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BI-LATERAL INVESTMENT TREATIES Disputes and their Resolution

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1. Introduction

A significant component of international trade and commerce is foreign investment. This is the investment of a nation state or entity domiciled in one nation state, in another nation state or with an entity of another nation state.

For a foreign investment to be successful in the eyes of both the investor and the host country the most important factor is the investor-host country relationship.

Initially conceived to provide protection to both parties in a transnational investment agreement for developmental projects and which essentially involved investment in third world or underdeveloped countries, treaties were developed as between two differing nation states² or, in some cases, as part of trade agreements involving two or more nation states³.

Because of the historical nature of foreign investment in developing countries and geographical locations, initially bilateral Investment Treaties (BITs) were ordinarily between developed countries north of the equator and underdeveloped countries south of the equator.

A developing form of BITs is what is described as preferential Trade Investment Agreements, of which Free Trade agreements are an example.

To resolve disputes that might arise the World Bank established a convention titled the International Convention on the Settlement of Investment Disputes (ICSID) created in 1966 following the 1965 Washington Convention on the Settlement of Investment Disputes between states and nationals of other states. A copy of the Convention is attached marked Appendix A.

In excess of 150 nation states now subscribe to the Convention.

The Convention in essence provides

¹ Past President IAMA, Past President ACICA. Practises full time as arbitrator in domestic and international disputes.

² for example United Kingdom and Tanzania Bilateral Investment Treaty
Peru and China Bilateral Investment Treaty
Mozambique and Uganda Bilateral Investment Treaty

³ for example North America Free Trade Agreement (NAFTA)
ASEAN Agreement and Protocol for the Promotion and Protection of Investments

- consent to arbitration is irrevocable
- the arbitration will be conducted and an award delivered even if a party refuses to participate
- there is respect for contractual and legal standards
- if the parties have not agreed upon a specific applicable law, international law can be used as a corrective of an abusive manipulation of national law
- national courts may not interfere with ICSID
- recognition and enforcement of awards is secured by the enforcement system of the Convention
- the Convention encourages settlement of disputes by conciliation or otherwise amicably.

In its early years few disputes were referred to ICSID arbitration⁴. However since that time the workload has dramatically increased, for example in 2006 a total of 258 cases were filed of which 160 were ICSID, 65 under the UNCITRAL Arbitration Rules and 18 under the Stockholm Chamber of Commerce Rules.

In recent years the preponderance of disputes arising involved Latin American countries, in particular Argentina, which, by early 2000, had some 62 disputes with foreign investors, essentially arising out of expropriation or termination of major infrastructure developments by the Argentinean government.

2. Nature of Bilateral Investment Treaties⁵

Investment contracts can cover a wide range of economic activities including

- exploitation of mineral and oil and gas resources by a foreign entity
- exploitation of agricultural resources
- establishment of manufacturing or service industries
- financial investment

An investment contract differs from international commercial contracts such as sales, construction, turnkey and performance guarantee construction or operation projects.

Often it is a transnational that assumes the role of the foreign investor. The historical concept of foreign investors enjoying what might be described as sovereign rights in an enclave in the host country without state involvement by either state control or joint ownership effectively disappeared with decolonisation.

Transnational corporations have various definitions but the definition found in the UN Code of Conduct on Transnational Corporations⁶ is typical of most definitions and is as follows

‘The term “transnational corporation” as used in this Code means an enterprise whether of public, private or mixed ownership, comprising

⁴ By 1996 only 30 ICSID arbitrations arose and only 10 went to award.

⁵ An example of a BIT between the “Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments” 9th April 1991 is attached as Appendix B

⁶ U.N. Code of conduct on Transnational Corporations, 23 I.L.M. 626 (1984)

entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.'

As with most commercial contracts the interests of the two (or more) parties are not entirely coincidental.

For the investor factors such as

- the need to gain or to maintain a stable flow of raw material;
- competitive position within the industry;
- control over marketing conditions especially in relation with membership in or outside position to an oligopoly;
- diversification or vertical integration;
- the company's history and experience;
- its home background

and, for the host country, the main factors include

- fiscal resources and foreign exchange earnings;
- infrastructure development;
- acquisition of technology;
- managerial knowhow and labour training;
- downstream integration;
- increased income for local labour, local shareholders (including the government), domestic firms and a resulting multiplier effect on the national economy;
- opening of markets and promotion of trade;
- attracting further investment.

Ordinarily infrastructure development on either a build, build operate and transfer (BOT), or build own operate and transfer (BOOT) basis will include a number of other contracts in addition to the investment contract between the investor and the host country.

The most common source of disputes in transnational investment activities arise in respect of control of investment projects and distribution or control of investment project income.

In many instances where "product in hand"⁷ projects are concerned, the time between commencing construction of a project and first payment flowing to the investor from or through the host state may be many years⁸.

During the developmental phase sometimes vast expenditure of funds is incurred by the investor in developing the necessary plant and infrastructure before income flow can commence.

⁷ eg electrical power to domestic power grid

⁸ for example, the large mining project OK Tedi mine in Papua New Guinea involved some 8 years of construction works before income generating product was realised.

Modern developments of the meaning of investment from the traditional notion of investment in capital now place more emphasis on an economic concept where there is a direct relationship between the expected contribution that an association between a foreign party and a State makes to the economy of the State concerned.

Cross reference clauses in the various contracts or agreements create a complex matrix of linkages and interdependences which impinge upon the totality of any foreign investment activity.

An example of this form of structure with a “Master Agreement” or “Protocol Agreement” with a set of subordinated agreements is the agreement between the Government of Jamaica and the Kaiser Bauxite Company (USA) negotiated in 1977.

The parties created additional contracts to the Master Agreement covering

- Sale of Land Agreement
- Special Mining Lease
- Sale of Mining Assets Agreement
- Deed of Partnership
- Management Agreement
- Mining Agreement
- Agency Agreement

It is within the complex nature of agreements and the legal obligations that apply that any disputes arising may lie to be resolved.

3. What is the nature of Investment Arbitration?

When an investor asserts a right to invoke the arbitration provisions of a BIT against a host State, is the right to arbitrate to be determined by reference to international public law, or does it arise out of a legal relationship governed by municipal law?

In *Republic of Ecuador v Occidental Exploration and Production Co*⁹ the High Court of England and Wales dealt with an application by Ecuador pursuant to Section 67(1) of the UK Arbitration Act 1996 to annul an ICSID Arbitration Award under a BIT entered into between Ecuador and the United States in 1993.

Occidental challenged the High Court’s power to hear the Ecuadorian application on the basis of the English doctrine on non-justiciability¹⁰.

Ecuador, in response, argued that the arbitration agreement giving rise to the arbitration and award made, and the rights asserted by Occidental, were of a private nature and entirely consistent with the provisions of the New York Convention¹¹ which was referenced in the subject BIT.

⁹ High Court of Justice of England and Wales [2005] EWHC (Comm) April 29 2005

¹⁰ The general principle that the Municipal Courts of England and Wales do not have the competence to adjudicate upon rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law.

¹¹ UN Convention on Recognition and Enforcement of Foreign Arbitral Awards

The High Court found ultimately in favour of Ecuador but in doing so agreed with Occidental's characterisation of its right to arbitrate.

The Court's reasons turned upon a finding that the BIT is an international treaty "which creates rights and obligations between states on the level of public interest law" and any arbitration based on that treaty is governed by public international law.

In the writer's opinion it is arguable that the High Court's interpretation is not correct.

A BIT establishes international rights and obligations as between states, but a non-state foreign investor is a private law entity which is not subjects of international law.

An investor's agreement to arbitrate within a contract is a private agreement not a treaty.

4. As an example of difficulties in interpretation and application relating to ICSID

Shortly before the High Court of Australia pronounced on the issue of confidentiality in arbitration¹² to the great surprise and concern of many in the arbitration world, particularly international arbitration, courts in France grappled with a problem¹³ symptomatic of courts in many jurisdictions, whether common law or civil code, in dealing with arbitration awards.

The understanding of many courts, including some in Australia, of international arbitration remains today one of the inherent problems of arbitration.

If a party prosecutes a case in arbitration, is successful, and is then, by a national court, denied the benefit of the award, then the entire fabric and *raison d'être* for international arbitration is deleteriously affected.

The predominant basis for recognition and enforcement is reliance upon the provisions contained in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)¹⁴ or the provisions of the UNCITRAL Model law¹⁵ or the ICSID Convention¹⁶.

Australia is a signatory to both the New York and ICSID Conventions and has adopted (subject to opting out provisions) the UNCITRAL Model law by s16 of the International Arbitration Act 1974 (Cth).

The provisions of these different Conventions and the Model Law in respect of recognition and enforcement are in themselves different.

UNCITRAL Model Law –

Art 35 provides

¹² *Esso Australia Resources Ltd & Others v Plowman & Others* (1995) 183 CLR 10

¹³ *Société Ouest Africaine des Bétons Industriels (SOABI) v State of Senegal* Cass. Civ. 1re

¹⁴ Made in New York 10 June 1958 [United Nations Treaty Series (1959) Vol 330 No 4739 at 38]

¹⁵ UNCITRAL Model Law on International Commercial Arbitration 1985

¹⁶ See page1 supra

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

New York Convention –

Art V(1)(a) provides

“The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;”

Note: Art 36 of the Model Law and Art V(1) of the New York Convention are in almost identical terms but there are some slight differences in wording.

ICSID Convention –

Section 6 provides

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

- (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution.

In the judgement of the Cour de Cassation of France made on 11 June 1991 in the case of *(SOABI) v Republic of Senegal*, the court confirmed the effectiveness of arbitration under the auspices of ICSID.

The case dealt with enforcement of the award rendered in an action brought under a bilateral investment treaty¹⁷.

SOABI was a Senegalese company controlled by Belgian and French interests. It entered into an agreement with the Government of Senegal to build 15,000 low income housing units in Senegal. A dispute arose in 1982 when a request for arbitration was filed. In 1988 an ICSID Tribunal determined that Senegal was liable under Senegalese law for unilateral termination of the contract and should indemnify SOABI. The measure of damages was awarded at 105,000,000F.

Initially an order was made by the Tribunal Regional in Dakar in April of 1988 declaring the ICSID Award enforceable in Senegal.

The enforcement proceedings in Senegal were suspended when SOABI became involved in bankruptcy proceedings.

Issues arose as to whether as SOABI was bankrupt the *mandataires* (the bankruptcy trustees) were to receive the award of damages.

SOABI, through the bankruptcy trustees, sought and was granted recognition of the Award in France, which was declared on 14 November 1988 by the Tribunal de Grande Instance.

A consequence of this recognition was that the ICSID Award became enforceable in France.

Senegal appealed the order on grounds that it was contrary to international public policy.

The basis of Senegal's argument was that the bankruptcy trustees had sought recognition in France to avoid an enquiry being held in Senegal into the SOABI bankruptcy.

In December 1985 the Cour d'appel¹⁸ reversed the order made by the Tribunal de Grande Instance in the following terms

¹⁷ *Société Ouest Africaine des Bétons Industriels (SOABI) v State of Senegal* 6 ICSID – F.I.L.J. 125(1991)

¹⁸ Judgment of December 5, 1989 - *State of Senegal v. Seutin, ès-qual. de liquidateur de la société (SOABI)*, 5 ICSID REV. – F.I.L.J. 69 (1990).

‘[T]he State of Senegal, by signing the arbitration clause contained in the agreement entered into with SOABI and agreeing to submit the dispute to the arbitration tribunal of [ICSID], undertook to enforce the pecuniary obligations imposed by the award within its territories ... but did not waive its right to invoke the immunity from enforcement in effect in a Contracting State ...

...[T]he immunity from enforcement enjoyed by a foreign State in France is a matter of principle ... [I]n exceptional circumstances it can be set aside when the assets on which the award is to be enforced have been assigned by that State to an economic and commercial activity governed by private law...

...[I]n the case in question the Company SOABI has not demonstrated that the award will be enforced on assets assigned by the State of Senegal to an economic and commercial activity, and that no objection could therefore be made for immunity from enforcement...;

...[E]nforcement of the award in France conflicts with international public order in that it would be contrary to this principle of immunity; that pursuant to Article 1502(5) of the New Code of Civil Procedure, it is consequently appropriate to vacate the enforcement order.’

In 1991 the Cour de Cassation reversed the decision of the Cour d’appel¹⁹.

In its judgment the Cour de Cassation made it clear principles that today are still not appreciated by national courts in various jurisdictions, that is that in respect of specific performance provisions of a Convention the provisions must be applied without regard to domestic law which might otherwise apply including issues of sovereign immunity –

- recognition does not constitute a measure of execution, therefore it does not raise issues of immunity from execution²⁰

and

- the autonomous and simple character of the ICSID system excludes recourse to French rules on recognition of Foreign Awards.

5. Laws of the Host Country

Many BITs have defined “investment” as “assets accepted in accordance with the laws and regulations of the contracting state”²¹.

In such BITs only investments that satisfy this criteria will be protected.

¹⁹ 30 L.L.M. 1167, 1169 (1991)

²⁰ for example, in *Maritime International Nominees Establishment (MINE) v Republic of Guinea* a United States District Court, in the writer’s opinion, erroneously applied domestic rules relating to arbitration (Federal Arbitration Act) and immunity relying on the Foreign Sovereign Immunities Act instead of the provisions of the ICSID Convention.

²¹ for example the German-Philippine BIT Art 1.1

In the case of *Inceysa Vallisoletara S.L. v Republic of El Salvador*²² in August 2006 the Arbitral Tribunal determined that ICSID had no jurisdiction as Inceysa had committed fraudulent acts during the bidding process thus the investment was not made “in accordance with law”.

A similar outcome arose in the case of *Fraport v The Philippines*²³ when in August 2007, a majority decision of the Tribunal decided ICSID had no jurisdiction and the Tribunal was accordingly not competent. The majority reasoned that Fraport breached Philippines law by intervening in the operation of Terminal 3 of the Ninoy Aquino International Airport through confidential shareholder agreements with various companies which in turn owned stock in the Philippine International Terminal Company which acted as the lead investor for both domestic and international investors.

Fraport had a direct holding of 31.44% but also had further indirect control through its investments in the terminal company.

This amount of total control was held by the Philippine Supreme Court to be a violation of domestic law and declared the concession agreement held by Fraport as null and void.

Where allegations of breach of domestic law arise, host states generally argue that goes to the issue of jurisdiction.

Contrary, investors argue that this position of host states encourages the states to avoid compliance with their treaty obligations²⁴.

6. ICSID and Contract Renegotiation

Art 25(1) of ICSID provides that it has jurisdiction over “legal disputes” without defining the term.

By way of explanation, §26 of the “Report of the Executive Directors of the World Bank”²⁵ states that

“The expression ‘legal dispute’ has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interest are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.”

Accordingly, two situations arise

- (1) The Agreement contains no Renegotiation Clause.
A party may seek contract change under the law applicable to the agreement by submitting a dispute to ICSID.
- (2) The Agreement contains a Renegotiation Clause.
These specific renegotiation clauses ordinarily authorize changes in a contract without following a predetermined sequence. A dispute over a renegotiation

²² ICSID case No ARB/03/26

²³ *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines* ICSID Case No ARB 03/25

²⁴ *Salini Construttore S.p.A. and Italtrade S.p.A. v Kingdom of Morocco* ICSID Case No ARB/00/4
Tokios Tokelés v Ukraine ICSID Case No ARB/02/19

²⁵ 4 ILM (1967)

clause is caught under Art 25(1) of the ICSID Convention. It is interesting that Art 42(b) of the Convention allows a Tribunal to arbitrate *ex aequo et bono* if the parties agree. Once having determined a triggering event has occurred then obligations to renegotiate arise.

7. Concepts of “Control”

Most international investment treaties or agreements rely upon the concept of “control” of legal persons both as to the investor and the host country entity (where it is not the host country of itself which is directly the beneficiary of the investment).

ICSID Convention Art 25(2)(b) refers to “control” for the purposes of jurisdiction.

The question of “control” becomes relevant when

- (a) certain sectors of the host country may, by that country’s domestic legislation, prohibit non-national control;
- (b) a claim mounted by an “investor” against the host country may involve claimants alleging an interest by control in the nominal investor

in both cases limiting or precluding claims, going directly to jurisdiction.

Many BITs and, for example NAFTA, incorporate the term “control” without any attempt to define what is meant by the term.

Often the term “control” is qualified as “direct” or “indirect”.

The determination of the scope and meaning of “control” became pertinent in many of the claims made against the Republic of Argentina arising out of nationalisation and expropriation of many large infrastructure projects being carried out or established in Argentina by international investors²⁶.

Whilst determining whether any degree of control may exist in a legal entity can be readily established by determining, for example, percentage of stock held, right to vote, or participation in fundamental decisions, such an analysis is not necessarily determinative.

A controlling link may exist independent of stock or voting rights, for example strategic participation in a market, connected technology and industrial property or financing. A controlling power may exist through a non exercised subtle power.

The difficulty was highlighted in a claim brought by Enron against Argentina²⁷.

In that case the Arbitral Tribunal stated

“there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected Company.”

²⁶ see Section 8 The Argentina Experience

²⁷ *Enron and Ponderos Assets L.P. v Republic of Argentina* ICSID ARB/01/0-3 Decision of Jurisdiction Jan 14, 2004

Although the majority of recent matters dealing with interpretation of the term “control” have emanated from cases involving Argentina, there is an extensive history of ICSID cases dealing with the proper construction of the term “control” involving Mexico²⁸, Spain²⁹, Venezuela³⁰, Latvia³¹ and Canada³².

8. The Argentina Experience

Some nation states having agreed to foreign investment projects which are directed to providing domestic benefit³³ have reasoned either because of changed economic circumstances or change in government or political ideology that they may act unilaterally to expropriate projects thus giving rise to dispute with the investors.

In the 1990s Argentina embarked upon a policy of encouraging investment in the development of major infrastructure projects perceived as necessary or to the benefit of Argentina and its peoples.

In one way or another almost all of the projects were covered by investment treaties or contracts which amounted to investment agreements principally subject to the ICSID Convention.

Argentina experienced a rapid and massive collapse of its economy.

In 2000, after receiving advice from two eminent US Professors of Law who had, among other things advised on NAFTA, the Congress of Argentina, having regard to the parlous economic state of the country, enacted the Economic-Financial Emergency Law No 25.344 (2000 Emergency Law).

This law empowered the President to renegotiate public sector contracts.

Most of the purposed renegotiations resulted in termination and expropriation of the many projects then on foot.

As a result, by about 2005 some 62 ICSID arbitrations had been commenced with some concluded with adverse findings for Argentina.

The largest ICSID award to date in relation to Argentina arose out of the Treaty for the Mutual Protection and Promotion of Investments made between Germany and Argentina on 9 July 1991. The case involved Siemens A.G. of Germany – *The Siemens A.G. v The Argentine Republic Award*³⁴.

On 6 October 1998 the Republic of Argentina entered into a contract with SITS, a domestic Argentinean company owned by SNI, a company legally integrated into Siemens of Germany.

²⁸ *Waste Management Inc 2 v United Mexican States* April 30 2004

²⁹ *Emilio Agustin Maffezini v Kingdom of Spain* Nov 13 2000

³⁰ *Autopista Concesionada de Venezuele CA v Bolivarian Republic of Venezuela*

³¹ *Nykomb Synergetics Technology Holding AB v Republic of Latvia* Dec 16 2003

³² *S.D. Myers Inc v Canada* Nov 13 2000

³³ for example, provision of electrical power or water resources

³⁴ ICSID Case No ARB/02/8 dated 17 Jan 2007

The contract was long term and for an integrated immigration control, personal identification and electoral information system. The contract included the provision of hardware and software and technical support services.

Compensation to SITS was a unit price for each national identity card issued, fees for immigration activities processed through the system and the cost of establishing voting rolls. The prices were in Argentine pesos, convertible to US dollars at par.

The pesos significantly devalued.

The contract satisfied the criteria of being a public sector agreement, thus being caught in the Economic-Financial Emergency Law of 2000.

This law came into effect two days before a scheduled meeting with a special commission of the Ministry for the Interior for the purposes of restating the contract.

On 18 May 2001 by Presidential Decree 666/01 under the terms of the Emergency Law of 2000, the contract was terminated.

SITS then filed an administrative appeal which was rejected.

Article 7(2) of the investment treaty between Germany and Argentina provided that each contracting party was to observe all the stated obligations in relation to investment.

The ICSID Arbitral Tribunal to which the dispute was submitted considered failure to meet obligations in the Treaty amounted to a material breach.

The Tribunal adopted the now well established principles in international private and public law that any State party to an investment contract, treaty or concession or any contractual obligation must act in accordance with commercial principles (*jure gestionis*) and not exercise or purport to exercise rights as Sovereign State (*jure imperii*). That is, a state entering into commercial agreements, whether or not made in the name of the State, cannot later rely on Sovereign Immunity to avoid obligations or consequences flowing from the commercial agreement.

If the agreement, treaty or contract provides for arbitration to deal with disputes arising or an arbitral award is against a Nation State, that State cannot seek to rely on sovereign immunity to avoid arbitration or the award.

In this *Siemens* case, the Tribunal found that nationalization and expropriation are governmental acts. Argentina, by purporting to terminate the agreement with Siemens pursuant to Presidential Decree 666/01 in effect relied upon "police powers". The Tribunal concluded that the intention of Argentina was to reduce the total costs of the contract by a "change of policy by a new administration eager to distance itself from its predecessor".

Further, the Tribunal found that there was an obligation to treat the investment in a "fair and equitable manner" and that the concept of a State's "bad faith and malicious intention" was an overly narrow and unacceptable interpretation preferring a wider meaning of "physical protection" when related to "full protection and security".

The Award ordered Argentina to pay

USD 208,440,540 for loss of investor's value
USD 9,178,000 for consequential damages

and
USD 219,899 for services rendered by Siemens to the Government.

In 1989 Argentina privatized certain utilities including the gas, transport and distribution industry.

A consortium of investors under the entity Gas Argentina S.A. purchased one of the gas distribution companies. The consortium included BG Group PLC of Britain.

In 1990 a Bilateral Investment Treaty was signed between the United Kingdom and Argentina.

An ICSID arbitration was commenced by BG claiming that its investment was harmed by the Argentinean economic emergency measures³⁵ and an award was made in favour of BG for USD 185,200,000 for damages plus interest. Argentina was also ordered by the award to pay to BG USD 247,300 for costs of the arbitration and USD 437,073 and GBP 2,400,000 for legal fees and expenses.

Argentina appealed the award in the US District Court of Columbia with a petition to vacate or modify the award on grounds that the Arbitral Tribunal exceeded its authority and lacked jurisdiction.

Argentina raised a number of arguments ranging from failure of BG to first litigate in the Courts of Argentina before claiming in arbitration as required by a term of the BIT to the Arbitral Tribunal arbitrarily rejecting Argentina's reliance on the state of necessity doctrine.

This latter argument was put in the following terms

“Despite abundant evidence that Argentina suffered an economic crisis of epic, even historical, proportions the Arbitral Tribunal summarily rejected Argentina's claim that its state of emergency justified application of emergency measures pursuant to the state of necessity doctrine. The Arbitral Tribunal misunderstood applicable law, the state of necessity doctrine, and failed to correctly apply the doctrine.

Indeed, the Arbitral Tribunal recognized that Argentina had encountered extraordinary and sudden economic travails. ‘The Tribunal is also persuaded that under the dire circumstances surrounding the emergency measures, the Executive Branch sought to present the collapse of the financial system’

Despite such recognition of ‘dire circumstances surrounding [the enactment of the temporary] emergency measures,’ the Arbitral Tribunal summarily and without reasoning rejected the application of the state of necessity doctrine.”

The outcome of this appeal is not yet available.

The argument of dire economic circumstances was raised in a series of UNCITRAL arbitrations involving the Republic of Indonesia as a result of Asian economic meltdown³⁶.

³⁵ see *Siemens case supra*

³⁶ *Himpurna California Energy Ltd and Government of Indonesia; Patuha Power Ltd and Government of Indonesia*

The Arbitral Tribunals in these Indonesian cases, whilst finding liability on the part of Indonesia, by majority had regard to economic circumstances and awarded sums significantly less than might otherwise have been awarded relying purely on the contractual terms³⁷.

An element in both the Argentinean and Indonesian cases cited was the obligation of the host nation to pay for “product in hand” in a currency other than their domestic currency (in both cases US Dollars) when, as a result of the prevailing economic circumstances, the requirement to pay in a foreign currency resulted in substantial escalation of domestic prices to domestic consumers.

9. Conclusions

Bilateral Investment Treaties, now commonplace around the world, have as an intended purpose the protection of both the investor and the host nation.

However, because of the vagaries and effects of world economies and misconceptions or assumptions inherent in many BITs, the purpose is often defeated by factors outside the control of the investor or the host country.

Regrettably, disputes inevitably arise and with those disputes come not only the issues to be dealt with within the context of the BIT or investment contract but a wider range of issues governed by international private and public law.

As most arbitral awards are published as a matter of public interest, a significant source of guidance or authorities is available and a source of considerable involvement for lawyers, arbitrators and courts in the foreseeable future.

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³⁷ See Dissenting Opinions of Arbitrator AA de Fina, *Mealeys International Arbitration Reporter* – Lexus Nexus Feb 2003