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On Necessity

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Oliver Cromwell thought that “necessity has no law”.¹ He meant that where events compel a certain path, it is irrelevant whether the law permits or proscribes the course to be taken. The most radical actions – fighting a civil war, overturning a constitutional order, executing a king – could be justified in the name of necessity; to hell with the law. This approach has not found favour with modern investment treaty tribunals. Indeed the attitude in public international law appears to be quite the opposite: necessity can justify almost nothing. The four “emergency defences” – necessity, *force majeure*, distress and fortuitous event – have a credible theoretical history. Nobody would deny that they exist on paper and in textbooks. But in practice they have appeared extremely hard to apply, it is rare they succeed, and the occasional cases that attempt to engage them make for depressingly threadbare reasoning. This article asks why this is, and why there is such a yawning gap between theory and practice. It highlights some serious problems of principle with public international law in this area, which is why tribunals have struggled to apply the law in a coherent fashion.

These topics are of increasing relevance in international law. The contemporary global financial crisis is a prime example of an extraordinary event that might be invoked in reliance upon a doctrine of necessity. It has led governments worldwide to take measures tantamount to nationalisation within key industries, including banking, insurance and manufacturing sectors. Cases concerning the emergency measures taken in response to threatened collapses of banks are likely to come before investment tribunals in the approaching years, as aggrieved investors complain that their assets have been expropriated, or they have been discriminated against in the application of emergency measures, or the procedures by which these measures have been applied were unfair, opaque or inequitable. The principal defence raised will be that crises require radical responses. Yet public international law is insufficiently clear to give such a defence the due consideration it deserves. It is impossible to apply and thus it is arbitrary. This benefits neither claimants nor respondents, and the law is due for an overhaul.

The emergency defences exhibit the tension between two competing strands of

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¹ Attributed to Cromwell by Hume, in David Hume, *The History of England in Three Volumes*, Volume 1 Part E.

international law at perhaps their most acute juncture. One of two rival themes is the sovereignty of the state within its own borders, a principle much under attack in international law since the early 1990s. Nonetheless the notion, such as it is, is that sovereigns may face all manner of remarkable and dangerous situations within their lands, in reaching to which they have exclusive provenance. They must be free to take such measures as they think fit to tackle crises within their territorial boundaries, often in the face of incomplete information. They may have been elected to address policy challenges through a particular ideological hue. It is not the role of international law, so this Westphalian theory goes, to fetter the sovereign's discretion. That is a matter for domestic law and politics alone. The other theme, which stands in direct opposition, is that states owe one-another obligations to accord their respective citizens certain rights. One privileged class of such citizens is foreign investors, who have spent money and energies in the territory of the state and who deserve to have those investments treated in accordance with minimum basic principles. The most important of these principles are the right not to have one's property expropriated without compensation, and the right to be treated fairly, impartially and in accordance with law. These are the theoretical underpinnings of the rights found in modern investment treaties. With the explosion in the number of those treaties over the last thirty years, the pendulum has definitively shifted away from state sovereignty and in favour of investor protection. The doctrine of necessity is one of the few remaining vestiges of the sovereignty principle: hence its capacity to create friction.

I. THE EMERGENCY DOCTRINES IN CONTEMPORARY INTERNATIONAL LAW

Historically there have been four closely related doctrines in customary international law, under which states may rely upon emergencies to excuse non-compliance with their international obligations. That accorded the most judicial consideration in recent times is "necessity", the essence of which is the existence of an immediate danger, in response to which the state takes an emergency measure to prevent catastrophe.² Where the defence of necessity applies, the act taken is said to be voluntary, in the sense that the state had a genuine choice as to whether to undertake the emergency measure. "*Force majeure*", the second doctrine, is distinguished from necessity by saying that the act taken is involuntary: there is no sense in which the state chooses to act in a manner inconsistent with its international obligation.³ A state under an obligation to protect a foreign diplomat's property will be excused from performance of this obligation where the event that destroys his property was unanticipated and impossible to prevent.⁴ The third doctrine, "fortuitous event",

² Paragraph (1) of the commentary to Article 25 of the ILC draft Articles on State Responsibility.

³ Paragraph (1) of the commentary to Article 23 of the ILC draft Articles on State Responsibility.

⁴ *Wipacram* (United States v Venezuela), US-Venezuela Claims Commission established pursuant to the Convention of 5 December 1885, Case No. 22, discussed in [1978] Yearbook Int'l L. Comm'n II(1), 156.

Mr. Wipacram was a US consul on a stranded vessel pillaged by tribesmen in a remote area in 1862, Venezuela relied successfully on a defence of *force majeure* to resist his complaint that it had not satisfied its obligation to defend the property of foreign diplomats. See also *Affaire relative à la commission des plaintes de l'Empire ottoman* (the footnote continued on next page)

applies where the intervening circumstances cause a state to fail to realise that its act is inconsistent with its international legal obligations. A state whose aircraft navigation equipment malfunctions, causing the aeroplane to stray into the territory of another state, will be excused from international responsibility because the relevant state agent (the pilot) could not have known at the time of the wrongful nature of his act.⁵ "Distress", the fourth doctrine, is akin to necessity. It is specifically concerned with saving life, and addresses emergency landings at closed airports and emergency docking of vessels at closed ports. The difference between a distressed incursion into airspace and a fortuitous one is that in the former the pilot knows what he is doing, but needs to undertake an emergency landing to save life; whereas in the latter, the pilot is not aware of his error.

These narrow distinctions are drawn in the textbooks, yet discussions of them by courts or tribunals are few and far between. No case has been decided on the basis of fortuitous event or distress theories in modern times. Historically, discussions of what are now known as the emergency defences have used all manner of language and criteria, that defy classifications of these sorts.⁶ The only tribunal to uphold a defence described using the label *force majeure* since World War I has been the Iran-US claims tribunal, but the doctrine was applied in the context of excusing contractual obligations rather than claims arising out of public international law.⁸ There is one modern

"Lighthouses" arbitration), UNRWA, vol. XII, 155 (1966), in which the principle of *force majeure* was used to deny a remedy claimed of restitution, sought after the requisitioning of a French-owned lighthouse by the Greek government. The remedy was denied on the ground that the requisitioned lighthouse had been destroyed by enemy action in World War I. Greece was nonetheless held liable in damages for the act of requisition, making its ostensible success in relying on the doctrine of *force majeure* somewhat pyrrhic.

⁵ This was the example cited by the ILC in 1978: Yearbook of the ILC 1978, Vol. II(1) (UN Doc. A/CN.4/315), page 61 *et seq.*, [250].

⁶ See e.g. the S.S. *Wimbolden* Case (UK, France, Italy and Japan v Germany), PCIJ, Ser. C (1923) No. 3, vol. I, 284. Germany refused access through the Kiel Canal (guaranteed by the Peace Treaty of Versailles) to a British vessel operating under a French charter, carrying munitions to the Polish government for the Polish-Russian war, on the ground that this was necessary for Germany to preserve neutrality in that war. See the dissenting opinions of Judges Anzilotti and Huber (at paragraph [7] thereof), who discuss "the exigencies of national defence" and "measures necessary to protect her interests as a belligerent or neutral power" as providing exceptions to Germany's treaty commitment. See also *Company General of the Orinoco* (France v Venezuela), French-Venezuelan Mixed Claims Commission (1902) X R.I.A.A. 184, 281-285, in which a defence akin to necessity was accepted by the tribunal in an action for expropriation by Venezuela of a French investor's investment, although none of the labels "necessity", *force majeure*, or similar where anywhere used in the decision of the Umpire. The investor had been granted possession of land in territory at dispute between Venezuela and Colombia; Colombia was threatening war if the territory was not returned. This threat was held sufficient to justify the expropriation and return of the territory to the belligerent state.

⁷ The *Lighthouses* arbitration, referred to in footnote 4 above, upheld the defence in the context of destruction of property during World War One.

⁸ In *Condit v Ministry of National Defence* (1983) 3 Iran-US CTR 147 the tribunal applied a *force majeure* doctrine to excuse both parties' failures of contractual performance, although neither party had expressly pleaded the doctrine. It said "[b]y *force majeure* we mean social and economic forces beyond the power of the state to control through the exercise of due diligence". In *Sylvania v Iran* (1985) 8 Iran-US CTR 298, "a general disruption of banking operations" was held to be a *force majeure* justifying late payment by the government of a commercial invoice. In *ITP v Iran* (1985) 9 Iran-US CTR 10, *General Dynamics v Iran* (1985) 9 Iran-US CTR 153 and *ISS v National Iranian Copper Industries* (1985) 9 Iran-US CTR 187, *force majeure* was used to justify the claimants' abandonment of their contractual commitments; it was not applied to excuse the respondent's sovereign law in obligations. The European Court of Justice also recognised *force majeure* as a principle of international law in *C-145/85 Denkavit v Belgium* and *C-101/84 Commission v Italy*, but in both cases held it inapplicable to the events at issue.

International Court of Justice (ICJ) decision⁹ and six investment tribunal awards¹⁰ that have considered the defence of necessity. As we shall see, these cases provide only the vaguest analyses of how these doctrines should be applied. Neither is there an international treaty in which the elements of these defences are set out.¹¹ Notwithstanding this paucity of case law or primary legal instruments, scholars of international law have been quite consistent in their opinions about the fundamental elements of each defence. James Crawford, UN Special Rapporteur and author of the International Law Commission's (ILC) draft Articles on State Responsibility, felt confident enough to pronounce the following principles that govern the doctrines:

ARTICLE 23

FORCE MAJEURE

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if:
 - (a) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) The State has assumed the risk of that situation occurring.

ARTICLE 24

DISTRESS

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
2. Paragraph 1 does not apply if:
 - (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) The act in question is likely to create a comparable or greater peril.

⁹ *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Rep 1997, 7. Being the principal modern judicial authority on the emergency doctrine, the case is discussed in detail later in this article.

¹⁰ *ALP v Sri Lanka*, ICISD Case No. ARB/87/03, Award of 27 June 1990; and the five *Argentina* cases, *CME v Argentina*, *IGCE v Argentina*, *Enron v Argentina*, *Sempria v Argentina* and *Continental Casualty v Argentina* discussed in detail in Section III below.

¹¹ The Vienna Convention on the Law of Treaties contains two doctrines permitting withdrawal from an international treaty in circumstances akin to those of necessity. See footnote 27 below.

ARTICLE 25

NECESSITY

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) The international obligation in question excludes the possibility of invoking necessity; or
 - (b) The State has contributed to the situation of necessity.

It is worth pausing to make a few observations about these articles. They are not statements of the law; they are the International Law Commission's opinion about what the law should be.¹² In judicial and arbitral practice, there is a real difference of opinion about whether the doctrine of necessity exists at all. Although in one recent ICJ case the doctrine was affirmed as a genuine feature of customary international law and the articles were cited as a statement of its content,¹³ in an earlier case the same court identified a doctrine which it called "necessity" and which it expressly affirmed did not exist.¹⁴ In the *Rainbow Warrior* arbitration¹⁵ between New Zealand and France, the tribunal opined that the existence of a general defence of necessity was controversial and not at all settled. It concluded that the ILC draft Articles did not in fact reflect customary international law, which was considerably more fluid than the ILC made out and incorporated only a general theory of "circumstances precluding wrongfulness", not a specific doctrine of necessity. Certainly the principles contained in the ILC draft Articles are not systematically reflected in prior case law, which does not generally draw the distinction between the three doctrines referred to by the ILC in the same clear way

¹² The International Law Commission is a UN-appointed Commission of legal scholars who draft reports. It has no authority to make law.

¹³ *Gabčíkovo-Nagymaros Project* (Slovakia v. Hungary), ICJ Rep. 1997, 7, 40, [51]. The case is discussed in a number of contexts below. *Gabčíkovo-Nagymaros* was followed in this regard by the International Tribunal on the Law of the Sea in *M/V Saiga No. 2* (Saint Vincent and the Grenadines v. Guinea), ITLOS (1999) 120 ILR 143.

¹⁴ *Cornu Channel Case* (United Kingdom v. Albania), ICJ Rep. 1949, 3, 77. "Since 1945, i.e. after the coming into force of the [UN] Charter, the so-called right of self-help, also known as the law of necessity (*Nöthelf*), which used to be upheld by a number of German authors, can no longer be invoked. It must be regarded as obsolete. The employment of force in this way, or of the threat of force, is forbidden by the Charter ...". It may be that the doctrine being disclaimed in this passage is confined to military actions taken in response to an emergency, although the measures taken by the United Kingdom were not strictly military in this case; they were the entry of military vessels into Albanian territorial waters to clear mines Albania had laid, which were posing a danger to passing vessels in the Corfu channel. This case is discussed in greater detail in Section II below.

¹⁵ *Rainbow Warrior arbitration* (New Zealand v. France), (1990) XX RIAA 217, 252, [76]. See also *Lafico and Birnadi* (1991) 96 Int'l L. Rep. 282, 319. "[i]t is not desired here to express a view on the appropriateness of seeking to codify rules on 'state of necessity' and the adequacy of the concrete proposals made by the International Law Commission".

proposed by the articles. Notwithstanding the purely hortatory nature of the draft Articles, and the split opinions of the ICJ, recent investment tribunals have effectively treated them as definitive statements of the law.¹⁶

The ILC's draft Articles conflate the doctrines of *force majeure* and fortuitous event, the latter effectively disappearing from the vocabulary of international law and being subsumed into the former.¹⁷ While the articles purport to define the circumstances in which the doctrines of *force majeure* and distress apply, all they say about necessity is the circumstances in which it does not apply, leaving the primary characterisation of the defence undefined. The standard of state choice is markedly different for each defence. For *force majeure* it is the impossibility of another course of action; for necessity the act must be the "only way"; for distress there must be "no other reasonable way".

It is not clear from where this poppourri of distinctions that the ILC created was derived. The distinctions between the doctrines were not generally judicially recognised prior to the ILC draft Articles, and it has been rare for any case to consider more than one of them. Where the USA complained of seizure of its aircraft and crew after (what it said was) an accidental incursion of its military aircraft into foreign airspace, in emphasising that the action was justified, it was not clear whether it was relying on the doctrine of *force majeure*, distress or fortuitous event.¹⁸ The principle that compliance with an obligation must be strictly impossible for the doctrine of *force majeure* to apply was confirmed by the Permanent Court of International Justice (PCIJ) in the Serbian Loans¹⁹ and *Brazilian Loans*²⁰ cases, which were both cases of failure to repay sovereign loans. The defence failed in each case because it was possible in principle for the sovereign to repay a loan, however much hardship that might cause to the rest of the country's economy. But those cases did not consider whether a defence of necessity might have applied instead. In *Société Commerciale de Belgique*,²¹ the defendant referred to the doctrine of *force majeure* interchangeably with that of necessity. In the *Rainbow Warrior* arbitration,²² France evacuated a French military prisoner convicted by a New

¹⁶ See e.g. *CMS v Argentina*, ICSID Case No. ARB/01/08, Award of 12 May 2005, [315]: "The tribunal, like the parties themselves, considers that Article 25 of the Articles on State Responsibility adequately reflect the state of customary international law on the question of necessity."

¹⁷ See footnote 351 to paragraph (5) of the commentary to draft Article 23, at page 77 of the Report of the fifty-third session of the ILC; Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, in Muchlinski, Ortino and Schreier, eds., *The Oxford Handbook of International Investment Law* (OUP 2009), 459, 472. Fortuitous event was identified as a species of *force majeure* in the ILC's 1980 draft Articles on State Responsibility, but was deleted from subsequent drafts as a distinct doctrine upon the recommendation of Special Rapporteur James Crawford. Report of the International Law Commission on the Work of its Fifty-First Session. State Responsibility (UN Doc A/54/10). See also *Rainbow Warrior arbitration* (1990) XX RIAA 217, 252: "*Force majeure* is generally invoked to justify involuntary, or at least unintentional conduct" (emphasis added).

¹⁸ *Treatment in Hungary of Aircraft and Crew of the United States of America* (USA v USSR), US application to the ICJ of 16 February 1954, ICJ Reports 1954, 42; commentary to the ILC draft Articles on State Responsibility, footnote 351.

¹⁹ *Case concerning the payment of various Serbian loans issued in France* (France v Kingdom of the Serbs, Croats and Slovenes), Judgment of 12 July 1929, PCIJ Series A, Nos. 20/21 (Judgment No. 14), 39-40.

²⁰ *Case concerning the Payment in Gold of the Brazilian Federal Loans Contracted in France* (France v Brazil), Judgment of 12 July 1929, PCIJ Series A, Nos. 20/21 (Judgment No. 15), 120.

²¹ *Société Commerciale de Belgique* (Belgium v Greece), PCIJ, Ser. C (1939) No. 87, 209. The Court accepted in principle that financial hardship could excuse Greece from paying an arbitral award; it was not clear how this was consistent with the same Court's reasoning in the *Serbian Loans* and *Brazilian Loans* cases.

²² *Case concerning ... problems arising from the Rainbow Warrior Affair* (New Zealand v France), (1990) XX RIAA 217.

Zealand Court from a French military base on the grounds of an alleged medical emergency, prior to the expiry of his sentence of incarceration. The tribunal based its analysis upon the concept of distress, considering the doctrine of necessity too controversial. Although the tribunal referred to the ILC draft Articles, it conspicuously failed to apply them, creating its own criteria for the doctrine of distress out of thin air.²³

In fact the distinctions between the different doctrines drawn by the ILC might be better understood as representing different historical periods of thinking about evading responsibility for breaching international obligations. In the nineteenth and early twentieth century, cases in which states sought to avoid obligations by reason of emergency were categorised as *force majeure*. In time, this came to be replaced by a more flexible doctrine called "necessity", which is not in truth an alternative to *force majeure* but rather a development of it. To the extent necessity was recognised before the Second World War, it was conflated with *force majeure*. Thus we find the PCIJ, in 1934, stating that it is a prerequisite for the defence of necessity that it is impossible for the respondent state to have acted other than contrary to the law.²⁴ The other two doctrines – distress and fortuity – are part of the same tradition, albeit applicable only to highly specialised circumstances. This makes one wonder whether drawing these distinctions is at all helpful, and if so then what policy justification might exist for applying different rules to different doctrines. Crawford was rightly commended for bringing the ILC exercise of preparing draft articles on state responsibility to a timely conclusion, an exercise which when he took over as Special Rapporteur in 1996 had already been continuing for over four decades.²⁵ But this achievement was the product of pragmatism and compromise, persuading all the members of the ILC to agree on a common baseline text and jettisoning that on which agreement could not be reached.²⁶ The distinctions drawn may not have had a legitimate policy rationale; after forty years the aim was to get some body of written principles, rather than perfect ones.

In addition to these doctrines in customary international law, some treaties contain explicit exceptions to treaty obligations where essential interests or national emergencies are at stake. The Vienna Convention on the Law of Treaties permits withdrawal from an international treaty either due to the permanent disappearance or destruction of an object indispensable for the execution of the treaty, or a fundamental change of circumstances that radically transforms the obligations still to be performed.²⁷ Equally,

²³ The criteria stated were "exceptional circumstances of an elemental nature of extreme emergency", a prompt subsequent demonstration of those circumstances; reestablishment of the original situation as soon as the emergency disappeared; and a good faith attempt to obtain the agreement of the other party. There seems little doubt that these criteria were created purely to fit the circumstances of the case.

²⁴ *Oscar Chin* (United Kingdom v Belgium), PCIJ Ser. A/B (1934) No. 63, Independent Opinion of Judge Azziotti, 112; a plea of necessity "by definition, implies the impossibility of proceeding by any other method than the one contrary to law."

²⁵ The ILC first chose the topic of "state responsibility" for codification in 1953. The ILC's first rapporteur on state responsibility, F. V. Garcia Amador, was appointed in 1955.

²⁶ See Crawford, *ibid.*, Introduction, Part 1.

²⁷ Articles 61 and 62 of the 1969 Vienna Convention on the Law of Treaties, which set out a *rebus sic stantibus* doctrine for termination of treaties. For judicial consideration of that doctrine see e.g. *Fisheries Jurisdiction* (United Kingdom v Iceland), ICJ Rep. 1974, 3, in which Iceland unsuccessfully invoked its economic reliance upon the fishing industry as a vital interest. This doctrine appears to suffer from many of the same uncertainties as the defence of necessity.

it is common for investment treaties to contain exculpatory clauses for emergency events.²⁸ There is remarkably little understanding of the interaction between the exceptional clauses contained in treaties and the customary international law doctrines this article discusses. Although it is manifest that they are all designed to deal with similar – unforeseen and emergency – circumstances, the contemporary view is that treaty – exceptions and customary international law are each to be considered separately as distinct doctrines, to which different legal tests apply.²⁹ That might seem surprising: for the same policy considerations are at stake in each case, and just as those considerations affect customary international law, so they ought to affect sensible interpretation of the Vienna Convention and individual investment treaties. Indeed the texts of treaty-based necessity defences are often quite vague. The US-Argentina BIT, considered in five recent cases,³⁰ is typical of these clauses. Article XI states that “[t]his treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, ... or the protection of its own essential security interests”. It is not clear what “public order” means, never mind “security interests” or even “essential” ones, and no guidance is given within the text on how to establish whether a measure is “necessary”. How should any of these questions be answered? It is not clear how these formulations take us beyond the vagaries inherent in customary international law.

II. A POLICY ON NECESSITY

Let us therefore investigate whether any principled justifications might be available for the distinctions drawn in the ILC draft Articles. Most domestic legal systems have emergency doctrines, such as frustration (English law),³¹ *force majeure* or *imprévision* (French law),³² *rebus sic stantibus* (Swiss law),³³ impracticability (American law)³⁴ or *Wegfall der Geschäftsvorgänge* (German law).³⁵ These doctrines find justification within the economic analysis of contract law, as a solution to imperfect information problems that arise in the course of negotiating long-term contracts.³⁶ Emergency defences might

²⁸ See e.g. Article XI Argentina-US BIT (considered in the investment tribunal cases discussed below); Article 4(3) Germany Model BIT; Article 5(4) US 2004 Model BIT.

²⁹ *Rimbaw Warrior Arbitration* (New Zealand v France), (1990) XX RIAA 217, 251, [75]; *CMS v Argentina*, ICSID Case No. ARB/01/08, Award of 12 May 2005, [332]; *Enron v Argentina*, ICSID Case No. ARB/01/03, Award of 22 May 2007, [294] and [314]; *Sempra v Argentina*, ICSID Case No. ARB/02/16, Award of 28 September 2007, [333], [356], [377]; *Continental Casualty Company v Argentina*, ICSID Case No. ARB/03/9, Award of 5 September 2008, [163] to [167].

³⁰ All five cases are considered in Section III below.

³¹ *Davis Contractors Ltd v Fareham Udc* [1956] AC 696.

³² See e.g. Articles 1148, 1348, 1631, 1730, 1733(1), 1754(4), 1755, 1784, 1929 French Civil Code. For *imprévision* (an administrative law doctrine which allows a Court to rewrite the terms of an onerous contract with a public body), see Req. no. 59928, *Compagnie Générale d'Éclairage de Bordeaux v. Ville de Bordeaux*, Conseil d'État, 30 mars 1916.

³³ See e.g. Article 373 Swiss Code of Obligations.

³⁴ Uniform Commercial Code §2-615.

³⁵ Article 242 German Civil Code as applied in jurisprudence: see J Cohn, *Frustration of Contract in German Law*, *Journal of Comparative Legislation and International Law*, v. 28 (1946), 20–21.

³⁶ Doctrines of necessity and impossibility in contract law are justified in the economic analysis of law by the principle that risk should be allocated to the party able to insure against it at least cost. A party should be able to rely upon the doctrine only if his costs of insuring against the risk of a supervening event rendering performance impossible are greater than those of the party against whom the doctrine is invoked. See e.g. Richard A. Posner

(footnote continued on next page)

therefore be justified in public international law by drawing an analogy between a treaty and a private contract.³⁷ A Pareto-efficient complete contract would assign contractual outcomes that maximise the cooperative surplus in every possible state of the world.³⁸ But real contracts cannot be so auspicious. Legal systems are faced with the fact that contracting parties may not anticipate future events, and therefore may not plan adequately for them in negotiating the provisions of their agreement. In the ordinary course of things, and within an array of hypotheses about the future anticipated by detailed terms of the contract, the parties will agree upon a course of action in which obligations, rights, risks and liabilities are distributed in such a way that in complying with the contract's terms there is a net increase in welfare. But there is a range of unanticipated events in which compliance with the letter of the contract will cause more net harm than if the parties had not entered into the contract at all. The longer the term of the contract, and the more complex and wide-ranging the events it is intended to cover, the greater the scope of such unanticipated events.

On this analysis, the law creates the fiction that had the parties in fact put their minds to considering those circumstances at the time when the contract was negotiated, they would have agreed on some outcome other than strict compliance with the letter of the contractual obligation. This is the economic justification of doctrines that permit parties to depart from their contractual commitments in exceptional circumstances. In this context, investment treaty obligations are in principle no different from any other kind of contractual obligation, save that the scope for unanticipated events is vastly broader than for most contracts. This is because investment treaties endure indefinitely far into the future: they are intended to cover an enormous range of different types of event, covering investments in every conceivable sector of a country's economy by enterprises of innumerable different kinds; the parties to them are states, whose motives, incentives, decision-making capacity and factual background are all enormously complex; and the treaty documents capturing the contractual relations between investor and state are in most cases modest in length and complexity, belying the varied range of circumstances they are intended to cover. The contrast between complexity of facts and brevity of the relevant treaties suggests that there is a wealth of unanticipated and unusual circumstances the parties to the treaties will not have anticipated in the course of their negotiations.

Therefore there is a proper role for a judicial body to step in to maximise the cooperative surplus in far more circumstances than in a conventional commercial

and Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 61 *Leg. Stud.* 83 (1977); Gerhard Wagner, *In Defense of the Impossibility Defense*, 27 *Loyola U. of Chi. L. J.* 55 (1995). See also Alan O. Sykes, *The Doctrine of Commercial Impracticability in a Second Best World*, 19 *J. Leg. Stud.* 43, 73 (1990), for a criticism of this analysis.

³⁷ For this analogy see Anne van Aaken, *International Investment Law between Commitment and Flexibility: A Contract Theory Analysis*, *J. Int. Economic Law* May 2009.

³⁸ In economists, a Pareto-efficient system is one in which any change that made somebody better off would make someone else worse off. It is optimal, in the sense that there is no way of increasing net welfare without doing harm to at least some person. A Pareto-efficient contract may be thought of as the product of a perfect negotiation process in the face of incomplete information about the future: the contract's performance will benefit, or at least not harm, any party to it, no matter what the future holds.

contract, likely drafted with far greater detail, and designed to address a far more limited and less complex range of circumstances. Emergency doctrines are a safety valve appropriate where the parties have not taken care to anticipate every imaginable circumstance arising out of cooperation, or have not gone to the efforts of negotiating and formalising those anticipations in the contract. It follows from this that they are exceptional doctrines – contractual intent should ordinarily prevail, if one believes that parties' free choices tend to generate the best outcomes for the parties themselves. Nonetheless, these doctrines recognise the frailties of the contracting process, and create escape clauses where strict performance of a contract creates overall harm, which is not what two fully rational and fully informed contracting parties would have intended had they reached agreement. The circumstances in which such a doctrine should apply are chiefly, where there is no evidence that the parties to the contract anticipated the emergency or planned for it in the contract's provisions; and that no party is at fault in causing the wrong (or there would be an incentive to breach a contract to take advantage of the doctrine).

On this analysis, the emergency doctrines are an exception to the principle of sanctity of contract. They provide that in certain exceptional circumstances, where human life or the essential interests of a state are at stake, the equities of the individual situation may override the general obligation. Almost five hundred years ago, it was remarked that law may permit deviation from legislation, if "the words of them are broken to avoid greater inconveniences".³⁹ The danger with this act-centred, rather than rule-centred, approach to the law is that it threatens to envelop legal principles in their entirety. If any departure from the law can be justified by considerations unique to the individual case at hand, rule of law becomes rapidly eviscerated. "[I]f hunger were once allowed to be an excuse for stealing, it would open a door through which all kinds of lawlessness and disorder would pass ... If homeless were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut."⁴⁰ Thus the defence must be narrowly circumscribed, lest it permit any state to evade its international obligations by plea of some greater good in pursuance of which an emergency measure is taken.

The most natural way to circumscribe the defence is to say that it applies only to certain unusual categories of emergency event. At one extreme, an emergency situation may threaten immediate loss of life. An aeroplane or vessel in immediate distress is perhaps the simplest example. However the emergency arose, respect for the sanctity of human life would suggest that action to preserve life would be justified, even if otherwise unlawful, unless that action threatened the same or even greater loss of life. This is the justification for the emergency aerial navigation exceptions (i.e. distress and fortuitous event). Even where the state invoking the emergency was in some respect responsible for the emergency (for example through negligence in

maintaining an aircraft), humanitarian considerations mandate that saving life overrides other, less fundamental, legal considerations. (Fortuitous event, which is about aircraft and ships inadvertently going off-course, recognises that human lives are at risk if the craft or vessels in question are not permitted to continue their journeys peacefully until the error is noticed and rectified.) On this theory, the ILC draft Articles are wrong, in that they suggest the defence is negated where the state is responsible for the emergency. People cannot be allowed to die in the name of international law, just because a state has been careless or even wanton in its disregard for life. Law must be sufficiently humane that respect for life is always an overwhelming concern. The only occasion on which necessity may not permit transgression of the law to save human life is where there is a greater interest in preserving more human lives; in those circumstances, the law may reluctantly conclude that those in peril must sacrifice themselves to save greater peril to others. If only one of two aeroplanes can land before crashing, it must be that with the greater number of people aboard.

Beyond the imperative to safeguard human life, the sorts of unusual event to which an emergency doctrine ought to apply remains very much an open question. In principle, the type of essential state interest in defence of which the doctrine of necessity might be invoked is broad, from environmental concerns⁴¹ to financial difficulties⁴² to ensuring civilian safety.⁴³ There is even a suggestion in one case that "maximising tax revenue" may count as an essential interest.⁴⁴ But the most fundamental hurdle in relying on an emergency doctrine is to show that the action taken is within the scope of permissible responses to the emergency; and this test remains the most uncertain. The older doctrine of *force majeure*, which requires the events to render violation of the international obligation materially impossible, manifestly sets the bar too high. An act

³⁹ *Gablikovo-Nagyvaras Project* (Hungary v Slovakia), ICI Rep. 1997, 7; *Russian Fur Seals controversy* (Russian regulation prohibiting sealing on the high seas justified on grounds of "absolute necessity"; see ILC Commentary on the draft Articles on State Responsibility, paragraph (6), Page 81); *Fisheries Jurisdiction* (Spain v Canada), ICI Reports 1998, 432, 443, [20] (reference to submissions by Canada; case declined for want of jurisdiction).

⁴⁰ *French Company of Venezuela Railroads* (France v Venezuela), French-Venezuelan Mixed Claims Commission (1902) X RIAA 285, 353. After a revolution, Venezuela defaulted on its debts to a French company. Its defence of *force majeure* was upheld: "The appeal of the company for funds came to an empty treasury, or to one only adequate to the demands of the war budget."

⁴¹ In the *Caroline Affair* (1837), British armed forces entered US territory and destroyed a US-owned vessel laden with money, arms and provisions destined for Canadian rebels. US Secretary of State Webster subsequently acknowledged that "clear and absolute necessity" could justify such an incursion (although the sides differed as to whether that necessity had been shown in this case); see the ILC's commentary to the draft Articles on State Responsibility, page 81, paragraph (5).

⁴² *M/V Sida* No. 2 (Saint Vincent and the Grenadines v Guinea), ITCOS (1999) 120 IRL 143 was a claim before the International Tribunal for the Law of the Sea. At issue was the legality of a Guinea customs law which, Guinea alleged, prohibited offshore refuelling of vessels (i.e. outside its territorial waters). The tribunal held that the Guinea law, to the extent it did indeed prohibit this, was inconsistent with the International Convention on the Law of the Sea. Guinea's plea of necessity – that it was preserving its essential interests in maximizing tax revenues from offshore fuel sales – was rejected, for two reasons: first, "[n]o evidence has been produced by Guinea to show that its essential interests were in grave and imminent peril"; second, "however essential Guinea's interest in maximizing its tax revenue from the sale of gas oil to fishing vessels, it cannot be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the exclusive economic zone." (Both quotes from [135].) However, the more obvious reason – that the importance of maximizing tax revenue cannot in principle count as an essential interest justifying evasion of international obligations – was not mentioned.

³⁹ *Reinger v Fogossa* (1552) 1 Plowd 1, 18, per Sergeant Pollard.

⁴⁰ *Southward London Borough v Williams* [1971] 2 All ER 175, 179, per Lord Denning MR.

which, although theoretically possible, would precipitate the gravest consequences, is excluded. Even where a country is on the verge of bankruptcy, and its treasury is empty, it is not impossible to repay one's loans. One can borrow on the international capital markets.⁴⁵ The fact that this might be exceptionally damaging to the state's macroeconomic situation does not matter: repayment is still, in principle, possible. Indeed the doctrine of *force majeure* is so rigid that it cannot even be relied upon to save life, if it is materially possible to take actions in compliance with international law that engender continued risk to life.⁴⁶

Thus the doctrine of necessity was developed by international law scholars, as a broader catch-all that would not be hampered by the rigid requirements of the *force majeure* doctrine. But such test of necessity as emerges from the ILC draft Articles – a “grave and imminent peril” – is a flexible formulation. The inevitable questions are asked, how grave and how imminent? This language is reminiscent of ticking time-bomb cases, such as the *Torrey Canyon* incident, an oft-cited example of the doctrine of necessity, in which British armed forces bombed an American-owned oil tanker stricken on a reef in March 1967 to prevent further contamination of the British coastline by its cargo. The legal principle involved in such circumstances was described in the *Caroline Affair*⁴⁷ as “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”. But the disputes that arise within the ambit of international law are rarely of this immediate nature. Neither the *Torrey Canyon* incident⁴⁸ nor the *Caroline Affair* were the subject of any sort of dispute settlement procedure. In *Gabčíkovo-Nagymaros Project*⁴⁹ the ICJ did consider the test, in the context of a defence of necessity to an environmental peril. The dispute arose out of a treaty for construction of an interterritorial dam and reservoir, a project which Hungary suspended on the ground that there was a risk the project could pollute drinking water in the area, including that supplied to its capital city. The Court concluded that notwithstanding the scientific evidence in support of Hungary's position, the dangers were of a long-term nature and were in the nature of a risk rather than a certainty. Therefore they could not, said the Court, be regarded as “imminent”,⁵⁰

⁴⁵ *Russian Claim for Interest on Indemnities* (Russia v Turkey), PCA, Award of the Tribunal dated 11 November 1912, para. 13. In the *Serbian Loans* case (France v Serbia), PCIJ Ser. A, Nos. 20/21, Judgment No. 14, 5 (1929), there was no material impossibility because there was an option to pay in either gold or paper francs. The Court suggested that had the obligation been to pay only in gold, material impossibility might have intervened, because the requisite quantity of gold was not available to the Serbian government; but paper francs could have been borrowed. These cases appear inconsistent with *French Company of Venezuelan Railroads*, discussed in footnote 42 above, in which a country's limited financial resources during war were held adequate grounds to excuse payment of sovereign debts under a *force majeure* doctrine.

⁴⁶ *Rainbow Warrior arbitration* (New Zealand v France), (1990) 20 RIMA 217, 253. In this case, which considered the legality of an evacuation of a prisoner from a military base on medical grounds, the doctrine of *force majeure* was rejected because it was not physically impossible to keep the prisoner on the base. He could have been kept there, and, presumably, he could have died there.

⁴⁷ Referred to in footnote 43 above. The quote is from US Secretary of State Daniel Webster to Henry Fox, British Minister to Washington, 24 April 1841; see *Report of the ILC* (1980), UN Doc. A/35/10, 93, footnote 129.

⁴⁸ No party so much as raised a protest to the British actions; see Report of the ILC (1980), UN Doc. A/35/10, 82.

⁴⁹ *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, 7.

⁵⁰ *Ibid.*, [55] to [57].

apparently unmoved by the argument that by the time the risk materialised and thus the danger became imminent, it would be too late.

In economic crises, even more than environmental ones, these doctrinal weaknesses are amplified. Environmental science, for all its uncertainties, is a more reliable discipline than economics. Where there is an economic crisis, it may be almost inevitable that its gravity be contested, or may not be conclusively measurable until after the emergency measure being contemplated has been taken. It may simply not be possible to say how serious a crisis may become if something is not done. When, in this context, does an economic peril become “imminent”? Economic collapses typically take place over months, or years. On the *Gabčíkovo-Nagymaros* criterion, we must all be bankrupt before the state is allowed to do anything to stop it. The state may close the financial stable door only once the economic horse has bolted down to the bottom of the recessionary ravine. One solution to these absurdities might be to make the concept of imminence relative to a time scale appropriate to the emergency at stake. Could imminence refer to a period of one year for an economic crisis? Yet imminence is not the only problem with this test; gravity is a mysterious concept too. When does an economic crisis become a grave peril? When 10% of the working population are unemployed? When mortgage repossessions are up on last year? When there is no bread in the shops? When there are riots and the government has fallen? Or must the government fall multiple times, as in Argentina in 2000-2001? As will be seen, these are some of the issues that investment tribunals have recently struggled with, and addressed somewhat inadequately.

Consider next the requirement that the state should not be responsible for nor having contributed to the emergency situation. This may seem like common sense, to prevent the risk of moral hazard. But it is not an easy test to apply where the emergency situation is a complex phenomenon with multiple and unclear causes. For an economic crisis, it is easy to say that the state is partially responsible in some measure. It may always be argued that a banking crisis is caused by inadequate regulation; had the banks higher capital adequacy ratios, or had those ratios been measured differently, it might be inferred that they would never have found themselves in trouble. States can thus be potentially responsible for any act by failing to anticipate and prevent it. Or a state's culpability may be shared with several other actors. The banks themselves may be at fault; the regulator may be at fault; the government may be at fault for not taking earlier intervening action; consumers may be at fault for borrowing too much money; market-makers may be at fault for failing to adequately assess and thus price securitised debt. What proportion of responsibility by the state is too much? 70%? 50%? 10%? In any event, what does it mean for a state to be 49% (or 51%) responsible for an economic crisis? That if the same crisis were repeated 100 times, if the state did not act in the way it did the crisis would still have resulted on 51 out of the 100 occasions? Partial causation is an adequately understood scientific notion, but the sort of statistical sampling necessary to render it meaningful is not available for economic crises. How then is share

of responsibility for complex events to be measured, beyond raising a damp finger to feel which way the wind blows?

In *Gabčíkovo-Nagymaros*, the ICJ engaged in some fiendishly obscure reasoning about contribution to emergency. Denying Hungary's defence of necessity on this ground, the Court suggested that in partially performing the treaty up until the date it had suspended it, Hungary had contributed to the environmental risk which it now faced. The treaty had been signed in 1977; scientific studies of the project's ecological consequences had been undertaken between then and 1992, when Hungary abandoned the project. The Court's reasoning seems to be that because Hungary had continued with the project over an extended period, it had contributed to the ecological risk which the project's performance had created.⁵¹ It is hard to understand this logic. It implies that the doctrine of necessity is never available, because a state will always have contributed to the emergency situation on which it relies, by signing the treaty which gave rise to the obligation which it subsequently became necessary to avoid. Moreover, it suggests that in order to avail itself of the doctrine of necessity, Hungary should have terminated the treaty much earlier than it in fact did, before the ecological evidence on which it ultimately relied became fully available.⁵² That is inefficient – it requires a state to make a decision too early, without complete information. Moreover, it would have the strangest consequences in international investment law. It might mean that the defence of necessity could not apply any later than the time the sovereign had permitted an investor to make its initial investment. After that, the project is ongoing and, on the reasoning of the ICJ in *Gabčíkovo-Nagymaros*, therefore it is too late because by participating in the project, the government has contributed to the state of necessity.

Finally, the reasoning of the Court may be that an emergency event must be exogenous to the transaction which it frustrates; it cannot arise out of events pertinent to the transaction itself. But that seems too restrictive. A treaty which is intended, or reasonably may be anticipated, to create an emergency is one thing: where the treaty is in some sense perverse or self-damaging, there is an argument that states should be bound to their commitments to deter them from entering into such agreements or to exercise proper cost-benefit calculations in advance. A treaty which has the best of intentions but, due to some consequence unforeseen at the time of negotiation and signature, turns out to create an emergency or serious harm, is different. In principle this is something which a sovereign should be able to escape, if it was genuinely not in the power of either party to foresee the problem and if the harm likely to be caused by the treaty's continuing performance outweighs the benefit. Of course a state should act reasonably promptly, upon becoming aware of the facts giving rise to the serious harm. But it should not have an incentive to act precipitously in disclaiming its treaty commitments; and this is what the *Gabčíkovo-Nagymaros* decision is in danger of prescribing.

⁵¹ *Ibid.*, [57].

⁵² See the dissent of Judge Herczegh, ICJ Rep. 1997, 7, 187, commenting on [57] of the Court's judgment: "That is a surprising conclusion, implying that Hungary should have finished the construction of the Nagymaros dam, which in reality would have helped to aggravate the state of necessity already existing as a result of the start of the works ..."

Likewise, the test of no alternative means leaves a plethora of questions unanswered. Will an alternative means that likewise violates an international obligation negate the defence of necessity? What if an alternative violation of an international obligation is less serious? (This is the test used for the necessity exception to international trade commitments in WTO law.)⁵³ How is "seriousness" measured? Is the test of alternative means to be applied from the perspective of the state at the time it made the decision it did? Or is a court or tribunal entitled to use hindsight? What if the putative alternative means would not have been as effective? What if the state had to make a decision with incomplete information, as is often the case with responses to economic or military crises?

The test of no alternative means is frequently used to defeat a state's plea of necessity, but with only the most nominal level of analysis. In its advisory opinion on the construction of the wall by Israel around the West Bank Palestinian territories, the ICJ was apparently of the view that it was for Israel to demonstrate that the "no alternative means" test was satisfied, in effect forcing it to prove that an indefinite series of negative hypotheses did not prevail. "In light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction."⁵⁴ Thus the Court concluded that the test was not satisfied, without stating what the other possible means actually were or even might have been. In *Gabčíkovo-Nagymaros*, the Court concluded that other alternative means were available to Hungary to mitigate its environmental concerns, such as purification of river water or discharge of gravel. These may have been more expensive, it conceded; but the fact that less convenient or more burdensome means were in principle available was enough to negate the necessity defence.⁵⁵ But no feasibility analysis was offered or referred to by the Court; no comparison of costs was undertaken; the reader of the judgment is left with no sense as to whether these were real options available to Hungary, and the parties did not apparently address the issue in evidence. The point was dealt with by the Court in just a few lines. A general principle to the effect that any theoretical alternative means to the course pursued negates a defence of necessity, no matter how expensive, cannot be right. It would allow the defence to be defeated by wild, theoretical or whimsical suppositions. The only sensible conclusion is that if an alternative means test is to be used as a criterion of a necessary defence, it must have two features. First, the burden of proof that there is an alternative means must lie upon the

⁵³ Article XX GATT provides that "... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; ... (d) necessary to secure compliance with laws or regulations which are not inconsistent with this agreement, including those relating to customs enforcement, ...". In Case DS285 *US-Gambling*, Appellate Body Report of 7 April 2005, [306] *et seq.*, the Appellate Body confirmed (in the context of GATS) that a measure is not necessary if another measure a state could be reasonably expected to employ is available and is either consistent with the treaty obligation or is less restrictive of the treaty obligation. See also Case DSS322 *Brazil - Retreaded Tyres*, Panel Report of 12 June 2007, [7.21.1].

⁵⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory opinion of 9 July 2004, [140].

⁵⁵ The Court's reasoning on this point appears at [55] to [57].

claimant resisting the defence of necessity, or the respondent is put to the impossible task of proving the existence of a negative. Second, the alternative means must be shown to be reasonable in all the circumstances, or the defence may be eviscerated through invocation of fanciful hypotheses. Unfortunately neither of these principles has emerged from the case law so far.

III. CONTEMPORARY INVESTMENT TREATY CASE LAW

Several recent investment tribunals have had to address necessity defences raised by sovereigns in the context of complaints of breach of duties owed to foreign investors under investment treaties. These are typically obligations not to expropriate assets, or to treat their investments fairly and equitably. While something of a consensus has emerged about the legal principles applicable where a state raises a necessity defence, the tribunals have clearly found the task of investigating the factual premises underlying these questions difficult. So difficult, in fact, that a number of commentators have considered their analyses distinctly unsatisfying.⁵⁶

In *Asip v Sri Lanka* (1991) 30 ILM 577, the claimant's shrimp farm was destroyed in a military incursion by the Sri Lankan security forces, who believed local rebels were present on the site. The tribunal noted that there was no reliable evidence determining the circumstances in which the claimant's shrimp crop was decimated.⁵⁷ While admitting the existence of a defence of necessity in principle, the tribunal concluded that Sri Lanka had not exercised "reasonable diligence"; it condemned the respondent's decision to launch the attack by asserting that it should have first consulted with the investor to expel from their property the persons it sought. In other words, the tribunal was prepared to prejudice the respondent's on-the-ground military decision even though, by its own admission, it did not have reliable evidence about what had happened.

It is not clear to what legal test within the ILC draft Articles the issue of "reasonable diligence" is relevant. Presumably what the tribunal meant was that had Sri Lanka thought about alternative ways of achieving the desired result, they might have devised a better method that would have caused less harm to the claimant. That the tribunal had to reach such a broad-brush conclusion, without reliable evidence, illustrates how difficult it is to apply the legal tests pertinent to the defence of necessity in the confusion of a military action. If that is the case, then applying the same tests in the context of complex economic problems seems even more unrealistic. In the raft of investment treaty claims that were brought against Argentina as a result of its financial crisis and currency collapse in 1999, investment tribunals found themselves having to deal with the defence of necessity, but their analyses were jejune. Of the five tribunals that have

so far ruled on the defence in the Argentine context, the exceptional circumstances, and the measures taken in response to it of which the claimants complained, were in all cases the same, but the tribunals could not agree on whether the defence of necessity was made out. Three ruled against Argentina on the issue,⁵⁸ and two ruled partially in its favour.

In *Cms v Argentina* (2005) 44 ILM 1205, a concessionaire under a contract for the provision of gas supply found itself subject to Argentine emergency legislation that imposed gas tariffs in the domestic devalued currency, restricted capital withdrawals from domestic bank accounts, and imposed forced restructuring of sovereign debts. These measures were triggered by government default on massive public debt, hyperinflation, high unemployment and a run on the domestic banks. In response to the complaint that its acts amounted to expropriation of the claimant's contractually acquired rights, and violation of the international law duty of fair and equitable treatment of foreign investors, Argentina pleaded that the measures taken were a proportionate response to the emergency that befell their economy. This defence was rejected on the twin bases that there were other lawful means available of meeting the emergency, and the respondent had contributed to the emergency.⁵⁹ Both these principles are reflected in the ILC draft Articles on State Responsibility.⁶⁰ However, the tribunal gave little factual guidance on why these tests were not satisfied. It did not say what the Argentine government might have done to address the crisis, short of the measures it in fact took. Nor did it explain why it found Argentina responsible for its financial problems. And with good reason: it would have been impossible for the tribunal credibly to answer these questions. Whether there was some other course Argentina could have chosen to minimise the effects of its economic collapse, and whether the measures it in fact took stabilised the situation, made it worse or avoided an even more catastrophic collapse, are the subject of continuing debates by academic economists which are necessarily inconclusive because of the wealth of historical and political counterfactuals any such questions necessarily embrace. Nobody knows with any certainty what would have happened if Argentina had not devalued its currency or imposed capital controls (which were anyway routinely circumvented). Nobody can say with certainty whether Argentina's problems would have been better or worse had the IMF cut off its funding to Argentina earlier, or imposed fewer conditions upon those loans. Any conclusion the tribunal came to on these questions at the end of a legal hearing would have been open to the obvious objection that if legions of economists and political analysts still cannot agree on the answers, there is no way a tribunal, limited in time, expertise and resources, can reach a reliable conclusion either.

⁵⁸ The Chairman of the tribunal in each of these three cases was the same, namely Orrego Vicuña. For each of the three cases, ICSID (the arbitral forum selected by the claimant) decided to appoint the same Chairman, perhaps to ensure some consistency in awards considering similar issues. The other two cases considering the defence, *LGGE and Continental Casualty*, were also ICSID cases, but different Chairs were appointed.

⁵⁹ Award of 12 May 2005, [323] to [329].

⁶⁰ See Articles 25(1)(a) and 25(2)(a) of the ILC draft Articles, affirmed as a correct statement of the public international law of necessity in paragraphs [315] *et seq* of the tribunal's award of 12 May 2005.

⁵⁶ See e.g. August Reinisch, *Necessity in International Investment Attribution – An Unnecessary Split of Opinions in recent ICSID Cases?*, 8 JWIT 191 (2007); Bjorklund, *ibid.*, 463, 491.

⁵⁷ *Ibid.*, [64], [85(B)(d)].

Thus it is perhaps with little proper surprise that we find another investment tribunal reached a quite different conclusion about the defence of necessity in the Argentine context, albeit also without any detailed discussion of the legal tests of "less onerous means" and "state responsibility for the emergency". In *LG&E v Argentina*,⁶¹ Argentina's plea of necessity was accepted in the context of precisely the same emergency measures. The issue was again whether Argentina was entitled to suspend calculation of energy tariffs in US Dollars and instead move to calculating them by reference to the freefalling local currency. Again there was no analysis of whether the measures taken were the only available, nor whether Argentina was itself responsible for the crisis. The third and fourth cases, *Enron v Argentina*,⁶² and *Sempra v Argentina*,⁶³ followed *Cms* at the expense of *LG&E*. But they contained no greater level of reasoning than did *Cms* about why the defence did not apply. The tribunal in *Sempra*⁶⁴ referred to the disagreement between the *LG&E* tribunal and the others, but gave no explanation of why it preferred to follow *Cms* and *Enron*.

It is hardly surprising that lip service was paid to the legal tests of "less onerous means" and "state responsibility for the emergency", without a serious attempt to apply them. As soon as facts become complicated, as in any analysis of macroeconomic collapse, assessing counterfactuals and attributing general responsibility for complex catastrophe become formidably difficult tasks. And so international tribunals have struggled to apply these principles to cases of financial crisis, as the divergent conclusions and paucity of factual analysis in the first four *Argentina* cases illustrates. Perhaps in response to criticisms of the reasoning in the prior tribunals' awards, the fifth and most recent case, *Continental Casualty v Argentina*,⁶⁵ attempted a far more detailed legal and factual analysis of the necessity defence. Again the facts at issue were the same, encompassing currency devaluation, suspension of bank withdrawals, conversion of debts into devalued local currency and compulsory restructuring of government loans. Unlike the prior cases, the tribunal showed some determination to evade the grip of the ILC draft Articles. It began its analysis with the proposition that the treaty-based defence of necessity, contained in the bilateral investment treaty in question ("this Treaty shall not preclude the application ... of measures necessary for the maintenance of public order ..."),⁶⁶ was to be considered separately from the customary international law of necessity, and therefore separately from the ILC draft Articles.⁶⁷ This in itself seems strange, if (as this article has suggested)⁶⁸ one accepts that treaty-based defences can only be sensibly interpreted in the context of the pre-existing customary international law on

necessity, as either expanding or narrowing the doctrine's ambit. In the event the tribunal undertook no analysis of customary international law, basing its conclusions upon a construction of the treaty provision alone and drawing comparisons and contrasts with WTO case law.⁶⁹ While their existence was acknowledged, the ILC's draft Articles were not followed, and the tribunal left itself sufficient flexibility to fashion its own doctrine of necessity, based on its autonomous view of how to construe treaty language.

The tribunal paid lip service to some of the tests considered by the prior case law: it asked whether the measure taken contributed materially to a legitimate aim; whether there were any reasonable less restrictive alternatives; and whether Argentina had contributed toward the emergency.⁷⁰ It concluded that a freeze on bank transfers, and conversion of US Dollar denominated sovereign debts into Argentine currency, were inevitable consequences of allowing the Peso to float (and thus devalue), and therefore no reasonable alternatives were available. Because international lending to Argentina had dried up, the country could never have paid its debts without these measures. However, the tribunal was not consistent about the standards it was applying, soon slipping into a broader test of whether bank withdrawal restrictions were "adequate and effective in respect of [Argentina's] legitimate aims".⁷¹ Mandatory debt restructuring was likewise justified as "appropriate and reasonable",⁷² save for some debt restructuring that was undertaken with onerous conditions and as the economy was beginning to recover,⁷³ and the tribunal refused to ask whether (as the draft ILC articles require) the measures considered were the *only* solution to the crisis. There was a considerable element of deference to the judgment of the sovereign; "[s]tates are basically free to adopt economic and monetary policies of their choice" and in the face of expert disagreement, the tribunal would not prejudge the policy decisions Argentina made.⁷⁴

The tribunal also refused to enquire in any detail whether Argentina had contributed towards the emergency, explicitly refusing to consider whether economic decisions the government had taken in 1998 and 1999 (some two to three years before the emergency measures in question) could have pre-empted the crisis. The "causative link", said the tribunal, between events at that time and the 2001-2002 economic collapse was too tenuous; and all governments are ultimately responsible for their economic policies, rendering the question empty.⁷⁵ A reader of the tribunal's reasoning on these points may have some sympathy with the pragmatic approach it adopted. Within its analysis one may see the emergence of a rather different doctrine of necessity, in which the predominant test is proportionality rather than absence of alternative means. If this is right, it marks a significant departure from the ILC draft Articles. The tribunal seemed determined to fashion its analysis by asking what reasonable legal

⁶¹ Decision on liability of 3 October 2006, [2004] *et seq.*

⁶² Award of 22 May 2007, [2004] *et seq.*

⁶³ Award of 28 September 2007, [344] *et seq.*

⁶⁴ *Ibid.*, [346].

⁶⁵ Award of 5 September 2008. The defence of necessity is dealt with at paragraphs [160] to [236]. At the time of writing both claimant and respondent have applied to ICSD for annulment of the tribunal's award; the annulment proceedings are pending.

⁶⁶ Article XI US-Argentina BIT. All five *Argentina* claims were brought under the same BIT.

⁶⁷ *Ibid.*, [162], [167], [192]. The tribunal was neutral as to whether the ILC draft Articles adequately express the customary international law of necessity. [168] and n238.

⁶⁸ See Section 1 above.

⁶⁹ *Ibid.*, [184], [192] to [195].

⁷⁰ *Ibid.*, [196] to [199] and [223] *et seq.*

⁷¹ *Ibid.*, [205].

⁷² *Ibid.*, [219].

⁷³ *Ibid.*, [219] to [222].

⁷⁴ *Ibid.*, [224].

⁷⁵ *Ibid.*, [229], [231], [235], [236].

evaluation of Argentina's economic policies a tribunal could in practice undertake. It would not be hindered by impossible counterfactuals, instead adopting an informed view "in the round" of whether the measures taken were sensible. It did this by adopting the legal fiction that it was construing the treaty rather than considering the customary international law precedents. But the reality is more likely that it did not want to feel bound by the ILC draft Articles, because the tests they prescribe are impossible to apply. The tribunal thus liberated itself from the ILC's straightjacket, and struck out on its own, common sense, course.

The legacy of this approach seems likely to carry forward to disputes arising out of the 2009 economic crisis. Not even the best economic minds can agree upon the most effective response to the current financial upheaval, or what could have prevented it. Requesting that investment tribunals rule on such questions is to ask the impossible. For all the undoubted ability of those who sit on these tribunals, it is simply not in the realistic remit of a legalistic procedure to determine issues which may otherwise fill volumes of speculative academic analysis. The tests of less onerous means and state responsibility for the crisis cannot be objectively applied to such complex political, social, historical and economic patterns of facts, when those facts are so fundamentally contested between different philosophical viewpoints. That is even more likely to be the case for the current global financial crisis than it was in the Argentine crisis of 1999 to 2002. The public international law of necessity needs to be completely rethought, embracing a common sense approach of the kind pursued by the *Continental Casualty* tribunal, but within a transparent set of legal rules. Those rules are not the principles found in the ILC draft Articles.

IV. REWRITING THE EMERGENCY DEFENCES

Public international law needs to rewrite the defence of necessity, at least in the investment context. The ILC draft Articles were grounded in neither prior case law nor analysis of policy, and have proved themselves impractical to apply. Greater thought must be given to the conditions under which the emergency defences operate if they are to function coherently. Appeals to the turbulent global economic conditions are likely to be recurrent features of sovereign defences in investment arbitrations for the next few years. A doctrine of necessity is important, because public international law incorporates important policy considerations not present in the law of private contracts. It must strike a balance between the importance of holding states to their stated commitments to foreign investors, and giving sufficient latitude to their sovereignty in determining what is in the best interests of their citizens and their economy as a whole.

Private companies can be liquidated should they become insolvent. The debts of states can last forever; and the bankruptcy of a country can cause immense hardship to its citizenry. In extreme times, states must have the right to deviate from their investment treaty commitments, but that right must not be unlimited, lest it become a

routine excuse for circumventing international obligations. However, the fear of overstretch must not become so all-pervasive that common sense is abandoned, or a tribunal is asked to apply impossible tests, or is granted such broad discretion that application of the doctrine becomes arbitrary. Moreover, the panoply of different emergency defences identified by the ILC draft Articles, each with its own criteria, is not particularly helpful. *Force majeure* has been rendered so difficult to use by its criterion of physical impossibility that it now deserves to be written out of the textbooks. The other doctrines distinguish emergencies involving human life and emergencies where other values are at risk. There is no reason, in principle, why different legal tests are necessary. Protection of human life can just be at the most important end of a range of vital interests that justify departure from international law. Economic catastrophe can also kill, and has the potential to affect an entire country's population.

It would not be hard to devise a series of tests for a defence of necessity that a tribunal could apply coherently, even in the economic context where facts are likely complex. For example, it could be said that the defence of economic necessity applies only where the respondent demonstrates a credible case that the country is in real danger of one of a series of trigger events, such as default on its sovereign debt, severe recession, significant currency depreciation, a dramatic increase in unemployment, real risk of the insolvency of a bank, or a number of other enumerated measurable economic crises. A short draft convention on the international legal effects of economic disruptions could set out such circumstances, defining terms such as severe recession or currency depreciation. The triggering events must be clearly defined and the case that they apply be strictly proven by the state, lest sovereigns attempt to over-extend the doctrine and say everything is a crisis entitling them to catch-all evasion of their international law obligations. For military emergencies, a similarly strict approach would be required. A general state of war would not suffice; there would need to be an identifiable military threat of one of a series of enumerated kinds, with a demonstrable risk to life to which the measures were intended to respond. Again this would require proof by the respondent state; there would be no deference to military strategy, without full disclosure by the respondent state of its risk assessments and decision-making process. States might be most reluctant to undertake this sort of disclosure; it might make the defence that much less attractive to run; but states should understand that the burden of proof for the defence of necessity is upon them.

Second, the measures taken must be a reasonable and proportionate response to the emergency at issue, even if there are other alternative courses of action that might be available to an affected sovereign and even if there is a legitimate debate about whether less drastic measures could be used. It is not reasonable to ask a tribunal to decide what would in all probability have happened if some other complex policy decision was enacted on terms unknown. If tribunals are obliged to engage in these speculative counterfactuals, the answers they give will either be disappointingly vacuous (as in the *Argentina* arbitrations) or demonstrably wrong. By contrast, the question of whether a

measure appeared reasonable and proportionate at the time to a reasonable third party, based upon the state's realistic political options and the intellectual consensus prevailing at the time, is an exercise well within capacities of a tribunal, given proper disclosure by a respondent. Proportionality is an easier test to apply than "what if?". But again, the burden of proof is on the state, which must cooperate in frankly revealing its thought processes. This is something respondent sovereigns may not wish to do: in which case the defence of necessity will fail.

Third, a finding of bad faith would negate the defence. A state which has manufactured an emergency in an attempt to escape its treaty obligations would be a simple example of this principle; case law could develop the concept further. The view has been expressed that this should be the only criterion of necessity; or that the emergency defences are "self-judging".⁷⁶ A sovereign may decide for itself whether a measure was necessary, subject solely to a test of whether invocation of necessity is *bona fide*. Although the tests of reasonableness and proportionality imply a measure of sovereign discretion (more than one course of action can be proportionate to a given aim), a pure self-judging approach cannot be seriously countenanced. It is inconsistent with ICG case law on the subject;⁷⁷ and, more fundamentally, it would leave ajar the door to the demons of anarchy. It is impossible to measure a state's subjective intention, because there are inevitably multiple reasons that can explain why a state acted as it did; and those reasons cannot be differentiated or parsed. After the event, faced with a complaint of any breach of international law, a state could always find some reason why it felt it was "necessary" to act in the way it did, in pursuit of some fundamental sovereign interest. International law would be decapitated with one fell swoop of the discretionary axe.

Fourth, the defence of economic necessity might be limited to claims of expropriation, and violations of umbrella clauses⁷⁸ or contractual commitments.⁷⁹ Breaches of fair and equitable treatment standards cannot avail themselves of this

⁷⁶ Article XXI GATT contains self-judging language: "Nothing in this Agreement shall be construed ... (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests ..." (emphasis added). It was the position of the US Government for some time that treaty-based necessity exceptions in BITs to which it is a party are self-judging, a point taken by Argentina in the five arbitrations against US claimants; statement of the US State Department on the US model BIT of February 1992, submitted to the US Senate on 30 July 1992. "we are careful to note, in each negotiation, the self-judging nature of the protection of a Party's essential security interests". Anne-Marie Slaughter (nominated in 2009 as Director of Policy Planning at the State Department) gave evidence on behalf of Argentina in the *Argentina* arbitrations, opining that the necessity exception contained in the US-Argentina BIT is self-judging. No tribunal accepted her view.

⁷⁷ See *Military and Paramilitary activities in and against Nicaragua* (Nicaragua v USA), ICG Reports 1986, 14, [1222], [282]. *Oil Platforms* (Iran v USA), ICG Reports 2003, 161, [43]. [73]. In the latter case, it was held (in the context of self-defence) that "the requirement in international law ... is strict and objective, leaving no room for any 'measure of discretion' ...". This approach seems if anything insufficiently flexible.

⁷⁸ The conventional understanding of umbrella clauses (which contain treaty language such as "each contracting party shall observe any obligation it has undertaken with regard to investments") see the 2005 model UK BIT) is that they elevate contractual obligations in investment contracts signed by states into obligations under the investment treaty. *SGS v Philippines* (2005) 8 ICSID Reports 518. However, case law is split on the effect of these clauses: see *Eureka v Poland* (2005) 12 ICSID Reports 335; *SGS v Pakistan* (2003) 42 ILM 1290; *Noble Ventures v Romania*, Award of 12 October 2005.

⁷⁹ Apart from umbrella clauses, it has been held that some breaches by a state of its contractual commitments may amount to a violation of the obligation to provide fair and equitable treatment: see e.g. *Mendez v Mexico* (2003) 42 ILM 85. The point is not finally decided; for a contrary view see *RECC v Morocco* (2005) 20 ICSID Review-FinJ 391.

defence; under no circumstances can necessity excuse arbitrary or discriminatory actions. Where necessity is invoked, any emergency measures must be undertaken transparently and fairly. Indeed such a criterion is implicit in a number of contemporary investment treaties, which provide that measures must treat foreign investors no worse than their domestic counterparts.⁸⁰ This approach is also sanctioned in the GATT.⁸¹ Fifth, the effect of the defence should be temporary. Economic crises do not last forever. Where emergency measures are taken to the detriment of investors, there should be an anticipation that normalcy will return, the measures will be reversed to the extent possible, and treaty commitments will later be honoured.⁸² Expropriation can only be undertaken with either full compensation or with a genuine anticipation, for which legislative provision exists, that the investments will be returned to their proper owners at some later date once the crisis has subsided. Sixth, one way of effectively limiting the defence might be to require sovereigns relying upon it to invoke it at the time of the emergency. To raise the defence only once a claim is made is too late. There is some (slender) support for this approach in GATT practice.⁸³

Two other issues that international law needs to address are compensation in the event of necessity; and risks of inconsistent determinations. It is unclear from the case law whether there is an obligation to compensate even in the event of a finding of a state of necessity. It has been suggested that necessity is an excuse rather than a defence: it does not legitimate an otherwise unlawful action, but merely means that state responsibility for the unlawful action is not invoked.⁸⁴ But it is not obvious what follows from this. A distinction between unlawful action and state responsibility might be used to conclude that compensation is payable only where there is both unlawful action and state responsibility. This was the conclusion reached by the tribunal in the *LCGE* and

⁸⁰ See e.g. the so-called "national treatment" obligation, found for example in Article 3(2) of the 2005 German model BIT: "Neither Contracting State shall subject investors of the other Contracting State, as regards their activity in connection with investments in its territory, to treatment less favourable than that it accords to its own investors or to investors of any third State."

⁸¹ Article XX GATT (General Exceptions) contains a necessity defence, "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means or arbitrary or unjustifiable discrimination between countries where the same conditions prevail ...". In other words, if a measure is to benefit from the necessity defence, it must be applied in a non-discriminatory way to all.

⁸² *Cadfilkovo-Nagymaros Projekt* (Hungary v Slovakia), ICG Rep. 1997, 7, 63, [101]: "as the state of necessity ceases to exist, the duty to comply with the treaty obligation revives".

⁸³ Decision Concerning Article XXI of the General Agreement on Trade Tariffs, 30 November 1982 (L/5426): "... until such time as the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI it is appropriate to set procedural guidelines for its application. THE CONTRACTING PARTIES decide that: 1. ... contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI ...; 2. ...; 3. ...; 4. ...; 5. ...; 6. ...; 7. ...; 8. ...; 9. ...; 10. ...; 11. ...; 12. ...; 13. ...; 14. ...; 15. ...; 16. ...; 17. ...; 18. ...; 19. ...; 20. ...; 21. ...; 22. ...; 23. ...; 24. ...; 25. ...; 26. ...; 27. ...; 28. ...; 29. ...; 30. ...; 31. ...; 32. ...; 33. ...; 34. ...; 35. ...; 36. ...; 37. ...; 38. ...; 39. ...; 40. ...; 41. ...; 42. ...; 43. ...; 44. ...; 45. ...; 46. ...; 47. ...; 48. ...; 49. ...; 50. ...; 51. ...; 52. ...; 53. ...; 54. ...; 55. ...; 56. ...; 57. ...; 58. ...; 59. ...; 60. ...; 61. ...; 62. ...; 63. ...; 64. ...; 65. ...; 66. ...; 67. ...; 68. ...; 69. ...; 70. ...; 71. ...; 72. ...; 73. ...; 74. ...; 75. ...; 76. ...; 77. ...; 78. ...; 79. ...; 80. ...; 81. ...; 82. ...; 83. ...; 84. ...; 85. ...; 86. ...; 87. ...; 88. ...; 89. ...; 90. ...; 91. ...; 92. ...; 93. ...; 94. ...; 95. ...; 96. ...; 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Continental Casualty cases against Argentina. They concluded that damages for breach of Argentina's investment treaty obligations were payable only in respect of losses suffered before and after the period of emergency. The effect of the defence of necessity was that losses incurred during the emergency period, as defined by the tribunal, could not be recovered.⁸⁵ But this is not the inference often drawn about the effects of the defence. Both scholars and case law have suggested that whenever necessity is successfully invoked, the action is treated as lawful, but compensation is nonetheless payable.⁸⁶

If this means that compensation is payable on the *Chorzów Factory*⁸⁷ basis (i.e. the conventional measure of damages in international law, meaning compensation to place the wronged party in the position it would have been in had the wrongful act not taken place), then that position is obviously not sustainable. That would have the consequence that invoking the doctrine of necessity has no practical effect vis-à-vis the financial responsibility of a respondent state before an investment tribunal. We might like to imagine that respondent states before such tribunals would be gratified and motivated by knowing that even if they have an obligation to pay full compensation, nonetheless they have been cleared of a breach of international law. However, in practice these tribunals are important because of their power to make often huge damages awards. States are not principally interested in moral victories. They want to evade liability to pay damages of hundreds of millions of dollars, enforced through the international banking system under the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.⁸⁸ The result of a successful invocation of the defence of necessity must therefore be either the extinction of damages altogether (at least in respect of acts that occurred during the period of necessity), or a reduced measure of damages.

It is not immediately clear what a reduced measure of damages might be. The commentary to the ILC draft Articles suggests such a distinction, but gives no insight into its substance other than proposing that the affected states could agree compensation levels between themselves.⁸⁹ One proposal might be that where necessity is successfully

⁸⁵ *IGBE v Argentina*, *ibid.*, [262] to [266]; *Continental Casualty v Argentina*, *ibid.*, [245] (necessity treated as an absolute defence to liability).

⁸⁶ See e.g. *CMS v Argentina*, *ibid.*, [388]; *Gran Lynen, State Responsibility and International Liability for Lawful Acts* (Jusus 1997). This was also the conclusion drawn by the League of Nations Enquiry into the *Incidents on the Frontier between Bulgaria and Greece* (League of Nations Official Journal, 7th Year, No. 2 (February 1926)), which addressed the problem (upon the dissolution of the Ottoman Empire under the Treaty of Sévres) of Greek refugees from Turkey occupying the abandoned properties of persons who had taken Bulgarian nationality and were thereby obliged to leave Greek territory. Greece pleaded *force majeure*, citing the necessity of housing refugees from Turkey; the Commission, while accepting Greece's defence, proposed that the Greek government nonetheless provide compensation to the dispossessed Bulgarian nationals. Likewise, in *Cadikhovo-Nagyiranos* (at [48]) "Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner". The French-Venezuelan Mixed Claims Commission came to the same conclusion in the *Orinoco* case, as did an *ad hoc* tribunal in the *Ort & Lathenheimer* case (*USA v Nicaragua*). Award of 16 June 1900, RSN Vol. XV, 37: damages awarded for military seizure of vessels, notwithstanding a finding that Nicaragua "exercised her sovereign rights under stress of the necessity of war". Article 27(b) of the ILC draft Articles provides that a defence of necessity "is, without prejudice to ... the question of compensation for any material loss caused by the act in question", implying that compensation is nonetheless due even if the defence is made out.

⁸⁷ *The Factory at Chorzów (Claim for Indemnity) (Germany v Poland)*, PCIJ, Ser. A, No. 17, 1928.

⁸⁸ Or for ICSID awards, automatic recognition and enforcement under Article 54 ICSID Convention.

invoked, investors can claim *damnum emergens* (i.e. the costs of their investment) rather than *lucrum cessans* (i.e. the value of their investments – the amount of profit they would have made had their investments not been interfered with). If an investor has spent US\$10m in an investment expected to earn it \$100m, the former figure is the *damnum emergens*, the latter the *lucrum cessans*. Such a distinction would be tolerably clear, but would not necessarily be grounded in any rational policy principle beyond the desire to provide a less burdensome measure of damages to respondents in dire straits.

The risk of inconsistent decisions is, as was seen in the *Argentina* arbitrations, more than merely fanciful. The varying tribunals came to opposite conclusions on (exactly) the same facts, without commenting significantly one upon the other or giving any explanation in law or fact of their differing reasoning. Where a government's response to major crisis triggers multiple investment claims, economy and rigour both require these claims to be resolved consistently. A tribunal's analysis of an economic crisis is likely to be a complex affair, involving expert evidence about its causes, consequences, the range of possible government actions available in response, a wealth of statistical economic data, and policy analysis of the measures actually taken. There is little value in repeating that lengthy process over multiple claims, but conventional investment arbitration procedures make it inevitable that the same issue be re-litigated. The issue of how to make international arbitration procedures amenable to multiple party claims arising out of the same facts is a topic about which a fair amount has already been written,⁹⁰ and it is beyond the scope of this paper to more than summarise the reforms already proposed. However, the basic procedural measures necessary would be an amendment to an arbitral institution's rules (for example, the ICSID rules) to permit joinder of related claims and active claims management by the tribunal; having the same panel of arbitrators determine all cases with a common element; and allowing an institution to define classes of claim, with cut-off dates for bringing claims within that class. Great weight would be placed upon the competence and resources of an effective arbitral institution to manage multiple party actions, but there is no reason in principle why such an institution need be any less effective in this regard than a national court system, some of which have managed complex multi-party actions for several decades. The broad lesson is that to render the defence of necessity a credible concept in the vocabulary of international law, the changes necessary are not just theoretical; some practical procedural measures may likewise be appropriate.

⁸⁹ Paragraph (4) of the commentary to Article 27: "Although the article uses the term 'compensation', it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather, it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference to 'material loss' is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V." Paragraph (6) *terro* continues: "Subparagraph (b) does not attempt to specify in what circumstances compensation should be payable. Generally, the range of possible situations covered by Chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case."

⁹⁰ See e.g. Veijo Heiskanen, *Arbitrating Mass Investor Claims: Lessons of International Claims Commissions*, in Permanent Court of Arbitration, ed., *Multiple Party Actions in International Arbitration* (OUP 2009).

V. CONCLUDING REMARKS

Perhaps the most important consequence for public international law of the 2008-9 global economic crisis is the need to develop a novel and more sophisticated doctrine of economic necessity. That theory must be one which contains legal principles applicable in a coherent way to complex events, without embroiling a decision-making tribunal in irresolvable debates about economic theory. Public international law must reflect the realities of sovereign decision-making in uncertain times, particularly the unavailability of complete information. It must harbour respect for genuine attempts to take state measures to alleviate financial collapse, while condemning pretextual seizures made in the name of catch-all emergencies. It is well within the capacity of investment tribunals to develop new and flexible doctrines in public international law to meet the contemporary investment crisis. There are likely to be many cases in the forthcoming years in which they have the opportunity to do so. Necessity is an important doctrine, as it acknowledges the existence of potentially extreme domestic and global events to which sovereigns from time to time are compelled to respond. These events are of such varied and often unforeseen kinds that a doctrine of necessity will inevitably require a degree of flexibility. Treaties are not of "so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever".⁹¹ Reprising the doctrine of necessity to the point that it is virtually impossible to successfully rely upon it will both penalise states that take legitimate emergency measures in good faith, and in the longer term discourage states from signing treaties at all, or increase transaction costs and decrease the efficacy of treaty law by motivating states to negotiate substantial express caveats to their treaty obligations.

The flexibility of the doctrine, if handled unwisely, has the potential to undermine the rule of law. There tend to be good internal reasons for the many occasions in which sovereigns depart from their international obligations. Not all such reasons can be encompassed by the doctrine of necessity, or there would be nothing left of international law. Necessity cannot be equated merely with national interest, or the idea of states as being bound by law at all is rendered ridiculous. Moreover, it is equally dangerous if there is no clear delimitation between acts that are covered by the doctrine and those that are not. If the conditions under which the doctrine pertains are too open-ended, or if courts and tribunals give the impression that they are applying it arbitrarily, beneficiaries of international obligations may conclude that they cannot rely upon treaty law because it is subject to arbitrary derogations. This is particularly true in the investment context, where the principal beneficiary of the treaty regime is a private investor which it is the treaty's expressed intention to attract. The efficiency of treaties, like that of contracts, depends upon the capacity of legal actors to bind themselves to future courses of action, on which others may rely in entering into cooperative solutions. To the extent that capacity is impaired by an over-extended or ambiguous

⁹¹ Memorandum of the British Government, in the *Anglo-Portuguese Dispute of 1832*, cited in the Report of the ICJ (1980), UN Doc. A/35/10, 84.

doctrine of necessity, the possibility for cooperation in the international sphere, whether between states or investors and states, is diminished. The policy solution to this dilemma is clear: consistent application of bright-line rules. This may require significant refashioning of the historical doctrine of necessity in international law. Traditionally hazy and unwieldy, its threads have been distorted by scholars, an array of multiple doctrines have been weaved together into a confusing web, and courts and tribunals have oft applied it with a remarkable lack of interest in the complex facts underlying the dispute.