

UNDERSTANDING THE DEBATE OVER NECESSITY: UNANSWERED QUESTIONS AND FUTURE IMPLICATIONS OF ANNULMENTS IN THE ARGENTINE GAS CASES

ELIZABETH A. MARTINEZ*

INTRODUCTION

Over the past several years, foreign investors have filed 49 claims with the International Centre for Settlement of Investment Disputes (ICSID) against Argentina.¹ Many of these claims originated from certain restrictive measures undertaken by the Argentine government in response to the nation's economic and financial crisis from 1999 to 2001.² Though Argentina claimed the emergency measures were necessary for the maintenance of public order, such measures "resulted in the greatest wave of claims by foreign investors against a single host country in recent history."³

Of those claims against Argentina that have been adjudicated, three tribunals awarded damages in excess of \$100 million to the investor-claimants, which are among the largest awards granted by an ICSID tribunal.⁴ Perhaps even more noteworthy than the amount of damages

* Duke University School of Law, JD/LLM expected 2013. I am grateful to Julie A. Maupin, for helping me to appreciate the intricacies of legal developments in international investment law, and for her valuable insight and support during the preparation of this article. I am also thankful for comments provided by A. Edelen, T. Kocpiel, D. Marvin, E. Okojie, M. Siller and members of the DJCIL editorial staff on earlier drafts.

1. The website for the International Centre for Settlement of Investment Disputes [hereinafter ICSID] lists both pending and concluded cases filed with ICSID, which are searchable by the official name of the respondent state (here, the Argentine Republic). See *List of ICSID Cases*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases> (last updated Mar. 15, 2010).

2. See Karl P. Sauvant, *The Rise of International Investment, Investment Agreements and Investment Disputes*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 13, 13 (Karl P. Sauvant & Michael Chiswick-Patterson eds., 2008) (noting that as of the end of 2006, 42 of 45 claims against Argentina were related to the Argentine financial crisis).

3. José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, 2008/2009 Y.B. INT'L INV. L. & POL'Y 379, 379 (2009).

4. *Id.*, at 380; see also Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 58, 60 (2007). Franck finds that, out of 52 publicly available investor-state dispute cases that decided damages, one of four tribunals awarded over \$10 million in a

awarded are the conflicting interpretations of the necessity of Argentina's emergency measures as a response to the economic crisis.⁵ In many of the claims against it, Argentina consistently raised the defense that it should be excused from liability for damages to foreign investments because of the "state of necessity" during its economic crisis,⁶ otherwise known as a necessity defense. Argentina has argued for a necessity defense in claims brought by investors in many different industries, including infrastructure, manufacturing, and natural resources.⁷ However, commentators and practitioners have taken a particular interest in a group of ICSID cases collectively known as the Argentine Gas Cases.⁸ Each of the four claims

claim against Argentina. *Id.* at 60, n.270 (noting specifically *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005), 44 ILM 1205 (2005), which awarded investors U.S. \$133,200,000). Additionally, Franck notes that three other awards, on the higher end of the spectrum but not subject to coding for purposes of her research, averaged U.S. \$150,000,000. Two of these three awards were against Argentina. *Id.* at 62, n.276 (noting specifically *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award (Feb. 6, 2007), <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>, which awarded investors U.S. \$217,838,439, and *Azurix v. Argentina*, ICSID Case No. ARB/03/30, Award (July 14, 2006), <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>, which awarded investors U.S. \$165,240,753). Each of the cases referenced by Franck can be found in the *List of ICSID Cases* on the ICSID website, *supra* note 1.

5. Jorge E. Viñuales, *State of Necessity and Peremptory Norms in International Investment Law*, 14 LAW & BUS. REV. AM. 79, 81 (2008).

6. Sauvant, *supra* note 2, at 14. Argentina's defense is otherwise known as a "necessity defense," and such term will be used to describe Argentina's defense claim throughout this paper.

7. *Id.* at 13-14.

8. Alvarez & Khamisi, *supra* note 3, at 379. The Argentine Gas Cases consist of the following four claims against Argentina:

CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), 44 ILM 1205 (2005) [hereinafter CMS award]; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) 21 ICSID Rev.-FILJ 269 (2006) [hereinafter LG&E decision on liability];

Enron Creditors Recovery Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007), <http://ita.law.uvic.ca/documents/Enron-Award.pdf> [hereinafter Enron award];

Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases> [hereinafter Sempra award].

For the purposes of analyzing Argentina's necessity defense, the scope of this paper is limited to the Argentine Gas Cases listed in this footnote. Although the necessity defense has been raised across different industry sectors, restricting comparative analysis to a single sector (here, natural gas), avoids variances in the application of the necessity defense to different industries. Assuming the successful invocation of the necessity defense grants a state broad discretion to enact measures to combat the state of necessity, the type of measures enacted to combat a military crisis may have drastically different effects than the type of measures enacted to combat an economic crisis. For example, in a military crisis, measures enacted may implicate aspects of society that affect human rights, such as availability of food and water services. However, measures enacted in an economic crisis, such as nationalization of foreign investments in gas distribution companies, for example, may not have similar effects related to human-rights concerns.

was brought by a foreign corporation investing in Argentina's gas transportation and distribution industry; yet, each of the four tribunals issued a significantly divergent interpretation of the necessity defense claimed by Argentina.⁹ While three of the four tribunals' awards share certain commonalities, ultimately finding Argentina liable for treaty violations despite its necessity defense, the fourth tribunal found in favor of Argentina.¹⁰ Attempts at reconciling the different interpretations and conclusions of the awards regarding Argentina's necessity defense leave many questions unanswered. Further complicating matters, two of the three awards levied against Argentina were recently annulled with respect to Argentina's necessity defense.¹¹

Awards by tribunals administered under ICSID may be annulled only in limited situations;¹² namely, where a tribunal is improperly constituted, fails to justify its decision, or displays "manifest excess of powers," corruption, or "serious departure from a fundamental rule or procedure."¹³

9. Alvarez & Khamsi, *supra* note 3, at 380-81. For a detailed description of the analysis conducted by each tribunal, see generally Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 459, 474-98 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

10. The tribunals in the CMS award, Enron award, and Sempra award found against Argentina on the issue of necessity. *See* Sempra award, *supra* note 8, ¶ 355; Enron award, *supra* note 8, ¶ 313; CMS award, *supra* note 8, ¶ 331. The LG&E decision on liability found in favor of Argentina on the issue of necessity. *See* LG&E decision on liability, *supra* note 8, ¶¶ 239-40, 258-59. For a discussion of the analysis of the awards, see *infra* Part II.A.

11. Both the Sempra award and the Enron award were annulled with respect to Argentina's claim of necessity. *See* Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, ¶¶ 222-23 (June 29, 2010), <http://italaw.com/sites/default/files/case-documents/ita0776.pdf> [hereinafter Sempra annulment decision]; Enron Creditors Recovery Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, ¶ 395 (July 30, 2010), <http://italaw.com/sites/default/files/case-documents/ita0299.pdf> [hereinafter Enron annulment decision]. The CMS award was not annulled, despite the annulment committee's recognition of several "errors of law." *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, ¶¶ 158-59 (Sept. 25, 2007), <http://italaw.com/sites/default/files/case-documents/ita0187.pdf> [hereinafter CMS annulment decision]. The LG&E decision on liability is presently undergoing an annulment proceeding, which was suspended as of August 1, 2011, pursuant to the parties' agreement. *See List of Pending Cases*, *supra* note 1. For a discussion of the analysis of the Annulments, see *infra* Part II.B.

12. *See* Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, in ANNULMENT OF ICSID AWARDS 17, 17 (Emmanuel Gaillard & Yas Banifatemi eds., 2004) ("In the framework of ICSID Arbitration, annulment was designed as an extraordinary remedy for unusual and important cases. It is *not* a routine step to be taken by a party that has lost a case.") (emphasis added).

13. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 52(1)(a)-(e), *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter the ICSID Convention]. As noted by the CMS annulment committee, errors in legal analysis are not grounds for annulment. Where the tribunal applied the law, albeit "cryptically and defectively," it did not

With limited grounds for annulment, both the annulment decisions and awards in the Argentine Gas Cases differed as to the proper interpretation of the necessity defense under both the bilateral investment treaty between Argentina and the United States (the U.S.–Argentina BIT)¹⁴ and under customary international law.¹⁵

The awards and corresponding annulment decisions issued in the Argentine Gas Cases have significant implications for the security of foreign investments and the legitimacy of international investment law and present policy concerns for states party to bilateral investment treaties. Prior to addressing these concerns, Part I aims to clarify the contextual background for the debate over the necessity defense. It first describes Argentina’s political and economic climate and the relevant facts of the Argentine Gas Cases. It then discusses the necessity defense as claimed by Argentina to excuse its failure to comply with certain provisions of the U.S.–Argentina BIT. Part II addresses the different interpretations of the necessity defense provided by the tribunals in the Argentine Gas Cases in addition to those provided by the respective annulment committees that reviewed each case. Having established the context for the debate over the necessity defense, Part III discusses concerns about the security of investor interests in foreign investment, inconsistencies in the awards and subsequent annulments, and related policy issues for states participating in the bilateral investment treaty system. Each of these concerns is assessed in light of the current debate over the merits of proposed solutions. While the proposed solutions present a number of advantages and drawbacks, it is clear that without a unified approach to international investment law, problems of security, inconsistency, and public policy will continue to plague both host states and foreign investors.

I. BACKGROUND

A. Emergency Measures Enacted in Response to Argentina’s Economic and Political Crisis

The Argentine Gas Cases are unique in that “the facts giving rise to these disputes were practically identical”¹⁶ and that each concerns foreign

demonstrate a “manifest excess of powers.” See CMS annulment decision, *supra* note 11, ¶ 136.

14. See generally Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.–Arg., Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1991) [hereinafter the U.S.–Argentina BIT].

15. See generally *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* art. 25, U.N. Int’l Law Comm’n, U.N. DOC. A/56/10 (2001) [hereinafter the *Draft Articles*].

16. Alvarez & Khamsi, *supra* note 3, at 388 (citing generally the CMS, LG&E, Enron and

investments in Argentina's natural gas industry. In 1992, Argentina enacted the Gas Law, privatizing the natural gas transportation and distribution industry into ten companies, each of which was granted an operating license.¹⁷ Foreign investors, including CMS, Enron, Sempra and LG&E,¹⁸ purchased significant interests in the licensed companies.¹⁹ Their interest in making these acquisitions was integrally related to three key pillars of the Argentine government's privatization process: (i) a stable, investor-friendly tariff regime denominated in U.S. dollars (citation?), (ii) the 1991 Convertibility Law,²⁰ which pegged the Argentine peso to the U.S. dollar at a one-to-one exchange rate, and (iii) the periodic adjustment of the tariff regime based on the U.S. Producer Price Index (U.S. PPI) pursuant to the Gas Law.²¹ In addition, the Argentine government assured investors it would neither revise nor revoke the operating licenses.²²

However, the Argentine economy took a turn for the worse beginning in the late 1990s. By 2001, the government was unable to repay foreign creditors and the country's banks suffered serious liquidity problems.²³ Argentina's rigid exchange rate and monetary policy were largely to blame, because tight policies were unable to respond to a number of external shocks (stagnating commodity prices, increase in cost of capital, appreciation of the dollar, and devaluation of the currency of Brazil,

Sempra awards, *supra* note 8, and the CMS annulment decision, *supra* note 11). See also Nicholas Song, *Between Scylla and Charybdis – Can a Plea of Necessity Offer Safe Passage to States in Responding to an Economic Crisis Without Incurring Liability to Foreign Investors?*, 19 AM. REV. INT'L ARB. 235, 237 (2008) (citing Stephan W. Schill, *International Investment Law and the Host State's Power to Handle Economic Crises: Comment on the ICSID Decision in LG&E v. Argentina*, 24 J. INT'L ARB. 265, 267 (2007) and August Reinisch, *Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS v. Argentina and LG&E v. Argentina*, 3 TRANSNAT'L DISP. MGMT. 4 (2006)); Viñuales, *supra* note 5, at 80-81. For a concise, but thorough description of the general facts that gave rise to the claims by CMS, Enron, Sempra and LG&E, see generally Alvarez & Khamsi, *supra* note 3, at 388-91; Bjorklund, *supra* note 9, at 478-79; Eric David Kasenez, Note, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID*, 41 GEO. WASH. INT'L L. REV. 709, 712-16 (2009-10).

17. The Gas Law is otherwise known as the *Ley del Gas Natural*, Law No. 24076, June 9, 1992, [27407] B.O. 30, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/475/norma.htm>.

18. CMS, Enron, Sempra, and LG&E are also the investor-claimants in each of the four Argentine Gas Cases, *supra* note 8.

19. Sempra award, *supra* note 8, ¶¶ 83, 88-92; Enron award, *supra* note 8, ¶¶ 47-54; LG&E decision on liability, *supra* note 8, ¶ 52; CMS award, *supra* note 8, ¶ 58.

20. The Convertibility Law is otherwise known as the *Ley del Convertibilidad del Austral*, Law No. 23928, Mar. 27, 1991, [27104] B.O. 1, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/328/norma.htm>.

21. See Alvarez & Khamsi, *supra* note 3, at 388 (describing the privatization of the Argentine gas industry).

22. LG&E decision on liability, *supra* note 8, ¶¶ 41, 53; CMS award, *supra* note 8, ¶ 146.

23. Alvarez & Khamsi, *supra* note 3, at 389.

Argentina's primary trading partner).²⁴ A relaxed fiscal policy and increased public spending further exacerbated the country's financial situation.²⁵ In July 2001, Argentina's stock market plummeted, and Argentina's credit ratings were cut.²⁶ The Argentine government enacted certain measures that tightened its budget and cut salaries by 13% in an effort to strengthen its financial position.²⁷ Argentine nationals responded in protest with a 48-hour strike by state workers in Buenos Aires, Argentina's capital city.²⁸

Withdrawals of bank deposits (approximately \$1.3 billion in November 2001)²⁹ also contributed to the liquidity problems, as account holders feared the government would freeze private bank accounts in order to service foreign indebtedness.³⁰ These fears were realized when savings accounts were frozen in December of that year, and dollar-based accounts were redenominated into highly devalued pesos.³¹ Argentine nationals felt that "by seizing its citizens' savings, the government ha[d] broken a basic contract, and violated the rule of law. Trust between government and citizens—the essential glue of a prosperous democracy—ha[d] been destroyed."³² The frustrations of the Argentine people culminated in the succession of five presidents over a two-week period in December 2001.³³ In January 2002, banks closed their doors for most of the month, further complicating the situation.³⁴ As unemployment skyrocketed to a quarter of the workforce, and with 44% of the population at or below the poverty line,³⁵ social unrest and economic instability intensified.³⁶ The Argentine economy had all but collapsed.³⁷ Taken together, these events demonstrate

24. *A Decline Without Parallel: Argentina's Collapse*, THE ECONOMIST, Special Report, Mar. 2, 2002, at 26-28, available at <http://www.economist.com/node/1010911>.

25. *Id.*

26. *The Events that Triggered Argentina's Crisis*, BBC NEWS, Dec. 21, 2001, <http://news.bbc.co.uk/1/hi/business/1721103.stm>.

27. *Id.*

28. *Argentines Protest Against Pay Cuts*, BBC NEWS, Aug. 8, 2001, <http://news.bbc.co.uk/2/hi/americas/1481313.stm>.

29. BBC NEWS, *supra* note 26.

30. Alvarez & Khamsi, *supra* note 3, at 389.

31. Special Report, *supra* note 24.

32. *Id.*

33. Alvarez & Khamsi, *supra* note 3, at 389 (citing generally to LG&E decision on liability, *supra* note 8, ¶ 63).

34. Special Report, *supra* note 24; see also Larry Rohter, *Bank Holiday and Creditors Add to Crisis in Argentina*, N.Y. TIMES, Apr. 22, 2002, available at <http://www.nytimes.com/2002/04/22/world/bank-holiday-and-creditors-add-to-crisis-in-argentina.html>.

35. *Id.*

36. Alvarez & Khamsi, *supra* note 3, at 389.

37. Special Report, *supra* note 24 ("The economy has ground almost to a halt, as the chain of

the “awe-inspiring severity of the economic, financial, political and social collapse that ha[d] befallen Latin America’s hitherto richest country and its third-largest economy.”³⁸

In January 2002, Argentina responded by enacting the Emergency Law, which abolished the 1991 Convertibility Law and mandated a renegotiation of many of the Gas Law regulations that had benefitted foreign investors.³⁹ The Emergency Law also redenominated the dollar-based tariff regime in pesos, and favorable tariff adjustments were discontinued in March 2002.⁴⁰ Instability continued until President Néstor Kirchner took office in May 2003, after which the Argentine economy began to grow.⁴¹ A return to an investor-friendly tariff regime, however, in the gas sector has been successfully blocked by domestic court injunctions, despite government attempts to renegotiate tariff arrangements with the gas transportation and distribution companies.⁴²

B. Alleged Violations Under the U.S.–Argentina BIT

The Argentine Gas Cases were brought against Argentina by private investors in Argentina’s natural gas industry pursuant to alleged violations of Argentina’s commitments under the U.S.–Argentina BIT. Four such investors, CMS, Enron, Sempra and LG&E, claimed that Argentina violated commitments to foreign investors under the U.S.–Argentina BIT, especially regarding the natural gas industry’s specialized tariff regime. Specifically, the investors claimed that Argentina had reneged on promises that (i) tariffs would be dollar-based and adjusted in accordance with the U.S. PPI, and (ii) the Argentine government would neither revoke nor otherwise alter the operating licenses described in Part I.A, above.⁴³ By disregarding its guarantees of investor-friendly treatment, the foreign investors argued that the Argentine government had violated both Articles

payments between consumers, businesses and suppliers has broken down. Cash is at a premium. All foreign-exchange transactions require the approval of the Central Bank, which has been slow to authorise them. So imports have all but dried up. In some ways, that is merely inconvenient: Chilean salmon, for example, is no longer on the menu at even the best restaurants in Buenos Aires. In others, it may be tragic: hospitals have run short of imported medicines.”)

38. *Id.*

39. Law No. 25.561. Jan. 6, 2002, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/71477/texact.htm>. For a description of the Emergency Law and its impact on the Argentine Economy, see Special Report, *supra* note 24.

40. Alvarez & Khamsi, *supra* note 3, at 389-90.

41. *Id.* at 390 (citations omitted).

42. *Id.* (citations omitted).

43. CMS award, *supra* note 8, ¶¶ 85-86; Enron award, *supra* note 8, ¶ 88; Sempra award, *supra* note 8, ¶ 85; LG&E decision on liability, *supra* note 8, ¶ 42.

II and IV of the U.S.–Argentina BIT.⁴⁴ Article II provides that foreign investments will not receive arbitrary, discriminatory, unfair, inequitable, or otherwise less favorable treatment than domestic investments and that both parties will observe any commitments they enter into with respect to investments.⁴⁵ Article IV further provides that investments may only be expropriated for a public purpose, provided that the investor is compensated in a “prompt, adequate and effective” manner.⁴⁶ Both the United States and Argentina are parties to ICSID, and the dispute resolution provision in Article VII of the U.S.–Argentina BIT provides for ICSID arbitration to resolve any conflicts arising thereunder.⁴⁷ Consequently, the investor-claimants in each of the Argentine Gas Cases instituted arbitration proceedings with ICSID in order to claim compensation for alleged violations of the BIT.⁴⁸

C. The Necessity Defense

After a failed dispute over the arbitral tribunals’ jurisdiction in each of the four Argentine Gas Cases,⁴⁹ Argentina responded by denying any

44. Specifically, the investors claimed violations of the following provisions in Articles II and IV of the U.S.–Argentina BIT: “Article II(a) (guaranteeing “fair and equitable treatment,” “full protection and security” and treatment no “less than that required by international law”); Article II(2)(b) (barring “arbitrary” or “discriminatory” measures); Article II(2)(c) (the “umbrella clause” providing a guarantee by [Argentina] that it would “observe any obligation it may have entered into with regard to investments); and Article VI(1) (ensuring compensation for direct or indirect expropriations or measures “tantamount” to expropriation).” Alvarez & Khamsi, *supra* note 3, at 390-91 (citing the CMS award ¶ 88, LG&E decision on liability ¶ 72, Enron award ¶ 87, and Sempra award ¶ 94).

45. U.S.–Argentina BIT, *supra* note 14, art. II. Article II provides, in relevant part:

Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

Neither party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments . . .

Each party shall observe any obligation it may have entered into with regard to investments.

46. U.S.–Argentina BIT, *supra* note 14, art. IV. Article IV provides, in relevant part:

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization except for public purpose; in a nondiscriminatory manner’ upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of investment provided for in Article II(2).

47. See U.S.–Argentina BIT, *supra* note 14, art. VII(3)(a)(i).

48. For details regarding the filing dates and other procedural history related to the Argentine Gas Cases, see *List of ICSID Cases*, *supra* note 1. The website is searchable by case name. Alternatively, a list of international arbitration cases, searchable chronologically, alphabetically, and by claimant, is available at *Alphabetical Listing by Respondent State*, INT’L TREATY ARB., http://italaw.com/alphabetical_list_respondant.htm (last visited Mar. 9, 2012).

49. Arbitration under ICSID permits a respondent state to challenge ICSID jurisdiction over the claim as a preliminary matter. See ICSID Convention, *supra* note 13, art. 32 (“Any objection by a party

breach of the U.S.–Argentina BIT with respect to the specific guarantees claimed by each of the investors. Argentina argued that the tariff regime guarantees were contingent on the 1991 Convertibility Law remaining in effect.⁵⁰ Alternatively, Argentina argued that its liability for any such breach or otherwise wrongful act by Argentina would be precluded by (i) the customary international law doctrine of necessity, given the state of political and economic crisis in Argentina, and (ii) Article XI of the U.S.–Argentina BIT, a non-precluded measures clause that limits investor protection in certain circumstances.⁵¹ In other words, Argentina’s necessity defense consisted of two prongs: first, a defense under customary international law; and second, a defense under Article XI of the U.S.–Argentina BIT. Given the disagreement among the four tribunals as to the applicability of the customary law doctrine of necessity in light of Article XI of the U.S.–Argentina BIT, Parts I.C.1 and I.C.2 below provide a description of both defenses in order to contextualize the tribunals’ and annulment committees’ debate over Argentina’s necessity defense.

E. Customary International Law Doctrine of Necessity, or the CIL Defense

In each of the Argentine Gas Cases, both Argentina and the investor-claimants agreed that the customary international law doctrine of necessity is reflected in Article 25 of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*.⁵² Article 25 states, in its entirety:

to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.”). Provided that both parties have consented to jurisdiction, the ICSID Convention grants the relevant ICSID tribunal jurisdiction over the claim “to the exclusion of any other remedy.” *Id.* art. 26. In the Argentine Gas Cases, Argentina challenged ICSID jurisdiction by arguing that the conflicts were subject to Argentine Law, as opposed to international law. However, Argentina’s claim failed in each case, thereby permitting the relevant ICSID tribunal to judge the merits of each case. *See* CMS award, *supra* note 8, ¶¶ 112-14; Enron award, *supra* note 8, ¶¶ 203-04; Sempra award, *supra* note 8, ¶¶ 233-34; LG&E decision on liability, *supra* note 8, ¶ 81.

50. CMS award, *supra* note 8, ¶ 91; Enron award, *supra* note 8, ¶ 90; Sempra award, *supra* note 8, ¶ 96; LG&E decision on liability, *supra* note 8, ¶ 114.

51. CMS award, *supra* note 8, ¶ 99; Enron award, *supra* note 8, ¶ 93; Sempra award, *supra* note 8, ¶ 98; LG&E decision on liability, *supra* note 8, ¶¶ 201-02. In addition to arguing a defense of necessity under customary international law and under the U.S.–Argentina BIT, Argentina argued that liability was precluded under Argentine law; however, the CMS, Enron, and Sempra tribunals found that Argentina did not have a defense of necessity under domestic law. *See* CMS award, *supra* note 8, ¶ 227; Enron award, *supra* note 8, ¶ 218; Sempra award, *supra* note 8, ¶ 246. LG&E did not consider the issue. For a comparative analysis of the tribunals’ interpretations of the availability of a necessity defense under Argentine domestic law, see Alvarez & Khamsi, *supra* note 3, at 402-04.

52. CMS award, *supra* note 8, ¶ 317; Enron award, *supra* note 8, ¶ 303; Sempra award, *supra* note 8, ¶ 344; LG&E decision on liability, *supra* note 8, ¶ 245.

1. 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.
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.⁵³

The weight of authority in international law accepts the customary international law doctrine of necessity, or the CIL Defense, as a valid defense against liability for wrongful acts or omissions by a state.⁵⁴ While there are other possible defenses precluding liability for wrongful conduct,⁵⁵ the CIL Defense is available only “under certain *very limited conditions*.”⁵⁶

Pursuant to Article 25 of the *Draft Articles*, all elements must be proved before the necessity defense can be claimed under customary international law. The first condition is that the measures taken must be the “only way” to preserve an “essential interest” of the state, which would otherwise be “impaired” because of a “grave and imminent peril.”⁵⁷ The comments to paragraph 1(a) of Article 25 note that such a determination is dependent upon the facts of the case.⁵⁸ Successfully meeting this element, however, requires that (i) no other lawful means was available to protect the interest (regardless of cost or convenience); (ii) the interest is particular

53. *Draft Articles*, *supra* note 15, art. 25.

54. *Id.* cmt. 3 at 80-81.

55. *Id.* cmt. 2 at 80 (“The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safe-guard against possible abuse.”). *See also* Bjorklund, *supra* note 9, at 465-66.

56. *Draft Articles*, *supra* note 15, art. 25, cmt. 14, at 83 (emphasis added).

57. *Id.* cmt. 15, at 83.

58. *Id.*

to the people, state, or international community, the “essential” character of which will be determined from surrounding circumstances; (iii) the interest is threatened at the time protective measures were taken; and (iv) the threat to the interest is serious and proximate, and not merely “apprehended or contingent.”⁵⁹ The four components of the first element are subject to the requirement in paragraph 1(b) that the essential state interest “must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests” of other states or the international community as a whole.⁶⁰

In addition to the conditions provided in paragraph 1, paragraph 2 provides that any invocation of necessity is limited in two situations. Under paragraph 2(a), where “the international obligation in question explicitly or implicitly excludes reliance on necessity,” a state is prohibited from invoking a necessity defense.⁶¹ Thus, a state may not rely on necessity to avoid *jus cogens*, or a nonderogable, preemptory norm of international law. Under paragraph 2(b), a state party cannot rely on necessity if it has “contributed to the situation of necessity” in any substantial manner.⁶² “Substantial” contribution does not include incidental or peripheral acts that would otherwise not be deemed as contributing to a state of necessity.⁶³

As noted above, successful invocation of the CIL Defense is not an easy task, as “both case law and commentary insist that this plea must be applied restrictively in order to prevent abuse and to avoid providing states with an easy excuse to avoid their international obligations.”⁶⁴ The *Draft Articles* were neither developed in the specific context of international investment nor were they designed to resolve investor–state conflicts.⁶⁵ However, Article 25 permits (at least in theory) the invocation of the customary international law doctrine of necessity, and “there is room for disagreement about the precise boundaries of the doctrine at its farthest reaches, and of course in its application in any given case.”⁶⁶ In other

59. *Id.*

60. *Id.* cmt. 17, at 84.

61. *Id.* cmt. 19, at 84.

62. *Id.* cmt 20, at 84.

63. *Id.*

64. Song, *supra* note 16, at 248 (citing Vaughn Lowe, INTERNATIONAL LAW (2007)). *See also Draft Articles, supra* note 15, art. 25, cmt. 2, at 80 (noting that the necessity defense “will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse”).

65. Bjorklund, *supra* note 9, at 522.

66. *Id.* at 474. This disagreement is discussed in Part II, *infra*, as the tribunals in the Argentine Gas Cases reached different conclusions regarding the various elements of the necessity defense.

words, although the CIL Defense only applies upon meeting a narrow set of requirements, a necessity defense may be claimed in a wide array of different situations.⁶⁷ For example, the CIL Defense has been successfully invoked in military and environmental situations, in addition to certain economic situations.⁶⁸ Argentina's claim that "the very existence of the Argentine State was threatened by the events that began to unfold in 2000" suggests that it considered its socioeconomic situation sufficiently severe to invoke a CIL Defense pursuant to Article 25 of the *Draft Articles*.⁶⁹

F. Article XI of the U.S.–Argentina BIT, or the NPM Exception

In addition to a defense predicated on the customary international law doctrine of necessity, Argentina also claimed its liability for any breach of provisions contained in the U.S.–Argentina BIT was precluded by Article XI. Article XI provides, in its entirety:

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.⁷⁰

Such language is typical of a non-precluded measures clause, or NPM clause, a feature common to U.S. bilateral investment treaties.⁷¹ An NPM clause permits a state to contravene investor protections under a bilateral investment treaty in "exceptional circumstances" as necessary "for the protection of essential security the maintenance of public order, or to respond to a public health emergency."⁷² In other words, a defense based on invoking an NPM clause, or an NPM Exception, allows a state to be absolved from liability where the state enacts emergency measures in

67. *See id.* at 249.

68. *See* Sarah F. Hill, *The "Necessity Defense" and the Emerging Arbitral Conflict in its Application to the U.S.–Argentina Bilateral Investment Treaty*, 13 *LAW & BUS. REV. AM.* 547, 551-57 (2007) (providing examples of various international disputes in which the defense of necessity has been invoked in military and environmental situations, in addition to economic situations). Comments to Article 25 of the *Draft Articles* discuss the invocation of necessity in a variety of such situations, noting two particular cases that suggest a state of necessity in dire economic situations. *See Draft Articles, supra* note 15, art. 25, cmts. 3-12, at 80-82.

69. CMS award, *supra* note 8, ¶ 305.

70. U.S.–Argentina BIT, *supra* note 14, art. XI.

71. 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, 313 (2008).

72. *Id.* at 311.

response to a crisis situation. However, where the state acts pursuant to an NPM clause in a bilateral investment treaty, two issues arise. The first is the question of liability, or whether it is wrong for the state to take such necessary measures in light of the circumstances. If the NPM clause precludes liability, then such actions are not considered to violate the acting state's obligation under the bilateral investment treaty.⁷³ The second issue is the question of compensation, or whether a state is required to compensate an investor for damages sustained as a result of necessary measures. This second question is less well settled than the question of liability, and tribunals differ as to whether liability absolves a state from compensating investors for losses sustained. Argentina assumed a favorable position to both questions, arguing that the economic crisis triggered the NPM clause in Article XI of the U.S.–Argentina BIT, thus precluding liability for any breach of investor protection mechanisms therein.⁷⁴ Consequently, Argentina claimed it was not liable to investors for losses resulting from emergency measures enacted pursuant to its NPM Exception.

II. THE NECESSITY DEFENSE AS INTERPRETED IN THE ARGENTINE GAS CASES AND CORRESPONDING ANNULMENT DECISIONS

Despite similar fact patterns and claims in the Argentine Gas Cases, “there was considerable disagreement among the [tribunals] about whether the measures adopted by the Argentine government could be defended as a response to the crisis faced by that country under Article XI of the [U.S.-Argentina] BIT or the customary international law doctrine of necessity.”⁷⁵ While the CMS, Enron and Sempra tribunals⁷⁶ ultimately held Argentina liable for violations of investor protection obligations under the U.S.–Argentina BIT, the LG&E tribunal found in favor of Argentina.⁷⁷ Further complicating the issue, the CMS, Enron and Sempra Awards were subject

73. *Id.* at 312.

74. CMS award, *supra* note 8, ¶¶ 317-18; Enron *supra* note 8, ¶¶ 303-04, Sempra *supra* note 8, ¶¶ 344-45, LG&E *supra* note 8, ¶ 245.

75. Alvarez & Khamsi, *supra* note 3, at 392. *See also* Bjorklund, *supra* note 9, at 474.

76. These tribunals are so named for the investor-claimants involved in each case against Argentina. *See* Argentine Gas Cases, *supra* note 8. Thus the tribunal arbitrating the case of *CMS v. Argentina*, is referred to as the “CMS tribunal.” The same naming device applies to the tribunals in *Enron v. Argentina*, or the “Enron tribunal,” *Sempra v. Argentina*, or the “Sempra tribunal,” and *LG&E v. Argentina*, or the “LG&E tribunal.”

77. The tribunals in the CMS award, Enron award, and Sempra award found against Argentina on the issue of necessity. *See* CMS award, *supra* note 8, ¶ 331; Enron award, *supra* note 8, ¶ 313; Sempra award, *supra* note 8, ¶ 346. The LG&E decision on liability found in favor of Argentina on the issue of necessity. *See* LG&E, *supra* note 8, ¶¶ 239, 258-59.

to annulment proceedings with respect to Argentina's necessity defense. The CMS Award was upheld despite the annulment committee's disagreement with the analytical approach taken by the CMS tribunal, while the Enron and Sempra tribunals' decisions on Argentina's necessity defense were annulled based in part on the logic provided in the CMS annulment.⁷⁸ In order to understand both the tribunals' and subsequent annulment committees' differing views on the correct interpretation and application of a necessity defense, this paper will first address the arbitration awards before moving to the annulment proceedings.

A. Argentina's Liability as Decided by the Original Arbitral Tribunals in CMS, Enron, Sempra and LG&E

Although the Argentine Gas Cases each involved a similar fact pattern, the tribunals differed in their analysis of the facts and relevant law, with the result that three tribunals found against Argentina while one found in its favor. As a preliminary matter, however, all four tribunals agreed that Argentina violated its investor protection obligations under Articles II and IV of the U.S.–Argentina BIT.⁷⁹ Specifically, the tribunals found that Argentina violated its obligation to provide fair and equitable treatment to the investors pursuant to Article II(2)(a) by enacting emergency measures that “entirely transformed and altered the legal and business environment under which the investments were made.”⁸⁰ Argentina's actions therefore violated investors' legitimate expectations regarding the nature of the investment regime.⁸¹ The tribunals also found that Argentina had failed to respect its commitments for investor protection under Article II(2)(c),

78. Both the Sempra award and the Enron award were annulled with respect to Argentina's claim of necessity. See Sempra annulment decision, *supra* note 11, ¶¶ 204-08; Enron annulment decision, *supra* note 11, ¶ 395. The CMS award was not annulled, despite the annulment committee's recognition of several “errors of law.” See CMS annulment decision, *supra* note 11, ¶ 136. The LG&E decision on liability is presently undergoing an annulment proceeding, which was suspended as of August 1, 2011. See *List of Pending Cases*, *supra* note 11.

79. Article II of the U.S.–Argentina BIT prohibits arbitrary, discriminatory, unfair, inequitable, or otherwise less favorable treatment of foreign investments relative to domestic investments and requires both parties to observe their respective investment obligations. See Article II of the U.S.–Argentina BIT, *supra* note 45. Article IV further provides that investments may only be expropriated for a public purpose, provided that the investor is compensated in a “prompt, adequate and effective” manner. See Article IV of the U.S.–Argentina BIT, *supra* note 46.

80. Alvarez & Khamsi, *supra* note 3, at 393 (citing as an example CMS award, *supra* note 8, ¶ 275). Regarding Article II(a), Alvarez & Khamsi also note that only the Enron and Sempra tribunals addressed and subsequently rejected the investors' claims regarding the guarantee of full protection and security, and none of the tribunals addressed whether there was a breach of “treatment no less than that required by international law.” *Id.* at 395.

81. See CMS award, *supra* note 8, ¶ 281; Enron award, *supra* note 8, ¶¶ 267-68; Sempra award *supra* note 8, ¶¶ 303-04; LG&E decision on liability, *supra* note 8, ¶ 175.

which requires Argentina to “observe any obligation it may have entered into with regard to investments.”⁸² However, each tribunal rejected claims of arbitrary treatment by Argentina, pursuant to Article II(2)(b), and all but the LG&E tribunal rejected claims of discriminatory treatment.⁸³ With respect to Article IV(1), all tribunals rejected investors’ expropriation claims.⁸⁴

Having found Argentina liable for various violations of the U.S.–Argentina BIT under Article II(2), the tribunals then turned to whether these breaches were excused by either a CIL Defense pursuant to Article 25 of the *Draft Articles* or by an NPM Exception pursuant to the U.S.–Argentina BIT. The tribunals agreed on several important issues regarding Argentina’s claimed necessity defense. First, each of the tribunals agreed that the purpose of a necessity defense is to preclude wrongfulness for a state’s actions during a period of crisis.⁸⁵ Second, all tribunals agreed that Article XI of the U.S.–Argentina BIT is not self-judging.⁸⁶ That is, Argentina was not permitted to unilaterally determine whether conditions were such that they required Argentina to take measures in breach of the U.S.–Argentina BIT.⁸⁷ Rather, the tribunals retained the right to decide whether Argentina had properly invoked the NPM Exception pursuant to Article XI.⁸⁸ Third, the tribunals agreed that an economic crisis might constitute “essential security interests” under Article XI of the U.S.–

82. U.S.–Argentina BIT, *supra* note 14, art. II(2)(c). See CMS award, *supra* note 8, ¶ 303; Enron award, *supra* note 8, ¶¶ 276-77; Sempra award *supra* note 8, ¶ 314; LG&E decision on liability, *supra* note 8, ¶ 175.

83. CMS award, *supra* note 8, ¶¶ 290-95; Enron award, *supra* note 8, ¶¶ 281-83; Sempra award *supra* note 8, ¶ 318; LG&E decision on liability, *supra* note 8, ¶¶ 147-48, 161.

84. All four tribunals rejected claims of indirect expropriation. CMS award, *supra* note 8, ¶¶ 262-64; Enron award, *supra* note 8, ¶¶ 245-46; Sempra award *supra* note 8, ¶¶ 283-86; LG&E decision on liability, *supra* note 8, ¶ 200. Only the Enron and Sempra tribunals considered, and subsequently rejected, claims of direct expropriation. See Enron award, *supra* note 8, ¶ 243; Sempra award, *supra* note 8, ¶¶ 280-82.

85. CMS award, *supra* note 8, ¶¶ 379-81; Enron award, *supra* note 8, ¶ 343; Sempra award *supra* note 8, ¶ 392; LG&E decision on liability, *supra* note 8, ¶ 261.

86. CMS award, *supra* note 8, ¶ 373; Enron award, *supra* note 8, ¶ 332; Sempra award, *supra* note 8, ¶ 385; LG&E decision on liability, *supra* note 8, ¶ 212.

87. See August Reinisch, *Necessity in Investment Arbitration*, 41 NETH. Y.B. INT’L L., 137, 142-43 (I. F. Dekker and E. Hey eds., 2010) (noting that the occurrence of self-judging treaty provisions are “not frequent in international economic law” and usually not contained in bilateral investment treaties) (emphasis added).

88. See CMS award, *supra* note 8, ¶ 373; Enron award, *supra* note 8, ¶¶ 339-40; Sempra award, *supra* note 8, ¶ 338; LG&E decision on liability, *supra* note 8, ¶¶ 212-14. For a detailed description of the reasoning behind the tribunals’ decision that Article XI is not self-judging, see Alvarez & Khamsi, *supra* note 3, at 417-26. *But see* Burke-White & von Staden, *supra* note 71, at 381-86 (arguing that Article XI is implicitly self-judging, and thus the tribunals erred in their decision that the provision was not self-judging).

Argentina BIT.⁸⁹ Finally, with respect to the CIL Defense, each of the tribunals held that Article 25 of the *Draft Articles* was an accurate statement of the requirements for such a defense.⁹⁰

Despite the similarities discussed above, the tribunals' analyses diverged significantly with respect to (i) the relationship between the CIL Defense, pursuant to Article 25 of the *Draft Articles*, and the NPM Exception, pursuant to Article XI of the U.S.–Argentina BIT; (ii) whether Argentina's claim successfully met each of the elements of necessity required for a CIL Defense; and (iii) whether or not successful invocation of the necessity defense under CIL or the NPM clause entitles investors to compensation for losses caused by Argentina's emergency measures.⁹¹ Each of these differences is individually discussed below.

1. The Tribunals' Analysis of the Relationship Between the CIL Defense and the NPM Exception

The relationship of the CIL Defense, pursuant to Article 25 of the *Draft Articles*, and the NPM Exception, pursuant to Article XI of the U.S.–Argentina BIT, was addressed by each of the tribunals in the Argentine Gas Cases. The analysis, however, differed among tribunals. The CMS tribunal regarded the CIL Defense and the NPM Exception as being part of the same issue of claiming a necessity defense. The CMS tribunal, therefore, addressed the requirements for an NPM Exception under the U.S.–Argentina BIT by referring to the elements required to invoke a CIL Defense under Article 25 of the *Draft Articles*.⁹² CMS, however, did not find that Argentina had met all of those elements.⁹³ In contrast to the CMS tribunal, the Enron and the Sempra tribunals regarded the CIL Defense and the NPM Exception as two separate issues. In the opinion of both tribunals, Article XI of the U.S.–Argentina BIT permitted Argentina to claim a necessity defense.⁹⁴ Nevertheless, both tribunals determined that the appropriate analysis should look to customary international law, and specifically to Article 25 of the *Draft Articles*, because Article XI did not

89. CMS award, *supra* note 8, ¶¶ 359-60; Enron award, *supra* note 8, ¶ 332; Sempra award, *supra* note 8, ¶ 374; LG&E decision on liability, *supra* note 8, ¶¶ 237-38. See Article XI of the U.S.–Argentina BIT, *supra* Part I.C.2.

90. CMS award, *supra* note 8, ¶ 315; Enron award, *supra* note 8, ¶ 303; Sempra award *supra* note 8, ¶ 344; LG&E decision on liability, *supra* note 8, ¶ 245. See *Draft Articles*, *supra* note 15, art. 25.

91. Alvarez & Khamsi, *supra* note 3, at 395-96.

92. CMS award, *supra* note 8, ¶¶ 308, 353-58. Such an interpretation was not specifically provided by the CMS tribunal; however, the CMS annulment committee interpreted the CMS award in this manner. CMS annulment decision, *supra* note 11, ¶¶ 124, 127.

93. CMS award, *supra* note 8, ¶ 331.

94. See Enron award, *supra* note 8, ¶¶ 333-34 (stating that the tribunal needed to evaluate the claim and then proceeding with this analysis); Sempra award, *supra* note 8, ¶¶ 375-76.

provide specific requirements for invoking such a defense.⁹⁵ Like the CMS tribunal, both the Enron and Sempra tribunals found that the elements of a CIL Defense had not been met.⁹⁶

Additionally, both the Enron and Sempra tribunals took the relationship analysis a step further than the CMS tribunal, and rejected Argentina's claim that Article XI of the U.S–Argentina BIT was *lex specialis*, or a “special rule of international law.”⁹⁷ If Article XI were interpreted as *lex specialis*, it would preclude the application of other rules of international law, including customary international law and Article 25 of the *Draft Articles*. However, absent any clear indication that both the United States and Argentina had intended Article XI to operate as *lex specialis* at the time the U.S–Argentina BIT was drafted, both tribunals refused to interpret an NPM Exception under Article XI as barring the applicability of a CIL Defense under Article 25 of the *Draft Articles*.⁹⁸

Like the Enron and Sempra tribunals, the LG&E tribunal found that an NPM Exception and a CIL Defense were two separate issues. In contrast to the other three tribunals, the LG&E tribunal found that Argentina's emergency measures were excused as legitimate emergency measures in response to a crisis situation under Article XI.⁹⁹ The LG&E tribunal also found that Argentina's emergency measures were excused as the only means to respond to its economic crisis under Article 25 of the *Draft Articles*.¹⁰⁰ Because Argentina's emergency measures were excused under the U.S–Argentina BIT and customary international law, the LG&E tribunal found that distinguishing between the NPM Exception and the CIL Defense was “not particularly significant.”¹⁰¹

2. Tribunal's Analysis of the Elements of a CIL Defense

In addition to differences over the relationship of the CIL Defense and the NPM Exception, each of the tribunals also varied in their application of Article 25 of the *Draft Articles* in determining whether Argentina had successfully met the conditions for a CIL Defense. The conditions to be satisfied for a successful CIL Defense pursuant to Article 25 are described in paragraph (1), which provides the requirements for the invocation of the necessity defense, and paragraph (2), which limits the necessity defense in

95. *Id.*

96. Enron award, *supra* note 8, ¶ 313; Sempra award, *supra* note 8, ¶ 346.

97. *Draft Articles*, *supra* note 15, art. 55, cmts. 1-2, at 140.

98. Alvarez & Khamsi, *supra* note 3, at 398 (citing the Enron award, *supra* note 8, ¶ 334, and the Sempra award, *supra* note 8, ¶ 378).

99. LG&E decision on liability, *supra* note 8, ¶ 240.

100. *Id.* ¶ 257.

101. Alvarez & Khamsi, *supra* note 3, at 397.

certain situations.

With respect to the elements of necessity pursuant to Article 25(1)(a),¹⁰² the tribunals disagreed whether Argentina had an “essential interest” at stake and whether it was subject to “grave and imminent peril.” The CMS tribunal found that the crisis was severe “enough to justify the government taking action to prevent a . . . total economic collapse.”¹⁰³ Despite the severity and proximity of the crisis, the tribunal did not find that Argentina had satisfied these requirements.¹⁰⁴ The Enron and Sempra tribunals likewise found that the crisis was severe, but not severe enough to threaten “the very existence of the state and its independence,” especially since Argentina had not provided sufficient evidence to convince the tribunal that the political and economic situation was sufficiently severe to require Argentina to violate obligations to investors under the U.S.–Argentina BIT.¹⁰⁵ In contrast, the LG&E tribunal found that Argentina’s economic crisis seriously compromised the nation’s internal state of affairs, and was therefore an “essential interest.”¹⁰⁶ The evidence presented to the tribunal proved, to the tribunal’s satisfaction, that Argentina’s essential interest was affected by a grave and proximate danger.¹⁰⁷ The tribunals further disagreed whether Argentina’s actions were the “only means” available. Without specifying other ways in which Argentina could have responded to the economic crisis, the CMS, Enron and Sempra tribunals all found that the emergency measures undertaken by Argentina were not the only means available.¹⁰⁸

With respect to the impairment of other nations’ essential interests as per Article 25(1)(b),¹⁰⁹ none of the tribunals found an impairment of an essential state interest of any other state.¹¹⁰ Specifically, the CMS, Enron

102. Article 25(1)(a) requires that any act taken pursuant to necessity “is the only way for the State to safeguard an essential interest against a grave and imminent peril[.]” See *Draft Articles*, *supra* note 15, art. 25, at 80.

103. CMS award, *supra* note 8, ¶ 322.

104. *Id.* ¶¶ 319-22.

105. Enron award, *supra* note 8, ¶¶ 306-07; Sempra award, *supra* note 8, ¶¶ 348-49.

106. LG&E decision on liability, *supra* note 8, ¶¶ 251-52.

107. *Id.* ¶¶ 253, 257.

108. CMS award, *supra* note 8, ¶¶ 323-24; Enron award, *supra* note 8, ¶ 308; Sempra award, *supra* note 8, ¶ 350. The Enron and Sempra tribunals further stated that an inquiry into other available responses to the economic crisis would be outside of the scope of the tribunals’ jurisdiction. See Enron award, *supra* note 8, ¶ 309; Sempra award, *supra* note 8, ¶ 351.

109. Article 25(1)(b) requires that any act taken pursuant to necessity “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[.]” See *Draft Articles*, *supra* note 15, art. 25, at 80.

110. CMS award, *supra* note 8, ¶¶ 357-58; Enron award, *supra* note 8, ¶ 341; Sempra award, *supra* note 8, ¶ 390; LG&E decision on liability, *supra* note 8, ¶ 257.

and Sempra tribunals found no impairment of an essential interest of the United States, as the state “towards which the obligation [under the U.S.–Argentina BIT] exists.”¹¹¹ The CMS, Enron and Sempra Tribunals also found no impairment of the essential interests of the international community as a whole.¹¹² The LG&E tribunal, however, did not address this element of Article 25.

With respect to the ability to invoke a necessity defense under the U.S.–Argentina BIT, pursuant to Article 25(2)(a),¹¹³ the CMS tribunal found that a necessity defense was not barred by the U.S.–Argentina BIT in general, but was precluded in Argentina’s case because Argentina did not face a sufficiently serious economic situation to invoke a CIL Defense.¹¹⁴ The Enron and Sempra tribunals merely stated that the CIL defense should be interpreted narrowly, but neither tribunal otherwise directly addressed the issue.¹¹⁵ Like CMS, the LG&E tribunal found that the U.S.–Argentina BIT permitted a plea of necessity, although it reached the opposite result with respect to Argentina’s ability to invoke such a defense.¹¹⁶

Finally, with respect to whether Argentina contributed to the economic crisis, or Argentina’s “situation of necessity,” under Article 25(2)(b),¹¹⁷ the CMS, Enron and Sempra tribunals found that the policies of the Argentine government had largely contributed to the economic crisis, thereby precluding a necessity defense.¹¹⁸ By contrast, the LG&E tribunal found that Argentina had not contributed to the crisis, based on the investors’ failure to prove that Argentina contributed to the economic crisis and government efforts to reduce its severity.¹¹⁹ Despite varied analyses of the different elements required for a CIL Defense under Article 25 of the *Draft Articles*, each of the CMS, Enron and Sempra tribunals found that Argentina had failed to meet the requisite elements, while the LG&E tribunal found that the elements were satisfied.

111. CMS award, *supra* note 8, ¶¶ 357-58; Enron award, *supra* note 8, ¶ 341; Sempra award, *supra* note 8, ¶ 390.

112. CMS award, *supra* note 8, ¶ 325; Enron award, *supra* note 8, ¶ 310; Sempra award, *supra* note 8, ¶ 352.

113. Article 25(2)(a) prohibits the necessity defense where “the international obligation in question excludes the possibility of invoking necessity[.]” *Draft Articles*, *supra* note 15, art. 25, at 80.

114. CMS award, *supra* note 8, ¶¶ 353-55.

115. Enron award, *supra* note 8, ¶ 331; Sempra award, *supra* note 8, ¶ 373.

116. LG&E decision on liability, *supra* note 8, ¶¶ 255, 259.

117. Article 25(2)(b) prohibits the necessity defense where “the State has contributed to the situation of necessity.” *Draft Articles*, *supra* note 15, art. 25, at 80.

118. CMS award, *supra* note 8, ¶¶ 379-82; Enron award, *supra* note 8, ¶¶ 311-13; Sempra award, *supra* note 8, ¶¶ 353-54.

119. LG&E decision on liability, *supra* note 8, ¶¶ 257-59.

3. Tribunal's Analysis of the Compensation Requirement

Each of the tribunals in the Argentine Gas Cases agreed that, where the elements of a CIL Defense are sufficiently proved under Article 25 of the *Draft Articles*, a state is not liable for wrongful actions during the period of necessity under Article 27.¹²⁰ However, the Tribunals disagreed as to whether compensation would be due for violations under the U.S.–Argentina BIT despite a successful invocation of the CIL Defense. The CMS, Enron and Sempra Tribunals found that the CIL Defense did not remove the requirement to compensate investors for losses or damages incurred as a result of the state's actions during a crisis situation.¹²¹ The tribunals also implied that a crisis situation would be considered in determining the amount of compensation due.¹²² The LG&E tribunal took the opposite position, arguing that because the CIL Defense excuses a state from liability, it follows logically that the state should not be required to compensate investors for losses or damages sustained during a period of crisis.¹²³ However, where investors incurred losses as a result of state actions unrelated to the crisis situation, the LG&E tribunal determined that the investor should be compensated for such losses.¹²⁴

B. Argentina's Liability Under the CMS, Enron and Sempra Annulment Proceedings

As discussed above, the CMS, Enron and Sempra decisions were all subject to annulment proceedings, pursuant to Article 52 of the ICSID Convention.¹²⁵ The grounds for annulment under the ICSID Convention are narrow and are limited to improper constitution of a tribunal, “manifest excess of powers” by a tribunal, corruption of a tribunal member, a “serious departure from a fundamental rule or procedure,” or failure “to

120. CMS award, *supra* note 8, ¶¶ 379-82; Enron award, *supra* note 8, ¶ 343; Sempra award, *supra* note 8, ¶ 392; LG&E decision on liability, *supra* note 8, ¶ 261. Article 27 of the *Draft Articles* provides in its entirety:

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) the question of compensation for any material loss caused by the act in question. *Draft Articles*, *supra* note 15, art. 27 at 85.

121. CMS award, *supra* note 8, ¶ 388; Enron award, *supra* note 8, ¶ 345; Sempra award, *supra* note 8, ¶ 394.

122. CMS award, *supra* note 8, ¶ 356; Enron award, *supra* note 8, ¶ 407; Sempra award, *supra* note 8, ¶ 346.

123. LG&E decision on liability, *supra* note 8, ¶ 264.

124. LG&E decision on liability, *supra* note 8, ¶ 265.

125. See ICSID Convention, *supra* note 12, art. 52.

state the reasons” for a tribunal’s decision.¹²⁶

Finding that the tribunals’ awards met the criteria for annulment in Article 52(1) of the ICSID Convention, the Enron and Sempra annulment committees annulled the portions of the tribunal awards that dealt with Argentina’s necessity defense.¹²⁷ Although the CMS Award was not annulled, the annulment committee found a “manifest error of law” with respect to the tribunal’s interpretation of the necessity defense.¹²⁸ Yet, because this error did not amount to a “manifest excess of powers” by the tribunal, the annulment committee declined to annul the CMS award with respect to Argentina’s necessity defense.¹²⁹ No annulment decision has been issued with respect to the LG&E decision on liability, as the annulment proceeding has been suspended by agreement of both parties.¹³⁰

By way of comparison, the CMS, Sempra and Enron annulment committees differed with the tribunals (and with each other) over the relationship between a CIL Defense under Article 25 of the *Draft Articles* and an NPM Exception under Article XI of the U.S.–Argentina BIT. The Enron annulment committee further disagreed with the Enron tribunal’s decision that the conditions for the necessity defense under Article 25 of the *Draft Articles* had not been sufficiently proved by Argentina.¹³¹ Moreover, the CMS and Enron annulment committees all rejected the respective tribunals’ conclusions that a CIL Defense requires compensation for losses or damages sustained by the investors, while the Sempra annulment committee did not directly address this issue. These differences are discussed below.

126. *Id.* art. 52(1)(a)–(e). As noted by the CMS annulment committee, errors in legal analysis are not grounds for annulment. Where the tribunal applies the law, albeit “cryptically and defectively,” the tribunal did not engage in a “manifest excess of powers.” See CMS annulment decision, *supra* note 11, ¶ 136.

127. Enron annulment decision, *supra* note 11, ¶ 222; Sempra annulment decision, *supra* note 11, ¶ 405. Though other portions of the Enron and Sempra awards were also annulled, they are outside of the scope of this paper and, accordingly, will not be addressed.

128. CMS annulment decision, *supra* note 11, ¶ 130.

129. CMS annulment decision, *supra* note 11, ¶ 136. Specifically, the annulment committee stated “that it has only a limited jurisdiction under Article 52 of the ICSID Convention. In the circumstances, the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the tribunal.” *Id.* Because the tribunal applied article XI of the Treaty, albeit doing so “cryptically and defectively” the tribunal did not exceed its power under the ICSID convention. *Id.*

130. The annulment proceeding was registered on September 19, 2008, and the status of the proceeding was pending as of August 1, 2001. See *List of Pending Cases*, *supra* note 11.

131. The CMS and Sempra annulment decisions did not address this issue.

1. Annulment Committees' Analysis of the Relationship between the CIL Defense and the NPM Exception

The CMS and Sempra annulment committees found that the tribunals made certain legal errors in their analysis of the relationship between a CIL Defense under Article 25 of the *Draft Articles* and an NPM Exception under Article XI of the U.S.–Argentina BIT. First, both annulment committees disagreed with the respective tribunals' failure to distinguish between the CIL Defense and the NPM Exception.¹³² Both annulment committees noted significant differences in the language adopted in both provisions: Article XI of the U.S.–Argentina BIT refers to “measures necessary” that “specif[y] the conditions under which the treaty may be applied,” while Article 25 of the *Draft Articles* refers to a “state of necessity” that only applies where “certain conditions are met.”¹³³ In the words of the CMS tribunal, “Article XI is a threshold requirement: if it applies, the substantive obligations under the [U.S.–Argentina BIT] do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.”¹³⁴ Thus the NPM Exception bars the application of other provisions of the U.S.–Argentina BIT, suggesting that there can be no breach of the U.S.–Argentina BIT when an NPM Exception has been successfully invoked. an NPM Exception therefore operates differently than a CIL Defense, which is only available after provisions of the U.S.–Argentina BIT have been breached. Given the plain language of both provisions, it was clear to the annulment committees that the provisions were “substantively different.”¹³⁵

Although the CMS annulment committee concluded its analysis with the difference in operative language, the Sempra annulment committee took the analysis a step further. The Sempra annulment committee

132. CMS annulment decision, *supra* note 11, ¶ 129; Sempra annulment decision, *supra* note 11, ¶ 204, 208.

133. CMS annulment decision, *supra* note 11, ¶ 129; *see also* Sempra annulment decision, *supra* note 11, ¶ 203.

134. CMS annulment decision, *supra* note 11, ¶ 129. The Sempra annulment decision presents a side-by-side comparison of the texts of both Article XI of the U.S.–Argentina BIT and Article 25 of the *Draft Articles*, noting that “Article 25 presupposes that an act has been committed that is incompatible with the State’s international obligations and is therefore “wrongful.” Article XI, on the other hand, provides that “This Treaty shall not preclude” certain measures so that, where Article XI applies, the taking of such measures is not incompatible with the state’s international obligations and is not therefore “wrongful.” The Sempra annulment committee therefore concluded that Article 25 of the *Draft Articles* and Article XI of the U.S.–Argentina BIT deal with quite different situations. Sempra annulment decision, *supra* note 11, ¶ 198–200.

135. CMS annulment decision, *supra* note 11, ¶ 130; *see also* Sempra annulment decision, *supra* note 11, ¶ 203.

suggested that, contrary to the tribunal's interpretation, the CIL Defense under Article 25 of the *Draft Articles* should not be imported to a NMP Defense under Article XI of the U.S.–Argentina BIT. While, “it may be appropriate to look to customary law as a guide to the interpretation of the terms used in the U.S.–Argentina BIT[,] it does not follow however that customary law . . . establishes a preemptory ‘definition of necessity and the conditions for its operations.’”¹³⁶ By contrast, the Enron annulment committee found that the tribunal's reasons for concluding that Article 25 of the *Draft Articles* had “the same or similar meaning” as Article XI of the U.S.–Argentina BIT were “sufficiently clear,” and therefore refused to determine the appropriateness of the tribunal's interpretation.¹³⁷

Despite the divergence between the CMS and Sempra annulment committees' interpretations of the relationship between the CIL Defense and the NPM Exception, both annulment committees agreed that Article XI operated as *lex specialis* to the extent that Argentina successfully demonstrated a crisis situation sufficient to create a “state of necessity.”¹³⁸ Analysis under Article 25 of the *Draft Articles* therefore serves as a “secondary rule of international law” such that the original tribunal was obliged to first determine whether Article XI excused Argentina's breach of the U.S.–Argentina BIT.¹³⁹ Only if the tribunal determined that an NPM Exception was unavailable, should the tribunal have then determined whether a CIL Defense excused Argentina's actions.¹⁴⁰ Conversely, the Enron annulment committee found that it was within the tribunal's discretion to decide if and how Article XI of the U.S.–Argentina BIT and Article 25 of the *Draft Articles* were to be integrated.¹⁴¹ The CMS annulment committee therefore concluded that the tribunal properly exercised its discretion in determining that an NPM Exception must be proved by reference to the elements of a CIL Defense.

136. Sempra annulment decision, *supra* note 11, ¶ 197.

137. Enron annulment decision, *supra* note 11, ¶ 403. The Enron annulment committee explicitly disagreed with the CMS annulment decision's analysis that Article XI of the U.S.–Argentina BIT and Article 25 of the *Draft Articles* were different, viewing such analysis as outside of the scope of the tribunal's authority. *Id.* ¶ 405.

138. CMS annulment decision, *supra* note 11, ¶ 133; Sempra annulment decision, *supra* note 11, ¶ 208–9.

139. CMS annulment decision, *supra* note 11, ¶ 134; Sempra annulment decision, *supra* note 11, ¶ 203–4.

140. *Id.*

141. Enron annulment decision, *supra* note 11, ¶ 405. The annulment committee justified this decision by claiming that “the role of an annulment committee is not to reach its own conclusions on these issues, but to determine whether the tribunal manifestly exceeded its powers in reaching the conclusion that it did, or whether the tribunal failed to state reasons for reaching the conclusion that it did.” *Id.*

The divergence among the CMS, Sempra and Enron annulment committees may be significant for pending claims against Argentina. Under both a CIL Defense pursuant to Article 25 of the *Draft Articles* and an NPM Exception pursuant to Article XI of the U.S.–Argentina BIT, Argentina is excused from liability for certain emergency measures taken in response to its economic crisis. However, as noted by the LG&E tribunal, Article 25 of the *Draft Articles* requires the state’s emergency measure to be the only available response, while Article XI may permit any response, whether or not it is the only response available, so long as the response was necessary to mitigate the crisis.¹⁴² Following the LG&E tribunal’s analysis, it appears that an NPM Exception under Article XI of the U.S.–Argentina BIT excuses a wider range of emergency measures than a CIL Defense under Article 25 of the *Draft Articles*. For future tribunals following the LG&E tribunal’s analysis, distinguishing Article XI as *lex specialis* may work in Argentina’s favor. If Article XI is deemed *lex specialis* (under the CMS and Sempra annulment committees’ analysis) Argentina may have wider discretion in claiming a necessity defense, than would otherwise be available where tribunals may determine the relationship between Article XI and Article 25 on an ad hoc basis (under the Enron annulment committee’s analysis).

Interestingly, the agreement between the CMS and Sempra annulment committees resulted in opposing conclusions. Both annulment committees addressed the issue of annulment by determining whether the tribunal had exercised “a manifest excess of powers” pursuant to Article 52 of the ICSID Convention.¹⁴³ While the tribunal’s failure to apply the relevant law was grounds for possible annulment, the tribunal’s misapplication of the relevant law was insufficient.¹⁴⁴ The CMS annulment committee did not find that the errors of law described above amounted to a “manifest excess of power,” despite the fact that the “errors made by the tribunal could have had a decisive impact on the operative part of the award.”¹⁴⁵ Taking special notice of the limited nature of its authority under Article 52 of the ICSID Convention, the CMS annulment committee concluded that the tribunal had applied the relevant law, albeit “cryptically and defectively,” and therefore had not engaged in a manifest excess of powers that would otherwise result

142. LG&E decision on liability, *supra* note 8, ¶239–40.

143. CMS annulment decision, *supra* note 11, ¶¶ 135–36, Sempra annulment decision, *supra* note 11, ¶¶ 205–06.

144. *Id.*

145. CMS annulment decision, *supra* note 11, ¶ 135. The CMS annulment committee further noted that “if the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground.” *Id.*

in annulment.¹⁴⁶ Applying the same logic, the Sempra annulment committee concluded that the tribunal's application of Article 25 of the *Draft Articles* to the exclusion of Article XI of the U.S.–Argentina BIT amounted to a “failure to apply the law” and was therefore a manifest excess of powers sufficient for annulment.¹⁴⁷ The Sempra annulment committee went further, however, by defining and interpreting a “manifest error” as one that is “plain,” “clear” or “obvious.”¹⁴⁸ This compelled the Sempra annulment committee's conclusion that “it is obvious from a simple reading of the reasons of the tribunal that it did not identify or apply Article XI of the U.S.–Argentina BIT as the applicable law.”

2. Enron Annulment Committee's Analysis of the Elements of a CIL Defense

Unlike the CMS and Sempra annulment committees, which did not consider the issue, the Enron annulment committee considered and rejected the portion of the Enron tribunal's analysis that addressed whether the elements of a CIL Defense had been met. The Enron annulment committee was satisfied with the tribunal's analysis of the “essential interest” and “grave and imminent peril” requirements pursuant to Article 25(1)(a).¹⁴⁹ However, the annulment committee found that the tribunal failed to address “a number of issues that are essential to the question of whether the “*only way*” requirement was met.”¹⁵⁰ The annulment committee also found that the tribunal's reliance on an economist as an expert regarding other possible responses to the economic crisis was tantamount to a failure to apply the law and therefore grounds for annulment. In the annulment committee's view, the tribunal was required to determine whether the “only way” requirement was satisfied from a legal point of view, “and not merely whether, from an economic perspective, there were other options available for dealing with the economic crisis.”¹⁵¹ In accepting the expert's opinions, the annulment committee also found that the tribunal had failed to give reasons for so doing, which is also grounds for annulment.¹⁵² The annulment committee found that the tribunal did not explicitly state whether the requirements of Article 25(1)(b) were met.¹⁵³ Therefore the annulment committee was unable to determine whether the tribunal made

146. CMS annulment decision, *supra* note 11, ¶ 136.

147. Sempra annulment decision, *supra* note 11, ¶¶ 206–08.

148. Sempra annulment decision, *supra* note 11, ¶ 211.

149. Enron annulment decision, *supra* note 11, ¶ 360.

150. *Id.* ¶¶ 368, 373.

151. *Id.* ¶ 377.

152. *Id.* ¶ 378.

153. *Id.* ¶ 384.

such a finding.¹⁵⁴ Even if the tribunal did find that Article 25(1)(b) was satisfied, the annulment committee decided that the tribunal had failed to provide reasons for such a finding, which is grounds for annulment.¹⁵⁵

Concerning the limitations to the necessity defense provided in Article 25(2) of the *Draft Articles*, the annulment committee found that the tribunal did not determine whether the U.S.–Argentina BIT “excludes the possibility of invoking necessity” under Article 25(2)(a). However, the annulment committee did find that the tribunal failed to apply Article 25(2)(b) by instead focusing on the expert opinion discussed above, which was sufficient grounds for annulment.¹⁵⁶ In the words of the annulment committee, “[w]hile an economist might regard a state’s economic policies as misguided . . . that would not itself necessarily mean that as a matter of law, the State had “*contributed to the situation of necessity*” such as to preclude reliance on the principle of necessity under customary international law.”¹⁵⁷

Because of the various “annullable errors” in the Enron tribunal’s analysis of the requirements for a necessity defense, the Enron annulment committee annulled the tribunal’s decision that Argentina had not successfully claimed a necessity defense (based on the tribunal’s analysis of a CIL Defense).¹⁵⁸ Although the Enron annulment committee did not adopt as generous a position as the LG&E tribunal, it appears that the annulment committee did withdraw from the more stringent standards required by the original CMS, Enron and Sempra tribunals to claim a CIL Defense.¹⁵⁹

3. Annulment Committees’ Analysis of the Compensation Requirement

Notwithstanding other disagreements regarding substantive law discussed above, the CMS and Enron annulment committees agreed that no compensation was due for Argentina’s actions during the economic crisis.¹⁶⁰ Insofar as an NPM Exception under Article XI of the U.S.–Argentina BIT absolved Argentina from liability for damages caused by the emergency measures taken in response to the economic crisis, the CMS

154. *Id.*

155. *Id.*

156. *Id.* ¶ 393.

157. *Id.*

158. *Id.* ¶ 395.

159. For description of the standards adopted by the CMS, Enron, Sempra, and LG&E tribunals, see *infra* Part II.A.2.

160. CMS annulment decision, *supra* note 11, ¶ 146; Enron annulment decision, *supra* note 11, ¶ 414.

annulment committee found that “there could be no possibility of compensation being payable during that period.”¹⁶¹ The CMS annulment committee further decided that the tribunal made a manifest error of law regarding Article 27 of the *Draft Articles*, which provides for compensation in certain situations regardless of a successful CIL Defense. According to the CMS annulment committee, the tribunal failed to first consider compensation under the U.S.–Argentina BIT before addressing the issue under Article 27, as required where Article XI of the U.S.–Argentina BIT operates as *lex specialis* relative to the *Draft Articles*.¹⁶² The Enron annulment committee took a similar position regarding the compensation question, finding that “there can be no obligation to pay compensation in the absence of any liability.”¹⁶³ However, because the Enron tribunal’s finding on liability was annulled, Argentina owed no compensation to the investor-claimants irrespective of the necessity defense. Although the Sempra annulment committee acknowledged that Argentina raised the issue of compensation under Article 27,¹⁶⁴ the annulment committee did not directly address the issue in its analysis of Argentina’s necessity defense.

III. FUTURE IMPLICATIONS AND UNANSWERED QUESTIONS

The divergent opinions of the tribunals and annulment committees in the Argentine Gas Cases have significant implications for international investment. Conflicting analyses and results raise questions about the future security of foreign investment, since international investment law is designed to support economic development by protecting the interests of foreign investors. Analysis of the Argentine Gas Cases reflects a widespread concern about inconsistency in international investment law and its ramifications for the legitimacy of the ICSID regime. Further, repercussions from conflicting tribunal awards and annulment committee decisions are evidenced by state policy concerns over the response to economic or financial crisis situations. Given the proliferation of bilateral investment treaties and the corresponding increase in ICSID disputes, these concerns are of primary importance and warrant the special attention of international investment law scholars, practitioners and policy-makers in the realm of international investment law.

161. CMS annulment decision, *supra* note 11, ¶ 146.

162. CMS annulment decision, *supra* note 11, ¶ 146. *See also* Article 27, *supra* note 120.

163. Enron annulment decision, *supra* note 11, ¶ 414.

164. Sempra annulment decision, *supra* note 11, ¶ 179.

A. Security for Foreign Investment

The preamble of the ICSID Convention emphasizes “the need for international cooperation for economic development and the role of the private international investment therein.”¹⁶⁵ This reflects the notion that “the common interest underpinning international investment law is economic development through foreign investment for capital-importing states and security of such investment for private actors in capital-exporting states.”¹⁶⁶ The importance of secure investments is evidenced by the 142 cases currently pending with ICSID¹⁶⁷ and over 2,750 bilateral investment treaties that were concluded as of 2009.¹⁶⁸ In light of the specific objectives of ICSID and of international investment law in general, understanding the positions taken by the annulment committees are relevant for the security of foreign investment “because they may be outcome-determinative and critically affect the general balance between the regulatory freedoms on the part of a host state’s government in times of national emergencies and the protections afforded to the investments of foreign investors.”¹⁶⁹

One perspective is that the Enron and Sempra Annulment Decisions actually compromise, rather than protect, the security of future foreign investments.¹⁷⁰ Both the Enron and Sempra annulment committees found annullable error in the tribunals’ analysis of Argentina’s necessity defense, reaching a result that directly contradicts the earlier CMS Annulment Decision. As discussed above, the CMS annulment committee concluded that the CMS tribunal had applied the relevant law, though erroneously, and therefore had not exercised a “manifest excess of powers.”¹⁷¹ This result was based on the distinction between the failure to apply the relevant

165. ICSID Convention, *supra* note 13, pmb1.

166. Bart M. J. Szewczyk, *Sempra Energy International v. Argentine Republic*, International Decisions, 105(3) Am. J. Int’l L., 547, 550 (2011). For a similar perspective from the practitioner’s point of view, 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 AND MEYERS LLP, Aug. 9, 2010, <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/>.

167. See *List of Pending Cases*, *supra* note 11.

168. See United Nations Conference on Trade and Development, *World Investment Report 2010 – Investing in a Low Carbon Economy*, 81 (2010), available at http://www.unctad.org/en/docs/wir2010_en.pdf; see also Szewczyk, *supra* note 166, at 550.

169. Andreas von Staden, *Towards Greater Clarity in Investor-State Arbitration: The CMS, Sempra, and Enron annulment decisions*, 2 CZECH Y.B. OF INT’L L., 207, 210 (2011).

170. The CMS, Enron and Sempra annulments have sparked a great deal of scholarly debate. See e.g., Szewczyk, *supra* note 166; von Staden, *supra* note 169; Reinisch, *supra* note 16; Schill, *supra* note 16; Michael Waibel, *Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E*, 20 LEIDEN J. INT’L L. 637 (2007).

171. CMS annulment decision, *supra* note 11, ¶ 136.

law and a misapplication or misinterpretation of the relevant law.¹⁷² The former is a manifest excess of powers and grounds for annulment under Article 52 of the ICSID Convention, while the latter is insufficient grounds for annulment.¹⁷³ Although both the Enron and Sempra annulment committees recognized this distinction, it is questionable whether the committees fully appreciated the distinction in their analysis. One commentator has argued that “[t]he *Sempra* annulment decision eviscerated this fundamental distinction by construing a misinterpretation of treaty text, which was understood by the tribunal in light of customary law, as an utter failure to apply the treaty provision.”¹⁷⁴ Instead of interpreting the tribunal’s conclusion (an NPM Exception pursuant to Article XI of the U.S.–Argentina BIT did not apply because of Argentina’s failure to prove the requirements of CIL Defense under Article 25 of the *Draft Articles*¹⁷⁵) as a failure to apply Article XI, the Sempra annulment committee arguably should have interpreted the tribunal’s conclusion as merely a misinterpretation of Article XI of the U.S.–Argentina BIT.¹⁷⁶ Accordingly, the difference in the Sempra and CMS annulment committees’ conclusions demonstrates the possibility that “all errors of law [are] potential grounds for annulment, as any misinterpretation of proper law could be equated to nonapplication of proper law.”¹⁷⁷

The Enron annulment committee reached the same conclusion as the Sempra annulment committee, but for different reasons. As discussed in Part II.B.2, the Enron annulment committee found a “manifest excess of power” in the tribunal’s analysis of whether Argentina had satisfied the requirements of Article 25 of the *Draft Articles*. The annulment committee concluded there was a “failure to apply the applicable law” in the tribunal’s mere acceptance of an economist’s opinion on an economic issue as dispositive of whether Argentina had committed to its state of necessity.¹⁷⁸ Yet contrary to both the CMS and Sempra annulment committees, the Enron annulment committee concluded that it was within the scope of the tribunal’s authority to determine the interrelationship of an NPM Exception under Article XI of the U.S.–Argentina BIT and a CIL Defense under

172. *Id.*; see also CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 938 (2d ed. 2009) (describing the difference between a failure to apply the law, which is grounds for annulment, and a failure to apply the law correctly, which is not).

173. CMS annulment decision, *supra* note 11, ¶¶ 135–36; Enron annulment decision, *supra* note 11, ¶ 68; Sempra annulment decision, *supra* note 11, ¶¶ 205–06.

174. Szewczyk, *supra* note 136, at 551.

175. Sempra annulment decision, *supra* note 11, ¶¶ 216–17.

176. Szewczyk, *supra* note 136, at 551.

177. *Id.*

178. Enron annulment decision, *supra* note 11, ¶ 393.

Article 25 of the *Draft Articles*. However, the Enron annulment committee, like the Sempra Annulment committee, annulled the tribunal's finding as to Argentina's necessity defense.¹⁷⁹ The Enron annulment decision thus engenders further confusion about precisely what is required for a necessity defense.

An alternate perspective is that, despite conflicting decisions issued by the annulment committees, the decisions “represent a great improvement in terms of doctrinal clarity as well as for the potential uses of the annulment procedure in the future.”¹⁸⁰ This position argues for applying a “substantive meaning” rather than a mere textual analysis, since “applying the proper law is not exhausted by paying lip service to the text in which it is clothed, but rather requires that its content is observed.”¹⁸¹ This suggests that the Sempra annulment decision, in which the annulment committee concluded that Article XI of the U.S.–Argentina BIT and Article 25 of the *Draft Articles* were not integrable, was the correct analysis.¹⁸² Had the Sempra annulment committee instead looked to the ordinary meaning of the terms of Article XI, its analysis would be frustrated by the “observable range of alternative interpretations” of the relevant terms “necessary,” “public order,” and “essential security interest.”¹⁸³ Given the existence of alternative interpretations of the terms of Article XI, there can be “no single ordinary meaning, [and] by the same token, such ordinary meaning cannot simply be found in the necessity defense either.”¹⁸⁴

Similarly, the Enron annulment committee's substantive review of the elements of a CIL Defense under Article 25 of the *Draft Articles* was the proper analysis, given that none of the terms in Article 25 “is so obvious as to obviate the need for interpretation,” without which “the application of these elements becomes impossible.”¹⁸⁵ For example, the requirement under Article 25(2)(b) that the state must not have “contributed to the state of necessity” for the CIL defense to apply raises questions about what types of activities constitute contribution for purposes of Article 25(2)(b). By undertaking a substantive analysis in the rendering of their decisions, both the Enron and Sempra annulment committees ensure, “*inter alia*, that the arbitrator has recognized, understood, and applied established principles

179. *Id.* ¶ 395.

180. von Staden, *supra* note 169, at 211.

181. *Id.* at 223.

182. *Id.* at 224 (citing 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, 337–68 (2008)).

183. *Id.*

184. *Id.*

185. *Id.*

and rules of law in a comprehensible and justifiable manner.”¹⁸⁶ Although there may be disagreement among commentators and practitioners alike as to whether the CMS, Enron, or Sempra annulment committees reached the correct result, the annulment committees’ observations “on the basic doctrinal parameters regarding the relationship between treaty law and customary law, and the interpretation and application of each, are great improvements over much of what can be found in the underlying tribunal awards.”¹⁸⁷ These improvements are threefold: (i) treaty provisions operate as *lex specialis* (except where in conflict with *jus cogens* norms) relative to customary international law, (ii) distinguishing rules governing the scope of an obligation from those governing consequences of breaching such obligation, and (iii) an emphasis on careful interpretation involving both textual and substantive analysis.¹⁸⁸ The Annulment Decisions should be therefore appreciated for their improvements to the ICSID system, which affords investors security in terms of stability and predictability of the analysis of investor-state disputes under bilateral investment treaties.¹⁸⁹

Despite the alternative interpretations of the CMS, Enron, and Sempra annulment decisions discussed above, a collective analysis of the interpretive legal errors recognized by the CMS annulment committee and the annulable legal errors recognized by the Sempra and Enron annulment committees lends itself to the possibility of a re-evaluation of the requirements for successful invocation of the necessity defense.¹⁹⁰ While the annulment committees may have provided guidance for the analytical process of interpreting competing rules of law, their decisions add little in the way of defining what is required for a successful necessity defense. Rather than exclusively criticize or acclaim the annulment decisions, the better approach may be to appreciate them for their contributions to the process of appropriate legal analysis of Argentina’s necessity defense, while also appreciating their limitations in terms of defining the scope of what a necessity defense does and does not require.

186. *Id.* at 225.

187. *Id.*

188. *Id.* at 225–26.

189. *Id.* at 226.

190. See Bjorklund, *supra* note 6, at 507 (“Moreover, it is difficult to conclude that abiding by any particular economic obligation would in and of itself be sufficient to send the country into collapse. Only an aggregate of the circumstances is likely to suffice. This suggests that a State facing individual claims brought under investment treaties will have an exceptionally difficult time successfully establishing a necessity defense, unless a tribunal adopts an approach similar to that of the LG&E tribunal, which viewed the economic crisis as requiring the adoption of an economic recovery package, into the details of which the tribunal did not inquire.”)

B. Inconsistency

As noted above, dispute resolution under ICSID is decentralized and not designed as a system of *stare decisis*.¹⁹¹ As a practical matter, tribunals under ICSID are constituted on an *ad hoc* basis, for the sole purpose of resolving a specific case.¹⁹² It should come as no surprise that both the tribunals and corresponding annulment committees in the Argentine Gas Cases reached conflicting decisions, despite highly similar fact patterns and issues raised. Given the nature of the ICSID dispute resolution system, the Argentine Gas Cases are illustrative of inconsistencies in arbitral awards under the ICSID regime. Several commentators have addressed the concern that inconsistencies in decisions by tribunals and annulment committees under ICSID have undermined the system's legitimacy.¹⁹³

Complaints of “vagueness and indeterminacy” of investor rights and protections illustrate problems of “predictability in the application of investment treaties.”¹⁹⁴ Inconsistencies among arbitral decisions thus present stability concerns that adversely affect the expectations of both states and their foreign investors.¹⁹⁵ On the one hand, foreign investors may not receive certain expected benefits that were the basis of their investment; on the other, states are accountable to taxpayers to explain why they are subject to costly damage awards only in certain circumstances.¹⁹⁶ Because of these concerns, it has been suggested that the ICSID regime must “involve reasoned and responsive debate among arbitral tribunals and annulment committees if it is to function at all as a system of law, rather than a set of arbitrary decisions.”¹⁹⁷

191. See ICSID Convention, *supra* note 12, arts. 37–49.

192. Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 475 (2009); see also GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 152–53 (2007).

193. See, e.g., Brower & Schill, *supra* note 192, at 473; Bjorklund, *supra* note 9, at 507–20; Khamis *supra* note 3, at 385 (describing the concern for consistency in international investment law as “reflect[ing] wider fears of the de-legitimizing consequences of the ‘fragmentation’ of public international law threatened by the growth of discrete specialties within international law and the proliferation of international dispute settlers”); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1546 (“This alternative gives broad discretion to the state invoking necessity under an NPM clause, and is not without consequences of its own.”).

194. Brower & Schill, *supra* note 192, at 473.

195. Franck, *supra* note 193, at 1558.

196. *Id.*

197. Szewczyk, *supra* note 166, at 551; see also Brower & Schill, *supra* note 192, at 472–3 (“This rise of international investment law and its dispute-settlement mechanisms does not, however, take place in a void. It is a consequence of equally unprecedented increases in transborder investment flows, a necessary concomitant of the increasing globalization that has taken place since the end of the Cold War. It is this change in the world's social and economic environment that has created the need for legal

To avoid inconsistency, one alternative is for the states party to the ICSID Convention, which are responsible for the development of international investment law and the rules for dispute resolution thereunder, to undertake serious efforts to clarify the substance what constitutes a valid necessity defense.¹⁹⁸ In the case of Argentina, further explanation of whether and to what extent the requirements of Article 25 of the *Draft Articles* are to be incorporated into an NPM Exception pursuant to Article XI of the U.S.–Argentina BIT would avoid inconsistencies in the application of both treaty-based law and customary international law.¹⁹⁹ Theoretically, a jointly issued interpretive note by the U.S. and Argentina on the applicability of Article 25 of the *Draft Articles* would provide insight into the interpretive process to be followed by future arbitral tribunals in adjudicating investor-state disputes under the U.S.–Argentina BIT. Realistically, however, clarification by either Argentina or the U.S. is highly unlikely. Given that Argentina still has many cases pending against it, investors would likely view any unilaterally issued clarification or interpretive note as self-interested. Moreover, many of the claimants in pending cases are U.S. investors, making it highly unlikely that the U.S. government would choose to join Argentina in issuing an official clarification.

Another suggestion to avoid legitimacy concerns is the creation of a centralized appellate review process for investment arbitration awards. The public interest served by international investment law “calls for transparency in the proceedings and consistency in the results.”²⁰⁰ However, the structure of investor-state dispute resolution systems such as ICSID are criticized as “‘shadow governments’ dispensing ‘justice behind

institutions that structure and stabilize foreign investment activities and help to regulate conflicts that unavoidably arise out of increases in investment cooperation.”).

198. Szewczyk, *supra* note 166, at 552; *see also* Bjorklund, *supra* note 9, at 514 (“The cases to date thus reflect differences in approach, but few concrete examples of how those approaches would be applied in practice. The lack of clear direction . . . and the potential for a different practice to develop in cases decided on the basis of exculpatory treaty provisions mean[s] that it will be up to dispute settlement tribunals themselves to establish the appropriate approach.”).

199. Szewczyk, *supra* note 166, at 552.

200. Gabrielle Kaufmann-Kohler, *In Search of Transparency and Consistency: ICSID Reform Proposal*, TRANSNAT'L DISP. MGNT., (Nov. 2005) at 1, available at <http://www.lk-k.com/data/document/search-transparency-and-consistency-icsid-reform-proposals-transnational-dispute-management.pdf> (“Transparency is about opening the doors of the hearing room. Consistency is about delivering coherent decisions and avoiding contradictory results that undermine the credibility of investment arbitration overall and jeopardize the development of investment law.”). For a list of advantages and disadvantages of an appeal mechanism, see Katia Yannaca-Small, *Improving the System of Investor-State Dispute Settlement: The OECD Governments' Perspective*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 13 (Karl P. Sauvant & Michael Chiswick-Patterson, eds., 2008).

closed doors’ and even sometimes engaging in ‘arbitral terrorism.’”²⁰¹ A large part of the problem stems from the fact that investor-state arbitration is modeled after commercial arbitration, which is largely private, confidential, and unconcerned with consistency due to the private nature of “one-off” contractual arrangements.²⁰² Where public interest is involved, as in international investment, it adds an extra element to the arbitral process that is not otherwise present in commercial arbitration. Based on these concerns, one solution (at one point contemplated by ICSID)²⁰³ is the creation of a centralized appellate review process for investment arbitration awards.

While a centralized appellate review process would “ensure overall consistency in the development of investment law,” it would be meaningless unless nationally and politically neutral.²⁰⁴ As an administrative matter, this creates a number of issues: staffing appellate panels with nationals of the states party to the dispute would defeat the purpose of an independent appellate review process,²⁰⁵ as may staffing panels with states that have favorable political or economic ties, or that have adverse interests to those states involved in the dispute. Moreover, determining the correct number of panelist so as to create a neutral review process without sacrificing efficiency also limits the feasibility of a centralized review process.²⁰⁶ One of the benefits of the current system is its finality, absent an annulment proceeding. However, it appears that finality comes at the cost of consistency in a system of ad hoc tribunals organized to arbitrate a specific case.

Yet another suggestion, “rather than remedy the damage after it has occurred” by way of appeal, or risk political controversy by way of an untimely interpretive note, is to permit a system of preliminary rulings during a pending proceeding.²⁰⁷ For example, European Community Law “effectively secures the uniform application of European law by domestic courts in all Member States through preliminary rulings of the Court of Justice of the European Communities.”²⁰⁸ Questions are deferred for preliminary rulings where a decision on a specific question is essential for

201. Kaufmann-Kohler, *supra* note 200, at 1.

202. *Id.* at 2.

203. *Id.*

204. *Id.* at 5.

205. *Id.*

206. *Id.* at 6.

207. Christoph Schreuer, *Preliminary Rulings in Investment Arbitration*, TRANSNAT’L DISP. MGMT., (Nov. 2007), at 3, available at http://www.univie.ac.at/intlaw/prel_rul_article.pdf.

208. *Id.*

the respective national court to render a judgment.²⁰⁹ Although there is an argument that permitting preliminary decisions would clog an otherwise heavily loaded system, the matters deemed permitted as preliminary questions could be limited to “a fundamental issue of investment treaty application”²¹⁰ such as conflicting decisions on the same facts like in the Argentine Gas Cases.

However, a system of preliminary rulings suffers from many of the same administrative complications as establishing a permanent appellate review process. Several substantive concerns would need to be resolved, including permitted circumstance for requesting a preliminary ruling, whether preliminary rulings are obligatory, and whether preliminary rulings would be binding or recommendatory in nature.²¹¹ Preliminary rulings provide an interesting alternative to combat inconsistency while avoiding some of the complexities involved in setting up an appeals process or issuing an interpretive note. Unfortunately, the feasibility of preliminary rulings is indeterminate, since several administrative and substantive issues would need to be worked out prior to implementing such a process.

While short-term decisions may be expected under a decentralized system of review, there is a strong argument that “in the long term . . . the effectiveness of any system of law requires common understanding of the rules.”²¹² To that end, all that may be necessary is merely:

the passage of time—bringing with it a continuous stream of investment jurisprudence, a refinement of state practice and treaty making, and growing doctrinal analysis—may help create a better understanding of the content and scope of the central principles of investment protection and result in the creation of a jurisprudence constant.²¹³

Regardless, focusing on long-term solutions would help avoid short-term inconsistencies stemming from ad hoc tribunals constituted with the limited goal of resolving a single investor’s claim, while also helping to stem concerns of arbitral tribunals acting as “shadow governments.”

209. *Id.* at 4.

210. *Id.* at 4–5.

211. *Id.* at 5.

212. Szewczyk, *supra* note 166, at 552; *see also* Alvarez & Khamsi, *supra* note 3, at 385 (“This emphasis on consistent law yields predictable prescriptions for reform, such as proposals for generalizable principles of investment law or for greater recourse to common background legal principles.”) (citations omitted).

213. Brower & Schill, *supra* note 192, at 474.

C. Public Policy Concerns

Inconsistency among the tribunals and annulment committees in the Argentine Gas Cases raises significant public policy concerns for Argentina, and likewise for similarly situated states party to bilateral investment treaties containing NPM clauses. On the one hand, any measure deemed necessary by Argentina in the wake of its financial crisis can result in significant penalties stemming from its obligations under customary international law, depending on the manner by which a tribunal chooses to apply the test for a necessity defense (i.e. whether or not Article XI of the U.S.–Argentina BIT imports the requirements under Article 25 of the *Draft Articles*, and what standard applies for meeting those requirements, among others).²¹⁴ Indeed, practice shows that it is extremely difficult to meet the requirements for invoking a necessity defense.²¹⁵ To that end, “it is possible that as a practical matter a necessity defence is unavailable to a State because the standards in themselves are so high, and because they must be cumulatively satisfied.”²¹⁶ In an effort to resolve this issue, one suggestion is amending the U.S.–Argentina BIT to the effect that Article XI becomes a self-judging provision, such that the need for “measures necessary for the maintenance of the public order” would be determinable on a good-faith basis by the state invoking Article XI, would address the issue of how to apply a claim for necessity.²¹⁷ This alternative gives broad discretion to the state invoking necessity under an NPM clause. However, self-judging treaty provisions are “infrequent in international economic law” and typically not provided for in bilateral investment treaties.²¹⁸ There is good reason for this, since self-judging treaties present two issues, (i) difficulty in ensuring that a state exercises objective judgment in determining the existence of a crisis situation where there is the benefit of an excuse from liability and (ii) the problem of “almost inevitable *post-hoc* judging” of a purported crisis situation.²¹⁹ Thus self-judging treaties do not necessarily resolve consistency problems across arbitral tribunals. Instead, a self-judging NPM clause presents a risk that allowing Argentina full discretion over what is and is not necessary in light of a severe economic crisis effectively would effectively eliminate all investor protection mechanisms

214. Szewczyk, *supra* note 166, at 552.

215. Bjorklund, *supra* note 9, at 520.

216. *Id.*

217. See generally Burke-White & von Staden, *supra* note 71, at 386–9 (describing the implications of self-judging NPM clauses, such as Article XI of the U.S.–Argentina BIT, for state responsibility and liability).

218. Reinisch, *supra* note 16, at 142–3.

219. Bjorklund, *supra* note 9, at 503.

afforded under the U.S.–Argentina BIT,²²⁰ including an independent review of decisions unilaterally taken by the Argentine government. An overly flexible doctrine of necessity would permit a state to effectively avoid obligations under a bilateral investment treaty.²²¹ Such an option obviates the object and purpose of international investment law to protect investors' foreign investments.

The annulment decisions are not helpful in this regard. Both the CMS and Sempra annulment committees found that the NPM Exception under Article XI of the U.S.–Argentina BIT was distinct from the CIL Defense pursuant to Article 25 of the U.S.–Argentina BIT.²²² However, neither annulment committee specified the standard by which an NPM Exception should be judged, and consequently, both failed to define a scope of permitted state action in times of crisis. By contrast, the Enron annulment committee found that importing the requirements of the CIL Defense into the treaty-based NPM Exception was a decision permissible within the authority of the tribunal.²²³ Although this provides a standard by which Article XI can be judged, the annulment committee does not further define the scope of each of the elements to be determined for a successful necessity defense. Like the CMS and Sempra annulment decisions, the Enron decision also provides little assistance in terms of policy-making. Although the LG&E tribunal found that Argentina had successfully proved a necessity defense, an annulment decision regarding the analysis of the LG&E tribunal may help clarify the issue in light of the CMS, Enron and Sempra annulment decisions. However, LG&E annulment proceedings are currently pending.²²⁴ Considering the opposing policy concerns discussed above, state policy-making in times of crisis is largely unaided, if not further muddled, by the differing interpretations of the tribunals and annulment committees in the Argentine Gas Cases.

CONCLUSION

Reconciling the conflicting tribunals' and annulment committees' interpretations of Argentina's necessity defense under both the U.S.–Argentina BIT and customary international law has proven impossible and leaves many serious policy questions unanswered. Further complicating matters, two of the three awards finding against Argentina were recently

220. Szewczyk, *supra* note 166, at 552.

221. Bjorklund, *supra* note 9, at 520.

222. CMS Annulment Decision, *supra* note 11, ¶ 133; Sempra Annulment Decision, *supra* note 11, ¶¶ 208–09.

223. Enron Annulment Decision, *supra* note 11, ¶ 405.

224. *See List of Pending Cases*, *supra* note 11.

annulled on the point of Argentina's necessity defense. The general confusion over conflicting interpretations has significant implications for the security of foreign investments and the legitimacy of international investment law, as well as public policy concerns for states party to bilateral investment treaties. In determining what makes for a satisfactory necessity defense, it is worth noting that the interrelationship between an NPM Exception and a CIL Defense is far from established in international law.²²⁵ Legal "interpretations of necessity clauses in treaties trigger difficult questions of meaning (*semantics*), and normative relationship (*ontology*)."²²⁶ This is especially true in the context of "specialized treaties," including those pertaining to international investment law.²²⁷

Ultimately, the question may be about "risk allocation and determining who should bear the burden in situations of unforeseen events or economic crises."²²⁸ In making such a determination, it is helpful to remember that unlike bilateral investment treaties, the *Draft Articles on State Responsibility* were not developed with the specific purpose of international investment in mind, nor were they designed to resolve investor-state disputes.²²⁹ However, in light of ICSID's goal to promote "international cooperation for economic development,"²³⁰ it is clear that international investment law "requires both a stable and predictable substantive legal framework" that prevents host governments from engaging in arbitrary, wholly unpredictable, or otherwise opportunistic behavior.²³¹ Future reforms must cohesively address investor protection, inconsistency and public policy concerns in a way that reflects the specialized development of international investment law, while also providing adequate risk protection for both host states and their foreign investors.

225. DIANE A. DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES 4 (2012) ("As Judge Rosalyn Higgins acknowledged in relation to the International Court of Justice's disposition of the issue in the *Gabčíkovo-Nagymaros Case*: '... the question arose as to whether a treaty may lawfully be terminated or suspended *only* through application of the substantive rules governing the law of treaties; or whether the State responsibility provisions on non-wrongfulness of conduct (for example, a state of necessity) *also* excuse termination or suspension of a treaty. If these questions received no clear answer from the Court in that case, nor do they from the International Law Commission in its Final Articles. The matter is still open.'") (citation omitted).

226. *Id.*

227. *Id.*

228. Bjorklund, *supra* note 11, at 522.

229. *Id.*

230. ICSID Convention, *supra* note 12, pmb1.

231. Stephan W. Schill, *Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 32 (Michael Waibel, et. al., eds., 2010).