

Calibrating Human Rights and Investment in Economic Emergencies: Prospects of Treaty and Valuation Defenses

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ABSTRACT: *This article explores potential treaty defenses and valuation defenses for host States to mitigate or temporarily excuse non-performance of obligations owed to investors during economic emergencies, arising from the host State's good faith performance of obligations under the International Covenant on Economic Social and Cultural Rights (ICESCR). Defenses under the Vienna Convention on the Law of Treaties (VCLT), such as the lex posterior rule of application of treaties in Article 30 or treaty interpretation in Article 31, are of limited utility for avoiding primary breaches of the investment treaty, since these defenses considerably depend upon the host State's a priori notification of ICESCR obligations to investors at the time of the establishment of the investment. Lacking these revisions to the due diligence process, it is submitted that a host State can advance a more pragmatic defense by proposing equitable adjustments in the valuation of compensation, taking into account the host State's good faith performance of ICESCR obligations. Adjustments are justifiable and appropriate, since tribunals tend to accept an unrealistic definition of the 'fair market value' standard, based on market assumptions of perfect competition, for pre-crisis valuations of investments. The bloating of the pre-crisis valuation of an investment thus tends to increase its ultimate differential with the post-crisis valuation of an investment, leading to damage assessments beyond what parties could ordinarily have foreseen from the investment contract. While tribunals have predominantly referred to 'compensation' within the general law of international responsibility, they have problematically neglected the counterpart practice of equitable adjustment within this legal regime.*

While it is imperative to respond to the current crises with a thorough review of the functioning of the international financial and monetary mechanisms, a human rights approach will contribute to making solutions more durable in the medium and long run... A human rights framework offers the appropriate context, legal rationale and ground to guide policies and programmes countering the negative effects of the financial crisis at the national, regional and international levels. Indeed, States are not relieved of their human rights obligations in times of crisis...

– Navanethem Pillay (2009)¹

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¹ Human Rights Council Tenth Special Session: 'The impact of the Global Economic and Financial Crises on the Universal Realization and Effective Enjoyment of Human Rights', Statement of Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9057&LangID=E (last accessed 25 February 2012).

The aim of social justice in a liberal state is not to build yet another community in which all are enslaved in the name of some grand collective ideal. Instead, it is to construct a form of community in which each participant is guaranteed the right to live his own life regardless of what his neighbors may think of him.

– Bruce Ackerman (1980)²

We are all Keynesians now.

– Joseph Stiglitz (2008)³

1. INTRODUCTION: AUTHORITATIVE DECISION-MAKERS IN ECONOMIC EMERGENCIES

Governments serve the public interest through regulation, social protection, and development generation. Economic emergencies challenge a government's ability to discharge each of these mandates fully, especially for those who subscribe to the view that '[t]he core purpose of the State is protection'.⁴ Throughout the history of financial and economic crises, governments have deliberately intervened in order to advance social protection objectives that have been imperiled by market failures.⁵ The wisdom of these interventions has not gone unchallenged. Economists such as Friedrich von Hayek and others of similar libertarian persuasion argue that governmental interventions result in price and tax distortions detrimental to the capital and financial markets, which could ultimately prolong economic crises and further deepen income cleavages.⁶

According to the taxonomy set by economists Carmen Reinhart and Kenneth Rogoff, economic emergencies usually take the forms of 'inflation crises', 'currency crashes', 'currency debasement', 'banking crises', 'external debt crises', 'domestic debt crises', and 'serial defaults'.⁷ In addressing such crises, governments' economic emergency measures

² Bruce Ackerman, *Social Justice in the Liberal State* (Yale University Press, 1980), at p. 376.

³ Joseph Stiglitz, 'Keynesian economics finds new relevancy in the 21st century global economy', *The Guardian*, 5 December 2008, available at www.guardian.co.uk/commentisfree/cifamerica/2008/dec/05/us-economy-keynesian-economic-theory (last accessed 25 February 2012).

⁴ Martin Wolf, 'What is the role of the State', *The Financial Times*, 8 August 2010, at <http://blogs.ft.com/martin-wolf-exchange/2010/08/08/what-is-the-role-of-the-state/#axzz1p6QB3fYF> (last accessed 25 February 2012).

⁵ See Baird Webel, N. Eric Weiss, Marc Labonte, 'Cost of Government Financial Interventions, Past and Present', pp. 61-66 in Pablo Sastre (eds.), *Government Interventions in Economic Emergencies* (Nova Science Publishers, 2011).

⁶ On counter-arguments against Keynesian fiscal stimulus packages, see Peter J. Boettke, Daniel J. Smith, and Nicholas A. Snow, 'Been there done that: the political economy of déjà vu', pp. 23-26 in Steven Kates (eds.), *The Global Financial Crisis: What Have We Learnt?* (Edward Elgar Publishing, 2011); Brett H. McDonnell, 'Of Mises and Min(sky): Libertarian and Liberal Responses to Financial Crises Past and Present', 34 *Seattle University Law Review* 1279 (2011), at pp. 1290-1299. For a recent illustration of the Austrian business cycle theories and the worsening effect of macroeconomic policy responses to financial crises, see Andreas Hoffmann and Gunther Schnabl, 'A Vicious Cycle of Manias, Crashes and Asymmetric Policy Responses – An Overinvestment View', CESifo Working Paper No. 2855, November 2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1513171 (last accessed 25 May 2012).

⁷ Carmen M. Reinhart and Kenneth Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (Princeton University Press, 2009), at pp. 3-14. An 'inflation crisis' is set at a 'threshold of 20 percent per annum'. A 'currency crash' is defined as 'an annual depreciation in excess of 15 percent'. 'Currency debasements' are of two types, the first being 'a reduction in the metallic content of coins in circulation of 5 percent or more', and the second being a 'currency reform whereby a new currency replaces a much-depreciated earlier currency in circulation.' A 'banking crisis' is marked by two types of events: '(1) bank runs that lead to the closure, merging, or takeover by the public sector of one or more financial institutions', and '(2) if there are no runs, the closure,

encompass a variable mix of market stabilization and social protection policies,⁸ as seen recently in the unprecedented magnitude of the Obama administration's fiscal stimulus and social protection package in response to the 2008 crisis, and European states' acceptance of direct intervention in crisis-beset jurisdictions within the Eurozone.⁹

The uncertain form and remit of governmental interventions during economic emergencies could conceivably result in host State breaches of investment treaty standards of protection. For example, as a matter of normative and policy priority during an economic emergency, a host State may be pressed to wield police powers according to its own sense of distributive justice and the good faith fulfillment of its citizens' social and economic rights, even if such measures interrupt foreign investors' receipt of expected returns under the investment contract with the host State. Argentina has attempted to argue precisely this context to justify investor deprivations arising from a whole host of pesification policies, transfer prohibitions, concession cancellations, and other governmental measures that it imposed during the 2001-2002 financial crisis,¹⁰ using its version of the defense of necessity (or emergency) to make investment treaties wholly inapplicable to emergency measures enforcing economic and social rights.¹¹ Due to the high probative threshold and strict elements of Article 25 of the ILC Articles of State Responsibility, as well as the actual textual parameters of the 'necessity' clauses in the investment treaties, the overwhelming majority of arbitral tribunals to date

merging, takeover, or large-scale government assistance of an important financial institution (or group of institutions) that marks the start of a string of similar outcomes for other financial institutions'. 'External debt crises' are those that 'involve outright default on a government's external debt obligations – that is, a default on a payment to creditors of a loan issued under another country's jurisdiction, typically (but not always) denominated in a foreign currency, and typically held mostly by foreign creditors.' 'Domestic debt crises' are those that 'typically occur against a backdrop of much worse economic conditions than the average external default', where domestic debt is 'denominated in the local currency and held mainly by residents'. 'Serial defaults' refer to the 'multiple sovereign defaults on external or domestic public (or publicly guaranteed) debt, or both. These defaults may occur five or fifty years apart, and they can range from wholesale default (or repudiation) to partial default through rescheduling (usually stretching interest payments out at more favourable terms for the debtor.'

⁸ Anne van Aaken and Jürgen Kurtz, 'Prudence or Discrimination? Emergency Measures, The Global Financial Crisis, and International Economic Law', 12 *Journal of International Economic Law* 4 (2009), pp. 859-894, at 862.

⁹ See full text of the January 31, 2012 EU intergovernmental treaty on the Eurozone ('Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union'), at www.european-council.europa.eu/media/579087/treaty.pdf (last accessed 25 February 2012). See 'Ghost of Keynes haunts the Eurozone', Editorial, *The Financial Times*, 16 August 2011, available at www.ft.com/intl/cms/s/0/402fdf1c-c7fe-11e0-9501-00144feabdc0.html#axzz1nsx91X6v (last accessed 25 February 2012); Charles Moore, 'Keynes' wisdom is perfect for the Eurozone', *The Telegraph*, 20 February 2012, available at www.telegraph.co.uk/comment/columnists/charlesmoore/9092602/Keynes-wisdom-is-perfect-for-the-eurozone.html (last accessed 25 February 2012).

¹⁰ See among others *LG&E Energy Corp and ors v. Argentina*, Decision on Liability, ICSID Case No. ARB 02/13 October 2006, paras. 213-266; *Sempra Energy International v. Argentina*, Decision on Argentina's Application for Annulment of the Award, ICSID Case No. ARB/02/16, 29 June 2010, paras. 106-223; *CMS Gas Transmission Company v. Argentina*, Award, ICSID Case No. ARB/01/8, 25 April 2005, paras. 315-392; *Enron Corporation and Ponderosa Assets, LP v. Argentina*, Award, ICSID Case No. ARB/01/3, 22 May 2007, paras. 303-339 (paras. 355-405 in the Decision on the Application for Annulment); *Continental Casualty Company v. Argentina*, Award, ICSID Case No. ARB/03/9, 5 September 2008, paras. 219-285; *BG Group PLC v. Argentina*, Final Award, Ad hoc (UNCITRAL), 24 December 2007, paras. 361-444; *National Grid PLC v. Argentina*, Award, Ad hoc (UNCITRAL), 3 November 2008, paras. 205-262; *Suez and ors v. Argentina*, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, paras. 249-271; *Total SA v. Argentina*, Decision on Liability, ICSID Case No. ARB/04/1, 21 December 2010, paras. 482-485; *El Paso Energy International Company v. Argentina*, Award, ICSID Case No. ARB/03/15, 27 October 2011, paras. 552-670; *Impregilo SpA v. Argentine Republic*, Final Award, ICSID Case No. ARB/07/17, 21 June 2011, paras. 336-360; *Metalpar SA and Buen Aire SA v. Argentina*, Award on the Merits, ICSID Case No. ARB/03/5, 6 June 2008, paras. 208-211.

¹¹ Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Martinus Nijhoff, 2012), at pp. 171-175 [hereafter, 'Desierto 2012'].

continue to reject Argentina's singular version of the necessity defense.¹² As I have shown elsewhere, a 'necessity clause within the terms of a treaty cannot be easily presumed to provide for treaty inapplicability, denunciation, or termination, unless its terms clearly and unambiguously provide for these effects.'¹³

Notwithstanding Argentina's lack of success in its resort to the defense of necessity, however, the broader problem of mitigating or excusing host States' good faith social protection measures that intentionally breach investment protection standards remains one of the most significant controversies in international investment law. The fact that this controversy has not frequently dominated investment arbitrations is an indication of difficulties in litigating social and economic rights as independent defenses. As Christoph Schreuer and Clara Reiner aptly observed, while some States have used human rights as defenses to investment claims, arbitral tribunals have preferred to 'dismiss the issues raised on a procedural basis rather than dealing with the substantive arguments themselves.'¹⁴ Other than Argentina's collateral invocation of social and economic rights in relation to its version of the necessity defense, no host State has substantially developed defenses based on the independent legal quality of the International Covenant on Economic Social and Cultural Rights (ICESCR).

This article aims to explore potential treaty and valuation defenses in relation to the host State's good faith performance of ICESCR obligations during economic emergencies. It takes its cue from the watershed 2010 award in *Suez and ors v. Argentina*, where an arbitral tribunal first took the categorical position that a host State is indeed obligated to observe *both* its human rights and investment treaty obligations during economic emergencies.¹⁵ While Argentina unsuccessfully invoked the defense of necessity in relation to the general right to water,¹⁶ it was significant that the *Suez* tribunal considered social and economic rights dispositive to its legal reasoning. However, the *Suez* tribunal fell short of discussing how human rights and investment obligations could indeed have been met by Argentina during the crisis, since the tribunal held that on the facts of the case, Argentina failed to show its inability to discharge both obligations at the time of the 2001-2002 crisis. Significantly, *Suez* also stands as the only arbitration to date that accepted *amicus curiae* intervention for the interpretation of fundamental social and economic rights in relation to investment treaty standards.¹⁷ The thirty-page *amicus* brief in *Suez*¹⁸ identified the applicable human rights involved to be the right to water, right to life, and

¹² See Desierto 2012, at pp. 145-236; Diane A. Desierto, 'Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties', 31 *U. Pa. J. Int'l L.* 3 (2010), 827-934, available at [http://effect.net.law.upenn.edu/journals/jil/articles/volume31/issue3/Desierto31U.Pa.J.Int'lL.827\(2010\).pdf](http://effect.net.law.upenn.edu/journals/jil/articles/volume31/issue3/Desierto31U.Pa.J.Int'lL.827(2010).pdf) (last accessed 25 February 2012).

¹³ Desierto 2012, at p. 126.

¹⁴ Clara Reiner and Christoph Schreuer, 'Human Rights and International Investment Arbitration', pp. 82-96, at 89-90 in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) [hereafter, 'Dupuy, Francioni, & Petersmann']. See also *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, Award and Concurring and Dissenting Opinion, ICSID Case No. ARB/05/22, 18 July 2008, at paras. 380 and 601.

¹⁵ *Suez and ors v. Argentina*, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, para. 262.

¹⁶ *Suez and ors v. Argentina*, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, paras. 250 and 252.

¹⁷ *Suez and ors v. Argentina*, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, para. 256.

¹⁸ See full text of the Amicus Curiae Submission by Centro de Estudios Legales y Sociales (CELS), Asociación Civil por la Igualdad y la Justicia (ACIJ), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria Unión de Usuarios y Consumidores, Center for International Environmental Law, 4 April

related rights. The *Suez amici* argued that these human rights are included in the relevant applicable law to the dispute as ‘rules of international law’ under Article 42(1) of the ICSID Convention;¹⁹ and as such, could be read to assist in the interpretation of the ‘fair and equitable treatment’ (FET) standard and the ‘indirect expropriation’ standard in the bilateral investment treaty (BIT).²⁰ The bulk of the analysis in the *Suez* brief was devoted to this novel reinterpretation of the FET and ‘indirect expropriation’, with a brief observation that human rights law ‘could displace investment law in a conflict of norms situation...’.²¹ The *amici* chose not to develop this argument further, finding that it was not necessary for the adjudication of the case.²² These arguments have not been articulated or fully developed elsewhere since.²³

This article broadly aims to develop the discursive openings made in the 2010 *Suez* award. It contrasts the limited utility of defenses under the Vienna Convention on the Law of Treaties (VCLT), such as the *lex posterior* rule in the application of treaties under VCLT Article 30 and the treaty interpretation rules in VCLT Article 31, with a more pragmatic approach of equitably adjusting the quantum of compensation ultimately owed by host States breaching investment treaty standards in the course of their good faith compliance with the ICESCR during an economic emergency. It furthers the potential for social and economic rights reasoning in the 2010 *Suez* award, by showing legal justifications for a host State’s attempt to observe both human rights and investment treaty obligations. But as I show in Part 2 (The ICESCR and Treaty Defenses), the ability to effectively harness this strategy would be largely constrained by the extent to which the host State included ICESCR compliance in the due diligence process with investors at the time of establishment of the investment.

More importantly, this article addresses the reality of a host State’s possible inability to fulfill both sets of obligations during an economic emergency. As I show in Part 3 (The ICESCR and Valuation Defenses), a host State can invite the attention of arbitral tribunals to the importance of equitable adjustment in the valuation process for compensation. The arbitrary practice of relying on a ‘fair market value’ standard, derived from perfectly competitive market assumptions, cannot be realistically applied to valuations during economic emergencies. This puts to question the accuracy of the ‘pre-crisis valuation’ and ‘post-crisis valuation’ of the investment, which comprise the bases for comparison in determining the compensation owed

2007, at www.ciel.org/Publications/SUEZ_Amicus_English_4Apr07.pdf (last accessed 25 February 2012) [hereafter, ‘*Suez amicus curiae* brief’].

¹⁹ Id. at pp. 13-14.

²⁰ Id. at pp. 15-26.

²¹ Id. at p. 26.

²² Id. at p. 26.

²³ The recently-discontinued *Piero Foresti et al. v. South Africa* arbitration was a missed opportunity to examine potential amicus curiae submissions on the interpretation of social and economic rights alongside international investment obligations, as this was a rare instance where the arbitral tribunal granted the petitions of various non-governmental organizations (including the Center for International Environmental Law and the International Commission of Jurists) to serve as non-disputing parties to the proceedings. The *amici* in the *Foresti* arbitration never had the opportunity to submit their brief, since the investor chose to settle its claim against the South African government. See *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, September 25, 2009 Procedural Order (on the granting of petitions of non-disputing parties), and the August 4, 2010 Award (on discontinuance and costs). See Andrew Friedman, ‘Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties in the Global South’, 7 *International Law & Management Review* pp. 37-51 (2010).

by host States. Furthermore, I show that arbitral tribunals almost automatically transpose the broad concept of ‘compensation’ under the general international law of international responsibility, while neglecting the settled practice in this legal regime of determining compensation quantum with regard to the objective of reaching ‘equitable outcomes’ for the litigating parties. A host State’s good faith fulfillment of its ICESCR obligations thus presents one compelling case for equitable adjustment of compensation or damages owed to investors during economic emergencies.

In the Conclusion (*Investment and Human Rights as Complementary Spheres of the Public Interest*), I submit that both investment protection and human rights protection are important and complementary spheres of the ‘public interest’. Calibrating protections of both sets of obligations during economic emergencies remains crucial to a host State’s sustainable economic development.

2. THE ICESCR AND TREATY DEFENSES

The ICESCR is a source of legally actionable and justiciable rights, the breach of which engages international responsibility.²⁴ The ICESCR fundamentally calls upon States to ‘respect’ (not to impede access to ICESCR rights), ‘protect’ (prevent others from impeding such access) and ‘fulfill’ (facilitate access to or directly provide social and economic goods) ICESCR rights.²⁵

Article 2(1) of the ICESCR contains the core obligation of States in the form of the ‘undertaking to take steps’ to realize ICESCR rights.²⁶ The tenor of the obligation is purposely evolutionary (‘to the maximum of available resources’) and dynamic (‘with a view to progressively achieving the full realization of rights recognized in the present Covenant by appropriate means’), in contrast with the discrete and readily-determinable obligation ‘to respect and to ensure’ civil and political rights under Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR).²⁷ The Committee on Economic Social and Cultural Rights (‘the Committee’) explains the obligation ‘to take steps’ as one that should be ‘deliberate, concrete, and targeted as clearly as possible towards meeting the obligations recognized in the Covenant,’²⁸ with the means to be used to fulfill the obligation to take steps

²⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, pp. 136, 181 at paras. 112, 131, 133-134. See International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability, (Human Rights and Rule of Law Series No. 2, International Commission of Jurists, 2008), available at www.icj.org/dwn/database/ESCR.pdf (last accessed 25 February 2012), pp. 23-64.

²⁵ Malcolm Langford and Jeff A. King, ‘Committee on Economic, Social and Cultural Rights: Past, Present and Future’, pp. 477-516, at 484 in Malcolm Langford (eds.), *Social Rights Jurisprudence: emerging Trends in International and Comparative Law* (Cambridge University Press, 2008).

²⁶ ICESCR Art. 2(1): ‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

²⁷ ICCPR, Art. 2(1): ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction rights recognized in the present Covenant...’

²⁸ CESCR General Comment 3 [The nature of States parties obligations (Art. 2, par. 1)], 14 December 1990, para. 2, at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?OpenDocument) (last accessed 25 February 2012).

being ‘all appropriate means, including particularly the adoption of legislative measures.’²⁹ Other possible appropriate measures may include, and are not limited to, ‘administrative, financial, educational and social measures.’³⁰

Most importantly, the Committee stresses that the ‘principal obligation of result reflected in article 2(1) is to take steps ‘with a view to achieving progressively the full realization of the rights recognized’ in the Covenant.’³¹ As such, States Parties to the ICESCR are obligated to ‘move as expeditiously and effectively as possible’ towards realizing ICESCR rights, and full justification must be provided before ‘deliberately retrogressive measures’ are introduced.³² During economic emergencies, States Parties to the ICESCR remain bound to observe minimum levels of protection,³³ or ‘the essential levels of each ICESCR right, without which a right loses its substantive significance as a human right.’³⁴ In the words of the Committee, maintaining the obligatory floor of minimum protection is ‘the *raison d’être* of the ICESCR’.³⁵ The Committee has itself issued General Comments specifying the minimum core content of the right to food,³⁶ the right to health,³⁷ the right to social security,³⁸ the right to water,³⁹ among others. While these General Comments are not legally binding in nature and are often regarded as a form of soft law, they are not to be easily disregarded. The General Comments are significant sources of authoritative interpretation of the ICESCR by the Committee, deriving ‘from an explicit invitation to do so by the Economic and Social Council.’⁴⁰ Notably, domestic constitutional courts have also accepted the obligatory floor of minimum socioeconomic protection during economic emergencies.⁴¹

A host State acting to fulfill its ICESCR obligations during economic emergencies can invoke two possible defenses within the domain of the law of treaties. First, it can argue that its actions are consistent with the limited application of both the ICESCR and the investment

²⁹ Id. at para. 3.

³⁰ Id. at para. 7.

³¹ Id. at para. 9.

³² Id. Underscoring in the original.

³³ Id. at para. 12.

³⁴ Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003), at p. 366.

³⁵ CESCR General Comment 3 [The nature of States parties obligations (Art. 2, par. 1)], 14 December 1990, paras. 2 and 10 at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument) (last accessed 25 February 2012).

³⁶ CESCR General Comment 12 [The right to adequate food (art. 11)], 1999, para. 17. See also Rolf Künemann, ‘The Right to Adequate Food: Violations Related to its Minimum Core Content’, pp. 161-183 in Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, 2002).

³⁷ CESCR General Comment 14 [The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)], para. 43. See also Audrey R. Chapman, ‘Core Obligations Related to the Right to Health’, pp. 185-215 in Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, 2002).

³⁸ CESCR General Comment 19 [The right to social security (art. 9)], 2007, para. 59. See also Lucie Lamarche, ‘The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights’, pp. 87-114 in Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, 2002).

³⁹ CESCR General Comment No. 15 [The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)], 2002, para. 37.

⁴⁰ Urfan Khaliq and Robin Churchill, ‘The protection of economic and social rights: a particular challenge?’ pp. 199-260, at 204-207, and 207, in Helen Keller and Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012).

⁴¹ *Government of South Africa v. Grootboom*, 2001 (1) SA 46 (CC), paras. 31-32; BVerfGE 40, 121 (133).

treaty under VCLT Article 30. Second, it can argue that the ICESCR is a fundamental part of host State law, and investment treaty protection can only be triggered for investments that are ‘in accordance with host State law’. The limitations and possibilities of each defense are set forth below.

2.1. Application of Treaties under VCLT Article 30

While there is considerable appeal in asserting the normative supremacy of the ICESCR as ‘*jus cogens*’ over investment treaty norms, a more careful dissection of this line of argument reveals its defects. For one, it is difficult to prove that the ICESCR – with its divergent record of States’ ratifications, reservations, and modes of accession – is included within the limited category of *jus cogens* or *obligations erga omnes* norms that have been recognized to date in international adjudication.⁴² More importantly, if the ICESCR is indeed *jus cogens*, VCLT Article 53 would invalidate the investment treaty if it could be shown that it was already incompatible with the ICESCR at the time the investment treaty was concluded.⁴³ The invalidity *ab initio* of the investment treaty would arguably make it incumbent upon the host State to return all benefits illegally obtained from the (supposedly) void treaty. VCLT Article 71 imposes a duty upon all States parties to a treaty deemed void for conflicting with *jus cogens* to ‘eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law’, as well as to ‘bring their mutual relations into conformity with the peremptory norm of general international law.’⁴⁴ At best, the host State would not be permitted to unjustly enrich itself by knowingly entering into a treaty that would conflict with *jus cogens*, and retaining the benefits of a treaty that is void *ab initio*.⁴⁵ Instead of exonerating itself from the duty to compensate investors during an economic emergency by invoking the alleged *jus cogens* nature of the ICESCR, the host State finds itself in the even worse situation of being internationally obligated to return the actual principal of the investment (and the stream of benefits from such investment) back to the investors as a result of the supposed invalidity *ab initio* of the investment treaty.⁴⁶

⁴² See Status of Ratifications, Accessions, and Reservations to the ICESCR in http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last accessed 9 March 2012); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at pp. 31-32, para. 64 (on the prohibition against genocide); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 32, paras. 33-34; *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 32, paras. 33-34 (on the right to self-determination); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 172, para. 88; *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment of 3 February 2012, I.C.J. Reports 2012*, at paras. 95 and 97.

⁴³ VCLT Article 53. See Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers), at pp. 674-675. [hereafter, ‘Villiger’].

⁴⁴ VCLT Article 71.

⁴⁵ See Christoph Schreuer, ‘Unjustified Enrichment in International Law’, 22 *Am. J. Comp. L.* 295 (1974), at pp. 295-296 (‘Restitution was also granted in situations where transfers of assets took place under putative agreements which later turned out never to have been validly concluded.’)

⁴⁶ Plainly, this is a proverbial case of throwing the baby out with the bathwater (*Das kindt mit dem bad vB schitten*). See Wolfgang Mieder and Wayland D. Hand, “(Don’t) Throw the Baby out with the Bath Water”: The Americanization of a German Proverb and Proverbial Expression, 50 *Western Folklore* 4 (Oct. 1991), pp. 361-400, at p. 361.

Applying VCLT Article 30 preserves both the ICESCR and the investment treaty obligations of the host State, but does not sufficiently address the question of international responsibility for breach of either treaty. VCLT Article 30 applies whenever incompatibility conceptually arises from the treaties that are subject of the comparison, regardless of the actual ‘subject-matter’ designation of the treaties at hand.⁴⁷ The ILC took this position in viewing the applicability of VCLT Article 30,⁴⁸ consistent with the earlier positions taken by the ILC Special Rapporteurs on the Law of Treaties – Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice, and Sir Humphrey Waldock.⁴⁹

If the ICESCR is the earlier treaty than the investment treaty, VCLT Article 30(4) would make the ICESCR applicable only ‘to the extent that its provisions are compatible’ with the investment treaty. A possible way to show some compatibility between the ICESCR minimum core obligation and the investment treaty duty to compensate would be for the host State to recognize *both* obligations, but negotiate with the counterpart State (the State of the nationality of the investor) as to the timing, *mode*, and *form* of payment of compensation owed to such investors for the host State’s expropriation of their investment. The investment obligation to compensate remains, but it would clearly no longer be ‘prompt’ or ‘immediately payable’, should the investor consent to the negotiated restructuring of payment terms. Another way would be for the host State to recognize both obligations, but choose to satisfy its obligation to compensate expropriatory acts through the issuance of sovereign debt instruments, consistent with its fiscal powers, or possibly through the recognition of an investor lien on government assets or receivables.⁵⁰ It has been the accepted view that it is only the ‘non-payment of *any* compensation for an unreasonable length of time that cannot be seen as lawful behavior because this would undermine the whole regime of international law on expropriation’.⁵¹ So long as the duty to compensate is accepted, therefore, there can be some differences as to the timing, mode, and terms of payment of compensation to an investor,

⁴⁷ Benedetto Conforti, ‘Consistency among Treaty Obligations’, pp. 187-191 in Enzo Cannizzaro (eds.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011), at p. 188; Alexander Orakhelashvili, ‘Article 30 Application of successive treaties relating to the same subject-matter’, pp. 764-800, at p. 776 in Olivier Corten and Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol. I (Oxford University Press, 2011). (‘...treaties can supplement each other by relating to the same subject matter (e.g. the case of optional protocols), and whether they are in conflict depends on their actual terms. According to Vierdag, the requirement of the sameness of the subject matter under Article 30 is satisfied if an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results.’) [hereafter, ‘Corten and Klein’].

⁴⁸ International Law Commission, ‘Commentary to the Draft Vienna Convention on the Law of Treaties’, *Yearbook of the International Law Commission*, 1966, Vol. II, at p. 214, para. 1. [hereafter, ‘ILC Commentary to the VCLT’]

⁴⁹ See I.M. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1973), at pp. 62-64.

⁵⁰ For a survey of public sector responses to, and fiscal strategies adopted as a result of, the global economic crisis of 2008/2009, see United Nations, ‘The Global Economic and Financial Crisis: Regional Impacts, Responses, and Solutions’ (2009); Alham Yusuf and Jonathan A. Batten, ‘Currency Swaps and Australian Debt Management Practice’, pp. 294-306 in J. Jay Choi and Michael G. Papaioannou (eds.), *Credit, Currency, or Derivatives: Instruments of Global Financial Stability or Crisis?* (Emerald Group Publishing, Limited, 2009); J.O.N. Perkins, ‘Monetary and Fiscal Policy and Crisis Economies’, pp. 14-27 in Tran Van Hoa, (eds.) *Economic Crisis Management: Policy, Practice, Outcomes and Prospects* (Edward Elgar Publishing, Ltd., 2002).

⁵¹ Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008), at p. 68.

without necessarily triggering a breach of the obligation to pay compensation.⁵² The host State owes the obligation to its counterpart State in the investment treaty to observe the obligation to compensate investors in good faith (*pacta sunt servanda*),⁵³ and as long as the tenor of this obligation does not specify a precise mode or form, there is room for the host State to negotiate payment terms. When it is only the host State who is a party to both the ICESCR and the investment treaty obligation, it is the investment treaty – as the ‘treaty to which both States are parties’ that will govern the mutual rights and obligations of both parties. Notably, VCLT Article 30 merely encapsulates a rule of thumb for the selection of the applicable treaty, without discharging international responsibility from the breach of the treaty not performed.⁵⁴

2.2. ICESCR and treaty interpretation in VCLT Article 31

Reported arbitral awards to date do not indicate that host State respondents have fully pleaded arguments based on economic and social rights. There has not yet been a reported arbitral award in which the tribunal’s determination of a BIT breach turned significantly on the issue of the host State’s observance of economic and social rights. In the 1999 *Goetz v. Burundi* award,⁵⁵ it was the claimants (and not the host State) that invoked the ICESCR as part of the applicable law governing an investment. The Belgian shareholders in a mining corporation sued the Republic of Burundi for alleged breaches of obligations under Burundi law, the ICESCR, and the Belgium-Luxembourg/Burundi BIT. In the arbitral award, the *Goetz* tribunal evidently considered the non-discrimination principle in Article 2(2) of the ICESCR⁵⁶ pursuant to Article 42(1) of the ICSID Convention, but ultimately found that the claimants were unable to establish their allegations of discrimination.⁵⁷ Argentina had also generally invoked social and economic rights as a matter of constitutional law in relation to the defense of necessity,⁵⁸ which, in its view, automatically displaces international investment obligations. While the notion of constitutional supremacy is a licit form of established constitutional reasoning, VCLT Article 27 makes such internal law immaterial for purposes of assessing international legal responsibility.⁵⁹

The bulk of literature to date on human rights and investment treaty obligations focuses on the interpretive value of human rights norms as ‘relevant rules of international law’ within the ambit of VCLT Article 31(3)(c).⁶⁰ Arbitral tribunals to date have sparingly resorted to

⁵² Id. at p. 68: ‘It would hardly be reasonable to suggest that for an expropriation to be considered lawful, compensation actually paid must meet the required standard *precisely*. There is an inherent uncertainty underlying the matter of compensation: international law does not provide a formula to calculate an exact amount to be paid in a specific case that would reduce the calculation to a simple mathematical exercise...’ (Italics in the original.)

⁵³ VCLT Article 26.

⁵⁴ VCLT Article 30(5).

⁵⁵ *Goetz and ors v. Burundi*, Award, ICSID Case No. ARB/95/3, 10 February 1999.

⁵⁶ ICESCR Article 2(2) states: ‘The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

⁵⁷ *Goetz and ors v. Burundi*, Award, ICSID Case No. ARB/95/3, 10 February 1999, at paras. 94-121.

⁵⁸ *National Grid PLC v. Argentina*, Award of 3 November 2008, UNCITRAL, para. 78. See also paras. 86-90, which discuss the sources of applicable law.

⁵⁹ VCLT Article 27.

⁶⁰ Bruno Simma and Theodore Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology’, pp. 678-707 in Christina Binder, et al., *International Investment Law for the 21st*

VCLT Article 31(3)(c) as a treaty interpretation mechanism, due to its subordinate role to the ordinary text of a treaty.⁶¹ The arbitral tribunal in *RosInvest Co. UK Ltd v. Russian Federation* required that such ‘relevant rules’ have to be those on which the performance of investment obligations had been specifically conditioned.⁶² The arbitral tribunal in *Berschader and Berschader v. Russian Federation* permitted resort to such ‘relevant rules’ only where there was a patent ambiguity in the treaty text that called for supplementation.⁶³

Where the terms of the investment treaty do not facially appear to contain any discernible reference to international human rights norms, arbitral tribunals have been demonstrably reluctant to use VCLT Article 31(3)(c) as an all-purpose gateway for human rights-sensitive interpretation. The arbitral tribunal in *Micula and ors v. Romania* invoked VCLT Article 31(3)(c) to support its additional consideration of Article 15 of the Universal Declaration of Human Rights, in the process of interpreting a BIT’s nationality requirements for investors.⁶⁴ The *Saluka Investments v. Czech Republic* arbitral tribunal also depended upon VCLT article 31(3)(c), in order to take account of the customary international law principle ‘that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order.’⁶⁵ The reported arbitral awards arising from the 2001-2002 Argentine crisis scarcely developed any cohesive human rights argumentation.⁶⁶

Another way to accommodate the ICESCR is to treat it as part of the fundamental host State law to which an investment is continuously subject under ‘in accordance with host State law’ clauses in investment treaties.⁶⁷ Much would depend on the actual formulation of the ‘in accordance with host State law’ clause; the extent to which the host State properly informs the investor of the inclusion of the ICESCR in the regulatory fabric governing the investment;⁶⁸ as

Century: Essays in Honour of Christoph Schreuer (Oxford University Press, 2009); United Nations Conference on Trade and Development (UNCTAD), ‘Fair and Equitable Treatment: A Sequel’, UNCTAD Series on Issues in International Investment Agreements II, 2012, pp. 22-33, and 61-82.

⁶¹ *Azurix Corporation v. Argentina*, Decision on Application for Annulment, ICSID Case No. ARB/01/12, 1 September 2009, at para. 90. On the minimal resort to VCLT Article 31(3)(c), see *Yukos Universal Ltd. v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 227, 30 November 2009, paras. 260 and 309; *Veteran Petroleum Ltd v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 228, 30 November 2009, paras. 260 and 309; *Hulley Enterprises Ltd. v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 226, 30 November 2009, paras. 260 and 309; *Kardassopoulos v. Georgia*, Decision on jurisdiction, ICSID Case No. ARB/05/18, 6 July 2007, paras. 207-208.

⁶² *RosInvest Co UK Ltd. v. Russian Federation*, Award on Jurisdiction, SCC Case No. V079/2005, 5 October 2007, at para. 39.

⁶³ *Berschader and Berschader v. Russian Federation*, Award and Correction, SCC Case No. 080/2004, 21 April 2006, at para. 95.

⁶⁴ *Micula and ors v. Romania*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/05/20, 24 September 2008, at paras. 86-88.

⁶⁵ *Saluka Investments BV v. Czech Republic*, Partial Award, PCA (UNCITRAL), 17 March 2006, at paras. 254-255.

⁶⁶ *CMS Gas Transmission Company v. Argentina*, Award, ICSID Case No. ARB/01/8, 25 April 2005, paras. 114, 121; *Siemens AG v. Argentina*, Award and Separate Opinion, ICSID Case No. ARB/02/8, 6 February 2007, at para. 79; *Azurix Corporation v. Argentina*, Award, ICSID Case No. ARB/01/12, 23 June 2006, at para. 261.

⁶⁷ See Christoph Schreuer and Ursula Kriebaum, ‘From Individual to Community Interest in International Investment Law’, pp. 1079-1096, at 1095, in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, Christoph Vedder (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011); Pierre-Marie Dupuy, ‘Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law’, pp. 45-62, at 59-60 in Dupuy, Francioni, & Petersmann.

⁶⁸ For the typology of ‘in accordance with host State law’ clauses, see Stephan Schill, ‘Illegal Investments in Investment Arbitration’, working paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1979734

well as the host State's rules for incorporation of international law as part of domestic law.⁶⁹ In order to make this interpretation feasible, it should be clearly shown that the ICESCR is part of the fundamental law of the host State, long before the investment is established.⁷⁰ Not every breach of host State law will disqualify an investment from treaty protection. Minor administrative errors do not suffice to show that an investment was not made in accordance with host State law.⁷¹ As the arbitral tribunal in *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* cautioned, the due diligence process enables investors and host States to jointly ascertain laws that are indeed fundamental to the host State, as opposed to mere clerical mistakes or administrative errors.⁷² 'In accordance with host State law' clauses have recently been amenable to broad teleological interpretations,⁷³ to safeguard against the protection of patently illegal investments or investments violative of a State's public policy, such as violations of anti-dummy legislation in *Fraport v. Philippines*, criminal laws on bribery in *World Duty Free v. Kenya*, and fraud in *Inceysa Vallisoletane v. El Salvador*.⁷⁴

Finally, beyond the 'in accordance with host State law' clause, it would also be possible to usher in ICESCR-sensitive interpretation from more direct treaty language providing for the ICESCR's continuing applicability and the subordination of investment compliance to the observance of ICESCR obligations. Some of the newer generations of investment treaties have adopted more direct treaty language explicitly providing for the continuing applicability of environmental laws, labor laws, and certain human rights treaties as part of the regulatory fabric governing the investment, such as the 2004 Model US BIT,⁷⁵ the 2004 Model Canadian FIPA,⁷⁶ and BITs concluded by the Belgium-Luxembourg Economic Union.⁷⁷ The 2002

(last accessed 5 March 2012). An example of two 'in accordance with laws and regulations' clauses that fulfill the two functions described by Schill are Articles 3(2) and 3(3) of the Croatia BIT discussed in paras. 190 and 197 of *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, Award, ICSID Case No. ARB/01/7, 25 May 2004.

⁶⁹ See Committee on Economic Social and Cultural Rights, General Comment No. 3 (The domestic application of the Covenant), E/C.12/1998/24, 3 December 1998, at paras. 7-8.

⁷⁰ *Anderson and ors v. Costa Rica*, Award, ICSID Case No. ARB (AF)/07/3, 10 May 2010, para. 55-59.

⁷¹ *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction and Dissent, ICSID Case No. ARB/02/18, 29 April 2004, at para. 86.

⁷² *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, Award, ICSID Case No. ARB/03/25, 16 August 2007, at para. 396. See also *Parkerings-Compagniet AS v. Lithuania*, Award on Jurisdiction and Merits, ICSID Case No. ARB/05/8, 14 August 2007, para. 307 (finding that failure to disclose a legal opinion to a counter-party before entering into an Agreement does not in itself amount to a breach of international law). For recent guidance on how to design a due diligence process that is sensitive to ICESCR compliance, see Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, 'Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements', A/HRC/19/59/Add.5, 19 December 2011.

⁷³ *Salini Costruttori SpA and Italstrade SpA v. Morocco*, Decision on Jurisdiction, ICSID case No. ARB/00/4, 23 July 2001, at para. 46. This standard was expressly adopted by the arbitral tribunal in *Mytilineos Holdings SA v. Serbia and Montenegro and Serbia*, Partial Award on Jurisdiction and Dissenting Opinion, UNCITRAL, 8 September 2006, at para. 152.

⁷⁴ *Id.*; *World Duty Free Company Ltd. v. Kenya*, Award, ICSID Case No. ARB/00/7, 25 September 2006; *Inceysa Vallisoletane SL v. El Salvador*, Award, ICSID Case No. ARB/03/26, 2 August 2006.

⁷⁵ See Articles 12 and 13 of the 2012 United States Model BIT, available at www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (last accessed 28 April 2012)

⁷⁶ See 11 of the 2004 Canadian Model FIPA, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (last accessed 5 March 2012).

⁷⁷ See 2004 Belgium-Luxembourg Economic Union/Serbia and Montenegro BIT, Articles 5 and 6; 2005 Belgian-Luxembourg Economic Union/Republic of Sudan BIT, Articles 5 and 6; 2006 Belgium-Luxembourg Economic Union/Federal Democratic Republic of Ethiopia BIT, Articles 5 and 6; 2005 Belgium-Luxembourg Economic Union/Guatemala BIT Articles 13 and 14; 2004 Belgium-Luxembourg Economic Union/Libya Arab Jamahiriya BIT, Articles 5 and 6; 2005 Belgium-Luxembourg Economic Union/Mauritius BIT, Articles 5 and 6; 2005 Belgium-Luxembourg Economic Union/Peru BIT, Articles 5 and 6.

Austria-Malta BIT expressly provides for the application of the European Convention on Human Rights in disputes arising from the BIT.⁷⁸ These provisions have not yet been tested and interpreted in concrete disputes, but they are well worth examining for a host State that plans to include the ICESCR as part of the corpus of host State law.

3. THE ICESCR AND VALUATION DEFENSES

A brief survey of the reported arbitral awards involving the 2001-2002 Argentine financial crisis shows that compensation was awarded to investors largely for Argentina's breach of non-expropriation standards (e.g. fair and equitable treatment standard, full protection and security standard, national treatment) and not based on a finding of direct or indirect expropriation. Among the arbitral awards that held Argentina internationally responsible for the measures it implemented during its 2001-2002 financial crisis, the awards in *El Paso*, *LG & E*, *Impregilo*, *Sempra*, *Azurix*, *Enron*, *CMS*, *BG Group*, *Suez*, and *Total* held that Argentina breached the FET standard in the respective BITs at issue in each case, and determined the compensation owed by Argentina under the general law of international responsibility. The same awards rejected the claims against Argentina for alleged violation of the direct or indirect expropriation provisions in an investment treaty, which usually contained an explicit clause on prompt, adequate, and effective compensation.⁷⁹ The award in *Compañía de Aguas del Aconquija SA and Vivendi Universal SA* found that Argentina violated the FET standard, full protection and security standard, and the BIT provision on expropriation, and thus applied methods of compensation arising from both general international law (for breaches of FET and full protection and security) and the BIT (for violation of the expropriation provision).⁸⁰

While all of the foregoing arbitral awards generally referred to compensation as a form of reparations permissible within the *Chorzów* standard,⁸¹ there is no precise unanimity among these awards insofar as the method for determining the quantum of compensation is concerned. In the 2011 Award in *El Paso Energy International Company v. Argentina*,⁸² the arbitral tribunal concurred with the tribunal's view in *SD Myers v. Canada*⁸³ that 'the silence of the treaty indicates the intention of the drafters 'to leave it open to tribunals to determine a

⁷⁸ Agreement between the Republic of Austria and Malta on the Promotion and Mutual Protection of Investments, 29 May 2002, Article 18(2).

⁷⁹ See among others *El Paso Energy International Company v. Argentina*, Award, ICSID Case No. ARB/03/15, 27 October 2011, para. 752; *LG&E Energy Corp and ors v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1, 3 October 2006, para. 267; *Impregilo SpA v. Argentine Republic*, Final award, ICSID Case No. ARB/07/17, 21 June 2011, part VI; *Sempra Energy International v. Argentina*, Award, ICSID Case No. ARB/02/16, 18 September 2007, para. 486; *Azurix Corporation v. Argentina*, Award, ICSID Case No. ARB/01/12, 23 June 2006, para. 442; *Enron Corporation and Ponderosa Assets, LP v. Argentina*, Award, ICSID Case No. ARB/01/3, 22 May 2007, para. 453; *CMS Gas Transmission Company v. Argentina*, Award, ICSID Case No. ARB/01/8, 12 May 2005, para. 472; *National Grid PLC v. Argentina*, Award, Ad hoc (UNCITRAL), Case 1:09-cv-00248-RBW, 3 November 2008, para. 296; *BG Group plc v. Argentina*, Final award, Ad hoc (UNCITRAL), 24 December 2007, paras. 413-418; *Suez and ors v. Argentina*, Decision on Liability, ICSID Case No. ARB/03/117, para. 248; *Total SA v. Argentina*, Decision on Liability, ICSID Case No. ARB/04/1, 21 December 2010, para. 485.

⁸⁰ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina*, Award, ICSID Case No. ARB/97/3, 20 August 2007, para. 11 and 11.1.

⁸¹ *Factory at Chorzów* (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (26 July), at p. 47.

⁸² *Id.* at paras. 698-742.

⁸³ *S.D. Myers Inc. v. Government of Canada*, UNCITRAL (NAFTA), First Partial Award of 13 November 2000.

measure of compensation appropriate to the specific circumstances of the case’, adding that ‘whatever precise approach is taken, it should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation.’⁸⁴ I show in the following subsections that: first, this porous valuation process ultimately resulted in arbitral tribunals relying mainly on the ‘fair market value’ standard; and second, when a host State acts to fulfill the ICESCR during an economic emergency, the ‘fair market value’ standard should be readjusted to reflect the requirement of ‘foreseeability’ between buyers and sellers, as proposed by dissenting Arbitrator Brigitte Stern in the 2011 *El Paso* award.

3.1. Defects in the ‘fair market value’ standard

The value of an investment can be determined from any, or a combination of, three approaches: 1) the ‘Income-Based Approach’, which involves ‘methods that convert anticipated economic benefits into a single present value amount’; 2) the ‘Market-Based Approach’, which refers to ‘methods that compare the business or business interest to similar businesses or business interests’; and 3) the ‘Asset-Based Approach’, which pertains to ‘methods based on the current market value of assets net of liabilities.’⁸⁵ Each of these approaches is intended to derive the ‘fair market value’ of an investment, defined in the International Glossary of Business Valuation Terms as:

[T]he price, expressed in terms of cash equivalents, at which the property would change hands between a hypothetical willing and able buyer and hypothetical willing and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.⁸⁶

The above definition has been widely adhered to by arbitral tribunals that dealt with the Argentine financial crisis, even if the constituent components of ‘fair market value’ (e.g. principal or capital contribution, profits, litigation costs, etc.) varied based on the facts of each case. This definition of ‘fair market value’ peculiarly presupposes perfectly competitive markets (e.g. ‘an open and unrestricted market’) and information readily available to both buyers and sellers (e.g. ‘both have reasonable knowledge of the relevant facts’). In a world of government interventions, market entry restrictions, and asymmetric information between market players, ‘fair market value’ is a putative fiction.

The definition ultimately assumes that when there has been an interference with investors’ property rights arising from an economic emergency, investors must still be compensated at the full value of the investment (assuming those same perfect market conditions) *before* the economic emergency occurred. ‘Fair market value’, in this sense, is deliberately estimated through pre-crisis valuation, and not at the time of the actual ‘taking’ or ‘interference’. Reliance on the ‘fair market value’ standard thus ignores the independent impact of the

⁸⁴ Id. at para. 701.

⁸⁵ Kantor, at p. 9.

⁸⁶ International Glossary of Business Valuation Terms, available at www.appraisers.org/Libraries/BV_Discipline/2009_BV_Standards.sflb.ashx (last accessed 30 March 2012).

deprivation actually caused by the host State's governmental measure, vis-à-vis exogenous price shocks from an economic emergency that are in no way attributable to the host State's own acts. By adhering to 'fair market value' under these unrealistic assumptions, arbitral tribunals effectively set up a mythical standard.

The broad conception of 'fair market value' has also suffused the practices of tribunals that have dealt with the Argentine crisis, often resulting in uneven constructions of the constituent elements of 'fair market value'. Tribunals have tended to use 'fair market value' for both treaty-defined compensation for expropriations, as well as compensation under the general international law of reparations for non-expropriation breaches of investment treaties. The frequency of the adoption of the unrealistic 'fair market value' standard suggests that it has already become the default option for many tribunals.⁸⁷ The components of 'fair market value' have not been straightforwardly established in many cases, where at times, the 'fair market value' of an investment was deemed to include not just the principal capital contribution but also all other costs presumably incurred to improve the productivity of an investment, such as additional capital contributions and actual litigation costs.⁸⁸

Among the Argentine awards that dealt with the issue of reparations for breaches of the BIT beyond expropriation, the 2005 *CMS* award provides the clearest and most comprehensive explanation on resort to compensation as a form of reparations under general international law.⁸⁹ At the outset, the *CMS* tribunal reiterated that compensation 'is only called for when the damage is not made good by restitution', and that there are a plethora of methods for financially assessing damage, such as the 'asset value' or 'replacement cost' approach; the 'comparable transaction' approach; the 'option' approach (alternative uses which can be made of the assets in question, and their costs and benefits); and the DCF approach.⁹⁰ While declaring that restitution 'is by far the most reliable choice to make the injured party whole', the *CMS* tribunal explicitly acknowledged that the Argentine 'crisis cannot be ignored and it has specific consequences on the question of reparation.'⁹¹ The tribunal did not explain what these consequences were, but rather went on to acknowledge that in the absence of a compensation provision for non-expropriation breaches of the BIT, 'the cumulative nature of the breaches...is best dealt with by resorting to the standard of fair market value'.⁹²

Clearly, there are some fissures with the prevalent resort to 'fair market value' in the arbitral awards that have dealt with the Argentine financial crises. Significantly, in the 2011 *Impregilo* award, the tribunal did not refer to the fair market value standard but rather awarded compensation limited solely to the actual principal or capital contributions of the claimant investor. The *Impregilo* tribunal agreed with the *Chorzów* standard and understood that

⁸⁷ *Sempra Energy International v. Argentina*, Award, ICSID Case No. ARB/02/16, 18 September 2007, at para. 400-405, 412-415; *Enron Corporation and Ponderosa Assets, LP v. Argentina*, Award, ICSID Case No. ARB/01/3, 22 May 2007, paras. 363, 388-389; *BG Group PLC v. Argentina*, Final award, Ad hoc (UNCITRAL), 24 December 2007, paras. 427-428.

⁸⁸ *Azurix Corporation v. Argentina*, Award, ICSID Case No. ARB/01/12, 23 June 2006, paras. 409-432-437.

⁸⁹ *CMS Gas Transmission Company v. Argentina*, Award, ICSID Case No. ARB/01/8, 12 May 2005, paras. 399-469.

⁹⁰ *Id.* at note 203, paras. 401 and 403.

⁹¹ *Id.* at para. 406.

⁹² *Id.* at para. 410.

‘Impregilo should in principle be placed in the same position as it would have been, had Argentina’s unfair and inequitable treatment of Impregilo’s investment not occurred.’⁹³ However, the tribunal was quick to acknowledge that this *ex ante* restitution was in no way a precise or definitive process: ‘it would be unreasonable to require precise proof of the extent of the damage sustained by Impregilo. Instead, reasonable probabilities and estimates have to suffice as a basis for claims for compensation.’⁹⁴ The *Impregilo* tribunal held that both the claimant investor as well as the host State Argentina had a shared responsibility for the failure of the concession, and thus it was ‘inappropriate to calculate damages on the basis of customary economic parameters such as a cost or asset based method or an income method. Instead, the damages to be paid by the Argentine Republic to compensate for unfair and inequitable treatment should be determined on the basis of a reasonable estimate of the loss that may have been caused to Impregilo.’⁹⁵ Compensation was awarded only according to the actual capital contribution of Impregilo, and not for any potential gains from the concession.⁹⁶

To date, the single critique on the impropriety of the broad conception of the ‘fair market value’ standard during economic emergencies stems from the opinion of dissenting Arbitrator Brigitte Stern in the 2011 *El Paso v. Argentina* award.⁹⁷ The *El Paso* tribunal stringently stood by the above definition of fair market value,⁹⁸ over the objections of dissenting Arbitrator Brigitte Stern that a fair market value assessment ‘should only take into account what a willing buyer and a willing seller could foresee at the time of the interference with the investor’s rights’. Arbitrator Stern’s approach would have adjusted the scope of ‘fair market value’ to a value closer to the time of the actual interference by the host State during Argentine financial crisis, but the *El Paso* majority rejected this view. Relying on the *Chorzów* standard,⁹⁹ the *El Paso* majority used an Income-Based Approach in the form of the DCF (discounted cash flow) method of valuation, simply following the preferred method indicated in the Expert’s Reports, and the practice of other arbitral tribunals in cases involving Argentine emergency measures in *CMS*, *Enron*, and *Sempra*.¹⁰⁰ Arbitrator Stern’s proposal to restrict the valuation to the ‘foreseeable’ price was quite similar to the method set by the United Nations Compensation Commission (UNCC) for the valuation of business losses based on past performance, and not future projections since the emergency (the invasion and occupation of Kuwait) was not a foreseeable event.¹⁰¹

As may be seen in the above approaches taken in different arbitrations arising from Argentina’s governmental measures during its 2001/2002 financial crisis, regardless of the valuation method used, arbitral tribunals have unstintingly adhered to the ‘fair market value’

⁹³ *Impregilo SpA v. Argentine Republic*, Final award, ICSID Case No. ARB/07/17, 21 June 2011, at para. 361.

⁹⁴ *Id.* at para. 371.

⁹⁵ *Id.* at paras. 376-378.

⁹⁶ *Id.* at paras. 379-381.

⁹⁷ *El Paso Energy International Company v. Argentina*, Award, ICSID Case No. ARB/03/15, 27 October 2011.

⁹⁸ *Id.* at paras. 702-703.

⁹⁹ *Id.* at para. 705.

¹⁰⁰ *Id.* at paras. 711-712.

¹⁰¹ United Nations Compensation Commission Governing Council, Decision taken by the Governing Council of the United Nations Compensation Commission during the resumed Fourth Session, at the 23rd meeting, held on 6 March 1992 (Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation), S/AC.26/1992/9, 6 March 1992, paras. 17 and 19.

standard as the level of compensation. The *CMS* tribunal acknowledged that Argentina's economic crisis would have 'specific consequences on the question of reparation',¹⁰² but the ensuing award did not describe in detail the extent (if any), to which Argentina's economic predicament mattered in the adjustments made by the *CMS* tribunal under their own customized asset valuation model. In reaching for the 'fair market value' of an investment as the level of compensation, the arbitral tribunals did not differentiate between price effects that were endogenously caused by the Argentine governmental measures, and the price effects that could have been exogenously caused by the systemic financial crisis as a whole. A very substantial pre-measure investment value based on this broad 'fair market value' definition, as compared with a very low post-measure investment value, will certainly yield a large damages or compensation award to the investor. However, systemic market risk (not firm-specific risk) – a variable that is separate and independent from the governmental measure that interferes or infringes with the investor's property rights – could also reduce the post-measure investment value.¹⁰³ The extent to which the discount rate fully captures this market risk is not clearly discussed in any of the currently reported awards involving the Argentine financial crisis.¹⁰⁴

It would appear from the arbitral awards that tribunals confronting the issue of valuation have tended to favor somewhat linear comparisons between the value of an investment *before* the imposition of a governmental measure ('pre-measure investment value'), with its value *after* the imposition ('post-measure investment value'). The value of the investment refers to 'fair market value', and can include the principal, the profit stream, expected earnings, and other items that the tribunal could understandably include due to the very broad definition of 'fair market value'. The positive differential between pre-measure investment value and post-measure investment value then operates as the 'damage' attributable to the host State for imposing the governmental measure. The very rationale of compensation is to protect the investors' 'expectancy interest' under the *Chorzów* standard (e.g. compensation that seeks to return the investor to a position in which the investment has been made had the injury not occurred).¹⁰⁵ However, it is precisely that quantum of the alleged expectancy interest that needs reassessment. The 'fair market value' standard used hitherto in economic emergencies or financial crises has not properly differentiated between *endogenous* effects (the deprivation caused by the host State's governmental measure on the value of investment) and *exogenous* effects (the overall market effects on price, in no way attributable to the acts of the host State). Lacking this differentiation, the pre-measure valuation of an investment based on the broad 'fair market value' definition is arguably already overestimated at the time the arbitral tribunal makes the comparison between the pre-measure investment value and the post-measure investment value. Equitable adjustments of the valuation are warranted.

¹⁰² Id. at para. 406.

¹⁰³ See Aswath Damodaran, *Investment Valuation: Tools and Techniques for Determining the Value of any Asset* (John Wiley & Sons, 2012), at p. 59; Kantor at pp. 145-146.

¹⁰⁴ See Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford University Press, 2009), at p. 152, paras. 3.337 and 3.338.

¹⁰⁵ Andrea Saldarriaga and Mark Kantor, 'Calculating Damages: Arbitrators, Counsel, and Experts Can Do Better than They Have in the Past', pp. 196-237, at p. 222, in Kevin W. Lu, Gero Verheyen, and Srilal M. Perera (eds.), *Investing with Confidence: Understanding Political Risk Management in the 21st Century* (World Bank, 2009).

3.2. Equitable adjustments under the general international law of reparations

To reiterate, arbitral tribunals have generally relied on their own discretion to use the ‘fair market value’ standard of compensation as the standard of compensation for non-expropriation breaches of investment treaty standards.¹⁰⁶ While it is the general law of international responsibility that governs the terms of reparations for non-expropriation breaches, compensation is but one of the forms of reparation under Article 36 of the ILC Articles of State Responsibility. The same Article does not provide for a scientific process for determining compensation. As seen in the Argentine cases discussed in the previous section, arbitral tribunals privilege certain factual and economic assumptions as they set pre-crisis and post-crisis asset valuations; determine the foreseeability of the economic crisis and its impact on the risk premium (if any) on the investment; and forecast quantitative estimates of the likely ‘fair market value’ of the investment or the deprivation of the economic benefits of the investment as a result of Argentina’s emergency measures during the 2001/2002 financial crisis. These judgment calls are unique to the arbitral tribunals’ own appreciation of how to approximate the ‘financially assessable damage’ contemplated for compensation as defined in Article 36 of the ILC Articles. Existing arbitration practices show that losses may be categorized according to ‘full loss of investment’s value’, the ‘diminution in investment’s value’, ‘unpaid taxes or contract price’, ‘loss of dividends by a shareholder’, ‘losses due to temporary interference’, and ‘loss of invested amounts’.¹⁰⁷

However, a fundamental axiom of compensation under Article 36 of the ILC Articles is that it is not intended to be punitive, exemplary, or expressive.¹⁰⁸ The ILC specifically requires that the determination of compensation owed to the injured State must contain ‘*an evaluation of the respective behavior of the parties* and, more generally, a concern to reach an *equitable and acceptable outcome*.’¹⁰⁹ This should also include the extent to which a party observed prudence to mitigate its own damages.¹¹⁰ As a matter of equity, therefore, it would not be unreasonable for the arbitral tribunal to adjust the quantum of compensation, in view of the host State’s good faith observance of the ICESCR during an economic emergency. Several arbitral tribunals have relied on ‘equitable considerations’¹¹¹ to adjust the quantum of compensation downward, taking into account the peculiarity of fact-patterns on a case to case basis and the inherent subjectivity of the valuation process.¹¹² Equitable considerations are perfectly suited to

¹⁰⁶ Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (BIICL, 2008), at pp. 90-91.

¹⁰⁷ Ripinsky and Williams, at pp. 91-92.

¹⁰⁸ Id. at note 170, p. 99, para. 4. See *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Merits*, Judgment, I.C.J. Reports 1974, p. 175, p. 204, para. 76; *Corfu Channel case*, Judgment of December 15th, 1949, I.C.J. Reports 1949, p. 244.

¹⁰⁹ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, with Commentaries, 2001, at p. 76, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed 2 March 2012).

¹¹⁰ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, with Commentaries, 2001, at p. 93, para. 11 available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed 2 March 2012).

¹¹¹ Id., citing *LAMCO v. Libya*, Award of 12 April 1977; *Tecmed v. Mexico*, Award of 29 May 2003, para. 190; *AMT v. Zaire*, Award of 21 February 1997, para. 7.16; *Kuwait v. Aminoil*, Award of 24 March 1982, para. 78; *Santa Elena v. Costa Rica*, Award of 17 February 2000, paras. 92 and 103; *Himpurna v. PLN*, Final Award of 4 May 1999, para. 237.

¹¹² Ripinsky and Williams, at pp. 124-126.

situations where adjudication inimitably involves some discretionary ambiguity,¹¹³ and have been applied by arbitral tribunals, such as the United States Special Mexican Claims Commissions¹¹⁴ and the Iran-US Claims Tribunal,¹¹⁵ in the absence of a settled procedure for determining compensation. Arbitral tribunals seeking to apply compensation under Article 36 of the ILC articles to non-expropriation breaches of a BIT should acknowledge that they engage in a discretionary exercise, and as such, be equally amenable to arguments on equity and fairness arising from the host State's good faith fulfillment of its ICESCR obligations during an economic emergency.

4. CONCLUSION: INVESTMENT AND HUMAN RIGHTS AS COMPLEMENTARY SPHERES OF THE PUBLIC INTEREST

Governance is a complex process of authoritative decision-making to serve the public interest. However, the 'public interest' is in reality, an amalgam of many interests that ultimately redound to the overall benefit of the State and its individual constituents. As observed in recent scholarship, the 'public interest' refers to 'some type of commonality or common characteristic between and among citizens' (such as the protection of individual rights as well as private property), and its application cannot be dissociated from the 'conception and use of political power...[which] is the fulcrum for balancing the interests of the state with the common interests, group interests, and the like'.¹¹⁶ The 'public interest' is thus generally concerned with matters of both *efficiency* (the size of the overall endowments available to society) as well as *equity* (the relative distribution of those endowments to individuals under a fair and just process).¹¹⁷ It is in this sense that human rights and investment protection are both matters of public interest. Investment hearkens to the efficiency dimension of the public interest by affecting the material conditions contributing to 'inherent dignity of the human person'.¹¹⁸ Human rights protection appeals to the equity dimension of the public interest by guaranteeing and preserving equal and non-discriminatory access of all individuals to social and economic goods. While human rights protection starkly and visibly exemplifies the public interest, it may also be said that generating economic development through welfare-improving and responsible

¹¹³ See Mark Weston Janis, 'The Ambiguity of Equity in International Law', 9 *Brooklyn J. Int'l L.* 7 (1983), at pp. 25-26 (restating Lauterpacht's acceptance of the use of equity in discretionary situations).

¹¹⁴ United States Special Mexican Claims Commission, *Decision N.1* (1938) 32 *AJIL* 858.

¹¹⁵ *CMI International Inc. v. Ministry of Roads and Transportation and the Islamic Republic of Iran*, Case No. 245, Iran-US Claims Tribunal, Award of 27 December 1983; *Starrett Housing v. the Islamic Republic of Iran*, Award of 19 December 1983; *Eastman Kodak v. the Islamic Republic of Iran*, Award of 1 July 1991.

¹¹⁶ Stephen M. King, Bradley S. Chilton, and Gary E. Roberts, 'Reflections on Defining the Public Interest', 41 *Administration & Society* (6 November 2010) 954, at p. 957.

¹¹⁷ See Burton A. Weisbrod, 'Conceptual Perspective on the Public Interest: An Economic Analysis', pp. 4-29, at p. 4, in Burton A. Weisbrod, Joel F. Handler, and Neil K. Komesar, *Public Interest Law: An Economic and Institutional Analysis* (University of California Berkeley Press, 1978).

¹¹⁸ See Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing, 2009), at pp. 106-109; *International Covenant on Economic, Social and Cultural Rights*, Preamble, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967). [hereafter, 'ICESCR'].

investment practices is also another dimension of the public interest.¹¹⁹ This article proceeds from this fundamental premise.

While one might be readily tempted to epitomize human rights protection as the fully disinterested representation of the public interest, and investment protection as nothing but the nefarious assertions of the private commercial interests of foreign investors,¹²⁰ the reality of genuine ‘public interest’ protection cannot be reduced to an easy ‘either-or’ dichotomy. The ‘legitimacy’ literature in international investment scholarship has pointed out numerous areas of procedural and substantive deficiencies, such as the lack of transparency and democratic accountability in international investment treaty-making and investment arbitration;¹²¹ allegedly biased procedures and outcomes that supposedly favor investors predominantly over host States and their constituents;¹²² and most importantly, the diminution of governments’ domestic policy and regulatory spaces due to the commitments they assume under international investment agreements (IIAs).¹²³ These are points to consider for systemic reform¹²⁴ (especially recent withdrawals from ICSID system by Bolivia, Ecuador, and Venezuela),¹²⁵ but not to draw a sweeping conclusion that there is a hard-and-fast ‘clash of paradigms’ ascribed from the ‘public interest’ orientation of human rights defenders sullied by the alleged ‘private

¹¹⁹ See Jeffrey D. Sachs, ‘Foreign Investment and the Changing Global Economic Reality’, pp. xliii-lviii in José E. Alvarez and Karl P. Sauvant, Kamil Gérard Ahmed and Gabriela P. Vizcaino (eds.), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press, 2011); Organisation for Economic Cooperation and Development (OECD), ‘Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs’, (2002 Report), available at www.oecd.org/dataoecd/47/51/1959815.pdf (last accessed 25 February 2012).

¹²⁰ See representative views and critiques against different features of the investment arbitration practice, procedure, and process in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010).

¹²¹ Howard Mann, ‘Civil Society Perspectives: What Do Key Stakeholders Expect from the International Investment Regime?’, pp. 22-29, at 24, in José E. Alvarez and Karl P. Sauvant, Kamil Gérard Ahmed and Gabriela P. Vizcaino (eds.), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press, 2011).

¹²² See Osgoode Hall Public Statement on the International Investment Regime, 31 August 2010, at www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20%28June%202011%29.pdf (last accessed 25 February 2012).

¹²³ See Stephan W. Schill, ‘Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’, 52 *Virg. J. Int’l L.* 1 (2011), pp. 57-102 at p. 66 (‘Host states are particularly concerned about a shrinking of domestic policy space occasioned by vague standards of investment protection, which are interpreted, partly in inconsistent ways, by international arbitrators who exercise significant interpretative powers over the content of investment treaty obligations, and who are de facto even able to restrict the policy choices made by democratically-elected legislators, without themselves enjoying a robust democratic mandate.’)

¹²⁴ Among some of the works on the subject, see Susan D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’, 73 *Fordham L. Rev.* 4 (2005), at pp. 1521-1625; David Schneiderman, ‘Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?’, 2 *J. Int’l. Disp. Settlement* 2 (2011), pp. 471-495; Christopher M. Ryan, ‘Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law’, 29 *U. Pa. J. Int’l L.* 3 (2008), at pp. 725-761; Erlend M. Leonhardsen, ‘Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration’, *J. Int’l. Disp. Settlement* (2011), pp. 1-42; Christina Cathey Schuetz, ‘Legitimacy and Inconsistency: Is Investment Arbitration Broken And If So, Can or Should it Be Fixed’, Ch. 12 in Ian a. Laird and Todd J. Weiler (eds.), *Investment Treaty Arbitration and International Law* (Juris Publishing, May 2010); Charles N. Brower and Stephan W. Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’, 9 *Chi. J. Int’l L.* 471 (2009).

¹²⁵ Luke Eric Peterson, ‘Venezuelan Exit from ICSID Raises Questions both Legal and Financial’, 31 January 2012, *Investment Arbitration Reporter*, at www.iareporter.com/articles/20120131_3 (last accessed 25 February 2012).

law' mandate and purely commercial dispositions of investment arbitrators.¹²⁶ The alleged mutual exclusivity of 'public interest' advocacies and investment arbitration is often assumed, but to date remains unproven. Rigid characterizations make doctrinal solutions for host States more elusive.

The suitability of the defenses discussed in this article will largely depend on the actual policy needs of host States according to their particular fiscal circumstances in a given economic emergency. Authoritative decision-makers in host States owe their mandate, as well as bases of power, to many constituencies - from the domestic voter population, influential party alliances, as well as possibly to external institutions that may also have an interest in ensuring the uninterrupted flow of continued financial assistance to a host State during the economic emergencies. If the goal of the host State's authoritative decision-maker is to achieve the maximal level of socioeconomic protection for its citizens during the economic emergency, its allocation of governmental resources to meet the ICESCR appears, at first glance, to be entirely well-justified. However, where fiscal resources are scarce, and the host State is impelled to seek recourse to external sovereign financing to ensure continued socioeconomic protection of its vulnerable domestic population,¹²⁷ it could also be the case that it would not serve the interests of the host State to adopt a 'beggar thy neighbor' position,¹²⁸ such as arbitrary foreign exchange controls and currency depreciations, unlimited borrowing from emergency funds in international financial institutions (with the full intention of summarily and unilaterally repudiating these obligations altogether), or purposely interfering with trade flows to cut imports and induce a domestic trade surplus. Host States would do well to calibrate their compliance policies, taking into consideration the likely impact of non-performance of one international obligation relative to the other, and formulate the least-costly strategy for performance of the international obligation that best contributes to its goal of socio-economic protection during the economic emergency.

Finally, it is important for the authoritative decision-makers of the host State to acknowledge that their choices between performing one international obligation (and not the other) do not take place in a vacuum. The state of the global political economy – and the interrelationships between markets, labor, institutions, and financing – bears significance for the achievement of the host State's goals during the economic emergency. Obviously, resource endowments and monetary capabilities will differ between developed country host States, and developing country host States. However, it is developing country host States that will be most

¹²⁶ See Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', 106 *Am. J. Int'l L.* (2012, forthcoming).

¹²⁷ See Committee on Economic, Social and Cultural Rights, Statement on an Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' Under the Optional Protocol to the Covenant, Thirty-Eighth Session, 30 April-18 May 2007, E/C.12/2007/1, 10 May 2007, at para. 5 ('The undertaking by a State party to use 'the maximum' of its available resources entitles it to receive resources offered by the international community. In this regard, the phrase 'to the maximum of available resources' refers to both the resources existing within a State as well as those available from the international community through international cooperation and assistance.')

¹²⁸ See World Bank Development Report (1987), at p. 139. See also Tim Weithers, *Foreign Exchange: A Practical Guide to FX Markets* (Wiley and Sons, 2011); Jens-Uwe Wunderlich and Meera Warrier, *A Dictionary of Globalization* (Taylor & Francis, 2007), at p. 47.

challenged to provide socioeconomic protection and observe the ICESCR during economic crises, and will most likely face sensitive political choices.¹²⁹

Considering the reality of developing countries' dependence on international support and development financing particularly in times of economic crisis, authoritative decision-makers of the host State must exert utmost efforts to observe the ICESCR without need of resorting to a unilateral repudiation of investment treaty obligations. Temporary non-performance of the duty to compensate investors during an economic emergency is one thing, but rejecting any degree of future international responsibility outright for the non-performance exposes the host State to a myriad of domino consequences in the international sphere. These could include the likely reluctance of sovereign creditor states to lend development financing; the increased political risk that could deter future foreign investment flows and sources of capital to the host State, as well as a litany of potential inter-State suits in the event that investors' States of nationality adopt and elevate their claims against the host State through diplomatic protection. As this article has attempted to show, there are various plausible defenses to enable a host State to prioritize the ICESCR during an economic emergency), without having to resort to extreme defections from international responsibility through investment repudiation, and ultimately jeopardizing the host State's future prospects of economic growth and development as a responsible member of the contemporary community of nations.¹³⁰ Governing for the public interest necessitates these seemingly pedestrian, but ultimately doctrinally careful, calibrations.

¹²⁹ United Nations, 'World Economic Situation and Prospects 2012' (United Nations, New York, 2012), at pp. xvi-xix, available at www.un.org/en/development/desa/policy/wesp/wesp_current/2012wesp.pdf (last accessed 5 March 2012).

¹³⁰ See UNCTAD, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries' (2009), at pp. 14-26 (showing that IIAs contribute to the 'coherence, transparency, predictability, and stability of investment frameworks of host countries', at p. 25).