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Five Years Later: The CMS Award Placed in the Context of the Argentine Financial Crisis and the ICSID Arbitration Boom

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Five Years Later: The CMS Award Placed in the Context of the Argentine Financial Crisis and the ICSID Arbitration Boom

Harout Samra*

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I. INTRODUCTION

The stunning financial collapse experienced by Argentina at the turn of the century undoubtedly had far-reaching effects in many arenas. The overnight failure of its economic system was an especially unwelcome development for the dozens of multinational

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corporations that had made significant investments in Argentine industries and public utilities.¹ Many of these companies, including Vivendi and Enron,² immediately turned for relief to international arbitration mechanisms that were placed in the Bilateral Investment Treaties (BITs) between Argentina and their home states.³ Among the most frequently invoked arbitration organizations in the wake of the crisis was the International Centre for the Settlement of Investment Disputes (the ICSID).⁴ Prior to this boom, the ICSID, an independent international agency related to the World Bank, was comparatively untested and largely underutilized.⁵ Currently, however, of the 110 cases pending before the ICSID⁶ nearly thirty percent involve Argentina and arose from the 2001 financial crisis.⁷

Five years removed from the devastating crisis, the vast majority of cases brought before the ICSID have not been resolved, although the economy has made a striking rebound.⁸ However, several cases have been decided, and others are currently being appealed. Although the ICSID does not strictly observe the legal principle of *stare decisis* as American courts do, previous decisions carry a great deal of weight.⁹ Thus, close analysis of the ICSID Tribunal's conclusions is undoubtedly valuable. These decisions may shed light on how to resolve remaining cases and others that will arise from Latin America, given the recent, dramatic political and economic volatility in the region.

In large measure, *CMS Gas Transmission Company v. Argen-*

1. See 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, 42 (2004).

2. See World Bank Group, ISCID List of Pending Cases, <http://www.worldbank.org/icsid/cases/pending.htm> (last visited Apr. 1, 2007) [hereinafter ISCID List of Pending Cases].

3. See Di Rosa, *supra* note 1 at 41.

4. See generally David R. Sedlak, *ICSID's Resurgence In International Investment Arbitration: Can the Momentum Hold?*, 23 PENN ST. INT'L L. REV. 147, 158 (2004) (noting the recent increased number of ICSID arbitrations).

5. See STEPHEN J. TOOPE, *MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS* 253 (Grotius Publ'ns Ltd. 1990).

6. See ISCID List of Pending Cases, *supra* note 2 (referencing data current as of Apr. 1, 2007).

7. See *id.*

8. See Larry Rohter, *Economic Rally For Argentines Defies Forecasts*, N.Y. TIMES, Dec. 26, 2004, at 11.

9. See Lauren E. Godshall, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter Eleven*, 11 N.Y.U. ENVTL. L.J. 264, 306 (2002).

tine Republic may prove to be a seminal case.¹⁰ As the first of the cases emanating from the Argentine financial crisis to result in an award,¹¹ it will likely serve as an important model and thus merits significant study. Freshfield Bruckhaus Deringer, the international firm which represented CMS, noted that “[a]lthough the decision of one ICSID tribunal is not binding on another, this award will undoubtedly be an important precedent in the cases that follow it.”¹²

Further, significant consideration must be given to the methods employed by the Argentine government against those bringing suit against it. Argentina has consistently sought to obstruct the ICSID arbitration process and has largely, though not entirely, succeeded.¹³ While the ICSID is conceptually regarded by some as the most efficient of the major arbitration mechanisms, Argentina has employed the ICSID's abundant safeguards to perpetuate the arbitration process, at great expense to the plaintiffs.¹⁴ Also, Argentina has challenged the authority of the ICSID, at times suggesting that potential awards would not be recognized.¹⁵ Finally, the dramatic post-crash rebound of the Argentine economy once again made it an enticing market for international investment.¹⁶ The consequent interest of international corporations (including many of the parties bringing suit before the ICSID) to invest in Argentina once again has resulted in the interestingly frequent willingness of companies to drop suits against Argentina.¹⁷ This development undoubtedly merits analysis.

In sum, the Argentine financial crisis has proven to be a profound test of the ICSID arbitration mechanism. While there have undeniably been numerous challenges to the system, one might argue that it has withstood the significant pressures initi-

10. See *CMS Gas Transmission Co. v. Argentine Republic*, ICSID No. ARB/01/8, 44 I.L.M. 1205 (2005).

11. See Freshfields Bruckhaus Deringer, *International Arbitration: Bilateral Investment Treaties (US/Argentina)*, <http://www.freshfields.com/practice/dispute-resolution/publications/pdfs/12397.pdf> (last visited Apr. 1, 2007) [hereinafter Freshfields Bruckhaus Deringer].

12. See *id.*

13. See generally Di Rosa, *supra* note 1 (Di Rosa points to several jurisdictional objections raised that have consistently been rejected by ICSID tribunals).

14. See *id.*

15. See Michael Casey, *Azurix Wins \$165 Million vs Argentina in Latest ICSID Ruling*, DOW JONES NEWSWIRES, July 18, 2006, available at http://www.bilaterals.org/article.php3?id_article=5535.

16. See Larry Rohter, *Argentina, Turning Corner, Leans to the Left*, N.Y. TIMES, May 18, 2003, (Money and Business) at 1.

17. See *id.*

ated thus far. Ultimately, however, a final challenge lurks in the distance: the collection of awards against the Argentine Republic. Although this final challenge still lays several years into the future, the ICSID has a very promising, though largely untested, mechanism for collection of awards.¹⁸

The ball now lies squarely in Argentina's court. Despite anti-investment rumblings and a seemingly unfriendly outlook towards the ICSID, Argentina's leadership must make an essential choice. They must choose whether to continue to press against the enforcement of ICSID awards, which if the CMS award is to be used as persuasive precedent in subsequent cases, are likely to be unfavorable to the Republic. This dilemma presents the complex choice between short-term political esteem and the long-term economic health of the Republic. Choosing the former would be nothing short of a pyrrhic victory as it likely would be made at the detriment of the latter.

Section I introduces the reader to the important historical events that have led to the current state of affairs. A brief overview of the World Bank and its related arbitration mechanism, ICSID, will acclimate the reader with both institutions. An overview of the Argentine Financial Crisis and a discussion of the political conditions that led to the election of Nestor Kirchner as President of the Argentine Republic follows. Section II addresses the merits issues (including BIT Umbrella Clauses and expropriation) resolved by the ICSID Tribunal in the *CMS Gas Transmission Co. v. Argentine Republic* award. Section III addresses Argentine political interference in the ICSID Tribunal's rendering of an award and its future enforcement. Among the specific conflicts discussed are potential domestic constitutional challenges, requests for the annulment of the award, and pressure applied on other parties to withdraw from arbitrations. Finally, Section IV addresses the possible consequences of future Argentine challenges.

A. *A Brief Introduction to ICSID*

The World Bank, established amid the ruins of World War II, pursuant to the Bretton Woods Agreement of 1944, was intended initially to aid in the reconstruction of Europe.¹⁹ Its first loan, in

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

19. See World Bank Group, World Bank History, www.worldbank.org/archives (follow "history" hyperlink) (last visited Apr. 1, 2007).

1947, was for \$250 million to France.²⁰ Over the years, as the bank played an increasingly important role in the world, member states asked the President of the Bank to act as an intermediary in disputes.²¹ The first such instance occurred in 1951 when Eugene Black, then the Bank's President, agreed to mediate a dispute between the United Kingdom and Iran.²² Although this initial attempt at dispute resolution by the Bank failed due to Iranian suspicions that Mr. Black favored the U.K., additional requests for the Bank's involvement in dispute settlement continued to be made.²³ By 1965, it became clear that while the President of the Bank understood the importance of his role as a mediator, he was also reluctant to expand the Bank's mission beyond its "fundamental role of giving loans and guarantees for the financing of projects of high economic priority in less developed states."²⁴ Essentially, the Bank could not continue to expand its role as "the judge" if it were to carry on its intended purpose of being "the Banker."²⁵

Work on the formation of a related, but independent dispute resolution branch, the ICSID, began in 1961.²⁶ The Bank's Board of Governors approved the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) in March 1965.²⁷ The ICSID began operations in October 1966.²⁸ As of December 15, 2006, 155 States had signed the ICSID Convention.²⁹

Although the organization has generally been compared to other major arbitration mechanisms around the world, including the International Court of Justice and the Permanent Court of International Arbitration, there are several key differences.³⁰ For one, ICSID tribunals convene on an *ad hoc* basis; there are no standing tribunals as there are in the other two institutions.³¹

20. *Id.*

21. See K.V.S.K. NATHAN, ICSID CONVENTION: THE LAW OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES 47 (Juris Publ'g 2000).

22. See *id.* at 48.

23. See *id.*

24. *Id.* at 49 (citation omitted).

25. See *id.*

26. See *id.* at 50-51.

27. See *id.* at 51.

28. See *id.*

29. World Bank Group, ICSID List of Contracting States, <http://www.worldbank.org/icsid/constate/c-states-en.htm> [hereinafter ICSID List of Contracting States] (last visited Apr. 1, 2007).

30. See NATHAN, *supra* note 21, at 51.

31. See *id.*

Panels form according to the requirements of the Convention, which grants the parties significant discretion.³² The ICSID also hears cases between states and investors, whereas the other two institutions may only do so indirectly.³³

The ICSID was founded under the general principle that it should treat international investors and host states equitably,³⁴ especially “considering the need for international cooperation for economic development, and the role of private international investment therein”³⁵ In fact, the Convention’s Preamble recognizes that “while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases”³⁶ Stephen Toope effectively illustrates the consequent dynamic the preamble establishes, “Investors will tend to be better protected under ICSID than under the legal system of a developing state.”³⁷ “The state will tend to lose the ability to give free rein to auto-interpretive notions of sovereignty. The *quid pro quo* may be increased foreign private sector investment.”³⁸ As noted earlier, flexibility has long been regarded as an important aspect of ICSID arbitrations and parties are given a “wide range of options regarding their ability to control the arbitration procedure . . . [i]n general, the parties can shape many of the arbitration rules for themselves, as long as there is an agreement between them regarding these rules.”³⁹

ICSID experienced tremendous growth over the last decade.⁴⁰

32. The Convention merely requires that “the Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.” See International Convention on the Settlement of Investment Disputes [ICSID], art. 37, Aug. 27, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention], available at <http://www.worldbank.org/icsid/basicdoc/partA.htm>. However, in the event that the parties cannot agree on “the number of arbitrators and the method of their appointment,” the Convention requires that “the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.” *Id.*

33. *Id.* (“Both the Hague institutions [the International Court of Justice and the Permanent Court of International Arbitration] only hear disputes between states themselves of between states and private parties through the intervention of states.”).

34. TOOPE, *supra* note 5, at 219.

35. ICSID Convention, *supra* note 32, pmbl.

36. *Id.*

37. See TOOPE, *supra* note 5, at 222-23 & n.15 (asserting that this is due to “the neutrality of the forum”).

38. *Id.* at 223.

39. MOSHE HIRSCH, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES 28 (Martinus Nijhoff Publishers 1993).

40. See generally Sedlak, *supra* note 4 (describing the resurgence of ICSID in international investment arbitration).

Two main reasons are cited for this impressive increase: (1) the “[r]ise in the [n]umber of [s]ignatories” to the ICSID Convention, and (2) the “[r]ise in the [n]umber of BITs.”⁴¹ In 1991, Professor Jan Paulsson specifically predicted that the number of ICSID arbitrations would increase dramatically over the next twenty-five years as more states, especially Latin American states, signed the Convention.⁴² Interestingly, Argentina signed the ICSID Convention that same year⁴³ and would soon contribute to the vindication of Professor Paulsson’s propitious forecast, as the remarkable number of ICSID arbitrations originating in Latin America would lead some to describe this era as ICSID’s “Arbitration Boom.”⁴⁴

B. Boom . . . then Bust: The Argentine Financial Crisis

Eduardo Alberto Duhalde assumed the Office of President of the Republic of Argentina on January 2, 2002 in the midst of a dramatic and devastating economic crash.⁴⁵ He was the fifth man to hold that office in a span of two weeks after the resignation of Fernando de la Rúa on December 21 of the previous year.⁴⁶ Although the crisis seemingly culminated in the final weeks of 2001, it was, in fact, years in the making. Many trace the 2001 crisis to the economic reforms instituted by Argentine President Carlos Menem over a decade earlier.⁴⁷ Ironically, these reforms initially were credited for Argentina’s economic renaissance of the 1990s.⁴⁸

Menem, elected in 1989, inherited a distressed country.⁴⁹ Crippled by the economic mismanagement of a staid military

41. *Id.* at 158, 159.

42. See Jan Paulsson, *ICSID's Achievements and Prospects*, 6 ICSID REV.: FOREIGN INVESTMENT L.J. 380, 398 (1991).

43. See ICSID List of Contracting States, *supra* note 29.

44. See Carlyn Kolker, *Arbitration Boom: The Rise of Left-Leaning Governments in Latin America has Corporate Clients Heading to ADR Forums*, 28 AM. LAW. 111 (2006).

45. See Georgios Theophanous, *Duhalde's Dilemma: Argentina in Crisis*, 25 HARV. INT'L. REV. 8-9 (2003), available at <http://hir.harvard.edu/articles/1083/>; Larry Rohter, *Populist Argentine Senator Steps In to Fill the Void, Becoming 5th President in 2 Weeks*, N.Y. TIMES, Jan. 2, 2002, at A6 [hereinafter Rohter, *Populist Argentine Senator Steps In*].

46. See Rohter, *Populist Argentine Senator Steps In*, *supra* note 45.

47. See generally U.S. Dep't. of State, Background Note: Argentina (Nov. 2006), <http://www.state.gov/r/pa/ei/bgn/26516.htm> [hereinafter Background Note: Argentina] (describing reforms instituted in the 1990's, and subsequent economic fallout).

48. See *id.*

49. See *id.*

junta, Argentina acquired a huge debt as a result of the *junta*'s disastrous decision to engage the United Kingdom in the 1982 war over the Falkland Islands (referred to as the *Malvinas* by Argentinians).⁵⁰ Following the 1983 reestablishment of democracy, the nation plunged further economically, experiencing average inflation of over 350% annually.⁵¹ This catastrophe largely formed the backdrop for the bold reforms that Mr. Menem would put into place in 1991, the second year of his term.⁵²

Among the main components of Menem's reforms was the implementation of the "Convertibility Plan."⁵³ Menem based the plan on two fundamental measures, in addition to a series of other related policies.⁵⁴ The first measure aimed to "establish a fixed exchange rate with the U.S. dollar" (with one peso worth one dollar, and the two currencies treated essentially as equivalents) that the Argentine government guaranteed.⁵⁵ The government "also promised not to issue new pesos except to buy foreign exchange . . . and to absorb local currency when people wanted to buy dollars."⁵⁶ Ultimately, the high cost associated with maintaining this policy led the nation to financial ruin. The subsequent reversal of this policy precipitated the arbitrations that would arise before the ICSID.

The second key component of Menem's sweeping economic reforms required the privatization of previously nationalized industries, including utilities.⁵⁷ Most of the formerly state-owned industries were privatized through long-term concessions and licenses.⁵⁸ The government specifically sought to attract foreign investors to acquire many of these businesses.⁵⁹ A widely held belief that the local market lacked potential investors with the requisite capital and expertise needed to acquire, maintain, and, ideally, improve the existing infrastructure motivated the

50. *See id.*

51. *See* Jorge Schvarzer, *The Costs of the Convertibility Plan: The Economic and Social Effects of Financial Hegemony*, in *BROKEN PROMISES? THE ARGENTINE CRISIS AND ARGENTINE DEMOCRACY* 71, 72 (Edward Epstein et al. eds., Rowman & Littlefield Pub's 2006).

52. *See id.*

53. *See id.* at 73.

54. *See id.*

55. *Id.*

56. *Id.*

57. *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID No. ARB/01/08, 44 I.L.M. 1205, 1211 (2005).

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

59. *See id.* at 44-45.

reform.⁶⁰ The government rolled back many of the barriers that had stood in the way of foreign investment in Argentina.⁶¹ It also sought to raise Argentina's profile among international investors by advertising the new, less burdensome regulations and, in some instances, actively engaging potential investors.⁶²

Additionally, Argentina aggressively sought, with great success, to expand its network of BITs with nations representing potential investors.⁶³ In the 1990s alone, Argentina entered into over fifty such BITs with nations throughout the world, of which thirty-eight are still in force.⁶⁴ These BITs largely set the ground rules by which citizens of each of the party nations could invest in the other.⁶⁵ Further, in creating concession contracts, the government included provisions purposely tailored to soothe investors' concerns regarding the security of their investments in Argentine utilities.⁶⁶ One key provision, which would later come to play an important role in the cases, regarded the process by which foreign utilities computed the cost of the services to Argentine consumers.⁶⁷ Most concession contracts enabled the foreign investor to compute their costs in U.S. dollars, then convert this amount to pesos (under the prevailing exchange rate).⁶⁸ At that time, the prevailing exchange rate was conveniently set at one-to-one by law.⁶⁹ Although several such concessions were made to foreign investors, Argentina, nevertheless, retained control of the fee schedules through government regulatory agencies.⁷⁰ The system seemed fairly stable at the time, reliance by foreign investors on the goodwill and continued regulatory reform by the government proved ill-advised.

The 1990s seemed to be a time of great progress for the Argentine economy — inflation was under control and quality of life improved dramatically.⁷¹ However, below the surface, pres-

60. *See id.* at 45.

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*; World Bank Group, Bilateral Investment Treaties, <http://www.worldbank.org/icsid/treaties/argentina.htm> (last visited Apr. 1, 2007).

65. *See* Di Rosa, *supra* note 1, at 41.

66. *See id.* at 45.

67. *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID No. ARB/01/8, 44 I.L.M. 1205, 1211 (2005).

68. *See* Di Rosa, *supra* note 1, at 45.

69. *See id.*

70. *See id.* at 45-46.

71. *See id.* at 46-47.

sure was mounting on the system and sustaining the Convertibility Plan soon became a profound burden on the nation.⁷² Even Menem announced that the current situation was unsustainable.⁷³ By the turn of the century, a global economic downturn, coupled with imprudent spending and tax initiatives, made the burden of Convertibility too great. Menem's new financial order, which had shown so much promise in the 1990s, soon would collapse.

As confidence in the peso began to falter, many Argentines chose to convert their savings from pesos to dollars.⁷⁴ Unable to maintain its commitment of exchanging the currencies at a one-to-one rate and facing a run on the banks, the Argentine government soon placed a strict cap on the amount of money citizens could withdraw from their own bank accounts.⁷⁵ Public disenchantment with the government reached its peak following this decision.⁷⁶ Soon protestors flooded the streets and paralyzed the nation.⁷⁷ The government subsequently declared a "State of Siege" to no avail.⁷⁸

On January 6, 2002, the Argentine government enacted Law 25561, called the "Public Emergency Law of 2002."⁷⁹ This law was intended to remedy the dire situation.⁸⁰ Among other things, the Convertibility System was abandoned in favor of a market approach to currency valuation.⁸¹ The value of the peso promptly fell from its previous rate of one-to-one with the dollar to approximately 3.90 pesos to one dollar.⁸²

Of specific interest to the subsequent litigation before ICSID, however, was that the Public Emergency Law also required that "privatized utility companies continue using a currency conver-

72. See Clifford Krauss, *Former Argentine President Warns of Economic Peril*, N.Y. TIMES, Aug. 16, 2000, at C4.

73. See *id.* (quoting Mr. Menem, "If we continue on this path, I think there will be a devaluation, or a dollarization of the economy . . . If things go on this way, we are heading into a depression that could be dramatic for Argentina.>").

74. See Clifford Krauss, *Argentine Economy: Postponing the Inevitable*, N.Y. TIMES, Dec. 4, 2001, at A10.

75. See Clifford Krauss, *Argentina Limits Withdrawals as Banks Near Collapse*, N.Y. TIMES, Dec. 3, 2001, at A3.

76. See *id.*

77. See Clifford Krauss, *Reeling From Riots, Argentina Declares a State of Siege*, N.Y. TIMES, Dec. 20, 2001, at A3.

78. See *id.*

79. See Law No. 25561, Jan. 6, 2002, [LXII-A] A.D.L.A. 44.

80. See *id.* (recitals).

81. See *id.* (tit. III, art. 3).

82. See CHRISTINA DASEKING ET AL., LESSONS FROM THE CRISIS IN ARGENTINA 1 (Int'l Monetary Fund 2004).

sion formula from dollars to pesos – for billing purposes – of one dollar to one peso.”⁸³ Clearly, this requirement, as Paolo Di Rosa notes, “substantially altered the economic and financial basis of the utilities’ business due to the sharp devaluation of the peso.”⁸⁴ Further, the law also required utility companies to provide the same level of service.⁸⁵ Thus, while the production costs born by utility companies did not change, the fees the companies were legally bound to charge Argentine consumers fell in value by more than two-thirds (considering the devaluation of the peso).⁸⁶

C. *Subsequent Political Upheaval and the Kirchner Era*

As the economic boom of the 1990s screeched to a halt and the Argentine economy dove into recession, the Government responded by imposing strict financial policies intended to limit the flight of capital and prevent the total collapse of the economy.⁸⁷ The policies, however, resulted in widespread discontent and culminated in violent riots throughout the country, though focused in Buenos Aires.⁸⁸ The upheaval toppled the sitting President, Fernando de la Rúa, who, as Menem’s successor, had been in office only two years.⁸⁹

Following the two-day tenure of interim president Federico Ramon Puerta, the Legislative Assembly elected Adolfo Rodriguez

83. Law No. 25561, art. 8 (“Dispónese que a partir de la sanción de la presente ley, en los contratos celebrados por la Administración Pública bajo normas de derecho público, comprendidos entre ellos los de obras y servicios públicos, quedan sin efecto las cláusulas de ajuste en dólar o en otras divisas extranjeras y las cláusulas indexatorias basadas en índices de precios de otros países y cualquier otro mecanismo indexatorio. Los precios y tarifas resultantes de dichas cláusulas, quedan establecidos en pesos a la relación de cambio UN PESO (\$ 1) = UN DOLAR ESTADOUNIDENSE (U\$S 1) [sic].” (emphasis in original)) (translation by author).

84. Di Rosa, *supra* note 1, at 47.

85. See Law No. 25561, art. 10 (“Las disposiciones previstas en los artículos 8° y 9° de la presente ley, en ningún caso autorizarán a las empresas contratistas o prestadoras de servicios públicos, a suspender o alterar el cumplimiento de sus obligaciones.”).

86. See Di Rosa, *supra* note 1, at 47-48. Di Rosa illustrates this with a very effective example of a thirty peso bill which was formerly valued at thirty dollars to the utility but which, given the new exchange rate, is now valued at only about ten dollars.

87. See generally Larry Rohter, *Within Hours, 2 Quit as Argentine Leader*, N.Y. TIMES, Dec. 31, 2001, at A6 (describing the economic and social upheaval in late December 2001).

88. See *id.*

89. *Id.*

Saa to the Presidency on December 23, 2000.⁹⁰ Saa subsequently announced that Argentina would default on its international debt but insisted on maintaining currency parity with the dollar.⁹¹ Amid continued violence and unable to garner significant support for his plan, Saa surprisingly resigned only seven days after his election, on December 30, 2001.⁹² After yet another two-day interim presidency, the Legislative Assembly elected the Peronist leader Eduardo Duhalde.⁹³ The fifth President in less than three weeks, Duhalde promptly moved to pass legislation to abandon Argentina's decade-long policy of currency parity with the dollar and imposed the new restrictions on foreign investment that would lead to the manifold subsequent arbitrations.⁹⁴ Duhalde also put social programs in place that were intended to pacify the massive discontent that had led to the resignation of his predecessors.⁹⁵ Largely successful in mollifying the capital, Duhalde served in office for over a year.⁹⁶

On April 27, 2003, presidential elections were finally held and former President Menem, who had instituted privatization and currency parity in the early 1990s, narrowly won the first round with twenty-four percent of the vote.⁹⁷ However, he was forced into a runoff against the relative outsider Nestor Kirchner, the Governor of Santa Cruz, a province in the southern Patagonia region of Argentina.⁹⁸ After it appeared in polls that Menem would lose handily to Mr. Kirchner, he pulled out of the runoff and Kirchner subsequently assumed the office on May 25, 2003.⁹⁹

90. See Clifford Krauss, *Argentine Leader Declares Default On Billions In Debt*, N.Y. TIMES, Dec. 24, 2001, at A1.

91. See Background Note: Argentina, *supra* note 47.

92. See *id.*; see also Larry Rohter, *Argentina Drifts, Leaderless, as Economic Collapse Looms*, N.Y. TIMES, Jan. 1, 2002, at A3.

93. See Larry Rohter, *Populist Argentine Senator Steps In to Fill the Void, Becoming 5th President in 2 Weeks*, N.Y. TIMES, Jan. 2, 2002, at A6.

94. See Larry Rohter, *Argentina's New Leader Will Present Economic Plan Today*, N.Y. TIMES, Jan. 4, 2002, at A4. This legislation would become Emergency Law 25561. See Law No. 25561, Jan. 6, 2002, [LXII-A] A.D.L.A. 44.

95. See Larry Rohter, *In Footsteps of Evita: Argentina's New First Lady*, N.Y. TIMES, Feb. 1, 2002, at A3 (noting that Hilda Duhalde, wife of President Eduardo Duhalde, oversaw these governmental social programs).

96. See Larry Rohter, *Signs of Life in Argentina*, N.Y. TIMES, Feb. 25, 2003, at W1.

97. See Larry Rohter, *Menem Takes Early Lead in Argentine Presidential Election*, N.Y. TIMES, Apr. 28, 2003, at A3.

98. See Larry Rohter, *Menem, Polls Slipping, Quits Argentine Race*, N.Y. TIMES, May 15, 2003, at A8.

99. See *id.*; Argentina: Kirchner Ya Es Presidente [Argentina: Kirchner Now Is President], BBC Mundo.com (May 25, 2003), http://news.bbc.co.uk/hi/spanish/latin_america/newsid_2935000/2935832.stm.

A virtual unknown in Buenos Aires, Kirchner has since buttressed his support nationally and is now enormously popular throughout his country.¹⁰⁰ However, he has adopted a very different tone on international investment than his predecessors.¹⁰¹ *The Economist* noted that Kirchner “revels in confrontation with politically unpopular foreign businesses”¹⁰² It further noted, “Under President Néstor Kirchner, Argentina has taken up the slogan ‘a serious country.’ But more than three years after its devastating financial crisis, it has made few efforts to make amends with foreign firms – not the least of those in its utilities and energy sectors.”¹⁰³ Kirchner has challenged the validity of ICSID awards, “indicat[ing] that he will ignore any rulings against the government, even though failure to comply could lead to trade sanctions.”¹⁰⁴ Further, he has placed significant pressure to withdraw on companies that are currently engaged in ICSID arbitrations against Argentina.¹⁰⁵

Anecdotes abound regarding Kirchner’s prickly personality and particular contempt for foreign investors who, he perceives, were a major cause of the crippling economic crash his country experienced.¹⁰⁶ Attending an international conference in Spain in July 2003, Mr. Kirchner held a meeting with Spanish business leaders, including the presidents of *Telefonica* and *Repsol YPF*, both heavily invested in his nation.¹⁰⁷ According to the Spanish and Argentine newspapers, *El Mundo* and *Clarín*, respectively, Kirchner told his powerful audience that they “should not complain about the freezing of tariffs on public services . . . because they had made sufficient money in Argentina during the 1990s.”¹⁰⁸ Mr. Kirchner later noted, “I spoke with crudeness, but with dig-

100. See Larry Rohter, *As Argentina’s Debt Dwindles, President’s Power Steadily Grows*, N.Y. TIMES, Jan. 3, 2006, at A1.

101. See ANDRÉS OPPENHEIMER, CUENTOS CHINOS: EL ENGAÑO DE WASHINGTON, LA MENTINA POPULISTA Y LA ESPERANZA DE AMÉRICA LATINA [TALL TALES: THE DECEPTION OF WASHINGTON, THE POPULIST LIE, AND THE HOPE OF LATIN AMERICA] (Editorial Sudamericana 2005).

102. See *Business in Argentina: Getting Serious*, ECONOMIST, May 21, 2005, at 97 [hereinafter ECONOMIST, *Getting Serious*].

103. *Id.*

104. *Taking on Foreigners, Again; Argentina*, ECONOMIST, Mar. 19, 2005, at 4 [hereinafter ECONOMIST, *Taking on Foreigners*].

105. See Luke Eric Peterson, *Spanish Firm, Gas Natural, Drops Argentine Claim*, INVESTMENT LAW AND POL’Y NEWS BULL., Apr. 8, 2005, at 6, available at www.iisd.org/pdf/2005/investment_investsd_april8_2005.pdf.

106. See OPPENHEIMER, *supra* note 101, at 166.

107. *See id.*

108. *Id.* at 166-67 (translation by author).

nity. I believe that, not all, but many Spanish businesses benefited greatly during the Menem era and I had to say that. Today they must respect the rules of the game.”¹⁰⁹ The next day, *El Pais*, a Madrid newspaper, ran the headline “Kirchner accuses Spanish businesses of taking advantage of Argentina.”¹¹⁰

Mr. Kirchner’s disdain for foreign investment is certainly not limited to those he faults for taking advantage of Argentina.¹¹¹ Carly Fiorina, then the leader of Hewlett-Packard, visited Mr. Kirchner in July 2004 with the express purpose of analyzing potential investment opportunities.¹¹² Ms. Fiorina left Mr. Kirchner’s office offended, however, after “he kept her waiting so long that her patience gave out.”¹¹³ Andrés Oppenheimer notes that when visiting Brazil on the same trip, Ms. Fiorina announced that Hewlett-Packard would double its investment in Brazil after meeting with Brazilian President Lula da Silva.¹¹⁴

Mr. Kirchner’s idiosyncratic manner, called “the K-style,”¹¹⁵ has generally proven rather politically effective with Argentines, “whose traditional suspicion of [international investors] was exacerbated by the crisis that brought about the collapse of the economy”¹¹⁶ Further, Kirchner has been credited, in large part, with the stunning rebound that his country has experienced over the last three years.¹¹⁷ *The New York Times* noted, “the economy has grown by 8 percent for two consecutive years, exports have zoomed, the currency is stable, investors are gradually returning and unemployment has eased from record highs”¹¹⁸ Some observers have described this turnaround as nothing short of a ““remarkable historical event.””¹¹⁹

109. *Id.* at 167 (quoting *Dura Reunión de Kirchner con Empresarios*, LA NACIÓN, July 18, 2003) (translation by author).

110. *Id.* (translation by author).

111. *Id.* Astute Latin American commentator Andrés Oppenheimer asserts Mr. Kirchner’s disdain for foreign investment is due, in part, to his leadership of an isolated southern province with limited experience in international affairs.

112. See *Waiting Game*, FIN. TIMES (London), July 29, 2004, at 12.

113. *Id.*

114. See OPPENHEIMER, note 101, at 166.

115. *Id.* at 172-73.

116. Larry Rohter, *Argentine Leader’s Quirks Attract Criticism*, N.Y. TIMES, DEC. 27, 2004, at A9; see OPPENHEIMER, *supra* note 101, at 172.

117. See Larry Rohter, *As Argentina’s Debt Dwindles, President’s Power Steadily Grows*, N.Y. TIMES, Jan. 3, 2006, at A1.

118. Larry Rohter, *Economic Rally For Argentines Defies Forecasts*, N.Y. TIMES, Dec. 26, 2004, at 1.

119. *Id.* (quoting economist Mark Weisbrot of the Center for Economic and Policy Research in Washington, D.C.).

II. THE CMS CASE: A DECISION ON THE MERITS

On July 26, 2001, a mere six months after the passage of Emergency Law 25561, the ICSID received a Request for Arbitration against the Argentine Government from CMS Gas Transmission Company.¹²⁰ This step formally initiated what would become a nearly four-year-long process that would ultimately lead to an award of over one hundred thirty-three million U.S. dollars in favor of CMS, the claimant.¹²¹ In order to appreciate the complexity of the merits issues analyzed by the Tribunal, it is necessary to review a decade of events that would, seemingly inexorably, lead to the ICSID Tribunal in Washington.

A. Overview of CMS v. Argentine Republic

As a part Menem's broad 1989 reforms,¹²² the Argentine Government specifically targeted the gas sector in its privatization plans, using Law No. 24076 of 1992.¹²³ The new legislation divided *Gas del Estado*, the national gas company, into several components for gas transportation and distribution.¹²⁴ The Government granted *Transportadora de Gas del Norte* (TGN), one of the gas transportation components, a license to operate and opened it to investors through a public tender offer.¹²⁵ CMS claimed that the legislation, regulations, and TGN licensure fashioned a legal framework for the conversion of tariffs and allowed the tariffs to be "adjusted every six months in accordance with the U.S. Producer Price Index."¹²⁶

On July 7, 1995, CMS initiated the process by which it would eventually purchase nearly thirty percent of TGN.¹²⁷ CMS' Offering Memorandum was based on the terms of the 1992 Information Memorandum and the license, both prepared by Argentina.¹²⁸ CMS claimed that its investment in TGN totaled to almost \$175 million.¹²⁹

120. See *CMS Gas Transmission Co. v. Argentine Republic*, ICSID No. ARB/01/8, 44 I.L.M. 1205, 1206 (2005).

121. See *id.* at 1257.

122. See *infra* Section I.B.

123. See *CMS Gas*, 44 I.L.M. at 1211 (footnote omitted).

124. See *id.* (footnote omitted).

125. See *id.* (footnote omitted omitted).

126. *Id.*; see also *infra* Section I.B. The PPI is tracked by the U.S. Department of Labor, Bureau of Labor Statistics and is available at <http://www.bls.gov/ppi/>.

127. See *CMS Gas*, 44 I.L.M. at 1211. Initially, it purchased 25% of the company, and it later purchased an additional 4.42%. See *id.*

128. See *id.*

129. *Id.* at 1213.

As Argentina's economy progressively crumbled near the end of the millennium, the Government called for a meeting with representatives of the gas companies to discuss a temporary suspension of PPI adjustments to the gas tariffs.¹³⁰ Although the companies agreed to a suspension of the adjustments for six months, they established that the deferral costs would be recouped by the companies over the subsequent year.¹³¹ This agreement was not intended to set any precedent or change the framework that had been adopted earlier.¹³² According to the Tribunal, however, it soon became apparent that the agreement to adjust tariffs at the end of the six-month period would not be implemented.¹³³ The "public regulatory agency of the gas industry", ENARGAS, even directed TGN to "refrain from introducing" adjustments of the tariffs as called for in the license agreement.¹³⁴

Subsequently, the gas companies held another meeting and, once again, PPI increases were frozen for a period of two years.¹³⁵ However, a related decree was negotiated at this meeting and represented the new arrangements that had been made by the Government with the gas companies.¹³⁶ This decree "recognize[ed] that the US PPI adjustment constituted 'a legitimately acquired right' and was a basic premise and condition of the tender and the offers."¹³⁷ Soon thereafter, though, an Argentine court suspended the agreement and the decree.¹³⁸ This suspension stemmed from a pending challenge to the legality of the PPI adjustments and TGN's persistent applications for tariff adjustments continued to be denied.¹³⁹

The economic crash at the end of 2001 and the passing of Emergency Law No. 25561 made the difficulties between the gas companies and the Argentine government dramatically more complex.¹⁴⁰ The new law envisioned a process of renegotiations of existing licenses by a special "Renegotiation Commission."¹⁴¹ However, this process moved slowly, largely due, according to

130. *See id.* at 1211.

131. *See id.* at 1211-12.

132. *See id.* at 1212.

133. *Id.*

134. *Id.*

135. *See id.*

136. *See id.*

137. *Id.*

138. *See id.*

139. *See id.*

140. *See id.*; *see also* discussion *infra* Part II.B.

141. *CMS Gas*, 44 I.L.M. at 1212.

Argentina, to the “inherent difficulty in renegotiating 64 public utility contracts and numerous subcontracts.”¹⁴²

CMS asserted that it relied on Argentina’s promises and guarantees, in terms of the stated tariff adjustment and the currency exchange policies, in deciding whether to invest in TGN.¹⁴³ A significant part of the losses that CMS claimed were related to the fact that CMS’ “ability to pay its debt had been reduced by a factor or more than three because the debt [was] denominated in US dollars and there ha[d] been an intervening devaluation of the peso.”¹⁴⁴

B. Argentina’s Preliminary Objections Addressed Generally

Prior to hearing the case on its merits, the Tribunal addressed a jurisdictional objection filed by Argentina.¹⁴⁵ As Paolo Di Rosa notes in his careful review of the jurisdictional issues addressed by the CMS Tribunal, “ICSID is a forum of limited jurisdiction.”¹⁴⁶ In the event that a party files jurisdiction objec-

142. *Id.*

143. *See id.* at 1213.

144. *Id.*

145. *See generally* CMS Gas Transmission Co. v. Argentine Rep. (*Jurisdictional Decision*), ICSID No. ARB/01/8, 42 I.L.M. 788 (2003) (providing the jurisdictional decision).

146. Di Rosa, *supra* note 1, at 49. Di Rosa further notes that Article 25 of the ICSID Convention governs jurisdiction. *See id.* at n.18. Its requirements are as follows: “(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision 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. (2) ‘National of another Contracting State’ means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention. (3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required. (4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would

tions, as Argentina did in the CMS case on October 7, 2002,¹⁴⁷ the Tribunal may suspend proceedings on the merits issues, as the CMS Tribunal chose.¹⁴⁸ Di Rosa further notes that Argentina has consistently raised jurisdictional objections, despite the fact that, in every instance, the judgments of the tribunals as to the objections have been “adverse to Argentina.”¹⁴⁹

Di Rosa divides the jurisdictional objections filed by Argentina into four major categories: (1) Applicable law, (2) Sovereign Prerogative, (3) Exclusive Jurisdiction and Waiver of Other Fora, and (4) *Ius Standi* and Related Issues.¹⁵⁰ Argentina based its legal objections largely on provisions of the ICSID Convention and the BIT, which indicated, for instance, “the Tribunal shall apply the law of the Contracting State party to the dispute”¹⁵¹ Di Rosa adds, however, that the Tribunal in the *Siemens* case flatly rejected this argument on the grounds that questions of jurisdiction are governed not by Article 42 of the Convention, but by Article 25.¹⁵² The Tribunal deemed Argentine law “irrelevant” in determinations of jurisdiction.¹⁵³

Argentina also consistently objected that the issues raised by the claimant “should be viewed as inherently sovereign determinations immune from legal challenges”¹⁵⁴ In the CMS jurisdictional proceeding, the claimants argued, “CMS’s compensation claim is not founded on the devaluation of the peso, but rather on the loss in value of its investment due to Argentina’s dismantling of the dollar-based tariff regime.”¹⁵⁵ CMS further claimed that it was not “complaining about general economic measures, but about specific measures of Argentine federal authorities that breached the commitments made towards CMS under the Treaty and inter-

not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).” ICSID Convention, *supra* note 32, art. 25.

147. See *Jurisdictional Decision*, 42 I.L.M. at 790.

148. *Id.* ICSID Rule 41 governs tribunals’ handling of jurisdictional objections. See ICSID, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), <http://www.worldbank.org/icsid/basicdoc/partF.htm> (last visited Apr. 1, 2007).

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

150. See *id.* at 51-57.

151. ICSID Convention, *supra* note 32, art. 42.

152. See Di Rosa, *supra* note 1, at 52 (citation omitted); see also ICSID Convention, *supra* note 32, art. 25.

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

154. *Id.* at 53.

155. *Jurisdictional Decision*, 42 I.L.M. at 792 (footnote omitted).

national law."¹⁵⁶ The Tribunal, acknowledging CMS's arguments, addressed this issue by distinguishing between "general economic policy" and "specific measures . . . of general economic policy having a direct bearing" on the foreign investments.¹⁵⁷ While in the former case, the Tribunal noted that it "cannot pass judgment on whether [the policies] are right or wrong," it held that in the latter case it has jurisdiction.¹⁵⁸

The third grouping of preliminary objections that Di Rosa outlined involves "Exclusive Jurisdiction and Waiver of Other Fora."¹⁵⁹ Di Rosa frames the issue as follows:

whether (1) the dispute should be construed to involve only a violation of the relevant contract (which, in those instances where the contract contains an exclusive jurisdiction clause pursuant to which the parties waive recourse to all other fora, would arguably render such dispute subject to resolution only in local Argentine courts), or whether (2) the dispute involves damages suffered by the foreign investor itself pursuant to the relevant BIT (not the concession contract), thereby engendering a cause of action under the BIT and rendering the dispute cognizable by an international arbitral tribunal.¹⁶⁰

As to these issues, ICSID Tribunals have held that "foreign investors' rights under the BITs are independent and separate from those enjoyed under any contract with the State, and that the BITs allow causes of action that are unrelated to those that may arise under any contract."¹⁶¹

The final grouping of objections, those involving *Ius Standi*, fundamentally address the issue of whether shareholders, as CMS is to TGN, may seek damages through ICSID arbitration.¹⁶² Argentina argued that shareholders are not entitled to seek damages independent of the company.¹⁶³ It further asserted that to hold that shareholders may seek damages through arbitration would result in "endless claims" from "attenuated and remote" parties.¹⁶⁴ In the CMS case, specifically, Argentina asserted, "TGN being the licensee, and CMS only a minority shareholder in

156. *Id.* at 793 (footnote omitted).

157. *Id.*

158. *Id.*

159. Di Rosa, *supra* note 1, at 54.

160. *Id.*

161. *Id.*

162. *See id.* at 57.

163. *See id.*

164. *Id.*

this company, only TGN could claim for any damage suffered . . . CMS is claiming not for direct damages, but for indirect damages which could result from its minority participation in TGN.”¹⁶⁵ The Tribunal soundly rejected this argument, holding that it could “find[] no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders.”¹⁶⁶

C. *Merits Issues Addressed in CMS v. Argentine Republic*

Of the nearly forty cases filed before the ICSID stemming from the Argentine financial crisis, *CMS Gas Transmission Co. v. Argentine Republic* was the first (and thus far only one) to result in an award.¹⁶⁷ Consequently, several merits issues addressed by the CMS Tribunal are likely to have an impact on subsequent Argentine arbitrations.¹⁶⁸ The Award, released on May 12, 2005, found that Argentina “breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II (2) (a) of the [BIT],” and that Argentina must pay CMS “compensation in the amount of U.S. \$133.2 million.”¹⁶⁹ Additionally, the Tribunal required that CMS transfer its remaining shares in TGN to Argentina upon payment of U.S.\$2.148 million.¹⁷⁰ The Tribunal also required Argentina to pay interest expenses.¹⁷¹ Although Annulment proceedings have been initiated against this award,¹⁷² the Tribunal’s decisions on the individual merit issues before it are ripe for study.¹⁷³

1. Interpretation of BIT “Umbrella Clauses”

Umbrella clauses, described as those “that obligate the Con-

165. *Jurisdictional Decision*, 44 I.L.M. at 793.

166. *Id.* at 795.

167. Freshfields Bruckhaus Deringer, *supra* note 11.

168. *See id.*

169. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID No. ARB/01/8, 44 I.L.M. 1205, 1257 (2005).

170. *See id.*

171. *See id.*

172. For reasons discussed *infra* Part III.B, it would seem that the Annulment proceedings requested by Argentina bear little chance of success.

173. Issue groupings are organized using Di Rosa’s formulation of the major merit issues that were before CMS Tribunal. Although no award had been rendered in the case at the time of Di Rosa’s publication, his framework is undoubtedly helpful. *See* Di Rosa, *supra* note 1, at 61-72.

tracting States to comply with any specific agreement or contract they may have entered into . . . with a foreign investor," are fairly prevalent in BITs but nevertheless have been subject to varying interpretations in ICSID arbitrations.¹⁷⁴ The issue of primary concern is "whether they can be construed to elevate to the status of a BIT violation . . . a commitment by the host State with respect to the investment."¹⁷⁵ Article II(2)(c) of the United States – Argentina BIT explicitly states the following: "Each Party shall observe any obligation it may have entered into with regard to investments."¹⁷⁶

Argentina argued against the application of the Treaty's umbrella clause on the grounds that "no obligations were undertaken by Argentina in respect of CMS, only in respect of TGN, and the latter has not made any claim for contractual violation under the License."¹⁷⁷ CMS responded, arguing,

all the commitments made by Argentina towards the investment, whether under the legislation in force or contractual arrangements, were breached as a result of the measures adopted and particularly the dismantling of the tariff regime and related matters. Therefore, the argument follows, the umbrella clause of the Treaty has also been breached.¹⁷⁸

Referring to Article II(2)(c) in the BIT, the Tribunal held that the obligations under the treaty's umbrella clause had "not been observed . . . to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty."¹⁷⁹ The Tribunal specifically referenced:

two stabilization clauses contained in the License that have significant effect when it comes to the protection extended to them under the umbrella clause. The first is the obligation undertaken not to freeze the tariff regime or subject it to price controls. The second is the obligation not to alter the basic rules governing the License without TGN's writ-

174. *Id.* at 62.

175. *Id.*

176. Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. II(2)(c), Nov. 14, 1991, 1991 U.S.T. LEXIS 176.

177. CMS Gas Transmission Co. v. Argentine Republic, ICSID No. ARB/01/8, 44 I.L.M. 1205, 1216 (2005).

178. *Id.* at 1237.

179. *Id.* at 1238.

ten consent.¹⁸⁰

Given this rather broad interpretation of the U.S. – Argentina BIT’s “umbrella clause” Argentina should have some cause for concern in future cases. However, given the non-binding nature of ICSID precedent and the general disagreement among tribunals as to the scope of umbrella clauses, it is not unlikely that other tribunals reviewing Argentina cases may come to starkly disparate results with nearly identical facts.¹⁸¹

2. Indirect Expropriation

Argument relating to issues of indirect expropriation dealt specifically with Article IV(1) of the US – Argentina BIT which states:

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (expropriation-) except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.¹⁸²

The Tribunal framed the question and defined indirect expropriation as follows:

The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation. In the Metalclad case the [T]ribunal held that this kind of expropriation relates to incidental interference with the use of property which has “the effect of depriving the owner, in whole or in

180. *Id.*

181. See Di Rosa, *supra* note 1, at n.63 (using two arbitration awards to show the varying findings as to the scope of umbrella clauses).

182. See Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. IV(1), Nov. 14, 1991, 1991 U.S.T. LEXIS 176.

significant part, of the use or reasonable-to-be-expected economic benefit of the property even if not necessarily to the obvious benefit of the host State."¹⁸³

As damages for the alleged expropriation, CMS sought "full compensation for these breaches in terms of recovering the fair market value of the investment calculated immediately before the date of expropriation."¹⁸⁴

In response to CMS's indirect expropriation argument, Argentina asserted that "TGN has continued to operate normally and has full use of its property and there has been no redistribution of wealth of any kind nor has there been an intention to do so"¹⁸⁵ Argentina further noted that the State had not "derived any benefit from the measures taken," and that the measures adopted were "temporary."¹⁸⁶

The Tribunal initially acknowledged that both parties "are in agreement that no direct expropriation has taken place."¹⁸⁷ Citing an earlier case, the Tribunal further refined its definition of indirect expropriation, characterizing it as a measure that "effectively neutralized the enjoyment of the property."¹⁸⁸

The Tribunal ultimately held, somewhat summarily, that indirect expropriation did not occur in this case, noting:

The Government of Argentina has convincingly argued that the list of issues to be taken into account for reaching a determination on substantial deprivation, as discussed in that case, is not present in the instant dispute. In fact, the Respondent has explained, the investor is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment.¹⁸⁹

3. Fair and Equitable Treatment

Perhaps the most significant development in the CMS case that will undoubtedly have a bearing on future cases was the Tribunals' handling of the US — Argentina BIT's "fair and equitable" treatment clause. The principle of "fair and equitable" treatment, as Professor Peter Muchlinski notes, "is a cornerstone of the

183. *CMS Gas*, 44 I.L.M. at 1234 (quoting *Metaclad*, 40 I.L.M. 55 (2001), para. 103).

184. *Id.* at 1248.

185. *Id.* at 1233.

186. *Id.*

187. *Id.* at 1234.

188. *Id.* (citation omitted).

189. *Id.*

evolving international law on the protection of investors and their investments.”¹⁹⁰ The near-ubiquitous presence of such clauses in BITs makes a clarification of this standard, as asserted by the CMS Tribunal, a worrisome development for Argentina. Professor Muchlinski further discusses the modern development of the standard:

Thus it is now reasonably well settled that the standard requires a particular approach to governance on the part of the host country that is encapsulated in the obligations to act in a consistent manner, free from ambiguity and in total transparency, without arbitrariness and in accordance with the principle of good faith. In addition, investors can expect due process in the handling of their claims and to have the host authorities act in a manner that is non-discriminatory and proportionate to the policy aims involved. These will include the need to observe the goal of creating favourable investment conditions and the observance of the legitimate commercial expectations of the investor. On the other hand, the standard is case specific and requires a flexible approach given that, “it offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures that have been taken against its interest.”¹⁹¹

The relevant portion of the Argentina — US treaty, Article II(2)(a), specifically requires that “[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.”¹⁹² CMS argued that ICSID precedent seemed to interpret the standard as requiring “the Contracting Parties to provide international investments treatment that does not affect the basic expectations that were taken into account by the investors to make the investment.”¹⁹³ Argentina, conversely, argued that “none of the measures adopted

190. See Peter Muchlinski, *‘Caveat Investor’? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 INT’L & COMP. L.Q. 527 (2006).

191. *Id.* at 530-31 (footnotes omitted) (quoting PT MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 625 (Blackwell Oxford ed., 1999)).

192. Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. II(2)(a), Nov. 14, 1991, 1991 U.S.T. LEXIS 176.

193. See *CMS Gas Transmission Co. v. Argentine Republic*, ICSID No. ARB/01/8, 44 I.L.M. 1205, 1234 (2005) (citation omitted).

[in Law 25561] breaches the standard . . . as the legislative prerogatives of the State cannot be frozen in time and the Emergency Law is just one such exercise of its prerogative."¹⁹⁴

Noting that "the measures that are complained [by CMS] did in fact entirely transform and alter the legal and business environment under which the investment was decided and made,"¹⁹⁵ the Tribunal concluded that "the measures adopted resulted in the objective beach of the standard laid down" in the treaty.¹⁹⁶ In reaching this conclusion, the Tribunal markedly asserted that bad faith was not an "essential element" of the fair and equitable treatment standard, although such a showing "can aggravate the situation."¹⁹⁷

4. *Force Majeure*

Finally, Argentina argued in the alternative that given the "severe economic, social and political crisis" which threatened "the very existence of the Argentine State," it should be "exempted from liability" due to "the existence of a state of necessity or a state of emergency."¹⁹⁸ Argentina's assertion of the state of necessity argument, a fundamental principle of international law, relied upon the contention that it "did not contribute to the creation of the state of necessity in a substantive way."¹⁹⁹ To that end, Argentina argued that the economic crisis was "prompted for the most part by exogenous factors."²⁰⁰ CMS countered these assertions, arguing that the conflict did not involve grave or imminent peril and that most of the causes of the financial crisis were, in fact, internal.²⁰¹

The Tribunal, in considering Argentina's assertion, first noted that the state of necessity argument is "an exceptional one and has to be addressed in a prudent manner to avoid abuse."²⁰² Principally, however, it concluded that Argentina's claim must be rejected on the grounds that Argentina played a "substantial" role in the creation of the crisis.²⁰³ The Tribunal noted,

194. *Id.* at 1235.

195. *Id.*

196. *Id.* at 1236.

197. *Id.*

198. *Id.* at 1238.

199. *Id.* at 1239.

200. *Id.*

201. *See id.*

202. *Id.* at 1240.

203. *See id.* at 1241.

[t]he crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.²⁰⁴

This methodical rejection of one of Argentina's primary arguments against the enforcement of CMS' claim will likely resonate, to the chagrin of the Argentine government.

III. ARGENTINE POLITICAL INTERFERENCE IN ICSID ARBITRATIONS

Bearing in mind the political and diplomatic style of the Kirchner administration and the notably, and perhaps consequently, uncompromising tenor with which Argentina has approached this particular arbitration, one must consider the extent to which politics has played a role and will continue to play a role in the ongoing and future challenges the CMS arbitration will face. During his meeting in Spain with business leaders,²⁰⁵ *ABC*, a leading Spanish daily noted, "[h]is message was motivated by electoral matters. He was interested in sending a message to Argentines of toughness with Spanish businesses."²⁰⁶ While *ABC*'s skeptical observation may have been subjective, it is not unreasonable to allow it some credence and to use it as an assumption informing analysis of Mr. Kirchner's continued motives in challenging the ICSID's authority.

A Presidential Election is set for October of 2007,²⁰⁷ and the front-runner in the race will be a Kirchner – either Mr. Kirchner or his wife, Cristina Fernandez de Kirchner.²⁰⁸ Among the opponents that have already announced that they will also be candidates are former President Menem and Kirchner's former finance

204. *Id.* at 1242.

205. See discussion *supra* Part I.C.

206. OPPENHEIMER, *supra* note 101, at 167 (translation by author).

207. See Benedict Mander, *Lavagna to Run in Presidential Poll*, *FIN. TIMES* (London), Jan. 6, 2007, (Americas) at 2.

208. See Patrick J. McDonnell, *First Lady May Have Eye on Husband's Job; Stylish Argentine Senator is Being Called the 'New Evita'*, *L.A. TIMES*, Feb. 18, 2007, at A14; *Estudian Possible Candidature de la Primera Dama*, *DIARIO LAS AMERICAS*, Feb. 26, 2007.

minister, Roberto Lavagna.²⁰⁹ The race is certain to be contested and Kirchner will have a significant interest in the race's outcome. Therefore, several scenarios must be considered regarding the future of the CMS case, assuming, that the ICSID cases will be relevant to the campaigns as they have been in the past. Three developments are discussed at length: the Outcome of the Annulment Proceedings, Constitutional challenges to Enforceability, and the use of informal pressure tactics to force settlements.

A. *The Annulment Proceeding: Effort to Prolong Final Resolution*

The ICSID Annulment procedure is distinctive when compared to an appeal to a national court to set aside an award.²¹⁰ There is no tribunal higher than the ICSID which hears these "appeals;" instead, an *ad hoc* committee of three arbitrators is formed by the Secretary-General of the ICSID to hear the requests for annulment.²¹¹ The ICSID Convention provides only five basis for annulment:

(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.²¹²

Argentina filed a Request for Annulment with the Secretary-General of the ICSID on September 8, 2005.²¹³ Pursuant to Article 52 (4) of the ICSID Convention, the Committee consequently agreed to stay the enforcement of the award.²¹⁴

In requesting the stay, Argentina argued that enforcing the award while waiting for the annulment proceeding would "irreparably harm" its interests.²¹⁵ It also argued the stay "would not prejudice CMS."²¹⁶ CMS, in turn, argued for rejection of the stay

209. See Mander, *supra* note 207; Jude Webber, *Former Argentine Leader Plots His Comeback*, FIN. TIMES (London), Jan. 6, 2007, (Americas) at 2.

210. See NATHAN, *supra* note 21, at 68.

211. See *id.* at 67-68.

212. ICSID Convention, *supra* note 32, art. 52(1).

213. See Int'l Inst. for Sustainable Dev., CMS Gas Transmission Co. v. Argentine Rep. Application for Annulment, ICSID No. ARB/01/8, para. 1, http://www.iisd.org/pdf/2005/investsd_cms_annulment_petition.pdf (providing the decision on the Argentine Republic's request for a continued stay of enforcement of the award).

214. See *id.* para. 52.

215. *Id.* para. 15 (quoting the Argentine Republic's request for annulment).

216. *Id.* (quoting the Argentine Republic's request for annulment).

request barring “adequate assurances” from Argentina that, in the event that the annulment failed, they would pay the Award.²¹⁷ CMS pointed to statements made by Argentine government officials expressing its intention to “subject final ICSID Awards ‘to a novel domestic review mechanism before the Argentine Supreme Court’”²¹⁸ The Tribunal agreed to grant Argentina’s request only after receiving a written guarantee from an Argentine official claiming that final ICSID Awards would be recognized.²¹⁹ CMS was doubtful of the value of the letter, noting that it is not binding on Argentina, but the Tribunal ignored its objections.²²⁰

B. Constitutional Challenges to Enforceability

Despite the Tribunal’s apparent faith in the commitment made to enforce the Award if Annulment procedures failed, CMS was justified in relying on a clear record indicating that senior Argentine officials consistently expressed the possibility of not recognizing the Award.²²¹ Among the prominent officials who have spoken on the matter, Horacio Rosatti, Argentina’s Justice Minister, “argue[d] that ICSID ha[d] no jurisdiction over Argentina.”²²² Also, the former Economy Minister and a current candidate for President, Roberto Lavagna, noted that the Supreme Court could find that the ICSID rulings are incompatible with the Constitution.²²³ Finally, President Kircher, himself has “indicated that he will ignore any rulings against the government.”²²⁴

After the announcement of the Award, several Argentine elected officials began to act upon the threats that Government Ministers and the President have long been asserting:

Argentina’s initial official reaction to the ICSID award in favor of the CMS Gas Transmission Company was to reject the ruling, stating that it would not pay. Furthermore, there were attempts by high-ranking government officials to pass a law rejecting all ICSID rulings on privatized utilities. The opposition ARI party in Congress went even further, presenting two bills, one calling for the rescission of all

217. *Id.* para. 16 (quoting CMS’ letter dated September 30, 2007 arguing against enforcement of a stay).

218. *Id.* para. 18 (quoting CMS’ letter dated May 16, 2006). The validity of this threat is addressed further, *infra* Part III.C.

219. *See id.* para. 28.

220. *See id.* para. 29.

221. *See id.* paras. 27-32.

222. ECONOMIST, *Getting Serious*, *supra* note 102, at 97.

223. *See id.*

224. *See* ECONOMIST, *Taking on Foreigners*, *supra* note 104, at 4.

BITs and the other calling for the rescission of Argentina's signatory status to the treaty that establishes the jurisdiction of the ICSID as a valid international court for investment disputes.²²⁵

Other commentators confirm the machinations discussed above but also openly speculate about potential rulings of the Argentine Supreme Court, noting

the Argentine Government has recently been evaluating the enactment of laws granting the Supreme Court jurisdiction to entirely review the ICSID awards . . . the current majority of the Supreme Court – appointed by this Government – seemed to be ideologically inclined to support government intervention . . . no rulings against the main policies of the Government are likely to be expected.²²⁶

Two general approaches for the possible challenge of ICSID Awards have been outlined. The first involves the “basic” Argentine Constitutional principle that international treaties are subordinated to the National Constitution.²²⁷ Under this approach, any ICSID awards would have to pass muster with domestic public policy principles.²²⁸ The second approach, described as more “radical,” entails the nullification of the ICSID Convention on the grounds that it failed to complete the validity requirements imposed by the new system of approving treaties that the Argentine Congress passed in 1994.²²⁹ This approach would annul all claims involving Argentina currently before the ICSID.²³⁰ While the rejection of ICSID Awards by Argentina is certainly plausible, some commentators argue that it is unlikely.²³¹ Osvaldo Marzorati, an Argentine law professor and international practi-

225. Alan Cibils, *ICSID Bleeds Argentina*, MULTINATIONAL MONITOR, July/Aug. 2005, available at <http://multinationalmonitor.org/mmm2005/072005/front.html>.

226. Carlos E. Alfaro and Pedro Lorenti (Alfaro-Abogados), *The Enforcement Process Of The ICSID Awards: Procedural Issues And Domestic Public Policy*, MONDAQ BUS. BRIEFING, June 1, 2005, available at <http://www.mondaq.com/article.asp?articleid=32803&lastestnews=1>.

227. Carlos E. Alfaro and Pedro Lorenti (Alfaro-Abogados), *Argentina vs. ICSID: Unconstitutionality of the BITs and ICSID Jurisdiction – the Potential New Government Defenses Against the Enforcement of the ICSID Arbitral Award – Issues That May Subject the Award to Revision by the Argentine Judiciary*, *Mondaq Bus. Briefing*, May 17, 2005, available at <http://www.mondaq.com/article.asp?articleid=32539&lastestnews=1>.

228. *See id.*

229. *See id.*

230. *See id.*

231. *See* Osvaldo J. Marzorati, *Enforcement of Treaty Awards and National Constitutions (the Argentinean Cases)*, 7 BUS. L. INT'L 226 (May 2006).

tioner, points out that Argentina has generally respected arbitration rulings in the past regarding border disputes, international trade, and international affairs.²³² However, he notes that “[t]ime will show whether politics or strict legal considerations prevail on this issue”²³³

C. *“Extra-Judicial” Tactics: Pressure Placed on Companies to Withdraw Claims*

Given the remarkable turnaround that the Argentine economy experienced a mere two years after the crash, Argentina has once again become a favorable market for foreign investment. Consequently, several companies, seeking to return to Argentina, have opted to withdraw their ICSID claims as “gestures of goodwill.”²³⁴ These “gestures,” however, do not seem entirely voluntary. In fact, the Government has consistently required withdrawal of ICSID claims as a condition for the renegotiation of contacts,²³⁵ although negotiation is required under the terms of Law 25561.²³⁶ On several occasions, Argentine officials and even the President have noted that they would apply financial pressure, through contract renegotiation, on those investors that remain in Argentina to withdraw their claims.²³⁷

IV. CONCLUSIONS: A PYRRHIC VICTORY?

Given the conditions discussed above: a deliberate but untested arbitral body moving obstinately towards the likely imposition of significant awards against Argentina, and a government, disdainful towards the ICSID and suspicious of foreign investment generally — there would seem to be a clash soon in the making. President Kirchner has built a national following based on his tough “K-style,” and the coming year is certainly not the most opportune time for him to abandon that persona, given that Presi-

232. *See id.*

233. *Id.* at 247.

234. *See* Int’l Inst. for Sustainable Dev., Investment Treaty News Archive, <http://www.iisd.org/investment/itn/archive.asp> (follow hyperlink for Apr. 8, 2005).

235. *See* Carlos E. Alfaro (Alfaro-Abogados), *Argentina’s Impressive Economic Recovery and the Debt Swap*, MONDAQ BUS. BRIEFING, Apr. 7, 2005, available at <http://www.mondaq.com/article.asp?articleid=31899&lastestnews=1>.

236. *See* Law No. 25561, art. 11, Jan. 6, 2002, [LXII-A] A.D.L.A. 44.

237. *See* RANSE W. HOWELL, CTR. FOR EFFECTIVE DISPUTE RESOLUTION, CAN THERE BE AN ALTERNATIVE INTERNATIONAL DISPUTE RESOLUTION MECHANISM TO ARBITRATION? (Aug. 2000), http://www.cedr.co.uk/index.php?location=/library/articles/20060829_179.htm.

dential elections are scheduled for October 2007. Like two trains rushing towards one another on the same track, the destructive result seems inevitable.

Were Argentina to reject the imposition of ICSID awards, however, what would it gain? A victory, perhaps, but surely a pyrrhic one. Although the short-term political rewards would be considerable, it is just as likely that the long-term consequences could be devastating. Diminished foreign investment and tense relations with among the world's largest lending institutions cannot bode well for a nation only five years removed from a total economic collapse. Beyond the macroeconomic effects, though, certain consequences have already become apparent. On March 20, 2007, Argentina's major newspaper, *La Nación*, reported that a group of representatives from the utility industry labor union *Luz y Fuerza* warned President Kirchner of the "worrisome" state of Argentina's electrical sector.²³⁸ The present situation, described as an "energy crisis," would be exacerbated, the union officials noted, by significant expected increases in demand for electricity.²³⁹ This warning illustrates the fundamental conflict at stake. Undoubtedly, as previous Argentine governments understood, substantial foreign investment must be an essential aspect of any plan to overhaul its infrastructure. However, the extent of such investment and its potential positive effects on the economic well-being of the Republic would certainly be circumscribed by anti-investment policies adopted by the political leadership of Argentina.

As the Greek leader Pyrrhus noted after defeating the Romans in a battle, "Another such victory over the Romans and we are undone."²⁴⁰ Here, too, a short-term victory would yield greater difficulties in the long-run.

238. See *Advertencia Gremial a Kirchner por La Crisis Energetica*, LA NACIÓN [Arg.], Mar. 20, 2007.

239. See *id.*

240. JOHN BARTLETT, FAMILIAR QUOTATIONS 82 (Justin Kaplan ed., 16th ed. 1992).