State of Necessity as an Exemption from State Responsibility for Investments

University of Heidelberg, Max Plank Institute for Comparative Public Law and International Law and the University of Chile,
March 2008

Marie Christine Hoelck Thjoernelund

Table of Contents

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 13, 2009, p. 423-480.

I. Introduction

In the framework of international investments, the state of necessity as an exemption from state responsibility has become relevant since the social, economic and political crisis in Argentina that began in the late 90's and peaked in 2000 and 2001. This led Argentina to take emergency measures that affected the foreign investors with whom the country had agreements. This resulted in Argentina being taken, in turn, before the International Centre for Settlement of Investment Disputes (hereinafter, ICSID), mainly by the companies which in the 90's, had participated in privatization processes of certain public service sectors, such as energy. There are currently more than forty cases pending against Argentina at the ICSID.

This analysis will focus on the ICSID jurisprudence for this type of case, which has been based on the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (hereinafter BIT).

These cases are characterized by the fact that the Argentinean state has invoked as a defense that, during the crisis, it was in a state of necessity or emergency, according both to the BIT, and also to the rules of customary international law. The arguments invoked by Argentina suggest that the circumstances that the state faced in 2001 and 2002 allowed it to take actions that could harm investors and which in ordinary circumstances would have breached the BIT obligations.[1]

---

1 W. Burke-White, "The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System", University of Pennsylvania Law School, 2008, Paper 202, 5.

Arbitration panels had to make pronouncements in relation to this complex subject, and their decisions have not always agreed with each other, even when dealing with the same facts and based on the same rules.

The aim of this thesis is twofold. First, it will study the Argentinean case and the possible outcomes of the arbitrations which are still pending. These will decide whether the situation Argentina found itself in fulfilled the requirements to constitute a state of necessity that would allow Argentina to be exempted from responsibility. Second, the thesis will use this jurisprudence as a base for the analysis of the state of necessity as exemption from the state's responsibility in investment affairs, which may be useful for future situations.

Bearing in mind the proliferation of bilateral investment treaties, which guarantee a certain stability to investors, is it pertinent to question when a state is responsible for measures that affect the investor? Should a state be unable to take measures to deal with an internal crisis caused by its commitments to investment affairs? To what extent can the state of necessity be used as an exemption from these commitments? Clearly states have to watch their interests and their own survival, but if the exemptions from responsibility are not used restrictively, international commitments tend to disappear. This is one of the reasons why this matter requires special attention and an investigation of the Argentinean situation and the jurisprudence that has been generated by this situation in recent years is worth studying. The various factors which produce a situation that may be considered a state of necessity, and thus exempt a state from its responsibilities regarding the protection of foreign investments imposed by a BIT, will be studied.

The requirements for certain circumstances to be considered as a state of emergency under customary international law are very strict. The generally accepted requirements in article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts elaborated by the ILC are the following: (i) the measures taken are the only way for the state to safeguard an essential interest against a grave and imminent peril; and (ii) the act does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole. In any case, necessity cannot be invoked by a state as a ground for precluding wrongfulness if the inter-

national obligation in question excludes the possibility of invoking necessity, or the state has contributed to the situation of necessity.[2]

However, one should bear in mind that the BIT also contains emergency clauses, which exempt certain measures taken by the states in response to extraordinary circumstances from the substantive protection of the BIT. The relationship between the provisions of the BIT regarding this matter and customary international law is one of the most controversial and relevant points that has arisen from the ICSID arbitration awards that are the subject of this study. The positions of the parties and specialists with regard to the arbitration awards have also given rise to controversy. While Argentina asserts that the BIT has a self-judging character, the Claimants dispute this and the respective tribunal is required to review the circumstances that allowed the invocation of the state of necessity.

Returning to the requirements of necessity, this defense is excluded if the state has contributed to the situation of necessity. In this regard, it is interesting to point out here that cases will be studied where the non-compliance is due to a crisis of political, financial and social nature making it impossible to attribute the crisis to one factor only. It is clear that a state has influence over its governmental policies, and these will affect the result of the crisis.

Another interesting aspect is related to the requirement that the measures adopted are the "only way" to safeguard the interest at stake. No other alternative is possible. This prerequisite should be interpreted using reasonableness as a criterion as there will be cases in which the non-compliance, although it is not the only possibility, is the less onerous and less damaging possibility for the state, and the difference in relation to any other possibility will be great enough to consider it as the "only way" in the framework of the circumstances.

The factors that must arise for a state of necessity to be declared as an exemption from responsibility of a state when dealing with investments will be determined and the Argentinean situation and the awards pronounced on this matter will be described below. For this purpose, the Articles on State Responsibility and the abundant doctrine that surrounds its preparation and comments will be considered.

Following this, the ICSID jurisprudence on this matter will be studied, highlighting the elements that have been considered as requirements for a state of necessity as exemption from responsibility and the

---

2 ILC, Fifty-third Session, 2001, see Annex.

relationship between customary international law rules on state responsibility and treaty clauses.

Three awards will be studied in particular. All of them considered by ICSID arbitration panels. The first is the *CMS* arbitration against Argentina, the first award issued by ICSID on this matter, which also influenced the debate concerning its annulment process. The second is the case *LG&E* against Argentina, which takes a different position with respect to the defense in a state of necessity. Finally the case of *Sempra Energy* against Argentina will be looked at.

The ICSID jurisprudence which will be studied is problematic because of the contradictions the awards issued. These differences arise not only from a diverse fact appreciation but mostly from different legal approaches regarding the requirements for the state of necessity defense and also the relationship between customary international law and treaty provisions. The purpose and content of article XI of the BIT has also been heavily discussed, as will be shown below.

II. State of Necessity as a Circumstance Precluding the Wrongfulness of a Conduct of State

In this Chapter, the state of necessity as a circumstance precluding the wrongfulness of a conduct of a state not in conformity with international responsibility contended in the Draft Articles on State Responsibility will be analyzed. The history of the Draft Articles will be examined. The purpose is to determine which are the conditions required for a circumstance to preclude the wrongfulness of a conduct of a state.

1. State of Necessity as a Circumstance Precluding Wrongfulness

a. Regulation of State Responsibility

The responsibility of a state is regulated in the Draft Articles that establish the basic rules of international law regarding the international responsibility of states. At the request of the General Assembly to codify

international law on this subject, the ILC appointed its first Special Rapporteur[3] on State Responsibility in 1955.[4]

The regulation of the responsibility of states has developed gradually over the years.[5] The ILC itself has worked on this matter for more than forty years. The articles were developed through reports prepared by a number of successive Special Rapporteurs, debates in the Commission, and debates in the UN General Assembly.

At its Thirty-second Session, the Commission provisionally adopted on first reading part one of the Draft Articles, regarding the origin of international responsibility.[6] In 1996 the Commission presented the first reading of parts two and three and submitted the Draft Articles to the states for comments and observations. At its Fifty-third Session, it proposed the most recent set of Draft Articles on State Responsibility[7] with extensive comments annexed. The articles reflect to a large extent international law that exists on state responsibility, but also in some respect they have progressively developed the law.[8]

The object of the ILC work on state responsibility is to codify the rules governing state responsibility as a general and independent topic. It does not impose obligations on states; it defines the rules, which determine the legal consequences of a failure to fulfill international obligations.[9] There exist "primary rules" of international law, these are rules laying down substantive obligations for states, and "secondary rules", which are rules establishing (i) on what conditions a breach of a "primary rule" may be held to have occurred; and (ii) establish the legal consequences of this breach. Rather than attempting to define particular "primary" rules of conduct, the articles set out more general "secondary" rules of responsibility and remedies for breaches of a primary

---

3 The term "*Rapporteur*" is used in French.

4 R. Boed, "Sate of Necessity as a Justification for Internationally Wrongful Conduct", *Yale Human Rights and Development Law Journal* 3 (2000), 12 et seq.

5 A. Cassese, *International Law,* 2nd edition, 2005, 243.

6 ILC, Thirty-second Session, 1980, see Annex.

7 S.M. Perera, "State Responsibility, Ascertaining the Liability of States in Foreign Investment Disputes", *The Journal of World Investment & Trade* 4 (2005), 499 et seq.

8 Cassese, see note 5.

9 ILC, see note 6, 26.

rule.[10] They are divided in four parts. The first concerns the internationally wrongful act of a state, part two deals with the content of the international responsibility of a state, part three with the implementation of the international responsibility of a state and part four with general provisions.[11]

b. Circumstances Precluding Wrongfulness

Part one of the Draft articles is divided into five Chapters. Chapter I is entitled "General Principles" and deals with the definition of the fundamental principles. Chapter II, is entitled "Attribution of Conduct to a State" and is about the subjective element of an internationally wrongful act: the determination of the requirements for an act to be considered as an "act of the state" under international law. Chapter III "Breach of an International Obligation" deals with the objective elements of an internationally wrongful act. Chapter IV "Responsibility of a State in Connection with the Act of another State" regulates the cases in which a state participates in the commission of an international wrongful act.[12] The focus will be on Chapter V, which is the final Chapter of part one and is entitled "Circumstances precluding Wrongfulness". It defines circumstances which may have the effect of precluding the wrongfulness of an act of a state not in conformity with its international obligations. Using James Crawford's terms,[13] it specifies six "justifications", "defences" or "excuses" precluding the wrongfulness of conduct which would otherwise be a breach of an international obligation. These circumstances are consent, countermeasures, *force majeure* and fortuitous event, distress, state of necessity and self-defense. Even though there are some parts of the Draft Articles that are still under discussion, this Chapter is almost unanimously accepted as a clear reflection of the rules of customary international law.

There is an international wrongful act of a state when a conduct is attributable to a state under international law and when the conduct

---

10 J.R. Crook/ D. Bodanzky, "Symposium: The ILC's State Responsibility Articles: Introduction and Overview", *AJIL* 96 (2002), 773 et seq.

11 W. Czaplinsky, "UN Codification of Law of State Responsibility", Berichte und Beiträge, *AVR* 41 (2003), 62 et seq.

12 ILC, see note 2.

13 J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, 2002, 5-6.

constitutes a breach of an international obligation.[14] Two basic conditions have to be fulfilled in order to justify a state's international responsibility: a breach of an international obligation and the attribution of the act to the state.[15] The principle of the Draft Articles, enunciated in article 1, is that every international wrongful act of a state entails the international responsibility of that state. Ago, who was in charge of elaborating the reports on this subject explained: "Chapter V is intended to define those cases in which, despite the apparent fulfillment of the two conditions for the existence of an internationally wrongful act, its existence cannot be inferred owing to the presence of a circumstance which stands in the way of such an inference".[16]

Why does one talk about "circumstances precluding wrongfulness" and not about "circumstances precluding responsibility"? The Commission has stated that a differentiation between these expressions should be made. The idea of wrongfulness suggests that a conduct of state conflicts with an international obligation, and the idea of responsibility indicates the legal consequences of such conduct.[17] There is a difference between the occurrence of a circumstance precluding wrongfulness and the end of the obligation itself. "The circumstances in chapter V operate as a shield rather than a sword."[18]

The Thirty-second Session of the ILC dealt with the circumstances precluding wrongfulness that had been discussed in the Eighth Report of Ago, and were still outstanding: state of necessity and self-defense.[19]

c. State of Necessity

The ILC provisionally adopted the text of article 33 (now article 25) of the Draft Articles on State Responsibility in 1980. At its Thirty-second Session, the Commission stated: "The term 'state of necessity' is used by the Commission to denote the situation of a state whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another state."[20]

---

14 R. Ago, Eighth Report on State Responsibility, see Annex, 27.
15 Czaplinsky, see note 11, 62-82.
16 Ago, see note 14, 27.
17 Ibid.
18 ILC, see note 2.
19 ILC, see note 6.
20 Ibid., 34.

The Commission, at the above-mentioned session, expressed its opinion in relation to the positions on the admissibility or non-admissibility of the state of necessity as a circumstance precluding the wrongfulness of an act of the state not in conformity with an international obligation. It noted that the idea that necessity can, exceptionally, justify state conduct contrary to an international obligation is explicitly accepted by classical writers of international law. But this acceptance is accompanied with very restrictive conditions.[21] Article 25 reflects the state of customary international law on this subject. It is "the learned and systematic expression of the law of the state of necessity developed by courts, tribunals and other sources over a long period of time."[22]

The ILC clearly establishes that "there is substantial authority in support of the existence of necessity as a circumstance precluding wrongfulness. It has been invoked by states and has been dealt with by a number of international tribunals."[23] Prior to that, in the *Gabčíkovo-Nagymaros* case,[24] the ICJ referred to article 33 of the first reading of the Draft Articles asserting: "In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading."[25]

Analyzing the history of this circumstance, it should be pointed out that the early doctrine about necessity was directly related to the notion of "self-preservation". When a danger that threatened the existence of the state arose, the state was authorized to take measures for its own preservation, even if they implied the breach of an international obligation. The notion of necessity was considered as a "right" of the state. This concept developed into the "essential interest doctrine".

---

21 Ibid., 47.

22 ICSID, Award in the proceeding between Sempra Energy International (Claimant) and Argentine Republic (Respondent), see Annex, 102.

23 ILC, see note 2.

24 This case concerns a dispute between Hungary and Slovakia concerning a treaty for a project of construction of dams on the Danube River for the production of electricity, among other purposes. Hungary had suspended the development of the project, alleging that it would impair the environment. It justified its conduct on a "state of ecological necessity".

25 Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports 1997, 7 et seq., 42.

Ago was requested by the ILC to prepare a comprehensive study of the concept of necessity in international law. His work on this topic had great influence on modern doctrine. He supported the idea that "the claim of necessity is not a right coming from the right of self-preservation, but rather an excuse to breach a state's international obligation when it is necessary to protect an essential interest."[26]

d. State of Necessity according to Article 25 of the Draft Articles

According to the ILC "necessity" in article 25 denotes exceptional cases where "the only way a state can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligations of lesser weight or urgency". However, to invoke it, a state must accomplish the conditions narrowly defined in article 25.

One of the first questions that came to mind when analyzing this circumstance precluding wrongfulness was what are the differences between necessity and the other circumstances precluding wrongfulness, especially *force majeure*. At first sight it might be confusing. According to the principles that rule state responsibility one can find among the exemptions from responsibility both circumstances: *force majeure* and the state of necessity. *Force majeure* is characterized by an irresistible force or an unforeseen situation beyond the state's control, which makes it impossible, under the circumstances of the case, to comply with the respective international obligation. A state of necessity assumes that one is not facing a *force majeure* situation, and it is expressed in the regulations in negative terms, that is to say, the state will not be able to claim necessity as an exemption from responsibility unless the requirements are clearly present. In other words, the obligation is not absolutely impossible to comply with; the non-compliance is justified to safeguard an essential state interest against a serious and imminent peril.

The ILC first notes the differences between this circumstance precluding wrongfulness and the others included in Chapter V. The first difference is that self-defense and countermeasures depend on a prior conduct of the state affected by the breach of an international obligation. The existence of a state of necessity is independent of the conduct of the affected state.[27]

---

26 Boed, see note 4.

27 ILC, see note 2, 80.

The distinction between a state of necessity and *force majeure* may be difficult. A characteristic that is common in both circumstances is that the state must have been induced by an external factor to adopt the conduct not in conformity with an international obligation. The difference is that necessity does not involve involuntary or coerced conduct. The ILC explained the main differences at its Thirty-second Session: "the factor is one making it materially impossible for the people whose conduct is attributed to the State either to adopt a conduct in conformity with the international obligation or to know that his conduct conflicts with the conduct required by the international obligation. The conduct adopted by the state is therefore either unintentional *per se* or unintentionally in breach of the obligation. In the case of the state of necessity, on the other hand, the deliberate nature of the conduct, the intentional aspect of its failure to conform with the international obligation are not only undeniable but in some sense logically inherent in the justification alleged; invoking a state of necessity implies perfect awareness of having deliberately chosen to act in a manner not in conformity with an international obligation."[28]

There are also differences between necessity and distress. Regarding this matter, the ILC stated that: "The state of necessity is a necessity of the state ... The situation of extreme peril alleged by the state consists ... in a grave danger to the existence of the state itself, to its political or economic survival, the maintenance of conditions in which its essential services can function, the keeping of its internal peace ..."[29]

2. Requirements of a State of Necessity

The Commentary on the Draft Articles of 2001 clearly indicates that this justification is exceptional in a number of respects. The ICJ noted this in the *Gabčíkovo-Nagymaros* case. It stated that: "The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis."[30] Necessity as a circumstance precluding wrongfulness must fulfill very strict requirements to be considered

---

28 ILC, see note 6, 34.

29 Ibid., 35.

30 See note 25, 42.

as a valid excuse for the non performance of an international obligation. The latter is reflected in article 25. The ILC highlighted that, to emphasize the exceptional nature of a state of necessity and prevent possible abuses by the states invoking it, article 25 is written in negative language: "Necessity may not be invoked … unless."[31]

Article 25 (1) of the Draft Articles defines necessity as the condition where an otherwise unlawful act is performed and such act[32] "(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole". Para. 2 adds that "In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity."

This article establishes in para. 1 two conditions without which necessity may not be invoked and excludes, in para. 2 two situations entirely from the scope of the excuse of necessity. Based on article 25, two sets of questions have to be answered to determine whether a state may validly invoke necessity as a circumstance precluding wrongfulness. The first set includes: (i) whether an "essential interest" is at risk; (ii) whether the threat to such interest rises to the intensity of "grave and imminent peril"; (iii) whether the state had other means of protecting the interest; and (iv) the balance of interests involved. The second set of questions contains exceptions to the possibility to invoke the necessity defense under special circumstances. Consequently, even when the first set of questions is answered in favor of the state that breaches an international obligation, the necessity defense is unavailable where: (i) the international obligation in question excludes the possibility of invoking necessity or (ii) the state in question has contributed to the situation of necessity.[33] Thus, necessity may not be argued when the obligation that the state breaches rules out, either expressly or implicitly, the possibility of invoking this ground for precluding wrongfulness.[34] The Commission stated that "the concept of 'necessity' accepted in international legal relations is very restrictive. It is restrictive in as far as it regards the determination of the essential importance of the interest of the state

---

31 ILC, see note 2.

32 Cassese, see note 5, 255.

33 ILC, see note 2.

34 Cassese, see note 5, 255.

which must be in jeopardy in order for the plea to be effective; it is also restrictive in regard to the requirement that the conduct not in conformity with an international obligation of the state must really be, in the case in question, the only means of safeguarding the essential interest which is threatened."[35]

In order to study each one of the above-mentioned requirements that must be fulfilled for the state of necessity to be valid, the work of the ILC between 1969 and 1980 will be reviewed. Ago produced eight reports and an Addendum to the Eighth Report. The Eighth Report is about the justifications or excuses for an internationally wrongful act ("Circumstances Precluding Wrongfulness") and the Addendum specifically deals with the state of necessity. The first question that the ILC had to answer was whether to incorporate a provision that permits a state to invoke a state of necessity as a justification for the breach of an international obligation. The ILC answered that question affirmatively. The next task was to determine what are the conditions and prerequisites that must exist to permit a state to invoke this defense.[36] This issue had been previously dealt with in Ago's reports. The idea of adding or not a norm considering the state of necessity as a possible circumstance precluding the wrongfulness of an act that breaches an international obligation was not always viewed favorably during the history of the Draft Articles since this exemption had been indiscriminately used by the states in order to cease fulfilling their international obligations. However, it was hard not to accept that there are certain cases in which a state could be affected by circumstances that would make it impossible to fulfill an international obligation. The task was then to set up the requirements that had jointly to be fulfilled. The text had to be precise enough so that the use of this justification should be exceptional and the requirements had to be strict enough to prevent misuse.

For the study of this topic, the study will be based mainly on the Eighth Report and its Addendum, the work of the Thirty second Session and the Fifty-sixth Session of the ILC.

---

35 ILC, see note 6, 41.

36 Ibid., 49.

a. The only Way to Safeguard an Essential Interest

-Existence of an Essential Interest

The first condition that must be fulfilled is that necessity may only be invoked if it is the only way for the state to safeguard an essential interest against a grave and imminent peril.[37] In its Report of the Thirty-second Session the ILC considered that the first task was to determine which interests of a state must be in danger to justify an act breaching an international obligation. The ILC considered that the best way for expressing this requirement was to indicate that an essential interest of the state must be involved.[38]

An important point that has to be considered: an essential interest of a state does not mean that the very "existence" of the state must be in danger. Ago declared in the Addendum to the Eighth Report: "it should be stressed that the concept of self-preservation and necessity are in no way identical, nor are they indissolubly linked in the sense that one is merely the basis and justification of the other".[39] He also explained that, according to the opinion that predominated at the time of the report – which is the same today – a state of necessity may be invoked to preclude the wrongfulness of a conduct that was adopted under certain circumstances in order to protect an essential interest of a state, without its existence being in any way threatened.

The next question is, logically, what interests shall be considered "essential". The ILC shows that the plea of necessity has been invoked to preclude wrongfulness of acts not in conformity with an international obligation to protect a wide variety of interests, including safeguarding the environment or ensuring the safety of the civilian population.[40] The ILC considered that it was pointless to try to identify or categorize these "essential" interests. Whether a particular interest is or is not essential, according to this opinion, will depend on all the circumstances in a specific situation. Accordingly, they should be judged on a case by case basis.[41] The Commentary considered this position and

---

37 ILC, see note 2.

38 ILC, see note 6, 49-50.

39 R. Ago, Addendum to the Eight Report on State Responsibility, see Annex, 17.

40 ILC, see note 2, 202 seq.

41 ILC, ibid.

stated that the extent to which a given interest is essential depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the state and its people, as well as to the international community as a whole.

-Serious and Imminent Peril

The ILC highlighted that the peril must be extremely serious, that it must be a threat to the interest at the actual time. It points out that only when the interest is threatened by a serious and imminent peril is the condition satisfied. According to the ILC, the danger has to be objectively established and not merely apprehended as possible. In addition, it has to be imminent. According to the ILC, the term "imminent" is used in the sense of "proximate".[42] The ILC also states an explanation in relation to this part of the condition. It is not enough to be facing a contingent or possible danger. The threat to that essential interest "has to be extremely serious, representing a present danger to the threatened interest."[43] The ICJ made a pronouncement on this requirement in the *Gabčíkovo-Nagymaros* case, asserting that the word "peril" evokes the idea of risk and that is what distinguishes "peril" from material damage. According to the ICJ, a state of necessity could not exist without a peril duly established at the relevant point in time; the mere apprehension of a possible peril is not enough. It also pointed out that the peril constituting the state of necessity must at the same time be "grave" and "imminent".

-The only Way to safeguard the Essential Interest

The ILC is very clear on this aspect indicating that the measures taken must be the "only way" available to safeguard that interest. It states: "The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient."[44] The ILC also explained what is meant by "only way" in this context. It is not limited to unilateral actions or solutions, but also includes actions in cooperation with other states or international organizations. In addi-

---

42 ILC, see note 2, 202.

43 Ago, see note 39, 19.

44 ILC, see note 2, 203.

tion, the conduct of the state must be indispensable for the preservation of the interest that was in danger. If the conduct of the state goes beyond what is strictly necessary for this purpose it will constitute a wrongful act. Once the peril to the essential interest has been avoided, there is no longer a circumstance precluding wrongfulness and the state shall adopt its conduct according to its international obligations.

According to the Thirty-second Session of the ILC, "the adoption by that state of a conduct not in conformity with an international obligation binding it to another state must definitely have been its only means of warding off the extremely grave and imminent peril which is apprehended; in other words, the peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance with international obligations."[45] The ICJ considered, for example, that in the *Gabčíkovo-Nagymaros* case Hungary could have resorted to other means in order to respond to the dangers that it apprehended.[46]

b. The Conduct of the State does not seriously impair an Essential Interest

Another issue that the ILC and Ago considered was the interest of the state towards the existing obligation.[47] The interest protected by the international obligation must be inferior to the threatened interest of the state with which the necessity is alleged.[48]

According to article 25, the second condition for invoking necessity established in subpara. 1 (b), is that the conduct in question does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole. The Commentary states that the interest relied on must outweigh all other considerations, not merely from the point of view of the acting state but on a reasonable assessment of the competing interests.[49] Over and above the conditions in article 25 (1), article 25 (2) lays down general limits to any invocation of necessity. This is made clear by the use of the words "in any case".[50]

---

45 ILC, see note 6, 49.
46 ICJ, see note 25, 44-45.
47 ILC, see note 6, 41.
48 Ago, see note 39, 19.
49 ILC, see note 2, 203.
50 Ibid., 204.

c. The Obligation does not exclude the Possibility of invoking Necessity

Subpara. 2 (a) concerns the cases where the international obligation in question excludes the possibility of invoking necessity. After defining what conditions shall be met for necessity to be invoked, the ILC dealt with the question of "whether the invocation of a state of necessity should not be totally barred *a priori* in cases in which the conduct requiring justification falls in conflict with certain particular categories of international obligations."[51]

There are some obligations which have been especially established to be binding under special circumstances. Some of them expressly establish that necessity may not be invoked. But the simple silence of the international obligation as such does not necessarily mean that the obligation admits the allegation of necessity. The ILC concurred on this issue, "In the view of the Commission, the bar to the invocation of the state of necessity then emerges implicitly, but with certainty, from the object and the purpose of the rule, and also in some cases from the circumstances in which it was formulated and adopted."[52]

d. The State has not contributed to the Situation of Necessity

Subpara. 2 (b) establishes that necessity can not be invoked if the responsible state has contributed to the situation of necessity. The ILC explains "for a plea of necessity to be precluded under subparagraph (2)(b), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. Subparagraph 2 (b) is phrased in more categorical terms than articles 23 (2) (a) and 24 (2) (a), because necessity needs to be more narrowly confined."[53]

The ILC also highlighted that the state invoking a state of necessity must not itself have provoked, either deliberately or by negligence, the occurrence of the state of necessity. Ago expressed the same idea in the Addendum to the Eighth Report indicating that the occurrence of a threat to such an essential interest must be entirely beyond the control of the state whose interest is threatened.[54]

---

51 ILC, see note 6, 49.

52 Ibid., 51.

53 ILC, see note 2, 205.

54 Ago, see note 39, 17.

After analyzing the factors it will be noted that the above-mentioned conditions must coexist to create a situation that allows a state to invoke the plea of necessity.[55] Regarding the question who shall decide if the conditions have been met, the ILC stated that the state that is invoking necessity shall not be the only judge of the occurrence of the conditions in a particular case. It is recognized, however, that at the time of adopting a particular plan of action in response to a situation of necessity, the state will be the only one to decide, since it does not have the time to submit the case to other authorities. Nevertheless, after that, the affected state will be entitled to object that the conditions for the necessity defense have not been met.[56]

3. Argentina's State of Necessity Defense in ICSID Procedures

Between 2001 and 2002, Argentina experienced one of the worst economic crises in its history. According to the IMF, production fell about 20 per cent over three years, the government defaulted on its debt, the banking system was paralyzed, and the Argentine peso, which used to be fixed to the US$, reached lows of 3.90 pesos per US$.[57]

Argentina adopted measures to deal with the crisis. Among others, it enacted the Public Emergency and Exchange Regime Reform Act (hereinafter, the "Emergency Law"), declaring a state of public emergency and delegating social, economic, administrative and financial exchange powers to the executive.[58] Within these measures, the devaluation of the peso through the termination of the currency board has to be considered which had pegged the peso to the US$, the "pesification" of all obligations and the effective freezing of all bank accounts through a series of measures known as "Corralito".[59] Argentina also suspended the United States Producer Price Index tariff adjustment and froze gas

---

55 ILC, see note 6, 49.

56 Ibid.

57 IMF, "Lessons from the Crisis in Argentina", prepared by the Policy Development and Review Department in consultation with the other Departments, available at: <http://www.imf.org/external/np/pdr/lessons/100803.htm> approved by Timothy Geithner of 8 October 2003, 3.

58 S.F. Hill, "The 'Necessity Defense' and the Emerging Arbitral Conflict in its Application to the U.S. – Argentina's Bilateral Investment Treaty", *Law and Business Review of the Americas* 13 (2007), 547 et seq.

59 Burke-White, see note 1, 4.

distribution tariffs.[60] That situation led investors to initiate arbitration procedures under the ICSID requesting reparation. Many of those foreign investors were engaged in the provision of public utilities.

One should bear in mind that in the past decades, the international investment law regime had expanded; increasing the number of BITs. This expansion has been accompanied by the development of ICSID.[61] ICSID provides a voluntary system of arbitration for the resolution of investment disputes between states and foreign investors.[62] Argentina is currently the most heavily litigated state in this arbitration system,[63] with dozens of similar cases pending.[64] Three cases concerning a number of restrictive measures taken by the Argentinean government during the crisis will be analyzed. When the government decided to suspend the United States Producer Price Index tariff adjustment and freeze gas distribution tariffs, those investors initiated arbitration proceedings under the aegis of the ICSID.[65] Argentina's main defense in those arbitration procedures has been the invocation of a state of emergency or necessity.

The first award to be analyzed is the one issued within the *CMS Gas Transmission Company v. Argentine Republic CMS* case (CMS case) issued on 12 May 2005. This was the first time that an ICSID arbitral tribunal resolved a case regarding a claim presented by an investor who considered that his investments and rights were diminished due to the emergency measures taken by Argentina in face of the crisis. This, in itself, makes the case emblematic. This is particular relevant if one considers that the second award that will be analyzed is the one issued in the *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic* (hereinafter, the LG&E case), dated 3 October 2006, which maintained a diametrically opposite position in relation

---

60 J.E. Vinuales, "State of Necessity and Peremptory Norms in International Investment Law", available at <http//:www.works.bepress.com/jorge_vinuales/1/, 2>, 2007.

61 Ibid., 1.

62 C.B. Lamm/ A.C. Smunty, "The Implementation of ICSID Arbitration Agreements", ISCID Review, International Centre for the Settlement of Investment Disputes, Volume 11, 1996, 64.

63 K. Jürgen, "ICSID Annulment Committee Rules on the Relationship between Customary and Treaty Exceptions on Necessity in Situations of Financial Crisis", ASIL Insights, Volume 20.

64 Vinuales, see note 60.

65 Vinuales, see note 60.

to the state of necessity. While in the *CMS* case it was resolved that the crisis did not met the requirements of a state of necessity, in the *LG&E* case the Tribunal stated that for a period of sixteen months Argentina was in fact in a state of necessity and had no obligation to consider the investors for the measures taken during that period. This award has been the only one, up to now, that has supported the existence of a state of necessity. The *CMS* and *LG&E* awards have generated many commentaries because both panels have reached contrasting conclusions on the invocation by Argentina of a state of necessity, despite the fact that the factual background was the same in both cases.[66]

The *CMS* Tribunal begins with an analysis of customary international law, considering that article 25 is a clear reflection of it, and then applies necessity according to the clauses of the US-Argentina BIT emergency clauses. On the other hand, the *LG&E* award first examines article XI of the US-Argentina BIT, and then, to reaffirm its conclusions, it analyzes article 25.[67]

Finally, an award issued on 28 September 2007, in the case *Sempra Energy International v. Argentine Republic* case (hereinafter, Sempra case) will be studied. Here the reasoning in relation to the state of necessity is much more developed. The *Sempra* award clarifies several points that in the *CMS* award were obscure and were therefore open to criticism by authors and by the Annulment Committee.

The part of the three awards that refers to a state of necessity will be studied further, summarizing and arranging the conclusions of the Tribunals on this point, including the opinion of the Annulment Committee in the *CMS* case.

III. The ICSID Case CMS Gas Transmission Company v. Argentine Republic

1. Background

This case was brought to the ICSID by *CMS* (hereinafter, the Claimant), a company incorporated in the United States of America, against Argentina (hereinafter, the Respondent). *CMS* initially alleged the breach of the BIT because Argentina had interrupted the adjustment of

66 Ibid.
67 Ibid.

the tariff formula, according to which the tariffs of gas transportation would be adjusted in line with a United States index. At the time of making the investment, Argentina had granted *CMS* the right to calculate tariffs in US$ and then convert them to pesos at the prevailing exchange rate, and to adjust tariffs every six months to reflect changes in inflation. These rights were enshrined in the Argentinean law and in the license granted to *CMS* for a period of 35 years (until 2027).[68] Later, *CMS* also objected to the emergency measures adopted by the Argentine government to deal with the above mentioned crisis. Arbitrators in this case were Marc LaLonde, appointed by *CMS*, Francisco Rezek, appointed by Argentina, and Francisco Orrego Vicuña, who served as President of the Tribunal.[69]

2. State of Necessity Defense

CMS claimed that the measures at issue were in violation of several of Argentina's obligations under the Argentina-US BIT and requested compensation of US$ 261 million (the decreased value of its shares in TGN plus interest and costs). Argentina argued that if the Tribunal should conclude that there was a breach of the BIT, it should be exempted from liability because of the existence of a state of necessity.

This argument was supported by the severe economic, social and political crisis that Argentina went through. According to this defense, the state of necessity based on the crisis would exclude any wrongfulness of the measures adopted by Argentina. In particular, in the view of the Respondent, it would eliminate damages compensation.[70]

a. Necessity under Customary International Law

In relation to customary international law, Argentina invoked several cases, like the *Gabčíkovo-Nagymaros* case, the *French Company of Venezuelan Railroads* case and the *Dickson Car Wheel Co.* case, among others. Argentina also invoked the work of the ILC, which was studied

---

68 Hill, see note 58.

69 L.E. Peterson, "First domino falls on Argentina as tribunal rules in financial crisis arbitration", available at: <http://www.iisd.org/investment/invest-sd/archive.asp> *Investment Law and Policy News Bulletin*, 27 May 2005, International Institute for Sustainable Development.

70 ICSID award in the CMS case, see Annex, 88.

in the first part of this article. It stated that the crisis met the requirements established in article 25 of the Draft Articles.

Responding to this point, the Tribunal held that, in the Respondent's view: "the Argentine state was not only facing a serious and imminent peril affecting an essential interest, but did not contribute to the creation of the state of necessity in a substantive way."[71] Argentina declared that the situation of necessity was caused mostly by exogenous factors. Developing the arguments to demonstrate that the critical situation of Argentina fulfilled the conditions required to constitute a state of necessity in accordance with customary international law, Argentina also asserted that the measures it had adopted and in particular the pesification of the contractual relations were the only ones available to protect the economic interests affected and did not impair an essential interest.[72]

In the Claimant's view, Argentina had not fulfilled the conditions required under article 25. Recognizing that the crisis was severe, it asserted that it did not involve a "grave" and "imminent" peril, and that the Respondent had not established that it had not contributed to the crisis.

The Tribunal solved the issue about the state of necessity starting with its conclusions in relation to the state of necessity under customary international law. It is important to highlight this point, since it will illustrate an important difference between this case and the *LG&E* case, and it will also be mentioned in the resolution of the Annulment Committee of the *CMS* award.

The Tribunal began its analysis by stating that article 25 "adequately reflects the state of customary international law on the question of necessity".[73] It should be noted that article 25 of the Draft Articles which contends customary international law was not in doubt neither by any of the parties nor by the Panel in any of the three ICSID cases.

According to this award, the existence of necessity as a circumstance precluding wrongfulness is not disputed and there is consensus about its exceptional nature. The fact that article 25 is written in negative terms is evidence of the restrictions imposed on a state to invoke this circumstance. The Tribunal also noted this point. Furthermore, the Panel explained that the reason for such restrictiveness is that if those restrictions are not imposed any state might easily not fulfill its interna-

---

71 Ibid., 90.

72 Ibid., 90.

73 Ibid., 91 to 96.

tional obligations.[74] The Tribunal then analyzed whether the Argentinean crisis did or did not meet the conditions set out in article 25.

-Essential Interest of the State

The Tribunal concluded that the issue on this matter was to determine the seriousness of the crisis. The need to avoid a major crisis, with all the social and political consequences that it implied, it is said, might constitute an essential interest of the state.[75] The Panel held that it believed that the crisis was severe. Nevertheless, it asserted that this does not mean that wrongfulness should be precluded as a matter of course under the circumstances. This means that the seriousness of the crisis does not automatically preclude the wrongfulness of the measures taken. The conclusion of the Tribunal on this point was not really decisive, since it finally stated that: "It follows the relative effect that can be reasonably attributed to the crisis which does not allow for a finding on preclusion of wrongfulness."[76]

-Serious and Imminent Peril

On this matter, the Tribunal asserted that it believed that the situation was serious enough to justify the actions of the government to prevent an escalation and risk the total collapse of the economy. On this subject, and directly related to the question of the essential interest, it declared "but neither does the relative effect of the crisis allow here for a finding in terms of preclusion of wrongfulness."[77] As can be seen, the decisions of the Tribunal in relation to these two first points were not conclusive but they were limited to state that the crisis had been really serious, but that the situation itself did not imply that the responsibility had to be exempted.

---

74 Ibid., 91 to 96.
75 Ibid., 93.
76 Ibid., 93.
77 Ibid., 94.

-The Measures were the "only way" to safeguard an essential Interest

The Tribunal accepted that Argentina had difficulties, albeit debatable ones. The positions of the parties and the economists were very divergent on this point. Some supported the measures adopted by the Argentine government, others analyzed a broad variety of alternatives that Argentina was deemed to have had at the time of the crisis. Determining which of those proposed alternatives would have been better was something that the Tribunal considered beyond its scope. It was not the Tribunal's task to determine what measures the government should have taken to remedy the financial crisis. Furthermore, it was almost impossible to determine – even if prestigious economists try doing so – what were the best measures in a case like this.[78]

The Tribunal deferred to the ILC in this matter. As mentioned above, the ILC highlighted that the plea of necessity is "excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient."[79] According to the Tribunal, this commentary "is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available."[80] Therefore, the Tribunal concluded that Argentina had other means available to deal with the crisis, and did not meet the requirements imposed by article 25 of the Draft Articles. In relation to this requirement, the Tribunal used the extremely restrictive interpretation made by the ILC. As was mentioned in the first part of the paper, this is the most direct and authentic interpretation of the Draft Articles. Both the parties and the Tribunal accepted that the Draft Articles, although not an international convention, contain the norms of customary international law on this matter and were applicable.

-The Measures do not seriously impair an essential Interest of the State or States towards which the Obligation exists, or of the International Community as a Whole

According to the Panel, the obligations towards another state are those set out in the BIT. This condition will be fulfilled, in this case, with regard to the United States and not to the specific investor, *CMS.*

78 Ibid., 94.

79 ILC, see note 2, 203.

80 ICSID, see note 70, 94.

The Tribunal analyzed this subject by considering the state's obligations according to the BIT provisions. Nevertheless as far as the international community as a whole was concerned, there was no indication that it was affected in any relevant way. The resolution of the Tribunal in this sense seems to be reasonable as the real interests that were affected in this case correspond to an enterprise belonging to the private sector, without considering this situation as one that goes against the interests of the international community as a whole.

The Tribunal merely mentioned the latter within the analysis of article 25, leaving aside the analysis of the first part of this requirement – that the measures adopted do not seriously impair an essential interest of the state or states towards which the obligation exists – to be studied under the headline "The Emergency Clause of the Treaty", which deals principally with article XI of the BIT (hereinafter, the Emergency Clause).

Within the analysis of the Emergency Clause, the Tribunal decided whether the conduct of the Respondent did or did not impair an essential interest of the state or states towards which the obligation exists. It was said that if the BIT exists it must be assumed that this is an important interest of the state parties. Whether it is essential or not is difficult to say, according to the Tribunal. The present author agrees with the Tribunal in the sense that in this kind of treaties, although the state has an interest in the protection of its investors, it is the investor rather than the state itself who is mainly affected. [81]

After analyzing requirements, the Tribunal evaluated the absolute prohibitions to invoke necessity established in para. 2 of article 25 of the Draft Articles.

-The International Obligation in Question does not exclude the Possibility of invoking Necessity

The Claimant argued that this case is precisely one of those in which the international obligation in question excludes the possibility of invoking necessity. According to the Claimant, the object and purpose of the BIT was to protect investors against economic difficulties, and be-

81 Ibid., 103.

cause of that, the BIT excluded reliance on such difficulties for non-performance.[82]

This matter was resolved by observing the BIT clauses in the corresponding part of the award. The Tribunal recognized that there were some BITs specially designed to be in force in cases of necessity and emergency. Concerning this BIT it stated that the treaty was designed to protect investments at a time of economic difficulties or other circumstances. The question that had to be answered, was how serious those economic difficulties might be. The Tribunal held that "a severe crisis cannot necessarily be equated with a situation of total collapse."[83] Finally, it explained that there were some consequences arising from the crisis and "while not excluding liability or precluding wrongfulness from the legal point of view they ought nevertheless to be considered by the Tribunal when determining compensation."[84]

The reasoning of the Tribunal on this matter is not convincing. It turns again on the issue of the gravity of the crisis. On this point, the answer should be found on the sole analysis of the international obligations, without considering the concrete circumstances that are invoked as necessity. It should be an "abstract" test and not a "concrete" one. Finally, the Tribunal does not really answer the question of whether the BIT does or does not exclude the possibility of invoking necessity.

-The State has not contributed to the Situation of Necessity

The Tribunal used the ILC interpretation of article 25, referring to the clarification that this contribution must be "sufficiently substantial and not merely incidental or peripheral."[85] It recognized that the causes that occasioned the crisis could not be qualified as completely endogenous (as the Claimant suggested) or exogenous (as the Respondent sustained), but they included domestic and international dimensions.[86] According to the Panel, this is a natural consequence of the operation of the global economy, where domestic and international factors interact.

---

82 Ibid., 97.
83 Ibid., 102.
84 Ibid., 102-103.
85 ILC, see note 2, 205.
86 ICSID, see note 70, 95.

The Tribunal then stated that the issue was to determine whether the contribution of Argentina had or had not been sufficiently substantial.[87] The Tribunal concluded that Argentina, in fact, had significantly contributed to the crisis. The analysis went through the causes of the crisis, considering that "government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter."[88]

The final conclusion of the Tribunal regarding the necessity defense under customary international law was that there are "elements of necessity partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test. This in itself leads to the inevitable conclusion that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts."[89]

b. Necessity under the Clauses of the Argentina – U.S. BIT

There are specific provisions of the BIT that deal with this matter. Article XI of the BIT provides: "This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."[90]

Article IV (3) of the BIT provides: "Nationals or companies of either Party whose investments suffer losses in the territory of the other party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that agreed for its own companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measure it adopts in relation to such losses."[91]

---

87 Ibid., 95.

88 Ibid., 95-96.

89 Ibid., 96.

90 Article XI, Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investments.

91 Ibid.

In relation to the analysis of article XI, both parties presented expert opinions. In the case of *CMS*, the expert informed, mainly, on the subject of determining whether article XI had or had not a self-judging character. The Tribunal focused on the two points that were dealt with above: whether the object and purpose of the BIT excludes the possibility of invoking necessity and if the act in question does seriously impair an essential interest of the state or states towards which the obligation exists.

The third issue to be determined was, according to the Tribunal, whether article XI can be interpreted in such a way as to provide that it includes economic emergency as an essential security interest. For the Claimant, "economic crises do not fall within the concept of 'essential security interests', which is limited to war, natural disaster and other situations threatening the existence of the state."[92] Another argument of the Claimant was that article XI does not allow the denial of benefits under the BIT. With regard to the abovementioned article IV (3) of the BIT, in its view it did not include economic emergency, and even if it did, *CMS* should still be entitled to full protection under the most favored nation clause.[93]

In the Respondent's view, the mentioned articles of the BIT provide "for the *lex specialis* governing emergency situations which the government has implemented in order to maintain public order, protect its essential security interests and re-establish its connections with the international economic system, all with a view to granting investors a treatment no less favorable than granted to nationals."[94]

Those arguments were supported by one of the expert opinions. According to her opinion, article XI of the BIT shall be interpreted broadly, as that was precisely the intention of the signing parties. She highlighted that security interests should include economic security, in particular in the context of a crisis as severe as that of Argentina. It was finally argued that the Claimants had not been treated differently from other investors. The Panel resolved that article XI does not expressly envisage this kind of difficulty but, according to the Tribunal's opinion, nothing in the context of customary international law or the object or

---

92 ICSID, see note 70, 98.

93 Ibid., 93-94.

94 Ibid., 94-95.

purpose of the treaty could on its own exclude a major economic crisis from the scope of this article.[95]

Another interesting point that the Panel highlighted was that a BIT should normally be interpreted according to the concerns of both parties. In a case like this, if the concept of essential security interests was limited to immediate political and national security interests, particularly of an international character, and excluded other interests, for example, economic emergencies, it could, in its view, result in an uneven interpretation of article XI.[96] The analysis of the Tribunal is reasonable if one bears in mind the obvious differences between the United States and Argentina. It can be considered an interesting approach, as these kind of situations will normally occur in circumstances where the contracting parties of a BIT are not at the same level of development and the risks of one or the other country facing an economic crisis are different. The decision of the Tribunal on this point was that the issue was to establish how serious an economic crisis must be to qualify as an essential security interest. Then, the Tribunal determined if the provision under discussion is or is not self-judging. The determination of this matter is, in the words of the Tribunal: "if the state adopting the measures in question is the sole arbiter of the scope and application of that rule, or whether the invocation of necessity, emergency or other essential security interests is subject to some form of judicial review."[97]

There are three different positions on this point that have emerged during the arbitration. Between the position of the Claimant, according to which the clause can not be self-judging and the one of the Respondent that argues that it is free to determine "when and to what extent necessity, emergency or the threat to its security interests need the adoption of extraordinary measures",[98] is the position, according to which the Tribunal "must determine whether article XI is applicable particularly with a view to establishing whether this has been done in good faith."[99] The Claimant's position was that article XI is not self-judging and the Tribunal should decide whether the requirements are met. It held that if a particular clause is supposed to be self-judging, it would be expressly provided. After analyzing the positions of both parties and giving examples of clauses that actually have a self-judging

---

95 Ibid., 104.
96 Ibid., 105.
97 Ibid., 105.
98 Ibid., 106.
99 Ibid., 106.

character, as well as quoting jurisprudence on this topic the Tribunal concluded that article XI is not self-judging. It affirmed that a state that considers itself in a situation of emergency will take the measures it considers appropriate without asking a court. Nevertheless, when the legitimacy of the measures taken is questioned in front of an international court, the court and not the state shall determine if the state of necessity may preclude wrongfulness. The Panel affirmed, "It is a substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness."[100] It is relevant to point out that, after this statement, the Tribunal did not carry out a new analysis about the occurrence of the requirements under customary international law and the treaty provisions, but went directly to the next point of the award.

As a conclusion regarding article IV (3) the Panel said that it is satisfied that the measures adopted by Argentina have not adversely discriminated against *CMS*.[101]

After finishing the previous analysis, the Tribunal referred to an important issue in a paragraph entitled "Temporary Nature of Necessity". In this part of the award the Tribunal referred in brief to article 27 of the Draft Articles, to conclude that "even if the plea of necessity were accepted, compliance with the obligation would re-emerge as soon as the circumstances precluding wrongfulness no longer existed, which is the case at present."[102]

The Panel came to two conclusions regarding this matter. The first one is that a crisis of an economic character might be covered by article XI of the BIT, and that the issue that determines its application is the determination of whether the crisis can be classified as threatening an essential interest of the state. The second one is that the questioned norm is not self-judging, so the analysis of the Tribunal determines the occurrence of the requirements of this provision. Furthermore, when analyzing the occurrence of the requirements of the state of necessity under customary international law, the Tribunal was not clear enough. In many of the analyzed points, the Tribunal only indicated that the matter had to be analyzed according to the seriousness of the crisis, without any further reflections. Moreover, it is not clearly stated what

---

100 Ibid., 108.
101 Ibid., 109.
102 Ibid., 110.

sort of relationship exists between the Emergency Clause of the BIT and customary international law.

3. Annulment Request of the CMS Award

In September 2005, Argentina requested the annulment of the CMS Award. This application was based on two of the five grounds considered in article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).[103] The ICSID Convention allows the annulment of arbitral awards only on very restrictive grounds, which are: "(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; and (e) that the award has failed to state the reasons on which it is based."[104] The Annulment Committee was composed of Gilbert Guilliame, Nabil Elaraby, and James R. Crawford.[105]

In its request, Argentina alleged that "the Tribunal has manifestly exceeded its powers by exercising jurisdiction over claims by a company's shareholder for income lost by the company." It also stated that "the Tribunal in its decision on jurisdiction and in its findings relating to the BIT and customary international law of necessity as well as in its calculation on damages, failed to state the reasons on which the award is based, contrary to article 52 (e) of the ICSID Convention."[106]

The first issue that one should have in mind before analyzing the resolution of the Ad-hoc Committee is that the ICSID system does not have an appeal stage but it only allows the request of an annulment of the award. This request can only be based on one of the reasons mentioned above. The decision of the Ad-hoc Committee will only be examined in respect of the state of necessity.

The Committee first analyzed the arguments of Argentina regarding the Panel's failure to state reasons under article 52 (e) of the ICSID

---

103 Burke-White, see note 1, 26.

104 Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

105 Burke-White, see note 1, 26.

106 ICSID, CMS Gas Transmission Company, Decision of the Ad-hoc Committee, see Annex, 12.

Convention. In this respect, the Committee began by pointing out that the Tribunal had established that article 25 of the Draft Articles contained customary international law in respect of this matter and that it had accurately studied each of the circumstances enumerated in that article, concluding that two of them had not been met. The requirements of necessity under customary law had not been fulfilled and Argentina could not invoke necessity. The Committee indicated that it could not void or annul this part of the award, since it had no jurisdiction to do so. The Committee affirmed: "In that part of the Award, the Tribunal clearly stated its reasons and the Committee has no jurisdiction to consider whether, in doing so, the Tribunal made any error of fact or law."[107]

Regarding Argentina's defense based on article XI of the BIT, the Committee summarized the conclusions of the Tribunal: "there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI."[108] The Committee made reference to the fact that the Tribunal determined that, according to this article, it had to make a substantive review on this point and that "it must examine whether the state of necessity or emergency meet the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness."[109] According to the Committee, the problem was that the Tribunal did not carry out that examination and did not provide any reasoning to support its decision on article XI.

The Committee made an important statement declaring that "the Tribunal evidently considered that Article XI was to be interpreted in the light of customary international law concerning the state of necessity and that, if the conditions fixed under that law were not met, Argentina's defense under Article XI was likewise to be rejected."[110] According to the Committee, the motivation of the award on this point of the award was "inadequate". Nevertheless, even considering that the motivation in this part of the award could have been clearer, the Committee declared that "a careful reader can follow the implicit reasoning of the Tribunal and, accordingly, the request of Argentina could not be upheld."

---

107 Ibid., 31.
108 Ibid., 32.
109 Ibid., 33.
110 Ibid., 32.

In relation to the excess of powers that Argentina invoked for the annulment, the Committee highlighted that the Tribunal and also the parties "assimilated the conditions necessary for the implementation of Article XI of the BIT to those concerning the existence of the state of necessity under customary international law." It also pointed out that, following the Argentinean presentation, the Tribunal had resolved first the defense based on customary international law and secondly the defense that arose from article XI of the BIT. According to Argentina, the Tribunal had manifestly exceeded its powers on both points.

The Committee made a comparison between both articles. It recognized that there was some language similar between both, but indicated that while article XI specified such conditions under which the BIT might be applied, article 25 instead "is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met." The Tribunal also held that if article XI is applied, the substantive obligation under the treaty does not apply. Article 25 is, in the view of the Committee "an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations."[111] The following statement of the Committee is of special relevance, since it pointed out the substantive differences between article XI of the BIT and article 25 of the Draft Articles: "The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions."[112] As an example, the Committee stated that the requirement of not impairing an essential interest of the state or states towards which the obligation exists, or of the international community as a whole is foreign to article XI. According to the Committee, the requirements under article XI are not the same as those under customary international law. The Committee held that on that point, the Tribunal made a manifest error of law.[113]

In its opinion, since both articles had a different operation and content, the Tribunal should have taken a position on their relationship and should have decided whether they were both applicable in the present case. The Tribunal had not entered into such an analysis, simply assuming that article XI and article 25 are on the same footing. In doing so, according to the Annulment Committee, the Tribunal had made an-

111 Ibid., 34.
112 Ibid., 35.
113 Ibid., 35.

other error. It summarized this point asserting that: "One could wonder whether state of necessity in customary international law goes with the issue of wrongfulness or that of responsibility. But in any case, the excuse based on customary international law could only be subsidiary to the exclusion based on Article XI."[114]

The Committee then made a distinction between "primary" and "secondary" rules of international law, as mentioned under I. above. According to the Committee's reasoning, if the state of necessity means that there has not been even a *prima facie* breach of the Treaty it would be, using the terminology of the ILC, a primary rule of international law. But this is, in the Committee's view, also the case in respect of article XI. Both articles cover the same field, and, according to the Committee, if this is the case, the Tribunal should have applied article XI as *lex specialis.*[115]

On the other hand, if a state of necessity in international law concerned the issue of responsibility, it would be a secondary rule of international law. This was, according to the Committee, the position taken by the ILC. The Committee held that in this case, the Tribunal would have an obligation to consider first whether there had been a breach of the BIT and whether that breach had been excluded by article XI. It stated: "Only if it concluded that there was a conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded in whole or in part under customary international law."

In relation to the consequences of the errors that, according to the Committee, the Tribunal made, it stated its opinion indicating a relevant point related to the ICSID system and the non existence of an appellation procedure. "These two errors made by the Tribunal could have had a decisive impact on the operative part of the Award. As admitted by CMS, the Tribunal gave an erroneous interpretation of Article XI. In fact, it did not examine whether the conditions laid down by Article XI were fulfilled and whether, as a consequence, the measures taken by Argentina were capable of constituting, even *prima facie*, a breach of the BIT. If the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground. The Committee recalls, once more, that it has only a limited jurisdiction under Article 52 of the ICSID Convention. Under these circumstances, the Committee cannot simply substitute its own view of the law and its own appreciation of

---

114 Ibid., 35.

115 Ibid., 36.

the facts for those of the Tribunal. Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers."[116]

This is an open and direct criticism of the award issued by the Tribunal. In the opinion of the present author, the assertions of the Committee are questionable. This was not an appeal procedure but an annulment. Therefore, the Committee does not have the competence to issue a decision on this matter. Nevertheless, it gave its opinion stating that the Tribunal was mistaken. Even though the Committee did not have the competence to modify the award, it made clear that it would have modified the award if it had been able to do so. If the institution has no jurisdiction on a certain matter, it is inadequate as well as inefficient to make such a pronouncement since the award will continue to be in force with no modifications.

Finally, the Committee considered that the Tribunal made another error regarding article 27 of the Draft Articles on the issue of compensation. It declared that "Article 27 concerns, *inter alia*, the consequences of the existence of the state of necessity in customary international law, but before considering this Article, even by way of *obiter dicta*, the Tribunal should have considered what would have been the possibility of compensation under the BIT if the measures taken by Argentina had been covered by Article XI. The answer to that question is clear enough: Article XI, if and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period."[117]

IV. LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic

1. Background

The second pronouncement by an ICSID Tribunal regarding the emergency measures adopted by Argentina between 2001 and 2002, in par-

---

116 Ibid., 36.
117 Ibid., 39.

ticular the Public Emergency and Exchange Regime Reform Law (the Emergency Law) of 7 January 2002, was the decision on liability in *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic.*[118] LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. (the Claimants) registered a request of arbitration with ICSID against the Republic of Argentina (the Respondent) invoking the BIT. They based their request on the fact that some measures adopted by Argentina, especially the enactment of the Emergency Law, modified the regulations under which *LG&E* invested in three natural gas distribution companies in Argentina.[119] The panel was composed of Tatiana B. de Maekelt, Francisco Rezek, Albert Jan van den Berg.

2. State of Necessity Defense

The Tribunal began its analysis of the state of necessity by stating some preliminary considerations that immediately show that this approach was substantively different from the *CMS* award.

It started directly with the interpretation of article XI of the BIT. Then, it held that its task was to: (i) decide if the conditions existing in Argentina allowed it to invoke the protection of article XI of the BIT; and (ii) decide if the measures that Argentina adopted were necessary to maintain the public order or to protect its essential security interests, albeit in violation of the treaty.[120] In order to do that, the Tribunal declared that it "shall apply first, the Treaty, second, general international law to the extent that it is necessary and third, the Argentine domestic law. The Tribunal underscores that the claims and defences mentioned derive from the Treaty and that, to the extent required for the interpretation and application of its provisions, the general law shall be applied."[121]

---

118 ICSID, LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, see Annex, 1.

119 Ibid., 1.

120 Ibid., para. 204.

121 Ibid., para. 205.

a. Necessity under the Clauses of the Argentina – U.S. BIT

The Tribunal began by dealing with the question of whether article XI of the BIT was self-judging or not. It decided that it was not self-judging. It also asserted that even if it had considered it self-judging, the Tribunal would anyway make a determination of the good faith with which Argentina acted. According to the Tribunal, this review does not significantly differ from the substantive analysis that it presents in the award.[122]

The present author does not agree with the Tribunal on this point as it is not the same to determine whether the Argentinean state acted in good faith when imposing the measures and to examine whether it acted effectively under a state of necessity in conformity with the applicable BIT provisions. It is very probable that a country that is facing an economic crisis will impose measures to try to deal with such a crisis, but that does not mean it fulfills the requirements of the state of necessity which exempts the state from responsibility. Describing the parties' positions, the Panel stated that Argentina defended the measures taken because they were "necessary to maintain public order and protect its essential security interests."[123] Argentina held that the crisis constituted a national emergency sufficient to invoke the protections of article XI.

In relation to the notion of "public order", the Respondent gave numerous examples to reinforce the above-mentioned affirmation of the necessity of the measures it implemented, e.g. reports of an economic catastrophe, massive strikes, shootings, shut down of businesses, transportation, etc. Those events, in the Respondent's words, ended in a "final massive social explosion" in which five presidential administrations resigned within a month. Argentina affirmed that, under these circumstances, the measures taken were fully justifiable under the public order provisions of article XI. Additionally, it argued that the specific measures taken – freezing of price increases in the gas-distribution sector – were justifiable to maintain the country's basic infrastructure, which was dependent on natural gas energy.[124]

On the other hand, the Claimant gave a strict definition of public order measures: "actions taken pursuant to a state's police powers, particularly in respect of public health and safety". According to the

---

122 Ibid., para. 215.
123 Ibid., para. 215.
124 Ibid., para. 216.

Claimant, the measures taken by Argentina were not aimed to bring calm to the collapse that was threatening the country.[125]

Regarding the notion of "essential security interests", Argentina argued that this comprised economic and political interests and defended the measures taken as necessary. The Claimant, on the other hand, argued that this clause was reserved for military actions. According to the Claimant, economic crises should not be elevated to an essential security interest, and that doing so would ignore the object and purpose of the treaty. It was argued that an economic crisis was precisely when investors needed the protections offered by a BIT.[126]

The Claimant named each one of the measures taken and indicated that Argentina should prove that each measure was "necessary in order to maintain public order and protect Argentina's essential security interests". According to the Claimant, "necessary" meant that the measures were the only options available to Argentina in order to invoke protection under article XI.[127]

Finally, the Claimant argued that in any event, article XI did not exonerate Argentina from its obligation to compensate for the damages suffered because of the breach of the BIT. It also invoked on this matter the clause of article 27 of the Draft Articles, arguing that: "even if the state of necessity defence is available to Argentina under the circumstances of this case, Article 27 of the Draft Articles makes clear that Argentina's obligations to the Claimants are not extinguished and Argentina must compensate Claimants for losses incurred as a result of the Government's actions."[128]

The Tribunal resolved that Argentina went through a crisis "during which it was necessary to enact measures to maintain public order and protect its essential security interests." According to the Tribunal, this period commenced on 1 December 2001 and ended on 26 April 2003 and Argentina was excused under article XI from liability for any breaches of the BIT during this time. The Tribunal also explained the reasons why it considered those precise dates as the starting and ending of the period where the defense of necessity was applicable and went through a long description of the crisis itself. "Evidence has been put before the Tribunal that the conditions as of December 2001 constituted

---

125 Ibid., para. 221.
126 Ibid., para. 222.
127 Ibid., para. 220.
128 Ibid., para. 225.

the highest degree of public disorder and threatened Argentina's essential security interests. (…) Extremely severe crises in the economic, political and social sectors reached their apex and converged in December 2001, threatening total collapse of the Government and the Argentine state."[129]

The Tribunal rejected the argument that article XI was only applicable in circumstances of armed conflict and war. Furthermore the Tribunal rejected the Claimants' argument that the necessity defense should not be applied in this case because the measures that Argentina adopted where not the only means available to respond to the crisis. The Tribunal asserted that "Article XI refers to situations in which a state has no choice but to act. A state may have several responses at its disposal to maintain public order or protect its essential security interests. In this sense, it is recognized that Argentina's suspension of the calculation of tariffs in U.S. dollars and the PPI adjustment of tariffs was a legitimate way of protecting its social and economic system."[130] After describing the crisis and its consequences, the Tribunal resolved: "All of these devastating conditions – economic, political, social – in the aggregate triggered the protections afforded under Article XI of the Treaty to maintain order and control the civil unrest."[131]

Regarding article IV (3) of the BIT, the Tribunal declared that this article confirmed that the state parties to the BIT considered the state of national emergency as a separate category of exceptional circumstances. It also resolved that it had not been shown to the Tribunal that during the period of crisis the provisions of that article had been violated by Argentina.

b. Necessity under Customary International Law

Once the Tribunal resolved that Argentina was excused from liability for the alleged breaches of the BIT from 1 December 2001 until 26 April 2003, the Tribunal also analyzed the concept of the state of necessity in customary international law. It clarified that the protections provided in article XI of the BIT were sufficient enough to excuse Argentina from liability: "the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in Article

---

129 Ibid., para. 231.
130 Ibid., para. 239.
131 Ibid., para. 237.

25 of the ILC's Draft Articles on State Responsibility) supports the Tribunal's conclusion."

According to the Tribunal, there were three circumstances required for the invocation of a state of necessity. The Tribunal stated that those circumstances were: (i) a danger for the survival of the state, and not merely for its interests, which is necessary; (ii) that danger must not have been created by the acting state; (iii) finally, the danger should be serious and imminent, so that there were no other means of avoiding it. The Tribunal greatly simplified the prerequisites described under I. above. It also had made a mistake in respect of the first requirement, since, as was shown, the Committee had not considered the existence of the state as the only essential interest of the state that could justify a state of necessity. To facilitate comparison between both cases, the requirements of a state of necessity under customary international law from the point of view of this Tribunal will be analyzed using the same order as in the consideration of the *CMS* case above, although this is not the same as that used in the *LG&E* case itself.

-Essential Interest of the State

In the *CMS* case this prerequisite was examined. It seems that the order in that case was actually more correct since the first question which should be answered is whether the state really had an essential interest to protect against a grave and imminent peril. The Tribunal here agrees with the *CMS* panel in the sense that what can qualify as an essential interest is not limited to the existence of the state. "As evidence demonstrates, economic, financial or those interests related to the protection of the state against any danger seriously compromising its internal or external situation, are also considered essential interests."[132] It also remarked that this requirement must be resolved in each specific case.

-Serious and Imminent Peril

The Tribunal limited its examination on quoting both Ago, stating that the threat must be extremely grave and imminent, and also Crawford when he stated that the danger must be established objectively and

---

132 Ibid., para. 251.

not only deemed possible. The Tribunal added that danger must be imminent in the sense that it will soon occur. It did not compare this requirement with the circumstances during the crisis.

-The Measures were the only Way to protect an essential Interest

The Tribunal in this part does not really explain how this requirements would be established, but only cites S.P. Jagota, member of the ILC. It states that according to him, this requirement implies that it has not been possible for the state to avoid the crisis by any other means, even a much more onerous one that would have maintained the respect of international obligations. "The state must have exhausted all possible legal means before being forced to act as it does. Any act that goes beyond the limits of what is strictly necessary is no longer covered by the state of necessity as a circumstance precluding wrongfulness."[133]

-The Measures do not seriously impair an essential Interest of the State or States towards which the Obligation exists or of the International Community as a Whole

The Tribunal limited the review of the point to the following: "The action taken by the state may not seriously impair another state's interest. In this respect, the Commission has observed that the interest sacrificed for the sake of necessity must be, evidently, less important than the interest sought to be preserved through the action. The idea is to guard against the possibility of invoking the state of necessity only for the safeguarding of a non-essential interest."

-The International Obligation does not exclude the Possibility of invoking Necessity

The exact words used by the Tribunal are: "the international obligation at issue must allow invocation of the state of necessity. The inclusion of an article authorizing the state of necessity in a Bilateral Investment Treaty constitutes the acceptance, in the relations between states, of the possibility that one of them may invoke the state of necessity."

---

133 Ibid., para. 250.

The Tribunal is thinking of article XI of the BIT, which in its view allows the invocation of necessity. Nevertheless, the obligation does not necessarily have to "allow" the invocation of necessity. The requirement is that the international obligation does not exclude the possibility of invoking necessity. This is a subtle difference between the statements.

-The State has not contributed to a State of Necessity

According to the Tribunal, "it seems logical that if the state has contributed to cause the emergency, it should be prevented from invoking the state of necessity. If there is fault by the state, the exception disappears, since in such case the causal relationship between the state's act and the damage caused is produced." In the examination of this condition, the Tribunal asserted, "in the first place, Claimants have not proved that Argentina has contributed to cause the severe crisis faced by the country; secondly, the attitude adopted by the Argentine Government has shown a desire to slow down by all means available the severity of the crisis."

The Tribunal applied this requirement in a much more restrictive manner. In the Tribunal's view, it had not been proved that Argentina had really contributed to the crisis. It also alluded to the conduct adopted by the Argentinean government after the crisis rather than prior to it which is what matters with regard to this requirement.

Finally, the Tribunal summarizes the occurrence of the prerequisites affirming, in para. 257 the following conclusions:[134] "(i) the essential interests of the Argentine state were threatened in December 2001. It faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace; (ii) there is no serious evidence in the records that Argentina contributed to the crisis resulting in the state of necessity; (iii) in these circumstances, an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed; (iv) it cannot be said that any other state's rights were seriously impaired by the measures taken by Argentina during the crisis; and (v) finally, as addressed above, Article XI of the

134 A numeration for academic purposes was added.

Treaty exempts Argentina of responsibility for measures enacted during the state of necessity."[135]

The Tribunal remarked that the analysis of the occurrence of the requirements in article 25 alone "does not establish Argentina's defense, it supports the Tribunal's analysis with regard to the meaning of Article XI's requirement that the measures implemented by Argentina had to have been necessary either for the maintenance of public order or the protection of its own essential security interests."[136] The Tribunal asserted that its interpretation of article XI determined its decision to exclude damages during the crisis period. Following this interpretation, the Tribunal considered the following: "Article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the state, and therefore, the state is exempted from liability. This exception is appropriate only in emergency situations; and once, the situation has been overcome, i.e. a certain degree of stability has been recovered; the state is no longer exempted from responsibility for any violation of its obligations under international law and shall reassume them immediately." This last declaration is important, since the Tribunal considered that, since in its view the state of necessity began on 1 December 2001 and ended on 26 April 2003, the measures adopted before and after that period were not covered by the state of necessity and therefore generated responsibility of Argentina towards its obligations. On 27 April 2003, the obligations of Argentina became effective again.

The conclusions ruled by the Tribunal are that Argentina is liable for the damages resulting from the violations of the BIT, except during the period of the state of necessity.[137]

Finally, the Tribunal made a pronouncement about damages. It said that Argentina met the prerequisites of a state of necessity and this factor excluded liability. The Tribunal also referred to article 27 of the Draft articles and ascertained that that article "does not specifically refer to the compensation for one or all of the losses incurred by an investor as a result of the measures adopted by a state during a state of necessity." It mentioned that the ILC added that this article does not attempt to specify under what circumstances compensation would be payable. According to the Tribunal, article 27 does not specify if compensation

---

135 Ibid., para. 257.
136 Ibid., para. 258.
137 Ibid., para. 267.

has to be paid during the state of necessity or once the state has reassumed its obligations.[138]

V. The ICSID Case Sempra Energy International v. Argentine Republic

1. Background

In September 2002, *Sempra Energy International* (the Claimant) requested arbitration against Argentina (the Respondent) under the ICSID Convention, invoking a breach of the BIT. Its request concerned its investments in two natural gas distribution companies, and a number of measures which, in its view, modified the general regulatory framework established for foreign investors under which the Claimant had made those investments.[139]

2. State of Necessity Defense

Argentina pleaded an exemption from liability in the light of a national emergency or state of necessity under domestic law, general international law and the BIT.[140]

The Tribunal began with an analysis of necessity and emergency under the Argentine Constitution. The Respondent had held that the Argentine Constitution provides for various kinds of emergency measures, including those aimed at dealing with economic emergencies such as the one declared by the Congress in this case. In the Respondent's view, those measures, as an act of the state, were only subject to judiciary control. Argentina maintained that the emergency legislation met the requirements laid down by judicial decisions, since a state of necessity existed, the measures attended to a public interest, the remedy was proportional to the emergency and its time frame was reasonable and related to the causes of the emergency.[141]

---

138 Ibid., para. 260.
139 ICSID, see note 22.
140 Ibid., 96.
141 Ibid., 97.

The Tribunal declared that "the very constitutional provisions which were subject to judicial control and which led to the definition of those conditions cannot be invoked to preclude a finding of wrongfulness as to the measures adopted if they do not comply with the conditions indicated."[142]

In its conclusion regarding this point, the Tribunal first stated that the constitutional order was not on the border of collapse and, with respect to investors, even if emergency legislation became necessary in this context, legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation.[143]

a. Necessity under Customary International Law

Analyzing the state of necessity in customary international law, the Tribunal referred to the *LG&E* case, indicating that it had examined it with particular attention, as it dealt with "mostly identical questions concerning emergency and state of necessity."[144] One should bear in mind that two arbitrators in the *Sempra* case were also members of the Tribunal in the *CMS* case, Francisco Orrego Vicuña and Marc LaLonde.

The Panel asserted that in addition to differences in the legal interpretation of the BIT, there was an important question concerning the assessment of the facts that distinguished the *LG&E* decision on liability from the *CMS* award, and also from the award in the *Enron* case.[145]

While the *CMS* and *Enron* Tribunals have not been persuaded by the severity of the Argentine crisis as a factor capable of triggering the state of necessity, *LG&E* has considered the situation in a different light and justified the invocation of emergency and necessity, at least for a limited period of time. This Tribunal asserted that it was no more persuaded than the *CMS* and *Enron* Tribunals about the crisis justifying the operation of emergency and necessity. Nevertheless, it accepted that the economic situation had an influence on the questions of valuation and compensation.

---

142 Ibid., 98.

143 Ibid., 98.

144 Ibid., 102.

145 ICSID case between Enron Corporation and Ponderosa Assets, L.P. (Claimant) and Argentine Republic (Respondent), Case No. ARB/01/3, 22 May 2007. This award rejected the necessity defense invoked by Argentina.

-Essential Interest of the State

The Tribunal pointed out that it had to determine whether the Argentine crisis could be qualified as affecting an essential interest of the state and that the opinions of the experts were divided. "They range from those that consider the crisis as having had gargantuan and catastrophic proportions, to those that believe that it was no different from many other contemporary crisis situations around the world."[146]

The Tribunal recognized that the crisis was severe. Nevertheless, it stated that: "Yet, the argument that such a situation compromised the very existence of the state and its independence, and thereby qualified as one involving an essential state interest, it is not convincing. Questions of public order and social unrest could have been handled, as in fact they were, just as questions of political stabilization were handled under the constitutional arrangements in force."[147]

-Serious and Imminent Peril

The Tribunal stated on this point that while the government had a duty to prevent a worsening of the situation and could not simply leave events to follow their own course, there is no convincing evidence that events were actually out of control or had become unmanageable.

-The Measures were the only Way to protect an essential Interest

The Tribunal noted that on this matter the parties and their experts were deeply divided. It held that "A rather sad global comparison of experiences in the handling of economic crises shows that there are always many approaches to addressing and resolving such critical events. It is therefore difficult to justify the position that only one of them was available in the Argentine case."[148]

The Tribunal correctly clarified its task on this point by stating that it should not substitute its view for the government's choice of eco-

146 ICSID, see note 22, 103-104.
147 Ibid., 103-104.
148 Ibid., 104.

nomic options. Rather, the Tribunal's duty was merely to determine whether the choice made was the only one available, and this did not appear to have been the case. Thus, the Tribunal decided that this requirement had not been met because, without pronouncing itself about its convenience or effectiveness, it determined that there were other alternatives for the Respondent.

-The Measures do not seriously impair an essential Interest of the State or States towards which the Obligation exists, or of the International Community as a Whole

According to the Tribunal, the interest of the international community does not appear to be in any way impaired in this context, as it is an interest of a general kind. The interest of other states is analyzed in connection with article XI of the BIT, "it does not appear that the Government's invocation of Article XI or of a state of necessity generally would be taken by the other party to mean that such impairment arises." Accepting the latter, the Tribunal mentioned that in the context of investment treaties there is still the need to take into consideration the interests of the private entities, which are the ultimate beneficiaries of those obligations. The essential interest of the Claimant would certainly be seriously impaired by the operation of article XI or a state of necessity in this case.

As can be seen, the Tribunal comes to the conclusion that this prerequisite was not accomplished since the conduct of Argentina did seriously impair the interests of the foreign investor. It is an interesting topic because in the investment area it is difficult to determine who the entity is "towards which the obligation exists". Although the states are the ones that execute the BITs and, thus they commit themselves, the beneficiaries of such obligations are the investors and not the states directly. In this case, the Tribunal considered that it must be the investor that is the entity "towards which the obligation exists", but in the *CMS* case, the Panel considered that it should be the counterpart in the Treaty.

-The International Obligation does not exclude the Possibility of invoking Necessity

This point was considered within the analysis of the Emergency Clause of the Treaty, just as it was in the *CMS* case. Although there is not a direct response in relation to this requirement from the point of view of the Tribunal, it did establish a position regarding the latter in relation to the purpose of the BIT and to the interpretation that should be applied to the Emergency Clause. In the Panel's opinion, the purpose of a BIT imposes a restrictive interpretation of the Emergency Clause. It stated: "the object and purpose of the Treaty is, as a general proposition, for it to be applicable in situations of economic difficulty and hardship that require the protection of internationally guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route from the defined obligations cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory."[149]

-The State has not contributed to a State of Necessity

The Tribunal pointed out that this prerequisite is an "expression of a general principle of law devised to prevent a party from taking legal advantage of its own fault." The facts that caused the crisis were considered endogenous by the Claimant and exogenous by the Respondent. For the Tribunal "the truth seems to be somewhere in the middle, with both kinds of factors having intervened. This mix has in fact come to be generally recognized by experts, officials and international agencies."[150]

This led the Tribunal to the conclusion that "there has to some extent been a substantial contribution of the state to the situation giving rise to the state of necessity, and that it therefore cannot be claimed that the burden falls entirely on exogenous factors. This state of affairs has not been the making of a particular administration, given that it was a problem which had been compounding its effects for a decade. Still, the state must answer for it as a whole."

Finally, the Tribunal noted that the requirements must occur in succession. In the light of the various elements examined above, the Tribunal concludes that the requirements for a state of necessity under customary international law have not be fully met in this case.

---

149 Ibid., 109-110.

150 Ibid., 104.

b. Necessity under the Clauses of the Argentina – U.S. BIT

The Tribunal recognized that the discussion about this matter was especially difficult. The parties have presented strong arguments and experts opinions on this point. Argentina asserted "public order and national security exceptions have to be interpreted broadly in the context of this Article so as to include considerations of economic security and political stability."[151]

The Respondent also indicated that this article is self-judging. As was shown, this means for Argentina's expert that "each party will be the sole judge of when the situation requires measures of the kind envisaged by the Article, subject only to a determination of good faith by Tribunals that might be called upon to settle a dispute on this point."[152] According to the Respondent, this self-judging character is reaffirmed by the interpretation that the U.S. itself made the same disposition in other BITs.

According to the Claimant and the expert exposition of José E. Alvarez, article XI is not self-judging and the review that Tribunals shall make is not limited to determine whether the state acted in good faith. From his point of view, the examination shall be on whether the facts fulfill the conditions of a state of necessity. He stated that the self-judging character is exceptional and shall be expressly established.

The summary of Alvarez's conclusions regarding this essential security and public order clause is set out in the text of the award "(1) is not self-judging; (2) does not apply to 'economic emergencies', except in the most extraordinary and so far unprecedented circumstances; and (3) even when it does apply (for example, in the event of war or insurrection), is not the equivalent of a 'denial of benefits' or termination clause in a treaty, and so does not negate state responsibility to pay compensation for actions that harm investors."[153]

In the Claimant's view, article XI does not apply to economic emergencies "but rather to internal security, just as international peace and security have been interpreted to mean the obligations under the Charter of the United Nations."[154]

---

151 Ibid., 107.
152 Ibid., 107.
153 Ibid., 109.
154 Ibid., 109.

The first consideration made in the resolution of the Tribunal on this point was regarding the purpose of the BIT, as was shown above.

In relation to the possibility of invoking article XI in case of economic emergency, it considered that there was nothing that would impede this. The Tribunal expressly accepted that "essential security interests" might include situations other than "the traditional military threats for which the institution found its origins in customary law."[155]

Regarding the self-judging character that the Respondent tried to give to article XI, the Tribunal held that this character must be expressly drafted to reflect that intent, since it was an exceptional clause.[156] It asserted that any other conclusion would be inconsistent with the object and purpose of the treaty, as already stated. "In fact, the treaty would be deprived of any substantive meaning."[157]

After carrying out this analysis, the Panel discussed the consequences of this norm not being self-judging. The following paragraph will be of special importance because, unlike in the *CMS* case, the Tribunal gave an explanation about the relationship between the provisions of article XI of the BIT and the regulations of state responsibility under customary international law. Broadly, what is determined in this award is that since the Emergency Clause of the BIT does not define what must be understood as "essential security interests" one must look for the content of this concept in article 25 of the Draft Articles. The Tribunal applied the BIT, which is the special regulation of this subject, and for its application, it used as an interpretative element the content of customary international law: "In addition, in view of the fact that the Treaty does not define what is to be understood by an 'essential security interest', the requirements for a state of necessity under customary international law, as outlined above in connection with their expression in Article 25 of the Articles on State Responsibility, becomes relevant to the matter of establishing whether the necessary conditions have been met for its invocation under the Treaty. The case might have been different if the Treaty had defined this concept and the conditions for its exercise, but this was not the case."[158]

The Tribunal recognized that the *CMS* Award was mistaken when it discussed article XI in connection with necessity under customary in-

---

155 Ibid., 109-110.

156 Ibid., 111.

157 Ibid., 109-110.

158 Ibid., 110.

ternational law. "This Tribunal believes, however, that the Treaty provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined. Similarly, the Treaty does not contain a definition concerning either the maintenance of international peace and security, or the conditions for its operation. Reference is instead made to the Charter of the United Nations in Article 6 of the Protocol to the Treaty."[159]

Argentina's position, as stated by its experts, was that in this case the principle shall be applied and the applicable norm is article XI of the BIT. According to this, while article XI only requires a good faith determination, under customary international law a state must comply with all the requirements set forth in article 25 of the Draft Articles.[160] According to the Tribunal, a treaty that deals with a specific matter shall prevail over the rules of customary international law. However, it explained that in this case the BIT does not deal with "the legal elements necessary for the legitimate invocation of a state of necessity. The rule governing such questions will thus be found under customary law."[161] The Tribunal concluded that according to customary international law, the situation of Argentina did not fulfill the requirements to be invoked as a state of necessity.

The Tribunal concluded that the latter means that judicial review is not limited to an examination of good faith in its invocation or application. It should be a substantive control, concerning whether the requirements under customary international law have been met. It added that the Tribunal had already concluded that the crisis did not meet the requirements of necessity and did not preclude the wrongfulness of the measures taken by Argentina, and "there is no need to undertake a further judicial review under Article XI since this article does not set out conditions different from customary law in such regard."[162]

This is an interesting conclusion as it shows that the Tribunal, after accurately examining the applicable regulation and studying the crisis situation from different points of view, came to the following conclusions: (i) the determination of whether the situation of emergency that Argentina suffered justifies it to be free of responsibility must be determined according to the corresponding norm of the BIT; (ii) such

---

159 Ibid., 110.

160 Ibid., 111.

161 Ibid., 111.

162 Ibid., 114.

norm is not self-judging, so the Tribunal must carry out a deep analysis of its opportunity and application; (iii) article XI of the BIT does not contain a definition of the state of necessity and it does not establish its requirements, so one must rely on the provisions of customary international law that regulate this matter, these are included in article 25 of the Draft Articles; and (iv) as the Tribunal has already determined, the crisis situation that Argentina faced did not meet the requirements in order to free that country of any responsibility. Therefore, in brief, Argentina is responsible for the damage of the investor in virtue of the adopted measures.

VI. Conclusions

Having analyzed the three selected awards in respect of the necessity defense invoked by Argentina on investment disputes, a brief comparison between the decisions taken will be made, concerning two main points. This will help us to get to some conclusions.

-Applicable Provisions of the Necessity Defense on Investment Disputes

This issue has been contradictory, since each of the awards came to different conclusions in respect of the relationship between the Emergency Clause of the BIT and article 25 of the Draft Articles.

The *CMS* Tribunal directly applied the provisions of customary international law. After concluding that the Argentinean crisis did not meet the requirements provided in article 25 of the Draft Articles, the Panel analyzed the Emergency Clause of the BIT. The Panel did not even question what international regulation should be applied first, but it went directly to the analysis of the requirements foreseen in article 25 of the Draft Articles. In addition, by assuming that certain points of article 25 were reflected in the wording of the BIT, the Panel has shown that its analysis was limited to the latter.

This interpretation was subject to criticism by the Annulment Committee, which explained that the Tribunal, even stating that article XI was not self-judging, did not make an analysis of that provision in the award.

In the *LG&E* case, the Panel expressly indicated that the Emergency Clause of the Treaty should be applied and that the provisions of cus-

tomary international law on this matter would be used only if they were necessary for a correct interpretation of the BIT. The Tribunal applied the Emergency Clause of the BIT and then asserted that it would also analyze the crisis according to article 25 of the Draft Articles, but only to support the conclusion already reached in the application of article XI of the BIT. It held that the requirements are effectively different.

In the *Sempra* case, the Tribunal gave an explanation about the relationship between the provision of article XI of the BIT and the regulations of a state of necessity under customary international law. The Tribunal determined which rule really does regulate the exemption of responsibility caused by a state of necessity and this point marks the difference between this award and the one issued in the *CMS* case. Here the Tribunal resolved that the BIT regulates the dispute and article XI has to be interpreted in order to determine the responsibility of Argentina for the measures adopted in breach of the BIT. Since the Emergency Clause of the BIT does not define what has to be understood by "essential security interests", one must look for the content of this concept in article 25 of the Draft Articles. The award recognizes as applicable law the Emergency Clause of the BIT. It clarifies that, since that provision does not regulate what the requirements are the Tribunal has to take the requirements of the concept of a state of necessity from customary international law.

All three awards agree on two points: (i) the Emergency Clause could eventually be invoked in a case of economic emergency; and (ii) this provision does not have a self-judging character.

-Exemption of Responsibility due to a State of Necessity

One of the reasons to analyze this issue is that the ICSID awards have been contradictory on the point of whether the crisis endured by the Argentinean state allows to exempt itself from responsibility for the measures adopted during that period.

The Tribunal in the *CMS* case identified the Emergency Clause of the BIT with the content of article 25. It analyzed the Argentinean Crisis from the perspective of article 25 of the Draft Articles, concluding that the situation experienced by Argentina did not meet the requirements of the provision. According to this Panel, as already explained, Argentina was to be held responsible for the damages caused to *CMS* because of the measures it adopted.

The *LG&E* award analyzed in depth the crisis itself and the periods in which, according to its judgment, the most critical parts took place. The analysis that was carried out in this award was much more detailed than the one in *CMS* case. While in the *CMS* award, most of the reasoning of the Tribunal in relation to necessity was carried out from the point of view of the applicable international normative framework, in the *LG&E* case, the Tribunal carried out a more detailed description of the facts that according to its judgment led to the crisis and its consequences. This Panel asserted that Argentina should be exempted from liability during a period of sixteen months, which was considered by the Tribunal as being the worst period of the crisis. The Panel came to this conclusion applying the Emergency Clause of the BIT, but also reaffirmed its decision asserting that the situation in Argentina did meet the requirements of article 25 of the Draft Articles. It asserted that the latter helps to support the above conclusion, but is not necessary in order to exempt it from responsibility. Following this line of thought, even if the Tribunal would have considered that the situation in Argentina did not meet the requirements of article 25 of the Draft Articles, it would have been excluded from liability. The Tribunal resolved that it met the requirements of article XI of the BIT and that was actually enough to bring about the exoneration of responsibility for the conduct during the crisis.

The *Sempra* award reverts to the decision made in the *CMS* case. The Tribunal held that the situation experienced by Argentina did not meet the requirements to exempt Argentina from the responsibility with regard to the Claimant. The Panel came to this conclusion by applying the Emergency Clause of the BIT, interpreted by customary international law contained in article 25 of the Draft Articles.

There are still dozens of investment disputes against Argentina pending at the ICSID. As mentioned in the introduction, the jurisprudence of the ICSID that has been issued regarding the Argentinean Crisis is very problematic, because the holdings have been contradictory and the panels have made different legal and factual analyses of exactly the same provisions and facts. In addition, it should be considered that the Annulment Committee has criticized the outcomes of the ICSID Panel in the *CMS* case, especially the legal reasoning regarding the necessity defense invoked by Argentina.

The first point that one must bear in mind is that the purpose and object of a BIT is to protect foreign investors against the other signing state. One of the situations against which an investor wishes to be protected is, precisely, an economic emergency in the host state. The for-

eign investment protection supposes that the host state gives the investor some guarantees. In this case, it is even more obvious, since the investors of the three studied cases are involved in public facilities business, because of a privatization process that the Argentinean state has made. Furthermore, Argentina had celebrated the BIT that protects such investors. With this in mind, it must be concluded that any provision that tends to eliminate the guarantees provided to foreign investors shall be interpreted and applied restrictively. Article XI of the US-Argentina BIT is the applicable provision in these cases. Nevertheless the Panels must also pronounce in the light of customary international law, since the Emergency Clause only suggests but does not provide the concepts applicable to a situation of emergency or necessity.

The prerequisites imposed by article 25 are very restrictive. However, such restrictiveness seems to be justified. It is a provision that allows a state to ignore under certain circumstances its international commitments to protect its own interest. Such permission should be strictly regulated, in order to prevent abuses.

In the light of the requirements that have been studied under I., there are some which might be questionable in the Argentinean crisis. For example, whether there was a grave or imminent peril or whether an essential interest of the state was impaired. Others do not seem to occur, for example, the condition that requires that the state had no other means available to protect the impaired interest.

The Argentinean state, as the *CMS* and the *Sempra* awards have maintained, had other means available to deal with the crisis. It is difficult to tell if those measures were or were not convenient, but only to determine that they existed at the time. The authorized legal doctrine about the matter has agreed that this does not imply that it is the less onerous alternative.

The requirements must be interpreted using reasonability as the criterion: there will be cases in which the non-compliance, although it is not the only possibility, is the less onerous and less damaging for the state, and the difference in relation to the other will be broad enough to consider it as "the only" in the framework of the circumstances.

Regarding the requirement that the state did not contribute to the necessity situation, it is not an easy task, since one is dealing with cases in which the non-compliance is due to a crisis of political, financial and social nature, which is impossible to be attributed to one factor only. It is clear that a state has influence on governmental policies, and these being good or bad will be related to the result of the crisis.

There is also a point in the analyzed awards that has not been properly developed by any of the three panels. The Emergency Clause supposes that the measures taken by the state are directly related and have the purpose to remedy the situation that occasioned them. This has not been proved, or at least the awards did not make any special reference to the fact that the measures affecting the Claimants were actually intended to resolve the situation that Argentina experienced.

Annex

Documents of the International Law Commission

- R. Ago, Eighth Report on State Responsibility, The Internationally Wrongful Act of the State, Source of International Responsibility, International Law Commission, Doc. A/CN.4/318, *ILCYB* 1979, Vol. II.
- R. Ago, Addendum to the Eight Report on State Responsibility, Chapter V, Circumstances precluding wrongfulness, Doc. A/CN4/318/ADD. 5-7, *ILCYB* 1980, Volume II, Part One.
- International Law Commission, Report of the ILC on the work of its Thirty-second Session, Doc. A/35/10, *ILCYB* 1980, Volume II, Part II, Chapter III, State Responsibility.
- International Law Commission, Report of the ILC, Fifty-third Session 2001, GAOR, Fifty-sixth Session, Suppl. No. 10, Doc. A/56/10.

Jurisprudence

- International Centre for Settlement of Investment Disputes, Award in the Proceeding between CMS Gas Transmission Company v. Argentine Republic, Case No. ARB/01/8, 12 May 2005.
- International Centre for Settlement of Investment Disputes, Decision on Liability in the Proceeding between LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, Case No. ARB/02/1, 3 October 2006.
- International Centre for Settlement of Investment Disputes, Award in the Proceeding between Sempra Energy International v. Argentine Republic, Case No. ARB/02/16, 28 September 2007.
- International Centre for Settlement of Investment Disputes, Award in the Proceeding between Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, Case No. ARB/01/3, 22 May 2007.