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The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues

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I. INTRODUCTION/SUMMARY

One of the consequences on an international level of the measures adopted by the Government of Argentina in connection with the economic crisis suffered by that country in late 2001 and early 2002 has been a welter of international arbitral claims filed by foreign investors pursuant to the dispute resolution clauses of Bilateral Investment Treaties ("BITs") to which Argentina is a party.

There are currently over 2000 BITs in force worldwide.[1] These are relatively new instruments in international law, as the vast majority of them were concluded as recently as the 1990s.[2] These treaties establish various substantive and procedural protections for foreign investors, such as bars against expropriation without adequate compensation and guarantees of fair and equitable treatment and non-discrimination.

The BITs also typically include dispute resolution clauses that enable individual investors to file claims directly against foreign states in international arbitral fora. The BIT dispute resolution clauses usually grant to the investor the option of either filing claims in the local courts of the host State, or of initiating an international arbitration. The latter can be an *ad hoc* arbitration

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1. Third World Network, *WTO Symposium Debates Investment Issue* (June 17, 2003), *available at* http://www.twnside.org.sg/title/twninfo29.htm (last visited Jan. 12, 2005).

2. U. NATIONS CONF. ON TRADE AND DEV., TRENDS IN INTERNATIONAL INVESTMENT AGREEMENTS: AN OVERVIEW, at 36-37, U.N. Sales No. E. 99-1-112463-8 (1999). *See also Bilateral Investment Treaties*, *at* http://www.worldbank.org/icsid/treaties/treaties.htm (last visited Feb. 13, 2005).

or an arbitration before the International Centre for the Settlement of Investment Disputes (ICSID), a World Bank-affiliated arbitration institution established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter "Washington Convention").[3] Over 140 countries are currently parties to the Washington Convention.[4]

The right that BITs confer on individual investors to seek legal recourse directly against States is a novel feature, as it obviates the need for investors to follow the traditional procedure in international law of obtaining redress against a foreign State by seeking diplomatic protection and espousal of its claim by its state of nationality against the State hosting the investment. An ICSID Tribunal stressed in a recent case:

> [T]he greatest innovation of ICSID and other systems directed at the protection of foreign investments is precisely that the rights of the investors are not any longer subject to the political and other considerations by their governments, as was the case under the old system of diplomatic protection, often resulting in an interference with those rights. Investors may today claim independently from the view of their governments.[5]

Almost all of the arbitral claims filed against Argentina have been brought before ICSID. There are thirty-five ICSID cases pending against Argentina as of this writing.[6] Most of these claims are based on the measures adopted by the Argentine Government in response to the economic crisis of late 2001 and early 2002 (hereafter, "the emergency measures"). This article focuses mainly on the claims related to the emergency measures.

In their multi-million dollar arbitral claims, the claimants allege that Argentina violated various substantive protections afforded to investors under the BITs. The principal BIT provisions invoked by the claimants are those that require the Parties to the treaty to do the following: (1) provide compensation for

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3. Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Washington Convention"), done at Washington on Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

4. *See List of Contracting States and other Signatories of the Convention, at* http://www.worldbank.org/icsid/constate/c-states-en.htm (last visited Jan. 12, 2005).

5. Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/03, ¶ 37 (Decision on Jurisdiction (Ancillary Claim) of Aug. 2, 2004).

6. *List of Pending Cases, at* http://www.worldbank.org/icsid/cases/pending.htm (last visited Feb. 28, 2005).

expropriatory acts; (2) guarantee fair and equitable treatment for foreign investors; and (3) guarantee non-discrimination and treatment no worse than that afforded to nationals of the host State and to third party nationals. These three BIT provisions are explored in greater detail later in this Article.[7]

The claimants in the thirty-five pending ICSID cases against Argentina include foreign companies that invested in various sectors of the Argentine economy. Many of the cases were brought by companies that invested in the Argentine public utility companies privatized in the 1990s. These foreign investors alleged that the emergency measures adversely affected their investments in violation of the BITs in force between Argentina and the State of which the investor is a national. Argentina has at least 50 BITs currently in force.[8]

Of the eighty-five claims pending as of this writing before ICSID, over forty-one percent are against Argentina, by far the greatest number of claims any single country has ever faced before ICSID.[9] Moreover, this is the first time during the almost four decades the Washington Convention has been in force that there has been a raft of claims by separate claimants arising out of a single operative nucleus of facts – in this case, the emergency measures (discussed below).

Aside from their unprecedented nature, the ICSID arbitral claims against Argentina (hereinafter also, "the Argentina claims") have raised interesting legal and political issues. This Article examines the political and economic background of these claims, particularly those involving the privatized public utilities and then describes some of the key legal issues. The focus is principally, although not exclusively, on the jurisdictional aspects of the Argentina claims, since, to date, there have been no rulings on the merits, whereas a sufficient number of jurisdictional decisions have been issued enabling some patterns to be identified and conclusions to be drawn.

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7. Other BIT provisions invoked in the Argentina cases, but not explored herein, include the guarantee of *full protection and security* and clauses regarding *repatriation of capital*.

8. AGENCIA DE DESARROLLO DE INVERSIONES, FOREIGN INVESTMENT: A LATIN AMERICAN LEGAL FRAMEWORK COMPARISON, *available at* http://www.inversiones.gov.ar/documentos/legislation_ied_eng.pdf (last visited Jan. 12, 2005).

9. *See List of Pending Cases*, *available at* http://www.worldbank.org/icsid/cases/pending.htm (last visited Feb. 28, 2005) (reflecting that 35 out of the 85 (41.2%) pending cases are against Argentina).

II. Political/Economic Background and Context

Since the Argentina claims are based on government measures ostensibly adopted to alleviate an economic crisis, notwithstanding the adverse impact of such measures on foreign investors, a brief review of the political and economic background is useful.

A. The Argentine State Reform Program of the Late 1980s and the 1990s

Argentina faced a deep institutional crisis in the 1980s. Its numerous problems included a bloated and inefficient State apparatus and an economy in shambles as a result of a crippling hyperinflation and a severe currency exchange crisis. These problems prompted a far-reaching State reform program, undertaken by the administration of President Carlos Menem, who assumed power in 1989.

One of the main measures adopted to control these fiscal problems – the reversal of which measures later became a key aspect of the problems that gave rise to the Argentina claims – was the adoption of legislation known as the "Convertibility Law."[10] This law created a currency board-like monetary system that pegged local currency (initially the austral, then the peso) to the U.S. dollar on a one-to-one basis. The monetary authority was required to back the local currency in circulation with foreign currency reserves (thus making each peso fully "convertible" to one U.S. dollar).[11] This Convertibility Law helped to control the inflation problem, in part because it prevented the State from financing deficits by printing money.

Another key measure adopted in connection with the State reform program – and also one that has substantial relevance in connection with the recent ICSID claims – was the restructuring of the public sector and the privatization of a massive number of State entities. These companies included State-owned public utility enterprises privatized through long-term concessions and licenses.

The State undertook a comprehensive program to attract for-

10. Law No. 23.928, March 27, 1991, [LXI-B] A.D.L.A. 1752, *amended by* Law No. 25.445, June 21, 2001, [LXI-D] A.D.L.A. 4043.

11. This requirement was relaxed somewhat at different times, which was one of the reasons that the system was not an orthodox currency board, but rather a currency board-like system.

eign investors to the public utilities sector. This was based on its perception that there existed a dearth of operators in the local market with sufficient experience and financial solvency to operate the public utilities with the requisite degree of skill and level of infrastructural investment. The program included the repeal of restrictions on foreign investment and the establishment of various legal guarantees to investors. These investor-friendly measures were advertised far and wide with the assistance of leading U.S. investment banking firms. Additionally, senior-level Argentine officials conducted road shows in which government officials promoted a "new" Argentina that they pledged would provide a stable and secure environment for foreign investors interested in making safe long-term investments. Simultaneously, and further to the effort to provide protections and assurances to foreign investors, the Argentine Government undertook an ambitious program of BIT negotiations, leading to the signature and entry into force of over fifty such treaties over the course of the 1990s.

The government fully reformed the regulatory frameworks of the relevant sectors and prepared concession contracts with provisions designed to provide maximum protection to foreign investors in order to attract them to the newly privatized public utility companies. These provisions included mechanisms intended to shield investors against potential variations in tariff rates, inflation and currency exchange rates. One provision, common in many concession contracts for water, gas, and power distribution services, was a measure enabling concessionaires to calculate their tariffs (i.e., utility rates) in U.S. dollars ("USD"), and then for billing purposes to convert this dollar figure to pesos at the prevailing exchange rate (set at that time by law at a ratio of one peso to one USD). Other protections included provisions enabling adjustments to the tariffs based on variations in the concessionaire's costs, indexation clauses tied to U.S. producer and consumer price indices (designed to protect against inflation), and other provisions enabling the State regulatory entities to adjust tariff rates to ensure that tariffs were "fair and reasonable" and that they provided a "reasonable rate of return." Such terms were typically embodied in the new laws establishing totally revamped regulatory frameworks and/or in the relevant contracts.[12]

Although one of the principal objectives of this tariff system was to attract foreign investors by guaranteeing them a reasona-

12. *See, e.g.*, Law. No. 24.065, Jan. 3, 1992, [LII-A] A.D.L.A. 83 (establishing a new regulatory framework law for the electrical sector).

ble return on their investment, the tariff schedules – from the very beginning and at all times thereafter – were within the control of the State through the regulatory entities. The concessionaires enjoyed no discretion to determine the rates they could charge. Rather, they had to abide by tariff schedules set by the State, including an initial tariff schedule spanning the duration of a specified number of years (in some instances ten years) that had been established prior to the public bidding contests through which the utilities were privatized. Thus, consumers were charged at rates set by the Government, and the investor was in turn protected by the guarantees of the regulatory reforms and concession contracts.

Ultimately, the process of privatization of the public utilities, especially in the power sector, was successful from the point of view of the State, as it resulted in most cases, in lucrative offers for the concession rights and the injection into the market of internationally renowned operators. These operators were later successful in modernizing the utilities, and in many instances, eventually provided better services at lower tariffs than did the former State-owned entities. By the end of the 1990s, the State privatization program had led to many billions of U.S. dollars of investment in Argentina[13] and attracted sophisticated multinational companies that had been drawn to Argentina in great part by the new legal framework and the promises and guarantees provided by the Argentine Government.

B. Argentina's Emergency Measures in Response to the Economic Crisis of Late 2001/Early 2002

Despite the outward appearance of a stable and growing economy in the 1990s, several phenomena occurred throughout the decade that precipitated a severe economic crisis in Argentina by the beginning of the following decade. The nature and origins of such phenomena transcend the scope of this Article, but they include, *inter alia*, an excessive level of indebtedness by the State, infelicitously timed tax reforms, and other government measures that were then exacerbated by international monetary crises that created a ripple effect on Argentina. The crisis peaked in December 2001, prompting on January 6, 2002, the enactment of the

13. *See* Permanent Secretariat of SELA, Latin American Council, *Foreign Direct Investment (FDI) in Latin America and the Caribbean*, *available at* http://www.sela.org/public_html/AA2K2/eng/consejo/spclxxviiidi3/spclxxviiidi3-2.htm#marc2 (last visited Jan. 12, 2005).

"Public Emergency Law of 2002."[14] This law terminated the one-to-one "convertibility system" and, together with follow-up regulations and decrees, allowed the peso to float on the currency market, leading to a substantial devaluation of the peso against the USD. The peso devalued to a level of four pesos to one USD before settling at a ratio of three pesos to one USD, where it approximately remains today.

At the same time, however, the Public Emergency Law contained provisions targeting the public utility sector. Specifically, the law mandated that the privatized utility companies continue using a currency conversion formula from dollars to pesos — for billing purposes — of one dollar to one peso, a requirement that substantially altered the economic and financial basis of the utilities' business due to the sharp devaluation of the peso. The net effect of this provision of the law is best illustrated with pre- and post-emergency law examples of an electrical bill for a hypothetical residential consumer. Let us posit a consumer's bill calculated by the electric distribution company, *prior* to enactment of the Public Emergency Law and pursuant to the tariff schedule set by the State on the basis of the distributors' costs, at thirty USD. This figure was then converted to pesos for billing purposes. Since by law the exchange rate was one to one, the bill was charged out to the consumer at thirty pesos, which upon receipt by the utility company from the consumer were then fully convertible by the utility company to thirty USD.

The same bill, following enactment of the Public Emergency Law, was calculated at thirty USD and still billed out at thirty pesos (because the Public Emergency Law mandated that a one-to-one exchange rate be used for billing). However, because the convertibility system had been scrapped and the peso consequently had floated and devalued three-fold, the value of those thirty pesos received from the consumer was only a third of what it had been before because now the utility company could convert the thirty pesos received from the consumer only to approximately ten USD. This phenomenon is known as the "pesification" of the tariffs.

At the same time that it "pesified" the tariffs in this manner, the Public Emergency Law also froze the tariff rates at their then-existing levels, thereby preventing any periodic or other adjustments contemplated by the regulatory framework laws and by the

14. Law No. 25.561, Jan. 6, 2002, [LXII-A] A.D.L.A. 44.

relevant concession contracts. The public utility companies thus had their rates frozen at January 2002 levels, even though many of them were due for a periodic revision or other adjustment under the pertinent concession contract.[15] Further compounding the constraints faced by these companies, the Public Emergency Law also ordered these companies to continue fully to abide by their obligations under their respective concession contracts, and authorized the executive branch to renegotiate the public utility concession contracts by the end of 2002.[16]

The net consequence for the utility companies was a roughly two-thirds reduction in income due both to the "pesification" of the tariffs and to the inability to obtain any upward adjustment on them (as a result of the "freezing" of the rates). These constraints have crippled such companies in part because tariffs constitute the only source of revenue for many public utilities (such as electrical distribution companies). In addition, the utility companies are still required to pay for many of their costs (imported equipment, etc.) in hard currency. Moreover, practically all of the debt incurred by these companies to finance their operations and investments is denominated in foreign currency. Lacking the income to service their debt, many companies have been forced to default.

These utility companies have been placed in a position that will be difficult, if not impossible, to sustain in the medium- to long-term range because the Public Emergency Law has forced them to continue providing their services in accordance with their obligations under the concession contracts. Electrical distribution companies, for example, faced with dramatically reduced cash flow, are forced to focus solely on the quality of their product and services in the short term. As a result, they have suspended costly investments on infrastructure that are critical to the optimal functioning of their networks over the long term. Despite the fact that three years have elapsed since the enactment of the Public Emergency Law, the government has failed to renegotiate the concession contracts as required by such Law.[17] This series of events has placed these companies in dire financial straits, while at the same time compromising the integrity and quality of the public utility services in Argentina.

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15. Most contracts established that the initial tariff period would have a fixed duration (e.g., 10 years), but would be subject to revision thereafter.

16. Law No. 25.561, Jan. 6, 2002, [LXII-A] A.D.L.A. 44.

17. *Id.*

Given this situation and the perceived lack of prospects for a satisfactory resolution to their predicament in the near future, many of these companies have resorted to international arbitration in an effort to recover at least part of their damages. The issue of whether Argentina could have achieved its policy goals without targeting the public utilities in its Public Emergency Law is relevant to the merits of the ICSID proceedings. This Article does not seek to address that issue, which is mainly an economic and political one, but rather seeks to identify the more noteworthy legal issues that have arisen in the arbitral proceedings instituted before ICSID.

The preceding detailed explanation of the background of the Argentina claims is intended to facilitate an understanding of the legal issues presented in the ICSID arbitrations, since many of these issues relate directly to the nature of the investments made, the context in which they were made, the guarantees the Argentine Government provided at the time of the investment, the expectations of the investors coming into the country, the nature of the economic crisis itself, and the justification for the measures adopted by the Government in response thereto.

III. Principal Legal Issues in the Argentina ICSID Cases

The ICSID cases against Argentina present numerous legal issues of interest, both in their jurisdictional and merits aspects. This Section provides a brief description and analysis of such issues, with a principal focus on the jurisdictional issues.

A. Jurisdictional Issues

ICSID is a forum of limited jurisdiction. The jurisdictional requirements are set forth in Article 25 of the Washington Convention.[18] ICSID's jurisdiction extends only to a "legal dispute

18. *See* Washington Convention, *supra* note 3. Article 25 thereof provides:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) Any natural person who had the nationality of a

arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to [ICSID]."[19] The term "national of another Contracting State" is defined, in the case of juridical (as opposed to natural) persons, as a person who, on the date of the parties' consent to arbitration, had the nationality of a Contracting State other than the State party to the dispute.[20]

When the arbitral claims are brought pursuant to a BIT, the claimants must satisfy the jurisdictional requirements imposed by both the BIT and the Washington Convention. Thus, to establish that a particular BIT applies to a given dispute, the claimant must prove that he or she qualifies as an "investor" under the BIT, that he or she satisfies the nationality requirements of such treaty, and that the dispute relates to an "investment" as defined in the BIT. In some instances, there are also issues of temporal application (e.g., whether the treaty applies retroactively).

In an ICSID arbitration, the Tribunal must suspend the mer-

Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) Any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Id. at art. 25.

19. *Id.* at art. 25(1).

20. *Id.* at art. 25(2).

its phase of a case if jurisdictional objections are raised.[21] The Tribunal can only resume the merits phase if it decides that jurisdiction properly exists, or if it determines that it must also hear the merits of the dispute to decide the issue of jurisdiction.[22] A joinder of the merits with jurisdiction could be decreed, for example, where one or more jurisdictional issues are inextricably linked to merits issues, such that the Tribunal concludes that it cannot properly evaluate the former without understanding the latter.

In each of its ICSID cases to date, Argentina has asserted jurisdictional objections, as well as other objections that are not "jurisdictional" in the formal sense of the term, but rather could be characterized as "admissibility" or political issues. The more salient aspects of these objections and issues are addressed in the following subsections.

As of late 2004, there have been six jurisdictional rulings in ICSID cases against Argentina: (1) *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8 (Decision on Objections to Jurisdiction of July 17, 2003); (2) *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 (Decision on Jurisdiction of Dec. 8, 2003); (3) *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Decision on Jurisdiction (Main Claim) of Jan. 14, 2004); (4) *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Decision on Jurisdiction (Ancillary Claim) of Aug. 2, 2004); and (5) *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8 (Decision on Jurisdiction of Aug. 3, 2004); and (6) *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1 (Decision on Jurisdiction of Apr. 30, 2004).[23] All of these jurisdictional decisions have been adverse to Argentina, thus allowing the merits phase of each case to proceed.

1. Applicable Law (Jurisdiction)

Article 42(1) of the Washington Convention provides:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the

21. *Id.* at art. 41(2). *See also* ICSID RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS R. 41(3) (2003), *available at* http://www.worldbank.org/icsid/basicdoc/partF-chap05.htm#r41 (last visited Jan. 12, 2005).

22. Washington Convention, *supra* note 3, at art. 41(2).

23. The texts of all of these jurisdictional decisions can be found at: http://ita.law.uvic.ca/chronological_list.htm (last visited Jan. 18, 2005). Additional details on each of these cases, including their procedural status, can be obtained at the ICSID website at: http://www.worldbank.org/icsid/cases/pending.htm (last visited Feb. 28, 2005).

> absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[24]

Pointing to this provision and to BIT provisions that also make reference to domestic law, Argentina has argued that Argentine law should be the law applicable to the proceedings. The *Siemens* Tribunal summarily rejected this argument on the basis that "Argentina in its allegations has not distinguished between the law applicable to the merits of the dispute and the law applicable to determine the Tribunal's jurisdiction. This being an ICSID Tribunal, its jurisdiction is governed by Article 25 of the ICSID Convention[25] and the terms of the instrument expressing the parties' consent to ICSID arbitration."[26]

Accordingly, the *Siemens* Tribunal ruled that Argentine law was irrelevant to a determination on its jurisdiction. Other Tribunals have similarly concluded that the relevant ICSID Convention and BIT provisions are unaffected by Argentine law, and that the issue of which law is applicable to jurisdiction is governed by Article 25 of the ICSID Convention[27] (and not by Article 42 of such treaty,[28] which is applicable only to the merits of the disputes).[29]

2. Sovereign Prerogative/General Government Measures

During the jurisdictional phase of the proceedings, Argentina has been raising, as a threshold matter, an argument that the Tribunals have construed as relevant mainly to the merits. The argument is that the measures complained of by the claimants, which were adopted by the Argentine State in the context of a serious economic crisis, were of a general nature that addressed

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24. Washington Convention, *supra* note 3, at art. 42(1).

25. *See supra* note 18 and accompanying text.

26. *See* Siemens A.G. v. Arg. Rep., ICSID Case No. ARB/02/8, ¶ 31 (Decision on Jurisdiction of Aug. 3, 2004). The "instrument expressing the terms of the parties' consent" in the *Siemens* case was the relevant BIT.

27. *See supra* note 18 and accompanying text.

28. For article 42(1), *see* text accompanying note 24. Article 42(2)-(3) provides:

> (2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.
>
> (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

Washington Convention, *supra* note 3, at art. 42(2)-(3).

29. *See, e.g.*, Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶ 38 (Decision on Jurisdiction (Main Claim) of Jan. 14, 2004).

economic problems and introduced changes to the currency exchange system. Such policy decisions, Argentina contends, should be viewed as inherently sovereign determinations immune from legal challenges by any individual person or entity. It claims that a State should have a right to revise its economic and currency exchange policy, without worrying about foreign investors (or anyone else) asserting legal claims against it for attempting to solve problems through the adoption of new policies. Further, Argentina argues that investors cannot use BITs to seek redress for adverse consequences they may suffer as a result of the particular economic policies of the State hosting the investment.

The *CMS* Tribunal was the first to pronounce itself on these issues by stating in its jurisdictional decision of July 17, 2003:

> [T]he Tribunal concludes . . . that it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts.[30]

In a similar context, albeit related to tax policies and not to economic emergency measures, the *Enron* Tribunal (Main Claim) opined:

> 29. The Tribunal will not sit in judgment over the general tax policies pursued by the Argentine Republic or the Provinces. . . . This is a matter exclusively appurtenant to the sovereignty of the Argentine Republic.
> 30. The Tribunal, however, has the duty to establish in

30. CMS Gas Transmission Co. v. Arg. Rep., ICSID Case No. ARB/01/8, ¶ 33 (Decision on Objections to Jurisdiction of July 17, 2003). Subsequent cases have adopted a similar approach. *See* Enron Corp. v. Arg. Rep.:

> Although most of these aspects belong to the merits of the dispute, the Tribunal is nonetheless aware of this emergency and takes due note of it. At this stage, it is only appropriate to conclude . . . that the Tribunal is not here to examine measures of general economic policy or to judge whether they are right or wrong. Its duty is only to examine in due course 'whether specific measures . . . have been adopted in violation of legally binding commitments made to the investor.'

Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶ 12 (Decision on Jurisdiction (Ancillary Claim) of Aug. 2, 2004) (quoting CMS Gas Transmission Co., ¶ 33).

> connection with the merits of the case whether such assessments violate the rights accorded to foreign investors under treaties, legislation, contracts and other commitments.[31]

Accordingly, the *Enron* Tribunal (Main Claim) rejected Argentina's invitation to dismiss the case as a threshold matter based on sovereign prerogative. The Tribunal concluded that it needed to consider that issue in the context of the merits:

> The line separating general tax measures from measures that affect the investor's rights is conceptually clear, but in practice what falls within or without the Tribunal's competence can only be established in the light of the evidence that the parties will produce in connection with the merits of the case.[32]

3. Exclusive Jurisdiction and Waiver of other Fora (Contract vs. Treaty Claims)

One of the principal issues in cases that involve claims by foreign companies that invested in Argentine companies to which concessions had been granted by the State (e.g., to provide public utility services), or with which the State has other types of contracts, has been whether (1) the dispute should be construed to involve only a violation of the relevant contract (which, in those instances where the contract contains an exclusive jurisdiction clause pursuant to which the parties waive recourse to all other fora, would arguably render such dispute subject to resolution only in local Argentine courts), or whether (2) the dispute involves damages suffered by the foreign investor itself pursuant to the relevant BIT (not the concession contract), thereby engendering a cause of action under the BIT and rendering the dispute cognizable by an international arbitral tribunal.

The Tribunals in the Argentina cases have consistently ruled that foreign investors' rights under the BITs are independent and separate from those enjoyed under any contract with the State, and that the BITs allow causes of action that are unrelated to those that may arise under any contract. In other words, certain Government acts can violate an investor's BIT rights whether or not such acts violate an existing contract, and if so, the affected

31. Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶¶ 29-30 (Decision on Jurisdiction (Main Claim) of Jan. 14, 2004).

32. *Id.* ¶ 31.

investor can assert a claim under the BIT and is not bound by any exclusive jurisdiction clause that may exist in the relevant contract.[33] As noted in the *Enron* Tribunal (ancillary claim) decision:

> The distinction between these different types of claims [i.e., contract and treaty claims] has relied in part on the test of the triple identity. To the extent that a dispute might involve the same parties, object and cause of action it might be considered as a dispute where it is virtually impossible to separate the contract issues from the treaty issues and drawing from that distinction any jurisdictional conclusions . . . However, 'a treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard.'[34]

Moreover, the foreign investor in the Argentina claims typically is not itself a party to the relevant contract; rather, the foreign investor usually owns stock in a local company created by the Argentine Government for the purpose of conferring upon it the relevant concession or license. Thus, this lack of party identity renders the BIT claims distinguishable from the contract claims, and the investor therefore cannot be held bound to any waiver of jurisdiction clause that may be contained in the contract.[35] A few of the Tribunals also have noted that under Article 26 of the Washington Convention, consent to ICSID jurisdiction excludes

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33. *See* Azurix Corp. v. Arg. Rep.:

> The investment dispute which the Claimant has put before this Tribunal invokes obligations owed by the Respondent [State] to Claimant under the BIT and it is based on a different cause of action from a claim under the Contract Documents. Even if the dispute as presented by the Claimant may involve the interpretation or analysis of facts related to performance under the Concession Agreement, the Tribunal considers that, to the extent that such issues are relevant to a breach of the obligations of the Respondent under the BIT, they cannot *per se* transform the dispute under the BIT into a contractual dispute.

Azurix Corp. v. Arg. Rep., ICSID Case No. ARB/01/12, ¶ 76 (Decision on Jurisdiction of Dec. 8, 2003).

34. Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶¶ 49-50 (Decision on Jurisdiction (Ancillary Claim) of Aug. 2, 2004) (quoting Compañía de Aguas del Aconquija, S.A. v. Arg. Rep.: ICSID Case No. ARB/97/3, ¶ 113 (Decision on Annulment of July 3, 2002)). *See also* Siemens A.G. v. Arg. Rep., ICSID Case No. ARB/02/8, ¶ 180 (Decision on Jurisdiction of Aug. 3, 2004).

35. *See* Azurix Corp. v. Arg. Rep.: "In the dispute before the present Tribunal . . . the State is not a party to any of the Contract Documents, and there was no waiver commitment made by the Claimant in favor of Argentina." Azurix Corp. v. Arg. Rep., ICSID Case No. ARB/01/12, ¶ 85 (Decision on Jurisdiction of Dec. 8, 2003).

any other remedy.[36] Thus, "the offer made by the Argentine Republic to covered investors under the ARGENTINA - U.S. [BIT] cannot be diminished by the submission to Argentina's domestic courts, to which the Concession Agreement remits."[37]

A long string of ICSID Tribunals have confronted the Respondent State's arguments that the claimant should be barred from asserting claims under a BIT because of allegedly applicable forum selection clauses in a contract. No Tribunal has upheld this argument, even when a concurrent violation of the BIT and the contract could be deemed to have existed. As stated by the *Enron* Tribunal (Main Claim):

> The Tribunal is mindful of the various ICSID decisions that have recently discussed this very issue, particularly those in *Lanco, Compañía Aguas del Aconquija* (Award and Annulment), *Wena, CMS,* and *Salini.*[38] In all of these cases the Tribunals have upheld jurisdiction under the Convention to address violations of contracts which, at the same time, constitute a breach of the pertinent bilateral investment treaty.[39]

4. *Ius Standi* and Related Issues

In those cases in which the claimant's investment consisted of shares of stock in an Argentine company, Argentina has advanced arguments revolving around the nature of the investment and the status of the claimant. Argentina has raised these points in the jurisdictional phase, but has styled them as points of admissibility rather than jurisdiction.

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36. *See* CMS Gas Transmission Co. v. Arg. Rep., ICSID Case No. ARB/01/8, ¶ 72 (Decision on Objections to Jurisdiction of July 17, 2003).

37. *Id.* ¶ 73 (quoting Lanco Int'l, Inc. v. Arg. Rep., ICSID Case No. ARB/97/6, ¶ 40 (Preliminary Decision of the ICSID Tribunal of Dec. 8, 1998).

38. Lanco Int'l, Inc. v. Arg. Rep., ICSID Case No. ARB/97/6 (Preliminary Decision of the ICSID Tribunal of Dec. 8, 1998); Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Arg. Rep., ICSID Case No. ARB/97/3 (Award of Nov. 21, 2000); Wena Hotels Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/98/4 (Award of Dec. 8, 2000); CMS Gas Transmission Co. v. Arg. Rep., ICSID Case No. ARB/01/8, ¶ 33 (Decision on Objections to Jurisdiction of July 17, 2003); Salini Construttori S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4 (Decision on Jurisdiction of July 23, 2001).

39. Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶ 91 (Decision on Jurisdiction (Main Claim) of Jan. 14, 2004). *See also* LG&E Energy Corp. v. Arg. Rep., ICSID Case No. ARB/02/1, ¶ 60-66 (Decision Pending); CMS Gas Transmission Co. v. Arg. Rep., ICSID Case No. ARB/01/8, ¶¶ 68, 76 (Decision on Objections to Jurisdiction of July 17, 2003); Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Arg. Rep., ICSID Case No. ARB/97/3, ¶ 53 (Award of Nov. 21, 2000).

One of the principal arguments in this regard is that only the company that suffered the damage, and not its shareholders, can seek redress for such damage. In other words, shareholders cannot make separate claims from the corporation that suffered the damage, not even in proportion to their interest, because they would have only an indirect claim and therefore lack standing to file ICSID claims. Only the Argentine company itself - and not its shareholders individually – suffered damages, and accordingly, Argentina reasons, only the company is entitled to seek damages. Argentina does not contend that shares of corporate stock are necessarily outside the scope of the BITs; rather, its position is that to assert such a claim, such stock must suffer direct consequences of the State action deemed to have violated the BIT. Under this conception, a direct expropriation of the shares would be actionable by the foreign shareholders under the applicable BITs, but such shareholders could not advance claims for general damages suffered by the company.[40]

In support of this argument, Argentina has contended, *inter alia*, the following: (1) Argentine law establishes that shareholders and corporations have a distinct legal personality and does not allow shareholders to file claims for indirect damages; thus, only the company that suffered the damage can bring claims; (2) international law also recognizes this distinct personality and precludes shareholder claims for indirect damages; (3) allowing these indirect claims could subject respondent States to endless claims by different shareholders suing independently of the corporation that suffered the damage, thereby creating a multiplicity of both claims and awards for the same facts and rights; and (4) allowing indirect claims—particularly where the investor does not have control of the relevant company—would enable litigation by holders of an attenuated and remote shareholder interest (for example, a company that owns shares of another company that has shares in an Argentine licensee or concessionaire).[41] In addition, Argentina argues that minority shareholders should not be allowed to assert claims because this approach would expose States to multiple claims by different minority shareholders suing in their own right under different treaties.[42]

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40. *See* Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶ 35 (Decision on Jurisdiction (Main Claim) of Jan. 14, 2004).

41. *See* Azurix Corp. v. Arg. Rep., ICSID Case No. ARB/01/12, ¶¶ 42-43, 45 (Decision on Jurisdiction of Dec. 8, 2003).

42. *See* CMS Gas Transmission Co. v. Arg. Rep., ICSID Case No. ARB/01/8, ¶ 8 (Decision on Objections to Jurisdiction of July 17, 2003).

The Claimants have countered that the BIT specifically and expressly allows investors to bring claims in relation to their investments, and nothing in international law prevents them from doing so. Thus, the claimants contend that their claims are independent of any claim that the companies (for example, the licensees or concessionaires in the public utilities) in which the claimants are shareholders might have as the holders of the licenses or concession rights. Moreover, they contend that whether the claimant is merely a minority shareholder or otherwise lacks control over the company is irrelevant.[43]

This argument has resulted in debate between the parties and by the Tribunals on two cases decided by the International Court of Justice ("ICJ"), *Barcelona Traction*[44] and *ELSI*,[45] which addressed the extent of the right of a State to grant diplomatic protection to nationals of that State who are shareholders in foreign companies. The Tribunals in the Argentina cases, however, found that debate misplaced and irrelevant.[46] The *Siemens* tribunal noted furthermore that ICSID case law has consistently affirmed a shareholder's right to bring a claim before arbitral tribunals.[47] ICJ jurisprudence has also evolved in this direction, prompting the *CMS* tribunal to note that, "the *Elettronica Sicula* decision evidences that the International Court of Justice itself accepted, some years later, the protection of shareholders of a corporation by the State of their nationality in spite of the fact that the affected corporation had a corporate personality under the defendant State's legislation."[48]

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43. *Id.* ¶ 62.

44. Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5).

45. Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J 15 (July 20).

46. *See* Siemens A.G. v. Arg. Rep.: "The Tribunal considers it unnecessary to discuss the relevance of these cases to the current proceedings. The issues before this Tribunal concern not diplomatic protection under customary international law but the rights of investors, including shareholders, as determined by the [BIT]." Siemens A.G. v. Arg. Rep., ICSID Case No. ARB/02/8, ¶ 141 (Decision on Jurisdiction of Aug. 3, 2004). *See also* Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶ 38 (Decision on Jurisdiction (Main Claim) of Jan. 14, 2004) (concluding that *Barcelona Traction* is "not controlling in investment claims, as it deals with the separate question of diplomatic protection in a particular setting."); Azurix Corp. v. Arg. Rep.: "The Tribunal does not find it necessary to resolve the controversy regarding the extent of the right of a State under public international law to protect its nationals who are shareholders in foreign companies." Azurix Corp. v. Arg. Rep., ICSID Case No. ARB/01/12, ¶ 72 (Decision on Jurisdiction of Dec. 8, 2003).

47. *See* Siemens A.G. v. Arg. Rep., ICSID Case No. ARB/02/8, ¶ 142 (Decision on Jurisdiction of Aug. 3, 2004).

48. *See* CMS Gas Transmission Co. v. Arg. Rep., ICSID Case No. ARB/01/8, ¶ 44

Argentina also has pointed to the NAFTA decision in *Mondev v. USA*,[49] in which the Tribunal concluded that shareholders cannot assert claims under NAFTA for damages suffered by the company in which they own shares. However, as the *Enron* (Ancillary Claim) decision pointed out, *Mondev* does not support Argentina's argument because in *Mondev* the Claimant was nevertheless deemed to have standing, to show "that it ha[d] suffered loss or damage . . . even if loss or damage was also suffered by the enterprise [in which *Mondev* had invested]."[50]

In the jurisdictional decisions rendered as of late 2004 in the Argentina cases, the Tribunals have rejected Argentina's arguments on the indirect or minority ownership issues. Their rejections primarily were based on the definition of "investments" in the BITs, which specifically includes shares of stock to protect foreign investors in local companies, and on the fact that there is no limitation that bars application of the BIT to this type of claimant, even if the claimant's damages are only indirect and even if the claimant is merely a minority shareholder:

> Claimants have *ius standi* to claim in their own right as they are protected investors under the Treaty [i.e., the BIT]. The Claimants' right to bring an action on their own has been firmly established in the Treaty and there are no reasons to hold otherwise in connection with this dispute. Neither is this situation contrary to international law or to ICSID practice and decisions.[51]

As the *Siemens* Tribunal noted, "The [BIT] does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments."[52] The Tribunal found further support for this proposition in the broad definition of the term "investment" in the BIT and in the lack of any explicit distinction between direct or indirect investment.[53]

(Decision on Objections to Jurisdiction of July 17, 2003) (citing ELETTRONICA SICULA S.P.A. (ELSI) (U.S. v. ITALY), 1989 I.C.J 15).

49. Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2 (Award Rendered Oct. 11, 2002).

50. *Id.* ¶ 82.

51. Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶ 27 (Decision on Jurisdiction (Ancillary Claim) of Aug. 2, 2004).

52. Siemens A.G. v. Arg. Rep., ICSID Case No. ARB/02/8, ¶ 137 (Decision on Jurisdiction of Aug. 3, 2004).

53. *Id.*

Along similar lines, the *Enron* (Ancillary Claim) Tribunal noted:

> Foreign investors, such as the Claimants, were specifically invited to participate in the privatization process, various companies were set up in Argentina to this effect and investments were channeled into TGS [i.e., the Argentine company whose shares the Claimants purchased] through this network of corporate arrangements. It is simply not tenable to try now to dissociate TGS from those other companies and the investors and argue that the Claimants do not have *ius standi*. This is one of the essential features of the [BIT] and the protection it extends to foreign investors.[54]

The mechanism established to transfer the rights to operate the utilities to private sector companies contemplated the mandatory creation by the State of a local company that would serve as a concessionaire or licensee, and the sale of such company's shares in a public bidding process in which only locally incorporated holding companies could participate as a vehicle for foreign companies' investment. On this point, the *Enron* (Ancillary Claim) Tribunal stressed that the definition of "investment" under the U.S. - Argentina BIT "evidently includes the channeling of investments through locally incorporated companies, particularly when this is mandated by the very legal arrangements governing the privatization process in Argentina. Not only was it required that TGS be an Argentine company but also that the holding companies should be incorporated in Argentina."[55] Moreover, as the *LG&E* Tribunal noted, Argentina's own investment law (Law No. 21.382) defines "foreign investment" to include "the acquisition of shares of capital in an existing local company by foreign investors."[56] The Tribunal concluded that the protection of the BIT extends to minority shareholders and there is nothing in international law precluding claims under a BIT by such shareholders.[57]

The *Enron* Tribunal addressed Argentina's argument that if

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54. Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶ 28 (Decision on Jurisdiction (Ancillary Claim) of Aug. 2, 2004).

55. *Id.* ¶ 30.

56. LG&E v. Arg. Rep., ICSID Case No. ARB/02/1, ¶ 55 (Decision on Jurisdiction of Apr. 30, 2004).

57. *See, e.g.*, Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶ 29 (Decision on Jurisdiction (Ancillary Claim) of Aug. 2, 2004) ("[I]t is irrelevant whether the shares are majority or minority shares."); *see also* Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶ 38 (Decision on Jurisdiction (Main Claim) of Jan. 14, 2004) ("[T]he rights of minority and non-controlling shareholders to claim independently of

indirect investors are allowed to make a claim, an endless chain of claims could be triggered because claims could be asserted by anyone with shares in some company that directly or indirectly owns shares in another company that suffers damages as a result of actions by the State hosting the investment. In this regard, the *Enron* (Main Claim) Tribunal admitted that "there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company."[58] The Tribunal went on to identify that cutoff point as related to the extent of the host State's consent to arbitration: "If consent has been given in respect of an investor and an investment, it can reasonably be concluded that the claims brought by such investor are admissible under the treaty."[59] Otherwise, such claims must be deemed "inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting the investment."[60]

Finally, in connection with the issue of indirect investors and indirect damages, the Washington Convention's requirement that a claim must "arise directly out of an investment" has been deemed irrelevant to the analysis, insofar as such requirement does not relate to whether or not the investment is direct or indirect but rather to whether there is a direct connection between the dispute and the investment.[61]

B. Merits Issues

As noted earlier, no Tribunal in the Argentina cases has ruled on the merits as of late 2004. The first such ruling is expected at the earliest in early to mid-2005. A very brief description set forth

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a separate corporate entity for the measures that affect their investment . . . ha[ve] been upheld both under international law and the ICSID Convention.").

58. Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶ 52 (Decision on Jurisdiction (Main Claim) of Jan. 14, 2004).

59. *Id.*

60. *Id.* Similarly, in its Ancillary Claim decision, the Enron Tribunal stated,

> Argentina is rightly concerned about the fact that successive claims by minority shareholders that invest in companies that in turn invest in other companies, could end up with claims that are only remotely connected to the measures questioned. However, . . . there is a clear limit to this chain in so far as the consent to the arbitration clause is only related to specific investors.

Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶ 20 (Decision on Jurisdiction (Ancillary Claim) of Aug. 2, 2004).

61. *See* Siemens A.G. v. Arg. Rep., ICSID Case No. ARB/02/8, ¶¶ 149-50 (Decision on Jurisdiction of Aug. 3, 2004); *See also* Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, ¶¶ 59-60 (Decision on Jurisdiction of Jan. 14, 2004).

below highlights some of the key issues the Tribunals in these cases are likely to face in the merits phase of the proceedings.

1. Interpretation of BIT "umbrella clauses"

Many BITs have so-called "umbrella clauses" that obligate the Contracting States to comply with any specific agreement or contract they may have entered into (e.g., an investment contract) with a foreign investor. For example, Article 7(2) of the BIT between Argentina and Chile states as follows: "Each Contracting State shall comply with any commitment it may have undertaken in connection with the investments in its territory of nationals or companies of the other Contracting State."[62]

One of the central issues with these clauses is whether they can be construed to elevate to the status of a BIT violation any violation of a commitment by the host State with respect to the investment. For example, if the host State enters into an investment contract with the foreign investor, can the "umbrella clause" of the BIT be interpreted to mean that any failure by the host State to fulfill its commitments under such contract constitutes, *a fortiori*, a BIT violation? The scope and legal significance of this type of clause has been widely debated in recent ICSID jurisprudence, with disparate conclusions.[63] The issue also is likely to be addressed in the merits phase of many of the Argentina cases.

2. Expropriation

One central contention in the Argentina ICSID claims concerns alleged violations of expropriation clauses in the BITs.[64] In

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62. Tratado Entre la República de Chile y la República de Argentina Sobre Promoción y Protección Recíproca de Inversiones [Bilateral Investment Treaty between Argentina and Chile], Aug. 2, 1991, Arg. – Chile, art. 7(2) (entered into force Jan. 1, 1995), *available at* http://www.nycas.cl/appi.htm (last visited Dec. 17, 2004).

63. *Compare* SGS Société Générale de Surveillance S.A. v. Rep. of the Philippines, ICSID Case No. ARB/02/6 (Decision on Objections to Jurisdiction of Jan. 29, 2004) *with* SGS Société Générale de Surveillance S.A. v. Islamic Rep. of Pakistan, ICSID Case No. ARB/01/13 (Decision on Objections to Jurisdiction of Aug. 6, 2003).

64. An example of a BIT provision granting foreign investors protections against expropriation or nationalization without adequate compensation is that contained in Article IV of the BIT between Argentina and Finland, signed Nov. 5, 1993:

> (1) Neither Contracting Party shall take, directly or indirectly, any measure of nationalization or expropriation or any other measure having the same effect against investments in its territory belonging to investors of the other Contracting Party, unless the following conditions are complied with:
>
> (a) the measures are taken in the public interest and under due process of law; and

the claims relating to the Public Emergency Law, the Tribunals must address various questions: Was there an expropriation? If so, what kind of expropriation? Is the relevant conduct by Argentina subject to some exemption or excuse?

(b) the measures are not discriminatory; and

(c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation.

(2) Compensation for cases referred to in paragraph (1) of this Article shall amount to the market value of the expropriated investment at the time immediately before the expropriation or before the impending expropriation became public knowledge. The compensation shall include interest at a commercial rate established on a market basis from the date of expropriation until the date of payment, shall be paid without delay and shall be effectively realizable.

Agreement between the Government of the Republic of Finland and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/argentina_finland.pdf (last visited Dec. 17, 2004). As another example:

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount in their consequences to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.
2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefore, conforms to the principles of international law.
3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded nondiscriminatory treatment by such other Party as regards any measures it adopts in relation to such losses.

Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Sept. 23, 1992, U.S. – Bulg., art. III, *available at* http:/www.usembassy.bg/rela/invest.html (last visited Dec. 17, 2004).

a. Indirect Expropriation

Many claimants in the Argentina cases are asserting claims of "indirect expropriation." Most BITs allow these claims under clauses referring to measures "equivalent to" or "tantamount to" expropriation.[65] The concept of indirect expropriation has been defined in various ways. For example, the Tribunal in *Metalclad v. Mexico* defined it as follows:

> [E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also *covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State.*[66]

The Tribunal in *TECMED v. Mexico* noted that there is no "clear or unequivocal definition" of the concept, while observing that, "it is generally understood that [indirect expropriation] materialize[s] through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect."[67]

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65. *Id.*

66. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, ¶ 103 (Award of Aug. 30, 2001) (emphasis added).

67. Técnicas Medioambientales TECMED S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2), ¶ 114 (Award rendered on May 29, 2003). *See also* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 100 (1995) ("In determining whether a taking constitutes an 'indirect expropriation,' it is particularly important to examine the effect that such taking may have had on the investor's rights. Where the effect is similar to what might have occurred under an outright expropriation, the investor could in all likelihood be covered under most BIT provisions."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 cmt. g (1986) ("A state is responsible for [a foreign] expropriation of property . . . when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property . . . ."; Middle E. Cement Shipping and Handling Co. S.A. v. Arab Rep. of Egypt, ICSID Case No. ARB/99/6, ¶ 107 (Award rendered on Apr. 12, 2002) ("When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of this investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation, or, as in the BIT, as measures 'the effect of which is tantamount to expropriation.'").

For sources discussing indirect expropriation, *see generally* Rudolf Dolzer, *Indirect Expropriation of Alien Property,* 1 ICSID REVIEW: FOREIGN INVESTMENT L.J. 41 (1986); DOLZER & STEVENS, *supra,* at 98-100; Maurizio Brunetti, *The Iran-United*

The ICSID Tribunals in the Argentina cases relating to the emergency measures therefore must decide whether such measures deprived foreign investors of reasonably expected investment benefits or had an effect on the investments such that the measures constituted an "indirect expropriation."

b. Defense of Necessity / Emergency

In connection with the expropriation arguments, and more generally with the other claims, a key issue is whether the Argentine State's relevant conduct was excusable based on notions of "necessity" or "emergency." What was the nature of such necessity or emergency? Did the circumstances warrant exempting Argentina from its BIT obligations? What is the meaning of "emergency" as that term is utilized in the BITs, and does it apply to emergencies of an economic (as opposed to a politico-military) nature? If so, how are such emergencies defined? Are they assessed under an objective standard (which would be subject to evaluation and determination by an ICSID Tribunal), or under a subjective one (which would be subject only to the discretion of the host State)? In other words, are such clauses "self-judging"? If these emergency clauses are applicable to economic emergencies - and especially if the relevant standard is self-judging - what are the general implications for BIT practice and implementation?

In its recent ICSID cases, Argentina reportedly is invoking the argument that, due to the severe economic emergency it faced in 2001-2002, it was left with no choice but to adopt the measures it did.[68] The argument presumably relies on concepts such as "impossibility of performance" or "fundamental change of circumstances," as set forth in Articles 61 and 62, respectively, of the Vienna Convention on the Law of Treaties.[69]

The concept of changed circumstances is known in interna-

States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation, 2 CHI. J. INT'L L. 203 (2001).

68. *"Balance del juicio en París - Rosatti: 'El submarino diesel enfrentó a los nucleares' - El Ministro de Justicia habló con La Nación antes de regresar,"* LA NACION (Buenos Aires), Aug. 21, 2004, *at* HTTP://WWW.JUS.GOV.AR/PRENSA/ARTICULOS/CIADI/21-8-04%20LN.PDF (last visited November 7, 2004).

69. Vienna Convention on the Law of Treaties, May 23, 1969, art. 61-62, 1155 U.N.T.S. 346-47.

> Article 61. Supervening Impossibility of Performance:
>
> 1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the

tional law as *rebus sic stantibus*. For the change in circumstance to excuse a party from a treaty obligation, it must be a radical one. In the *Fisheries Jurisdiction* case, the ICJ stated: "International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty."[70] The ICJ referred to Article 62 of the Vienna Convention and stated: "One of the basic requirements embodied in that Article is that the change of circumstances must have been a fundamental one."[71] Elaborating further, the Court went on to observe that the changes of circumstances that "must be regarded as fundamental or vital are those which imperil the existence or vital development of one of the parties."[72] In light of these stringent standards, it is very rare for international tribunals to grant relief to a treaty Party on the basis of *rebus sic stantibus*.

The doctrine of *force majeure* also could be relevant. In its Articles of State Responsibility, the International Law Commission ("ILC") delineated the doctrine as follows:

> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.[73]

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treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

Article 62. Fundamental Change of Circumstances:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
   (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
   (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

70. Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, ¶ 36 (Judgment on Jurisdiction of Feb. 2, 1973).

71. *Id.* at ¶ 37.

72. *Id.* at ¶ 38.

73. G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, at art. 23, U.N. Doc. A/56/589 (2001).

However, the ILC cautions in its Articles of State Responsibility that the doctrine does not apply in either of the following circumstances:

> (a) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
> (b) The State has assumed the risk of that situation occurring.[74]

The other concept that could be debated in the Argentina cases is that of "necessity," on which the ILC commented in its Articles of State Responsibility as follows:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>   a. Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>   b. Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>   a. The international obligation in question excludes the possibility of invoking necessity; or
>   b. The State has contributed to the situation of necessity.[75]

Aside from the foregoing general principles and concepts of international law, Argentina is reportedly invoking in the ICSID arbitrations a provision in its BITs that is fairly common not only in the Argentine BITs but also in those of other countries, which creates a special exception to the expropriation standards for foreign investors in certain circumstances of "emergency." For example, Article IV(3) of the BIT between Argentina and the United States provides:

> Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or

74. *Id.* at art. 23, para. 2.
75. *Id.* at art. 25.

> companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.[76]

One of the main issues the ICSID Tribunals will need to decide in connection with the applicability of these BIT clauses to the Argentine emergency of early 2002 is whether such clauses were intended to cover *economic* emergencies (as opposed to politico-military ones). A reasonable argument can be made that, under the *ejusdem generis* rule of construction, treaty negotiators did not so intend, since the clauses appear to address only confrontations, upheavals, or strife of a violent or military nature. Moreover, given the relative frequency of economic crises in capital-importing states, creating a BIT exception for economic emergencies could circumscribe the scope of such treaties in a way that renders their applicability largely unpredictable for investors, thereby thwarting one of the principal purposes of these instruments.

3. Fair & Equitable Treatment

Most BITs impose obligations on the Parties to provide "fair and equitable treatment" to investors of the other Party.[77] However, the relevant clauses typically do not delineate clearly that concept, or what types of conduct are encompassed by it. The ICSID Tribunals thus have been left to determine the matter on a case-by-case basis. The Tribunal in the recent case of *Tecmed v. Mexico* expressed the following views on the subject:

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76. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, U.S. – Arg., art. IV, ¶ 3, 1991 U.S.T. LEXIS 176, at 19.

77. An example of a BIT provision granting foreign investors guarantees of fair and equitable treatment is that contained in the BIT between Argentina and the Netherlands, at Article 3(1): "Each Contracting Party shall ensure fair and equitable treatment to investments of investors of the other Contracting Party . . . ." *See also* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Aug. 3, 1984, U.S. – Congo, art. II, ¶ 4, 1984 U.S.T. LEXIS 246, at 25-26:

> Investments of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and may not be less than that recognized by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party. Each Party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other Party.

153. The Arbitral Tribunal finds that the commitment of fair and equitable treatment included in [the BIT] is an expression and part of the *bona fide* principle recognized in international law, although bad faith from the State is not required for its violation:
To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith. [citation omitted]

154. The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations.[78]

The Tribunal further explained:

> The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the invest-

78. Técnicas Medioambientales TECMED S.A. v. the United Mexican States, ICSID Case No. ARB(AF)/00/2, ¶ 153-54 (Award Rendered on May 29, 2003) (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 19 (5th ed. 1989)). The *TECMED* Tribunal also noted, "it is understood that the fair and equitable treatment principle included in international agreements for the protection of foreign investments expresses 'the international law requirements of due process, economic rights, obligations of good faith and natural justice.'" *Id.* at n.189 (quoting S.D. Myers, Inc. v. Gov't of Can., 2004 FC 38, ¶ 29 (Judgment Awarded on Jan. 13, 2004)).

> ment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle. Therefore, compliance by the host State with such pattern of conduct is closely related to the above-mentioned principle, to the actual chances of enforcing such principle, and to excluding the possibility that state action be characterized as arbitrary; i.e. as presenting insufficiencies that would be recognized ". . .by any reasonable and impartial man," or, although not in violation of specific regulations, as being contrary to the law because: . . . [it] shocks, or at least surprises, a sense of juridical propriety.[79]

For its part, the Tribunal in *CME Czech Republic B.V. v. Czech Republic* described the standard as follows:

> Whether conduct is fair and equitable depends on the factual context of the State's actions, including factors such as the undertakings made to the investor and the actions the investor took in reliance on those undertakings. This requirement can thus prohibit conduct that might be permissible in some circumstances but appears unfair and inequitable in the context of a particular dispute.[80]

The Argentine emergency measures will need to be evaluated by the ICSID tribunals in the Argentina cases in light of the jurisprudence. Was it necessary for the State to adopt the particular measures that it did? What were its justifications? Was there an adequate relation between the means used and the intended goals? Or was the severity of the measures disproportionate to the objectives sought? Could the measures be characterized as arbitrary, unfair, or capricious? Could alternative measures have been adopted with a less harmful result to the foreign investors? Did the measures thwart the investors' reasonable expectations, or vitiate conditions upon which the investors reasonably relied?

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79. Técnicas Medioambientales TECMED S.A., ICSID Case No. ARB(AF)/00/2, ¶ 154 (Award Rendered on May 29, 2003) (internal citations omitted).

80. CME Czech Rep. B.V. v. Czech Rep., UNCITRAL, ¶ 157 (Partial Award Rendered on Sept. 13, 2001).

4. Discrimination & National Treatment; Most-Favored-Nation Treatment

The BITs typically contain provisions prohibiting discrimination against investors of the other State Party, and guaranteeing treatment of such investors at least as favorable as that of the host State's own nationals and those of other States.[81] The debate concerning claims based on discriminatory treatment in the Argentina cases will likely revolve around whether these measures affected all investors equally. Argentina can be expected to argue that the laws and regulations were drafted to apply to everyone equally, irrespective of nationality. However, the Claimants that invested in the public utilities sector can contend that their sector was unfairly singled out in the Public Emergency Law. Specifically, they can be expected to argue that the "pesification" and freezing of the tariffs were discriminatory measures insofar as there were concessions in other sectors in which dollar-based rates were not "pesified" or frozen, and that the public utili-

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81. An example of a BIT provision granting foreign investors protections against discrimination is that contained in Article II(2)(b) of the BIT between Argentina and the United States:

> Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party.

Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, U.S.-Arg., art. II, ¶ 2(b), 1991 U.S.T. LEXIS 176 at 15-16.

An example of a BIT provision guaranteeing to foreign investors and their investments treatment no less favorable than that accorded to national investors or those of third party states is that contained in Article 3 of the BIT between the United Kingdom and Chile, which states in relevant part as follows:

> 1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.
> 2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State.

Agreement between the Government of the Republic of Chile and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments, Jan. 8, 1996 (entered into force June 23, 1997), *available at* http://www.cinver.cl (last visited Jan. 14, 2005).

ties sector is disproportionately foreign-controlled as compared to other sectors of the Argentine economy.

The relatively novel aspect of this last argument is that the investors would not be claiming that they individually suffered discrimination vis-à-vis individual investors of Argentine or some other particular nationality or nationalities, but rather, that a whole sector of the economy - comprised of investors of various nationalities - was discriminated against in comparison to other sectors that were controlled to a greater degree by Argentine investors.

IV. Issues of Enforceability Should Claimants Prevail

One of the principal advantages of ICSID arbitration is that enforcement of ICSID awards is swifter and relatively less complicated than that of other types of international arbitral awards (and even swifter and less complicated than the enforcement of domestic court judgments). This is so because pursuant to the Washington Convention:

> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.[82]

Thus, a claimant may seek enforcement of an ICSID award in the territory of any State Party to the Washington Convention in which assets of the respondent State may be found, and such state must enforce the award as if it were a ruling of the highest court of the State in which enforcement is sought.[83] Enforcing an ICSID award does not require initiation of proceedings under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),[84] since the relevant rules are contained in the Washington Convention.[85] In the

82. Washington Convention, *supra*, note 3, at art. 54(1).

83. *Id.*

84. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 7 I.L.M. 1042 (entered into force on June 7, 1959).

85. Note that the *execution* of any ICSID award remains subject to the relevant rules of immunity under the legislation of the State where execution is sought. However, many States have special exceptions to immunity for the enforcement of international arbitral awards. *See, e.g.*, United States Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(6) (1976) (as amended).

Argentina cases, the limitations on enforcement abroad of any award favorable to the claimants will likely stem —at least in the short run— from solvency problems and the ability of claimants to find assets against which they can execute their judgments.

One of the places where Argentine assets could be found for satisfaction of ICSID judgments favorable to the claimants is naturally Argentina itself. Argentine courts, like those of any other State Party to the Washington Convention, would be bound under that treaty to honor the award as if it were a final ruling in Argentina's own judicial system. However, Argentine executive branch authorities have already indicated to the press that any attempt to enforce an ICSID award within Argentina will likely be challenged on constitutional grounds in Argentine courts.

V. CONCLUSIONS

The welter of Argentina claims is the first in ICSID history filed by separate claimants against a single country in connection with an economic crisis. The Argentina cases have dramatically increased the number of pending claims before ICSID (thirty-five of the eighty-five pending claims as of this writing are against Argentina),[86] thereby placing a great strain on ICSID's resources as an arbitral institution. Furthermore, it is expected that additional claims against Argentina will be filed in upcoming months.

Perhaps more important than the budgetary and resource concerns are the implications of these cases on ICSID as an arbitral institution. The first ruling on the merits (likely in the *CMS* case) is expected to substantially influence subsequent awards in the Argentina cases. However, since there is no rule of *stare decisis* in international arbitration, it is at least conceivable that Tribunals in later cases will rule differently on identical or similar fact patterns. Even though multiple claimants can assert joint claims against a state under the current ICSID system (assuming each of them meets the applicable jurisdictional requirements), and such claim consolidation would have the advantage of producing a single arbitral interpretation of - and pronouncement on - a given fact pattern and its legal implications, the bureaucratic and procedural imperatives in the ICSID system would render it difficult for a consolidation of all claims to occur in practice.

The Argentina ICSID cases also could have substantial impli-

86. *See List of Pending Cases, available at* http://www.worldbank.org/icsid/cases/pending.htm (last visited Feb. 28, 2005).

cations as a precedent for future international claims relating to economic crises. If the claimants are successful in the Argentina cases (and particularly if the outcomes are the same or substantially the same in all of the cases), ICSID could face similar waves of claims against other countries that – in the context of an economic crisis (real or alleged) - adopt measures arguably contrary to the BIT obligations of that country to investors of its BIT counterparts. Depending on the outcome of the Argentina claims, such waves could place further strains on ICSID's resources and institutional reputation.

Additionally, the Argentina claims combined with Argentina's default on a record eighty-one billion USD of debt could give renewed impetus to the idea of a bankruptcy system for sovereigns. Although there has been substantial discussion for some time regarding possible constitution of a "sovereign debt restructuring mechanism" ("SDRM"), no agreement has been reached yet on how such a mechanism would operate or who would conduct it.

Further, it can be expected that negotiators of future BITs, and perhaps parties to existing ones (particularly parties from developing nations), might consider amending their BITs explicitly to grant the parties discretion - in the context of economic crises - to make policy decisions that could affect foreign investors in a way that might otherwise be contrary to BIT obligations.[87] In any event, for the time being and except in cases where such an amendment may be effected (or even more drastic measures adopted[88]), states facing an economic crisis will need to take into account their BIT obligations in making decisions on palliative measures.

87. In such event the treaty negotiators would grapple with the difficult issue of how to define "economic crisis" and whether or not to make the relevant determinations "self-judging" (i.e., a subjective assessment by the relevant State Party to the BIT, not subject to review by an international tribunal).

88. It is worth noting that some States are considering the possibility of terminating certain BITs due to the liability exposure and costs of defending itself in complex international arbitrations. *See, e.g.*, LATIN AMERICA ADVISOR (Inter-American Dialogue, Sept. 23, 2004) (reporting on Ecuador's Attorney General announcement that he is studying the possibility of terminating Ecuador's BIT with the United States).