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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 it has evolved into the centrepiece 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 centrepiece 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,[1] the proliferation and growing importance of investment tribunals and

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1 See, e.g., UNCTAD *World Investment Report 2012, New York & Geneva: United Nations* 88 (2010); M. Sornarajah, Toward Normlessness: T*he Ravage and Retreat of Neo-Liberalism in International Investment Law*, in *Yearbook on International Investment Law & Policy* 2009–2010, 619 et seq. (Karl P. Sauvant ed., Oxford University Press 2008); M. Sornarajah, A Coming Crisis: *Expansionary Trends in Investment Treaty Arbitration*, in *Appeals Mechanism in International Investment Disputes* (Karl P. Sauvant & M. Chiswick-Patterson eds, Oxford University Press 2008); W. W. Burke-White The Argentine Financial Crisis: *State Liability under BITs and the Legitimacy of the ICSID System*, 3 (1) Asian J. WTO & Int'l Health L. & Policy 202 (2008); Stephan W. Schill, *Burying an International Law Legacy – Argentina's Currency Reform in the Face of Investment Protection: The ICSID Case CMS v. Argentina* 3 (2) Transnational Dispute Mgt. 15 (2006).

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exponential recourse to international arbitration[2] 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.[3] With the exception of the Iran-United States Claims Tribunal,[4] and the more recent United Nations (UN) Compensation Commission,[5] 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)[6] or the World Trade Organization's (WTO's)

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2 See UNCTAD *World Investment Report 2013*, *New York & Geneva: UN,* 2013, p. 110; UNCTAD *World Investment Report 2012*, *New York & Geneva: UN,* 2012, p. 86; International Centre for Settlement of Investment Disputes, *ICSID 2011 Annual Report*, Washington: ICSID, 2012, 25 et seq.; OECD, Improving the System of Investor-State Dispute Settlement: An Overview, in OECD *International Investment Perspectives 2006 Edition*, OECD, 2006, 184; C. Brown & K. Miles, *Introduction: Evolution in Investment Treaty Law and Arbitration*, in *Evolution in Investment Treaty Law and Arbitration* 3 (C. Brown & K. Miles eds, CUP 2006); E.-U. Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralisation of Dispute Settlement in International Trade*, U. Pa J Int'l Econ. L. 27 (2008); A. Reinisch, *The Proliferation of International Dispute Settlement Mechanisms, The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration*, in International *Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner* (I. Buffard, J. Crawford, A. Pellet, & S. Wittich eds, Martinus Nijhoff 2012); Gary Born, *A New Generation of International Adjudication*, 61 (4) Duke L. J. 775 (2006); N. Lavranos, *The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbiter?* 19 Leiden J Int'l L. 223 (2009), with further references; Peter Muchlinski, *Trends in International Investment Agreements: Balancing Investor Rights and the Right to Regulate: The Issue of National Security*, in Yearbook on *International Investment Law & Policy* 2008–2009 38 (Karl P. Sauvant ed., Oxford University Press 2008–2009).

3 See Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 (4) Virginia J. Int'l L. 825, 834 (2011); Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* para. 144 (Banks Law Publishing 1916); Gary Born, *A New Generation of International Adjudication*, 61 (4) Duke L. J. 775, 820 (2012); Guy I.F. Leigh, *Nationality and Diplomatic Protection*, 20 (3) Int'l & Comparative L. Q. 453, 455 (1971).

4 See the Iran-United States Claims Tribunal's official website, www.iusct.net/Default.aspx. Cf. Karl Matthias Meessen, *Economic Law in Globalizing Markets* 234 (Kluwer Law International 2004).

5 See the U.N. Compensation Commission's official website, www.uncc.ch/. See further Gary Born, *A New Generation of International Adjudication*, 61 (4) Duke L. J. 775, 845 et seq. (2012).

6 See, e.g., Art. 34(1) of the Statute of the International Court of Justice, adopted 26 Jun. 1945, entered into force 24 Oct. 1945, 33 U.N.T.S. 993. See further Won-Mog Choi, *The Present and Future of the*

dispute settlement body.[7] 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[8] 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.'[9]

The Convention of the International Centre for Settlement of Investment Disputes ('ICSID Convention') was created and promoted as a means of depoliticizing investment disputes.[10] Not surprisingly, the Convention explicitly

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Investor-State Dispute Settlement Paradigm, in *The Future of International Economic Law* 287, 288 et seq. (William J. Davey & John Howard Jackson eds, Oxford University Press 2008); John Collier & Vaughan Lowe, *The Settlement of Disputes in International Law* 132 et seq. (Oxford University Press 1999).

7 See Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

8 Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1 ICSID Rev. – Foreign Investment L. J. (1986); Ibrahim F.I. Shihata, *Introduction by the Secretary General*, ICSID 1984 Annual Report 5 (1984); Sergio Puig, *Emergence and Dynamism in International Organizations: ICSID, Investor-State Arbitration and International Investment Law*, 44 Georgetown J. Int'l L. 531 (2013); Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards,* 51 (4) Virginia J. Int'l L. 825, 833–34 (2011); Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 Harvard Int'l L. J. 435, 442; Martins Paparinskis, *The Limits of Depoliticisation in Contemporary Investor-State Arbitration*, in *Selected Proceedings of the European Society of International Law* (James Crawford and Sarah Nouwen eds, 2010); W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 4 Duke L. J. 739, 750 (1989); Elihu Lauterpacht, '*Foreword' to Christoph H. Schreuer et al., The ICSID Convention: A Commentary* xi (2d ed., Cambridge University Press 2009); Christoph Schreuer, *Investment Protection and International Relations*, in *The Law of International Relations, Liber Amicorum Hanspeter Neuhold* 345, 346–47 (August Reinisch & Ursula Kriebaum eds, Eleven International Publishing 2007); C. M. Ryan, *Meeting Expectations: Assessing the Long-Term Stability and Legitimacy of International Investment Law*, 29 U. Pennsylvania J. Int'l L. 725, 734 (2008); Christoph Schreuer, *Do We Need Investment Arbitration?* (2014) 11 (1) *Transnational Dispute Management*, in *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* 3 (Jean E. Kalicki & Anna Joubin-Bret eds). See also *Banro American Resources, Inc. & Société Aurifère du Kivu et du Maniema SARL v. Congo*, ICSID Case No. ARB/98/7, Award, 1 Sep. 2000, paras 17, 19; *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 Jan. 2008, Separate Opinion of Andreas F. Lowenfeld, para. 1. Cf. *Ecuador v. United States*, PCA Case No. 2012-5, Michael Reisman's Opinion with respect to jurisdiction, 24 Apr. 2012, para. 37.

9 *Sempra Energy Int'l v. Argentina*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, para. 157; and *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005, para. 145. See also Ahmadou Sadio Diallo (*Guinea v. Congo*), Preliminary Objections, Judgment, [2007] ICJ Reports 582, para. 88.

10 Aron Broches, *Selected Essays, World Bank, ICSID, and Other Subjects of Public and Private International Law* 457, 521 (Martinus Nijhoff Publishers 1995); Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Recueil des Cours 136, 344 (1972); Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 1 (ICSID, Washington 1968), p. 242, 464 and passim. See also *Banro American Resources, Inc. & Société Aurifère du*

precludes the use of diplomatic protection.[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.'[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[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.[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.[15] It was claimed that the Convention was meant, *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.'[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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Kivu et du Maniema SARL v. Congo, ICSID Case No. ARB/98/7, Award, 1 Sep. 2000, paras 17, 19.

11 See further Ibrahim F.I. Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA*, 1 (1) American University International Law Review 103 (1986).

12 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 1 (ICSID, Washington 1968), see p. 242, 464.

13 According to the Calvo doctrine, dispute resolution was to take place through the application of local laws by domestic courts and investors should renounce applying to their home government for diplomatic protection, at least until available local remedies had been exhausted. Initially, the Calvo doctrine was famously elaborated in Carlos Calvo, *Derecho internacional teórico y práctico de Europa y América*, Paris: D'Amyot and Durand et Pedone-Lauriel, 1868. See also Carlos Calvo, *Le droit international théorique et pratique*, Paris: Rousseau, 1896; Enrique Fernández Masiá, El incierto futuro del arbitraje de inversiones en Latinoamérica, *Transnational Dispute Management* 6 (4), p. 2 (2009); Bernardo M. Cremades, La participación de los Estados en el arbitraje internacional. *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* III (3), p. 658 (2010); Wenhua Shan, *From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 (3) Northwestern J. Int'l L. & Bus. 632 (2007); Guido Santiago Tawil, *On the Internationalization of Administrative Contracts, Arbitration and the Calvo Doctrine*, in Albert *Arbitration Advocacy in Changing Times* 329 (Jan van den Berg ed., Kluwer Law International 2011); International Law Commission, Addendum to the third report on diplomatic protection by John Dugard, Special Rapporteur, UN, General Assembly, Fifty-fourth session, A/CN.4/523/Add.1 (16 Apr. 2002).

14 International Law Commission, *supra* n. 13, at 3. See also Catharine Titi, *Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas*, 30 (2) Arb. Int'l 360 (2014).

15 Sergio Puig, *Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law*, 44 Georgetown J. Int'l L. 531, 550–51 (2013).

16 *Ibid*. at 550.

atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.'[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 lawmaking to evaluation by arbitrators.'[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 *re*politicization 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,[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 *The Function of Law in the International Community*, 'is of a political character' and 'the

[17] ICSID, *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965), *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/basic-en.htm.

[18] Catherine Rogers, *The Arrival of the 'Have-Nots' in International Arbitration*, 8 Nevada L. J. 341, 356–57 (2007).

[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.'[20] A dispute is political in that it is of importance to the state, or states, party to it. The Latin apothegm *de maximis not curat praetor* express the view that important matters are not amenable to judicial settlement.[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.'[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[23] and their 'political' nature does not imply that they should not be resolved through legal means.[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.'[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.[26] Lauterpacht was critical of the opinion that issues considered political should not be amenable to a judicial or arbitral process[27] and expressed the view that 'inalienable rights are safe under international judicial settlement, because nothing – except force – can alienate them.'[28]

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20 H. Lauterpacht, *The Function of Law in the International Community* (first published in 1933) 153, 155 (The Lawbook Exchange 2000) (emphasis added).

21 See generally *ibid*. at 139 et seq., 153 et seq., 165, 168 et seq.

22 *Ibid*. at 153–54.

23 *Ibid*. at 153, 155, 157–58, 164.

24 *Ibid*. at 163. Cf. Eric A. Posner & John C. Yoo, *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).

25 Lauterpacht, *supra* n. 20, at 173.

26 For some historical examples, see David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 (1) American J. Int'l L. 3 (2000); Gary Born, *A New Generation of International Adjudication*, 61 (4) Duke L. J. 775, 794 et seq. (2012). A relatively recent example outside the field of investment law is the United States' withdrawal from the jurisdiction of the International Court of Justice under the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (signed in Vienna on 24 Apr. 1963). See Adam Liptak, *US Says It Has Withdrawn from World Judicial Body*, New York Times, 10 Mar. 2005; Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice,* 18 (5) European J. Int'l L. 843 (2008); Philip V. Tisne, *The ICJ and Municipal Law: The Precedential Effect of the Avena and Lagrand Decisions in US Courts*, 29 (4) Fordham Int'l L. J. 887 (2005); John Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences,* Duke J. Comparative & Int'l L. 19 (2009).

27 Lauterpacht, *supra* n. 20, at 166 et seq.

28 *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.[29] 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.[30]

This is the problem of regulatory chill[31] 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.[32] 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*[33] and the

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29 B. Stern, *Are Some Disputes Too Political to be Arbitrable?* 24 (1) ICSID Rev. 80 (2009).

30 J. Ruggie, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework,* Report of the UNSRSG on Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/11/13 (22 Apr. 2009), para. 30, footnote omitted. For a similar statement, see European Commission, Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements (November 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf.

31 On regulatory chill, see Lars Markert, *The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States*, in *EYIEL 2011, Special Issue: International Investment Law and EU Law* 146 (M. Bungenberg, J. Griebel & S. Hindelang eds, Springer 2011); K. Tienhaara, *Regulatory Chill and the Threat of Arbitration*, in *Evolution in Investment Treaty Law and Arbitration* (C. Brown & K. Miles eds, CUP 2011).

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[34] cases, against Belgium and Cyprus respectively (arising out of nationalizations in the banking sector), and the *Poštová banka*[35] and the *Cyprus Popular Bank*[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.[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.[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.'[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

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[34] *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Cyprus*, ICSID Case No. ARB/13/27, registered 27 Sep. 2013.

[35] *Poštová banka, a.s. & Istrokapital SE v. Greece*, ICSID Case No. ARB/13/8, registered 20 May 2013.

[36] *Cyprus Popular Bank Public Co. Ltd. v. Greece*, ICSID Case No. ARB/14/16, registered 16 Jul. 2014.

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

[38] Titi, *supra* n. 32.

[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.[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.[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.[42] In particular, annulment committees concluded that some awards contained errors of law[43] and that a number of tribunals had entirely failed to apply the applicable law.[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[45] that resulted in violent demonstrations, deaths, and a succession of five presidents in less than a fortnight.[46] In an endeavour to

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[40] It must be noted, however, that even a self-judging exception allows a good faith review. On the adjudication of economic crises, see Titi, *supra* n. 32; J. Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis,* ICLQ 59 (2010), passim; W. W. Burke-White & A. von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, Virginia J. Int'l L. 48 (2008).

[41] Titi, *supra* n. 32, at 255.

[42] See, e.g., *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 Sep. 2007; *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment, 30 Jul. 2010; *Sempra Energy Int'l v. Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 Jun. 2010. For a critical appraisal, see Titi, *supra* n. 32; Burke-White & von Staden, *supra* n. 40, at 498 et seq.; J. Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, Int'l & Comparative L. Q. 59, 25 et seq. (2010); F. Ortino, *Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures*, 3 (1) J. Int'l Dispute Settlement 41 (2012). Contrast J. E. Alvarez & K. Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, in *Yearbook on International Investment Law & Policy 2008–2009* at 427–44 (K. P. Sauvant ed. Oxford University Press 2009).

[43] *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 Sep. 2007, paras 45, 130, 146, 148; *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment, 30 Jul. 2010, paras 395, 405.

[44] *Sempra Energy Int'l v. Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 Jun. 2010, paras 165, 208–209; *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment, 30 Jul. 2010, para. 393.

[45] *BG Group Plc. v. Argentina*, UNCITRAL, Final Award, 24 Dec. 2007, para. 54 et seq.; *LG&E Energy Corp., LG&E Capital Corp. & LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006, para. 54.

[46] *El Paso Energy Int'l Co. v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 Oct. 2011, para. 91; *BG Group Plc. v. Argentina*, UNCITRAL, Final Award, 24 Dec. 2007, paras 60, 72; *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 64; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006, paras 63, 235–236.

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

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47 Burke-White & von Staden, *supra* n. 40, at 309.

48 Argentina: Decreto 1570/2001, BO 3 Dec. 2001, No. 29787, p. 1.

49 *El Paso Energy Int'l Co. v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 Oct. 2011, para. 91; *LG&E Energy Corp., LG&E Capital Corp. & LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006, para. 63; *BG Group Plc. v. Argentina*, UNCITRAL, Final Award, 24 Dec. 2007, paras 56, 70 et seq. The word 'corralito' is the diminutive of corral, which refers to a corral, an animal pen or enclosure, thus making reference to the restrictive effect of the measures. See *BG Group Plc. v. Argentina*, UNCITRAL, Final Award, 24 Dec. 2007, n. 38.

50 Ley 25.561, Emergencia Pública y Reforma del Régimen Cambiario, BO 7 Jan. 2002. See further *BG Group Plc. v. Argentina*, UNCITRAL, Final Award, 24 Dec. 2007, para. 73; Enron Creditors Recovery Corp. (formerly Enron Corp.) & Ponderosa Assets, *L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (hereinafter 'Enron Award'), para. 71 et seq.; *El Paso Energy Int'l Co. v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 Oct. 2011, para. 95; *LG&E Energy Corp., LG&E Capital Corp. & LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006, para. 64 et seq.

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

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[56] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session (23 Apr.–1 Jun. and 2 Jul.–10 Aug. 2001), U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001).

[57] For example, *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 315; *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 Sep. 2007, para. 130; *Enron Creditors Recovery Corp. (formerly Enron Corp.) & Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 303; *Sempra Energy Int'l v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 Sep. 2007, para. 344; *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 Dec. 2010, para. 220; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 Oct. 2005, para. 69.

[58] ILC Articles, Art. 25.

[59] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Report adopted at the ILC's Fifty-third Session, YBILC II, Part Two, Commentary on Art. 25 (2001), para. 15.

[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.

[63] *Sempra Energy Int'l v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 Sep. 2007, paras 350–351.

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.'[64] 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.'[65]

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.[66] 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.[67] 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,[68] 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.'[69] According to the interpretation of these tribunals, Argentina was then considered to be liable.[70]

More recently, the *El Paso* Tribunal made a lengthy scrutiny of Argentina's potential contribution to the crisis.[71] 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.

65 *Enron Creditors Recovery Corp. (formerly Enron Corp.) & Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 307; *Sempra Energy Int'l v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 Sep. 2007, para. 349.

66 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Report adopted at the ILC's Fifty-third Session, YBILC II, Part Two, Commentary on Art. 25 (2001), para. 20. Cf. *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, and *Anglian Water Group (AWG) v. Argentina*, UNCITRAL, Decision on Liability of 30 Jul. 2010, para. 263.

67 *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 329.

68 *Enron Creditors Recovery Corp. (formerly Enron Corp.) & Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 311; *Sempra Energy Int'l v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 Sep. 2007, para. 353.

69 *Enron Creditors Recovery Corp. (formerly Enron Corp.) & Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 312, and the almost identical statement in *Sempra Energy Int'l v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 Sep. 2007, para. 354.

70 See further Titi, *supra* n. 32, at 251–252.

71 The tribunal devoted no less than twenty-two paragraphs to this analysis. See *El Paso Energy Int'l Co. v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 Oct. 2011, paras 649–670.

contributed to the crisis.[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.[73] The latter does not contain any requirement to take into account whether the regulating state has contributed to a situation of crisis.[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.[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.'[76] It emphasized that Argentina's attitude had demonstrated a wish to 'slow down by all the means available the severity of the crisis'[77] and concluded there was no evidence showing that the state had contributed to the crisis.[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.[79] The tribunal recognized Argentina's responsibility for its economic policy,[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.[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

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72 *Ibid*. para. 656.
73 *Ibid*. para. 665 ('Argentina contributed to the crisis to a substantial extent, so that Article XI cannot come to its rescue') (emphasis added).
74 See further Titi, *supra* n. 32, at 252.
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.
76 *Ibid*. para. 257.
77 *Ibid*. para. 256.
78 *Ibid*. para. 257.
79 *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 Sep. 2008, paras 234–236.
80 *Ibid*. para. 235.
81 *Ibid*. para. 235.

policies with more conviction.[82] 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.'[83] 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.[84]

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,[85] permitting a restructuring of its debt valued at over USD 100 billion.[86] 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.[87] 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

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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.

85 See Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 (3) American Rev. Int'l Arb. 335 (2006). According to a 2009 survey, Argentina appeared to have been an exception among recent sovereign debt restructurings in obtaining a relatively low creditor participation, see Ugo Panizza, Federico Sturzenegger & Jeromin Zettelmeyer, *The Economics and Law of Sovereign Debt and Default*, 47 (3) J. Econ. Literature 651, 672, 683 (2009).

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),[88] 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.[89] State engagement with its creditors is therefore a *sine qua non* of the process if negotiations are to be successfully concluded.[90] But inevitably, not all investors accept the offer and a minority would require that the debt instruments be honoured in full.[91]

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.[92] 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.[93] 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.[94]

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,[95] the latter issue arising in particular with respect to the *Abaclat*, *Ambiente Ufficio*,[96] and *Alemanni*[97] cases. Irrespective of this discussion concerning tribunal

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88 International Monetary Fund, Sovereign Debt Restructuring: Recent Developments and Implications for the Fund's Legal and Policy Framework (26 Apr. 2013), p. 6.

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.

93 International Monetary Fund, *supra* n. 88, at 6, 28, 31; Ugo Panizza, Federico Sturzenegger, & Jeromin Zettelmeyer, *The Economics and Law of Sovereign Debt and Default*, 47 (3) J. Econ. Literature 651, 658 (2009).

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.

96 *Ambiente Ufficio S.p.A. and others v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 Feb. 2013.

97 *Giovanni Alemanni and others v. Argentina*, ICSID Case No. ARB/07/8, registered 27 Mar. 2007.

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 investment[100] 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 *Vattenfall*[105] and the

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98 See *supra*.

99 Denmark-Poland BIT (1990), Art. 1(1)(b).

100 Colombian Model BIT (2007), Art. I; Canada-Colombia FTA, Art. 838, n. 11; Colombia-United Kingdom BIT (2010), Art. I; Colombian Model BIT (2007), Art. I. For a relevant discussion, see also República de Colombia, Departamento Nacional de Planeación, 2002, Documento Conpes 3197, Manejo de los Flujos de Endeudamiento en los Acuerdos Internacionales de Inversión Extranjera, Bogotá D.C., 26 Aug. 2002, available at www.dnp.gov.co/Portals/0/archivos/documentos/Subdireccion/Conpes/3197.PDF. See also José Antonio Rivas, *Colombia*, in *Commentaries on Selected Model Investment Treaties* 203 (Chester Brown ed., Oxford University Press 2013).

101 United States-Dominican Republic CAFTA, Annex 10-A.

102 See United States-Colombia FTA, Annex 10-F.

103 See also Gallagher, *supra* n. 95, at 27 and Kevin P. Gallagher, Mission Creep: International Investment Agreements and Sovereign Debt Restructuring, Investment Treaty News, 12 Jan. 2012.

104 S. I. Strong, *Rogue Debtors and Unanticipated Risk*, 25 U. Pennsylvania J. Int'l L. (2014); Catharine Titi, *Institutional Developments in Investor-State Dispute Settlement and Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes*, in *European Yearbook of International Economic Law* (C. Herrmann, M. Krajewski, & J. P. Terchechte eds, Springer 2015) (forthcoming).

105 *Vattenfall A.B., Vattenfall Europe A.G., & Vattenfall Europe Generation A.G. v. Germany*, ICSID Case No. ARB/09/6 and *Vattenfall and others v. Germany*, ICSID Case No. ARB/12/12.

Philip Morris[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.[107] The dispute was eventually settled outside arbitration, and although an 'award' exists,[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.[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[110] (a decision that appears to have been abandoned by the

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[106] *Philip Morris Brand Sàrl, Philip Morris Products S.A., & Abal Hermanos S.A. v. Uruguay*, ICSID Case No. ARB/10/7 and *Philip Morris Asia Ltd. v. Australia,* UNCITRAL, PCA Case No. 2012-12, Notice of Arbitration, 21 Nov. 2011.

[107] Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy [2000] OJ L327, 22 Dec. 2000.

[108] *Vattenfall A.B., Vattenfall Europe A.G., & Vattenfall Europe Generation A.G. v. Germany*, ICSID Case No. ARB/09/6, Award, 11 Mar. 2011.

[109] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12.

[110] Government of Australia, Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading our Way to More Jobs and Prosperity (April 2011), p. 14, available at www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf. On the Australian government's rejection of investor-state dispute settlement, see further J. Kurtz, *Australia's Rejection of*

new Australian government after the conclusion of the recent free trade agreement between Australia and Korea)[111] it explained that one of its reasons was that:

> [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.[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.[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.

Investor-State Arbitration: Causation, Omission and Implication, ICSID Rev. 27 (1) (2012); J. Kurtz, *The Australian Trade Policy Statement on Investor-State Dispute Settlement*, ASIL Insights 15 (22) (2011); L. Nottage, The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's 'Gillard Government Trade Policy Statement', Sydney Law School Legal Studies Research Paper No. 11/32 (2011).

111 See Korea-Australia FTA (2014) (KAFTA), Ch. 11, s. B (Arts 11.15 et seq.). See further Australian Government Department of Foreign Affairs and Trade, Frequently Asked Questions on Investor-State Dispute Settlement (ISDS), available at www.dfat.gov.au/fta/isds-faq.html and Luke Nottage, Investor-State.

Dispute Settlement Back for Australia's Free Trade Agreements (2013), available at http://blogs.usyd.edu.au/japaneselaw/2013/12/isds_back.html.

112 Government of Australia, Department of Foreign Affairs and Trade, *supra* n. 110, at 14.

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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114 Roger P. Alford (2013), The Convergence of International Trade and Investment Arbitration, Santa Clara Journal of International Law 12 (1), p. 50.

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.

116 Andrew Martin, Philip Morris Leads Plain Packs Battle in Global Trade Arena, Bloomberg, 22 Aug. 2013, available at www.bloomberg.com/news/2013-08-22/philip-morris-leads-plain-packs-battle-in-global-trade-arena.html.

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,[122] 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.[123] 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,[124] consultations had been sought at the WTO by both economies affected by the dispute.[125] 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.[126] 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*.'[127] This provision has been described as 'the clearest expression of the self-contained and autonomous nature

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122 Directive 2014/40/EU of the European Parliament and of the Council of 3 Apr. 2014 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning the manufacture, presentation, and sale of tobacco and related products and repealing Directive 2001/37/EC.

123 *Ibid*.

124 *Repsol, S.A. & Repsol Butano, S.A. v. Argentina*, ICSID Case No. ARB/12/38, registered 18 Dec. 2012.

125 WTO, Argentina – Measures Affecting the Importation of Goods (EU), Dispute DS438, Request for Consultations of 30 May 2012 and WTO, European Union and a Member State – Certain Measures concerning the Importation of Biodiesels, Dispute DS443, Request for Consultations of 23 Aug. 2012. See also EU RAPID Press Release, Q&As: EU's Challenge to Argentina's Import Restrictions at the WTO, MEMO/12/376, Brussels, 25 May 2012; Jennifer Freedman, European Union Challenges Argentina's Import Curbs at WTO, Bloomberg, 25 May 2012, available at www.bloomberg.com/news/2012-05-25/european-union-challenges-argentina-s-import-curbs-at-wto.html; European Parliament, Resolution on the legal security of European investments outside the European Union (2012/2619(RSP)), P7_TA(2012)0143, Strasbourg, 20 Apr. 2012, para. 6.

126 Tobias Buck & Benedict Mander, Repsol draws line under Argentina dispute, Financial Times, 26 Feb. 2014, available at www.ft.com/cms/s/0/b89c5516-9efc-11e3-8663-00144feab7de.html#slide0; Repsol agrees $5bn Argentina compensation, BBC News, 26 Feb. 2014, available at www.bbc.com/news/business-26349207.

127 Emphasis added.

of the arbitration procedure provided for by the Convention.'[128] And the first paragraph of Article 27 of the ICSID Convention explicitly states that:

> [n]o Contracting State shall give *diplomatic protection, or bring an international claim,*[129] *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.[130]

In the words of the *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.'[131] It is remarkable in this respect that the *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.[132]

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[133] and, to a lesser degree, on some other measures that will be discussed below.87

GSP schemes find their legal basis in the WTO's Enabling Clause[134] and have traditionally been offered by a handful of developed economies, including Australia, Canada, the EU, Switzerland, and the US,[135] to allow developing countries to benefit from non-reciprocal preferential tariff rates without extending

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128 Schreuer et al., *supra* n. 8, at 351.

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., *supra* n. 8, at 420.

130 Emphasis added.

131 *Banro American Resources, Inc. & Société Aurifère du Kivu et du Maniema SARL v. Congo*, ICSID Case No. ARB/98/7, Award, 1 Sep. 2000, para. 20.

132 See, e.g., Austrian Model BIT (2011), Art. 21(2).

133 Proclamation 8788 of 26 Mar. 2012, Federal Register Vol. 77 No. 61, p. 18899, 29 Mar. 2012. On this topic, see, e.g., Titi, *supra* n. 14, at 375 et seq.; Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards*, Georgetown J. Int'l L. 44 (2013) and Alford, *supra* n. 114.

134 Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, GATT Doc. L/4903 (28 Nov. 1979), BISD 26S/203.

135 Rosenberg *supra* n. 133, at 520; Alford, *supra* n. 114, at 50.

the same privileges to developed economies.[136] These schemes are generally subject to performance obligations incumbent upon the beneficiaries,[137] 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.'[138]

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.[139] 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.'[140] 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,[141] but no action appears to have been taken in this respect.[142]

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,[143] evoking in particular the country's 'failure to enforce or recognize arbitral awards under the BIT.'[144] The ATPA, enacted in the early 1990s, offered preferential access to the US market to exports

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136 See Enabling Clause for developing countries (goods), available at www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm; also Alford, *supra* n. 114, at 50–51. Detailed documentation and updates on GSP programmes is available through UNCTAD's website at http://unctad.org/en/Pages/DITC/GSP/Generalized-System-of-Preferences.aspx.

137 Alford, *supra* n. 114.

138 19 U.S.C. s. 2462(b)(2)(E).

139 Blue Ridge Investments is the owner of the CMS Award, *Blue Ridge Investments, LLC v. Argentina*, US District Court, Southern District of New York, Case 1:10 Civ. 153 PGG, Memorandum, Opinion & Order, 30 Sep. 2012. For further details on the topics discussed here, see Titi, *supra* n. 14, at 376.

140 Proclamation 8788 of 26 Mar. 2012, Federal Register Vol. 77 No. 61, 29 Mar. 2012, p. 18899. On some of the interpretive issues arising out of this statement in relation to the traditional distinction drawn between compliance with an award and enforcement, see Titi, *supra* n. 14, at 369 et seq.

141 Alford, *supra* n. 114, at 53.

142 19 U.S.C. s. 2411.

143 Office of the United States Trade Representative, Sixth Report to the Congress on the Operation of the Andean Trade Preference Act as Amended, 30 Jun. 2012 http://www.ustr.gov/webfm_send/3488. See also http://unctad.org/Sections/dite_pcbb/docs/bits_ecuador.pdf, p. 36; Office of the United States Trade Representative, Seventh Report to the Congress on the Operation of the Andean Trade Preference Act as amended, 20 Jun. 2013, p. 31, available at www.ustr.gov/sites/default/files/USTR%202013%20ATPA%20Report.pdf. See also Chavez says he won't respect World Bank panel's decision, CNN, 9 Jan. 2009, available at http://edition.cnn.com/2012/01/09/business/venezuela-exxon.

144 Office of the United States Trade Representative, Sixth Report to the Congress on the Operation of the Andean Trade Preference Act, *supra* n. 143, at 36; Office of the United States Trade Representative,

from Bolivia, Colombia, Ecuador, and Peru in order to assist them in their fight against drug trafficking by offering economic alternatives to drug production.[145] 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.'[146] 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.'[147]

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,[148] or whether intended as a sanction[149] or a warning to third states that may be envisaging non-compliance with arbitral awards,[150] 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

Seventh Report to the Congress on the Operation of the Andean Trade Preference Act, *supra* n. 143, at 31.

145 Office of the United States Trade Representative, Seventh Report to the Congress on the Operation of the Andean Trade Preference Act, *supra* n. 143, at 3.

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

147 Office of the United States Trade Representative, Sixth Report to the Congress on the Operation of the Andean Trade Preference Act, *supra* n. 143, at 25; Office of the United States Trade Representative, Seventh Report to the Congress on the Operation of the Andean Trade Preference Act, *supra* n. 143, at 16–17. See Titi, *supra* n. 14, at 378.

148 Press Release, US Trade Representative Ron Kirk Comments on Presidential Actions Related to the Generalized System of Preferences, March 2012, available at www.ustr.gov/about-us/press-office/press-releases/2012/march/us-trade-representative-ron-kirk-comments-presidenti; Rosenberg, *supra* n. 133, at 527–28.

149 See post by Ricardo Beltramino on Questions about Suspending GSP Benefits to Argentina, available at http://worldtradelaw.typepad.com/ielpblog/2012/04/questions-about-suspending-gsp-benefits-to-argentina.html.

150 Rosenberg *supra* n. 133, at 508–509; Titi, *supra* n. 14, at 377. See also, e.g., Chavez says he won't respect World Bank panel's decision, CNN, 9 Jan. 2009, available at http://edition.cnn.com/2012/01/09/business/venezuela-exxon. Both the US GSP scheme and the ATPA programme have, at the time of writing, expired. The schemes had been authorized until 31 Jul. 2013. See www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp; Office of the United States Trade Representative, Seventh Report to the Congress on the Operation of the Andean Trade Preference Act, *supra* n. 143, at 3. A lapse in GSP authorization may be redressed by retroactive extension of the benefits to eligible products that had been imported in the United States between the programme's expiration date and that of the entry into force of its renewal. Vivian C. Jones, Generalized System of Preferences: Background and Renewal Debate, Congressional Research Service, 9 Jan. 2013.

Convention expressly allows diplomatic protection where a state has failed to comply with an arbitral award.[151] 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.[152] 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.[153]

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.[154] 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.'[155] 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.[156] 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.'[157] 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.[158] 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*.

152 See also Enrique Fernández Masiá, La estrategia de argentina de dilatar el pago de las condenas comienza a encontrar obstáculos en el CIADI, Arbitraje: Revista de Arbitraje Comercial y de Inversiones II (3), p. 795 (2009).

153 On this, see Titi, *supra* n. 14, at 369 et seq.

154 *Ibid*. at 379.

155 European Parliament, Resolution on the legal security of European investments outside the European Union (2012/2619(RSP)), P7_TA(2012)0143, Strasbourg, 20 Apr. 2012, para. 8.

156 Rosenberg, *supra* n. 133, at 517–518, n. 75. On this, see generally Titi, *supra* n. 14, at 374 et seq.

157 Letter from Mark Kirk, US Senator, to Timothy Geithner, 21 Jun. 2011, available at http://embassyofargentina.us/embassyofargentina.us/files/letterambchiaradiatotimothyf.pdf.

158 Rosenberg, *supra* n. 133, at 517.

Development Bank (IDB) loans to Argentina[159] and it is possible that this particular aspect of US 'diplomacy' may have encouraged Argentina to reach post-award settlements[160] 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.[161] Although states are generally entitled to launch such arbitrations on the basis of applicable treaty law,[162] and the parties to the respective investor-state and state-to-state disputes are not the same,[163] 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.[164]

A first example of the recent 'trend' of initiating such disputes comes from the context of the *Chevron* case,[165] where Ecuador (the respondent), having disagreed with the tribunal's interpretation of the US-Ecuador BIT's 'effective means' provision (Article VII, paragraph 7),[166] 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

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159 *Ibid*. at 517.

160 See Gobierno oficializó acuerdos en CIADI por u$s 677 M, Ámbito Financiero, 18 Oct. 2013, available at www.ambito.com/noticia.asp?id=712044&seccion=Econom%EDa&fecha=18/10/2013. See also Ministerio de Economia y Finanzas Publicas Resolución No. 598/2013, Buenos Aires, 8 Oct. 2013, published in the Boletin Official, available at www.boletinoficial.gov.ar/Inicio/Index.castle. Kyriaki Karadelis, *Argentina 'Close' to Settling Treaty Awards*, Global Arb. Rev. (20 Sep. 2013). Cf. Alford, *supra* n. 114, at 53.

161 On state-to-state disputes, see further Lars Markert & Catharine Titi, *States Strike Back: Old and New Ways for Host States to Defend against Investment Arbitrations*, in *Yearbook on International Investment Law & Policy* 2013–2014, Vale Columbia Center on Sustainable International Investment (Andrea Bjorklund ed., Oxford University Press 2015) (forthcoming).

162 See also Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 Harvard International Law Journal 1, 16 (2014).

163 The same issue is raised in Schreuer et al., *supra* n. 8, at 421.

164 See, e.g., United States-Senegal BIT (1983), Art. VIII(7); United States-Cameroon BIT (1986), Art. VIII(9).

165 *Chevron Corp. (USA) & Texaco Petroleum Co. (USA) v. Ecuador*, PCA Case No. 34877, Partial Award on the Merits, 30 Mar. 2010.

166 *Ecuador v. United States*, PCA Case No. 2012-5, Request for Arbitration, para. 2.

could have been used in the local court in order to influence the latter's decision.[167] 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.[168] Ecuador had previously informed the US government of its disagreement with the way the treaty had been interpreted but the latter did not respond.[169] 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.[170] This interpretation has been criticized for more than one reason.[171]

Another example is the *Peru v. Chile* case,[172] launched in the aftermath of the *Lucchetti* claim instituted by Chilean investors against Peru.[173] 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.[174] Following the *Lucchetti* tribunal's rejection of Peru's request to suspend proceedings,[175] the latter abandoned its state-to-state claim against Chile.[176]

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,[177] and a claim brought by Italy against Cuba, on behalf, *inter alia*, of Italian investors over alleged violations of the Cuba-Italy BIT.[178]

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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 Reporter; Sebastian Perry, US and Ecuador Battle over BIT (2012) Global Arbitration Review.

168 Jarrod Hepburn & Luke Eric Peterson, US-Ecuador inter-state investment treaty award released to parties; tribunal members part ways on key issues (2012) 21 (5) IA Reporter.

169 *Ecuador v. United States*, PCA Case No. 2012-5, Request for Arbitration, para. 7–13.

170 Hepburn & Peterson, *supra* n. 168.

171 For a critical appraisal, see Roberts, *supra* n. 162.

172 See *Empresas 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 enforcement of commercial arbitration award in Lithuania cannot be challenged as an expropriation under BIT (2009) 2 IA Reporter.

178 *Italy v. Cuba* (ad hoc arbitration), sentence finale, 15 Jan. 2008.

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 *re*politicization, 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.

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179 *Empresas Lucchetti, S.A. & Lucchetti Peru, S.A. v. Peru*, ICSID Case No. ARB/03/4, Award, 7 Feb. 2005, paras 7–9. See also *Middle East Cement Shipping & Handling Co. S.A. v. Egypt*, ICSID Case No. ARB/99/6, Award, 12 Apr. 2002, paras 35–38.

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.

182 Rudolf Dolzer & Yun-i Kim, *Germany,* in Commentaries on Selected Model Investment Treaties 315–16 (Chester Brown (ed.), Oxford University Press 2013).

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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Since its 1984 launch, the Journal of International Arbitration has established itself as a thought provoking, ground breaking journal aimed at the specific requirements of those involved in international arbitration. Each issue contains in depth investigations of the most important current issues in international arbitration, focusing on business, investment, and economic disputes between private corporations, State controlled entities, and States. The new Notes and Current Developments sections contain concise and critical commentary on new developments. The journal's worldwide coverage and bimonthly circulation give it even more immediacy as a forum for original thinking, penetrating analysis and lively discussion of international arbitration issues from around the globe.

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