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Repsol, YPF, and Argentina: A Hypothetical Look at the Pending ICSID Arbitration over YPF

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A hypothetical look at the pending ICSID arbitration over YPF

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Abstract

In this paper I will discuss the 2012 expropriation of the Repsol subsidiary, YPF S.A., by the Argentine government and the upcoming ICSID arbitration on the legality thereof. Taking into account basic tenets of international arbitration law, bilateral investment treaties, and ICSID jurisprudence, I will put forward some of the principal arguments of both parties could make and discuss a likely decision by the ICSID Tribunal. In addition to the ICSID award I will also discuss the difficulties of enforcing ICSID and other arbitral awards against Argentina and will discuss Latin American attitudes towards ICSID in general. Keeping in mind that it is impossible to predict the decisions of a body which often contradicts its own judgments, this paper seeks to give a broad look at the case of YPF and give likely outcomes based on available information.
Cases Cited


2. Anglo-Iranian Oil Co. Ltd. v. Jaffrare (The Rose Mary) 1953, I WLR 246, 20 ILR 316 (Supreme Court, Aden, 1953).

3. Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, para 307 (July 14, 2006) (hereinafter “Azurix”).


6. LG&E Energy Corp, LG&E Capital Corp, and LG&E International Inc v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, para 146 (Oct. 3, 2006).

7. Metaclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, para 122 (Aug. 30, 2000).

8. S.D. Myers, Inc. v. Canada, UNCITRAL (NAFTA), Award, para 311 (Nov. 13, 2000).
Introduction

On April 16th, 2012 the President of Argentina, Christina Fernandez de Kirchner, announced that Argentina would partially nationalize YPF S.A., seizing 51% of YPF owned by the Spanish oil company, Repsol S.A. This action by the Argentine government followed months of investor speculation surrounding the possibility of nationalization as the Argentine government accused Repsol of failing to reinvest profits in its subsidiary and falling production forcing Argentina to import more oil. Repsol countered that the nationalization was motivated by the recent discovery by YPF of the Vaca Muerta shale in Argentina’s Neuquen province, estimated to contain up to 22.5 billion barrels of oil. Regardless of the motivations, the nationalization has provoked a flurry of litigation and arbitration from New York to Madrid.

On December 3rd, 2012 Repsol formally filed a complaint against Argentina at the International Center for the Settlement of Investment Disputes (ICSID), one the five

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1 YPF stands for Yacimientos Petrolíferos Fiscales, Treasury Petroleum Fields in English.
2 See Chris Dolmetsch, Repsol Sues Bank of New York Mellon Over YPF Election, Bloomberg, August 1, 2012, http://www.bloomberg.com/news/2012-08-01/repsol-sues-bank-of-new-york-mellon-over-ypf-election.html. Repsol has brought suit against Bank of New York Mellon for issues stemming from YPF’s director elections after the nationalization. See Jude Webber, Repsol in US class action lawsuit on YPF, Financial Times, May 16, 2012, available at http://www.ft.com/intl/cms/s/0/ec29ba3a-9f72-11e1-a255-00144feabdc0.html#axzz2LvlZe1pu. YPF shareholder Texas Yale Capital Corp has launched a class action suit on behalf of all YPF shareholders alleging Argentina must make a tender offer to all class D shareholders per the terms of its privatization of YPF in 1993. See Argentina’s YPF sued in U.S. over nationalization, Reuters, February 6, 2013, http://uk.reuters.com/article/2013/02/06/ypf-lawsuit-idUKL1N0B6JUN20130206. YPF shareholders have filed a class action suit against YPF, Repsol, and YPF’s underwriters alleging failure to fully disclose the risk of nationalization of YPF to its shareholders in the months leading up to the event.
organizations that together compose the World Bank Group. This paper will mainly focus on the pending ICSID proceedings and the arguments of both Repsol and Argentina, specifically with respect to the issues of the effective compensation for YPF and whether or not its expropriation was discriminatory under the terms of the Bilateral Trade Agreement (BIT) between Argentina and Spain.

In section I, I provide a general background on the International Center for the Settlement of Investment Disputes followed by a discussion of the current climate towards the center in Latin America. In section II, I discuss the factual background of the expropriation of YPF, beginning with the expropriation itself and ending with the filing of Repsol’s claim at ICSID in December 2012. In sections III and IV, I analyze the interpretation of BITs in general and specifically Repsol’s access to ICSID under the Argentina-Spain BIT. In section V, I discuss the legality of the Argentine government’s actions under international law. Finally, I address in section VI the difficulties in enforcing a potential ICSID award against Argentina.

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4 See, the organizational structure of the World Bank group as well as the other organizations in the group at http://web.worldbank.org/WBSITE/EXTERNAL/EXABOUTUS/0,,contentMDK:23063010~menuPK:8336848~pagePK:50004410~piPK:36602~theSitePK:29708,00.html.

I. General Background on ICSID

The International Center for the Settlement of Investment Disputes (ICSID) was founded by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also known as the Washington Convention of 1965). The Convention had been the brainchild of Aaron Broches, the then General Counsel of the World Bank, who saw the need for an international structure for the protection of foreign direct investments. Before 1965, the President of the World Bank would intervene in investment disputes since the goal of the World Bank was to promote economic development and cooperation. In order to lessen the burden on the World Bank, as well as the burden on the president of the World Bank in his personal capacity, Broches saw the need for an independent organization whose main task would be the resolution of investment disputes. After consulting legal scholars from around the world between 1962 and 1965, the World Bank staff began writing the first official draft of the convention. On March 18, 1965, the World Bank distributed the draft convention to all of its member states. The required minimum twenty states signed the convention soon after and on October 14, 1966 the convention entered into force.

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7 Nigel Blackaby et al., GUIDE TO ICSID ARBITRATION 1-2 (2004).
9 While ICSID is an autonomous international organization, it is considered to be part of the World Bank family and is financed by the World Bank in addition to charges borne by the arbitrating parties. See ICSID Convention, supra note 6, at art. 17.
10 Blackaby, supra note 7, at 1-2.
11 Id.
12 The ICSID Convention, supra note 6.
Judging solely by the number of member states, ICSID has been a resounding success. As of April 1, 2013, 158 states have signed the ICSID Convention and 148 of those signing states have deposited their instruments of ratification with the Center. Notable holdouts are Brazil, Mexico, and India. Canada and Russia have signed the convention but have not ratified it.

Map of the ICSID Contracting States and Other Signatories to the ICSID Convention as of June 30, 2010

In addition to its success in attracting a large number of member states, ICSID’s success can also be quantified in the vast number of BITs signed in the past 30 years that include ICSID arbitration as an available option for dispute resolution. This demonstrates that not only does the Center exist and have a large membership, but that states see it as a

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14 Id.
15 Id.
17 Blackaby, supra note 7, at 4.
central player in international dispute resolution enough to include it in their BITs as a
valuable resource for the resolution of investment disputes. The first ICSID case based on a
BIT was registered in 1987, however by 2012, 63% of all cases brought before ICSID were
brought under BITs.

Basis of Consent Invoked to Establish ICSID Jurisdiction in Registered ICSID Cases

ICSID arbitration took a while to take off. Its first arbitration was not decided until
1974. From 1974 to 1996 cases registered per year ranged from 0 to 4 cases until 1997,

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18 Id.  
19 Id.  
21 Id.  
22 UN Conference on Trade and Development, Dispute Settlement: 2.1 Overview,
UNCTAD/EDM/Misc.232 10 (2003), available online at
Conference on Trade and Development”).
when 8 arbitration cases were registered.\textsuperscript{23} The number of annual registered ICSID arbitration cases reached an all time high in 2012 with 40 registered cases. The largest share of those cases, 30\%, came from South America.\textsuperscript{24}

**Geographic Distribution of All ICSID Cases by State Party Involved**

ICSID came to be in the era of decolonization of the 1960s.\textsuperscript{26} Many newly independent states were unhappy with the unfavorable conditions of the concession agreements they were inheriting from their former colonizers and as a result a wave of nationalizations began as a way to assert economic sovereignty.\textsuperscript{27} It was in this climate that the need for an independent arbitral body be created so as to stimulate foreign direct

\begin{itemize}
  \item \textsuperscript{23} ICSID Statistics, \textit{supra} note 16, at 8.
  \item \textsuperscript{24} \textit{Id.} at 11.
  \item \textsuperscript{25} \textit{Id.}
  \item \textsuperscript{26} Boralessa, \textit{supra} note 8, at 125.
  \item \textsuperscript{27} \textit{Id.} at fn. 3.
\end{itemize}
investment and thus promote economic growth. In fact, the Convention’s primary goal is to promote economic development through the creation of a favorable climate for foreign direct investment. The Preamble of the Convention itself states, “Considering the need for international cooperation for economic development, and the role of private international investment therein.” Additionally, the Report of the Executive Directors on the Convention explains the primary benefit of signing the convention as follows; “…adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.”

Latin America’s relationship with ICSID has been a tenuous one at best. Most of the region avoided signing the Convention until the 1990s, with Brazil and Mexico still declining to become members. Reluctant countries were hesitant to submit their investment disputes to international arbitration, which they viewed as a forum generally biased in favor of the developed world. They preferred to submit investment disputes to their national courts, arguing that by investing in their country, trans-national corporations (TNCs) had availed themselves of the local law. This rationale is summed up neatly by the Calvo Doctrine. Carlos Calvo was an Argentine jurist who in the mid 1800s put forward to principles; (1) that no foreigner should be granted more favorable rights and privileges than a national, and (2)

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28 See UN Conference on Trade and Development, supra note 21, at 6 (“Foreign direct investment is widely regarded as the most important factor in economic development”).
29 Id. at 11.
30 Id.
31 ICSID Convention, supra note 6, at pmbl.
33 UN Conference on Trade and Development, supra note 21, at 10.
34 Boralessa, supra note 8, at 58-59.
that foreign states may not enforce their private citizens’ claims through diplomatic or territorial intervention.\footnote{Daniel Shea, THE CALVO CLAUSE 19 (1955).}

Foreign investors and TNCs were hesitant to accept the jurisdiction of domestic courts because of the nature of their opposing party in the dispute.\footnote{Boralessa, supra note 8, at 59.} In an expropriation case, the opposing party is by definition, the state (or regional/local governments). Investors feared entering in to a biased forum where the state was both one of the parties, the “independent” judge, and the rule maker.\footnote{Id.} Even in cases where the judiciary was not biased in favor of the state, TNCs and foreign investors often found domestic courts to be inefficient, unsophisticated, and congested.\footnote{Id.}

While two private parties may contract that any future dispute arising from the agreement be governed by the New York Convention,\footnote{See Convention on Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 5217 (June 10, 1958) (hereinafter “the NYC Convention”) (ratifying a treaty seeking to harmonize the enforcement of arbitral awards around the world and limiting the circumstances under which an award may be annulled or refused enforcement in national courts).} a private party and the state had no such option before the ICSID Convention. Foreign investors and TNCs approve of ICSID because it provides them an independent forum, away from the expropriating state’s influence, in which to arbitrate investment disputes. ICSID’s independence is limited however, at the enforcement stage, where it becomes dependent on national courts.\footnote{Boralessa, supra note 8, at 59. This is no different then the situation under the New York Convention where an arbitral award is granted but enforcement must be sought at the national level. Id. Enforcement will be discussed more in-depth in Section VI.}
Due to the perceived biases of ICSID in favor of multinationals, there has been a backlash against the center, specifically from Latin America.\textsuperscript{41} Bolivian President Evo Morales announced on May 1, 2007 that his country would be withdrawing from ICSID.\textsuperscript{42} On September 13, 2011 Venezuelan President Hugo Chavez announced that his country would also be withdrawing from ICSID, after Venezuela had accumulated more than $40 billion in claims for expropriated investments.\textsuperscript{43} Argentina has faced a flurry of unfavorable ICSID judgments since taking emergency economic actions during its 2001-2002 crisis.\textsuperscript{44} The number of awards against Argentina has pushed them into the same camp as Venezuela and Bolivia, who oppose ICSID on more ideological grounds.\textsuperscript{45} Venezuela and Bolivia’s leftist governments seek to control the natural resources of their countries through the government, claiming that foreign companies had been exploiting those resources and not benefiting the their citizens.\textsuperscript{46}

Left-leaning Latin American states have used a variety of methods to reject ICSID\textsuperscript{47} with the most likely result of these actions being a reduction in foreign investment in the region. An increasingly volatile climate and lack of political security means investors will look elsewhere for their investments and Latin American countries rejecting ICSID may face

\textsuperscript{41} For more information on the current attitudes of Latin American countries towards ICSID, see generally, Katia Fach Gómez, \textit{Latin America and ICSID: David Versus Goliath?}, 17 L. & Bus. Rev. Am. 195, (2011).
\textsuperscript{44} Gomez, \textit{supra} note 41, at 226.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 226-27.
\textsuperscript{47} “(1) [R]esorting to the Constitution to ignore ICSID awards, (2) promoting national courts' reactions against ICSID, (3) drafting international contracts that avoid ICSID arbitration, (4) withdrawing from the ICSID Convention, (5) using Bilateral Investment Treaties to combat ICSID, (6) creating national agencies to react against ICSID arbitrations, and (7) developing a regional arbitration center aimed at replacing ICSID.” \textit{Id.} at 227.
difficulties finding foreign investment.  

Venezuela and Bolivia may claim they seek national sovereignty over their natural resources but they alone do not have the capital required to exploit those resources, and inevitably have to look to foreign companies with whom to work.

II. YPF Factual Background

Following an economic crisis in the late 1980’s, Argentina reorganized YPF as a limited liability company and partially privatized the business between 1991 and 1993, maintaining a 20% stake in the company and a golden share with an additional 12% stake held by the regional governments. YPF remained under government control until 1999, when Repsol acquired a 14.99% stake from the Argentine government for $2 billion USD. Later on in the same year, Repsol consolidated it’s holding to 98.23% of YPF through an unsolicited bid for an additional 83.24% at $44.78 USD per share. The resulting company was renamed Repsol YPF, a subsidiary of Repsol SA. In 2007, the Peterson Group acquired 15% of Repsol’s stake in YPF through a vendor’s loan from Repsol and exercised an option to expand their stake to 25% in 2011. By this point Repsol still possessed the majority position in YPF

48 Id.
53 The Peterson Group had planned to use dividends from YPF to pay off its loan and pledged its YPF shares to Repsol as collateral. With the nationalization of YPF, the Peterson Group lost access to dividends and subsequently defaulted on a portion of the loan, which caused a 5.43% stake in YPF...
at 58% and the Argentine government’s maintained its golden share, unchanged since the early 1990s.\textsuperscript{54}

In 2011 Argentina announced a $3 billion USD international energy trade deficit, kicking off conflict between the Argentine President, Cristina Fernandez de Kirchner and Repsol. Kirchner and the Argentine government accused Repsol of failing to reinvest in YPF and using its wells to supply liquidity and thus finance global expansion outside of Argentina. In 2010, YPF was the single largest source of revenue for Repsol, yet accounted for only 2% of the company’s reinvestment.\textsuperscript{55} Additionally, since 2008 YPF distributed dividends five times more than the industry average, a fact which Argentine Minister for the Economy, Hernan Lorenzino, cited as evidence of Repsol’s strategy to use YPF as bank account to finance investment elsewhere.\textsuperscript{56}

Repsol countered in a report published in April 2012, that energy price controls in Argentina combined with an annual growth in GDP of 8% since 2002 has made it unsustainable to sell all of YPF gas on the Argentine market when it sells for more than twice the domestic price abroad.\textsuperscript{57} According to Repsol, Argentine policies of subsidies and price controls made any reinvestment of profits in Argentina unprofitable and yet despite this, Repsol cites that it nonetheless invested $11 billion in Argentine operations between 2007 and

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2012 and only issued $3.5 billion in dividends.\footnote{58} Most international energy analysts are in agreement with Repsol’s analysis of the situation.\footnote{59}

In the months leading up the announcement of the renationalization of YPF, the company had already lost 28\% of its Argentine production capacity due to the rescission of 15 concession agreements by six regional governments.\footnote{60} In rescinding YPF’s concessions, Argentine regional governors relied on Article 31 of the Argentine Hydrocarbons Law which requires “concession holders to carry out, within reasonable periods, the necessary investments for a rational and proper exploitation [...], ensuring the maximum production of hydrocarbons compatible with the adequate and economic exploitation of deposits and the observance of criteria which guarantee the appropriate conservation of the reserves.”\footnote{61} These governors claimed that Repsol had failed to adequately reinvest in the concessions and thus had violated Article 31 of the Hydrocarbons Law.\footnote{62} From the announcement of the first rescission to the announcement of the expropriation of YPF, between January 27 and April 16, 2012, YPF’s stock lost 47\% of its value.\footnote{63} Repsol claims this shows a concerted effort between the national and regional Argentine governments to drive down YPF’s value by revoking concession agreements in the period leading up to the renationalization.\footnote{64}


\footnote{59} \textit{Id.}


\footnote{61} Ley de Hidrocarburos, Nº 17.319, Jun. 30, 1967 (unofficial translation by me).

\footnote{62} Krakowiak, \textit{supra} note 60.


\footnote{64} \textit{Repsol acusa a Kirchner de tapar crisis con YPF, reclama $10.000 millones}, La Nación, April 17, 2012, http://www.nacion.com/2012-04-17/Mundo/Repsol-acusa-a-Kirchner-de-tapar-crisis-con-YPF--reclama--10-000-millones.aspx.
Finally, on April 16, 2012, President Fernandez de Kirchner announced that her government would seize control of 51% of YPF, all of that stake coming from Repsol’s 58% stake. The Argentine Congress passed the bill authorizing the nationalization on May 4, 2012, and Kirchner signed it into law the following day. The resulting shareholder makeup of YPF was thus as follows: the Argentine national government 26.03%, the Peterson Group 24.99%, the oil-producing Argentine provinces 24.99%, Repsol 6.43%, and 17% continues to float in the Buenos Aires and New York markets. Following almost eight months of unfruitful negotiations, on December 3, 2012, Repsol filed a formal complaint with ICSID to initiate the ICSID arbitral process. On December 18, ICSID formally registered Repsol’s request for arbitration on their website. In their complaint, Repsol requests compensation of US$10.5 billion from Argentina for the nationalization of YPF.

III. Interpretation of BITs

Where there are no specific rules as to the interpretation of a treaty, one must look to customary international law to interpret any ambiguities. In the case of an ambiguity we must look to articles 31 and 32 of the Vienna Convention on the Law of Treaties as they represents

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68 Bronstein, *supra* note 3.

the seminal codification of customary international law addressing the rules on the interpretation of treaties.  

Article 31(1) states that “A treaty shall be interpreted in good faith accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 31 also requires that the preamble any annexes of a treaty be used in addition to the text itself in interpreting the treaty. In Azurix Corp. v. the Argentine Republic, the ICSID Tribunal stated that it would remain mindful of the objectives of the BIT, set forward in the preamble, when analyzing the case. The preamble of the Argentina-Spain BIT reads as follows:

The Argentine Republic and the Kingdom of Spain, hereafter “the Parties”

Desiring to intensify the economic cooperation in economic benefit to both countries,

Proposing to create favorable conditions for the investments made by investors of each of the Parties in the territory of the other Party, and

Recognizing that the promotion and protection of investments in accordance with the present Agreement encourage the initiatives in this field,

Have agreed upon the following:

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71 Id. at art. 31(1).
72 Id. at art. 31(2).
73 Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, para 307 (July 14, 2006) (hereinafter “Azurix”).
74 Argentina-Spain BIT preamble. Original text in Spanish: “La República Argentina y el Reino de España, en adelante “Las Partes” Deseando intensificar la cooperación económica en beneficio económico de ambos países, Proponiéndose crear condiciones favorables para las inversiones realizadas por inversores de cada una de las partes en el territorio de la otra, y Reconociendo que la promoción y la protección de las inversiones con arreglo al presente Acuerdo estimulan las iniciativas en este campo, Han convenido lo siguiente:”. 
The ICSID Tribunal faced with the case of YPF should apply these principles of economic cooperation and protection of investments when deciding on any possible award.

IV. Repsol’s access to ICSID under the Argentina-Spain BIT

Argentina and Spain signed a Bilateral Investment Treaty on October 03, 1991, with that agreement coming in to force on September 28, 1992. Under Article X, “Resolution of controversies between one party and investors of the other party,” of the Argentina-Spain BIT, in the case of disputes arising between one signing State and an investor of the other signing State, these parties must attempt to amicably resolve the dispute during a period of six months. If after six months no amicable settlement has been reached, the dispute shall be submitted to the courts of the country where the investment at the center of the dispute was realized. Paragraph 3 of Article X, states that only after 18 months have transpired since the initiation of the national court procedures, and no final decision has been rendered, may one of the parties request the dispute be settled by an international arbitral tribunal.

Additionally, if a decision has been rendered within 18 months by the court or tribunal handling the national procedures, but that decision does not entirely resolve the dispute, then, if the parties are in agreement, they may submit the dispute to an international arbitral tribunal. Article X goes on to state that if the dispute is to be resolved through international arbitration, the parties must submit the dispute to either the International Center for

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76 Argentina-Spain BIT art. 10(1-2) (“Solución de controversias entre una parte e inversores de la otra parte”).
77 Argentina-Spain BIT art. 10(2).
78 Argentina-Spain BIT art. 10(3).
79 Id.
Investment Disputes ("ICSID") established under the Washington Convention, or to an ad hoc arbitral tribunal established under the principals of United Nations Commission on International Trade Law ("UNCITRAL"). If three months after one of the parties has submitted a request for international arbitration and both parties have not reached an agreement as to a separate *ad hoc* arbitration, then the dispute shall be submitted to ICSID.

This procedure includes many waiting periods that could delay the commencing of ICSID procedures by up to 27 months and require the investor to submit himself to the potentially unfriendly national courts of the country in which the investment was located. However, the Spain-Argentina BIT includes a “most favored nation” clause, set forward in Article VII, which requires that if the State in question has signed other BITs providing more favorable terms to the investors of other States, as is the case with Argentina, those more favorable terms shall be applied to the investors in the dispute in question. Originally, this “importing” of more favorable terms from other BITs was limited to substantive terms and excluded procedural rights such as dispute resolution clauses.

Nevertheless, in the ICSID arbitral award *Emilio Augustín Maffezini v. Kingdom of Spain*, the tribunal determined that “dispute settlement arrangements are inextricably related to the protection of foreign investors” and that the Argentina-Spain BIT’s most favored nation clause extends to the dispute resolution clause, allowing those privileges to also extend to the

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80 ICSID Convention, *supra* note 6.
81 *Argentina-Spain BIT* art. 10(4).
82 *Id.*
83 *Argentina-Spain BIT* art. 7.
84 *Emilio Augustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award of the Tribunal, (Nov. 13, 2000), 5 *ICSID Rep.* 419 (2002) (hereinafter “Maffezini”) (Interestingly enough, in *Maffezini*, the Spanish government argued against allowing an Argentine investor to use more favorable dispute resolution procedures against them. In this case the Spanish investor, Repsol S.A., will be taking full advantage of this rule against the Argentine government).
procedural aspects of the BITs.\textsuperscript{85} Thus, under \textit{Maffezini}, a foreign investor claiming against a State under the relevant BIT may apply a more favorable dispute resolution clause from another BIT entered into by the State.

In this case, a Spanish investor claiming against Argentina under the Argentina-Spain BIT, may apply for example, the Argentina-Chile BIT dispute resolution clause, which has the more favorable term of only requiring that the investor wait six months for an amicable settlement before being allowed the choice of either submitting the dispute to ICSID or to the national courts of the country of the investment.\textsuperscript{86} Under the Argentina-Chile BIT, once a claim has been submitted to either of these two forums, that forum’s jurisdiction shall be definitive.\textsuperscript{87} Additionally, Article 26 of the ICSID Convention states that once the parties have consented to the ICSID arbitration, that consent is irrevocable and exclusive, that is to say the parties may not commence parallel proceedings.\textsuperscript{88}

\textbf{V. Was the expropriation legal under the Argentina-Spain BIT?}

Bilateral Investment Treaties (“BITs”) are the fundamental instrument used by states to regulate investments by the citizens and/or nationals\textsuperscript{89} of one state in the territory of the other.\textsuperscript{90} These agreements are typically signed between developed and developing nations as a way of encouraging foreign investment which might otherwise be riskier due to lack of legal

\begin{footnotesize}
\textsuperscript{85} Id. at paras 54-64.

\textsuperscript{86} \textit{Tratado entre la República Argentina y la República de Chile sobre promoción y protección recíproca de inversiones} (“Treaty between the Argentine Republic and the Republic of Chile on the reciprocal promotion and protection of investments”) art. 10, Aug. 2, 1991, (hereinafter \textit{Argentina-Chile BIT}) available at http://www.sice.oas.org/bits/argch-1.asp (in Spanish).

\textsuperscript{87} \textit{Argentina-Chile BIT} art. 10(2).

\textsuperscript{88} See ICSID Convention, \textit{supra} note 6, at art. 26.

\textsuperscript{89} This applies to legal and natural persons.

\textsuperscript{90} See Rudolf Dolzer & Margaret Stevens, \textsc{Bilateral Investment Treaties} (1995).
\end{footnotesize}
protections for the investor. The standards of protections set forward by BITs almost always include protection against discriminatory measures, as well as guarantees of fair and equitable treatment, full protection and security, minimum standards of treatment under international law, and “treatment as favorable as that accorded to a country’s own citizens.”

In addition, these treaties often provide conditions under which a state may legally expropriate an investment.

The term “investment” under these BITs has typically extended to investments in natural resources such as oil or gas but there is a modern trend in Latin America, (e.g. Bolivia, Ecuador, Venezuela) which excludes natural resources from the definition of investment under BITs and thus excludes these investments from ICSID arbitration. While in Argentina investments in natural resources such as Repsol’s investment in YPF are still considered investments under the Argentina-Spain BIT, the expropriation of YPF illustrates the trend in Latin America towards the nationalization of these types of investments.

Under the Argentina-Spain BIT, the conditions under which an expropriation or nationalization may be carried out legally are set forward under Article V of the treaty. In order for a party to expropriate an investment of the investors of the other party the action must be for the public utility, be in conformity with the law, and can in no case be

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92 Id. at 377.
93 See Gómez, supra note 41, at 211.
94 Argentina-Spain BIT art. 5 (“En el caso de que una Parte, en base a leyes, reglamentos, disposiciones o contratos específicos, hubiera adoptado para inversores de la otra Parte normas más ventajosas que las previstas por el presente Acuerdo, se acordará a los mismos el tratamiento más favorable.”).
discriminatory.\textsuperscript{95} Once an expropriation takes effect, the expropriating party must adequately compensate the investor in convertible currency and without unjustified delay.\textsuperscript{96}

I speculate that in the ICSID arbitration on YPF’s expropriation the parties will focus most of the debate on three points: (1) whether Argentina’s actions were for the public utility; (2) whether the expropriation was discriminatory given that only Repsol S.A.’s shares in YPF were expropriated while the Argentine Ezkenazi family’s 25\% stake was not; and (3) what level of compensation will be considered “effective,”\textsuperscript{97} with particular focus on whether the rescission of various concession agreements by Argentine regional governments in the months leading up to the expropriation\textsuperscript{98} was a concerted attempt to drive down the value of YPF. I will discuss each of these issues in order in the following sections.

1. Expropriation for the Public Utility?

The Argentina-Spain BIT requires that an expropriation serve the public utility in order to be considered a legal expropriation.\textsuperscript{99} Typically the concept of “public utility” is interpreted broadly in favor of the State, making it difficult for the investor to challenge the validity of the State’s interest here.\textsuperscript{100} In \textit{ADC v. the Republic of Hungary}, the ICSID Tribunal required that Hungary substantiate its public interest in the actions taken through convincing facts or legal reasoning.\textsuperscript{101} The Tribunal went on to state that the State cannot merely reference a public interest and thus “magically put such interest into existence and
therefore satisfy the requirement.”

In short, the public interest must be a genuine interest of
ter the public.

Argentina has a genuine public interest in controlling its essential natural resources. In
her speech announcing the expropriation, President Kirchner went as far as to enumerate most
ations with either a fully or partially nationalized petroleum company. Given that Argentina
became a net importer of petroleum in 2012, the Argentine Government has affirmed the
national interest in assuring hydrocarbon self-sufficiency. Whether or not the change in
Argentina from net-exporter to net-importer of petroleum was caused by the government’s
subsidies and price and currency controls, or from Repsol’s alleged lack of reinvestment in
YPF, the government’s public utility argument is unlikely to be challenged by the ICSID
Tribunal due to its history of broad interpretation of the interest in favor of the State.

2. Discriminatory Measures

Under customary international law, discriminatory actions are based on two elements,
(1) that the rationale behind the action bears no relation to the substance of the matter, and (2)
the action constitutes treatment different from that of similarly situated parties. 
Additionally, under Article V of the Argentina-Spain BIT no expropriation, nationalization, or
equivalent measure shall be taken in a discriminatory manner. Discriminatory measures

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102 Id. at para 432.
103 Id.
104 See, Orihuela, supra note 65.
105 Guillermo Aguilar and William Michael Reisman, THE REASONS REQUIREMENT IN
106 “La nacionalización, expropiación, o cualquier otra medida de características o efectos similares
que pueda ser adoptada por las autoridades de una Parte contra las inversiones de inversores de la
otra Parte en su territorio […] en ningún caso deberá ser discriminatoria.” Argentina-Spain BIT
art(5).
can be based on nationality, race, religion, political affiliation, and many other bases.\textsuperscript{107} Given that the essence of bilateral investment treaties is to protect foreign investors’ investments abroad, the most debated form of discrimination under BITs is that based on nationality. In analyzing the discriminatory nature of a government act, arbitral tribunals focus on two issues, the basis of comparison, and discriminatory intent.\textsuperscript{108}

The basis of comparison is relevant in cases where the facts surrounding the various investments that have been treated differently are themselves different. An example would be the application of strict measures on oil producers who happen to be foreign, while domestic natural gas producers are not affected. The tribunal in that hypothetical case would have to determine if natural gas and oil producers could be considered within the same basis of comparison. In the case of YPF, Argentina seized 51\% of the company, 100\% of that seized stake came from Repsol’s 57\% investment. The Peterson Group, an Argentine investment group, had a 25\% stake in YPF that was left untouched by the Argentine government’s actions. Both of these parties were investors in the same investment, the only difference being that one was a Spanish \textit{sociedad anónima} and the other was an Argentine investment group, thus the question of basis of comparison here is moot since the investors were both nearly identically situated.

This concept of non-discrimination in expropriation cases is closely related to the principle of national treatment, a separate standard of protection well established in many BITs. Article 4(5) of the Argentina-Spain BIT states “In addition to the provisions of paragraph 2 of this article, each Party shall apply, in accordance with their national law, to the investments of the investors of the other Party, a treatment no less favorable than that

\textsuperscript{107} Principles of International Investment, supra note 102, at 177.
\textsuperscript{108} Id.
extended to its own investors.” The national treatment standard prevents the government from enacting laws of general application which apply less favorably to nationals than they do to foreigners. A government may enact measures more favorable to foreign investors, as most BITs use the phrase “no less favorable” rather than requiring that treatment be equal. This stems from the fact that often, states seek to aggressively promote foreign investment and many of those measures would not be allowed if equal treatment were required.

There are three steps of analysis to establish a breach of the national treatment standard of protection. Firstly, one must see if the domestic investor and the foreign investor are similarly situated or in a “like situation/circumstance.” Secondly, it must be determined if the treatment granted to the foreign investor is at least as favorable as that granted to domestic investors. Finally, in the case where the treatment of foreign investors is less favorable than that of domestic investors, the question becomes whether or not the measures are justified. In the case of YPF, because it is clear that there has been an expropriation in its purest form, we look to the various legal standards applicable to the act of expropriation as opposed to standards of protection against non-expropriatory measures, such as different levels of taxation for foreign and domestic investors.

In cases of expropriation, in addition to analyzing the basis of comparison, arbitral tribunals focus on the presence of discriminatory intent. Discriminatory intent is not required in order to establish whether or not an action was discriminatory, but it can be relevant in that assessment. In LG&E v. Argentina, the ICSID Tribunal held that a measure is considered

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109 Argentina-Spain BIT art. 4(5). Original Spanish text “Además de las disposiciones del párrafo 2 del presente artículo, cada Parte aplicará, con arreglo a su legislación nacional, a las inversiones de los inversores de la otra parte un tratamiento no menos favorable que el otorgado a sus propios inversores.” Id.

110 PRINCIPLES OF INTERNATIONAL INVESTMENT, supra note 102, at 178.

111 Id. at 177.
discriminatory if its intent was discriminatory or if the measure had a discriminatory effect.\textsuperscript{112} In \textit{LG\&E}, the ICSID tribunal adopted the ELSI standard, first espoused in the ICJ case concerning \textit{Elettronica Sicula S.p.A (ELSI)}.\textsuperscript{113} This standard, as summarized by the ICSID Tribunal in \textit{LG\&E}, states that, “in order to establish when a measure is discriminatory, there must be (i) an intentional treatment (ii) in favor of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national.”\textsuperscript{114}

3. Adequate Compensation

a. Adequate Compensation for Legal Expropriations

Finally, the Argentina-Spain BIT requires that any nationalization or expropriation be accompanied by adequate compensation, without unjustified delay, and in convertible currency.\textsuperscript{115} The World Bank deems compensation to be adequate “if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known.”\textsuperscript{116} The rationale behind using the date before the expropriation became known is to prevent the imminent expropriation from affecting the investment’s market value in the period between the announcement and the effective expropriation date.\textsuperscript{117} This same rule is applied under

\textsuperscript{112} \textit{LG\&E Energy Corp, LG\&E Capital Corp, and LG\&E International Inc v. Argentina}, ICSID Case No. ARB/02/1, Decision on Liability, para 146 (Oct. 3, 2006) (hereinafter, \textit{LG\&E}).
\textsuperscript{114} \textit{LG\&E v. Argentina}, supra note 114, at n. 62.
\textsuperscript{115} \textit{Argentina-Spain BIT} art(5).
\textsuperscript{116} Guideline IV (3), 31 ILM 1379, at 1382.
\textsuperscript{117} \textit{PRINCIPLES OF INTERNATIONAL INVESTMENT}, supra note 102, at 275.
customary international law as well, since it would be unfair to make the investor bear the consequences of the loss in market value of the investment caused by State conduct.\textsuperscript{118}

The value of expropriated investments is often calculated using the fair market value method. This is determined by using the discounted cash flow method which looks at projections of in the investment’s probable income in the coming years.\textsuperscript{119} Often there is no market for a large industrial or infrastructure project and thus valuation based on the fair market value is unreliable.\textsuperscript{120} In other cases, a project may have yet to turn a profit and thus its market value cannot be determined using the discounted cash flow method.\textsuperscript{121} In this situation the investment’s liquidation value is used, although this typically gives a lower value than the discounted cash flow method would.\textsuperscript{122} Finally, included in the definition of adequate compensation is the interest accrued on the fair market value of the investment between the initial valuation date and the final date of payment of compensation.\textsuperscript{123}

In the case of YPF, in 1993 the Argentine Government put in place Article 28 of the company bylaws specifying valuation minimums per share in the case of a re-nationalization. The Government approved the article intending to protect investors when the company was privatized that year.\textsuperscript{124}

\textbf{Article 28} establishes that if, as a result of acquisitions, the National Argentinean Government becomes the owner of 49\% of the capital stock it would need to launch a tender offer for all YPF’s share capital. The price to be offered is determined by Article 7. There are four methodologies to determine the offer price and the highest of these four is the one that should be paid:

\textsuperscript{118} Sergey Ripinsky, \textsc{DAMAGES IN INTERNATIONAL INVESTMENT LAW} 244 (2008).
\textsuperscript{119} \textsc{PRINCIPLES OF INTERNATIONAL INVESTMENT}, supra note 102, at 275.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Fernandez, supra note 63, at 7.
A. The highest price per share paid by the bidder within the 2-year period preceding the notice of takeover.
B. The highest closing price per share during the 30-day period preceding the notice of takeover.
C. A price per share equal to the market price calculated in B, multiplied by the ratio between the highest price per share paid by the bidder within the 2-year period preceding the notice of takeover and the price per share the day preceding the 2-year period preceding the notice of takeover.
D. YPF net income per share during the last 4 complete fiscal quarters preceding the notice of takeover multiplied by the highest of: a) the price/income ratio for that period; b) the highest price/income ratio during the 2-year period preceding the notice of takeover.  

Following these rules established by the bylaws the ICSID tribunal would have to confront another standard of valuation. Because the Argentine Government, the bidder, has not acquired any stake in YPF in the 2-year period preceding the notice of takeover, sections A and C are irrelevant. Applying section B with the date of notice of the expropriation, April 16, 2012, the highest closing price per share during the 30-day period preceding the notice of takeover was US$34.3 per share. Applying section D from April 16, 2012 the relevant price/income ratio multiplied by the net income per share of 2011 results in a value of US$46.30 per share. The highest value comes from methodology D and thus, per Article 28 US$46.30 should be the offer price per share. Still using methodology D, this offer price increases to US$56.70 per share if we use January 27, 2012, (the date before the first rescission of one of YPF’s regional concession agreements) as the base date of calculation.

Now looking at the market value of YPF per several analyst reports, from April 12, 2011 to February 2012, the average “target price” per share of YPF was US$50.70 per

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125 Id.
126 Id.
127 Id.
share. From February 2012 to the day of the announcement of the expropriation that April
16, the “target price” fell from an average of US$50.70 per share to between US$25 and
US$35 per share.129

In both the market value analysis and the valuation methodology provided for by
Article 28 of YPF’s bylaws, the offer price due by the Argentine Government varies
significantly depending on the date considered. The question thus becomes one of time. Due

128 Id. at 5. Full Spanish text of Article 28 of YPF’s bylaws:
Artículo 28°—Normas especiales para adquisiciones del Estado Nacional

A. Las previsiones de los incisos e) y f) del Artículo 7 (con la única excepción de lo establecido
en el apartado (B) de este Artículo) se aplicarán a las adquisiciones que directa o indirectamente
efectúe el Estado Nacional, por cualquier medio o título, de acciones o títulos de la Sociedad, 1)
cuando como consecuencia de dicha adquisición el Estado Nacional resulte titular de, o ejerza el
control sobre, acciones de la Sociedad que, sumadas a sus tenencias anteriores de cualquier clase,
representen, en total, el 49% o más del capital social; o 2) cuando el Estado Nacional adquiera un
8 % o más de las acciones clase D en circulación, mientras retenga acciones de la clase A que
alcancen o superen el 5% del capital social establecido en el inciso (a) del artículo 6 de estos
Estatutos al tiempo del registro de los mismos en el Registro Público de Comercio. En caso que las
acciones clase A en poder del Estado Nacional representen un porcentaje inferior al anteriormente
mencionado, no regirá lo previsto en el punto 2) de este Artículo, aplicándose en tal caso los criterios
generales previstos en el inciso d) del Artículo 7.

B. La oferta de compra prevista para los supuestos contemplados en los puntos (1) y (2) del
apartado (A) anterior, se limitará a la totalidad de las acciones de la clase D.

C. Las sanciones previstas en el inciso (h) del Artículo 7 se limitarán, en el caso del Estado
Nacional, a la pérdida del derecho de voto, cuando la adquisición violatoria de lo previsto en el
Artículo 7 y en el presente artículo se haya producido a título gratuito o por efecto de una situación
de hecho o de derecho en la que el Estado Nacional no haya actuado con el fin y la voluntad de
adquirir acciones por encima del límite establecido, salvo que como consecuencia de dicha
adquisición, el Estado Nacional resulte titular de, o ejerza el control sobre, 49% o más del capital
social, o 50% o más de las acciones clase D. En todos los demás casos se aplicarán las sanciones
contempladas en el inciso h) del Artículo 7 sin limitación.

D. A los efectos previstos en este artículo y en los incisos e) y f) del artículo 7º, el término
“sociedades” contemplado en el inciso (i) del artículo 7º, en lo que resulte pertinente, incluye
cualquier tipo de ente u organismo respecto del cual el Estado Nacional tenga una vinculación de las
características descriptas en el mencionado inciso. El término “títulos” empleado en este artículo
tendrá el alcance previsto en el inciso d) del artículo 7º. El término “adquisición de control”
empleado por el artículo 7º se aplica a las adquisiciones previstas por el apartado (A) de este artículo
con las salvedades, excepciones y régimen establecido en este artículo 28º.

129 Id. For a full series of charts and tables discussing the numerical valuation of YPF see Fernandez,
supra note 63.
to the rescission of the concession agreements by the various Argentine regional governments in the months leading up to the expropriation, should YPF be valued as of January 27, 2012, or as of April 16, 2012, the day the expropriation was announced? In analyzing this question I propose that the Tribunal look to the standard used in cases of creeping expropriations and extrapolate that standard to the case of YPF, which is a case of direct expropriation with certain features of creeping expropriation.

i. Applying the standard from creeping expropriations to the case of YPF

In the case of a direct expropriation, the date of valuation is normally easy to establish since the government has in a single action, taken control of a formerly private company. Thus the date of valuation of that company for the purpose of compensation will be the date before the expropriation or the date before the expropriation became public knowledge. A creeping expropriation is one that is taken through a series of acts by the government which, taken together, have the same effect as a direct expropriation on the foreign owner.\textsuperscript{130} A study by UNCTAD describes this process as “a slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment.”\textsuperscript{131} These government acts could come in the form of new taxes, cancellations of concession agreements, or any law or regulation that restricts the investor’s “use and enjoyment of the reasonably-to-be-expected economic benefits of [his] investment.”\textsuperscript{132}

Assessing the date of valuation of in the case of a creeping expropriation has proved difficult due to the fact that the expropriation occurred through a series of acts and not a single

\textsuperscript{130} PRINCIPLES OF INTERNATIONAL INVESTMENT, supra note 102, at 114.
\textsuperscript{132} Azurix, supra note 73, at para 277.
government action. The standard applied by the ICSID Tribunal has been that the date of valuation shall be “the date on which the governmental ‘interference’ has deprived the owner of his rights or has made those rights practically useless.”\textsuperscript{133} In discussing the issue of choosing a valuation date, the Iran-US Claims Tribunal has determined that “‘where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of property’, the date of the expropriation is ‘the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events.’”\textsuperscript{134} This method has been criticized as “inequitable”\textsuperscript{135} because if the Tribunal applies the “tipping point” date, it would be ignoring the fact that the adverse government actions leading up to the tipping points have most likely already reduced the market value of the investment. The Tribunal in \textit{Azurix} responds to this criticism by stating that the “in assessing fair market value, a tribunal would establish that value in a hypothetical context where the State would not have resorted to such maneuvers but would have fully respected the provisions of the treaty and the contract concerned.”\textsuperscript{136}

This statement seems to negate the entire point of using the “tipping point” date. On the one hand the Tribunal is applying the “tipping point” for the purpose of valuing the expropriated investment, but is using this date as if the events leading up to that date had never happened. This appears to be a roundabout way of applying the date before the first adverse action was applied. The most obvious way to quantitatively value a company on date X, in a hypothetical situation where the government’s actions from the previous months had

\textsuperscript{133} \textit{Id.} at para 417 (citing \textit{Compañía del Dessarollo de Santa Elena, S.A. v. Costa Rica}, ICSID Case No. ARB/96/1, Award, (Feb. 17, 2000) 39 ILM 1317, 1330 (2000)).

\textsuperscript{134} \textit{Id.} (citing \textit{Malek v. Iran}, Award 534-193-3, para. 114 (1992)).

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.}
not happened, would be to look at the price of the company on the earlier date $Y$ before those actions had occurred. However, in the case where other force majeure events or events caused by third parties had occurred as well, resulting in a lower market price for the investment, this hypothetical situation allows us to use the “tipping point” date while surgically removing the effects on price caused by the government’s actions, and not holding them responsible for a decline in price they did not cause.

In the case of YPF, the Argentine regional governments one by one rescinded 15 concession agreements between January 27, 2012, and the date of the announcement of the expropriation on April 16, 2012. All in all, YPF lost 28% of its Argentine production capacity during this period, but with 72% of production capacity in tact, it is unlikely that on its own, these rescissions would reach the “tipping point” described by the Azurix Tribunal. In this case we would use the direct expropriation date of April 16, but the Tribunal could use April 16 but in a hypothetical situation where the government’s actions in violation of the BIT from the previous months had never happened. This would put us in a situation similar to that of January 27, 2012. In the case of YPF, there were no major force majeure events which would have caused a significant decrease in market price between January 27 and April 16, 2012, and thus the January 27 market price itself should be a relatively good indicator for how the ICSID Tribunal will decided to compensate should Repsol’s claim succeed.

### b. Adequate Compensation for Illegal Expropriations

All of the above assumes that the expropriation or nationalization was legal under the Argentina-Spain BIT (non-discriminatory, pursuant to the law, and for the public utility). If

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137 See, supra, text accompanying notes 16-19.
138 See, Krakowiak, supra note 60.
the ICSID Tribunal should find that the expropriation was illegal, then remedies available would not be limited to monetary compensation for the value of the investment plus interest. Remedies for illegal expropriation include incidental and consequential damages as well as (rarely) full restoration of the expropriated property. There have even been cases where an oil concession was illegally expropriated and the injured oil company was permitted to seize exported oil as a form of payment.\textsuperscript{139}

In the Permanent Court of International Justice’s\textsuperscript{140} (PCIJ) landmark case, \textit{The Case Concerning the Factory at Chorzów},\textsuperscript{141} the Court provided Germany with full-restitution of the expropriated investment in Poland. Poland had been forbidden from expropriating any assets of German nationals in Upper Silesia per a May 1922 Convention between Germany and Poland (hereinafter the Geneva Convention). In 1915, a nitrate factory was built in Chorzów, a Silesian town in Germany that later became part of Poland after World War I. On June 24, 1922, the Polish government issued a ministerial decree, unilaterally taking possession of the nitrate factory from its German owners. Germany brought suit against Poland at the PCIJ on behalf of its nationals for violation of the Geneva Convention. In highlighting the insufficiency of compensatory damages, the Court stated:

\begin{quote}
It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; in the present case, such a limitation might result in placing Germany and the interests protected by the Geneva
\end{quote}

\textsuperscript{139} See \textit{Anglo-Iranian Oil Co. Ltd. v. Jaffrâe (The Rose Mary)} 1953, I WLR 246, 20 ILR 316 (Supreme Court, Aden, 1953).

\textsuperscript{140} The predecessor to the International Court of Justice (ICJ).

\textsuperscript{141} \textit{Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits), Germany v. Poland}, 1928 P.C.I.J. Ser. A., No. 17, Judgment No. 13 (Sept. 13, 1928)(hereinafter the \textit{Chorzów Factory}).
Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust, but also incompatible with the aim of Article 6\(^ {142}\) and following articles of the Convention – that is to say, the prohibition, in principle of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia – since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.\(^ {143}\)

Poland’s actions were in clear violation of Articles 6 and 7 of Geneva Convention and thus constituted an illegal expropriation.\(^ {144}\) In the case of a legal expropriation, the injured party would be entitled to the “value of the undertaking at the moment of dispossession, plus interest to the day of payment.”\(^ {145}\) Due to the illegal nature of Poland’s expropriation, the PCIJ found that the German nationals were entitled to full reparations, i.e. restoration of their ownership of the factory. In the case that full reparation be impractical or impossible, the injured party shall be entitled to monetary damages in lieu of restitution.\(^ {146}\) In addition, the injured party is entitled to monetary damages for any consequential losses stemming from the expropriation. This scheme of remedies is intended to put the injured party back where he was before the illegal expropriation took place.\(^ {147}\)

\(^{142}\) Art. 6 of the Geneva Convention provides:

Poland may expropriate in Polish Upper Silesia in conformity with the provisions of Articles 7 to 23 undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in these clauses, the property, rights and interests of German nationals or of companies controlled by German nationals may not be liquidated in Polish Upper Silesia.

\(^{143}\) Chorzów Factory at 46.

\(^{144}\) Id. at 27.

\(^{145}\) Id. at 46.

\(^{146}\) Id. at 47 (“Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind of payment in place of it.”).

\(^{147}\) Pierre Bienvenu and Marin J. Valasek, Compensation for Unlawful Expropriation and Other Recent Manifestations of the Principle of Full Reparation in International Investment Law, 235, in Albert
International arbitral tribunals, including ICSID tribunals, have repeatedly affirmed the continuing validity of the Chorzów reparations standard in recent cases, among them, *ADC v. Hungary*. In this case the Tribunal found that the State had illegally expropriated an airport and thus allowed for damages to be calculated in a way that put the claimant back in the situation that they would have occupied had the expropriation never happened. The Tribunal applied this standard because there was no specific provision in the Cyprus-Hungary BIT setting forward a compensation scheme for cases of illegal expropriations; only the standard for legal expropriations. The Tribunal determined that to apply the same compensation for legal and illegal expropriations would be to “conflate compensation for a legal expropriation with damages for an unlawful expropriation.” It was in this void that the Tribunal decided to apply the applicable customary international law standard first espoused in *Chorzów*. Once the *ADC* Tribunal determined that the *Chorzów* full reparation standard was still valid law and was applicable in their case, they had to determine how to apply the standard, given that restoration of the investment to the claimant was either impractical or impossible. “It is clear that actual restitution cannot take place and so it is, in the words of the *Chorzów Factory* decision, ‘payment of a sum corresponding to the value which a restitution in kind

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148 See *Metaclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, para 122 (Aug. 30, 2000) (“[t]he award to Metalclad of the cost of its investment in the landfill is consistent with the principles set forth in Chorzów … namely, that where the state has acted contrary to its obligations, any award to the claimant should, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed (the status quo ante).”); see also *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Award, para 311 (Nov. 13, 2000) (“The principle of international law stated in the Chorzow Factory (Indemnity) case is still recognised as authoritative on the manner of general principle.”).

149 *ADC v. Hungary*, supra note 103, at n. 53.

150 *Id.* at para 481.

151 *Id.* at para 483-94.
would bear.” The Tribunal thus analyzed the fact that the value of the expropriated airport had increased significantly between 2002, the year of expropriation, and 2006, the year of the arbitral award, a situation that was unprecedented for the Tribunal, which more often saw cases of falling investment value post-expropriation. The Tribunal thus decided that using the 2006 award date to calculate the value of the investment was proper given that Hungary had illegally expropriated the airport and to use the 2006 date was the only way to put the claimant where he would have been had the expropriation never occurred.

In the case of YPF, if the Tribunal finds that Argentina has breached Article V of the Argentina-Spain BIT and has illegally expropriated YPF, then it will likely apply the Chorzów standard. Because it would be impossible to restore Repsol’s 51% stake in YPF the Tribunal will have to analyze how much money in damages will “correspond to the value which a restitution in kind would bear.” If on the date of an eventual arbitral award, the value of YPF has increased from the announcement of the expropriation on April 16, 2012, then the Tribunal may apply a similar rationale to that applied in ADC and use the award date as the date of valuation of the investment. If the value of YPF declines in that same period, then the Tribunal will again look to the date of the announcement of the expropriation, or perhaps even the date before the Argentine regional governments began rescinding the various concession agreements in January 2012.

152 Id. at para 495.
153 Id. at para 496.
154 Id. at para 499.
155 Id. at para 495.
156 See, supra, text accompanying notes 16-20.
VI. Enforcement of an ICSID Award Against Argentina

Enforcement and Recognition of ICSID awards is governed by Articles 53-55 of the Convention. Article 53(1) states, “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

In the case where a state does not comply with the terms of an award, Article 27 allows the investor to seek enforcement against the assets of the non-compliant state in all ICSID contracting states. In order to ensure that enforcement in third-party states is effective, all contracting states are required to recognize ICSID arbitral awards.

Thus, if an arbitral award is issued against a contracting state, that state is under an international law obligation to recognize and enforce that award. If that state fails to comply, then the investor may take the award and seek enforcement in all other contracting states. However, the investor may only seek enforcement of pecuniary awards in third party states, not specific performance. The investor only need provide to the national court a copy of the award certified by the secretary-general of ICSID.

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157 See, ICSID Convention, supra note 6, at art. 53-55.
158 Id. at art. 53(1).
160 ICSID Convention, supra note 6, at art. 27.
161 Id. at art. 54(1) (“Each Contracting State shall recognize an award rendered pursuant to this Convention and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”).
It must be noted that ICSID awards typically have a high level of voluntary compliance.\textsuperscript{162} Factors ranging from fear of scaring off foreign investment, to unwillingness to violate the legal order of an international organization associated with the World Bank, pressure countries to comply with awards.\textsuperscript{163} Failure to comply with awards may also reduce investor confidence in a country and diminish their political standing in the world.\textsuperscript{164} The question of enforcement of ICSID awards only becomes difficult in the cases of non-compliance, a situation that has grown more and more common in the past fifteen years with respect to Argentina. 

Unlike under the New York Convention, the ICSID Convention affords no grounds under which a national court can refuse to enforce an award, including public policy reasons.\textsuperscript{165} In this sense, the enforcement and recognition mechanism under the ICSID Convention is automatic and national courts cannot institute vacatur proceedings.\textsuperscript{166} Parties may however, request annulment of the award by an application in writing to the Secretary-General of ICSID. The criteria under which this annulment may be granted are similar to those under the New York Convention, the main difference being that ICSID annulments are decided by the organization itself, and not be national courts of the forum state.\textsuperscript{167}

\textsuperscript{162} Boralessa, \textit{supra} note 8, at 67.
\textsuperscript{163} \textit{Id.}
\textsuperscript{165} Under the New York Convention enforcement of an arbitral award can be refused if a party proves one of the following: (1) the parties did not have the capacity to contract, (2) lack of notice of the arbitration, (3) the award exceeds the scope of the arbitration agreement, (4) the subject matter is not arbitrable, (5) the award was set aside under the law of the forum country, (6) the composition of the arbitral panel was improper, and (7) the enforcement of the award would run contrary to public policy. The NYC Convention, \textit{supra} note 38, at art. V.
\textsuperscript{166} \textit{See} Coe, \textit{supra} note 161, at 1451.
\textsuperscript{167} Article 52: “(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
This process can however, be complicated by the principle of sovereign immunity. Under Article 54 of the Convention, “[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.” 168 This includes the law of sovereign immunity. Therefore, while a state may not be able to refuse enforcement under the same grounds as those available under the New York Convention, it may deny access to state assets using a broadly drafted sovereign immunity law. Investors will naturally search for a third party state with a narrow definition of sovereign immunity to enforce the ICSID award. 169

In the case of YPF and Argentina, even if Repsol’s claim succeeds with the ICSID Tribunal, it will most definitely have a difficult time enforcing the potential award. 170 Since Argentina’s financial crisis in 2001-2002, ICSID has rendered nine final awards against Argentina, with more than thirty other claims still outstanding. 171 As of June 2009, Argentina

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168 ICSID Convention, supra note 6, at art. 54(3). See Coe, supra note 161, at 1451 (“ICSID Convention awards--subject only to such rules of sovereign immunity from execution as may apply at the place of enforcement”).


had yet to comply with any of the ICSID arbitral awards. Even if Argentina were willing to comply with not only the unpaid ICSID awards, but all of the outstanding creditor claims against it, given its financial position it would unlikely be able to pay the billions of dollars in claims. As a matter of policy, Argentina has begun following the ICSID Article 52 annulment proceedings as a way of stalling payment for every ICSID arbitral award rendered.

While Argentina may seek to annul the arbitral awards through Article 52 of the Convention, its requests will almost certainly be denied by the ICSID Secretary-General, as an international organization does not usually take steps to undermine their own authority. A more fruitful course of action for Argentina will be the application of sovereign immunity laws. Should enforcement be sought in the US, Argentina can invoke the Foreign Sovereign Immunities Act of 1976 (FSIA). This act requires that in order for a party seeking enforcement of an award or judgment against a foreign sovereign in the United States, the property sought for attachment must be for a commercial use. If this requirement is satisfied then the property must also be for a commercial activity from which the claim stemmed, the party seeking enforcement must show that the foreign sovereign has waived sovereign immunity, or as would be in the case of YPF, the judgment must be based on an order confirming an arbitral award rendered against the foreign state. There are several

173 See Boralessa, supra note 8, at 57 discussing Argentina’s near bankrupt position.
174 Lin, supra note 173, at 2.
other exceptions to the rule but these are the principal ones most relevant to the case of YPF.\footnote{28 U.S.C. § 1610(a).} Under the UK’s State Immunity Act the party seeking enforcement must only show that the property sought is used or intended to be used for a commercial purpose.\footnote{Boralessa, supra note 8, at 93 (citing State Immunity Act of 1978, §13(4), 10 Halsbury’s Statutes 829, 845 (4th ed.2001 reissue) (U.K.)).}

Repsol is seeking a USD$10.5 billion award from the ICSID tribunal and in the case its claim is successful, it will face an uphill battle seeking enforcement of an award that large. With the unpaid claims already in line for payment and the other cases ahead of Repsol’s on ICSIDs docket, by the time a potential award comes through it’s difficult to see where Repsol would find the assets large enough to enforce any award. If the tribunal determines that Argentina’s expropriation was illegal and orders for a restitution of the investment, as was ordered in the \textit{Chorzów Factory} decision, then perhaps Repsol could seek enforcement of that specific performance, however unlikely Argentina’s compliance may be. Regardless of the strengths of Repsol’s legal arguments, the enforcement and execution of any award presents a bleak picture.

\section*{VII. Conclusion}

With Repsol’s initial claim filed with ICSID as of December 2012,\footnote{Case Details: Repsol, S.A. and Repsol Butano, S.A. v. Argentina Republic, ICSID, available at https://icsid.worldbank.org/ICSID/FrontServlet.} it will only be a matter of time before proceedings begin. Argentina’s challenge to ICSID’s jurisdiction will likely fail, as Repsol will argue that it can apply the dispute resolution clause of the Argentina-Chile BIT\footnote{See, \textit{Argentina-Chile BIT}, supra note 87.} per the most favored nation clause of the Argentina-Spain BIT.\footnote{See, \textit{Argentina-Chile BIT}, supra note 87.}
allowing it access to pursue its claim against Argentina at ICSID. Any Argentine argument against this essence of this rule will be further weakened as the seminal case from which the rule stems, *Mafezzini*¹⁸³, was based on an Argentine investor suing the Kingdom of Spain, and they would be in effect arguing against their own prior arguments.

On the merits of the case, it is likely that the Tribunal will find that Argentina had a valid public interest in controlling its natural resources, but acted illegally by violating Article V of the Argentina-Spain BIT¹⁸⁴ in expropriating only Repsol’s shares in YPF, and not those of domestic investors as well. This discriminatory expropriation is illegal under the BIT and therefore there is a probability that the Tribunal will look to the *Chorzów* standard¹⁸⁵ when calculating damages and will seek to put the put Repsol where it would have been had the illegal action never taken place. As restitution in kind of the investment would be impracticable, the Tribunal will likely attempt to compensate Repsol with an award “correspond[ing] to the value which a restitution in kind would bear.”¹⁸⁶ Thus, the Tribunal will value YPF on the future date when a potential award might be granted, unless the value of YPF has fallen between the announcement of the expropriation and the award date, in which case the Tribunal will value YPF as of the announcement, April 15, 2012.

If Repsol succeeds with its claim at ICSID, no matter the size of the judgment, one can be sure that enforcement will be difficult. Creditors are hounding Argentina around the world, with limited success, even pursuing a military frigate docked in an African port.¹⁸⁷

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¹⁸² *See, Argentina-Spain BIT, supra* note 5, at art. VII.
¹⁸³ *See, Mafezzini, supra* note 85 and accompanying text.
¹⁸⁴ *See, Argentina-Spain BIT, supra* note 5, at art. V.
¹⁸⁵ *See, supra* fn 143-148 and accompanying text.
¹⁸⁷ *See, Fontevecchia, supra* note 171.
judgment potentially reaching USD$10.5 billion would be next to impossible to enforce without bankrupting Argentina, regardless of its willingness to pay. One can say with some certainty that if Argentina continues down this path it will find it increasingly difficult to encourage foreign investment and as a result; will not develop the Vaca Muerta shale any time soon, will continue as a net importer of petroleum, and will not be able to maintain the levels of economic growth to which it has become accustomed.