Investor-State Arbitration in Times of Crisis

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The preservation and protection of citizens' welfare and the State's economic and political interests in encouraging foreign investment form 2 sides of the same coin. The emergence of an extensive global network of Bilateral Investment Treaties therefore, can be attributed primarily to the desire of States to safeguard their foreign investments. Traditionally perceived as being harmless accords, Bilateral Investment Treaties have increasingly occupied global centre stage for their ability to impact States in multiple ways, especially during times of crisis. And in light of this amplified significance, the growth and evolution of the international investment treaty regime has become extremely necessary. This article delineates the essential legal elements of Bilateral Investment Treaties and examines their usage in light of landmark investment awards. It also discusses measures that States can adopt in order to achieve the investor-citizen balance in times of crisis. Finally, the author proposes reforms that could be implemented in general and at the International Centre for Settlement of Investment Disputes, in order to address current issues with the process of Investment Treaty Arbitration.

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I. Introduction

The development of Bilateral Investment Treaties [*Hereinafter*, "BITs"], Multilateral Investment Treaties [*Hereinafter*, "MITs"], and Free Trade Agreements [*Hereinafter*, "FTAs"], worldwide has been largely motivated by a desire to protect and promote foreign investment. International Investment Agreements [*Hereinafter*, "IIAs"], have now become the most widely used mechanism for the promotion and reciprocal protection of investments. Host States that sign IIAs offer protection to investors in their State. Such protections include compensation that may be awarded for losses resulting from expropriation, armed conflict, revolution, discriminatory treatment of foreign investors and requisitioning or destruction of the property by a State's forces or authorities amongst other political, economic and environmental disturbances. In the case of disputes, most IIAs provide that any dispute arising between the State and the investor concerning the interpretation or application of the treaty that is not resolved through negotiations may be directly submitted to arbitration.

In the past, BITs were regarded as reasonably straight-forward and innocuous instruments and in the early days, negotiating BITs was not a long or protracted affair. Developing countries involved would generally be quite anxious to secure BITs with major capital exporting States and were willing to give very favourable treaty terms to more powerful nations in a bid to secure foreign investment at all costs.[1] However, the jurisprudence of investor-State arbitration over the last decade has indicated that BITs are not at all innocuous and both States and investors should exercise great care and caution when entering them. This becomes most apparent in times of crisis where States can find themselves trapped in positions where they are presented with the competing interests of their citizens and investors. Likewise, investors can be exposed to adverse risks to which arbitration is sometimes the only recourse. The measures and responses that States choose to implement in times of crisis are critical as they can give investors grounds under which to bring a claim in arbitration against the host State.

This article will outline the relevant legal provisions in situations of crisis such as economic, military and environmental disasters through the examining of different sources of law, in particular, international customary law, treaty based provisions as well as some landmark awards. The article will also discuss what parties to a BIT can do to mitigate risk in situations of crisis both before they happen,

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1 Chester Brown, *Investor-State Arbitration as the "New Frontier"* 28 The Arbitrator And Mediator 59, 60-61 (2009).

at the drafting stage of the BIT and some expedient measures to be taken post factum by way of damage control when a crisis has broken out. Finally the article will outline some suggested areas for reform, both generally and at the International Centre for the Settlement of Investment Disputes [*Hereinafter*, "ICSID"], that need to take place in order to more effectively respond to the needs of the parties to arbitrations that have come about as a result of a crisis.

II. Contextualising Investor-State Arbitration in Times of Crisis

Investor-State arbitration is a dispute resolution process for individual and private investors who seek a neutral forum for a claim against a State in which they have made an investment.[2] Today investor-State arbitration operates within the framework of the ICSID, the United Nations Commission on International Trade Law [*Hereinafter*, "UNCITRAL"], and other arbitration rules, which are referred to in more than 3000 BITs.

The history of investor-State disputes starts in 1930 with the famous *Lena Goldfields* v. *USSR* ad hoc case. Both parties had signed a concession contract including an arbitration clause referring to a three-member arbitral tribunal in London, where one arbitrator was to be appointed by each of the parties and one arbitrator by the Freiberg Mining Academy.[3] After the withdrawal of the Soviet appointed arbitrator the two member tribunal awarded almost thirteen million pounds to Lena Goldfields.[4] Between the 1950s and 1970s more cases on concession arbitration between companies and the Gulf States appeared. The most remarkable decision of this period is the *ARAMACO Case*[5] over the infringement of concession rights by Saudi Arabia and the *Libyan Nationalisation* cases in the 1970s.[6] In tandem with these cases, the finalising of the ICSID Convention in 1965, and the adoption of UNCITRAL Arbitration Rules in 1976 began a new era for investor-State arbitration.

2 Timothy G. Nelson, *"History Ain't Changed": Why Investor-State Arbitration Will Survive the 'New Revolution'* in Michael Waibel *et al.* (eds.), The Backlash Against Investor-State Arbitration: Perceptions And Reality, 555 (2010).

3 V. V. Veeder, *The Lena Goldfields Arbitration: The Historical Roots of Three Ideas* 47 International and Comparative Law Quarterly 747, 790 (1998).

4 Arthur Nussbaum, *Arbitration between the Lena Goldfields Ltd. and the Soviet Government* 36 Cornell Law Quarterly 48, 51 (1950).

5 Saudi Arabia v. Arabian American Oil Co., 27 ILR 117.

6 Texas Overseas Petroleum Co./California Asiatic Oil Co. v. Libyan Arab Republic, 17 ILM 3.

Over 30 years later, investor-State arbitration has developed considerably. As of 30 June 2012, the ICSID, which is an autonomous institution under the auspices of the World Bank and established by a convention to which there are over 147 members States, has registered 390 cases. In 63% of cases, the ICSID's jurisdiction to hear the cases arose from BITs. In 48% of disputes decided by arbitral tribunals under the ICSID Convention, the outcome favoured the investor as the award upheld their claims in part or in full. Out of 36 annulment proceedings under the ICSID Convention, only 8 were successful between 2001 and 2011.[7] In regards to the geographic distribution of ICSID cases, South America alone accounted for 29% of the State parties involved in ICSID proceedings. Among South American States, Argentina still accounts for a disproportionate number of outstanding claims, representing nearly one sixth of the ICSID's pending case-load.[8] The vast majority of these claims against Argentina can be attributed to the effects of the 'emergency measures' Argentina implemented in response to its 2001-02 economic crisis and brought by U.S. investors under the 1991 U.S.-Argentina BIT. The most notable of these claims, which have been exhaustively analysed by academics and practitioners alike, include *CMS* v. *Argentina,*[9] *LG&E* v. *Argentina,*[10] Sempra Energy International v. Argentine Republic,[11] *Enron Corporation and Ponderosa Assets, LP (U.S.)* v. *Argentine Republic*[12] and Continental Casualty Company v. Argentine *Republic.*[13] In contrast, however, Asian States appear to be quite under-represented in the ICSID statistics, with several countries, including India, not being listed as having any claims pending against them or any which have been concluded.[14] The Investment Treaty Arbitration [*Hereinafter*, "ITA"] statistics provide similar results.[15]

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7 ICSID, *Pending Cases, available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (Last visited on 30 July 2013).

8 *Id.*

9 CMS Gas Transmission Company v. The Argentine Republic, (CMS v. Argentine Republic) (ICSID Case No. ARB/01/8, Award of 12 May 2005).

10 LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. The Argentine Republic, (LG&E v. Argentine Republic) (ICSID Case No. ARB/02/1, Award of 25 July 2007).

11 Sempra Energy International v. The Argentine Republic, (ICSID Case No. ARB/02/16, Award of 28 September 2007).

12 Enron Corporation and Ponderosa Assets v. Argentina, (ICSID Case No. ARB/01/3, Award of 22 May 2007).

13 Continental Casualty Company v. The Argentine Republic, (ICSID Case No. ARB/03/9, Award of 5 September 2008).

14 *Supra* note 7; ICSID, *Concluded Cases, available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded (Last visited on 30 July 2013).

15 Investment Treaty Arbitration (ITA), *available at* http://www.italaw.com/cases-by-respondent?field_case_respondent_tid=All&=Apply (Last visited on 30 July 2013).

In the major investor-State disputes in times of crisis that have taken place over the last decade, the causes of disagreement between investors and States have contained some recurrent themes. These include: disagreements over character, that is, whether a provision is self-judging or not; disagreements over the application and scope of the defence of necessity; the existence of alternative measures and the State's contribution to a crisis.

III. Sources of Law in Times of Crisis

The law in the context of investor-State arbitration derives from two sources: customary international law and treaty based law. States have increasingly relied on customary international law defences to excuse investment treaty breaches. Such defences excuse a State's unlawful actions if specific preconditions are met but they are subject to strict limitations.

Concurrently, there are certain standards of protection found within treaties that afford investors protection. Although BITs are not identical, they tend to cover the same issues and contain similarly worded standard clauses (National Models BITs). These standard clauses are intended to remedy the uncertainty of customary law doctrines.

A line of ICSID awards rendered over the last decade illustrates the application of both customary defences and treaty based protections. The following section of this paper will outline the most commonly invoked defences and protections, explain their mechanics and examine their effectiveness.

A. International Customary Law and State Defences

First and foremost, under international customary law all States have an obligation to ensure that aliens are treated in accordance with what is known as the 'minimum standard of treatment' and any treatment that falls short of this level gives rise to liability on the part of the State. Case law points to a number of areas to which the notion of an international minimum standard applies. These include the administration of justice in cases involving foreign nationals (usually linked to the notion of denial of justice), the treatment of aliens under detention and the full protection and security of aliens.[16] The latter is usually understood as the

16 US and Mexico General Claims Commission, *Janes Claim,* United Nations, *Reports of International Arbitral Awards,* 1926, IV, 82; US and Mexico General Claims Commission, Harry Roberts Claim, United Nations, *Reports of International Arbitral Awards,* 1927, IV, 77; *see,* Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection* 269 Recueil des Cours, 255, 347 (1997).

obligation for the host State to adopt all reasonable measures to physically protect assets and property from threats or attacks that may target particularly foreigners or certain groups of foreigners. This means that there is a general obligation under international customary law for the host State to exercise due diligence in the protection of foreign investment as opposed to creating 'strict liability', which would render a host State liable for any destruction of the investment, even if caused by persons whose acts could not be attributed to the State.[17]

There are also rules of customary international law that govern the circumstances in which wrongfulness of conduct under international law may be precluded and provide defences for States to justify investment treaty breaches. These defences have been codified in the United Nations International Law Commission's [*Hereinafter*, "ILC"] Articles on Responsibility of States for Internationally Wrongful Acts [*Hereinafter*, "ILC Articles"]. That is not to say that the ILC Articles are a treaty or even part of customary law by themselves. Rather, they are the *"learned and systematic expression of the development of the law ... by decisions of courts and tribunals and other sources along a period of time"*.[18]

These defences are only one aspect of a State's overall defence and do not cover the entirety of a State's legal and factual defences. There is no exhaustive list of defences and they can be invoked, even in the absence of a specific provision in an investment treaty, as they are recognised as part of international customary law. If a State defence is evidenced, the State will be excused from its obligations even if the investor proves that, prima facie, the State has breached an international obligation. However, the defences have varying degrees of effect as some defences will excuse the State permanently, some will only provide temporary excuse by suspending the obligation, and others will fully exonerate the State by annulling the agreement containing the obligation.

This paper will examine the most commonly invoked State defences that have proved successful, illustrated by landmark ICSID decisions.[19] The successful defences to be discussed below are *force majeure* and necessity. Less successful and infrequently used State defences such as consent, bribery, international public

17 Catherine Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment, Number 2004/3, 9. *See also*, R. Dolzer and M. Stevens, Bilateral Investment Treaties (1995).

18 Enron Corporation and Ponderosa Assets v. Argentina, at ¶ 124 (ICSID Case No. ARB/01/3, Award of 22 May 2007).

19 Alexis Martinez, *Invoking State Defences in Investment Treaty Arbitration* in Waibel *et al.* (eds.), at 315, 315-17 (2010).

policy, legitimate exercise of sovereignty, self-defence and distress will not be discussed here. All of these State defences are separate to the legal rights created for investors and host States under BITs and treaty-based law, and these two sources of law should not be conflated.

(i) Force majeure

Force majeure is the notion that a State may defend itself if its conduct, even if prima facie in breach of an international obligation, was coerced or compelled by external events outside the State's control. *Force majeure* is codified in Article 23 of the ILC Articles, precluding the acts of a State in non-conformity with an international obligation if the act is due to the occurrence of an 'irresistible force'[20] or of an 'unforeseen event'[21] that is 'beyond the control of the State', making it 'materially impossible in the circumstances to perform the obligation'.[22] There are two exceptions where Article 23 does not apply, that is, where the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it or the State has assumed the risk of that situation occurring.[23]

The effect of *force majeure* clauses depends in each case on the words used in the clause. The courts generally give *force majeure* clauses a narrow construction, and apply the *"presumption that the expression* force majeure *is likely to be restricted to supervening events which arise without the fault of either party and for which neither of them has undertaken responsibility"*.[24] Such events may include (but are not limited to) fire, flood, atmospheric disturbances, storm, tornado, earthquake, epidemic, war, riots, strike, lockouts, civil war, terrorism, revolution, military or usurped power or similar unforeseen circumstances and acts beyond the control of the parties. In addition, parties generally have an obligation to mitigate the effects of a *force majeure* event.

The consequences of *force majeure* depend upon the relevant circumstances and the applicable contractual provisions. Often *force majeure* will delay the

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20 Article 23, ILC Articles. An irresistible force is defined as *"a constraint which the State was unable to avoid or oppose by any means"*.

21 Article 23, ILC Articles. An unforseen event is one that is *"neither foreseen nor easily foreseeable"*.

22 Article 23, ILC Articles. Materially impossible is qualified with the Statement that *"a more difficult performance is not sufficient, for example in case of political or economic crisis"*.

23 Article 23, 2(i) and (ii), ILC Articles.

24 Fyffes Group Ltd v. Reefer Express Lines Ltd (The Kriti Rex), [1996] 2 Lloyd's Rep 171.

performance of an obligation or entitle the delayed party to an extension of time for performance. A contract may include provisions aimed at ensuring performance in case of *force majeure*. If *force majeure* conditions prevent performance or delay it for an extended period of time, the contract may be terminated. The rationale for these termination clauses is that the essential purpose of the contract will at some point be frustrated if the contracted work cannot be undertaken for an extended period. *Force majeure* is yet to be successfully argued in investment treaty arbitration. However, it was successfully invoked in a number of claims in the Iran-US Claim Tribunal set up in the aftermath of the 1979 Islamic Revolution to handle claims of American investors against Iran.[25]

More recent instances of where *force majeure* may potentially be raised include the political upheaval in Libya that has cast uncertainty over Libya's oil and gas industry, with each side in the developing civil war claiming to be in control of the country's oil fields, pipelines and ports. The civil unrest, trade and financial sanctions imposed by the EU, US and others, as well as the UN-sanctioned no-fly zone, forced many foreign companies doing business in Libya to evacuate their expat employees and assess their legal rights and obligations in respect of their ongoing business operations in the country. Foreign companies that are involved in Libyan projects and transactions may in turn attempt to extricate themselves from burdensome contracts, meaning that disputes regarding the interpretation of *force majeure* and price review clauses are inevitable. Investors will need issues to be addressed promptly in accordance with rights and obligations stipulated by contracts and applicable laws. Similarly, investors with significant investments in India may be faced with the same challenges following events such as cyclones, earthquakes, hailstorms and rains that sometimes devastate significant areas of the country.

(ii) Necessity

Most frequently invoked by States in times of crisis, a State may be excused from its obligations in exceptional circumstances where it can demonstrate that it was acting out of necessity.[26] The doctrine of necessity is a well-grounded concept

25 *See*, Gould Marketing, Inc. v. Ministry of National Defence of Iran, Interlocutory Award No., ITL 24-29-2 (Jul. 27, 1983); Amoco International Finance Corporation v. Government of the Islamic Republic of Iran, Award (Jul. 14, 1987), 15 Iran-U.S. Cl. Trib. Rep. 189; Phillips Petroleum Company Iran v. The Islamic Republic of Iran & the National Iranian Oil Company, Award (Jun. 29, 1989), 21 Iran-U.S. Cl. Trib. Rep. 79.

26 Gabcikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 7 (1997), Judgment, at ¶¶ 51-52 (Sep. 25, 1997).

in customary international law and has been codified into Article 25 of the ILC Articles.[27] According to Article 25, necessity arises where there is an irreconcilable conflict between an essential interest on the one hand and an international obligation of the State invoking necessity on the other.

Necessity will only be available to excuse non-performance of an obligation where it meets the four strict criteria in order to safeguard against possible abuse.[28] These criteria are, that the State's act was to safeguard an 'essential interest', that the peril it was guarding against was 'grave and imminent', that the course of action was the 'only option available' and that no other 'essential interests' were seriously impaired as a result of the breach. Regarding the meaning of the term 'essential interest', the ILC has observed that *"the extent to which a given interest is 'essential' depends on all the circumstances and cannot be prejudged"* and that *"it extends to particular interests of the State and its people, as well as of the international community as a whole"*.[29] The term 'essential interests' can encompass not only the existence and independence of a State itself, but also other subsidiary but nonetheless 'essential' interests, such as the preservation of the State's broader social, economic and environmental stability, and its ability to provide for the fundamental needs of its population.[30] The ICJ has defined 'peril' as requiring an element of 'risk', as opposed to material damage having already been occurred, and must be established (an 'apprehension of possible peril' is not sufficient).[31] According to the Draft Articles, 'only option available' means that the defence may not be invoked if a State has other lawful means to preserve the interest, even if those means are 'more costly or less convenient'.[32]

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27 *Draft Articles on Responsibility of States for Internationally Wrongful Acts* in REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001).

28 Articles on State Responsibility, reporting in The International Law Commission's articles on State responsibilities: introduction text and commentaries, James Crawford (ed.) THE INTERNATIONAL LAW COMMISSION, 61 (2002); *see also*, U.N. GAOR, THE INTERNATIONAL LAW COMMISSION, Fourth Report on State Responsibility, U.N. Doc. A/CN.4/517 (Apr. 2, 2001).

29 *See*, ILC Commentary to Article 25, at ¶¶ 5-9 (discussing cases where an 'essential interest' at stake ranged from economic stability to the natural environment).

30 *See*, ILC Commentary to Article 25, at ¶¶ 5-9.

31 Gabcikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 7 (1997), Judgment, at ¶¶ 51-52 (Sep. 25, 1997).

32 ILC Commentary to Art 25, at ¶15.

The party pleading the defence must meet the significant burden of proving that it should be allowed to justify its failure to perform its valid international obligations under the BIT on grounds of necessity.[33] There are two exceptions where the defence is not available; that is, where the State has renounced the defence so as to exclude the possibility of invoking the defence or where the State has contributed to the situation of necessity. A State's contribution to its situation of necessity need not be specifically intended or planned and can be the consequence, *inter alia,* of well-intended but ill-conceived policies.[34] In contrast to *force majeure,* necessity does not require the State to be coerced or compelled but involves an element of free will. Importantly, the defences are not self-judging and are subject to a good faith review by the tribunal. It is also noteworthy that necessity merely permits otherwise non-permitted behaviour for the duration of the circumstances causing necessity. Upon termination of those circumstances, the obligations revive.[35]

The doctrine of necessity has been used successfully in, and has generally been accepted by, the international community for cases of military and environmental crisis. For example in *AAPL* v. *Sri Lanka,*[36] military necessity was assessed by the tribunal in relation to acts of the Sri Lankan security forces executing a counter-insurgency operation during which the investment (a prawn farm) was destroyed. The tribunal held that the force deployed by the army had been excessive and found Sri Lanka responsible.

Necessity has also been invoked in times of economic crisis. Although some scholars question the use of the doctrine for economic necessity, the ICSID recently expressed in a handful of cases that the doctrine of necessity could be used as a defence to preclude wrongdoing in cases of economic emergencies, thereby silencing any criticism that it can only be applied in cases of military or environmental disaster.[37] In both the *LG&E* and *Continental Casualty* cases, the tribunal found that the defence of necessity is only justified when measures are essential for safeguarding essential public interests, and in light of the aggregate of devastating economic, political and social conditions, this requirement is satisfied.

33 ILC Commentary to Chapter V ('Circumstances Precluding Wrongfulness'), at ¶ 8.

34 Impregilo S.p.A v. The Argentine Republic (ICSID Case No. ARB/07/17, Award of June 21 2011).

35 Gabcikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 7 (1997), Judgment, at ¶ 101 (Sep. 25, 1997).

36 AAPL v. Sri Lanka, Award of 21 June 1990, 4 ICSID Reports 246 (1997).

37 Eric D. Kasenetz, *Desperate Times call for Desperate measures: the Aftermath of Argentina's State of Necessity and the Current Flight of the ICSID* 41 The George Washington International Law Review 709, 710, 721 (2010).

The tribunals in *Sempra* and *Enron* rejected the defence of necessity as it was not one that compromised the very existence of the State and its independence. These subsequent rulings suggest that the defence of necessity, while available, may not necessarily be relied upon when dealing with sovereign financial crisis.

B. Treaty Protections

Apart from the customary international law doctrines outlined above, there are certain standards of protection found within most BITs that protect investors. The key feature of most BITs is a focus on detailed standards of treatment, that is, the obligation of the host State as to treatment which investors are entitled and the provision for the settlement of disputes through direct investor-State arbitration. Certain standards of protection can be found under most international investment agreements, are frequently invoked by investors in arbitrations and are construed in accordance with international law.[38]

(i) Substantive standards of protection - MFN and NT Clauses

There are two major substantive standards for protection in most BITs. These are the Most Favoured Nation Treatment [*Hereinafter*, "MFN"] and National Treatment [*Hereinafter*, "NT"] clauses.

The obligation to afford MFN treatment generally requires that investors from that State receive treatment no less favourable than the treatment enjoyed by investors from other States. Similarly, the NT obligations are usually expressed in such a way as to entitle investors to treatment that is 'not less favourable' than the treatment that is accorded to nationals or companies of the host State.

The effects of including such obligations in a BIT are pertinent as an investor can generally rely on the MFN provision in its treaty to obtain more beneficial treatment than the host State may have agreed to grant investors from another State, in a different BIT. There are divergent views as to whether an MFN clause in a BIT should apply only to substantive standards of protection, or whether it also extends to any additional procedural rights, such as an investor-State arbitration provision.[39] There seems to be no resolution to this issue as it depends largely on the wording of the particular MFN provision in the relevant BIT.[40]

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38 Brown, *supra* note 1, at 59, 62-66.

39 Brown, *supra* note 1, at 59, 62-66. *See also*, Maffezizi v. Spain, ¶ 64 (ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000), in contrast to Salini Costruttori SpA and Italstrade SpA v. Jordan, at ¶ 114 (ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004).

40 Brown, *supra* note 1, at 59, 65.

An interesting investor-State arbitration case which relied heavily upon the MFN provision of one of India's BIT's was decided in November 2011, when the arbitral tribunal in *White Industries Australia Ltd* v. *Republic of India* held India to be liable to the Australian foreign investor on the ground of a breach of its BIT with Australia. The Australian and Indian governments signed a BIT in 1999 which included 17 articles aimed at protecting and encouraging the investments that investors from each State might make in the other State's territory.[41]

In 1989, White Industries entered into an agreement with Coal India Limited, an Indian company, for the provision of services relating to the development of one of Coal India's mines. Various disputes arose over the years that followed, culminating in a referral to arbitration in 1999. A final award favouring White Industries in respect of the disputes was rendered in 2002, at which point White Industries began proceedings in the Indian courts to have the award enforced. The Australian corporation was met with considerable resistance in its attempts, however, which resulted from the combination of both the various applications from Coal India to have the award set aside and the continued delay of the court system.

After nine years of persistence, the award was still yet to be enforced. White Industries thus brought an action against India in arbitration, arguing that the excessive delay it experienced in having its award enforced in the Indian courts violated the India-Australia BIT. Central to White Industries' claim was that the Indian courts had failed to enforce the award in a timely manner and consequently had failed in providing it an "*effective means of asserting claims and enforcing rights*".[42] The curious aspect of this argument was that no provision in the India-Australia BIT mentioned or included such a duty for either of the states as hosts to foreign investments.

In presenting its argument, White Industries relied upon the MFN clause in the India-Australia BIT to draw into play a provision to this effect from the BIT that India had entered into with Kuwait. Article 4.2 of the India - Australia BIT contained the relevant MFN clause and provided that a "*Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country*".

41 Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments (26 February 1999).

42 Article 4(5), Agreement Between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment (27 November 2001).

This MFN clause enabled the Australian corporation to use the 'effective means' provision of the India-Kuwait BIT to its advantage; the tribunal concluded that the delay by Indian courts had caused India to breach its BIT with Australia, and White Industries was awarded approximately AUD 4 million.

Apart from having produced the only publicly known award secured against India, this case is important for several other reasons. First, it puts considerable pressure on the Indian government to make a concerted effort to reform its judicial system so as to ensure the more efficient enforcement of arbitral awards. Second, there is some evidence to suggest that the decision has opened the floodgates for other foreign investors to pursue similar claims against India if they encounter lengthy delays or other difficulties in enforcing their award. By way of example, February 2012 saw Sistema JSFC, a Russian conglomerate, submit a formal notice to India threatening international arbitration proceedings under the India-Russia BIT if the Indian government failed to settle a dispute related to the revocation of its telecom licences within six months.[43]

(iii) General standards of protection - FET, Full-Protection and Security and Umbrella Clauses

Some general standards of protection can be found in clauses such as 'Fair and Equitable Treatment' [*Hereinafter*, "FET"]; minimum international level of protection; Full Protection and Security; and Respect of Host State's Contracts (more commonly known as an 'Umbrella Clause').

FET clauses will be breached if the host State acts in a way that is 'arbitrary, grossly unfair, unjust or idiosyncratic' or engages in 'discriminatory'[44] conduct or acts in a way that is inconsistent with the investor's legitimate expectations.[45] There may also be requirements to maintain a stable business environment that is

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43 *Sistema threatens arbitration in 2G case*, in The Times of India (28 February, 2012), *available at* http://timesofindia.indiatimes.com/business/india-business/Sistema-threatens-arbitration-in-2G-case/articleshow/12070637.cms (Last visited on 30 July 2013).

44 Waste Management, Inc v. Mexico (No2), at ¶ 98 (ICSID Case No. ARB (AF)/00/3, Award of 30 April 2004).

45 *See*, Tecnicas Medioambientales Tecmed SA v. Mexico, at ¶ 154 (ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003); *see also*, MTD Equity Sdn Bhd and MTD Chile SA v. Chile, ¶¶ 111-15 (ICSID Case No ARB/01/7, Award of 25 May 2004); Saluka Investments BV v. Czech Republic, at ¶¶ 300-8 (UNCITRAL Arbitration, Partial Award of 17 March 2006).

consistent with reasonable investor expectations.[46] A few tribunals have recently noted the close link between the FET standard and the notion of legitimate expectations, as well as the need to balance investors' expectations with the right of host States to regulate in the public interest in applying the FET standard.[47]

The obligation to provide 'full protection and security' is concerned primarily with failures of the State to provide physical protection for the investor's property and protect it from actual damage, either caused by State officials, or by the actions of others where the State has failed to exercise due diligence.[48] However, it has also been interpreted as extending beyond mere physical protection to requiring the host State to provide legal protection for the investor's rights.

Umbrella clauses provide additional protection to investors in that they elevate any breaches, by the host State, of its contractual obligations to the status of a breach of international law. They are generally formulated in broad terms as requiring the host State to observe any obligation it may have entered into with regard to the investment of nationals or companies of the other contracting party.[49] The effect of the umbrella clause, although there are divergent views in the case law, is to elevate to the international plane, any contractual obligation that the host State may owe the investor as well as, arguably, any obligations that might exist under domestic legislation.[50]

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46 *See e.g.*, LG&E v. Argentina, ICSID Award 2003; Tecnicas Medioambientales Tecmed SA v. Mexico, at ¶ 154 (ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003).

47 Joseph Charles Lemire v. Ukraine, at ¶ 264 (ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010); AWG v. Argentina, at ¶ 226 (ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010).

48 *See*, Asian Agricultural Products Ltd v. Sri Lanka, at ¶¶ 78-86 (ICSID Case No. ARB/87/3, Award of 27 June 1990); Wena Hotels Ltd v. Egypt, at ¶¶ 84-95 (ICSID Case No. ARB/98/4, Award of 8 December 2000).

49 *See e.g.*, Article III(3) Agreement Among The Governments Of Brunei Darussalam, The Republic Of Indonesia, Malaysia, The Republic Of The Philippines, The Republic Of Singapore, And The Kingdom Of Thailand For The Promotion And Protection Of Investments (15 December 1987) 27 ILM 612; Article 10(2), Chinese Model BIT; Article 8(2), German Model BIT (2005); Article 2(2), UK Model BIT. *Further see*, Andrew P. Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 437 (2009).

50 *See*, Noble Ventures, Inc v. Romania, at ¶¶ 51-61 (ICSID Case No. ARB/01/11, Award of 12 October 2005); SGS Societe General de Surveillance SA v. Philippines, at ¶¶ 115, 121, 128 (ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004).

(iv) Expropriation

There are also some non-contingent standards included in most BITs such as protection in case of expropriation through compensation. Expropriation clauses protect foreign investors by ensuring that host States may not arbitrarily take ownership of their investments in the absence of certain conditions, without the payment of adequate compensation. Most BITs provide that expropriation can be 'direct' or 'indirect' and includes 'measures having effect equivalent to expropriation', or measures 'tantamount' to expropriation.[51] Thus it is broader than just the physical seizure of assets and includes indirect measures that amount to expropriation, the right to outwards transfer of funds (such as profits and divestment) and management of investments in host country provisions. Expropriation may also include changes in law or policy that substantially detracts from the value of an investment.

(v) ISDR or Arbitration Clause

There are investor-State dispute resolution [*Hereinafter*, "ISDR"] provisions in most BITs providing for direct arbitration by aggrieved foreign investors, as an alternative to the host State's national courts, to ensure impartiality and parity. Most treaties allow the investor to choose arbitration under a number of different fora and arbitral rules for the prosecution of its claims. The most frequently selected options are for the arbitration to proceed either under the rules of the ICSID or the UNCITRAL Arbitration Rules.

(vi) NPM Clause

In addition to these protections for investors, many BITs contain non-precluded measures [*Hereinafter*, "NPM"] clauses designed to limit the applicability of investor protections in exceptional circumstances. NPM provisions may appear either in the main treaty text or in the attached protocol, though they are more often found in the body of the treaty itself. The NPM provisions allow countries to take measures inconsistent with their treaties when, for example, their actions are necessary *"for the protection of essential security, the maintenance of public order,*

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51 *See e.g.*, German Model BIT, Art 4(2); UK Model BIT, Art 5(1). *See also*, AWG v. Argentina (ICSID Case No. ARB/03/19 Decision on Liability, 30 July 2010) ¶ 134; Chemtura v. Canada, at ¶ 247 (Award, Ad hoc NAFTA Arbitration under UNCITRAL Rules, 2 August 2010); RosInvestCo v. Russia, *at* ¶ 249, SCC Arbitration V (079/2005) Final Award, 12 September 2010.

or to respond to a public health emergency".[52] Despite textual variation, NPM clauses share several structural elements. First, they require a link between the measures adopted by the host State that might breach the treaty and the permissible objectives of States in the provisions. This is known as the 'nexus' requirement. Second, they define the breadth, or 'scope' of the NPM clause's application *vis-à-vis* the other treaty provisions. NPM clauses can either be drafted so as to apply to an entire BIT or can be written in a more limited form so that they apply only to a subset of the treaty's substantive provisions. Third, they list the 'permissible objectives' in the pursuit of which measures deviating from other substantive treaty provisions are not precluded by the BIT. The most commonly found permissible objectives include security, international peace and security, public order, public health and public morality. Some less frequently occurring objectives include 'extreme emergency',[53] *"relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"*[54] and *"ensuring the integrity and stability of a contracting party's financial system"*.[55] Collectively, these three structural elements determine whether States or investors will bear the costs of State action in exceptional circumstances.[56]

As long as the host State's actions are taken in pursuit of one of the permissible objectives specified in the NPM clause, acts otherwise prohibited by the treaty do not constitute breaches of the treaty and States should face no liability under the BIT. If an NPM defence is successful, it can mean the State avoids international liability and paying damages. India is one of the few countries that has included NPM clauses since the beginning of the BIT program in the early 1980s. Exceptional circumstances covered by such clauses can include financial crises, terrorist threats, public health emergencies and other such crisis situations. NPMs limit the legal regime protecting foreign investors and bring into question whether BITs really

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52 *See e.g.*, Article XI, Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Argentina, 14 Nov., 1991, S. Treaty Doc. No. 103-2, 1993.

53 Article 12, Agreement for the Promotion and Protection of Investments, Czech Republic-India BIT, 11 Oct., 1996.

54 Annex I, Agreement for the Promotion and Protection of Investments, Canada-Uruguay BIT, 9 Oct., 1997, 1999 Can. T.S. No. 31.

55 Annex I, Agreement for the Promotion and Protection of Investments, Canada-Uruguay BIT, 9 Oct., 1997, 1999 Can. T.S. No. 31.

56 William W. Burke-White and Andreas von Staden, *Investment Treaty Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties* 48(2) Virginia Journal of International Law 307, 339 (2008) [*Hereinafter*, "Burke-White and von Staden"].

provide as strong a form of investor protection as they have been understood to provide in the past.

The interpretation and application of NPM clauses is critical to determining both State freedom to respond to crisis situations and the scope of investment protections accorded under a BIT.

IV. Pre-Emptive Measures and Allocating Risk

There are a number of measures that investors and host States can take at the negotiation phase of a BIT to pre-emptively address the situation where a crisis may happen in the future by allocating risk. A full discussion on the most successful fiscal policies for governments to employ and the most effective ways of drafting BITs is beyond the scope of this article. However, below are some suggested relevant risk mitigation strategies for times of crisis that have been at the centre of recent discourse in the field. First, strategies that can be employed by investors will be explored, followed by strategies that may be engaged by host States.

A. Investors

Typically Model BITs afford the variety of protections outlined above to qualifying investors who make an investment into the host country, against improper interference from the host State. Common protections include NT, MFN, FET, full protection and security, expropriation and umbrella clauses.

Apart from these protections, taking out political risk insurance is another option for investors in order to guard against the potential outbreak of crisis. Political risk insurance will generally cover expropriation, currency inconvertibility and non-transfer risk, and political violence, including war and civil war. While expropriation and non-transfer are generally addressed within the BIT, political violence and the associated risk of civil unrest are rarely addressed. As a result, political risk insurance can be an important measure to protect investors from these perils. Political risk insurance comes in a number of forms, from merely insuring the obligations under the BIT to more extensive and broader coverage. A commonly accepted general rule is that starting with a broader political risk insurance policy is prudent, as layers can always be stripped away as the project develops and the risks become better understood.[57]

57 Daniel Galvao, *Political Risk Insurance: Project Finance Perspective and New Developments* 7(2) Journal of Structured Finance 35 (2001).

As an alternative, or in addition, to an investment treaty, investors and hosts States can bargain contractually over the allocation of regulatory risk. Specifically, they can include a stabilisation clause in host government contracts, which commit governments to not alter regularly frameworks in a way that undermines the economic viability of the investment. A stabilisation clause can be demanded as a condition of an investment contract by investors who want to allocate risk. Such agreements can also provide that the government must pay compensation in the event of a material change in law or regulation affecting the investor. Moreover, they can make such contracts enforceable through international arbitration, thus avoiding dependence on the domestic court system in the host country. Despite the enormous amount of controversy over BITs and their effects on regulatory autonomy, there has been very little attention to stabilisation clauses.[58] Yet such clauses are used extensively, particularly in the case of investments in extractive industries, infrastructure and the energy sector.[59] The downside is that investment contracts can involve considerable transaction costs and such contracts are much less feasible for smaller investors or projects.

B. States

States may take measures to counter undesired expansive interpretations of the definition of expropriation, equitable treatment and the ambit of the MFN clause, by arbitral tribunals in investor-State arbitrations. States may attempt to make their definitions clearer by providing, for example, more specific guidelines about the content of each concept when drafting their investment treaties. If such drafting measures are effectively implemented by more States, investors may find it increasingly harder to make successful claims under investment law in these areas.

The use of an NPM clause is also an effective pre-emptive step that a State can take at the drafting phase of a BIT. In the field of international investment law, it is unreasonable to conclude that States ever intend through BIT provisions to renounce or at least substantially curtail their right to guarantee public order or pursue fundamental society goals whenever foreign investors' rights are affected.[60] Therefore the use of NPM provisions, where the State expressly reserves its right to adopt measures to protect certain essential interests, are an effective form of

58 Robert Howse, *Freezing government policy: Stabilization clauses in investment contracts* 1(3) INVESTMENT TREATY NEWS 3, 3-5 (2011).

59 *Id.*

60 T. J. Grierson Weiler, INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW, 146 (2008).

risk mitigation for host States. NPM provisions are a well-known feature of BITs concluded by India, as well as other countries such as the USA, Germany and Canada.

However, the application of such provisions can raise considerable controversy. Generally, States should keep in mind recent ICSID decisions and adopt an NPM clause that is likely to provide them with the flexibility they need to deal with emergencies and crisis situations.[61] More specifically, States entering agreements should protect themselves by expressly stating their intent in the text of the treaty i.e. whether the NPM clause is subject to self-judgement or requires review by the arbitral tribunal. Delimiting the scope of a NPM is a crucial policy challenge. The BITs that have been found to be the most explicitly self-judging have been that of the USA and tend to use the term 'measures necessary for' in relation to the nexus of the NPM, list permissible objectives of *"essential security interests, international peace and security, public order and public morals"* and are comprehensive rather than limited by using language such as 'this Treaty shall not preclude' to describe scope. In contrast, the language used by Indian BITs in relation to nexus, permissible objectives and scope has tended to be presumptively not self-judging. Indian BITs have used phrases such as *"that have to be taken for"* rather than 'necessary for' to expressly limit the scope of the NPM.[62]

Beyond drafting techniques, there are also steps that States can take to mitigate crisis at the fiscal policy level. There is new evidence in the field of economics showing that capital controls are an effective macro-prudential measure that nation States should employ as part of their economic policy in order to prevent and mitigate financial crisis.[63] Capital flows can help developing countries such as India grow rapidly but they tend to be pro-cyclical in their tendency to come quickly when times are good and leave swiftly during a downturn. In a crisis, capital controls can help smooth the inflow and outflows of capital and protect developing economies. Most controls target highly short-term capital flows, usually conducted for speculative purposes. For example, Columbia's 2007 capital

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61 Eric D. Kasenetz, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID* 41 The George Washington International Law Review 709, 736 (2010).

62 Burke-White and von Staden, *supra* note 56, at 336-342.

63 Kevin P. Gallagher, *Reforming United States trade and investment treaties for financial stability: The case of capital controls* 1(3) IISD Investment Treaty News 3, 9-11 (April 2011). *See also*, Bruno Coelho and Kevin P. Gallagher, *Capital Controls and 21st Century Financial Crisis: Evidence from Columbia and Thailand* PERI Working Paper No. 213, January 2010.

controls required foreign investors to park a percentage of their investment in the central bank, which helped that nation escape some of the damage from the Global Financial Crisis [*Hereinafter*, "GFC"]. Likewise, in the wake of the GFC, States such as Brazil, Indonesia, South Korea, Taiwan and Thailand all used capital control to stem the massive inflows of speculative investment entering their economies and prevent the wreaking of havoc on their exchange rates and asset markets. South Korea, for example, has direct limits on foreign exchange speculation and has levied an outflows tax on capital gains of foreign purchases of government bonds. In a recent International Monetary Fund [*Hereinafter*, "IMF"] study, it was found that capital controls such as these have helped OECD countries buffer some of the worst effects of the GFC.[64] The IMF now endorses capital controls as part of the macroeconomic policy toolkit and has recommended that a system of global coordination be put in place for capital controls, an initiative that the IMF, with the support of the G-20, is continuing to develop.[65]

As an extreme measure, States have the option to do what Australia has recently done. The Australian federal government issued a trade policy in April 2011 based on a report from the Productivity Commission, to no longer include Investor-State Dispute Settlement [*Hereinafter*, "ISDS"] provisions in future BITs and Regional Trade Agreements [*Hereinafter*, "RTAs"].[66] The policy was justified by reference to the principles of 'no greater rights' for foreign investors and the Governments' right to regulate to protect the public interest. The implications are that countries with which Australia enters future trade agreements will most likely have to pursue claims against the host government through diplomatic channels, inter-State claims or before the national courts under national law. This is a questionable policy as, while it perhaps ensures greater State sovereignty, it may be a difficult position for Australia to maintain in the Trans-Pacific Partnership Agreement [*Hereinafter*, "TPPA"] negotiations, particularly given the pressure that is likely to come from the USA. The policy also leaves Australian companies investing off-shore vulnerable as it means they will not benefit from a suite of

64 Jonathan D. Ostry, Atish R. Ghosh *et al.*, *Capital Inflows: The Role of Control*, IMF Staff Position Note, SPN/10/04, 19 February 2010.

65 G20 Finance Ministers and Central Bank Governors, *G20 Coherent Conclusions for the Management of Capital Flows Drawing on Country Experiences* (15 October 2011) *available at* http://www.g20.utoronto.ca/2011/2011-finance-capital-flows-111015-en.pdf (Last visited on 30 July 2013); IMF, *Liberalizing Capital Flows and Managing Outflows* (13 March 2012) *available at* http://www.imf.org/external/np/pp/eng/2012/031312.pdf (Last visited on 30 July 2013).

66 Kyla Tienhaara and Patricia Ranald, *Australia's rejection of investor-State dispute settlement: Four potential contributing factors* 1(4) IISD Investment Treaty News 6, 6-8 (12 July 2011).

Australian treaties with such provisions, particularly if they are investing in non-ASEAN emerging markets with unstable political climates and less developed legal systems where judicial bias and corruption is unknown. The Policy Statement makes clear that Australian investors must assess (and protect against) the risk for themselves. Thus the policy is by all accounts a double-edged sword and, some have suggested, somewhat retrograde.

V. When Crisis Strikes – Possible Reactions and Consequences

C. *States*

It is important for States to carefully consider the measures they take after a crisis has broken out, especially if they are likely to affect foreign investments and breach the provisions of any BITs they may be signatory to. Depending on the steps a State takes, they may amount to breaches of BITs thus inviting arbitration claims against them, and the steps used may preclude their ability to use certain customary defences.

The actions of States in coping with the GFC and other financial crises have generally been aimed at containing the contagion, minimising losses to society, restoring confidence in financial institutions and instruments and lubricating the economic system in order for it to return to full operation. Some typical measure that are taken by governments in times of financial crisis include domestic stimulus packages to prevent recession, increased government spending, decreased taxes, infrastructure development, lower interest rates, capital controls and expropriation.

At the Euro area Summit on October 12, 2008, Euro area countries along with the UK urged all governments to adopt a common set of principles to address the financial crisis. The measures the nations supported are largely in line with those adopted by the UK and include:

- **Recapitalisation:** governments fund banks that might be struggling to raise capital and pledge to pursue wide-ranging restructuring of the leadership of those banks that are turning to the government for capital.

- **State ownership:** governments buy shares in the banks that are seeking recapitalisation.

- **Government-debt guarantees:** guarantees offered for any new bets, including inter-bank loans, issued by the banks in the Euro zone area.

- **Improved regulations:** governments implement and encourage regulations to permit assets to be valued on their risk of default instead of their current market price.[67]

These measures are perhaps some of the more globally accepted responses. One of the critical questions for States is whether these emergency measures could amount to a violation of IIA obligations. Whether the response of a State during times of financial crisis will trigger claims from investors is largely dependent on the extent of the damage to investors and the degree to which there were more desirable options available to the host State.

There are a number of IIA provisions that are most commonly affected by crisis which are found to be breached through emergency measures taken by States. Expropriation clauses are one such commonly affected provision as there are cases where emergency measures amount to an expropriation and give rise to compensation entitlements to the investor. FET clauses are another such provision and tribunals often interpret them broadly to mean a breach of 'legitimate expectation' of investors will amount to a breach of the provision. The principle of non-discrimination or NT provisions also may be triggered by measures such as State aid programmes and individual rescue packages, which favour domestically-owned companies.

The most notable example of measures taken by States after a crisis that was problematic, of which perhaps some lessons can be drawn, are the measures taken by Argentina through the enactment of the Public Emergency Laws in 2002. Most cases filed against Argentina have targeted three main areas of the Emergency Laws: the institution of provincial taxes, contrary to the concessions, the Economic Emergency Law on the *pesification* of charges (that is the freezing of charges for public services) and the application of petroleum export retentions in 2002.[68] In the *CMS* case, the claimant successfully argued that the emergency legislation had violated Article II(2) of the US-Argentina BIT by breaching the FET clause and non-discrimination provisions and that the Government had expropriated gas investments in TGN without full compensation. Likewise in

67 European Union, *Summit of the Euro Area Countries: Declaration on a Concerted European Action Plan of the Euro Area Countries* (12 October 2008). *See also*, Dick K. Nanto, *The Global Financial Crisis: Analysis and Policy Implications* Congressional Research Service, Report for Congress, 60 (2 October 2009).

68 Amin G. Forji, *Drawing the Right Lessons from ICSID Jurisprudence on the Doctrine of Necessity*, 76 Arbitration: the International Journal of Arbitration, Mediation and Dispute Management 44 (2010).

the *LG&E* case, the tribunal accepted LG&E's claim that the suspension of the tax regime in the gas sector breached the FET standard and umbrella clause contain the BIT. Similarly in the *Enron* case, the tribunal found that *"Argentina went too far by completely dismantling the very legal framework constructed to attract investors"* which in turn amounted to *"an objective breach of the fair and equitable treatment due under the treaty"*.[69]

Another essential concern for States is that should the means by which they choose to mitigate the crisis later be found by an arbitral tribunal to have not only breached, but 'contributed' to the crisis, this may work to defeat a necessity defence. For example, in *National Grib PLC* v. *Argentine Republic,*[70] another claim arising from the Argentinean financial crisis and brought by an electrical power company, the tribunal rejected Argentina's reliance on the necessity defence, finding that Argentina had made a 'substantial' contribution to the situation invoked and that its response to the crisis 'further contributed to it'. Similarly the *CMS* tribunal ruled that Argentina not only had other means available to respond to the crisis but had significantly contributed to the crisis through the failing to give due consideration to the 'shortcomings' of the Emergency Laws.[71]

Likewise, States should ensure that they have exhausted all measures that are not harmful to foreign investors before they take such measures, because in the event of an investor-State dispute arising later, they will need to show evidence that the harmful measure was the only option available in order to run a successful necessity defence. As already noted, according to the Draft Articles, 'only option available' means that the defence must not be invoked if a State has other lawful means to preserve the interest, even if those means are 'more costly or less convenient'.

Declaring an official State of emergency can be a prudent action to take for States in times of crisis if they want to rely on the doctrine of necessity as a defence. In *Continental Casualty* v. *Argentina,*[72] the tribunal noted that the fact that Argentina's Congress declared a 'public emergency' in economic, financial, exchange, social and

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69 Enron Corp and Ponderosa Assets v. Argentina, at ¶ 306 (ICSID Case No. ARB/01/3, Award of 22 May 2007).

70 National Grid plc v. The Argentine Republic (UNCITRAL Award of 3 November 2008, UK/Argentina BIT).

71 CMS v. Argentine Republic (ICSID No. ARB/01/8, Award of 12 May 2005), at ¶¶ 304, 324, 329.

72 Continental Casualty Company v. The Argentine Republic, (ICSID Case No. ARB/03/9, Award of 5 September 2008)

administrative matters in conformity with Article 76 of its Constitution, and enacted a specific 'Public Emergency Law' to cope with the crisis, was *"powerful evidence of its gravity such as that could not be addressed by ordinary measures"*.[73] Interestingly, this was found despite the fact that the BIT clause being invoked (Article XI) was not self-judging, suggesting that the tribunal was willing to rely on Argentina's own characterisation of the situation.

D. *Investors*

In the first instance, investors obviously have recourse to direct arbitration provided that the BIT has an ISDR clause. They then have a variety of protections within treaties and also under customary law that have been outlined above, to base their claims upon. The success of their claim is dependent upon their ability to meet the threshold of various standards of international law.

As an alternative to arbitration or recourse to nation courts of the host, the remedy of "diplomatic protection" or an inter-State claim, whereby the investor's home State can bring a claim on behalf of the investor against the host State before the International Court of Justice is available, but it is very rarely used by States. Investors may also consider suing States through alternative regimes, such as under WTO law or a FTA services chapter. It must be noted that investors have no direct right of standing in WTO disputes or disputes arising from FTA services chapters because both provide only for inter-State dispute settlement mechanisms. However, private investors who possess sufficient influence can lobby their governments to initiate State-to-State dispute settlement proceedings at the WTO and under an FTA services chapter in order to circumvent unfavourable developments in investment law. However, the limitations of these options are that the home State retains discretion and control over the claims process and the process is less likely to be invoked for smaller investors or projects.

It is noteworthy then, that investors, especially those that do not have a great deal of political influence or have less significant investments, have little recourse against the actions of host States above and beyond investor-State arbitration.

73 *Id*, at ¶ 181.

VI. The Backlash against Investor-State Arbitration and the Need for Reform

The withdrawal by the plurinational State of Bolivia and by Ecuador from the ICSID as well as the termination of several BITs by Ecuador and some other countries[74] raises novel and complex legal issues of systemic importance for the international investment regime. It has been suggested that these withdrawals and denunciations indicate that some countries no longer view ICSID or arbitration as the preferred means of resolving investor-State disputes.[75] This invites a broader discussion on whether reform to the IIA system and the ICSID is needed.

The critics of ISDR tend to argue that BITs unduly favour the interests of investors. The expropriation and FET provisions of BITs have resulted in host States being forced to compensate investors, even for legitimate and public interest regulatory change in times of crisis, including environmental and social regulations. Moreover, ISDRs can limit a country's ability to efficiently restructure its debt following a financial crisis as ISDR mechanisms can allow individual bond holders to arbitrate against a host State attempting to legitimately rescue its economy.[76]

Conversely, those who defend the system contend that in most instances where investors have received compensation, governments have acted out of regulatory opportunism, luring the investor into the country with promises of a stable and favourable economic and legal framework, only to alter that framework to the investor's disadvantage, or threaten to do so, in order to force renegotiation of the terms and conditions of the investment that are more favourable to the host State after the investment has already been established. Advocates of increased investor protection argue that it is in the best interests of the host State and investors to protect FDI as it will lead to stronger economies and more FDI for the host State.

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74 In 2008, Ecuador terminated nine BITs - with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. Other denounced BITs include those between El Salvador and Nicaragua, and the Netherlands and the Bolivarian Republic of Venezuela. In 2010, Ecuador's Constitutional Court declared arbitration provisions of six more BITs (China, Finland, Germany, the UK, Venezuela and United States) to be inconsistent with the country's Constitution. It is possible that Ecuador will take action to terminate these (and possibly other) BITs.

75 Nicaragua and the Bolivarian Republic of Venezuela have also said that they wish to withdraw from ICSID but have not done so to date. *See also, Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims,* IIA Issues Note, UNCTAD, No. 2 (December 2010).

76 *Sovereign Debt Restructuring and International Investment Agreements,* IIA Issues Note, UNCTAD, No. 2 (July 2011).

With the recent EU report showing a clear inclination towards strengthening host States power to regulate and implement policy choices without being overburdened by treatified standards of investment protection,[77] countries like Australia abolishing ISDR clauses from all future BITs and FTAs and South American countries being faced with walking away from ICSID as their best possible alternative to avoid complete economic ruin, it is undeniable that there is a case for reform to the IIA system generally and ICSID arbitrations specifically.

A. *General areas of reform in investor-State arbitration*

(i) Refining the scope of "investment" in Article 25(1) of the ICSID Convention

In order to establish jurisprudence over a dispute that has come before ICSID, a tribunal must satisfy itself of the following four requirements pursuant to Article 25(1) of the ICSID Convention, namely that;

(i) the dispute is a legal dispute;

(ii) the dispute arises directly out of an 'investment';

(iii) the dispute is between a contracting State and a national of another contracting State, and;

(iv) the parties to the dispute have consented in writing to submit it to ICSID.

The second requirement, that the dispute arises directly out of an investment, is one jurisdictional condition that continues to provoke divergent approaches and opposing views from arbitrators and commentator alike. Specifically, there is debate surrounding whether an 'investment' should be understood and interpreted objectively, as distinct from the definition of 'investment' contained in the relevant BIT, or whether the BIT should be relied on exclusively to illuminate the meaning of 'investment'.[78] These two diverging approaches have been encapsulated in the *Salvors* award and the *Salvors* Annulment Decision where the same set of facts led to opposite findings on the presence of an 'investment'.[79] In the initial award, the tribunal favoured an objective meaning of investment that was ascertainable

77 *See*, part VI (A) (ii) below.

78 Jean Ho, *The Meaning of 'Investment' in ICSID* 26(4) ARBITRATION INTERNATIONAL 633, 635 (2010).

79 Malaysian Historical Salvors, SDN, BHD v. Malaysia (ICSID Case No. ARB/05/10, Award of 17 May 2007 and Decision on the Application for Annulment, 16 April 2009).

independently of how 'investment' was defined in the UK – Malaysia BIT. The tribunal subsequently found that there was no 'investment' within the meaning of the ICSID Convention. In contrast, the majority in the ad hoc Committee in the *Salvors* Annulment Decision relied on the BIT as the sole interpretive source of the meaning of 'investment' and found that an investment did exist. Subsequent tribunals have been tasked with determining which of the two prevailing approaches to apply.

This lack of a uniform approach to defining what constitutes an 'investment' and where any outer limits of access to ICSID jurisdiction lie is problematic as it has lead to inconsistency in ICSID decisions. Moreover, where too broad a jurisdictional opening is allowed in relation to the definition of what constitutes an 'investment', it can facilitate the initiation of vexatious claims by investors. Therefore reform is needed to further refine the scope of an investment.

(ii) Balancing public welfare objectives and private investor interests

Critics of IIA argue that the current system of international investor protections has granted excessive power to global corporations and in a number of cases, powerful investors have exploited investor-State arbitration to undermine democratic processes, often at the expense of vulnerable developing countries and the environment. With climate change emerging at the forefront of government policy around the world through various emissions trading initiatives, the latitude afforded to multinationals and foreign investors by host States is being increasingly questioned. On the other hand, there is evidence that agreeing to deals through BITs that favour investors brings strong benefits for national economies and that legal certainty through protections afforded to investors in BITs is paramount to the functioning of private international law. It is suggested that policymakers should weight up the benefits and shortfalls carefully before signing any BITs and draft them in a way that ensures that foreign investment supports social and environmental goals while guaranteeing the legal certainty of agreements in times of crisis. To do this, they need to reflect on the degree of policy flexibility they need to maintain *vis-à-vis* foreign investors in order to promote sustainable development and deal with political, social and economic emergencies.

The latest developments in the European Parliament seem to support the notion that there is a global shift towards ensuring that States are not unduly restrained from legislating in the public interest.[80] The landscape of investor

80 Ralph A. Lorz, *Good News and Bad for European Investors* 6(3) Global Arbitration Review (2011).

protection through the EU is about to enter a period of major change as the Lisbon Treaty has endowed the EU with an exclusive competence to negotiate and conclude agreements on FDI. The resolution adopted on 6 April 2011 by the EU Parliament based on a report by the Committee on International Trade, shows a clear inclination towards weaker investment protection in future EU investment treaties.[81] Instead the resolution emphasises the need to strengthen host States' power to regulate and implement their policy choices in sensitive areas without being overburdened by treatified standards of investors' protection. In particular, the EU Parliament has called for a clearer definition of the protected investments and investors, with the view that 'speculative' forms of investment shall not be protected and that 'abusive practices' should be abolished. The resolution seeks to frame NT and MFN clauses more precisely so as to focus on circumstances in which foreign and national investors must operate. It also aims to reduce FET to the minimum customary international law standard and to modify the provisions protecting against direct and indirect expropriation in order to establish *"a clear and fair balance between public welfare objectives and private interests"*.

The resolution also emphasises that future EU agreements must 'respect the capacity for public intervention' and highlights the desire to have various restraining clauses. These include corporate social responsibility clauses, special clauses to prevent the watering down of social and environmental legislation, a reference to the OECD Guidelines for Multinational Enterprises and clauses laying down the right of host States to regulate not only in the areas of national security, public health and the environment, but also with regards to workers' and consumers' rights, cultural diversity and industrial policy.

The EU Parliament seems willing to defend existing member States' BITs against the latest attack from the Commission with regard to the necessary transitional arrangements. It even expressly acknowledges the rights of investors whose investments fall within the scope of those arrangements and emphasises the importance of their legal certainty. However, when it comes to the future investment policy of the EU, it is yet to be seen which direction the EU will proceed on policy with regard to future investment agreements as well as to the treatment of existing BITs that are in force between EU member States and third countries as well as intra-EU BITs, which the EU Commission has openly purported to dislike.

Similarly, and perhaps more controversially, the Australian Federal Government's new trade policy has emerged out of the feeling that local investors

81 European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy, EU Resolution 2010/2203(INI).

and citizens lose out to foreign investors in investor-State arbitration and that investor protections in BITs can allow investors to unduly influence government policy. Illustrative of this fear is the 27 June 2011 request for arbitration that was made by Phillip Morris Asia against the Australian government, pursuant to the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments. The substance of the claim was that Peter Morris alleged that proposed legislation mandating plain packaging of cigarettes amounted to 'expropriation' of its trademarks (Article 6) and possibly a violation of 'fair and equitable treatment' obligations (Article 2(2)). This case came as a sequel to Peter Morris's request against the Uruguayan government under the Switzerland-Uruguay BIT.[82] That case was seen by analysts as a test case where Peter Morris chose a relatively small Latin American country for potentially precedent-setting litigation instead of taking on major countries in the West that have legislated with varying degrees of enthusiasm to discourage tobacco use.[83] The manufacturer was perhaps emboldened by the perceived expectation that Uruguay wouldn't have pockets deep enough to fight the case in an international forum. With the action initiated against Australia, it seems that this prediction may be reigning true. Interestingly, the Uruguayan tobacco legislation is less stringent than the scheme proposed by the Australian Government so the outcome of the case will be significant.

The examples of both the EU and Australia indicate that States are not happy with a legal framework where the rights and expectations of investors are prioritised over or interfere with the legitimate interests of the citizens of the host States with little regard to the norms of human rights law, environmental law, labour law, public health or sustainable development.[84] This issue is further aggravated in the situation of investors who enter into agreements with developing nations. On one hand investors/corporations or supporters of free trade claim that strong investor protections help developing countries attract additional foreign

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82 F. C. Dias, *Philip Morris Initiates Arbitration Against Uruguay Over New Labelling Requirements, Taxes* IISD INVESTMENT TREATY NEWS, (May 2010); Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7).

83 Editorial, *Tobacco giant Philip Morris suing Uruguay over ban*, in UNITED PRESS INTERNATIONAL (27 May 2011) *available at* www.upi.com/Top_News/Special/2011/05/27/Tobacco-giant-Philip-Morris-suing-Uruguay-over-ban/UPI-10951306490742/ (Last visited on 30 July 2013).

84 Graham Mayeda, *Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries* in Marie-Claire C. Segger *et al.* (eds.) SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW, 539-559, 558 (2011) [*Hereinafter*, "Mayeda"].

investment, which in turn boosts economy and advances developmental aims. On the other hand, it can be argued that granting excessive protections to foreign investors does not guarantee more FDI and cripples a government's ability to ensure that investment supports national goals. It also curtails the ability of governments to prioritise the welfare of their citizens when responding to crisis.[85] The lack of symmetry in the current dispute settlement regime, with protection for investors but not for host governments, appears unfair to host governments. It is perhaps a product of the unequal bargaining power when powerful countries negotiate treaties with developing countries. If investors had to face rigid enforcement of their contracts, the odds are high that they would want some review of the system in order to make it more responsive to changed or unforeseen circumstances.[86]

Thus there is a case to be made for the need for States and investors to negotiate more sustainable investment agreements. At the moment the parties negotiating the BITs and the tribunals interpreting them do not see investment issues through a sustainable development lens and they do not generally include provisions expressly relating to development, human rights or the environment but perhaps this will have to change going forward. IIAs can also be used to promote sustainable development policies in a number of ways. If the agreements incorporate principles of sustainable development in their preambles and objectives, and if they cite specific norms in the substantive provisions, then they can be useful tools for ensuring that international investment contributes to the protection of human rights, the environment, and achieving the development objectives of developing countries.[87]

(iii) Reform to the ICSID

A number of positive reforms have already taken place and evince the responsiveness of ICSID in addressing the needs of the international community. These include the introduction of amicus briefs and increased transparency through new rules that allow third parties to attend oral hearings. However, there is still room for improvement, especially in regard to the problem of inconsistent outcomes that have arisen out of ICSID decisions and the need for transparency in cases where there is a clear public interest such as in times of crisis.

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85 Sarah Anderson and Sara Grusky, *Challenging Corporate Investor Rule,* Food and Water Watch, Institute for Policy Studies, 2, 24-30 (April 2007).

86 Louis T. Wells, *Backlash to Investor-State Arbitration: Three Causes* in Waibel *et al.* (eds.), at 345.

87 Mayeda, *supra* note 84, at 539-559.

(iv) The Problem of Inconsistencies

A distinctive feature of investor-State arbitration is that a single crisis situation within a country can give rise to a multitude of claims by investors. An unfortunate consequence of the resulting proliferation of separate arbitrations is that tribunals can reach very different conclusions on similar, or even identical issues.

A useful illustration of this problem arises from the Argentine economic crisis between 1992 – 2002. As a result of that particular event, over 47 ICSID claims were brought against Argentina to determine the question of whether the crisis constituted a state of necessity. During this period there were legitimate concerns that multiple cases brought against a single country based on a single measure could lead to inconsistent awards.[88]

These anxieties crystallised with two different arbitrations brought against Argentina, the first by CMS Gas Transmission Company[89] and the second by LG&E Energy Corp, LG&E Capital Corp, and LG&E International Inc.[90] In these proceedings, the two tribunals reached opposite conclusions on the availability of the necessity defence despite almost identical facts and pleadings.[91] In *CMS* v. *Argentina*, a state of necessity was held to not have prevailed during the period in question because the situation was not severe enough to amount to necessity.[92] Less than a year later, *LG&E* v. *Argentina* tribunal found that the same situation did reach the level of a state of necessity.[93]

The inconsistency of decisions is damaging because it undermines the legitimacy and predictability of investor-State arbitration as a method of dispute resolution, especially in times of crisis where multiple claims on the same facts are commonplace. Since there is no accepted principle of *stare decisis* in investor-State arbitration, tribunals are not bound to follow the decisions of earlier tribunals where the present facts and issues are similar or identical. If inconsistency of awards

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88 Katherine Yannaca-Small, *Improving the System of investor-State Dispute Settlement: An Overview* Working Paper 2006/1, OECD, 18 (2006).

89 CMS v. Argentine Republic (ICSID Case No. ARB/01/8, Award of 12 May 2005).

90 LG&E v. Argentine Republic (ICSID Case No. ARB/02/1, Award of 25 July 2007).

91 Kathryn Khamsi, *Compensation for Non-expropriatory Investment Treaty Breaches in the Argentine Gas Sector Cases: Issues and Implications* in Waibel *et al.* (eds.), at 165.

92 CMS v. Argentine Republic (ICSID Case No. ARB/01/8, Award of 12 May 2005).

93 LG&E v. Argentine Republic (ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006).

causes parties to lose faith in investor-State arbitration, the utility of the system is significantly reduced. Furthermore, the proliferation of proceedings arising from a single issue creates significant inefficiencies where multiple tribunals are constituted to decide similar questions.

(v) Possible Solutions

1) Consolidation of Proceedings

A potential solution to these problems is to consolidate similar proceedings into a single arbitration. This would allow for related disputes to be heard together, eliminating the possibility that separate tribunals will reach inconsistent awards on similar facts. Further, this would circumvent the inefficiencies inherent in multiple arbitrations on the same issue.

Commentators have proposed that consolidation may be achieved either formally or informally.[94] Formal consolidation involves joining two separate proceedings to be heard by a single tribunal. Informal consolidation occurs when the same panel of arbitrators is constituted to hear two separate proceedings. While informal consolidation does not reduce the number of proceedings, it does provide the benefit of a more uniform interpretation and application of legal rules to each fact situation, improving the consistency and predictability of awards.

Neither the ICSID Convention nor the ICSID Arbitration Rules contain any clear guidance relating to the formal consolidation of parallel arbitral proceedings. As such, short of amending the ICSID Convention, which would be politically extremely difficult, consolidation may be achieved through provisions in individual investment treaties. This has been an emerging trend in the drafting of BITs and FTAs.[95] For example, Article 1126 of the North American Free Trade Agreement [*Hereinafter*, "NAFTA"] provides for the consolidation of proceedings where a tribunal specially constituted to determine the question *"is satisfied that claims have been submitted to arbitration ... that have a question of law or fact in common"*.[96] NAFTA envisages that its investment provisions apply to *"measures adopted or maintained by a [State] in relation to investors of another [State]"*.[97] This notion of 'measures'

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94 Christian J. Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure* 4(5) Transnational Dispute Management 44 (2007).

95 Antonio Crivellaro, *Consolidation of Arbitral and Court Proceedings in Investment Disputes* 4 The Law and Practice of International Courts and Tribunals 371, 403 (2005).

96 Article 1126(2), North American Free Trade Agreement [*Hereinafter*, "NAFTA"].

97 Article 1101, NAFTA.

is significant. Given this provision, Article 1126 should be read as allowing for consolidation where the question of 'fact in common' is a single State measure.[98]

Several subsequent BITs and FTAs have adopted similar consolidation provisions premised on the rationale that *"a State cannot be exposed to two opposite decisions in regard to a same measure"*.[99] In addition to NAFTA, the 'same State measure' principle has been adopted in:

- Article 33 of the New United States Model BIT;
- Article 32 of the New Canada Model BIT;
- Article 10.24 of the Chile-USA FTA;
- Article 10.24 of the Morocco-USA FTA;
- Article 15.24 of the Singapore-USA FTA; and
- Article G27 of the Canada-Chile FTA.

Informal consolidation has been used quite effectively in a number of cases as a simple technique to overcome problems of inconsistency. *Camuzzi* v. *Argetina*[100] and *Sempra* v. *Argentina*[101] were two technically separate arbitrations in which the parties agreed to appoint the same panel of arbitrators to hear each dispute. Both tribunals reached the same conclusion and relied on very similar reasoning in deciding the question of their jurisdiction over their claims.[102] Furthermore, the ICSID Secretariat has played a role in facilitating informal consolidation of proceedings.[103] For example, in the *Salini* v. *Morocco* arbitration,[104] the ICSID Secretariat recommended that the parties appoint the same panel of arbitrators

98 Crivellaro, *supra* note 95, at 408.

99 Crivellaro, *supra* note 95, at 415.

100 Camuzzi International S.A. v. The Argentine Republic (ICSID Case No. ARB/03/02, Decision on Objection to Jurisdiction, 11 May 2005).

101 Sempra Energy International v. The Argentine Republic (ICSID Case No. ARB/02/16, Award of 11 May 2005).

102 August 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 Investor-State Arbitration,* in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION – FESTSCHRIFT IN HONOUR OF GERHARD HAFNER, 107, 122 (2008).

103 Crivellaro, *supra* note 95, at 385.

104 Salini Costrutorri S.p.A and Italstrade S.p.A v. Kingdom of Morocco (ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001).

as had already been appointed in a parallel arbitration concerning Morocco and another Italian investor pursuant to the same BIT and concerning similar facts.[105] Although the procedures remained separate, the decisions reached by the identical tribunals were consistent.

2) An ICSID appellate structure

The establishment of an appeals facility has been proposed as a solution to increasing consistency of decisions, as it would open the possibility to review arbitral decisions within the ICSID system. At present, there is no such provision within the ICSID Convention.

All that exists is provision for an ad hoc committee to be constituted with jurisdiction to annul an award on the grounds that:[106]

- the tribunal was not properly constituted;
- the tribunal has manifestly exceeded its powers;
- there was corruption on the part of a member of the tribunal;
- there has been a serious departure from a fundamental rule of procedure; or
- the award has failed to State the reasons on which it is based.

Advocates in favour of an ICSID appellate structure contend that the current annulment provisions are insufficient to address the problem of inconsistency. This is because none of the grounds for annulment are wide enough to allow for appeal on the basis of inconsistency per se.[107] Inconsistency would not, without more, constitute a valid ground upon which an award could be annulled.

An appellate structure would therefore fill this gap in the provisions of the ICSID Convention. It would improve both the quality and consistency of awards by reconciling inconsistent decisions at the appeals stage. As a more direct solution, the establishment of an institutional appellate body under the ICSID Convention is seen

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105 Consortium R.F.C.C. v. Kingdom of Morocco (ICSID Case No. ARB/00/6, Award of 22 December 2003).

106 Art 52(1), ICSID Convention, provides: *"Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds ..."*

107 Christina Knahr, *Annulment and Its Role in the Context of Conflicting Awards* in Waibel *et al.* (eds.), at 151, 163.

as preferable to alternatives such as expanding the scope of annulment grounds under Article 52(1) of the ICSID Convention. Notice, however, should be paid to the great political difficulty of amending the ICSID Convention. This clearly forms a significant practical impediment to the realisation of such a reform proposal.

VII. Conclusion

There are lessons to be learnt from the jurisprudence of the ICSID over the last decade in relation to which responses by governments in times of crisis provoked claims against host States, and the most effective ways in which investors can protect themselves in times of crisis. The global financial crisis led to a more systematic approach by the international community in building a framework that addresses the root causes of economic crisis. While measures like stimulus packages provide short term relief, they run the risk of further encouraging moral hazards and do not mitigate future risks. Initiatives like the G – 20 forum, where discourse is targeted towards the study and review of international financial stability and regulation, represent an attempt at a global solution to a global problem. Likewise with investment-arbitration, the framework is in need of reform both at a macro level and specifically at the ICSID level. With the continuing influx of ICSID claims against Argentina, the controversy created by Phillip Morris and countries like Australia removing ISDS clauses in all future BITs, it is an interesting and dynamic time in investor-State arbitration. Perhaps these events will inspire governments and investors alike around the world to examine their own investment policies more critically, especially in the context of social and economic crisis. As the world is faced with new environmental, political and economic challenges, reform to this area would allow the investor-State arbitration process to become more sustainable, further in step with global discourse and better equipped to deal with future challenges.