ and that this cost the company \$209.3 million.⁹¹

Argentina, however, presented several jurisdictional objections to Sempra’s ability to bring its claims to ICSID.⁹² Pursuant to ICSID procedural rules and the Convention,⁹³ the tribunal suspended determination of the merits to consider Argentina’s objections.⁹⁴

B. ARGENTINA’S OBJECTIONS TO JURISDICTION

1. Nationality and Control

“The Argentine Republic puts forward as an objection to jurisdiction, first, that Sempra does not meet the nationality requirement established in Article 25(2)(b) of the Convention because, in its capacity as minority

86. See Sempra I, *supra* note 5, ¶ 19; see also Camuzzi Int’l, ICSID Case No. ARB/03/2, at 4.

87. Sempra I, *supra* note 5, ¶ 19.

88. *Id.* at ¶¶ 1 & 20.

89. *Id.*

90. See generally Sempra II, *supra* note 5, ¶¶ 270-324.

91. *Id.*, ¶ 198; see also *supra* notes 63-71 and accompanying text.

92. See Sempra Energy Int’l, ICSID Case No. ARB/02/16, at 5, ¶¶ 21-28. Though Argentina pleaded six specific objections against jurisdiction, this note will focus only on three of these objections. *Id.* The other three objections, that “the claim is not mature since the matter is still subject to a renegotiation,” “that Sempra has not established or proven its condition of investor with the pertinent corporate documents,” and Sempra is “prevented from taking action in this [ICSID] forum as a result of the forum selection clause[s] of [Sodigas Sur and Sodigas Pampeana’s] license[s].” will not be discussed as they are either baseless or mooted by the tribunal’s resolution of the other objections. *Id.*

93. See Convention, *supra* note 4, ch. IV, §3, art. 41(2); see also ICSID Rules of Procedure for Arbitration Proceedings, R. 41(3) (2003), <http://www.worldbank.org/icsid/basicdoc/partF-chap05.htm#r41>.

94. See Sempra I, *supra* note 5, ¶ 13; see also Di Rosa, *supra* note 1, at 50-51 (“In an ICSID arbitration, the Tribunal must suspend the merits phase of a case if jurisdictional objections are raised. The Tribunal can only resume the merits phase if it decides that jurisdiction properly exists, or if it determines that it must also hear the merits of the dispute to decide the issue of jurisdiction.”)

shareholder in the companies participating in CGS and CGP, it cannot substitute itself in the latter's rights."⁹⁵

The premise of Argentina's first objection is simple.⁹⁶ Article 25(1) only allows a "national of another contracting state" to invoke ICSID jurisdiction.⁹⁷ In turn, Article 25(2)(b) defines "national of another Contracting State," to mean either a company that is actually a citizen of another nation that has signed the ICSID Convention or a company that, while actually a citizen of the nation defending the ICSID claim, will per agreement⁹⁸ be considered a citizen of another nation for the limited purpose of establishing ICSID jurisdiction. The ICSID tribunal in the present case refers to these options as those of the first and "second sentence[s] of Article 25(2)(b) of the Convention," respectively.⁹⁹

Argentina argued that in a situation such as this, where the investment itself was really an Argentine corporation, ICSID jurisdiction must be invoked under the second sentence; otherwise the first sentence would be merely redundant.¹⁰⁰ Argentina then argued that because, in its analysis, Sempra did not maintain "exclusive control"¹⁰¹ over either CGP or CGS, Sempra, acting in the guise of either CGP or CGS, could not invoke jurisdiction under the second sentence either.¹⁰² Consequently, Argentina argued that without a claimant that qualifies as a "national of another Contracting State,"¹⁰³ the tribunal did not have the required article 25(1) jurisdiction.¹⁰⁴ The tribunal flatly rejected Argentina's objection and declared:¹⁰⁵

[T]he option offered by the second sentence of Article 25(2)(b) of the Convention, as well as by Article VII(8) of the Treaty, provides an additional or different alternative which does not in this case prevent an investor from opting to act under the first sentence of the Convention article if it meets the pertinent requirements.¹⁰⁶

Simply put, the tribunal rejected the exclusivity of the two options, and declared that Sempra was free to claim "as a national of the United States, the other contracting State, insofar as it meets the requirements laid down in the Convention and the Treaty."¹⁰⁷ The U.S.-Argentina BIT, in pertinent part, says that a company "shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the

95. *Sempra I*, *supra* note 5, ¶ 29.

96. *See id.* ¶¶ 29-58.

97. *See Di Rosa*, *supra* note 1, at 50.

98. Convention, *supra* note 4, ch. II, art. 25(2)(b).

99. *Sempra I*, *supra* note 5, ¶ 44.

100. *Id.*

101. *Id.* ¶ 30. Argentina maintained that "exclusive control" meant that a shareholder need not only be dominant, but must be capable of "blocking changes in the company." *Id.*

102. *Id.* ¶¶ 29-30.

103. Convention, *supra* note 4, ch. II, art. 25(2)(b).

104. *Sempra I*, *supra* note 5, ¶ 22.

105. *See id.* ¶ 45.

106. *Id.*

107. *See id.* ¶ 42.

ICSID Convention.”¹⁰⁸ Implicit in the tribunal’s reasoning was that, “as a national of the United States,”¹⁰⁹ Sempra by definition meets the requirements¹¹⁰ of the first sentence of article 25(2)(b).¹¹¹ Consequently, under the tribunal’s reasoning it had jurisdiction to hear Sempra’s claims despite Argentina’s first objection.¹¹²

2. *Indirect Losses*

The second objection to jurisdiction presented by the Argentine Republic is that the Claimant could only validly claim if it could prove that a legal right that it possessed in its capacity as shareholder had been violated, causing it a direct loss. If it were a matter of a mere interest affected as a result of a measure that affects the company in which it is a shareholder, it is then the company that is entitled to claim and not the shareholder.¹¹³

Essentially, Argentina claimed that Sempra’s claim is not a legal dispute and that in any case, even if it were a legal dispute, Sempra’s claimed loss does not arise directly from its investment.¹¹⁴

The tribunal again rejected Argentina’s objection.¹¹⁵ First, the tribunal held that “[t]he actual claim submitted . . . arises from alleged violation of the rights and guarantees that the investor has in the light of the Treaty.

108. U.S.-Argentina BIT, *supra* note 8, art. VII(8). In its entirety, article VII(8) of the BIT reads: “For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.” *Id.*

109. Sempra I, *supra* note 5, ¶ 42; *see also* Sempra Website, *supra* note 87.

110. *See* discussion *supra* Part. II.B (explaining the requirements of Article 25(2)(b) of the ICSID Convention).

111. *See* Sempra I, *supra* note 5, ¶ 45.

112. While the tribunal ruled that Sempra had legitimately invoked its jurisdiction under the first sentence of Article 25(2)(b) of the Convention, it chose to also opine on the hypothetical situation in which Sempra chooses to invoke its jurisdiction under the second sentence, on the basis that it controlled CGS and CGP. Sempra I, *supra* note 5, ¶ 46. Ultimately, the tribunal concluded that had Sempra chose to go the route of the second sentence, it would have had the requisite control of CGS and CGP through its shareholders agreement with Cammuzi. *See id.* ¶ 56. Taking into account the complications arising from the fact that both Sempra and Camuzzi claim different nationalities, the tribunal noted that “if the context of the initial investment or other subsequent acquisitions results in a certain foreign investors operating jointly, it is then presumable that their participation has been viewed as a whole [by the host nation], even though they are of different nationalities and are protected by different treaties. In such a case, it would be perfectly feasible [and satisfy ICSID jurisdictional requirements] for these participations to be combined for purposes of control or to make the whole the beneficiary.” *Id.* ¶ 54. The tribunal, however, stressed that in this situation a claimant would have to demonstrate that “joint participation was actually the case,” and among other factors, in this case highlighted the fact that a department of the Argentine government had approved Sempra and Camuzzi’s arrangement. *Id.* ¶ 55.

113. *Id.* ¶ 59.

114. *See id.*

115. *Id.* ¶¶ 77-79.

[Consequently,] [t]he legal nature of this dispute is beyond any doubt.”¹¹⁶ Argentina attempted the argument¹¹⁷ that in fact its actions had harmed, if at all, only the licenses possessed by CGS and CGP,¹¹⁸ which did not create a required cause of action under Argentine law for shareholders.¹¹⁹ Instead, the tribunal accepted Sempra’s assertion that a legal dispute is created merely because Sempra’s claim “refers to a violation of the obligations contained in the Treaty and the corresponding compensation. . . [because] the existence of such obligations arises directly from the Treaty and is independent of the fact that the right of the licensees may also have been violated.”¹²⁰ Thus, regardless of the merits of Sempra’s claim, it is legal in nature as soon as the U.S.-Argentina BIT’s legal obligations are invoked.¹²¹

Second, the tribunal concluded that as alleged “the [legal] dispute arises directly from the investment that the Claimant has made in the companies incorporated in the Argentine Republic for the purpose of channeling the investment to the licensees.”¹²² Here the tribunal again based its decision on the BIT.¹²³ According to the tribunal, the way in which the BIT defines “investment”¹²⁴ and the BIT’s underlying purposes would be frustrated if it were to find otherwise.¹²⁵ In other words, the BIT broadly defines what constitutes an investment and offers broad protection for these investments.¹²⁶ Because “the investment was made to carry out the specific economic activity involved in the privatization project, in addition to the fact that in doing so contracts leading to the issuance of a license were signed with the State”, there is a sufficiently direct connection between Argentina’s alleged breach of its treaty-based duties and Sempra’s alleged losses.¹²⁷ Consequently, the tribunal found that it had jurisdiction to hear Sempra’s claim despite Argentina’s second

116. Sempra I, *supra* note 5, ¶ 68.

117. This argument and the facts upon which it is based also have significance as to the issue of whether Sempra’s claimed loss arises directly enough from its investment. *See id.*

118. *See id.* ¶ 60.

119. *See id.*

120. *Id.* ¶ 64.

121. *See id.* ¶¶ 70-71.

122. *Id.* ¶ 69. Argentina tried to draw a distinction between general measures, such as regulatory change, and specific violations of specific contracts. *Id.* ¶ 71. While agreeing that Argentina retained certain sovereign prerogatives, the tribunal found that general measures can still amount to bilateral investment treaty violations. *See id.* .

123. *See id.* ¶ 70.

124. An “‘investment’” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation . . . a company or shares of stock or other interests in a company or interests in the assets thereof.” U.S.-Argentina BIT, *supra* note 8, at art. I, § 1(a)(ii).

125. The tribunal argued that Argentina “signed [the treaty] with the precise intention of guaranteeing the investments that would be made in the privatization process” *See Sempra I, supra* note 5, ¶ 69.

126. *See U.S.-Argentina BIT, supra* note 8, at art. I, § 1(a)(ii).

127. *See Sempra I, supra* note 5, ¶ 74.

objection.¹²⁸

3. *Lack of jus standi*

[Argentina's final argument is] that although companies [CGS and CGP] qualify as investments under the terms of the Treaty, such companies must be directly or indirectly owned or else be controlled by a national or a company having the nationality of the other State party to the dispute. In the opinion of the Argentine Republic, Sempra does not own or control any national company having links with the licensees. . . [Therefore] Sempra cannot argue that it has a genuine claim of its own in the light of the Treaty entitling it to bring an action before ICSID since, if it suffered harm this is purely of a contractual nature and should therefore be a matter of claim and action by licensee companies.¹²⁹

This was Argentina's final attempt¹³⁰ to object to jurisdiction based on its assertion that "the Tribunal could not hear the claims of investors who did not control the licensees."¹³¹ According to Argentina, "the right [to bring a claim based on CGS and CGP's licenses] belongs to the licensees under a contract and not to their shareholders [Sempra and Camuzzi] under international law."¹³² Therefore, the tribunal decided that in order to resolve Argentina's third objection and to determine whether in fact Sempra has *jus standi* before the tribunal, the tribunal must determine two things under international law:¹³³ (1) whether the U.S.-Argentina BIT allows an investor who is not a majority shareholder to bring a claim, and (2) "whether the cause of action lies in the Treaty, the contract, or both."¹³⁴

If Sempra lacked the right, as a minority shareholder, to bring a claim to ICSID under the treaty, then the tribunal would lack jurisdiction.¹³⁵ As to this first question, the tribunal found that under the BIT itself, a minority shareholder, "whether they control the company or not,"¹³⁶ as well as the majority shareholder, has the right to make a claim.¹³⁷ The tribunal rested its decision mainly on previous ICSID tribunal decisions,

128. *Id.* ¶ 79. Argentina also raised what amounts to a policy concern, "that if the right of shareholders to claim when only their interests are affected is recognized it could lead to an unlimited chain of claims". *Id.* ¶ 77. The tribunal answered quite logically, quoting the *Enron* decision, that while Argentina is theoretically correct, the possibility is simply a manifestation of the extent of Argentina's own consent to arbitration. *Id.*; see also *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (2004) (decision on jurisdiction).

129. *Sempra I*, *supra* note 5, ¶ 80, 83.

130. See discussion *supra* Parts IV.1 and 2 (explaining Argentina's first two objections to jurisdiction, which in some way both relate back to an objection that Sempra itself lacked control of the violated licensees).

131. *Sempra I*, *supra* note 5, ¶ 90.

132. *Id.*

133. *Id.* ¶ 91.

134. *Id.*

135. See *id.* ¶ 80.

136. *Id.* ¶ 93.

137. *Id.*

which according to the tribunal support their contention uniformly,¹³⁸ but also added that the word “investment” was broadly understood in the BIT and intended to provide enforceable investment protection.¹³⁹ Consequently, Sempra did have to the right to bring an ICSID claim under the BIT.¹⁴⁰

As to the second question, the tribunal found that Sempra’s “claim is . . . founded on both the contract and the Treaty, independently of the fact that purely contractual questions having no effect on the provisions of the Treaty can be subject to legal action available under the domestic law of the Argentine Republic.”¹⁴¹ In finding this, the tribunal noted that while it is true that the “specific nature of each claim can only be assessed by examining the merits of the dispute,”¹⁴² the dispute at the heart of the claim itself is how any violation of purely contractual agreements between CGS and CGP affected Sempra’s rights as an investor “in the light of the provisions of the Treaty and the guarantees on the basis of which it made the protected investment.”¹⁴³ Explicit in the tribunal’s reasoning was that a claim can be both contract- and treaty-based, and still support ICSID jurisdiction where the fact giving rise to the claim is first and foremost just a contractual violation.¹⁴⁴ Consequently, according to the tribunal, Sempra did not lack *jus standi* to bring its claim before ICSID.¹⁴⁵

V. ANALYSIS OF THE DECISION ON JURISDICTION

A. THE JURISDICTIONAL HOLDINGS OF THE TRIBUNAL

At the end of the day, the tribunal’s decision in the present case can be boiled down to three simple ICSID jurisdictional rules.¹⁴⁶ First, the two options presented by the first and second sentences of Article 25(2)(b) of the Convention are not mutually exclusive: a claimant may invoke ICSID’s jurisdiction using either sentence so long as he meets the requirements of either sentence.¹⁴⁷ Second, a legal dispute is present where the alleged harm is done in violation of the BIT, and under the U.S.-Argentina BIT, there was a sufficiently direct connection between Sempra and the harm by virtue of the fact that Sempra’s partial ownership control over the Argentine companies counts as an investment under the BIT’s

138. *See id.* ¶ 94.

139. *Id.* ¶ 93, *see also* discussion *supra*, Part I.C (explaining the definition of an investment under the U.S.-Argentina BIT).

140. *See Sempra I*, *supra* note 5, ¶ 94.

141. *Id.* ¶ 101.

142. *Id.* ¶ 100.

143. *Id.*

144. *See id.* ¶¶ 98-99.

145. *See id.* ¶ 101.

146. These rules, in large part, find their support in the U.S.-Argentina BIT, and may not be generally applicable to claims based on other BITs. *See, e.g., id.* ¶ 93 (utilizing the U.S.-Argentina BIT and the decisions of previous tribunal decisions concerning such treaty in reaching its final jurisdictional decision).

147. *See* discussion *supra* Part IV.B.1 (discussing the tribunal’s rejection of Sempra’s argument that the two sentences of Article 25(2)(b) of the Convention were mutually exclusive).

broad definition.¹⁴⁸ Third, under the U.S.-Argentina BIT, a minority shareholder can bring a claim, and the ICSID may hear the claim even if it is based in contract and in treaty.¹⁴⁹ All of these conclusions are consistent with recent ICSID precedent and the U.S.-Argentina BIT. Argentina should accept them once and for all and stop objecting to jurisdiction on such grounds.

1. The Two Options Presented by the First and Second Sentences of Article 25(2)(b) of the Convention Are Not Mutually Exclusive

At first glance, Argentina's argument seems sensible given the circumstances.¹⁵⁰ In a case such this, where a claimant contends their investment is an Argentine corporation that it controls, the second option might seem redundant.¹⁵¹ The tribunal's decision to allow Sempra its choice of whether to claim its status as a "juridical person who . . . has the nationality of a contracting State different from the State that is a party in the dispute"¹⁵² makes good sense in light of the purpose of the U.S.-Argentina BIT and also in light of ICSID precedent interpreting a similar treaty.¹⁵³

As noted above,¹⁵⁴ the purpose of the BIT was to give "important protections to investors and. . . [to create a] more stable and predictable legal framework for investment."¹⁵⁵ Many investors in the Argentine privatization process, which this treaty was supposed to promote,¹⁵⁶ do not directly have contracts with the Argentine Government.¹⁵⁷ Rather, they own only stock, purchased from the Argentina Government, in corporations set up by the Argentine Government for the specific purpose of conferring the utility concession contracts.¹⁵⁸ If the ICSID were to force such foreign investors to satisfy the second sentence and prove control,¹⁵⁹ not only might this frustrate the treaty's purpose of protecting an investor

148. See discussion *supra* Part IV.B.2 (discussing the tribunal's rejection of Argentina's second objection to jurisdiction).

149. See discussion *supra* Part IV.B.3 (discussing the tribunal's rejection of Argentina's third objection to jurisdiction).

150. See Sempra I, *supra* note 5, ¶ 44.

151. *Id.* .

152. *Id.* ¶ 39 (citing the Convention, *supra* note 4, at art. 25(2)(b)).

153. See *id.* ¶ 93.

154. See discussion *supra* Part I.C (explaining that both the United States' and Argentina's motive for creating a bilateral investment treaty was to better protect investors and to increase Argentine economic development).

155. U.S.-Argentina BIT, Letter of Submittal, 1991 U.S.T. LEXIS 176, at *4 (1993) (explaining that both the United States' and Argentina's motive for creating a bilateral investment treaty was to better protect investors and to increase Argentine economic development).

156. See *id.* (noting that although the BIT encourages investment, it does not, by itself, cause increased U.S. private investment right away).

157. Di Rosa, *supra* note 1, at 55.

158. *Id.*

159. See Sempra I, *supra* note 5, ¶¶ 39-41 (demonstrating that in this case, the tribunal was inclined to find that Sempra likely could also have demonstrated the requisite control to claim under the second sentence of Article 25(2)(b)).

who for some reason cannot show this control adequately, but for practical purposes it would make the first sentence of Article 25(2)(b) a nullity for the investors who participated in Argentina's privatization process. By cleverly structuring the terms of its privatization process, Argentina would have been allowed to rescind the part of its obligation to the United States regarding the very investors the United States meant to protect, and Argentina meant to attract, by using the treaty.¹⁶⁰

In any case, without explicitly relying on the US-Argentina BIT's ostensible values, the tribunal instead chose to rely explicitly upon a prior ICSID tribunal decision, *Lucchetti*, which interpreted a similar treaty to reach its decision. In *Lucchetti*,¹⁶¹ an ICSID tribunal interpreted Article VII(3) of the Peru-Chile BIT, which "envisaged in the pertinent treaty" that a domestic company controlled by a foreign investor could claim as a citizen of the other nation, as providing an option between petitioning as a foreign investor or as a foreign controlled company.¹⁶² The *Sempra* tribunal found no reason to reject the spirit of the *Lucchetti* holding, and even found that such an interpretation made good sense by allowing investors the right to pick based on their own unique "corporate arrangements and control structures."¹⁶³ Given both the treaty purpose considerations discussed above and also the *Lucchetti* decision, the tribunal's interpretation of Article 25(2)(b) stands on firm ground.

2. *Sempra's Legal Dispute and the BIT's Broad Definition of Investment Creates a Sufficiently Direct Connection*

The tribunal rightly found that "[t]he legal nature of this dispute is beyond any doubt."¹⁶⁴ The tribunal supported its assertion by pointing out that *Sempra* had indeed alleged a violation of its own rights under the BIT, and that this created a valid legal dispute.¹⁶⁵ Argentina had attempted to re-characterize *Sempra's* claim as actually being that of CGP and CGS under their contracts with Argentina.¹⁶⁶ The tribunal correctly resisted this attempt and read *Sempra's* allegations for what they actually said. To do otherwise in this instance would have been to ignore the fact that *Sempra* had rights under the BIT, and would frustrate the very purpose of the BIT.¹⁶⁷ In order to give the treaty force, a proper allegation must support jurisdiction.¹⁶⁸

Furthermore, the tribunal also correctly found that this dispute arose with sufficient directness from *Sempra's* investment.¹⁶⁹ This finding was

160. See 771 PLI/Lit 9 at 1192.

161. See *Lucchetti S.A. v. Peru*, ICSID Case No. ARB/03/4 (2005) (award).

162. See *Sempra I*, *supra* note 5, ¶ 44.

163. *Id.*

164. *Id.* ¶ 68.

165. *Id.*

166. See *id.* ¶ 29.

167. See *id.* ¶ 69 (explaining the purpose of the U.S.-Argentina BIT as "guaranteeing the investments that would be made in the privatization process").

168. See *id.* ¶ 73.

169. See *id.* ¶ 79.

partly based on the BIT itself, specifically, the BIT's definition of the word "investment."¹⁷⁰

The definition provided by the BIT is broad, and the tribunal noted again that the BIT "was signed with the precise intention of guaranteeing the investments. . . by means of the specific modality with which they were made."¹⁷¹ This interpretation is consistent with previous interpretations of the BIT's definition of investment, such as in the *Azurix* decision where the tribunal said, "[t]he objective of the definition of investment in the BIT is precisely to include this type of structure established for the exclusive purpose of the investment in order to protect the real party in interest."¹⁷² Consequently, although the tribunal agreed with Argentina that "setting the value of the currency is a sovereign right,"¹⁷³ the tribunal found the requisite directness between so-called "measures of a general nature"¹⁷⁴ and Argentina's alleged treaty violation. CGS and CGP were the modalities of Sempra's investment, and therefore when Argentina enacts even general measures, which harm CGS and CGP, the treaty may be directly violated—regardless of whether or not the harm occurred as a result of an otherwise valid exercise of Argentina's sovereign power.¹⁷⁵

Finally, the tribunal also pointed out that directness has been found in a similar fashion under the North American Free Trade Agreement (NAFTA):¹⁷⁶

The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of the NAFTA leads with sufficient directness to loss or damage in respect of a given instrument. Whether GAMI can establish such prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.¹⁷⁷

Because the BIT has the purpose of protecting Sempra's exact type of investment,¹⁷⁸ the tribunal was sound in relying on the *GAMI* tribunal's determination that direct does not mean explicit interference "with share ownership."¹⁷⁹

170. See U.S.-Argentina BIT, *supra* note 8, at art. I, § 1(a)(ii).

171. Sempra I. *supra* note 5, ¶ 69.

172. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 ¶ 64 (2003) (*decision on jurisdiction*).

173. See Sempra, *supra* note 5, ¶ 71.

174. *Id.* ¶ 62.

175. *Id.* ¶¶ 71-79.

176. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), available at <http://www.dfait-maeci.gc.ca/nafta-alena/agree-en.asp>.

177. Sempra I. *supra* note 5, ¶ 75 (quoting *GAMI Invs., Inc. v. United Mexican States*, Proceedings pursuant to NAFTA Chapter 11 & UNCITRAL Arbitration Rules ¶ 33 (2004) (final award), available at <http://www.state.gov/documents/organization/38789.pdf>).

178. See *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 ¶ 64 (2003) (*decision on jurisdiction*).

179. Sempra I. *supra* note 5, ¶ 75.

3. *Minority Shareholders May Bring a Claim and ICSID May Hear the Claim as Long as It Is Treaty Based*

Past ICSID tribunals have reached the same conclusion as the *Sempra* tribunal that investors may bring treaty-based claims regardless of whether or not a parallel cause of action in contract is available elsewhere.¹⁸⁰ In the present, case, Argentina attempted to rely upon the distinction made by the *Vivendi*¹⁸¹ tribunal between claims based on contractual breaches and those based on treaty violations, suggesting that contract law should govern contract breaches.¹⁸² While such is the case where the claim is only based on contract law,¹⁸³ the *Sempra* tribunal correctly rejected such exclusive national jurisdiction where the claim was also based on a treaty violation.¹⁸⁴ In practice, the rule has been that “as contractual claims. . . even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration.”¹⁸⁵ Several other cases have echoed this conclusion.¹⁸⁶ The *Sempra* tribunal only strengthened this conclusion on its facts by reference to the U.S.-Argentina BIT,¹⁸⁷ and its “umbrella”¹⁸⁸ clause,¹⁸⁹ which creates an obligation of the host nation to observe its contractual arrangements under the treaty.¹⁹⁰ Finally, as noted above, the BIT’s broad definition of investment supplies a minority investor with the right to bring a claim¹⁹¹ that Argentina has expropriated its investment.

180. See Di Rosa, *supra* note 1, at 54. See also, e.g., *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3 ¶ 50 (2004) (decision on jurisdiction) (finding that if a claim is based in both contract and treaty, the fact that it may be submitted to national courts does not prevent its submission to an ICSID tribunal).

181. See *Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 ¶ 21 (2002) (decision of the ad hoc committee on the request for supplementation and rectification of its decision concerning annulment of the award).

182. See *id.*

183. See, e.g., *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 ¶ 162 (2003) (decision of the tribunal on objections to jurisdiction) (finding “that the Tribunal has no jurisdiction with respect to claims submitted . . . and based on alleged breaches of” contract).

184. See *Sempra I*, *supra* note 5, ¶ 101.

185. *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 ¶ 50 (2004) (decision on jurisdiction) (citing *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8 (2003) (decision of the tribunal on objections to jurisdiction) [hereinafter *CMS Gas I*]).

186. See, e.g., *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 ¶ 67-74 (2003) (decision on jurisdiction).

187. See *Sempra I*, *supra* note 5, ¶ 101.

188. *Id.*

189. See U.S.-Argentina BIT, *supra* note 8, at art. II(2)(C).

190. See *Sempra I*, *supra* note 5, ¶ 101.

191. See discussion *supra* Part. IV.B. (discussing the right of a minority investor to bring a claim before ICSID).

VI. THE MERITS OF SEMPRA V. ARGENTINA

A. FACTUAL FINDINGS OF THE TRIBUNAL

As an initial matter, the tribunal first made several factual findings:¹⁹² (1) Sempra was guaranteed a right under its license and the regulatory framework to tariff adjustments based on the U.S. Producer Price Index (PPI);¹⁹³ (2) Sempra had a right to calculate its tariffs in U.S. dollars initially before re-expressing them as Argentine pesos on customers' bills;¹⁹⁴ (3) the measures adopted by Argentina violated the guarantees to stability of investment found in Clause 9.8 of Sempra's license by modifying the terms of the license unilaterally;¹⁹⁵ (4) Sempra was due, but never paid, reimbursement of subsidies but that reimbursement was due in Argentine pesos;¹⁹⁶ and (5) Argentina's interference with Sempra's bill collection and internal employment matters was reasonable, limited, and did not entail demonstrable damage beyond or in addition to the effects the general economic crisis in the nation had on Sempra's investment.¹⁹⁷ In light of its findings, the tribunal considered the merits of Sempra's treaty based claims.¹⁹⁸

B. ARGENTINA DID NOT EXPROPRIATE SEMPRA'S INVESTMENT

Expropriation was the principle claim made by Sempra in this arbitration; the tribunal, however, found that Argentina neither directly nor indirectly expropriated Sempra's investment.¹⁹⁹ Article IV(1) of the U.S.-Argentina BIT provides that "[i]nvestments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization. . . except for a public purpose. . . upon payment of prompt, adequate and effective compensation."²⁰⁰ This language clearly establishes a treaty-based right against expropriation.²⁰¹

192. These determinations of fact involved a fairly thorough consideration of recent Argentine history to determine how the license and other guarantees should be interpreted both legally and in terms of legitimate expectations, but these details are beyond the scope of this note. Furthermore, Argentina's argument that its measures were excused by the defense of emergency under Argentine law was rejected by the tribunal, which stated its conclusion that liability existed under Argentine law, international law, and specifically under the U.S.-Argentina BIT. To the extent any inconsistency does exist, the BIT is supreme under both Argentine law and international law. *Sempra II*, *supra* note 5, ¶ 238.

193. *Id.* ¶¶ 110-15.

194. *Id.* ¶ 141.

195. *Id.* ¶¶ 170-74.

196. *Id.* ¶¶ 182-84.

197. *Id.* ¶¶ 93-94.

198. See discussion *supra* Part IV.A (stating Sempra's allegations were expropriation, a denial of fair and equitable treatment, violation of the treaty's umbrella clause, arbitrary and discriminatory treatment, and failure to give full protection and security). See also, Di Rosa, *supra* note 1, at 54.

199. *Sempra II*, *supra* note 5, ¶¶ 280-81, 283.

200. U.S.-Argentina BIT, *supra* note 8, art. IV(1).

201. See Di Rosa, *supra* note 1, at 64 (explaining that "Most BITs allow these [expropriation] claims under clauses referring to measures 'equivalent to' or 'tantamount to' expropriation").

Further, under the Argentine Constitution, “[f]oreigners enjoy. . . all the civil rights of citizens.”²⁰² One of these civil rights granted to citizens is the right to protection of private property against confiscation by the government except when “[e]xpropriation for reasons of public interest [is] authorized by law and previously compensated.”²⁰³ Therefore, the Argentine Constitution establishes protection against expropriation for a foreign national doing business in Argentina.²⁰⁴

1. *Direct Expropriation Did Not Occur*

As an initial matter, the tribunal rightfully pointed out that no direct expropriation occurred because no “essential component of [Sempra’s] property right[s] [were] transferred to a different beneficiary, in particular the State.”²⁰⁵ It is well settled under international law that direct expropriation is only found where there has been “open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State.”²⁰⁶ Therefore, “[i]n spite of all the difficulties which the Licensees and the investors have experienced . . . they are still the rightful owners of the companies and their businesses,”²⁰⁷ so no property was directly expropriated by Argentina.

2. *Indirect Expropriation Did Not Occur*

The tribunal’s determination that no indirect expropriation occurred is also consistent with established international law. The tribunal applied substantial deprivation of rights test.²⁰⁸ Under this test, “[s]ubstantial deprivation results. . . from depriving the investor of control over the investment, managing the day-to-day operations of the company.” et cetera.²⁰⁹ While the tribunal found that the measures undertaken by Argentina had an adverse effect on the conduct of Sempra’s business,²¹⁰ Sempra still controlled its own business despite the changed circumstances of its operation.

202. CONST. ARG. ch. 1, § 20.

203. *Id.* § 17.

204. See Christina M. Wilson, *Argentina’s Reparation Bonds: An Analysis of Continuing Obligations*, 28 *FORDHAM INT’L L.J.* 786, 804 (stating that the Argentine constitution protects property rights to the extent it requires expropriation only for a public purpose with prior compensation).

205. *Sempra II*, *supra* note 5, ¶ 280.

206. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 ¶ 103 (2000) (award).

207. *Sempra II*, *supra* note 5, ¶ 281.

208. *Id.* ¶ 284. See also *Metalclad*, ICSID Case No. ARB(AF)/97/1 ¶ 13 (utilizing the substantial deprivation test to judge an indirect expropriation claim); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8 ¶ 24 (2005) (award) [hereinafter *CMS Gas II*].

209. *Sempra II*, *supra* note 5, ¶ 284.

210. Indeed, the tribunal found that these adverse effects were bad enough to be compensable under other treaty provisions. See, e.g., *id.* ¶ 398 (requiring compensation to Sempra based on Argentina’s violations of Article I12(a) and (c) of the U.S.–Argentina BIT).

The application of the substantial deprivation test finds support in another recent decision regarding the CMS Gas Transmission Company. In *CMS Gas*, CMS made essentially the same claims as Sempra did in the present case—that Argentina’s regulatory changes violated its agreements with CMS by altering the tariff structure and subsequently pesifying the existing tariff rates in manner that effectively destroyed the value of CMS’s investment and thus indirectly expropriated the investment.²¹¹ The tribunal found that Argentina had indeed failed to honor several legitimate expectations and rights of CMS, including those relating to tariff rates, and that these violations indeed had an important effect on the value of CMS’s investment.²¹² Even so, the tribunal found that in consideration of all the situational facts, these violations did not amount to indirect expropriation. In particular, the *CMS* tribunal relied on facts similar to the *Sempra* tribunal in making its determination.

As in the present case, the measures complained of in *CMS* were arguably temporary in nature and in response to an actual economic crisis.²¹³ The *CMS* tribunal found as a fact that more than five years had passed since the adoption of the first measures of which CMS complained²¹⁴ and the tribunal appeared to be wary of interpreting any tariff agreement as “an insurance policy or a super-right under the License that would ensure profits under any circumstances, irrespective of prevailing economic conditions.”²¹⁵ Finally, the *CMS* tribunal also focused on the fact that not only did CMS retain formal ownership of its investment, CMS also retained full and unobstructed control of such investment.²¹⁶ Consequently, the *CMS* tribunal decided that “the Government of Argentina has not breached the standard of protection laid down in Article IV(1) of the Treaty.”²¹⁷

C. ARGENTINA VIOLATED SEMPRA’S RIGHT TO FAIR AND EQUITABLE TREATMENT

Sempra also argued that the measures undertaken by Argentina breached the standard of fair and equitable treatment under Article II(2)(a) of the BIT, which reads, “Investment shall at all times be accorded fair and equitable treatment. . . and shall in no case be accorded treatment less than that required by international law.”²¹⁸ In an important victory for investors, the tribunal interpreted this clause broadly to protect “basic expectations that were taken into account by foreign inves-

211. See *CMS Gas II*, *supra* note 211.

212. See *id.* ¶¶ 127-66. In fact, the tribunal stated that “the combined effect of tariff freezes and devaluation, even if the latter resulted in a decrease of operating costs, led to the evaporation of operating income, [and] prompted constant negative results in the balance sheet.” *Id.* ¶ 182.

213. See *id.* ¶ 105. See also *Sempra II*, *supra* note 5, ¶ 193.

214. See *CMS Gas II*, *supra* note 211, ¶ 107.

215. *Id.* ¶ 232.

216. See *id.* ¶ 263.

217. *Id.* ¶ 264.

218. *Id.* ¶ 266.

tors to make the investment.”²¹⁹ The tribunal noted that the changes in the tariff regime themselves were enough to transform “[a] long term business outlook. . . into a day-to-day discussion about what is next to come,” and thus “substantially changed the legal and business framework under which the investment was decided and implemented.”²²⁰

1. *Meaning of Fair and Equitable*

In so deciding, the tribunal recognized that BITs such as the U.S.-Argentina BIT can make international law more investor friendly. As the tribunal hinted,²²¹ prior to about the year 2000 there was little opinion as to precisely what sort of protection a BIT’s “fair and equitable” clause provided.²²² More recently, however, multiple tribunals interpreting various BITs have attempted clarification.²²³ The *Sempra* tribunal essentially adopted the reasoning of the *Tecmed* tribunal, which held that a similar clause in the Mexico-Spain BIT “requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment” or any understandings or agreements “that were relied upon by the investor to assume its commitments as well as plan and launch its commercial and business activities.”²²⁴

Given the stated objectives of the United States and Argentina in signing their BIT, to “creat[e] a more stable and predictable legal framework for investment” so as to encourage investment,²²⁵ and the objective of Argentina’s privatization plan, to attract foreign investment by changing their law and economy,²²⁶ an interpretation that protects the legitimate expectations of investors is the only interpretation that passes the smell test. This interpretation is not only in line with progressive thinking on the topic,²²⁷ but is the right policy choice given the interconnectedness of today’s world economy.

219. *Id.* ¶ 268.

220. *Sempra II*, *supra* note 5, ¶ 303.

221. *Id.* ¶ 296.

222. Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT’L LAW. 87, 88 (2005).

223. *See, e.g.*, CMS Gas II, *supra* note 211; Técnicas Medioambientales, *Tecmed v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 (2003) (award); Int’l Thunderbird Gaming Corp. v. United Mexican States, NAFTA Arbitration (Award of January 26, 2006).

224. *Tecmed*, ICSID Case No. ARB(AF)/00/2 ¶ 154. Article 4(1) of the Mexico-Spain BIT is essentially the same as Article II(2)(a) of the U.S.-Argentina BIT; it reads: “Each contracting Party will guarantee in its territory fair and equitable treatment, according to international Law, for the investments made by investors of the other Contracting Party.”

225. U.S.-Argentina BIT, Letter of Submittal, 1991 U.S.T. LEXIS 176, at *4 (1993).

226. *See Di Rosa*, *supra* note 1, at 45-46.

227. *See Sempra II*, *supra* note 5, ¶ 302.

D. ARGENTINA VIOLATED THE UMBRELLA CLAUSE OF THE BIT

The tribunal held that Argentina's violations of its obligation "not to freeze the tariffs or subject them to price controls, to compensate for any resulting differences if such actions were in fact taken, and not to amend the License without the licensee's consent"²²⁸ resulted in a violation of the Article II(2)(c) of the BIT, the Umbrella Clause, which reads: "[e]ach Party shall observe any obligation it may have entered into with regard to investments."²²⁹ This holding was particularly important for investors in that it assumed that "major legal and regulatory changes introduced by the State" constitute treaty violations if such changes affect a right protected under the treaty.²³⁰ Argentina attempted to characterize the measures it took as perhaps mere contractual violations not protected by the treaty.²³¹ The tribunal admitted that while the line between a treaty breach and a contractual breach may not always be crystal clear, such legal and regulatory changes are not ordinary contractual breaches because ordinary parties cannot commit them—only a government can.²³² This holding protects investors by holding governments to their promises when they agree to do what only a government can do in order to entice foreign investors to their country.

E. ARGENTINA DID NOT TREAT SEMPRA ARBITRARILY AND DISCRIMINATORILY

The tribunal held that Argentina did not treat Sempra arbitrarily and discriminatorily in violation of Article II(2)(b) of the U.S.-Argentina BIT.²³³ Sempra had complained that the measures Argentina took were arbitrary because they destroyed Sempra's "rights and reasonable expectations, lacked proportionality, and were in violation of the law."²³⁴ In rejecting this claim, the tribunal stated that a prerequisite for a finding of arbitrariness is that the actions complained of are shown to constitute "impropriety."²³⁵ The tribunal found that while Argentina's actions did violate Sempra's rights, Sempra did not show that Argentina's government only reacted to its economic crisis in a manner it genuinely believed best.²³⁶ This appears to have been merely a problem with Sempra's proof

228. *Id.* ¶ 313.

229. U.S.-Argentina BIT, *supra* note 8, at art. II(2)(c).

230. Sempra II, *supra* note 5, ¶ 311.

231. *Id.* ¶ 309.

232. *Id.* ¶ 311.

233. Article II(2)(b) provides: "Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party." U.S.-Argentina BIT, *supra* note 8, at art. II(2)(b).

234. Sempra II, *supra* note 5, ¶ 315.

235. *Id.* ¶ 318.

236. *Id.*

and does not attack the heart of the protections involved.

Sempra also argued that Argentina's measures were discriminatory in that they imposed burdens disproportionately on the predominately foreign-owned gas sector.²³⁷ The tribunal found, however, that Sempra simply failed to show any one sector had been irrationally or capriciously singled out for harsher treatment.²³⁸ While Sempra failed to prove this claim, protection is available for future investors under such BIT provisions if a complaining investor can show that a similar primarily foreign-owned industry was singled out capriciously.²³⁹

F. ARGENTINA DID NOT FAIL TO PROVIDE FULL PROTECTION AND SECURITY TO SEMPRA'S INVESTMENT

Finally, the tribunal rejected Sempra's claim that Argentina failed to provide its investment with full protection and security. Article II(2)(a) of the U.S.-Argentina BIT reads in pertinent part that "[i]nvestments shall at all times. . . enjoy full protection and security."²⁴⁰ Quite summarily, the tribunal rejected this claim because Sempra did not show that Argentina failed to physically protect its employees or facilities.²⁴¹ Importantly, however, the tribunal suggested that in the future it may be possible to make this claim in regards to legal protection of an investment.²⁴² The tribunal pointed out that this possibility would be hard to distinguish from a breach of fair and equitable treatment or a case of expropriation, but such a case might be possible.²⁴³ For instance, if a government were to shut down the local court system so as to make it impossible for a foreign investor to properly function within its expected and unchanged regulatory environment, such a claim may start to look more viable. Again, while of little help to Sempra itself, the discussion by the tribunal here suggests an evolving, pro-investor interpretation of another common BIT clause.

G. ARGENTINA'S DEFENSE OF EMERGENCY/NECESSITY DOES NOT APPLY

The tribunal rejected Argentina's claims that it was exempt from liability in light of a state of national emergency or necessity under its own

237. *Id.* ¶ 315.

238. ¶ 317.

239. *But see* LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1 ¶¶ 147-63 (2006) (decision on liability) (setting a strict separation between BIT "fair and equitable" provisions and provisions barring discriminatory treatment to the effect that inequitable treatment does not per se violate an anti-discrimination protection). Under *CMS*, which also interpreted Article II(2)(b) of the U.S.-Argentina BIT, this provision is arguably satisfied so long as a government allows for some process in making its decision to single out a foreign-held industry for harsher treatment.

240. U.S.-Argentina BIT, *supra* note 8, at art. II(2)(a).

241. Sempra II, *supra* note 5, ¶ 324.

242. *Id.* ¶ 323.

243. *Id.*

domestic law, general international law, and the Treaty. The precise reasoning of the first two arguments is beyond the scope of this note, but essentially the tribunal rejected them because Argentina did not show that its government was on the verge of collapse, nor that the measures taken were in fact the only measures that were available to deal with its economic crisis.²⁴⁴ These two findings were also important to the determination of Argentina's treaty-based defenses.

Finally, the tribunal also rejected Argentina's treaty based defenses. The tribunal rejected Argentina's plea of necessity under Article IV(3)²⁴⁵ of the treaty, declaring that the Article cannot "be read as a general escape clause from treaty obligations."²⁴⁶ Similar to its analysis of emergency under international law discussed above, the tribunal found that this Article deals with crises of a greater magnitude than in the present case and thus could not serve to abrogate other treaty rights in this context. Further, the tribunal also rejected Argentina's plea of necessity under Article XI²⁴⁷ of the treaty for the same reason.²⁴⁸ Important to this determination was a finding that the United States and Argentina did not intend for Article XI to be a self-judging treaty provision. Instead, they intended Article XI to be consistent with the treaty's stated objectives.²⁴⁹ As a whole, this rejection of an emergency/necessity defense for Argentina confirms that even amidst an admitted economic crisis the treaty's protections do not stop protecting foreign investors.

VII. CONCLUSION

The *Sempra* jurisdictional decision and subsequent cases to the same effect²⁵⁰ were an important reaffirmation of the right of foreign investors

244. *Id.* ¶¶ 348-50.

245. Article IV(3) read: "Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses." U.S.-Argentina BIT, *supra* note 8, at art. IV(3).

246. *Sempra* II, *supra* note 5, ¶ 363.

247. Article XI reads: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests." U.S.-Argentina BIT, *supra* note 8, at art. XI.

248. The tribunal held that Article XI is not self-judging and that requirements for exemption from liability under it are the same as under customary international law. As a consequence, because the tribunal already determined that Argentina did not qualify for the emergency defense under customary international law, it found Article XI was not satisfied either. *See, e.g., Sempra* II, *supra* note 5, ¶¶ 374, 383.

249. *See* discussion *supra* Part I.C (explaining that the intent of the BIT was to create a more stable and predictable legal framework for investment for investors of both nations in the other nation).

250. *See, e.g., El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15 (2006) (decision on jurisdiction).

to ICSID arbitration. By 2004, Argentina had faced adverse jurisdictional decisions in six similar cases,²⁵¹ and faced many more pending claims,²⁵² including Sempra Energy's claim. Had the tribunals in each of those previous decisions accepted Argentina's jurisdictional arguments, many investors would have had little recourse but to have the companies they control bring contract claims in local Argentine courts. This is exactly what the Calvo Doctrine suggests should happen, but it is at odds with what the U.S.-Argentina BIT was meant to protect against by means of the ICSID tribunal arbitration system.

While the validity of an expropriation claim by Sempra is uncertain, both Sempra and other potential claimants can still potentially utilize other treaty protections such as a guarantee of fair and equitable treatment.²⁵³ By allowing Sempra a chance to be heard and interpreting jurisdictional rules in favor of arbitration, the ICSID has given investors all over the world more confidence that they too will be protected from unfair treatment by host nations. In fact, in the *CMS* decision the ICSID tribunal found that Argentina violated CMS's rights to fair and equitable treatment and awarded CMS approximately \$150 million.²⁵⁴ While the Calvo system may not have breathed its last breath yet, jurisdictional decisions such as *Sempra* ensure that international investors will have recourse to the ICSID should a host nation treat them unfairly, and the system is one more positive step in the process of economic globalization.

251. See Di Rosa, *supra* note 1, at 51.

252. See *id.* at note 9 and accompanying text (showing that as of the time Di Rosa wrote, Argentina faced thirty-five outstanding ICSID claims arising from Argentina's 2002 Emergency Law).

253. See discussion *supra* Part section I.C (discussing the protections offered by the U.S.-Argentina BIT).

254. See *The \$20bn question: CMS Wins Landmark Case Against Argentine Government*, <http://www.freshfields.com/news/dynamic/Pressrelease.asp?newsitem=681> (May 25, 2005).

