

STUDENT NUMBER: 1341847

**THE NECESSITY EXCEPTION TO STATE
LIABILITY IN INTERNATIONAL
INVESTMENT ARBITRATION:
THE ICSID APPROACH.**

INSTITUTE OF ADVANCED LEGAL STUDIES

**IN PARTIAL FULFILMENT OF THE MASTERS DEGREE (LL.M) IN
INTERNATIONAL CORPORATE GOVERNANCE, FINANCIAL REGULATIONS
AND ECONOMIC LAW**

2013

TABLE OF CONTENTS

Introduction..... 1

CHAPTER I..... 3

The Doctrine of Necessity in Customary International Law 3

 The Essential Interest..... 7

 Grave and Imminent Peril 9

 The Balancing of Interests..... 10

CHAPTER II..... 12

The Doctrine of Necessity and Sovereign Debt Crises..... 12

 The International Centre for Settlement of Investment Disputes (ICSID)..... 15

 ICSID Treatment of the Doctrine of Necessity – The Argentinian Economic Crisis Cases 18

 Argentina’s Economic Crisis 19

 The Cases 22

CHAPTER III 27

Democracy and Sovereign Debt Crisis: A Hypothetical Situation..... 27

CHAPTER IV 35

The Current Financial Crisis and the ICSID 35

 The Future of ICSID and Doctrine of Necessity in Economic Crises 36

Conclusion 44

BIBLIOGRAPHY..... i

TABLE OF STATUTE i

STUDENT NUMBER: 1341847

TABLE OF CASES	ii
REFERENCES	iii

INTRODUCTION

This paper explores the invocation by sovereign states of the doctrine of necessity in customary international law when faced with very severe adverse economic conditions. The very recent global economic crisis has manifested itself most severely in the countries of Southern Europe, with many countries being in receipt of one form of EU backed rescue package or the other. In order to receive a bail out, a country suffering from sovereign debt crisis is forced to implement a number of austerity measures. The effect of austerity may lead to a democratic deficit, substantial protest or riots and social unrest against the implementation of these austerity measures as seen in the example of Greece. Whilst the Greek crisis did not reach a dangerous dimension with the threat of for example military coup, it however shows how severe the situation could become when Greece a sovereign state was at the brink of leaving the EU, had a sustained period of dangerous political instability, social unrest and ran the risk of a total economic collapse.

This paper investigates the effects of the implementation of austerity measures on a country which is suffering from Economic crisis in a manner that tends to threaten its political existence like the sovereign debt where it may affect Investments made by persons or organisations who are not nationals of the country leading to Arbitral proceedings. In an international arbitration action brought by a foreign investor against a state who implements measures aimed at saving its economy from collapse, it may be possible for a country to argue the doctrine of necessity in customary international law in order to avoid its duties to foreign investors. Such a situation is considered in the light of the Awards which were made against Argentina under the ICSID Arbitral System, concerning the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, November 1991 (the US-Argentina BIT).

The current situation in Greece will be considered, and a hypothetical situation will be investigated, covering the danger of economic collapse, the implementation of austerity measures, and the subsequent effects on democracy where there is no supervening regional structure (EU in the Greek case). In addition to the invocation of the doctrine of necessity in the ICSID cases concerning Argentina, this paper will also make a comparison with other Arbitral regimes such as the WTO. It will be argued that it is ultimately advisable for an International Threshold Standard to be implemented, which if a sovereign state is able to meet, will absolve it of liabilities, with the aim of avoiding total economic collapse and preserving a country's democratic structures. The necessity of developing and implementing a system of precedents as an ICSID mechanism which will sustain the International Threshold Standards will also be discussed.

CHAPTER I

THE DOCTRINE OF NECESSITY IN CUSTOMARY INTERNATIONAL LAW

The doctrine of necessity as it currently stands in customary international law is generally considered to be attributed to Hugo Grotius, the man considered to be the ‘father of international law.’¹ Writing in the seventeenth century, Grotius linked the state of necessity to a state’s need to ensure its preservation, asserting that when a state was threatened with ruin it was considered justifiable for the state to preserve its existence by taking any steps necessary.² Grotius observed that the internal law of a number of nations recognized the right to self-preservation, writing that ‘the Jewish law... no less than the Roman, acting upon the same principle of tenderness forbids us to kill anyone, who has taken our goods, unless for the preservation of our own lives.’³

Current international law has developed the early understanding of state self-preservation as a defence to the violation of international law as analysed by Grotius so that it is reflected in the Draft Articles of the International Law Commission (ILC).⁴ The International Law Commission is composed of thirty-four international legal experts who work individually, but

¹ Schier, H. *Towards a Reorganisation System for Sovereign Debt: An International Law* (Martinus Nijhoff Publishers, 2007) 5

² Grotius, H. *De Jure Belli Ac Pacis* (Libri Tres) bk. II, ch.XIV, para XIII, cl.4

³ Ibid.

⁴ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, p 43, UN Doc A/56/10 (2001) <http://www.un.org/ga/search/view_doc.asp?symbol=A/56/10%28SUPP%29> Accessed 19/07/2013

who are elected by the General Assembly of the United Nations⁵ and its aim, since its establishment in 1949, has been the codification of international law.⁶

Article 25 of the ILC Draft Articles covering the state of necessity states that 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,' and is not permitted unless the act 'is the only way for the State to safeguard an essential interest against a grave and imminent peril' and it does not 'seriously impair an essential interest of the State of States towards which the obligation exists, or of the international community as a whole.'

It is important to note as Boed has asserted that although the International Law Commission's Draft Articles 'do not have the quality of a treaty, its work is accepted as an authoritative statement.'⁷ Article 30 creates obligations for the state which is in breach of international law, notably creating the duties of cessation and non-repetition and the duty to make full reparation under Article 31. Article 33(1) verifies that these obligations are owed by the breaching state to other states or to the entire international community.⁸

Shaw notes that the doctrine of necessity in customary international law has been accepted by international treaties such as the European Convention of Human Rights (ECHR)⁹ and the International Covenants on Civil and Political Rights (ICCPR)¹⁰ so that it has become accepted as a part of international law 'by the overwhelming body of legal doctrine,'¹¹ An

⁵ Fleischhauer, C. A. 'Article 33' in Bruno Simma, ed. *The Charter of the United Nations: A Commentary* (Oxford: New York) 265

⁶ Szasz, P. 'General Law Making Process,' in *United Nations Legal Order*, eds. Oscar Schacter and Christopher C. Joyner (Harper, 1995 Vol. 1) 35

⁷ Boed, R. 'State of Necessity as a Justification for Internationally Wrongful Conduct' 3 *Yale Hum. Rts. & Dev. L.J.* 2000) 13

⁸ ILC Draft Articles

⁹ European Convention of Human Rights 1950 (ECHR)

¹⁰ International Covenant on Civil and Political Rights (ICCPR) <www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> Accessed 19/07/2013

¹¹ Shaw, M. N. *International Law* (Cambridge: Cambridge University Press, 2003 5th ed.) 710

example is its acceptance by the International Court of Justice in the *Gabcikovo* decision¹², it is however the case that legal commentators are still undecided as to the extent to which the doctrine of necessity ought to apply to states when faced with claims as a result of reconstructive economic measures being undertaken in an era of prevalence of the Sovereign Debt issue.

Article 25(1)a of the ILC Draft Articles concerning the state of necessity notes that the doctrine of necessity may be invoked as a ‘ground for precluding the wrongfulness of an act’ if it is the only way in which a state can safeguard ‘an essential interest.’ There is therefore an interest in understanding what ‘*essential interest*’ is in relation to the servicing of sovereign debt. Article 25 talks about ‘safeguarding an essential interest’ of the State, rather than safeguarding the state itself. Robert Ago, one of the legal scholars who developed the concept of necessity asserted that a successful defense of necessity must be of an exceptional nature.¹³ In 1980, the International Law Commission declined to define ‘essential interests’, stating only that the interests were dependent on and particular to the specific case at hand.¹⁴ However, Ago stated that a state’s essential interests cover its ‘political or economic survival, the continued functioning of its essential services, the maintenance of internal peace and the survival of a sector of its population.’¹⁵

Schier has noted how states that are in default of their debts may find their essential interests threatened, if a state’s main essential interests are the lives of its people, using the example of developing nations who may find themselves subjected to devastating famines even where

¹² *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep. 7 at paragraph 48.

¹³ Ago, R. *Addendum to the Eighth Report on State Responsibility* (Document A/CN. 4/318/ADD.5-7). (1980) II-2 Y.I.I.C. at 156

¹⁴ Report of the International Law Commission on the Work of its Thirty-Second Session, U.N. Doc.A/35/10 (1980)

¹⁵ Ago, R. (*n13*) at 156

the economic change that has occurred is minor.¹⁶ However, he notes that even in Argentina, following the default on its sovereign debts in the 1980s, regional famines were reported and indeed approximately half of the country's population was living below the poverty line. Pfeiffer noted that in Argentina at this time, the poverty line was fixed at subsistence level, so that a drop below it could no longer be regarded as a mere social duress, which was in itself insufficient to invoke a state of necessity.¹⁷

A defaulting state is normally under a great deal of pressure where its leaders are constantly in search of ways and measures to alleviate the situation. Not only is the state limited in its ability to take part in further transactions on the international financial markets, but assets located outside the country are not protected by sovereign immunity, so that the defaulting state's possibility of being economically rehabilitated are made extraordinarily difficult.¹⁸ Another difficulty is the question of whether the claims of creditors ought to be regarded individually or cumulatively. For example, the majority of sovereign debt agreements contain clauses that mean that a default on one debt means a default on all, and the principle of equality between creditors means that the defaulting state is then required to repay all its creditors¹⁹. As Allegaert explains, (using the case of the Dart Family and NML Capital, in which the Dart Family refused to compromise on the debt it was owed with a restructuring plan, but claimed the full amount) even a single debt may mean that a sovereign state may be extraordinarily burdened.²⁰

¹⁶ Schier, H. *Towards a Reorganisation System for Sovereign Debt: An International Law* (Martinus Nijhoff Publishers, 2007) 70

¹⁷ Pfeiffer, T. *Zahlungskrisen ausländischer Staaten im deutschen und internationalen Rechtsverkehr* (2003) 102 *ZVgIRWss* at 141

¹⁸ *Ibid.* at 122

¹⁹ Goldman, S. E. 'Mavericks in the Market: The Emerging Problem of Hold-Outs in Sovereign Debt Restructuring' (2005) *UCLA J. Int'l & Foreign Aff* at 170

²⁰ Allegaert, T. 'Recalcitrant Creditors Against Debtor Nations, or How to Play Darts' (1997) 6 *Minn. J. Global Trade* at 477

The issue therefore is whether a state in default of its loans is able to argue the doctrine of necessity in order to ensure its essential interests are protected and ultimately the preservation of its democratic structures by evading repaying its creditors, and by evading such repayment evade the need to implement austerity measures. This is due to the fact that when a defaulting state is dependent on a bail-out of its economy through aid from the International Monetary Fund, one condition of the aid it receives will be the reduction of public spending, otherwise known as austerity measures. These measures are likely to result in public anger which can erupt on the streets as has been seen in Greece, where there have been regular protests and violent rioting, requiring a constant police presence, and internal peace has been undermined²¹.

Based on the ILC Draft Articles therefore, two questions may be asked regarding the ability of a state to invoke the doctrine of necessity; these being, whether it is necessary to secure an 'essential interest', and whether the threat to the essential interest amounts to a 'grave and imminent peril.' The other options that the state may have for safeguarding the essential interests must be considered and followed, and finally, the balance of interests involved must be considered before the doctrine can be invoked.

The Essential Interest

Early cases decided under the auspices of international adjudicative bodies provide some guidance as to what 'essential interest' is when a state raises necessity as a defence in an action against it for its failure to fulfil its international obligation. In the case of *The Neptune* the doctrine of necessity was invoked when an American ship navigating to France, which was then at war with Britain, was seized by the British navy and taken to a British port. The ship was stocked with foodstuffs, which the British Government appropriated. Following the

²¹ Gatapoulos, D. and Paphitis, N. Greek Parliament Approves Austerity Measures *The Huffington Post* 17/07/2013 <www.huffingtonpost.com/2013/07/17/greek-parliament-austerity-measures_n_3613957.html> Accessed 19/07/2013

claim by the American owners of the vessel against the British Government at an arbitral commission, the ship owners' claim was upheld and the British Government's argument that its action had been justified by necessity, by being at war with France, and the scarcity of food in Britain, and so was not required to pay compensation, was not legitimate or justified.²²

A more recent case is that of the *Torrey Canyon* Incident. This occurred in 1967, when a Liberian Tanker which was carrying crude oil ran aground off the coast of Cornwall in Southern England. Although the incident happened outside British territorial waters, when the oil began to leak, thus posing an environmental threat to the coast of England and indeed her population, the British Government bombed the ship following various other means of averting disaster.²³ Although this incident posed no threat to the actual existence of Britain, it certainly threatened one of its essential interests, this being its environmental health and marine and coastal environment. The International Law Commission considered that the action which the British Government took in bombing the ship was legal under international law due to the state of necessity²⁴. The *Torrey Canyon* case therefore showed that the doctrine of necessity could be invoked for varying sets of circumstances and its applicability is not limited in nature. In the 1997 *Gabčíkovo* case the International Court of Justice reaffirmed that it was possible to invoke the doctrine of necessity in modern circumstances.²⁵ This case involved an ambitious project which by Hungary and Czechoslovakia undertook to develop a system of dams on the River Danube to generate electricity, and the countries involved were bound by a treaty. However, twelve years into the project Hungary abandoned

²² *The Neptune* 1797 reprinted in IV International Adjudications: Modern Series (John Bassett Moore Ed. 1931) 372

²³ Brown, E.D. 'The Lessons of the *Torrey Canyon*' in Ed. George W. Keeton and George Shwarzenberg *Current Legal Problems*, Vol. 20 (Sweet and Maxwell Limited, 1967) 116

²⁴ Int'l L. Comm'n 26, 34, U.N. Doc. A/CN.4/SER.A/1980 para 15

²⁵ *Gabčíkovo-Nagymaros Project* (n12 above). paragraph 48

its obligations, claiming that the environmental risks of the project were too great.²⁶ When Czechoslovakia brought the case against Hungary before the International Court of Justice, it was decided that the threat of environmental disaster could be sufficient to invoke the state of necessity due to the environment being an essential interest of the state. The International Court of Justice stated, ‘The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gablíkovo-Nagymaros Project related to an ‘essential interest’ of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.’²⁷ The *Gablíkovo* case therefore verified that a state’s invocation of the doctrine of necessity was viable as regards the essential interest requirement even when it concerned a particular region of the state’s territory or a certain interest.

Grave and Imminent Peril

Under Article 25 of the ILC Draft Articles, the threat of ‘*grave and imminent peril*’ must be proven in addition to the necessity of safeguarding ‘essential interests’ before the doctrine of necessity can be invoked. Interestingly, unlike the insight given in the Ago Report to what ‘*essential interest*’ is, the report does not define the criteria by which ‘*gravity*’ and ‘*peril*’ may be judged.²⁸ However, in its commentary the ILC does refer to ‘*imminent peril*’ as a ‘threat to the interest at the actual time’²⁹, although this is rather vague. In the *Gablíkovo-Nagymaros* case, the ICJ did attempt to define the term, asserting that imminence is

²⁶ Graffy, C. P. ‘Water, Water, Everywhere, Nor Any Drop to Drink: The Urgency of Transnational Solutions to International Riparian Disputes’ 10 *Geo Int’l Envr’l L. Rev.* 339 (1998) at 434

²⁷ *Gabcikovo-Nagymaros Project* (n12) Para 53. Note that Article 33 here is the predecessor of the current Article 25 of the ILC Draft Articles

²⁸ Ago, R. (n13 above) at 156

²⁹ Report of the International Law Commission on the Work of its Thirty-Second Session, U.N. Doc.A /35/10 (1980) para 33

‘synonymous with ‘immediacy’ or ‘proximity’ and goes beyond the ‘concept of possibility’, and interpreted ‘peril’ as referring to danger that ‘evoked the idea of risk.’³⁰

The Balancing of Interests

In addition to considering *Essential Interest* and *Grave and Imminent Peril*, an Arbitral court considering the doctrine of necessity as a defence for the internationally wrongful action(s) of a state must balance the interests and the needs of the state to which the obligation is owed against the state which is invoking the necessity. As Grotius asserted, the plea of necessity may be accepted only if the balance tips in favour of the state that has acted unlawfully, stating, ‘No emergency can justify any one taking and applying to his own use what the owner stands in equal need of himself.’³¹ Although in the *Gablíkovo* case the court did not engage in a balancing of interest exercise as the preconditions to the doctrine of necessity had not been met, the court did verify that the balancing test is a vital part of the course of determining if the doctrine of necessity will apply in international law.³²

Bin Cheng asserted that the balancing test is a central part of determining the right of a state to invoke necessity. He explained that the law of necessity is a ‘means of preserving social values’ and it is this that justifies the reversal of the legal protection that is usually accorded a right ‘so that a socially important interest shall not perish for the sake of respect for an objectively minor right. In every case, a comparison of the conflicting interests appears to be indispensable.’³³ Bin Cheng was unequivocal on this point, noting, ‘if, after every conceivable legal means of self- preservation has been first exhausted, the very existence of the State is still in danger, and if there exists only one single means of escaping from such danger, the State is justified in having recourse to that means in self-preservation, even

³⁰ *Gabcikovo-Nagymaros Project*(n12 above) para 54

³¹ Grotius, H. (n2 above)

³² *Gabcikovo-Nagymaros Project* (n12 above) at para 58

³³ Bin Cheng, *General Principles of Law as Applied in International Courts and Tribunals* (London, 1953) 74

though it may otherwise be unlawful.’³⁴ This balancing exercise is therefore akin to the search of the proportionality of the actions of the state that is in breach of its international obligation as against its obligation under the international agreement.

However, it is less complicated to argue necessity in a case where there is a risk of terrorism, for example, or of severe environmental catastrophe, as in the *Gablíkovo* case, than in a case of sovereign default or crisis precipitated by economic factors. However, as will be considered, such an argument has been successfully put forward.

³⁴ Ibid.

CHAPTER II

THE DOCTRINE OF NECESSITY AND SOVEREIGN DEBT CRISES

The doctrine of necessity as a means of excluding responsibility by states for their actions has a long history in customary international law, particularly in light of the judgement in the *Gabcikovo-Nagymaros* case. The question however is whether it is determinable whether or not a sovereign state will be entitled to use the necessity exclusion in a situation where it is in default of say for example its national debt.

International law on necessity grew out of the need for states to use force and thereafter argue their right to self-defence. It can therefore be difficult to transpose the doctrine of necessity from the military to the financial arena. Indeed in 1928, the commentator Roddick noted using the past decisions of international courts and tribunals as a guide that the doctrine of necessity is practically inapplicable even where a sovereign state's economic situation appears hopeless³⁵. The ILC Draft Articles accepts that the doctrine of necessity may be necessary as a customary defense available ordinarily to sovereign states.³⁶ However, it is also necessary to note that whilst the Draft Articles identify the principles of state responsibility, they are modelled after customary international law and James Crawford who authored the commentary to the Draft Articles noted that where a state attempts to use the necessity defense, the state's interest must be threatened by 'grave and imminent peril.'³⁷ Asserting economic necessity is therefore a complicated matter. Nevertheless, international tribunals have applied the necessity defense in accordance with the rules of the Draft Articles

³⁵ Roddick, B. *The Doctrine of Necessity in International Law* (New York: Columbia University Press, 1928) 4

³⁶ In my view Article 25 of the ILC Draft Articles seeks to aggregate the international customary law standard of Necessity in a codified form.

³⁷ Hill, S, "The 'Necessity Defense' and the Emerging Arbitral Conflict in its Application to the U.S.-Argentina Bilateral Investment Treaty" (2007).13 *Law and Bus Rev. Am.* at 549

proving that the doctrine can certainly be utilised in cases other than those of environmental or military necessity.³⁸

In the *Russian Indemnity Case*³⁹ involving an indemnity agreement between state parties, the Imperial Ottoman Government sought to rely on economic necessity amongst other arguments as justification for the delay in payment of its debt to the Russian Government. The Ottoman Government asserted that its extreme and difficult financial situation had created a '*Force Majeure*' akin to a state of necessity. The arbitral panel took a restrictive approach to the situation holding that it was only possible to plead necessity if it would be self-destructive for the country to comply. Although the plea of the Ottoman Government was rejected in this case, the court did in principle recognize that a situation of necessity may be available stating that it was possible that 'the obligation for a State to execute treaties may be weakened if the very existence of the State is endangered, if observation of the international duty is ...self-destructive.'⁴⁰

In another case, *Societe Commerciale de Belgique*⁴¹, the Greek Government which was owing money to a Belgian company (pursuant to arbitral awards made concerning disputes relating to the construction of railway lines in Greece) pleaded economic constraints (budgetary and monetary constraints) in its necessity defense following an action brought by Belgium before the Permanent Court of International Justice. Belgium sought a declaration that Greece was in breach of its international obligations by refusing the demands to fulfil its obligation to pay the Belgian company to whom it owed money. Although the arbitral court accepted the principle of necessity, it did not rule on the extent to which the Greek

³⁸ Ibid. at 566

³⁹ *Affaire de l'Indemnité Russe (Russian Indemnity case)* XI, UNRIAA (1912)

⁴⁰ Ibid at para.443

⁴¹ *Societe Commerciale de Belgique (Belgium v. Greece)* (1939) P.C.I.J., Ser. A/B, No. 78 available at http://www.icj-cij.org/pcij/serie_AB/AB_78/01_Societe_commerciale_de_Belgique_Arret.pdf assessed 26/07/2013

Government was right to assert the defense due to the ‘declarations made between the parties during proceedings’⁴².

In 1929, the Permanent Court of International Justice made a brief reference to economic necessity concerning *force majeure* in the Serbia Loans case of 1929. The court stated that despite the grave economic consequences of war, the legal obligations of the Serbian Government to the French bondholders remained unaffected, and the indebted state was not relieved of its financial obligations⁴³. Although, as Lamarque and Vivien have noted, *force majeure* is intended to be temporary, it can in some circumstances be considered to be long-lasting, if it becomes ‘finally and definitely impossible for the country to meet its financial obligations.’ The consequence of this is that the suspension of the repayment of debts could be turned into a total cancellation of debt.⁴⁴ This is what occurred in 1918, when the Soviet Government of Russia relied on *force majeure* when it announced that all foreign loans were cancelled without exception.⁴⁵

Prior to the Argentinian debt crisis of the 1980s, there was little case law dealing with the possibility of a state pleading economic reasons as a necessity defense for failure to fulfil its obligations. However, from the general tone of the cases discussed, whilst it is not entirely clear that a state can rely on the doctrine of necessity in economic crisis as there are not clear statements on its inapplicability, the judgements left room to be exploited by international advocates arguing on behalf of states that the doctrine of necessity can be applied in situations where there is economic crisis. The doctrine has been argued from an economic perspective under the ICSID regime mostly by the Republic of Argentina in cases brought against it by foreign investors. These cases decided under ICSID will show that the

⁴² Ibid at page 177

⁴³ Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.), 1929 P.C.I.J. (ser. A) No. 20 (July 12)

⁴⁴ Lamarque, C. and Vivien, R. *Suspending Public Debt Repayments by Legal Means* (CADTM) http://cadtm.org/IMG/pdf/Comment_suspendre_paiements_sur_base_legale_EN.pdf Accessed 22/07/2013

⁴⁵ Swift, R. *International Law: Current and Classic* (Wiley, 1969) 110

customary international law doctrine of necessity can be pleaded as a defense to state liability and it is not limited to situations of war or environmental issues.

The International Centre for Settlement of Investment Disputes (ICSID)

Disputes resulting in litigation arising out of commercial agreements (contracts) between states and companies or individuals are often now settled under the arbitral panels of ICSID. ICSID was sponsored by the World Bank and created by the Washington Convention on the Settlement of Investment Disputes Between States and Individuals of Other States in 1965⁴⁶ with the aim of enhancing foreign investment with an international system of neutral dispute resolution which would negotiate settlements between states and foreign investors.⁴⁷ The founders of the ICSID commented on the 'need for international cooperation'⁴⁸ and although states were initially cautious to use ICSID as a forum for investment arbitration, it eventually gained a reputation as a neutral and feasible dispute resolution forum. by 2009, the ICSID convention had been signed and ratified by a large number of states⁴⁹ with the former secretary-general of the ICSID Robert Danino crediting this growth to the increase in investment by companies in foreign states, which meant that companies who wanted to ensure that their investments were protected ensured that the governments of the states with which they did business signed international investment treaties from the 1980s.⁵⁰

ICSID arbitration is voluntary requiring the consent of both the investor and the receiving state, however, 'once such consent is given, it cannot be withdrawn unilaterally and it becomes a binding undertaken'⁵¹. The effectiveness of the ICSID is determined by the fact

⁴⁶ ICSID Convention < <https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> > Accessed 21/07/2013

⁴⁷ Goodman, C.L. 'Comment, Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina' 28 *U. PA. J. Int'l Econ. L.* 449, 450

⁴⁸ *Ibid.* 457

⁴⁹ Member States, International Centre Settlement Investment Dispute <www.icsid.world> Accessed 22/08/2013

⁵⁰ Peterson, L. 'Striking a Difficult Balance' *Foreign Direct Investment Magazine* 03/04/2006

⁵¹ ICSID 2011 Annual Report, ICSID

that signatories to its convention gives it exclusive jurisdiction over pertinent investment disputes'⁵² and awards are 'binding on the parties' and are not 'subject to appeal or to any other remedy except those provided for in the Convention.'⁵³ The fairness of the tribunals are achieved by parties agreeing on the appointment of a sole arbitrator or arbitrators of any uneven numbers or 'where parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.'⁵⁴

The authority of an ICSID tribunal may be challenged only on a certain number of specified grounds. A party holding the belief that it has been wronged by the arbitral tribunal may apply for annulment of the award on the grounds that the tribunal was not properly constituted, that the tribunal manifestly exceeded its powers, that there was corruption on the part of any of the tribunal members, that there was a serious departure from a fundamental rule of the procedure, or that the award failed to state the reasons on which it was based. When a party applies for annulment of the award, a new ad hoc committee will be created with new members sitting on the tribunal.⁵⁵

It is also important to note that whilst to function properly the authority of an ICSID panel must be preserved by ensuring the acquiescence of members to the arbitrators, even if the actual process of the arbitration proceeds smoothly, issues may still arise concerning the enforcement of awards. For example, whilst a claimant is able to seek enforcement of an award in the territory of any state, national attachment laws might still restrict the party from

⁵² Goodman, C.L. (n47 above) 463

⁵³ Member States, International Centre Settlement Investment Dispute <www.icsid.world> Accessed 22/08/2013 Article 25.

⁵⁴ ICSID Convention < <https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> > Accessed 21/07/2013 Article 37 (2)b

⁵⁵ Ibid. Article 52(3)

accessing the funds. Choi has related three ICSID cases where private parties struggled to ensure their arbitral awards against states.⁵⁶ In these cases, private parties attempted to enforce the arbitral awards they had received from the ICSID against states. However, the enforcement courts were confused by the ICSID's automatic recognition process and instead attempted to introduce the national laws of the states concerned into the process. Although the awards were eventually recognized and enforced, in two of the cases, the private parties did not actually receive payment of their awards due to the effect of national laws.⁵⁷ Choi referenced the 1986 case of *Liberian E. Timber Corp* in its battle with the Republic of Liberia. In this case the corporation was owned by French nationals and they were unable to enforce the ICSID award due to national execution laws,⁵⁸ and in the 1980 case of *Benvenuti & Bonfant v. People's Republic of the Congo*, French laws governing execution prevented an Italian company from enforcing the award from the ICSID in France.⁵⁹ In this way, the execution of ICSID awards has proven to be problematic. Although Article 54(4) (1) of the ICSID Convention is intended to ensure that signatories treat awards as binding, and that states must 'enforce the ...award within its territories as if it were a final judgement of a court in that State', with Article 54 (3) stating that the execution of the award shall be 'governed by the laws concerning the execution of judgements in force in the State in whose territories such execution is sought', in practice ensuring this has proved difficult.⁶⁰

⁵⁶ Choi, S. 'Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions' 28 N.Y.U. J. Int'l & Pol. 175, 185.

⁵⁷ *Ibid.* at 181

⁵⁸ *Liberian E. Timber Corp. v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, (Mar. 31, 1986)

⁵⁹ *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award (Aug. 8, 1980)

⁶⁰ ICSID Convention < <https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> > Accessed 21/07/2013 Article 54 (4)

ICSID Treatment of the Doctrine of Necessity – The Argentinian Economic Crisis Cases

A view of the ICSID list of cases will reveal that foreign investors with interest in Argentina have lodged 50 claims against Argentina under the ICSID regime⁶¹ as a result of its economic crisis of the 1980s/1990s and the measures taken by Argentina to tackle the economic and financial problems it faced.

Two cases out of many which have been argued in the merit under the auspices of the ICSID are *CMS Gas Transmission Company v The Republic of Argentina*⁶² and *LG & E v Argentine Republic*⁶³ and the significance of these two cases is that they diverged rather significantly on the application of necessity under customary international law⁶⁴. Whilst the tribunal in *LG & E* came to the conclusion that Argentina's financial crisis did amount to a temporary state of necessity under customary international law and the Non-Precluded Measures clause of the US-Argentina BIT, eighteen months earlier, the arbitral tribunal in *CMS* reached precisely the opposite conclusion. The disparity between these two cases, which turned on almost identical facts, highlights deficiencies in the lack of a rule of binding precedents under the ICSID regime and shows how panels could come to varying conclusions on similar facts in dealing with the doctrine of necessity. The situation may lead to arguments amongst others that the doctrine should not be seen as appropriate for application to financial crises; that national and international courts might be better suited to adjudicate on issues of debt in financial crises; and that an alternative could be found to the doctrine of necessity, as it is not developed for

⁶¹ The ICSID website reveals this by a search using the word 'Argentina'. The list contains cases which have been determined and those that are still pending. See <https://icsid.worldbank.org/ICSID/FrontServlet> last assessed 10/08/2013

⁶² *CMS Gas Transmission Company v The Republic of Argentina* (ICSID Case No. ARB/01/08)

⁶³ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. Argentina Republic* ICSID Case No. ARB/02/1

⁶⁴ Other cases where Argentina had raised the customary international law doctrine of necessity include *Continental Casualty Company vs. Republic of Argentina* (ICSID Case No. ARB/03/09); *Enron Creditors Recovery Corporation vs. Argentine Republic* (ICSID Case No. ARB/01/3); *Sempra Energy International vs. Argentine Republic* (ICSID Case No. ARB/02/16) amongst others.

application to financial issues. If ICSID arbitration between states and firms in cases of economic crisis is to continue, then *LG & E* and other cases where the doctrine has been successfully argued as a state defense heralds a departure from the traditionally restrictive view that has been taken of the necessity doctrine's application to economic crisis.

Argentina's Economic Crisis

Argentina's economic crisis has been attributed to a number of causes, but it is believed that the country accumulated significant debts in its failed war against the United Kingdom over the Falkland Islands⁶⁵ and then descended into economic uncertainty when its inflation rose and the country experienced 'severe currency exchange crisis.'⁶⁶ The policies of the President Carlos Menem who was elected in 1989 exacerbated the economic situation when he implemented the Convertibility Law which established a fixed exchange rate with the United States dollar.⁶⁷ The aim of this was to ensure that by matching the foreign currency reserves with the Argentinean peso, the Argentinean monetary authority would be able to control inflation because it prevented the State from financing deficits by printing money.'⁶⁸ Although the government had intended to 'absorb the local currency' when its citizens bought American dollars, this policy proved not only extraordinarily expensive to maintain, it also eventually led Argentina directly to 'financial ruin.'⁶⁹ The Menem government also chose to tackle the economic crisis by privatising industries that had previously been state owned, in particular the utilities sector using foreign investors⁷⁰. Argentina targeted foreign investors for its privatization program due to the fact that it deemed an injection of foreign capital necessary for the country's economic recovery. The Argentinean government repealed

⁶⁵ Goodman, C.L. (n47 above) 463

⁶⁶ Di Rosa, P. 'The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues' 36 *U. Miami Inter-AM Law Rev.* (2004) 41, 44

⁶⁷ *Continental Casualty Co. v. R Argentine Republic*, ICSID Case No. ARB/03/09, Award, ¶ 320 (Sept. 5, 2008)

⁶⁸ Di Rosa, P. (n66 above)

⁶⁹ Samra, H. 'Comment, Five Years Later: The CMS Award Placed in the Context of the Argentine Financial Crisis and the ICSID Arbitration Boom, 38 *U. Miami Inter- AM L. Rev.* (2007) 667, 674

⁷⁰ *Ibid.*

its former restrictions on foreign investment and implemented ‘guarantees’ to investors in order to increase its attractiveness as a country that foreigners could invest in⁷¹. It used the assistance offered by investment banking firms from the United States to advertise measures to foreign investors which would ensure that their long term investments in Argentina were secured, promising them provisions which were designed to ‘shield investors against potential variations in tariff rates, inflation, and currency exchange rates.’⁷²

These measures aimed at restoring the economy of the country did not work well and despite several efforts by subsequent regimes, Argentina’s public debts remained unsustainable. Massive concessions were made to the foreign investors as they were permitted to set their own rates for utilities in United States dollars with the dollars then being converted to the Argentinean peso for the billing of consumers using the exchange rate which the Convertibility law had set at one peso to one dollar⁷³. However, as the foreign owned concessionaries were unable to determine the rates they should have charged for utilities and were forced instead to submit to the tariff schedules which were set for them by the Argentinean government, the system involved the government setting consumer utility rates whilst protecting foreign investors from risk⁷⁴.

Argentina was still at risk and it found itself susceptible to the effects of the recession of the global economy, with its drastic economic situation intensified by government spending and tax structures⁷⁵. Foreign investors became scared and their fear was intensified by the withdrawal of the International Monetary Fund (IMF) which had originally enthusiastically promoted the Argentinean investment plan from Argentina. Hill, discussing the withdrawal of

⁷¹ Di Rosa, P. (n66 above) at 45

⁷² Ibid.

⁷³ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. vs. Argentina Republic* ICSID Case No. ARB/02/1

⁷⁴ Di Rosa, P. (n66 above)

⁷⁵ Ibid. at 48

US investment from Argentina, has described the desertion of the IMF as ‘one of the biggest contributing factors to the crises’⁷⁶.

Following this, the government announced that the situation, in particular the Convertibility Law, was ‘unsustainable’ and therefore ordered the freezing of deposits in the banking system, stopped transfers abroad and restrained citizens from taking a certain amount out of their own bank accounts⁷⁷. This led to panic and the conversion by a huge proportion of Argentines of their pesos to dollars. It was at this point that protesters ‘flooded the street and paralyzed the nation’⁷⁸. In December 2001, the government declared a ‘state of siege’⁷⁹.

The government focused on the utility sector in their financial changes which followed with measures stipulating that the private utility companies were to continue in the use of the former one-peso to one dollar approach for the purposes of billing customers resulting in a significantly lowered reduction in income for the utility companies⁸⁰. Despite this, the Argentinean government still expected the foreign owned utility companies to adhere to their contracts.⁸¹ As the foreign companies utility concessionaires were not receiving the correct income for the services they were providing, this resulted in the need of a number of the foreign companies to default on their payments and halt any long term investments, thus affecting the quality of their products⁸². The economic woes of Argentina led to instability of the government and a new president was installed in 2001.

The new President Eduardo Duhalde set to enact and implement measures which were aimed at helping to stabilize the economy and within two years his plan had succeeded and

⁷⁶ Hill, S. (n37 above)548

⁷⁷ Samra, H. (n69 above) 676

⁷⁸ Ibid.

⁷⁹ *Continental Casualty Co. v. R Argentine Republic*, ICSID Case No. ARB/03/09, Award, ¶ 320 (Sept. 5, 2008)

⁸⁰ Ibid. at 48

⁸¹ Samra, H. (n69)

⁸² Ibid.

Argentina's economy did indeed stabilize⁸³. Duhalde enacted the Public Emergency and Exchange Regime Reform Act (Public Emergency Law), which declared that Argentina was in a state of public emergency and held that the executive branch of government had the power to renegotiate government contracts.⁸⁴ The Public Emergency Law repealed the one-peso-to-one dollar system in favour of a market led approach to currency exchange, Argentinean peso rapidly devalued.⁸⁵

The Cases

Several cases were brought under the ICSID scheme by private investors against the Argentinean state alleged violations of the US-Argentina BIT Article II⁸⁶ and VI⁸⁷ as a result of the emergency measures implemented by Argentina to save its economy and society. The investors alleged that the measures had caused them to lose significant income and that it was wrong for the Argentinean government to unilaterally alter the contracts it held with foreign investors⁸⁸ through the emergency measures implemented. This was the main plank of most of the cases brought against Argentina under ICSID.

Argentina in the contrary argued that it was not in breach of the provisions of the US-Argentina BIT and were it be held in breach, 'its liability for any such breach or otherwise wrongful act ... 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 US-Argentina BIT, a non-precluded measures clause that limits investor protection in

⁸³ Samra, H. (n69)

⁸⁴ Hill, S. (n37 above) at 549

⁸⁵ Di Rosa, P. (n66 above)

⁸⁶ Fair and Equitable Treatment; Full Protection and Security; Treatment as required by International Law; Prohibition against Arbitrary and Discriminatory Measures; The Umbrella Clause providing guarantee that the state will observe all its obligations with regard to investments

⁸⁷ Ensuring compensation for direct and indirect expropriation or measures akin to expropriation

⁸⁸ Goodman, C.L. 'Comment, Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina' 28 *U. PA. J. Int'l Econ. L.* 449, 450

certain circumstances'⁸⁹. Argentina argued that as inflation rapidly rose and riots broke out in the streets, the government was forced to take drastic measures to ensure the stability of Argentinean society and avoid social unrest⁹⁰. The cases came about due to the emergency measures that the government was forced to introduce to alleviate the crisis and prevent the total collapse of the economy and indeed of society.

Article XI of the US-Argentina BIT states that 'this treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.' In the *LG & E* case *Article XI* of the BIT was interpreted literally according to the language of the BIT and read together with the necessity doctrine of Article 25 of the Draft Articles⁹¹. The case analysed the argument for the actions of the Argentinean government under Article XI of the BIT, asserting that it hinged on two issues, these being: 'whether the conditions that existed in Argentina during the relevant period were such that the state was entitled to invoke the protections included in Article XI of the Treaty . . . ' and 'whether the measures implemented by Argentina were necessary to maintain public order or to protect its essential security interests, albeit in violation of the Treaty.'⁹²

THE TWO CASES

Both *CMS Gas Transmission Company v The Republic of Argentina*⁹³ and *LG&E Energy Corp* turned on the same facts, but both arbitration tribunals came to completely different

⁸⁹ Elizabeth A. Martinez, 'Understanding the Debate over Necessity: Unanswered Questions and Future Implications for Annulments in the Argentine Gas Cases' 23 *Duke Journal of Comparative & International Law* 149-186 (2012)

⁹⁰ Samra, H. (n69 above) 676.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *CMS Gas Transmission Company v The Republic of Argentina* (ICSID Case No. ARB/01/08)

And *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. vs. Argentina Republic* ICSID Case No. ARB/02/1

opinions. In the *CMS* case, CMS, an American company, had bought a large share in an Argentinean gas company. CMS accused the Argentinean government of having breached the US-Argentina BIT by changing the tariff for gas transportation. The Argentinean government pleaded both Article XI of the BIT and the doctrine of necessity in the Draft Articles as an excuse for breaching its obligations. However, the ICSID arbitral tribunal ultimately found in the favour of CMS holding that Argentina had not given the investor ‘fair and equitable treatment’ as required by the US-Argentina BIT.⁹⁴ As Hill reports, the tribunal concluded that although Argentina’s economic crisis had certainly been ‘severe’, it did not exempt the Argentinean government from its obligations to foreign investors as the emergency measures which the government had taken were not the only means available to it to quell the crisis. Indeed, it ruled that the Argentinean government had by its actions contributed to the economic crisis⁹⁵.

Argentina challenged the tribunal’s decision on its failure to properly apply the provisions of *Article XI* of the BIT,⁹⁶ and the Ad Hoc Committee agreed that Article XI of the BIT provided an important defense for Argentina, and that the tribunal had made ‘manifest errors of law’⁹⁷. However, the Ad Hoc Committee asserted that its jurisdiction was limited and it was unable to ‘simply substitute its own view of the law’ as there was no ‘manifest excess of power’⁹⁸.

⁹⁴ *CMS Gas Transmission Company v The Republic of Argentina* (ICSID Case No. ARB/01/08) at 48

⁹⁵ Hill, S. ‘The “Necessity Defense” and the Emerging Arbitral Conflict in its Application to the U.S.-Argentina Bilateral Investment Treaty’ 13 (2007).*Law & Bus. Rev. AM.* 547, 559

⁹⁶ *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, 1-2 (Sept. 25, 2007)

⁹⁷ *Ibid.* at 132

⁹⁸ *Ibid.*

In contrast to the CMS Case, in the *LG&E Case*⁹⁹ the arbitral tribunal ruled in favour of Argentina as regards the emergency laws it enacted during its economic crisis. LG & E, an American firm based in Kentucky, had purchased a large interest in three gas distribution companies in Argentina and brought its claim against the government for breach of contract following the government's adjustment of tariffs. Interestingly, in complete contrast to the decision in the *CMS* case, although the tribunal did assert that Argentina had breached the BIT, it concluded that Argentina's actions were indeed borne of necessity and therefore Argentina was exempted from liability for the actions it took. On the evidence placed before it, the tribunal concluded that it showed that from December 21, 2001 until April 26, 2003, Argentina was in a period of crisis "during which it was necessary to enact measures to maintain public order and protect its essential security interest"¹⁰⁰.

The complete disparity in these decisions therefore poses certain questions regarding the potential for the ICSID to arrive at fair decisions in its arbitration between states and companies. Both tribunals certainly agreed that Argentina took extreme measures during its financial crisis to attempt to salvage its economy and the stability of its society and that economic crisis may amount to an "essential security interest" under the BIT¹⁰¹. It remains unclear, however, due to the very different conclusions that the tribunals reached, to what extent the customary international law defense of necessity as encapsulated in Article 25 of the ILC Draft Articles may be applied. This is an issue which is relevant to all agreements between states and foreign companies; not only to Argentina. Hill believes that the defense of necessity can be interpreted as a justification, rather than an excuse, as exemplified by the

⁹⁹ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentina Republic* ICSID Case No. ARB/02/1

¹⁰⁰ *Ibid.* whilst the tribunal's decision quoted was mainly in relation to the argument on Article XI of the applicable BIT, it noted that the customary international law doctrine of necessity as reflected in Article 25 of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* also supported its conclusions. See paragraphs 245 – 259 of the Decision on Liability of 3rd October 2006. See also *Continental Casualty Company vs. The Argentine Republic* (ICSID Case No. ARB/03/9)

¹⁰¹ CMS Award – Para 359 – 360; LG&E Decision on Liability – Para 237 - 238

decision in *LG & E*¹⁰², yet if this decision is to be followed by future tribunals, then it offers states something of an exemption clause when they breach their obligations. As Johnstone notes, if future ICSID panels do view the necessity defense as a justification for breach of obligations instead of an excuse, then the state is essentially accepting responsibility 'but denies that its actions were bad' and therefore has a chance of avoiding liability¹⁰³.

Essentially, where the panel views the necessity of defense as an excuse, it acknowledges that whilst the actions did indeed breach obligations, the actions were not the fault of the state, whilst the other interpretation acknowledges that a state's actions may in fact be justified. Ultimately, in *LG&E*, the tribunal 'absolved Argentina of liability and damages for the period of crisis, justifying the Government actions in light of the social, economic and political circumstances alleged.'¹⁰⁴

The conflicting opinions of the tribunals and annulment committees in the Argentine cases as argued by Elizabeth Martinez¹⁰⁵ do have serious repercussions on international investments in that investors may not be rest assured about the security of their investments in foreign territories. In the current age where some investors would rather invest in state backed bonds and securities or securities in private enterprise as in the Argentina cases, concerns may arise as to what may be the outcome of measures undertaken by states in a situation where there are no regional governing bodies like the EU to help out or where international agencies refuse to bail such a country out of its economic woes. However, the point to note is that whilst previously there was doubt as to whether the necessity defence can be raised in an economic context, the ICSID cases on the Argentinean crisis has revealed that customary international law doctrine of necessity can be raised in an economic context.

¹⁰² Hill, (n95 above)

¹⁰³ Johnstone, I. 'The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism' 43 *Colum. J. Transnational L. Rev.* 337, 350

¹⁰⁴ Hill, S. (n95 above)

¹⁰⁵ Elizabeth Martinez (n89 above) at page 75

CHAPTER III

DEMOCRACY AND SOVEREIGN DEBT CRISIS: A HYPOTHETICAL SITUATION

The way that economic crises manifest themselves in countries is always different. Countries have different laws, different cultures, political systems, and different histories. In a situation where a state finds itself sinking into financial crisis and is unable to pay its creditors, it is possible that the state will seek to look after its own citizens first and ignore its creditors. For example, in the case of an economic downturn, it is probable that states might resort to 'protectionist policies' that will support domestic enterprise due to pressures from trade unions and industry lobbies¹⁰⁶. Politicians might be likely to acquiesce to pressure from industry and trade unions by supporting local industries in an attempt to improve employment figures¹⁰⁷. The country might hold off from repayments to foreign investors with whom it has entered into agreements. Yet, in this post-globalised world, in the instance where a state is suffering from severe economic volatility and cannot meet its obligations to creditors, this might not be the case. Instead, in a world that is ruled by neo-liberal values, it is quite likely that a country which finds itself in default of its sovereign debt might be forced to accept certain austerity measures in return for economic aid and help with debt restructuring from certain international bodies such as the International Monetary Fund. As Konzelmann has noted, in the past austerity was part of the cycle of economies to ensure that inflation was not triggered. However, austerity 'no longer has the economic objective of macroeconomic

¹⁰⁶ Ripinsky, S. 'Does International law Help' *Amsterdam Law Forum* (University of Amsterdam) <<http://ojs.uvu.vu.nl/alf/article/view/77/140>> Accessed 25/07/2013

¹⁰⁷ Ibid.

stabilization’ but is itself an object ‘as evidence that governments are serious about managing their deficit’¹⁰⁸.

Furthermore, depending upon the ideologies of the government in power in the country concerned, it might not actually be forced to implement these austerity measures, but find itself in agreement with outside bodies demanding such measures. For example, commentators such as Lamarque and Vivien have observed how the governments of Europe, the United Kingdom included, are currently using the debt of their countries and the global economic crisis as an excuse for them to ‘introduce austerity policies that in many respects are similar to the structural adjustment programmes (SAPs) advocated by the IMF and the World Bank’¹⁰⁹. Austerity is a product of neo-liberal ideology and Lamarque and Vivien assert that they are in favour of the application of austerity measures to high earners and those in possession of large amounts of capital ‘as a means of ensuring social justice and respect for people’s economic, social and cultural rights’. However, a number of governments are instead failing to remove the financial advantages which are available to the most economically successful members of society and exporters, failing to take measures to counter tax fraud whilst at the same time massively reducing the amount which is spent on social welfare and health.¹¹⁰

The neo-liberal ideology which supports the imposition of austerity has been proposed by the economics Nobel Laureate Paul Krugman.¹¹¹ Yet although, as mentioned, all economic crises are different, the implementation of austerity appears to be due to ideology as the commentator Naomi Klein argued in a particularly prophetic book which was published just

¹⁰⁸ Konzelman, S. ‘The Economics of Austerity’ Centre for Business Research, University of Cambridge Working Paper No. 434 <<http://www.cbr.cam.ac.uk/pdf/WP434.pdf>> Accessed 25/07/2013

¹⁰⁹ Lamarque, C. and Vivien, R. ‘Suspending public debt repayments by legal means.’ (*CADTM*) <http://cadtm.org/IMG/pdf/Comment_suspendre_paiements_sur_base_legale_EN.pdf> Accessed 25/07/2013

¹¹⁰ Ibid.

¹¹¹ Krugman P. ‘Myths of austerity’ *New York Times* 2010. <www.nytimes.com/2010/07/02/opinion/02krugman.html> Accessed 25/07/2013

before the arrival of the global financial crisis where she foretold that the neo-liberal politicians of Europe who were opposed to the centralisation of government would use the opportunity of an economic crisis to shrink the state and argue that their methods were the only way of improving the economies of their countries, and that there was no alternative¹¹².

There is therefore a strong possibility that in a state which is dependent on money from outside institutions such as the International Monetary Fund to bail it out, austerity measures might be more of a triumph of neo-liberal ideology rather than of necessity. Cuts to the welfare state will inevitably result in a society that is increasingly insecure with high levels of unemployment, huge falls in living standards and an undermining of faith in the politico-economic institutions. This will be as a result of government implementation of measures such as indiscriminate taxation of the population and the reduction of wages and welfare benefits and services. In this way, the cost of the economic crisis is transferred to the 'easy targets-the salaried working population and pensioners...while keeping other sectors and services protected'¹¹³. Of course the desperation of the population may lead to revolt against state institutions and threaten the existence of the state.

One example of a country that has followed this strategy is Greece, which, 'having surrendered substantial parts of its national economic sovereignty and having to implement very harsh austerity measures under the surveillance of its lenders'¹¹⁴ now finds itself with a society that is instead increasingly broken. As McKee et al have observed, austerity has not only been an economic failure, 'but also a health failure with increasing numbers of suicides and where cuts in health budgets are being imposed, increasing numbers of people being

¹¹² Klein N. *The Shock Doctrine: The Rise of Disaster Capitalism* (London: Allen Lane, 2007) 27

¹¹³ Papadopoulos, T. and Roumpakis, R. 'The Greek welfare state in the age of austerity: anti-social policy and the politico-economic crisis' in eds. Majella Kilkey, Gaby Ramia, Kevin Farnsworth *Social Policy Review 24: Analysis and Debate in Social Policy*, 2012 (The Policy Press, 2012) 222

¹¹⁴ Ibid.

unable to access care.’¹¹⁵ Of course, a country might evade its foreign investors and creditors and later on claim necessity should it be sued in ICSID arbitration, but as part of a necessary link in an ever increasingly globalised world and if a state hopes to benefit from economic aid, then it is likely that it will have to implement austerity measures.

Such measures will inevitably result in street protests and violence, and in threats to the weak governmental structure which accompanies times of economic crisis. One example again at the present time is Greece, which has a suffering former middle class which is becoming politicised. Faith in the government has been undermined and people are furious. The far right, in the shape of the Golden Dawn party has stepped into the gap which is left by the mainstream political parties who are viewed as servile and compliant to the demands of the International Monetary Fund and foreign governments such as Germany with violence growing as foreigners are targeted.

Economic crises are never the result of merely one cause. Interestingly, Fominaya and Cox have noted how the series of protests demanding ‘economic and political inclusion’ which have taken place across the world over the past few years, since the onset of the global financial crisis, may be linked¹¹⁶. They note that these protests occurred in the Middle East to overthrow despotic and authoritarian regimes and in Western Europe over austerity policies and the profligacy of the bankers and the super-rich who have so far escaped any penalties for the financial crisis. This sense of injustice could well spread. However, they also noted that the European ‘Occupy’ and North American anti-capitalist protest movements might well look to the movements of the Middle East which although very different in their histories,

¹¹⁵ McKee, M.; Karanikolos, M. ; Belcher, P. and Stuckler, D. ‘Austerity: a failed experiment on the people of Europe’ *Clinical Medicine* 2012, Vol 12, No 4: (349)

¹¹⁶ Fominaya, F. and Cox, L.) ‘*Conclusion: Anti-austerity protests in European and global context – future agendas for research*’. In *Understanding European movements: new social movements, global justice struggles, anti-austerity protest*. (Routledge, 2013) 256

‘are responses to the particular movement histories and locations of these regions within the capitalist and geographical order.’¹¹⁷

Therefore, whilst it may appear simple to imagine a hypothetical state which is in default of its sovereign debt, unable to pay creditors, suffering from economic volatility and social problems which might be taken advantage of by ambitious politicians who may use the situation to advance themselves and even, for instance, mount a coup, it is impossible to theorise generally because the current financial crisis was caused by a combination of different factors and different countries affected have also reacted in varying ways. France, for example, has elected a socialist government,¹¹⁸ whilst the United Kingdom is ruled by a Conservative led coalition government. Whilst the majority of European governments are stable partly due to the implementation along with the policies of austerity, of severe anti – protest legislation of the sort that was used to fight terror. Indeed, in the United Kingdom the Terrorism Act has been used to silence protesters against austerity on the streets, whilst in North America political dissent has essentially been criminalized.¹¹⁹ In Greece, left-wing protestors have shown their anger in targeting capitalism; others have turned their anger against immigrants and made a Neo-Nazi political party almost respectable electing it to government. It is therefore almost impossible to imagine how any particular state might react to an economic crisis.

However, should a state’s reaction to its economic crisis entails the implementation of measures which substantially alters its agreements with foreign investors and is serious

¹¹⁷ Ibid.

¹¹⁸ ‘Socialist Francois Hollande wins French Presidency’ *BBC* 7 May 2012 <<http://www.bbc.co.uk/news/world-europe-17975660> > Accessed 26/9/2013

¹¹⁹ Chang, N. *Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties* (Seven Stories Press,2011) 44

enough to breach the terms of any bilateral or multilateral investment treaties it may have entered into, investors may have to take a view about further investments in the country. It may be the case that a state in economic crisis which is negotiating a bail out with its creditors and international donor agencies may factor the interest of its foreign investors into any agreement reached with international organisations. In actual fact, it is not my belief that any bail out negotiations will significantly trade off the interest of investors as the preamble of the ICSID Convention aptly asserts “the need for international cooperation for economic development and the role of private international investment therein”¹²⁰. But, should it be the case that investors reach the conclusion that the measures undertaken by a state is of such a nature that the state is not seen as giving a helping hand to the security of foreign investments, a commercial issue from the standpoint of the investor may soon result in a legal challenge to the measures implemented.

The general notion is 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”¹²¹. The issue for investors and practitioners advising them in a dispute with a state who has violated the terms of a given BIT will be the lack of clarity about what would amount to necessity should an action be brought and these fear will only go to affect further investments in the state or other countries.

Commentators who have written severally on the ICSID decisions on the Argentinian cases have argued on the one hand that some of the annulment decisions “actually compromise,

¹²⁰ ICSID Convention, Preamble

¹²¹ Bart M. J. Szewczyk, *Sempra Energy International v. Argentine Republic* American Journal of International Law, Vol. 105, 2011. Available at SSRN: <http://ssrn.com/abstract=1883852>

rather than protect, the security of future foreign investments”¹²². The main plank of their arguments has been the seemingly opposing views emanating from the decisions about what really is the basis for upholding any necessity argument raised by a state in defense of an action brought by an investor who alleges violation of a BIT. As argued by Elizabeth Martinez “The Enron annulment decision [I will add *Sempra* and *Continental Casualty*] engenders further confusions about precisely what is required for a necessity defense”¹²³. A further argument about the issue of clarity of what the state of economic necessity is the assertion that “those who care about the legitimacy of investor-state arbitration should also care about the rationales offered for such balancing and where, how, and to what end it is applied”¹²⁴ when tribunals or annulment committees are engaging in a ‘proportionality balancing’ assessment of arguments proffered in investor-state arbitration.

On the other hand, it has been argued that the seemingly conflicting decisions of the ICSID system ‘represents a great improvement in terms of doctrinal clarity as well as for the potential uses of annulment procedure in the future. While they will likely reopen the “finality vs. correctness” debate, both the *Sempra* and *Enron* decisions have appropriately applied the sharp sword of setting aside binding awards on the basis of errors of law that are so egregious that they amount effectively to a non-application of the proper law and thus constitute a legitimate ground for annulment under the manifest excess of powers criterion.’¹²⁵

¹²² Martinez Elizabeth A, *Understanding the Debate over Necessity: Unanswered Questions and Future Implications of Annulments in the Argentine Gas Cases*, Duke Journal of Comparative & International Law 149-186 (2012). Available at: <http://scholarship.law.duke.edu/djcil/vol23/iss1/4>. See also Bart above; Michael Waibel, *Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E*, 20 LEIDEN J. INT’L. L. 637 (2007)

¹²³ Martinez (n122above)

¹²⁴ Alvarez, Jose E. and Brink, Tegan, *Revisiting the Necessity Defense: Continental Casualty v. Argentina* Yearbook on International Investment Law and Policy, 2010-2011; NYU School of Law, Public Law Research Paper No. 11-09. (February 1, 2011).

¹²⁵ Von Staden, Andreas, *Towards Greater Doctrinal Clarity in Investor-State Arbitration: The CMS, Sempra, and Enron Annulment Decisions* CZECH YEARBOOK OF INTERNATIONAL LAW, Vol. 2, p. 207, 2011. Available at SSRN: <http://ssrn.com/abstract=1689872>

It is therefore the case that in a hypothetical situation, a state will have to be guided by the dicta of the available decisions emanating from ICSID likewise the investor in assessing their positions on likely arguments on necessity. An investor will likely argue that the state has contributed to the economic crisis by acts of corruption and/or mismanagement and the fact that the measures undertaken which threatens its investment are not the only available measures in the particular circumstance. It is my view that in any given circumstance, the argument on necessity will ultimately be resolved by reference to the available evidence before an arbitral panel and the available jurisprudence in these regard.

CHAPTER IV

THE CURRENT FINANCIAL CRISIS AND THE ICSID

The recent economic crisis has become global with a huge number of countries ‘heading into economic recession and volumes of international trade and investment contracting fast.’¹²⁶

Majority of countries which have been affected have implemented urgent economic measures with the aim of stabilising their banking systems through a combination of privatisation, austerity measures, and bail outs. For example, the International Monetary Fund is currently bailing out Greece with a combination of investments, but is making the payments on the condition that Greece implements austerity measures including contentious redundancies and wage cuts of public sector workers. This in turn has led to violent protests against both the fragile Greek coalition government and the International Monetary Fund and European Union.¹²⁷

Investors in Greece have already begun to bring cases against Greece in the ICSID including a case over the Greek debt swap which was taken as part of the country’s bail out.¹²⁸ The decision to sue the Greek state was taken following the decision of the Greek government to trigger Collective Action Clauses to the bonds, which forced all bondholders to agree to the swap. The foreign bondholders are currently seeking compensation.¹²⁹ To a large extent, the troubles of Greece mirror those of Argentina from a decade ago, and the current case is

¹²⁶ Ripinsky, S. ‘Does International law Help’ *Amsterdam Law Forum* (University of Amsterdam) < <http://ojs.uvu.nl/alf/article/view/77/140>> Accessed 25/07/2013

¹²⁷ Greece Chronology 25 June 2013 *New York Times* <<http://topics.nytimes.com/top/news/international/countriesandterritories/greece/index.html>> Accessed 25/07/2013

¹²⁸ Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic (ICSID Case No. ARB/13/8). See also Wilson, J. and Wiesmann, G. The Financial Times 12th March 2012 < <http://www.ft.com/cms/s/0/79ed422c-6c67-11e1-bd0c-00144feab49a.html>> Accessed 25/07/2013

¹²⁹ Glinavos, I. ‘Investors v Greece: The Greek “Haircut” and Investor Arbitration Under BITs’ University of Reading 15th May 2012 < <http://ssrn.com/abstract=2021137> or <http://dx.doi.org/10.2139/ssrn.2021137>> Accessed 25/07/2013

similar to the case of *Abaclat v Argentina*. In this case, Italian bondholders sued Argentina, alleging the violation of their rights under a BIT.¹³⁰ This case would have provided a relevant guide as to what to expect from an ICSID panel, however, the matter is yet to be considered on the merit and a decision on merit could provide a precedent were the principle of *stare decisis* applicable under ICSID.

Yet as Vicuna has noted, the doctrine of necessity has been ‘softened’ so that countries suffering from economic hardship may be able to use the doctrine to evade responsibility for their debts. As he notes, ‘If the threshold is lowered to the extent that recent decisions have suggested one may wonder whether a state of necessity may not be invoked by the United States in view of a major financial crisis, the United Kingdom in the light of its GDP having fallen to levels comparable to the post-war years or Spain for having unemployment reaching a third of its work force’¹³¹. However, for those foreign investors who have found their rights infringed due to Greek austerity measures and debt restructuring, it must be borne in mind that the doctrine of necessity as a defense under Article 25 of the Draft Articles for failure to uphold treaty obligations has not been interpreted uniformly by the ICSID and therefore the prospect of success for foreign investors who wish to pursue states in the ICSID is by no means certain.

The Future of ICSID and Doctrine of Necessity in Economic Crises

The need for a profound change in ICSID arbitration system is highlighted by the variations in decisions emanating from its tribunals and annulment committees especially on cases with very similar facts and similar argument proffered. As international lawyers working in

¹³⁰ *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5

¹³¹ Orrego Vicuña, F. O. *Looking to the Future : Essays on International Law in Honor of W. Michael Reisman* ed. by Mahnoush Arsanjani Publisher Leiden: Nijhoff Year 2010 (745)

arbitration have recently noted, although annulment of awards which have been issued through the ICSID procedures is an ‘extraordinary remedy for unusual and important cases’, in the light of recent decisions, it is possible that the entire system may need to be reformed.¹³² The ad hoc committees which are not subject to domestic authority are convened by the ICSID itself for the purpose of hearing reviews. As the ad hoc tribunal in *MTD v Chile* stated, the ‘role of an ad hoc committee in the ICSID system is a limited one. It cannot substitute its determination on the merits for that of the tribunal. Nor can it direct a tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a res judicata but on a question of merits it cannot create a new one’¹³³.

Indeed, the annulment of decisions and the inconsistency of decisions in such cases as *CMS Gas Transmission Company v Argentina* and *LG&E Argentina* inevitably challenges the ICSID arbitral system.¹³⁴ As Chowdry has noted, the ‘non-precedential design coupled with the similarity of BITs across the world creates numerous opportunities for inconsistent decisions’¹³⁵. The fact that ICSID decisions are used to create ‘the rules for the conduct of foreign investment’¹³⁶ makes the case for reform even more urgent.

The decisions in *Sempra*¹³⁷ and *Enron*¹³⁸ as other similar cases concerned Argentina’s economic crisis and the emergency measures that the government took in 2001 to contain it.

¹³² Nair, P. and Ludwig, C. ‘ICSID Annulment Awards: The Fourth Generation?’ *Journal of Global Arbitration Review* Volume 5, Issue 5 (October 2010)

¹³³ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7

¹³⁴ *CMS Gas Transmission Company v The Republic of Argentina* (ICSID Case No. ARB/01/08) and *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentina Republic* ICSID Case No. ARB/02/1

¹³⁵ Chowdhury, W. ‘Recent Developments in ICSID Arbitration: Too Early to Jump Ship’ *Young ICCA Blog* <<http://www.youngicca-blog.com/recent-developments-icsid-arbitration-not-yet-time-jump-ship-by-wamiq-chowdhury/>> Accessed 27/07/2013

¹³⁶ *Ibid.*

¹³⁷ *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16.

¹³⁸ *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3)

The US companies Enron and Sempra took action against Argentina under the BIT arguing that Argentina had breached it. However, Argentina argued *Article XI* of the BIT to the effect that states are permitted to take measures which are necessary for the protection of their security interests¹³⁹. An ad hoc tribunal later declared that the original tribunal should not have equated *Article XI* of the BIT with the customary international law necessity defence in Article 25 of the Draft Articles and the exemption in the BIT should be treated separately from customary international law.¹⁴⁰ These two decisions have added to the uncertainty regarding the definition of ‘*necessity*’ for economic reasons in customary international law.

Another case of note dealing with the treatment of the doctrine of necessity is the case of *Continental Casualty Company v. The Argentine Republic*¹⁴¹. Continental was a subsidiary company of a U.S. financial institution with investment in low-risk assets, such as cash deposits, treasury bills and government bonds through its Argentinian subsidiary. Continental claimed that as a result of the measures introduced as part of Argentina’s Capital Control Regime. It had suffered losses in value of its assets. Like the other ICSID cases, the Continental tribunal accepted that economic crises is capable of affecting state’s security interest and its ability to maintain public order and therefore capable of engaging *Article XI* of the BIT. It distinguished between *Article XI* and the Customary International Law doctrine of necessity as enshrined in Article 25 of the ILC Draft Article treating Necessity in line with GATT/WTO case law¹⁴².

¹³⁹ *Enron* (note 138 above)

¹⁴⁰ Rubino, K. ‘Investors Beware: Enron and Sempra Annulment Decisions Bolster the State Necessity Defense While Sowing New Uncertainty Regarding the Finality of ICSID Arbitral Awards’ August 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/>> Accessed 27/07/2013

¹⁴¹ ICSID Case No. ARB/03/9

¹⁴² For general critique of the decision and argument against the reference to WTO/GATT jurisprudence see Alvarez J., Brink T *Revisiting The Necessity Defense: Continental Casualty V. Argentina*, Institute For International Law And Justice Ilij Working Paper 2010/3

Continental's decision ultimately followed the spirit of the CMS annulment committee's view on treatment of the doctrine of necessity as distinct from the *Article XI* defense but reached same conclusion with the LG&E tribunal in holding that Argentina had a valid defense under Article XI. This situation further compounds the problem of predictability of the outcome of case brought before ICSID by investors.

Commentators have proposed various structural reforms. Indeed, the ICSID is not the only global arbitral system. For example, the World Trade Order (WTO) has an arbitral system. Fontaura Costa in studying the differences between the WTO and the ICSID systems observed that the WTO is more similar to domestic legal systems which are primarily formed by political forces¹⁴³. Alford observed that whilst the WTO is extremely bureaucratic, 'the legitimacy of the entire ICSID system rests on the shoulders of the arbitrators.'¹⁴⁴ This means that arbitrators who work within the ICSID structure want to preserve their powerful positions, and therefore are not interested in helping to develop a more cohesive and connected arbitration system. Fontaura-Costa further noted that 'the existence of a small and ... cohesive group of arbitrators and panellists may be regarded as denoting the existence of a self-sustaining network, which defines its own centres, while wider and less concentrated groups may be less dependent ... on elitist leadership, since the power of decisions derives from bureaucratic arrangements.'¹⁴⁵ He goes on to compare the WTO and the ICSID, noting, that in the ICSID, the arbitrators are extremely knowledgeable and of the highest quality 'incorporating the spirit of international arbitration and being directly responsible for the

¹⁴³ Fonatura-Costa, J.A. 'Socio-Legal Aspects of Adjudication of International Economic Disputes Comparing WTO Panellists and ICSID Arbitrators: the Creation of International Legal Fields' *Oñati Socio-Legal Series*, v. 1, n. 4 (2011) 4

¹⁴⁴ Alford, R. 'ICSID and the WTO: Comparing Institutionalization and Leadership Concentration' Kluwer Arbitration Blog 08/07/2011 < <http://kluwerarbitrationblog.com/blog/2011/06/08/icsid-and-the-wto-comparing-institutionalization-and-leadership-concentration/>> Accessed 27/07/2013

¹⁴⁵ Fonatura-Costa (n143 above)

confidence in the system', whilst in contrast, the WTO is very similar to domestic legal systems.' He states in conclusion that whilst the system of the WTO 'stays close to bureaucratic and formalized rational legitimacy, investment arbitration seeks more support from charisma ... and tradition.'¹⁴⁶

The UNCITRAL Arbitration Rules also provide a system for those seeking to fight a case against investors. However, the difference between the UNCITRAL rules and the ICSID is that ICSID awards are the equivalent of a final judgement in a domestic court and they therefore do not need to be subject to domestic procedures to gain enforcement of an award.¹⁴⁷ It appears therefore that whilst the ICSID arbitral system does require reforming, it remains nevertheless the superior option for foreign investors seeking to claim compensation from states that have broken their BITs.

Nevertheless, the problem of defining the economic necessity defense remains. Nair and Ludwig have commented on the possibilities for reform proposing a change involving the replacement of ad hoc annulment committees with a body of jurists similar to that obtainable under WTO regime to review ICSID arbitral tribunal awards¹⁴⁸. However, this is not a realistic option in the light of the number of states which have threatened to withdraw from the ICSID in recent times drawing attention to dissatisfaction with the ICSID and the need for a more radical reform of its structure. For example, Venezuela, Ecuador, and Bolivia have withdrawn from the ICSID, whilst Argentina is considering it¹⁴⁹. Interestingly, Brazil which is the Latin American state with the highest number of foreign investors is free of any BITs and ICSID mechanism¹⁵⁰.

¹⁴⁶ Ibid at 24

¹⁴⁷ Article 54(1) of the ICSID Convention.

¹⁴⁸ Nair, P. and Ludwig, C. (n132 above)

¹⁴⁹ Boeglin, N. 'ICSID and Latin America: criticisms. Withdrawals and regional alternatives' *Committee for the Abolition of Third World Debts* < <http://cadtm.org/ICSID-and-Latin-America-criticisms>> Accessed 27/07/2013

¹⁵⁰ Ibid.

The apprehensions of investors and states alike on the issue of inconsistency in the decisions emanating from ICSID and the argument that it may undermine the legitimacy of the system¹⁵¹ it has been suggested can be addressed by making sure that the ICSID system “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”¹⁵². Furthermore as argued by Szewczyk Bart¹⁵³, another way of resolving the impasse about inconsistent ICSID decisions is for state parties to the ICSID convention to clarify the element of what is a valid necessity argument. However, it is my submission that one potential option is to reform the approach taken by arbitral tribunals and annulment ad hoc ICSID committees by in addition to clarifying what a valid necessity argument is, defining the evidential threshold for necessity in cases where states plead economic necessity. This can be achieved either by an amendment to the ICSID convention or by the secretariat issue practice notes/directions dealing with the subject of necessity amongst other with the agreement of members.

In the *Enron* case, the ad hoc committee asked whether the emergency measures of the state were at that time the ‘only ways’ that it had to respond to its financial crisis¹⁵⁴. Furthermore, it was pointed out in this case that there is, in economic terms, often more than one way to react to a financial crisis, whilst such a crisis is never due to one cause, but is almost always the result of a number of factors.¹⁵⁵ This raises the question of how it may be possible to ascertain the extent to which a state is at fault for its economic crisis. However, once there is

¹⁵¹ Jose E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of Investment Regime*, 2008/2009 Y.B. Int'l Inv. L. & Pol'Y 379 (2009)

¹⁵² Bart M. J. Szewczyk, *Sempra Energy International v. Argentine Republic* American Journal of International Law, Vol. 105, 2011. Available at SSRN: <http://ssrn.com/abstract=1883852>

¹⁵³ *Ibid* at 552

¹⁵⁴ *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) (Annulment decision) at 369

¹⁵⁵ *Ibid* at 388

clarity on what a valid necessity argument is and an evidential threshold defined, the cases before arbitral panels will become much clearer for arbitrators and the problem of inconsistent decisions will be solved without a complete overhaul of the ICSID. As Nair and Ludwig have noted in the absence a system of legally binding precedent under the ICSID, proliferation of inconsistent decisions and the fact that losing parties have successfully attained the annulment of decisions which were previously made against them, it is now clear that others 'will be emboldened to seek annulment, in hope of getting a second bite at the cherry,' and if this situation is not rectified, with the establishment of a firm threshold for economic necessity, there is a danger that the length of ICSID disputes will increase, and seriously undermine confidence in the efficacy of the centre's dispute resolution regime.'¹⁵⁶

It is therefore arguable that the introduction of a mechanism of binding precedent to the ICSID system is advisable. At present, international arbitration completely lacks a doctrine of precedent in the form in which exists in the common law. Nevertheless, it has been noted that arbitrators do 'appear to refer to, discuss and rely on earlier cases.'¹⁵⁷ Yet if there is no binding system of precedent, then the motivation of arbitrators in referring to the decisions of earlier cases is questionable and it is asked whether they merely seek some guidance, an excuse or mask for the deficiencies in their own reasoning...or do they apply a de facto doctrine of precedent out of a sense of obligation?'¹⁵⁸

In a 2009 interview, the Secretary-General of ICSID asserted that although ICSID tribunals are not bound by the common law principle of precedent and *stare decisis*, it is a 'well accepted practice' for tribunals to consider the awards of relevant, previous cases when determining their judgement and that over time this leads to the 'development of a coherent

¹⁵⁶ Nair, P. and Ludwig, C. (n132 above)

¹⁵⁷ Kauffman-Koehler, G. 'Arbitral Precedent: Dream, Necessity or Excuse?' *Arbitration International*, Volume 23 Issue 3 2007

< <http://www.arbitration-icca.org/media/0/12319143087130/00950001.pdf> > Accessed 27/07/2013

¹⁵⁸ Ibid.

body of law'¹⁵⁹. Yet if the leadership of the ICSID is so favourable towards the development of a coherent body of law, it is strange to dismiss the introduction of a threshold for economic necessity with a system of precedent which would uphold it and provide more consistent decisions. Indeed, a precedent can provide predictability for both investors and states. As Professor Schreuer has stated, 'drawing on the experience of past decisions plays an important role in securing the necessary uniformity and stability of the law. The need for a coherent case law is evident. It strengthens the predictability of decisions and enhances their authority'¹⁶⁰. It has been argued that '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 rules for dispute resolution thereunder, to undertake serious efforts to clarify the substance (of) what constitute a valid necessity defence'¹⁶¹. Ultimately, the introduction of a threshold for economic necessity in preclusion of adherence to BITs and the implementation of a system of precedents in the ICSID to uphold the threshold would encourage foreign investment and be to the benefit of both parties¹⁶².

¹⁵⁹ Meg Kinneer, Secretary-General of ICSID (Interview) December 2009<<http://www.robertwraypllc.com/an-interview-with-meg-kinneer-secretary-general-of-icsid/>> Accessed 27/07/2013

¹⁶⁰ Schreuer, C. 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' 3 *Transnational Dispute Management* (Apr. 2006) 10

¹⁶¹ Elizabeth A. Martinez, Understanding the Debate Over Necessity: Unanswered Questions and Future Implications of Annulments in the Argentine Gas Cases, 23 *Duke Journal of Comparative & International Law* 149-186 (2012)

¹⁶² Rodgers, M.' Bilateral Investment Treaties and Arbitration: An Argument and a Proposal for the ICSID's Implementation of a System of Binding Precedent' *Transnational Dispute Management*, 2008 < <http://www.transnational-dispute-management.com/>> Accessed 27/07/2013

CONCLUSION

Due to the inconsistency of the decisions in the ICSID arbitral system over the past decade, it is evident that the ICSID requires reform. It is evident from the decisions of arbitral bodies using customary international law in the ICSID system particularly in the cases involving Argentina that whilst it is recognised that the doctrine of necessity as stated in *Article 25* of the ILC Draft Articles provide a valid defence for the failure of a state to uphold its obligations under BITs, the actual threshold of can be a valid necessity defence remains unclear. For example, in the *CMS* case, the tribunal held that Argentina had other means of stemming its economic crisis and had also significantly contributed to the crisis by its own actions, thus not meeting the demands of Article 25.¹⁶³ This poses a problem of uncertainty and the creation of distrust in the ICSID amongst contract states and foreign investors.

There is also the underlying economic problem. As one commentator has noted, host states requiring foreign investors are under pressure to accept the BITs regime, to liberalise their economies, and to provide security and assurance for foreign investors. Yet at the same time, when a state's economy fails, the preservation of its own country and its efforts to ensure the preservation of public order and a stable government, rather than ensuring the financial security of its investors and creditors must be its main priority.¹⁶⁴

This paper concludes that the most advisable way for the ICSID is to reform its stance on the twin issues of having a sort of binding precedent system and doctrine of necessity concerning the economic crises of states is to create a threshold that will ensure that arbitral decisions will become more uniform and maintain faith in the ICSID system. An international threshold system will fairly balance the rights allocated to investors in BITs against the power

¹⁶³ *CMS Case No.ARB/01/8 ICSID (2005)* at 329

¹⁶⁴ Thomas, C. 'Competing Cultures of Law and Development in Investor-state Disputes' Annual meeting, Panel IV *The American Society of Comparative Law* (2007) (2)

STUDENT NUMBER: 1341847

of a state to uphold its interests. To uphold an international threshold system, a mechanism in the ICSID for precedents must be implemented, even though arbitration law has not depended on precedent as a matter of arbitration principle.

BIBLIOGRAPHY

TABLE OF STATUTE

- i) Convention on the Settlement of Investment Disputes Between States and Nationals of Other States – ICSID Convention 1966
- ii) Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, UN Doc
- iii) European Convention of Human Rights 1950 (ECHR)
- iv) International Covenant on Civil and Political Rights (ICCPR)
<www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> Accessed 19/07/2013
- v) Treaty With Argentina Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Arg., Nov. 14, 1991, 31 I.L.M. 124 (US-Argentina BIT)

TABLE OF CASES

- i) *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5
- ii) *Affaire de l'Indemnité Russe (Russian Indemnity case)* XI, UNRIAA (1912)
- iii) *CMS Gas Transmission Company v The Republic of Argentina* (ICSID Case No. ARB/01/08)
- iv) *Commerciale de Belgique (Belgium v. Greece)* (1939) P.C.I.J., Ser. A/B, No. 78.
- v) *Continental Casualty Co. v. R Argentine Republic*, ICSID Case No. ARB/03/09
- vi) *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3)
- vii) *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ
- viii) *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentina Republic* ICSID Case No. ARB/02/1
- ix) *Liberian E. Timber Corp. v. Republic of Liberia*, ICSID Case No. ARB/83/2
- x) *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7
- xi) *Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.)*, 1929 P.C.I.J. ser. A No. 20
- xii) *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8
- xiii) *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award (Aug. 8, 1980)
- xiv) *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16.
- xv) *Societe Commerciale de Belgique (Belgium v. Greece)* (1939) P.C.I.J., Ser. A/B, No. 78
- xvi) *The Neptune 1797* reprinted in IV International Adjudications: Modern Series (John Bassett Moore Ed. 1931)

REFERENCES

- i) Ago, R. Addendum to the Eighth Report on State Responsibility (Document A/CN.4/318/ADD.5-7). (1980) II-2 Y.I.I.C.)
- ii) Allegaert, T. 'Recalcitrant Creditors Against Debtor Nations, or How to Play Darts' (1997) 6 *Minn. J. Global Trade*
- iii) Alford, R. 'ICSID and the WTO: Comparing Institutionalization and Leadership Concentration' *Kluwer Arbitration Blog* 08/07/2011 <
<http://kluwerarbitrationblog.com/blog/2011/06/08/icsid-and-the-wto-comparing-institutionalization-and-leadership-concentration/>> Accessed 27/07/2013
- iv) Alvarez J., Brink T *Revisiting the Necessity Defense: Continental Casualty V. Argentina* Institute for International Law and Justice IILJ Working Paper 2010/3
- v) Alvarez J., Khamsi K. The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of Investment Regime, 2008/2009 Y.B. Int'l Law & Pol'Y 2009
- vi) Bart M.J. Szewczyk, *Sempra Energy International vs. Argentine Republic*, American Journal of International Law Vol 105, 2011
- vii) Bin Cheng, *General Principles of Law as Applied in International Courts and Tribunals* (London, 1953)
- viii) Boed, R. 'State of Necessity as a Justification for Internationally Wrongful Conduct' 3 *Yale Hum. Rts. & Dev. L.J* 2000
- ix) Boeglin, N. 'ICSID and Latin America: criticisms. Withdrawals and regional alternatives' *Committee for the Abolition of Third World Debts* <
<http://cadtm.org/ICSID-and-Latin-America-criticisms>>
- x) Brown, E.D. 'The Lessons of the Torrey Canyon' in Ed. George W. Keeton and George Shwarzenberg *Current Legal Problems*, Vol. 20 Sweet and Maxwell Limited, 1967

- xi) Chang, N. *Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties* (Seven Stories Press, 2011)
- xii) Choi, S. 'Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions' (1996) 28 *N.Y.U. J. Int'l & Pol.*
- xiii) Chowdhury, W. 'Recent Developments in ICSID Arbitration: Too Early to Jump Ship' *Young ICCA Blog* < <http://www.youngicca-blog.com/recent-developments-icsid-arbitration-not-yet-time-jump-ship-by-wamiq-chowdhury/>
- xiv) Di Rosa, P. 'The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues' 36 *U. Miami Inter-AM Law Rev.* (2004)
- xv) Elizabeth A. Martinez, *Understanding the Debate over Necessity: Unanswered Questions and Future Implications of Annulments in the Argentine Gas Cases*, 23 *Duke Journal of Comparative & International Law* 149-186 (2012).
- xvi) Fleischhauer, C. A. 'Article 33' in Bruno Simma, ed. *The Charter of the United Nations: A Commentary* (Oxford: New York)
- xvii) Fominaya, F. and Cox, L. 'Conclusion: Anti-austerity protests in European and global context – future agendas for research'. In *Understanding European movements: new social movements, global justice struggles, anti-austerity protest*. (Routledge, 2013)
- xviii) Fonatura-Costa, J.A. 'Socio-Legal Aspects of Adjudication of International Economic Disputes Comparing WTO Panellists and ICSID Arbitrators: the Creation of International Legal Fields' Oñati *Socio-Legal Series*, v. 1, n. 4 (2011)
- xix) Gatapoulos, D. and Paphitis, N. 'Greek Parliament Approves Austerity Measures' *The Huffington Post* 17/07/2013 <www.huffingtonpost.com/2013/07/17/greek-parliament-austerity-measures_n_3613957.html>

- xx) Glinavos, I. 'Investors v Greece: The Greek "Haircut" and Investor Arbitration Under BITs' *University of Reading* 15th May 2012 < <http://ssrn.com/abstract=2021137> or <http://dx.doi.org/10.2139/ssrn.2021137>>
- xxi) Goldman, S. E. 'Mavericks in the Market: The Emerging Problem of Hold-Outs in Sovereign Debt Restructuring' (2005) *UCLA J. Int'l & Foreign Aff*
- xxii) Goodman, C.L. 'Comment, Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina' 28 *U. PA. J. Int'l Econ. L.*
- xxiii) Graffy, C. P. 'Water, Water, Everywhere, Nor Any Drop to Drink: The Urgency of Transnational Solutions to International Riparian Disputes' 10 *Geo Int'l Envr'l L. Rev.* 339 (1998)
- xxiv) Greece Chronology 25 June 2013 *New York Times*
<http://topics.nytimes.com/top/news/international/countriesandterritories/greece/index.htm>
1
- xxv) Grotius, H. *De Jure Belli Ac Pacis* (Libri Tres) bk. II, Ch. XIV
- xxvi) Hill, S, "The 'Necessity Defense' and the Emerging Arbitral Conflict in its Application to the U.S.-Argentina Bilateral Investment Treaty" (2007).13 *Law and Bus Rev. Am.*
- xxvii) Johnstone, I. 'The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism' 43 *Colum. J. Transnational L. Rev.*
- xxviii) Klein N. *The Shock Doctrine: The Rise of Disaster Capitalism* (London: Allen Lane, 2007)
- xxix) Konzelman, S. 'The Economics of Austerity' Centre for Business Research, University of Cambridge Working Paper No. 434 < <http://www.cbr.cam.ac.uk/pdf/WP434.pdf>>

- xxx) Krugman P. 'Myths of austerity' *New York Times* 2010. www.nytimes.com/2010/07/02/opinion/02krugman.html
- xxxi) Lamarque, C. and Vivien, R.' Suspending Public Debt Repayments by Legal Means' (*CADTM*)
http://cadtm.org/IMG/pdf/Comment_suspendre_paiements_sur_base_legale_EN.pdf
- xxxii) McKee, M.; Karanikolos, M.; Belcher, P. and Stuckler, D. 'Austerity: a failed experiment on the people of Europe' *Clinical Medicine* 2012, Vol. 12, No 4
- xxxiii) Meg Kinnear, Secretary-General of ICSID (Interview) December 2009 <http://www.robertwraypllc.com/an-interview-with-meg-kinnear-secretary-general-of-icsid/>
- xxxiv) Nair, P. and Ludwig, C. 'ICSID annulment awards: the fourth generation?' *Journal of Global Arbitration Review* Volume 5, Issue 5 (October 2010)
- xxxv) Orrego Vicuña, F. O. Looking to the Future: Essays on International Law in Honour of W. Michael Reisman ed. by Mahnoush Arsanjani (Leiden: Nijhoff, 201)
- xxxvi) Papadopoulos, T. and Roumpakis, R. 'The Greek welfare state in the age of austerity: anti-social policy and the politico-economic crisis' in eds. Majella Kilkey, Gaby Ramia, Kevin Farnsworth *Social Policy Review 24: Analysis and Debate in Social Policy, 2012* (The Policy Press, 2012)
- xxxvii) Peterson, L. 'Striking a Difficult Balance' *Foreign Direct Investment Magazine* 03/04/2006
- xxxviii) Pfeiffer, T. 'Zahlungskrisen ausländischer Staaten im deutschen und internationalen Rechtsverkehr' (2003) 102 *ZVgIRWss*
- xxxix) Report of the International Law Commission on the Work of its Thirty-Second Session, U.N. Doc. A/35/10 (1980)

- xl) Ripinsky, S. 'Does International law Help' *Amsterdam Law Forum* (University of Amsterdam) < <http://ojs.uvu.vu.nl/alf/article/view/77/140>>
- xli) Roddick, B. *The Doctrine of Necessity in International Law* (New York: Columbia University Press, 1928)
- xlii) Rodgers, M.' Bilateral Investment Treaties and Arbitration: An Argument and a Proposal for the ICSID's Implementation of a System of Binding Precedent' *Transnational Dispute Management*, 2008 < <http://www.transnational-dispute-management.com/>>
- xliii) Rubino, K. 'Investors Beware: Enron and Sempra Annulment Decisions Bolster the State Necessity Defense While Sowing New Uncertainty Regarding the Finality of ICSID Arbitral Awards' August 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/>
- xliv) Samra, H. 'Comment, Five Years Later: The CMS Award Placed in the Context of the Argentine Financial Crisis and the ICSID Arbitration Boom, 38 *U. Miami Inter- AM L. Rev.* (2007)
- xlvi) Schier, H. *Towards a Reorganisation System for Sovereign Debt: An International Law* (Martinus Nijhoff Publishers, 2007)
- xlvi) Schreuer, C. 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' 3 *Transnational Dispute Management* (Apr. 2006)
- xlvii) Shaw, M. N. *International Law* (Cambridge: Cambridge University Press, 2003 5th Ed.)
- xlviii) Staden Von, Towards Greater Doctrinal Clarity in Investor-State Arbitration, *Czech Yearbook of International Law*, Vol 2, 2011
- xlix) Swift R, *International Law, Current and Classic* (Wiley 1969)

STUDENT NUMBER: 1341847

- l) Szasz, P. 'General Law Making Process,' in *United Nations Legal Order*, eds. Oscar Schacter and Christopher C. Joyner (Harper, 1995 Vol. 1)
- li) Thomas, C. 'Competing Cultures of Law and Development in Investor-state Disputes' Annual meeting, Panel IV The American Society of Comparative Law (2007)
- lii) Waibel Michael, Two Worlds of Necessity in ICSID Arbitration, CMS and LG&E, 20 Leiden Journal of International Law 2007

OTHERS

- a. <http://arbitration-icca.org>
- b. <http://www.bbc.co.uk/news/world-europe-17975660>
- c. <http://icsid.worldbank.org>
- d. <http://nytimes.com>
- e. <http://ssrn.com>