State Responsibility for "General Measures of Economic Policy" Under International Investment Law

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Abstract

This essay seeks to examine the prospect of state responsibility under international investment law for general measures of economic policy in light of the decisions on jurisdiction from eighteen arbitration disputes related to the 2001-02 Argentine financial crisis. Upon reaching the conclusion that state responsibility for such measures may obtain, the essay proposes devising a standard of the fair and equitable treatment by using as a point of reference, pursuant to Article 31.3(c) of the Vienna Convention on the Law of Treaties, the preamble and first two provisions of Article IV of the Articles of Agreement of the International Monetary Fund. The essay then considers the practical challenge of framing a claim. Last, the essay concludes with brief reflections on the results of this inquiry.

This essay offers a legal framework for considering the conformity of general measures of economic policy with international investment treaties. While the framework could apply to historical, ongoing, and future instances of impugnable economic measures, this essay does not speculate on potential results from applying the legal framework to the facts of any particular episode.

I. Introduction: International Law Collides With Economic Policy: Argentina 2001

The Argentine government of the early 1990s pursued a broad agenda of economic liberalization, in a volte-face from its industrial development policies of the prior decade. One initiative within this program was the conclusion of bilateral investment treaties (BITs) with its economic partners. These treaties contained reciprocal legal obligations pertaining to the

treatment of foreign investors of the nationality of the treaty partner, as well as consent by each government to the jurisdiction of an arbitral forum should an investor wish to challenge its compliance with obligations in the BIT.[1] By instituting arbitration, the foreign investor could claim that the government had breached the treaty, thus incurring state liability and an obligation to compensate for resultant losses.[2]

A second initiative within the Argentine economic reform agenda of the 1990s was the privatization of public utility companies. In the interest of attracting investment to improve the performance of utility services, the government actively recruited foreign companies with expertise and access to capital to submit proposals for the purchase of controlling stakes in industries such as natural gas, telecommunications, and water treatment.

Realizing sophisticated multinational corporations would be wary of sinking millions of dollars in immobile infrastructure assets in a country with a long record of populist politics and volatile economic conditions, the Argentine government took additional steps, complementary to the BIT program, to mollify reservations from investors. The government established a currency board fixing the value of the Argentine peso at parity with the United States dollar and guaranteeing convertibility of pesos into dollars on demand. The government also was willing to program periodic tariff adjustments to respond to indices of U.S. dollar inflation. These measures proved effective at attracting a surge of foreign investment in infrastructure industries.

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[1] BITs typically provide for jurisdiction at either the International Center for the Settlement of Investment Disputes (ICSID), which is an autonomous unit of the World Bank Group, or through the United Nations Commission on International Trade Law (UNCITRAL). *E.g.*, Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, art. VII.4 (Oct. 20, 1994) [hereinafter Argentina-U.S. BIT].

[2] The investment treaty need not state explicitly that a breach results in an obligation to compensate; reparation is a general obligation resulting from a breach. *See Draft Articles on Responsibility of States for Internationally Wrongful Acts, in* Report of the International Law Commission 91, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter *Draft Articles*].

In 1999, the currency board arrangement became fragile. In a series of events that would require intensive post hoc scrutiny, the economic situation in Argentina continued to deteriorate, culminating in December 2001 with the government freezing bank accounts, the president resigning, and, the following month, termination of peso-dollar convertibility and the largest default on sovereign debt in history, at the time. Riots and political chaos erupted as five different presidents took office over a span of ten days. Among other response measures, the Argentine government promulgated emergency legislation and executive decrees precluding utility companies from collecting tariffs according to their U.S. dollar equivalents, which would have tripled the cost to users, or from adjusting tariffs according to U.S. dollar inflation levels.

Foreign investors eligible to challenge the conformity of the response measures with BIT obligations exercised their right to do so. Since 2001, the Argentine government has received at least 46 complaints under BITs, with the great majority deriving from the financial crisis.[3] Several investors have won arbitral awards entitling them to compensation.

International law scholars have examined closely how the arbitral tribunals applied international investment law, or how they believe those tribunals *should* have applied it, to disputes arising from the financial crisis. One point that has not attracted attention from commentators, however, is the basis on which tribunals found—and did not find—that they had jurisdiction to hear the claims. This essay examines a particular point on which sixteen tribunals based their jurisdiction: emphatically *not* on general measures of economic policy, but rather, specific commitments that happened to have a relationship to general economic policy. Had

[3] Lucy Reed, Scorecard of Investment Treaty Cases Against Argentina Since 2001, Kluwer Arbitration Blog (Mar. 2, 2009), http://kluwerarbitrationblog.com/blog/2009/03/02/scorecard-of-investment-treaty-cases-against-argentina-since-2001; *see also* Argentina: Latin Arbitration Law Country Profile, Latin Arbitration Law, http://www.latinarbitrationlaw.com/argentina/#toc-anchor-4.

claimants challenged the measures directly, the tribunals explained in dicta, they would have declined jurisdiction.

This essay challenges this dictum. It does so by appealing to codified customary international law, relevant conventional law, and commentary from scholars who have published in areas of international law related to general economic policy, particularly international monetary law. While seeking to examine the topic with a broad, general, and analytical approach, the essay proceeds in light of the economic crisis that besieged Argentina, the legal measures that the Argentine government enacted in response, and clues from the arbitral decisions on jurisdiction as to what motivated their dictum.

II. Jurisdiction in the Argentine Investment Disputes

A. The Argentine Disputes: Accepting Jurisdiction

When foreign investors submitted disputes for arbitration in the aftermath of the 2001-2002 Argentine financial crisis, their complaints often implicated management by the Argentine government of its domestic economy. This aspect of the disputes prompted arguments by counsel for Argentina that the tribunals lacked jurisdiction to entertain the claims. When the International Centre for the Settlement of Investment Disputes (ICSID) was serving as host to the arbitration proceedings, these arguments centered on a provision of the ICSID Convention that limits jurisdiction to "any legal dispute arising directly out of an investment."[4] The Argentine

[4] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

government submitted its arguments on the basis of two requirements within this provision: that the dispute be *legal*, and that the dispute arise *directly out of an investment*.[5]

First, according to counsel for Argentina, the post-crisis disputes were not of a *legal* nature because "general measures taken by a government destined to have an impact on the economic life of a nation are not matters for the consideration of [a] Tribunal," and tribunals "do[] not have jurisdiction to decide on matters of public policy, but rather to settle legal issues."[6] Similarly, in another instance the Argentine government submitted that "[u]niversal measures addressed to the general public cannot be considered by ICSID Tribunals" because "[t]hat would be to judge a public policy and not a legal conflict."[7]

Concerning the second requirement, that the dispute must arise *directly out of an investment*, the Argentine government argued that "the measure or measures alleged as in violation of the [BIT] must be *specifically* addressed to the investments."[8] These arguments centered on the contention that "the measures . . . [were] not specifically related to [the investor's] investments. . . . They were measures of general bearing, which . . . did not target [the investor] in particular."[9] In advancing this argument, the Argentine government emphasized that tribunals should interpret "directly" to mean "specifically."[10]

Counsel for Argentina submitted these two arguments—regarding *legal dispute* and *directly out of an investment*—with slight variations in *eighteen* disputes whose decisions are

[5] In disputes not subject to the ICSID Convention, such as UNCITRAL arbitration proceedings, the Argentine government presented analogous arguments on the basis that the scope of consent within the BITs implied the same requirements. *See, e.g.*, BG Group Plc. v. Republic of Arg., Final Award ¶ 219 (UNCITRAL Dec. 24, 2007).
[6] Nat'l Grid v. Argentine Republic, Decision on Jurisdiction ¶ 123 (UNCITRAL June 20, 2006).
[7] Cont'l Cas. v. Argentine Republic, ICSID Case No. ARB/03/9, Decision on Jurisdiction ¶ 38 (Feb. 22, 2006).
[8] *Id.* at ¶ 38 (Feb. 22, 2006).
[9] AES Corp. v. Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction ¶ 48 (Apr. 26, 2005).
[10] *E.g.*, Cont'l Cas., *supra* note 7, at ¶ 38 ("'directly' in [ICSID Convention] Art. 25(1) 'may also be translated as specifically'") (quoting submission from counsel for Argentina); *see also BG Group*, *supra* note 5, at ¶ 219 ("the measures that are alleged to be prejudicial must be directed specifically against [the investments]") (quoting submission from counsel for Argentina, in the context of an analogous argument under provisions of an investment treaty, rather than under the ICSID Convention) (translation by author).

publicly available.[11] The tribunals hearing these objections to jurisdiction, which comprised sixteen unique combinations of arbitrators,[12] uniformly rejected them both. For example, on "legal dispute," the *Continental Casualty* tribunal held:

> "[T]he Claimant invokes specific legal acts and provisions as the foundation of its claim: it indicates that certain measures by Argentina have affected its legal rights stemming from contracts, legislation, and the BIT. . . . In the Tribunal's view, these indications . . . allow the Tribunal to conclude that the Claimant has made legal claims against Argentina."[13]

Similarly, the *National Grid* tribunal held that "the issue is not passing judgment on policy measures . . . but whether the Measures . . . violated binding obligations between Argentina and the Claimant."[14]

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[11] [1] CMS Gas Transmission Co. v. Republic of Arg., ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (July 17, 2003); [2] LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction (Apr. 30, 2004); [3] AES Corp., *supra* note 9; [4] Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction (May 11, 2005); [5] Camuzzi Int'l v. Argentine Republic, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction (May 11, 2005) [hereinafter Camuzzi (first claim)]; [6] Camuzzi Int'l v. República Arg., ICSID Case No. ARB/03/7, Decisión del Tribunal sobre Excepciones a la Jurisdicción (June 10, 2005) [hereinafter Camuzzi (second claim)]; [7] Gas Natural v. Argentine Republic, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions of Jurisdiction (June 17, 2005); [8] Cont'l Cas., *supra* note 7; [9] El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006);[10] Metalpar & Buen Aire v. República Arg., ICSID Case No. ARB/03/5, Decisión sobre Jurisdicción Dictada (Apr. 27, 2006); [11] Suez, Sociedad Gen. de Aguas de Barcelona & InterAguas Servicios Integrales v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006); [12] Telefónica v. Argentine Republic, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (May 25, 2006); [13] *Nat'l Grid*, *supra* note 6; [14] Pan Am. Energy & BP Arg. Exploration Co. v. Argentine Republic, ICSID Case No. ARB/04/8, Decision on Preliminary Objections (July 27, 2006); [15] Suez, Sociedad Gen. de Aguas de Barcelona, Vivendi Universal & AWG Grp. v. Argentine Republic, ICSID Case No. ARB/03/19; [16] Total v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Objections to Jurisdiction (Aug. 25, 2006); [17] Enron Corp. & Ponderosa Assets v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Jan. 14, 2007); and [18] *BG Group*, *supra* note 5. At least one award on jurisdiction, EDF Int'l, SAUR Int'l, & León Participaciones Argentinas v. Argentine Republic, ICSID Case No. ARB/03/23, Decision on Jurisdiction (Aug. 5, 2008), is not publicly available. *See* Investment Treaty Arbitration, Alphabetical Listing by Claimant, http://italaw.com/alphabetical_list.htm.

[12] Identical panels of arbitrators served in two pairs of disputes: *Sempra*, *supra* note 11, and *Camuzzi (first claim)*, *supra* note 11; and *Suez, Sociedad Gen. de Aguas de Barcelona & InterAguas Servicios Integrales*, *supra* note 11 and *Suez, Sociedad Gen. de Aguas de Barcelona, Vivendi Universal, & AWG Grp.*, *supra* note 11.

[13] *Cont'l Cas.*, supra note 7 at ¶¶ 67, 69.

[14] *Nat'l Grid*, *supra* note 6, at ¶ 138.

Tribunals were similarly unmoved by the second set of arguments, stemming from the *arising directly out of an investment* requirement. "Specifically," they held, is not a synonym for "directly."[15] Furthermore, the text Article 25(1) indicates clearly that the link to evaluate for jurisdictional purposes is that between the *dispute* and the investment, rather than between the *measure* and the investment.[16] Since each investor had framed its claims, and thus the dispute, in direct relation to an investment, this argument from the Argentine government could not prevail.

In the end, no tribunal would decline jurisdiction on the basis that the disputes were not legal or did not arise directly out of an investment. However, their observations on the matter did not end there.

B. The Argentine Disputes: Accepting Jurisdiction . . . Narrowly and Timidly

The holdings above reflect sound interpretation and reasoning, as evident from the universal consent they earned from arbitrators. Moreover, this aspect of the Argentine post-crisis disputes, in contrast to many other aspects, has not attracted academic debate.

However, the tribunals did not stop with these holdings. In dicta, with remarkable consistency, the tribunals went on to express the timidity with which they would carry jurisdiction into the arena of "general economic policy."

The pattern began with the first tribunal to issue a jurisdictional award addressing crisis response measures, *CMS Gas Transmission v. Argentine Republic*.[17] The *CMS* tribunal qualified

[15] *See, e.g.*, *Cont'l Cas.*, *supra* note 7, at ¶ 70; *BG Group*, *supra* note 5, at ¶ 219-26, 233.
[16] "The jurisdiction of the Centre shall extend to any legal *dispute* arising directly out of an *investment*." ICSID Convention Art. 25(1) (emphasis added).
[17] *CMS Gas Transmission*, *supra* note 11; *cf.* CMS Gas Transmission Company v. Argentine Republic, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/8, ¶ 43 (Sept. 25, 2007) ("Argentina [] submits that 'the present case was the first award in the large group of ICSID

its decision to proceed into the merits with the following words of caution: "[BITs] cannot prevent a country from pursuing its own economic choices. These choices are not under the Centre's jurisdiction and ICSID tribunals cannot pass judgment on whether such policies are right or wrong."[18]

The *CMS* tribunal explained its hesitant posture further in two passages that *fifteen* tribunals would rely upon in subsequent decisions on jurisdiction; another *two* tribunals would accept jurisdiction in similar disputes against the Argentine government without specifically addressing, or questioning, the reasoning in *CMS*.[19] In the fifteen decisions expressly to follow *CMS*, the tribunals reaffirmed the proposition that investment tribunals may not intrude into the realm of economic policy, and that they found themselves accepting jurisdiction only due to "specific commitments." In the first of the two passages, the *CMS* tribunal specified:

> [Q]uestions of general economic policy not directly related to the investment, as opposed to measures specifically addressed to the operations of the business concerned, will normally fall *outside* the jurisdiction of the Centre. A direct relationship can, however, be established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. What is brought under the jurisdiction of the Centre is *not* the general

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arbitrations currently pending against Argentina.") (referring to the *CMS* merits award that followed the jurisdictional decision) (quoting Argentina's Annulment Memorial ¶ 10).

[18] *CMS Gas Transmission*, *supra* note 11, at ¶ 29.

[19] *See LG&E*, *supra* note 11, ¶¶ 64-68; *AES*, *supra* note 9, at ¶¶ 48-60; *Sempra*, *supra* note 11, at ¶¶ 67-74; *Camuzzi (first claim)*, *supra* note 11, at ¶¶ 54-62; *Gas Natural*, *supra* note 11, at ¶¶ 36-40; *Cont'l Cas.*, *supra* note 7, at ¶¶ 70-74; *El Paso Energy*, *supra* note 11, at ¶¶ 89-100; *Metalpar & Buen Aire*, *supra* note 11, at ¶¶ 111-15; *Suez & InterAguas*, *supra* note 11, at ¶¶ 27-32; *Telefónica*, *supra* note 11, at ¶¶ 59-67 & n.26; *Nat'l Grid*, *supra* note 6, at ¶¶ 135-40; *Pan Am. & BP Arg. Exploration*, *supra* note 11, at ¶¶ 63-70; *Suez, Vivendi, & AWG*, *supra* note 11, at ¶¶ 27-32; *Total*, *supra* note 11, at ¶¶ 58-60; *Enron*, *supra* note 11, at ¶¶ 29-32 & n.4. Two tribunals did not examine the issue. *See BG Group*, *supra* note 5, at ¶¶ 219-33 (focusing on distinguishing and questioning the decision on jurisdiction in Methanex v. United States, Partial Award (UNCITRAL Aug. 7, 2002) [hereinafter *Methanex I*]); *Camuzzi (second claim)*, *supra* note 11, at ¶ 34 (upholding jurisdiction to adjudicate "differences of a juridical nature that arise directly from an investment" with little discussion) (translation by author).

> measures themselves but the extent to which they may violate those specific commitments.[20]

On that same note, in a second passage the *CMS* tribunal reiterated:

> [T]he Tribunal concludes on this point that it does *not* have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments.[21]

The first of the two passages helps to explain the persistence by the Argentine government in later disputes regarding the "directly out of an investment" requirement. Nonetheless, to the extent one might read this *CMS* excerpt as requiring that the "measures [be] specifically addressed to the operations of the business concerned," it is safe to conclude that the later tribunals dispelled any possibility of a material distinction between *specific* measures and *general* measures.[22] As the *Continental Casualty* tribunal observed:

> International practice indeed shows that many, if not most, disputes based on an alleged breach of international standards concerning the treatment of the property of aliens . . . have arisen from *general measures* taken by host State, that affected directly those investments, *without necessarily being specifically aimed* at them.

[20] *CMS Gas Transmission*, *supra* note 11, at ¶ 27 (emphasis added).
[21] *Id.* at ¶ 33 (emphasis added).
[22] *See supra* note 15 and accompanying text.

> Were this not the case . . . a substantial portion of those disputes, would have escaped any international litigation.[23]

Schreuer approves of this assessment: "[A] host state cannot rely on the general policy nature of measures taken by it if these measures and a concrete effect on the investment and violated specific commitments and obligations."[24]

Reviewing the excerpts from the *CMS* decision reveals another conceptual division at the foundation of its appraisal: on one hand, "examin[ing] whether . . . measures of general economic policy . . . have been adopted in violation of specific commitments," and on the other hand, "pass[ing] judgment on whether such policies are right or wrong."

This contradistinction, which reflects the "legal dispute" requirement for ICSID jurisdiction, affirms that the sole role of the tribunal is to interpret and apply legal standards. Neither the BIT nor the ICSID Convention task a tribunal with evaluating whether policy judgments are "right or wrong," which is the sovereign prerogative of the state. A general measure of economic policy, therefore, in theory, could be "right," yet violate a legal commitment, and, conversely, could be "wrong," yet not violate a legal commitment. In either case, the "right or wrong" question is immaterial, and it is beyond the scope of jurisdiction.

This appraisal from the *CMS* decision earned endorsements, in the form of quotation, citation, or direct mention, from all fifteen of the later tribunals that would examine directly the issue of jurisdiction over general measures of economic policy.[25] Some of those tribunals would add original comments as reinforcement. In *El Paso v. Argentine Republic*, for example, the tribunal stated: "In this Tribunal's judgment, general measures of economic policy taken by the

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[23] *Cont'l Cas.*, *supra* note 7, at ¶ 72 (emphasis added); *cf.* Pope & Talbot v. Gov't of Can., Interim Award ¶ 99 (UNCITRAL June 26, 2000) ("[A] blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation.").
[24] CHRISTOPH SCHREUER, ET AL., THE ICSID CONVENTION: A COMMENTARY 114 (2009).
[25] *See supra* note 19.

host State are not within the purview of Article 25(1) of the ICSID Convention."[26] The *Continental Casualty* tribunal commented, "the subject matter of the dispute is not those general measures of Argentina *per se*, nor can the Tribunal pass judgment on whether they were right or wrong from an economic or domestic legal point of view."[27]

Despite their guarded posture, the *CMS* tribunal and its followers either did not decline jurisdiction or would do so on other, unrelated grounds. The tribunals reached this outcome hesitantly, on the narrow basis of "specific commitments given to the investor in treaties, legislation or contracts," while emphatically *not* accepting jurisdiction over "the general measures in themselves."[28] The tribunals did not enumerate in their holdings which "specific commitments" in "treaties, legislation or contracts" they determined to be necessary. It is clear, however, that without the alleged "specific" guarantees in legislation, licenses, and other instruments particular to the industries and companies,[29] the tribunals would have declined jurisdiction. The BIT alone, the tribunals implied, would not have sufficed as a basis for challenging general measures of economic policy.

Among the fifteen tribunals expressly to follow the reasoning from *CMS*, none cited to an authority other than the *CMS* decision to substantiate its findings on the scope of its jurisdiction, or lack thereof, over general measures of economic policy. The trailblazing *CMS* tribunal, for its part, cited to authorities only for two tangential propositions. First, it cited to a 1929 article by Joseph Sulkowski as evidence that "the question is certainly not new in

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[26] *El Paso Energy*, *supra* note 11, at ¶ 97; *see also Pan Am. & BP Arg. Exploration*, *supra* note 11, at ¶ 63 ("In this Tribunal's judgment, general measures of economic policy taken by the host State are *in principle* not within the purview of Article 25(1) of the ICSID Convention.") (emphasis added).
[27] *Cont'l Cas.*, *supra* note 7, at 74.
[28] *CMS Gas Transmission*, *supra* note 11, at 27.
[29] *See, e.g.*, *CMS Gas Transmission*, *supra* note 11, at ¶ 19 ("The Gas Law, the Gas Decree, the 1992 Information Memorandum, the Model License and other instruments were prepared and enacted in order to undertake the reorganization of this important sector of the economy. Within this overall legal framework, [the claimant's investment] obtained in 1992 a license.").

international law."[30] Second, it quoted an observation by the tribunal in *Maffezini v. Spain*, from the merits award, that "[BITs] are not insurance policies against bad business judgments."[31] Nonetheless, at least one international investment law decision, from the Permanent Court of International Justice, would have supported their findings.

C. Timidity To Accept Jurisdiction in the Argentine Disputes: Precedent

The absence of citations by the fifteen tribunals might reflect the axiomatic appeal of the proposition they were affirming: that tribunals do not have jurisdiction over general measures of economic policy because they may not "pass judgment" on whether economic policies are "right or wrong." Investment arbitration obviously is a process of interpreting and applying legal standards, not a platform for punditry. ICSID Convention Article 25(1) makes this explicit by limiting jurisdiction to "legal disputes." In addition, at least some of the claimants had conceded the point. In *CMS*, for example, the tribunal quoted the claimant as having submitted that "CMS is by no means complaining about general economic measures, but about specific measures of Argentine federal authorities that breached the commitments made toward CMS."[32]

Although the tribunals cited no authority, one available source of support would have been the 1934 holding by the Permanent Court of International Justice (PCIJ) in *The Oscar*

[30] *Id.* (citing Joseph Sulkowski, *Questions Juridiques soulevées dans les Rapports Internationaux par les Variations de Valeur des Signes Monétaires*, 29 RECUEIL DES COURS DE L' ACADÉMIE DE DROIT INT'L 5 et seq. (1929)).
[31] *CMS Gas Transmission*, *supra* note 11, at ¶ 29, *quoting* Emilio Augustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award ¶ 64 (Nov. 13, 2000).
[32] *CMS Gas Transmission*, *supra* note 11, at ¶ 31, *quoting* Hearing, April 8, 2003, at 84; *see also BG Group*, *supra* note 5, at ¶ 221 ("BG contended that it does not complain of economic conditions in Argentina, nor does it take issue with the government's general economic policies or measures."); *Camuzzi (second claim)*, *supra* note 11, at ¶ 32(viii).

Chinn Case.[33] In that dispute, the United Kingdom challenged measures that the Belgian government had enacted in the Belgian Congo in response to the Great Depression. In an effort to support struggling businesses in its African colony, the Belgian government ordered the state-controlled shipping company to reduce its rates drastically, while guaranteeing reimbursement for the losses. Oscar Chinn, a British national, claimed his shipping business on the Congo River failed as a result, and the U.K. government espoused his claim at the PCIJ under various treaties.

Counsel for the United Kingdom presented three sets of arguments to the PCIJ, which would reject all three. The Court found, first, that the Belgian measures were consistent with treaty provisions guaranteeing "equality and freedom of trade" and "freedom of navigation."[34] Second, the PCIJ held that those measures also were consistent with "equality of treatment."[35] Scholars have since discredited each of these two holdings.[36]

Of interest for this essay, however, is the third holding. As its final alternative argument, counsel for the United Kingdom appealed to "respect for vested rights" as a general principle of international law. By depriving Chinn of any prospect of operating his business profitably, the Belgian government, they claimed, had violated his vested rights.[37] The PCIJ would give little consideration to this claim, disposing of it in a single page and holding summarily that "[n]o

[33] Oscar Chinn Case (U.K. v. Belg.), [1934] PCIJ Rep., Ser. A/B, Case No. 63, 65.
[34] *Id.* at 82-86.
[35] *Id.* at 86-87.
[36] *See* Christian J. Tams, *Oscar Chinn Case* ¶ 9, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum, ed.) (2007), http://www.mpepil.com/subscriber_article?id=/epil/entries/law-9780199231690-e189, last visited Apr. 28, 2012 ("Much suggests that were the case to be litigated again today . . . the outcome would be different."); Todd Weiler, *Saving Oscar Chinn: Non-Discriminatin in International Investment Law*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES 159 (N. Horn & S.M. Kröll, eds.) (2004) ("Had Oscar Chinn been able to make his claim today, there is little doubt he would have received the kind of protection that only the slimmest of majorities withheld from him.").
[37] *Oscar Chinn*, *supra* note 33, at 87.

enterprise . . . can escape from the chances and hazards resulting from general economic conditions."[38]

This categorical statement inoculating states from grievances about "general economic conditions," unlike the prior two holdings in *The Oscar Chinn Case*, came "without much protest from dissenters"[39] and continues to enjoy frequent approval from scholars and tribunals.[40]

III. State Responsibility for "General Measures of Economic Policy"

Tribunals in the Argentine cases, while largely upholding this principle from *Oscar Chinn*, perhaps chipped into its categorical status,[41] in that they held the Argentine government accountable for "specific" and "binding" commitments that it had "given to the investor[s] in treaties, legislation or contracts."[42]

This essay challenges the *Oscar Chinn* holding further and argues that the Argentine tribunals need not have tiptoed into the realm of "general economic policy" with such diffidence. Whether the applicable standard comes from customary international law, the ICSID Convention, or investment treaties such as the BITs in the Argentine disputes, the contours of

[38] *Id.* at 88.
[39] *Tams*, *supra* note 36, at ¶ 8.
[40] *See, e.g.*, SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 328 (2008) (quoting with approval *Oscar Chinn*, *supra* note 33, at 88); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 755 (2007) ("Echoing the *Chinn* case, bondholders, like other creditors, cannot expect to be isolated from financial crises and subsequent sovereign debt restructurings."); Merrill & Ring Forestry v. Gov't of Can., Award ¶ 215 (UNCITRAL Mar. 31, 2010), (quoting with approval *Oscar Chinn*, *supra* note 33, at 88); LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability ¶ 197 (Oct. 3, 2006) (quoting *Oscar Chinn*, *supra* note 33, at 88); Legal Opinion of M. Sornarajah, El Paso Energy Int'l v. Argentine Republic, Case No. ARB/03/15, at ¶ 36 (Mar. 5, 2007), (quoting with approval *Oscar Chinn*, *supra* note 33, at 88).
[41] Of course, the PCIJ in *Oscar Chinn* abstained from making its categorical holding until after it had rejected, on other grounds, the two other claims.
[42] *CMS Gas Transmission*, *supra* note 11, at ¶¶ 27, 33, cited or quoted in fifteen subsequent decisions on jurisdiction in Argentine disputes. *See supra* note 19.

jurisdiction for investment law tribunals are broader than the holdings and dicta of from the Argentine tribunals suggest.

Before proceeding, it is worth noting that no tribunal defined what it meant by "general measure of economic policy," nor did the PCIJ define the metes and bounds of "general economic conditions." This essay will consider general measures of economic policy as, roughly, the type of general measures that one would expect from a finance ministry or central bank, or measures from other branches of government that would be of keen interest to a finance ministry or central bank.

A. State Responsibility: ILC Draft Articles & Customary International Law

Since international investment law is a division of international law, unless an instrument specifies otherwise, the customary international law of state responsibility will be applicable. An examination of the prospect of state responsibility for general measures of economic policy thus begins with a review of the rules of customary international law and how they might apply to such measures.

In 2001, the United Nations International Law Commission adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts.[43] These articles and their commentary "seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts."[44] The relevance of the Draft Articles, and limits to their relevance, are evident from the following passage:

[43] *Draft Articles*, *supra* note 2.
[44] *Draft Articles*, *supra* note 2, at 31 cmt. 1.

> The Articles [on State Responsibility] inevitably include some elements of progressive development, such as that on the procedural aspects of countermeasures. But, being essentially a codification of customary international law, the ILC's work was a good indication of what the international law is on this subject. International courts and tribunals have over the years cited previous ILC drafts. Even if the final draft Articles are never turned into a new convention, they are certain to continue to be very influential with international courts and tribunals.[45]

Article 2 of the Draft Articles defines two elements as necessary conditions for an internationally wrongful act: (a) "an action or omission" that is attributable to the State under international law; and (b) that the action or omission constitutes a breach of an international obligation of the State.[46]

Chapter II of the Draft Articles, comprising Articles 4 to 11, addresses the first element, attribution of an action or omission to the state under international law. While some portions of the Draft Articles "inevitably include some elements of progressive development," Schreuer notes that "[t]he rules of attribution, found in Articles 4-11, are generally accepted to be a codification of applicable customary international law rules."[47]

To begin, Article 4 states that "[t]he conduct of any State organ shall be considered an act of that State under international law."[48] The article then preempts any inclination to interpret restrictively "*any* State organ" when it continues, "whether the organ exercises legislative,

[45] ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 377 (2010).
[46] *Draft Articles*, *supra* note 2, art. 2.
[47] SCHREUER ET AL., *supra* note 24, at 150.
[48] *Draft Articles*, *supra* note 2, art. 4.1.

executive, judicial or any other functions, whatever position it holds in the organization of the State."

Next, Article 5 expands the scope of attribution further:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[49]

Combined, Articles 4 and 5 would seem to capture any general measures of economic policy that a government could implement. In addition to actions and omissions by a legislature, executive, or judiciary, these provisions would cover central banks, including those that are independent or private,[50] to the extent they are "empowered by the law of that State to exercise elements of governmental authority." An international investment law tribunal has considered the status of a central bank in *Genin v. Estonia*.[51] The tribunal found that the BIT provision defining a state agency as "any state enterprise" that "exercises any regulatory, administrative or other governmental authority that the Party has delegated to it," included the Bank of Estonia, and thus that the Republic of Estonia was the proper respondent for a complaint relating to its conduct.[52]

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[49] *Draft Articles*, *supra* note 2, art. 5.

[50] The independence of central banks and their status as publicly or privately owned varies across countries. For example, the U.S. Federal Reserve Board of Governors is a public entity, whereas each regional branch is privately owned by its membership of private financial institutions. The Banca d'Italia is almost entirely owned by banks. *See* Antonio Sáinz de Vicuña, *An Institutional Theory of Money*, *in* INTERNATIONAL MONETARY AND FINANCIAL LAW 517, 526 & n.34 (2010).

[51] Alex Genin, E. Credit Ltd., & A.S. Baltoil v. Republic of Est., ICSID Case No. ARB/99/2, Award (June 25, 2001).

[52] *Id.* at ¶ 327, *quoting* Treaty Between the Government of the Republic of Estonia and the Government of the United States of America for the Encouragement and Reciprocal Protection of Investment Art. II.2(b), Apr. 19, 1994.

Based on the Draft Articles of State Responsibility, attribution should not present a severe obstacle when measures of general economic policy are the source of a complaint. This presumes a distinction between "measures of general economic policy," the subject of concern in the Argentine disputes, and "general economic conditions," to which the PCIJ referred in *Oscar Chinn*. "Measures" implies the exercise of state authority,[53] whereas "conditions" might derive from state measures or they might not. Attribution to the state inherently requires identification of a state measure and its origin within the state apparatus.

Under the Draft Articles, a second element also is necessary: a "breach of an international obligation of the State." By design, the Draft Articles do not contain substantive obligations. Rather, in Chapter III, Articles 12 to 15, they provide the rules for identifying the breach of a substantive obligation in general.

For thinking about the prospect of state responsibility for general measures of economic policy, Articles 12 and 15 are of possible interest. Article 12 provides, plainly, that "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character." This article indicates the broad nature of state responsibility, exempting no subject matter area from its scope.

Meanwhile, Article 15 makes clear that "composite acts" can amount to a breach, even if the components individually would not: "[t]he breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action

[53] For example, the NAFTA definitions of general application provide that "measure" includes "any law, regulation, procedure, requirement, or practice." North American Free Trade Agreement art. 201, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 298 (1993) [hereinafter NAFTA].

or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."[54]

These two articles must apply in conjunction with a substantive legal obligation, which this essay will consider further below, in Part IV. First, however, is a consideration of possible deviations from the Draft Articles, which the Draft Articles themselves anticipate. Pursuant to Article 55, "[t]hese articles do not apply where and to the extent that . . . the international responsibility of a State [is] governed by special rules of international law." This *lex specialis* provision includes treaty agreements, such as the ICSID Convention and the BITs that governed the Argentine disputes.

B. Jurisdiction in the Argentine Investment Disputes: A Second Look

As detailed above, the Argentine tribunals examined closely the jurisdictional provision of the ICSID Convention, Article 25(1). That article, in its entirety, reads:

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

Nothing in this article deviates from the rules of attribution in the ILC Draft Articles on State Responsibility. The parenthetical phrase, "or any constituent subdivision or agency of a Contracting State designated to the Centre by that State," is a possible source of confusion. It

[54] *Draft Articles*, *supra* note 2, art. 15.

does *not* condition state responsibility for the acts and omissions of subdivisions or agencies on prior "designation" of the subdivision or agency to ICSID. This provision, rather than relating to attribution and state responsibility, relates to the ability of those state entities to be a party to ICSID arbitration proceedings.[55] Schreuer states that "designations of constituent subdivisions or agencies serve procedural convenience but do not affect questions of State responsibility. The State entity's party status is independent of the issue of the attribution of its actions to the State."[56] As a result, the parenthetical phrase does not modify the prospect of attributing measures by a central bank, or any other state agency, to the state.[57]

When tribunals hearing the Argentine disputes disclaimed jurisdiction over general measures of economic policy, they did so without expressly grounding their reasons in any particular element of ICSID Article 25(1). Nonetheless, of the two textual requirements accompanying their dicta—"legal dispute" and "directly out of an investment"—commentary from the tribunals focused on the former. "Legal disputes," the tribunals implied, contrast with disputes over whether a policy is "right or wrong."[58]

In examining the "legal dispute" requirement, Schreuer concludes from arbitral practice that "the legal nature of a dispute is determined by the way the claimant presents its claim. If the claim is couched in terms of violation of legal rights, is based on legal arguments and seeks legal remedies there is a legal dispute." Similarly, the Executive Directors of the ICSID Convention

[55] *See* SCHREUER ET AL., *supra* note 24, at 150-52 (2009).
[56] *Id.* at 152; *see also* Compañía de Aguas del Aconquija & Compagnie Générale des Eaux v. Argentine Republic, Award ¶¶ 46-49 (Nov. 21, 2000).
[57] *See supra* text accompanying notes 45-47; c*f. Genin*, *supra* note 51, at ¶ 327 (finding acts of the central bank of Estonia attributable to the Republic of Estonia while operating under ICSID rules, without expressly examining ICSID Article 25).
[58] *See, e.g.*, *CMS Gas Transmission*, *supra* note 11, at ¶ 29.

define "legal dispute" as a dispute that "concern[s] the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation."[59]

The final element of immediate interest in Article 25(1),[60] "arising directly out of an investment" is notable for what it does *not* require: specific targeting of a measure upon an investment.[61] Moreover, the critical link is not between the *measure* and the investment, but between the *dispute* and the investment. The directness requirement, according to Schreur, "means that . . . the dispute must not only be connected to an investment but must also be reasonably closely connected."[62]

As was the case under the Draft Articles on State Responsibility, the hurdle for a prospective claim based on general measures of economic policy would be identifying a substantive legal obligation as the basis of a claim. This topic, bases for liability, will be considered next.

IV. State Responsibility for "General Measures of Economic Policy": Bases for Liability

State responsibility for a wrongful act requires attribution of an action or omission to the state and the breach of a substantive legal obligation.[63] In the context of investment disputes, the source of substantive legal obligations is the investment treaty itself, which may incorporate standards from customary international law. This section explores the prospect of general measures of economic policy breaching three obligations that investment treaties typically

[59] *Report of the Executive Directors to the ICSID Convention*, 1 ICSID REP. 28, at ¶ 26 (1993).
[60] Other aspects of jurisdiction are critical, such as categorization as an "investment" and eligibility as a national of a treaty partner, but those and other important requirements are independent of the question of jurisdiction over general measures of economic policy.
[61] *See supra* notes 22-24 and accompanying text.
[62] SCHREUER ET AL., *supra* note 24, at 106.
[63] *Draft Articles*, *supra* note 2, art. 2.

provide: non-discrimination, conditional direct and indirect expropriation, and fair and equitable treatment.

A. Bases for Liability: Nondiscrimination

Nondiscrimination commitments typically appear in investment treaties in two forms: national treatment and most-favored nation (MFN) treatement. In the Argentina-United States BIT, for example, Article II.1 provides: "Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of *its own* nationals or companies, or of nationals or companies *of any third country*, whichever is the more favorable."[64]

Drafters of investment treaties and scholars of international law have considered the prospect of discrimination specifically in the context of general economic policy. Since 2004, U.S. investment treaties have included an article that provides: "Nothing in this Treaty applies to *non-discriminatory measures of general application* taken by any public entity in pursuit of *monetary and related credit policies or exchange rate policies*."[65] The 1994 NAFTA includes an analogous provision within the Chapter on Financial Services.[66]

The presence of an explicit exception for "monetary and related credit policies or exchange rate policies" in these treaties indicates that the drafters contemplated that such policies

[64] Argentina-U.S. BIT art. II.1 (emphasis added). The Protocol to the BIT provides limited exceptions to Article II.1.
[65] *E.g.*, Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment art. 20.2(a) (emphasis added) (Jan. 1, 2012) [hereinafter Rwanda-U.S. BIT]; Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment art. 20.2(a) (Nov. 1, 2006) [hereinafter U.S.-Uruguay BIT]; *see also* United States Model Bilateral Investment Treaty art. 20.2(a) (2012); United States Model Bilateral Investment Treaty art. 20.2(a) (2004).
[66] NAFTA art. 1410.2 ("Nothing in this Part applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies.").

otherwise could be within the scope of substantive obligations. This contradicts expressions from the influential *CMS* decision that "[BITs] cannot prevent a country from pursuing its own economic choices,"[67] and that "[the tribunal] does not have jurisdiction over measures of general economic policy."[68] Moreover, the exception itself asserts that such measures must be non-discriminatory. With the Argentina-U.S. BIT lacking any such exception, measures of general economic policy would be subject to the substantive obligations, despite the dicta emanating from *CMS* and its followers.

The lead U.S. negotiator for the NAFTA Chapter of Financial Services, Olin Wethington, confirms that measures to implement a monetary or exchange rate policy, if discriminatory, would fail to qualify for the exception, and he provides an example of such a scenario:

> Financial services obligations of the NAFTA do not prevent a party from conducting monetary policy or exchange rate policy *provided that* the implementation of that policy is through measures that are of general application and are *not discriminatory*. For example, the central bank of a NAFTA Party may tighten or loosen credit provided such action does not have any *differential application* as between banks owned by investors of other NAFTA countries and banks owned by home country investors.[69]

A second NAFTA exception for a category of general measures of economic policy follows suit in preserving a nondiscrimination requirement. The exception in Article 2104 for "serious balance of payments difficulties, or the threat thereof" requires that measures under that

[67] *CMS Gas Transmission*, *supra* note 11, at ¶ 29.
[68] *Id.* at ¶ 33.
[69] OLIN L. WETHINGTON, FINANCIAL MARKET LIBERALIZATION: THE NAFTA FRAMEWORK 53-54 (1994).

exception "be applied on a national treatment or most-favored-nation treatment basis, whichever is better."[70]

It could be tempting to interpret the nondiscrimination requirement in these provisions as merely a *lex specialis* "exception to the exception," peculiar to the particular treaties, without reflecting international investment law generally. Two points are worth reiterating. First, inclusion of the nondiscrimination requirement in each provision confirms that such measures—measures of monetary policy, of exchange rate policy, and for balance of payments management—are at least susceptible to legal scrutiny. Second, the presence of the exceptions in the first place, irrespective of any conditions internal to the exceptions, indicates that the drafters considered those measures as otherwise within the substantive scope of the treaty. Although these provisions lie outside the Investment Chapter of the 1994 NAFTA, since 2004 the U.S. Model BIT has included the same provision for monetary and exchange policies,[71] as have the investment treaties that the United States government has concluded since 2004.[72]

Nor is U.S. treaty practice anomolous, as international law scholars and tribunals also have reported a nondiscrimination requirement to be applicable to general measures of economic policy pursuant to customary international law. For example, Brownlie states directly: "Currency depreciation is lawful unless it is discriminatory."[73] In the 2005 edition of *Mann on the Legal Aspect of Money*, Proctor writes, "the principle [of monetary sovereigny] will not apply in respect of monetary legislation which discriminates against foreign nationals."[74] Both authors cite to the *Claim of Zuk*, in which the United States Foreign Claims Settlement Commission, in

[70] NAFTA art. 2104(3)(e).
[71] *See supra* note 65 and accompanying text.
[72] *See, e.g.*, Rwanda-U.S. BIT art. 20(2)(a); U.S.-Uruguay BIT art. 20(2)(a).
[73] IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 532 n.65 (2008).
[74] CHARLES PROCTOR, MANN ON THE LEGAL ASPECT OF MONEY 514 (2005); *see also id.* at 505 ("A State may not only allow its currency to depreciate; it may also take active steps to achieve that end, provided that it does not act in a *discriminatory* manner.") (emphasis added).

the context of a Soviet devaluation, stated in dicta that "where a state pursues a deliberate course of injuring or discriminating against foreigners, a violation of international law results."[75] Shuster observed in 1973 that "[s]tatements such as . . . 'loss caused by discriminatory action will engage State responsibility' are almost invariably to be found in any exposition on the international law of money."[76]

These authorities firmly belie the statements from the Argentine tribunals and the PCIJ that states cannot be responsible under international law for measures of "general economic policy" or for "general economic conditions." As a result, the remainder of this essay will continue to examine issues of state responsibility for such measures without necessarily addressing directly the holdings, dicta, and reasoning from tribunals in the Argentine disputes.

B. Bases for Liability: Expropriation

Investment treaties typically address two forms of expropriation: direct expropriation and indirect expropriation.[77] The treaties acknowledge the right of states to expropriate investments, while also requiring compliance with the four customary international law conditions for legality: the expropriation must be for a public purpose, nondiscriminatory, in accordance with due process, and upon payment of prompt, adequate, and effective compensation.[78]

[75] Zuk Claim, 26 I.L.R. 284, 285 (U.S. For'n Cl. Settlement Comm'n Nov. 5, 1956).
[76] M.R. SHUSTER, THE PUBLIC INTERNATIONAL LAW OF MONEY 60 (1973).
[77] *See, e.g.*, Argentina-U.S. BIT art. IV.1; NAFTA art. 1110.
[78] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 90-92 (2008).

As the incidence of direct expropriations has declined, indirect expropriation has become an important area of international investment law. An expropriation is indirect when the expropriatory measures leave legal title to the investment formally intact with the investor.[79]

Two critical issues of indirect expropriation law remain unsettled, which creates a degree of uncertainty when considering the prospect of indirect expropriation as a basis for state liability for general measures of economic policy. First, indirect expropriation claims often stem from regulatory measures, which has forced upon tribunals the question of whether to consider solely the *effects* of measures upon an investment or whether to account for the *purpose and context* of the measures as well.[80] Proponents of the "sole effects" doctrine highlight that public purpose is a requisite for expropriation to be legal, which suggests that a public purpose should not vitiate the coordinate requisite for compensation. Advocates of accounting for purpose and context emphasize the need for governments to enact legitimate public interest measures without tiptoeing around investors.

Another unsettled issue in indirect expropriation law is the threshold at which a deprivation constitutes an indirect expropriation, rather than a noncompensable expense that the investment must absorb alone.[81] Tribunals have articulated various standards, such as "rights rendered so useless they must be deemed expropriated,"[82] "effectively neutralizes the enjoyment of property,"[83] and "depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property."[84] Despite such attempts, the *Feldman*

[79] *See id.* at 92.
[80] *See* DOLZER & SCHREUER, *supra* note 78, at 101-04.
[81] *See* Jan Paulsson & Zachary Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 145, 145 (Norbert Horn & Stefan Kröll eds., 2004).
[82] Starrett Hous. Corp. v. Gov't of the Islamic Republic of Iran, Interlocutory Award No. ITL-32-24-1, Case No. 24 (Dec. 19, 1983), 4 Iran-U.S. Cl. Trib. Rep. 122, § IV(b).
[83] Lauder v. Czech, Award ¶ 200 (UNCITRAL Sept. 3, 2001).
[84] Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award ¶ 103 (Aug. 30, 2000).

tribunal rightly noted that "it is fair to say that no one has come up with a fully satisfactory means of drawing [the] line."[85]

Proctor, who identified instances where nondiscrimination applies to general measures of economic policy, does the same for expropriation. First, however, Proctor observes that, while confiscation is the "main cause of action" available in this area, "it seems that monetary legislation will not normally infringe [the confiscation] principle."[86] He explains that "[e]xpectations relating to the continuing intrinsic or external value of a currency are . . . . not property, their change is not deprivation."[87]

Examples of expropriation from monetary legislation do exist, however. The "clearest case" is a Cuban law of 1961 that declared all Cuban currency situate outside the country to be null and void.[88] In another instance, German exchange control regulations allowed a German debtor to discharge a debt to an English creditor by paying the sum to a German government agency for the creditor's account.[89] An English court found this to constitute a confiscation, albeit not an offense of public international law or English public; Proctor notes that this latter finding was incorrect.[90] Exchange controls could lead to confiscations in other limited circumstances as well, as opinions from the Iran-United States Claims Tribunal have suggested.[91] However, in line with the initial observation from Proctor, Shuster notes that, while such

[85] Feldman v. Mex., ICSID Case No. ARB(AF)/99/1, Award ¶ 100 (Dec. 16, 2002).
[86] PROCTOR, *supra* note 74, at 511.
[87] *Id.* at 511. This statement reflects the principle of "nominalism" in monetary law. Nominalsism holds that "[a] debt expressed in the currency of another country involves an obligation to pay the nominal amount of the debt in whatever is the legal tender at the time of payment according to the law of the country in whose currency the debt is expressed (*lex monetae*), irrespective of any fluctuations . . . between the time when the debt was incurred and the time of payment." *Id.* 228 (quoting JONATHAN HILL, DICEY & MORRIS: THE CONFLICT OF LAWS r. 206 (Albert Venn Dicey et al. eds., 13th ed. 1999).
[88] PROCTOR, *supra* note 74, at 511-12.
[89] *Id.* at 512 (citing Re Helbert Wagg & Co., [1956] Ch. 323).
[90] PROCTOR, *supra* note 74, at 512.
[91] *Id.* at 513 (citing Schering Corp. v. Gov't of the Islamic Republic of Iran, 5 Iran-U.S. Cl. Trib. Rep. 361 (1984) (Mosk, J., dissenting); Hood Corp. v. Gov't of the Islamic Republic of Iran, 7 Iran-U.S. Cl. Trib. Rep. 36, 51 (1984)).

interferences in theory could amount to expropriation, "[i]n practice . . . tribunals, both national and international, have almost invariably held that currency depreciation or devaluation does not constitute an illegal taking of property."[92]

Expropriation, though a valid basis for state responsibility and, historically, the "main cause of action" in this area, thus does not seem to offer investors serious prospects for protection from general measures of economic policy. Nonetheless, its applicability in theory and precedent for its invocation belie the dicta from *CMS*, and as the notion of indirect expropriation continues to develop, it too may offer a plausible basis for claims. In the meantime, however, the most likely check on general measures of economic policy comes from a different standard of protection: fair and equitable treatment.

C. Bases for Liability: Fair and Equitable Treatment

"Virtually all" investment treaties include an obligation by states to provide "fair and equitable treatment" (FET) toward investors.[93] This standard is "vague and ambiguous on its face and is never defined within the treaties themselves,"[94] and "has become one of the most actively debated concepts in investment protection law."[95] Furthermore, the FET standard has undergone

[92] SHUSTER, *supra* note 76, at 55.
[93] JESWALD SALACUSE, THE LAW OF INVESTMENT TREATIES 218 (2010); *accord* DOLZER & SCHREUER, *supra* note 78, at 119 ("Most BITs and other investment treaties provide for fair and equitable treatment [] of foreign investments."). *But see* UNCTAD, FAIR AND EQUITABLE TREATMENT: A SEQUEL 18-20 (2012) (listing examples of BITs that lack a FET clause, while noting that MFN clauses can nonetheless lead to incorporation of a FET requirement.).
[94] SALACUSE, *supra* note 93, at 218.
[95] CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH D. RUBINS, & BORZU SABAHI, INVESTOR-STATE ARBITRATION 502 (2008).

intensive judicial interpretation only since 2000,[96] just as the number of investment treaty arbitrations was beginning to ascend.[97]

Despite the vagueness and ambiguity inherent to the FET standard, scholars have identified several "specific applications,"[98] "principles,"[99] or "specific criteria, norms, and principles"[100] that investment tribunals have found to be components of fair and equitable treatment. Seven component standards that tend to appear on these lists are: 1) coercion or abusive treatment; 2) consistency, stability, or legitimate expectations; 3) due process or denial of justice; 4) good faith; 5) nondiscrimination; 6) reasonableness or nonarbitrariness; and 7) transparency.[101] Although the threshold for liability under these component standards remains controversial and in flux, scholars and tribunals generally accept them in principle as inherent to fair and equitable treatment.[102]

Importantly, the fair and equitable treatment standard is absolute, i.e., it is not contingent on enduring different or less favorable treatment than any other investor.[103] Identical treatment

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[96] DOLZER & SCHREUER, *supra* note 78, at 119 (citing Metalclad Corp. v. United Mexican States, ICSD Case No. ARB(AF)/97/1, Award (Aug. 30, 2000) and *Maffezini*, *supra* note 31). In 1999, a scholar noted the "paucity of jurisprudence" on the fair and equitable treatment standard. Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. INT'L L. 99, 163 (1999).

[97] *See* UNCTAD, LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT 3 (2010).

[98] DOLZER & SCHREUER, *supra* note 78, at 133.

[99] Kenneth Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y. J. INT'L L. & POL. 43, 54 (2010).

[100] SALACUSE, *supra* note 93, at 230.

[101] *See, e.g.*, DOLZER & SCHREUER, *supra* note 78, at xiii; DUGAN ET AL., *supra* note 502, at xiv; SALACUSE, *supra* note 93, at xvi; UNCTAD, *supra* note 93, at viii; Stephan W. Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*, IILJ Working Paper 2006/06 (2006); Vandevelde, *supra* note 99, at 43.

[102] *See, e.g.*, note 101. *But see* M. Sornarajah, *Fair and Equitable Treatment—Whose Fairness? Whose Equity?*, *in* INVESTMENT TREATY LAW: CURRENT ISSUES VOLUME II, at 167, 179 (2007) ("My contention simply is this that fair and equitable treatment is not fleshed out in these treaties and that it's a sort of a cipher, a zero."). A related issue under debate is whether FET reflects a minimum standard of treatment under customary international law or whether FET is an independent, *lex specialis* treaty standard. The NAFTA Free Trade Commission issued a binding interpretation in 2000 that, under NAFTA, the FET provision prescribes only the customary international law minimum. Outside the NAFTA context, tribunals have held that no difference exists for the purpose of their particular disputes. *See* DOLZER & SCHREUER, *supra* note 78, at 124-28 & n.32.

[103] *See, e.g.*, DOLZER & SCHREUER, *supra* note 78, at 123; SALACUSE, *supra* note 93, at 221.

by a government upon on all investors, native and foreign, is capable of violating the FET standard, even if only certain foreign investors enjoy treaty protection as a means of redress.

In the sections that follow, this essay will consider the potential applicability of particular FET standards to general measures of economic policy.

1. Fair and Equitable Treatment: Legitimate Expectations

Because the jurisdictional decisions that provoked this essay accepted the applicability of the "legitimate expectations" standard to measures of general economic policy, examination of the topic will be brief. At its essence, the standard holds that an investment occurs within a legal framework, and that the investor is entitled have expectations "based on this legal framework and on any legal undertakings and representations made explicitly or implicitly by the host state."[104] Where the state breaches the legitimate expectations of an investor, liability may attach. In the circumstances of *CMS*, the government of Argentina had established a regime that denominated gas tariffs in U.S. dollars and provided for adjustments according to a U.S. inflation index, and the Argentine government abrogated this regime in response to the financial crisis.[105] On the merits, the *CMS* tribunal would find these actions to result in an objective breach of the FET standard of the Argentina-U.S. BIT.[106]

Notably, the legitimate expectations standard does not preclude *unilateral* government statements from qualifying as a legal undertaking or representation. Arsanjani & Reisman, after

[104] DOLZER & SCHREUER, *supra* note 78, at 134.
[105] *See CMS Gas Transmission*, *supra* note 11, at ¶ 20 ("Under the arrangements . . . tariffs were to be calculated in U.S. dollars and expressed in pesos at the exchange rate at the time of billing, and there [*sic*] were also to be adjusted semi-annually in accordance with the United States Producer Price Index."); *see also* CMS Gas Transmission v. Argentine Republic, ICSID Case No. ARB/01/8, Award ¶¶ 53-83 (May 12, 2005) (describing the regime and arguments from each party in detail).
[106] *CMS Gas Transmission*, *supra* note 105, at ¶¶ 273-281.

surveying seven decades of decisions from the PCIJ, International Court of Justice (ICJ), and investment tribunals that pertained to unilateral undertakings,[107] conclude that unilateral undertakings are indeed capable of constituting part of the applicable law under an investment treaty.[108] They observe that, in the context of foreign investment disputes, "[t]he factors that appear to be critical are: (i) inducement; and (ii) reasonable reliance on the part of the foreign investor,"[109] with criteria for each of these two factors available from the history of decisions from international tribunals that have examined the matter.[110]

These conclusions are notable because, as Arsanjani and Reisman note, "governments vying for foreign investment increasingly try to show that the legal regimes in their States will provide, at the least, the minimum international standards of protection, if not special guarantees, to prospective investors."[111] The content of the protection or guarantees that governments advertise can certainly reach into the realm of general economic policy. For instance, in his opening address at the April 2012 Summit of Business Leaders of the Americas, to an audience of over 700 heads of state and businesspersons,[112] President of Colombia Juan Manuel Santos announced the following:

> In Colombia were were approving reforms that nobody had imagined would be possible a few years ago. . . .

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[107] W. Michael Reisman & Mahnoush H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, *in* COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 409 (Pierre-Marie Dupuy et al. eds., 2006).

[108] *Id.* at 420-21 ("A state can always promise to ensure treatment that exceeds what is required in a BIT to an investor or a category of investors by a unilateral statement. . . . [I]t would appear that, under certain circumstances and conditions, the investor can also invoke a unilateral statement or declaration which a State made to the investors and on which it reasonably relied. . . . Any question as to the application of unilateral statements to investment treaties, as a distinct genre of international agreement, has been dispelled by the recent decision in *Waste Management v. Mexico*.").

[109] Arsanjani & Reisman, *supra* note 107, at 422.

[110] *See id.* at 422.

[111] *Id.* at 409.

[112] *Santos Inaugura Cumbre de Empresarios en Colombia*, AGENCIA GUATEMALTECA DE NOTICIAS, Apr. 13, 2012, http://www.agn.com.gt/index.php?option=com_content&view=article&id=18454:santos-inaugura-cumbre-de-empresarios-en-colombia&catid=86:actualidad (translation by author).

> We introduced a reform that gave to investors great tranquility; we introduced in our Constitution the concept of fiscal sustainability, so that any decision by the judiciary, any Law that Congress approves, or any decision by the Government has to take into account that criterion of fiscal sustainability.
>
> Accompanying that, we introduced a Law where the Government itself puts limitations on itself in regard to public spending, its indebtedness, so that investors know that here there is, by Law and by the Constitution, some rules of the game that are going to guarantee stability in the long term.[113]

While it is beyond the scope of this essay to examine whether, to what extent, or in what circumstances an investment tribunal might find this address to have created legal obligations upon the government of Colombia, the excerpt illustrates the salience of unilateral undertakings and the prospect of state responsibility for general measures of economic policy under international investment law.

2. Fair and Equitable Treatment: Reasonableness, Denial of Justice, Abus de Droit, and Good Faith

The authorities, discussed above, that have found a nondiscrimination requirement to apply to general measures of economic policy also recognized other international law standards to be applicable as well. Those standards—reasonableness, denial of justice, abus de driot, and good faith—also happen to fall within the scope of fair and equitable treatment.

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[113] Juan Manuel Santos, President, Republic of Colombia, Palabras del Presidente Juan Manuel Santos en la Cumbre de Líderes Empresariales de las Américas (Apr. 13, 2012) (translation by author of the speech transcript), *available at* http://wsp.presidencia.gov.co/Prensa/2012/Abril/Paginas/20120413_06.aspx; Colombia en la Cumbre, *Inauguración de la Cumbre de Empresarios*, YOUTUBE (Apr. 13, 2012), http://www.youtube.com/watch?feature=player_embedded&v=gR1Z94qI-wM#! (video of the live speech).

Returning to NAFTA, one finds that reasonableness appears as a condition for two exceptions pertaining to general measures of economic policy. First, NAFTA Article 1410(1), an exception for prudential financial regulation, explicitly covers solely "reasonable" measures. Wethington comments:

> [T]he [prudential] exception cannot be used as a guise or an indirect means for discriminating against United States or Canadian entities or for taking *arbitrary* action in connection with individual firm applications or approval or licensing requests. It does not constitute an exception which permits backhanded avoidance of the national treatment *and other significant obligations* in the financial services chapter.[114]

Likewise, the NAFTA exception for balance of payments measures, Article 2104, is subject to conditions alluding to reasonableness. Paragraph 3 states that "a measure adopted under this Article shall: (a) *avoid unnecessary damage* to the commercial, economic or financial interests of another Party; (b) *not be more burdensome than necessary* . . . [and] (c) *be temporary* and be phased out progressively."[115] These requirements implicitly lead to a test for proportionality, a standard that tribunals have considered together with reasonableness under FET provisions.[116]

Denial of justice is another recognized limitation on general measures of economic policy. The U.S. Foreign Claims Settlement Commision, in the *Zuk Claim*, referred to denial of justice as a qualification to the sovereign power "to establish a national currency . . . and to make

[114] WETHINGTON, *supra* note 69, at 75 (emphasis added). Chapter 14 does not contain a FET requirement, though Article 1411 contains transparency obligations.
[115] NAFTA Art. 2104(3) (emphasis added).
[116] *See, e.g.*, Schill, *supra* note 101, at 22-23.

that currency lawful money for all purposes."[117] The Commission specified, "[t]hus, where a state pursues a deliberate course of injuring or discriminating against foreigners, a violation of international law results."[118] Additionally, in the 1961 Draft Convention on the Responsibility of States for Injuries to the Economic Interests of Aliens, Article 10.5 provides that "a general change in the value of currency . . . shall not be considered wrongful, provided . . . (c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world."[119]

The concepts of abus de droit and good faith also have a long pedigree as checks on general measures of economic policy. Again from the 1961 Draft Convention, provision (d) of Article 10.5 requires that general changes in the value of currency must not be "an abuse of [] powers."[120] Shuster concluded that "currency measures (depreciation, devaluation, gold clause abrogation)" must "be shown to be *legitimate* acts undertaken as a result of economic difficulties and *for the purpose of ensuring economic stability* within the legislating country."[121] He elaborated:

> [I]f such measures are undertaken not for *bona fide economic reasons* but for the express purpose of eliminating foreign indebtedness or otherwise maliciously prejudicing foreign nationals—in short, for reasons which cannot be justified on *legitimate* economic grounds (as has been suggested with regard to the ruinous German mark inflation of 1918-23)—then international law may well object.[122]

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[117] *Zuk Claim*, *supra* note 75, at 285.
[118] *Id.* at 285.
[119] Louis B. Sohn & R. R. Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, 55 AM. J. INT'L L. 545, 554 (1961).
[120] *Id.* at 554. Article 10.5 of the 1961 Draft Convention also contained a provision prohibiting "a clear and discriminatory violation of the law of the State concerned." *Id.*
[121] SHUSTER, *supra* note 76, at 53 (emphasis added).
[122] *Id.* at 54 (emphasis added).

Proctor, the only source in this section from after 2000, when the FET standard began to take its current form, devotes a brief section to fair and equitable treatment within his chapter on "Monetary Sovereignty."[123] He enumerates familiar standards that can constitute a breach of FET: discrimination, arbitrary intervention, denial of justice, abuse of rights, lack of a reasonable relation to a legitimate end, and use for purposes repugnant to the accepted function.[124] Regardless of the particular component standard most applicable to a given scenario, he submits, "the essence of the matter is always the same. It is fair and equitable treatment or, as it is sometimes put, good faith . . . . [A]ll other aspects of State responsibility are mere illustrations."[125]

Proctor then reports instances in which standards of fair and equitable treatment have applied, or would have applied, to matters of monetary sovereignty. Among his examples are the 1921-23 German inflation of "astronomic proportions," German legislation in 1935 requiring that bonds that were issued *outside* Germany be redeemable only in devalued currency, and the alleged misuse of exchange restrictions by the Spanish government to deprive Belgian investors of their investment in the Barcelona Traction, Light and Power Company.[126] Proctor notes that "[t]he examples could no doubt be multiplied," and concludes that, while monetary sovereignty is an incident of statehood, it also is subject to "the important qualification" that exercises of monetary sovereignty must constitute "a legitimate use . . . for purposes of which it is conferred."[127]

3. Fair and Equitable Treatment: Content for Economic Policy

[123] PROCTOR, *supra* note 74, at 514-20.
[124] *Id.* at 514.
[125] *Id.* at 514.
[126] *Id.* at 515-19.
[127] *Id.* at 520.

At end of his review of example scenarios in which FET standards have applied or would have applied, Proctor notes that, from these examples, "a firm and well-delineated rule may perhaps, in due course, be derived."[128] Inductive reasoning may indeed one day supply a satisfactory rule or standard of international law to govern the use of general measures of economic policy. This essay, however, proposes a different route for identifying a serviceable standard of fair and equitable treatment for the context of economic policy: reference to obligations on economic policy in a treaty that enjoys ratification from 188 states[129]: the Articles of Agreement of the International Monetary Fund (IMF Agreement).[130]

a. Recourse to "Relevant Rules" via VCLT Article 31.3(c)

Before examining the contents of IMF Agreement, it is appropriate to consider how that treaty might be applicable, and the limits to its applicability, outside the specific setting of the International Monetary Fund (IMF). To the extent an obligation of fair and equitable treatment originates in the text of a treaty, interpretation of the FET standard will be subject to the customary rules of treaty interpretation, which international law communities widely accept as Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT).[131] Before embarking

[128] *Id.* at 515.
[129] List of Members, International Monetary Fund, http://www.imf.org/external/np/sec/memdir/memdate.htm (Apr. 18, 2012). One member country of the IMF, Kosovo, is not a member of the United Nations. *See* Member States of the United Nations, United Nations, http://www.un.org/en/members/ (last visited May 7, 2012).
[130] Articles of Agreement of the International Monetary Fund, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39, *as amended* through March 3, 2011 [hereinafter IMF Agreement], *available at* http://www.imf.org/external/pubs/ft/aa/index.htm.
[131] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

on the process of treaty interpretation, investment tribunals often recite Article 31.1[132] and occasionally Article 31.2 as well.[133]

Rarely, however, do tribunals quote or cite to Article 31.3, despite its status within the "general rule of interpretation."[134] Article 31.3 contains three provisions, which enjoin the interpreter to take "into account, together with the context:"

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.[135]

The first two provisions are seldom pertinent to investment treaty interpretation and, when they are, as in the case of NAFTA,[136] their potential relevance for a particular dispute should be obvious. Buried beneath this pair of usually irrelevant provisions, however, is another provision that should be applicable to every investment dispute: the injunction on tribunals to account for any relevant rules of international law applicable between the treaty parties.

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[132] *E.g.*, *LG&E Energy*, *supra* note 40, at ¶ 122 (Oct. 3, 2006). VCLT Art. 31.1 states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." VCLT art. 31.1.

[133] *E.g.*, S.D. Myers v. Gov't of Can., Partial Award ¶ 201 (UNCITRAL Nov. 13, 2000). VCLT Art. 31.2 defines the "context" of a treaty to be its text, including its preamble and annexes, agreements relating to the treaty between all the parties in connection with the conclusion of the treaty, and any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by all other parties as a related instrument. VCLT art 31.2.

[134] An important exception is NAFTA tribunals that have interpreted the fair and equitable treatment provision of Article 1105 since 2000, when the NAFTA Free Trade Commission issued a binding interpretation of that provision as prescribing the customary international law minimum. *See* note 102.

[135] VCLT art. 31.3.

[136] *See supra* note 134.

As a practical matter,[137] the sources of international law are typically those in Article 38.1 of the Statute of the International Court of Justice: a) international conventions, b) international custom, c) general principles of law recognized by civilized nations, and d) as a subsidiary means for the determination of the rules of law, judicial decisions and the teachings of the most highly qualified publicists.[138] Reading VCLT Article 31.3(c) together with ICJ Statute Article 38.1(c) offers a potential explanation for how tribunals discovered within vague and ambiguous provisions for "fair and equitable treatment" familiar general principles of law,[139] even if they did so *sub silentio* or unwittingly, rather than expressly through VCLT Article 31.3(c).

In any event, VCLT Art. 31.3(c) provides a potentially useful means for identifying standards of fair and equitable treatment that would be appropriate and functional for the context of general measures of economic policy. "Relevant rules of international law applicable in the relations between the parties" would include treaties to which all members of the investment treaty, usually two, are a party.[140] Since 188 states have ratified the IMF Agreement,[141] it will be a source of rules of international law applicable in the relations between the parties in nearly every investment dispute.

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[137] *E.g.*, JARG KAMMERHOFER & JÖRG KAMMERHOFER, UNCERTAINTY IN INTERNATIONAL LAW: A KELSENIAN PERSPECTIVE 210 (2011) ("However, there is no denying that the *pragmatic* status of Article 38 is very high. Almost all works on the sources of international law . . . start with Article 38 of the [ICJ] Statute.").

[138] Statute of the International Court of Justice art. 38.1, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S 993.

[139] *Cf.* Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT'L COMP. L. QUARTERLY 361, 396 (2008) ("[R]eference to general principles of law in the investment context more commonly serves a rather different function, namely to inform the content of an existing, but open-textured treaty norm.").

[140] The traditional interpretation of "applicable in the relations between the parties" is that "parties" refers to all members of the treaty under interpretation, not just the parties to the particular dispute. *E.g.*, Ulf Linderfalk, *Who Are 'the Parties'? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the 'Principles of Systemic Integration' Revisited*, [2008] NETHERLANDS INT'L L. REV. 343, 345. In addition, one could plausibly identify the IMF Agreement as a source of customary international law. *See* Proctor, *supra* note 74, at 504 ("[I]n some respects the content of customary law may itself be shaped by international treaties which have won general acceptance. . . . [This] category is represented by the Articles of Agreement of the International Monetary Fund."). As a final note, Pauwelyn describes modes of using *nonbinding* international standards as a point of reference. For example, nonbinding standards could serve as an aid for interpreting terms that share a context or as a defense when the respondent has satisfied the requirements of a relevant nonbinding standard. Joost Pauwelyn, *Is It International Law or Not, And Does It Even Matter?*, *in* INFORMAL INTERNATIONAL LAWMAKING (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950068.

[141] *See supra* note 129.

Reference to the IMF Agreement for the purpose of interpreting an investment treaty requires a measure of caution. By its text, VCLT Article 31.3(c) ascribes to "relevant rules of international law" the role of being "taken into account, together with the context." As the ICJ noted in the *Pulp Mills* dispute, "taking account of relevant rules of international law applicable in the relations between the Parties . . . has no bearing on the scope of [] jurisdiction."[142] Like context, the "relevant rules" are a point reference, but are not per se justiciable. As McLachlan notes with regard to general international law, its primary role in investment treaty cases is "the progressive illumination of the parties' intentions, as expressed in their treaty text; or its application to issues not expressly addressed in the Treaty in a different way."[143] The same holds for relevant rules that originate in treaties.

b. IMF Articles of Agreement: Article IV

With that proviso, the IMF Agreement offers a point of departure for gauging the conformity of a general measure of economic policy with the fair and equitable treatment standard. Of particular interest are the preamble, general obligation, and first two specific provisional obligations of Article IV[144]:

Article IV

Obligations Regarding Exchange Arrangements

Section 1. *General obligations of members*

[142] Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 135, ¶ 66 (Apr. 20).
[143] McLachlan, *supra* note 139, at 391.
[144] The IMF Legal Department divides Article IV into three parts: the preamble, general obligation, and four specific obligations. *See* LEGAL DEP'T, INT'L MONETARY FUND, ARTICLE IV OF THE FUND'S ARTICLES OF AGREEMENT: AN OVERVIEW OF THE LEGAL FRAMEWORK ¶ 16 (June 28, 2006). The third provision, which pertains to currency manipulation, has attracted academic commentary in the past decade. *See, e.g.*, Brian Mercurio & Celine Sze Ning Leung, *Is China a "Currency Manipulator"?: The Legitimacy of China's Exchange Regime Under the Current International Legal Framework*, 43 INT'L LAWYER 1257 (2009).

> Recognizing that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries, and that sustains sound economic growth, and that a principal objective is the continuing development of the orderly underlying conditions that are necessary for financial and economic stability, each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates. In particular, each member shall:
>
> (i) endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances;
>
> (ii) seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions.[145]

This article is relatively new to the IMF Agreement: in the original version that entered into force in 1945, Article IV governed the maintenance and adjustment of par values under the gold standard.[146] The current Article IV took its place with an amendment in 1978, marking a "complete departure from the par value system, which had been the central feature of the Articles."[147]

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[145] IMF Agreement art. IV.1(i)-(ii).

[146] Articles of Agreement of the International Monetary Fund art. IV, July 22, 1944 [hereinafter IMF Agreement 1944], *available at* http://www2.econ.iastate.edu/classes/econ355/choi/1944jul22.html.

[147] LEGAL DEP'T, INTERNATIONAL MONETARY FUND, ARTICLE IV OF THE FUND'S ARTICLES OF AGREEMENT: AN OVERVIEW OF THE LEGAL FRAMEWORK ¶ 3 (June 28, 2006). Pursuant to Article XVII of the IMF Agreement at the time, an amendment would enter into force within three months of approval from three-fifths of the members representing four-fifths of the voting power. A report from the IMF Executive Directors to the Board of Governors stated that "[t]he Proposed Amendment will enter into force for all members on the date of the formal communication [that the voting thresholds were reached], whether they have accepted the Amendment or not."

The former Article IV lacked any obligation reaching directly into domestic policy.[148] Only two provisions mention or relate to domestic policy at all. First, Section 4 obligated members to "undertake[] to collaborate with the Fund to promote exchange stability,"[149] which indirectly could have encompassed domestic economic policies. Second, Section 5 provided that, when a proposed change to the par value of a currency met specified criteria, the Fund would need to acquiesce to the change, regardless of any "domestic social or political policies of the member proposing the change."[150] Thus, domestic "economic" policies receive no mention at all, and this provision referring to domestic "social or political" policies is to obligate the IMF into a position of deference.

By adopting the 1978 amendment that created the current text of Article IV, the IMF members prescribed that the IMF awaken from this passive posture. The change reflected recognition by the IMF Board of Governors that "the stability of the overall system of exchange rates is enhanced by the pursuit of domestic policies that create the underlying conditions for economic and financial stability."[151] The surveillance role that IMF members simultaneously assigned to the Fund in Section 3 of Article IV, to "oversee the compliance of each member with its obligations under Section 1,"[152] marked a shift for the IMF "from custodian to supervisor."[153]

INT'L MONETARY FUND, PROPOSED SECOND AMENDMENT TO THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND: A REPORT BY THE EXECUTIVE DIRECTORS TO THE BOARD OF GOVERNORS, 15 I.L.M. 501, 544 (1976).

[148] *See* Sean Hagan, *Reforming the IMF, in* INTERNATIONAL MONETARY AND FINANCIAL LAW: THE GLOBAL CRISIS 2.11 (M. Giovanoli, D. Devos, eds.) (2010) ("[U]nlike the text of the original Articles—the Second Amendment introduced obligations with respect to members' domestic policies.").

[149] IMF Agreement 1944 art. IV.4(a).

[150] IMF Agreement 1944 art. IV.5(f).

[151] LEGAL DEP'T, *supra* note 144, at ¶ 3 (June 28, 2006); *see also id.* ("[E]rratic disruptions and disorderly developments in exchange rates would be limited if members pursued appropriate economic policies.").

[152] IMF Agreement art. IV.3(a).

[153] Erik Denters, International Monetary Fund (IMF) 19, *in* INTERNATIONAL ENCLYCOPAEDIA OF LAWS: INTERGOVERNMENTAL ORGANIZATIONS (J. Wouters, ed.) (2006), *available at* http://www.ielaws.com/modeligoimf.pdf.

The obligations in Article IV are highly deferential to governments, while setting boundaries that resemble the recognized FET standards of good faith, reasonableness, and abus de droit. The first obligation of interest appears at the end of the preamble and requires that "each member undertake[] to collaborate with the Fund and other members."[154] The undertaking "to collaborate with the Fund" is a remnant from the original Article IV, with the amendment of 1978 adding collaboration with "other members" to the obligation.

Collaboration is primarily a procedural requirement, but as is clear from the provisions that follow, perfunctory interaction with Fund and its members does not suffice for compliance. The IMF Legal Department notes that the collaboration requirement in the original Article IV "was relied upon as a basis for the Fund to call on members to take specific actions or refrain from taking specific actions," at times gently, and at times as a requirement such that failure to comply would have constituted a breach of the Agreement.[155]

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[154] IMF Agreement art. IV.1 pmbl. The IMF Legal Department treats the verb "undertakes" to signal an "obligation." *See* LEGAL DEP'T, *supra* note 144, at ¶ 20 ("[T]he general obligation of Article IV is to 'collaborate with the Fund and other members.'"). The provisions of Article IV, by contrast, follow from the preface: "In particular, each member *shall*." IMF Agreement art. IV.1 pmbl. (emphasis added). Sir Joseph Gold, who joined the IMF as a Counselor in 1946 and would serve as its General Counsel from 1960 to 1979, describes the "undertaking" to collaborate as an "obligation," but a "more deferential" one than the "shall" obligations of the provisions. *See* JOSEPH GOLD, INTERPRETATION: THE IMF AND INTERNATIONAL LAW 333 ("In the IMF, it has been understood by the organization and its members that an obligation to collaborate is indeed an obligation."); *id.* at 310 ("[C]lauses (i) to (iv) . . . can be considered qualifications of the firmly expressed *obligations* according to which 'each member undertakes to collaborate.'") (emphasis added); *id.* at 335 ("The delicacy of the task of preventing *obligations to collaborate* from becoming trespasses on the sovereignty of members is recognized in a subtle use of language in the Articles. The normal mode in which the treaty expresses the obligations of members to behave is by directing that they 'shall'act in the prescribed manner. This style has been considered most appropriate for imposing obligations. When the Articles deal with *obligations of collaboration*, however, the formulation is that a member 'undertakes' to collaborate to achieve a specified objective. This usage stresses the willingness with which members have accepted so unspecific an obligation. The language is thought to be *more deferential* to members when their discretion in economic matters is subject to international supervision and regulation without specification in the treaty of the behavior that may be required of them pursuant to an obligation to collaborate.") (emphasis added); *cf.* Medellín v. Texas, 552 U.S. 491, 508 (2008) (holding that "undertakes to comply" in Article 94 of the United Nations Charter "does not provide that the United States 'shall' or 'must' comply.'").

[155] LEGAL DEP'T, *supra* note 144, at ¶ 22; *see also id.* box 3 (describing deployment of the collaboration requirement in two specific instances: in 1947 to constrain multiple currency practices and in 1971-74 as the par value system unraveled.); GOLD, *supra* note 154, at 334 ("The IMF made ample use of the obligation of members to collaborate with the IMF in the field of exchanges during the period when the par value system was in operation and then in the period between its breakdown and the effective date of the Second Amendment. . . . The IMF has relied on the

The provisional obligations that follow give substance to what is necessary to fulfill the general obligation to collaborate. The four provisions are not exhaustive, however, as is evident from the preface, "*[i]n particular*, each member shall."[156]

The first provision states that each member "shall endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances."[157] This commitment is minimal, obliging ratifiers merely to *endeavor* toward *orderly* growth with *reasonable* price stability consistent with the *circumstances*.

A 2007 Decision by the IMF Executive Board provided guidance on the meaning of "with due regard to its circumstances."[158] For the purposes of bilateral surveillance by the IMF of its members under Section 3 of Article IV,[159] the clause means that any assessment and advice are to be "within the framework of the general economic situation and economic policy strategy of the member," are to "pay due regard to its implementation capacity," and to "take into account the member's other objectives."[160] At the same time, the preamble to the 2007 Decision emphasizes that "members have legitimate policy objectives that are beyond the scope of Article

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obligation as an aid to interpretation when relevant provisions of the Articles were ambiguous or not sufficiently specific.").

[156] LEGAL DEP'T, *supra* note 144, at ¶¶ 20, 28.

[157] IMF Agreement art. IV.1(i).

[158] International Monetary Fund, Bilateral Surveillance over Members' Policies, Executive Board Decision ¶ 9, June 15, 2007 [hereinafter IMF 2007 Decision]. Pursuant to Article XXIX of the IMF Articles, "[a]ny question of interpretation of the provisions of this Agreement . . . shall be submitted to the Executive Board for its decision." IMF Articles art. XXIX(a). The 2007 Decision does not claim to be a formal interpretation, however, but claims to "provide[] guidance to the Fund in its oversight over members' policies . . . and guidance to members in the conduct of their exchange rate policies." *Id.* art. 1. The Decision also is explicit that "the guidance being provided to members . . . relates to the performance of their existing obligations under Article IV; no new obligations are created for members by this Decision." *Id.* pmbl. Gold comments that "if a member does not observe guidelines, it is not, by reason of that neglect alone, in breach of an obligation under the [IMF] Articles. The presumption may be inevitable that in failing to behave in accordance with a guideline, a member is flouting the expectation with which the guideline was established, but the member would be entitled to explain that there was good reason for its conduct." GOLD, *supra* note 154, at 312 (1996).

[159] IMF Agreement art. IV.3(a) ("The Fund . . . shall oversee the compliance of each member with its obligations under Section 1 of this Article.").

[160] IMF 2007 Decision, *supra* note 158, at ¶ 9 (appearing under the heading "The Modalities of Bilateral Surveillance").

IV . . . although when adopting policies to achieve these objectives, members need to ensure that such policies are consistent with their obligations under Article IV."[161] Thus, the 2007 Decision reinforces both deference from the IMF to legitimate policy goals and the obligation upon members to pursue those goals within the boundaries of Article IV.

The second provision of Article IV, like the first, is an obligation of conduct rather than an obligation of result.[162] IMF members shall "*seek* to promote stability," and do so "by *fostering* orderly economic and financial conditions and a monetary system that does not *tend* to produce erratic disruptions."[163] This provision, like the first, one could interpret as reflecting standards of good faith, reasonableness, and abus de droit.

The 2007 Decision included guidance on the obligations in provisions (i) and (ii), again in the context of bilateral surveillance by the IMF of its members:

> The Fund in its surveillance will assess whether a member's domestic policies are directed toward the promotion of domestic stability. While the Fund will always examine whether a member's domestic policies are directed toward keeping the member's economy operating broadly at capacity, the Fund will examine whether domestic policies are directed toward fostering a high rate of potential growth only in those cases where such high potential growth significantly influences prospects for domestic, and thereby external, stability.[164]

This excerpt contains two policies, perhaps not immediately visible, as guidance for IMF surveillance. First, staff will always examine *whether* a government is seeking to keep the economy "*broadly* at capacity." This would contrast with a scenario where a government

[161] IMF 2007 Decision, *supra* note 158, at pmbl.
[162] *See* LEGAL DEP'T, *supra* note 144, at ¶ 50 ("[T]he [domestic] obligations are of a 'soft' nature, requiring efforts rather than the achievement of results.").
[163] IMF Agreement art IV.1(ii).
[164] IMF 2007 Decision, *supra* note 158, at ¶ 6 (appearing under the heading "The Scope of Bilateral Surveillance").

implements general measures of economic policy that tend to oppress the economy from operating at capacity or that tend to propel an economy beyond its sustainable capacity. Because the capacity of an economy is difficult to identify, the word "broadly" grants a high degree of deference, akin to a reasonableness standard. Furthermore, the word "whether" suggests this mandatory inquiry will be binary—the surveillance team will examine whether *or not* policies are *directed at* keeping the economy *broadly* near capacity.

The second policy follows directly from the first. According to the excerpt, in the event the first inquiry yields a conclusion that policies are *not* directed at keeping the economy near capacity, the surveillance team must determine if the "high rate of potential growth" ascertained in the first inquiry "significantly influences" prospects for stability. Only if this second inquiry yields an affirmative conclusion will the surveillance team proceed to examine, in a third step, "whether those policies are *directed toward*" the high rate of potential growth, rather than directed toward some other objective. In other words, the surveillance team must first determine that the policies put "domestic, and thereby external, stability" at risk prior to making an (intrusive) examination into the intent behind those policies. This approach is consistent with the obligations on states merely to "endeavor to direct" prudent policies, to "seek to promote" stability, and to "foster" stable economic conditions. This guidance from the 2007 Decision is therefore loyal to the modesty of the commitments in Article IV, while also upholding the mandatory "shall" prescriptions on conduct.[165]

c. Fair and Equitable Treatment: IMF Article IV as Reference Point

[165] *Compare* POL'Y DEP'T AND THE REVIEW DEP'T AND THE LEGAL DEP'T, INT'L MONETARY FUND, REVIEW OF THE 1977 DECISION—PROPOSAL FOR A NEW DECISION: COMPANION PAPER ¶ 34 (May 22, 2007) ("'Should' indicates that [Principle] D is a recommendation and that following it is not mandatory.").

These excerpts from the 2007 Decision address the narrow context of Article IV surveillance,[166] whose "organizing principle" is "*external* stability."[167] Article IV carries the title "Obligations Regarding Exchange Arrangements," and the objectives of the general obligation, of which the specific provisional obligations are components, are "orderly exchange arrangements" and "a stable system of exchange rates."[168]

These purposes of Article IV and the purposes of IMF Agreement are important,[169] as any recourse to them in international investment law—viz., any "tak[ing] into account" of them to interpret an investment treaty—must include careful consideration of how their context does and does not translate to the foreign investment context. Investment treaties do not seek "orderly exchange arrangements," but rather, typically, the "reciprocal encouragement and protection of investment."[170] The contents of "fair and equitable treatment" to a foreign investor operating *internal* to the state would seem to require, all else equal, a *higher* standard of conduct than would be the case where the "organizing principle" is "*external* stability."[171] As the 2007 Decision makes clear, an IMF surveillance team will disregard any measures that do not "significantly influence[]" *external* stability.[172] Where external stability is the "organizing principle," turning a blind eye in such scenario is sensible; where the protection of foreign investment is paramount, the same gesture would not be appropriate. Rather, the difference in

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[166] *See supra* notes 160 and 164 and accompanying text.
[167] STRATEGY, POLICY, AND REVIEW AND LEGAL DEP'TS, INT'L MONETARY FUND, THE 2007 SURVEILLANCE DECISION: REVISED OPERATIONAL GUIDANCE ¶ 1 (June 22, 2009) (emphasis added).
[168] IMF Agreement art. IV tit., pmbl.; *see also* Hagan, *supra* note 148, at ¶ 2.06 ("Article IV of the Articles sets forth obligations of members regarding . . . those domestic policies that have an impact on their exchange rates.").
[169] Six provisions in Article I of the IMF Agreement announce the purposes of the IMF. *See* IMF Agreement art. I.
[170] *See, e.g.*, Argentina-U.S. BIT tit.
[171] *Cf.* Hagan, *supra* note 148, at 2.12 ("Unlike the obligations with respect to domestic policies [in Article IV.1(i)-(ii)], members'exchange rate obligations [in Article IV.1(iii)] are of a 'hard' nature, which was considered appropriate given their direct international impact.").
[172] *See* IMF 2007 Decision, *supra* note 158, at ¶ 6 (emphasis added); *see also id.* ¶ 5 ("[E]xchange rate policies will always be the subject of the Fund's bilateral surveillance . . . as will monetary, fiscal, and financial sector policies . . . . Other policies will be examined in the context of surveillance only to the extent that they significantly influence present or prospective *external* stability.") (emphasis added).

context would call for a shift in focus away from the external repercussions of measurs on exchange rates and more toward the internal impact on investments.

Differences in context do not, however, render the Article IV standards entirely inutile. At a higher level of abstraction—i.e., as standards for general measures of economic policy that are attributable to a government—it is fair to read Article IV as an articulation of the requirements of good faith, reasonableness, and abus de droit. As such, they are a useful point of reference when seeking to ascertain what constitutes fair and equitable treatment in the context of general economic policy. The Appellate Body of the World Trade Organization similarly found a particular treaty provision to be an "expression of good faith":

> The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle . . . controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of abus de driot, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." . . . Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretive guidance, as appropriate, from the general principles of law.[173]

In this excerpt, the Appellate Body suggests that, since the treaty provision reflects the good faith principle, it can, pursuant to VLCT Article 31.3(c),[174] refer to good faith and abus de droit for "additional interpretive guidance, as appropriate." In like fashion, an investment tribunal could, pursuant to VCLT Article 31.3(c), refer to Article IV of the IMF Agreement, as a treaty rule

[173] Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 158, WT/DS58/AB/R (Oct. 12, 1998) (quoting BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 125 (1953)).
[174] *Id.* n.157.

applicable between the parties or as an expression of good faith,[175] for "additional interpretive guidance, as appropriate" should the tribunal need to interpret "fair and equitable treatment" in the context of general economic policy.[176]

IV. State Responsibility for "General Measures of Economic Policy": Framing a Claim

Even under a standard as specific as Article IV of the IMF Agreement, framing a colorable claim would be no easy task.[177] With intent as an element, standards like "orderly" and "reasonable," and the need to take "due regard" of circumstances, evidence and burden of proof could be severe obstacles, even in a case of egregious measures. Commentators who have previously identified the susceptibility of general measures of economic policy to standards of international law also recognized this practical challenge. Shuster, after writing that "if such measures are undertaken . . . for reasons which cannot be justified on legitimate economic grounds . . . then international law may well object," proceeded to observe, "however, the real difficulty in applying the economic test for determining liability lies in ascertaining exactly where the legitimate use [for economic reasons] defence ends."[178] Similarly, Proctor noted that

[175] *Cf.* Proctor, *supra* note 74, at 504 ("[I]n some respects the content of customary law may itself be shaped by international treaties which have won general acceptance. . . . [This] category is represented by the Articles of Agreement of the International Monetary Fund.").

[176] Burke-White & von Staden have proposed applying a good faith standard for the purpose of reviewing measures that otherwise fall within the scope of a self-judging exception. Their observations on a good faith standard of review may be of interest; for example, "[w]hile deferential . . . good faith review is not hollow;" "[u]nfortunately, the paucity of jurisprudence on the principle of good faith means that the practical standards for undertaking a good faith review are underdeveloped and arbitrators may find the standard lacking specificity;" and "[a]s a standard of review, good faith has two basic elements: . . . honest and fair dealing and . . . a rational basis for the action." William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 312 (2010).

[177] Recall, however, that the Argentine tribunals and the PCIJ did not base their statements about the impropriety of examining general measures of economic policy on practical concerns like evidence.

[178] SHUSTER, *supra* note 76, at 54 (citing B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW (1950)).

"[t]he difficulties lie in application rather than the existence of a doctrine."[179] Nonetheless, legal standards of this nature, and the evidentiary challenges that accompany them, permeate international investment law.

While issues of evidence and burden of proof would be highly contingent on the given factual scenario, the following sections seek to examine the issues briefly in the abstract.

A. Framing a Claim: Pleading Requirements

The ICSID Convention, ICSID Arbitration Rules, the UNCITRAL Arbitration Rules, and typical investment treaties do not prescribe a specific pleading requirement; however, tribunals commonly impose, pursuant to "generally accepted practice,"[180] pleading requirements upon the claimant. Although the imposition of pleading requirements without a legal instrument prescribing them does not enjoy universal acceptance,[181] the tribunals tend to describe adequate pleading as a requisite for jurisdiction.

An influential decision on the content of pleading requirements came from the tribunal in *Impregilo v. Pakistan*.[182] After reviewing several ICJ opinions and investment awards, that tribunal reached a pleading standard that several subsequent investment tribunals have

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[179] PROCTOR, *supra* note 74, at 514.
[180] Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility ¶ 303 (Aug. 4, 2011).
[181] *See, e.g.*, Todd Weiler, *NAFTA Chapter 11 Jurisprudence: Coming Along Nicely*, 9 SW. J. L. & TRADE AM. 245, 254 (2003) ("[T]he *UPS v. Canada* tribunal concluded that it must be satisfied that an argument contained within the statement of claim is 'capable of constituting a violation' of a particular provision at issue. The flaw in this reasoning is all too apparent: How can a Tribunal properly come to such a decision without having the opportunity to be fully briefed on the law in question? . . . What the UPS Tribunal appeared to miss is a point clearly noted by the *Methanex* Tribunal. In the *Oil Platforms* case, the ICJ was not operating under the same type of jurisdiction-granting treaty provision as a NAFTA Tribunal. . . . The ICJ obtains jurisdiction under a treaty that requires more than the submission of a *pro forma* claim for its compulsory jurisdiction to attach. Moreover, the ICJ, unlike a NAFTA tribunal, has the authority to entertain objections regarding the admissibility of a claim.").
[182] Impregilo S.p.A. v. Islamic Republic of Pak., ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005).

followed.[183] The examination in *Impregilo* spanned several paragraphs, which the tribunal in *Bayindir v. Pakistan* synthesized into the following standard: "the Tribunal should be satisfied that, if the facts or the contentions alleged by [the claimant] are ultimately proven true, they would be capable of constituting a violation of the BIT."[184] The *Bayindir* tribunal also inferred that the arbitrators in *Impregilo* "took it for granted that the Claimant had to satisfy 'the burden of proof required at the jurisdictional phase' and make 'the prima facie showing of Treaty breaches required by ICSID Tribunals."[185] Other tribunals have reached similar conclusions from the *Impregilo* decision.[186]

At least one tribunal has imposed a more stringent pleading standard. In *Methanex I v. United States*, the tribunal extracted a pleading requirement out of NAFTA Article 1101(1), which limits the scope and coverage of the NAFTA Investment Chapter to measures "relating to" an investor or investment. According to the *Methanex I* tribunal, a measure cannot fall within the "relating to" standard, which it interpreted as a condition for jurisdiction,[187] unless the claimant pleads facts sufficient to establish a "legally significant connection between [the measure and the effect]."[188] As Weiler observed, "[e]ssentially, the Tribunal merely employed a *proximate cause*

[183] *See, e.g.*, Saipem S.p.A. v. People's Republic of Bangl., ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures ¶¶ 83-91 (Mar. 21, 2007), Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pak., ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 193-94 (Nov. 14, 2005), Jan de Nul N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 ¶ 69-71 (June 16, 2006).
[184] *Bayindir*, *supra* note 183, at ¶ 194, *quoted in Jan de Nul*, *supra* note 183, at ¶ 71.
[185] *Bayindir*, *supra* note 183, at ¶ 190, *quoting Impregilo*, *supra* note 182, at ¶ 79.
[186] *See Saipem*, *supra* note 183, at n.14.
[187] *See Methanex I*, *supra* note 19, at 127-47. *But see BG Group*, *supra* note 11, at ¶¶ 227-30.
[188] *Id.* at ¶ 147; *see also id.* ¶ 137 ("If the threshold provided by Article 1101(1) were merely one of 'affecting', as Methanex contends, it would be satisfied wherever any economic impact was felt by an investor or an investment. For example, in this case, the test could be met by suppliers to Methanex who suffered as a result of Methanex's alleged losses, suppliers to those suppliers and so on, towards infinity. As such, Article 1101(1) would provide no significant threshold to a NAFTA arbitration. . . . [A] strong dose of common sense is required. *But see BG Group*, *supra* note 5, at ¶¶ 230 ("The context of Article 1101(1), as well as the object and purpose of the NAFTA, demonstrate that the interpretation of Article 1101(1) in *Methanex I* cannot be sustained.").

or *remoteness* test, which one could find in the theory of domestic negligence law, at an early stage of the case."[189]

Although this pleading standard could potentially be a substantial hurdle for a claim against a general measure of economic policy, the facts behind the decision would seem to differ materially from a claim against general measures of any sort. The claimant, Methanex, produced methanol, an input to methyl tertiary-butyl ether (MTBE), a gasoline additive.[190] The governor of California ordered in 1999 the removal of MTBE from gasoline in California within three years due to environmental risks,[191] and Methanex impugned procedural and substantive aspects of the order and related measures.[192] The critical fact defeating proximate causation was that the measures targeted MTBE, not methanol. Since the claimant produced only methanol, measures nominally addressing only MTBE lacked, in the tribunal's estimation, a "legally significant connection" to its investment and, therefore, did not "relate to" the investment.[193] However, since general measures of economic policy typically, by virtue of being "general," will reach all domestic investments as an uninterrupted linear vector, as the *Methanex I* tribunal seemed to require, those measures should pass the *Methanex I* standard for jurisdiction.[194]

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[189] Weiler, *supra* note 181, at 254 (noting that "[t]he Tribunal's solution conveniently allowed it to avoid many controversial political issues involving Methanex's assertions that the measure was not fair and equitable and expropriated its business.").
[190] *Methanex I*, *supra* note 19, at ¶¶ 22, 24.
[191] *Id.* at ¶¶ 28-29.
[192] *Id.* at ¶ 35.
[193] *Id.* at ¶ 147.
[194] The *Methanex I* tribunal was interpreting this standard from the NAFTA Investment Chapter, which differs from the standards in the ICSID Convention and in other investment treaties. *See supra* notes 4-5 and accompanying text. Scrutiny for proximate causation at the jurisdictional stage is notable in light of the position of the concept of proximate causation within the Draft Articles of State Responsibility, i.e., under Article 31 of Part Two. *Draft Articles*, *supra* note 2, art. 31 cmt. 10. According to the first comment to Part Two: "Whereas Part One of the articles defines the general conditions necessary for State responsibility to arise, *Part Two deals with the legal consequences for the responsible State*." *Id.* pt. 2, cmt. 1 (emphasis added). In effect, the *Methanex I* tribunal inserted, via the words "relating to," an examination of the merits to the jurisdictional stage of the arbitration. *See* Jan Paulsson, *Admissibility and Jurisdiction*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE, AND DISPUTE RESOLUTION 601, 607 (2005) ("The [*Methanex I*] tribunal quite correctly took the view that this was not a jurisdictional challenge. Regrettably it did not clear the air by adding that was not an objection to admissibility either. This can be easily demonstrated . . . . The merits of a case are not limited to issues of fact. The USA may

B. Framing a Claim: Establishing a Breach

Whether as a pleading requirement or during later stages on merits and damages, to prevail a claimant eventually must frame a claim and meet the burden of proof. These tasks would require overcoming factual intricacies in at least two facets of the claim: first, in establishing that certain general measures of economic policy constitute a breach of a legal obligation and, second, in establishing a "legally significant connection" linking the measures and breach to the investment and resultant damages.

The second facet, proximate causation, inherently requires reference to a particular investment and its damages. This analytical requirement constrains the usefulness of any examination in the abstract, so this section will not attempt to examine further the issue of demonstrating proximate causation in the context of general measures of economic policy.[195] Moreover, the challenges that arise in this facet of a claim would likely be common with the challenges of proximate causation that arise in international investment disputes generally.[196]

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have been seeking a knock-out blow on the merits before any hearing of facts, but however early such a defence may be pleaded and considered, it is a defence on the merits."); *cf.* Weiler, *supra* note 181 ("[T]he *UPS v. Canada* tribunal concluded that it must be satisfied that an argument contained within the statement of claim is 'capable of constituting a violation' of a particular provision at issue. The flaw in this reasoning is all too apparent: How can a Tribunal properly come to such a decision without having the opportunity to be fully briefed on the law in question?").

[195] In the *Methanex I* decision, in which proximate causation was dispositive, the tribunal did not articulate the specific contents of a "legally significant connection" between the measure and the investment. Rather, it confined its decision to the facts before it. *See Methanex I*, supra note 19, at ¶ 150 ("Methanex's claim, as originally pleaded . . . does not meet the essential requirements of alleging facts establishing a legally significant connection."). This is unsurprising since, as the Draft Articles note: "[T]he requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage 'is not part of the law which can be satisfactorily solved by search for a single verbal formula.'" *Draft Articles*, *supra* note 2, art. 31 cmt. 10 (quoting P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 466 (1995)). Furthermore, other NAFTA tribunals have used a less stringent test for proximate causation. *See* MEG KINNEAR, ANDREA K. BJORKLUND, & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA §§ 1101.34-40 (2008).

[196] *See generally* Stanimir A. Alexandrov & Joshua M. Robbins, *Proximate Causation in International Investment Disputes*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 317 (Karl P. Sauvant ed.) (2009).

The first facet, establishing the breach of a legal obligation, is also difficult to consider in the abstract, but the following subsection will attempt to examine at least of the broad outlines of establishing a breach under the standards in Article IV of the IMF Agreement.

1. Establishing a Breach: A Brief Examination in the Abstract

One can safely expect that an investment law claim stemming from general measures of economic policy would involve complex facts, as is often the case in disputes under branches of international economic law.[197] For immediate purposes then, a simplistic and stylized account will have to suffice. The account in the following excerpt, however, is not fanciful; it comes from an academic article on hyper- and high inflation episodes.[198] The observations offer a rough idea of one possible conception of a scenario in which a general measure of economic policy—or a series of such measures[199]—might be impugnable under a standard resembling Article IV of the IMF Agreement:

> While the relationship may not necessarily be instantaneous nor precisely one-for-one, there can be no doubt that inflation can be ended if the monetary taps are turned off.

[197] *See, e.g.*, Cont'l Cas. v. Argentine Republic, ICSID Case No. ARB/03/9, Award ¶¶ 200-36 (Sept. 5, 2008) (examining whether economic measures by the Argentine government were a "necessary" response to the financial crisis); *see also* Panel Report, Australia—Apples WT/DS367/R (Aug. 9, 2010) (examining sanitary and phytosanitary measures for preventing fire blight); Panel Report, United States—Subsidies on Upland Cotton, WT/DS267/AB/R (Sept. 8, 2004) (examining whether the effect of cotton subsidies was "significant price suppression" in the "world market."). The NAFTA Chapter on Financial Services provides for the participation of officials from the finance ministry of each party in the event of dispute settlement procedures under the article containing exceptions for monetary policy and exchange rate policy. *See* NAFTA arts. 1412, 1415, Annex 1412.1.
[198] Stanley Fischer, Ratna Sahay, & Carlos A. Végh, *Modern Hyper- and High Inflations*, 40 J. ECON LIT. 837 (2002).
[199] A "series" of "actions or omissions" can constitute a breach of an international obligation when, "in aggregate," they are "sufficient to constitute the wrongful act." *Draft Articles*, *supra* note 2, art. 15.1.

> . . . [T]here remains the question: What drives money growth? The question is relevant because high inflations are not popular, and it is reasonable to believe that it is rare for governments to take a deliberate policy decision to have a high inflation—even if a set or sequence of policy decisions produces high inflation. The usual answer to the question of what drives money growth is fiscal deficits.
>
> An alternative answer . . . is the unintended consequence of inappropriate monetary policies, for instance policies directed at producing real outcomes that are inconsistent with the real equilibrium of the economy, be it for unemployment, the real exchange rate, real wages, or the real interest rate.[200]

This excerpt by no means suggests that every episode of hyper- or high inflation is the result of government measures or that such measures would fail to meet, or even be impugnable under, the standard in Article IV of the IMF Agreement. The excerpt does, however, suggest hyper- or high inflation as a *possible* scenario.

A key acknowledgement from the authors—that it is "rare" for governments to choose policies "deliberately" for the purpose of high inflation—raises two important points. First, investment disputes often stem from rare or idiosyncratic events, and the choice of the word "rare" rather than "never" was not solely a precaution. The authors substantiate this in a footnote: "It is sometimes argued that the Soviet inflation of the early-1920s was a deliberate act of policy; it has also been argued that the German hyperinflation was an attempt to demonstrate that reparations could not be paid."[201]

Second, the intent elements in Article IV represent *affirmative* obligations: states must (affirmatively) endeavor to direct their economic policies prudently and must (affirmatively)

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[200] Fischer et al., *supra* note 198, at 849-50.
[201] *Id.* at 850 n.29.

seek to promote stability by (affirmatively) fostering orderly economic conditions; even if inaction is a prudent affirmative policy decision and satisfies the standard, Article IV does not merely obligate states to *refrain* from enacting reckless measures.[202] As a result, *deliberately intending* high inflation, or any other specific economic disruption, is not requisite to a breach of the standards in Article IV.[203]

Furthermore, to the extent that demonstrating intent is a necessary element to a breach, the following comments from Hagan are a reminder that an objective assessment of evidence regarding the intent behind general measures of economic policy is not impossible:

> [I]t is necessary for the Fund to determine intent, which makes the provision more difficult to apply. It was agreed, however, that this did not mean that the Fund would be required simply to accept the representation made by the member regarding the purpose for its actions. Rather, while such a representation would be given the benefit of any reasonable doubt, the Fund would take into account all other available evidence . . . [and] make its own independent and objective assessment of intent.[204]

Of course, the affirmative intent obligations are a far distance from being obligations of result, and under Article IV and the official guidance on Article IV surveillance, states would

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[202] *See* IMF Agreement art. IV.

[203] Nonetheless, observers have identified instances in which government measures or practices related to economic policy were likely to have been deliberately deceptive. *See, e.g.*, *Don't Lie to Me, Argentina*, ECONOMIST, Feb. 25, 2012, *available at* http://www.economist.com/node/21548242 ("Since 2007 Argentina's government has published inflation statistics that almost nobody believes. . . . Independent economists, provincial statistical offices and surveys of inflation expectations have all put the rate at more than double the official number."); Juan Forero, *Doctored Data Cast Doubt on Argentina: Economists Dispute Inflation Numbers*, WASH. POST, Aug. 16, 2009 ("Workers at the government's National Institute of Statistics call it crass manipulation: Their agency, under pressure from above, altered socioeconomic data to reflect numbers palatable to the presidency."); *see also* EUROPEAN COMMISSION, REPORT ON GREEK GOVERNMENT DEFICIT AND DEBT STATISTICS 7 (2010) ("This quality assurance system and its features is however based on assumptions which have shown to be subject to shortcomings and limitations, of particular relevance in the case of Greece: The partners in the [European Statistical System] are supposed to cooperate in good faith. Deliberate misreporting or fraud is not foreseen in the regulation.").

[204] Hagan, *supra* note 148, at 2.14(a)(3).

enjoy additional safeguards. For example, the provision granting "due regard" for circumstances expands greatly the scope for governments to use discretion in balancing policy objectives. This implies that simply "turning off the monetary taps" in response to high inflation cannot necessarily be an imperative when doing so would itself be disruptive. In addition, the 2007 Decision stated that surveillance would entail examining whether policies are directed toward the economy performing "broadly" at capacity. This approach would dictate a high level of deference when evaluating the extent to which a government has directed its policies toward "real outcomes that are inconsistent with the real equilibrium of the economy," since clear identification of that equilibrium is sure to prove elusive. Nonetheless, where the difference between the two is an order of magnitude, a colorable claim of breach could be feasible.

VI. Reflections & Conclusion

This essay has sought to examine, analytically, the prospect of state responsibility for general measures of economic policy in international investment law, while proposing an articulation of the fair and equitable treatment standard suitable to that context. As a matter of policy, states and investors might wish for a level of protection that differs from the level that this essay has found to be an appropriate outcome of legal interpretation and analysis. States are free to confine the scope of their consent to arbitration to a more deferential standard of protection or to exclude from their consent a category of disputes altogether.[205] Investors, meanwhile, are free to pursue contractually a standard providing greater assurance that a

[205] *See* SCHREUER ET AL., *supra* note 24, at 103 ("It is open to States to exclude categories of disputes that they consider inappropriate for arbitration from the terms of their consent."); *see also Draft Articles*, *supra* note 2, art. 55 ("These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.").

government and its successors will implement general measures of economic policy that are consistent with the investment climate they seek.

Tribunals should not, however, be reticent to accept jurisdiction over measures due to their subject matter. Concerns about sensitive policy areas certainly are not novel; they are even traceable to the drafting of the ICSID Convention:

> Even a dispute that gives rise to legal questions is sometimes said to be inappropriate for arbitration if it affects sovereign powers or questions of political significance. In fact, in the course of the Convention's drafting, most of the discussion about the types of disputes that should be made subject to the Centre's jurisdiction did not turn on their legal or non-legal nature but on whether it was acceptable to expose a State to arbitration in respect of activities within its sovereign prerogative . . . . These ideas were opposed by Mr. Broches. He pointed out that it was always open to the parties to define the disputes that they regarded as justiciable in their consent agreement. Eventually, none of the proposed limitations relating to justiciability found entry into the Convention and there is nothing to suggest that they are included by implication.[206]

Nor should the identification of a standard of fair and equitable treatment suitable to general measures of economic policy be solely to the benefit of foreign investors. It would be facile to suggest that local investors and local consumers can free ride on the nonexcludable benefits of prudent general economic policy. The likelihood that fear of treaty claims from foreign investors will be the marginal inducement that provokes a government to manage prudently its economy is, however, admittedly slim.

[206] SCHREUER ET AL., *supra* note 24, at 101-02.

A more plausible benefit to governments is clarity as to what investors, without assurances of anything greater than fair and equitable treatment, legitimately can—and cannot—expect of general measures of economic policy. Governments would be myopic to consider *carte blanche* a superior alternative as the standard for legitimacy; they too have an interest in prudent economic management, both of their own economies and those of their neighbors and trading partners. Additionally, when prudent policies nevertheless fail, a fair and equitable treatment standard of sufficient specificity can offer governments a source of vindication in a context that may offer few others.

International investment law tribunals have an obligation to settle legal disputes, which does not include editorializing on whether a measure was "right or wrong." The task does, however, entail an obligation to determine if a measure is discriminatory, expropriatory, or incompatible with fair and equitable treatment. General measures of economic policy are no exception.