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Are Investment Tribunals Adjudicating Political Disputes?

Some Reflections on the Repoliticization of Investment Disputes and (New) Forms of Diplomatic Protection

Catharine Titi*

Conceived from its inception as a tool for the depoliticization of disputes involving a foreign investor and a sovereign state, Investor-State Dispute Settlement (ISDS) has emerged as a popular alternative to state justice and diplomatic protection and has evolved into the centerpiece and guarantor of the international system of investment protections. And yet, despite the common perception of its neutrality as a forum for the non-political resolution of disputes, the scope of subject matters that fall within the purview of arbitral control and the utilization of political means by states and investors alike in order to interfere with or influence the arbitral process shed light on some unusual aspects of investment arbitration and reveal that ISDS has been heading down a trajectory of repoliticization.

Conceived from its inception as a tool for the resolution of disputes involving a foreign investor and a sovereign state, investment arbitration has emerged as a popular alternative to state justice and diplomatic protection in the field and it has evolved into the centerpiece and guarantor of the international system of investment protections. Although the framework set in place for the settlement of such disputes is far from perfect and it has recently become the target of increased criticism, the proliferation and growing importance of investment tribunals and

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exponential recourse to international arbitration illustrate only too well the continuing attractiveness of this system for investors. Part of investment arbitration’s attractiveness is owed to the fact that it is understood to provide a neutral non-political forum for the resolution of disputes between sovereign states and disgruntled foreign investors. And yet, despite this common perception of neutrality, new elements shed light on some unusual aspects of the system and reveal it in a different prism. Its undiminished popularity does not detract from an observation too obvious to ignore: Investor-State Dispute Settlement (ISDS) has been pulling away from its established role as a step away from international politics and has been heading down a trajectory of repoliticization.

Until the advent (and the ‘banalization’) of modern investor-state arbitration, effective investment protection, the enforcement of international economic law rights, and the resolution of related disputes have ordinarily taken place through the espousal of private claims by states in an edifice where private actors have had little or no role to play. With the exception of the Iran–United States Claims Tribunal, and the more recent United Nations (UN) Compensation Commission, public international law dispute resolution has in principle been sought through diplomatic protection and, in particular, through recourse to the International Court of Justice (ICJ) or the World Trade Organization’s (WTO’s)

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dispute settlement body. Bilateral investment treaties (BITs), born from a need to protect foreign investors from the vagaries and abuses of host state normative or regulatory measures, generally provide for investor-state arbitration, thus allowing disputes to be removed from the control of domestic courts. BITs therefore act as an alternative and a counterweight to diplomatic protection. Investor-state arbitration was indeed developed as a tool for the depoliticization of investment disputes and, unsurprisingly, the use of diplomatic protection in the same context has been relegated to a ‘residual mechanism available when the affected individual has no direct channel to claim in its own right.’

The Convention of the International Centre for Settlement of Investment Disputes (‘ICSID Convention’) was created and promoted as a means of depoliticizing investment disputes. Not surprisingly, the Convention explicitly
precludes the use of diplomatic protection.\textsuperscript{11} According to Aron Broches, General Counsel of the World Bank between 1959 and 1979, the Convention was intended to ‘offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy.’\textsuperscript{12}

It must be recalled that states’ unpleasant experience with diplomatic protection has caused scepticism in some quarters vis-à-vis the international adjudication of investment disputes. Latin American countries’ adherence to the Calvo doctrine\textsuperscript{13} as a result of a preoccupation with the use and abuse of diplomatic protection in order to allow foreign intervention in domestic affairs is proverbial.\textsuperscript{14} The depoliticization of disputes through the ICSID Convention became an argument in its drafters’ endeavour to convince Latin American countries to join the Convention in the 1990s.\textsuperscript{15} It was claimed that the Convention was meant, \emph{inter alia}, to act ‘as a tool for balancing power between asymmetrical states that served to limit abuses traditionally observed with the practice of diplomatic protection.’\textsuperscript{16} The facilitation of the settlement of disputes between investors and host states could be ‘a major step toward promoting an

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\textsuperscript{11} Kiva et du Maniema SARL v Congo, ICSID Case No. ARB/98/7, Award, 1 Sep. 2000, paras 17, 19.


\textsuperscript{15} International Law Commission, \textit{supra} n. 13, at 3. See also Catharine Titi, \textit{Investment Arbitration in Latin America: The Uncertain Venality of Preconceived Ideas}, 30 (2) Arb. Int’l 360 (2014).

atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.\textsuperscript{17}

But what may have been intentionally overlooked is that from the outset this was an oxymoron. Through investment arbitration states 'agreed to submit their own sovereign conduct and lawmaker to evaluation by arbitrators.'\textsuperscript{18} This may have been (and it continues to be) entirely legitimate, given that political disputes are not necessarily incapable of receiving legal solutions. But the paradox remains. It is therefore remarkable that although the new discussion addresses the repoliticization of investment disputes, thus creating an expectation of a repetition of an earlier state, some of the topics discussed here have in fact been political since the system's inception. Others are effectively new.

The purpose of this article is to examine some aspects of investment disputes that demonstrate that the investment arbitration process is in several aspects very much a political one. On the one hand, subject matters of disputes adjudicated by arbitral tribunals inevitably raise political questions. The evaluation of public policies by tribunals, such as the treatment of economic and financial crises, including sovereign debt restructuring, or those regarding environmental and health measures, lead to a certain degree of indirect control of state policies by the investment arbitration process. On the other hand, new forms of 'diplomatic' protection are employed in order to interfere with or influence investment arbitrations, such as, for instance, negative votes concerning the renewal of international bank loans vis-à-vis a country involved in an investment dispute or the use of the WTO dispute settlement body to 'circumvent' investment arbitration. Without aiming to be exhaustive,\textsuperscript{19} the ensuing analysis will focus on these aspects in order to highlight some seminal elements of the new politicization of investment disputes.

1 INVESTMENT ARBITRATION AS A POLITICAL PROCESS AND THE CONTROL OF STATE INTERESTS BY ARBITRAL TRIBUNALS

1.1 LEGAL RESOLUTION OF POLITICAL DISPUTES

'[E]very international dispute,' wrote Hersch Lauterpacht in his 1933 treatise \textit{The Function of Law in the International Community}, 'is of a political character' and 'the


\textsuperscript{18} Catherine Rogers, \textit{The Arrival of the 'Have-Not's in International Arbitration}, 8 Nevada L. J. 341, 356–57 (2007).

\textsuperscript{19} Some topics, such as the presence of sovereign investors, that may reveal an arbitration process in strongly political colours are not examined at all.
proposition that some legal questions are political is an understatement.\textsuperscript{20} A dispute is political in that it is of importance to the state, or states, party to it. The Latin apothegm \textit{de maximis not curat praetor} express the view that important matters are not amenable to judicial settlement.\textsuperscript{21} Disputes are political not only when they affect the state as a whole but also when they affect an individual citizen, since a 'wrong done to the individual is a wrong done to his State.'\textsuperscript{22} But Lauterpacht also recognized that, if it is easy to contend that all international disputes are political, so it is equally easy to demonstrate that all international disputes are also legal; where the rule of law reigns, the disputes are susceptible to a legal resolution\textsuperscript{23} and their ‘political’ nature does not imply that they should not be resolved through legal means.\textsuperscript{24}

Although these comments precede the advent of modern day ISDS, they remain pertinent today. States’ traditional reluctance to submit in advance political disputes to international arbitration is underlain by a suspicion that arbitration decides issues by means of a compromise, and the vital interests of the State ought not to be submitted to that procedure.\textsuperscript{25} Unsurprisingly, on a number of occasions states have proved unwilling to submit disputes to obligatory arbitration, and therefore the latter has generally remained a voluntary dispute resolution mechanism.\textsuperscript{26} Lauterpacht was critical of the opinion that issues considered political should not be amenable to a judicial or arbitral process\textsuperscript{27} and expressed the view that ‘inalienable rights are safe under international judicial settlement, because nothing – except force – can alienate them.’\textsuperscript{28}


\textsuperscript{21} See generally \textit{ibid}. at 139 et seq., 153 et seq., 165, 168 et seq.

\textsuperscript{22} \textit{Ibid}. at 153–54.

\textsuperscript{23} \textit{Ibid}. at 153, 155, 157–58, 164.

\textsuperscript{24} \textit{Ibid}. at 163. Cf. Eric A. Posner & John C. Yoo, \textit{Judicial Independence in International Tribunals}, 93 (1) Calif. L. Rev. 1, 3 (2005) (‘In the last few years, international dispute resolution has assumed an unprecedented prominence in international politics’) (emphasis added).

\textsuperscript{25} Lauterpacht, \textit{supra} n. 20, at 173.


\textsuperscript{27} Lauterpacht, \textit{supra} n. 20, at 166 et seq.

\textsuperscript{28} \textit{Ibid}. at 173.
The political nature of legal disputes in investment arbitration raises the acute question of where lies the dividing line ‘between judging a State’s policies and judging the consequences of such policies’ for investors. With the growth of ISDS, the subjects that have come within the purview of arbitral control have multiplied and often include topics that are to all intents and purposes political. The adjudication of these disputes could influence the future conduct of a host state in the exercise of its normative power. The view has been expressed that: some treaty guarantees and contract provisions may unduly constrain the host Government’s ability to achieve its legitimate policy objectives . . . because under threat of binding international arbitration, a foreign investor may be able to insulate its business venture from new laws and regulations, or seek compensation from the Government for the cost of compliance.

This is the problem of regulatory chill and it becomes a poignant issue in the case of arbitral decisions that bear judgment on host state policies that directly impact the public interest. Economic and financial policies in times of crises, including in the case of sovereign defaults and sovereign debt restructuring, are one example and these are the aspects that we will now turn to.

1.2 Adjudication of Economic Crises in General

In modern day investment arbitration, essential state security concerns are more likely to be invoked in the context of economic crises than other traditional national security interests. As a corollary, the adjudication of investment disputes arising out of economic crises becomes a political issue par excellence. Recent investment claims registered against European Union (EU) Member States as a result of the economic and financial crisis in Europe, notably, the Ping An and the

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29 B. Stern, Are Some Disputes Too Political to be Arbitrable? 24 (1) ICSID Rev. 80 (2009).
32 The Argentine crisis disputes provide the best example in this respect. See also Catharine Titi, The Right to Regulate in International Investment Law 76 (Nomos and Hart Publishing 2014).
33 Ping An Life Insurance Co. of China, Ltd. & Ping An Insurance (Group) Co. of China, Ltd. v. Belgium, ICSID Case No. ARB/12/29, registered 19 Sep. 2012.
Marfin\textsuperscript{34} cases, against Belgium and Cyprus respectively (arising out of nationalizations in the banking sector), and the Poštová banka\textsuperscript{35} and the Cyprus Popular Bank\textsuperscript{36} claims against Greece in relation to Greece’s 2012 debt restructuring, demonstrate all too well that even developed states, whose investors have traditionally assumed the role of claimants in investment disputes, are not immune to arbitration and the rules, if there are indeed any, have been changing. While these cases are still pending and relatively little is known about them at the time of writing, other disputes, namely those arising from the Argentine crisis and sovereign debt restructuring, have been in the spotlight for some time. Their ramifications, as the new arbitrations reveal, are not limited to Latin America but could soon involve the old masters of the game. In this respect, it is of interest to note that EU Member States are badly prepared to deal with such disputes, given that their treaties are old generation agreements which do not shield, as their North American counterparts do, from the scope of a treaty’s protections issues affecting security concerns.\textsuperscript{37}

Decisions relating to essential security interests are likely to nurture high sensitivities; where a state considers that such a security interest is at stake, any interference with it will be considered as intrusion in an internal matter.\textsuperscript{38} It has been argued that it is doubtful whether the subjective perceptions of a state in relation to its national security risk are susceptible of an objective evaluation or whether any tribunal acting judicially can override the assertion of a State that a dispute affects its security or vital interests.\textsuperscript{39} Indeed, where a state considers that its essential security may be compromised, the latter’s protection will doubtless take precedence over investment obligations that may have been assumed through international investment treaties, potentially rendering the state liable to compensate aggrieved investors.

1.3 Argentine crisis disputes

Adjudication of economic crises by investment tribunals and findings against the host state where the latter has taken measures injurious to foreign investors in its attempt to tackle a crisis take place so much because an investment treaty contains no relevant carve-out or exception as because the treaty’s exception is not

\textsuperscript{34} Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Cyprus, ICSID Case No. ARB/13/27, registered 27 Sep. 2013.

\textsuperscript{35} Poštová banka, a.s. & Istrokapital SE v. Greece, ICSID Case No. ARB/13/8, registered 20 May 2013.

\textsuperscript{36} Cyprus Popular Bank Public Co. Ltd. v. Greece, ICSID Case No. ARB/14/16, registered 16 Jul. 2014.

\textsuperscript{37} Catharine Titi, The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration, 14 (5) J. World Investment & Trade 829, 832 et seq. (2013).

\textsuperscript{38} Titi, supra n. 32.

\textsuperscript{39} Lauterpacht, supra n. 20, at 188.
self-judging; in that latter case a tribunal is invited to pronounce on whether the interest invoked by the state qualifies as an essential security interest.\textsuperscript{40} Beyond explicit exceptions in conventional law, the necessity defence in customary international law does not shield a state to a satisfactory extent from such claims.\textsuperscript{41} Argentina has learned this the tough way, with a wave of investment claims brought against it in the aftermath of its economic and political crisis of 2001. It is noteworthy that some of the awards consequently delivered against the Latin American country have proved controversial and several of them have been annulled.\textsuperscript{42} In particular, annulment committees concluded that some awards contained errors of law\textsuperscript{43} and that a number of tribunals had entirely failed to apply the applicable law.\textsuperscript{44} The paragraphs that follow will draw heavily on some of these disputes, to demonstrate that, in resolving them, arbitrators have had to delve into issues that are to all intents and purposes political.

The facts that triggered the disputes are well-known. Argentina’s economic recession of the late 1990s significantly deepened in 2001, precipitating a severe economic and political crisis\textsuperscript{45} that resulted in violent demonstrations, deaths, and a succession of five presidents in less than a fortnight.\textsuperscript{46} In an endeavour to

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\item Titi, \textit{supra} n. 32, at 255.
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stabilize the economy and restore confidence among the population,\(^{47}\) Argentina adopted measures across-the-board, including the freezing of bank accounts to prevent a run on the banks with Decree No. 1570/01,\(^ {48}\) known as the Corralito,\(^ {49}\) and the abandonment of the currency board system that had pegged the Argentinean peso to the US dollar with the Emergency Law of January 2002.\(^ {50}\) The adoption of these measures had an impact on foreign investors protected under international investment treaties Argentina had concluded with the investors’ respective home states. These treaties, while broadly similar (all of them old generation agreements), were nonetheless not identical. For instance, the bilateral investment treaty concluded between Argentina and the United States (US) in 1991 contains a (non-self-judging\(^ {51}\)) essential security interests’ exception, allowing the host state to digress from any obligation assumed under the treaty if such digression is necessary for the protection of its essential security interests;\(^ {52}\) by contrast, its counterparts concluded between Argentina (on the one hand) and France and the United Kingdom (on the other) do not contain an equivalent exception, thereby prioritizing, through the absence of any wording indicating the contrary, investment protection over the state’s essential security interests.\(^ {53}\)

Although adjudicating disputes in the presence of an essential security interests exception\(^ {54}\) would render recourse to customary international law inappropriate,\(^ {55}\) a number of tribunals turned to the necessity defence as enshrined in the International Law Commission’s Articles on Responsibility of States for

\(^{47}\) Burke-White & von Staden, supra n. 40, at 309.


\(^{51}\) The issue of whether the said exception in the treaty was self-judging or not triggered an intense rift between the Argentinean government and the claimants in the disputes that arose. Unanimously, the tribunals found that the exception was not self-judging. For a discussion of this topic, see Titi, supra n. 32, at 195 et seq.

\(^{52}\) United States-Argentina BIT (1991), Art. XI.

\(^{53}\) Titi, supra n. 32, at 290–291.

\(^{54}\) This is true of the tribunals deciding cases on the basis of the United States-Argentina BIT of 1991 (see Art. XI).

\(^{55}\) See generally CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Decision on Annulment, 25 Sep. 2007.
Internationally Wrongful Acts (‘ILC Articles’)\(^{56}\) which was deemed (not without controversy) to codify customary international law.\(^{57}\) Successful invocation of the necessity plea as encapsulated in the ILC Articles requires the presence of a number of criteria, among which some whose determination requires delving into political decisions taken by the state. Notably, the contested measure must have been ‘the only way for the State to safeguard an essential interest against a grave and imminent peril’ and the state must not have contributed to the situation of necessity.\(^{58}\)

The first of these conditions, the ‘only way’ requirement, is understood to prevent a state from successfully invoking necessity where lawful means other than those employed are available, even if these are costlier or less convenient, and it points to the fact that the contested measures must be strictly speaking necessary.\(^{59}\)

In examining this requirement, the CMS Tribunal cited ‘a variety of alternatives’ to support the argument that Argentina’s actions during the crisis did not constitute the only means available but stopped short of suggesting which policy alternatives would have been preferable.\(^{60}\) In a similar vein, the Enron Tribunal estimated that a ‘sad world comparative experience in the handling of economic crises, shows that there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case.’\(^{61}\) Like the CMS Tribunal, the Enron Tribunal did not put forward an alternative that Argentina might have adopted.\(^{62}\) Sometime later, its arguments were reiterated by the tribunal pronouncing on the Sempra dispute.\(^{63}\)

Another requirement that comes into play in the determination of whether the necessity defence can be successfully invoked is that the contested state measure must protect an essential interest against ‘grave and imminent peril.’ The


\(^{58}\) ILC Articles, Art. 25.


\(^{60}\) CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras 323–324.

\(^{61}\) Enron Creditors Recovery Corp. (formerly Enron Corp.) & Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 308 (emphasis added).

\(^{62}\) Ibid., para. 309.

Argentine crisis tribunals examined this condition more cursorily. The CMS Tribunal simply stated that the situation was ‘difficult enough’ to justify taking action to prevent it from getting worse and to avert the risk of ‘total economic collapse’ but added somewhat abstrusely that ‘the relative effect of the crisis’ did not allow ‘for a finding in terms of preclusion of wrongfulness.’ The Enron and Sempra Tribunals likewise rejected the presence of a ‘grave and imminent peril,’ because they remained unpersuaded that the situation was ‘out of control or had become unmanageable.’

The third requirement for the successful invocation of the defence is that the state must not have contributed to the situation of necessity in a ‘sufficiently substantial’ way. The CMS Tribunal found that the state had a sufficiently substantial contribution to the crisis; although it recognized the presence of exogenous factors that aggravated the crisis, it considered that these did not exonerate Argentina from its responsibility. Equally, the Enron and Sempra Tribunals admitted the presence of both endogenous and exogenous factors, without evaluating the respective weight of their contribution to the crisis, and concluded perfunctorily that the state had substantially contributed to the crisis, since it could not be said ‘that the burden falls entirely on exogenous factors.’

According to the interpretation of these tribunals, Argentina was then considered to be liable.

More recently, the El Paso Tribunal made a lengthy scrutiny of Argentina’s potential contribution to the crisis. It determined that endogenous and exogenous factors had been present but the tribunal focused on the country’s ‘failure to control several internal factors’ and ‘in particular the fiscal deficit debt accumulation and labour market rigidity’ which it considered to have substantially

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64 CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 322.
67 CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 329.
70 See further Tin, supra n. 32, at 251–252.
contributed to the crisis.\textsuperscript{72} This interpretation of the El Paso Tribunal needs to be taken with a pinch of salt, given that it did not take place in view of the necessity defence enshrined in Article 25 of the ILC Articles but rather the essential security interests exception in Article XI of the US-Argentina BIT.\textsuperscript{73} The latter does not contain any requirement to take into account whether the regulating state has contributed to a situation of crisis.\textsuperscript{74}

The attitude of the aforementioned tribunals may be contrasted with that of the LG&E Tribunal. More deferential to the host state, the latter tribunal considered the necessity defence in a complementary manner, since it had already ‘excused’ Argentina’s liability on the basis of the essential security interests exception in the US-Argentina BIT.\textsuperscript{75} The tribunal found that the ‘only way’ requirement was satisfied, estimating that ‘an economic recovery package was the only means to respond to the crisis’ and, while other ways to draft the economic recovery plan may have been possible, ‘an across-the-board response was necessary.’\textsuperscript{76} It emphasized that Argentina’s attitude had demonstrated a wish to ‘slow down by all the means available the severity of the crisis’\textsuperscript{77} and concluded there was no evidence showing that the state had contributed to the crisis.\textsuperscript{78}

Regarding the same requirement concerning the state’s contribution to the crisis, the Continental Casualty Tribunal confounded the need to examine the contribution to the situation of necessity under Article 25 of the ILC Articles with the BIT’s essential security interests exception.\textsuperscript{79} The tribunal recognized Argentina’s responsibility for its economic policy,\textsuperscript{80} but considered that the economic and fiscal policies which eventually became unsustainable and culminated in the crisis had been considered ‘sound economic policies’ that Argentina had benefited from for years and had been ‘praised by the international financial community and by many qualified observers,’ including the International Monetary Fund (IMF) and the US.\textsuperscript{81} It is noteworthy that arguments had been advanced both to the effect that Argentina could have rejected the policies that had been recommended to it, thereby allowing its economy to digress from the path it eventually took, and to the effect that it could have pursued these same

\textsuperscript{72} Ibid. para. 656.
\textsuperscript{73} Ibid. para. 665 (‘Argentina contributed to the crisis to a substantial extent, so that Article XI cannot come to its rescue’) (emphasis added).
\textsuperscript{74} See further Titi, supra n. 32, at 252.
\textsuperscript{75} LG&E Energy Corp., LG&E Capital Corp. & LG&E Int’l Inc. v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006, para. 245.
\textsuperscript{76} Ibid. para. 257.
\textsuperscript{77} Ibid. para. 256.
\textsuperscript{78} Ibid. para. 257.
\textsuperscript{79} Continental Casualty Co. v. Argentina, ICSID Case No. ARB/03/9, Award, 5 Sep. 2008, paras 234–236.
\textsuperscript{80} Ibid. para. 235.
\textsuperscript{81} Ibid. para. 235.
policies with more conviction. The tribunal emphasized that both arguments had received conflicting appraisals and concluded that the crisis could only have been avoided if different economic policies had been followed years earlier, and ‘against the advice and support that Argentina was receiving from the outside.’ This part of the tribunal’s reasoning is particularly interesting, since it shows that advice received by international financial and economic institutions, such as the World Bank and the IMF, or other state actors, may produce outcomes that jar with states’ investment obligations, and could end up becoming the indirect object of investment arbitration. The paradox is only too palpable when a dispute born out of such policies is adjudicated at ICSID, itself a World Bank institution.

When interpreting the requirements imposed on the basis of Article 25 of the ILC Articles for the determination of the presence of a state of necessity, some tribunals enquired into plainly political questions. What effectively had been under review in these disputes was the host state’s response to a major economic crisis, leading arbitral control to the heart of governmental policy.

1.4 Particular Case of Sovereign Debt Restructuring

A new chapter in the adjudication of economic crises started to be written with disputes involving Argentina’s sovereign debt restructuring. Following its economic and financial crisis discussed in the preceding section, Argentina defaulted on its debt in December 2001. Sometime later, in early 2005, an attempt was made to restructure and the state secured the acceptance of at least 75% of its creditors, permitting a restructuring of its debt valued at over USD 100 billion. This first attempt was coupled with a new offer in 2010 targeting the holdout investors of the 2005 restructuring. Following the restructurings, holdout investors filed claims against Argentina and the disputes have subsequently raised the question of the necessity of according policy space to a state wishing to restructure its debt. Here again, the number of recent defaults beyond Argentina’s indicates the topic’s wider implications; in early 2012, Greece launched the largest ever sovereign debt restructuring relating to EUR 205 billion in debt, and, as mentioned above, two

82 Ibid. para. 236.
83 Ibid. para. 236. For a further discussion, see Titi, supra n. 32, at 252–253.
84 See also Burke-White & von Staden, supra n. 40, at 372; Titi, supra n. 32.
86 See Halverson Cross, supra n. 85, at 335.
87 UNCTAD, Sovereign Debt Restructuring and International Investment Agreements, IIA Issues Note No. 2 (July 2011), p. 3.
ICSID cases have already been registered against the country, while other recent sovereign debt restructurings, including those of Belize (twice since 2007), Ecuador (2009), and Jamaica (twice since 2010), may pave the way for future claims.

When sovereign debt becomes unsustainable, restructuring may be negotiated between the state and its creditors. Typically, the state makes an exchange offer in the hope that a large majority of its creditors will accept the proposed terms. State engagement with its creditors is therefore a sine qua non of the process if negotiations are to be successfully concluded. But inevitably, not all investors accept the offer and a minority would require that the debt instruments be honoured in full.

Judicial resolution of disputes is not foreign to sovereign debt restructuring. As a rule, sovereign debt instruments provide for litigation of such disputes although they remain silent on the potential for arbitration. In the context of the Argentine debt restructurings, more than 100 creditor litigations, including class actions, were launched in the US, the United Kingdom, Italy, and Germany. Several of them have resulted in judgments favourable to holdout funds, in one case for USD 725 million, raising concerns regarding their potential impact on future sovereign debt restructurings.

But arbitration of sovereign debt restructurings before international investment tribunals is a new phenomenon and one that has raised heated questions. Notably, it has been debated whether sovereign bonds constitute covered ‘investment’ within the meaning of investment treaties and within the meaning of the ICSID Convention, and whether states have consented to the arbitration of mass claims, the latter issue arising in particular with respect to the Abacalt, Ambiente Ufficio, and Alemanni cases. Irrespective of this discussion concerning tribunal

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89 UNCTAD, supra n. 87, at 2.
90 International Monetary Fund, supra n. 88, at 10.
91 UNCTAD, supra n. 87, at 2.
92 Brazil appears to be an exception to this rule, whose debt agreements have regularly provided for arbitration of disputes. Halverson Cross, supra n. 85, at 339, 341 et seq.
94 International Monetary Fund, supra n. 88, at 6, 28, 31; Panizza, Sturzenegger, & Zettelmeyer, supra n. 93, at 658.
95 Titi, supra n. 37, at 835–838; Kevin P. Gallagher, The New Vulture Culture: Sovereign debt restructuring and trade and investment treaties, IDEAs Working Paper Series Paper No. 02/2011, p. 15 et seq.
jurisdiction, where such a dispute reaches the merits phase it is the restructuring itself that comes under review, and as a result the state’s economic policy. Arbitration of sovereign debt restructurings by investment tribunals is therefore adjudication of political disputes. The mass or multi-party element is worth noting in that it potentially renders the disputes all the more important to the state and therefore all the more political.98

Newer treaties sometimes preclude sovereign debt restructurings from the purview of their arbitration clause. This is possible where a treaty does not cover portfolio investments,99 where it explains that ‘public debt operations’ do not constitute an investment100 or that such operations are not subject to the treaty’s investment protection provisions,101 or where an international investment agreement excludes the possibility of raising claims related to sovereign debt restructurings.102 States could likewise make sure that agreements prevent arbitration of mass claims, make explicit that sovereign crises come within the scope of an essential security interests exception,103 or further provide explicit waivers in contracts associated with sovereign debt.104

1.5 HEALTH AND ENVIRONMENTAL POLICIES

Investment disputes can be political not only when they touch upon essential security issues and situations of economic crises. One field where the legal and the political merge to the extent that it is difficult to distinguish one from the other is the adjudication of claims concerning the protection of public health and the environment. A brief overview of two sets of disputes, the Vattenfall105 and the

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98  See supra.
99  Denmark-Poland BIT (1990), Art. 1(1)(b).
101  United States-Dominican Republic CAFTA, Annex 10-A.
102  See United States-Colombia FTA, Annex 10-F.
Philip Morris\textsuperscript{106} cases, helps highlight the potential political implications of such claims.

The Vattenfall disputes were initiated against Germany on the basis of the Energy Charter Treaty. The first claim related to a water permit that imposed restrictions on Vattenfall intended to minimize the impact of its investment on the environment. According to the local authorities that issued the permit, these restrictions were set in place in order to meet requirements concerning water quality targets imposed by the EU Water Framework Directive.\textsuperscript{107} The dispute was eventually settled outside arbitration, and although an ‘award’ exists,\textsuperscript{108} the particular terms of the negotiation have not become publicly available. Mystery also shrouds the second Vattenfall claim, currently pending at ICSID and relating to Germany’s decision to phase-out nuclear power.\textsuperscript{109} Procedural documents of the case have not been made public. The Vattenfall cases, or at least what is known of them, demonstrate that investment arbitration may involve state decisions on seminal environmental policy issues. Decisions relating to water pollution or nuclear energy production, while likely to affect investors operating in the field, primarily relate to longer-term or broader environmental policies and targets. The impact of the above arbitrations on such policies is easily evident. It is noteworthy, for example, that in the first Vattenfall case, Germany preferred to negotiate and settle, and therefore compromise, rather than pursue the arbitration. It is possible that the German government considered that the local authorities’ measures relating to the EU Directive’s water quality targets were not necessary as adopted and that compliance with the Directive could have been secured by less drastic means.

The Philip Morris cases, registered against Uruguay in 2010 and against Australia in 2011, relate to copyright issues and tobacco packaging legislation. Here again, little information relating to the disputes themselves has been released, but the facts of the second one have seen some publicity. When, in April 2011, the Gillard government in Australia announced its intention to discontinue ISDS in its investment agreements\textsuperscript{110} (a decision that appears to have been abandoned by the


\textsuperscript{109} Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12.

new Australian government after the conclusion of the recent free trade agreement between Australia and Korea\textsuperscript{111} it explained that one of its reasons was that:

\[\text{[The Government does not] support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.}\textsuperscript{112}

In other words, we are here in the domain of public policy and Ruggie’s afore-cited words become all the more pertinent, highlighting the ‘fear’ of a sovereign state that its ability to regulate will be limited in view of potential investor-state arbitrations and likely compensation awards hanging like the sword of Damocles over its public (health) policymaking.\textsuperscript{113} It must be stressed, however, that the political nature of these disputes does not and should not place them outside the scope of investment arbitration tribunals’ jurisdiction.

2 POLITICS AS A MEANS OF INFLUENCING OR ALTERING THE INVESTMENT ARBITRATION PROCESS AND NEW FORMS OF DIPLOMATIC PROTECTION

And yet, it is not only the subject matters of disputes that have started to be political. States are increasingly employing ‘political’ means as a way to ‘respond’ to, get involved in or influence the outcome of an investment dispute. This approach, although described as ‘political,’ may not necessarily be limited to the narrow political sphere and could also relate to the use of other legal means, such as recourse to the WTO dispute settlement body, in the parties’ endeavour to impact on the arbitral process.

\textsuperscript{112} Government of Australia, Department of Foreign Affairs and Trade, supra n. 110, at 14.
\textsuperscript{113} Compare Titi, supra n. 32, at 73 and passim.
2.1 ‘Parallel’ disputes at the WTO

Very recently, recourse to WTO law has emerged as a new form of ‘diplomatic’ protection that takes place in parallel with investment arbitration. A first example comes from the Philip Morris cases. While these investment disputes are ongoing, the tobacco industry appears to have searched for and funded countries willing to initiate cases before the WTO on its own behalf.114 Between March 2012 and September 2013, Ukraine, the Dominican Republic, Honduras, Cuba, and Indonesia lodged requests for consultations in relation to Australia’s plain packaging legislation before the WTO.115 At least part of the complainants’ legal costs is being covered by the tobacco industry, including directly by Philip Morris.116 The latter appears to have also lobbied the US government to introduce in the Trans-Pacific Partnership Agreement language that would make it difficult for economies to pass analogous legislation without violating the prospective treaty.117 This approach has been described as ‘diplomatic espousal shopping,’118 which could have, as a result, ‘increas[ed] the transaction costs of tobacco legislation.’119 Litigation before international trade and investment fora could have a discouraging effect on other economies when considering the adoption of analogous legislation.120 It is reported that the United Kingdom has stalled the passing of cigarette packaging legislation pending the outcome of the Philip Morris disputes.121 That said, it is noteworthy that the EU has eventually adopted a new

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115 These cases are WTO, Australia – Certain Measures concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Ukraine), Dispute DS434, Request for Consultations of 13 Mar. 2012; WTO, Australia – Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Honduras), Dispute DS435, Request for Consultations of 4 Apr. 2012; WTO, Australia – Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Dominican Republic), Dispute DS441, Request for Consultations of 18 Jul. 2012; WTO, Australia – Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Cuba), Dispute DS458, Request for Consultations of 3 May 2013; WTO, Australia – Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Indonesia), Dispute DS467, Request for Consultations of 20 Sep. 2013.
117 Ibid.
118 Alford, supra n. 114, at 50.
119 Ibid. at 50.
120 Ibid. at 50.
121 Martin, supra n. 116.
Tobacco Products Directive, but one a lot less radical than Australia’s. The interest that these cases have kindled is not astonishing and several WTO members, including the EU, participate as amicus curiae in the disputes before the WTO’s dispute settlement body. The political nature of the disputes is easily palpable and at the same time it is significant that the WTO disputes are taking place with the quasi-direct involvement of a party to an investment dispute.

A different example of political pressure exercised at the WTO in relation to an investment dispute concerns the nationalization of Repsol’s stake in its Argentine subsidiary YPF. Even before Repsol had registered its ICSID claim against Argentina, consultations had been sought at the WTO by both economies affected by the dispute. It is unclear whether this mutual pressure exercised through the WTO had an actual impact on the investment arbitration, but in late February 2014 an announcement was made that the latter was about to be settled. The particularity of Repsol’s example is that a home economy (the EU in casu) brought a claim before the WTO in an apparent ‘response’ to an investment treaty violation targeting one of its investors. The political nature of the dispute is also here obvious.

The compatibility of taking the avenue of the WTO ‘in parallel’ with an investment dispute with Articles 26 and 27 of the ICSID Convention may easily come into question. According to Article 26, ‘[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.’ This provision has been described as ‘the clearest expression of the self-contained and autonomous nature

123 Ibid.
127 Emphasis added.
of the arbitration procedure provided for by the Convention.\textsuperscript{128} And the first paragraph of Article 27 of the ICSID Convention explicitly states that:

\textit{No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.}\textsuperscript{129}

In the words of the \textit{Banro} Tribunal, ‘Article 27 of the ICSID Convention, read in the context of Article 26, and in light of the purpose and aim of the ICSID Convention, ought to be interpreted as foreclosing ... a plurality of channels.’\textsuperscript{130}

It is remarkable in this respect that the \textit{Philip Morris v. Australia} case is conducted under UNCITRAL rules rather than the ICSID Convention. Analogous provisions limiting recourse to multiple fora are sometimes incorporated in investment treaties.\textsuperscript{131}

2.2 Compliance with arbitral awards and the suspension of trade remedies and bank loans

Trade remedies and bank loans have recently been used in order to exert political pressure on states in relation to the payment of investment awards or a state’s ambivalent approach to investment arbitration. The scholarly discussion in this respect has centred on the suspension of Argentina’s designation as a beneficiary of the US Generalized System of Preferences (GSP) in March 2012\textsuperscript{132} and, to a lesser degree, on some other measures that will be discussed below.\textsuperscript{87}

GSP schemes find their legal basis in the WTO’s Enabling Clause\textsuperscript{133} and have traditionally been offered by a handful of developed economies, including Australia, Canada, the EU, Switzerland, and the US,\textsuperscript{134} to allow developing countries to benefit from non-reciprocal preferential tariff rates without extending

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\item \textsuperscript{128} Schreuer et al., \textit{supra} n. 8, at 351.
\item \textsuperscript{129} Despite the phrasing of this provision, bringing an international claim is of course a form of diplomatic protection. It appears that the phrase was employed in order to ensure that state-to-state arbitration was precluded for the same dispute. See Schreuer et al., \textit{supra} n. 8, at 420.
\item \textsuperscript{130} Emphasis added.
\item \textsuperscript{131} \\
\item \textsuperscript{132} See, e.g., Austrian Model BIT (2011), Art. 21(2).
\item \textsuperscript{134} \textit{Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries}, GATT Doc. L/4903 (28 Nov. 1979), BISD 26S/203.
\item \textsuperscript{135} Rosenberg \textit{supra} n. 133, at 520; Alford, \textit{supra} n. 114, at 50.
\end{itemize}
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the same privileges to developed economies. These schemes are generally subject to performance obligations incumbent upon the beneficiaries, and one such obligation in the US GSP programme was the requirement that the beneficiary ‘act in good faith in recognizing as binding or in enforcing arbitral awards.’

Azurix Corporation and Blue Ridge Investments petitioned the US government to take action in relation to Argentina’s alleged failure to comply with the Azurix and CMS awards, respectively. The petitions were endorsed by the government, which considered that Argentina had ‘not acted in good faith in enforcing arbitral awards in favour of United States citizens or a corporation, partnership, or association that is 50% or more beneficially owned by United States citizens.’ A further petition was filed against the Latin American country for trade remedies under section 301 of the US Trade Act of 1974. The latter concerns cases where foreign trade practices violate trade agreements or unjustifiably impede US commerce, but no action appears to have been taken in this respect.

Following the petitions against Argentina’s GSP benefits, Chevron lobbied the US Trade Representative in order to obtain the suspension of Ecuador’s beneficiary status under the Andean Trade Preference Act (ATPA) in relation to the country’s conduct in the Chevron case, evoking in particular the country’s ‘failure to enforce or recognize arbitral awards under the BIT.’ The ATPA, enacted in the early 1990s, offered preferential access to the US market to exports...
from Bolivia, Colombia, Ecuador, and Peru in order to assist them in their fight against drug trafficking by offering economic alternatives to drug production. Similarly to the GSP scheme, ATPA benefits may be suspended if a beneficiary country ‘fails to act in good faith in recognizing as binding or in enforcing arbitral awards.’ In annual reports of the Office of the US Trade Representative on the operation of the ATPA, it was stressed that Ecuador’s BIT terminations, its withdrawal from the ICSID Convention, and the government’s conduct in the Chevron dispute raised concerns about Ecuador’s ‘long-term commitment to international arbitration for the settlement of investor disputes.’

The decision to suspend a country’s trade benefits, whether interpreted as an attempt to exercise pressure on the government to pay the award beneficiaries, or whether intended as a sanction or a warning to third states that may be envisaging non-compliance with arbitral awards, constitutes a form of political interference with the arbitration process. In this respect the eventual pressure put on Ecuador regarding suspension of its trade benefits under the ATPA is broader than that put on Argentina, since it concerns not only a specific dispute adjudicated by an arbitral tribunal but also the state’s wider stance vis-à-vis the international system of investment protection. Such pressure may be a way of pursuing action external to the means provided for in the relevant arbitration rules. The caveat for ICSID arbitration is that Article 27(1) of the ICSID


146. See 19 U.S.C. s. 3202(c)(3), Beneficiary country.


Convention expressly allows diplomatic protection where a state has failed to comply with an arbitral award. This provision is complemented by Article 64 of the ICSID Convention, which gives jurisdiction to the ICJ over disputes between contracting states concerning the interpretation or application of the Convention. Questions to ask are whether the suspension of trade benefits is a form of diplomatic protection, although, with an *a maiore ad minus* argument, if diplomatic protection (the *maius*) is allowed, suspension of trade benefits (the *minus*) will also be allowed; and whether there was failure to comply with an ICSID award.

The decision to suspend trade benefits could incite other developed economies that offer preferential trade schemes to suspend benefits in order to exercise political pressure. An example arises from Repsol’s nationalization. Soon after the suspension of Argentina’s benefits under the US GSP scheme, the European Parliament urged the European Commission and the Council to consider adopting measures necessary to prevent ‘such situations’ from ‘arising again, including the possible partial suspension of the unilateral tariff preferences under the GSP scheme.’ The proposal does not appear to have been followed through.

Reflections similar to those discussed above become pertinent with respect to another means employed against Argentina in relation to payment of investment awards, namely the attempt to block the disbursement of loans by using leverage at international financial institutions, notably the World Bank and the IMF. US Treasury Secretary Timothy Geithner received letters from US political figures in 2011 expressing ‘concern about United States taxpayer dollars providing funding for World Bank loans to Argentina and . . . request[ing] a suspension of loans to sovereigns not in compliance with . . . ICSID . . . rulings.’ Within the same context, it was suggested that the US should object to the Latin American country’s request to restructure its outstanding Paris Club debt. The US eventually voted against the extension of some World Bank and Inter-American

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151 For the wording of this article, see *supra*.
153 On this, see Titi, *supra* n. 14, at 369 et seq.
156 Rosenberg, *supra* n. 133, at 517–518, n. 75. On this, see generally Titi, *supra* n. 14, at 374 et seq.
158 Rosenberg, *supra* n. 133, at 517.
Development Bank (IDB) loans to Argentina and it is possible that this particular aspect of US ‘diplomacy’ may have encouraged Argentina to reach post-award settlements with the beneficiaries of the awards reordered against it. The post-award settlements themselves may be considered means extraneous to the legal remedy system and, accordingly, they can be described as political.

2.3 **State-to-state arbitration**

A final aspect of the new politicization of investment disputes to be considered is the initiation of state-to-state arbitrations in relation to an investor-state dispute. Although states are generally entitled to launch such arbitrations on the basis of applicable treaty law, and the parties to the respective investor-state and state-to-state disputes are not the same, there is little doubt that a state-to-state case that runs in parallel or in respect of an investor-state dispute introduces a political element. Indeed, some older US treaties are explicit about excluding the possibility of state-to-state arbitration where investor-state arbitration has been initiated.

A first example of the recent ‘trend’ of initiating such disputes comes from the context of the *Chevron* case, where Ecuador (the respondent), having disagreed with the tribunal’s interpretation of the US-Ecuador BIT’s ‘effective means’ provision (Article VII, paragraph 7), instituted a claim against the US in order to clarify the scope of that provision. The state-to-state arbitration appears thus to have predominantly targeted future interpretations of the same article. But it is remarkable that Ecuador had at the same time instituted set-aside proceedings before a national judge and a finding in its favour in the state-to-state arbitration

159 Ibid. at 517.
163 See, e.g., United States-Senegal BIT (1983), Art. VIII(7); United States-Cameroon BIT (1986), Art. VIII(9).
164 *Chevron Corp. (USA) & Texaco Petroleum Co. (USA) v Ecuador*, PCA Case No. 34877, Partial Award on the Merits, 30 Mar. 2010.
could have been used in the local court in order to influence the latter’s
decision. As it were, the arbitral tribunal, whose award has not to this date been
made public, seems to have declined jurisdiction; the tribunal considered that no
concrete dispute with practical consequences existed between the parties and there
was no ‘positive opposition’ on the part of the US to the interpretation advanced
by Ecuador. Ecuador had previously informed the US government of its
disagreement with the way the treaty had been interpreted but the latter did not respond. The tribunal held US silence not to signify ‘positive opposition’ and
estimated that it was due to a wish not to interfere with an already delivered
investment award. This interpretation has been criticized for more than one
reason.

Another example is the Peru v. Chile case, launched in the aftermath of the
Lucchetti claim instituted by Chilean investors against Peru. Peru appears to have
filed a request asking for the suspension of the Lucchetti proceedings, in light of
the concurrent state-to-state arbitration it initiated against Chile. Following the
Lucchetti tribunal’s rejection of Peru’s request to suspend proceedings, the latter
abandoned its state-to-state claim against Chile.

Other recent examples of state-to-state arbitrations involve the Russian region
of Kaliningrad, which resorted to arbitration against Lithuania with the allegation
that the enforcement of a commercial award had amounted to expropriation
under the Russia-Lithuania BIT, and a claim brought by Italy against Cuba, on
behalf, inter alia, of Italian investors over alleged violations of the Cuba-Italy
BIT.

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167 Markert & Titi, supra n. 161. See also Luke Eric Peterson, Ecuador initiates unusual state-to-state
arbitration against United States in bid to clarify scope of investment treaty obligation (2011) 4 IA
parties; tribunal members part ways on key issues (2012) 21 (5) IA Reporter.
170 Hepburn & Peterson, supra n. 168.
171 For a critical appraisal, see Roberts, supra n. 162.
172 See Empresa Lucchetti, S.A. & Lucchetti Peru, S.A. v. Peru, ICSID Case No. ARB/03/4, Award, 7 Feb.
2005, para. 7.
173 Ibid.
174 Ibid., para. 7.
175 See ibid., para. 9.
176 Roberts, supra n. 162, at 8.
177 Kaliningrad Region v. Lithuania, ICC Arbitration Case No. 14651/JHN (Final Award, 2009). See also
Kaliningrad Region v. Lithuania, Paris Court of Appeal, Pôle 1, Chambre 1 No. 09/19535 (Arrêt, 18
Nov. 2010). See Markert & Titi, supra n. 161 and Luke Eric Peterson, Lithuania prevails in
investor-state BIT claim brought by Russian regional government; ICC tribunal rules that en-
forcement of commercial arbitration award in Lithuania cannot be challenged as an expropriation
under BIT (2009) 2 IA Reporter.
It is noteworthy that Article 27(1) appears to exclude the possibility for a state to espouse its national’s claim in order to bring another international claim, but it does not explicitly prevent the respondent state from bringing an international claim against the claimant’s state. This issue was relevant in the Lucchetti dispute\(^{179}\) and in the Chevron dispute, which claims were not registered under the ICSID Convention.\(^ {180}\) Also, as already noted, the tribunal in the state-to-state arbitration declined jurisdiction.

The foregoing discussion on the political nature of state-to-state disputes must not lead to the conclusion that the latter are necessarily to be frowned upon. The opinion has been expressed that they may reflect a new era in investment law where the interests of both investors and states are recognized, representing ‘a permissible and potentially progressive mechanism by which treaty parties can re-engage with the system in order to correct existing imbalances and shape its development from within.’\(^ {181}\)

By way of two closing remarks, it is noteworthy that some early state-to-state dispute settlement provisions included the option of resorting either to an ad hoc tribunal or to the ICJ, a type of provision that later gave place to ad hoc arbitration to the exclusion of the ICJ.\(^ {182}\) Finally, some treaties, such as recent treaties concluded by Japan, provide for joint committees regarding the ‘implementation and operation’ of the agreement in question.\(^ {183}\)

3 CONCLUSIONS

The ‘political’ nature of disputes brought to investment arbitration is a fact, and their repoliticization, a novel topic in investment law, will probably be debated for some time to come. The issue is not one susceptible to easy solutions, nor does it necessarily require solutions. An appropriate degree of deference by investment tribunals is certainly desirable where sensitive state issues and policies are involved, and concrete treaty language, notably exceptions and clarifications, may facilitate the distinction between that which the state considers essential and wants to safeguard and that which it consciously accepts to arbitrate. Such language, of course, does not distinguish between that which is political and that which is not.


\(^{180}\) See Chevron Corp. (USA) & Texaco Petroleum Co. (USA) v. Ecuador, PCA Case No. 34877 and Ecuador v. United States, PCA Case No. 2012-5.

\(^{181}\) Roberts, supra n. 162, at 5.


\(^{183}\) See, e.g., Japan–Cambodia BIT, Art. 23.
But it is admitted at the same time that this system is imperfect. One may evoke Lauterpacht’s pertinent observation that ‘[n]o juridical test has so far been devised by which the degree of the exclusion of the judicial process in disputes involving [political] issues could be determined. It may be doubted whether such a test is possible at all.’ 184 Until the time when such a test can be developed, political disputes – and political means – will continue to form part of the arbitration process.

184 Lauterpacht, supra n. 20, at 183.
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