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FROM SILENCE TO EQUITABLE COMPENSATION:

'VALUING' FINANCIAL AND ECONOMIC CRISES IN INVESTMENT ARBITRATION

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From *Silence* to *Equitable Compensation*:

'Valuing' Financial and Economic Crises in Investment Arbitration

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1. Introductory remarks 2
2. International investment obligations in times of financial and economic crises: framing the responsibility of the host States 3
3. The necessity defence and the application of NPM clauses to breaches occurred during financial and economic crises. A case-law overview 8
4. The relevance of financial and economic crisis in the determination of compensation 13
4.1. Assessing compensation for unlawful acts under international investment law: the legal framework of reference 13
4.2. Compensation for breaches occurred during financial and economic crises: a survey of the relevant case-law ... 18
4.2.1. Compensation and the application of the necessity defence under customary international law… 18
4.2.2. …and the application of treaty-based emergency clauses…. 20
4.2.3…and emergency situations as a ground for an 'equitable' assessment 21
4.2.4. The relevance of the pursuit of public interests of State measures 23
5. Concluding remarks: from silence to explicit equity 27

1. Introductory remarks

National governments are prone to taking emergency measures to overcome their financial and economic crises. While addressing social and economic concerns, these measures may also affect the protection of foreign direct investment (FDI). Indeed, arbitral tribunals have been increasingly called upon to determine whether and to what extent emergency measures adopted by host States have breached international obligations towards foreign investors. In this respect, arbitrators have tried to balance foreign private investment interests with domestic public interests, i.e. the need for the host State to restore the financial and economic stability of the country. However, despite the acknowledgment by investment arbitral tribunals of public interests by host States in interpreting and applying host States' obligations corresponding to foreign investors' rights,[1] their relevance at the

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[1] For a general overview on this topic, C. Titi, *The Right to Regulate in International Investment Law* (Baden-Baden: Nomos, 2014), 275 f.; B. Kingsbury, S.W. Schill, 'Public Law Concepts to Balance Investors' Rights With

remedial level has remained largely unexamined. At the same time, the literature on the remedies stage in investment arbitration tend to be more focused on the description of the complex valuation methods concerning damages, rather than on the relevance of public interest considerations.[2]

The main objective of this paper is to ascertain how investment arbitrators have tried so far to 'monetize' financial and economic crises at the remedies stage in investment arbitration. It is suggested that the public interests of the host State facing a financial and economic crisis should be reflected in the determination of the amount of compensation due to foreign investors. In order to achieve this result, arbitrators should apply the concept of equity as legal criterion for balancing the interests at stake, on a case-by-case basis.

After a brief overview (§2) of the international investment obligations which normally come into consideration in times of financial and economic crises, the paper focuses on the investment arbitration case law which has dealt with financial and economic measures to date. Special attention is devoted to the case-law involving Argentina, with particular regard to the defences raised by the host State to justify its governmental measures (§3) and the reasoning of arbitral tribunals on the issue of compensation (§4).

2. International investment obligations in times of financial and economic crises: framing the responsibility of the host States

Though FDI has long been part of the global economy, it has expanded greatly over the past few decades. International investment law comprises core principles, which are considered part of customary international rules, like the minimum standard of treatment, the fair and equitable treatment and full protection and security, and bilateral investment treaties (BITs) between States aimed at promoting and protecting foreign investment. FDI is also regulated at the domestic level. Indeed, each State has its own investment laws.[3]

International legal literature has paid little attention so far to the analysis of FDI laws and policies in situations of financial crises, even though it is beyond question that FDI is a main contributor to the economic growth of a country.

State Regulatory Actions in the Public Interest. The Concept of Proportionality', in S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford, Oxford University Press, 2010), 75-104.

[2] See M.B. Devaney, 'Remedies in Investor-State Arbitration: A Public Interest Perspective' *Investment Treaty News* (22 March 2013), http://www.iisd.org.

[3] For a general overview of the sources of international investment law and, in particular, on the standards of protection of FDI, see, among others, A. Reinisch, *Standards of Investment Protection* (Oxford: Oxford University Press, 2008), M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2°ed., 2004) and J.W. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2°ed., 2015). Most standards of investment protection, and in particular, for the purposes of this paper, the FET standard, have been considered as reflecting now customary international law. See more in detail on this point OECD, "Fair and Equitable Treatment Standard in International Investment Law" *OECD Working Papers on International Investment* (2004) 2004/03 and *Metalclad Corporation v. Mexico*, ICSID Case ARB(AF)/97/1, Award, 30 August 20002, para 74 *and SD Myers Inc v. Canada*, NAFTA/UNCITRAL Case, Partial Award, 13 November 2000, paras. 258 ff.

During a financial and economic crisis, it is essential for foreign investors to be able to rely on a stable domestic legislation. Indeed, a major concern for prospective investors is that governments may exercise their sovereign rights to change laws, and even withdraw from guarantees of international arbitration at a later date. This has a negative impact on the overall inflow of FDI in the countries.

Governmental interventions during economic emergencies and their negative impact on FDI protection have already been discussed before investment arbitral tribunals.

Ideed, in case of disputes between the host State and foreign investors, BITs - and generally international investment agreements (IIAs) - permit to solve disputes by using neutral arbitrators and to enforce the awards before the courts of any signatory State. In this respect, the International Centre for the Settlement of Investment Disputes (ICSID)[4] provides a neutral arbitral forum for settling investor-state disputes.

In the early 2000s, the Argentine government's regulatory responses to the financial and economic crisis[5] have triggered more than 44 investment arbitration cases against the country, involving a broad range of sectors, from water and electricity supply to financial and insurance services.[6] Argentina was ultimately found liable for damages incurred by investors as a result of governmental measures taken during the crisis, which were deemed to have breached non-expropriation standards, such as the fair and equitable treatment (FET) and the full protection and security standard.[7]

Also the measures related to sovereign debt restructuring which took place in Argentina have triggered cases before arbitral tribunals established according to the procedural rules of ICSID.

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[4] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed at Washington, 18 March 1965, 575 *U.N.T.S.* (1965), 159-235.

[5] For a general background, see J.A. Kaemmerer, 'Argentine Debt Crisis', in *Max Planck Encyclopedia of Public International Law*, online edition, http://www.mpepil.com.

[6] For a review of the Argentina case-law, see, among others, J.A. Alvarez, G. Topalan, 'The Paradoxical Argentina Cases' 6 *World Arbitratin & Mediation Review* (2012) 3, 492-544.

[7] The breach of the FET standard was upheld in almost all the cases which dealt expressly with measures taken to overcome the financial and economic crisis: *Azurix Corp. v. Argentina Republic,* ICSID Case No. ARB/01/12, Award, 14 July 2006; *BG Group v Argentina*, UNCITRAL Case, Final Award, 24 December 2007; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011; *Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic*, ICISID, Award, 22 May 2007; *Impregilo S.p.A. v. Argentine Republic,* ICSID Case No. ARB/07/17, Award, 21 June 2011; *LG&E Energy Corp./LG&E Capital Corp./LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; *National Grid plc v. The Argentine Republic*, UNCITRAL Case, Award, 3 November 2118; *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007; *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 (Award not public). Moreover, in some of these cases arbitral tribunals have recognised the breach of the full protection and security standard (*Azurix* Award; *National Grid* Award; *SAUR* Decision on Jurisdiction and Liability) and the breach of the umbrella clause (*LG&E* Decision on Liability; *Sempra* Award). In *Azurix* the arbitral tribunal found that the measures taken to overcome the financial and economic crisis were arbitrary in nature.

Indeed, sovereign debt is often a covered investment under the relevant IIAs.[8] Consequently, in the framework of a sovereign debt restructuring, while the majority of bondholders participate in the offering for the recovering of the debt, 'holdouts' may refuse to negotiate and demand the full value of their investments by resorting to international investment arbitration.[9] This is what happened in Argentina, when the government restructured US$100 billion of debt three times between 2001 and 2010, in the framework of one of the most controversial sovereign default in history. In September 2006, approximately 180,000 Italian bondholders filed a claim under the Italy-Argentina BIT for approximately US$4.3 billion. The creditors claimed that the Argentine restructuring was tantamount to expropriation and violated the FET standard under the relevant BIT.[10] In August 2011, the ICSID tribunal ruled that it had jurisdiction to hear the 'mass claim'.[11] After that, other two similar claims have been filed at ICSID.[12]

These decision will likely lead to increased ICSID involvement in future sovereign debt restructuring. In the European context, in particular, if sovereign debt falls under Greece's BIT obligations, bondholders may be able to hold out from contractual restructuring by threatening to bring claims with the ICSID.[13] Indeed, scholars who have recently commented on the implications of the Argentinean cases have all raised fears of ICSID claims during Greek restructuring.[14]

Some treaties, such as the North American Free Trade Agreement (NAFTA) and the majority of Peru's and USA's IIAs, exclude or safeguard sovereign debt. Also Argentina's new model BIT is reported to be moving in this direction.[15]

The exclusion of sovereign debt from 'covered' investments under future treaties would indeed relegate sovereign debt arbitration to national courts and to international financial bodies.[16] One may also recall that the United Nations Conference on Trade and Development (UNCTAD) has suggested that international investment agreements be amended to exempt sovereign debt from their scope of application.[17] Such a suggestion seems to have been followed by the European Union (EU). Indeed,

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[8] See K.P. Gallagher, 'Financial Crises and International Investment Agreements: The Case of Sovereign Debt Restructuring' 3 *Global Policy* (2012) 3, 363. On sovereign debt restructuring, see generally M. Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge: Cambridge University Press, 2011) and A. Tanzi, 'Sull'insolvenza degli Stati nel diritto internazionale' *Rivista di diritto internazionale* (2012) 1, 66-88.

[9] Gallagher, *cit.*, 364

[10] *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5. See M. Waibel, 'Opening Pandora's Box: Sovereign Bonds in International' 101 *American Journal of International Law* (2007) 4, 711–759.

[11] *Abaclat*, Decision on Jurisdiction and Admissibility, 4 August 2011.

[12] *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013 and *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014.

[13] See E. Norton, 'International Investment Arbitration and the European Debt Crisis' 13 *Chicago Journal of International Law* (2012) 1, 292.

[14] *Ibidem*, 312, O. Sandrock, 'The Case for More Arbitratin When Sovereign Debt is to be Restructured: Greece as an Example' 23 *The American Review of International Arbitration* (2012), 507-543 and A. Viterbo,'Sovereign Debt Restructuring and Investment Protection', in in T. Treves, F. Seatzu, S. Trevisanu (eds.), *Foreign Investment, International Law and Common Concerns* (London: Routledge, 2014), 325-336.

[15] Gallagher, *cit.*, 368.

[16] See M.B. Devaney, 'Leave it to the Valuation Experts?: The Remedies Stage of Investment Treaty Arbitration and the Balancing of Public and Private Interests' *Online Proceedings of the 3rd Biennial Global Conference of the Society of International Economic Law (SIEL) - Working Paper No. 2012-06* (July 2012).

[17] UNCTAD, 'Sovereign Debt Restructuring and International Investment Agreements' 2 *IIA Issues Note* (July 2011), 8.

sovereign debt restructuring issues have been excluded from the scope of jurisdiction of international arbitration in the text of the freshly negotiated EU-Canada Comprehensive Economic and Trade Agreement (CETA), as well as in the EU's proposal for the Investment Chapter to be included in the Transatlantic Trade and Investment Partnership (TTIP) Agreement with USA, currently under negotiation.[18]

Thus, protection of FDI are triggered both under financial and economic crises[19] as well as during sovereign debt restructuring. As regards the former scenario, EU institutions have reacted to the financial crisis by introducing major changes to the EU fiscal constitution.[20] At the same time, member States have announced stimulus packages for their economies, which are likely to discriminate foreign investors and thus could enable them to claim damages for breach of the national treatment standard.[21]

It is under debate whether such discriminations towards foreign investor may be justified, as questioned in the Argentinean cases.[22]

In 2013 a number of European investment cases emerged from the current financial and economic crisis: Marfin Investment Group filed a claim against Cyprus in connection with the Government's effective takeover of the Cyprus Popular Bank,[23] while Poštová banka, a Slovak bank, together with its

[18] See Annex X of the CETA on Public Debt, which reads as follows: '1. No claim that a restructuring of debt issued by a Party breaches an obligation under Sections [Non-Discriminatory Treatment, Investment Protection] may be submitted to, or if already submitted continue in, arbitration under Section 6 [Investor-State Dispute Settlement] if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission […]' (Consolidated CETA Text, published on 26 September 2014, http://trade.ec.europa.eu). The same wording can be found in Annex II on Public debt to the Investment Protection and Resolution of Investment Disputes Chapter (to be included in the TTIP), which was made public by the EU Commission on 12 November 2015 (http://trade.ec.europa.eu).

[19] For a general overview, see G. Sacerdoti, 'BIT Protection and Economic Crises: Limits to theirs Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity' *ICSID Review* (2013), 1-33 and G. Sacerdoti, 'The Application of BITs in Times of Economic Crisis: Limits to their Coverage, Necessity and the Relevance of WTO Law', in G. Sacerdoti, P. Acconci, M. Valenti, A. De Luca, *General Interests of Host States in International Investment Law* (Cambridge: Cambridge University Press, 2014), 3-25. In particular, the standards of protection of FDI affected during a financial and economic crisis are the following: FET standard, national treatment, full protection and security and indirect expropriation.

[20] See, among others, F. Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 32 *Berkeley Journal of International Law* (2014) 1, 64-123. For a useful timeline see the official EU website http://ec.europa.eu/economy_finance/crisis/index_en.htm.

[21] For a general and up-to-date overview, see C.L. Lim, B. Mercurio, 'The Fragmented Disciplines of International Economic Law after the Global Financial and Economic Crisis: an Introduction', in *International Economic Law After the Global Crisis: a Tale of Fragmented Disciplines* (Cambridge: Cambridge University Press 2015), 1-30.

[22] On the other hand, it has been suggested that treaty obligations under IIAs might be suspended during the crisis, thanks to the application of article 62 of Vienna Convention on the Law of Treaties. See H. Ferré, K. Duggal, 'The World Economic Crisis as a Changed Circumstance' 43 *Columbia FDI Perspectives* (2011), http://www.vcc.columbia.edu/content/fdi-perspectives.

[23] *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus,* ICSID Case No. ARB/13/27. The Government's actions were taken to stabilize the Bank, which was suffering from broad exposure to defaulted Greek sovereign debt and other non-performing loans in Greece.

Cypriot shareholder brought a claim against Greece alleging that, as owners of Greek sovereign bonds, they suffered from losses arising from the 2012 Greek Bondholder Act.[24]

One may wonder whether the alleged violation of standard of treatment towards foreign investors should be claimed against the EU or rather if it is still up to each member State to guarantee the protection of foreign investors within their territory.

Indeed, the 2009 Lisbon Treaty[25] has added FDI to the common commercial policy (CCP) of the EU,[26] which has now exclusive competence over FDI and entails, accordingly, the authority to conclude international investment agreements with third countries.[27] Moreover, the EU is already party to one agreement with the possibility for investor-State dispute settlement (the Energy Charter Treaty),[28] and a number of other agreements are currently under negotiation (or at the last stages of negotiations), namely with USA, Canada,[29] Singapore[30] and, finally, China.[31]

Accordingly, from now on the EU may be also involved in investment-related disputes.[32] In order to determine the *ius stand* and the allocation of financial responsibility between the EU and its member

[24] *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8. The arbitral tribunal issued an Award on 9 April 2015, rejected the claim for lack of jurisdiction.

[25] Treaty of Lisbon - Amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01); for the consolidated texts of the two core Treaties, see the official EU website http://ec.europa.eu/archives/lisbon_treaty/full_text/index_en.htm.

[26] See N. Lavranos, 'New Developments in the Interaction between International Investment Law and EU Law' 9 *Law & Practice of International Courts & Tribunals* (2010) 409.

[27] Article 206 of the Treaty on the Functioning of the European Union (TFEU) establishes that 'the Union shall contribute, in the common interest, to […] the progressive abolition of restrictions on […] foreign direct investment […]'. According to EU Regulation 1219/2012 of 12 December 2012 *establishing transitional arrangements for bilateral investment agreements between Member States and third countries*, the European Commission may authorize member States to open formal negotiations with a third country to amend or conclude a BIT. Consequently, the almost 1200 BITs concluded by EU member States will be in force until they are replaced by EU agreements. See M. Bungenberg, C. Herrmann (eds.), *Common Commercial Policy after Lisbon*, 2013 and N.J. Calamita, 'The Making of Europe's International Investment Policy: Uncertain First Steps' 39 *Legal Issues of Economic Integration* (2012) 3, 301-330.

[28] The 1994 Energy Charter Treaty aims at creating a legal framework for trade and investment in the energy sector. In particular, Part III of the Energy Charter Treaty entitled 'Investment Promotion and Protection' is itself an investment treaty, influenced by the various European and American BITs in its structure, content and drafting. For a comment, Salacuse, *cit.*, 2, 102

[29] The negotiations with Canada are now over, while the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) with the United States of America are still on-going. For a critical analysis see, among others, M. Nicolini, 'Rechtlicher Umriss zu den Freihandelsabkommen' paper presented at the Conference *Freihandelsabkommen EU–USA–Kanada: Chance oder Verhängnis? Politische, volkswirtschaftliche und rechtliche Überlegungen zu CETA & TTIP* held at the EURAC Convention Center (Bozen (Italy), 5 September 2014).

[30] The negotiations for a comprehensive FTA between EU and Singapore were completed on 17 October 2014. The draft agreement needs now to be formally approved by the EU Commission and then agreed upon by the Council of Ministers, and ratified by the European Parliament.

[31] The Council authorised the Commission to initiate negotiations for a comprehensive EU-China investment agreement on 18 October 2013. For a comprehensive and updated overview of current negotiations, see the document prepared by the Europena Commission, *Overview of FTA and other Trade Negotiations. Updated December 2015*, http://trade.ec.europa.eu.

[32] In this respect, the Commission has highlighted the need to design a new investment dispute settlement system, which should be structured in such a way as to prevent investors from bringing multiple or frivolous claims and to make the arbitration system more transparent. See European Commission (March 2014) *Investment Protection and Investor-to-State Dispute Settlement in EU Agreements. Fact Sheet*, http://trade.ec.europa.eu.

States in future investor-State/EU arbitrations, a new Regulation *establishing a framework for managing financial responsibility linked to investor-State dispute settlement tribunals established by international agreements to which the European Union is party* has been adopted on 23 July 2014.[33]

As long as one of the above-mentioned treaties with third countries enters into force, it remains up to member States to act as a respondent in the relevant investment arbitration cases.

Since a 'special regime' of investment protection in times of financial and economic crises does not exist in international law, questions arise as to how situations of financial and economic crises could be taken into consideration by arbitral tribunals when assessing the responsibility of host States. In this respect, arbitral tribunals in the Argentinean cases have had to answer the following questions:

- can a financial and economic crisis be considered as a valid justification or excuse for the relief of State's responsibility?
- can a financial and economic crisis be taken into consideration at the remedies stage, as a circumstance which could justify a lowering of the amount of compensation due to foreign investors?

Given the raise of investment cases related to the current economic and financial crisis against, in particular, European countries, the Argentinean case-law could offer some guidance when choosing the interpretative criteria to be followed and applied in situations involving financial and economic crises.

Before entering into the analysis of the issue of compensation, it seems useful first to understand how financial and economic crises have been treated and considered in the merits stage by arbitral tribunals so far.

3. The necessity defence and the application of NPM clauses to breaches occurred during financial and economic crises. A case-law overview

Financial and economic crises have been considered in the merits stage in arbitration case-law for the determination of the responsibility of the host State for breaches of its obligations towards foreign investors. Indeed, Argentina's main defence in the above-mentioned investment arbitration procedures has been the invocation of a state of emergency or necessity,[34] according to both the rules

[33] Regulation No. 912/2014, published in the Official Journal of the European Union on 28 August 2014., and entered into force on 17 September 2014 (according to its Article 25). See A. Dimopoulos, 'The involvement of the EU in investor-State dispute settlement: a question of responsibilities' 51 *Common Market Law Rreview* (2014), 1671 and F. Baetens, G. Kreijen, A. Varga, 'Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know' 47 *Vanderbilt Journal of Transnational Law* (2014), 1203.

[34] See M.C. Hoelck Thioernelund, 'State of Necessity as an Exception from State Responsibility for Investments' 13 *Max Planck YearBook of United Nations Law* (2009), 441 and W.W. Burke-White, 'The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System', in M. Waibel, A. Kaushal, K.H.L. Chung, C. Balchin, *The Backlash against Investment Arbitration* (The Netherlands: Kluwer Law International BV, 2010), 415.

of customary international law - as codified in article 25 of the 2001 International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts (ILC Articles), according to which a State may not invoke necessity as a ground for precluding the wrongfulness of an act not in conformity with an international obligation, unless the act is the only way to safeguard an essential interest against a grave and imminent peril -[35] and the applicable non-precluded-measures (NPM) clause, which offers a justification for non performance of treaty obligations in certain circumstances, included in the relevant BIT.[36] The latter provision is normally drafted in the sense that the relevant treaty 'shall not preclude the applicability of measures' or 'shall not apply to' particular measures in order to safeguard the protection of the State's essential security, the maintenance of public order, or in order to cope with a public health emergency.[37] When a State action falls under the terms of one of such clauses, the result is the preclusion of the wrongfulness of the action itself.[38]

Since such provisions refer to a situation of 'emergency', which is similar to the concept of 'necessity', they are frequently interpreted through reliance on article 25 of the ILC Articles. However, the ILC has drafted 'necessity' as a secondary rule of international law.[39] Article 25 is indeed a circumstance precluding the wrongfulness of a conduct which is in breach of an international obligation. On the contrary, NPM clauses are primary rules of international law justifying the non performance of certain treaty obligations under exceptional circumstances. Consequently, an act of the State is deemed to be lawful under the treaty when it meets the requirements set forth in such provisions. It follows that article 25 of the ILC Articles and the treaty-based emergency clauses operate at different levels and deal with different situations.

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[35] Article 25 of the ILC Articles: '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which an obligation exists, or the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity'. See ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Yearbook of the International Law Commission. Vol. II. Particle Two* (2001), 31-143. This article, drafted as a secondary rule of law by the ILC, has been constantly referred to as reflecting the customary rule of necessity. See, among others, S. Olleson, *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts – Preliminary Draft* (British Institute of International and Comparative Law, 2007) and A. Tanzi, 'State of Necessity', in *Max Planck Encyclopedia of Public International Law*, online edition, http://www.mpepil.com.

[36] See, W.W. Burke-White, A. Von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' *Vanderbilt Journal of International Law* (2008) 48, 321 and D.A. Desierto, *Necessity and National Emergency Clauses. Sovereignty in Modern Treaty Interpretation* (Leiden, Boston: Martinus Nijhoff Publishers, 2012).

[37] See, for example, article 18, par. 2 of the 2004 United States Model BIT: 'nothing in this Treaty shall be construed: [...] to preclude a Party from applying measures that it considers necessary for […] the protection of its own essential security interest'.

[38] Similar emergency clauses can also be found in international human rights law treaties and international economic treaties, such the WTO Agreements. Overall, they are usually referred to as "primary" rules of law, in contrast of the secondary tule of the customary necessity defence. On this point, more in detail, see J.R. Crawford, S. Olleson, 'The Exception of Non-Performance: Links Between the Law of Treaties and the Law of State Responsibility' 21 *Austrian Yearbook of International Law* (2000), 1-21.

[39] 'Report of the ILC on the Work of its Twenty-Fifth Session', *YearBook of the International Law Commission Vol. II* (1973), 169, para. 40.

However, investment arbitral tribunals which had to deal with such pleas in the Argentinean cases, while recognising, at least in principle, the possibility to invoke such a justification in case of financial and economic crises, came to different conclusions on the relationship between the treaty-based emergency clause and article 25 of the ILC Articles.[40] It could be useful to overview the different reasonings employed, since they had also consequences at the remedies stage. In this respect, arbitral awards may be divided into two main groups.

The first group (1) includes awards in which the Tribunals had to apply the NPM clause of the relevant BIT. Since most of the cases dealt with the 1991 US-Argentina BIT,[41] the NPM clause relied on was article XI (Emergency clause), according to which the treaty

> shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

The second group (2) of awards refers to cases in which the applicable BITs did not provide for an emergency clause, so that the Tribunals had to deal with the interpretation and application of the customary rule of necessity defence.

As to the first group of awards (1), two main approaches emerge. On the one hand (a), a group of awards relied only on article 25 of the ILC Articles and rejected the plea of necessity; on the other hand (b), a number of awards upheld the plea of necessity relying exclusively on article XI of the US-Argentina BIT.

The awards relying only on the customary rule of necessity defence (a) includes the *CMS, Enron, Sempra* and *El Paso* Awards.[42]

CMS v Argentina was the first case brought against Argentina in the aftermath of the Argentine financial crisis of 2001-2002.[43] The Tribunal analyzed the customary rule of necessity, applying article 25 of the ILC Articles.[44] As regards the 'only way' requirement under article 25,[45] according to the Tribunal Argentina had other means available to deal with the crisis - even though it did not specify

[40] C. Binder, 'Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis', in C. Binder, U. Kriebaum, A. Reinisch, S. Wittich (eds.), *International Investment Law for the 21st Century* (Oxford: Oxford University Press, 2009), 608-630 and J. Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' 59 *International and Comparative Law Quarterly* (2010), 325-371.

[41] Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (signed on 14 November 1991, in force on 20 October 1994).

[42] Defined as 'interpretation or conflation approach' in Binder, *cit.*, 613.

[43] CMS, an American company, alleged the breach of the US-Argentina BIT because of Argentina's decision to interrupt the adjustment of the tariff formula (*CMS* Award, para. 88).

[44] *CMS* Award, paras. 91-96. See Hoelck Thioernelund, *cit.*, 444.

[45] Article 25, par. 1(a) of the ILC Articles.

which measures Argentina should have adopted.[46] Accordingly, the customary defence of necessity could not be upheld.[47]

The *Enron* Award of 22 May 2007[48] and the *Sempra* Award of 28 September 2007[49] came to similar conclusions.

All these awards have been subject to annulment proceedings. In particular, the *CMS* Annulment Decision[50] strongly criticized the reasoning followed by the Tribunal, affirming that article 25 of the ILC Articles and article XI of the US-Argentina BIT should be interpreted according to the primary-secondary rule approach.[51] According to the Committee, the Tribunal made a manifest error of law - though not justifying the annulment of the Award -[52] since the requirements under article XI were not the same as those under customary international law.[53] Thus, the Tribunal should have considered first the application of article XI and 'only if concluded that there was a conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded […] under customary international law'.[54]

The *Sempra* and *Enron* Awards have been subject to annulment proceedings as well. On 29 June 2010 an *ad hoc* ICSID Annulment Committee annulled the *Sempra* Award for manifest excess of powers, since it found that the Tribunal had failed to apply Article XI of the US-Argentina BIT.[55] The reasoning is quite similar to the *CMS* Annulment Decision, even though the *Sempra* Committee did not refer expressly to the primary-secondary rule approach.[56] Also the *Enron ad hoc* Annulment Committee concluded that the original Award was to be annulled for manifest excess of power.[57]

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[46] *CMS* Award, para. 324. See Hoelck Thioernelund, *cit.*, 446.

[47] *CMS* Award, para. 331.

[48] Enron Corporation and Ponderosa Assets L. (an American company) invested in an Argentine transportation company, Transportadora de Gas del Sur (TGS), relying on the Standard Gas Transportation License, which provided for a system of tariff adjustment. After the 2001 economic crisis, the Argentine Government refused to respect what have been established in the Licence and Enron brought a claim before an ICSID tribunal. See *Enron* Award, paras. 43-46.

[49] Sempra, an American company, had invested in two Argentine gas companies which had been granted licenses for the distribution of gas in the national territory. Sempra complained that its investments suffered serious damages resulting from the emergency measures taken by Argentina (*Sempra* Award, paras. 37, 45-46). For a comment, Hoelck Thioernelund, *cit.*, 466.

[50] *CMS Gas Transmission Company* v. *Argentine Republic*, ICSID case ARB/01/8, Decision on Annulment, 25 September 2007. See T. Gazzini, 'Necessity in International Investment Law: Some Critical Remarks on CMS v. Argentina' 26 *Journal of Energy & Natural Resources Law* (2008) 3, 450-469.

[51] Ibidem.

[52] Due to the limited mandate conferred by article 52, par. 1 of the ICSID Convention. See *CMS* Annulment Decision, paras. 35, 158.

[53] *Ibidem*, para. 34.

[54] *Ibidem*, para. 134. See Hoelck Thioernelund, *cit.*, 456.

[55] *Sempra Energy International v. Argentine Republic*, ICSID ARB/02/16, Decision on the Argentine's Republic Application for Annulment of the Award, 29 June 2010, paras. 159, 165.

[56] *Ibidem*, paras. 208-209.

[57] *Enron Creditors Recovery Corp. Ponderosa Assets LP v. The Argentine Republic*, ICSID case ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, paras. 377-378. However, the Committee did not engage in a discussion as to whether the customary rule of necessity defence was the right applicable law in the case (*Ibidem*, para. 408). See S. Singh, 'The Enron Annulment Decision's Exposure of Necessity's Endemic Uncertainty. A Welcome Critique' *E.J.I.L.: Talk!* (25 October 2010), http://www.ejiltalk.org/author/ssingh.

Another case which involved the application of article XI of the US- Argentina BIT was *El Paso v. Argentina*. Here, again, the tribunal considered the contributory element of the State as a general principle of law, which precluded the application of article XI US-Argentina BIT.[58]

Among arbitral awards which applied the US-Argentina BIT, a second group of cases (b) includes the *LG&E* and *Continental* cases. In such instances, the Tribunals rightly applied the emergency clause included in the US-Argentina BIT.

In the *LG&E* Decision on Liability,[59] the Tribunal considered that it '[would] apply first, the Treaty, second, general international law'.[60] It found that, from 1 December 2001 until 26 April 2003, Argentina was in a period of crisis during which it was necessary to enact regulatory measures to maintain public order and protect its essential security interests.[61] Consequently, the requirements of Article XI of the US-Argentina BIT had been met and Argentina was exempted from liability.[62]

Also the *Continental Casualty* Tribunal[63] accepted Argentina's reliance on necessity and found that the economic crisis constituted a state of necessity precluding the wrongfulness of the treaty violations according to Article XI of the US-Argentina BIT.[64]

The second group of awards in which the Tribunals had to rely only on the customary defence of necessity (2), given the lack of an emergency clause in the applicable BITs, includes the ICSID *Suez, Saur, Impregilo, EDF, Hochtief*[65] and *Total* cases and the UNCITRAL *BG* and *National Grid* cases.

In the *Suez/Vivendi* and *AWG* Decision on Liability, the Tribunal rejected Argentina's defence of necessity,[66] on the ground that the 'only way' requirement under article 25 had not been met.[67] Moreover, the Tribunal found that Argentina had 'significantly contributed to the crisis'.[68] Also in the UNCITRAL *National Grid* case and the ICSID *Impregilo, Saur,*[69] *Hochtief*[70] and *Total* cases the Tribunals came to the same conclusions.[71]

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[58] *El Paso* Award, paras. 552 ff. The Annulment Decision of 22 September 2014 dismeed the Argentinean application.

[59] The American LG&E Energy Corp., LG&E Capital Corp. and LG&E International Int. invested in three Argentine natural gas distribution companies. The Emergency Law enacted by Argentina in 2001 modified the regulations under which LG&E invested, in particular blocking the adjustment of tariff.

[60] *LG&E* Decision on Liability, para. 205.

[61] These dates coincided, on the one hand, with the Government's announcement of the measure freezing funds, which prohibited bank account owners from withdrawing more than one thousand pesos monthly and, on the other hand, with the election of President Kirchner. See *LG&E* Decision on Liability, paras. 226 and 230.

[62] *Ibidem*, paras. 226, 245 and 258

[63] The American Casualty Company invested in the Argentine CNA Aseguradora de Riesgos del Trabajo S.A. After the 2001 emergency measures took by Argentina, Continental suffered a loss in value of its assets. *Continental Casualty Co v. Argentina*, ICSID case ARB/03/9, Award, 5 September 2008, paras. 19-20.

[64] *Continental* Award, paras. 234-236. The Continental Annulment Decision of 16 October 2011 upheld the tribunal's reasoning on the application of article XI US-Argentina BIT.

[65] *Hochtief AG v. Argentina*, ICSID Case ARB/07/31, Decision on Liability, 29 December 2014.

[66] The BITs involved were those between Argentina and France, on the one hand, and Argentina and Spain, on the other hand.

[67] *Suez* Decision on Liability, para. 238.

[68] *Ibidem*, para. 242.

[69] More precisely, the arbitral tribunal rejected the necessity plea since it saw no connection between the alleged unlawful measures and the state of emergency (Decision on Jurisdiction and Liability, para. 460).

[70] *Hochtief* Decision on Liability, para. 301.

[71] *National Grid* Award, para. 260; *Impregilo* Award, para. 359

On the other hand, in the UNCITRAL *BG* case the Tribunal stated that article 25 of the ILC Articles 'may relate exclusively to international obligations between sovereign States'.[72] Therefore, 'article 25 would be of little assistance to Argentina as it would not disentitle BG, a private investor, from its right to compensate under the Argentina-UK BIT'.[73] Consequently, Argentina's reliance on the necessity defence was rejected.

4. The relevance of financial and economic crisis in the determination of compensation

As shown in the precedent paragraph, to date host State defences grounded on the fact they were in a situation of financial and economic crises have not been upheld but in two cases by arbitral tribunals; and even when rarely upheld, they were not enough to completely relief them from responsibility towards foreign investors.

Nevertheless, arbitral tribunals had at least posed the question whether such a circumstance could be taken into consideration at the remedies stage, in order to mitigate the *quantum* of compensation due to foreign investors.

Preliminarly, it seems necessary to consider the methods of evaluation of compensation employed by investment arbitral tribunals.

In the Argentinaen cases, the host State was found in breach of the FET standard of treatment, the full protection and security standard and, albeit in very few cases, the umbrella clause.[74] It has already been noticed that the same breaches are likely to be claimed in foreseeable investment cases against (non)European countries by foreign investors as a consequence of measures which are being taken to overcome the current financial and economic crisis.

Generally, international investment agreements include provisions relating to compensation for expropriation,[75] but are generally silent on the appropriate damages to be awarded for breaches of non-expropriatory obligations.[76] It seems thus necessary to turn to the relavant case law to assess the approach taken by arbitral tribunal in the latter circumstances.

4.1. Assessing compensation for unlawful acts under international investment law: the legal framework of reference

One of the consequences of the host State's responsibility under international law is its obligation to provide reparation, which in international investment law mainly takes the form of compensation[77]

[72] *BG* Final Award, para. 408.
[73] Ibidem.
[74] See *supra* §2.
[75] See R. Dolzer, M. Stevens, *Bilateral Investment Treaties* (The Hague: Nijhoff, 1995), 108-10.
[76] For a commnet, see S. Ripinsky, K. Williams, *Damages in International Investment Law* (London: British Inst. of Internat. and Comparative Law, 2008), 23 and 25.
[77] See T.W. Waelde, B. Sabahi, 'Compensation, Damages and Valuation', in P. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), 1049-1124, S. Wittich, 'Compensation', in *Max Planck Encyclopedia of Public International Law*, online edition,

and less commonly restitution.[78] In this respect, one may well recall Article 36 of the ILC Draft Articles, according to which compensation 'shall cover any financially assessable damage including loss of profits in so far as it is established'.

The development of legal principles on the determination of compensation in investment law are closely related to cases of expropriation.[79]

Under the current state of customary international law, states have the right to expropriate the property of foreign nationals, provided that they do so for a public purpose, in a non-discriminatory manner, and upon payment of compensation.[80] In order to be lawful, compensation must conform to the requirements of the so-called 'Hull Formula', namely it has to be 'prompt, adequate, and effective':[81] 'prompt' means that compensation must be paid without unreasonable delay; 'adequate' means that it must be equal to the fair market value of the taken property immediately before the taking, and 'effective' means that it must be made in a freely transferable currency.[82] The Hull Formula is now generally accepted as the prevailing standard and it has been included in the great majority of investment treaties.[83]

However, generally treaties are silent on the method(s) to be used for determining compensation in case of unlawful acts, such as violations of investment treaty protections regarding unfair and inequitable treatment.

Until 2000s, arbitral tribunals simply applied investment treaty provisions on compensation for lawful expropriation to other unlawful acts.[84]

Instead, according to recent case law, compensation payable for lawful and unlawful acts should be different. One could well recall in this regard the NAFTA case *SD Myers v Canada*,[85] where the tribunal noticed that investment treaties lacked any provision regarding calculation of compensation for violation of protections other than expropriation, such as FET standard and the national treatment. The tribunal recognized that the gap must be filled by arbitrators:

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http://www.mpepil.com and I. Marboe, 'Compensation and Damages in International Law. The Limits of "Fair Market Value"' *Journal of World Investment & Trade* (2006), 723-759.

[78] Restitution has been recognized as the primary remedy in international law. See B. Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford: Oxford University Press, 2011), 192 and generally on restitution in international law, A. Tanzi, 'Restitution', in *Max Planck Encyclopedia of Public International Law*, online edition, http://www.mpepil.com.

[79] Sabahi, *cit.*, 5.

[80] *Ibidem*, 93.

[81] The Hull Formula was drawn from a 1938 letter sent by US Secretary of State, Cordell Hull, to the Mexican government, in the aftermath of the Mexican revolution in the early twentieth century, which culminated, *inter alia*, in the expropriation of properties belonging to American nationals. See C. Dugan, D. Wallace, Jr, N. Rubins, B. Sabahi, *Investor State Arbitration* (Oxford: Oxford University Press, 2008), 435–438.

[82] Sabahi, *cit.*, 93-94.

[83] A 2007 survey of about 2,000 investment treaties by UNCTAD describes the current trend: 'Most [investment] agreements include the same four requirements for a lawful expropriation, namely public purpose, non-discrimination, due process and payment of compensation. […] Notwithstanding some variations in language, the overwhelming majority of BITs provide for prompt, adequate and effective compensation, based on the market or genuine value of the investment' (UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (New Yor, Geneva: United Nations, 2007), 52).

[84] See Sabahi, *cit.*, 94, 96.

[85] *SD Myers Inc v Canada*, UNCITRAL Case, First Partial Award, 13 November 2000.

> [b]y not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case.[86]

The ICSID arbitration in *ADC v Hungary*[87] made it clear that 'the assessment of damages is not a science'[88] and in *Lemire* case, the arbitral tribunal acknowledged that

> the actual calculation of damages cannot be made in the abstract, it must be case specific. […] Valuation is not an exact science. The Tribunal has no crystal ball and cannot claim to know what would have happened under a hypothesis of no breach; the best any tribunal can do is to make an informed and conscientious evaluation, taking into account all the relevant circumstances of the case.[89]

The same approach can be also found in the 2011 Award in *El Paso v. Argentina*, where, according to the tribunal the silence of the treaty indicated the intention of the drafters

> to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case. […W]hatever precise approach is taken, it should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation.[90]

Most recently, the arbitral tribunal in the *Suez* case, in issuing its award on compensation, made it clear that 'the Tribunal, in the exercise of prudent judicial discretion, must '[…apply] standards of reasonableness' when assessing the compensation due.[91]

Also the ILC has acknowledged the inherent flexibility of the process of determining the *quantum* of compensation:

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[86] *Ibidem*, para. 309.

[87] ADC possessed a series of development rights at Budapest airport, which were expropriated. Since the value of the investment had increased between the date of the taking and the date of the award, that extra amount was awarded in accordance with the 'full reparation' standard. The ADC tribunal did, however, note that such an increase in value between the date of the taking and the date of the award was unusual, if not unique. *ADC v Hungary*, ICSID Case ARB/03/16, Award, 2 October 2006, paras. 429-444. See Devaney, *cit.*

[88] *ADC* Award, para. 521.

[89] *Joseph Charles Lemire v. Ukraine*, ICSID Case ARB/06/18, Award, 28 March 2011, paras. 152 and 248.

[90] *El Paso* Award, paras. 698-742.

[91] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina Republic*, ICSID Case ARB/03/19, Award, 9 April 2015, para. 33.

> [a]s to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behavior of the parties and, more generally, a concern to reach an *equitable* and acceptable outcome. (emphasis added)[92]

Indeed, valuation is not what lawyers normally do. It is up to other disciplines to assess the facts and produce a number. Nevertheless, the lawyer must identify the applicable legal standard; accordingly, arbitrators play an important role in developing legal standards and methods of assessing compensation. Also scholarly guidance regarding the calculation of damages in arbitration has developed quickly in recent years, highlighting the growing awareness of 'one of the least understood and most unpredictable areas of international investment law'.[93]

The above-metioned *leading* case of *SD Myers v Canada* expressely relied on the *Chorzów Factory* case and the principle of full reparation stated therein,[94] which it found to be authoritative on the general principle of reparation.[95] Subsequently, a number of other tribunals followed the *SD Myers*' approach.[96]

Indeed, under customary international law, given the silence of the relevant treaties, one should look at the customary law principle according to which reparation should 'wipe out all the consequences of the illegal act'. In this respect, also the *ADC* tribunal is worth mentioning. The tribunal reasoned as follows:

> [T]he application of the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed. […] It is noteworthy that the European Court of Human Rights has applied *Chorzów Factory* in circumstances comparable to the instant case to compensate the expropriated party the higher value the property enjoyed at the moment of the Court's judgment rather than the considerably lesser value it had had at the earlier date of dispossession. […] Moreover, Sole Arbitrator Dupuy in *Texaco Overseas Petroleum Company v. Government of the Libyan Arab Republic* […] cited a number of authorities on the contours of the principle of restitutio in integrum as set out in the *Chorzów Factory* case. Dupuy cited in particular the view of former ICJ President Jiménez de Aréchaga, writing extra-

[92] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries*, text adopted by the ILC at its fifty-third session and submitted to the General Assembly (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission. Vol. II. Part Two* (2001), 76.

[93] N. Rubins, N. Kinsella, International Investment Political Risk and Dispute Resolution: A Practitioner's Guide (Oxford: Oxford University Press, 2005), 258.

[94] *The Factory at Chorzów (Germany v Poland)*, Decision on Indemnity, 13 September 1928, *PCIJ Ser A No. 17* (1928), 47.

[95] *SD Myers* First Partial Award, para. 311.

[96] See, among others, *CMS* Award, para. 409; *Enron* Award, para. 360; *LG&E* Award, para. 30; *Sempra* Award, para. 403; *BG* Final Award, paras. 419-429; *National Grid* Award, paras. 269-270.

judicially, who stated: '[…T]he value of a confiscated property may be higher at the time of the judicial decision than at the time of the unlawful act. Since monetary compensation must, as far as possible, resemble restitution, the value at the date when indemnity is paid must be the criterion.[97]

From the *ADC* case one can make the following points: (1) unlawful acts under investment law require a different method of calculation of reparation than the one required in lawful expropriation and (2), more precisely, compensation should be calculated, according to the *Chorzów Factory* standard, taken into account the value of the property at the moment of the Court's judgment rather than the arguably lesser value it had had at the earlier date of dispossession.

Since then, arbitral tribunals such as *Siemens v Argentina,*[98] *Vivendi v Argentina*[99] have followed the *ADC* approach,[100] as well as, more importantly for the purposes of the present paper, all the above mentioned cases regarding breaches which arose due to the measure taken by Argentina to overcome the financial and economic crisis.[101]

As regards the methods employed to assess full reparation for unlawful breaches, generally arbitrators rely either on the 'fair market value' or on the discounted cash flow (DCF) method.

The 'fair market value' method seems the most used one, even though it involves a significant element of discretionary choice.[102] In *Compañia de Aguas del Aconquija/Vivendi* case, the Tribunal made it clear that

'[f]air market value' […] has […] generally been accepted as appropriate compensation for expropriation. However, as pointed out by the tribunal in CMS Gas Transmission Co. v. Argentine Republic […], a 'fair market value' standard might also be appropriate for other breaches which result in long-term losses. The Azurix tribunal also concluded that it could properly resort to fair market value to compensate breaches other than expropriation – in particular the fair and equitable standard […].[103]

[97] *ADC* Award, paras. 496-499.
[98] *Siemens AG v Argentina*, ICSID Case No. ARB/02/8, Award, 17 January 2007, paras. 349-352.
[99] *Compañía de Aguas* Award, paras. 8.2.3-8.2.5.
[100] See Sabahi, *cit.*, 96.
[101] Indeed, express reference to the *Chorzów Factory* principle was made in *Azurix* Award (para. 423), *BG* Award (para. 426), *CMS* Award (para. 400), *Compania de Aguas* Award (para 8.2.4), *El Paso* Award (para. 700), *Enron* Award (para. 359), *Impregilo* Award (para. 361), *LG&E* Award (para. 31), *National Grid* Award (para. 270), *Sempra* Award (para. 400), *Saur* Award (para. 86) and *Suez* Award (para. 27). In the *Continental* Award, the tribunal did not refer expressely to the *Chorzów Factory* principle, but stated the necessity to award 'full reparation' (para. 308), while in the *EDF* Award the tribunal merely refer to the 'genuine value of the investment', though recognising the necessity to calculate damages for breaches of non-expropriate obligation differently than lawful expropriation (*EDF* Award, para. 1209).
[102] See, among others, *CMS* Award, para. 410; *Enron* Award, para. 361; *Sempra* Award, para. 404; *BG* Award, para. 422; *National Grid* Award, para. 275.
[103] *Compañía de Aguas* Award, para. 8.2.10.

Also other arbitral tribunal in the Argentinean cases have applied this method to determine the amount of compensation due.[104]

As mentioned, another way in which compensation is determined for unlawful acts is the DCF valuation.[105] DCF calculates the present value of future expected net cash flows using a discount rate. It estimates the value of a property based on the present value of the amount of cash that the property could generate for its owners in the future.[106]

The DCF method has been used by tribunals in a number of recent investment treaty arbitrations, including those involving Argentina.[107] Due to its complexity, however, arbitral tribunals have rarely discussed its technical aspects in detail. An exception is *CMS v Argentina*, where the tribunal engaged in a detailed analysis on the point at issue.[108]

4.2. Compensation for breaches occurred during financial and economic crises: a survey of the relevant case-law

As already seen, financial and economic crises have come into consideration in investment arbitration as possible grounds for exclusion of the responsibility of the host State. In the majority of cases, such a defence has been dismissed by arbitral tribunals. However, it is still interesting to verify which would be the impact on the determination of compensation in case of a successful invocation of the necessity defence.

The following paragraphs assess what arbitrators have reasoned in this regard, with special attention to the reference made to 'equitable circumstances' when assessing the impact of financial and economic crises to the determination of the *quantum* of compensation due.

4.2.1. Compensation and the application of the necessity defence under customary international law…

Argentina has always relied either on the customary defence of necessity or on the application of the relevant NPM clause in order to get rid of its responsibility towards foreign investors. When arbitral tribunals have relied on the customary defence of necessity (as embodied in article 25 of the ILC Articles), they had always rejected Argentiona's defence.

However, should they have found article 25 of the ILC Articles applicable in the cases at hand, the question would have arisen as to the impact of such an application at the remedial level.

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[104] See *Azurix* Award; *BG* Award; *Compañía de Aguas* Award and *Sempra* Award. The tribunal in the *EDF* case stated that '[t]he fairest measure of damages for th[e] breach would be the genuine value of the investment' (*EDF* Award, para. 1210).
[105] Sabahi, *cit.*, 118.
[106] *Ibidem*.
[107] See the *CMS* and *Sempra* Awards. Also the traibunal in the *Enron* case used the DCF method, albeit making certain adjustments to reflect the reality of the economic crisis. See Sabahi, *cit.*, 120.
[108] *CMS* Award, paras. 281 and 303.

Indeed, under general international law, the application of the customary rule of necessity is, according to article 27 of the ILC Articles, 'without prejudice to (…) the question of compensation for any material loss caused by the action in question'.[109] The ILC specified that

> the term 'compensation' is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected […] reference to 'material loss' is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.[110]

And indeed, arbitral tribunals have stated that, in case of an application of article 25 of the ILC Article, also article 27 should have come into consideration.

The *CMS* Tribunal, in particular, declared itself 'satisfied that Article 27 establishes the appropriate rule of international law on this issue'[111] and added that

> [e]ven if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present.[112]

However, the tribunal did no engage in a further analysis on the point at issue. The same approach was also endorsed by the arbitral tribunal in the *EDF* case.[113]

Nevertheless, article 27 of the ILC Articles poses some problems in its application. Indeed, it is not clear whether compensation is due for *any* material losses suffered *during* the invoked period covered by the circumstance precluding wrongfulness, or *only* for those suffered *before* and *after* such a period. Indeed, the ILC itself stated that article 27(b) 'does not attempt to specify in what circumstances compensation should be payable'.[114]

Moreover, the ILC commentary seems to leave the question open on the amount of compensation due, when affirming that

> [i]t will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.[115]

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[109] Article 27(b) of the ILC Articles. For a comment, see S. Ripinsky, 'State of Necessity: Effect on Compensation' *Research Paper of the British Institute of International and Comparative Law* (2007), 5, 11.
[110] ILC Commentary to article 27, para. 4.
[111] *CMS* Award, par. 380. However, such an approache was strongly critised ba the *ad hoc* Committee in the Annulment Decision (eve though the Committee did not annul the award in this part).
[112] *Ibidem*, para. 382
[113] *EDF* Award, para. 1177.
[114] ILC Commentary to article 27, par. 6.
[115] *Ibidem*.

It remains to be seen how future arbitrators will interpret such provisions in analogous situations of host States successfully invoking the customary defence of necessity for situations of financial and economic crises.

4.2.2. …and the application of treaty-based emergency clauses…

As seen above, Argentina also relied on NPM clauses included in the US-Argentina BIT to overcome its responsibility. NPM clauses are drafted as exceptions to BIT's substantive provisions. Consequently, if the action is covered by the terms of the exception, there is no violation of the treaty obligations.This position was confirmed by the ICSID Tribunal in *LG&E*, which found that

> [a]rticle XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability.[116]

While short of an NPM clause, the State would be required to compensate investors for harms resulting from the State action in breach of the BIT, the application of an NPM clause prevents the duty to pay compensation.[117]

Indeed, the *LG&E* tribunal ruled that, having successfully invoked the state of necessity under Article XI of the BIT, Argentina was exempted from liability during the period of necessity (from 1 December 2001 to 26 April 2003) and was only liable for damages caused by the measures at issue before and after the period of necessity.[118] In particular, the Tribunal affirmed that 'the damages suffered during the state of necessity should be borne by the investor'.[119] The tribunal in the *Continental Casualty* case took the same approach.[120]

As already seen, the application of a treaty-based emergency provision has the effect to make the act of the State lawful. Consequently, compensation, if any, should be considered as a compensation due for a *lawful* act under international law.[121] In this regard, one may have a look also at the works of the ILC, especially the 2001 Draft Articles on Prevention of Transboundary Damage from Hazardous

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[116] *LG&E* Decision on Liability, para. 261. See Burke-White, Von Staden, *cit.*, 387.
[117] This approach was followed by the *ad hoc* Annulment Committee in the *CMS* case, where it made it clear that Article XI, if applied, would have excluded the operation of the substantive provisions of the BIT. As a consequence, there could have been no compensation in such cases (*CMS* Annulment Decision, para. 146). See Ripinsky, *cit.*, 9.
[118] See Ripinsky, *cit.*, 11.
[119] *LG&E* Decision on Liability, para. 264. See S.W. Schill, 'International Investment Law and the Host States's Power to Handel Economic Crises. Comment on the ICSID Decision in LG&E v Argentina' 24 *Journal of International Arbitration* (2007) 3, 265-286.
[120] *Continental Casualty* Award, para. 304. The same line of reasoning seemed also to have been followed by the *ad hoc* Committee in the *Enron* Annulment Decision (para. 407).
[121] See A. Tanzi, 'Liability for Lawful Acts', in *Max Planck Encyclopedia of Public International Law*, online edition, http://www.mpepil.com.

activities[122] and the 2006 Draft Articles on the Allocation of Loss in case of Transboundary Harm arising out of Hazardous Activities.[123] In this context, the State has the duty to repair the harm it has caused, even if its conduct can be considered lawful under international law.[124] During its works, the ILC also referred to the situation of the compensation due in case of the successful invocation of a circumstance precluding wrongfulness. In this regard, it recalled that

> [i]n 1980 […] the Commission when dealing with […the] state of necessity […], asked itself whether 'such an exclusion, if established, would have the effect […] of relieving it of any obligation it might otherwise have to make compensation for damage caused by its conduct'. Finding some cases in which 'States relied on the existence of the state of necessity to justify their conduct but offered to make compensation for the material damage […] caused', the Commission concluded that 'the preclusion of the wrongfulness of an act of a State does not automatically entail the consequence that this act may not, in some other way, create an obligation to make compensation for the damage, even though that obligation should not be described as an obligation' to make reparation for a wrongful act.[125]

However, the ILC decided to devote its work only to transboundary harm, due to lack of practice on the issue of compensation for damage in case of the application of a circumstance precluding wrongfulness.[126]

Moreover, uncertainty remains as to the determination of the *quantum* of compensation due in such cases. The ILC simply established that the States involved should reach an agreement between themselves on the point.[127] Lacking such an agreement, it is up to the arbitrators to exercise their discretion in determining an equitable compensation.

4.2.3…and emergency situations as a ground for an 'equitable' assessment

[122] The ILC had been working on the topic of 'International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law' since 1977. See the First Report of the related Working Group (*Report of the International Law Commission on the work of its Thirtieth Session (1978). Supplement n. 10* (8 May -28 July 1978). Extract from the *Yearbook of the International Law Commission. Vol. II. Part. Two* (1978), para. 9. For a comment, see G. Handl, 'Liability as an Obligation Established by a Primary Rule of International Law' 16 *Netherlands Yearbook of International Law* (1985), 49 ff.

[123] ILC, 'Draft Articles on Prevention of Transboundary Damage from Hazardous activities', *Yearbook of the International Law Commission Vol. II. Part Two* (2001), 148 ff. and 'Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, with Commentaries', *ibidem* (2006), 110 ff..

[124] In particular, Principle 4 of the Draft Articles on the Allocation of Loss in case of Transboundary Harm arising out of Hazardous Activities deals with 'prompt and adequate compensation'. On this point, Handl, *cit.*, 51.

[125]Yearbook of the International Law Commission. Vol. II, Part 1 (1983), 221, para. 70

[126] *Ibidem*, para. 74.

[127] *Ibidem,* para. 4.

The *CMS, Enron, Sempra, Impregilo* and *National Grid* tribunals, though rejecting Argentina's pleas of necessity, gave nevertheless relevance to the emergency situation at the remedies stage.

The *CMS* tribunal acknowledged that the 2001–2002 Argentine financial crisis would have 'specific consequences on the question of reparation' and decided to take into account the 'magnitude of the crisis faced by Argentina' in determining the amount of compensation due to the Claimant;[128] however, the ultimate award of compensation did not specify those consequences.[129]

Also in *Sempra* case, the tribunal expressly stated that

> [it] will […] take into account the crisis conditions affecting Argentina when determining the compensation due for the liability found in connection with the breach of the Treaty standards.[130]

The Tribunal referred to the 'macroeconomic conditions that Argentina faced at the end of 2001 and in 2002'[131] and to 'the major economic crisis which Argentina suffered',[132] stating that accounting for the crisis circumstances was 'a measure of justice the Tribunal [was] bound to respect'.[133]

Also the *Enron* tribunal, while relying on the DCF method when assessing compensation, made certain corrections in order to 'reflect the reality of the [Argentine economic] crisis and the specific influence it has in connection with valuation and compensation'.[134]

The tribunals in *Impregilo v. Argentina* and *National Grid PLC v. Argentina* went a little further when taking into account the impact of economic crises in the remedies stage. Indeed, the tribunal in *Impregilo* made it clear that 'the damages to be paid by the Argentine Republic to compensate for unfair and inequitable treatment should be determined on the basis of a *reasonable* estimate of the loss' (emphasis added).[135]

On the other hand, the *National Grid* tribunal recognized that the measures of the Argentine government 'were taken at a time of economic crisis and that it is part of the task of the Tribunal, in calculating the quantum of compensation, to assess the effect of such crisis',[136] adding that 'because of the economic and social crisis, the situation of the Argentine economy was definitely not 'business as usual''.[137] More precisely, in assessing the amount of compensation due, the tribunal first considered a DCF valuation would be appropriate.[138] However, it ultimately decided that the

[128] *CMS* Award, paras. 356 and 444. See also para. 455, where the Tribunal made reference to 'the historical evidence on the economic and political performance of Argentina and the above facts'. The *CMS* Annulment Decision seemed to uphold the approach of the tribunal (paras. 156-157).
[129] Desierto, *cit.*, 481.
[130] *Sempra* Award, par. 397.
[131] *Ibidem*, para. 422.
[132] *Ibidem*, para. 436.
[133] *Ibidem* para. 397.
[134] *Enron* Award, para. 407.
[135] *Impregilo* Award, para. 378.
[136] *National Grid* Award, para. 274.
[137] *Ibidem*, paras. 274 and 290.
[138] *Ibidem*, paras. 276-277.

complexities of the Argentine financial crisis would make such a forecast too speculative.[139] Therefore, the tribunal made some adjstments to the DCF methods so that to 'appropriately' consider the complexity of the emergency situation in Argentina.[140]

4.2.4. The relevance of the pursuit of public interests of State measures

When a State enacts domestic measures to overcome a financial and economic crisis, it does so by means of *regulatory* acts, as expression of the sovereign power of the State. Moreover, measures of this kind can be considered expression of the public concern of the State in financial and economic matters, since they are aimed at the economic and financial stability/survival of the State itself.

Accordingly, one should have expected in the above mentioned case-law some reference regarding the regulatory nature of such acts or the public concerns involved. Instead, and quite surprisingly, arbitrators have adopted a self-restrained approach, limiting themselves to some references to the gravity of the crisis, which led, at least in some cases, to an adjustment in the assessment of the compensation due to foreign investors.

Nevertheless, it seems useful to look at the general approach followed by arbitral tribunals when dealing with regulatory acts and public concerns, in order to distill some useful guidelines for the future.

Regulatory measures[141] are generally considered under investment law to be lawful and, consequently, to involve no obligation of compensation for the host State. As clearly stated by the *Methanex* tribunal

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[139] *Ibidem*, para. 290.

[140] *Ibidem*, para 282. See Sabahi, *cit.*, 118. Looking beyond the Argentine cases, one may recall the ICSID *Mitchell* case, where the Committee found that the emergency clause did not apply (*Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 57, footnote 30), adding that: 'even if the Arbitral Tribunal had examined Article X(1) of the Treaty, if it had checked the need for the measures […and] if it had concluded that they were not wrongful, this would not necessarily have had any impact on […] the need for compensation; possibly, it could have had an influence on the calculation of the amount of such compensation' (*ibidem*, para. 57). It may be also recalled the Award in the *Eritrea v. Ethiopia* case (Eritrea Ethiopia Claims Commission, *Eritrea's Damages Claims between The State of Eritrea and The Federal Democratic Republic of Ethiopia*, Final Award, 17 August 2009, 26 *Reports of International Arbitral Awards*, 631-770). The Commission found that the situation of emergency of Ethiopia could be taken into account when considering the issue of compensation (para. 22).

[141] P. Bertoli, Z. Crespi Reghizzi, 'Regulatory Measures, Standards of Treatment and the Law Applicable to Investment Disputes', in T. Treves, F. Seatzu, S. Trevisanu (eds.), *Foreign Investment, International Law and Common Concerns* (London: Routledge, 2014), 26. On regulatory see, among others, R. Dolzer, C. Schreuer, *Principles of international investment Law* (Oxford: Oxfrod University Press, 2°ed., 2012), 89 ff. and 119 ff.; P.M. Dupuy, F. Francioni and E.U. Petersmann (eds), *Human Rights in International Investment Arbitration* (Oxford: Oxford University Press, 2009); M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010), 69 ff. and 224 ff .; K. Yannaca- Small, 'Indirect Expropriation and the Right to Regulate: How to Draw the Line?', in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford: Oxford University Press, 2010), 445 ff.; OECD, 'Indirect Expropriation and the Right to Regulate in International Investment Law' *OECD Working Papers on International Investment* 2004/4 (2004).

> [i]t is a principle of customary international law that, where economic injury results from a bona fide regulation within the police powers of a State, compensation is not required.[142]

In *Saluka*, the tribunal affirmed that

> the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today.[143]

Adding that

> The standard of 'reasonableness' […] requires […] a showing that the State's conduct bears a reasonable relationship to some rational policy.[144]

The same approach was followed also by the arbitral tribubal in the *Azurix* case.[145]

As Brownlie has stated,

> State measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.[146]

As a general rule, the legitimate exercise of regulatory powers, aimed at protecting the environment, health and other welfare interests of society, requires a case-by-case, fact-based inquiry that considers, among others, the economic impact, the degree of interference with the investor's reasonable expectations, and the character of the governmental action. Consequently, the issue still largely depends on the consideration of arbitral tribunals.[147]

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[142] *Methanex v USA*, UNCITRAL Case, Final Award, 3 August 2005, para. 410.
[143] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006, para. 262.
[144] *Ibidem*, para. 460.
[145] *Azurix* Award, para. 310.
[146] I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 6th ed., 2003), 509.
[147] Bertoli, Crespi Reghizzi, *cit.*, 33.

Perhaps the most well-reasoned analysis of regulatory measures taken during a financial and economic crisis has been endorsed by the arbitral tribubal in the above-mentioned *Suez* case. Here the arbitralt tribunal recognized that Argentina, in enacting measures aimed at coping the financial and economic crisis, has exercised its *police powers*. Consequently, it found that no unlawful expropriation had occurred because of such measures. Indeed, the tribunal stated:

> As numerous cases have pointed out, in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation. […] In analyzing the measures taken by Argentina to cope with the crisis, the Tribunal finds that, given the nature of the severe crisis facing the country, those general measures were within the general police powers of the Argentine State, and they did not constitute a permanent and substantial deprivation of the Claimants' investments. […] The Tribunal therefore concludes that such measures did not violate the above quoted BIT articles with respect to direct or indirect expropriation.[148]

However, as the tribunal clearly pointed out, 'that is not to say that they have not violated other treaty commitments'[149] and found that the same measure, while not constituting unlawful expropriation of the rights of foreign investors, did nevertheless breach the FET standard. In this respect, the tribunal did 'balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service'[150] concluding that

> when faced with the crisis, Argentina […] enacted various measures […]. Such actions were outside the scope of its legitimate right to regulate and in effect constituted an abuse of regulatory discretion.[151]

Few months later the *Suez* decision, the arbitral tribunal in the *Total* case summarizes the criteria to be followed when assessing the impact of regulatory measures taken during a financial and economic crisis:

> [T]he host State's right to regulate domestic matters in the public interest […] requires […] 'a weighing of the Claimant's reasonable and legitimate expectations on the one hand and the Respondent's legitimate regulatory interest on the other.' Thus an evaluation of the fairness of the conduct of the host country towards an investor cannot be made in isolation […]. The context of the evolution of the host economy, the reasonableness of the normative changes challenged and

[148] *Suez* Decision on Liability, paras. 139-140.
[149] Ibidem.
[150] *Ibidem*, para. 236.
[151] *Ibidem*, para. 237.

their appropriateness in the light of a criterion of proportionality also have to be taken into account.[152]

Consequently, the balance between the state's regulatory powers and the investor's expectations must be assessed on a case-by-case basis, taking into consideration all the relevant circumstances.[153] Among such consideration, one should not lose sight of the public concerns at stake.[154] Looking at investment case-law, one may observe a quite recent tendency to apply the proportionality test in order to balance the different interests involved.

Again, the *Suez* case is quite telling. The arbitral tribunal denied the Argentina's claim of the necessity defence; however, the case differs from the others involving Argentina, to the extent that the necessity defence was raised in order to claim that the alleged unlawful measures were *necessary* to comply with human rights obligations, i.e. the obligation to afford rights to water to its population.[155] Under such circumstances, while accepting as a matter of principle that '[the tribunal] must balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service',[156] nonetheless it concluded that in the case at hand the measures adopted by Argentina did breach the FET obligation towards foreign investors.

In *Saur,* the factual background of which was quite similar to *Suez*, the tribunal affirmed that it had to take into account 'human rights in general and the right to water in particular' insofar as they belong to the general principles of international law.[157] However, such a finding was of no particular help for Argentina.[158]

As it has been rightly affirmed, notwithstanding some attempts by arbitral tribunals to balance all the interests at stake, 'the impact of human rights considerations on the decision by [investment] tribunals remains a matter for speculation'.[159]

Neverthless, the above overview on investment arbitration case-law on regulatory measures, on the one hand, and public concerns, on the other, reveals that the proportionality test, combined with an in-depth consideration of all the circusmstances at issue, seems so far the most appropriate one to assess the regulatory (un)lawfulness of the measures taken by host States. This can be easily

[152] *Total* Decision on Liability, para. 123.
[153] Bertoli, Crespi Reghizzi, *cit.*, 36.
[154] For the purposes of the present paper, the concepts of "public concerns" and "public interest" are used interchangeably with reference to the daily well-being of the population, with special regard to those rights indispensable for leading a life in human dignity, including the right to health and to environmental protection. See, among others, A. Tanzi, 'On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector' 11 *The Law and Practice of International Courts and Tribunals* (2012), 50.

[155] *Ibidem*, 57-58.
[156] *Suez* Decision on Liability, para. 236.
[157] *Saur* Decision on Jurisdiction and Liability, para. 330. See A. Tanzi, 'Reducing the Gap Between International Investment Law and Human Rights Law in International Investment Arbitration?' 1 *Latin American Journal of International Trade Law* (2013) 2, 841.
[158] *Ibidem*, 843.
[159] A. Tanzi, 'Public Interest Concerns in International Investment Arbitration in the Water Service Sector. Problems and Prospects for an Integrated Approach', in T. Treves, F. Seatzu, S. Trevisanu (eds.), *Foreign Investment, International Law and Common Concerns* (London: Routledge, 2014), 311.

considered valid also with respect to those governmental measures adopted to overcome a financial and economic crisis.

5. Concluding remarks: from *silence* to explicit *equity*

Investment arbitration case-law shows an increasing awareness of the need to 'monetize' the public interests of the host State; indeed, in some cases arbitrators have lowered the amount of compensation due to foreign investors, in that showing a tendency to try to reach an 'equitable outcome' (in the words of the ILC).

Even though none of the above mentioned cases involving Argentina have engaged in a detailed analysis on the role of equity in the determination of compensation, it is beyond doubt that *equitable* compensation in investment arbitration may well serve to 'value' financial and economic crises.

The assessment of compensation for unlawful acts under international investment law, and in particular the application of the 'fair market value' and 'full reparation' methods, involves a significant element of arbitral discretion, given the silence of investment treaties in this respect.[160] Such a discretion is an application of the principle of equity.[161] One of the most telling cases in this respect is the *LIAMCO* case,[162] where the Arbitrator expressely recognised that

> [t]aking Equity into consideration, it would be reasonable and just to adopt the formula of 'equitable compensation' as a measure for the estimation of damages in the present dispute.[163]

Also in the *Kuwait v Aminoil* case[164] the tribunal stated that

[160] See C. Serkin, 'The Meaning of Value: Assessing Just Compensation for Regulatory Takings' 99 *Northwestern University Law Review* (2005), 677, 725-27; D. Desierto, 'Human Rights and Investment in Economic Emergencies: Conflict of Treaties, Interpretation, Valuation Decisions', *paper presented at the Society of International Economic Law (SIEL) 3rd Biennial Global Conference* (July 2012), 46.

[161] Aldrich, in his book on the jurisprudence of the Iran-US Claims Tribunal, stated that 'I believe that when they are making a complex judgment such as one regarding the amount of compensation due for expropriation or rights to lift and sell petroleum products, equitable considerations will inevitably be taken into account, whether acknowledged or not' (G.H. Aldrich, *Jurisprudence of Iran-United States Claims Tribunal* (Oxford: Clarendon Press 1996), 241). See Sabahi, *cit.*, 188.

[162] The case arose out of an oil exploration concession awarded to the Libyan American Oil Company (LIAMCO). Consequent to a coup d'état in Libya, LIAMCO was subject to a number of very restrictive actions by the succeeding government, which had the composite result of virtually negating the concession granted to LIAMCO. In 1973 LIAMCO sought relief for measures taken by the government. *Libyan Am. Oil Co. (LIAMCO) v. Libya*, Award, 12 April 1977, 20 *International Legal Materials* (1981) 1.

[163] *Ibidem*, para. 150. See S.M. Perera, 'Equity-Based Decision-Making and the Fair and Equitable Treatment Standard: Lessons From the Argentine Investment Disputes – Part I' 13 *The Journal of World Investment & Trade* (2012), 229-230.

[164] The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL), Award, 24 May 1982, 21 International Legal Materials (1982), 976.

> any estimate in purely monetary terms of amounts intended to express the value of an asset, of an undertaking, of a contract, or of services rendered, must take equitable principles into account.[165]

Adding that

> the determination of the amount of an award of 'appropriate' compensation is better carried out by means of an enquiry into all the circumstances relevant to the particular concrete case, than through abstract theoretical discussion. Moreover the Charter of the Economic Rights and Duties of States, even in its most disputed clause (Article 2, paragraph 2c) and the one that occasioned reservations on the part of the industrialized States recommended taking account of 'all circumstances' in order to determine the amount of compensation which does not in any way exclude a substantial indemnity.[166]

Again, in *AMT v Zaire* the tribunal affirmed that it was exercising 'its discretionary and sovereign power to determinate the quantum of compensation […] taking into account the circumstances of the case before it'.[167]

Generally, framing the concept of equity is not an easy task:[168] Oscar Schachter emphasized that '[n]o concept of international law resists precise definition more than the notion of equity'.[169]

International lawyers as well as the International Court of Justice (ICJ) have distinguished two types of equity: first, equity as a general principle of law[170] and, second, equity as in *ex aequo et bono*, which appears in Article 38(2) of the ICJ Statute and allows the decision makers to dispense with legal principles and to decide the case based on principles of fairness and justice. The former is part of the law and hence may be applied by the judges without any specific permission from the parties, whereas making a decision *ex aequo et bono* requires the authorization of the parties to the dispute. Without such an authorization, the tribunals relying on equity in the latter sense risk their awards being set aside. Considering the inherent proximity of the two concepts it is difficult to determine with precision when a tribunal has applied equity as part of the law and when it has decided *ex aequo et bono*.[171]

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[165] *Ibidem*, para. 78.
[166] *Ibidem,* para. 114.
[167] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, para. 7.21.
[168] Equity can be traced in Aristotle's Nicomachean Ethics, where he referred to equity as the *corrective* of law in special cases (*The Nicomachean Ethics of Aristotle* (translation by F. Peters), London: Kegan Paul, Trench, 1893, Book V, Chapter X, 175-176). See, in general terms, F. Francioni, 'Equity in International Law', in *Max Planck Encyclopedia of Public International Law*, online edition, http://www.mpepil.com.
[169] O. Schachter, 'International Law in Theory and Practice: General Course of Public International Law', 178 *RCADI* (1982), 82.
[170] M. Akehurst, 'Equity and General Principles of Law' 25 *International & Comparative Law Quarterly* (1976), 801; S. Rosenne, 'Equitable Principles and the Compulsory Jurisdiction of International Tribunals', in Emmanuel Diez et al (eds.), *Festschrift fur Rudolf Bindschedler* (Stampfli & Cie 1980), 407.
[171] See, *North Sea Continental Shelf* case where the ICJ clarified that it was not deciding *ex aequo et bono*. *North Sea Continental Shelf*, Judgment, 20 February 1969, *I.C.J. Reports* (1969), 3. But see Friedmann who said the ICJ

Equity as part of the law has been applied particularly in maritime and territorial delimitation cases. In the *North Sea Continental Shelf* case the ICJ affirmed that

> [w]hatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles.[172]

Adding that

> [i]t is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles.[173]

The *dicta* on equity from the *North Sea Continental Shelf* case are often quoted as the benchmark for the capacity of international courts and tribunals to apply equity. In the continental shelf dispute between Tunisia and Libya the International Court of Justice was even more precise:

> [e]quity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. […W]hen applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice.[174]

As it has rightly be noted,

> tribunals are almost inevitably, although to varying degrees, guided by equitable considerations […] The notion of equity is inherently subjective: a conception of what is equitable or fair in particular circumstances will differ depending on a view-point […]. Generally […] in the context of an investment dispute, equitable considerations can well serve as a basis for finding a just balance between private interests of the foreign investor and public interests of the respondent State.[175]

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had decided the case *ex aequo et bono* (W. Friedmann, 'The North Sea Continental Shelf-A Critique' 64 American Journal of International Law (1970), 229).

[172] North Sea Continental Shelf, para 88.

[173] *Ibidem*, para. 85.

[174] Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, 24 February 1982, I.C.J. Reports (1982), para. 71. See Gourgourinis, cit., 334.

[175] See Ripinsky, Williams, *cit.*, 124-126.

Thus, equity as a principle of international law may well serve the aim to balance the different interests at stake in investment disputes. This certainly involves the application of the proportionality test and the consideration of all the circustances of the case at issue, as already been seen with respect to the assessment of regulatory acts and public concerns by investment arbitral tribunals. More precisely, the application of equity has been rather successful in the framework of the evaluation of measures taken during financial and economic crises in order to reach a conclusion on the determination of the *quantum* of compensation due to foreign investors. In such a way, arbitrators have overcome the *silence* of investment treaties on the right method of evaluation to apply in such circumstances.

In this respect, one could also make the point that IIAs might be more specific in guiding arbitrators in determining the amount of compensation due for breaches of non-expropriatory obligations by the host State. In this respect, it is interesting to note that the UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD)[176] includes a number of options relating to the remedies stage in its menu of drafting options for policy-makers.

In particular, the IPFSD suggests a policy option providing for the amount of compensation to be 'equitable in light of the circumstances of the case'.[177] The IPFSD's inclusion of remedies-related suggestions in its menu of policy options is to be welcomed as it seems to rightly include the approach already followed by some arbitral tribunals on the point at issue.[178]

As concerns in particular the 'evualuation' of financial and economic crises in investment arbitration, as the case-law on Argentina has shown, investment law lacks clear answers on how to balance the different interests at stake. Nevertheless, one may well argue that future cases on this matter should not avoid *equitable* considerations in their reasonings, if not at the merits stage, at least on the assessment of the *quantum* of compensation due as a consequence of the governmental (un)lawful acts.

[176] UNCTAD *Investment Policy Framework for Sustainable Development* (UNCTAD, 2015), http://investmentpolicyhub.unctad.org/ipfsd.
[177] *Ibidem*, p. 57. See Devaney, *cit.*
[178] *Ibidem*.