The Return of the State

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International lawyers are both indebted to and at war with the state. Although we acknowledge, as we must, that states remain the primary actors in creating, interpreting, and enforcing *inter-national* rules, we usually make this point in passing – as we try to puncture, evade, eclipse or overtake sovereignty. As Martti Koskenneimmi's apology/utopia dialectic demonstrates, much of what we do tries to reconcile the un-reconcilable. This is epitomized by our efforts to portray *pacta sunt servanda* as a bridge between unilateralism and multilateralism. We explain that states *exercise* their sovereignty (and do not relinquish it) when they conclude a treaty. This was, of course, the rationale adopted by the Permanent Court of International Justice in the Wimbledon case.

International lawyers largely define success by how much states are convinced by Wimbleton's rationale – by the victory of the supra- or multi-national over the parochial national. We think of ourselves as greasing the wheels that drive global governance. This defines our professional outlook. Nearly all of our efforts involve getting states to delegate away some part of their "domestic jurisdiction." We do this through more or less convincing appeals to states' long-term self-interest, or by recruiting to the multilateral side transnational non-state actors (MNCs, NGOs, international civil servants, and even individuals as private attorney generals) or intra-state constituencies with discrete interests, such as traders of goods seeking to restrain the protectionist impulses of their own governments.

Our efforts to promote multilateralism or inter-state cooperation in lieu of unilateral sovereign action cut across the public/private international law divide. We established global institutions as diverse as the UN, UN specialized agencies, and the international financial institutions to centralize states' talents and resources or to supply needed supra-national neutrality and independence. We sold these on the premise that they would fulfill needs that each state could not satisfy on its own -- to provide collective security (the UN Security Council), solve coordination problems (such as those solved by ICAO with respect to aviation), arbitrate/adjudicate disputes, solve prisoners' dilemmas too numerous to mention, or address threats posed by non-state actors like pirates and terrorists. The age of international organizations was built on the proposition that states, like first year law students, should not travel alone. But even though global governance serves the needs of states, getting them to accept the Wimbledon premise in discrete contexts has not always been easy -- as when a treaty imposes unexpected, or, given changing circumstances, temporally inconvenient, obligations.

For the builders of global governance, state sovereignty is most often a hindrance that needs to be overcome. It is not the favored ordering mechanism among today's leading thinkers of global governance. For those focused on states' threats to the human rights of their citizens, such as the late great Louis Henkin, sovereignty was the hated "S" word that needed to be banned from polite lawyerly discourse. Global and regional human rights systems respond almost entirely to the threat that sovereignty, unabated and unrestrained, poses. Those who strengthened the GATT's weak dispute settlement scheme at the Uruguay Round devised end-runs around state sovereignty, such as the reverse consensus rule making WTO panel and Appellate Body rulings binding. The WTO's house was built on the proposition that leaving matters to bilateral diplomatic leverage would impoverish us all. And even modern regimes built on bilateralism – such as international investment – turned to bilateral treaties only after various multilateral efforts failed. Of course, bilateral investment treaties (BITs) are efforts by states to bind themselves to the mast to avoid the tempting sirens calling for breaches of investment contracts or nationalizations without compensation. These also involve relinquishments of sovereign "policy space" in favor of investor rights for the greater good.

If the abstracts for the papers presented at this conference are any indication, the global governance tradition – and the urge to defend and improve it -- is alive and well. A number of presenters continue to propose, in the best tradition carved out by those "present at the creation," new forms of supra-national governance or needed reforms to make it better. This include Anna Gelpern and Adam Feibelman (both addressing the problem of unmanaged exchange rates), Aldo Caliarai and Ioana Ciobanasu (on needed reforms for the IMF), Galit Sarfaty (on the need to harmonize anti-corruption efforts among multilateral development banks), Sarah Woo (on the need for regulatory reforms to respond to a group of non-state actors, namely credit rating agencies), Kevin Gray (on changing how the WTO handles government procurement), Markus Wagner (on how to improve the WTO's handling of disputes involving analysis of scientific evidence), Janelle Diller (on the need for greater complementarity with respect to applicable regimes on international product standards), Andrea Schneider and Nancy Welsh (on whether the investment regime can be improved by a greater reliance on mediation), Krista Nadakavukaren Schefer (on the likely impact of R2P for international economic regimes). Others explore lesser known reaches of global governance, such as Michelle Badin's look at the impact of the WTO's dispute settlement system on the civil aircraft sector, or Doak Bishop and Ben Love's analysis of the use of soft law by investor-state arbitrators. Some describe new forms of global governance or describe old ones in new ways. Claire Kelly and Sungjoon Cho describe the G20 as the helm of a new global governance order that connects with the WTO, UNCTAD and OECD. David Zaring compares global regimes that deploy rule-making techniques with those who use adjudication. Some, like Jessica Lawrence, Gareth Davies and Laurens Ankersmith, Elizabeth Trujillo, Valentina S. Vadi, Henry Gao, explore fragmentations dilemmas posed by our disparate schemes for global governance.

Others address why multilateral regulation eludes us in distinct areas. This includes Odette Lienau's look at how the basic notions of sovereignty constrain our solutions to sovereign debt problems, Alexandra Koutoglidou's exploration of how immunity from execution, as "the last fortress, the last bastion of State immunity," continues to hinder international arbitral mechanisms, Chunbao Liu's examination of the challenges faced by those who would seek to liberalize international labor flows, Caroline Bradley's look at the hazards of ad hoc efforts to develop transnational standards for financial regulation, and Shashank Kumar and Mehana Sharafudeen's critical view of certain national laws on IP with extraterritorial effects.

But a closer look at the abstracts suggests some cross-currents at odds with the expected Grotian narrative. Some of the authors merely describe particular global regimes without endorsing them. Jide Nzelibe (who writes of the unholy alliance between Republicans and Democrats in the United States that has led to differing results with respect to US participation in multilateral regimes), Julian Ku (who criticizes judicial assumptions on the status of corporations), Jason Yackee (who questions whether BITs promote flows of FDI), and Anu Bradford and Travis Bradford (who contend that multilateral negotiations on climate change are self-defeating) all evince no enthusiasm for the international regimes they address.

A number of the papers remind us of the serious gaps – in coverage or effectiveness – of our existing forms of global governance without necessarily proposing that we fill these with more global law. Aunpam Chander, for example, addresses the problems of regulating cloud computing by focusing on very traditional conflict of laws questions – namely which territory is best suited to address the question. Some presenters appear to be entertaining second thoughts about the turn to global governance itself, questioning whether more global regulation or more court-like binding adjudication is really a good idea. Juscelino Colares, who sees the limits of WTO adjudication as a source of the regime's strength, Alexia Marks, who outlines the beneficial deterrence impact of national product liability laws, Jarrod Wong, who examines the bottom-up aspects of clawback statutes on corporate governance without need for international regulation, or Joseph Yockey, who suggests that extraterritorial national regulation for passive corruption might be a good idea, all appear to fall into this camp.

Some presenters suggest my theme here – namely that states or at least some states – are staging a comeback. Tania Voon's and Andrew Mitchell's paper on the Australian federal government's efforts to establish a company majority owned by the government to deliver superfast broadband services, tells us that even with respect to that most "global" of phenomena – the web -- states are not helpless supplicants beholden to external developments and forms of regulation. Their paper reminds us that countries such as China appear to be surprisingly resilient when it comes to protecting themselves as sovereigns from the web's effects. Their paper, as well as Efraim Chalamish's on "state-run capitalism," also remind us that, particularly as a result of the global economic crisis but independently of it, states remain or are increasingly economic actors. They have not been privatized out of the picture. And Marian Prado's study of Brazilian privatization efforts with respect to the electricity versus telecommunications sectors is second generation privatization scholarship. It tells us that despite global efforts to encourage privatization, governments retain considerable discretion on how they privatize and whether their efforts remain subject to transnational scrutiny.

But my theme here --the return of the state – is most directly suggested by Koutoglidou's paper on sovereign immunity and Yackee's questioning the desirability of BITs. Both of these authors remind us that the investment regime – the one contemporary legal regime that has displaced the WTO among critics of globalization and has been seen as the greatest threat to sovereignty-- in actually in the throes of a serious sovereign backlash. The regime most criticized for ignoring the will of states has become the foremost example of the persistent power of sovereigns.

Consider the United States. The US, which established its BIT program in the 1980s, was a late-comer to the investment regime. But when the United States decided to join the movement away from trade-oriented FCNs – whose raison d'etre was undercut by the emergence of the GATT -- to investment protection agreements, it elevated investor protection to a new high. Those early U.S. model BITs of 1984-87 were those most investor-protective in the world. As the BIT comparison chart that I have handed out suggests, those treaties deployed every lawyerly device imaginable to achieve a single unitary object and purpose: protecting the foreign investor. Unlike many of the earlier European BITs, the US model protected the entry *and* post-entry treatment of investment. It gave investors the better of national and most favored treatment, subject only to delimited sectoral exceptions; provided additional assurances against any other discriminatory or arbitrary treatment; gave investors a treaty right to demand access to national court remedies; accorded them the better of any treatment accorded under national law, customary international law, and the absolute guarantees of "fair and equitable treatment" and "full protection and security;" extended the Hull Rule assuring prompt, adequate and effective payment if expropriated to all measures, including indirect regulatory acts that were "tantamount to expropriation;" included a comprehensive umbrella clause that turned all breaches of host state-investor contracts into treaty breaches; and provided an iron-clad guarantee that violations of any of these rights could be taken at the option of the investor to international arbitration, notwithstanding any clause to the contrary in the investors' contract with the host state. The US Model BIT of that period set a new standard for investor protection that became widely emulated when the Berlin Wall fell and countries donned Thomas Friedman's "golden straightjacket" to suit post-Cold War capitalism. Most of the investor-protective aspects of the US BIT became standard during the golden age of BIT proliferation, namely the 1990s.

Foreign investment protection is now global. Today, some 3000 international investment agreements (IIAs) exist, including BITs and investment chapters in free trade agreements (FTAs). More countries have concluded at least one BIT than are members of the WTO. BITs are not just popular with Western capital exporting nations. Leading BIT nations include China and Egypt as even developing nations have MNCs requiring protection elsewhere. Cuba has concluded more BITs than the U.S. and today about a third of the total number of IIAs have been concluded between developing states. Moreover, although the international investment regime consists largely of bilateral agreements, investment protections increasingly appear in multi-party agreements such as the Energy Charter and the CAFTA; and the rights accorded investors find significant support in multilateral instruments promulgated by the OECD, and the advice and actions of the IFC, the World Bank, the IMF, and regional development banks. Indeed, one scholar plausibly portrays the IMF and its approach to conditionality as a de facto international investment regulator. These international efforts have a domestic component. As the annual UNCTAD surveys of domestic investment laws indicate, since 1992 when these studies began, the vast proportion of new regulatory changes were, consistent with the proliferation of BITs, "liberalization" or "promotion" measures. Indeed, throughout the 1990s, UNCTAD characterized over 90 percent of national regulatory changes as such. In addition, starting in the mid-1990s but especially since 2000, publicly known investment treaty arbitrations have dramatically increased. Today, with over 350 known investor-state claims either pending or concluded, the driving force of international investment law is not the proliferation of treaties or the adoption of liberalizing national laws but the ever more abundant (and usually effective) arbitral awards on point.

But history did not stop with the end of the Cold War. As Yackee's paper reminds us, the international investment regime has been the victim of its own success and is buffeted by opposing cross currents. The proliferation of investor-state disputes have come with a price: many of the states that established the regime are having second thoughts about the amount of sovereign "policy space" they originally ceded. Many are exercising some of their exit and voice options. (This includes, as we shall see, most prominently its once most prominent cheerleader, the United States, now the fourth most regularly sued respondent state under investor-state dispute settlement (with some 18 claims).) To be sure, states have not stopped concluding BITs and they have not ceased making their national laws and practices investor-friendly. Over the course of 2009 alone, 82 new BITs were concluded along with another 20 IIAs. UNCTAD's latest report of national policy developments tells us that in that year, of 102 policy measures affecting FDI, a little less than 70 percent supported its liberalization and promotion. But that same report indicates that more than 30 percent of national policy changes surveyed were in the opposite direction, the highest proportion since UNCTAD began its surveys in 1992. UNCTAD's examples of the latter reveal how some countries are re-asserting their "sovereign rights" vis-à-vis foreign investors. The 2009 measures restricting entry include Algeria's new requirement of a 49 percent equity share limit on foreign investors seeking to produce for the domestic market; Australia's tightening of its rules on foreign investment in residential real estate; and Canada's and Germany's revisions to their respective laws to authorize these governments to review investments that impair or threaten national security. The 2009 measures affecting established investors include Bolivia's nationalization of several electric generation companies and one foreign controlled bank; Indonesia's requirement that divesting requirements for foreign investors in mining; Kazakhstan's imposition of Kazakh content requirements and its requirement that Kazakh service provides need to employ no less than 95 percent Kazakh nationals; and Nigeria's domestic content requirements with respect to oil and gas.

And more BITs do not mean more treaties that look like the US Model of 1984. Many of the more recently concluded investment treaties accord states greater room to maneuver and foreign investors fewer rights. The changes to the US Model BIT over time suggest what is happening. If the United States led the charge in favor of investor protections, it now appears to be leading the drive in the opposite direction. My handout shows the transformation of the US Model BIT from the heyday of investor-protection to the US Model BIT of 2004. The 2004 US model is at least twice as long as it once was – and as every lawyer knows, the length of a treaty is often inversely related to the rights that it accords. The 2004 model has now shrunk, sometimes dramatically, virtually every right originally accorded to foreign investors while at the same time increasing – sometimes vastly – the discretion accorded host states. As is evident from the handout, the 2004 US model:

--"re-balances" through preamblar language and exceptions, the rights accorded investors in favor of states' rights to protect health, safety, and the environment;

--narrows the definition of covered investment by, for example, excluding some forms of debt or licenses;

--narrows national and MFN treatment by, for example, imposing fewer constraints on the sectors that a state can exclude from such obligations, exempting local government measures, and by indicating that the MFN clause in post 2004 BITs does not provide investors under them the right to claim any better rights accorded under the US's older BITs;

--eliminates the additional protection against arbitrary or discriminatory measures;

--eliminates the umbrella clause;

-- reduces the scope of fair and equitable treatment and full protection and security guarantees to those which would have been accorded under the "customary international law minimum standard of treatment of aliens;"

-- omits the old provision assuring investors' rights to pursue claims in national courts;

-- excludes from investor-state dispute settlement any claims based on denial of transparency in administrative proceedings;

--restricts the scope of cognizable regulatory takings claims and indicating that "except in rare circumstances" non-discriminatory regulatory actions taken to protect public welfare do not constitute an indirect taking;

-- requires investors to first seek the approval of government tax authorities before taking certain investment claims based on tax measures to arbitration;

-- otherwise restricts the ambit of investment arbitrators' discretion and/or elevating the costs of bringing such claims by imposing new 90 day notice of claims, a three year statute of limitations, and new transparency and participation requirements;

-- permits the state parties to the treaty to issue binding interpretations of their agreement, even in anticipation of known claims or the course of pending arbitrations;

--permits state parties to invoke much more expansive exceptions to justify measures "relating to financial services for prudential reasons;" "in pursuit of monetary and related credit policies or exchange rate policies;" and, perhaps most significantly, that a state asserts are required to protect its "essential security."

As I have suggested elsewhere, it is harder to say exactly what the object and purpose of the 2004 US Model BIT is. The combination of changes to the preamble, restricted rights and expansive host state exceptions suggest that that object and purpose now includes the right of host states to regulate as they please. The elevation of the power of the host state is perhaps most evident with respect to the United States' efforts to clarify that its decision to invoke "essential security" to justify any measure, no matter how detrimental to a foreign investor's rights, is a non-reviewable, self-judging action that renders any investor's arbitration claim inadmissible.

As with respect to its earlier pro-investor Model, the United States is influencing other countries' BITs by the power of its example. If the world's leading capital exporter, the state responsible for establishing the Hull Rule, for discrediting the Calvo Clause, and for creating a perfected investor-state arbitration clause is now stressing the need to protect its sovereign prerogatives, others are sure to follow. They have. The latest Canadian Model closely resembles the United States and many of the sovereign-protective innovations in post-2004 U.S. investment agreements are now appearing in recent Chinese treaties, including those between China and Mexico, China and New Zealand, and China and India. UNCTAD's latest investment report tells us that Russia, France, Columbia, Mexico, Austria and Germany have all recently concluded a review process of their respective model BITs while comparable reviews are on-going in Argentina, Venezuela, Ecuador, Morocco, Bolivia, South Africa, and Turkey. In most cases, the stated reasons are to ensure consistency with the public interest, adjust the model to new developments, and seek a "balance between protecting investor and host country." Like the changes to the US Model, more recent BITs include more general exceptions that allow host states greater regulatory space, restrictions (or "clarifications") to specific investor rights, and more carve outs from investor-state arbitration. The power of the US example has also been felt with respect to the screening of incoming foreign investment to protect the state's essential or national security interests. The United States, which adopted an elaborate statutory scheme permitting the President to bar mergers and acquisitions which pose such threats, strengthened its scrutiny over incoming investments after the Dubai Ports deal debacle and perceived threats from the entry of state-owned enterprises, particularly from China. As a result, a greater number of transactions are scrutinized, delayed or even derailed thanks to such scrutiny and other states are following the US lead in adopting or strengthening their own national security screening mechanisms. Countries, including the United States, tend not to adopt clear definitions of what exactly threatens their "security" or, particularly after 9/11, transparent procedures for making such determinations. These factors, particularly when combined with self-judging essential security clauses in BITs, threaten to eviscerate the erstwhile right of entry. Of course, many countries, including Canada, have screened incoming foreign investment on a variety of other grounds; national security is merely the latest governmental tool.

BIT signatories have also found other ways to re-assert their prerogatives. In January 2008, Ecuador expressed its intention to withdraw from its BITS with Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania, and Uruguay. That country's constitutional court ruled another four BITs unconstitutional and Ecuador has also withdrawn from the ICSID Convention. Bolivia has done the same and is renegotiating its BIT with the Netherlands. Russia decided not to become a party to the Energy Charter, while several European countries have abrogated intra-EU BITs. Indeed, renegotiating old BITs is now keeping a number of foreign ministries busy. UNCTAD reports that 19 BITs were renegotiated in 2009 alone with the Czech Republic being the most active.

Nor is this the end of the story. The systemic evolution of the US Model BIT remains a work in progress. Back in the United States, the Obama Administration has suspended at least some pending BIT negotiations while it undertakes yet another review of the 2004 US Model BIT. A recent divided and inconclusive advisory committee report to the US State Department makes it doubtful that the Administration will release a revised US model any time soon. That report, like testimony before Congress, revealed sharp divisions between business groups and the regime's critics, including representatives of the labor movement, academics and NGOs. While business would welcome a return to the more investor-protective provisions of earlier US Model BITs, others contend that the post-2004 changes do not go far enough to protect sovereign "policy space." Some recommend adopting a general exceptions clause comparable to that in Article XX of the GATT, eliminating absolute guarantees like fair and equitable treatment in favor of a simple assurance of non-discriminatory treatment, requiring investors to exhaust local remedies prior to seeking international arbitration, or, most radical of all, eliminating investor-state dispute settlement altogether in deference to resolution by the local courts of the host state.

Business groups fear that at some point the effort to protect sovereign discretion will render a BIT negotiation an entirely pointless exercise. They point to the example of Norway which released in 2007 a model BIT so protective of Norwegian sovereign rights to regulate that in the end Norwegian business groups withdrew their support. Norway's effort to please all sides ended with a suspended BIT program. A former US BIT negotiator, Dan Price, argues that the 2004 US Model may have already gone too far in the direction of protecting sovereign discretion. He argues that a BIT that merely affirms that investors have the right to be treated like all other national investors and have their rights decided only by local courts returns us to the days of Carlos Calvo, when South American states over-reacted to US gunboat diplomacy in favor of US investors by refusing to participate in international arbitration altogether. Despite Price's fears, the odds are good that if the US were to release a new model treaty, the starting point will be the 2004 model and only more sovereignty-protective changes will be added.

But if, as indicated, international investment law is driven by the jurisprudence produced by investment arbitrators, does that jurisprudence provide a firewall to protect investors against trends in favor of "re-balancing"? This is far from clear. Consider, by way of example, three of the most recent annulment rulings rendered in the on-going saga of the leading respondent state in investor-state arbitration, Argentina. All of these cases involved claims by US companies operating privatized utilities in Argentina. In all cases, the underlying claims, involving alleged breaches of the umbrella clause, fair and equitable treatment, and expropriation clauses of the US-Argentina BIT resulted from Argentina's "emergency legislation" adopted in response to that country's economic and political crisis starting in 2001. In all cases, a principal issue concerned the interpretation of the treaty's measures not precluded clause which permits state parties to take measures to maintain public order or protect their essential security interests. The three underlying decisions under challenge before an ICSID annulment committee, involving the companies of CMS, Sempra, and Enron, rendered multi-million dollar decisions in favor of the claimants. All three panels decided that the non-precluded measures clause should be read in light of the underlying customary defense of necessity, requiring states to demonstrate that any measures taken in response to a essential or grave peril were the “only” measures possible and that the state invoking such measures did not significantly contribute to the underlying peril.

The first annulment decision, in CMS, upheld the underlying award but not without extensive dicta indicating that had the scope of review been more generous and not restricted as it is under ICSID, they would have found the original panel’s ruling as to the meaning of the non-measures clause to have been erroneous. The CMS annulment committee opined that it was wrong to equate the treaty clause – which in their view was a “primary” rule obviating liability – to the secondary rule contained in the customary defense of necessity (which arguably does not eliminate liability even when it is properly invoked).

The second annulment decision, in Sempra, applied the dicta of the CMS decision and decided that the original Sempra panel manifestly exceeded its powers in applying the customary defense of necessity instead of the non-precluded measures clause of the BIT. It annulled the award in its entirety.

The third annulment decision, in Enron, upheld the underlying finding that the non-precluded measures clause of the US-Argentina BIT should be read in light of the customary defense of necessity. To this extent, they rejected both the dicta in the CMS annulment and the Sempra annulment ruling. But the Enron annulment committee nonetheless annulled the underlying Enron award on a different ground. It found that the original panel had failed to failed to apply the applicable law because it relied on the wrong reasons and the wrong evidence in rejecting Argentina’s customary defense of necessity. The Enron annulment committee found, among other things, that the original panel did not address what precisely is meant by the customary defense’s requirement that the state relying on the defense not have “contributed to the situation of necessity.” It found that the panel had erroneously relied on evidence presented by an economic expert who did not address the underlying legal questions, such as whether this aspect of the defense requires the state to have been shown to be "blameworthy" for its conduct, "regardless of whether or not the State could have in any way foreseen that its conduct would contribute to a situation of necessity."

All of these decisions are strongly sovereignty protective interpretations of the US-Argentina BIT. All three come up with striking and surprising conclusions in the context of a treaty that is on all relevant matters nearly indistinguishable from the strongly investor-protective US Model of 1984. Quite apart from whether these decisions were correctly decided, my larger point here is that at least some investment arbitral decisions are also now re-empowering the state. These decisions do so in three different ways.

The CMS annulment formally upheld the investor's award. But by going out of its way to severely criticize the legal merits of that award, the CMS annulment committee, consciously or not, made enforcement of that decision considerably harder. Whether or not the CMS annulment committee intended the result, the underlying award has not yet been paid. As Koutoglidou's paper reminds us, it is always hard to secure payment from an entity that enjoys sovereign immunity. Although ICSID awards are more enforceable than most international obligations, they are not immune from the fundamental weakness of all such obligations: namely that enforcement rests in the end on the legitimacy of the obligation and a state's desire to comply. By removing the legal legitimacy of the underlying award, the CMS annulment committee made it easier for Argentine authorities to continue to refuse to pay. The annulment decision in effect licensed Argentina's continued civil disobedience. Indeed, even assuming that the Argentine authorities had been inclined to comply with the underlying award if it had survived the annulment process, the CMS annulment's criticisms of the basis for the award would render the public payment of such an award by a democratically accountable body much more difficult to explain to tax payers. The CMS annulment in short empowers the state by enabling the defiance of law.

The Sempra award defers to state sovereignty in a different way. Its controversial finding that an erroneous treaty interpretation constitutes a "manifest excess of powers" and therefore requires annulment threatens to turn the limited ICSID annulment process into a forum for full appellate review of the legal findings below. This is, as is suggested by the CMS annulment ruling as well as the Sempra annulment decision itself, not consistent with what the states agreed to pursuant to the ICSID Convention or the US-Argentina BIT itself in reliance on that Convention. Moreover, the Sempra annulment's underlying finding that the non-precluded measures clause cannot mean the customary defense of necessity may reflect that committee's effort to re-interpret the treaty in light of what the arbitrators speculate may be the parties' current respective views of the meaning of that clause instead of what they actually intended when the treaty was concluded in 1991. This is a contestable form of treaty interpretation. There does not appear to be any evidence that both parties share a *common* view of what is the interpretation of the non-precluded measures clause. Of course, the traditional rules of treaty interpretation license resort to the "subsequent practice of the parties" (note the plural) and not to the views of only one of them or what we speculate might be their views. (In these cases, the expressed view of the US Executive branch expressed in a letter during the course of the proceeding itself was that the non-precluded measures clause was not subject to any review by an arbitrable body as it was intended to be self-judging; the position taken by Argentina, on the other hand, in the Sempra case among others, was that the tribunal had the power to examine whether Argentina's invocation of necessity was in good faith. Both views were rejected by all the tribunals that have addressed the question.) There is no evidence that I know of indicating that both the US and Argentina were of the view that the non-precluded measures clause was a rule of *lex specialis* intended to depart from the ordinarily applicable rule, namely the customary defense of necessity. Indeed, given the US government's position, as clearly expressed in BITs concluded after the US-Argentina BIT that the non-measures not precluded clause was not reviewable, that government has never expressed a view on what the clause actually means. Even assuming that the state parties had reached a common understanding concerning the meaning of the non-precluded measures clause in their treaty, it remains doubtful whether that view, no where expressed as an amendment to the treaty or licensed as a binding understanding that can bind investment arbitrators in the US-Argentina BIT (as compared to the NAFTA for example), should *retroactively* affect the rights of a third party investor who relied on the original understanding when the investment was made. In my assessment, the Sempra annulment ruling empowers the state through the retroactive re-interpretation of a treaty -- in detriment to the rights accorded a third party under that treaty.

The Enron annulment ruling may be the most expansive precedent in deference to sovereignty of the three. While that decision avoids some of the flaws committed by the CMS or Sempra annulment committees, it potentially expands the scope of the customary defense of necessity. That defense applies to all international obligations not subject to special *lex specialis* rules. The Enron annulment appears to make new law insofar as it finds that economic evidence cannot serve to justify an application of a legal rule, namely the customary defense of necessity. Although the precise basis of the Enron finding is not altogether clear, the annulment committee suggested that the underlying panel had not clarified what amounts to "fault" in the context of contribution to the situation of necessity and faulted that tribunal for not answering questions such as the following: "Must the conduct of the State in question be deliberate) in the sense of being deliberately intended to bring about the situation of necessity), or does it suffice that the conduct was reckless or negligent, or is some even lesser degree of fault sufficient?" It accused the original tribunal of "cursory reasoning" insofar as it accepted the testimony of an economic expert for the conclusion that Argentina's own "misguided" policies contributed to the magnitude of the economic crisis, and indicated that an economist's conclusion was not relevant to a determination that, as a matter of law, the state had contributed to the situation of necessity.

What is most surprising about the Enron annulment is that it does not appear that any of these issues were raised by the litigants and argued before the original panel. Nor does the Enron annulment address the question of burden of proof. Prior to this decision, most had assumed that the burden of proving an affirmative defense like necessity rests on the party invoking it. (This would appear to be all the more the case to the extent the Enron annulment committee is suggesting that the motivation for the underlying Argentine actions that allegedly contributed to the situation of necessity might be relevant since Argentina is presumably in the best position to prove whether its contributing actions were negligent or deliberate.) The Enron annulment says nothing about whether it disagrees with the traditional allocation of burden of proof but it was apparently not swayed by the fact that Argentina failed to prove that it had not contributed to the situation of necessity. This suggests that, for the annulment committee, the burden of proof on this point rests with the claimant. Finally, the Enron annulment says nothing about the contention, based on the ILC's articles of state responsibility, that even assuming the defense of necessity had been properly invoked, its invocation does not absolve the invoking state from any financial liability otherwise due. The fact that the financial award was annulled suggests that the Enron annulment committee assumed otherwise.

Like the Sempra annulment, the Enron annulment empowers states by giving them a second bite at the apple despite the limited basis for annulment permitted under ICSID. What is perhaps more troubling, however, is that the Enron annulment may be empowering all states far beyond the context of the investment regime insofar as it suggests that the defense of necessity, formerly seen as an exceedingly and purposely narrow excuse that has to be affirmatively proven by those seeking to evade their international obligations that does not in any case absolve states from liability otherwise due, may be far more expansive in scope and effect as well as easier to invoke than was previously assumed – including the ILC when it drafted Article 25 codifying the defense of necessity.

The latest Argentina decisions demonstrate that investor-state dispute settlement, long disparaged for its supposedly “pro-investor” bias, may bend to the will of those who built it, namely states. Investment arbitration was sold on the premise that, like US passage of the FSIA, neutral apolitical adjudication would displace the political actions of the US State Department with adjudication. The Argentina annulments – like some of those under the NAFTA involving the United States as respondent – suggest that this was naïve. Politics does not end at the door to ICSID. Investment arbitrators, which after all invariably include one appointed by the respondent state, do not necessarily ignore the political concerns of those who could, if sufficiently dissatisfied with the result, deploy their powers of exit and voice to undermine the entire edifice of the regime. In my view, these decisions and possibly others can best be explained by one salient political reality: in the wake of the latest global economic crisis BIT parties, including the United States, want to retain discretion to respond to such crises through any means necessary. The state parties to BITs – and many of the investment arbitrators apparently – are now seeing the Argentina crisis cases through different eyes. They are now saying to themselves, “there but for the grace of God go I.”

At least some recent investor-state arbitral decisions confirm the trend towards “re-balancing.” A recent decision again involving Argentina reads the GATT’s GATT XX jurisprudence, complete with its proportionality analysis, into the U.S.-Argentina BIT, to the benefit of the respondent state. And even the Argentina cases decided in favor of the claimant suggested that a successful claim of expropriation requires an act that is effectively a government seizure of the investors’ entire property and not merely a decrease in the profitability of an enterprise. In light of such rulings, fears that claims for regulatory takings would dramatically shrink states’ capacity to regulate appear grossly overstated. Other investment arbitrations seem to be incorporating or relying implicitly on a form of proportionality reasoning that balances the rights of investors with those of the state, including with respect to applying the FET guarantee. Some recent FET decisions seem inclined to ask in connection with determining whether government action violated the legitimate expectation of the investor, whether the investor's expectations were indeed "legitimate" given the states' regulatory needs. And within the NAFTA, now subject to the NAFTA parties' interpretation that shrinks the FET guarantee to CIL, one recent decision, Glamis Gold, attempts to limit that right even further – perhaps to the bare bones protections protected by denial of justice claims circa 1927. And even the Argentina cases whose annulments are discussed here suggest that Argentina's economic crisis and its impact need to be taken into account when it comes to determining the amount of liability imposed.

There is a bigger context to all of this. The efforts to rebalance the rights of sovereigns vis-à-vis foreign investors increasingly evident in the text of BITs, national laws, and even some arbitral awards coincides with a much chastened Washington Consensus. Much of the world has lost faith in deregulation, privatization, the un-abashed protection of property, and wholly unrestricted trade and capital flows. This formula for state disempowerment in economic affairs has been chastened by perceptions that it has not really raised all boats. Empirical work casts doubt on whether adherence to the formula – and concluding a BIT to evince a creditable commitment to following it – produces enhanced capital flows or whether, even when they flow, this invariably produces the sustained economic development and beneficial spillovers anticipated. Columbia's Joseph Stiglitz and Harvard's Dani Rodrik, among others, have seeded doubts about neo-liberal growth strategies and whether history's success stories – from the Asian Tigers to the turn of the century industrializing United States – truly adhered to them. Others have emphasized the negative externalities often accompanying incoming capital flows, including more unequal income distribution, politically disruptive dislocations of people, and adverse social or environmental effects. Some have suggested that properly managing these requires more, not less, government.

Of course, the global economic meltdown – and the perception that this time it started with us – has also undermined confidence in Western states' and the IFFYs's advice on how best to achieve "good governance." IMF conditionality is viewed with more skepticism today – including by the IMF itself – which is trying hard to figure out how *it* will achieve good governance. This is particularly true for those who think – like many Argentineans – that IMF conditions led to the over 40 ICSID claims (face value said to be over $80 billion) against their country. The age is past when the United States could get away with handing its Model BIT circa 1984 to states and saying, as early BIT negotiators did, "here: this is the best recipe to establish absolutely minimum conditions for a successful economy." The United States' changing BIT sends a very different message: it says that even the United States is experimenting with the balance between the market and regulation and is no longer confident that there is a one-size-fits-all formula for success.

The newly chastened U.S. BIT is part of a larger trend. It may be part of the historical dialectic between champions of the market and regulation described by Karl Polanyni in his classic, <u>The Great Transformation</u>, or Amy Chua in <u>World on Fire</u>. We see it in scholarly and civil society challenges to the International Finance Corporation's advice (including with respect to its indices for "progress" produced in its annual "Doing Business" reports which confidently rank countries on how business-friendly is the national rule of law). Slipping confidence in the structures of global governance – and the perception that these failed to prevent the latest global economic crisis and were not even particularly relevant to the subsequent recovery -- has resulted in a more humble and slightly more transparent IMF, no longer as confident about having the answer and even inclined to reform its voting procedures. While most of us tout the IMF's contemplated governance reforms as efforts to "improve global governance," it is worth noting the obvious: the IMF's governance reforms are also likely to give more clout to distinct states, such as Brazil and India. Of course, the trend in favor of greater sovereign "policy space" in the investment regime finds echoes in demands made by many at the WTO's DOHA Round, and by trade scholars anxious to re-calibrate the GATT-covered agreements, to permit, for example, regulatory actions ostensibly demanded by the Covenant on Economic, Social and Cultural Rights (such as ostensible right to water or health). It is strongly endorsed by those international economic regimes that remain dominated by national laws with extraterritorial effects, such as what David Gerber's calls the global competition regime.

What Hollywood would call "the revenge of the state" is also suggested, of course, by the revival of, if not nostalgia for, old-fashioned government regulation, including in the United States. To the chagrin of the Tea Party movement, the actions of the Obama Administration suggest a belated backlash to the Reagan years which memorably portrayed "government as the problem." The touted revival of government regulation In the United States preceded Obama, of course, and included the adoption of Sarbanes -0xley but it certainly garnered public notice given governments' responses worldwide to the global economic crisis. The consequential impact on governmental involvement in the financial sector is particularly stark. Katharina Pistor points out how, starting with a series of transactions that began in the fall of 2007 that involved turning to sovereign wealth funds to secure fresh capital, our largest financial intermediaries have become increasingly dominated by governments. She reports that at least as of 2009, the largest stakeholder of the following banks was the United States government: AIG (85 stake), Bank of America (6), and Citigroup (32). The second largest stakeholder in Citigroup was also governmental: the government of Singapore Investment Corporation with an 11 percent stake. The Qatar Investment Authority was the leading stakeholder in Barclays (12) and Credit Swiss (8), while the UK government was the leading owner of HBOS (43), Lloyds (75), RBS (75). Pistor also notes the obvious: the global crisis has expanded the role of the home government of these banks from regulator (including as part of corporate governance as with respect to executive compensation) to that of capital provider or investor of last resort. She notes that even without formal voting rights, the government owners of these banks are in a position to exert substantial leverage over them and perhaps even vis-à-vis the home governments of these banks.

Whether we (or governments) should be pleased or distressed by these developments is not my concern here. It may very well be true that old-fashioned protectionism – including the alleged risk that it poses for the "outsourcing" of jobs – lies beyond our lawmakers' concerns over, for example, the state-owned enterprises of China. What is clear is that states' efforts to re-secure their borders and replenish their regulatory prowess responds at least in part to the fact that the state is making a comeback through the return of state-owned enterprises and the renewed clout of impressively endowed sovereign wealth funds, whether based in Norway, Qatar or Singapore. The changes to the investment regime respond in part to doubts about whether we should treat these entities –or long established Chinese owned enterprises -- as if they were no different than privately owned multinational enterprises operating for commercial gain. We are not as sure as we once were whether we should welcome all foreigners so long as they come with lots of cash.

What this means is that governments are empowering themselves along two dimensions. They are, as noted, re-entering the economic marketplace. Despite widespread privatization, they still or now control many enterprises that seek to invest or direct the investment strategies of SWFs. At the same time, they are shoring up their regulatory abilities to better protect themselves from others' exercises in "state capitalism."

Like the proverbial man armed with a hammer, much looks to me like a nail. The return of the state with respect to finance and investment may be part and parcel of the empowerment of the state that is now occurring outside international economic law. It is now a commonplace that the "war on terror" has given states a highly persuasive new rationale to enhance their powers – whether with respect to its use of force (as in Afghanistan and through drones) or enhanced surveillance over individuals and organizations. 9/11 has created a vast new battleground with respect to states and human rights. Lou Henkin's "S" word seems less curse word than blessing if "S" claims to be protecting us from non-state actors armed with WMDs. In both the context human rights regimes and in the context of BITs, we are now seeing states' recourse to their need to protect "security" as an end-run against rights-based arguments. Whether we like the comparison or not, there are strong parallels between these contentions – whether made in ICSID or before UN human rights treaty bodies – and Carl Schmitt's notorious "law of the exception." At least when it comes to security and perhaps more generally, the Lotus presumption – states can do whatever is not forbidden – may be making a comeback. Charles Tilly argued that "war made the state" and even our Supreme Court has suggested that the U.S. civil war made the United States. Threats to security empower governments. Today, as is suggested by Argentina's increasingly successful arguments before arbitral bodies, human security includes economic security. Perhaps that perceived threat, more than any other is remaking the investment regime – just as it appears to be remaking the laws of war.

Once we start appreciating how states empower themselves, many of the papers at this conference take on a somewhat different meaning. The many flaws in global governance highlighted may be conscious (and successful) efforts by states or groups of them to avoid supra-national regulation and not simply failings of the international legal imagination. Maybe fragmentation dilemmas among sub-international legal regimes and courts is the product of forum-shifting/shopping by empowered states whose interests are served by fragmented law. On the flip side, perhaps some of the things that we commend as "new forms of global governance" may also be something else when viewed through the "wrong" end of the telescope—that is as exercises of state power. The decision to expand the trade regime to encompass intellectual property, after all, is commonly seen as both a victory for global governance as well as a controversial exercise in hegemonic international law. In terms of the papers presented at this conference, might we suggest that the G20, for example, is less newfangled global governance and more (very old) “Concert of Europe”? Enough said.

Marian Pardo’s examination of Ecuador’s distinct approaches to privatization may suggest broader lessons. It suggests that all too often we international lawyers assume that a problem is solved once a treaty is concluded or an IO established and we do not examine carefully how the purpose of the treaty or of the IO might be altered, sometimes dramatically, with what states do by way of implementation. It reminds me of recent scholarship indicating that national institutions, practices and laws, and not the form or structure of global regulation, may determine the difference between success and failure. For example: Laurence Helfer and Karen Alter’s recent work on the experiences of the Andean Tribunal of Justice and the sharp differences between how preliminary references are deployed in that Tribunal as compared to the model on which it was based the European Court of Justice, provides a sharp reminder of the continued relevance of the states – and differing cultural and legal traditions -- in which our supra-national institutions are embedded. Theirs is a sharp rebuke to those who believe that there is a standard global law tool-box that can be deployed across the planet capable of yielding comparable results.

My “return of the state” should not be misunderstood. I am not suggesting that all states have been equally empowered, even within the changing investment regime. Sovereign equality, if it ever existed, has not miraculously returned. A more proper title for my remarks is the return of *some* states. The fact that the United States is leading the drive to “rebalance” the investment regime is no accident. Nor am I suggesting that those states that are re-balancing their BITs are necessarily doing so in the same way. Although many states are emulating the sovereignty-enhancing aspects of the post 2004 US Model BIT, not all states will enhance their relative powers over investors using the same provisions. Some, like

China, may decide to reserve greater policy discretion over their exchange rates or their ability to allocate foreign investors to particular parts of the country, for example. Other states may not be able to assert their own sovereign preferences in quite the same way as the Chinese or the US. Many African states will likely remain parties to older Chinese and other BITs based on pro-investor model treaties comparable to those of the US Model circa 1984. Not all states now in the investment regime will be able to deploy their "exit and voice" options equally. Despite its multilateral aspirations and effects, the international investment regime remains subject to bilateral leverage. Inter-state power dynamics will determine which state gets a real chance to re-negotiate its old treaties or leave ICSID. Nor are the political dynamics in investment arbitrations likely to benefit all respondent states equally.

Nor am I suggesting that states do not need to protect themselves from other states or that the empowerment of states means that states are empowering themselves. On the contrary, as the existence of SWFs suggest, SWFs may assert untoward powers vis-à-vis other states in which they invest. The United States is not empowered by Norway's or Qatar's SWF, but SWFs are examples of state empowerment.

Nor am I making a normative claim. I am describing reality not celebrating it. While some, like human rights advocates, have tended to assume that "the erosion of sovereignty is a bell-weather for progress," I make no such claim here. Nor do I claim the opposite. Perhaps restoring greater sovereign policy space is a needed corrective within the investment regime, perhaps not. My point simply is that it is happening and that both critics and proponents of the investment (and perhaps other international economic) regimes need to take this into account.

But my talk today does have a target: those many scholars – we all know who they are – who have for over a decade told us that the state is "withering away," is "waning," is in "decline," "retreat," is already gone, or perhaps was always a "myth." Those political scientists and lawyers have been a tad premature in declaring the end or death of the state. Perhaps some of them have confused their normative agenda with reality; some may have seen "global governance" as a purely binary proposition. Whatever the reason, they are wrong. The state is not being dismantled; indeed even with respect to so-called "failed states" the goal is to restore something that resembles a state because no one knows what to do with something that is not a state or part of one. The Westphalian system may be a blink of an eye given human history but we are living in its time. No one unfortunate enough to be outside what Martti Koskenneimmi's calls the "wonderful artificiality" of statehood – like Palestinians -- believes that it is a myth. State power and global governance are not defining end points in a zero sum game. In accordance with the insight of the Wimbledon case, both co-exist -- even if sometimes the pendulum swings more toward one side. At times, global institutions like the UN Security Council or the WTO Appellate Body may empower some states more than others. I am therefore definitely *not* suggesting that global governance is in decline in all or most areas or that attempts to make it better are futile. I am only suggesting that the state is making a comeback in some discrete areas.