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How has international law dealt with the tension between sovereignty over natural resources and investor interests in the energy sector? Is there a balance?

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*I.E.L.R. 95 Introduction

The energy industry is already the world's biggest industry by volume and capital. And it is growing. Predictions are that globalisation in the energy sector is likely to increase[1] as world demand for energy is likely to continue to grow in absolute terms,[2] especially given the exponential growth[3] of the economies in the BRIC countries.[4] Seen from an energy perspective, our modern world is therefore not only increasingly linked together "by flows of energy already produced but also by investment flows which are needed to produce this energy [that is to say] to develop energy projects".[5] This means that investment protection is becoming more important by the day. At the same time, the strategic importance of non-renewable resources is increasing steadily as these become scarcer. The tension between a resource-rich state's sovereignty[6] over its natural wealth and investor/investment protection is therefore bound to increase over the next decades. How does international law deal with this tension?

Divergence of interests

In this increasingly interdependent energy world, there is a wide variety of divergent interests involved in the extraction of resources. States, relying on their "inalienable right … freely to dispose of their natural wealth and resources in accordance with their national interests"[7] seek maximum flexibility in extracting, refining and selling the resources present within their territory so as to be able to make the most of the current market conditions as well as to be able to adapt to the political sentiment prevalent at any given time. Investors, on the other hand, being actors in an exceptionally long-term and capital-intensive industry, desire reliable, consistent and transparent legal frameworks so as get the maximum possible return on their investment.[8] There being a third variable in the equation, these often contradicting interests have to be read in conjunction with the interests of the international community as a whole. Broadly speaking, these can be said to be reflected by concerns such as energy security, environmental protection and sustainable development.

How effectively has the law dealt with this divergence?

It is the aim of this article to determine how the law has dealt with these often conflicting interests. Where is the balance between sovereignty over natural resources (host state interests) and investor rights in current mechanisms of international law? Are the mechanisms biased and, if so, towards whose interests? What is the effect of this bias? Where and how do the interests of the community fit in?

What this article will do

This article will not strive to provide a thorough analysis of the evolution of the principle of permanent sovereignty over natural resources, nor will it attempt to provide a detailed account of the heated

conflict between *rights and duties* relating to permanent sovereignty, as this has been done elsewhere.[9] It will also not provide an "extensive survey of existing instruments of international law dealing with investment protection and conventional political risk".[10] Instead, it will attempt to focus on a selection of the primary international law mechanisms[11] and evaluate ***I.E.L.R. 96*** the balance they have struck between diverging interests while allowing conceptual, critical and policy oriented[12] angles to inform the analysis where adequate.

Different sections

The first section of this article will aim to provide the reader with a brief overview of the tendencies of the current global energy situation so as to better understand the significance of the analysis in the overall context. It will try to extract common themes in different regions of the world and introduce some of the pertinent issues. It will also raise a number of questions to be kept in mind throughout the analysis.

The second section will look at the Energy Charter Treaty, a unique multilateral treaty, the central aim of which is to "consolidate Eurasian Energy Security and form common grounds for international investment practices that are able to place serious legal delimitations on arbitrary domestic transfers of property rights in the East European and Eurasian Energy sectors".[13] In addition to briefly investigating the interplay of some of its provisions, the discussion will also include an award rendered under its dispute resolution mechanism to illustrate some of the problems faced by tribunals and briefly evaluate the possibility of bias.

Then, a brief look will be taken at the bilateral investment treaty regime, which to a large extent operates under the auspices of the International Centre for the Settlement of Investment Disputes in Washington DC and the corresponding Convention. This system elegantly appears to combine individualisation and centralisation under the same roof. Its mechanisms, as will be seen, do significantly contribute to striking the balance in the right place at the right times.

The next section will then contain an analysis of the customary international law defence of *state of necessity* as codified in Art.25 of the International Law Commission Articles on State Responsibility. This discussion will show that although at the first glance one of the few trump cards in the hands of sovereign governments looking to assert their sovereignty over their resources in emergency situations to the detriment of investors, its invocation in practice is far from easy. In fact, in most circumstances, other mechanisms appear to be more apt in striking a balance.

The last section will extract common elements, discern current trends and evaluate the balance in the light of the foregoing discussion.

Issues

Russia

Vladimir Putin, Prime Minister of the world's largest energy supplier-nation only recently signed an order rejecting Russia's participation in the Energy Charter Treaty.[14] Given "the fragile state of Russia's Soviet-era infrastructure" [15] and its "dire need for hundreds of billions of roubles in investment"[16] to improve this infrastructure, this decision certainly is not a well-timed one. Some of this much-needed investment will inevitably have to come from abroad. But will multinational companies be willing to commit billions of dollars without adequate legal protection on a transnational level?

Necessitating the question

Ending the provisional application[17] of the Treaty (citing consumer-bias[18] as one reason for non-ratification) and thereby explicitly asserting its sovereign right over its natural resources is certainly some form of evidence of Russia's tendency to use its energy supplies as a strategic weapon.[19] However, much more importantly, it raises a number of significant questions: Is there consumer, or in our case, investor-bias in the treaty? Could that have been one of the major reasons

for non-ratification and finally exit? On the other hand, do alternative international law mechanisms adequately balance investor protection and host state sovereignty? Can they prevent a host state from *abusing* its sovereignty? After all, such abuse does not only impair investor interests. Given that by 2020 Russia will in all likelihood be supplying over 50 per cent of Europe's natural gas,[20] the interests of the (in this case European) energy consumer are also directly affected. One of the fundamental questions occupying politicians and experts alike is whether Russia will be able to meet ever-rising demand.[21] Indeed, it is imaginable that the falling apart of Russia's already crumbling energy-infrastructure could have devastating consequences for consumer states dependant on steady imports.

*I.E.L.R. 97 Venezuela

A few months earlier, Hugo Chavez, the Venezuelan President notorious for the implementation of his *Bolivarian Revolution,* [22] "changed the [national] law to make the whole [oil] industry preserve of the state".[23] This enabled the National Guard "to occupy dozens of drilling rigs, docks and boats operated by private contractors, both local and foreign, hired by PDVSA,[24] the state oil company",[25] in the process of extracting the black gold (or the *devil's excrement* as it has also been called[26]) in the territory of one of the most resource-rich countries in the world. Effectively expropriating local and foreign investors alike, Venezuela sought to justify this radical step by citing concerns of *national security,* arguing that the prices charged by the services firms were unreasonable in the light of current market conditions. However, as commentators argue, the real reason seems to be that PDVSA has run out of cash.[27] Already having "radicalised the oil nationalisation[s] by forcing six western major oil companies to renegotiate their agreements with respect to four heavy oil projects"[28] in 2007, this is a further controversial step increasing the tension between the government and investors. At the same time, it necessitates asking the question of how much room there is for a government to invoke national security or other essential interests to assert its right over its natural resources and thereby escape being held accountable for violating international obligations.

A prime example of impaired interests

By way of illustration, these developments neatly outline the divergent interests that can be involved. The government wants flexibility and will use its sovereignty to achieve it. The investors on the other hand want stability and security to be able to profit from investments in the long term. Similar to the scenario in Eastern Europe, the tension in Venezuela also goes further than just to impair the interests of the investors. For example, countries like the United States heavily depend on Venezuelan oil imports. At the same time, in order to extract the heavy crude oil from the Orinoco belt region, known to be one of the largest oil fields in the world, Venezuela is extremely reliant on the expertise and technology of foreign multinational companies.[29] Hence, there exists an *interdependence* which is there to stay and a tension that is likely to increase as non-renewable resources around the world continue to become scarcer over the next few decades. Are international legal mechanisms capable of balancing the divergent interests?

Cheered too early?

Two authors came to the conclusion that the "New International Economic Order gave heretofore voiceless States, including Venezuela, the courage and ability to assert their rights over natural resources in their territory".[30] However, as they concede, these rights, through mechanisms such as treaties and customary international law, have been given *shape* over time.[31] Is this shape adequate in the modern energy context?

The Energy Charter Treaty

The limitation of sovereignty by treaties

Accepting that Art.38 of the Statute of the International Court of Justice is generally regarded as a complete statement of the sources of international law,[32] it only makes sense to begin by analysing

international conventions. This section will first look at the Energy Charter Treaty[33] and then proceed to evaluate the Bilateral Investment Treaty system currently in place under the auspices of the World Bank's International Convention for the Settlement of Foreign Investment Disputes.

Energy Charter Treaty

Where is the *balance* between sovereignty and investors' rights in the ECT? In its preamble, the Energy Charter Treaty clarifies that, in relation to matters of investment, its objective is "to ensure the creation of a '*level playing field'* for energy sector investments throughout the ***I.E.L.R. 98*** Charter's constituency, with the aim of reducing to a minimum the non-commercial risks associated with energy-sector investments".[34] Interestingly, as opposed to failed agreements such as the Multilateral Agreement on Investment which was designed to create international obligations of investor protection in all industries, the ECT "maintains the right of the host country to exercise its sovereignty by choosing investors".[35] Certainly, this managed policy has somewhat contributed to the Treaty's widespread acceptance and its ability to achieve a "political compromise between energy-rich and energy-consuming countries".[36]

Recognising sovereignty

Article 18 explicitly recognises state sovereignty and sovereign rights over energy resources.[37] It asserts that each state holds the right "to decide the geographical areas within its Area to be made available for exploration and development of its energy resources … and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises".[38]

Protecting investment

Once investment has been allowed to enter, the Treaty places certain limits on a host state. Art. 10 demands the encouragement and creation of stable, equitable, favourable and transparent conditions for investors.[39] It also requires investments to be accorded fair and equitable treatment and condemns impairment of its management, maintenance, use, enjoyment or disposal by unreasonable or discriminatory measures.[40] Furthermore, it requires that investments not be accorded treatment less favourable than that required by international law[41] and requires each member state to observe any obligations entered into with respect of an investment. This succinct package of investment protection mechanisms, in combination with the dispute resolution provision in Art.26 is impressive. Effectively, it has established the first multinational agreement that not only matches, but even to some extent exceeds the protection provisions of many other international agreements.

How does the Treaty work in practice?

The first investor-state arbitration award[42] under the Treaty, rendered in 2003, provides some clues as to how the Treaty works in practice and is a decent illustration of where the state-investor balance is struck. The dispute arose out of an agreement between the Latvian subsidiary of a Swedish company and Latvenergo, the Latvian state-owned power company under which the former agreed to build and operate a modern cogeneration plant in Latvia. In an effort to, inter alia, increase its energy independence, the Latvian government made commitments (by way of law) to pay a substantially higher than normal tariff for eight years to make the venture attractive to investors.[43] When the plant was ready, the state company then refused to buy the electric power at the agreed tariff[44] arguing that since the *relevant domestic law* had changed and in fact been replaced by new legislation, it was only obliged to pay substantially less, causing the plant to operate at a loss from the start.[45] Unable to settle the dispute, the claimant initiated proceedings under Art.26(4)(c) of the ECT. Somewhat reassuringly for infrastructure investors with operations in ECT member states, the tribunal, applying rules of customary international law,[46] held Latvia to its bargain and ordered it to pay the full tariff for the remaining contractual term.

Reading between the lines--limiting arbitrary policy changes

Reading between the lines, one can observe the tension between sovereignty and investor rights from an interesting angle. As counsel for the claimant points out, Latvian news articles at the time cited certain officials as saying that "buying power from small generators [is] financially disadvantageous for the state" and that "supporting power plants with the help of Latvenergo is not the best solution".[47] In other words, trying to reduce ***I.E.L.R. 99*** dependency on energy imports from its big neighbour Russia[48] and incentivise environmental investment,[49] Latvia had passed a law trying to attract foreign investors. Once it realised that these financial incentives were not economically viable or sustainable, it tried to go back on its agreement by changing the 1995 Entrepreneurial Law to a new 1998 Energy Law.[50] However, having already admitted investors into its territory, it remained bound by the provisions of the Energy Charter Treaty and could not go back on the agreement through regulatory amendments. As the tribunal made very clear, "a Contracting Party to the Treaty cannot be relieved of its obligations under the Treaty simply by letting it be announced that legally binding commitments, upon which the foreign investor is relying, will not be honored".[51]

Bias in favour of investor protection?

Hence, the balance in the ECT appears to be in favour of investor protection once the investments have been allowed to enter. Similar to the opinion of sole arbitrator René-Jean Dupuy in the *TOPCO* case, the general stance under the Treaty seems to be "that a State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty and cannot, through measures belonging to its internal order, make null and void the rights of the contracting party which has performed its various obligations under the contract".[52] For investors, this is certainly reassuring.

A counterbalance through Article 18?

On the other hand, there are some interesting arguments regarding the drafters' insertion of Art. 18 (recognising state sovereignty and sovereign rights over resources). As one author points out, its inclusion creates a danger that "as no limit is imposed on the exercise of this right, the contracting parties can derogate from their obligations in other parts of the treaty, such as protection of investment, through claiming sovereignty and the fact that the 'public interest' so necessitated".[53] Indeed, by preserving a degree of interpretative ambiguity[54] there appears to be at least some scope for arguing that sovereignty trumps an obligation in case of conflict.[55]

Notable in this context is also Art.24(2), which allows member states, subject to the compensation and expropriation provisions in the Treaty, to adopt "measures necessary to protect human, animal or plant life or health". Somewhat a manifestation of the doctrine of sovereignty over natural resources, it will be interesting to see how arbitral tribunals will utilise this provision, in combination with Art. 18, to strike a balance between host state and investor interests in practice. At least some argue that because of their role as service providers to the global business community, arbitrators inherently tend to adopt a property-friendly approach and will therefore tend to awarding compensation where the impact of the interfering regulation on the investor's property was substantial or where it exceeds internationally accepted environmental standards.[56]

As another author adds, the state-sovereignty doctrine also allows any "country with a state-owned energy sector … to fully or partially reverse the conditions of an investment contract if it considers the conditions to be detrimental (ex post) to its energy security".[57] Indeed, reading Art. 18 in conjunction with Art.24(3)(a) (which provides that the Treaty's provisions shall not prevent any party from taking measures which it considers necessary to protect its essential security interests) such an argument seems conceptually possible. By significantly increasing investment risk, this would cause a shift away from an emphasis on investment protection and towards highlighting sovereignty over natural resources. The essential security interest aspect is further scrutinised below.

Compensation--another counterbalance through sovereignty

Another problem for investors may lie in matters of compensation. As Professor Sornarajah has pointed out, "the theory of internationalization of foreign investment works on the idea that the process of foreign investment be removed from the domestic sphere and be subject to a regime which gives it more protection".[58] By dedicating an entire provision to the principle of permanent

sovereignty and thereby placing it on par with Art. 12 (covering losses) and Art. 13 (governing the conditions of an expropriation) which both embrace the internationally accepted Hull standard, domestic law is ***I.E.L.R. 100*** effectively allowed to creep into the Treaty's international investment regime.[59] In doing so, it appears to permit compensation to be determined according to the domestic legal system of the host state rather than according to objectively determined international legal standards.[60] This brings the whole debate back to the controversial Art.2.2(c) of Resolution 3281.[61] Rather than referring to rules of international law,[62] this section provided that compensation for nationalisation, expropriation or the transfer of foreign property should be paid by the state adopting such measures, taking into account *its* relevant laws and regulations and all circumstances that *the state* considers pertinent.[63] In other words, it left the compensation mechanism entirely to the whims of the host state and its political and legislative processes as they came.

Dangerous though that route may seem at first, one can presume that reality will dictate that in a case of expropriation Arts 12 and 13 and Art.18 will be read together as two sides of the same coin rather than as two distinct legal norms. Furthermore, as the Energy Charter Secretariat's Readers-Guide[64] makes clear, “sovereignty must be exercised in accordance with and subject to the rules of international law”.[65] If anything, the above discussion shows that this issue still remains open to conflicting interpretations, potentially inviting arguments that could tilt the balance in favour of greater state control instead of investment protection.

Criticism--too one--sided despite Article 18?

Having briefly looked at a number of relevant provisions and their interplay, it appears that although the invocation of sovereignty over natural resources is conceptually possible, there is a certain practical investment protection bias to be found in the Treaty. As Wälde and Dow assert, the Treaty focuses “mainly on protection of investment, but not on the obligations of investors and the process of investment itself”.[66] Another author adds that whereas the investment “provisions apply … to failures to honor obligations on the part of the host contracting state … [t]hey do not apply to foreign investors that fail to fulfil their obligations”.[67] Indeed, it is imaginable that this bias actually contributed to Russia's decision to withdraw from the entire mechanism completely.[68] It almost goes without saying that “cooperation in the field of energy, where both exporting and consuming countries are members, necessitates a reflection upon the concerns of both parties”.[69] Incorporating Art. 18 in the middle of a complex legal document such as the ECT is certainly a first step towards creating “a balance between the concerns of energy-exporting countries in maintaining their sovereignty over natural resources and the demand of consuming nations to have access to energy resources and invest in the exploration and production of those reserves”.[70] However, given that resource rich-states such as Russia are looking for a certain degree of reciprocity[71] in opening their energy markets to Western investors, merely recognising the principle of sovereignty over natural wealth and resources without clarifying its operative role amongst the Treaty's substantive provisions might just not be enough to convince them.

Investment treaties

The limitation of sovereignty by bilateral investment treaties

Where is the *balance* between sovereignty and investor rights in Bilateral Investment Treaties? Described by Dolzer and Schreuer as the “boldest innovative step in the modern history of international cooperation concerning the role and protection of foreign investment”, the International Centre for the Settlement of Investment Disputes, operating under the 1965 ICSID Convention[72] has become the main forum for the settlement of investment disputes between developed and developing states all around the world. Today, there are more than 2,500 investment treaties in force,[73] most of them referring ***I.E.L.R. 101*** to ICSID as a forum for dispute settlement.[74] It is this widespread use, also in the energy sector, which makes this mechanism an interesting one to analyse for the purposes of discerning the prevalent balance of interests between investors and host states. Even though some of the following awards have not been rendered in the natural resources sector, they are useful to provide an overall picture from which trends and ideas for the natural resources sector can be derived.

The function of investment treaties

As one would imagine, the central aim of Bilateral Investment Treaties (BITs) is to protect foreign investors and their investments. To achieve this aim, they essentially internationalise disputes by inserting a variety of substantive protection provisions. They also give investors the right to bring a claim against the state before an arbitral tribunal for alleged breaches of these provisions.[75]

Whose interests prevail?

It has been said that although the preambles of BITs almost always state that it is their purpose to *promote* and *further* investments, "this cannot be conflated with a general preference for the interests of the investor over those of the host state".[76] On the other hand, Wälde and Dow have asserted that generally speaking, bilateral investment treaties do endorse a "one-sided focus on investor protection and thereby government-only discipline".[77] This, if true, would be unfortunate given that "the overall objective requires a balanced approach, since … an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host states from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations".[78] Is there such a balanced approach? Or is there a one-sided bias which provides for government-only discipline?

Limits on sovereignty

Certainly, BITs do place certain limits on the host state's sovereignty in an effort to provide stable and predictable legal frameworks for investors. For example, in *ADC v Hungary,* [79] the tribunal asserted that "while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries".[80] In this case, the extent of these boundaries was determined by the treaty entered into between Hungary and Cyprus.[81] Analysing the facts in the light of Art.4 of the Treaty (governing the conditions for expropriation), the tribunal here decided that the taking by decree of a contract for the construction and operation of a terminal at Budapest International Airport amounted to an unlawful expropriation. Considering Hungary's assertion that the measures were really taken for the strategic interest of the state, the tribunal concluded that due to a lack of convincing facts or legal reasoning, this argument had to be dismissed.[82]

Another example of the limitation

In the case of *Santa Elena v Costa Rica,* [83] the tribunal determined that as regards *environmentally* motivated expropriations, "the state's obligation to pay compensation [remains] … no matter how laudable and beneficial to society as a whole"[84] they might be. Furthermore, it was adamant that the "reason [for the taking] does not affect either the nature or the measure of the compensation to be paid".[85] This imposes quite a stringent standard on host states. After all, it means that governments are "unlikely to succeed should [they] argue that 'exceptional circumstances' warrant a departure from the standard of full compensation"[86] and that they will be held to the Hull formula regardless of their motivation for the taking. Such a stance clearly illustrates a strong emphasis on protecting and giving full effect to investors' property rights at the expense of the host state's freedom to exercise its sovereignty according to its own developmental policies.

Would the stance differ in another context?

Santa Elena concerned the expropriation by decree of a plot of land invoking the public purpose of creating a natural habitat in which flora and fauna could flourish.[87] In this context, the tribunal found no difficulty in applying the well-established rule of international law that permits governments "to expropriate foreign-owned property within [their] territory for a public purpose *and* against ****I.E.L.R. 102*** the prompt payment of adequate and effective compensation".[88] In this particular case, there were no allegations of any damage to the environment caused by the investor; the decision to expropriate was wholly based on environmental policy. What would the stance be like in a situation where the investor's energy infrastructure causes harm to the environment? Would compensation still be required to make the expropriation lawful under international law?

Shifting liability

As Professor Sornarajah points out, whereas in the past damages "to the environment [were] hardly an excuse for interference with the foreign investment" and disputes were mainly one-sided, in the modern natural resources context there are "emerging categories of disputes in which the host state will be the victim of malpractice and as such would claim damages against the foreign investor".[89] For example, the distinguished professor highlights that "[w]here oilfield practices adopted by the foreign investor are shown to be unsound, the operator will not only be violating internal law but international standards of environmental protection as well" [90] and therefore a corresponding obligation to pay compensation for any damage caused will arise. Hence, it appears that past attitudes to regulatory and outright takings will have to be revised considerably to keep up with and adequately address the issues and concerns brought about by the increasing globalisation of the modern energy industry.[91] Where particularly calamitous circumstances attend exploration, there is even an argument that arbitration, which "has grown up in the context of safeguarding the interests of the foreign investor", [92] is not a suitable mechanism at all.

Limits on sovereignty but recognition of other interests as well

In the light of the increased recognition of the need to balance investor protection against legitimate host state environmental concerns, it can be said with a certain conviction that the definition of the boundary between legitimate regulatory interference and excessive expropriatory regulation will keep challenging energy lawyers over the decades to come.[93] Nevertheless, the cases above also illustrate that it is a well-established principle that by entering into BITs, states accept, in the words of Dupuy, a "limitation, partial and limited in time, of the exercise of sovereignty"[94] and are thereby prevented from acting in breach of the substantive obligations contained in the treaties they have entered into. Whether or not this restriction is a justified trade-off against the benefits generally associated with attracting foreign direct investment in the resources sector is a debate far from concluded.[95]

Sometimes host state interests prevail

Under limited circumstances, host state interests have been held to outweigh investor protection. For example, in the NAFTA case of *Feldman v Mexico,* [96] the tribunal clarified that governments "must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like".[97] This award can be distinguished from the *Santa Elena* award as it did not concern an expropriation by decree but alleged regulatory interference with the claimant's ability to conduct his business. It is of interest to the current discussion because it shows that there will indeed be circumstances in which reasonable governmental interests must sensibly prevail. It is not hard to agree with the concerns expressed by the tribunal that "[r]easonable governmental regulation … cannot be achieved if any business that is adversely affected may seek compensation".[98] Accordingly, although host state sovereignty is temporarily limited by investment treaties, such as the NAFTA in this case, there is also an inherent recognition of the essential need to allow governments to conduct their internal affairs according to their own policies, regardless of the potentially damaging effects to investors. Allowing for a certain degree of flexibility, it essentially becomes a balancing exercise.

The balancing exercise--fair and equitable treatment

A good example of such a balancing exercise is the often-used substantive protection provision contained in most bilateral investment treaties obliging the host state to accord the investor fair and equitable treatment at all times.[99] This standard, inter alia, includes elements of consistency, transparency, legitimate expectations, ***I.E.L.R. 103** stability and predictability.[100] It has been described as "especially important for direct investments which are usually made for a considerable duration and whose profitability and economic contribution to the host country's economy are dependent on them being treated by local authorities in a way which is coherent with the ordinary conduct of business activity".[101] In other words, it is highly relevant to resource-related investment projects. Here, tribunals have begun to identify situations where the equitable balancing of legitimate public interests of the state against investor interests indicates that the standard has not been breached.[102]

Balancing in practice

The case of *Saluka v Czech Republic* [103] required the weighing of the claimant's legitimate and reasonable expectations against the host state's legitimate regulatory interests.[104] Having looked at whether the expectations were reasonable in the light of the circumstances and whether the policies were implemented bona fide, the tribunal decided on the facts that the fair and equitable standard was breached because of the non-transparent and discriminatory way in which the government had acted towards the investor.[105]

In *Genin v Estonia,* [106] on the other hand, the tribunal had to scrutinise the internal conduct of a bank to determine whether legitimate regulatory concerns justified the withdrawal of a banking license to the detriment of the foreign investor. Finding that there were ample grounds justifying the withdrawal, the tribunal held that the fair and equitable standard had not been breached in this case.[107]

In *CMS v Argentina,* [108] the tribunal found that the fair and equitable treatment provision in the relevant BIT had been breached because Argentina, in response to its economic crisis in 2001, took measures which essentially entirely transformed and altered the "legal and business environment under which the investment was decided and made".[109] Even though this decision was not satisfactory on its facts,[110] it demonstrated the broad discretion given to tribunals by the lack of a clear definition of the fair and equitable standard.[111] Relying on factors such as the treaty's preamble,[112] this decision clearly came down on the side of investment protection.

Flexibility is welcomed in balancing interests

Clearly, under the investment treaty regime, there is an attempt to recognise host state sovereignty and balance it against investors' interests as countervailing factors. Even though there is purportedly a high degree of deference to governmental decisions,[113] tribunals in practice do thoroughly scrutinise the real reasons behind governmental regulation. Depending on the context, they will then come down on either side to make the decision as fair as possible. Not bound by precedent,[114] this regime offers a significant degree of flexibility allowing decisions to be tailored to the dispute at hand. However, as decisions such as *CMS v Argentina* show, it is also somewhat prone to analytical error, thereby substantiating accusations of a too property-friendly approach caused by arbitral tribunals' professional background and orientation.[115]

Government-only discipline

Wälde and Dow rightly assert that on the face of it, the ICSID regime does not directly regulate the behaviour of investors once they have entered the country through mechanisms other than host state law, thereby raising the suspicion of institutional bias. However, through the reasoning employed by tribunals, some limits to the conduct of investors have been shaped. Interesting in this context are a number of arbitral decisions concerning the definition of an *investment* in Art.25(1) of the ICSID Convention, a requirement that needs to be satisfied in order to be able to bring a claim under the Convention.

For example, in the case of *World Duty Free v Kenya,* [116] the tribunal declined jurisdiction and dismissed the claim because there was evidence of bribery during pre-investment negotiations.[117] Similarly, in *Fraport v Philippines,* [118] the majority "determined that an investment intentionally structured in violation of Philippine law in order for the investor to gain the prohibited control and management of a project"[119] did not satisfy the definition of investment under ICSID and therefore fell outside the tribunal's jurisdiction.[120] Also, in the case of *Inceysa v El Salvador,* [121] the tribunal denied the claim as the claimant had received the concession in question by intentionally providing false information about the company, thereby committing systematic fraud.[122] The "investment" was hence not recognised as falling within Art.25(1) of ICSID and was therefore held to be outside the jurisdiction of the tribunal.

Interpretative flexibility to address concerns of institutional one-sidedness

These decisions outline an interesting mechanism to be found under ICSID: the ability to deal with factors such as "corruption, lack of tendering or other cases of lack of transparency and propriety in the acquisition of an investment" [123] which have been described as "the seedbed for subsequent

governmental intervention into infrastructure projects".[124] It appears that despite assertions to the contrary, the ICSID regime has managed to, at least to some extent, address concerns of institutional one-sidedness through the interpretative flexibility of the term "investment" contained in Art.25(1) of the ICSID Convention. Rather than having to accept investment regardless of its form through the conclusion of Bilateral Investment Treaties and thereby placing worrying constraints on the host-states sovereignty to regulate the extraction of its resources according to its own policies, the requirement that investments be in accordance with host state law is a reassuring one. It is certainly a significant step towards striking the right balance.

Customary international law

Issues--does custom still play a role?

Having analysed two treaty mechanisms protecting investor rights in the energy sector, one cannot be blamed for asking whether custom has a role left to play at all in striking the balance between the various interests involved. Two of the most eminent authorities have answered this question in the affirmative. In their opinion, given "the vagaries of international economic relations, the reference to customary law in some treaties and the patchwork of the current net of treaties with its remaining gaps … the ongoing controversies on the state of customary international law will [certainly] occupy foreign offices, judges and arbitrators in the future".[125] In other words, customary international law is here to stay. Regrettably, as another author laments, the perceived limitations of the protections afforded by custom have in practice led to the majority of state practice in the foreign investment sector being made through treaties.[126] This in turn has led to a situation in which custom in this area is starved of independent progressive development.[127] Has this lack of progressive development led to an imbalance in the mechanisms of custom?

The exercise and limitation of sovereignty in interplay

An interesting concept to be looked at for the purposes of this discussion is the defence of *state of necessity* as enshrined in Art.25 of the International Law Commission's Articles on State Responsibility.[128] In theory, it appears to be one of the few, albeit extremely narrow, trump cards in the hands of states seeking to invoke their sovereignty over natural resources to the detriment of investors in the energy infrastructure industry. As mentioned above, given the rising global energy interdependence and the depletion of non-renewable resources around the world, there is a corresponding increase in the tension between investor rights and host state interests. In the light of this fact, it is conceivable and indeed likely that the concept of *state of necessity* will arise in the energy context in the future. Take for example Venezuela's invocation of its national security to justify expropriating small and large-scale infrastructure investors in the oil industry. Could Venezuela conceptually rely on the defence of necessity to excuse its non-performance of the obligations contained in bilateral investment treaties or the international law principle that the taking of foreign property, no matter how beneficial, carries with it the requirement to pay compensation?[129]

**I.E.L.R. 105 Necessity*

The customary international law defence of *state of necessity* can be a very powerful one. As one author put it, the concept exists in international law "because it has a role to play as a safety valve … to relieve the inevitably untoward consequences of a concern for adhering at all costs to the letter of the law".[130] The Commentary to the ILC Articles clarifies that "the existence in a given case of a circumstance precluding wrongfulness in accordance with [chapter V] provides a *shield* against an otherwise well-founded claim for the breach of an international obligation".[131] Article 25, upon satisfying a number of very stringent conditions, allows a state "not to perform some other obligation of lesser weight or urgency" where that is the "only way a State can safeguard an essential interest threatened by a grave and imminent peril".[132] That way, it is capable of relieving a state from its responsibility with respect to an international obligation because the state had no choice but to act in breach of its obligations to safeguard its own interests. The obligations referred to could for example be those contained in a bilateral investment treaty or those contained in a rule of custom.

In the past, the defence "has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the state and its people in time of public emergency, or ensuring the safety of a civilian population".[133] For example, the Commentary mentions a dispute between England and Portugal in 1823, in which Portugal successfully argued "that the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances … justified its appropriation of property owned by British subjects"[134] despite a treaty obligation. However, the negative wording of the article already provides a clue as to the difficulty of successfully invoking the defence in practice.[135]

The Argentine cases--three worlds of necessity

A number of ICSID awards rendered in the aftermath of the 2001 Argentine financial crisis provide some very interesting insight on the *state of necessity* doctrine as applied in modern arbitral practice. The central issue in these disputes was the suspension of tariff adjustments in privatised utility companies by the Argentine government in an effort to avert a complete breakdown of its economy.[136]

CMS v Argentina--a controversial decision

In *CMS v Argentina,* [137] the claimant alleged that the "Emergency Law", passed by Argentina in response to a looming fiscal breakdown, significantly impaired the value of its minority shareholding in an Argentine gas company and therefore constituted a breach of a number of substantive obligations contained in the US-Argentina BIT, such as fair and equitable treatment. Argentina on the other hand argued that even if the tribunal were to find such breaches, it should be exempted from liability in the light of the existence of a state of necessity.[138] Basing its argument on the then prevalent "economic, political and social crisis … and on the belief that the very existence of the Argentine State was threatened",[139] the Republic asserted that the defence "based on this crisis would exclude … any wrongfulness of the measures adopted by the government and in particular would rule out compensation".[140] The tribunal, however, disagreed. Having analysed conditions for relying on the *state of necessity,* it came to the conclusion that even though elements of the defence were partially present here and there, it did not as a whole meet the cumulative test for its successful invocation.[141]

A balance--or too much investor protection?

On the one hand, the tribunal conceded that "the situation was difficult enough to justify the government taking action to prevent a worsening of the situation"[142] therefore seemingly amounting to a grave and imminent peril as required by Art.25. However, it ultimately opined that the defence as a whole was unavailable because the measures adopted were not the only ones available and because Argentina substantially contributed to the crisis through its government policies and their shortcomings ***I.E.L.R. 106** in the first place. The form of this reasoning, despite not being satisfactory in substance,[143] was upheld in subsequent annulment proceedings.[144]

After all, the tribunal seems to have been significantly swayed by the strict limitations of the defence which were inserted to safeguard against possible abuse.[145] It is not hard to understand that a looser approach would lead to a situation in which "any state could invoke necessity to elude its international obligations".[146] This would indeed be rather unfortunate. However, in the particular case of Argentina, as subsequent awards demonstrate, it is questionable whether such an overly restrictive approach provided the right mechanism to achieve a just result and a proper balance between the state's interests and investor protection.

LG&E v Argentina--another view

Eighteen months after *CMS,* in the case of *LG&E v Argentina,* [147] the tribunal, on almost identical facts,[148] came to a diametrically opposite conclusion as regards the possibility of invoking the defence of necessity under customary international law as well as under Art.XI of the US-Argentina BIT. The latter provided that the obligations undertaken in the treaty "shall not preclude … the application of measures necessary for … the maintenance of public order [or for] the protection of essential security interests".[149] As in *CMS,* a number of US corporations which had acquired equity stakes in Argentine gas companies, and whose interests had been substantially affected by the measures taken by the

administration during the crisis, sought compensation for breaches of substantive obligations contained in the Treaty. Argentina on the other hand alleged that because the measures in question were "necessary to maintain public order and protect its essential security interests"[150] responsibility should be precluded. The tribunal, thoroughly analysing[151] the circumstances prevalent at the time and the conditions for invoking the defence, came to the conclusion that, for a limited period between 2001 and 2003, Argentina was "excused under Article XI from liability for any breaches of the treaty".[152] After all, devastating conditions had "called for immediate, decisive action to restore civil order and stop the economic decline".[153]

Really excused under the BIT

The tribunal was satisfied that the conditions for invoking Art.25 were fulfilled.[154] But it concluded that rather than establishing Argentina's defence on its own, it simply supported the tribunal's analysis with regard to the meaning of the requirements for invoking Art.XI, which alone was sufficient to excuse Argentina's liability.[155] In other words, although the codification of the defence of necessity at customary international law in Art.25 of the ILC Articles was helpful in determining the boundaries, the treaty provision was by itself sufficient to determine that liability ought to be excused under these exceptional circumstances. Interestingly, it was therefore the bilateral treaty, and not custom which gave the tribunal the tools to weigh host state interests against investor protection.

Continental casualty--a detailed reasoning on the matter

Two years later, in the ICSID arbitration of *Continental Casualty v Argentina,* [156] the dispute again concerned the measures taken by the Argentine government during its 2001 financial crisis. Here, an American insurance company claimed that the value of its stake in a number of Argentine low-risk vehicles was substantially impaired as a result of the steps taken by the administration. However, the tribunal took yet another stance on the defence of necessity and its relationship with Art.XI of the BIT.

Similarities and differences between custom and lex specialis

Comparing Art.25 to Art.XI of the BIT, the tribunal conceded that both provisions "intend to provide flexibility in the application of international obligations, recognising that necessity to protect national interests of a paramount importance may justify setting aside or ***I.E.L.R. 107*** suspending an obligation, or preventing liability from its breach".[157] However, the tribunal then stressed that because Art.XI in essence "restricts or derogates from the substantial obligations undertaken by the parties" whereas Art.25 precludes "the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin", the conditions for their applications cannot be the same.[158] Essentially, the tribunal opined that being a kind of *lex specialis,* Art.XI effectively pre-empts recourse to the more restrictive customary exception of necessity.[159] Emphasising once more the highly restrictive nature of the custom rule, the tribunal made clear that although it will refer to Art.25 to assist its interpretation of the BIT provision, it will focus on the latter to determine whether Argentina can be excused for not performing its international obligations.

How relevant is the concept really?

For example, in its analysis, the tribunal was at one point invited to rely on the ILC commentary of Art.25(1)(a) which, at para. 15 states that "the plea [of necessity] is excluded if there are other (otherwise) lawful means available, even if they may be more costly or less convenient".[160] In other words, under the customary law principle, the measures taken by the state need to be the *only* available option. In the tribunal's view, the treaty was separable from the customary law standard. It therefore refused to apply this rather strict standard to determine whether the measures taken by Argentina were really necessary. Instead, the tribunal found "it more appropriate to refer to GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating [from] obligations".[161] Applying the balancing test contained in Art.XX of the GATT,[162] the tribunal ultimately concluded that "the measures taken by Argentina were necessary to address, through painful means and by retreating from a number of commitments to the public as to the stability and convertibility of the national currency, an impending situation of complete breaking down of the economy".[163] This in turn led the tribunal to consider that the

Republic's “conduct, in the face of the economic crisis conformed, by and large, with the conditions required for derogating from its obligations under [Article] XI of the BIT”.[164] Hence, rather than feeling constrained by the strict nature of the plea contained in Art.25, the tribunal applied various interpretative mechanisms to distinguish the standard contained in Art.XI from the customary international law principle and thereby allowed Argentina, for a limited period of time, to be relieved of its obligations towards investors.

Criticism or praise?

Whilst drafting Art.25, the ILC was concerned about not setting too high a standard so that “the defence would be rendered virtually meaningless” and not too low a standard so “that it could be used successfully to excuse the breach of any obligation that had become unpalatable”.[165] Having looked at the application of the defence in recent arbitral practice, it appears that indeed it sets a very high standard. In the investment context this interpretation even tilts the balance slightly towards investment protection rather than host state sovereignty. However, that is by no means to say that it has therefore been rendered virtually meaningless.

In the *CMS* case, the stringent format of Art.25 arguably led the tribunal to come down in favour of investment protection, essentially failing to give sufficient weight to host state interests where the circumstances undoubtedly so required. In the *LG&E* decision on the other hand, the tribunal, although satisfied that the stringent conditions for invoking the defence of state of necessity were fulfilled, decided to excuse Argentina under the relevant provision of the BIT. Finally, *Continental Casualty* then provided some very persuasive reasoning as to why the defence at custom differs from that under the relevant treaty and why the latter was a more appropriate one to use in the circumstances. Interestingly, the tribunal here relied on the balancing test contained in Art.XX of the GATT to determine whether the measures adopted by Argentina were really necessary. This article also allows member states to take measures “necessary to protect human, animal or plant life or health” or “relating to the conservation of exhaustible natural resources” provided that such are not applied in an arbitrary, discriminatory or trade-restrictive manner.[166] It is therefore conceivable that another tribunal, when faced with a dispute relating to the extraction of natural resources, could rely on this provision as well in an effort to inform its interpretative analysis. Utilised this ***I.E.L.R. 108** way, it could prove to be a versatile tool to balance environmental protection and sustainable development against investor interests.

Even though the *LG&E* and the *Continental Casualty* tribunals relied on the doctrinal rationales behind the custom rule to inform their analysis in an aim to strike an appropriate balance, both ultimately excused Argentina, for a limited period of time, under the *essential security provision* in the treaty. Did they do so because they felt that necessity is “at best a crude defence, appropriate as long as international law in this area remains underdeveloped?”[167] If this is true, it would mean that the process of the ever-increasing use of investment treaties starving international law of independent progressive development is predestined to continue. Certainly, on the face of it, the treaty exception in the hands of a knowledgeable tribunal seemed to allow for a far more flexible and all-encompassing approach, giving due consideration to all the interests involved.

In the light of this discussion, it is unlikely that significant actors in the energy sector such as Venezuela or Russia will in practice be able to seek recourse to the defence at customary law unless truly devastating and catastrophic conditions so allow. Much rather, it is to be expected that they will attempt to invoke the essential security provisions in their bilateral investment treaties, if such a provision was included. In doing so, they can be fairly certain that a knowledgeable tribunal, using the more flexible tools available to them, will strike an adequate balance between their sovereignty and investor interests in any given situation.

Conclusions

Having looked at a variety of different mechanisms, it is now necessary to extract common themes and draw brief conclusions from the foregoing analysis.

Where is the balance?

As the *Nykomb* arbitration illustrates, the Energy Charter Treaty's investment protection provisions

seem to be effective in practice, thereby placing temporary and arguably justified limits on host-state sovereignty. Interestingly, the operative role of Art. 18, recognising sovereignty over natural wealth and resources, has yet to be determined.[168] Of course, there is the argument that the doctrine has only been included to secure widespread support for the Treaty.[169] On the other hand, it may be interesting to see whether resource-rich host states will be able to invoke this provision, in combination with the section governing exceptions, to argue that their essential interests, perhaps in the form of energy security or environmental concerns justify non-observance of the investment protection provisions contained in Art. 10. Furthermore, there appears to be the theoretical possibility of arguing that Art. 18, read together with Art. 13, which governs expropriation, brings the compensation debate back to the controversial Resolution 3281 and its emphasis on national law as opposed to international standards. However, despite this interpretation risk, the better view is that common sense will dictate that the whole Treaty be read as one document, thereby precluding the possibility of one provision overriding another.

By providing for host state discipline while not mentioning positive obligations to be observed by investors, there is arguably a certain practical bias inherent in the investment-protection mechanisms of the ECT. Whether or not and to what extent this bias contributed to Russia's decision to terminate its role in the Treaty remains open to debate. Certainly the termination was not the powerful energy-liberalisation signal much hoped-for by the international community.[170] Given that governance is the key to security for investments,[171] this development read in the overall framework of events is not a reassuring one. In the light of the Russian government's increasing influence in the private sector, the continued privileged status of its national petroleum companies and the persistent inadequacy of its investment regime outside the Energy Charter Treaty, it is to be expected that foreign companies will remain to be deterred from investing in Russia's natural resource sector.[172] Down the line, this could have far-reaching consequences for the European consumer dependant on imported Russian petroleum products.

Does the BIT regime under ICSID provide a balanced approach? From the discussion, one can see that bilateral treaties in practice also place certain limits on the exercise of host state sovereignty. However, there is at least an argument that these boundaries are a justified trade-off against the benefits commonly associated with attracting foreign direct investment through holding out a stable and transparent legal framework.

Also interesting in this context is the increased recognition of emerging international standards of environmental protection. Certainly, these will inform arbitral awards in the resources industry in the future and impact on where the balance is struck in practice. Further evidence of shifting parameters is that this recognition is shared by Art.23 of the ECT as well as Art.XX of the GATT. Recently applied by the *Continental Casualty* ***I.E.L.R. 109*** tribunal in the Argentine economic necessity context, it is indeed conceivable that the environmental and sustainable development aspect of the latter provision could be used to inform the analysis of an arbitral tribunal in a dispute related to the extraction of resources.

Perhaps the most significant attribute to be found in the bilateral treaty regime is flexibility. In the *fair and equitable* treatment context for example, it gives tribunals considerable room to weigh diverging interests so as to strike an adequate balance. However, as the *CMS* award shows, this mechanism does not always achieve the right balance. On the other hand, partially through this interpretative flexibility, the regime has also managed to somewhat address claims of institutional one-sidedness by placing fairly stringent conditions on the behaviour of investors, at least when they are in the process of making their investments.

The analysis of the customary international law doctrine of *state of necessity* in the light of the Argentine award trilogy revealed that indeed there is some force to the argument that rules of custom are being starved of independent progressive development by the widespread use of individually negotiated investment treaties. Both the tribunals in *LG&E* and *Continental Casualty,* albeit using the custom rule to inform their analysis, ultimately excused Argentina under the relevant provision of the bilateral treaty between the US and Argentina. The tribunal in *CMS* on the other hand placed significant emphasis on the strict standard enshrined in Art.25. It therefore felt that on the facts, investor protection had to prevail.

Transposing these observations onto the resources and energy infrastructure industry, it thus appears that because of their flexibility, bilateral treaties may be the most apt tools to balance host state sovereignty over natural wealth and resources and investor protection. However, ultimately much will depend on the tribunal and whether it is capable of using these tools to equitably weigh essential host

state interests such as energy security or environmental protection against the interests of investors from abroad.

Concluding remarks--a note of caution

Even though the discussed mechanisms should be somewhat praised for a decent attempt to strike the right balance, it is nevertheless true that many of them have been shaped or are at least seen as having been shaped by the rich capital-exporting states of the North.[173] Furthermore, many of the treaty and custom mechanisms are arguably trapped in a conventional perspective of international law which focuses on the interaction of sovereign governments with each other and thereby fails to implicate all the new actors in the modern energy context as would undoubtedly be necessary so as to give the various regimes more credibility.[174] Also, receptivity and hostility to foreign investments are cyclical phenomena in the lives of states.[175] As these cycles are determined by the prevalent political sentiment, legal documents and the balancing mechanisms contained therein will often not suffice. Some issues may be better dealt with on the playing field of international politics. Be that as it may, the increasing tension between diverging interests brought about by the inevitable depletion of natural resources and the ever-growing global energy interdependence will certainly keep occupying energy lawyers, governments, investors and consumers alike.

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1. J. Hickey, *Energy Law and Policy for the 21st Century* (Colorado, 2000), at 4-1.

2. A. Konoplyanik, “Energy Security: The Role of Business, Governments, International Organisations and International Legal Framework” (2007) 6 IELTR 85 at 85.

3. E. Sussman, “Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development” (2008) 14 *ILSA Journal of International & Comparative Law* Spring 2008 available at *http://papers.ssrn com/sol3/papers.cfm?abstract_id=1090261#* at 7.

4. Brazil, Russia, India and China.

5. A. Konoplyanik “Energy Security and the Development of International Energy Markets”, in B. Barton, C. Redgwell, A. Rønne and D. Zillman (eds), *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (Oxford, 2004) at 63.

6. Brownlie argues that this principle and the right to self-determination are “probably” peremptory norms.

7. United Nations General Assembly Resolution 1803 (XVII) of December 14, 1962 “Permanent Sovereignty over Natural Resources”.

8. A. Konoplyanik, “Energy Security: The Role of Business, Governments, International Organisations and International Legal Framework” (2007) 6 IELTR 85 at 87.

9. N. Shrijver, *Sovereignty over Natural Resources* (Cambridge, 1997), 258. See also K. Gess, “Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and its Genesis” (1964) 13 ICLQ 398 and Vielleville and Vasani “Sovereignty over Natural Resources versus Rights under Investment Contracts: Which one prevails?” (2008) 5 *Transnational Dispute Management* 2.

10. See e.g. R. Dolzer, *Principles of International Investment Law* (Oxford, 2008); P. Muchlinski, F. Ortino and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford, 2008), p.261; M. Sornarajah, *The International Law on Foreign Investment* (Cambridge, 2000); Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford, 1995); and T. Wälde (ed.), *The Energy Charter Treaty* (Kluwer, 1996).

11. As enshrined in Art.38(1) of the Statute of the International Court of Justice.

12. T. Wälde and S. Dow, “Treaties and Regulatory Risk in Infrastructure Investment--The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment” (2000) 34 *Journal of World Trade* 1 at 3.

13. T. Grigoriadis “State Responsibility and Antitrust in the Energy Charter Treaty: Socialization vs. Liberalization in Bilateral Investment Relations” (2008) 44 *Texas International Law Journal* 45 at 48.

14. "Russia PM Putin rejects international energy charter", *Reuters,* Thursday August 6, 2009 8:16pm IST available at *http://in reuters.com/article/oilRpt/idINL639469220090806.*

15. C. Belton, "Power plant accident--eleven dead in Russia", *Financial Times,* Tuesday August 18, 2009, at 6.

16. C. Belton, "Power plant accident--eleven dead in Russia", *Financial Times,* Tuesday August 18, 2009, at 6.

17. The option to do so is provided for by Art.45 of the Treaty and whereas other states delivered declarations that they are not able to provisionally apply the ECT, Russia did not do so. See E. Sussman, "Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development" (2008) 14 *ILSA Journal of International & Comparative Law* Spring 2008 available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090261#* at 4. See also Art.45 of the Treaty and Art.25 of the Vienna Convention on the Law of Treaties, 1969, 115 U.N.T.S. 331.

18. "Russia PM Putin rejects international energy charter", *Reuters,* Thursday August 6, 2009 8:16pm IST available at *http://in reuters.com/article/oilRpt/idINL639469220090806.*

19. M. Walker, "Russia v. Europe: The Energy Wars" (Spring 2007) *World Policy Journal* 1.

20. C. Flynn, "Russian Roulette: The ECT, Transit and Western European Energy Security" (2007) 1 I.E.L.T.R. 12, at 16.

21. M. Walker, "Russia v. Europe: The Energy Wars" (Spring 2007) *World Policy Journal* 4.

22. N. Mapstone, "Peru quake victims left waiting for homes", *Financial Times,* Saturday August 15, 2009. See also C. Twickel, *Hugo Chávez--Eine Biografie* (Hamburg, 2006).

23. "Venezuela's oil industry, Skint, Expropriating accounts payable", *The Economist,* May 14. 2009, available at *http://www.economist.com/world/americas/displaystory.cfm?story_id=13649558.*

24. Petroléos de Venezuela S.A.

25. "Venezuela's oil industry, Skint, Expropriating accounts payable", *The Economist,* May 14. 2009, available at *http://www.economist.com/world/americas/displaystory.cfm?story_id=13649558.*

26. C. Twickel, *Hugo Chávez--Eine Biografie* (Hamburg, 2006). Juan Pablo Perez Alfonso, the famous Venezuelan leftist and co-founder of OPEC, called oil the "excrement of the devil" after he realised that even nationalisation of the oil industry doesn't have the desired effect of keeping a sufficient amount of petro-dollars in the country for national betterment (author's own translation) at 235. See also M. Naim, "Oil can be a curse on poor nations", *Financial Times,* Wednesday August 19, 2009, at 9 (also forthcoming in Foreign Policy).

27. "Venezuela's oil industry, Skint, Expropriating accounts payable", *The Economist,* May 14. 2009, available at *http://www.economist.com/world/americas/displaystory.cfm?story_id=1 3649558.*

28. Vielleville and Vasani, "Sovereignty over Natural Resources versus Rights under Investment Contracts: Which One Prevails?"(2008) *Transnational Dispute Management* 2, at 2.

29. C. Twickel, *Hugo Chávez--Eine Biografie* (Hamburg, 2006). p.256. As Twickel points out, this dependence at one point was about to disappear due to a special production method developed by PDVSA which created an innovative and more affordable product called Orimulsión. However, production and marketing of this product was soon stopped for political reasons, because, as critics speculate, it presented a significant danger to the US-American coal industry.

30. Vielleville and Vasani, "Sovereignty over Natural Resources versus Rights under Investment Contracts: Which One Prevails?"(2008) *Transnational Dispute Management* 2, at 21.

31. Vielleville and Vasani, "Sovereignty over Natural Resources versus Rights under Investment Contracts: Which One Prevails?"(2008) *Transnational Dispute Management* 2, at 21.

32. I. Brownlie, *Principles of Public International Law* (Oxford, 2008), p.5.

33. Hereinafter ECT or the Treaty, Energy Charter Treaty (ECT) (signed December 17, 1994, entry into force April 16, 1998) 2080 UNTS 100.

34. ECT, at 14, emphasis added.

35. S. Haghighi, *Energy Security--The External Legal Relations of the European Union with Major Oil-and Gas-Supplying Countries* (Oxford and Portland, 2007), p.195.

36. S. Haghighi, *Energy Security--The External Legal Relations of the European Union with Major Oil-and Gas-Supplying Countries* (Oxford and Portland, 2007), p.212.

37. Article 18(1), Energy Charter Treaty.

38. Article 18(3), Energy Charter Treaty.

39. Article 10(1) Energy Charter Treaty.

40. Article 10(1) Energy Charter Treaty.

41. Dolzer and Schreuer describe this *international minimum standard* as basically being "a widespread sense that the alien is protected from unacceptable measures of the host state by rules of international law that are independent of those of the host state". For a succinct summary see R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, 2008), p.13.

42. *Nykomb Synergetics Technology Holding AB v Latvia,* Stockholm Rules (Energy Charter Treaty) Award, December 16, 2003, Stockholm Intl. Arb Rev 2005:1, p.53.

43. J. Wetterfors, "The First Investor-State Arbitration Award under the 1994 Energy Charter Treaty--A Case Comment" (2004) 5 OGEL available at *http://www.hpa.se/pdf/eng_energycharter.pdf,* at 2.

44. J. Wetterfors "The First Investor-State Arbitration Award under the 1994 Energy Charter Treaty--A Case Comment" (2004) 5 OGEL available at *http://www.hpa.se/pdf/eng_energycharter.pdf,* at 3.

45. J. Wetterfors "The First Investor-State Arbitration Award under the 1994 Energy Charter Treaty--A Case Comment" (2004) 5 OGEL available at *http://www.hpa.se/pdf/eng_energycharter.pdf,* at 3, emphasis added.

46. *Nykomb Synergetics Technology Holding AB v Latvia,* Stockholm Rules (Energy Charter Treaty) Award, December 16, 2003, Stockholm Intl. Arb Rev 2005:1, p.53 at section 4.3.3(c). See also T. Grigoriadis "State Responsibility and Antitrust in the Energy Charter Treaty: Socialization vs. Liberalization in Bilateral Investment Relations" (2008) 44 *Texas International Law Journal* 45 at 57.

47. J. Wetterfors, "The First Investor-State Arbitration Award under the 1994 Energy Charter Treaty--A Case Comment" (2004) 5 OGEL available at *http://www.hpa.se/pdf/eng_energycharter.pdf,* at 11.

48. J. Wetterfors, "The First Investor-State Arbitration Award under the 1994 Energy Charter Treaty--A Case Comment" (2004) 5 OGEL available at *http://www.hpa.se/pdf/eng_energycharter.pdf,* at 2.

49. E. Sussman, "Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development" (2008) 14 *ILSA Journal of International & Comparative Law* Spring 2008 available at *http://papers.ssrn com/sol3/papers.cfm?abstract_id=1090261#* at 3.

50. J. Wetterfors, "The First Investor-State Arbitration Award under the 1994 Energy Charter Treaty--A Case Comment" (2004) 5 OGEL available at *http://www.hpa.se/pdf/eng_energycharter.pdf,* at 2.

51. *Nykomb Synergetics Technology Holding AB v Latvia,* Stockholm Rules (Energy Charter Treaty) Award, December 16, 2003, Stockholm Intl. Arb Rev 2005:1, p.53 at section 4.3.3(c).

52. *Texaco Overseas Petroleum Company and California Asiatic Oil Company (TOPCO) v Government of the Libyan Arab Republic,* Award of January 19, 1977, 17 I.L.M. 3, 24-27 (1978), para.68.

53. S. Haghighi, *Energy Security--The External Legal Relations of the European Union with Major Oil-and Gas-Supplying Countries* (Oxford and Portland, 2007), p. 210.

54. T. Wälde and G. Ndi, "Stabilizing International Investment Commitments: International Law Versus Contract Interpretation" (1996) 31 Tex. Int'l L.J. 215, at 247.

55. S. Haghighi, *Energy Security--The External Legal Relations of the European Union with Major Oil-and Gas-Supplying Countries* (Oxford and Portland, 2007), p. 210.

56. T Wälde and A. Kolo "Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law" (2001) 50 Int'l & Comp. L.Q. 811, at 823.

57. T. Grigoriadis "State Responsibility and Antitrust in the Energy Charter Treaty: Socialization vs. Liberalization in Bilateral Investment Relations" (2008) 44 *Texas International Law Journal* 45 at 54, footnote omitted.

58. M. Sornarajah, "Compensation for Nationalization: The Provision in the European Energy Charter, in T. Walde (ed), *Energy Charter Treaty: An East-West Gateway for Investment and Trade* (1996), p.399.

59. S. Haghighi *Energy Security--The External Legal Relations of the European Union with Major Oil-and Gas-Supplying Countries* (Oxford and Portland, 2007), p.211. Footnote omitted.

60. S. Haghighi *Energy Security--The External Legal Relations of the European Union with Major Oil-and Gas-Supplying Countries* (Oxford and Portland, 2007), p.211. Footnote omitted. The Hull standard requires prompt, adequate and effective compensation to be paid in case of an expropriation.

61. General Assembly Resolution 3281 (XXIX) Charter of Economic Rights and Duties of States A/RES/29/3281. For a discussion of the controversial nature of Art.2.2.c see R R. Dolzer and C. Schreuer, Principles of International Investment Law (Oxford, 2008), p.15. See also Vielleville and Vasani, "Sovereignty over Natural Resources versus Rights under Investment Contracts: Which One Prevails?" (2008) *Transnational Dispute Management* 2, at 8.

62. As provided for in the second sentence of Art.4 of General Assembly Resolution 1803 (XVII) of December 14, 1962 “Permanent sovereignty over natural resources”.

63. Article 2.2.c of General Assembly Resolution 3281 (XXIX) Charter of Economic Rights and Duties of States A/RES/29/3281

64. Energy Charter Secretariat, The Energy Charter Treaty: A Reader's Guide 10 (2002) available at *http://www.encharter.org/fileadmin/user_upload/document/ECT_Guide_ENG.pdf.*

65. Energy Charter Secretariat, The Energy Charter Treaty: A Reader's Guide 10 (2002) available at *http://www.encharter.org/fileadmin/user_upload/document/ECT_Guide_ ENG.pdf* at 36.

66. T. Wälde and S. Dow, “Treaties and Regulatory Risk in Infrastructure Investment--The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment” (2000) 34 *Journal of World Trade* 1 at 19.

67. P. Andrews-Speed, “The Politics of Petroleum and the Energy Charter Treaty as an Effective Investment Regime (1999) 4 J. Energy Fin. & Dev 117, at 121.

68. Although it is also conceivable that Russia sees the ECT and its liability clause as an institutional effort by the international community to reduce the Kremlin's control over Russia's strategic resources while increasing its state responsibility under Arts 22-23 of the ECT. For a very interesting discussion see T. Grigoriadis “State Responsibility and Antitrust in the Energy Charter Treaty: Socialization vs. Liberalization in Bilateral Investment Relations” (2008) 44 *Texas International Law Journal* 45 at 49-51 and P. Andrews-Speed, “The Politics of Petroleum and the Energy Charter Treaty as an Effective Investment Regime (1999) 4 J. Energy Fin. & Dev. 117, at 128-129.

69. S. Haghighi *Energy Security--The External Legal Relations of the European Union with Major Oil-and Gas-Supplying Countries* (Oxford and Portland, 2007), p.338.

70. S. Haghighi *Energy Security--The External Legal Relations of the European Union with Major Oil-and Gas-Supplying Countries* (Oxford and Portland, 2007), p.336.

71. See the very interesting opinion of Vladimir Putin in an interview with the German channel ZDF which can be found at *http://www.kremlin.ru/eng/speeches/2006/07/13/1416_type82916_108575.shtml.*

72. 1965 International Convention on the Settlement of Investment Disputes between States and Nationals of Other States available at *http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.*

73. R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, 2008), p.2.

74. R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, 2008), p.20.

75. This in itself has been recognised as “a significant incentive and protection for investors”. See *Gas Natural SDG, S.A. v The Argentine Republic,* ICSID Case No. ARB/03/10 (Spain/Argentina BIT), para.31.

76. C. McLachlan, “Investment Treaties and General International Law” (2008) 57(2) I.C.L.Q. 361, at 371.

77. T. Wälde and S. Dow, “Treaties and Regulatory Risk in Infrastructure Investment--The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment” (2000) 34 *Journal of World Trade* 1 at 19.

78. C. McLachlan, “Investment Treaties and General International Law” (2008) 57(2) I.C.L.Q. 361, at 371.

79. *ADC Affiliate LTd and ADC & ADMC Management LTd v Republic of Hungary,* ICSID Case No. ARB/03/16 (Cyprus/Hungary BIT).

80. *ADC Affiliate LTd and ADC & ADMC Management LTd v Republic of Hungary,* ICSID Case No. ARB/03/16 (Cyprus/Hungary BIT), para.423.

81. *ADC Affiliate LTd and ADC & ADMC Management LTd v Republic of Hungary,* ICSID Case No. ARB/03/16 (Cyprus/Hungary BIT), para.423.

82. *ADC Affiliate LTd and ADC & ADMC Management LTd v Republic of Hungary,* ICSID Case No. ARB/03/16 (Cyprus/Hungary BIT), para.430. The subsequent privatisation of the airport terminals in question led the tribunal to conclude that the debate concerning essential security interests was somewhat unnecessary. See para.433.

83. *Compania del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award of February 17, 2000, 39 I.L.M. 1317, 1329 (2000).

84. *Compania del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award of February 17, 2000, 39 I.L.M. 1317, 1329 (2000), para 72.

85. *Compania del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award of February 17, 2000, 39 I.L.M. 1317, 1329 (2000), para.71.

86. E. Khalil, "A selection of views on the expropriation of interests in the mineral and petroleum extraction industries" (2008) 3 I.E.L.R. 79-98, at 92

87. *Compania del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award of February 17, 2000, 39 I.L.M. 1317, 1329 (2000), para.18.

88. *Compania del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award of February 17, 2000, 39 I.L.M. 1317, 1329 (2000). para.71, emphasis added.

89. M. Sornarajah, *The International Law on Foreign Investment* (Cambridge, 2000), p.71.

90. M. Sornarajah, *The International Law on Foreign Investment* (Cambridge, 2000), pp.70-71.

91. M. Sornarajah, *The International Law on Foreign Investment* (Cambridge, 2000), p.71.

92. M. Sornarajah, *The International Law on Foreign Investment* (Cambridge, 2000), p.182.

93. T. Wälde and A. Kolo "Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law" (2001) 50 Int'l & Comp. L.Q. 811, at 813.

94. *Texaco Overseas Petroleum Company and California Asiatic Oil Company (TOPCO) v Government of the Libyan Arab Republic,* Award of January 19, 1977, 17 I.L.M. 3, 24-27 (1978), para.77.

95. I. Shihata, "Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme" (1987) 21 Int'l Law. 671, at 675. But for a converse view see M. Naim, "Oil can be a curse on poor nations", *Financial Times,* Wednesday August 19, 2009, at 9.

96. *Marvin Roy Feldman Karpa v United Mexican States,* ICSID Case No. ARB(AF)/99/1 Award of the Tribunal (December 16, 2002).

97. *Marvin Roy Feldman Karpa v United Mexican States,* ICSID Case No. ARB(AF)/99/1 Award of the Tribunal (December 16, 2002), para.103.

98. *Marvin Roy Feldman Karpa v United Mexican States,* ICSID Case No. ARB(AF)/99/1 Award of the Tribunal (December 16, 2002), para.103.

99. See e.g. the recently concluded BIT between the US and Uruguay at Art.5.1 available at *http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file748_9005.pdf.*

100. For consistency see *MTD Equity Sdn Bhd. & MTD Chile S.A. v Chile* ICSID Case No. ARB/01/7 Award, May 25, 2004, para.163. For transparency see *Saluka v The Czech Republic,* Partial Award, 17 March 2006 available at *http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf.* para.307. For legitimate expectations see e.g. *Tecmed S.A. v United Mexican States* ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, paras 88 and 157. For stability and predictability see e.g. *CMS Gas Transmission Co v Argentine Republic* ICSID Case No. ARB/01/8 , Award of May 12, 2005; 44 I.L.M. 1205 (2005), para.267.

101. *Continental Casualty Company v Argentina,* ICSID Case No. ARB/03/9 Award, 5 September 2008, para. 254.

102. C. McLachlan, "Investment Treaties and General International Law" (2008) 57(2) I.C.L.Q. 361, at 9.

103. *Saluka v The Czech Republic,* Partial Award, March 17, 2006 available at *http://ita law.uvic.ca/documents/Saluka-PartialawardFinal.pdf.*

104. *Saluka v The Czech Republic,* Partial Award, March 17, 2006 available at *http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf.* para.306.

105. *Saluka v The Czech Republic,* Partial Award, March 17, 2006 available at *http://italaw.uvic.ca/documents/Saluka-PartialawardFinal.pdf.* para.306.

106. *Alex Genin v Republic of Estonia,* ICSID Case No. ARB/99/2, Award--6 ICSID Rep 236.

107. *Alex Genin v Republic of Estonia,* ICSID Case No. ARB/99/2, Award--6 ICSID Rep.367.

108. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005).

109. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005), para.275.

110. As will be seen in Chapter 5.

111. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005), para.273.

112. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005), para.274.

113. *Saluka v The Czech Republic,* Partial Award, March 17, 2006 available at *http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf,* para.305.

114. *AES Corp v Argentina (Jurisdiction),* ICSID Case No. Arb/02/17 (2005) at para.30.

115. T. Wälde and A. Kolo "Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law" (2001) 50 Int'l & Comp. L.Q. 811, at 823.

116. *World Duty Free Co Ltd v Republic of Kenya,* ICSID Case No. ARB/00/7.

117. *World Duty Free Co Ltd v Republic of Kenya,* ICSID Case No. ARB/00/7, para.157.

118. *Fraport AG Frankfurt Airport Services Worldwide v Philippines,* ICSID Case No. ARB/03/25.

119. OECD Working Party of the Investment Committee, *Working Paper on the Definition of Investor and Investment in International Investment Agreements,* December 18, 2007, at 59.

120. *Fraport AG Frankfurt Airport Services Worldwide v Philippines,* ICSID Case No. ARB/03/25, para.398.

121. *Inceysa Vallisoletana S.L. v Republic of El Salvador,* ICSID Case No. ARB/03/26.

122. OECD Working Party of the Investment Committee, *Working Paper on the Definition of Investor and Investment in International Investment Agreements,* December 18, 2007, at 60.

123. T. Wälde and S. Dow, "Treaties and Regulatory Risk in Infrastructure Investment--The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment" (2000) 34 *Journal of World Trade* 1 at 19.

124. T. Wälde and S. Dow, "Treaties and Regulatory Risk in Infrastructure Investment--The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment" (2000) 34 *Journal of World Trade* 1 at 19.

125. R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, 2008), p.17.

126. C. McLachlan, "Investment Treaties and General International Law" (2008) 57(2) I.C.L.Q. 361, at 365.

127. C. McLachlan, "Investment Treaties and General International Law" (2008) 57(2) I.C.L.Q. 361, at 365.

128. 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts, available at *http://untreaty.un.org/ilc/texts/instruments/english/draftärticles/9_6_2001.pdf,* Art.25.

129. M. Sornarajah, *The International Law on Foreign Investment* (Cambridge, 2000), p.63. Sonarajah points out that there is general agreement that compensation is payable though quantum still remains a matter of dispute. See also *Compania del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award of February 17, 2000, 39 I.L.M. 1317, 1329 (2000), para.18.

130. R. Boed, "State of Necessity as a Justification for Internationally Wrongful Conduct" (2000) 3 Yale Hum. Rts. & Dev. L.J. 1 at 45.

131. 2001 ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, available at *http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf* at chapter 5, p.71, para.1, emphasis added.

132. 2001 ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, available at *http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf* at chapter 5, p.80, para.1.

133. 2001 ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, available at *http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf* at chapter 5, p.83, para.14.

134. 2001 ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, available at *http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf* at chapter 5, p.81, para.4.

135. 2001 ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, available at *http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf* at chapter 5, p.81, para.4.

136. M. Waibel, "Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E" (2007) 20 *Leiden Journal of International Law,* at 637-648.

137. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005).

138. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005), para.304.

139. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005), para.305.

140. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005), para.306.

141. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005), para.331.

142. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005), para.322.

143. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005). Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic (September 25, 2007), para.136, See also A. Bjorklund "Emergency Exceptions: State of Necessity and Force Majeure", in P. Muchlinski, F. Ortino and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford, 2008), p.485 who states that "As other alternatives will nearly always be available, such a strict interpretation of the requirement would seem to defeat any defence".

144. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205, decision of the annulment committee, para. 121. The jurisdiction of ad hoc annulment panels under Art.52 of the ICSID Convention is extremely limited and cannot in any way be compared to an appeals procedure. The award was upheld on this particular point even though the annulment committee opined that the original tribunal had applied the law "cryptically and defectively". See *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005), para.136.

145. 2001 ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, available at *http://untreaty.un.org/ilc/texts/instruments/english /commentaries/9_6_2001.pdf* p.80, para.2.

146. *CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Award of May 12, 2005; 44 ILM 1205 (2005), para.317.

147. *LG&E v Argentina,* ICSID Case No. ARB/02/Decision on Liability October 3 2006.

148. S. Schill, "International Investment Law and the Host State's Power to Handle Economic Crises--Comment on the ICSID Decision in LG&E v Argentina" (2007) 24 *Journal of International Arbitration* 211, at 214.

149. *LG&E v Argentina,* ICSID Case No. ARB/02/Decision on Liability, October 3 2006, para.204.

150. *LG&E v Argentina,* ICSID Case No. ARB/02/Decision on Liability, October 3 2006, para.215.

151. *LG&E v Argentina,* ICSID Case No. ARB/02/Decision on Liability, October 3 2006, para.234.

152. *LG&E v Argentina,* ICSID Case No. ARB/02/Decision on Liability, October 3 2006, para.229.

153. *LG&E v Argentina,* ICSID Case No. ARB/02/Decision on Liability, October 3 2006, para.238.

154. *LG&E v Argentina,* ICSID Case No. ARB/02/Decision on Liability, October 3 2006, para.paras 246-257.

155. *LG&E v Argentina,* ICSID Case No. ARB/02/Decision on Liability, October 3 2006, para.paras 245 and 258.

156. *Continental Casualty Company v Argentina,* ICSID Case No. ARB/03/9 Award, September 5, 2008.

157. *Continental Casualty Company v Argentina,* ICSID Case No. ARB/03/9 Award, September 5, 2008, para.168.

158. *Continental Casualty Company v Argentina,* ICSID Case No. ARB/03/9 Award, September 5, 2008, paras 164-167.

159. *Continental Casualty Company v Argentina,* ICSID Case No. ARB/03/9 Award, September 5, 2008, para.168. In stating this, the tribunal was in concurrence with the ad hoc panel in the *CMS* annulment decision *(CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8 , Award of May 12, 2005; 44 ILM 1205, para.136, which had lamented that the original tribunal in that case had applied the law, at least with regard to necessity and the correlation between Article XI and the customary law rule as enshrined in Art.25, "cryptically and defectively".

160. *Continental Casualty Company v Argentina,* ICSID Case No. ARB/03/9 Award, September 5, 2008, para.191.

161. Continental Casualty Company v Argentina, ICSID Case No. ARB/03/9 Award, September 5, 2008, para.192.

162. *Continental Casualty Company v Argentina,* ICSID Case No. ARB/03/9 Award, September 5, 2008, paras 192-195 (test) and 196-230 (application).

163. *Continental Casualty Company v Argentina,* ICSID Case No. ARB/03/9 Award, September 5, 2008, para.231.

164. *Continental Casualty Company v Argentina,* ICSID Case No. ARB/03/9 Award, September 5, 2008, para.233 (footnotes ommited). The tribunal states that the measures only conformed "by and large" because it found that with respect to one particular measure, the requirements making it "necessary" were not met and did not therefore fall under the exception.

165. P. Muchlinski, F. Ortino and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford, 2008), p. 476.

166. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, available at *http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX,* Article XX.

167. M. Waibel, "Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E" (2007) 20 *Leiden Journal of International Law,* at 637.

168. T. Wälde and G. Ndi, "Stabilizing International Investment Commitments: International Law Versus Contract Interpretation" (1996) 31 Tex. Int'l L.J. 215, at 247.

169. S. Haghighi, *Energy Security--The External Legal Relations of the European Union with Major Oil-and Gas-Supplying Countries* (Oxford and Portland, 2007), p. 211.

170. T. Grigoriadis "State Responsibility and Antitrust in the Energy Charter Treaty: Socialization vs. Liberalization in Bilateral Investment Relations" (2008) 44 *Texas International Law Journal* 45 at 62.

171. L. Barrera-Hernandez, "Are We There Yet? The Long Road to South America's Energy Future", in Zillman (ed.), *Beyond the Carbon Economy: Energy Law in Transition* (Oxford, 2008), p.133, at p.136.

172. P. Andrews-Speed, "The Politics of Petroleum and the Energy Charter Treaty as an Effective Investment Regime (1999) 4 J. Energy Fin. & Dev. 117, at 128. See also C. Belton, "Too big to fail", *Financial Times,* Analysis, July 28, 2009, in which the author describes that the Russian government has recently received significant stakes in strategic companies as collateral in exchange for bail-out packages preventing them from having to enter into bankruptcy, thereby increasing its influence in the "private" sector.

173. M. Sornarajah, *The International Law on Foreign Investment* (Cambridge, 2000), p.16.

174. T. Wälde and S. Dow, "Treaties and Regulatory Risk in Infrastructure Investment--The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment" (2000) 34 *Journal of World Trade* 1 at 14.

175. M. Sornarajah, *The International Law on Foreign Investment* (Cambridge, 2000), pp.22-23.