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THE "NECESSITY DEFENSE" AND THE EMERGING ARBITRAL CONFLICT IN ITS APPLICATION TO THE U.S.-ARGENTINA BILATERAL INVESTMENT TREATY

Sarah F. Hill*

I. A GLIMPSE AT THE ARGENTINEAN ECONOMIC CRISIS

At the turn of the twenty-first century, while the Internet boom was generating incredible wealth in developed countries, Argentina experienced one of the worst economic and fiscal crises in its history. Between 2001 and 2002, output fell 20 percent over three years, inflation reignited, the government defaulted on its debt, the banking system was largely paralyzed, and the Argentine peso reached lows of 3.90 pesos per U.S. dollar.¹ In the context of other regional economic troubles, such as the Asian crisis of 1997-1998, the Brazilian devaluation in early 1999 and the steady appreciation of the dollar from 1998 to 2001, the overvaluation of the Argentine peso led to a structural crisis.²

Although there are recurring themes in the analyses of the events leading up to the crisis, blame cannot be assigned to any one individual or entity. The government of Argentina is ultimately responsible for its own fiscal policies, including, among others, the privatization of public utilities. In retrospect, the International Monetary Fund (IMF) concluded that "the crisis . . . . was the result of economic forces that were difficult to reverse in the context of Argentina's existing vulnerabilities," including unmanageable public debt, the fixed currency board, and structural weak-

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1. Christina Daseking, Atish Ghosh, Timothy Lane, & Alun Thomas, Lessons from the Crisis in Argentina 1 (Int'l Monetary Fund, Occasional Paper No. 236, 2004) [hereinafter IMF Lessons]. This publication also provides an in-depth analysis of the events leading up to the crisis, the crisis itself and possible causes from the Fund's viewpoint.


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nesses that had built up during the 1990s. By 2001, the IMF concluded almost no strategy would have succeeded absent sovereign debt restructuring of Argentina's public debt burden.

The IMF is not blameless either, having made mistakes both before and during the crisis. Although it expressed reservations at various times, the IMF backed Argentina throughout the 1990s, and in 1998, the IMF went so far as to say that Argentina's economic policy was 'the best in the world,' despite its deep depression. During the crisis, the IMF delayed its support, heightening foreign investors' perception of risk.

The international financial community also shares some of the blame. The favorable financial expectations promoted by institutions like the IMF created a tremendous flow of foreign capital into Argentina; its subsequent flight was one of the biggest contributing factors to the crisis. The United States was particularly indifferent to the crisis. The administration of President George W. Bush imposed high tariffs on Argentine exports and refused to adjust the tariffs during the crisis yet at the same time provided tremendous support to the government of Turkey, which was in a similar crisis but was strategically more important for the United States' own economic and political interests.

The crisis broke with the flight of private investment, which fell by more than $3.6 billion in the last two days of November 2001. On January 3, 2002, President Eduardo Duhalde, the fifth president in three weeks, confirmed a moratorium on Argentina's debts and announced he would negotiate with private creditors. Three days later, the government enacted the Public Emergency and Exchange Regime Reform Act (Reform Act), declaring a state of public emergency and delegating social, economic, administrative, and financial and exchange powers to the Executive.

4. Id.
5. 'In fact, at the annual IMF meeting in 1998, the Fund's Managing Director heralded Argentina's economic policy as "the best in the world."' Ocampo, supra note 2, at 26.
6. Id.
7. Id.
8. 'The bluntest statement of official indifference came from [United States] Treasury Secretary Paul H. O'Neill this summer and helped accelerate the loss of capital and confidence here. "They've been off and on in trouble for 70 years or more," Mr. O'Neill said dismissively in an interview with the British magazine The Economist. "They don't have any export industry to speak of at all. And they like it that way. Nobody forced them to be what they are."' Larry Rohter, A Fiscal Crisis, Paid in Credibility, N.Y. TIMES, Dec. 25, 2001, at A16.
9. Id.
10. IMF Lessons, supra note 1, at 37.
11. Id. at 38.
contracts and established a commission to monitor the actions taken by the executive in accordance with the Act.\textsuperscript{13}

The Reform Act resulted in a flood of requests for arbitration at the International Centre for the Settlement of Investment Disputes (ICSID) at the World Bank in Washington, D.C. These requests were filed by foreign corporations seeking to recover for breach of contract under their respective country's bilateral investment treaty with Argentina. As of December 8, 2006, there were thirty-four cases currently pending against Argentina in ICSID.\textsuperscript{14} Eight have been resolved.\textsuperscript{15} Argentina invoked the controversial defense of necessity in two cases brought by United States corporations; one arbitral panel accepted the defense, and one did not. This article analyzes the cases to determine which panel was correct within the context of established customary law and state practice regarding the necessity defense or necessity doctrine.

II. THE INTERNATIONAL LAW COMMISSION DRAFT ARTICLES ON STATE RESPONSIBILITY

The only attempt to codify the doctrine of necessity is found in the United Nations International Law Commission's (ILC) Draft Articles on State Responsibility (Draft Articles).\textsuperscript{16} The Draft Articles are intended to specify the principles of state responsibility but not the rules.\textsuperscript{17} They echo themes established in customary law, which are cited extensively in the commentary and will be discussed at length in this article.

The Draft Articles prohibit the assertion of the necessity defense by a state except to “safeguard an essential interest against a grave and imminent peril,” and only if the action does not “seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community.”\textsuperscript{18} Furthermore, they completely prohibit the invocation of the doctrine if the obligation in question “excludes the possibility of invoking necessity” or if the state itself “contributed to the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 59.
\item Id. at 49. Article 25:
\begin{enumerate}
\item Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only 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.
\end{enumerate}
\end{enumerate}
\end{footnotesize}
situation of necessity.”

James Crawford, the author of the commentary to the Draft Articles, notes that unlike other defenses in international law, necessity is exceptional because it does not depend on the prior conduct of the injured state, but it arises in the case of two conflicting interests: the obligation of the state under the law and the interests giving rise to the necessity. The determination as to whether the interests are essential is necessarily dependent upon the relative concerns of and threats to the state, its people, and the international community. But, whatever the interest, it must also be threatened by a “grave and imminent peril” before necessity may be raised in defense of the state’s action to protect it.

In any event, the defense is completely excluded if other lawful means are available to preserve the interest, even if they are more costly or less convenient. Furthermore, the conduct of the state may not “seriously impair an essential interest” of any other state concerned or the international community. All of these elements must be satisfied before necessity can preclude the wrongfulness of the state action in breach.

III. CRITIQUE OF THE DRAFT ARTICLES

Because of the varying treatment of the doctrine of necessity in customary international law, some have questioned whether the Draft Articles accurately reflect the development of the doctrine. Critics suggest that the drafters “stitched together” arbitral awards and state practice to create the illusion of a broader acceptance of the doctrine in a way that is “dated, ambiguous, or otherwise not particularly compelling.” The very language of article 25 is attacked as being “deliberately vague,” “open-ended,” and overly dependent on the particular circumstances of each individual case.

But this critique does not take into account the development of customary law that has elevated the doctrine of necessity to a long-standing value of international political and legal discourse. Nor does it appreciate the fact that its inherent nature as dependent on circumstance does not preclude a certain degree of analytical consistency—as evidenced in the development of the doctrine to date.

19. Id. at 49. Article 25: “(2) In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity.”
21. Id. at 202, ¶¶ 15.
22. Id.
23. Id.
24. Id. at 203, ¶ 17.
26. Id. at 788.
27. Id. at 789.
IV. EVIDENCE OF CUSTOMARY LAW ESTABLISHING THE NECESSITY DEFENSE

The earliest notions of necessity are rooted in military self-defense and the idea that legitimate conflicting activities cause inevitable harm.\textsuperscript{28} In 432 B.C., representatives from the Greek city-state of Sparta convened a meeting of the Peloponnesian League to ask their allies whether they should go to war over Athenian violations of the Thirty Years’ Peace Treaty, whereupon the Corinthians urged immediate action, stating, “We have arrived at the moment of necessity.”\textsuperscript{29}

References to necessity can be found in domestic legal traditions, such as the \textit{Kinkyu-hinan} in Japan, \textit{Notstand} in Germany, and \textit{état de nécessité} in France.\textsuperscript{30} Indeed, the concept of necessity is “so deeply rooted in the consciousness of the members of the international community” that Judge Robert Ago of the International Court of Justice once [said] that if it was “driven out the door it would return through the window.”\textsuperscript{31}

As it has evolved through customary international law, necessity has been used to justify various policies both to intervene when it was expedient and to abstain when it was not.\textsuperscript{32} Thus, a dual role has evolved: the doctrine is used not only as a shield from liability for actions taken by the state to avert a morally repugnant humanitarian disaster, but also as a sword, justifying the attack of a perceived threat under the banner of a moral imperative. By examining the various applications of necessity in international customary law to date, patterns emerge that are helpful in determining whether Argentina has rightfully asserted the defense.

A. MILITARY NECESSITY

In the Anglo-Portuguese dispute of 1832, property owned by British subjects was appropriated by the Portuguese in violation of treaty obligations in order to provide for the subsistence of troops engaged in quelling internal disturbances.\textsuperscript{33} The parties agreed in a rare moment of diplomatic unity, the British conceding that the treaty could not be

\begin{itemize}
\item \textsuperscript{28} “Like parallel activities, legitimate conflicting activities cause inevitable harm. These are the \textit{rights of self-defence}. Thus, there may be a defence either of a legitimate \textit{group} (national, occupational, social or religious), or of an individual. Self-defence, legal proceedings or necessity are . . . examples of this.” International Law Commission, Second Report on State Responsibility, U.N. GAOR, 51st Sess., at 6, ¶ 11, U.N. Doc. A/CN.4/498/Add.3 (Apr. 1, 1999) \textit{(prepared by James Crawford)} (emphasis in the original).
\item \textsuperscript{29} Gregory A. Raymond, \textit{Necessity in Foreign Policy}, 113 \textit{Pol. Sci. Q.} 673, 673 (1998-1999) [hereinafter Raymond] (citing THUCYDIDES, \textit{HISTORY OF THE PELOPONNESIAN WAR} 30 (Paul Woodruff, ed., Hackett Publ’g Co. 1993)).
\item \textsuperscript{30} Id. at 675.
\item \textsuperscript{32} Id. at 675.
\item \textsuperscript{33} James Crawford, \textit{The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries} 196, ¶ 4 (2002) [hereinafter ILC COMMENT].
\end{itemize}
of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.\(^\text{34}\)

State practice thus embraced the acknowledgment of the doctrine of necessity as inherent.

Necessity was again invoked in state practice in the “Caroline” incident of 1837, during which British armed forces attacked and destroyed a ship owned by American citizens that was carrying recruits and military materials to Canada in violation of a treaty.\(^\text{35}\) In the end, both Governments agreed that “a strong overpowering necessity may arise when this great principle may and must be suspended.”\(^\text{36}\) “It must be so,” added Lord Ashburton, the British Government’s envoy to Washington, “for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity.”\(^\text{37}\) Emerging out of military necessity, the doctrine has since been developed in other areas of international law where imminent harm requires the suspension of legal obligation.

**B. Humanitarian Necessity**

The doctrine’s dual application is most clearly illustrated in its recent applications to humanitarian crises. On one hand, it has been used as a shield to escape the harmful consequences of strict adherence to the law, such as the justification of NATO’s emergency interference in Kosovo in the late 1990s without the pre-approval of the United Nations Security Council.\(^\text{38}\) On the other hand, necessity has also been used as a sword to enact protectionist measures and avoid a moral responsibility. For example, in cases where disturbances lead to a mass displacement of individuals to neighboring countries, the concept of necessity has been used to justify a state’s border closure to prevent a large-scale influx of asylees.\(^\text{39}\)

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36. *Id*.

37. *Id*.


39. See Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, (2000) [hereinafter Boed] describing the 1995 exodus of Rwandan refugees and local Burundis to the border of Tanzania and Tanzania’s invocation of the doctrine of necessity to subsequently close of its borders to prevent the migration of the refugees. Necessity has also been used as a sword in cases justifying the use of torture to secure information under the guise of national security.
One of the earliest assertions of necessity involved a humanitarian theme. The Neptune Case, considered by an arbitral panel convened under the Jay Treaty in 1797, resulted from the seizure by the British Army of an American vessel on its way to France to sell the food products on board. Although the army paid for the products that it took from the American vessel plus a 10 percent profit, the Americans argued that they were entitled to the difference of the price they would have received on the open market in France. The tribunal agreed, rejecting the British Government’s claim that the food was seized out of necessity due to a short supply in their country and stating that although the right to assert a necessity existed in international law, the British had not exhausted all other means of self-preservation as required by the doctrine.

C. Environmental Necessity

The doctrine of necessity has also been accepted in environmental cases, the earliest of these being the Russian Fur Seals Case of 1893. The Russian Government, fearing the danger of the extermination of a fur seal population by unrestricted hunting, issued a decree prohibiting sealing in an area of the high seas until a long-term solution could be reached. The “essential interest” to be safeguarded was the natural resource, and the “grave and imminent peril” was the lack of jurisdiction of any state or treaty to regulate it.

In Torrey Canyon, another early environmental necessity case, a ship became grounded on submerged rocks outside British territorial waters, spilling large amounts of oil that threatened the English coastline. To remedy the situation, the British government destroyed the ship and burned the remaining oil. Although there was no international protest, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (High Seas Convention) was adopted shortly thereafter, and its language foreshadowed the terminology of the Draft Articles.

The High Seas Convention provides that member states can take measures in international waters “as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests

40. *Id.* at 8 (citing *The Neptune*, reprinted in IV International Adjudications: Modern Series 372 (John Bassett Moore ed., 1931) (decided in 1797)).
41. *Id.*
42. *Id.* at 9, n.36 (citing the opinion of arbitration panelist Mr. Trumball, “The necessity which can be admitted to supersede all laws and to dissolve the distinctions of property and right must be absolute and irresistible, and we cannot, until all other means of self-preservation shall have been exhausted, justify by the plea of necessity the seizure and application to our own use of that which belongs to others.”)
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
from pollution or threat of pollution of the sea by oil" due to a maritime casualty that "may reasonably be expected to result in major harmful consequences." 49 Also, the treaty requires that no matter what type of action is taken, it "shall not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate." 50 Themes of necessity are also included in the provisions governing the proportionality of the emergency measures taken. 51 In sum, the High Seas Convention codified the necessity defense as it pertains to international waters, identified its application in the corporate context, and represents a pre-Draft Articles international consensus regarding the elements of the necessity defense.

Despite these examples of apparent international recognition of the doctrine of necessity, in 1990 the arbitral panel in the Rainbow Warrior Case expressed doubt as to the very existence of the doctrine in international law. 52 Yet within the next decade, the International Court wholly embraced the doctrine in their decision in the well-known Gabcikovo-Nagymoros Project Case involving a dispute over the building of a dam on the River Danube. 53 Although the Court did not allow the assertion of necessity under the circumstances of the case, its discussion of the doctrine cemented the establishment of the necessity defense in modern jurisprudence as customary international law. 54

For the most part, the Court in Gabcikovo-Nagymoros accepted the elements of necessity as set forth in the Draft Articles. 55 The Court had no difficulty in acknowledging that Hungary’s environmental concerns were "essential" but found that they had not sufficiently established that the peril was "imminent". 56 Hungary’s proofs failed even though the Court adopted a more expansive view of imminency than the Draft Articles. In expanding the concept of imminency, the Court indicated that the peril need not be immediate but may be a future harm, which may be imminent as soon as it is established. 57 Evidently, the arbitral panel’s

50. Id. art. V, ¶(1) & (2).
51. Id. art. V, ¶(3).

In considering whether the measures are proportionate to the damage, account shall be taken of: (a) the extent and probability of imminent damage if those measures are not taken; and (b) the likelihood of those measures being effective; and (c) the extent of the damage which may be caused by such measures.

53. Id. at 199, ¶ 11; see also Gabcikovo-Nagyamaros Project (Hung v. Slovk.), 1997 I.C.J. 2.
54. Id.
56. Id. ¶¶ 54-57.
57. Id. ¶ 54.

That does not exclude, in the view of the Court, that a “peril” appearing in the long term might be held to be “imminent” as soon as it is estab-
challenges to the necessity defense in *Rainbow Warrior* were unpersuasive, as the *Gabcikovo-Nagymaros* Court fully embraced and even somewhat expanded the doctrine.\textsuperscript{58}

D. **Economic Necessity**

Although some would argue that the necessity defense is limited to the context of military action, there is clear evidence that, in addition to the above environmental scenarios, necessity has also been raised in the context of foreign crises and investment. In the *Russian Indemnity Case*, the Ottoman Government, to justify its delay in paying its debt to the Russian Government, relied on the fact that it had been in an extremely difficult financial situation.\textsuperscript{59} The arbitral panel analyzed the Russian claim very restrictively, holding that necessity could only be invoked if compliance with the international obligation at issue would be "self-destructive."\textsuperscript{60}

In the *Société Commerciale de Belgique Case*, the Greek Government owed money to a Belgian company under two arbitral awards but pled the country's serious budgetary and monetary situation as a necessity that precluded its obligation to pay.\textsuperscript{61} The Court implicitly accepted the principle of necessity but declined to declare whether the Greek Government was within its rights to assert the defense in that instance.\textsuperscript{62}

Other courts have denied a state from asserting a financial necessity defense when alternative means to avoid the peril are available.\textsuperscript{63} In the *Libyan Arab Foreign Investment Case*, the Tribunal declined to comment on the appropriateness of codifying the doctrine of necessity but noted that the measures taken by the defendant Burundi did not appear to have been the only way to safeguard its essential interest.\textsuperscript{64} Most recently, the International Tribunal for the Law of the Sea rejected a necessity defense raised by Guinea in a case defending its right to seize a foreign vessel in accordance with its customs laws for providing oil within Guinea's exclusive economic zone.\textsuperscript{65} The Tribunal held that alternative means were

\footnotesize{lished, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

58. For an additional example of necessity in the context of environmental issues, see *Fisheries Jurisdiction Case*, (Spain v. Can.), 1998 I.C.J. 432 (Dec. 4), wherein Canada enacted emergency legislation to put a stop to the exploitation of the stocks by Spanish fishermen. The Court declined jurisdiction, and this opinion is therefore not included in this analysis.

59. The Government brought the claim as "force majeure" but it was more like a state of necessity. *Draft Articles*, *supra* note 16, at 197-198, ¶ 7.

60. *Id.*


62. *Id.*


64. *Id.* (citing Libyan Arab Foreign Investment Company v. Republic of Burundi, 96 I.L.R. 279, 319 (Arbitral Trib. 1994)).

available to avoid the economic harm alleged.\textsuperscript{66}

Necessity is likewise unavailable when the state itself contributes to the economic crisis. In the \textit{Oscar Chinn Case}, despite the fact that the issue of necessity was never pled, the Permanent Court of International Justice found that respondent Belgium had several options to choose from to avoid financial crisis and that the final decision to create an illegal monopoly over the Congo River ultimately rested with the Belgian Government.\textsuperscript{67} The Court remarked that the Belgian Government itself used a number of policies to avoid the crisis, thereby demonstrating that a number of alternative means were available.\textsuperscript{68}

Similarly, in the \textit{French Company of Venezuela Railroads Case} of 1905, the French-Venezuelan Claims Commission decided a case regarding economic losses incurred by the company when the Venezuelan revolutions of the 1890s slowed its railroad construction.\textsuperscript{69} The panel held Venezuela liable for the acts of the revolutionary movement because the revolution was successful, but it did not provide a reason for doing so.\textsuperscript{70}

In a rare case involving the combination of both the military and economic necessity doctrines, ICSID discussed the relative burdens to be applied. \textit{Asian Agric. Prods. Ltd. v. Sri Lanka} was the first case submitted to ICSID arbitration based upon a consent provision in Sri Lanka-UK Bilateral Investment Treaty [BIT].\textsuperscript{71} The claimant's main producing farm was destroyed on January 28, 1987, during a military operation conducted by the security forces of Sri Lanka against local rebels.\textsuperscript{72} The BIT between the United Kingdom and Sri Lanka required "adequate compensation for the destruction of the Claimant's property if the circumstances were not justified by combat action or the necessities of the situation."\textsuperscript{73} The Court charged Sri Lanka with the burden of providing convincing proof of both.\textsuperscript{74}

But the Tribunal noted that the restitution clause of the BIT appeared

\textsuperscript{66} Id.

\textsuperscript{67} Id. "The question whether the Belgian Government was acting, as the saying is, under the law of necessity is an issue of fact which would have had to be raised, if need be, and proved by the Belgian Government." The \textit{Oscar Chinn Case} (Gr. Brit. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63, at 7 (May 1).

\textsuperscript{68} Id.

\textsuperscript{69} It may be observed, moreover, that there are certain undisputed facts which appear inconsistent with a plea of necessity. To begin with, there is the fact that, when the Belgian Government took the decision... it chose, from among several possible measures... that which it regarded as the most appropriate in the circumstances.

\textsuperscript{70} French Company of Venezuelan Railroads (Fr. v. Venez.), 10 R. Int'l Arb. Awards 9, 285 (Mixed Cl. Comm'n 1905).


\textsuperscript{73} Id. at 582, ¶ 7 (emphasis added).

\textsuperscript{74} Id. at 605, ¶ 58.
to grant most favored nation (MFN) status to investors suffering losses.\textsuperscript{75} The mere proof of losses sustained would be sufficient to require restitution without the need to determine whether the destruction was necessary.\textsuperscript{76} The Tribunal also found that the language of the BIT was so general that the MFN clause should be interpreted to cover all losses, including those incurred during a state of national emergency.\textsuperscript{77} Claimant was thus awarded damages to compensate for its loss, but not on the basis of necessity.

\section*{V. CMS AND LG&E – THE ICSID ARBITRATION PANELS’ CONFLICTING ANALYSES}

Two ICSID panels have reached different conclusions regarding the interpretation of Argentina’s plea of necessity in defense of alleged breaches of article 11 of the BIT between the United States and Argentina (the BIT or Treaty), which reads “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.”\textsuperscript{78}

The relevant inquiry is the scope of the article, specifically what constitutes an “essential security risk.” Argentina seeks to evade liability for breaching the BIT through this public order provision, claiming that the breach was necessary to avoid economic crisis and contending that the circumstances giving rise to the crisis as well as the consequences therefrom were “essential security risks” within the contemplation of the BIT.

\subsection*{A. CMS Gas Transmission Co.}

The first case ever decided by the ICSID in the context of the Argentinian economic crisis, \textit{CMS Gas Transmission Co. v. Argentine Republic (CMS Gas)} was brought by a Michigan-based company (CMS) six months prior to the peak of the crisis.\textsuperscript{79} It alleged that the Government of Argentina breached the BIT by suspending a tariff adjustment formula for gas transportation.\textsuperscript{80} After Argentina had privatized the gas industry,

\begin{thebibliography}{99}
\item \textsuperscript{75} Highet, \textit{supra} note 71, at 373.
\item \textsuperscript{76} \textit{Id}.
\item \textsuperscript{77} \textit{Asian Agric. Prods.}, 30 I.L.M. at 606-07.
\item \textsuperscript{79} CMS Gas Transmission Co. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/8, 2005 WL 1201002 ¶ 4.
\item \textsuperscript{80} \textit{Id}.
\end{thebibliography}
CMS bought over one quarter of the interest in one of the new gas companies that was licensed to operate for the next thirty-five years.\(^8\)

The licensing and offering agreements stated that the tariffs were to be calculated in U.S. dollars, converted to pesos at the time of billing, and adjusted every six months in accordance with U.S. inflation.\(^8\) However, Argentina unilaterally changed the form of the tariffs, prompting CMS to file with the ICSID for breach of the BIT.\(^8\) The claim was registered by the ICSID on August 24, 2001.\(^8\)

Argentina's arguments relied heavily upon customary international law and the provisions of the Draft Articles. Citing the \textit{Gabcikovo-Nagymaros Case} and the \textit{French Company of Venezuelan Railroads Case}, Argentina presented its arguments according to the definition of necessity set forth by the Draft Articles, first by comparing the instances of “grave and imminent peril” in those two cases to the circumstances surrounding its own economic crisis.\(^8\) Secondly, Argentina argued that the State did not contribute to the creation of the state of necessity in a “substantive” way, but that the situation was prompted “for the most part by exogenous factors.”\(^8\)

Additionally, they claimed that the measures adopted “were the only measures capable of safeguarding the essential economic interests affected.”\(^8\) Finally, Argentina argued that it did not breach the essential interests of another state or of the international community as a whole by adopting these measures and that the foreign investors were not treated in a discriminatory manner.\(^8\)

CMS initially argued that Argentina did not meet the burden of proving the necessity as set forth in the \textit{Gabcikovo-Nagymaros Case}.\(^8\) Severe as the crisis may have been, it did not involve “grave” or “imminent” peril, nor could Argentina definitively establish that they had not themselves contributed to the emergency; CMS took the position that most of the causes underlying the crisis were endogenous to the State.\(^9\) Finally, CMS countered that Argentina had not shown that the measures adopted were the only means available to overcome the crisis.\(^9\)

The Tribunal’s analysis referenced heavily the customary international law regarding necessity. Quoting the Draft Articles verbatim and citing the \textit{Caroline, Russian Indemnity, Société Commerciale de Belgique, Torrey Canyon} and \textit{Gabcikovo-Nagymaros} cases, the Tribunal held against Ar-

\(^8\) Id. ¶\textsuperscript{1-2}; see also Barry Appleton, \textit{A Closer Look at CMS v. Argentina: The Impact of ICSID's First Argentine Crisis Award}, \textit{APPLETON'S NEWS} 055, 2005 WL 1071211 (2005).
\(^8\) Id. supra note 81.
\(^8\) Id.
\(^8\) CMS Gas, ICSID Case No. ARB/01/8, 2005 WL 1201002 ¶ 7.
\(^8\) Id. ¶¶ 309-312.
\(^8\) Id. ¶ 312.
\(^8\) Id.
\(^8\) Id.
\(^8\) Id. ¶ 313.
\(^8\) Id. ¶ 314.
\(^8\) Id.
gentina for a number of reasons. First, with respect to whether the severity of the crisis itself warranted the defense of necessity, the Tribunal noted competing viewpoints of leading economists on both sides and concluded that although the crisis was severe, the circumstances could not preclude wrongfulness as a matter of course.

Secondly, the Tribunal held that the measures adopted to prevent the crisis were not the only means available. Furthermore, the most damaging finding of all was the Tribunal’s conclusion that the Argentinean Government itself substantially contributed to the crisis, beginning with its fiscal policies dating back to the 1980s.

Notably, however, the Tribunal did agree that article 11 of the BIT does include economic crises in the definition of “essential security interest” and that such interests are not limited to physical threats to national security or military invasions. Although the Tribunal ultimately found that the economic crisis did not rise to the level of an essential security interest, its determination that necessity is not limited to military action is significant to the advancement of necessity as a defense in customary international law.

Finally, the Tribunal examined whether article 11 was “self-judging”, that is, whether a state seeking to invoke the provision may itself determine whether a security interest is so essential as to trigger its protections or if some sort of judicial review is required. The Tribunal concluded that a state is free to determine its course of action, but once challenged, the reviewing body is charged with the responsibility of determining whether the state’s claim of necessity was warranted by the circumstances.

B. LG&E CAPITAL CORP.

The facts are almost identical in the case of LG&E Capital Corp. v. Argentine Republic (LG&E), which also resulted from Argentina’s unilateral tariff adjustment in the newly-privatized gas industry. LG&E, a Kentucky corporation, purchased interest in three gas distribution companies—Centro, Cuyana, and GasBan—and brought a claim in ICSID for breach of contract after the tariff adjustment. LG&E’s claim was registered with the Tribunal on January 31, 2002, five months after the CMS Gas case was registered, and several months after the economic crisis

92. Id. ¶¶ 315-316.
93. Id. ¶ 320.
94. Id. ¶ 324.
95. Id. ¶¶ 328-329.
96. Id. ¶¶ 359-361.
97. Id. ¶ 366.
98. Id. ¶ 373.
The Tribunal determined that the relevant arguments on the doctrine of necessity and the scope of article 11 were: (1) whether the conditions that existed in Argentina during the relevant period were such that the state was entitled to invoke the protections included in article 11 of the Treaty; and (2) whether the measures implemented by Argentina were necessary to maintain public order or to protect its essential security interests, albeit in violation of the Treaty.  

Argentina argued that the tariff policy was adopted in order to overcome the economic crisis, and if the policy resulted in a violation of the rights guaranteed under the BIT, such measures were implemented under a "state of necessity" under article 11 of the BIT and customary international law, excusing them from liability during the crisis. Argentina further claimed that economic stability falls within a state's "essential security interests" and that during the crisis period, the health, safety and security of the Argentine State were "imminently threatened." As such, the laws passed to alter its financial arrangements were justified by necessity.

LG&E rejected Argentina's contentions regarding the alleged state of necessity, arguing—despite the previous ruling of CMS Gas to the contrary—that the "essential security interest" language of article 11 of the BIT is not applicable in the case of an economic crisis because the language is intentionally narrow in scope and limited to physical security threats in defense or military concerns. LG&E further argued that elevating an economic crisis to the level of an essential security interest would disregard the object and purpose of the Treaty, because it is in times of economic uncertainty that the investors must be able to rely upon the protections contained in the BIT.

With respect to the necessity of the particular economic policies, LG&E identified four measures that the Government implemented unilaterally under a claim of "necessity"—suspension and subsequent abolishment of the Producer Price Index adjustment, freezing the gas-distribution tariffs, and abandonment of the calculation of the tariffs in dollars—and contended that in order to assert its necessity defense to these acts, Argentina had to prove that these were the only means available to avoid the crisis and protect the essential interests under article 11.

Whereas the arbitral panel in CMS Gas approached the issue first with a customary international law analysis, the LG&E panel began with a...
THE "NECESSITY DEFENSE"

literal analysis of the language of the Treaty and then applied the customary international law regarding necessity to further interpret the provisions in dispute as to scope and intent. The Tribunal cited a parade of economic indicators, evidence of civil unrest, murder, and mass protests, which reflected a situation of grave economic, political, and social crisis in the country. Then, in response to LG&E’s argument that the “essential security interest” language of article 11 applied only to military actions, the Tribunal soundly rejected that notion, stating that the conditions in Argentina at the height of the crisis called for “immediate, decisive” action to restore order. Similarly, the Tribunal cited the urgency with which the crisis legislation was passed as reflected in Argentina’s witness testimony, summarily rejecting the assertion that Argentina had other means available to avoid the crisis.

In addressing whether article 11 is self-judging, Argentina argued that language of the Article suffered from “strategic ambiguity” on the part of the United States, since it does not clearly define who should determine if the measures to maintain public order or protect essential security interests are necessary. Siding with LG&E on this issue, the Tribunal disagreed, stating that the United States did not consider essential security clauses as self-judging until after the Treaty was passed, therefore the BIT provisions must be interpreted in conformity with the interpretation given and agreed upon by both parties at the time of this signature. On this sole point, both the CMS and LG&E panels agreed.

After concluding that a state of necessity existed under the BIT and customary international law, the Tribunal ruled that from December 1, 2001 until April 26, 2003, Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests. The Tribunal chose these dates because they coincided with the Government’s announcement of the measure freezing funds, which prohibited bank account owners from withdrawing more than one thousand pesos monthly, and with the election of President Kirchner.

Once order was restored to the country, the Tribunal argued, the tariff regime should have been reinstituted. Therefore, Argentina is liable

107. See id. ¶¶ 226-266.
108. Id. ¶¶ 231-237.
109. Id. at 238.
110. Id. ¶¶ 240-41 (citing the witness testimony of Eduardo A. Ratti and Nouriel Roubini).
111. Id. ¶ 209.
112. Id. ¶¶ 211-213.
113. Id. ¶ 226.
114. Id. ¶ 230.
115. Id.
for the damages resulting after April 23, 2003, the date order was re-
stored.\textsuperscript{116} Citing evidence that the conditions as of December 2001 con-
stituted the “highest degree of public disorder” and “threatened
Argentina’s essential security interests,” the Tribunal discredited LG&Es
claim that the period was one of “economic problems” or “business cycle
fluctuation.”\textsuperscript{117}

Finally, and perhaps most telling, the Tribunal placed the burden on
LG&E to prove that Argentina itself contributed to the state of neces-
sity.\textsuperscript{118} Finding that it did not so prove, the Tribunal concluded that the
efforts of Argentina’s Government were focused on slowing down the
impact of the economic, social and political crisis, and did not contribute
significantly to the factors that caused it.\textsuperscript{119} This particular portion of the
Tribunal’s analysis is the most troubling. The bulk of customary interna-
tional law regarding the defense of necessity as discussed at length herein
places the burden of proof not on the party seeking to enforce the treaty
or agreement but upon the state seeking protection from an alleged
breach thereof. As such, on this particular provision, it appears that the
Tribunal departed from established custom. It is unclear from the text of
the decision whether the Tribunal did so to avoid the morass of economic
evidence that the CMS tribunal sifted through or whether the Tribunal
had any other justification for such a departure.

Reaction to the \textit{LG&E} decision has been mixed. Some categorize the
decision as political, bearing little precedential value on the issue of ne-
cessity.\textsuperscript{120} But a recent article by an international arbitration practitioner
offers a much more ominous observation that the holding in the \textit{LG&E Case}
is so inclusive that it might be said that the Tribunal’s analysis
throws open the doors for abuse in times of economic hardship, rendering
BITs less effective on the whole.\textsuperscript{121} Still others question whether unfa-
vorable ICSID awards such as \textit{CMS Gas} will actually ever be enforced or
if the Argentinean Government will find that the awards are in conflict

\textsuperscript{116} Id.
\textsuperscript{117} Id. at 231, 235.

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. . . . Widespread
violent demonstrations and protests brought the economy to a halt, in-
cluding effectively shutting down transportation systems. Looting and
rioting followed in which tens of people were killed as the conditions in
the country approached anarchy.

\textsuperscript{118} Id. \S 256.
\textsuperscript{119} Id.
\textsuperscript{120} Todd Weiler, \textit{editor of investmentclaims.com and naftaclaims.com says: “My im-
pression is that the decision is a prudent, political one. I would not read too much
into it, at least with respect to the substantive necessity defence.” Todd Weiler,

\textsuperscript{121} David Foster, \textit{Necessity Knows No Law! \textit{LG&E} v. Argentina}, 9(6) \textit{INT’L ARB. L.
with domestic law. With a large number of cases still pending at the ICSID, further development of the economic necessity defense is likely.

VI. A POSSIBLE EXPLANATION: NECESSITY AS A JUSTIFICATION OR AN EXCUSE

In a recent article, Ian Johnstone analyzed whether necessity is properly utilized as a defense or if it is more useful in excusing failures of the state or even in justifying unlawful behavior in the name of "national security." When used to justify behavior, the state accepts responsibility but denies that its actions were bad; when used as an excuse, the state admits that its actions were bad but either partially or completely rejects responsibility. In other words, justification concedes that the elements of the offense are satisfied, but asserts that the act is not wrongful; excuse concedes that the act is wrongful, but seeks to avoid fault. The distinction is important because excuses can be claimed only by those in direct peril, while justifications can also be claimed by third parties. Justifications relate to whether the act is right or wrong, whereas excuses look to the circumstances of the actor. And the availability of the excuse depends on the actor's personal circumstances.

The language used in the Draft Articles establishing the defense as a "ground for precluding wrongfulness" supports the idea that "necessity" is a justification, not an excuse. But CMS Gas appears to analyze it as an excuse. In determining whether Argentina was in "grave and imminent" peril sufficient to justify necessity, the Tribunal found that although the situation was difficult enough to justify the government's taking preventative actions, it did not preclude the wrongfulness of those actions. CMS Gas viewed the assertion of the necessity defense by Argentina as an excuse for taking actions that were wrong. The CMS Tribunal refuses therefore to preclude wrongfulness despite Argentina's "excuse."

Alternatively, the LG&E Tribunal treats the defense as a justification. The panel absolved Argentina of liability and damages for the period of crisis, justifying the Governments actions in light of the social, economic and political circumstances alleged. Thus, the decision in LG&E precludes Argentina from wrongfulness. As such, it would appear that the LG&E reasoning may actually be closer to the intent of the drafters of the Draft Articles, yet nothing in the commentary would suggest that this is so.

123. See Johnstone, supra note 38, at 378.
124. Id. at 350.
125. Id.
126. Id. (citing George P. Fletcher, Rethinking Criminal Law (Oxford Univ. Press 1978)).
127. Id.
128. Id. at 352-353.
129. CMS Gas, ICSID Case No. ARB/01/8, 2005 WL 1201002 ¶ 322.
Perhaps the two approaches of the Tribunals to the problem explain the different results. CMS disallows the excuse and LG&E allows the justification. But, the doctrine of necessity may in fact be neither. Corporations can invoke the protections of bankruptcy when in financial crisis, freezing whatever assets are left for reorganization or dissolution, and in most cases, many creditors are left with nothing despite contracts with all types of language to the contrary. Perhaps necessity, when applied correctly in the narrowest of circumstances, is neither a justification nor an excuse, but rather a remedy that acknowledges that a wrong occurred but holds that suspension of obligation is the only means available post-crisis to provide some creditors with some compensation and give the host country a “fresh start.” When circumstance leads to injustice for all, the only way to proceed is to restore as much to as many as possible.

VII. SUGGESTED DAMAGES ANALYSIS FOR THE LG&E RESULT

The LG&E Tribunal rendered its decision on liability on October 3, 2006, but has yet to conclude on damages. Article 27 of the Draft Articles provides that even if a party prevails on a defense precluding wrongfulness (such as the necessity defense) it does so without prejudice to the question of compensation. But the Tribunal in its findings declared that all measures adopted by Argentina both before and after the period of exemption “shall be taken into account by the Tribunal to estimate the damages.”

In a disturbingly unprecedented move, however, the Tribunal then specifically assigned all damages for the duration of the crisis to LG&E, precluding them from subsequently recovering for those losses. The only reason given was that the investors assumed the risk of foreign investment. The Tribunal did not legally support such an absolution of the Argentinean government but simply noted the lack of instruction in the Draft Articles and the BIT as to who should compensate for losses incurred during a state of necessity.

130. Draft Articles, supra note 16, art. 27.

131. LG&E, ICSID Case No. ARB/02/1, 2006 WL 2985837 ¶ 263.

132. Id. ¶ 264.

133. Id. ¶¶ 107, 260-61, 264.

134. Id. ¶¶ 260-264 (emphasis in original).
This wholesale assignment to LG&E was despite the Tribunal's earlier analysis of the fair and equitable treatment clause of the BIT where the Tribunal found that the Government of Argentina went "too far by completely dismantling the very legal framework constructed to attract investors." This ruling introduces the investment-chilling idea that the investor bears the entirety of the risk whenever it cannot establish that the defaulting country was not protecting an essential security interest, even when the Government is admittedly not totally free from all blame.

It is evident from the facts of the case and the conclusions of the IMF that Argentina was facing an enormous social, economic and political crisis with very limited choices. Widespread violent demonstrations and protests halted the economy and shut down the transportation systems. But LG&E claims between $248 million and $268 million in total lost profits. Certainly the toll for the seventeen-month crisis window was in the hundreds of millions. Although Argentina has been found liable for the portion of LG&E's claim that accrued beyond the defined crisis period and will likely pay a large sum, assigning wholesale the costs of the crisis itself to the investor is a troubling proposition. This not only provides a disincentive for foreign companies to invest in new or emerging democracies, but also discourages countries in crisis from emerging from peril; the longer a country is found to be "in crisis" the fewer damages it must pay to those injured.

Although a state may be justified in taking emergency measures in times of economic, social and political crisis, the investor should not have to walk away from the situation empty-handed, especially in consideration of almost a year and a half of lost profits. The necessity defense itself embodies a balancing of interests, prohibiting a state from invoking the defense if its actions "seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole." This theme of balancing interests is also found in Draft Article 33, which defines the scope of international obligations.

Therefore, a fairer proposal seems to be a "balancing test" or "necessity discount" approach that entails a weighing of the social, political, and economic interests of Argentina and the risks assumed by the investor against LG&E's lost profits in crisis, then calculating the total amount of the damages for which Argentina would have been responsible in the absence of crisis and discounting them for the urgency of the necessity measures involved. Admittedly, this is a circumstantial and speculative

135. *Id.* § 139.
136. *Id.* § 235.
137. *Id.* § 74.
139. "This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State." *Id.* art. 33(2). *See also* Boed, *supra* note 39, for a more extensive discussion of "balancing test" notions in the humanitarian application of the necessity defense.
approach that requires the adjudicating body to determine the "direness" of the necessity, but it eliminates the incentive to a country to prolong the appearance of crisis and provides it with a reasonable measure of exemption for the period of crisis, all while preserving the vital BIT protections expected by the investor.

VIII. ADDITIONAL CONCLUSIONS AND OBSERVATIONS

Both tribunals, though reaching different conclusions, agreed on a few key issues. First, they both acknowledged the doctrine of necessity as a defense that may preclude wrongdoing. This basic agreement on the existence and legitimacy of "economic necessity" as a defense is more significant than it seems at first glance. Modern arbitrators have called the very existence of the "necessity defense" into question as recently as 1990 in the *Rainbow Warrior* case. There is no shortage of legal debate regarding the establishment of the doctrine in customary international law. The fact that the ICSID Tribunals accepted the necessity defense in accordance with the Draft Articles lends great support to the argument that necessity is not limited solely to military action.

Additionally, both of the Tribunals agreed that Article 11 of the Treaty is not self-executing. This is important because it allows a country to take whatever measures are necessary to avoid a crisis but removes the judgment as to whether the crisis is indeed an "essential security interest" to a third and presumably neutral party. Finally, although they used the Draft Articles in different ends of the analysis, both panels recognized the authority of the definition of "necessity" in Article 25 and the accompanying commentary.

The drafters of the Treaty must have been savvy enough to understand that risk is inherent in investment and that developing countries are risky environments. However, it is doubtful that they contemplated a seventeen-month exposure for investors due to civil, political, and economic unrest. Since it is clear that "essential security interest" will be read to include economic crises, perhaps BITs should include "necessity clauses" that set forth exactly what types of instabilities in the public or financial order will trigger a situation of necessity so as to justify a breach of the BIT. This would certainly refine the investors' expectations and would further guide the governments of the host countries as they formulate economic policy.

Perhaps it is true, as William Pitt, Secretary of State in Great Britain during the Seven Years' War, stated, "Necessity is the plea of every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves." Or is it true that in extraordinarily narrow and unique circumstances, the availability of the defense of necessity "must be so" as noted by Lord Ashburton? Only further application and development of the doctrine as either a justification or an excuse will provide the answer. Until then, necessity provides an avenue by which a state may take critical action to defend fundamental interests, but the weight of customary
law to date is against preclusion of wrongfulness through its use. Accordingly, the narrow language of the Draft Articles and the limited development of the economic necessity defense in international courts and tribunals caution against a full embrace of the LG&E decision.