Reaffirming the Rights of Foreign Investors to the Protection of ICSID Arbitration: Sempra Energy International v. the Argentine Republic

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On January 6, 2002, Argentina passed the “Public Emergency Law of 2002,” in response to its ongoing economic crisis. Because of this law and its effects on foreign investors, Argentina has faced a multiplicity of claims against it in the International Centre for Settlement of Investment Disputes (“ICSID”). One such claim was filed by Sempra Energy International (“Sempra”). Consistently, Argentina has objected to ICSID jurisdiction to hear claims against it. The ICSID has consistently rejected these objections and found it has jurisdiction to hear the claims. 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. This note explores Argentina’s main objections to jurisdiction in Sempra’s case against it, explain 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), and suggest that these jurisdictional holdings are an important reaffirmation of the rights of foreign investors to the protection of ICSID arbitration under the U.S.-Argentina BIT. Furthermore, this note

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3 See discussion infra Part III.C.
6 See Paolo Di Rosa at 51.
7 See Sempra at 44.
will also explain 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 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 bilateral investment treaty (“BIT”) was signed by Germany and Pakistan on November 25, 1959. Since that initial BIT was signed nearly 50 years ago, BITs proliferated rapidly across the globe, including over 800 since 1987 alone. These treaties typically offer investors from each signatory nation an extensive set of substantive protections for their investments within the boarders of the other signatory nation, with the hope of increasing bilateral foreign direct investment between the two nations. 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. Currently, international

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10 Id.
12 See Franck at 54; see also Di Rosa at 42 (adding that as of 2005 over 140 were party to the ICSID convention).
investors of a variety of nations are protected by the approximately 2000 BITs in force in the world today.\textsuperscript{13}

\textbf{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,\textsuperscript{14} which is named after Argentine statesman Carlos Calvo.\textsuperscript{15} 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.\textsuperscript{16} Needless to say, this meant that access to neutral international arbitration was generally unavailable to foreign investors.\textsuperscript{17}

The current state of affairs in Latin American, on paper at least, paints a much friendlier picture for foreign investors.\textsuperscript{18} Beginning in the 1990s, many Latin American nations started to increase the number and scope of their BIT obligations dramatically.\textsuperscript{19} This increase was consistent with the greater world-wide proliferation of BITs\textsuperscript{20} also occurring at this time\textsuperscript{21} due to the increasing worldwide trend toward market

\textsuperscript{14} 722 Prac. L. Inst. 1431, 1433
\textsuperscript{15} 59 JUL Disp. Resol. J. 78, 79.
\textsuperscript{16} See \textit{id.} at 80.
\textsuperscript{17} See \textit{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 \textit{id.} at 80.
\textsuperscript{18} \textit{But see} Franck at 56 (stating that despite the rise of international arbitration foreign investors face increasing transaction costs, inconsistent arbitration results, and a generally “unpredictable situation.”).
\textsuperscript{20} See \textit{supra} notes 7-8 and accompanying text (showing that BITs are a modern development in international relations which have multiplied in number especially during the past two decades).
\textsuperscript{21} 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/year, 8.1/year, and 17.7/year respectively. See http://worldbank.org/icsid/treaties/i-1.htm visited on 9/5/2006.
economies. As of August 2002, Latin American nations had signed 219 BITs, with Argentina itself accounting for 38 of these. Many of these BITs provide foreign investors with the right to arbitrate their grievances with one of several international bodies. The United States-Argentina BIT is one such treaty.

c. The United States-Argentina BIT

On November 14, 1991, the United States and Argentina entered into a bilateral investment treaty, which came into force on October 20, 1994. The United States signed this treaty with the intent of eliminating the harm caused to American investors by the Calvo Doctrine, and to provide “important protections to investors and . . . [to create a] more stable and predictable legal framework for investment.” 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. 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:

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22 See Vinuesa at 504.
25 Franck, supra note 10 at 3.
27 722 Prac. L. Inst. 1431, 1433
28 Id. at 1435. See also U.S.-Argentina BIT 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”)
29 See 722 Prac. L. Inst. at 1438.
ii) a company or shares of stock or other interests in a company or interests in the assets thereof;\(^{30}\)

For these investments, the treaty offers several substantive protections. First, Article IV(1) of the US-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.\(^{31}\) To give these investment protections teeth in case of a dispute,\(^{32}\) the U.S.-Argentina BIT allows investors from either nation three dispute resolution options,\(^{33}\) the most important of which is recourse to binding arbitration under a tribunal established by the ICSID.\(^{34}\)

II. ICSID

a. History

\(^{30}\) U.S.-Argentina BIT, art. I, § 1(a)(ii).


\(^{32}\) The U.S.-Argentine 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.” Art. VII, § 1(a)-(c).

\(^{33}\) 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. Art. VII, §§ 2(b)-3(a)(ii).

\(^{34}\) Id. at 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://worldbank.org/icsid/constate/c-states-en.htm (last visited on 10/10/06) (showing that the United States entered into the ICSID convention on October 14, 1966 and Argentina on November 18, 1994).
The International Centre for Settlement of Investment Disputes ("ICSID") is an "autonomous intergovernmental" organization, which facilitates the creation and running of arbitral tribunals to settle investments disputes between certain sovereign nations and international investors.\textsuperscript{35} 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.\textsuperscript{36} 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 1999\textsuperscript{37} – 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.\textsuperscript{38}

\textbf{b. ICSID Jurisdictional Bases}

Ratification of the ICSID convention itself imposes no obligation on contracting states to submit to ICSID arbitration.\textsuperscript{39} 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,\textsuperscript{40} such as the United States and Argentina did in their BIT.\textsuperscript{41} Most ICSID arbitration cases are initiated based

\textsuperscript{35} http://siteresources.worldbank.org/INTLAWJUSTICE/214576-1139604306966/20817156/ParisICSID.pdf
\textsuperscript{36} ICSID ANNUAL REPORT PAGE 5. "As of April 10, 2006, 143 countries have ratified the Convention to become Contracting States [sic]." \textit{Id.}
\textsuperscript{37} http://siteresources.worldbank.org/INTLAWJUSTICE/214576-1139604306966/20817156/ParisICSID.pdf
\textsuperscript{38} \textit{See} Di Rosa at 42.
\textsuperscript{39} http://siteresources.worldbank.org/INTLAWJUSTICE/214576-1139604306966/20817156/ParisICSID.pdf
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{See} U.S.-Argentin BIT, \textit{supra}, at note 29 and accompanying text.
upon such BIT jurisdiction clauses.\textsuperscript{42} Simply because a state has consented to ICSID jurisdiction, however, does not mean that it may be sued in an ISCID tribunal, for “ICSID is a forum of limited jurisdiction.”\textsuperscript{43} ICSID jurisdiction is limited to disputes falling under Article 25(1) of the ICSID convention, which reads,

\begin{quote}
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 party may withdraw its consent unilaterally.\textsuperscript{44}
\end{quote}

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.\textsuperscript{45}

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.”\textsuperscript{46} The second,

\begin{footnotesize}
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\item \textsuperscript{43} \textit{Id.} at 504. “Consent of the investor is assumed when the option is expressed on the request for ICSID arbitration.” \textit{Id.}
\item \textsuperscript{44} Convention, Article 25(1).
\item \textsuperscript{46} See U.S.-Argentine BIT, Art. 25(2)(a).
\end{itemize}
\end{footnotesize}
[is] any juridical person which had the nationality of a Contracting State other than the State party to the dispute . . . 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.\(^{47}\)

On its face, this section says that not only can corporations of a nationality different 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.\(^{48}\) It is this section that was at the heart of the jurisdictional dispute in *Sempra Energy Int. v. Argentine Republic*. 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.\(^{49}\) Historically, this has meant that many of

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\(^{47}\) *Convention, Art. 25(2)(b).*

\(^{48}\) *See* *Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16 P. 12-13* (Decision on Objections to Jurisdiction of May 11, 2005).

\(^{49}\) *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. Rosen, 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* (Stating that “[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.”).
Argentina’s leaders have expressed an indifference to the rule of law.50 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.51 In 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.52

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.53 Menem’s government undertook two main reforms to attack these and other problems: the “Convertibility Law” and the privatization54 of many of its state owned enterprises.55 The Convertibility Law set a fixed exchange rate of one Argentine peso to one United States dollar, and was primarily responsible for curing Argentina’s inflation ills.56 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.57

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

50 See Jacobs at 397.
51 See Jacobs at 397-98.
52 See id. 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 10/11/06).
54 See Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, p. 6-7 (Decision on Objections to Jurisdiction of May 11, 2005) (explaining that Sempra Energy International participated in this privatization scheme and that the failure of this scheme lead to its initiation of ICSID arbitration against Argentina).
55 See id.
56 See Jacobs at 398-99.
57 See Di Rosa at 44-45.
banking firms, Argentina began to privatize many sectors, including its energy sector. 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. 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. 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.

b. Emergency Measures

Despite the initial success of Argentina’s reform program, the 1990s eventually brought severe recession to Argentina. Argentina was unable to control its public spending at this time, and fell deeply into debt. Furthermore, Argentine industry became less competitive as the United States dollar, to which its currency was pegged, rose in value. One of the final straws in Argentina’s back broke when the effects of the 1998-99 Asian financial crisis spread to Latin America. Shortly afterwards, the International Monetary Fund (“IMF”) refused to allow Argentina to borrow any additional money to finance its massive budget deficits. As a consequence of this IMF decision, Argentina’s President announced that Argentina would enter “into the largest

58 See id.
60 See Di Rosa at 45-46.
61 See id.
63 See supra note 33 and accompanying text (arguing that initially Argentina’s reforms were successful).
64 See Jacobs at 399.
65 See id.
66 See id.
67 See Di Rosa at 46.
68 Jacobs at 400.
sovereign default in history.” Cumulatively, these events and others prompted the Argentine government to pass the Public Emergency Law of 2002 (Emergency Law). The Emergency Law affected foreign investments in the energy industry greatly. Foremost among the damaging legal changes for foreign investors under the Emergency law was the Emergency Law’s “pessification” of utility rates. 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. As long 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. 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. The value of the floating peso would fall as low as a 4-1 ratio against the U.S. dollar. By comparison, today the exchange rate has recovered somewhat, but still

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69 Jacobs at 400.
70 See Di Rosa at 47. See also Argentine Federal Law No. 25.561, Jan. 6, 2002, [LXII-A] A.D.L.A. 44. (need to fix cite 2 here
71 See Di Rosa at 47.
72 See id.
73 See id. at 46.
74 Jacobs, supra, at note 37 and accompanying text.
75 See Di Rosa at 47.
76 See id.
77 See id.
stands at approximately 3.1 pesos to the dollar.\textsuperscript{78} This measure alone cut utility company incomes by 2/3.\textsuperscript{79} The Emergency Law, however, went even a step further than this. It froze utility rates at their then-current level, “ordered these companies 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.”\textsuperscript{80} 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.\textsuperscript{81}

c. Recent Wave of ICSID Claims Against Argentina

As of this writing 33 of the 105 pending claims, or about 31.4%, at ICSID were against Argentina.\textsuperscript{82} While as recently as 2005 the percentage of pending ICSID claims against Argentina was even higher,\textsuperscript{83} claims relating to Argentina still account for a vastly disproportionate amount of pending ICSID claims.\textsuperscript{84} Currently the states facing the second highest amounts of ICSID claims, Ecuador and Mexico, face only 6 each.\textsuperscript{85} 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.\textsuperscript{86}

IV. Sempra v. Argentine Republic Discussed

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\item \textsuperscript{78} http://finance.yahoo.com/currency/convert?amt=1&from=USD&to=ARS&submit=Convert (last visited 10/11/06 at 11:21 pm).
\item \textsuperscript{79} See Di Rosa at 48.
\item \textsuperscript{80} Id.
\item \textsuperscript{81} Id. at 49.
\item \textsuperscript{82} http://worldbank.org/icsid/cases/pending.htm, last visited 10/08/06 at 9:29 pm
\item \textsuperscript{83} See Di Rosa at 43 fn. 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).
\item \textsuperscript{84} http://worldbank.org/icsid/cases/pending.htm, visiting 10/08/06 at 9:29 pm
\item \textsuperscript{85} Id. Even more telling, is that out of a total of 41 states facing such claims, only 13 other states face more than one claim and only eight other states face three or more claims.
\item \textsuperscript{86} See Di Rosa at 42.
\end{itemize}
a. Sempra Energy and its Claims

Sempra Energy International is a large, Fortune 500, San Diego, CA based energy company that serves over 29 million utility customers in North America, Asia, and South America. In the midst of Argentine President Menem’s large-scale privatization plan, Sempra purchased a 43.09% share in the Argentine companies Sodigas Sur S.A. (“Sodigas Sur”) and Sodigas Pampeana S.A. (“Sodigas Pampeana”). The other shareholder in these two companies is Camuzzi International S.A. (“Camuzzi”), a Luxembourg based corporation, which owned 56.91% in both Sodigas Sur and Sodigas Pampeana. “The latter two Argentine companies, in turn, hold 90% and 86.09%, 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.”

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,” and consequently, the BIT. Specifically,

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87 http://www.sempra.com/aboutUs/about.htm (last visited 11/12/06) (hereinafter “Sempra Website”).
88 Camuzzi requested, and the tribunal granted, that both Sempra’s claims and Camuzzi’s claims be heard and decided by a single ICSID tribunal. See Camuzzi Int’l v. Argentine Republic, ICSID Case No. ARB/03/2, p. 2 (Decision on Objections to Jurisdiction of May 11, 2005). 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.
89 See Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, p. 6 (Decision on Objections to Jurisdiction of May 11, 2005). See also Camuzzi Int’l v. Argentine Republic, ICSID Case No. ARB/03/2, p. 4 (Decision on Objections to Jurisdiction of May 11, 2005).
90 Id.
91 Id. at 7.
92 Id. at 2, 7.
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, and that this cost the company $209.3 million.

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

b. Argentina’s Objections to Jurisdiction

i. 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


See also supra notes 63-71 and accompanying text.

See Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, pgs. 5, 7-9 (Decision on Objections to Jurisdiction of May 11, 2005). 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 negotiation,” “that Sempra has not established or prove 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 licenses, will not be discussed as they are either baseless or mooted by the tribunal’s resolution of the other objections. Id. at 30, 32, 33.


See Sempra Energy at 5. See also Di Rosa at 50-51 (Stating that “[i]n an ICSID arbitration, the Tribunal must suspend the merits phase of a case is 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.”)

Id. at 9. See also discussion supra Part II.B. (explaining the jurisdictional base the Convention Art. 25(2)(b) and its definition of who counts as a “national of another state”).
shareholder in the companies participating in CGS and CGP, it cannot substitute itself in the latter’s rights.  

The premise of Argentina’s first objection is simple. Article 25(1) only allows a “national of another contracting state” to invoke ICSID jurisdiction. In turn, Article 25(2)(b) defines “national of another contracting state,” to mean either a company which is actually of citizen of another nation that has signed the ICSID Convention or a company, which, while actually a citizen of the nation defending the ICSID claim, will per agreement 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.

Argentina argued that in a situation such as this, where the investment itself was really an Argentine corporation, that ICSID jurisdiction must be invoked under the second sentence, otherwise the first sentence option would be merely redundant. Assuming this were true, Argentina then argued that because, in its analysis, Sempra did not maintain “‘exclusive’ control” over either CGP or CGS, that Sempra, acting in the guise of either CGP or CGS, could also not invoke jurisdiction under the second sentence.

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99 Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16 P. 14 (Decision on Objections to Jurisdiction of May 11, 2005).
100 See Sempra Energy at 9-17.
101 See Di Rosa at 50.
103 See Sempra Energy at 14.
104 See id.
105 Id. at 9. 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.
either.\footnote{106} Consequently, said Argentina, without a claimant that qualifies as a “national of another contracting state,”\footnote{107} the tribunal does not have the required Article 25(1) jurisdiction.\footnote{108} The tribunal flatly rejected Argentina’s objection, and declared,\footnote{109} 

[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.\footnote{110}

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.”\footnote{111} 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 ICSID Convention.”\footnote{112} Implicit in the

\footnote{106} Id. at 10-11.  
\footnote{107} Convention, Art. 25(2)(b).  
\footnote{108} See Sempra Energy at 11.  
\footnote{109} See id. at 14.  
\footnote{110} Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, P. 14 (Decision on Objections to Jurisdiction of May 11, 2005).  
\footnote{111} See id.  
\footnote{112} See Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, U.S. – Arg., Nov. 14, 1991, U.S.- Arg., S. Treaty Doc. No. 103-2 (hereinafter “U.S.-Argentina BIT”). 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 even 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.
tribunal’s reasoning was that as a national of the United States, Sempra by definition meets the requirements of the first sentence of Article 25(2)(b). Consequently, under the tribunal’s reasoning it had jurisdiction to hear Sempra’s claims despite Argentina’s first objection.

ii. Indirect Losses

The second objection 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 a 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.

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113 See id. at 13. See also Sempra Website.
114 See discussion, supra, Part. II.B. (explaining the requirements of Article 25(2)(b) of the ICSID Convention.
116 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. See Sempra Energy at 14. 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 International S.A. (“Cammuzi”). See id. at 17. Taking into account the complications arising from the fact that both Sempra and Cammuzi 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. at 16. 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 Cammuzi’s arrangement. Id. at 17.
117 Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16 P. 20 (Decision on Objections to Jurisdiction of May 11, 2005).
Essentially, Argentina claims 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.\textsuperscript{118}

The tribunal again rejected Argentina’s objection.\textsuperscript{119} First, the tribunal held that “[t]he actual claim submitted . . . arises from alleged violations of the rights and guarantees that the investor has in light of the treaty. [Consequently,] [t]he legal nature of this dispute is beyond any doubt.”\textsuperscript{120} Argentina had attempted the argument\textsuperscript{121} that in fact its actions had harmed, if at all, only the licenses possessed by CGS and CGP,\textsuperscript{122} which did not create a cause of action under Argentine law for shareholders, as it claims is required.\textsuperscript{123} The tribunal, however, 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.”\textsuperscript{124} 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.\textsuperscript{125}

Second, the tribunal concluded that as alleged “the [legal] dispute arises directly from the investment that the Claimant has made in the companies

\begin{itemize}
\item\textsuperscript{118} See id. at 20.
\item\textsuperscript{119} See id. at 23.
\item\textsuperscript{120} Id. at 20.
\item\textsuperscript{121} 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.
\item\textsuperscript{122} See id. at 21-22.
\item\textsuperscript{123} See id. at 19.
\item\textsuperscript{124} Id. at 19.
\item\textsuperscript{125} See id. at 19-20.
\end{itemize}
incorporated in the Argentine Republic for the purpose of channeling the investment to the licensees.” 126 Here the tribunal again based its decision on the BIT. 127 According to the tribunal, the way in which the BIT defines “investment” 128 and the BIT’s underlying purposes would be frustrated if it were to find otherwise. 129 In other words, the BIT broadly defines what constitutes an investment and offers broad protection for these investments. 130 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. 131 Consequently, the tribunal found that it had jurisdiction to hear Sempra’s claim despite Argentina’s second objection. 132

iii. Lack of jus standi

126 Id. at 20. Argentina tried to draw a distinction between “general measures,” such a regulatory change and specific violations of specific contracts. Id. at 18. While agreeing that Argentina retained certain sovereign prerogatives, it found that general measures can still amount to bilateral investment treaty violations. See id. at 21.
127 See id. at 20-23.
128 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 . . . [or] . . . a company or shares of stock or other interests in a company or interests in the assets thereof.” Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, art. I, § 1(a)(ii), U.S. – Arg., Nov. 14, 1991, U.S.- Arg., S. Treaty Doc. No. 103-2.
129 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 Energy at 20.
130 See U.S.-Argentina BIT, art. I, § 1(a)(ii),
131 See Sempra Energy at 22.
132 See id. at 23. Argentina also rose what amounts to the 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 claim. Id. 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 their own consent to arbitration. See id. at 23; see also Enron Corp. & Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3 (Decision on Objections to Jurisdiction of August 2, 2004).
[Argentina’s final argument is] that although the 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 licenses . . .

[Therefore] Sempra cannot argue 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.133

This was Argentina’s final attempt134 to object to jurisdiction based on its assertion that “the Tribunal could not hear the claims of investors who did not control the licensees.”135 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.”136 Therefore, the Tribunal decided that in order resolve Argentina’s third objection and to determine whether in fact Sempra has jus standi before the tribunal, the tribunal must determine two things:137 (1) whether the U.S.-Argentina BIT allow an investor who is not a majority shareholder to bring a claim,

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133 See id. at 24.
134 See discussion, supra, Parts IV.i and ii (explaining Argentina’s first two objections to jurisdiction, which in some way all relate back to a objection that Sempra itself lacked control of the violated licensees).
136 See id.
137 See id.
and (2) “whether the cause of action lies in the Treaty, the contract, or both” as far as international law is concerned.\textsuperscript{138}

If Sempra lacked the right, as a minority shareholder, to bring a claim to ICSID under the treaty, then the tribunal would lack jurisdiction.\textsuperscript{139} As to this first question, the tribunal found that under the BIT itself, a minority shareholder, “Whether they control the company or not,”\textsuperscript{140} as well as the majority shareholder, has the right to make a claim.\textsuperscript{141} The tribunal rested its decision mainly on previous ICSID tribunal decisions, which, according to them support their contention uniformly,\textsuperscript{142} but also, added that the word “investment” was broadly understood in the BIT and intended to provide enforceable investment protection.\textsuperscript{143} Consequently, Sempra does have to the right to bring an ICSID claim under the BIT.\textsuperscript{144}

As to the second question, the tribunal found that the 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 Argentina.”\textsuperscript{145} In finding this, the tribunal noted that it is true that the “specific nature of each claim can only be assessed by examining the merits of the dispute,”\textsuperscript{146} but that 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

\textsuperscript{138} Id.
\textsuperscript{139} See id. at 24.
\textsuperscript{140} Id. at 27.
\textsuperscript{141} See id. at 27.
\textsuperscript{142} See id. at 27-28.
\textsuperscript{143} See discussion, supra, Part I.C (explaining the definition of an investment under the U.S-Argentine BIT).
\textsuperscript{144} See Sempra Energy at 27-28.
\textsuperscript{145} Id. at 29.
\textsuperscript{146} Id.
the guarantees on the basis of which it made the protected investment." Explicit in the tribunal’s reasoning, was that a claim can be both contractual and treaty based, but still support ICSID jurisdiction where the fact giving rise to the claim is first and foremost just a contractual violation. Consequently, according to the tribunal Sempra does not lack jus standi to bring its claim before ICSID.

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: (1) the two options presented by the first and second sentence of Article 25(2)(b) of the Convention are not mutually exclusive, and that a claimant may invoke ICSID’s jurisdiction using either sentence so long he meets the requirements of either sentence; (2) that a legal dispute is present where the alleged harm is done in violation of the BIT and that under the U.S.-Argentina BIT there is 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 aforementioned BIT’s broad definition; and (3) that under the U.S.-Argentina BIT a minority shareholder can bring a claim and that ICSID may hear

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147 Id.
148 See id. at 28-29
149 See id. at 29.
150 These rules, in large part, find their support in the U.S.-Argentina BIT, however, and in the whole may not be generally applicable to claims based on other BITs. See, e.g., id. at 27 (utilizing the U.S.-Argentine BIT and the decisions of previous tribunal decisions concerning the same in reaching its final jurisdictional decision).
151 See discussion, supra, Part IV.B.i (discussing the tribunal’s rejection of Sempra’s argument that the two sentences of Article 25(2)(b) of the Convention were mutually exclusive).
152 See discussion, supra, Part IV.B.ii (discussing the tribunal’s rejection of Argentina’s second objection to jurisdiction).
the claim even if it is based both in contract and treaty. All of these conclusions are consistent with recent ICSID precedent, the U.S.-Argentina BIT, and Argentina should accept them once and for all and stop objecting to jurisdiction on such grounds.

i. 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. In a case such this, where a claimant contends their investment is an Argentine corporation, which it controls, the second option might seem redundant. The tribunal’s decision, however, to allow Sempra its choice of whether to claim as itself, a “a juridical person who . . . has the nationality of a contracting State different from the State that is a party in the dispute,” makes good sense in light of the purpose of the U.S.-Argentine BIT’s and its language, and also in light of ICSID precedent interpreting a similar treaty.

As noted above, the purpose of the BIT was to give “important protections to investors and . . . [to create a] more stable and predictable legal framework for investment.” Many investors in the Argentine privatization process, which this treaty...

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153 See discussion, supra, Part IV.B.iii (discussing the tribunal’s rejection of Argentina’s third objection to jurisdiction).
155 See id. at 10-11.
158 See discussion, supra, Part I.C (explaining both the United States’ and Argentina’s motive of creating a bilateral investment treaty to better protect investors and to increase Argentine economic development).
159 722 Prac. L. Inst. at 1435. See also U.S.-Argentina BIT 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”)

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was supposed to promote, do not directly have contracts with the Argentine government. 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. If ICSID were to force such foreign investors to satisfy the second sentence and prove control, not only might this frustrate the treaty’s purpose of protecting an investor 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 part of its obligation to the United States regarding the very investors the United States meant to protect and Argentina meant to attract using the treaty.

In any case, without explicitly relying on the US-Argentina BIT’s ostensible values, the tribunal itself instead chose to rely explicitly upon a prior ICSID tribunal decision interpreting a similar treaty to reach its decision. In the *Lucchetti* decision, an ICSID tribunal interpreted Article 8(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. The tribunal found no reason to reject the spirit of the *Lucchetti* holding, and even found that such an interpretation made good

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160 See 722 Prac. L. Inst. at 1435.
162 See id.
163 See note 114 (demonstrating that in this case, the tribunal was inclined to find that Sempra likely could have demonstrated the requisite control to claim under the second sentence of Article 25(2)(b) anyways).
164 See 722 Prac. L. Inst. at 1435.
sense by allowing investors the right to pick based on their own unique “corporate arrangements and control structures.”

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.

**ii. 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.” 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 creates a valid legal dispute. Argentina had attempted to re-characterize Sempra’s claim as actually being that of CGP and CGS under their contracts with Argentina, 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. In order to give the treaty force, a proper allegation must support jurisdiction.

Furthermore, the tribunal also correctly found that this dispute arose with sufficient directness from Sempra’s investment. This finding was partly based on the BIT itself; specifically, the BIT’s definition of the word “investment.” 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

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167 See Sempra at 14.
168 See Sempra at 20.
169 See id.
170 See id.
171 See supra, notes 28-29 and accompanying text (explaining the purpose of the U.S.-Argentina BIT).
172 See id. at 20.
173 See Sempra at 22-23.
modality with which they were made.\textsuperscript{175} This is consistent with previous interpretations of the BIT’s definition of investment, such as in the \textit{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.”\textsuperscript{176} Consequently, although the tribunal agreed with Argentina that “setting the value of the currency is a sovereign right,”\textsuperscript{177} the tribunal found the requisite directness between so called “measures of a general nature”\textsuperscript{178} 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.\textsuperscript{179}

Finally, the tribunal also pointed out that directness has been found in a similar fashion under the North American Free Trade Agreement.\textsuperscript{180}

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

\textsuperscript{175} Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16 P. 20 (Decision on Objections to Jurisdiction of May 11, 2005)
\textsuperscript{176} Azurix Corp. v. Arg. Rep., ICSID Case No. ARB/01/12 P. 35 (Decision on Jurisdiction of Dec. 8, 2003).
\textsuperscript{177} See, supra, note 124.
\textsuperscript{178} Sempra at 19.
\textsuperscript{179} See Sempra at 22.

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examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.\textsuperscript{181}

Because the BIT has the purpose of protecting Sempra’s exact type of investment,\textsuperscript{182} the tribunal was sound in relying on the \textit{GAMI} decision’s determination that direct does not mean explicit interference “with share ownership.”\textsuperscript{183}

\section*{iii. 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 \textit{Sempra} tribunal, that investors may bring treaty-based claims regardless of whether or not a parallel cause of action in contract is available elsewhere.\textsuperscript{184} In the present, case, Argentina attempted to rely upon the distinction made by the \textit{Vivendi}\textsuperscript{185} tribunal between claims based on contractual breaches and those based on treaty violations, suggesting that contract law should govern contract breaches.\textsuperscript{186} While such is the case where the claim is only based on contract law,\textsuperscript{187} the tribunal correctly rejected such exclusive national jurisdiction where the claim was also based on a treaty violation.\textsuperscript{188} In practice, the rule has been that

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\item \textsuperscript{181} Sempra at 22 (quoting \textit{Gami Investments, Inc. v. United Mexican States} (Final Award of Nov. 15, 2004).
\item \textsuperscript{182} See \textit{Azurix} at 35.
\item \textsuperscript{183} Sempra at 22 (quoting \textit{Gami Investments, Inc. v. United Mexican States} (Final Award of Nov. 15, 2004).
\item \textsuperscript{184} See Paolo Di Rosa, \textit{The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues}, 36 \textit{U. MIAMI INTER-AM. L. REV.} \textit{41}, \textit{54} (2004); \textit{see also}, \textit{e.g.}, Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, P. 15 (Decision on Jurisdiction (Ancillary Claim) of Aug. 2, 2004) (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).
\item \textsuperscript{185} See \textit{Vivendi Universal v. Arg. Rep.}, ICSID Case No. ARB/97/3 (Decision of the ad hoc Committee of July 3, 2002).
\item \textsuperscript{186} See \textit{id. at}
\item \textsuperscript{187} \textit{See, e.g.}, SGS Societe Generale de Surveillance S.A. Islamic Rep. of Pakistan, ICSID Case No. ARB/01/13 P.162 (finding “that the tribunal has no jurisdiction with respect to claims submitted . . . and based on alleged breaches of” contract).
\item \textsuperscript{188} See \textit{Sempra Energy Int’l v. Argentine Republic}, ICSID Case No. ARB/02/16 P. 29 (Decision on Objections to Jurisdiction of May 11, 2005).
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“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.”\textsuperscript{189} Several other cases have echoed this conclusion.\textsuperscript{190} The Sempra tribunal only strengthened this conclusion on its facts by reference to the U.S.-Argentina BIT,\textsuperscript{191} and its “umbrella”\textsuperscript{192} clause,\textsuperscript{193} which requires creates an obligation of the host nation to observe its contractual arrangements under the treaty.\textsuperscript{194} Finally, as noted above, the BITs broad definition of investment supplies a minority investor with the right to bring a claim.\textsuperscript{195} that Argentina has expropriated its investment

VI. The Merits of Sempra v. Argentina

a. Factual Findings of the Tribunal

As an initial matter, the tribunal first made several factual findings:\textsuperscript{196} (1) Sempra was guaranteed a right under its license and the regulatory framework to tariff adjustments based on the United States Producer Price Index (PPI);\textsuperscript{197} (2) Sempra had a right to calculate its tariffs in U.S. dollars initially before re-expressing them as Argentine

\textsuperscript{189} Enron Corp. at 15 (citing CMS Gas Transmission Co. v. Rep. of Arg., ICSID Case No. ARB/01/8 P. 24 (Decision on Objections to Jurisdiction of July 17, 2003)).

\textsuperscript{190} See, e.g., Azurix Corp. v. Arg. Rep., ICSID Case No. ARB/01/12 P. 36-40 (Decision on Jurisdiction of Dec. 8, 2003).

\textsuperscript{191} See Sempra at 29.

\textsuperscript{192} Id.


\textsuperscript{194} See Sempra at 29.

\textsuperscript{195} See discussion, supra Part. V.B. (discussing the right of a minority investor to bring a claim before ICSID).

\textsuperscript{196} 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 B.I.T. To the extent any inconsistency does exist the BIT is supreme under both Argentine law and internal law. Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/18, pp. 69, 79 (Award of Sept. 28, 2008) (“Sempra II).

\textsuperscript{197} Id. at 25-27.
pesos on customers’ bills;\textsuperscript{198} (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;\textsuperscript{199} (4) Sempra was due, but never paid, reimbursement of subsidies but that reimbursement was due in Argentine pesos;\textsuperscript{200} 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 additional to the effects the general economic crisis in the nation had on Sempra’s investment.\textsuperscript{201} In light of its findings, the tribunal considered the merits of Sempra’s treaty based claims.\textsuperscript{202}

\textbf{b. Argentina Did Not Expropriate Sempra’s Investment}

Expropriation was the principle claim made Sempra in this arbitration, however, the tribunal found that Argentina neither directly nor indirectly expropriated Sempra’s investment.\textsuperscript{203} Article IV(1) of the US-Argentina BIT provides that “Investments 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.” This language clearly establishes a treaty-based right against expropriation.\textsuperscript{204} Further, under the Argentine Constitution, chapter 1, § 20, “Foreigners . . enjoy . . all the civil rights of citizens.”

\textsuperscript{198} \textit{Id.} at 38.
\textsuperscript{199} \textit{Id.} at 48-49.
\textsuperscript{200} \textit{Id.} at 52-53.
\textsuperscript{201} \textit{Id.} at 55-57.
\textsuperscript{202} \textit{See} discussion, supra 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). \textit{See also} 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, 54 (2004) (discussing these as potential claims in regards to the multitude of ICSID claims currently outstanding against Argentina).
\textsuperscript{203} \textit{Sempra II} at 79-85.
\textsuperscript{204} \textit{See} Di Rosa at 64 (explaining that “Most BITs allow these [expropriation] claims under clauses referring to measures ‘equivalent to’ or ‘tantamount to’ expropriation”).
One of these rights granted to citizens, is the right to the protection of their private party against confiscation by the government except where “[e]xpropriation for reasons of public interest . . . [was] . . . authorized by law and previously compensated.” CONST. ARG. Chapter 1, § 17. This language establishes a right against expropriation for a foreign national doing business in Argentina.\(^{205}\)

**i. Direct Expropriation Did Not Occur**

As an initial matter, the tribunal rightfully pointed out that no direct expropriation occurred because no “essential component of the [Sempra’s] property right[s]” have “been transferred to a different beneficiary, in particular the State.”\(^{206}\) 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.”\(^{207}\) “In 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,”\(^{208}\) and thus no property was directly expropriated by Argentina.

**ii. Indirect Expropriation Did Not Occur**

The tribunal’s determination that no indirect expropriation occurred is also consistent with established international law. The tribunal applied the “substantial deprivation of rights test.”\(^{209}\) Under this test, “substantial deprivation results . . . from depriving the

\(^{205}\) See Christina Marie Wilson, Argentina’s Reparation Bonds: An Analysis of Continuing Obligations 28 FORDHAM INT’L L.J 786, 804 (stating that that Argentine constitution protects property rights to the extent it requires expropriation only for a public purpose with prior compensation).

\(^{206}\) *Sempra II* at 82.

\(^{207}\) Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, P 103 (Award of August 30, 2001).

\(^{208}\) *Sempra II* at 83.

\(^{209}\) *Sempra II* at 83. See also Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, P 13 (Award of August 30, 2001) (utilizing the substantial deprivation test to judge an indirect expropriation
investor of control over the investment, managing the day-to-day operations of the company,” etc.  

While the tribunal found that the measures undertaken by Argentina had an adverse effect on the conduct of Sempra’s business, Sempra still controlled its own business despite the changed circumstances of its operation.

The application of the “substantial deprivation” test finds support in another recent decision. In CMS, CMS made essentially the same claims as did Sempra in the present case, that Argentina’s regulatory changes violated its agreements with CMS by altering the tariff structure and subsequently pessifying the existing tariff rates in such a way as to effectively destroy the value of CMS’s investment and thus indirectly expropriate the investment. 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 had indeed also had an important effect on the value of CMS’s investment. 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. The CMS tribunal found as a fact that more than five years had passed since the adoption of the first of the

claim); CMS Gas Transmission Co. v. Rep. of Arg., ICSID Case No. ARB/01/8 P. 24 (Award of May 12, 2005).

Sempra II at 83.

Indeed, it found that these adverse effects were bad enough to be compensable under other treaty provisions. See, e.g., Sempra II at 118 (requiring compensation to Sempra based on Argentina’s violations of Article II2(a) and (c) of the U.S. – Argentina B.I.T.

CMS Gas Transmission Co. v. Rep. of Arg., ICSID Case No. ARB/01/8 P 38-49 (Award of May 12, 2005).

CMS Gas Transmission Co. v. Rep. of Arg., ICSID Case No. ARB/01/8 P 38-49 (Award of May 12, 2005).

See id. at 38-49, 76. 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. at 53-54.

See id. at 32. See also Sempra II at 56-57.
measures of which CMS complained\textsuperscript{215} and it 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.”\textsuperscript{216} Finally, the CMS tribunal also focused on the fact that not only does CMS retain formal ownership of its investment, CMS also retains full and unobstructed control of the investment.\textsuperscript{217} Consequently, the CMS tribunal also decided that “the Government of Argentina has not breached the standard of protection laid down in Article IV(1) of the Treaty.”\textsuperscript{218}

\textbf{c. Argentina Violated Sempra’s Right to Fair and Equitable Treatment}\n
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.” In an important victory to investors, the tribunal interpreted this clause broadly to extend to protect “basic expectations that were taken into account by foreign investors to make the investment.”\textsuperscript{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 to come next,” and thus “substantially changed the legal and business framework under which the investment was decided and implemented.”\textsuperscript{220}

\textbf{i. Meaning of Fair and Equitable}

\textsuperscript{215} See id.\textsuperscript{216} Id. at 67-68.\textsuperscript{217} See id. at 77.\textsuperscript{219} Id.\textsuperscript{219} Id. at 87-88\textsuperscript{220} Id. at 89,
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 hints, prior to about the year 2000 there was little opinion as to precisely what sort of protection a BIT’s “fair and equitable” clause provides. More recently, however, multiple tribunals interpreting various BITs have attempted clarification. 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 treatments 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.”

Given the stated objectives of the U.S. and Argentina in signing their BIT, “creating a more stable and predictable legal framework for investment” so as to encourage investment, and that the objective of Argentina’s privatization plan was to attract foreign investment by changing their law and economy, an interpretation that protects the legitimate expectations of investors is the only interpretation that passes the

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221 Sempra II at 87.
223 See, e.g., CMS Gas Transmission Co. v. Rep. of Arg., ICSID Case No. ARB/01/8 (Award of May 12, 2005); Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2 (Award of May 29, 2003); Int’l Thunderbird Gaming Corp. v. United Mexican States, NAFA Arbitration (Award of January 26, 2006).
224 Tecmed at 173. 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.”
smell test. This interpretation is not only in line with progressive thinking on the topic, but is the right policy choice given the interconnectedness of today’s world economy.

d. Argentina Violated the Umbrella Clause of the BIT

The tribunal held that Argentina’s violations of its obligation “not to free 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” result in a violation of the Article II(2)(c) of the BIT, the Umbrella Clause, which read: “Each Party shall observe any obligation it may have entered into with regard to investments.” 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. Argentina attempted to characterize the measures it took as perhaps mere contractual violations not protected by the treaty. The tribunal admitted that there 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. This holding protects investors by holding government’s 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

228 Sempra II at 93.
229 Sempra II at 92.
230 Id.
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. 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 law.” In rejecting this claim, the tribunal stated that a perquisite for a finding of arbitrariness is that the actions complained of must be shown to constitute “impropriety.” The tribunal found instead that while Argentina’s actions did violate Sempra’s rights, Sempra had not shown that Argentina’s government reacted to its economic crisis in any way but what it genuinely believed best. This appears to have been merely a problem with Sempra’s proof 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 largely foreign-owned gas sector. The tribunal found, however, that Sempra had simply failed to show any one sector had been irrationally or capriciously singled out for harsher treatment. While Sempra failed in to prove this claim, protection for future investors under such BIT provisions if a complaining investor can show a similar primarily foreign owned industry was singled out capriciously.

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231 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 [§16] or administrative tribunals of a Party.”
232 Sempra II at 93.
233 Id. at 94.
234 Id. at 93.
235 Id. at 94.
236 But see LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, pp. 240-244 (Decision on Liability of October 3, 2006) (setting a strict separation between BIT “fair and equitable” provisions and
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 reads in pertinent part that “Investments shall at all times . . . shall enjoy full protection and security.” Quite summarily, the tribunal rejected this claim because Sempra had not shown that Argentina failed to physically protect its employees or facilities.²³⁷ Importantly, however, the tribunal suggested that in the future it may possible to make this claim in regards to legal protection of an investment.²³⁸ The tribunal points 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 may be possible. 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 it was exempt from liability in light of a state of national emergency or necessity under its own 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 had shown neither that its government was on the verge of collapse nor that the 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.

²³⁷ Sempra II at 95.
²³⁸ Id. at 95.
measures taken were in fact the only measures that were available to deal with its economic crisis. These two findings are also important for its 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) of the treaty, declaring that the Article cannot “be read as a general escape clause from treaty obligations.” 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 present here and thus cannot serve to abrogate other treaty rights in this context. Further, the tribunal also rejected Argentina’s plea of necessity under Article XI of the treaty for the same reason.

Important to this determination was a finding that the U.S. and Argentina did not intend for Article XI to be a self-judging treaty provision. Instead, consistent with the treaty’s stated objectives. As a whole, this rejection of an emergency/necessity defense for Argentina confirms that even amidst an admitted economic crises the treaty’s protections does not stop protecting foreign investors.

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239 Id. at 96-105.
240 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.”
241 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.”
242 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.
243 See discussion supra Part II.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).
VIII. Conclusion

The Sempra jurisdictional decision and the subsequent cases to the same effect\textsuperscript{244} were an important reaffirmation of the right of foreign investors to ICSID arbitration. By 2004, Argentina had faced adverse jurisdictional decisions in six similar cases,\textsuperscript{245} and faced many more pending claims,\textsuperscript{246} including Sempra Energy’s claim. Had the tribunals in each of those previous decisions accepted Argentina’s jurisdiction, 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.-Argentine BIT 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 a guarantee of fair and equitable treatment.\textsuperscript{247} By allowing Sempra a chance to be heard and interpreting jurisdictional rules in favor of arbitration, 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 ISCID tribunal found that Argentina violated CMS’ rights to fair and equitable treatment and awarded CMS approximately $150 million.\textsuperscript{248} While the the Calvo system may not have breathed its last breath yet, decisions such as the Sempra jurisdictional decision ensures that international investors

\textsuperscript{244} See, e.g., El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15 (Decision on Jurisdiction of April 27, 2006).
\textsuperscript{245} See Paolo Di Rosa, The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues, 36 U. MIA\textsc{mi}I INTER-AM. L. REV. 41, 51 (2004).
\textsuperscript{246} See id. at n.6 and accompanying text (showing that as of the time Di Rosa wrote Argentina faced 35 outstanding ICSID claims arising from Argentina’s 2002 Emergency Law).
\textsuperscript{247} See supra section I.c. (discussing the protections offered by the U.S.-Argentine BIT).
will have recourse to the ICSID should a host nation treat them unfairly, and is one more positive step in the process of economic globalization.