

International Investment Agreements Between Developed and Developing Countries: Dancing with the Devil?

Case Comment on the *Vivendi*, *Sempra* and *Enron* Awards*

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*International investment agreements can have detrimental effects for developing countries: they can limit a government's ability to regulate in the public interest where this interest runs counter to that of foreign investors; they can severely restrict a country's ability to enact measures responding to financial, social, and economic crises; and they can impede legitimate democratic processes. Three recent arbitral decisions at the International Centre for Settlement of Investment Disputes—*Compañía de Aguas del Aconquija S.A. v. Argentina*, *Sempra Energy International v. Argentina*, and *Enron v. Argentina*—demonstrate these risks. This comment examines how these tribunals have negatively impacted Argentina through their interpretations of expropriation*

law, the fair and equitable treatment principle, and equitable defences such as necessity, as well as through the tribunals' willingness to interpret Argentine law. The author proposes that future international investment tribunals apply a sustainable development analysis to avoid similar outcomes. Such an analysis would consider promoting investment not as an end in itself, but as part of a country's approach to important social issues, including promoting human rights, protecting the environment, and improving social welfare. In advancing this proposal, the author explores the legal and equitable basis for applying sustainable development law when interpreting international investment agreements.

*Les accords internationaux d'investissement peuvent avoir des effets préjudiciables pour les pays en voie de développement: en premier lieu, ces accords sont en mesure de limiter la capacité d'un gouvernement de réglementer aux fins de l'intérêt public lorsque cet intérêt se trouve à l'encontre de celui des investisseurs étrangers; ensuite, ces accords peuvent sévèrement restreindre la capacité d'un pays à promulguer des mesures pouvant répondre aux crises financières, sociales et économiques; enfin, ces accords peuvent entraver la légitimité du processus démocratique. Trois décisions arbitrales récentes du Centre international pour le règlement des différends relatifs aux investissements—*Compañía de Aguas del Aconquija S.A. c. Argentine*, *Sempra Energy International c. Argentine*, et *Enron c. Argentine*—*

démontrent la portée de ces risques. Le présent commentaire examine les impacts négatifs de ces tribunaux sur l'Argentine—d'abord par leur interprétation du droit d'expropriation, du principe du traitement juste et équitable, et des défenses équitables telles que la nécessité, et ensuite par la volonté des tribunaux d'interpréter le droit argentin. L'auteur propose aux futurs tribunaux se penchant sur des questions relatives aux investissements internationaux d'appliquer un cadre analytique fondé sur les principes du développement durable pour éviter de tels dénouements. En avançant ces propos, l'auteur approfondit les fondements juridiques et équitables qui justifient l'application du droit du développement durable lors de l'interprétation des accords internationaux d'investissements.

* I would like to thank Prof. Don McRae for his advice on various points of law in this paper, as well as Case Comment Editor Andrew Brighten, whose patience and enthusiasm I greatly appreciated. Thank you also to the reviewers, who provided helpful feedback.

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When developing countries sign international investment agreements (“IIAs”) with developed countries, they run many risks. Some of these risks arise from the negotiation process. Developing countries generally have fewer resources than developed countries to evaluate an agreement’s appropriateness or to assess its impact on their economy. Even if a developing country has the resources necessary to evaluate the advantages of signing an IIA, many developed countries employ draft templates that leave little room for change during negotiations.¹ Dangers also arise from the manner in which investment tribunals interpret common IIA provisions. Recent decisions of tribunals of the International Centre for the Settlement of Investment Disputes (“ICSID”) and tribunals using the United Nations Commission on International Trade Law (“UNCITRAL”) Rules are quickly establishing authoritative interpretations of key IIA provisions without any consideration of sustainable development principles. These precedents are highly protective of foreign investors’ rights, and give little regard for the role of foreign investment in the overall development policy of a developing country. The cases reviewed in this article exemplify this worrying trend.²

¹ For an overview of some common features of these templates and of IIAs generally, see J. Anthony VanDuzer, Penelope Simons & Graham Mayeda, “Modeling International Investment Agreements for Economic Development” in Veniana Qalo, ed., *Bilateralism and Development: Emerging Trade Patterns* (London: Cameron May, 2008) at 359.

² The three cases reviewed are: *Compañía de Aguas del Aconquija S.A. v. Argentina* (2007), (International Centre for Settlement of Investment Disputes), online: Investment Treaty Arbitration <<http://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf>> [*Vivendi III*]; *Sempra Energy International v. Argentina* (2007), (International Centre for Settlement of Investment Disputes), online: Investment Treaty Arbitration <<http://ita.law.uvic.ca/documents/SempraAward.pdf>> [*Sempra*]; and *Enron v. Argentina*

These cases raise a number of important issues that developing countries must consider when signing international investment agreements. As many scholars have noted, IIAs can potentially limit a government's ability to regulate in the public interest where this interest runs counter to that of foreign investors.³ As a result, IIAs may also limit the democratic functioning of government. For instance, prior to *Vivendi III*, legislators had voiced their opposition to the privatization of water utilities, an action that had resulted in an overnight doubling of the cost of water. The investment panel used these legislators' statements as evidence of the "political" intent of Argentine authorities to damage Vivendi's affiliate without considering whether the legislators were giving voice to the legitimate concerns of the citizens they represented.⁴ Similarly, in *Sempra* and *Enron*, the tribunal interpreted the international law defence of necessity and the availability of the non-precluded measures clause of the Argentina-U.S. treaty very narrowly. This interpretation severely restricted Argentina's ability to enact measures to deal with the financial, social, and economic crisis it faced at the end of the 1990s and early part of the new millennium without attracting liability for losses sustained by foreign investors.⁵

In addition to the policy concerns raised by IIAs, all three cases demonstrate alarming developments in the interpretation of the doctrines of fair and equitable treatment and expropriation. Particularly disturbing is the tribunals' acceptance that the principle of fair and equitable treatment protects a foreign investor's expectations of profits.⁶ This broad protection likely gives investors greater protection than the parties to an IIA intended—the scope of an IIA provision should be defined by the intentions of the parties to the treaty, not the expectations of a single party.⁷ Moreover, these intentions should be interpreted contextually through the application of a sustainable development analysis, as I will outline below.⁸

None of the ICSID tribunals deciding the cases reviewed in this article applied a development analysis to the issues. As mentioned above, all three decisions raise questions about the role of democracy in promoting sustainable development, since they impede the ability

(2007), (International Centre for Settlement of Investment Disputes), online: Investment Treaty Arbitration <<http://ita.law.uvic.ca/documents/Enron-Award.pdf>> [*Enron*].

³ Jeswald W. Salacuse & Nicholas P. Sullivan, "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" (2005) 46 *Harv. Int'l L.J.* 67 at 70. See also Aaron Cosbey *et al.*, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements* (2004) at 13, online: International Institute for Sustainable Development <http://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf>; Konrad von Moltke & Howard Mann, *Towards a Southern Agenda on International Investment: Discussion Paper on the Role of International Investment Agreements* (2004) at 29, online: International Institute for Sustainable Development <http://www.iisd.org/pdf/2004/investment_sai.pdf>; William W. Burke-White, "The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System" (2008) 3 *Asian Journal of WTO & International Health Law & Policy* 199.

⁴ Further discussion will be found in Sections 2.1 and 4.1 below.

⁵ Further discussion will be found in Section 8 below.

⁶ For a critique of the principle of fair and equitable treatment as it has developed in the context of international investment law, see Graham Mayeda, "Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties" (2007) 41 *J. World Trade* 273 [Mayeda, "Fair and Equitable Treatment in BITs"].

⁷ Further discussion will be found in Section 6 below.

⁸ See Section 4.1 below.

of elected officials to change a former government's policy. A close analysis of the government's actions in *Vivendi III* may lead one to conclude that, in failing to obey the rule of law, Tucumán's government did not respect the principles of a constitutional democracy. However, if one looks at the issue of democracy in the context of sustainable development, one realizes that the cases do not address one of the central issues, namely, the effects of the privatization of Argentina's water and gas utilities on the country's people. This gap raises the further question as to how the economic and social impact of privatization on citizens should be taken into account when balancing the rights of parties to an IIA.

2. FACTUAL BACKGROUND

Vivendi III, *Sempra* and *Enron* comprise three of the approximately forty cases brought by foreign investors against Argentina in the wake of its economic meltdown in the late 1990s and early part of the new millennium.⁹ To understand the issue of democracy's role in international investment, a detailed account of the facts in *Vivendi III* is required. A relatively short combined summary of *Sempra* and *Enron* will follow.

2.1 *Vivendi III*

The case arose from a dispute between Argentina and Compañía Aguas del Aconquija S.A. ("CAA"), an Argentine affiliate of the French company *Companie Générale des Eaux* ("CGE"). CGE's successor company is *Vivendi Universal S.A.* ("Vivendi"), also a French company. CAA and CGE were parties to a concession agreement with the province of Tucumán in Argentina. The concession aimed at privatizing the water utilities in Tucumán.¹⁰ This agreement was part of a great wave of privatization that swept across Argentina during the presidency of Carlos Menem (1989-1999).¹¹ The agreement transferred the provision of water from the state utilities to CAA as of 22 July 1995, when the agreement came into effect. As a result of the privatization, consumers saw the cost of water jump by 110 per cent on average,¹² which amounted to an average total invoice of U.S. \$25.92 per month.¹³ This increase accorded with the terms of the concession agreement,¹⁴ which had been approved by "all relevant government entities in Tucumán."¹⁵ The pre-award commission had described the proposed rate increases as "reasonable from a commercial and economic perspective."¹⁶ The recommendation of the pre-award commission to award the concession to CAA was ratified by the Tucumán legislature.¹⁷

⁹ Bernard Hoekman & Richard Newfarmer, "Preferential Trade Agreements, Investment Disciplines and Investment Flows" (2005) 39 J. World Trade 949 at 966.

¹⁰ *Vivendi III*, *supra* note 2 at para. 1.1.1.

¹¹ *Ibid.* at para. 4.2.1.

¹² *Ibid.* at para. 4.10.3.

¹³ *Ibid.* at para. 4.14.18.

¹⁴ *Ibid.* at para. 4.5.2. The agreement provided that the tariffs would rise by 67.9 per cent immediately, and then 10 per cent in each subsequent year. An additional 38.7 per cent of the tariff increase consisted of various provincial, municipal, and federal taxes (*ibid.* at paras. 4.14.3, 4.14.4).

¹⁵ *Ibid.* at para. 4.3.9.

¹⁶ *Ibid.* at paras. 4.3.9, 4.3.11.

¹⁷ *Ibid.* at para. 4.3.12.

The increased costs of water services were mostly passed on to consumers with middle to high incomes, rather than to those with lower incomes.¹⁸

Despite these initial positive assessments, local authorities in Tucumán province began to voice their opposition to the agreement. In addition to concerns about the legality of the privatization of the utility, allegations arose against CAA and CGE that they were failing to provide potable water. Shortly after the takeover, two episodes of water turbidity occurred. The first episode affected limited areas of Tucumán, causing approximately five to ten per cent of customers to have reddish drinking water during December 1995 and January 1996.¹⁹ The second more serious episode involved customers' water turning black as a result of manganese in the El Cadillal reservoir. This manganese turbidity was more widespread than the earlier reddish turbidity and lasted for about two weeks.²⁰ Experts did not consider that either episode posed a health risk.²¹

Both the public and political leaders in Tucumán reacted negatively to the two instances of turbidity. Politicians were becoming increasingly opposed to privatization generally and to the privatization of the water utility in particular. ERSACT, the provincial water regulator, charged CAA with breaching its obligation to maintain water quality under the concession agreement.²² The vice-governor of Tucumán, Raul Roque Topa, replaced the board of directors of ERSACT, which he claimed was a response to the huge tariff increases and the water turbidity.²³ On the same day that its board of directors was replaced, the regulator issued a resolution declaring CAA at fault for the episode of manganese turbidity and declared that affected customers would receive thirty-five days of free service.²⁴ As well, government ministers and the executive stated that the water supplied by CAA was "bacteriologically contaminated" and could cause cholera, typhoid, and hepatitis.²⁵ At various times, the government advised customers not to pay their invoices.²⁶ Elected officials gave speeches maintaining that the concession agreement and subsequent renegotiated agreements were illegal.²⁷

Both CAA and the Tucumán government attempted to renegotiate the water tariffs three times. The first renegotiation ended when the legislature issued a report criticizing the privatization process and alleging the possibility of corruption,²⁸ although the attorney general later announced that these charges were unfounded.²⁹ The agreement resulting from a second

¹⁸ *Ibid.* at para. 4.10.3.

¹⁹ *Ibid.* at paras. 4.12.5-4.12.7.

²⁰ *Ibid.* at para. 4.12.21.

²¹ *Ibid.* at paras. 4.12.4, 4.12.7, 4.12.21.

²² *Ibid.* at paras. 4.13.3-4.13.10.

²³ *Ibid.* at paras. 4.13.15-4.13.17.

²⁴ *Ibid.* at para. 4.13.19.

²⁵ *Ibid.* at para. 4.13.13.

²⁶ *Ibid.* at para. 4.14.19.

²⁷ *Ibid.* at para. 4.16.14. For instance, it was alleged that the Framework Agreement arising from the second renegotiation violated Law No. 6445, which established basic guidelines for the privatization process (see *ibid.* at para. 4.2.5).

²⁸ *Ibid.* at para. 4.15.11.

²⁹ *Ibid.* at para. 4.15.12.

set of negotiations, which would have reduced the total amount of bills by twenty-eight per cent,³⁰ was likewise criticized and eventually rejected by the legislature.³¹ CAA then initiated proceedings at the ICSID. A final attempt at renegotiation was made, but seventy changes were made to the revised concession agreement before it came for approval by the legislature. These changes were made without CAA being aware of them,³² and when its protests were ignored, CAA terminated the concession agreement, which permitted unilateral termination with fifteen days notice if acts or omissions by ERSACT or the province “resulted in grave, unjustified violations of obligations” under the agreement.³³ Termination was conditional on the province or ERSACT having an opportunity to rectify its breaches of the agreement.³⁴

For various reasons, CAA was forced to continue providing water services between the termination of its obligations as concessionaire on 27 November 1997 and the takeover of its operations by the new concessionaire by 7 October 1998.³⁵ CAA attempted to collect payment for its services during the term of the concession. However, both the ombudsman and various legislators advised CAA customers that they were not obligated to pay their bills.³⁶ Attempts by CAA to recover amounts owing to it through summary court proceedings were thwarted when the legislature enacted a law preventing CAA from collecting any damages awarded to it by the courts.³⁷ Finally, the Argentine tax authority demanded payment of income tax on the unpaid invoices of CAA’s customers and on assets that CAA had transferred to the province once its concession was finally taken over in 1998. CAA challenged the assessment, and the tax authority obtained a court judgment attaching CAA’s assets in Tucumán bank accounts.³⁸

Overall, the facts in *Vivendi III* were characterized by the tribunal as a series of attempts by the Tucumán authorities, who had come to oppose the privatization of the water utility, to force CAA to renegotiate the water tariffs. The motivation of these officials was considered to be “political,” and the means used were characterized generally as violations of the rule of law and due process.³⁹

2.2 *Sempra* and *Enron*

The facts in these cases are quite similar and can be treated relatively quickly. They arise from the same situation dealt with in *CMS Gas Transmission Company v. Argentina*.⁴⁰ Enron and Sempra, both American energy companies, had purchased gas utilities in Argentina following the privatization of these utilities, which began in 1989. Both companies claimed damages for

³⁰ *Ibid.* at para. 4.16.3.

³¹ *Ibid.* at para. 4.16.14.

³² *Ibid.* at para. 4.17.17.

³³ *Ibid.* at para. 4.5.8.

³⁴ *Ibid.* at para. 4.5.8.

³⁵ *Ibid.* at paras. 4.20.2, 4.20.8.

³⁶ *Ibid.* at para. 4.21.3.

³⁷ *Ibid.* at para. 4.21.7.

³⁸ *Ibid.* at paras. 4.22.1-4.22.3.

³⁹ See Section 4.2 below.

⁴⁰ (2005) 44 I.L.M. 1205 (International Centre for Settlement of Investment Disputes) [*CMS Gas*]. For a summary and analysis of *CMS Gas*, see Mayeda, “Fair and Equitable Treatment in BITs,” *supra* note 7.

breach of the Argentina-U.S. bilateral investment treaty (“Argentina-US BIT”).⁴¹ They alleged that their investments were lost due to decisions made by the governments that succeeded President Carlos Menem after Argentina’s economic meltdown at the turn of the twenty-first century. The measures complained of are detailed in the following paragraphs.

The gas tariffs charged by the affiliates of Enron and Sempra were supposed to be adjusted on a semi-annual basis in accordance with the U.S. Producer Price Index (“PPI”).⁴² However, in response to Argentina’s economic crisis, the government suspended these price adjustments. Although the gas utilities had initially agreed to this measure, Argentina has refused to make any PPI adjustments after 1999.⁴³ Sempra and Enron argued that this refusal violated a vested right to PPI tariff adjustments established in Article 41 of the Gas Decree and confirmed by Decree 669/00, the decree that resulted from the agreement between the Argentine government and the utilities to temporarily freeze gas rates.⁴⁴ Argentina contended that adjusting the gas rates in accordance with the U.S. PPI no longer made sense after 2000. As of that date, Argentina argued, the scheduled tariff increases would worsen the Argentine economic crisis, since the contemporaneous deflation in Argentina and inflation in the U.S. would result in disproportionate tariff increases.⁴⁵ Furthermore, in Argentina’s view, suspension of the tariff adjustments had been agreed to by the parties and was eventually enforced by a judicial injunction obtained on 18 August 2000.⁴⁶

The second investor complaint arose because Enron and Sempra’s affiliates had obtained guarantees that tariffs would be calculated in U.S. dollars under the Gas Law, the Gas Decree, and the Basic Rules of the License Agreement. These guarantees were intended to guard against currency fluctuations.⁴⁷ On 6 January 2002, Argentina enacted Law No. 25.561, also known as the “Emergency Law.” This law eliminated the calculation of gas tariffs in U.S. dollars and the conversion of those amounts into pesos at the rate of one U.S. dollar per peso, thus destroying the initial formula established for calculating the tariffs.⁴⁸

The third basis for Sempra and Enron’s claims was that Argentina breached the provisions in the License Agreement that guaranteed the stability of that agreement.⁴⁹ The fourth basis, unique to *Sempra*, was that Argentina failed to pay the gas utilities the subsidies that it was providing for customers in Patagonia.⁵⁰

⁴¹ *Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, United States and Argentina, 14 November 1991, online: Organization of American States <<http://www.sice.oas.org/BITS/USAARGTC.ASP>> [Argentina-US BIT].

⁴² *Sempra*, *supra* note 2 at para. 85; *Enron*, *supra* note 2 at para. 44.

⁴³ *Sempra*, *ibid.* at paras. 100-103; *Enron*, *ibid.* at paras. 62-68.

⁴⁴ *Sempra*, *ibid.* at paras. 104-105; *Enron*, *ibid.* at para. 96.

⁴⁵ *Sempra*, *ibid.* at para. 106; *Enron*, *ibid.* at para. 97.

⁴⁶ *Sempra*, *ibid.* at para. 108; *Enron*, *ibid.* at para. 99.

⁴⁷ *Sempra*, *ibid.* at para. 117; *Enron*, *ibid.* at para. 106.

⁴⁸ *Sempra*, *ibid.* at para. 116; *Enron*, *ibid.* at para. 72.

⁴⁹ *Sempra*, *ibid.* at para. 170; *Enron*, *ibid.* at para. 151.

⁵⁰ *Sempra*, *ibid.* at para. 175.

3. THE LEGAL CLAIMS UNDER THE BIT

With the foregoing facts as a background, I now set out the investors' legal claims under the bilateral investment treaties ("BIT") in each case.

3.1 *Vivendi III*

CAA's claim against the Argentine government was based on breaches of its obligations under a BIT between Argentina and France ("Argentina-France BIT").⁵¹ CAA alleged that the Tucumán authorities had, by their acts and omissions, failed to provide the fair and equitable treatment required by Article 3 of the BIT, and that their acts amounted to expropriation in violation of Article 5.⁵² As a result of these breaches, CAA claimed damages of U.S. \$316,923,000, plus compound interest and litigation costs.⁵³

In response to these allegations, Argentina made six main arguments, which raise further legal issues. The first related to the jurisdiction of the ICSID tribunal. Argentina maintains that CAA was originally an Argentine company that only became a French national able to make a claim under the BIT by virtue of its acquisition by CGE, a French company.⁵⁴ In accordance with the concession agreement, such a change of ownership required the consent of the Tucumán government.⁵⁵ In Argentina's view, this consent had not been obtained. Second, Argentina argued that the matter was purely contractual; thus, it could not give rise to international legal liability.⁵⁶ Third, Argentina maintained that CAA did not meet its obligations under the concession agreement, since it had increased the tariffs at once rather than in the gradual manner provided for by the agreement.⁵⁷ As well, Argentina alleged that CAA did not ensure the safety of the water supply, because it had failed to update the water treatment facility's laboratory sufficiently quickly,⁵⁸ had failed to establish a proper water quality control program,⁵⁹ and had provided poor service that resulted in two episodes of turbidity.⁶⁰ As well, CAA failed to make the investments necessary to expand its area of service as required by the agreement.⁶¹ In the absence of evidence that CAA fulfilled its contractual obligations in good faith, Argentina argued that CAA should be barred from relying on Tucumán's breaches of

⁵¹ *Accord Entre le Gouvernement de la République Française et le Gouvernement de la République Argentine sur l'Encouragement et la Protection Réciproques des Investissements*, France and Argentina, 3 July 1991, online: Organization of American States <http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ARG_France_f.pdf> [Argentina-France BIT].

⁵² *Vivendi III*, *supra* note 2 at para. 1.1.7.

⁵³ *Ibid.* at para. 5.7.6.

⁵⁴ *Ibid.* at para. 6.2.1.

⁵⁵ *Ibid.* at para. 6.2.2.

⁵⁶ *Ibid.* at paras. 6.3.1-6.3.4.

⁵⁷ *Ibid.* at para. 6.4.2.

⁵⁸ *Ibid.* at paras. 6.4.3, 6.4.4.

⁵⁹ *Ibid.* at paras. 6.4.5, 6.4.6.

⁶⁰ *Ibid.* at para. 6.4.8(i).

⁶¹ *Ibid.* at para. 6.4.7.

the concession agreement.⁶² Argentina also rejected CAA's claims under the BIT.⁶³ Finally, it objected to the basis on which CAA claimed damages.⁶⁴

3.2 *Sempra* and *Enron*

A preliminary question raised in these cases related to the applicable law. Should the law of Argentina apply only to determine factual matters, but the law of the BIT and rules of international law that are not incompatible with the treaty be applied to settle the dispute?⁶⁵ Or should Argentine law be applied to determine the rights of the investors, for instance in relation to property rights?⁶⁶

A second question was whether the economic emergency in which Argentina found itself should determine the contractual rights between the parties. This issue required the tribunals to consider the doctrines of "imprévision" or "unforseeability," *force majeure*, and other equitable principles found in Argentine contract law.⁶⁷

Enron and *Sempra* also alleged violations of the principle of fair and equitable treatment⁶⁸ and the prohibition on expropriation⁶⁹ contained in the Argentina-U.S. BIT. Furthermore, they argued that Argentina had failed to abide by the "umbrella" clause of the BIT, which *Enron* and *Sempra* argued obliged Argentina to respect the principle of *pacta sunt servanda*.⁷⁰ The companies argued that Argentina's response to its economic crisis "breached every commitment made in the Gas Law, the Gas Decree and the License,"⁷¹ thereby breaching this maxim. In addition, *Sempra* and *Enron* argued that the actions taken by Argentina were arbitrary and discriminatory.⁷² Finally, the plaintiffs alleged that Argentina had failed to provide its investment full protection and security, as required under the BIT.⁷³

In addition to defending itself against these claims, Argentina argued that it had a defence under both Argentine and international law, since the measures to which *Sempra* and *Enron* objected were taken in response to an emergency.⁷⁴

⁶² *Ibid.* at para. 6.4.10.

⁶³ *Ibid.* at paras. 6.1.2, 6.5.1-6.8.10.

⁶⁴ *Ibid.* at paras. 6.9.1-6.13.1.

⁶⁵ *Sempra*, *supra* note 2 at para. 232; *Enron*, *supra* note 2 at para. 203.

⁶⁶ *Sempra*, *ibid.* at para. 233; *Enron*, *ibid.* at para. 204.

⁶⁷ *Sempra*, *ibid.* at para. 243; *Enron*, *ibid.* at para. 214.

⁶⁸ *Sempra*, *ibid.* at para. 290; *Enron*, *ibid.* at para. 251.

⁶⁹ *Sempra*, *ibid.* at para. 271; *Enron*, *ibid.* at para. 234.

⁷⁰ *Sempra*, *ibid.* at para. 305; *Enron*, *ibid.* at para. 269.

⁷¹ *Sempra*, *ibid.* at para. 306; *Enron*, *ibid.* at para. 270.

⁷² *Sempra*, *ibid.* at para. 315; *Enron*, *ibid.* at para. 278.

⁷³ *Sempra*, *ibid.* at para. 321; *Enron*, *ibid.* at para. 284.

⁷⁴ *Sempra*, *ibid.* at para. 325; *Enron*, *ibid.* at para. 288.

4. DISCUSSION OF THE RULINGS OF THE TRIBUNALS

In this section, I explain the rulings of the tribunals in each of the three cases—*Vivendi III*, *Sempra*, and *Enron*—and raise some concerns about the tribunals' approaches to various issues.

4.1 Tribunals Ought to Apply a Sustainable Development Analysis

One of the main failures of the tribunals in *Sempra*, *Enron*, and *Vivendi III* is that they fail to take into account the fact that Argentina is a developing country according to the World Bank's Development Indicators.⁷⁵ The development context of these decisions is important, because investment tribunal decisions have the potential to further marginalize developing countries. For instance, estimates of the total value of claims against Argentina arising out of its financial crisis range from U.S. \$8 billion to U.S. \$80 billion.⁷⁶ When one takes into account that even the lower figure surpasses Argentina's entire financial reserves in 2002,⁷⁷ one can appreciate the huge impact that this litigation may have on the country. Furthermore, as will be seen in the next section, these decisions have implications for the promotion of democracy—an important aspect of sustainable development and a goal promoted through the development policies of most developed countries. If developed countries and the international investment regime are to take the promotion of democracy seriously, it is important for investment tribunals to appreciate the effects of their decisions on developing countries.

What is meant by a sustainable development analysis? Such an analysis would require courts to see promoting investment not as an end in itself, but as part of a country's approach to important social issues, including promoting human rights, protecting the environment, and improving social welfare. From the perspective of sustainable development, investment is one of the enabling conditions for the achievement of key human capabilities.⁷⁸ For instance, *Agenda 21*⁷⁹ states that the promotion of investment is a *means* to achieve various development goals:

Investment is critical to the ability of developing countries to achieve needed economic growth to improve the welfare of their populations and to meet their basic needs in a sustainable manner, all without deteriorating or depleting the resource base that underpins development. Sustainable development requires increased investment, for which

⁷⁵ Although listed as a developing country, Argentina is currently considered an "upper middle income" country. See *World Bank List of Economies* (2008), online: World Bank <<http://siteresources.worldbank.org/DATASTATISTICS/Resources/CLASS.XLS>>.

⁷⁶ Burke-White, *supra* note 3 at 204, citing Wailin Wong, "Argentina Tsy Attorney: World BK Claims Could Reach \$80B" *Dow Jones International News* (21 January 2005); Gabriel Bottini, "Issues of Jurisdiction and Merits Arising from the Argentine Litigation at ICSID" (Speech delivered at the International Investment and Transnational Litigation Symposium, University of Pennsylvania Law School, 2 February 2007) [unpublished].

⁷⁷ *Ibid.*

⁷⁸ On the capabilities approach to sustainable development, see Amartya Sen, *Development As Freedom* (New York: Anchor, 1999).

⁷⁹ *Agenda 21: Programme of Action for Sustainable Development*, 14 June 1992 (adopted by the United Nations Conference on Environment and Development, Rio de Janeiro, Brazil 3-14 June 1992), online: United Nations Department of Economic and Social Affairs <<http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter2.htm>>.

domestic and external financial resources are needed. Foreign private investment and the return of flight capital, which depend on a healthy investment climate, are an important source of financial resources.⁸⁰

An international tribunal that recognized that investment was not an end in itself, but a means of realizing and promoting key areas of human functioning, would recognize the intersection between international investment law and other areas of international and national law and policy.

In fact, the kind of intersectional analysis to which sustainable development analysis inevitably leads has previously been applied by international tribunals. For instance, Judge Weeramantry recognized the diverse components that make up the law of sustainable development in the Case Concerning *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia),⁸¹ where he stated that “[t]he components of the principle [of sustainable development] come from well-established areas of international law—human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, good neighbourliness—to mention a few.”⁸² The importance of an intersectional analysis is reinforced by international documents that recognize how sustainable development implicates many aspects of citizens’ well-being. The New Delhi Declaration,⁸³ for example, recognizes that social, economic, financial, and environmental concerns need to be understood in an integrated way.⁸⁴ This suggests that a sustainable development approach to international investment would take into account the impact of international investment and IIAs more generally on a developing country’s ability to meet the needs of those living in its territory.⁸⁵

A sustainable development analysis is not just an aspiration—it has concrete content. For instance, sustainable development law suggests that developing countries should have a greater role in decisions about international investment, and that the citizens of these countries should

⁸⁰ *Ibid.* at para. 2.23.

⁸¹ [1997] I.C.J. Rep. 7 [*Gabčíkovo-Nagymaros*].

⁸² *Ibid.* at 95.

⁸³ *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 2 April 2002, 2 International Environmental Agreements: Politics, Law & Economics 209 (adopted by the 70th Conference of the International Law Association, New Delhi, India 2-6 April 2002) [*New Delhi Declaration*].

⁸⁴ See *ibid.*, Art. 7.1, which articulates the principle of the integration of social, economic, financial, and environmental factors, as well as human rights.

⁸⁵ The declaration also provides as follows in its preamble:

[T]here is a need for a comprehensive international law perspective on integration of social, economic, financial and environmental objectives and activities and that enhanced attention should be paid to the interests and needs of developing countries, particularly least developed countries, and those adversely affected by environmental, social and developmental considerations (*ibid.*, preamble).

See also Eva Nieuwenhuys, “Global Development Through International Investment Law: Lessons Learned from the MAI” in Nico Schrijver & Friedl Weiss, eds., *International Law and Sustainable Development: Principles and Practice* (Leiden: Martinus Nijhoff, 2004) 295 at 300, who writes, “in seeking an appropriate forum for negotiating a multilateral investment system, developing countries ... wish to ensure that governments are not deprived of opportunities to ensure that these investments are consistent with their development policies.”

have more say in the regulation of investments affecting their well-being. The Brundtland Commission pointed to the need for greater participation in its report:

Meeting essential needs requires not only a new era of economic growth for nations in which the majority are poor, but an assurance that those poor get their fair share of the resources required to sustain that growth. Such equity would be aided by political systems that secure effective citizen participation in decision making and by greater democracy in international decision making.⁸⁶

Other international documents, including the *Johannesburg Declaration*,⁸⁷ also note the need for parties that will be impacted by international investment to have a place at the table where investment instruments are negotiated.⁸⁸

Once we recognize that developing countries should have a role in shaping and interpreting international rules about investment, and that citizens of these countries should have a say in the domestic regulation of foreign investment, it is only a short step to recognizing that IIAs can affect the promotion of democracy in developing countries. For this reason, development analysis must also involve the protection and promotion of democracy as one of the lenses through which it considers international investment. It is widely accepted that there exists a human right to democratic government, as this right has been reaffirmed in many international instruments.⁸⁹ The development policies of many developed countries include the promotion of democracy and democratic capacity-building as part of the mandate of national develop-

⁸⁶ World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, UN GAOR, 42nd Sess., Supp. No. 25, UN Doc. A/42/427 (1987) at 25 [*Brundtland Report*].

⁸⁷ *Johannesburg Declaration on Sustainable Development*, 4 September 2002, para. 31 (adopted by the 17th plenary meeting of the World Summit on Sustainable Development, Johannesburg, South Africa 26 August - 4 September 2002) [*Johannesburg Declaration*].

⁸⁸ See *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 38 I.L.M. 517 (entered into force 30 October 2001); *Rio Declaration on Environment and Development*, 14 June 1992, 33 I.L.M. 874, principle 10 [*Rio Declaration*]; *Draft Principles on Human Rights and the Environment*, Annex I in *Human Rights and the Environment: Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur*, UN ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., Annex, Agenda Item 4, UN Doc. E/CN.4/Sub.2/1994/9 (1994), arts. 15, 18.

⁸⁹ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) art. 21 [*UDHR*]. See also *Draft Resolution on Promotion of the Right to Democracy*, UN ESCOR, Commission on Human Rights, 55th Sess., Annex, Agenda Item 11, UN Doc. E/CN.4/1999/L.55/Rev.2. (1999) at para. 1; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976), arts. 1, 25 [*ICCPR*]. Art. 25 of the *ICCPR*, which provides for a right of political participation, has developed into a right of democratic government through statements of the ICCPR Human Rights Committee. See *General Comment 25*, ICCPR Human Rights Committee, 57th Sess., UN Doc. CCPR/C/21/Rev.1/Add.7 (1996); *Promotion of the Right to Democracy*, Res. 1999/57, UN Commission on Human Rights, 55th Sess., UN Doc. E/1999/23 (1999) 190; OAS, General Assembly, 21st Sess., *Resolution on Representative Democracy*, OR AG/RES. 1080 (XXI-0/91) (1991); *Resolution on Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, GA Res. 45/150, UN GAOR, 45th Sess., Supp. No. 49A, UN Doc. A/45/766 (1990) 254. For the view that these documents do not establish an entitlement to democratic government, see Gregory H. Fox and Brad R. Roth, "Democracy and International Law" (2001) 27 *Review of International Studies* 327.

ment agencies.⁹⁰ These policies attest to the recognition on the part of these states that sustainable development includes a right to democracy. Finally, prominent academics have noted the emergence of an entitlement to democracy,⁹¹ as well as the fact that democracy supports sustainable development, since the accountability mechanisms of democracies make it more difficult for the benefits of economic growth to be siphoned off by corrupt governments.⁹²

Of course, there are potential barriers to applying the sustainable development analysis that I suggest. One such issue concerns the degree to which investment tribunals should take into account emerging principles of international law such as sustainable development. The principles of sustainable development will only become customary norms of international law if adherence to these norms is reflected in state practice and *opinio juris*—evidence of a state's recognition that it is bound by the obligations set out in the principles.⁹³ Unfortunately, social and economic rights have generally not achieved this status. However, in a discussion of the Millennium Development Goals, Philip Alston has argued that at least some of those goals have reached the status of customary international law. He suggests that if the norm embodied in a development principle is essential to protecting human dignity—the value underlying human rights' protection—and, furthermore, if a state is able to implement the norm with other states' support, the norm ought to be recognized as part of customary international law.⁹⁴ This is a progressive analysis to which I subscribe. However, I question whether it is adequately supported by *opinio juris*, as the mere capacity to implement a norm is far different from the recognition that the norm *must* be implemented.

However, norms need not be rules of customary international law to be relevant to an international tribunal's analysis of a legal problem. As Vaughn Lowe has argued, there are also *interstitial* norms, which, while not primary legal rules, nonetheless influence the way that judicial decision-makers render judgments.⁹⁵ These norms are employed by tribunals to interpret and apply the core legal rules of international law. I have dealt with the role of interstitial norms in a previous article, in which I concluded that new and emerging principles of custom-

⁹⁰ See e.g. the democratization programs of the following countries: Canada (*Governance: Themes*, online: Canadian International Development Agency <[http://pdf.usaid.gov/pdf_docs/PDACF999.pdf](http://www.acdi-cida.gc.ca/CIDAWEB/acdicida.nsf/En/JUD-121135230-Q5V>); United States (<i>At Freedom's Frontiers: A Democracy and Governance Strategic Framework</i> (2005), online: US Agency for International Development <); and the United Kingdom (*Making Democracy Work for the Elimination of Poverty*, online: Department for International Development <<http://www.dfid.gov.uk/pubs/files/election.pdf>>).

⁹¹ Thomas Franck, "The Emerging Right to Democratic Governance" (1992) 86 Am. J. Int'l L. 46.

⁹² Jack Donnelly, "Human Rights, Democracy, and Development" (1999) 21 Hum. Rts. Q. 608 at 610.

⁹³ See *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7, Art. 38(1).

⁹⁴ Philip Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals" (2005) 27 Hum. Rts. Q. 755 at 774.

⁹⁵ Vaughan Lowe, "Sustainable Development and Unsustainable Arguments" in Alan Boyle & David Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999) 19 at 26; Vaughan Lowe, "The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?" in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 207 at 207. See also Sumudu A. Atapattu, *Emerging Principles of International Environmental Law* (Ardsey, NY: Transnational, 2006) at 182-186.

ary international law such as the principles of sustainable development have a positive role to play in the decisions of international investment tribunals, because emerging norms help us to interpret and apply well-established norms to novel contemporary situations.⁹⁶ The sustainable development analysis that I am proposing involves applying norms that are emerging principles of customary international law. Their status, however, is not denigrated by this classification; international tribunals should apply these principles, because they will help make sense of how traditional customary and treaty norms should apply in the contemporary context of international development.

Another potential obstacle to a development analysis is the relationship between the rules set out in IIAs and the rules of customary international law, emergent or otherwise. Arguably, IIAs create *lex specialis* that supplants customary international law in important areas.⁹⁷ Furthermore, one could plausibly maintain that the process of adjudicating disputes arising out of IIAs is more similar to investment arbitration between private parties than public international law disputes between states. As a result, it might seem inappropriate for investment tribunals to consider development issues or apply international law more broadly. As is the case with many IIAs, however, the Argentina-U.S. BIT provides in Article VIII that if a dispute arises between the parties about the meaning of the treaty, it will be interpreted in accordance with the rules of international law.⁹⁸ Similarly, the ICSID Convention states that if the parties to an IIA have not specified the law applicable to their agreement, which is the case with the Argentina-U.S. BIT (the Argentina-France BIT specifies that the investment tribunal will rely on international law⁹⁹) an ICSID tribunal will “apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and *such rules of international law as may be applicable*.”¹⁰⁰ Furthermore, provisions in many IIAs specify that particular principles such as expropriation and fair and equitable treatment are to be interpreted in accordance with international law.¹⁰¹ Finally, in interpreting IIAs, investment tribunals apply customary law concerning the interpretation of treaties. All of this suggests that investor-state dispute resolution under an IIA requires the interpretation and application of principles of international law, of which the law of sustainable development forms a part.

Indeed, many academics support the view that treaties must be interpreted in accordance with customary international law. For instance, Philippe Sands argues that treaties are not self-contained legal documents; instead, they are continuous with customary international law. These customary principles should be applied in interpreting treaties when they do not

⁹⁶ Graham Mayeda, “Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law” (2004) 15 *Colo. J. Int’l Envtl. L. & Pol’y* 29 at 37-38 [Mayeda, “Johannesburg”].

⁹⁷ See e.g. Institut de Droit International, “Resolution on Problems Arising from a Succession of Codification Conventions on a Particular Subject” (1996) 66-ii *Ann. inst. dr. int.* 435, Conclusion 11, which states that “in the application of international law, relevant norms deriving from a treaty will prevail between the parties over norms deriving from customary law.”

⁹⁸ Argentina-U.S. BIT, *supra* note 41, Art. VIII.

⁹⁹ *Ibid.*, Art. VIII(1).

¹⁰⁰ *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 18 March 1965, 575 U.N.T.S. 159, Art. 42(1) (entered into force 14 October 1966) [emphasis added].

¹⁰¹ See e.g. Art. 3 on fair and equitable treatment in the Argentina-France BIT (*supra* note 51) and the similar provision in the Argentina-US BIT (*supra* note 42, Art. II(2)(a)).

undermine the object and purpose of the legal system created by the treaty.¹⁰² Sands' argument rests on Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*,¹⁰³ which states that when interpreting a treaty, "any relevant rules of international law applicable in the relations between the parties" should be applied.¹⁰⁴

Another objection to this view is that, like all treaties, an IIA represents an agreement between parties and is to be interpreted with an eye to what the parties to the treaty have consented to.¹⁰⁵ Since most IIAs do not specifically mention sustainable development, one can presume that the parties did not intend to promote sustainable development through the treaty and so did not intend to apply principles of sustainable development in the resolution of disputes. However, Article 31(3)(c) of the *Vienna Convention* states that for the purpose of interpreting treaties, the relevant context includes "any relevant rules of international law applicable in the relations between the parties."¹⁰⁶ This rule accords with the general presumption that states do not intend to abrogate their international legal obligations through the negotiation of a treaty.¹⁰⁷ Article 31(3)(c) and this presumption make it reasonable to presume that principles of sustainable development, to the extent that they are principles of customary law, are part of the context for interpreting and applying an IIA.¹⁰⁸ Therefore, it is reasonable for investment tribunals to take into account principles of sustainable development when adjudicating disputes governed by IIAs. The arbitrations involving Argentina clearly exemplify situations in which the context of the disputes requires applying principles of development. Finally, I note that in the preambles of Argentina's BITs with both the U.S. and France, the parties state that the agreement's purpose is to "stimulate ... economic development."¹⁰⁹ Arguably, this aspect of these preambles also legitimizes the application of those elements of sustainable development law that relate to economic development.

4.2 IIAs Raise Issues of Democratic Legitimacy

Democracy is an essential aspect of sustainable development. In his well-known book *Development As Freedom*, Amartya Sen posits that democracy is an essential component of development for two reasons: it creates incentives for governments to respond to the social and

¹⁰² Philippe Sands, "Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law" in Alan Boyle & David Freestone, eds., *International Law and Sustainable Development* (Oxford: Oxford University Press, 2000) 39 at 59.

¹⁰³ 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) [*Vienna Convention*].

¹⁰⁴ *Ibid.*, Art. 31(3)(c).

¹⁰⁵ *Ibid.*, Art. 31(1).

¹⁰⁶ *Ibid.*, Art. 31(3)(c).

¹⁰⁷ See *ibid.*, Art. 30.

¹⁰⁸ Also, Thomas Franck points out that investment disputes are settled through the application of treaty law, customary law, and principles of fairness. Franck writes that "bilateral agreements form a significant safety net for resolving investment disputes in accordance with international legal principles congruent with notions of international law and the balancing tests by which an international panel of judges introduces the requisites of fairness" (Thomas Franck, *Fairness in International Law and Institutions* [Oxford: Clarendon Press, 1995] at 449). Arguably, sustainable development principles constitute an important part of fairness in this context.

¹⁰⁹ Argentina-U.S. BIT, *supra* note 41; Argentina-France BIT, *supra* note 51.

economic needs of citizens, and it gives citizens the tools to identify their economic needs.¹¹⁰ The *Brundtland Report* also recognizes democracy as an essential element of sustainable development.¹¹¹ The report states:

Meeting essential needs requires not only a new era of economic growth for nations in which the majority are poor, but an assurance that those poor get their fair share of the resources required to sustain that growth. Such equity would be aided by political systems that secure effective citizen participation in decision making and by greater democracy in international decision making.¹¹²

Eva Nieuwenhuys also underlines that sustainable development raises questions about the “just distribution of wealth.”¹¹³ If IIAs are to conform to principles of sustainable development, they should promote, rather than hinder, democratic debate and facilitate the proper functioning of democratic processes. In order to achieve this goal, when assessing the fairness of a government’s treatment of investors, an investment tribunal should take into account the potential impact of its decision on the needs and rights of the host country’s citizens.¹¹⁴ Moreover, tribunals should also consider whether the decisions made by the host state reflect democratic processes.

The three decisions discussed in this comment provide a good case study for articulating democracy’s role in the deliberations of investment arbitration panels. It is clear that the tribunals in all three cases based their opinions on a particular view of how a democratic government should arrive at a decision. For instance, the tribunal in *Sempre* held that while a government should be able to respond to emergencies and adjust contracts with utilities, the

issue is not whether contracts should remain frozen forever, but whether they can be adjusted to such changing realities in an orderly manner, as is provided under the regulatory framework and the contract itself. Such methods include the negotiated modification of the license, the alternative being that such change will be accomplished by unilateral action of the Government.¹¹⁵

In other words, the tribunal had a particular image of what a democratic response to an economic emergency would be, and having measured Argentina’s response against this standard, found it wanting.

¹¹⁰ Sen, *supra* note 78 at 154.

¹¹¹ *Brundtland Report*, *supra* note 86 at 25.

¹¹² *Ibid.*

¹¹³ Nieuwenhuys, *supra* note 85 at 298.

¹¹⁴ See the *New Delhi Declaration*, *supra* note 83, which states in its preamble:

[T]here is a need for a comprehensive international law perspective on integration of social, economic, financial and environmental objectives and activities and that enhanced attention should be paid to the interests and needs of developing countries, particularly least developed countries, and those adversely affected by environmental, social and developmental considerations (*ibid.*, preamble).

See also Nieuwenhuys, “Global Development,” *supra* note 85 at 300, who writes, “in seeking an appropriate forum for negotiating a multilateral investment system, [d]eveloping countries ... wish to ensure that governments are not deprived of opportunities to ensure that these investments are consistent with their development policies.”

¹¹⁵ *Sempre*, *supra* note 2 at para. 168.

In *Vivendi III*, the tribunal also demonstrated a lack of appreciation for the democratic process at work. In its harsh assessment of the acts of the Tucumán authorities, the tribunal described their behaviour as “international delinquency.”¹¹⁶ It is clear from the facts set out in the tribunal’s decision, however, that almost everyone in Tucumán was unhappy about the privatization of the water utility, the instances of water turbidity, and the doubling of water tariffs overnight. Dr. Jorge Rais, one of the expert witnesses, described the situation as follows:

In truth, a veritable chorus was formed, where legislators, journalists, politicians and leaders from civil society competed to be perceived as the most virulent [critic of the water situation in Tucumán].¹¹⁷

Given this widespread complaint from all sectors of society, the Tucumán authorities were surely justified in doing something about the water tariffs, and they used their freedom of speech and legislative processes—both essential features of the democratic process—to resolve the issue. Moreover, both the second and third renegotiated concession agreements were submitted to the Tucumán legislature for consideration. The third agreement was eventually approved, though with changes to which CAA had not agreed.¹¹⁸ In their decisions, the tribunals gave almost no consideration to the needs of Tucumán residents, expressed through the media and by elected officials. Instead, they contented themselves with condemning the process as a violation of the rule of law, rather than recognizing a democratically voiced opposition to the water tariffs. This reasoning demonstrates that the tribunals were unable to recognize a democratic process outside of the model with which they were familiar—the liberal democratic model. This lack of flexibility means that democracy—an essential element of sustainable development—was given only limited play in the decisions.

Of course, a clear distinction must be drawn between the actions of the Tucumán government in *Vivendi III* and those of the Argentine government in *Sempra* and *Enron*. In the former case, elected officials used the media and various pressure tactics to bring a company owned by a foreign investor to heel and, according to the tribunal, to force it to renegotiate the concession agreement. While it seems to me that these tactics are used by elected officials in many jurisdictions, one can at least see that they can legitimately be characterized as infringing the requirement to provide due process and respect the rule of law. In *Sempra* and *Enron*, however, investors’ rights were violated by a validly enacted law intended to deal with an economic emergency. This latter scenario does not raise the same concerns about the validity of government action as arise in *Vivendi III*; yet, as pointed out above, the government’s actions were challenged by the tribunals on the basis that they did not respect the rights of the investors. This lack of deference is troubling. Furthermore, the decisions illustrate the tribunals’ refusal to consider the needs and rights of Argentine citizens faced with an economic emergency.

Some of the issues I have raised about respect for democratic decision-making can be resolved by establishing the appropriate standard for distinguishing compensable state nationalizations from those that are non-compensable. If a standard were chosen that left sufficient

¹¹⁶ *Vivendi III*, *supra* note 2 at para. 7.4.46.

¹¹⁷ *Ibid.* at para. 7.4.20, quoting Jorge Carlos Rais, María Esther Equivel & Sergio Sour, *Case Study – Concession for the Potable Water and Sewerage Services in Tucumán, Argentine Republic* (2001).

¹¹⁸ *Vivendi III*, *ibid.* at paras. 4.17.1-4.17.14.

leeway to the host state to regulate and legislate in the public interest, it would respect the democratic ideal of having the law reflect the needs of society. This comment will address the appropriate standards for establishing a compensable expropriation or a violation of the minimum standard of treatment in the sections dealing specifically with those provisions.¹¹⁹ However, dealing with these specific issues does not solve all of the issues related to promoting democracy. As suggested above, a development analysis should be applied, because only such an analysis recognizes that international legal rules must be adapted to the specific needs of developing countries.¹²⁰ In the specific context of *Vivendi III*, using a sustainable development analysis might lead one to question the general applicability of the rule that when a state nationalizes a company, utility, or sector, the private owners are entitled to compensation. This rule follows from the more general international law rule that successor governments are bound by the decisions of earlier governments.¹²¹ During the period of decolonization, however, this rule was not strictly followed; instead, it was recognized that decolonization legitimately involved the indigenisation of local business and state infrastructure,¹²² because economic control would contribute to the sustainability of the former colony's development. This history demonstrates the importance of contextual analysis in applying international law, particularly when issues of sustainable development are involved. In cases involving breaches of IIAs by developing countries, this development context should be taken into account. As a practical consequence, arbitral tribunals should broadly interpret exceptions to expropriation provisions where the state is attempting to deal with a threat to human health or its own political, social, or economic viability. This analysis should take into account whether the state has attempted to deal with a serious situation in good faith, which requires considering the degree to which due process was employed in the decision to nationalize and the current reasons in the public forum justifying the nationalization. If that justification accords with the IIA's goals—such as economic development and sustainable development (if the latter is intended to be promoted by the treaty, as it should be in all future IIAs)—the tribunal should defer to the government's policy choice. However, where the nationalization has not been instituted in good faith after a democratic decision, due process has not been demonstrated, and the decision does not promote economic or sustainable development, this analysis suggests that the state will have breached its obligations to investors.

¹¹⁹ See Sections 6 and 7 below.

¹²⁰ For instance, the principle of common but differentiated responsibilities, a principle of sustainable development, recognizes that

because of historical circumstances, countries at different stages of development have different capacities, and consequently, different levels and kinds of responsibility for dealing with international environmental issues. ... [The principle] recognizes the importance of taking responsibility for past actions. As well, differential responsibility is consistent with a recognition of the varied needs and capacities of individuals and states (Mayeda, "Johannesburg," *supra* note 96 at 50).

¹²¹ John Currie, *Public International Law* (Toronto: Irwin Law, 2001) at 36-37, citing *Aguilar-Amory and Royal Bank of Canada Claims (Great Britain v. Costa Rica)* (1923), 1 R.I.A.A. 375.

¹²² M. Sornarajah, *The International Law of Foreign Investment* (Cambridge: Cambridge University Press, 2004) at 23, 398. On the international legality of nationalization in pursuit of economic reform, see: John Fischer Williams, "International Law and the Property of Aliens" (1928) 9 Brit. Y.B. Int'l L. 20; Alexander P. Fachiri, "Expropriation and International Law" (1925) 6 Brit. Y.B. Int'l L. 159.

Of course, the analysis of whether due process has been observed must be undertaken contextually with due regard for the host state's norms of fairness and due process. As Thomas Franck argues, rules and institutions can only be considered fair from the point of view of a particular community's norms:

Legitimacy can only be accorded to rules and institutions, or to claims of right and obligation, in the circumstance of an existing community. It is only by reference to a community's evolving standards of what constitutes right process that it is possible to assert meaningfully that a law, or an executive order, or a court's judgment, or a citizen's claim on a compatriot, or a government's claim on a citizen, is legitimate.¹²³

Franck goes on to point out that the voluntary compliance with rules that is exhibited in international law only makes sense if right process is consistent with "a community's evolving standard."¹²⁴

It is hard to know whether *Vivendi III's* final outcome would have differed had the tribunal employed a development analysis. Having failed to do so, the tribunal did not conduct the inquiries necessary to assess whether the Tucumán government's acts promoted or undermined democracy. For instance, the tribunal did not inquire into whether Tucumán's dealings with CAA reflected norms current in the province's public sphere. Had it done so, the tribunal might have considered whether the public supported the provincial officials' opposition to the Menem government's privatization measures—a factor relevant to deciding whether the government's actions were purely self-interested, as the tribunal held, or whether they sought to promote the public good. Instead, the tribunal focused on the lack of due process in Tucumán's dealings with CAA. On the facts as presented in the decision, it appears that the tribunal reached a reasonable conclusion that CAA was denied due process of law. Had the issue of due process been considered through a development lens, however, other factors would once again have been relevant. For instance, it would have been useful to ascertain the normative content of due process in Argentina. Of course, the particular standards of fairness current in Argentina might still violate the international minimum standard of treatment. The international standard, however, should only be applied once the impugned governmental acts have been assessed in the context of the host state's norms of fairness. This conclusion follows from the contextual nature of a sustainable development analysis.

A final issue to consider is the tribunal's assessment of the government's acts after CAA withdrew from the concession. When Vivendi's affiliate, CAA, obtained court orders to enforce its judgments against debtors who still owed for their water bills, the Tucumán government issued enactments (Law No. 7196 and Law No. 7234) to prevent CAA from continuing these suits and from enforcing judgments against these debtors.¹²⁵ The tribunal held that "[t]hese measures were, and can only be seen as a vindictive exercise of sovereign power aimed at punishing CAA and its shareholders for seeking to terminate the Concession Agreement and for exercising their rights to arbitrate under the BIT."¹²⁶ It is hard to see how this conclusion was justified on the facts of the case as portrayed by the tribunal. The tribunal's summary of

¹²³ Franck, *supra* note 108 at 26.

¹²⁴ *Ibid.*

¹²⁵ *Vivendi III*, *supra* note 2 at paras. 4.21.6, 4.21.7.

¹²⁶ *Ibid.* at para. 7.4.45.

the facts did not mention any evidence justifying its conclusion. The only evidence cited—a speech by Terán Nogues (the former vice-governor of the province)—was to the effect that the legislature had to protect the public from enforcement of the Argentine courts' judgments because the public had refused to pay on the advice of members of the executive, who had disseminated the view that the bills issued by CAA violated the concession agreement.¹²⁷ The excerpt provided could be read as stating that the public's actions had been induced by the statements of government officials, and so it was unjust to hold them responsible for actions taken in accordance with these statements. At any rate, it is not obvious that the statement is evidence of "a vindictive exercise of sovereign power," as the tribunal held.

5. INTERNATIONAL TRIBUNALS SHOULD NOT INTERPRET THE DOMESTIC LAW OF THE HOST STATE

In this section, I address the role of an international investment tribunal in interpreting the domestic law of the host state. I first set out the issues and then present an argument explaining why the tribunals in the three cases undermined democracy by interpreting Argentine law as they did.

As mentioned earlier, one of the major issues in *Sempra* and *Enron* was the status of Argentina's economic emergency in determining the contractual rights of the parties. The tribunals acknowledged the existence of the principles of *imprévision* (unforeseeability), *force majeure*, and unjust enrichment in Argentine law.¹²⁸ The tribunals then interpreted Argentine law by examining how these doctrines were applied domestically, concluding that Argentina's measures to deal with its economic crisis could not be justified on the basis that they were taken in response to an emergency. First, the emergency laws had been renewed repeatedly, and were still in place until December 2007. This lack of clearly defined temporal boundaries led the tribunal to conclude that abrogating the contractual rights of *Sempra* and *Enron*'s affiliates was not a justifiable response to an emergency.¹²⁹ Second, the essence of the rights under the contract had been changed. In other words, Argentina's declaration of an emergency permanently eliminated certain rights of *Sempra* and *Enron*'s affiliates, rather than transforming these rights in accordance with the emergency.¹³⁰ Third, the restrictions imposed on the affiliates were unreasonable. The Argentine government recognized the need to deal with tariffs and renegotiate them, and its failure to do so over six years was unreasonable in the eyes of the tribunal.¹³¹ Finally, the tribunal held that the Argentine government was not competent to act unilaterally in response to the emergency: It was obliged to either negotiate with the parties, use the mechanisms in the license agreements to change the tariffs, or request that a judge alter the contracts in accordance with the Argentine Civil Code.¹³²

After considering other aspects of Argentine administrative law, the tribunals concluded that

¹²⁷ See *ibid.* at para. 4.21.8.

¹²⁸ *Sempra*, *supra* note 2 at para. 243; *Enron*, *supra* note 2 at para. 214.

¹²⁹ *Sempra*, *ibid.* at paras. 250-52; *Enron*, *ibid.* at paras. 221-22.

¹³⁰ *Sempra*, *ibid.* at paras. 253-54; *Enron*, *ibid.* at para. 223.

¹³¹ *Sempra*, *ibid.* at para. 256; *Enron*, *ibid.* at para. 225.

¹³² *Sempra*, *ibid.* at paras. 258-60; *Enron*, *ibid.* at paras. 227-30.

[w]hether the question is examined from the point of view of the Constitution, the Civil Code or Argentine administrative law, the conclusion is no different. Liability is the consequence of such a breach, and there is no legal excuse under the legislation that could justify the Government's non-compliance since the very conditions set out by the legislation and the decisions of courts have not been met.¹³³

It is clear that the tribunals in both *Sempra* and *Enron* felt they had jurisdiction to interpret the national law of the host state. Although I do not challenge whether the tribunals had jurisdiction in the formal sense (i.e., by virtue of a rule set out in the BIT or in international law), it follows from a development analysis that tribunals should only interpret domestic law if they possess appropriate expertise and if they respect the interpretations of national tribunals. As mentioned in the previous section, the promotion of democracy is an important aspect of sustainable development. Democracy goes beyond simple support for elections; it recognizes the role of all three branches of government (legislative, executive, and judicial) in preserving and promoting democracy. The judiciary derives its legitimacy through various norms, including impartiality, but one of the most important sources of legitimacy is that the norms applied by courts reflect the norms and values broadly supported in the state's public political forum.¹³⁴ The best judicial interpretation, therefore, is that which best justifies the norm set out in the judgment; the best justification, in turn, is that which best accords with the state's political morality.¹³⁵ Unless the tribunal's composition and procedures allow for the norms of the host state's political morality to be presented before it, this tribunal will not have the legitimacy of a domestic court in interpreting domestic law. As a result, the application of a sustainable development lens to *Sempra* and *Enron* suggests that although these tribunals may need to interpret Argentina's domestic law to establish a breach of the treaty, their interpretation should defer to that of Argentine courts. Let us apply the sustainable development analysis to the specifics of *Sempra* and *Enron*.

As was the case in *CMS Gas*,¹³⁶ the tribunals in *Sempra* and *Enron* received expert opinions on the interpretation of Argentine law, including constitutional law, administrative law, and contract law, and applied these to determine the parties' rights.¹³⁷ This approach is extremely problematic. If the legal issue of the rights of parties to a contract had arisen under domestic law, a domestic court would have used the adversarial process of a trial to determine these rights.¹³⁸ By deciding how to interpret domestic law by means of expert opinions on its nature and application as occurred in these ICSID cases, however, the truth-finding mechanism of argument before an impartial judge *versed in the relevant law* is lost. True, each side presents its own experts. But unless all the tribunal's members are experts in the domestic law of the host state, they are not "plugged in" to the political morality of that state's public forum. Furthermore, it is unlikely that this political morality can be conveyed by experts without help

¹³³ *Sempra, ibid.* at para. 268; see similar wording in *Enron, ibid.* at para. 231.

¹³⁴ See Ronald Dworkin, "Law's Ambitions for Itself" (1985) 71 Va. L. Rev. 173.

¹³⁵ *Ibid.* at 178.

¹³⁶ See e.g. *CMS Gas, supra* note 40 at paras. 119-21, 201-39.

¹³⁷ See e.g. *Sempra, supra* note 2 at paras. 145, 158, 245, 247, 266-67, 330; *Enron, supra* note 2 at paras. 215, 219, 327-28; 334-35.

¹³⁸ Admittedly, civil law systems exhibit some inquisitorial aspects to their trial procedures. Nevertheless, to resolve a dispute, the parties may confront each other in court before a judge *versed in domestic law*.

from the various civil society groups and NGOs that would normally seek standing to intervene as *amicus curiae* in an important domestic law case.

Of course, international courts and arbitral tribunals frequently interpret domestic law to determine breaches of international law. In such cases, the tribunal receives the interpretation of domestic law as a fact.¹³⁹ It may thus appear as if the process employed by the tribunals in *Sempra* and *Enron* is simply an example of this practice. I am of a different view, however. The degree of interpretation that international tribunals are entitled to undertake has long been unclear. Some experts maintain that tribunals have a broad power to interpret domestic law and that the reception of national law as a fact is merely part of this process.¹⁴⁰ Others claim that because of law's normative content, establishing the meaning of domestic law necessarily involves some degree of interpretation.¹⁴¹ Finally, the other extreme argues that since many international tribunals have held that interpretations of domestic law by domestic courts are binding on international tribunals, it can be inferred that international tribunals lack jurisdiction to interpret national law.¹⁴² The uncertainty in this area invites further elaboration of the proper role of international tribunals in interpreting national law. As mentioned earlier, an international tribunal's legitimacy as an interpreter of the host state's domestic law is a function of two factors: whether the procedures of the tribunal require that its members be experts in the domestic law of that state, and whether procedures exist for informing the tribunal about the political context in which the domestic law is to be interpreted. If these mechanisms are absent, the international tribunal is unlikely to be a legitimate interpreter of domestic law.

Moreover, for the reasons mentioned above, it would be best for future IIAs to include clauses requiring investors to exhaust domestic remedies. The role of experts on national law would then be diminished, since lower courts' decisions would be provided as factual evidence of the interpretation of national law. This evidence would ensure that international tribunals would have decisions about the application of domestic law that would be directly on point. International courts could thus defer to the interpretation provided by a national court, unless the investor alleged that it had been denied justice by local courts as occurred in *Azinian v. Mexico*.¹⁴³

6. FAIR AND EQUITABLE TREATMENT AND FULL PROTECTION AND SECURITY

These cases demonstrate the great pitfalls that threaten developing countries when they include the principle of fair and equitable treatment in their IIAs. As this section will demon-

¹³⁹ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)* (1926), P.C.I.J. (Ser. A) No. 7.

¹⁴⁰ C.S. Jenks, *The Prospects of International Adjudication* (London: Stevens & Sons, 1964), at 600.

¹⁴¹ Sharif Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System* (Cambridge: Cambridge University Press, 2007) at 215-216.

¹⁴² Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 39. See also *Case Concerning the Payment of Various Serbian Loans Issued in France* (1929), P.C.I.J. (Ser. A.) No. 20-21 at 46; *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France* (1929), P.C.I.J. (Ser. A) No. 21 at 124; *Fisberies Case (United Kingdom v. Norway)*, [1951] I.C.J. Rep. 116 at 181; *Nottebohm Case (Second Phase) (Liechtenstein v. Guatemala)* [1955] I.C.J. Rep 4 at 28-29; *Lighthouses Case Between France and Greece* (1934), P.C.I.J. (Ser. A./B) No. 62 at 22.

¹⁴³ (1999), 39 I.L.M. 537, (International Centre for Settlement of investment Disputes).

strate, the three tribunals interpreted the provision in the Argentine BITs requiring fair and equitable treatment of investors as requiring Argentina to protect investors' expectations. This interpretation is far too broad and can severely limit the host state's ability to take legislative action promoting its sustainable development goals.

The interpretation of the principle of fair and equitable treatment arose in all three cases. The standard of treatment required by the principle was considered "none too clear and precise."¹⁴⁴ Rather, the purpose of the protection is to "fill gaps which may be left by the more specific standards."¹⁴⁵ The tribunal rejected Argentina's argument that fair and equitable treatment is the same as the international minimum standard, ruling that the two cannot be equated in this way. In *Vivendi III*, the tribunal pointed to the fact that Article 3 refers to fair and equitable treatment "in conformity with the principles of international law" to conclude that the principle "invites consideration of a wider range of international law principles than the minimum standard alone."¹⁴⁶ The tribunal went on to hold that the requirement that the principle of fair and equitable treatment conform to international law could be met by acknowledging the international minimum standard as a floor rather than a ceiling.¹⁴⁷ The *Vivendi III* panel also stated that the international minimum standard cannot be interpreted as it was in the 1920s. It cited the views of F.A. Mann, affirmed in a number of ICSID cases,¹⁴⁸ that the principle of fair and equitable treatment has broadened to simply require an evaluation of whether "the actions in question are in all the circumstances fair and equitable or unfair and inequitable."¹⁴⁹ Finally, the tribunal asserted that the standard was an objective one.¹⁵⁰

The tribunals in *Sempra* and *Enron* made more general—and at times confusing—statements. They held that the standard "might be a broader one" than required by customary international law.¹⁵¹ In the tribunals' view, the principle spells out "in a more contemporary fashion" the international minimum standard,¹⁵² which at times is precise and at other times imprecise.¹⁵³ In the latter cases, the principle of fair and equitable treatment will be more precise,¹⁵⁴ though the tribunals did not specify in what regard.

¹⁴⁴ *Sempra*, *supra* note 2 at para. 296; *Enron*, *supra* note 3 at para. 256.

¹⁴⁵ *Sempra*, *ibid.* at para. 297, quoting Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) 39 *Int'l Law* 87 at 90.

¹⁴⁶ *Vivendi III*, *supra* note 2 at paras. 7.4.6, 7.4.7.

¹⁴⁷ *Ibid.* at para. 7.4.7.

¹⁴⁸ *CMS Gas*, *supra* note 41 at para. 284; *Azurix Corp. v. Argentina* (2006) at para. 361, (International Centre for Settlement of Investment Disputes), online: Investment Treaty Arbitration <<http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>>; *Técnicas Medioambientales Tecmed S.A. v. United States* (2003), 43 *I.L.M.* 133, (International Centre for Settlement of Investment Disputes) [*Tecmed*].

¹⁴⁹ *Vivendi III*, *supra* note 2 at para. 7.4.9, quoting F.A. Mann, "British Treaties for the Promotion and Protection of Investments" (1981) 52 *Brit. Y.B. Int'l L.* 241 at 244.

¹⁵⁰ *Vivendi III*, *ibid.* at para. 7.4.12; *Sempra*, *supra* note 2 at para. 304; *Enron*, *supra* note 2 at para. 268, citing *CMS Gas*, *supra* note 41 at para. 280.

¹⁵¹ *Sempra*, *ibid.* at para. 302; *Enron*, *ibid.* at para. 258.

¹⁵² *Sempra*, *ibid.* at para. 302.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*; *Enron*, *supra* note 2 at para. 258.

The three tribunals differed on the norms underlying the principle of fair and equitable treatment. In *Vivendi III* and *Enron*, the tribunals held that finding a breach of fair and equitable treatment does not depend on a demonstration of the defendant's intention to breach or its bad faith in doing so.¹⁵⁵ In contrast, in *Sempra*, the tribunal held that “[t]he principle of good faith is ... the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes.”¹⁵⁶ Of course, these two statements can be reconciled by arguing that although the norm of good faith treatment of investors underlies the principle of fair and equitable treatment, proof of bad faith is not necessary to make out a breach of the principle. This seems a fine point, however.

In all three cases, the tribunals found a violation of the principle of fair and equitable treatment. In *Sempra* and *Enron*, the tribunals held that the business environment in which the companies' affiliates operated was no longer certain and stable: “A long-term business outlook has been transformed into a day-to-day discussion about what is next to come.”¹⁵⁷ In *Vivendi III*, after reviewing the facts at length, the tribunal held that the actions of the Tucumán authorities were intended to “disparage and undercut” the concession, thus violating the principle of fair and equitable treatment.¹⁵⁸

In addition to their claims that Argentina violated its obligation to provide fair and equitable treatment to investors, the plaintiff in each case alleged that Argentina had breached its obligation under the Argentina-U.S. BIT that “investments ... shall enjoy ... protection and full security in accordance with the principle of fair and equitable treatment ... ”¹⁵⁹ In the tribunal's view in *Vivendi III*, “protection and full security” cannot be interpreted to mean only physical security, as Argentina had argued. Rather, this obligation must be understood to require the host state to ensure that the investment is not withdrawn or devalued either by the host state's amendment of its laws or by actions of its administrative bodies.¹⁶⁰

The tribunal in *Vivendi III* also found a breach of the principle of fair and equitable treatment on the basis that Tucumán's authorities actively sought to undermine the concession in order to undo the privatization of the water utility or to force CAA to renegotiate a lower tariff.¹⁶¹ In the words of the tribunal:

Under the fair and equitable standard, there is no doubt about a government's obligation not to disparage and undercut a concession (a “do no harm” standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation. And that is exactly what happened in Tucumán.¹⁶²

¹⁵⁵ *Vivendi III*, *supra* note 2 at para. 7.4.12; *Enron*, *ibid.* at para. 263.

¹⁵⁶ *Sempra*, *supra* note 2 at para. 297; see also paras. 298-99.

¹⁵⁷ *Sempra*, *ibid.* at para. 303; *Enron*, *supra* note 2 at para. 266.

¹⁵⁸ *Vivendi III*, *supra* note 2 at paras. 7.4.39, 7.4.42.

¹⁵⁹ *Ibid.* at para. 7.4.13, quoting Argentina-France BIT, *supra* note 51, Art. 5(1). See also *Sempra*, *supra* note 2 at para. 321; *Enron*, *supra* note 2 at para. 284.

¹⁶⁰ *Vivendi III*, *ibid.* at para. 7.4.16, citing *CME Czech Republic B.V. v. Czech Republic* (2001), 9 I.C.S.I.D. 113 at para. 613 (UNCITRAL) [*CME*].

¹⁶¹ *Vivendi III*, *ibid.* at para. 7.4.19.

¹⁶² *Ibid.* at para. 7.4.39.

This amounts to stating that a government's attempt to change its policy concerning a water utility will violate the principle of fair and equitable treatment and constitute failure to provide full protection and security if it is "politically motivated."¹⁶³ The tribunal went on to describe the actions of Tucumán authorities as follows:

[W]hile it would have been entirely proper for a new government with a different policy perspective on privatisation to seek to renegotiate a concession agreement in a transparent non-coercive manner, it is clearly wrong (and unfair and inequitable in terms of the BIT) to seek to bring a concessionaire to the renegotiation table through threats of rescission based on colourable allegations after having wrongly deprived the concessionaire's billings of formal legitimacy.¹⁶⁴

When one reviews the three tribunals' findings in these cases, one inevitably concludes that in the context of investment treaties, fair and equitable treatment has become a principle that protects the expected return of foreign investors that have entered into a contract with the host country. For instance, quoting *Tecmed*, the tribunal in *Sempra* pointed out that the principle requires that "the foreign investment ... be treated in a manner such that it 'will not affect the basic expectations that were taken into account by foreign investor [*sic*] to make the investment.'"¹⁶⁵ The tribunal in *Enron* similarly articulated that the purpose of the principle is to ensure a "stable framework for the investment."¹⁶⁶ In essence, the tribunals use fair and equitable treatment to protect investments where other more precise principles such as expropriation do not apply. As the tribunal in *Sempra* stated:

[I]t would be wrong to believe that fair and equitable treatment is a kind of peripheral requirement. To the contrary, it ensures that even where there is no clear justification for making a finding of expropriation, as in the present case, there is still a standard which serves the purpose of justice and can of itself redress damage that is unlawful and that would otherwise pass unattended. Whether this result is achieved by the application of one or several standards is a determination to be made in the light of the facts of each dispute. What counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby safeguarding the very object and purpose of the protection sought by the treaty.¹⁶⁷

In other words, the principle of fair and equitable treatment is an equitable principle in international law¹⁶⁸ that can be used, like the principles of fairness common to all legal systems, to

¹⁶³ *Ibid.* at para. 7.4.22, where the tribunal describes ERSACT's referral of the Concession Agreement to the Attorney General as "politically motivated".

¹⁶⁴ *Ibid.* at para. 7.4.31.

¹⁶⁵ *Sempra*, *supra* note 2 at para. 298, quoting *Tecmed*, *supra* note 149 at para. 154.

¹⁶⁶ *Enron*, *supra* note 2 at para. 260, quoting *CMS Gas*, *supra* note 41 at paras. 274-76. However, see Bhuiyan, *supra* note 141 at 223, who suggests that despite statements to the contrary, international tribunals will weigh the various decisions of national courts and choose the one they find most convincing. In this regard, see also *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (France v. Brazil)* (1929), Judgment, P.C.I.J. (Ser. A) No. 21 at 124.

¹⁶⁷ *Sempra*, *supra* note 2 at para. 300.

¹⁶⁸ "Equitable principle" is intended here to mean a principle of fairness, rather than the common law concept of "equity," which identifies a particular field of law historically administered by chancery courts as opposed to common law courts. As Thomas Franck (*supra* note 109 at 48) notes, equitable principles are common to all legal systems, and became part of international law by means of Art. 38(1)(c) of the

right “injustices” that would otherwise go unpunished through the application of more precise standards.

While it is important to recognize the role of equitable principles in international justice, the principle of fair and equitable treatment’s development through international investment arbitration is failing to take into account all of the factors relevant to an equitable solution. In particular, principles of sustainable development and the interests of citizens of the host country that the latter is trying to protect and promote should also feature in applying principles of fairness. To date, the latter factors have never been taken into account, and so the principle of fair and equitable treatment has on balance favoured the protection of investors’ rights to the detriment of those in the host country affected by the investment.

As noted above, ICSID tribunals are unable to articulate a precise meaning of the principle of fair and equitable treatment. At times, they maintain that the principle includes the more precise treatment required by the international minimum standard. However, in situations where the treatment required by customary international law is vague, the tribunals held that the principle of fair and equitable treatment is more precise, although none of the tribunals explained in precisely what regard. Moreover, this latter statement of the precision of the principle in comparison to the international minimum standard of treatment contradicts the opening statements in *Sempra* and *Enron* concerning the principle of fair and equitable treatment, where the tribunals acknowledged that the principle is “none too clear.”¹⁶⁹ Indeed, in both of the latter decisions, it was acknowledged that what is fair and equitable differs from case to case.¹⁷⁰ Overall, tribunals seem to view the invocation of the principle as an opportunity to expand the protection offered to investors by an investment treaty by creating new standards of treatment. This tendency should give pause to developing countries signing IIAs. A guarantee of fair and equitable treatment is a feature of most IIAs.¹⁷¹ Yet, to the degree that its meaning is evolving and imprecise, countries signing an IIA may be granting more protection to investors than they think, and granting investment tribunals the ability to interpret an imprecise standard in order to find new ways to protect investors.

This problem could be solved either by defining the meaning of fair and equitable treatment more precisely in the IIA or by defining the principle as equivalent to the international minimum standard. For example, both the Canadian and American model BITs specify the equivalence between the two standards in this way, although the American model goes on to specify what treatment is required under the international standard.¹⁷²

Statute of the Permanent Court of International Justice ((1926), P.C.I.J. 7 (Ser. D) No. 1), enabling that court to employ “general principles of law recognized by civilized nations.” See also Oscar Schachter, “International Law in Theory and in Practice: General Course in Public International Law” (1982) 178 *Rec. des Cours* 9 at 74-82. For a comparison of principles of equity in arbitration and adjudication, see Manfred Lachs, “Equity in Arbitration and in Judicial Settlement of Disputes” (1993) 6 *Leiden J. Int’l L.* 323.

¹⁶⁹ *Sempra*, *supra* note 2 at para. 296; *Enron*, *supra* note 2 at para. 256.

¹⁷⁰ *Sempra*, *ibid.* at para. 297; *Enron*, *ibid.* at para. 257.

¹⁷¹ VanDuzer, Simons & Mayeda, *supra* note 1 at 379; Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff, 1995) at 58.

¹⁷² *Canada’s Foreign Investment Promotion and Protection Agreement Model* (2004), Art. 5, online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/assets/trade-agreements->

I have explained elsewhere why ICSID tribunals have misinterpreted the principle of fair and equitable treatment.¹⁷³ After reviewing a number of cases in which the standard was interpreted, as well as surveying the principle's use in various BITs and model IIAs, I concluded the following about the principle's meaning:

1. The principle of fair and equitable treatment overlaps to a considerable degree with the international minimum standard;
2. Neither the international minimum standard nor the principle of fair and equitable treatment in various BITs and international agreements has extended protection to investments beyond procedural fairness, protecting against arbitrariness, transparency, due diligence in the physical protection of property, or due diligence in consulting with foreign investors on the effects of policy changes on them.¹⁷⁴

This interpretation of the principle is not only supported by case law, it is also warranted by the competence of investment tribunals. As mentioned earlier, principles of sustainable development, including a due regard for democracy, would have to be taken into account to properly apply equitable principles to investors, since to do so requires a balancing of investors' interests with the public interest promoted by the host country through its impugned actions. Such consideration would require investment panels to have greater transparency, expertise in sustainable development, and legitimacy generally.¹⁷⁵ Although various mechanisms have been implemented to improve the transparency and legitimacy of investment panels,¹⁷⁶ there is still no requirement for panel members to have expertise in development issues. This is a fundamental flaw and a bar to international justice.

Even if one accepts the narrower interpretation of the principle of fair and equitable treatment proposed above, it still seems clear that the principle was violated in *Vivendi III*. Vivendi's affiliate, CAA, was not properly consulted about many proposed changes to the tariff structure, and the decision-making process in relation to the tariffs was not transparent. Also, the Tucumán authorities seem to have tampered with the board of ERSACT, the water regulator, in a way that denied CAA due process. Thus, a breach of fair and equitable treatment could have been found without requiring that the principle protect the investor's expected return, and without requiring the principle to become a catch-all principle of fairness.

accords-commerciaux/pdfs/2004-FIPA-model-en.pdf>; 2004 Model BIT (2004), art. 5, online: Office of the United States Trade Representative <http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf>. See also the very similar *IISD Model International Agreement on Investment for Sustainable Development* (2005), Art 7, online: International Institute for Sustainable Development <http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf>.

¹⁷³ Mayeda, "Fair and Equitable Treatment in BITs," *supra* note 6 at 284-87.

¹⁷⁴ *Ibid.* at 287. For a more expansive interpretation of the principle, see F.A. Mann, "British Treaties for the Formation and Protection of Investment" (1981) 52 *Brit. Y.B. Int'l L.* 244; Dolzer & Stevens, *supra* note 171 at 60.

¹⁷⁵ Mayeda, "Fair and Equitable Treatment in BITs," *ibid.* at 288.

¹⁷⁶ J. Anthony VanDuzer, "Enhancing the Procedural Legitimacy of Investor-state Arbitration through Transparency and *Amicus Curiae* Participation" (2007) 52 *McGill L.J.* 681.

7. EXPROPRIATION

The three cases considered in this article help to delineate the precise limits of the doctrine of expropriation. For this reason, they are an important addition to the case law on this subject. As I will explain in this section, however, the tribunals' interpretation of the doctrine of expropriation is far too broad: it unduly limits the ability of developing countries to legislate or implement policies promoting their development goals.

The tribunals in *Sempra* and *Enron* distinguished between *direct* and *indirect* expropriation. Direct expropriation involves transferring an essential component of a property right to a different beneficiary.¹⁷⁷ In contrast, to establish a claim of indirect expropriation, a party must demonstrate a "substantial deprivation" of control over an investment.¹⁷⁸ This latter standard requires more than simply an adverse effect on the conduct of business. Rather, it requires that "the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated."¹⁷⁹ *Vivendi III* set out a similar standard: expropriation would be established if the plaintiff's investment had lost all or nearly all of its value.¹⁸⁰ In *Vivendi III* and *Sempra*, the tribunals concluded that the violation of contractual rights could give rise to expropriation.¹⁸¹ Other measures capable of constituting indirect expropriation were those listed in *Pope & Talbot v. Canada*,¹⁸² including

depriving the investor of control over the investment, managing the day-to-day operations of the company, arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in whole or in part.¹⁸³

Applying these standards, the *Vivendi III* tribunal found an indirect expropriation, while in *Sempra* and *Enron* no expropriations were found. The tribunal in *Vivendi III* considered that the Tucumán government's acts amounted to more than simple non-performance of a commercial contract. Instead, Tucumán used its "superior governmental power"¹⁸⁴ to deny the plaintiff "the benefit and economic use of [its] property."¹⁸⁵ In the tribunal's view, the measures

¹⁷⁷ *Sempra*, *supra* note 2 at para. 280; *Enron*, *supra* note 3 at para. 243.

¹⁷⁸ *Sempra*, *ibid.* at para. 284; *Enron*, *ibid.* at para. 245.

¹⁷⁹ *Sempra*, *ibid.* at para. 285. See also *Enron*, *ibid.*, where the tribunal stated that "[s]ubstantial deprivation results ... from depriving the investor of the control of the investment ..."

¹⁸⁰ *Vivendi III*, *supra* note 2 at para. 7.5.11, citing *Tecmed*, *supra* note 148 at para. 115.

¹⁸¹ *Vivendi III*, *ibid.* at paras. 7.5.4, 7.5.18. Cases cited by the tribunal to illustrate this view include: *Spar Phillips Petroleum Co. Iran v. Iran* (1989), 21 Iran-US C.T.R. 79; *Southern Pacific Properties (Middle East) Ltd. v. Egypt* (1992), 32 I.L.M. 933, (International Centre for Settlement of Investment Disputes). See also *Sempra*, *supra* note 2 at para. 281.

¹⁸² (2000), 40 I.L.M. 258 (UNCITRAL) [*Pope & Talbot*].

¹⁸³ *Sempra*, *supra* note 2 at para. 284; *Enron*, *supra* note 2 at para. 245, citing *Pope & Talbot*, *ibid.* at para. 100.

¹⁸⁴ *Vivendi III*, *supra* note 2 at paras. 7.5.8-7.5.9, citing *Jalapa Railroad and Power Co. (U.S. v. Mexico)* (1948), reported in Marjorie Whiteman, ed., *Digest of International Law*, vol. 8 (Washington, D.C.: US Gov., 1976) 908 at 908-909.

¹⁸⁵ *Vivendi III*, *ibid.* at para. 7.5.15, citing *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica* (2000), 39 I.L.M. 317 at para. 77, (International Centre for Settlement of Investment Disputes).

implemented by Tucumán, “taken cumulatively, rendered the concession valueless and forced CAA and Vivendi to incur unsustainable losses.”¹⁸⁶ As a result, the “[c]laimants were radically deprived of the economic use and enjoyment of their concessionary rights.”¹⁸⁷

In *Sempre* and *Enron*, however, the tribunals found that Argentina had not substantially deprived the companies of the economic benefit of their investments.¹⁸⁸ In both cases, the companies did not withdraw from their concessions, as occurred in *Vivendi III*. Indeed, the tribunal in *Enron* noted that Enron’s “interests in [its subsidiaries] have been freely sold and included in complex transactions, some involving foreign companies too ...”¹⁸⁹ This was evidence that Enron still enjoyed the benefits of the licence agreement.

Where the decisions differ substantially is in the requirement of an intention to expropriate. In *Vivendi III*, the tribunal held that although the authorities’ motive might be regulatory and in good faith, the standard of expropriation will be met so long as the government effectively deprived an investor of its property’s value.¹⁹⁰ In *Sempre*, by contrast, the tribunal held that direct expropriation requires the defendant to have positively intended to transfer the plaintiff’s property. However, a claim of indirect expropriation can be established even if the damage was inflicted unintentionally, so long as the defendant is found to have caused the expropriation:

The Tribunal is persuaded that while many damages can be inflicted unintentionally, and as such will be entitled to compensation if liability is found to exist, a transfer of property and ownership requires positive intent. This is not a question of formality, but rather one of establishing a causal link between the measure in question and the title to property.¹⁹¹

The position of the tribunal in *Vivendi III* is slightly less clear. The tribunal points out that intent to expropriate is not an essential element of expropriation, but merely one factor demonstrating that expropriation has taken place.¹⁹² If the tribunal made this statement in relation to indirect expropriations, it can be reconciled with the *obiter dicta* in *Sempre*. Otherwise, it appears inconsistent.

Finally, the *Vivendi III* tribunal held that even if the deprivation was for a public purpose, so long as the government has not compensated the plaintiff, an illegal expropriation will be established.¹⁹³

An examination of the tribunals’ conclusions on the issue of expropriation requires reviewing some basic principles of the international law of expropriation employed by the tribunals. As mentioned above, there are two types of expropriation: direct and indirect. A breach of contractual rights can constitute indirect expropriation if it renders these rights essentially valueless, as in *Vivendi III*. However, measures that merely decrease the value of contractual rights

¹⁸⁶ *Vivendi III*, *ibid.* at para. 7.5.28.

¹⁸⁷ *Ibid.* at para. 7.5.29.

¹⁸⁸ *Sempre*, *supra* note 2 at para. 285; *Enron*, *supra* note 2 at para. 246.

¹⁸⁹ *Enron*, *ibid.*

¹⁹⁰ *Vivendi III*, *supra* note 2 at para. 7.5.20.

¹⁹¹ *Sempre*, *supra* note 2 at para. 282.

¹⁹² *Vivendi III*, *supra* note 2 at para. 7.5.20.

¹⁹³ *Ibid.* at para. 7.5.21.

will not constitute expropriation if the claimant can still operate the concession or contract for its sale. As mentioned above, the three decisions are unclear about whether intention to expropriate must be demonstrated. The most charitable reading of these cases is that proof of intention is necessary to establish direct expropriation, but unnecessary to demonstrate indirect expropriation. In the latter case, the defendant's motivation is only one factor considered in determining whether expropriation has occurred.

In *Ronald S. Lauder v. The Czech Republic*,¹⁹⁴ the tribunal defined formal expropriation as “the coercive appropriation by the State of private property, usually by means of individual administrative measures.”¹⁹⁵ Informal expropriation or “creeping” expropriation was defined in that case as caused by a “measure that does not involve an overt taking, but that effectively neutralizes the enjoyment of the property.”¹⁹⁶ The tribunal went on to distinguish formal expropriation, which involves a transfer of property, from informal expropriation, which “deprives the owner of his ‘right to use, let or sell (his) property.’”¹⁹⁷ On these standards, it appears that the *Sempra* and *Enron* tribunals were right to find neither formal nor informal expropriation: there had been no transfer of the investors' property to the Argentine government, nor had the investors been completely hindered in using their property. Rather, the plaintiff's property had simply decreased in value.

In its interpretation of the law of expropriation under bilateral investment treaties, *Vivendi III* has gone far beyond the recognized principles of expropriation in the domestic laws of certain jurisdictions. In Canadian law, for instance, where the state causes property to lose its value, a taking will not arise unless the government acquires the property¹⁹⁸ or enhances the value of its own property by devaluing another's property.¹⁹⁹ Even in American jurisprudence, which places greater limits on the state's ability to regulate and is generally more protective of property rights, courts have refused to find expropriation where an owner has been only partially deprived of enjoying her property. In *Andrus v. Allard*,²⁰⁰ the United States Supreme Court held that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”²⁰¹ In *Vivendi III*, by contrast, as in *Tecmed*, the tribunal held that an indirect expro-

¹⁹⁴ (2001), 9 I.C.S.I.D. 62, (UNCITRAL), (Arbitrators: Lloyd Cutler, Robert Briner, Bohuslav Klein) [*Lauder*]. See also *Tecmed*, *supra* note 148 at para. 113.

¹⁹⁵ *Lauder*, *ibid.* at para. 200. See also *Tecmed*, *ibid.* at para. 114. Note that *Lauder* focuses on the appropriation of the property by the state, rather than merely on whether the investor had been deprived of the property's use; see Andrew Newcombe, “The Boundaries of Regulatory Expropriation in International Law” (2005) 20:1 ICSID Rev. – F.I.L.J. 1, who argues that this “appropriation” model is more desirable than one based on evaluating the effects of the deprivation on the investor.

¹⁹⁶ *Lauder*, *ibid.* at para. 200. See also *CME*, *supra* note 160 at paras. 604, 606; *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran* (1984), 6 Iran-US C.T.R. 219 at 225.

¹⁹⁷ *Lauder*, *ibid.* at para. 200 [emphasis in original].

¹⁹⁸ *Haddock v. Ontario (A.G.)* (1990), 73 O.R. (2d) 545, 70 D.L.R. (4th) 644 (Ont. H.C.); *A & L Investments Ltd. v. Ontario* (1997), 36 O.R. (3d) 127, 152 D.L.R. (4th) 692 (Ont. C.A.).

¹⁹⁹ *British Columbia v. Tener* (1985), 1 S.C.R. 533, 17 D.L.R. (4th) 1.

²⁰⁰ 444 U.S. 51 (1979).

²⁰¹ *Ibid.* at 65-66. See also *Keystone Bituminous Coal Association v. Pennsylvania (Department of Environmental Resources)*, 480 U.S. 470 at 497 (1987) [*Keystone*].

priation can result even when a government has not acquired the complainant's property nor enhanced the value of government property.²⁰²

The domestic law of both Canada and the United States generally permits expropriation for a legitimate public purpose. In *Keystone*, the United States Supreme Court affirmed this view—some regulation with a public purpose will not constitute a taking, and so no compensation will be required.²⁰³ In Canada, the state is permitted at common law to expropriate property without compensation so long as it does so through clear wording in a legislative enactment.²⁰⁴ By contrast, in *Vivendi III*, the tribunal considered that Article 5(2) of the Argentina-France BIT would be violated if the government did not provide compensation, even if the expropriation reflected a valid public purpose.²⁰⁵ Thus, unlike in Canadian and American law, the existence of a valid public purpose is not a threshold issue for establishing expropriation. Rather, provision of compensation is the threshold. Where the government does not compensate the investor, the existence of a valid public purpose is immaterial, and an expropriation will be found.

Developing countries should be wary of signing IIAs containing expropriation provisions similar to those in the Argentine BITs; these provisions give governments less latitude than they might have in domestic law to enact statutes expropriating the property of foreign investors for valid public purposes without providing compensation. In applying the expropriation provisions of the Argentina-France BIT, the *Vivendi III* tribunal concluded that since Tucumán had not compensated CAA, there was no need to evaluate whether the province had a legitimate public purpose in renegotiating the concession agreement.²⁰⁶ This approach is problematic. It is only by assessing whether a legitimate public purpose exists that a tribunal can properly weigh investors' interests against those of a developing country's citizens. The lesson to be learned is that developing countries should negotiate IIAs that require tribunals to evaluate whether there was a valid public purpose motivating the government's actions. Such an IIA is more in line with principles of sustainable development, since it promotes investment that is consistent with the goals of citizens in developing countries.

Vivendi III raises broader questions about the proper boundaries of expropriation. For instance, to what degree should the law of expropriation in the context of investment treaties exclude the state from liability for expropriations in the public interest? As noted above, the international legal standard for expropriation differs from the law of expropriation in countries such as Canada and the United States. This is in part because the law of expropriation serves different purposes in the national and international contexts. In the national context, limits on expropriation are set by balancing the property interests of citizens as a group against the interests of the individual(s) alleging an expropriation. In international law, however, the purpose of expropriation law is to protect foreign investors' interests against the state's supposedly greater

²⁰² *Vivendi III*, *supra* note 2 at para. 7.5.24; *Tecmed*, *supra* note 148 at para. 113.

²⁰³ *Keystone*, *supra* note 201 at 488-92.

²⁰⁴ *Florence Mining Co. v. Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275 at 279. See also *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 S.C.R. 101 at 118, 88 D.L.R. (3d) 462; *Authorson v. Canada (A.G.)*, 2003 SCC 39, [2003] 2 S.C.R. 40 at para. 53.

²⁰⁵ *Vivendi III*, *supra* note 2 at para. 7.5.21.

²⁰⁶ *Ibid.*

power.²⁰⁷ For this reason, some scholars argue that IIAs should provide minimum standards of treatment but leave the balancing of individual and group interests to the state.²⁰⁸ Of course, what international law fails to take into account is the power imbalance between states. IIAs benefit foreign investors, but they are negotiated between states—usually developed and developing countries—that have unequal bargaining power. Furthermore, the current approach to expropriation in IIAs overlooks governments' understandable need to address the legitimate perceptions of their citizens, who may well perceive that an IIA unfairly permits foreign investors to profit at their expense. As Franck argues, the solution is to ensure that the compact between the state and the foreign investor guaranteeing a stable investment environment has the "elasticity needed to accommodate the inevitable tension between the political pull to change and the economic rationale for stability."²⁰⁹ The current IIA expropriation regime lacks a mechanism for resolving this tension.

The elasticity that Franck recommends can be best achieved by exempting states from providing compensation for expropriations pursuing a legitimate redistributive function within the state. Although the traditional position in international law requires compensation for all takings,²¹⁰ Franck correctly argues that there should be a distinction between

a general taking in pursuance of a nationwide social policy intended to achieve industrial reform or redistribute income ... and an ad hoc taking of one property. The former can be viewed as analogous to certain other redistributive governmental takings, such as general taxation, for which compensatory remedies are not provided by international law.²¹¹

An appropriate starting point for implementing this distinction between legitimate regulation and ad hoc taking is Article 10(5) of the Harvard *Draft Convention on the International Responsibility of States for Injuries to Aliens*,²¹² which identifies a number of cases where compensation need not be paid for a government expropriation:

An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful ...²¹³

This list could be expanded by also exempting government measures related to the achievement of legitimate government objectives.²¹⁴ The requirement that these objectives be legal and

²⁰⁷ Franck, *supra* note 108 at 445.

²⁰⁸ Newcombe, *supra* note 195 at 7.

²⁰⁹ Franck, *supra* note 108 at 441.

²¹⁰ See Rosalyn Higgins, "The Taking of Property by the State" (1982) 176 *Rec. des Cours* 331.

²¹¹ Franck, *supra* note 108 at 462. For a development of this distinction, see also Derek William Bowett, "State Contract with Aliens: Contemporary Developments on Compensation for Termination or Breach" (1988) 59 *Brit. Y.B. Int'l L.* 49 at 72-74.

²¹² (1961) 55 *A.J.I.L.* 548.

²¹³ *Ibid.* at 554.

²¹⁴ Newcombe considers that no compensation is due in international law for government regulation that is reasonably necessary to protect public health, safety, morals, or welfare, or for non-discriminatory

constitutional in the host state, that they not be arbitrary, and that they not target a particular investor, but rather be of general and wide applicability, will help to winnow legitimate from illegitimate cases of expropriation.²¹⁵ Finally, since not all legislation or regulation aimed at a legitimate government objective should obviate the need for compensation, the government objective must be sufficiently pressing and the means used reasonably necessary to achieve that goal.²¹⁶ The distinction between compensable expropriation and noncompensable regulation remains unhelpful, since it has not been adequately explained.²¹⁷ In my view, the difference between non-compensable and compensable expropriation lies in the existence of a legitimate public purpose, the absence of discrimination, and the use of due process.

To conclude, had common features of the law of expropriation in the domestic laws of Canada and the U.S. been applied to the facts in *Vivendi III*, Vivendi would have been required to demonstrate that it was substantially deprived of its property's usage, that the Tucumán government had acquired the property or enhanced the value of its own property by depriving Vivendi, and that Tucumán lacked a valid public purpose. No compensation would have been necessary so long as Tucumán had been clear in its legislative intent to expropriate without compensation, had been motivated by a valid public purpose, and had not acted arbitrarily or in a discriminatory way against the investor. Under the present BIT regime, however, all that Vivendi had to prove to make out its claim of expropriation was a substantial, uncompensated loss in the value of its investment. Vivendi succeeded by demonstrating that the concession agreement created a legitimate expectation of a particular level of revenue. There was no need for Vivendi to demonstrate that Tucumán had acquired Vivendi's property or enhanced the value of its own property, nor was Vivendi required to demonstrate that Tucumán's authorities lacked a valid public purpose.

8. DEFENCES IN INTERNATIONAL LAW: *FORCE MAJEURE*, *NECESSITY*, *ET CETERA*

In both *Sempra* and *Enron*, Argentina raised the defence of necessity under customary international law.²¹⁸ In neither case was Argentina successful, since the tribunals held that the elements of the defence, codified by Article 25 of the International Law Commission's *Draft*

regulation for the purpose of taxation or the achievement of the state's police powers (Newcombe, *supra* note 196 at 22). See also George H. Aldrich, "What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal" (1994) 88 A.J.I.L. 585 at 609.

²¹⁵ See Sornarajah, *supra* note 122 at 385, who asserts that "the starting point must always be that the regulatory interference is presumptively non-compensable." Sornarajah goes on to state that the

presumption against compensation ... is strengthened where the public interests are so dominant as to overwhelm individual interests. It is weakened where there is discrimination that cannot be explained in a legitimate manner. It is weakened also where the exercise is not accompanied by due process and other procedural safeguards that amount to a denial of justice in terms of international law (*ibid.* at 385-86).

²¹⁶ See Newcombe, *supra* note 195 at 40. Newcombe argues that assessing a measure's necessity should not involve the tribunal in a substantive review of the viability of other alternatives to expropriation; rather, tribunals should defer to the judgment of national governments in this regard.

²¹⁷ Sornarajah, *supra* note 122 at 377; Newcombe, *ibid.* at 3.

²¹⁸ *Sempra*, *supra* note 2 at paras. 353-54; *Enron*, *supra* note 2 at paras. 294-313.

Articles on State Responsibility for Internationally Wrongful Acts,²¹⁹ had not been met. The following discussion applies a sustainable development analysis to demonstrate how the tribunals' overly narrow interpretation of these defences can limit a state's ability to protect its inhabitants' welfare in an emergency situation such as that faced by Argentina.

In customary international law and international treaty law, defences exist that function in a similar way to the principles of equity common to most developed legal systems.²²⁰ These principles are generally considered defences to a breach of a treaty. However, the content of these principles diverges from similar domestic legal doctrines. Generally, equitable principles in international law provide less flexibility to review the substantive fairness of an agreement or to consider the fairness of holding parties to it. As well, they have been considered in few cases, with the result that their meaning and application is less precise than the domestic doctrines.²²¹ This constitutes a barrier preventing international investment law from fully respecting the needs of developing countries.

Equity is a fundamental value underlying sustainable development. As Atapattu points out:

It can ... be argued that equity underlies the whole debate on sustainable development, which seeks to ensure that people have a decent standard of living in a healthy environment; they have access to resources and to information relating to their environment; they have the opportunity to participate in the decision-making process; the disparity between the rich and the poor is addressed; poverty is eradicated; and unsustainable patterns of consumption and production are addressed.²²²

The principles of equity common to many legal systems flow from the general notion of equity that Atapattu articulates. As the ICJ stated in the *Continental Shelf Case*,²²³ “[e]quity as a legal concept is a direct emanation of the idea of justice.”²²⁴ Judge Weeramantry, in a later decision, also referred to the key role that equity plays in international law:

At its most general level, equity has been seen as the source of that dynamism which is necessary for legal development. Thus, in the words of the eminent comparativist Puig Brutau, “equity is one of the names under which is concealed the creative force which animates the life of the law”.

At the level of international law, that creativity is well illustrated when one considers that equity has been the source that has given international law the concept of international mandates and trusts, of good faith, of *pacta sunt servanda*, of *jus cogens*, of unjust

²¹⁹ UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) 43 [*Draft Articles on State Responsibility*].

²²⁰ See *supra* note 168.

²²¹ Paul Reuter, *Introduction to the Law of Treaties*, trans. by José Mico and Peter Haggemacher (London: Kegan Paul, 1995) at 173.

²²² Sumudu A. Atapattu, *Emerging Principles of International Environmental Law* (Ardsey: Transnational, 2006) at 114-15.

²²³ *Case Concerning the Continental Shelf (Tunisia v. Libya)*, [1982] I.C.J. Rep. 18.

²²⁴ *Ibid.* at para. 71.

enrichment, of *rebus sic stantibus* and of abuse of rights. No doubt, the future holds for it a similarly vital creative role.²²⁵

Equitable principles in international law overlap with similar principles in the municipal law of host states. For example, although the concept of equity in international law is distinct from that which animated the Chancery courts in common law jurisdictions, the former nonetheless encompasses some of principles developed by the latter. As Judge Weeramantry pointed out:

Some of the principles of equity, as evolved by the English Court of Chancery, may, however, be relevant to a matter concerning the law of the sea, not because they are part of the English law of equity, but because those principles accord with the concepts of general equity as more widely understood.²²⁶

Equitable principles of the civil law are also relevant to international law. The history of the civil law suggests that these principles were initially understood to be outside the law; in modern civil law, however, as in international law, these principles form an integral part of the law.²²⁷

Defences are equitable principles of the sort to which Judge Weeramantry referred.²²⁸ They are principles of corrective equity that seek a just result where it would be unfair to hold a party to its agreement given the supervention of unforeseen events. These defenses are manifestations of a broad principle of justice “flexible enough to permit a rational adjustment of conflicting interests according to the circumstances of each case.”²²⁹ As Ralph A. Newman states, “[h]ardship resulting from mistake or misfortune must be shared, even at the sacrifice of strict legal rights, and if necessary by the whole community.”²³⁰

Most of the equitable principles applicable to the interpretation of international treaties are codified in the *Vienna Convention* and the *Draft Articles on State Responsibility*. The Convention includes doctrines of mistake in assumptions and frustration similar to rules of domestic contract law. For instance, Article 48(1) of the *Vienna Convention* (“Error”) provides that a “state can invoke an error in a treaty in invalidating its consent to be bound by it if the error relates to a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.”²³¹ The principle of error is more limited than the common law doctrine of mistake, since the former has mostly been used in the context of treaties transferring territory where there has been an error

²²⁵ *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, Order of 13 June 1993, [1993] I.C.J. 38 at paras. 16-17, Judge Weeramantry, separate opinion [*Maritime Delimitation Case*].

²²⁶ *Ibid.* at para. 48.

²²⁷ See *ibid.* at paras. 49-51.

²²⁸ We have already seen that Judge Weeramantry explicitly refers to one of these defences, *clausula rebus sic stantibus* (“as things thus stand”), the defence of fundamental change in circumstances (*ibid.* at para. 17).

²²⁹ Ralph A. Newman, “The Principles of Equity as a Source of World Law” (1966) 1 *Isr. L. Rev.* 616 at 624-625.

²³⁰ *Ibid.* at 625.

²³¹ *Vienna Convention*, *supra* note 103, Art. 48(1).

due to an inaccurate map or geographical description.²³² This defence is also unavailable where the error originates from a party's failure to account for possible circumstances that give rise to the mistaken assumption.²³³

The *Vienna Convention* also includes a doctrine of frustration. Article 61(1) ("Supervening impossibility of performance") provides that if the "impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty," the application of the treaty will be suspended.²³⁴ Again, this article has a much more limited application than the doctrine of frustration in domestic contract law, since the former applies only when a material thing has disappeared. In other words, the application of this article is limited to circumstances in which performance is materially impossible.²³⁵ Article 62(1) of the *Vienna Convention* ("Fundamental change of circumstance") also relates to frustration. A change in circumstances that is an "essential basis of the consent of the parties" and that "radically ... transform[s] the extent of obligations" under the treaty can provide a basis for suspension, withdrawal from, or termination of the treaty.²³⁶ Again, this doctrine applies only if the change in circumstance is unforeseen and external to the party relying on it.²³⁷

Finally, the customary international doctrine of *force majeure* will apply to the interpretation of obligations under a treaty if an event occurs that is "irresistible, unforeseen and external to the party relying on it."²³⁸ This doctrine's application is also limited. Generally, for *force majeure* to apply, performance must be absolutely impossible, although there is some flexibility in some of the case law.²³⁹ Similar protection is afforded by customary international law, as codified in the *Draft Articles on State Responsibility*, Article 25 of which permits a breach of treaty in case of necessity. This article reads:

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:

²³² Reuter, *supra* note 221 at 176.

²³³ *Ibid.*

²³⁴ *Vienna Convention*, *supra* note 103, Art. 61(1).

²³⁵ Reuter, *supra* note 221 at 185-86.

²³⁶ *Vienna Convention*, *supra* note 103, Art. 62(1).

²³⁷ Reuter, *supra* note 221 at 188. See also *Free Zones Case of Upper Savoy and the District of Gex (France v. Switzerland)* (1932), P.C.I.J. (Ser. A/B) No. 46, in which France and Switzerland disputed certain territories under the *Treaty of Versailles (Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919, 225 Cons. T.S. 188)*. The Permanent Court of International Justice agreed with Switzerland that the doctrine of *clausula rebus sic stantibus* did not apply unless the circumstances that were alleged to have changed had been essential to the parties entering into the treaty. The court also held that France had waited unreasonably long to point out the change of circumstances. See also *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, [1973] I.C.J. Rep. 3 at paras. 36-37, where the I.C.J. held that the circumstances in question must have been fundamental to the parties' decision to enter the treaty and that the change in circumstances must have fundamentally changed the rights between the parties.

²³⁸ Reuter, *ibid.* at 186-87. See also *Himpurna California Energy Ltd. (Bermuda) v. P.T. (Persero) Perusahaan Listrik Negara (Indonesia)* (1999), 14 Mealey's International Arbitration Reporter A-1; *Société Commerciale de Belgique v. Greece* (1939), P.C.I.J. (Ser. A/B) No. 78 at paras. 167-74; *Martini Case* (1903), 10 R.I.A.A. 644.

²³⁹ Reuter, *ibid.* at 187.

(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.²⁴⁰

We thus see that while equitable principles exist both in the *Vienna Convention* and in customary international law, these doctrines have restricted scope and have not been extensively interpreted by courts or tribunals.

Sempra and *Enron* demonstrate the restricted application of these equitable doctrines in international law. Argentina clearly faced a severe economic crisis in the late 1990s and early part of this century. These tribunals, however, were unconvinced that Argentina's existence as a state was threatened,²⁴¹ nor were they convinced that the Emergency Law and consequent violation of the licence agreements with Enron and *Sempra* were the only ways to deal with the crisis.²⁴² Furthermore, the tribunals considered that Argentina had to some degree contributed to its own crisis, thus precluding application of the doctrine of necessity.²⁴³

These tribunals' decisions are puzzling, both because of their inconsistency with later cases and because of the errors of law that they exhibit. Both of these points have been examined in depth by William W. Burke-White in "The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System."²⁴⁴ The first puzzling aspect of *Enron* and *Sempra* arises from their interpretation of the applicability of the non-conforming measures provision in the Argentina-US BIT.²⁴⁵ The tribunals maintained that Article XI was to be interpreted identically with the customary law excuse of necessity,²⁴⁶ which seems to make the former article redundant—a violation of the rule of interpretation that all provisions should be interpreted to give them effect.²⁴⁷ The proper analysis of these two provisions is contained in

²⁴⁰ *Draft Articles on State Responsibility*, *supra* note 219, Art. 25.

²⁴¹ *Sempra*, *supra* note 3 at para. 348; *Enron*, *supra* note 2 at para. 306.

²⁴² *Sempra*, *ibid.* at paras. 350-51; *Enron*, *ibid.* at paras. 308-309.

²⁴³ *Sempra*, *ibid.* at para. 354; *Enron*, *ibid.* at para. 312.

²⁴⁴ *Supra* note 3.

²⁴⁵ Argentina-US BIT, *supra* note 41, Art. 11. This provision essentially exempts the host state from liability if the measures taken by the state are "necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests" (*ibid.*). The provision thus provides an exemption similar to the defence of necessity.

²⁴⁶ *Sempra*, *supra* note 2 at paras. 375-76; *Enron*, *supra* note 2 at para. 334.

²⁴⁷ Burke-White, *supra* note 3 at 215, quoting *United States--Standards for Reformulated and Conventional Gasoline (Complaint by Brazil & Venezuela)* (1996) WTO Doc. WT/DS2/ABR (Appellate Body Report), 35 I.L.M. 603 at 627, which held that "interpretation must give meaning and effect to all the terms of a

the decision on the annulment proceeding in *CMS Gas*.²⁴⁸ In that case, the ad hoc committee pointed out that Article XI differs from the customary law doctrine of necessity in both function and content:

The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions.²⁴⁹

Furthermore, the annulment committee held that the doctrine of necessity operates as an excuse and must thus be subsidiary to Article XI, which absolves the state of liability rather than merely offering an excuse.²⁵⁰ Finally, had the *Enron* and *Sempra* tribunals been right to hold that Article XI and the customary international principle cover the same field, the rule of *lex specialis* would have required the treaty provision to have been applied.²⁵¹

The second puzzling aspect of *Enron* and *Sempra* is that in denying the applicability of necessity, they effectively narrowed the defence to such an extent that it will rarely, if ever, be available to a state. They did so by holding that the defence will not be available if the state had another means at its disposal to deal with the emergent situation.²⁵² As Burke-White points out, this approach shows insufficient deference toward the host state's choice of an effective means to deal with the emergency. As a result, the decisions narrow "the state's potential policy responses in a crisis situation."²⁵³ In contrast, *LG&E Energy Corp. v. Argentina*²⁵⁴ takes a more deferential approach, equivalent to a good faith review.²⁵⁵ This kind of deference is essential both to ensure that developing countries can regulate to pursue their development goals and to promote democratic decision-making.

The third controversial conclusion arrived at by recent investment tribunals is that even if a state of necessity has been made out, the host state will not be exempted from liability.²⁵⁶ As Burke-White correctly argues, there is no point including a non-conforming measures article in an IIA if the state's decision to act is hampered by the possibility of having to compensate foreign investors.²⁵⁷ A similar point can be made about the defence of necessity in international

treaty." The redundancy arises because if art. XI were identical with the customary international defence, there would be no reason to include the former article since customary international law would fill the gap.

²⁴⁸ *CMS Gas Transmission Company v. Argentina* (2007), (International Centre for Settlement of Investment Disputes), online: International Treaty Arbitration <<http://ita.law.uvic.ca/documents/CMSAnnulmentDecision.pdf>>.

²⁴⁹ *Ibid.* at para. 130.

²⁵⁰ *Ibid.* at para. 132.

²⁵¹ *Ibid.* at para. 133.

²⁵² See *supra* note 242 and accompanying text.

²⁵³ Burke-White, *supra* note 3 at 215.

²⁵⁴ (2006), 21 ICSID Rev. – F.I.L.J. 203, (International Centre for Settlement of Investment Disputes) [*LG&E*].

²⁵⁵ *LG&E, ibid.* at para. 214. See also Burke-White, *supra* note 3 at 213.

²⁵⁶ *CMS Gas, supra* note 40 at paras. 388, 394.

²⁵⁷ Burke-White, *supra* note 3 at 215.

law.²⁵⁸ Indeed, in Burke-White's view, the doctrine of necessity is generally intended to absolve the state of liability.²⁵⁹ Furthermore, as Newman points out, equitable defences often achieve justice by requiring both parties to bear the consequences of an unforeseen emergency.²⁶⁰

Finally, *Enron* and *Sempra* are problematic to the degree that they find that Argentina contributed to the state of necessity, thus denying it the customary international law defence.²⁶¹ Essentially, the tribunals held that "any contribution by Argentina whatsoever, including long range economic planning, was sufficient to invalidate the plea of necessity."²⁶² In contrast, the tribunal in *LG&E*, essentially reviewing the same facts, found that Argentina had not contributed to the economic crisis.²⁶³ The tribunal concluded:

There is no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity. In this circumstances [*sic*], an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed.²⁶⁴

This questionable and inconsistent application of the doctrine of necessity is troubling. The tribunals have overly narrowed this defence's availability in international law, thus restricting developing countries' ability to act to achieve legitimate development goals such as alleviating poverty, averting economic collapse, and avoiding political and civil unrest. Furthermore, the failure of Argentina's pleas based on equitable principles in international law demonstrates how

²⁵⁸ See *Draft Articles on State Responsibility*, *supra* note 219, Art. 27(b). This article states that the invocation of a defence such as necessity is without prejudice to the question of compensation for material losses caused by the state's actions. Phrased as a "without prejudice" clause, the article does not require compensation in the case of a successful plea of necessity. It leaves open the option, but that is all. Admittedly, James Crawford explains in his comments on Article 27(b) that the defence of necessity could be one of the defences for which compensation might be payable, because an act taken out of necessity, unlike one to deal with *force majeure*, is a conscious act of the state (I.L.C. Special Rapporteur on State Responsibility, *Second Report of the Special Rapporteur*, UN GAOR, 51st Sess., UN Doc. A/CN.4/498, Add. 2, (1999) at 51-53). In my view, however, the situation with which Argentina was dealing is much closer to one of *force majeure* than one of necessity, in that much of Argentina's financial crisis was due to circumstances beyond its control. It would severely limit a state's ability to effectively deal with a situation of necessity if compensation were obligatory whenever the defence was invoked. Indeed, in the case to which Crawford refers in his report (*Gabčíkovo-Nagymaros*, *supra* note 81), the Court merely confirmed that Hungary had acknowledged *on the facts of that case* that it should compensate Czechoslovakia, concluding that this indicated that Hungary acknowledged it had breached its treaty obligations. However, the court does not state that customary international law requires compensation in all circumstances upon a successful defence of necessity (see *ibid.* at para. 48).

²⁵⁹ As Burke-White (*supra* note 3 at 208) writes, "[a] successful invocation of the necessity defense precludes the wrongfulness of a state's actions and thereby allows the state to possibly avoid both responsibility and liability."

²⁶⁰ Newman, *supra* note 229 at 625, 629.

²⁶¹ The customary defence only applies if the state did not contribute to bringing about the state of necessity (*Draft Articles on State Responsibility*, *supra* note 220, Art. 25(2)(b)).

²⁶² Burke-White, *supra* note 3 at 219; *Enron*, *supra* note 2 at paras. 311-12.

²⁶³ *LG&E*, *supra* note 254 at para. 257.

²⁶⁴ *Ibid.*

limited these doctrines are, and how unsuited to modern realities. These limits render the principles useless for meaningfully assessing the impact of complex social, political, and economic crises on the relations among states and between states and foreign investors. These equitable principles should be expanded by taking into account principles of sustainable development. A simple and precise way of doing so would be to interpret these international legal doctrines in conformity with similar equitable doctrines in the domestic law of most states. For instance, as reviewed earlier, the international law defence unduly restricts the availability of necessity by preventing its application if the state had other means of dealing with an emergency. This restriction is absent from the municipal law of many states. Another option would be to recognize equitable defences that act as justifications rather than excuses. Such defences would allow a court to consider a developing country's argument that the action it took was justified—for example, in order to protect the public from severe harm. By expanding the application of equitable principles in international law, it would become possible for international tribunals to take into account the unique situations of developing countries facing social, political, and economic crises such as that faced by Argentina.

A full explanation of how this expansion might be accomplished is beyond the scope of this case comment. However, the area is a fertile ground for future expansion of the role of sustainable development in international investment law. The most relevant principle of sustainable development that could provide the normative basis for an expansion of the availability of international law defences is the principle of integration. This principle indicates a need for states to integrate economic and social development with environmental protection.²⁶⁵ The recognition that economic development cannot be achieved at the expense of social development or environmental protection could be used to define the proper limits of equitable defences. For example, where an investment is harmed by a policy decision of a government reacting to an emergency, a tribunal should take into account the state's good faith in enacting the offending measure, given the difficulty of balancing foreign investors' economic interests with citizens' economic and social well-being. A rule forbidding state action unless no other choice is available, as elucidated by the *Sempra* and *Enron* tribunals,²⁶⁶ fails to recognize that protection of investors' rights can come at the expense of the welfare of the host state's inhabitants. It thus fails to recognize the interrelationship between economy, society, and the environment that is one of the bases of sustainable development.

9. CONCLUSION

Sempra, *Enron* and *Vivendi* raise red flags about IIAs. These cases interpret doctrines such as expropriation and fair and equitable treatment in ways that are incompatible with principles of sustainable development. As a result, IIAs have the potential to usurp the ability of developing countries to address legitimate economic, social, and political upheavals. Furthermore, the large damage awards in cases such as these may cripple the developing countries against which they are made.²⁶⁷

²⁶⁵ *Johannesburg Declaration*, *supra* note 87 at para. 5.

²⁶⁶ See *supra* note 242 and accompanying text.

²⁶⁷ See *supra* notes 76-77 and accompanying text.

Why do developing countries continue to negotiate IIAs with developed countries? The main reason is fear—developing countries fear that without an IIA, they will not attract as much foreign investment as states with IIAs. While there is some evidence to support this view,²⁶⁸ it is not overwhelming. Sornarajah, for instance, argues that attracting foreign investment depends on the host country's political and economic climate, not on the existence of a legal structure to protect investment.²⁶⁹ Jason Webb Yackee goes further: countries will attract more foreign direct investment if they have strong domestic protection for investment. Yackee argues that while an IIA can positively impact a state's inflow of foreign investment, a strong domestic infrastructure protecting both domestic and foreign investors can be an effective substitute.²⁷⁰ This analysis suggests that developing countries may do better to strengthen their domestic laws concerning investments than to create a separate international regime to protect foreign investors.

In conclusion, entering into an IIA with a developed country is truly a dance with the devil. While it can yield some positive results, such as attracting higher levels of foreign direct investment, it risks undermining many essential elements of the host state's sustainable development.

²⁶⁸ Peter Egger & Valeria Merlo, "The Impact of Bilateral Investment Treaties on FDI Dynamics" (2007) 30 *World Economy* 1536; Salacuse & Sullivan, *supra* note 3 at 67; Eric Neumayer & Laura Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment in Developing Countries?" (2005) 33 *World Development* 1567; Susan Rose-Ackerman and Jennifer Tobin, "When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties" (November 2006) [unpublished]; online at: <http://www.law.yale.edu/faculty/roseackermanpublications.htm>; and Susan Rose-Ackerman and Jennifer Tobin, "Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties," Yale Law & Economics Research Paper No. 293 (May 2, 2005); online: <http://ssrn.com/abstract=557121>.

²⁶⁹ Sornarajah, *supra* note 122 at 82.

²⁷⁰ Jason Webb Yackee, "Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties" (2008) 33 *Brook. J. Int'l L.* 405 at 444-48.