

The Paradoxical Argentina Cases

Prof. José Enrique Alvarez (and Gustavo Topalian)
New York University School of Law

**Wilmer Cutler Pickering Hale and Dorr Scholar-in-
Residence Seminar**

December 17, 2012 - London

Index of Tables

Table 1 - Arbitral Decisions in Investment Treaty Cases in Which Argentina Appeared as Respondent (as of March 18, 2012).....	2
Table 2 - Investment Treaties Involved in Cases in Which Argentina Appeared as Respondent.....	4
Table 3 - Awards on the Merits and Damages.....	5
Table 4 - Total of Awards Against Argentina Net of Annulled/Vacated Awards and Proceedings Discontinued or Suspended.....	9
Table 5 - Recurrent Jurisdictional Issues in Argentine Cases.....	10
Table 6 - Specific Jurisdictional Issues in Argentine cases.....	13
Table 7 - 18-month Requirement/MFN Clause Jurisdictional Issues in Argentine Cases.....	15
Table 8 - Recurrent Expropriation-Related Issues in Argentine cases.....	17
Table 9 - Discussion of Arbitrary and Discriminatory Treatment in Argentine Cases.....	18
Table 10 - Discussion of Umbrella Clauses in Argentine Cases.....	19
Table 11 - Open Questions Regarding the “Necessity” Defense: Representative Argentina Cases.....	20
Table 12 - Recent Procedural Developments in Argentina Arbitrations.....	23

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

DECISIONS ON JURISDICTION AND AWARDS UPHOLDING OR DECLINING JURISDICTION (35)	AWARDS ON THE MERITS (19)	DECISIONS ON ANNULMENT (7)	DECISIONS ON STAY OF ENFORCEMENT (7)
<i>Abaclat</i>			
<i>AES</i>			
<i>Azurix I</i>	<i>Azurix I</i>	<i>Azurix I</i>	<i>Azurix I</i>
<i>BG (Award)</i>	<i>BG</i>		
<i>Camuzzi</i>			
<i>Camuzzi II</i>			
<i>CMS</i>	<i>CMS</i>	<i>CMS</i>	<i>CMS</i>
<i>Continental Casualty</i>	<i>Continental Casualty</i>	<i>Continental Casualty</i>	
<i>Daimler (w/ separate conc. and dissenting opinions)**</i>			
<i>EDF – SAUR*</i>	<i>EDF – SAUR</i> (Decision on Merits and Quantum)		
<i>El Paso</i>	<i>El Paso</i>		
<i>Enron I</i>	<i>Enron</i>	<i>Enron</i>	<i>Enron (twodecisions)</i>
<i>Enron Ancillary Claim</i>			
<i>Gas Natural</i>			
<i>Hochtief(w/ separate conc. and dissenting opinion)</i>			
<i>Houston*</i>	<i>Houston*</i>		
<i>ICS**</i>			
<i>Impregilo I (Award)</i>	<i>Impregilo I</i> (w/ two conc. and diss. opinions)		
<i>Lanco</i>			
<i>LG&E</i>	<i>LG&E</i> (Dec. on Liability and Final Award)		
<i>Metalpar</i>	<i>Metalpar</i>		
<i>National Grid</i>	<i>National Grid</i>		
<i>Pan American & BP</i>			
<i>SAUR</i>	<i>SAUR</i> (Decision on Liability)		
<i>Sempra</i>	<i>Sempra</i> (w/ partial dissenting opinion)	<i>Sempra</i>	<i>Sempra (twodecisions)</i>
<i>Siemens</i>	<i>Siemens</i> (w/ separate opinion)		
<i>Suez – AWG</i>	<i>Suez- AWG</i> (Decision on Liability)		
<i>Suez – Interagua</i>	<i>Suez- Interagua</i> (Decision on Liability)		
<i>Telefonica</i>			
<i>Total</i>	<i>Total</i> (Decision on Liability)		
<i>TSA Spectrum</i> (w/ a concurring			

and a dissenting opinion)***			
<i>Vivendi I</i> (Award)		<i>Vivendi I</i>	
<i>Vivendi II</i>	<i>Vivendi II</i>	<i>Vivendi II</i>	<i>Vivendi II</i>
<i>Wintershall</i> (Award)**			

*Decisions not available as of December 10, 2012

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

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

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

BELGIUM/LUX. UNION (2)	CHILE (1)	FRANCE (7)	GERMANY (4)	ITALY (2)	NETHERLANDS (1)	SPAIN (4)	UNITED KINGDOM (4)	UNITED STATES (11)
<i>Camuzzi I</i>	<i>Metalpar</i>	<i>SAUR</i>	<i>Daimler</i>	<i>Abaclat</i>	<i>TSA Spectrum</i>	<i>Gas Natural</i>	<i>BG</i>	<i>AES</i>
<i>Camuzzi II</i>		<i>Total</i>	<i>Hochtief</i>	<i>Impregilo I</i>		<i>Telefonica</i>	<i>NationalG rid</i>	<i>Azurix I</i>
		<i>Vivendi I</i>	<i>Siemens</i>				<i>ICS</i>	<i>CMS</i>
		<i>Vivendi II</i>	<i>Wintershall</i>					<i>Continental Casualty</i>
		<i>EDF - SAUR</i>						<i>El Paso</i>
								<i>Enron</i>
								<i>Houston</i>
								<i>Lanco</i>
								<i>LG&E</i>
								<i>Pan American & BP</i>
								<i>Sempra</i>
<i>Multiple Treaties Involved</i>								
		<i>Suez - Interagua</i>				<i>Suez – Interagua</i>		
		<i>Suez – AWG</i>				<i>Suez - AWG</i>	<i>Suez – AWG</i>	

Table 3 - Awards on the Merits and Damages

AWARDS ON THE MERITS	BREACHES FOUND	AWARD ON DAMAGES	INTEREST RATE AND PERIOD OF COMPOUNDING	COSTS AND FEES	ANNULMENT / VACATUR STATUS
<i>Azurix I</i>	- FET - FPS - Arbitrary Measures	\$ 165.2 MM	US 6-month certif. of deposit Comp. semi-annually	Almost all fees and expenses of arbitrators and costs of ICSID Secretariat	Annulment rejected by ICSID Ad-Hoc Committee
<i>BG</i>	- FET	\$ 185.3 MM	US 6-month certif. of deposit Comp. semi-annually	Costs of arbitration Legal fees and expenses	Vacated by the U.S. Court of Appeals for the District of Columbia Circuit Petition for a Writ of Certiorari filed by BG at the U.S. Supreme Court and amicus briefs filed in support of petition. Not yet accepted but Supreme Court has asked for the opinion of the Solicitor - General

<i>CMS</i>	- FET - Umbrella Clause	\$ 133.2 MM (plus transfer of shares to Argentina for an additional \$2 MM)	US Treasury Bills <u>Pre-award:</u> Simple <u>Post- Award:</u> Comp. semi-annually		Partial annulment on finding of breach of umbrella clause Argentina's motion to dismiss the petition by Blue Ridge Investments, LLC. to confirm the award denied by U.S. District Court Southern District of New York
<i>Continental Casualty</i>	- FET	\$ 2.8 MM	US 6-month Libor plus 2% Comp. annually		Annulment rejected by ICSID Ad-Hoc Committee Continental Casualty's petition for recognition and confirmation pending in the District Court of the District of Columbia.
<i>EDF SAUR</i>	- FET - Umbrella Clause	\$136.1 MM	Rate for the ten year US Treasury Bonds	Each side bears own legal expenses: 50/50 split of arbitrators fees and ICSID costs	Pending (suspended)
<i>El Paso</i>	- FET	\$ 43 MM	US 6-month Libor plus 2% Comp. semi-annually		Pending
<i>Enron</i>	- FET - Umbrella Clause	\$ 106.2 MM	US 6-month Libor plus 2% Comp.semi-annually		Annulled by ICSID Ad-Hoc Committee
<i>Impregilo I</i> (w/ two conc. and diss. opinions)	- FET	\$ 21.3 MM	6% compounded annually		Pending

<i>LG&E</i> (Dec. on Liability and Final Award)	<ul style="list-style-type: none"> - FET - Discriminatory Measures - Umbrella Clause 	\$ 57.4 MM	6-month US Treasury Bills Compounded		Pending (suspended)
<i>Metalpar</i>	No breaches found				

AWARDS ON THE MERITS	BREACHES FOUND	AWARD ON DAMAGES	INTEREST RATE AND PERIOD OF COMPOUNDING	COSTS AND FEES	ANNULMENT / VACATUR STATUS
<i>National Grid</i>	- FET - Protection and Constant Security	\$ 53.6 MM	US 6-month certif. of deposit Comp. semi-annually	75% of the fees and expenses of the Members of the Tribunal and the administration costs payable by Argentina	No further legal recourses available in US Courts.
<i>SAUR</i>	- Expropriation - FET	Damages Phase Pending			
<i>Sempra</i> (w/ partial dissenting opinion)	- FET - Umbrella Clause	\$ 128.2 MM (plus contingent payments regarding due subsidies)	US 6-month Libor plus 2% Comp. semi-annually		Annulled by ICSID Ad-Hoc Committee; Resubmission proceeding pending
<i>Siemens</i> (w/ separate opinion)	- Expropriation - FET - Full Protection and Security - Arbitrary measures	\$ 217.9 MM (plus delivery of contract performance bond)	US 6-month certif. of deposit Comp. semi-annually	75% of the fees and expenses of the Members of the Tribunal and ICSID Secretariat costs payable by Argentina	Settlement agreed by the parties and proceeding discontinued at their request
<i>Suez- AWG</i> (Decision on Liability)	- FET	Award on Damages Pending			
<i>Suez- Interagua</i> (Decision on Liability)	- FET	Award on Damages Pending			
<i>Total</i> (Decision on Liability)	- FET	Award on Damages Pending			
<i>Vivendi II</i>	- FET - FPS - Expropriation	\$ 105 MM	6% compounded annually	Reasonable Claimants' costs for the jurisdictional phase (\$ 700 K) with interest payable by Argentina	Annulment rejected by ICSID Ad-Hoc Committee

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

“FPS” means full protection and security.

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

AWARD	PRINCIPAL (IN MILLION US\$)	COMMENTS
<i>Azurix I</i>	165.2	Annulment rejected by ICSID Ad-Hoc Committee
<i>BG</i>	185.3	Vacated
<i>CMS</i>	133.2	Annulment rejected by ICSID Ad-Hoc Committee
<i>Continental Casualty</i>	2.8	Annulment rejected by ICSID Ad-Hoc Committee
<i>EDF-SAUR</i>	136.1	Annulment proceeding pending
<i>El Paso</i>	43	Annulment proceeding pending
<i>Enron</i>	106.2	Annulled
<i>Impregilo I</i>	21.3	Annulment proceeding pending
<i>LG&E</i>	57.4	Proceeding suspended
<i>National Grid</i>	53.6	No further legal recourses available in US Courts.
<i>Sempra</i>	128.2	Annulled
<i>Siemens</i>	217.9	Proceeding discontinued
<i>Vivendi II</i>	105	Annulment rejected by ICSID Ad-Hoc Committee

GROSS TOTAL (INCLUDING ANNULLED AND VACATED AWARDS AND PROCEEDINGS DISCONTINUED OR SUSPENDED)	NET TOTAL (NET OF ANNULLED AND VACATED AWARDS AND PROCEEDINGS DISCONTINUED OR SUSPENDED)
US\$ 1355.2 MM	US\$ 660.2 MM

Table 5 - Recurrent Jurisdictional Issues in Argentine Cases

INVESTMENT UNDER BIT	COMPLIANCE WITH ARTICLE 25 - INDIRECT CLAIMS	FORK IN THE ROAD	FORUM SELECTION CLAUSES – CONTRACT CLAIMS	18-MONTHS IN DOMESTIC COURTS	ONGOING NEGOTIATIONS PRECLUDE ARBITRAL JURISDICTION
Mostly Consistent in Result	Consistent	Consistent	Consistent	Inconsistent	Consistent
<i>Holding</i>					
Shareholdings qualify as investments even if they are: (a) minority; and/or (b) indirect	Claims arise directly out of an investment even if the governmental measures were general or not directed expressly at that investment if they violate specific legally binding commitments	A fork in the road provision is only triggered when there is an identity of parties, object and cause of action	Forum selection clauses in contracts only apply to contractual causes of action and not to claims based on BITs	<i>See separate table</i>	Irrelevant for jurisdictional purposes. Their outcome, if any, may be relevant for the merits phase
	Claims based on alleged breaches of a BIT constitute legal disputes				
<i>Reasoning</i>					
Definition of investment is very broad and includes shares.	“Directly” in Art. 25 refers to the dispute, not to the investment – and requires a connection of a sufficient degree of directness between a dispute submitted to ICSID and a claimant’s investment	There are differences between the violation of a contract and the violation of a treaty	A contractual cause of action is different from a treaty cause of action. (<i>Vivendi Annulment I</i>). Claimants are bringing BIT claims	<i>See separate table</i>	The renegotiation is <i>res inter alios acta</i> – negotiations are often carried by the parties to a dispute, but they are irrelevant unless the parties agree to suspend or discontinue the proceeding
There is no language in the BITs requiring that requires that there be no interposed companies/ the treaty itself clarifies that it protects indirect shareholdings (US BIT)	A dispute exists because a legal issue has been raised which determination has some practical and concrete consequences		In some cases, reference was made to the fact that the investor himself was not a part to the contract containing the forum selection clause		

	Tribunal shall not examine measures of economic general policy or judge them – only their impact on legally binding commitments.				
<i>Cases</i>					
<i>See.g. LG&E, Metalpar, Siemens, Suez-AWG, Telefonica, Gas Natural, Enron, Azurix, El Paso, Pan American & BP, CMS, Camuzzi I, Camuzzi II, AES, Impregilo, Hochtief, BG; Daimler; SAUR.</i>	<i>See.g. LG&E, Metalpar, NationalGrid, Siemens, Suez-AWG, Telefonica, Gas Natural, Enron, Azurix, El Paso, Pan American & BP, CMS, Semptra, Camuzzi I, Camuzzi II, AES, Impregilo, Hochtief, Total, BG, Abaclat; Daimler; SAUR.</i>	<i>See e.g. LG&E, Siemens, Azurix, Enron I, PanAmerican & BP, CMS.</i>	<i>See.g. LG&E, NationalGrid, Siemens, Suez-AWG, Telefonica, Semptra, Camuzzi I, Azurix, Total, CMS, Camuzzi II, AES, Abaclat, Impregilo I; Daimler</i> <i>TSASpectrum (noting that a clear indication in the contract could exclude or limit the application of the treaty)</i>	<i>See separate table</i>	<i>See.g. LG&E, Telefonica, Semptra, Camuzzi I, Total, CMS, Camuzzi II, AES.</i>

Description of recurrent jurisdictional issues in Argentine cases

- INVESTMENT UNDER BIT
Argentina generally argued that (i) minority; and/or (ii) indirect shareholdings did not constitute a protected investment under the relevant BITs, claiming that only direct, majority shareholders could bring claims.
- COMPLIANCE WITH ARTICLE 25 - INDIRECT CLAIMS
Argentina generally argued that investors were complaining about general measures that did not meet the “directness” requirement set forth under Article 25 of the ICSID Convention.

- **FORK IN THE ROAD**

Argentina generally argued that investors had triggered fork in the road provisions of the relevant BITs due to the submission of some sort of dispute to local courts by the investors themselves, or more typically, by the locally-incorporated companies in which they had invested.
- **FORUM SELECTION CLAUSES – CONTRACT CLAIMS**

Argentina generally argued that the existence of forum selection clauses in concession, license or similar contracts entered into between Argentina (or an Argentine Province) and the locally-incorporated companies carrying out activities in Argentina prevented the submission of investment disputes before ICSID or ad-hoc tribunals under UNCITRAL Rules.
- **18-MONTHS IN DOMESTIC COURTS**

Argentina generally argued that investors could not submit their investment disputes to international arbitration without previously submitting the dispute to domestic courts for an 18-month period once the consultation period had elapsed, a requirement established in some Argentine BITs (Belgium-Luxembourg Union, Germany, Netherlands, Italy, Spain, United Kingdom, *inter alia*). Investors generally argued that they should not be required to comply with such 18-month requirement because (a) it was a futile requirement given the fact that they could not obtain any favorable decision from domestic courts in such timeframe; and/or (b) through the operation of an MFN Clause, they could avail themselves from more favorable dispute settlement clauses contained in other Argentine BITs (typically the BITs with the U.S. and Chile) that did not contain said requirement.
- **ONGOING NEGOTIATIONS PRECLUDE ARBITRAL JURISDICTION**

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

Table 6 - Specific Jurisdictional Issues in Argentine cases

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

Description of specific jurisdictional issues in Argentine cases

- Foreign Control
In the *TSA Spectrum* case Argentina (successfully) argued that the ultimate control of the alleged investor was held by an Argentine citizen.
- Tax Measures
Article XII of the U.S.-Argentina BIT limits to a certain extent the application of the BIT to tax measures. In the *Enron*, *El Paso* and *Pan American & BP* cases, the Tribunals concluded that: (i) Article XII (1) of the BIT (setting forth that the Contracting Parties shall “strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party”) had to be afforded some meaning; and (ii) they had jurisdiction to consider tax claims based on the existence of an expropriation and on the violation of an investment agreement or authorization. However, the *Enron* Tribunal further argued that “once expropriation is invoked, (...) then the connection between Article IV and the standards of treatment under Article II (2) of the Treaty becomes operational, including fair and equitable treatment, full protection and security and treatment not less than that required by international law. In turn, this brings in the meaning of paragraph 1 of Article XII. It is in this context, and not in isolation, that the questions of transparency and the availability of effective remedies also become relevant. And, above all, the whole discussion is then governed by Article VII of the Treaty on the settlement of disputes.” (§ 66)
- Consultation Periods
None of the Tribunals deciding investment cases against Argentina has denied its jurisdiction or found claims inadmissible on grounds of a failure to comply with a prior consultation period (not to be confused with the 18-month requirement). However, some of the Tribunals have held that such requirement would constitute a jurisdictional, rather than procedural requirement (*Enron*), and suggested that the investors must make an adequate and reasonable effort to consult and negotiate (*Pan American & BP*), while others held that the mere lapsing of the consultation period set in the BIT would suffice to allow access to international arbitration (*LG&E*).

- Illegality

In the SAUR International case, Argentina (unsuccessfully) argued that the investor had acted illegally in making a series of secret payments and that the France-Argentina BIT prevented jurisdiction over claims tainted by such illegality. The Tribunal concluded that the legality requirement was inherent to all investment treaties, regardless of whether they contained any provision on the subject, but found that, on the facts, there was no evidence that the investor had breached Argentine law.

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

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

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

- REQUIREMENT IS NOT AN ABSOLUTE IMPEDIMENT TO ARBITRATION

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

- NO ACTUAL DEPRIVATION OF RIGHTS TO ARGENTINA

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

- HIGHLY FORMALISTIC

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

Table 8 - Recurrent Expropriation-Related Issues in Argentine cases

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

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

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

***In *SAUR*, the Tribunal concluded that “the combination of expropriatory measures adopted by the Province – the intervention, revision and the transfer of the concession to a new company – cannot be considered as private acts based on the rights and obligations arising from the Concession Contract. The measures are set forth in the Law, and could be adopted precisely because the Province is a territorial entity of the Argentine Republic, with its own Executive and Legislative Power, and with inherent sovereign powers.” (author’s translation)

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

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

Table 10 - Discussion of Umbrella Clauses in Argentine Cases

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

TABLE 11: OPEN QUESTIONS REGARDING THE “NECESSITY” DEFENSE: REPRESENTATIVE ARGENTINA CASES

Question	Answer	Answer	Answer
When a BIT has an “essential security” clause as does the U.S.-Argentina BIT, is that a separate or distinct defense from the excuse of necessity under customary law? That is, does Article XI of the U.S.-Argentina BIT* = Article 25 of the Articles of State Responsibility** or is it <i>lexspecialis</i> ?	Same as CIL: <i>CMS</i> , <i>Enron</i> , <i>Sempra</i>	Distinct from CIL: <i>CMS</i> Annulment, <i>Continental Casualty</i> , <i>Sempra</i> Annulment	Not an error to treat Art. XI as the equivalent of the customary defense: <i>Enron</i> Annulment
Does the customary defense of necessity apply when a BIT is silent as to that defense?	Maybe not: <i>BG</i>	Yes: <i>National Grid</i>	
Assuming that it is applicable, what does the customary defense of necessity require by way of proof in order for it to be successfully invoked?	Article 25 Factors: <i>CMS</i> , <i>Enron</i> , <i>Sempra</i> , <i>BG</i> , <i>National Grid</i>	Unclear: <i>LG&E</i>	Article 25 Factors (revisited): <i>Enron</i> Annulment
Assuming that Article XI of the U.S.-Argentina treaty is a distinct defense from the excuse of necessity, what exactly does it require in order for it to be successfully invoked?	Same as CIL: <i>LG&E</i>	Different from CIL but undefined: <i>CMS</i> Annulment, <i>Sempra</i> Annulment	Same as GATT Art. XX: <i>Continental Casualty</i>
What is the effect of a successful invocation of Article XI?	Does not affect compensation: <i>CMS</i> , <i>Enron</i> , <i>Sempra</i>	Precludes compensation: <i>CMS</i> Annulment, <i>Continental Casualty</i> , <i>Sempra</i> Annulment	Unclear: <i>LG&E</i>

*** Article XI of the United States-Argentina BIT provides:** “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligation with respect to the maintenance of restoration of international peace or security, or the protection of its own essential security interests.”

**** Article 25 of the Articles of State Responsibility on “Necessity” provides:**

“1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

- (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
- 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) the international obligation in question excludes the possibility of invoking necessity; or
 - (b) the State has contributed to the situation of necessity.”

Table 12 – Recent Procedural Developments in Argentina Arbitrations (March 2012- 17 December 2012)

CASE	CURRENT PROCEDURAL STAGE	NEW AWARDS	ANNULMENT/VACATUR PROCEEDINGS
<i>Abaclat</i>	Pending (the Tribunal issues a procedural order concerning the conduct of the proceedings on November 20, 2012)		
<i>AES</i>	Pending (the suspension of the proceeding is further extended, pursuant to the parties' agreement on June 22, 2012)		
<i>Azurix I</i>	The Tribunal issues a procedural order for the discontinuance of the proceeding for lack of payment of the required advances, pursuant to ICSID Administrative and Financial Regulation 14(3)(d) (June 18, 2012).		
<i>BG</i> (UNCITRAL)	N/A		<p>Petition for a Writ of Certiorari filed by BG at the US Supreme Court (27 July 2012) on the following question:</p> <p>“In disputes involving a multi-staged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?”</p> <p>Amicus briefs filed in support of petition by:</p> <ol style="list-style-type: none"> 1. AAA (27 August 2012) 2. Leading academic commentators led by Professor Bermann and Hughes Hubbard & Reed LLP (29 August 2012)

			<p>3. US Council for International Business (29 August 2012)</p> <p>4. AWG Group (30 August 2012)</p> <p>Supreme Court has now requested the opinion of the US Solicitor-General (4 November 2012)</p>
<i>Camuzzi</i>	N/A		
<i>Camuzzi II</i>	Pending (the suspension of the proceeding is further extended, pursuant to the parties' agreement on June 13, 2012)		
<i>CMS</i>	N/A		Memorandum opinion by the U.S. District Court for the Southern District of New York denying Argentina's motion to dismiss the petition by Blue Ridge Investments, LLC. to confirm an arbitral award (30 September 2012).
<i>Continental Casualty</i>	N/A		Memorandum opinion by the U.S. District Court for the Eastern District of Virginia granting Argentina's motion that Continental Casualty's petition for recognition and confirmation should be transferred to the District Court of the District of Columbia. (Argentina's other objections on subject matter and personal jurisdiction were denied) (11 September 2012).
<i>Daimler</i>		Award (w/ dissenting opinion by Judge Brower and concurring separate opinion by Prof. Bello Janeiro), 22 August 2012	

<i>EDF – SAUR</i>		Award on Merits and Quantum, 11 June 2012	Annulment proceedings initiated on 11 October 2012 (<i>ad hoc</i> Committee not yet constituted; enforcement of the award provisionally stayed).
<i>El Paso</i>			Annulment proceedings initiated on 7 March 2012; <i>ad hoc</i> committee constituted on 22 May 2012 (Rodrigo Oreamuno (President), Teresa Cheung; and Rolf Knieper); the Argentine Republic files a memorial on annulment on 5 October 2012.
<i>Enron I</i>	Pending (the resubmission proceeding is suspended until January 18, 2013, pursuant to the parties' agreement on July 31, 2012)		
<i>Enron Ancillary Claim</i>			
<i>Gas Natural</i>	N/A		
<i>Giordano Alpi</i>	Pending (parties filed post-hearing briefs in March 2011, further submissions on jurisdiction in November 2011 and statements of costs in July 2012)		
<i>Giovanni Alemanni</i>	N/A		
<i>Hochtief</i>	Document production; parties exchanged second round submissions on the merits; hearing on the merits was held in Paris on 19-23 September and 22-27 October 2012.		
<i>Houston</i>	N/A		

<i>ICS</i> (UNCITRAL)	N/A		
<i>Impregilo I</i>			Pending annulment proceedings (<i>ad hoc</i> annulment committee is constituted on 30 January 2012 (Rodrigo Oreamuno (President), Eduardo Zuleta and Teresa Cheng); the Argentine Republic files a memorial on annulment on 26 June 2012; ImpregiloS.p.A files a counter-memorial on annulment on October 4, 2012)
<i>Lanco</i>	N/A		
<i>LG&E</i>	Pending (the suspension of the proceeding is further extended, pursuant to the parties' agreement on November 5, 2012)		
<i>Metalpar</i>	N/A		
<i>National Grid</i> (UNCITRAL)	N/A		
<i>Pan American & BP</i>	N/A		
<i>SAUR</i>	Pending (the Claimant files a memorial on quantum on October 15, 2012)	Award on Jurisdiction and Liability, 6 June 2012	
<i>Sempra</i>	Pending resubmission proceeding (The Respondent files a statement of costs on July 25, 2012)		
<i>Siemens</i>	N/A		

<i>Suez – AWG</i>	Pending (parties filed submissions on damage adjustments in March-May 2012; parties exchanged submissions on admissibility of evidence and requests for additional documentation)		
<i>Suez – Interagua</i>	Pending (parties filed submissions on damage adjustments in March-May 2012)		
<i>Teinver</i>	Pending (the Tribunal issued procedural orders concerning provisional measures on October 3, 2012)		
<i>Telefonica</i>	N/A		
<i>Total</i>	Pending (the parties filed post-hearing briefs on 27 March 2012 and submissions on costs on 26 April 2012; Tribunal issued a procedural order concerning supplementary post-hearing briefs on quantum on June 1, 2012)		
<i>TSA Spectrum</i>	N/A		
<i>Urbaser</i>	Pending (parties filed statements of costs on August 24, 2012)		
<i>Vivendi I</i>	N/A		
<i>Vivendi II</i>	N/A		
<i>Wintershall</i>	N/A		