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The Enron v. Argentina Annulment Decision: Moving a Bishop Vertically in the Precarious ICSID System

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NOTE

The Enron v. Argentina Annulment Decision: Moving a Bishop Vertically in the Precarious ICSID System

Michael Wilson*

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* Student Writing Editor, INTER-AMERICAN LAW REVIEW; J.D. candidate, University of Miami School of Law, 2012. This article is dedicated to my parents, Jan and Alan. A special thanks to Jehovah Nissi.

I. INTRODUCTION

Argentina's grandiose economic problems of the 21st century date back to its government's decisions during the late 1980s under the rule of former President Carlos Menem.¹ Menem's regime attempted to reform the collapsed Argentine economy by passing a "Convertibility Law," which set a fixed exchange rate of one Argentine peso to one U.S. dollar and was largely successful in keeping inflation static for over a decade.² Taking a step further towards change, Menem privatized many State-owned entities and loosened restrictions on trade in order to attract foreign investment.³ Subsequently, Argentina signed many bilateral investment treaties (BIT) with other countries,⁴ which facilitated foreign investment by providing investors with protections against host-state derogation, guarantees for contractual rights, and national protection.⁵

The effectiveness of Menem's reforms was ephemeral, however, since in the late 1990s and early 21st century Argentina's economy did not fare as well, with unemployment rising to nearly 25%.⁶ When the International Monetary Fund stopped releasing funds to Argentina in December of 2000, the country lapsed into the largest sovereign default in its history.⁷ Foreign investors and Argentine citizens began rapidly pulling funds from their Argentine bank accounts, but the government responded by capping

1. Daniel A. Krawiec, *Sempra Energy International v. the Argentine Republic: Reaffirming the Rights of Foreign Investors to the Protection of ICSID Arbitration*, 15 L. & BUS. REV. AM. 311, 317 (Spring 2009).

2. Becky L. Jacobs, *Pesification and Economic Crisis in Argentina: The Moral Hazard Posed by a Politicized Supreme Court*, 34 U. MIAMI INTER-AM. L. REV. 391, 398-399 (Summer 2003).

3. See Krawiec, *supra* note 1, at 317.

4. For a list of Argentine BITs, see U.N. Conference on Trade & Dev. [UNCTAD], *Bilateral Investment Treaties 1959-1999*, at 26-27, U.N. Doc. UNCTAD/ITE/IIA/2 (Dec. 2000) (prepared by Abraham Negash), available at <http://www.unctad.org/en/docs/poiteiid2.en.pdf>.

5. See William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, SCHOLARSHIP AT PENN LAW, Paper 202, 1 (2008), http://lsr.nellco.org/upenn_wps/202; For general knowledge of protections provided under BITs, see M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 233-58 (2004); Andrew Guzman, *Review Essay*, 6 EUR. J. INT'L L. 612, 613-14 (1995).

6. *Argentina's Collapse: A Decline Without Parallel*, THE ECONOMIST, Feb. 28, 2002, at 26, <http://www.economist.com/node/1010911>. See also Jacobs, *supra* note 2, at 399.

7. Jacobs, *supra* note 2, at 400.

withdrawal amounts.⁸ In the midst of the crisis and under the direction of new interim President Eduardo Duhalde, the Convertibility Law was abolished, allowing the peso to float freely on the international currency exchange.⁹ Duhalde also enacted the controversial “Emergency Law,” which mandated the conversion of bank deposits denominated in U.S. dollars to Argentine pesos, otherwise known as “pesification.”¹⁰ After pesification, most foreign investors instantly lost two-thirds of their income,¹¹ making it clear that their assets were invariably linked to Argentina’s political discretion notwithstanding any contemporaneous BITs.

In the 1990s, the former Enron Corporation invested in the newly privatized energy sector of Argentina. When the Argentine government made changes to its currency laws in the early 21st century, the value of Enron’s investments was rapidly diminished. Enron, among other international corporations, filed a claim against Argentina before the International Centre for Settlement of Investment Disputes (ICSID),¹² arguing that Argentina breached the U.S.-Argentina BIT¹³ by altering Argentina’s laws during the economic crisis.¹⁴ The ICSID is a forum under the guidance of the World Bank that allows for direct investor-state arbitration of which the majority of claims filed allege violations of BITs.¹⁵ The ICSID system is one without an appellate procedure or a corresponding concept of *stare decisis*,¹⁶ as such, losing parties

8. The limitation on withdrawals was colloquially known as a “*corralito*.” *Id.* at 401.

9. *See id.* at 402-03; *see also* Krawiec, *supra* note 1, at 318.

10. Krawiec, *supra* note 1, at 318.

11. *See id.*

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

13. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, S. Treaty Doc. No. 103-2 (1993) [hereinafter U.S.-Arg. BIT].

14. Argentina has the largest number of investor state arbitrations of any of the 81 countries in the ICSID system, having entered into roughly 51 at the end of 2009. *See International Center for the Settlement of Investment Disputes, Pending and Concluded Cases* [hereinafter ICSID Cases], <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases>; *see also Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note No. 1, 13 (2010), http://www.unctad.org/en/docs/webdiaeia20103_en.pdf.

15. *See* Burke-White, *supra* note 5, at 1.

16. *See* Andrea K. Bjorklund, *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* 471 (Todd Weiler ed., 2005) (explaining, “Parties to an ICSID

are stuck with the finality of Tribunal decisions.¹⁷ However, any losing party may petition to have an ICSID Tribunal's award vacated through the annulment process.¹⁸ If annulment is successful a losing party will not be liable to pay damages assigned by the Tribunal. Awards against Argentina tend to be set in the hundreds of millions of dollars and are "among the highest ever rendered by an ICSID tribunal."¹⁹

In the litigation that ensued after the enactment of the Emergency Law, Argentina has persistently argued that the currency changes adopted during its national crisis effectively invoke the BIT's non-precluded measures (NPM) clause,²⁰ which would release it from liability to its investors. The treaty's NPM clause is a standard provision in BITs that exempts State action during extraordinary circumstances from the protections of the BIT.²¹ Whether Argentina can properly invoke the NPM clause turns on whether its decision to allow the peso to float and to pesify bank accounts was "necessary for the maintenance of public order."²² The ICSID has found it an arduous task to define the extent that the NPM clause applies to Argentina's actions during the crisis.

arbitration are able to seek annulment of an award rendered under the ICSID Convention, but are not able to appeal the merits of the award.").

17. See David D. Caron, *Reputation and Reality in the ICSID Annulment Process*, 7 ICSID REV. 21, 25 (1992) (noting, "in a sense, annulment is all that doctrinally survives the parties agreement to regard the award as final and binding.").

18. Article 52 of the ICSID Convention reads, "Either party may request annulment of the award." ICSID Convention, *supra* note 13; *cf.*, Bjorklund, *supra* note 16, at 471.

19. José E. Alvarez and Kathryn Khamisi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, in THE YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 379, 380 (Karl P. Sauvant ed., 2008/2009).

20. Article XI of the U.S.-Argentina BIT does not preclude the government from adopting "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." U.S.-Arg. BIT, *supra* note 13. This clause has also been referred to by many scholars as the "measures not precluded" clause. See, e.g., Alvarez & Khamisi, *supra* note 19, at 380. On NPM clauses in BITs generally, see William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307 (2008).

21. See Steven Smith & Kevin Rubino, *Investors Beware: Enron and Sempra Annulment Decisions Bolster the State of Necessity Defense While Sowing New Uncertainty regarding the Finality of ICSID Arbitral Awards*, O'Melveny & Myers LLP News Alert (Aug. 9, 2010), available at <http://www.omm.com/investors-beware—enron-sempra-annulment-decisions-bolster-state-necessity-defense-while-sowing-new-uncertainty-regarding-finality-of-icsid-arbitral-awards-08-09-2010/>.

22. U.S.-Arg. BIT, *supra* note 13, art. XI.

This problem arises from the BIT itself, which does not define necessity or the conditions for its application. Some Tribunals have thus responded by using the customary necessity defense,²³ which is conceded by both parties to be reflected by Article 25 of the International Law Commission's (ILC) Articles on State Responsibility,²⁴ to interpret the NPM clause; of course, such an analysis begs the question as to the proper relationship between the NPM clause and the customary necessity defense.

Argentina has importunately advanced a second argument—the customary necessity defense—asserting that it precludes any illegitimacy of Argentina's actions in response to the emergency.²⁵ Alternative to the NPM argument,²⁶ the customary necessity defense argument turns on whether Argentina's actions were the “only way for the State to safeguard . . . against a grave and imminent peril,” also known as the only way provision.²⁷ The ICSID Tribunals have not only applied the customary necessity defense disparately, but also have interpreted the only way provision differently.²⁸ The heart of the application debate is whether the customary necessity defense can be applied directly to the NPM clause or, to the contrary, as a secondary measure only after the NPM clause has been parsed independently. The core of the interpretive quandary is whether the only way provision should be interpreted literally—in which case there will almost always be

23. Many scholars refer to the customary necessity defense as the “customary law defense of necessity” or “customary international law as reflected in Article 25 of the ILC's Articles,” among other names. *See, e.g.*, Burke-White, *supra* note 5, at 18; Smith & Rubino, *supra* note 21, para. 5. For sake of simplicity, however, this note refers to it only as the customary necessity defense.

24. *See* Smith & Rubino, *supra* note 21, para. 5; Int'l Law Comm'n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, art. 25, U.N. Doc. A/56/10 (2001) [hereinafter ILC's Articles].

25. *See* Smith & Rubino, *supra* note 21, para. 4 (describing Argentina's perspective on its actions as “necessitated by a collapsing economy that had produced nationwide rioting and five different presidents in the span of a month. [Argentina] argue[s] that its actions were accordingly exempted from liability by both Article XI of the BIT as well as customary international law.”).

26. *See* Burke-White, *supra* note 5, at 2 (explaining that Argentina has set forth two distinct arguments: one based on treaty law and the other based on customary international law).

27. ILC's Articles, *supra* note 24, art. 25(1)(a).

28. *See* Andreas von Staden, *Reestablishing Doctrinal Clarity and Correctness: Treaty Exceptions, Necessity, and the CMS, Sempra, and Enron Annulment Decisions*, October 9, 2010, CZECH YEARBOOK INT'L L., vol. 2 (forthcoming 2011) (manuscript at 3, on file with SSRN), available at <http://ssrn.com/abstract=1689872> (explaining frankly that “the interpretation of the elements of the necessity defense . . . has often been lacking systematic approach and proceeded in so cursorily a manner that if a law student had done so in a final exam, he or she might well have failed.”).

another hypothetical way for the government to have acted—or conversely, interpreted to mean the only logical way after balancing a variety of factors.

Enron v. Argentina is one of five recent cases brought under the U.S.-Argentina BIT, the other are: *CMS v. Argentina*, *Sempra v. Argentina*, *LG&E v. Argentina*, and *Continental Casualty v. Argentina*;²⁹ collectively, these cases are known as the “Argentine Gas Sector Cases.”³⁰ Among these cases, only *CMS*, *Sempra*, and *Enron* have issued annulment decisions³¹ with the others pending annulment review.³² The issues arising in *Enron* are no different than those in the other Argentine Gas Sector Cases since parties to the arbitration proceedings have essentially made the same arguments of law; notwithstanding, equivocation has permeated the ICSID Tribunal decisions. The judges for these disputes have given ambiguous and in some cases contradictory analyses reaching antithetical holdings for cases with identical facts.³³ Evidently noting this flagrancy in Tribunal decisions, the *Enron*, *Sempra*, and *CMS Annulment* Committees have provided Tribunals with doctrinal correctness while attempting to solidify the integrity of the ICSID system.³⁴ In doing so, however, the Annulment Com-

29. See ICSID Cases, *supra* note 14.

30. See Alvarez and Khamsi, *supra* note 19, at 379.

31. *Enron Corp. Ponderosa Asset, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Annulment Decisions of July 30, 2010 [hereinafter *Enron Annulment*]; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Decision of June 29, 2010 [hereinafter *Sempra Annulment*]; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision of Sept. 25, 2007 [hereinafter *CMS Annulment*].

32. *LG&E Annulment* and *Continental Casualty Annulment* were registered on September 19, 2008, and January 14, 2009, respectively. See <http://icsid.worldbank.org/>.

33. See Matthew Parish, *On Necessity*, 11 J. WORLD INVESTMENT & TRADE 169, 193 (2010), available at http://www.matthewparish.com/pdf/On_Necessity.pdf (arguing, “the risk of inconsistent decisions is, as was seen in the *Argentina* arbitrations, more than merely fanciful. The varying tribunals came to opposite conclusions on (exactly) the same facts, without commenting significantly one upon the other or giving any explanation in law or fact of their differing reasoning;” see also Sahib Singh, *Necessity in Investor-State Arbitration: The Sempra Annulment decision*, August 16, 2010, EJIL: Talk! (Blog of the European Journal of International Law), at 1, available at <http://ssrn.com/abstract=1660584> (noting that “discrepancies in reasoning still appear.”).

34. See Burke-White, *supra* note 5, at 29 (noting, “[t]he [CMS] Annulment Committee may have found the award and the fact that its analysis was quickly becoming the majority approach in the Argentine cases so legally troubling that it sought to vitiate the award of any precedential value and ensure that subsequent tribunals addressing similar issues did not follow the CMS Tribunal’s line of analysis.”).

mittees may have crossed their delegated authority in order to correct the Tribunals' egregious errors of law.

The *Enron Annulment* Committee found grounds for annulment on three bases: first, it held that the *Enron* Tribunal did not apply the customary necessity defense, resulting in a "manifest excess of powers," which is a violation of Article 52(1)(b) of the ICSID Convention.³⁵ Second, the Committee noted that the Tribunal's failure to apply the customary necessity defense affected its analysis of the NPM clause, which also resulted in a manifest excess of powers.³⁶ Third, the Committee decided that if the Tribunal had applied the customary necessity defense *sub silentio*, then it still "failed to state the reasons for [its] decision,"³⁷ which is a violation of Article 52(1)(e) of the ICSID Convention.³⁸ There are five grounds for annulment under the ICSID Convention,³⁹ but only two of relevance for the Argentine Gas Sector Cases—Article 52(1)(b) and Article 52(1)(e).

This note argues that the *Enron Annulment* decision moves the ICSID a step closer towards legitimacy in investment arbitration, adds a talismanic piece to the ICSID puzzle, and leaves the proper scope of annulment review ambiguous but evidently expansive. *Enron Annulment's* approach to the customary necessity defense should be applauded since it gives an adequate paradigm for Tribunals to parse the only way provision, which was prominently absent from former rulings,⁴⁰ and provides State parties to the BIT with a fairer standard that doesn't preclude the necessity defense.⁴¹ Part II of this note examines the relevant ICSID Tribunal decisions leading up to *Enron Annulment* while focusing on the interpretation of contentious provisions of the NPM clause

35. *Enron Annulment*, *supra* note 31, para. 377; ICSID Convention, *supra* note 12, art. 52.

36. *Enron Annulment*, *supra* note 31, para. 405; *cf.*, ICSID Convention, *supra* note 12, art. 52(1)(b).

37. *Enron Annulment*, *supra* note 31, para. 384.

38. ICSID Convention, *supra* note 12, art. 52.

39. *Id.*

40. All other ICSID Tribunals and Annulment Committees have interpreted this clause so narrowly that they have effectively passed over it. *See generally* August Reinisch, *Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS and LG&E*, 8 J. WORLD INVESTMENT & TRADE 191 (2007) (noting, "other ways had been available . . . therefore, the invocation of the necessity plea failed.").

41. Many commentators have responded to Tribunals' analyses as an obviation of the necessity clause. *See* Burke-White, *supra* note 5, at 2 (asserting, "ICSID Tribunals . . . have interpreted the customary law doctrine of necessity extremely narrowly—so narrowly as to make it essentially unavailable to any state.").

and its nexus to the customary necessity defense. Part III considers the ICSID Annulment decisions that have preceded and influenced the Committee in *Enron Annulment*. Part IV highlights *Enron Annulment's* reasons for annulment, analyzing whether its novel treatment of the only way provision was necessary and whether mere errors of law are enough to trigger annulment. Part IV also questions *Enron Annulment's* errant disregard of the relationship between the NPM clause and the customary necessity defense. Part V concludes by discussing the proper balance between the concepts of finality and substantive correctness in the ICSID system, focusing on their relevance and direction post-*Enron Annulment*.

II. PERSPECTIVE: THE JURISPRUDENCE OF THE ICSID TRIBUNAL DECISIONS

A. *The NPM Clause and The Customary Necessity Defense: A Concise History*

The purpose of the ICSID and BITs are to provide investors with protection against State injury to international investments.⁴² More than twenty-five of the cases pending before the ICSID have been brought against Argentina alleging that Argentina's response to the economic crisis of 2001-2002 abrogated investor rights safeguarded under Argentine BITs.⁴³ Argentina's arbitration cases invariably involve an analysis of the BIT's NPM clause and the ILC's customary necessity defense, which measure the extremes of Argentina's freedom to act in anomalous circumstances and the extent investor's rights curtail such freedom.⁴⁴

Traditional legal doctrine affirms the customary necessity defense as a valid basis for precluding wrongfulness under customary international law.⁴⁵ The threshold, however, for invoking

42. See Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, 24 BERKELEY J. INT'L L. 444, 444-45 (2006) (explaining that the intent of the ICSID Convention is "to enforce a regime of investors' rights.").

43. See Burke-White, *supra* note 5, at 1; see also Alan Cibilis, *ICSID bleeds Argentina*, in MULTINATIONAL MONITOR JOURNAL, July 1, 2005, at 4, available at <http://www.allbusiness.com/specialty-businesses/846549-1.html>. Cibilis's satirical title, that ICSID is literally bleeding Argentina, comes not only from the many claims filed against Argentina, but also from the estimation of the lucrative prospects for investors since the "total potential claims . . . are estimated at more than \$30 billion."

44. See Burke-White, *supra* note 5, at 2.

45. See Reinisch, *supra* note 40, at 195; *c.f.* Julio Barboza, *Necessity (Revisited) in International Law*, in ESSAYS IN HONOUR OF JUDGE MANFRED LACHS 27, 41 (1984)

and utilizing the customary necessity defense is rather high,⁴⁶ the ILC, which drafts the modern standards for customary international law, describes the customary necessity defense as “narrow[]” and “only rarely . . . available to excuse non-performance of an obligation.”⁴⁷ While many precedents have acknowledged the customary necessity defense as a matter of law, this seemingly legitimate defense has almost always been rebuffed—it has historically only been a nominative defense.⁴⁸ Although the ILC’s Articles should be interpreted narrowly in order to prevent exploitation by State actors and to ensure justification for intentional and illegitimate acts,⁴⁹ the consequence of a narrow approach is that the customary necessity defense is preemptively and surreptitiously vitiated from customary international law.⁵⁰

In the past decade, however, there has been a lack of consensus among the ICSID Tribunals regarding the correct interpretation of the customary necessity defense, and moreover, of the NPM clause,⁵¹ indeed, numerous commentators have considered the Tribunals’ analyses particularly frustrating.⁵² However, the legal principles to be applied have developed a closer harmony albeit with subsequent disaccord in application.⁵³ For instance Article 25 of the ILC’s Articles is generally accepted as the correct

(explaining that “necessity is an admitted cause in international law for preclusion of responsibility for State conduct not in conformity with an international obligation.”).

46. See Reinisch, *supra* note 40, at 195-96 (explaining that while “necessity has been recognized as a customary international law rule . . . [the] restricted availability of the necessity defense is . . . confirmed by a number of older precedents.”).

47. Int’l Law Comm’n, *Commentary to Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, art. 25, paras. 1-2, U.N. Doc. A/56/10 (2001) [hereinafter *Commentary to the ILC’s Articles*].

48. See Reinisch, *supra* note 40, at 196.

49. See Alberto Alvarez-Jiménez, *New Approaches to the State of Necessity in Customary International Law: Insights from WTO Law and Foreign Investment Law*, 19 AM. REV. INT’L ARB. 463, 463 (2008) (noting, “the ILC’s Articles . . . need to be interpreted narrowly in order to prevent the abuse of [the customary necessity defense] . . .”).

50. See Burke-White, *supra* note 5, at 2 (arguing, “ICSID Tribunals . . . have interpreted the customary law doctrine of necessity extremely narrowly—so narrowly as to make it essentially unavailable to any state.”).

51. See Reinisch, *supra* note 40, at 212 (noting the “divergent results” in recent Tribunal decisions).

52. See von Staden, *supra* note 28, at 210 (noting the egregious equivocation among various Tribunals, “it is precisely with respect to doctrinal clarity and correctness that several of the awards rendered against Argentina have fallen surprisingly short.”).

53. See Parish, *supra* note 33, at 184 (affirming that “something of a consensus has emerged about the legal principles applicable where a state raises a necessity defense.”).

promulgation of the customary necessity defense;⁵⁴ nevertheless, the ensuing jurisprudence of the Argentine Gas Sector Tribunal Cases is convoluted and problematic due to shoddy legal reasoning, suspicious treaty interpretation, and inconsistent holdings in the Tribunal awards.⁵⁵

The *Enron*, *Sempra*, and *CMS* Tribunal decisions all found the NPM clause and the necessity defense inapplicable.⁵⁶ According to the Tribunals, Argentina's arguments did not overcome the threshold for invoking the customary necessity defense, and therefore an analysis of the NPM clause was unnecessary. In contrast, the *LG&E* and *Continental Casualty* Tribunals found the NPM clause properly invoked and the customary necessity defense applicable to Argentina.⁵⁷ Save *LG&E* and *Continental Casualty*, former Tribunals have essentially curbed the NPM clause through a narrow and vapid reading of the customary necessity defense. The divergence in the Argentine Gas Sector Tribunal Cases centers on the Tribunals' disparate understanding of the connection between the NPM clause and the customary necessity defense.

B. *The Nexus Between The NPM Clause and The Customary Necessity Defense: A Center of Contention*

The Tribunals for the Argentine Gas Sector Cases had an opportunity to obviate the ambiguity surrounding the correct interpretation and application of the NPM clause in the U.S.-Argentina BIT. Aside from *Continental Casualty*, the other Tribunals accepted the ILC's Articles as the appropriate medium to interpret the NPM clause,⁵⁸ but applied them variably to deter-

54. See Reinisch, *supra* note 40, at 196.

55. See von Staden, *supra* note 28, at 211 (explaining, "several of the [Tribunal] awards . . . have come under close scrutiny.").

56. *Enron Corporation Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award of May 22, 2007, para. 339 [hereinafter *Enron* award]; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award of Sept. 28, 2007, para. 391 [hereinafter *Sempra* award]; *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award of May 12, 2005, para. 373 [hereinafter *CMS* award].

57. See *Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decisions on Liability of Oct. 3, 2006, para. 266 [hereinafter *LG&E* Liability decision]; *Continental Casualty v. Argentine Republic*, ICSID Case no. ARB/03/9, Award of Sept. 5, 2008, para. 192 [hereinafter *Continental Casualty* award].

58. *Continental Casualty* award, *supra* note 57, para. 192; *CMS* award, *supra* note 56, para. 315; *LG&E* Liability decision, *supra* note 57, para. 245; *Enron* award, *supra* note 56; *Sempra* award, *supra* note 56.

mine the relevance of the NPM clause.⁵⁹ Notably, *Continental Casualty* and *LG&E* took the primary/secondary approach,⁶⁰ whereas *Enron*, *Sempra*, and *CMS* took the conflation approach.⁶¹ The primary/secondary approach analyzes the NPM clause first as the primary rule, and only if a violation of that clause is found, then an analysis of the customary necessity defense is triggered as a secondary rule.⁶² The conflation approach is less sophisticated and merely assumes that the customary necessity defense mirrors the NPM clause; that is, the requirements of the customary necessity defense are imported into the NPM clause.⁶³

While struggling with these dual approaches, the *Enron* Tribunal noted, “[B]ecause there is no specific guidance [regarding how to interpret the NPM clause] . . . [t]his is what makes necessary to rely on the requirements of state of necessity under customary international law”⁶⁴ In contrast, the *LG&E* Tribunal juxtaposed the NPM clause with the customary necessity defense, finding that the requirements of the latter should not be integrated into the former, explaining:

“The concept of excusing a State for the responsibility for violation of its international obligations during what is called a ‘state of necessity’ or ‘state of emergency’ also exists in international law. While the Tribunal considers that the protections afforded by Article XI (the NPM clause) have been triggered in this case, and are sufficient to excuse Argentina’s liability, the Tribunal recognizes that

59. See José E. Alvarez and Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina*, INST. INT’L L. & JUST. Working Paper 2010/3, Finalized 04/14/10, at 4, available at www.iilj.org/publications/documents/2010-3.Alvarez-Brink.pdf (explaining, “the tribunals expressed divergent views on the relationship between Art. XI and the CIL defense of necessity as codified in Art. 25 of the ILC Articles on State Responsibility.”).

60. While the prominence of the primary/secondary approach is much more obvious in *Continental Casualty*, the *LG&E* Tribunal indubitably found that the conflated approach was inappropriate; *c.f.*, Burke-White, *supra* note 5, at 14 (noting, “For the *LG&E* Tribunal, the NPM clause is a separate risk allocation device . . . providing state parties greater protections than would have been available in customary law.”).

61. See Singh, *supra* note 33, at 3 (noting, “[The] *Enron*, *CMS* and *Sempra* [Tribunals] have conflated the relationship between necessity under customary international law and Article XI,” and the *Sempra* Tribunal went so far as to “prioritize the customary right over Article XI.” On the distinctions between the primary/secondary and conflated approaches generally, see Jürgen T. Kurtz, *Adjudging The Exceptional At International Investment Law: Security, Public Order And Financial Crisis*, 325 INT’L & COMP. L.Q. 371, vol. 59, no. 2 (2010).

62. See Singh, *supra* note 33, at 3.

63. See von Staden, *supra* note 28, at 210-212.

64. *Enron* award, *supra* note 56, para. 333.

satisfaction of the state of necessity standard (the customary necessity defense) as it exists in international law . . . supports the Tribunal's conclusion."⁶⁵

In reaching the conclusion that Argentina satisfied the requirements of the NPM clause, the *LG&E* Tribunal determined that it was not required to further consider the elements of the customary necessity defense; rather, the latter was merely support for its initial conclusion.⁶⁶

Incidentally, the Tribunals for the Argentine Gas Sector Cases were also inconsistent in their assessment of damages should the NPM clause be found germane. The Tribunals taking the primary/secondary approach decided that Argentina's financial liability would be excused for any breach of the BIT, at least during the time of the crisis.⁶⁷ In contrast, the Tribunals taking the conflation approach determined that even if Argentina had a legitimate defense under the NPM clause, it still would have a duty to investors as a matter of principle, and evidently, as a matter of customary international law.⁶⁸ In the latter case, a demonstration of necessity would preclude Argentina's wrongfulness but not its liability to compensate investors, which is really just a way of paying mere lip service to the necessity defense.

Yet it's not only the Tribunals who are splitting between the primary/secondary and conflation approaches—scholars disagree as to which paradigm is more suitable for the ICSID system. The fortuitous argument for the primary/secondary approach is one of legality; a reading of the customary necessity defense into the NPM clause arguably violates the ILC's rule of *lex specialis*,⁶⁹

65. *LG&E* Liability decision, *supra* note 57, para. 245 (parentheticals added).

66. See Alvarez & Brink, *supra* note 59, at 4 (noting, "*LG&E* appeared to treat Article XI [*i.e.* the NPM clause] as a distinct defense").

67. *Continental Casualty* award, *supra* note 57, para. 304, 320(A)-(B); *LG&E* Liability decision, *supra* note 57, para. 124.

68. *CMS* award, *supra* note 56, para. 388; *Enron* award, *supra* note 56, para. 260; *Sempra* award, *supra* note 56, para. 303.

69. See Int'l Law Comm'n, *Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, para. 487, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter ILC Fragmentation Report] (Martti Koskenniemi); see also John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 13, n.60., available at harvardhrj.com/wp-content/uploads/2010/10/1-50.pdf (explaining, "This view reflects by implication the limitations associated with article 31(3)(b) of the VCLT, which allows for recourse to any subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation. This rule may be relevant to the interpretation of bilateral treaties . . .").

which states simply that a particular provision may not preempt recourse to other applicable provisions.⁷⁰ In any event, superseding the NPM clause with the customary necessity defense appears to be a violation of *lex specialis*. As a matter of policy, the incorporation of the customary necessity defense into the NPM clause fails to recognize the actual understanding of the U.S.-Argentina BIT as a *quid pro quo* for greater protections to investors than are available under the customary necessity defense on the one hand and greater freedom for a State to act on the other.⁷¹

Proponents of the conflation approach argue that the NPM clause can only be logically interpreted within the framework of the preexisting customary necessity defense as either broadening or narrowing it.⁷² Under this view, a Tribunal reaching a conclusion based on the NPM clause, without using the customary necessity defense as an interpretive guide, would be acting *sua sponte*.⁷³ However, even some critics of the primary/secondary approach would seem to prefer it to conflation because of its pragmatism. Matthew Parish, who is adverse to the primary/secondary approach, highlights that “[t]he ILC draft Articles [reflecting the customary necessity defense] were grounded in neither prior case law nor analysis of policy, and have proved themselves impractical to apply.”⁷⁴

C. *The ICSID Tribunals’ Interpretations of the Only Way Provision*

The only way provision is a concise but prominent piece of the customary necessity defense found under Article 25(1)(a) which reads, “Necessity may not be invoked by a State . . . unless the act . . . [i]s the only way for the State to safeguard . . . against a grave and imminent peril”⁷⁵ As part of the analysis for the customary necessity defense, Tribunals have reached bifurcated holdings as to the proper interpretation of the only way provision. At the center of this disparity is whether “only way” should be interpreted literally—that is, if there were any conceivable option to act available to the State, then the necessity defense is moot—or

70. See Alvarez & Brink, *supra* note 59, at 19.

71. If Judge Posner were sitting on an ICSID Tribunal, the conflation approach would be considered profanity given its disregard for a requisite economic/risk analysis. See Burke-White, *supra* note 5, at 14.

72. See Parish, *supra* note 33, at 186-87.

73. *Id.*

74. *Id.* at 188.

75. ILC’s Articles, *supra* note 24, art. 25.

interpreted broadly, which considers a myriad of factors such as whether a graver harm was evaded, whether the measures adopted were adequate and/or their proportionality to the crisis.⁷⁶ In practice, the interpretation that a Tribunal selects usually depends upon the amount of deference it gives to the State in making policy decisions during times of peril.⁷⁷ The more deference a Tribunal gives to a State, the more likely it is to interpret the only way provision broadly.

The *LG&E* Tribunal deferred its judgment for that of Argentina, concluding that it was not the Tribunal's role to second-guess the policy decisions Argentina made during its emergency, asserting:

“In this circumstance, 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.”⁷⁸

Following a more sagacious standard, the *LG&E* Tribunal did not query whether another course of action could have been taken or whether a variable economic plan was available.⁷⁹ This departure from the literal reading of the only way provision started the current trend towards a more sensible approach to the customary necessity defense, whether or not formalistically proper.⁸⁰

Two years later, the *Continental Casualty* Tribunal continued in the footsteps of *LG&E* by deferring considerably to Argentina's policies in reaction to the financial crisis, arguing “[s]tates are basically free to adopt economic and monetary policies of their choice.”⁸¹ Given the nearly insurmountable standard of necessity as interpreted by the ILC,⁸² it is likely that the *Continental Casualty* Tribunal attempted to find another means to give purpose to the only way provision while not precluding the necessity defense.⁸³ By delegating these considerations to Argentina, who

76. See Reinisch, *supra* note 40, at 201 (criticizing the *LG&E* Tribunal for not having “incorporated considerations of adequacy and proportionality.”).

77. See Burke-White, *supra* note 5, at 19-20.

78. *LG&E* Liability decision, *supra* note 57, para. 257.

79. See *id.*

80. See Parish, *supra* note 33, at 187 (noting, “Within [the *LG&E* Tribunal’s] analysis one may see the emergence of a rather different doctrine of necessity in which the predominant test is proportionality . . .”).

81. *Continental Casualty* award, *supra* note 57, para. 224.

82. See Commentary to the ILC’s Articles, *supra* note 47, art. 25, paras. 1-2.

83. See Parish, *supra* note 33, at 188 (noting, “. . . because the tests [which the ILC

was in a more appropriate position in the midst of the crisis to make such a decision, the *Continental Casualty* Tribunal found the elements of the customary necessity defense satisfied.

In an antithetical line of cases addressing the only way provision, the Tribunals for *Enron*, *Sempra*, and *CMS* questioned Argentina's policy decisions, emphasizing that because some other means were available to respond to the emergency, the customary necessity defense was unavailable as a matter of law. The *Enron* Tribunal opined, "A rather sad world comparative experience in the handling of economic crises, shows that there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case."⁸⁴ Similarly, the *CMS* Tribunal frankly claimed, "[T]he measures adopted were not the only steps available."⁸⁵ Although the *Enron*, *Sempra*, and *CMS* Tribunals were deficient in mentioning other alternative courses of action that Argentina could have followed, the reality of the situation is that there will always be another hypothetical course for a State to have taken,⁸⁶ however this fact does not necessitate a conclusion that the customary necessity defense fails but for the only way provision. Such realizations merely beg the question as to the proper analysis of the only way provision, and in particular, whether the literal approach to the only way provision is apposite.

III. EVOLUTION: THE ICSID ANNULMENT COMMITTEE DECISIONS: FALLOUT OR REFORM?

A. *Red Flags Raised for Annulment Committees to Consider*

The effects of the general ambiguity and potential diminution of the customary necessity defense have been felt by States and investors alike, many of whom are questioning the legitimacy of the ICSID system.⁸⁷ In fact, some States have abandoned the

draft Articles] prescribe are impossible to apply. . . the tribunal thus liberated itself from the ILC's straightjacket, and struck out on its own, common sense[] course.").

84. *Enron* award, *supra* note 56, para. 308; *see also Sempra* award, *supra* note 56, para. 350 (giving almost a verbatim analysis, "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.").

85. *CMS* award, *supra* note 56, para. 324.

86. Argentina made a similar argument before the *Enron Annulment* Committee. *See Enron Annulment*, *supra* note 31, para. 369.

87. *See Burke-White*, *supra* note 5, at 25 (noting, "The failure to give effect to the

ICSID system in order to avoid arbitration and minimize the impact of their obligations under BITs.⁸⁸ In May 2007, Bolivia advised the World Bank that it was withdrawing from the ICSID Convention, and the President of Bolivia, Evo Morales, implored other member-States within Latin America to likewise vacate the ICSID Convention.⁸⁹ Some of his counterparts may have heeded to his call; particularly, Ecuador and Venezuela have expressed a desire to minimize potential BIT liability by curbing the ICSID jurisdiction.⁹⁰ Ecuador has taken a step even further by excluding disputes related to non-renewable resources from ICSID arbitration.⁹¹

Some States are concerned that their intentions should be more salient in the ICSID decisions, reflecting the bargained-for-exchange of the BITs; that is, on the one hand an aggrandized flow of investment and investor protections, and on the other, the ability of States to preserve their policy interests.⁹² A proper balance needs to be found in a system that is perceived to be favoring and expanding investor rights.⁹³ Significantly, one of the most important talismans for foreign investors—the State of Brazil—is not considering becoming a party to the ICSID Convention due to the ICSID’s former whimsical decisions and apperceived bias towards investors.⁹⁴

The ICSID Tribunals’ capricious decisions surface the general

clear language of the BIT and to do justice to the intent of the state parties . . . [is] causing states to rethink their commitment to guarantee investor rights through BITs . . . before ICSID.”; see also Luke Eric Peterson, *Another Argentine Crisis Award is Annulled, ICSID Committee Strikes Down \$100+Million Verdict in Favour of Enron Corporation*, Investment Arbitration Reporter News and Analysis, August 2, 2010, para. 5, available at http://www.iareporter.com/articles/20100802_1 (describing investors as likely to be “glanc[ing] nervously over their shoulders . . .”).

88. See Burke-White, *supra* note 5, at 25 (noting, “. . . they have led some state to withdraw from the ICSID system . . . a system which they perceive to lack legitimacy.”).

89. See Damon Vis-Dunbar, Luke Eric Peterson & Fernando Cabrera Diaz, *Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions*, INV. TREATY NEWS, May 7, 2007, available at http://www.iisd.org/itn/wp-content/uploads/2010/10/itn_may9_2007.pdf.

90. See *Treaty Developments Related to Bolivia, Ecuador, and Venezuela*, WHITE & CASE INT’L DISPUTES QUARTERLY (Fall 2007), available at http://www.whitecase.com/idq/fall_2007/ia1/.

91. See José Rosell, *The CMS Case: A Lesson for the Future?*, 25 J. INT’L ARB. 493, 501 (2008).

92. See Burke-White, *supra* note 5, at 25 (noting, “Tribunals fail to recognize or accept the nature of that bargain underlying many BITs . . .”).

93. See Rosell, *supra* note 91, at 501 (arguing, “a more balanced interpretation of BITs is absolutely essential.”)

94. *Id.*

problems of an arbitration system that lacks a genuine appellate influence and seemingly no means for resolving cases, which reach opposite conclusions from the same facts.⁹⁵ It is precisely the call by States, investors, and scholars towards legitimacy⁹⁶ that has likely been the instigation for a change in the framework of the ICSID, which the Annulment Committees have evidently heard loud and clear.

B. *The CMS v. Argentina Annulment Decision*

The *CMS Annulment* decision heavily criticized the legal reasoning of the *CMS Tribunal*,⁹⁷ but refrained from annulling the Tribunal's award given its restrained role as a mere Annulment Committee. Indeed the Committee was quick to belabor its frustration of having its hands tied: "if the Committee [were] acting as a court of appeal, it would have to reconsider the award on this ground."⁹⁸ Many scholars have noted the prominent irritations that arise after reading the Committee's opinion, as though it were acting as a whistle blower.⁹⁹

The *CMS Annulment* Committee centered its criticism on the Tribunal's conflation approach—specifically, in regards to the relationship between the NPM clause and the customary necessity defense.¹⁰⁰ Since each article was distinct, a different set of requirements should have applied to their procedure.¹⁰¹ The Committee frankly rejected the conflation approach, noting that under the *lex specialis* rule, the NPM clause would be applied as the more specific provision even if the customary necessity defense were taken to be the primary rule.¹⁰² Alternatively, under the primary/secondary approach, the NPM clause is undoubtedly the primary rule and thus the customary necessity defense would be

95. See Burke-White, *supra* note 5, at n.34.

96. See *id.* at 25 (explaining, "As states reconsider their commitment to ICSID . . . the viability of investor-state arbitration . . . is called into question.").

97. *CMS Annulment*, *supra* note 31, para. 136 (highlighting superfluously, "the . . . errors and lacunas in the Award" and, "[the Tribunal] appli[ed] [the NPM clause] cryptically and defectively . . .").

98. *Id.* para. 135.

99. See von Staden, *supra* note 28, at 10 (noting "That such a strongly worded critique of the erroneous interpretation and application of the relevant law by the CMS tribunal does not suffice to establish the existence of an annulable error may justly be seen as irritating.").

100. *CMS Annulment*, *supra* note 31, para. 130.

101. See von Staden *supra* note 28, at 9.

102. *CMS Annulment*, *supra* note 31, para. 133.

applied secondarily only if there were a violation of the BIT.¹⁰³ In either case, the NPM clause would have to be applied, which the Tribunal failed to do.

The *CMS Annulment* decision was a watershed opinion in so far as it displayed the problems of the ICSID system; prominently, erroneous jurisprudence could present challenges to the authenticity of BITs and to the ICSID system. The *CMS Annulment* Committee, seeing the conflation analysis as the persuasive approach among the ICSID Tribunals, attempted to redirect their influence so that subsequent Tribunals addressing similar issues did not follow problematic precedent.¹⁰⁴ At its extreme, the *CMS Annulment* opinion is viewed as an attempt to “call into question the legitimacy of the *CMS* Tribunal and, more generally, a system that lacks appellate review to reverse gross and outcome determinative errors of law.”¹⁰⁵ After *CMS Annulment*, some States have been reluctant to enforce the Tribunal awards, a further demarcation of ICSID’s vulnerability.¹⁰⁶ The Argentine government publicly declared that it would be a political contest for Argentina to pay the *CMS* Tribunal award, which the *CMS Annulment* Committee had found to be legally erroneous.¹⁰⁷

The most important effect of the *CMS Annulment* opinion was one that the ICSID judges likely did not intend—it sparked affirmative arguments for the possibility that a grave error of law, such as conflation, would result in an effective non-application of the NPM clause and be enough for annulment.¹⁰⁸ If the *CMS Annulment* Committee were to rule again on the same facts today, it would likely find grounds for annulment under Article 52(1)(b) of the ICSID Convention; that is, by taking non-application to be an effective manifest excess of the Tribunal’s powers. To rule otherwise is to permit egregious errors of law to be protected by a tenuous shield of draconian procedure.

C. *The Sempra v. Argentina Annulment Decision*

Three years later and under frighteningly similar facts, the *Sempra Annulment* Committee reached the opposite conclusion as the *CMS Annulment* Committee, holding that the *Sempra* Tribu-

103. *Id.* para. 129.

104. See Burke-White, *supra* note 5, at 29.

105. *Id.*

106. See Rosell, *supra* note 91, at 501.

107. Statement of Osvaldo Guglielmino, *Procurador del Tesoro de la Nación Argentina*, American University, Washington College of Law, October 24, 2007.

108. See Smith & Rubino, *supra* note 21, para. 15.

nal had manifestly exceeded its powers since it failed to apply the NPM clause by equating it with the customary necessity defense.¹⁰⁹ However the substantive analysis was nearly the same for both *CMS Annulment* and *Sempra Annulment*, except that the latter further expounded the differences between the NPM clause and the customary necessity defense.

First, the *Sempra Annulment* Committee found that treaty law took general precedence over customary law aside from where it violates the rule of *jus cogens*,¹¹⁰ which would only happen if customary law preempted a treaty provision because the terms of the latter conflicted with that of the former.¹¹¹ The *Sempra Annulment* Committee, however, acknowledged that the NPM clause in the treaty was not preempted by the customary necessity defense; thus, the parties could “invok[e] a defense of necessity in whatever terms they may agree . . . [albeit] politically or economically unwise, but this does not render them unlawful.”¹¹²

Next, the *Sempra Annulment* Committee noted that the NPM clause and the customary necessity defense were drafted for different purposes, the former circumventing instances where State action is permitted; but, the latter demarcates instances where the necessity defense is permitted and prohibited, which apply only where a violation of a State action has already occurred.¹¹³ Furthermore, the NPM clause and the customary necessity defense varied in “material respects,” and as such the latter could not be considered a “guide to interpret[]” the former.¹¹⁴

The principal reason for the disparity between the *CMS Annulment* and *Sempra Annulment* holdings apparently resides in the fact that the *Sempra* Tribunal, unlike the *CMS* Tribunal, had explicitly stated, “[T]here is no need to undertake a further judicial review under Article XI (the NPM clause) given that this Article does not set out conditions different from customary law in such regard.”¹¹⁵ The *Sempra Annulment* Committee took this

109. *Sempra Annulment*, *supra* note 31, paras. 164-65.

110. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969), art. 53, available at, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

111. *Sempra Annulment*, *supra* note 31, paras. 201-02; *see id.* para. 197 (noting that customary law did not provide for “a preemptory ‘definition of necessity and the conditions for its operation’ in the context of the interpretation of the treaty-based exception clause of Article XI) (quoting the *Enron* award, para. 376)).

112. *Id.* paras. 201-02.

113. *Id.* paras. 187, 200, 203; *see also* von Staden, *supra* note 28, at 11.

114. *Sempra Annulment*, *supra* note 31, paras. 198-99.

115. *Id.* para. 121(parenthetical added).

statement as evidence that the *Sempra* Tribunal had, “adopted Article 25 of the ILC Articles (the customary necessity defense) as the primary law to be applied, rather than Article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law.”¹¹⁶ The failure to apply the NPM clause, evident from the Tribunal’s own statements, constituted a manifest excess of powers that had to result in the annulment of the award as a whole.¹¹⁷

Even still, it is arduous to reconcile the difference in outcomes between *Sempra Annulment* and *CMS Annulment*. The apparent distinction is that the *Sempra* Tribunal did not apply the NPM clause whereas the *CMS* Tribunal directly applied the NPM clause by conflating it with the customary necessity defense;¹¹⁸ yet both Annulment Committees obviously identified the same errors of law—each Tribunal effectively used the customary necessity defense as the primary law—but reached opposite conclusions as to annulment. The real difference here between application and non-application of the NPM clause appears to be a matter of mere semantics. If the *Sempra* Tribunal had applied the customary necessity defense yet made mention of the application of the NPM clause, even if in name only, then the holding would have been based on whether an error of law rises to a mistake grave enough to be considered a manifest excess of powers, which would be a grounds for annulment under the ICSID Convention.¹¹⁹ The disparity in outcomes of these cases is problematic since the Annulment Committees identified the same flawed analysis under identical facts.

D. *The Enron v. Argentina Annulment Decision*

In May of 2007, the *Enron v. Argentina* Tribunal sided with Enron and held that Argentina was responsible to foreign companies for abrogating its Convertibility Law and erecting the Emergency Law during its economic crisis of 2000-2001; the Tribunal practically read the U.S.-Argentina BIT as providing a shield for investor rights during Argentina’s fallout.¹²⁰ Before paying \$106.2 million to Enron, however, Argentina requested annulment of the Tribunal’s award, arguing that the BIT’s necessity defense

116. *Id.* para. 208 (parenthetical added).

117. *Id.* para. 209.

118. *CMS Annulment*, *supra* note 31, para. 136.

119. ICSID Convention, *supra* note 12, art. 52(1)(b).

120. *Enron Award*, *supra* note 56, para. 339.

released Argentina from liability to its foreign investors.¹²¹ The *Enron Annulment* Committee agreed with Argentina and annulled the Tribunal's award, finding in effect that Argentina's actions during times of peril were not to be second-guessed by the ICSID Tribunals.¹²²

Enron Annulment, released just one month after *Sempra Annulment*,¹²³ is very distinct from former annulment decisions in that it found grounds for annulment by reading the *Enron* Tribunal's analysis of the only way provision to be a non-application of its terms, resulting in a manifest excess of powers.¹²⁴ Specifically, the Committee faulted the Tribunal for giving a " cursory " ¹²⁵ analysis of the only way provision by relying solely on the opinion of " an economist. " ¹²⁶ Economists will likely not be called to testify in front of a panel of ICSID judges ever again—economists' divinations don't matter, especially in retrospect.¹²⁷

The *Enron Annulment* decision was shocking to scholars since the facts of *Sempra Annulment* and *CMS Annulment* are the same as those in *Enron Annulment*. Many were expecting confirmation of either the *Sempra* or *CMS* approach.¹²⁸ Instead, *Enron Annulment* raises new issues for tribunals to consider when parsing the only way provision of the customary necessity defense and gives a crucial paradigm of the only way provision that many tribunals have been overlooking.

IV. ANALYSIS OF THE ENRON V. ARGENTINA ANNULMENT DECISION

A. *Parsing the Only Way Provision of the Customary Necessity Defense*

Under Article 25(1)(a),¹²⁹ the customary necessity defense is

121. *Enron Annulment*, *supra* note 31, para. 353.

122. *Id.* at 362-68, 373, and 377.

123. *Sempra Annulment* and *Enron Annulment* were issued on June 29, 2010 and July 30, 2010, respectively, *supra* note 31.

124. *Enron Annulment*, *supra* note 31, paras. 373-77.

125. *Id.* para. 376.

126. *Id.* para. 374.

127. See Todd Tucker, *Economists Don't Count in Enron Attack on Argentina*, PUBLIC CITIZEN'S BLOG ON GLOBALIZATION AND TRADE, (August 4, 2010), <http://citizen.typepad.com/eyesontrade/2010/08/economists-dont-count-in-enron-attack-on-argentina.html>.

128. See Smith & Robino, *supra* note 21, para.16 (noting that *Enron Annulment* "prolong[s] the uncertainty surrounding the proper interpretation of a standard necessity defense provision.").

129. ILC's Articles, *supra* note 24, art. 25.

available to Argentina only if its actions were “the only way for the State to safeguard an essential interest against a grave and imminent peril.”¹³⁰ This provision turns on the extent to which a Tribunal will defer to Argentina’s decisions in response to the economic crisis.¹³¹ If an alternative choice were available to Argentina, then a literal interpretation of the only way provision would give no deference to the State and render the customary necessity defense moot. Similar to the approach taken by the *LG&E* Tribunal, the *Enron Annulment* Committee asks for something more than “whether . . . there were other options available.”¹³² In particular, the Committee discusses the complexities involved in such an analysis: the degree of effectiveness that the response to the crisis would have had in comparison to alternative measures;¹³³ whether alternative measures involved a graver breach of customary law;¹³⁴ and whether alternative measures should be decided by the Tribunal in retrospect or from the prospective of the Argentine government with the “basis of information reasonably available at the time”¹³⁵

By highlighting the multitude of queries that arise from a seemingly simple provision, the *Enron Annulment* Committee confronts the ambiguity of the customary necessity defense which “previous tribunals (including the ICJ) have shied away from.”¹³⁶ The *ad hoc* paradigm called for by *Enron Annulment* is more sensible than a literal approach because it doesn’t preempt the necessity defense if an alternative measure or less effective means could have been used to respond to the crisis, which may have been less harmful to the interests of investors.¹³⁷ This novel

130. *Id.*

131. See Burke-White, *supra* note 5, at 19.

132. *Enron Annulment*, *supra* note 31, para. 377.

133. *Id.*, para. 371.

134. *Id.*, para. 370.

135. *Id.*, para. 372.

136. Sahib Singh, *The Enron Annulment Decision’s Exposure of Necessity’s Endemic Uncertainty: A Welcome Critique*, October 23, 2010, EJIL: Talk! (Blog of the European Journal of International Law), at 5, available at <http://ssrn.com/abstract=1697522>

137. *But see* Parish, *supra* note 33, at 185 (arguing “Whether there was some other course Argentina could have chosen to minimize the effects of its economic collapse, and whether the measures it in fact took stabilized the situation, made it worse or avoided an even more catastrophic collapse, are the subject of continuing debates by academic economists which are necessarily inconclusive because of the wealth of historical and political counterfactuals any such questions necessarily embrace.”). Although Parish makes a strong argument, the reality is that Tribunals have to rule one way or the other when analyzing the only way provision. This article suggests

approach supersedes the *LG&E* Tribunal method, which merely denied a literal interpretation of the only way provision, and is superior to it because the novel approach considers the adequacy of the measures adopted and their proportionality to the crisis.¹³⁸ Argentina's logical argument against a literal approach is very impressive, was acknowledged by the *Enron Annulment* Committee,¹³⁹ and may have persuaded it to annulment even if in the end it nominally left the proper interpretation to the Tribunal's deference.¹⁴⁰

Although *Enron Annulment* did not confirm a perfect analysis of the only way provision, the finality of the literal approach to the provision likewise supports a non-literal interpretation. To adhere to a literal interpretation "implies, of course, that the necessity defense will become practically unavailable in cases of economic necessity where states almost invariably will have different options how to react."¹⁴¹ In effect, a literal interpretation vitiates the customary necessity clause from the ILC's Articles, making it impracticable to apply in any situation.¹⁴² As a matter of policy, this approach makes little sense since Tribunals should intend to give effect to the parties' intentions, and where parties include a NPM clause in a treaty, it will always be the case that the parties meant something rather than nothing from its words. Furthermore the parties' intentions under the U.S.-Argentina BIT lend support to the conclusion that Argentina should be able to act in a crisis, "in exchange for granting investors greater protections than would have been available in customary law, the states . . . sought to preserve for themselves greater freedom of action . . . than would have been available in customary international law."¹⁴³

that in making such a decision, the broad approach to the only way provision is proper.

138. See Reinisch, *supra* note 40, at 201 (faulting the *LG&E* Tribunal for not having "incorporated considerations of adequacy and proportionality.").

139. See *Enron Annulment*, *supra* note 31, para. 369 (affirming, "As Argentina points out, there will almost inevitably be more than one way for a Government to respond to any economic crisis, and if this interpretation were correct, the principle of necessity under customary international law could rarely if ever be invoked in relation to measures taken by a Government to deal with an economic crisis.").

140. See Singh, *supra* note 132, at 4 (arguing, "a literal interpretation cannot be evinced to uphold Article 25's exceptionality.").

141. Reinisch, *supra* note 40, at 200.

142. See Burke-White, *supra* note 5, at 20.

143. *Id.* at 14; see also Parish, *supra* note 33, at 176 n.36 (noting the bargained-for-exchange and citing to Judge Posner, "Doctrines of necessity . . . are justified in the economic analysis of law by the principle that risk should be allocated to the party able to insure against it at least cost. A party should be able to rely upon the doctrine

The core of necessity is the existence of an immediate threat for which a State takes an emergency measure to preclude.¹⁴⁴ Where the necessity defense applies, a State's action is said to be voluntary in the sense that it "had a genuine choice as to whether to undertake the emergency measure."¹⁴⁵ If the act is voluntary, then it can't be mandated. A literal reading of the only way provision would mandate a State's action in the sense that there really was no other viable option for the State to take. The *Enron Annulment* Committee brings to light these basic fundamentals of the customary necessity defense, which require it to not be repressed. For this reason alone, *Enron Annulment* is a remarkable step forward for the ICSID system. Indeed, divinations as to what could have happened if alternative courses of action were taken by a government will likely be dismissed by future Tribunals as suspect.¹⁴⁶ Economists, who have been used as expert witnesses to support investment companies,¹⁴⁷ will no longer be given the time of day in an ICSID court—and indeed, investors should be wary. This is good news for the 157 ICSID member-States,¹⁴⁸ especially in the midst of a global recession, allowing State autonomy to maintain its proper place in international investment. Where the essential security of a country is at stake, leaders of countries should be able to make decisions that are in the best interests for their people, not for foreign investors who are hoping to canter away from a State's crisis with a bag of money and an early retirement in Cabo.

B. *Left in Limbo: The NPM Clause and the Customary Necessity Defense*

Although the former section of this note praised *Enron Annulment* for its treatment of the only way provision, it does not follow

only if his costs of insuring against the risk of a supervening event are greater than those of the party against whom the doctrine is invoked.”)

144. See Commentary to the ILC's Articles, *supra* note 47, para. 1.

145. Parish, *supra* note 33, at 170.

146. See Todd Tucker, Public Citizen's Blog on Globalization and Trade, *Economists Don't Count in Enron Attack on Argentina*, (August 4, 2010), available at <http://citizen.typepad.com/eyesontrade/2010/08/economists-dont-count-in-enron-attack-on-argentina.html> (supra note 127).

147. See *Enron Annulment*, *supra* note 31, para. 376; see also *ADC Affiliate Limited & ADC & ADMC Management Limited v. the Republic of Hungary* (ICSID Case No. ARB/03/16), Award of the Tribunal, October 2, 2006, para. 61.

148. See ICSID List of Contracting States and Other Signatories of the Convention, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>

that *Enron Annulment* is wholly perfect. In fact, *Enron Annulment* marks an unwarranted and novel split in Annulment Committee decisions by avoiding the question as to the adequate interrelationship between the NPM clause and the customary necessity defense.¹⁴⁹ The *Enron Annulment* Committee intentionally evaded an analysis of their relationship, deciding that they were beyond the scope of its analysis, “[T]he substantive operation and content of Article XI (the NPM clause) and the customary international law principles of necessity, and the interrelationship of the two, are issues that fall for decision by the tribunal.”¹⁵⁰ Whether or not done in good faith, it is unlikely that prospective Annulment Committees will *sua sponte* drop the argument for lack of an answer as evidently the *Enron Annulment* Committee has done.

There is scant understanding of the interaction between the NPM clause and the customary necessity defense.¹⁵¹ This fact becomes salient after viewing the Argentine Gas Sector Tribunal Cases, which take different stances on their proper relationship.¹⁵² Moreover, the *CMS Annulment* Committee, consisting of the most prestigious figureheads in international law,¹⁵³ is well known for its barrage of criticism towards the conflation approach taken by the *CMS* Tribunal.¹⁵⁴ Similarly, the *Sempra Annulment* decision revolved around the relationship between the two articles and found the conflation approach to be a grave error of law.¹⁵⁵

In shirking this contentious debate, *Enron Annulment* disservices the international arbitration community by effectively disseminating as superfluous nearly all of *CMS Annulment* and much of *Sempra Annulment*. The modern view on the matter is that the NPM clause and the customary necessity defense should

149. *See id.* at 176.

150. *Enron Annulment*, *supra* note 31, para. 405 (parenthetical added).

151. *See* Parish, *supra* note 33, at 176.

152. *See* section II(B) above.

153. The membership of the *CMS Annulment* Committee was comprised of Judge Gilbert Guillaume (former President of the International Court of Justice (ICJ)), Judge Nabil Elaraby (a former judge of the ICJ), and Professor James Crawford (ILC Special Rapporteur on State Responsibility), all of whom are considered superstars in the international legal community. *See* Jürgen T. Kurtz, ASIL Insights, *ICSID Annulment Committee Rules on the Relationship between Customary and Treaty Exceptions on Necessity in Situations of Financial Crisis*, December 20, 2007, vol. 11, issue 30, 22-23, available at <http://www.asil.org/insights071220.cfm> (noting that the “particular membership [of] the [*CMS Annulment*] report is likely to have persuasive effect on . . . pending cases.”)

154. *CMS Annulment*, *supra* note 31, para. 130.

155. *Sempra Annulment*, *supra* note 31, paras. 198-99, 208.

be considered as separate and distinct doctrines, resulting in the application of different legal tests.¹⁵⁶ There is a contemporary accord, at least among international legal scholars, that a genuine difference exists between the two articles and their respective paradigms.¹⁵⁷ Scholars have affirmed the primary/secondary approach as the adequate approach because it makes the most sense under a traditional treaty interpretation analysis.¹⁵⁸ As a matter of customary international law, the conflation approach violates the treaty interpretation principle of *ut res magis valeam quam pereat*, which states that each clause must be given effect.¹⁵⁹ Moreover the primary/secondary approach fares better than the conflation approach because the latter does away with the requirement of interpreting the terms of the treaty and thus flagrantly disregards what the parties intentionally put into writing. Since the language in the NPM clause differs from that of the customary necessity defense and does not directly refer to it, to supplant one for the other for the sake of convenience does not make sense.

By deferring to the Tribunals to decide the proper relationship between the NPM clause and the customary necessity defense, *Enron Annulment* commits its only *faux pas* and effectively defers a different debate for another day: whether an error of law could be grave enough for annulment. By answering the question as to the relationship between the two articles, *Enron Annulment* could have clarified the ambiguity that remained after *Sempra Annulment* and *CMS Annulment* regarding egregious errors of law. But *Enron Annulment* did not leave its readers completely in the dark. Meticulous readers will note that egregious errors of law are likely enough for annulment post-*Enron Annulment*.

C. *Are Errors of Law Enough for Annulment?*

The ICSID review process is curbed so that awards are not

156. See Parish, *supra* note 33, at 176.

157. See Rosell, *supra* note 91, at 498-99; see also von Staden, *supra* note 28, at 14-15.

158. See von Staden, *supra* note 28, at 9-10.

159. See Burke-White, *supra* note 5, at 14 (noting, “[the conflation approach] violates the Vienna Convention rule of *lex specialis* and the canonical rule that each treaty provision . . . be given effect.”); see also Singh, *supra* note 33, at 3 (noting, “the conflation methodology essentially jumps straight to that envisaged by Article 31(3)(c) VCLT,” whereas the primary/secondary approach reaches clearer decisions since “identifying the operative primary rule enables the logical application of Article 31 through its step by step analysis.”).

subject to appeal.¹⁶⁰ Conspicuously, the ICSID Convention does not permit an Annulment Committee to overturn a Tribunal's award even for egregious errors of law.¹⁶¹ As the *Sempra Annulment* Committee confirmed, "Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment' . . . [whereas] 'failure to apply the applicable law [constitutes] a ground for annulment . . .'"¹⁶² In other words, non-application of a requisite rule of law is sufficient for annulment—such was the case in *Enron Annulment* and *Sempra Annulment* where it was determined that the Tribunals failed to apply the NPM clause—whereas erroneous application is a mere error of law and is not enough for annulment of a Tribunal's award.

Yet this apparent black letter law is turning gray post-*Enron Annulment* and post-*Sempra Annulment*. Although the *Sempra Annulment* Committee described its basis for annulment as a non-application of the NPM clause,¹⁶³ its decision rested on a tenuous distinction between erroneous application and non-application of the law.¹⁶⁴ The *Sempra* Tribunal opinion could just as easily have been read as an erroneous application of the NPM clause since the Tribunal was intending to apply the NPM clause vicariously through the customary necessity defense, which would not have been enough for annulment under a traditional approach to annulment review.¹⁶⁵

The *Enron Annulment* decision pushes the envelope even further than the *Sempra Annulment*, begging the question where the line should be drawn to decide whether an error of law is so grave as to effectively deprive the applicable law of its intended meaning and purpose, furnishing a ground for annulment.¹⁶⁶ The *Enron* Tribunal applied both the NPM clause and the customary neces-

160. See Burke-White, *supra* note 5, at 1.

161. ICSID Convention, *supra* note 12, at 24 (as interpreted by former Annulment Committees).

162. *Sempra Annulment*, *supra* note 31, paras. 173-74 (citing *Maritime International Nominees Establishment v. Republic of Guinea* (1989) 4 ICSID Reports 79, 87, at 5.03-5.04) (citing *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/71/1), Decision on Annulment of May 16, 1986 (Amco I)).

163. *Sempra Annulment*, *supra* note 31, para. 196.

164. See *id.* para. 208 (opining that the Tribunal had used "Article 25 [to] 'trump[]' Article XI in providing the mandatory legal norm to be applied. Thus [the Tribunal] made a fundamental error in identifying and applying the applicable law.").

165. See *Sempra* award, *supra* note 56, paras. 376, 378-88 (notably, "The Tribunal believes that [the NPM clause] is inseparable from the customary law standard [*i.e.*, the customary necessity defense].").

166. See von Staden, *supra* note 28, at 13.

sity defense explicitly, but interpreted them so equivocally that the *Enron Annulment* Committee found its analysis to result in non-application of the applicable law.¹⁶⁷ This change in the *Enron Annulment* Committee's analysis from application to non-application is so slight that it may easily be overlooked.

Alternatively, the *Enron Annulment* Committee could have found that errors of law in the award did, in fact, constitute a manifest excess of powers, which would have served as a basis to overturn the award. Respondents for *MTD Annulment* have argued this proposition:

"There comes a stage . . . at which a tribunal, in purportedly applying a rule of law, gets it so wrong that it must be regarded as having disregarded the rule and not really having applied it at all. The purported application of the rule must be so inadequate, and suffused with such fundamental error, that it transcends the mere commission of an error in applying the law and becomes instead a veritable case of its non-application."¹⁶⁸

While it appears that the former argument is precisely to which the *Enron Annulment* Committee effectively concurred, it did so in a nebulous manner by masquerading an error of law as a non-application of the applicable law. In reaching this decision, whether candidly or not, the *Enron Annulment* Committee absconds from the scope of proper annulment review as understood by the *CMS Annulment* Committee.¹⁶⁹

By departing from the traditional concept of substantive annulment review, scholars have predicted that the *Enron Annulment* Committee will likely be criticized for blurring the line between annulment and appeal.¹⁷⁰ However, it engaged in such a review for good reason. Applicable law must be given meaning and content beyond a mere title; that is, paying lip service to the NPM clause and the customary necessity defense without actually expounding either or both of them is not the same as application. This is exactly what the authors of *Enron Annulment* were seek-

167. *Enron Annulment*, *supra* note 31, paras. 384, 393.

168. See Opinion of January 20, 2006 annexed to the Respondent's Annulment Reply, para. 25, *MTD Equity Sdn Bhd. & MTD Chile v. The Republic of Chile* (ICSID Case No. Arb/01/07, Decision on Annulment, 21 March 2007).

169. See Smith & Robino, *supra* note 21, para. 15.

170. See von Staden, *supra* note 28, at 13 (noting, "For some commentators, the conclusions reached by the Enron committee[] concerning the presence of the annullable failure to apply the proper law will still smack too much of appellate review.")

ing to correct. Scholar Andreas von Staden lucidly explains, “. . . [the applicable law] has to be understood not merely in purely formal terms in the sense of not even referring to the applicable legal provisions, but must be given a substantive meaning.”¹⁷¹

Enron Annulment will force foreign investors to make logical arguments that don't beg the question. Moreover *Enron Annulment* takes away investors' get-out-of-jail-free-cards since corporations are less likely to be given an esoteric exit in extraordinary circumstances. Pragmatically, corporations should expect to sink when an economy crashes rather than being thrown a golden life raft only to watch ordinary citizens drown.¹⁷²

Enron Annulment's model of substantive review will result in a step forward for Argentina's economic status. Argentina's restricted access to international finance markets will only be loosened when it starts paying back its foreign debt. However, where investors are free to reach into Argentina's pockets, which are not deep even a decade after its economic collapse,¹⁷³ then it's likely that Argentina will continue to default on its foreign debt driving inflation to monumental percentages.¹⁷⁴ Furthermore recent Tribunal awards have continued to aggrandize monetarily,¹⁷⁵ making it less likely that Argentina will satisfy its debt claims. Through all of this, it should not be overlooked that the *Enron Annulment* is an extension of the views of the greatest minds in international arbitration; that is, a continuum of *CMS Annulment*, which shifts the scale in the favor of Argentina.

V. FINALITY: THE WRITING IS ON THE WALL

“Nothing is final until it is right.” -Abraham Lincoln

The proper balance of power for the ICSID annulment judges to consider is said to involve “emergency relief in rare cases of fundamental importance but to uphold the finality of awards in the face of alleged relatively minor substantive and procedural

171. *Id.*

172. The exception to this proposed rule is, of course, Goldman Sachs: the Death Star that keeps a golden parachute for economic crashes navigated by its very own Goldman bankers. See generally Matt Taibbi, *The Great American Bubble Machine*, Rolling Stone (Apr. 5, 2010, 3:58 PM), <http://www.rollingstone.com/politics/news/the-great-american-bubble-machine-20100405>.

173. Argentina's foreign debt in 2011 is 15 billion USD, with a domestic budget deficit between 2 and 7 billion USD. See *Court backs Argentina government's debt plan*, BBC News, March 31, 2010, <http://news.bbc.co.uk/2/hi/business/8596850.stm>.

174. Inflation in 2011 could reach up to 20%. See *id.*

175. See Alvarez & Khamsi, *supra* note 19, at,380.

flaws.”¹⁷⁶ While balancing these two ends, the principle of finality is generally seen to take precedence over the principle of substantive correctness.¹⁷⁷ Substantive correctness should not be cast aside to ensure that the finality of awards remains static if there be egregious errors littered throughout a Tribunal’s analysis. There is no balance between finality and correctness when proper interpretation is obviated as if it were a superficial legal fiction. The *Enron Annulment* opinion should be read for what it’s worth—an intent to restore stability to the ICSID system by forcing Tribunals to go beyond mere lip service when interpreting the provisions of the NPM clause and the customary necessity defense.

While *Enron Annulment* is not binding on the ICSID as a matter of law,¹⁷⁸ precedent can be highly persuasive authority in subsequent decisions dependent on the quality of the opinion.¹⁷⁹ *Enron Annulment* should be very impressive on the ICSID, having presented a much more in-depth analysis than former Tribunals save for its avoidance of the perennial question as to the relationship between the NPM clause and the customary necessity defense. Its pragmatic decision for annulment based on the effective non-application of applicable law will allow the ICSID to counterbalance its system’s foregone conclusion of finality with that of correctness, at least where there is an egregious error of law, and thereby boost its legitimacy.¹⁸⁰ Alternatively, holding that finality always trumps correctness will continue to discourage States from joining the ICSID, facilitate the system’s illegitimacy, and effectively turn the ICSID system into an arbitrary Caesar’s thumbs-up or thumbs-down.

176. Christoph H. Schreuer, *ICSID Annulment Revisited*, 30 LEGAL ISSUES OF ECONOMIC INTEGRATION 103, 122 (2003).

177. See Jason Clapham, *Finality of Investor-State Arbitral Awards: Has the Tide Turned and is there a Need for Reform?*, 26 J. INT’L ARB. 437 (2009); see also CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, 891-94 (2001).

178. There is no formal concept of *stare decisis* under the ICSID Convention. See Burke-White, *supra* note 5, at 1.

179. See von Staden, *supra* note 28, at 15 (explaining, “its persuasive authority [is] based on the more cogent and convincing [the] argument.”).

180. See *id.*