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SYSTEMIC INTEGRATION AND INTERNATIONAL INVESTMENT LAW – SOME PRACTICAL REFLECTIONS

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SYSTEMIC INTEGRATION AND INTERNATIONAL INVESTMENT LAW – SOME PRACTICAL REFLECTIONS

Daniel Kalderimis[*]

Overview

One of the most well-worn complaints of modern international law, and especially international investment law, is the sense of increasing fragmentation in the face of specific treaty-based regimes.

Fragmentation has given rise to considerable scholarship debating the extent to which the operation of different regimes constitutes a form of *lex specialis* or, conversely, can be said to reflect deeper organising principles of CIL.

One of the most elegant attempts to locate specific treaty-based regimes within the context of broader principles is the notion that what is called "*systemic integration*" (*SI*) is mandated by Article 31(3)(c) of the Vienna Convention on the Law of Treaties (*VCLT*), which provides that treaties should be interpreted taking into account "*any relevant rules of international law applicable in the relations between the parties*". This theory has most famously been developed and applied to international investment law by Professor Campbell McLachlan,[1] building on the work of Professor Sands, whose well-known ICLQ articles arose out of and have been reflected in the ILC's Study Group on fragmentation of international law.

Despite academic work by Professor McLachlan and others, it remains unclear to what extent the SI theory has been, or can realistically be, applied to investment treaty arbitration practice in a meaningful and effective manner.

To empirically test whether the SI theory does meet practice in the international investment regime, this paper examines the cases brought against Argentina over the last decade, especially under the US-Argentina BIT. In these cases, tribunals were presented with two different exculpatory arguments on behalf of the State: first, the so-called non-precluded measures clause included as Article XI of the BIT; and secondly, the CIL defence of necessity, as codified in Article 25 of the ILC Draft Articles on State Responsibility. The question is to what extent SI principles can be regarded as realistically capable of influencing coherent outcomes in similar cases.

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[*] Partner, Chapman Tripp, Wellington. The author is grateful to Amelia Keene for her assiduous research into the relevant investment treaty case law. All errors or omissions remain the sole responsibility of the author.

[1] See C McLachlan "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 ICLQ 279 (*McLachlan I*) and "Investment Treaties and General International Law" (2008) 57 ICLQ 361 (*McLachlan II*).

I won't keep you in suspense. In my view, the evidence does not support the notion of SI as being what I will call outcome-determinative.

This may, but will probably not, be regarded as a novel conclusion.

What I then want to do is consider what this might mean for how we think about international law generally. The thrust of my analysis is in opposition to positivist accounts of international law. To my mind what can be drawn from the Argentina necessity cases supports a more realist account of what some, including Gerald Postema, have called "*practical reasoning*".[2] Part of the object of this paper is, then, to use the necessity case law to illustrate the ways in which practical reasoning is helpful, perhaps more helpful than systemic integration theory, in understanding the jurisprudence of international law.

What is SI?

Public international lawyers are a self-selecting bunch of integrationists. If we weren't we could happily join the school of thought which denies that international law is law at all. But we generally do not. We mostly accept that a horizontal legal system with a lack of central rule making and enforcement may yet be a legal system. We strive for ways to make this legal system whole, even though it is constantly under construction. We are driven, as Professor Crawford pointed out in his 2012 Hudson Medal Lecture at Cambridge University, by our "*blessed rage for order*".

This drive accounts for some of the undeniable appeal of the SI theory. As explained by the ILC Study Group:[3]

> *Article 31(3)(c)...gives expression to the objective of "systemic integration" according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated on that fact.*

Accordingly, paragraph (3)(c) plays a role, as part of a process of legal reasoning, in the overall interpretative enterprise specified by Articles 31 and 32 of the VCLT. The effect of the systemic integration principle is said to have both positive and negative aspects:[4]

(a) positively, the parties are taken to refer to CIL and general principles of law for all questions which the treaty does not itself resolve in express terms; and

(b) negatively, in entering into treaty obligations, the parties do not intend to act inconsistently with generally recognized principles of international law.

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[2] See e.g., G Postema "Salience Reasoning" (2008) UNC Legal Studies Research Paper No. 1, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1129841> (last accessed 5 July 2012).

[3] ILC Study Group, "Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (see A/61/10, [251]) 2006, at [17]–[18].

[4] Ibid, at [19].

In the view of the ILC Study Group, paragraph (3)(c) is particularly relevant where the treaty rule is "*unclear or open-textured*" or where the relevant concept used in the treaty "*has a very general nature or is expressed in such general terms that it must take into account changing circumstances*".[5] Both would seem potentially relevant in considering arguments relating to necessity in the context of the Argentina cases.

Professor McLachlan's first ICLQ article famously elaborated on the systemic integration theory, which he characterised as "*an unarticulated major premise in the construction of treaties*"; namely, the fact that treaties must be applied and interpreted against the background of general principles of international law.[6] Rather than a mere truism, this premise can be seen as a constitutional norm within the international legal order. In seeking to explain this insight, Professor McLachlan used a striking analogy. Systemic integration serves a function akin to a master-key in a large building. Mostly the use of individual keys will suffice to open the door to a particular room. But, in exceptional circumstances, it is necessary to utilise the master to gain access. Similarly, in most cases the interpretation and application of a treaty will be matter of its own terms and context. But in "*hard cases*" it may be necessary to invoke an express justification for looking outside the four corners of a particular treaty to its place in the broader framework of international law, applying general principles of international law.[7]

This paper discusses systemic integration in context of international investment law, which is a good subject for five main reasons.

First, Professor McLachlan's second ICLQ article specifically applies SI to international investment law, so we have a detailed and clearly expressed theory to work with.

Secondly, and as pointed out at the beginning of that article, it is acknowledged that BITs essentially cover the field. Thus, the ICJ stated in 2007 that "*in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements...In that context, the role of diplomatic protection is somewhat faded...*".[8]

Thirdly, as a result of the direct investor-state dispute settlement mechanism, we are seeing vastly increased adjudication of international investment law. This upswing of adjudication has placed more pressure than ever upon the interpretation and application of rights. Major issues of principle and policy which may have remained obscure or inchoate

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[5] Ibid, at [20] and [23].

[6] McLachlan I, above n 1, at 280.

[7] McLachlan I, above n 1, at 280–281.

[8] *Case Concerning Ahmadou Sadio Diallo (Guinea v Congo)* Preliminary Objections, ICJ Case No 103 (24 May 2007) at [88].

for decades are now deliberated upon several times a year. Investment treaty arbitration is accordingly an important case study for how the modern system of international law really works when applied to actual rights, rather than when discussed as theoretical positions.

Fourthly, and as a mere observation, perhaps the most celebrated international decision to utilise systemic integration techniques, the ICJ *Oil Platforms* case, itself involved a non-precluded measures clause in similar terms to Article XI of the US-Argentina BIT.[9]

Fifthly, the CIL of necessity has been invoked in several cases not merely in a background or contextual fashion, but as a secondary rule precluding liability which is not contained in, but not necessarily excluded by, the treaty text. As the ILC Study Group pointed out, this technique is possible in theory, as the application of special law does not extinguish relevant general law.[10] The receptiveness of tribunals to such arguments, however, is an important empirical test on how systemic integration works in practice.

Professor McLachlan's key conclusions arising out of applying the SI theory to international investment law were – and here I paraphrase – that:[11]

- the starting point remains the treaty text, interpreted in accordance with VCLT, Articles 31 and 32;

- the meaning of that treaty text may, however, be informed by general international law, which is applicable as a whole to treaty obligations, as well as custom. Thus, for example, "*secondary rules of State responsibility relating to...circumstances precluding wrongfulness may be applied if the treaty language, properly interpreted, permits*";

- this process of treaty interpretation which may, in turn, inform the content of general international law;

- the relationship between general international law and investment treaties is properly characterized as conducted at the level of general principles of international law. This is how the weight of investment arbitral tribunal awards is

[9] *Case Concerning Oil Platforms (Iran v United States of America)* ICJ Reports 2003, 161 (6 November 2003). The Court reasoned as follows: "*78. The Court thus concludes from the foregoing that the actions carried out by United States forces against Iranian oil installations on 19 October 1987 and 18 April 1988 cannot be justified, under Article XX, paragraph 1 (d), of the 1955 Treaty, as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty.*" In other words, the general international law of self-defence, including as set out in the UN Charter, informed the meaning of Art XX(d) of the treaty. This finding was not without dissent (e.g., Judges Higgins and Kooijmans).

[10] ILC Study Group, above n 3, at [9].

[11] McLachlan II, above n 1, at 398–402.

to be understood: not as a matter of binding precedent, but as a matter of the consistency of such awards with the general framework of international law;

- that relationship is thus symbiotic: general principles of international law offer guidance to investment treaty tribunals in answering novel and difficult questions, and the reasoning and decisions of investment treaty tribunals may, over time, contribute to the development of general principles of international law; and

- viewed in this way, SI really is a constitutional principle, explaining the accretion and evolution of a legal system through a form of dialectic.

Professor McLachlan's focus on general principles of international law is not accidental. He accepts that international investment law is an area in which custom is both limited and contested. It is hard to contend otherwise given the fractious history of investment protection law (leading to comments such as that of the United States Supreme Court in 1964 to the effect that on few legal issues are opinions so divided as the limitations of a state's power to expropriate an alien's property).[12] This is not to say that a more settled order is not arising due to the proliferation of BITs since the 1990s, merely that the shards of true historical insight available through custom are relatively few and far between.

The genius of Professor McLachlan's argument is its ability to situate disparate treaty regimes on a broader canvas and in this way convert non-binding arbitral decisions into a source of general international law, through the elucidation of general principles relating to matters not previously or sufficiently addressed by custom.[13] In this way, developments in general international law can inform the treaty rule; and developments in the treaty rule can inform general international law.

Standing back, so as not to be blinded by the eloquence of the McLachlan theory, the better to assess its relevance, there is no doubt that international investment law is part of international law. The question is how this fact can, in a practical sense, help resolve interpretative difficulties.

Whilst the tone of the ILC Study Group is resolutely pragmatic, this does not mean its precepts are easy to apply. In his second article, Professor McLachlan acknowledged that the confusion engendered by the necessity cases, which frequently embraced the notion of SI, "*appears to call into question the very utility of reference to general international law in investment treaty arbitration*".[14] But he concludes that many cases applied SI incorrectly. A process of orderly treaty interpretation would have prevented the confusion,

[12] *Banco Nacional de Cuba v Sabbatino* 374 US 398 (1964) at 428 per Harlan J.

[13] McLachlan II, above n 1, at 400.

[14] McLachlan II, above n 1, at 386.

such that "*general international law in investment treaty cases does not become the juridical equivalent of a bag of liquorice allsorts*".[15]

This conclusion has not met with universal acclamation. Some, such as Diane Desierto, fear that the principle of SI inherently licenses overly-expansive and illegitimate treaty interpretation practices, by reference to quite different areas of law.[16] Thus, Desierto particularly objects to the *Continental Casualty* tribunal borrowing from WTO to inform its analysis and application of Article XI of the US-Argentina BIT.[17] Sir Franklin Berman made a similar observation in *RosInvest v Russia*, in which he held that the qualifying phrase to Article 31(3)(c), "*applicable in the relations between the parties*", "*must be taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty – or else it would amount to a general licence to override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole*".[18]

Others, such as Kammerhofer, have advanced critiques that systemic integration lacks a sound positivist theoretical foundation. He thinks that the effect of opening the Article 31(3)(c) funnel is not merely to provide access to broader forms of guidance, but to expand by incorporation and exponentially the range of norms encompassed by each treaty falling under the VCLT regime.[19]

Still others, notably the late Thomas Wälde, harboured what might be described as thematic doubts about the ILC's harmonisation project generally. His view is that fragmentation can be reinterpreted as specialisation; cross-fertilisation can be viewed as "*cross-blockage*".[20] In short, Wälde wanted specialist international law regimes to get on with their business without being held back by general principles of international law.

My critique is different again. Unlike Desierto and Berman, I do not regard it as a major concern that tribunals will look to apply wholly inappropriate sources of law, nor consider it plainly illegitimate for an investment treaty tribunal to consider WTO law in interpreting words under a BIT. Unlike Kammerhofer, I do not consider the key difficulty with SI to

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[15] McLachlan II, above n 1, at 391.

[16] D Desierto *Necessity and National Emergency Clauses* (2012, Martinus Nijhoff) at 230–231.

[17] See also, J E Alvarez and T Brink "Revisiting the Necessity Defense: *Continental Casualty v Argentina*" in Karl P Sauvant (ed) *Yearbook on International Investment Law and Policy* (OUP, New York, 2011), Chapter 8.

[18] *RozInvest v The Russian Federation*, Award on Jurisdiction, SCC Case No V079/2005, 1 October 2007 at [39].

[19] J Kammerhofer, "Systemic Integration, Legal Theory and the ILC" [2010] 19 Finnish Yearbook of International Law 2008, 157 at 168.

[20] J Gaffney "Going to Pieces without Falling Apart: Wälde's Defence of 'Specialisation' in the Interpretation of Investment Treaties" in J Werner and A H Ali (eds) *A Liber Amoricum: Thomas Wälde* (Cameron May, London, 2009) at 59.

be its lack of positivist theoretical foundation. And unlike Waldë, I do not harbour concerns about the overall harmonisation objective of which SI is a part.

What I do understand, and in many ways agree with, is the underlying disquiet – that there is a risk of a muddle. I prefer to put this critique in a realist way. To my mind SI must remain, at least in the investment context, an elegant theory which does not, and probably cannot, have a demonstrable effect on practical outcomes. It is susceptible to the charge of being rather more like intellectual window-dressing and rather less like an effective legal or constitutional norm.

I may part ways with both Desierto and McLachlan, however, to the extent that I think the muddle is an unavoidable aspect of our pioneering international legal system. Fronting up to, rather than dressing up, the interpretative primordial swamp seems to me to be important, because doing so reveals how international law really works. Thus, I come here neither to praise SI nor to bury it, but to point out its innate limitations as a matter of practice.

This paper suggests that the order SI is able to impose is largely procedural and mechanical. It can help resolve vexed questions about which provision to avert to first and when to look to CIL. But it still leaves open the all important substantive question of what use to make of such customary law, or general principles, when one does look at them.

Looking briefly at the Argentina necessity cases

The Argentina cases make one thing clear: necessity has not generally been a winning defence.

As at the end of June 2012, there are 32 proceedings listed in www.italaw.com in which Argentina is the respondent, of which 16 resulted in substantive awards.[21] Of those substantive awards, what I will call the customary international law (***CIL***) necessity defence was invoked 12 times. Although most tribunals took the approach, arguably consistently with the theme of harmonisation, that CIL is not precluded by the terms of the BIT (a significant exception is the *BG Group* case),[22] in no case did that defence succeed as a stand-alone ground.

Of the 16 substantive decisions, six were determined under the US-Argentina BIT. Five of these cases – *Continental Casualty*, *CMS*, *LG&E*, *Enron* and *Sempra* – involve consideration of both Article XI and the CIL necessity defence.[23] The *Continental*

[21] A full list of such cases appears as Appendix 1 to this paper. A table of the 16 substantive decisions appears as Appendix 2. Note that *Wintershall* and *TSA Spectrum* have been excluded from Appendix 2 as they dealt only with jurisdiction, even though they were disposed of by instruments labelled awards.

[22] *B G Group Plc v Argentina* UNCITRAL Award, 24 December 2007.

[23] *Continental Casualty Company v Argentina* ICSID Case No ARB/03/9, Award, 5 September 2008; *CMS Gas Transmission Company v Argentina* ICSID Case No ARB/01/8, Award, 12 May 2005;

Casualty case involved an investment in the insurance industry; the other four cases involved investments in the gas industry. All, however, dealt with the effects of the same fiscal and economic crisis between 2001 and 2002. Much has been written about the nature of that crisis, which I do not repeat here.

In *CMS*, *Enron* and *Sempra* (which all had the same President), the tribunals dealt with the CIL necessity defence to the exclusion of Article XI, and each rejected it. This methodology was criticised in subsequent annulment proceedings. The *CMS* award was subject to trenchant comment, but not annulled. Each of the *Enron* and *Sempra* awards were annulled, within a month of each other, but for different reasons.

In *Continental Casualty*, Article XI was found to apply but the CIL necessity defence was rejected. The tribunal instead looked to the 'necessity' test in WTO law (i.e. under art XX of GATT) to colour its interpretation of Article XI. The award was not annulled, despite a vigorous application by the investor.

In *LG&E* Article XI was also found to apply and the CIL necessity defence also succeeded, but played a supportive, and not decisive, role.[24]

Some might argue that the several annulment decisions have now improved consistency in this area of law. However, the annulment committees have been careful to avoid giving guidance as to the content of the CIL necessity defence or the substantive meaning of Article XI. They have mostly been confined to procedural and methodological issues of delineating the two. As can be seen, the cases have struggled with two main questions in establishing the proper relationship between Article XI (or a similar clause) and the CIL necessity defence:

(a) To what extent can the CIL necessity defence influence the interpretation of Article XI?

(b) To what extent can the CIL necessity defence operate as an independent secondary rule precluding liability, irrespective of the terms of Article XI?

The preponderant view appears to be that:

(a) Article XI should be regarded as a primary rule which disengages the other primary rules (and not a secondary rule precluding wrongfulness), but it is not improper to consider CIL in interpreting and applying Article XI;[25]

Enron Corporation, Ponderosa Assets LP v Argentina ICSID Case No ARB/01/3, Award, 22 May 2007; *Sempra Energy International v Argentina* ICSID Case No ARB/02/16, Award, 28 September 2007; and *LG&E Energy Corp v Argentina* ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006.

[24] See *LG&E Energy Corp v Argentina* ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006 at [245] and [258].

(b) The CIL necessity defence may be available as a stand-alone ground, but only if this is not precluded by the treaty text.

Overall, despite some differences in reasoning and approach, of the 16 substantive decisions, only in *BG Group* did the tribunal consider that the terms of the treaty precluded it from taking account of, or applying, the CIL necessity defence in its analysis.

Interestingly, the main area of criticism has been too much, rather than too little SI. That is, some Annulment Committees and most commentators have agreed that tribunals, particularly in *CMS, Enron* and *Sempra*, were too willing to resort to general international law, and insufficiently rigorous in interpreting and applying the treaty text of Article XI, which they treated as inseparable from the CIL necessity defence.

Aside from correcting this interpretative imprecision, however, the extensive consideration of the CIL necessity defence in the various cases has not been widely condemned. Overall, there is much anti-fragmentation rhetoric. Nonetheless, it is difficult to draw out any conclusions from these awards, except perhaps that referring to CIL arguably reduces coherency, rather than improving it.

Professor McLachlan does not accept that the confusion can be properly laid at the door of SI. As mentioned above, he argues that a structured and orderly approach to treaty interpretation would have prevented most of the difficulties. General international law can properly be used to assist in the interpretation of Article XI. Although the CIL necessity defence can provide a possible secondary preclusion of liability, it will not be applicable where it has been excluded by the terms of the treaty. In any event, where the customary rule provides a stricter test than the treaty text, as here, there will be no need for separate resort to custom.[26]

I do not entirely disagree with this analysis. But I think it is as notable for what it does not say, as for what it does. As a matter of substance, and despite detailed scrutiny, the ability of states to successfully plead necessity in response to severe economic crisis, in the context of a BIT, remains opaque. In other words, despite the theoretical possibility, necessity has not been applied as providing – in fact – an independent defence to liability, by precluding wrongfulness.

I want to explore why this is.

Why has the necessity defence not been more successful?

Part of the reason why the necessity defence has not been more successful might be that Article 25 is in strict terms, providing that:

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[25] See, e.g., *Sempra Energy International v Argentina* ICSID Case No ARB/02/16, Annulment decision, 29 June 2010 at [197].

[26] McLachlan II, above n 1, at 390–391.

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 of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.

In this way, it arguably poses a stricter test than Article XI, which provides:

This treaty shall not preclude the application by either Party of measures necessary for...the protection of its own essential security interests.

But this is only an arguable claim – it could equally be contended that measures will only be "*necessary for...the protection of [a State's] own essential security interests*" when there are no other means available to safeguard those interests and where the State itself has not contributed to the situation. Similarly, it could be claimed that the "*only way*" test in Article 25, whilst an exceptional defence, is not to be applied oppressively and without regard to proportionality and reasonableness. On this view, the essential criterion is whether the actions were necessary, not whether no other possible actions – irrespective of the consequences for the State and its citizens – could have been taken.

The truth is that neither Article XI nor Article 25 is drafted with economic crises in mind. They are directed towards threats to security. This does not mean that either could not be interpreted to apply to grave economic emergencies.

Certainly, there is some historic caselaw indicating that necessity will not ordinarily apply to economic difficulties. For example, on the same day in 1929, the PCIL delivered decisions in two cases involving sovereign default on loans: one in respect of Serbian loans issued in France,[27] the other in respect of Brazilian loans issued in France.[28] An issue was whether the economic dislocation caused by the First World War, and the impact of the Treaty of Versailles on the value (and availability) of the French franc, released the States from their repayment obligation. The answer was no. It must be said, however, that these cases discussed the issues in terms of force majeure, rather than necessity.

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[27] *Case Concerning the Payment of Various Serbian Loans Issued in France (France v Yugoslavia*) 1929 PCIJ (ser A – No 20/21), PCIJ Case No 14 (12 July 1929).

[28] *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil)* 1929 PCIJ (ser A – No 20/21), PCIJ Case No 15 (12 July 1929).

Two decades earlier, however, a PCA decision involving a Russian claim against the Imperial Ottoman Government for indemnities for injuries to Russian soldiers injured during the 1877-78 war, held that force majeure was applicable to public, as well as private debts, and would arise where the very existence of the State should be in danger.[29] The PCA appeared to accept that Turkey was from 1881 to 1902 in the midst of grave financial difficulties, but held that it was still able to obtain loans at favourable rates. This decision is probably capable of reinterpretation as an early economic necessity case.

In any event, the world appears to have moved on. By 1988 an ILA Resolution on International Monetary Law indicated that state inability to pay a debt "*will normally have to be considered under the rule of necessity*".[30] Almost all the Argentina necessity tribunals accepted that Article XI and Article 25 did not exclude major economic crises from their scope.[31]

I am myself unconvinced that the stricter terms of Article XI can account for the total failure of the CIL necessity defence. Of the 16 decisions, 10 either addressed non-precluded measures (*NPM*) provisions of lesser scope than Article XI or also did not apply any NPM provision at all. Yet in none of these cases did the CIL necessity defence succeed. My sense is that this reflects a reluctance to rest a significant decision to preclude liability upon CIL alone.

An alternative argument is that the reluctance to apply Article 25 to preclude liability reflects legitimate doubt over the extent to which Article 25 properly codifies the CIL of necessity. There is some possible ground for this view. Although the ICJ in the *Gabcikovo-Nagymaros*[32] case endorsed the precursor of Article 25 (then Article 33) as reflecting CIL, only seven years earlier, the *Rainbow Warrior* Tribunal had regarded Article 33 as a "*controversial proposal*" and quoted with approval commentary contending that there is "*no general principle allowing the defence of necessity*".[33] However, whilst this is of concern to an academic writing a scholarly text on necessity, it did not appear to

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[29] *Russian Claim for Interest on Indemnities (Russia v Turkey)* (PCA, 11 November 1912).

[30] ILA, Resolution on International Monetary Law, *Report of the Warsaw Conference 1988* at 20–22. See *Continental Casualty Company v Argentina* ICSID Case No ARB/03/9, Award, 5 September 2008 at [178], fn 259.

[31] See, e.g., *Continental Casualty Company v Argentina* (Award) at [178]; *CMS Gas Transmission Company v Argentina* (Award) at [359]; *Enron Corporation, Ponderosa Assets LP v Argentina* (Award) at [332]; *Sempra Energy International v Argentina* (Award) at [374]; and *LG&E Energy Corp v Argentina* (Award) at [238].

[32] *Case Concerning the Gabčíkovo–Nagymaros Project (Hungary v Slovakia)* Judgment, ICJ Reps 1997, 7, (25 September 1997) at 41.

[33] *Difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair (New Zealand v France)* Arbitral Award, *RIAA* vol XX, 215 (30 April 1990) at 254.

concern the tribunals, who largely treated Article 25 as a correct and complete codification of the CIL necessity defence.[34]

My sense is that another factor explains Argentina's distinct lack of success in pleading Article 25. This is the lack of authoritative *detail* and *guidance* with respect to necessity and economic emergencies. In theory, some serious economic emergencies may qualify where Argentina has no other options but to take the relevant measures. To state this test is, however, merely to state a high-level principle. It is not to apply it in a concrete situation.

Here, tribunals stand alone, and are unwilling to rest their analysis on what may a contested account of the CIL necessity principle. Accordingly, even where Tribunals have adopted the orderly approach advocated by Professor McLachlan, there is a sense that the entire debate has been conducted in a simplistic and slightly unreal way. Some tribunals have parsed the words of the BIT. Others have done the same thing with Article 25. Some have conflated the two. But in most cases there is a slight air of aridity about the reasoning employed.

The difficulty is not a lack of positive law. It is not the appointment of inadequate arbitrators. It is not the absence of the legal pathway of systemic integration. It is the lack of sufficient institutional basis, mandate and intellectual support for most tribunals to be confident in applying necessity as an exculpatory defence. That is, as a matter of institutional reality, the epistemic community of international investment arbitration has not yet forged sufficient linkages between the statement of high principle in Article 25 and its practical application within the treaty context.

Professor McLachlan suggests, based upon Max Huber's writings, that tribunals view their task as examining a series of concentric circles, moving from treaty text, to customary C to general principles.[35] Or, to use a different metaphor, all treaties are like stencils laid out on a blanket of wider doctrine. To the extent the questions raised can be answered from within the treaty, well and good. To the extent they cannot, the wider doctrine informs the meaning of the treaty or fills the gaps.

I do not disagree with these metaphors as a matter of theory. But it does seem to me that, even though in formal terms custom and general principles enjoy the same status as does treaty text, in practice they are much more difficult to rely on. On this basis, of

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[34] Albeit that this was generally attributable to the parties' agreement that art 25 was a codification of the necessity principle, so as to avoid arguing about what that general principle would otherwise be. One notable exception is: *BG Group v Argentina* (Award) at [400], where the BG Group highlighted that art 25 was non-binding for any bilateral relations involving the UK, which was a "persistent objector" to necessity as customary international law. The Tribunal avoided the issue by finding that CIL was implicitly precluded by the terms of the UK-Argentina BIT: at [409].

[35] McLachlan I, above n 1, at 310–311.

pragmatism rather than theory, I wonder how helpful SI is as a method of increasing certainty and reducing incoherence in international law.

Looking at the necessity cases through the perspective of legal pragmatism

The objection I have is not so much technical as philosophical. Let me try to explain with an anecdote. In the late 1800s the philosopher William James was in a camping party in the mountains. Being amongst like-minded companions, he was not surprised to return from a solitary ramble to find everyone engaged in a ferocious metaphysical dispute. As James explains:[36]

> *The corpus of the dispute was a squirrel – a live squirrel supposed to be clinging to one side of a tree-trunk; while over against the tree's opposite side a human being was imagined to stand. This human witness tries to get sight of the squirrel by moving rapidly round the tree, but no matter how fast he goes, the squirrel moves as fast in the opposite direction, and always keeps the tree between himself and the man, so that never a glimpse of him is caught. The resultant metaphysical problem now is this:* Does the man go round the squirrel or not? *He goes round the tree, sure enough, and the squirrel is on the tree; but does he go round the squirrel? In the unlimited leisure of the wilderness, discussion had been worn threadbare. Every one had taken sides, and was obstinate; and the numbers on both sides were even. Each side, when I appeared therefore appealed to me to make it a majority.*

Williams' response was as follows:

> *Mindful of the scholastic adage that whenever you meet a contradiction you must make a distinction, I immediately sought and found one, as follows: "Which party is right," I said, "depends on what you practically mean by 'going round' the squirrel. If you mean passing from the north of him to the east, then to the south, then to the west, and then to the north of him again, obviously the man does go round him, for he occupies these successive positions. But if on the contrary you mean being first in front of him, then on the right of him, then behind him, then on his left, and finally in front again, it is quite as obvious that the man fails to go round him, for by the compensating movements the squirrel makes, he keeps his belly turned towards the man all the time, and his back turned away. Make the distinction, and there is no occasion for any farther dispute. You are both right and both wrong according as you conceive the verb 'to go round' in one practical fashion or the other.*

Williams then sought to explain his response not as mere word-splitting, but as a philosophical position:

> *I tell this trivial anecdote because it is a peculiarly simple example of what I wish now to speak of as* the pragmatic method*. The pragmatic method is primarily a method of settling metaphysical disputes that otherwise might be interminable. Is the world one or many? – fated or free? – material or spiritual? – here are notions either of which may or may not hold good of the world; and disputes over such notions are unending. The pragmatic method in such cases is to try to interpret each notion by tracing its respective practical consequences. What difference would it practically make to any one if this notion rather than that notion were true? If no practical difference whatever can be traced, then the alternatives mean practically the same thing, and all dispute is idle. Whenever a dispute is serious, we ought to be able to show some practical difference that must follow from one side or the other's being right.*

[36] W James, "What is Pragmatism", based on a lecture presented as part of a series in 1904, and reproduced in W James, *Writings 1902-1920* (Library of America, 1988).

I am put in mind of this analogy when looking at the different positions taken on the necessity defence in the cases. Is the view on the correct formal relationship between Article XI and Article 25 really of integral importance? Does deconstructing this relationship, however impeccably, tell you the answer to the critical question, which is the way in which the CIL necessity defence extends to, and properly balances the competing interests engaged by, severe economic crises?

As noted above, one can see cursory and conclusory reasoning in most cases, for instance as to whether a grave and imminent peril existed, or whether Argentina's measures were the only way to address the crisis.[37] To illustrate this, it is instructive to quote two passages. First, the entire analysis of the "*only way*" issue from the *Enron* decision, repeated word for word in the *Sempra* decision:[38]

> *It is thus quite evident that measures had to be adopted to offset the unfolding crisis. Whether the measures taken under the Emergency Law were the "only way" to achieve this result and no other alternative was available, is also a question on which the parties and their experts are profoundly divided, as noted above. A rather sad world comparative experience in the world handling of economic crises, shows that there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case.*
>
> *While one or other party would like the Tribunal to point out which alternative was recommendable, it is not the task of the Tribunal to substitute for governmental determination of economic choices, only to determine whether the choice made was the only way available, and this does not appear to be the case.*

Secondly, the analysis of the same issue by the *LG&E Tribunal*:[39]

> *The essential interests of the Argentine State were threatened in December 2001. It faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation and to the preservation of its internal peace. There is no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity. In this circumstances [sic], an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed.*

The *Enron* Annulment Committee held the reasoning just quoted from the *Enron* Tribunal to be defective, pointing out that the expression "*only way*" is capable of more than one possible interpretation.[40] It might be read literally as meaning genuinely no other measures

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[37] See, e.g., the critiques of A Reinisch "Necessity in International Investment Arbitration – an Unnecessary Split in Opinion in Recent ICSID Cases" (2007) 8 JWIT 191 and A Newcombe & L Paradell *Law and Practice of Investment Treaties* (Kluwer Law International, The Netherlands, 2009) at 519.

[38] *Enron Corporation, Ponderosa Assets LP v Argentina* (Award) at [308]–[309]; repeated in *Sempra Energy International v Argentina* (Award) at [350]–[351].

[39] *LG&E Energy Corp v Argentina* (Award) at [257].

[40] *Enron Corporation, Ponderosa Assets LP v Argentina* ICSID Case No ARB/01/3, Annulment decision, 30 July 2010 at [369].

that Argentina could have adopted. It might be read more broadly as meaning that there were no alternative measures Argentina might have taken which did not involve a similar or graver breach of international law.[41] The Committee went on to note that the Tribunal did not take account of the relative effectiveness of different measures, or whether CIL accords a margin of appreciation or deference to a state in applying the Article 25 test.[42] The Committee then concluded, gnomically, that it is not for it to provide answers to any of these questions.[43]

The point might be equally made that the *LG&E* Tribunal's reasoning, whilst veering in the opposite direction, is almost as spare and conclusory.

The *Sempra* Annulment Committee did not address Article 25 in such detail, as the basis of its decision was that the Tribunal had illegitimately conflated that CIL principle with Article XI of the BIT. What it did do was pour scorn on the notion that serious weight should be put on Article 25 in interpreting Article XI. That is, although accepting that in theory that CIL may inform the meaning of treaty text, in practice, it considered Article 25 to be too different from Article XI to offer much assistance.[44] Its decision therefore takes the high ground of pointing out that the correct interpretative approach must derive from in the treaty text. This is basically the same view that the *CMS* Annulment Committee had reached previously, but not implemented on the basis that the Tribunal's reasoning, whilst "*inadequate*" was yet sufficiently clear. However, neither Annulment Committee felt empowered to explore or elucidate the meaning of that text.

Thus, despite many years of caselaw, we are still not much closer to understanding what exactly the Article 25 standard (or the Article XI test, for that matter) means and how it is to be applied in practice. The *Continental Casualty* Tribunal came closest to seeking to deconstruct the meaning of Article 25. Its award relied on concepts from WTO law to seek to interpret Article XI. This was not regarded as an error of law by the Annulment Committee, as the Tribunal "*was clearly not purporting to apply that body of law, but merely took it into account as relevant to determining the correct interpretation and application of Article XI*".[45] It has, however, been severely criticised by some commentators, including Desierto, who maintains that the Tribunal did not sufficiently parse the words of the treaty, and that reference to WTO law was "*inexplicable*".[46]

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41 Ibid, at [370].

42 Ibid, at [371]–[372].

43 Ibid, at [373].

44 Ibid, at [200]–[202].

45 *Continental Casualty Company v Argentina* ICSID Case No ARB/03/9, Annulment decision (16 September 2011) at [133].

46 Desierto, above n 16, at 220–231. See also generally D Desierto "Necessity and 'Supplementary Means of Interpretation' for Non-Precluded Measures in Bilateral Investment Treaties" (2010) 31(3) U Pa J Int'l L 827.

A traditionalist will still contend that the answer is to bear down and try to address all of the issues as a process of interpretation. Some excellent books, including most recently from Weeramantry,[47] have sought to clearly identify the correct interpretative process. These efforts are to be applauded. The question is whether they are sufficient.

The Argentina necessity cases have identified several specific questions regarding Article 25 which beg for answers:

- To what extent does it apply to economic, as opposed to security, crises?
- What counts as an "*essential interest*" of a State, what counts as a "*grave and imminent peril*", and what level of evidence is required?
- What is the meaning of "*the only way*" – is it to be read literally, purposively, reasonably, practically?
- To what extent is the State's opinion on any of those matters relevant?
- In parsing the text, to what extent should account be taken of the wider interests of bondholders, the orderly operation of the international financial system, democratic cohesion and imperatives, and human rights and environmental concerns?

To state these questions, which are presently being debated in the context of Greece, is to see that Article 25 does not contain a rule. At best it articulates a general principle which needs to be applied in specific situations to come to life. Many legal scholars, most prominently Professor Dworkin, have distinguished principles from rules. Dworkin's general claim that several positivist accounts of law fail to take account of the weight to be accorded to principles within the overall system. My objective is not to enter into this debate (still less to debate whether Art 31(3)(c) includes or excludes principles),[48] but merely to note Dworkin's definition that a principle, unlike a rule, is merely "*a reason that argues in one direction but <u>does not necessitate a particular decision</u>*" (emphasis added).[49]

My interest is in what does necessitate a particular decision, when all one has to go on is a general principle. Hence my interest in the school of "*practical reasoning*", the jurisprudential line of thought which has grown out of the wider analytical philosophy tradition started by James and others, the focus of which has been on how to derive and understand reasons to act.

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[47] J Romesh Weeramantry *Treaty Interpretation in Investment Arbitration* (OUP, Oxford, 2012).

[48] But note Z Douglas *The International Law of Investment Claims* (CUP, Cambridge, 2009), arguing that the Article 31(3)(c) reference to "*rules*" is best understood as "*any legal norms*" (at 154).

[49] R Dworkin *Taking Rights Seriously* (rev ed, Harvard University Press, Harvard, 1978) at 26.

One article, in the legal tradition, has sought to explain the idea as follows:[50]

> *Practical reason, unfortunately, is easier to invoke than to define. Advocates of practical reason are a diverse group, both politically and intellectually. Like many groups, they are most united by what they reject – the primary (or even exclusive) reliance on deduction as a method of analysis. At the level of legal theory, practical reason means a rejection of foundationalism, the view than normative conclusions can be deduced from a single unifying value or principle. At the level of judicial practice, practical reason rejects legal formalism, the view that the proper decision in a case can be deduced from a pre-existing set of rules.*
>
> *...Although formalism and foundationalism are not inseparable, a common understanding of cognition often unites them. Under this view, "reason" consists of a set of logical procedures, which may be difficult to follow in a given case, but which will lead to a unique correct conclusion if correctly employed.*

This may not be precisely what Professor McLachlan had in mind, but it is the utopian epitome of the SI project.

Practical reasoning scholars assert that such a utopia exists only in the minds of theoreticians. Whilst it might be difficult to define what is meant by practical reasoning:[51]

> *...we had all better hope that judges have some capacity to engage in practical reason, because in hard cases – by definition – the ability of rules to dictate results straightforwardly has been exhausted, and some form of practical reason is necessary. Formalism cannot eliminate the existence of hard cases, and deciding those hard cases will remain a major part of the work of the appellate judge.*

Michael Detmold, Emeritus Professor of the University of Adelaide, is one of the most articulate advocates of practical reason.[52] He takes the view that:[53]

> *Law is practical. Legal reasoning is practical reasoning... Legal reasoning is practical in the sense that its natural conclusion is an action (in the judge's case the action of giving judgment) rather than a state of knowledge. [...]*

It follows that:[54]

> *Meaning is* use*, not some mental entity established prior to use; so that when a court applies, say, the statutory term of our example, "motor vehicle", to a particular contraption the meaning of "motor vehicle" is found only in its application or use.*

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[50] D Farber "The Inevitability of Practical Reason: Statutes, Formalism and the Rule of Law" (1992) 45 V and L Rev 533 at 539–540.

[51] Ibid at 559.

[52] J D Goldsworthy has summarised Detmold's approach by saying that "*[a]t the root of Detmold's various arguments is his conception of law as an activity rather than an inert system of norms. The most fundamental questions in law are practical, not theoretical....*": J D Goldsworthy "Detmold's 'The Unity of Law and Morality'" [1986] 12(1) Mon LR 8 at 25.

[53] M Detmold "Law as Practical Reason" (1989) 48(3) CLJ 436 at 436.

[54] Ibid, at 439.

This theory has been regularly applied to international law, to which it would seem ideally suited. As Professor Kratochwil has put it, in a detailed examination of norms in international law:[55]

> *[T]he legal character of rules and norms can be established when we are able to show that these rules and norms are* used *in a distinct fashion in making decisions and in communicating the basis for those choices to a wider audience.*

Or, as Kammerhofer succinctly describes it:[56]

> *Unlike an advisory opinion, a tribunal judgment contains a norm binding on the parties to the dispute. As such, it is not a logical deduction from the law that is applied, but an act of will that creates new law.*

In exercising this act of will, considerations other than strict legal norms play an important role. Kratochwil points out that values, as well as rules, are important in considering the practice of decision-making. As he says, judges who have to close gaps or assign weights to competing normative principles often have to resort to values to lend persuasiveness to their arguments.[57]

Perhaps the easiest way to grasp this insight is an extended thought experiment of Detmold's concerning a person seeking to acquire judicial office by exam, involving a problem consisting of facts A, B and C. The person concludes that, in circumstances A, B and C, the defendant ought to pay damages. The person passes the exam and is appointed a judge. Her first case turns out to be exactly the same case as the exam. A, B and C are proved. The judge is sitting alone in her chambers. But the judgment is still unwritten. What is giving the judge pause? It is not that she doubts her conclusion. She remembers her reasoning very clearly. It is not that there are facts which have been overlooked. It is just, as Detmold explains that the judge now has a "*particular, practical problem, which universal (hypothetical) reasoning does not solve*".[58] Detmold argues that this moment of indecision is a recurring theme in literature (think of Hamlet), and part of the human condition. Detmold discusses a passage from War and Peace, where Davoût fails to execute Pierre, due to a "*look that established human relations between the two men*". In Detmold's view, our judge, like Davoût, has "*at the moment of practicality entered the unanswering void of particularity...about which only mystical, poetic things can be said*".[59]

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[55] F Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (CUP, Cambridge, 1991) at 42.

[56] Kammerhofer, above n 19, at 10.

[57] Kratochwil, above n 55, at 66.

[58] Detmold, above n 53, at 455–456.

[59] Detmold, above n 53, at 457.

I imagine few international arbitrators, even experienced ones, consider themselves to operate within a mystical or poetic realm. If they do, they are careful to conceal their revelation behind pages of dogged prose.

The point remains, however, that the act of particularising a general principle by applying it to a specific instance is an act of will. And the more general the principle, the greater the act of will required. As Benjamin Cardozo said of the common law system, "*cases do not unfold their principles for the asking. They yield up their kernels slowly and painfully*".[60] It might equally be said of the international legal system in general, and international investment law in particular, that general principles are a dime a dozen – but they do not unfold their meaning for the asking. They do so only slowly and painfully. And in prising open their meaning, values and attitudes both play their part.

The feature of the system is intrinsic. For instance, Anthea Roberts has pointed out that, in the realm of modern CIL, declared by worthy General Assembly resolutions, *lex lata* is often *lex ferenda* dressed up. Hence "*[d]etermining what the law is from what practice has been relies heavily on the choice of characteristics under which precedents are classified and the degree of abstraction employed*".[61] In this way, modern custom can be "*descriptively inaccurate, because it reflects ideas, rather than actual standards of conduct*".[62] Citing HLA Hart, Roberts notes the critique that such customary laws "*lack efficacy because states have not internalized them as standards of behaviour to guide their actions and judge the behaviour of others*".[63]

A slightly different critique can be made of seeking to apply abstract principles, such as the necessity defence, within the context of a modern investment protection claim. Here, it is not the state which has difficulty internalising the rule – it is the tribunals charged with applying an investment treaty. Especially when Annulment Committees consider that their powers are limited to addressing matters of form and procedure, there is no doubt that applying the principle of necessity is a hellishly difficult job.

A common law analogy

Writing this adjective reminded me to re-read the famous English common law case of *R v Dudley & Stephens*.[64] In that case a five-member High Court was convened to consider a question of law arising out of findings of fact by a jury at the Devon and Cornwall Winter Assizes. The problem for the jury is that, having found the facts, they did not know

[60] B N Cardozo *The Nature of the Judicial Process* (YUP, New Haven, 1921) at 29.

[61] A Roberts "Traditional and Modern Approaches to Customary International Law" (2001) 95 AJIL 756 at 761.

[62] Ibid at 769. The prohibition of torture is an obvious example.

[63] Ibid.

[64] *R v Dudley & Stephens* (1884) 14 QBD 273.

whether or not they amounted to murder. The issue was whether the defence of necessity applied.

The grisly facts are well known. On 5 July 1884, Thomas Dudley and Edward Stephens, together with a Mr Brooks and the unfortunate Richard Parker, the cabin boy, found themselves cast away in a row boat 1600 miles from the Cape of Good Hope. They had no water and no food, save for two 11lb tins of turnips, on which they survived for three days. On the fourth day they caught a turtle, on which they survived for a week. This was the last food they had until the twentieth day, on which the act was committed. On the nineteenth day, Dudley and Stephens proposed to Brooks that lots should be cast to decide who should be put to death to save the rest, but Brooks dissented. The next day, Dudley indicated that the boy, who was helpless and immobile, had better be killed. Brooks again dissented, although Stephens did not. The three men fed on the boy for four days, upon which they were rescued, but in the lowest state of prostration.

What interests us today is not the gruesome facts,[65] but the way in which the five-member Court sought to discern the law to apply to them. Like much of modern day international law, there was no decided case of plain relevance; the principles were to be discerned from learned books of authority. However, depending on the level of abstraction used and scrutiny applied, such books could be found to say different things.

Most textbooks consulted proffered the general principle that "*in order to save your own life you may lawfully take the life of another*". But when looked at more closely, doubt crept in. Bracton, while supporting the principle, intimates that "*he is thinking of physical danger from which escape may be possible*". Lord Hale's and Sir Michael Foster's texts, whilst similarly broad, betray that the writers primarily had in mind self-defence. Serjeant Hawkin's chapter of justifiable homicide uses guarded language: "*[i]t is said to be justifiable*". Justice Stephens' book more squarely embraced the proposition, but was perhaps against the weight of authority.

The recently formed commission preparing the Criminal Code had sat squarely on the fence, saying "*we judge it is better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case*".[66] As to this advice, Lord Coleridge CJ commented ruefully:

> *It would have been satisfactory to us if these eminent persons could have told us whether the received definitions of legal necessity were in their judgment correct and exhaustive, and if not, in what way they should be amended, but as it is we have, as they say, 'to apply the principles of law to the circumstances of this particular case'.*

[65] Beware that Lord Coleridge CJ indicated that, "*other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury*": at 279.

[66] Ibid, at 286.

It is that act of applying a general principle to a particular case which was the heavy and difficult task. In this, the most useful authority proves to be John Milton:[67]

> *It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No".* "So spake the Fiend, and with necessity / The tyrant's plea, excused his devilish deeds".[68]

And so, the prisoners were sentenced to death.[69]

Article 25 does not entail results

The main lesson I think we can learn is that there is a difference between general principles, even when accepted at a level of generality, and what I will call effective norms.

Necessity is, at present, a general principle only; or CIL in a general sense. When sought to be applied to serious economic crises, it remains inchoate, vague and opaque. Its true contours become clear only as it is applied to a specific situation. It has not yet been applied as a stand-alone defence, although it was applied as an additional supportive ground in *LG&E*. Although there is general agreement that it can apply to certain economic crises, it is perhaps too early to say what actual conditions would have to exist to have confidence that it would preclude liability.

The difficulty for tribunals in summoning the act of will to apply the necessity defence has been, as it was for the Court in *Dudley & Stephens*, a lack of detailed sources from which to draw concrete analysis. This is changing,[70] although the emphasis of much scholarly work remains on the process of investment treaty law rather than on its substance.[71]

From a sociological perspective, the inconsistency of key decisions, both as to reasoning and result, indicates that the epistemic community of international investment law practitioners has not yet converged on a dominant understanding of how its key principles operate and interrelate. This will come in time. Looking around, one can see how specific rules can be derived from general principles. For instance, many private international textbooks, notably *Dicey & Collins* and the writers on international sales law, have created

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67 Ibid, at 287–288.

68 J Milton "Paradise Lost" *Book IV*, ll 393–394.

69 Although a footnote to the case indicates that this sentence was afterwards commuted by the Crown to six months' imprisonment.

70 See, most notably, Desierto, above n 16.

71 Compare McLachlan et al *International Investment Arbitration: Substantive Principles* (OUP, Oxford, 2008), which does not address the ILC Draft Articles.

carefully indexed digests of second and third order rules ultimately derived from abstract principles.

But surely we still have rules?

So where does this leave us? Professor McLachlan has warned that systemic integration could not resolve "*true conflicts of norms in international law*", but thought that it could operate "*before an irreconcilable conflict of norms has arisen*".[72] As he says:[73]

> *Rules derived from these sources [custom and general principles] may well be expressed at a very great level of generality. They may even, as in the case of general principles derived from private law sources, be inchoate in character. But they are nonetheless rules of law within the international legal system for all that.*

I wonder whether this last sentence, whilst correct, is only trivially true. Necessity may be a combination of formal principles – codified by the ILC and caught by Art 31(3)(c) – but is it yet an effective norm?[74]

Taken to its logical conclusion, the practical reason critique of positivism goes further than insisting – as did Dame Higgins – that to understand a legal system you need to take account of non-rules, such as systems and processes.[75] Even doctrine which is stated as a high-level principle or a rule may yet not have the force of an effective norm in a specific situation, because it is not, or cannot yet be, applied to that situation in practice.

As Professor Raz has said:[76]

> *A person follows a mandatory norm only if he believes that the norm is a valid reason for him to do the norm act... and that it is a valid reason for disregarding conflicting reasons.... Having a rule is like deciding in advance what to do. When the occasion for action arises one does not have to reconsider the matter for one's mind is already made up. The rule is taken not merely as a reason for performing its norm act but also as resolving practical conflicts by excluding conflicting reasons. This is the benefit of having rules and that is the difference between mandatory norms and other reasons for action.*

On this definition the necessity defence appears little like a mandatory norm, capable of dictating actions and hence results.

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[72] McLachlan I, above n 1, at 318.

[73] McLachlan I, above n 1, at 283.

[74] Cf rules are not necessarily principles, but as McLachlan concedes, words of Art 31(3)(c) are "*apt to include all of the sources of international law, including custom, general principles, and, where applicable, other treaties*": McLachlan I at 290. Also at 313: "*[I]t should not be forgotten that Article 31(3)(c)'s reference to 'rules of international law' comports a reference to the international legal system as a whole, many of whose rules are necessarily expressed at a high level of generality*". See also Z Douglas, above n 48.

[75] R Higgins *Problems and Process: International Law and How We Use It* (OUP, Oxford, 1995) at 8.

[76] J Raz *Practical Reasons and Norms* (OUP, Oxford, 1999) at 73.

On this basis, I'd like to revisit Professor McLachlan's "*master key*" analogy. To my mind, the problem is not that there is a room which cannot be opened with specific keys, so a master key is needed. The problem is more like being unable to decide which room to enter, though all are unlocked. Systemic integration gives us a Google map of the neighbourhood or, perhaps, a detailed blueprint of a different (but potentially similar) house. But the power of decision still rests in the mind of the adjudicator. They still need to decide. They can use the other maps available through SI as a reason for decision. But this will not vanquish a feeling of indecision or personal responsibility, because those blueprints were not created for the correct house.

Where does this leave SI?

I think Anthea Roberts' article on the clash of paradigms relatively accurately assesses the state of development of international investment law.[77] At present there are different, value-laden, paradigms which different stakeholders in the system use to analogise to and characterise the nascent system. These interpretative devices are invoked because of the need for guidance in decision-making. Such guidance cannot be found wholly within the treaty texts. A world view, against which to assess difficult policy choices, or make hard decisions, is needed. Only it is not yet settled from where these values, and hence the required guidance, can legitimately be sourced.

International law purists, such as Desierto, abjure attempts such as that in the *Continental Casualty* case to look horizontally at WTO and other jurisprudence in interpreting necessity. They might have a similar reaction to Roberts' article. The controversy of asserting the dependence of international investment law on interpretative paradigms is that it deflates the objective legalistic account of the enterprise. If international investment is to be law, then surely it should be grounded in identifiable obligations, not a potpourri of choices.

Professor McLachlan's quest is to fashion SI as a theoretical pathway though which general principles of law can be accessed, leading to a systematic accretion of decisions and writings which can then, in turn, be used to inform (or create) general principles of international law. This could eventually happen.

In the meantime, international investment law will develop in a way which seems to decision-makers to strike the most appropriate balance between investor rights and state autonomy – and achieves the acceptance of the epistemic community, both for result and the intellectual process used to arrive at that result. It may be that, in a regime characterised by private rights of action against states, less orthodox, though still principled, reasoning will come to be accepted in order to locate the optimal balance. Thus, I entirely understand the attempts of global administrative law scholars to imbue international investment law with principles of domestic administrative law.

[77] A Roberts "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System" 106 AJIL I (forthcoming, 2012) at 6.

At the end of his second article, Professor McLachlan says this:[78]

> *If the practice of investment arbitral tribunals helps to explain the operation of the larger system of international law better, it may be because it exposes to view the essential dependence of the system as a process of reasoning upon a set of norms which are not fully explained as either custom or general principles of domestic law. Rather, they are general principles of international law.*

It is correct to say that the reasoning of tribunals cannot be fully explained by reference to custom or general principles of domestic law. But it seems to me to beg the question to say that the source of law being applied by investment tribunals is "*general principles of international law*". What the tribunals are doing may well, in time, uncover or create such general principles or even custom.

But is it really true to say that the source of law which is being applied is really general principles of international law? It is, to my mind, rather a form of bootstrapping to claim that the material which decisively informs the content of the necessity defence as applied international investment law is actually SI at work.

Kammerhofer sought to articulate a similar idea in the following words:[79]

> *[T]he legal effects that supposedly follow from the systematic nature of international law are simply assumed, not proven, to exist. Postulating a principle does not mean proving it. Proving a general norm does not entail proving the legal consequences that follow from it. An example may make this point clearer. Assume that under a municipal statue citizens have the right to good roads. This does not mean that citizens may force workers to improve roads at gunpoint, because proving that the right to good roads is valid does not entail proving the right to enforce this right.*

An important questions is whether SI is to be understood as a normative or a descriptive theory. If SI is to be understood as a normative theory about how international law should work, then I suggest it is somewhat ahead of its time. Sufficient general principles do not yet exist in a sufficiently clear form for it to be said that the entire reasoning process is endogenous to the international legal system. As many critics have pointed out, much of the thinking is muddled and not representative of general principles being applied without intermediation from outside ideas or influences. As with the bench in *R v Dudley & Stephens*, the tribunals in the *Argentina* necessity cases lack the necessary foundation. Just like *R v Dudley & Stephens*, what goes into their reasoning reflects a combination of influences (although John Milton has yet to rate a mention).

Of course, for formal coherence, Professor McLachlan needs to call the inputs of tribunal reasoning "*general principles of international law*", for what else could they be? They are not treaties, or general principles common to civilised nations. Whilst necessity is part of CIL, its contours when applied to economic crises are not yet clarified. So, general

[78] McLachlan II, above n 1, at 401.

[79] Kammerhofer, above n 19, at 4.

principles of international law it must be. But this is merely to use a label because it is the only one available as a matter of law, not because, as a matter of fact it is descriptively accurate. Hence, the divergence between positivism and pragmatism.

If SI is to be understood as a descriptive theory, it is a formal positivist one. It explains what must be deemed to be the case for all the elements to cohere. But we should not pretend that we can, by this process of labelling, actually create coherence.

I have one caveat to this observation. If SI is understood as a descriptive theory not of how law is created, but merely of the general process which is being followed by tribunals, and of the outcome to which that process will eventually lead, I think it is closer to the truth. The process is of borrowing from wherever one can, including from other branches of international law. In other words, to the extent SI can be used as a descriptive theory, it is only at the highest, Higginsian level: at this very general level, the language of SI may be used to describe the messy process of international law decision-making.

Conclusion

In short, I think the necessity cases do not support the notion of SI as a genuinely cohering mechanism for international investment law.

Accordingly, in my view the career of what Professor McLachlan calls the "*neglected son*",[80] art 31(3)(c), is steady, but not stellar. He is not a celebrity or a CEO. I like to imagine he works in a library. He is a font of knowledge, but it is difficult to discern which parts of this knowledge are truly relevant and which are merely interesting. He does not yet hold all the answers to important questions; but can always offer some facts which may, or may not, be pertinent, depending on who is making the decision.

It is appropriate, indeed important, that procedural mechanisms exist for tribunals and other international decision-makers to have regard to other areas of international law. It is useful for such mechanisms to be provided for expressly, as in art 31(3)(c). What I wish to resist is simply the strong form of the SI argument, which is to, by intellectual sleight of hand, elevate those procedural mechanisms into a deductive argument that international law is, therefore, a coherent whole.

From a practical perspective, the doctrine of necessity for international investment law will be synthesised over time as leading awards, textbook writers and state practice converges on the nuances of an approach as applied to concrete economic situations. In many cases, this process will be supported by reference to certain selected episodes from international law history, including in other areas of the law. One may claim that this process is the deductive application of general principles of international law at work. But one may as well claim that judges and arbitrators never make law, they merely discover it.

[80] McLachlan I, above n 1, at 289.

APPENDIX 1: THE ARGENTINA NECESSITY CASES – LIST OF ALL DECISIONS

1 *Abaclat and Others v Argentina* ICSID Case No ARB/07/5, (Argentina-Italy BIT), Decision on Jurisdiction and Admissibility, 4 August 2011.

2 *AES Corporation v Argentina* ICSID Case No ARB/02/17, (Argentina-US BIT) Decision on Jurisdiction, 26 April 2005.

3 *AWG Group Ltd v Argentina* UNCITRAL (UK-Argentina, Argentina-France, Argentina-Spain), Decision on Liability, 30 July 2010.

4 *Azurix v Argentina* ICSID Case No ARB/01/12 (US-Argentina), Award, 14 July 2006.

5 *BG Group Plc v Argentina* UNCITRAL (UK-Argentina), Award, 24 December 2007.

6 *BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v Argentina* ICSID Case No ARB/04/8, (Argentina-US BIT), 27 July 2006 and *Pan American Energy LLC and BP Argentina Exploration Company v Argentina* (Argentina-US BIT) ICSID Case No ARB/03/13, Decision on Preliminary Objections, 27 July 2006.

7 *Camuzzi International S.A. v Argentina* ICSID Case No ARB/03/2, (Argentina-Belgium-Luxembourg BIT), Decisions on Objections to Jurisdiction, 11 May 2005.

8 *Camuzzi International S.A. v Argentina* ICSID Case No ARB/03/7, (Argentina-Belgium-Luxembourg BIT), Decisions on Objections to Jurisdiction, 20 June 2005.

9 *CMS Gas Transmission Company v Argentina* ICSID Case No ARB/01/8 (US-Argentina), Award, 12 May 2005; Annulment decision, 25 September 2007.

10 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v Argentina* ICSID Case No ARB/97/3 (France-Argentina BIT), Award (21 November 2000), Annulment of Award (3 July 2002).

11 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v Argentina (No 2)* ICSID Case No ARB/97/3 (France-Argentina BIT), Award (20 August 2007), Annulment (10 August 2010).

12 *Continental Casualty Company v Argentina* ICSID Case No ARB/03/9, (US-Argentina) Award, 5 September 2008; Annulment decision, 16 September 2011.

13 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentina* ICSID Case No ARB/03/23, (Argentina-France BIT and Argentina-Belgium-Luxembourg BIT) Decision on jurisdiction, 5 August 2008.

14 *El Paso Energy International Company v Argentina* ICSID Case No ARB/03/15, (Argentina-US BIT) Award, 31 October 2011.

15 *Enron Corporation, Ponderosa Assets LP v Argentina* ICSID Case No ARB/01/3, (US-Argentina) Award, 22 May 2007; Annulment decision, 30 July 2010.

16 *Gas Natural SDG, S.A. v Argentina* ICSID Case No ARB/03/10, (Argentina-Spain BIT) Decision on jurisdiction, 17 June 2005.

17 *Hochtief AG v Argentina ICSID Case* No ARB/07/31, (Argentina-Germany BIT), Decision on Jurisdiction, 24 October 2011.

18 *ICS Inspection and Control Services Limited (United Kingdom) v Argentina* UNCITRAL (Argentina-UK BIT), PCA Case No 2010-9, Award on jurisdiction, 10 February 2012.

19 *Impregilo S.p.A v Argentina* ICSID Case No ARB/07/17 (Italy-Argentina BIT) Award, 21 June 2011.

20 *Lanco International Inc v Argentina* ICSID Case No ARB/97/6, (Argentina-US BIT), Jurisdiction, 8 December 1988.

21 *LG&E Energy Corp v Argentina* ICSID Case No ARB/02/1, (US-Argentina BIT) Decision on Liability, 3 October 2006.

22 *Metalpar S.A. and Buenos Aires S.A. v Argentina* ICSID Case No ARB/03/5 (Chile-Argentina BIT), Award, 6 June 2008.

23 *National Grid plc v Argentina* UNCITRAL (UK-Argentina BIT), Award, 3 November 2008.

24 *SAUR International SA v Argentina* ICSID Case No ARB/04/4, (Argentina-France BIT) Decision on Objections to Jurisdiction, 27 February 2007; Decision on Jurisdiction and Liability, 6 June 2012 (not yet available in English and therefore excluded).

25 *Sempra Energy International v Argentina* ICSID Case No ARB/02/16, (US-Argentina) Award, 28 September 2007; Annulment decision, 29 June 2010.

26 *Siemens v Argentina* ICSID Case No ARB/02/8 (Germany-Argentina BIT), 6 February 2007.

27 *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v Argentina* ICSID Case No ARB/03/17, ARB/03/19 (France-Argentina and Spain-Argentina BITs), Decision on Liability, 30 July 2010.

28 *Telefónica S.A. v Argentina* ICSID Case No ARB/03/20 (Argentina-Spain BIT), Decision of the Tribunal on Jurisdiction, 25 May 2006.

29 *Total S.A. v Argentina* ICSID Case No ARB/04/01 (France-Argentina BIT), Decision on Liability, 27 December 2010.

30 *TSA Spectrum de Argentina S.A. v Argentina* ICSID Case No ARB/05/5 (Argentina-Netherlands BIT), Award (on jurisdiction only), 19 December 2008.

31 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID Case No ARB/07/26, Decision on Proposal to Disqualify Arbitrator, 12 August 2010.

32 *Wintershall Aktiengesellschaft v Argentina* ICSID Case No ARB/04/14, Award (on jurisdiction only), 8 December 2008.

APPENDIX 2: THE ARGENTINA NECESSITY CASES – TABLE OF SUBSTANTIVE DECISIONS

		Panel		***Annulment***	
Claimant	**Citation and BIT at issue**	**Non-precluded measures/BIT defence**	**Necessity at CIL**	**Ground of annulment and result**	**Comment**
AWG Group Ltd and others	UNCITRAL (UK/Argentina, Argentina/France, Argentina/Spain), Decision on Liability, 30 July 2010. Note dissent of Pedro Nikken on FET.	Not provided for in any of the BITs (at [262]).	Denied: Argentina's measures in violation of BIT were not only means to satisfy its essential interests and Argentina contributed to emergency situation (at [265]).	-	CIL relevant where not provided in BIT.
Azurix	ICSID Case No ARB/01/12 (US/Argentina), Award 14 July 2006.	-	-	-	-
BG Group Plc	UNCITRAL (UK/Argentina), Award, 24 December 2007.	-	Denied: Argentina may not invoke CIL necessity doctrine to excuse liability for breach of BIT.	-	CIL impliedly precluded by BIT (goes against the general trend).
CMS Gas Transmission Company.	ICSID Case No ARB/01/8 (US/Argentina), Award, 12 May 2005; Annulment decision, 25 September 2007.	Argued at [99]. Tribunal determines that necessity under Treaty does not excuse liability but should be considered in determining compensation, at [356]. Refers extensively to	Denied (at [331]). Argued at [99], [308], [309]–[311]. ILC Articles on state responsibility reflects CIL at [315]. Also reference to CIL in determining how to characterise the crisis: *Gaz*	Tribunal should have been clearer in explaining that for same reasons as failure of necessity as matter of CIL, also failed necessity under Treaty (at [125]–[127]). But no annulment as implicitly able to be understood. Manifest excess of powers: Tribunal assimilated conditions necessary for	Annulment Committee says wrong for tribunal to consider that art XI and CIL give rise to the same standard. Therefore would not be *correct* to apply CIL when interpreting BIT. Committee did not

		Panel		***Annulment***	
Claimant	**Citation and BIT at issue**	**Non-precluded measures/BIT defence**	**Necessity at CIL**	**Ground of annulment and result**	**Comment**
		international law when determining whether art XI satisfied (at [368]– [372]), at [379]–[394].	*de Bordeaux* (1916) (at [241]).	implementation of art XI and those at CIL. The two are substantively different (at [129]–[130]), and they are not necessarily on the same footing (at [131]), CIL must be subsidiary to art XI, which is lex specialis (at [133]). But no annulment: although applied "cryptically and defectively", Tribunal did apply art XI (at [136]).	undertake its own analysis of art XI.
Compañiá de Aguas del Aconquija S.A. and Vivendi Universal	ICSID Case No ARB/97/3 (France/Argentina BIT), Award (21 November 2000), Annulment of Award (3 July 2002).	-	-	Annulled.	-
Compañiá de Aguas del Aconquija S.A. and Vivendi Universal (No 2)	ICSID Case No ARB/97/3 (France/Argentina BIT), Award (20 August 2007), Annulment (10 August 2010).	-	-	Not annulled.	-
Continental Casualty Company	ICSID Case No ARB/03/9, (US-Argentina) Award, 5 September 2008; Annulment decision, 16 September 2011	Made out in part (at [219]). Panel refers to WTO "necessity" test to support interpretation of the treaty.	- Applies annulment decisions in *CMS* as meaning that CIL necessity has a different meaning to art XI of BIT (fn 236).	Award upheld (at [131]–[132]). Dismissed Continental's argument that Tribunal failed to state reasons by failing to consider relationship between art XI of BIT and art 25 of Draft Arts on State Responsibility – reasons were given; no failure to give	Arbitrators rely on WTO law to support their interpretation of art XI, rather than CIL. This approach upheld on annulment application.

		Panel		*Annulment*	
Claimant	**Citation and BIT at issue**	**Non-precluded measures/BIT defence**	**Necessity at CIL**	**Ground of annulment and result**	**Comment**
			Necessity is "exceptional". Treaty is not "inseparable" from CIL standard (At [192]). Application of art XI renders "superfluous a detailed examination of the defense of necessity under general international law" (at [162]).	reasons as to why it would not grant compensation even for those acts that occurred after the state of necessity.	
Enron Corporation, Ponderosa Assets LP	ICSID Case No ARB/01/3, (US-Argentina) Award, 22 May 2007; Annulment decision, 30 July 2010.	Not self-judging (at [322]), must rely on CIL to give definition to the Treaty (at [333]), Treaty is "inseparable" from CIL insofar as necessity concerned (at [334]).	Denied. Not fully met (at [313]).	Annuls decision on CIL on the basis that Tribunal does not address a number of key issues when considering whether art 25 made out (manifest excess of powers) – whether this was the "only way" available to Argentina (at [368]), whether relative effectiveness of alternative measure is to be taken into account (at [371]), who makes decision as to whether there is a relevant alternative (at [372]), and whether Argentina has contributed to the state of necessity (at [393]) and [395]. However, no annullable error on art XI as reasons for finding that the	Enron Tribunal decision the same as *Sempra* on necessity. Somewhat surprisingly, then, though both awards are annulled, the reasoning of the annulment committees are quite different – *Enron* Committee does not annul on the basis that the tribunal erred in treating CIL and art XI as the same substantive requirements. Leaves ambiguous how

		Panel		*Annulment*	
Claimant	**Citation and BIT at issue**	**Non-precluded measures/BIT defence**	**Necessity at CIL**	**Ground of annulment and result**	**Comment**
				same as CIL sufficiently clear, not for Committee to decide whether interpretation correct (at [403]). But annuls BIT decision on the basis that the necessity ground has already been annulled (at [405]).	future tribunals should properly have regard to CIL in interpreting BIT.
Impregilo S.p.A	ICSID Case No ARB/07/17 (Italy/Argentina BIT) Award, 21 June 2011	No equivalent of art XI of US-Argentina BIT. But does consider art 4 of Italy-Argentina BIT, which provides NT and MFN obligations in state of emergency, war, or other similar events (at [338]), but says not a defence but instead imposes obligations (at [341]).	Denied. Article 4 does not exclude CIL (at [343]). But Tribunal finds by majority that ILC draft art 25 not made out, as Argentina contributed to the state of necessity (at [358]). Professor Brigitte Stern dissented on basis that a State's contribution to a situation of economic crisis should not be lightly assumed.	-	CIL relevant where not provided for in the Treaty. But not made out.
LG&E Energy Corp	ICSID Case No. ARB/02/1, (US-Argentina BIT) Decision on Liability, 3 October 2006.	Made out at [229]. Focus is on text of treaty, CIL applied to the extent required for interpretation and application of its provisions (at [206]). See also at [266]	Made out – but is supportive, rather than essential (at [245], [258] for example).	-	CIL rendered a supportive role and focus of Tribunal on the wording of the BIT. E.g. when considering whether or not compensation was required to be paid notwithstanding the state

		Panel		***Annulment***	
Claimant	**Citation and BIT at issue**	**Non-precluded measures/BIT defence**	**Necessity at CIL**	**Ground of annulment and result**	**Comment**
		consequences of state of necessity being made out.			of necessity, Tribunal applies wording of BIT rather than CIL (at [260]).
Metalpar S.A. and Buenos Aires S.A.	ICSID Case No ARB/03/5 (Chile/Argentina BIT), Award, 6 June 2008 (unofficial English translation).	Not considered (not clear whether there was an express article in the BIT).	- Not required to consider as Claimants had not proved that Argentina had infringed its rights (at [213]).	-	-
National Grid plc	UNCITRAL (UK/Argentina BIT), Award, 3 November 2008.	Not provided for in Treaty – only dealt with in art 4 (as in *Impregilo*).	Denied. Considered, but not made out as Argentina's own evidence showed that its contribution to the crisis was considerable (at [262]).	-	CIL relevant where not provided in Treaty (at [255]). But not made out.
Sempra Energy International	ICSID Case No. ARB/02/16, (US-Argentina) Award, 28 September 2007; Annulment decision, 29 June 2010.	Treaty is "inseparable" from CIL of necessity, given that it is under CIL that conditions of necessity have been defined (at [376], [388].) As CIL necessity not made out, neither is BIT. Art XI not self-judging (by reference to	Denied. Not fully met (at [355]).	Award annulled in its entirety on basis of manifest excess of powers in respect of failure to apply BIT (at [159], [219], [222]). No annulment for failure to state reasons on self-judging nature (on contrary, gave reasons – (at [170]). Treaty takes precedence over CIL,	NB at [346] Tribunal struggles to reconcile different ICSID decisions – arguably shows that reference to CIL does not bring greater coherence. Annulment decision suggests is incorrect to conclusively refer to CIL

		Panel		***Annulment***	
Claimant	**Citation and BIT at issue**	**Non-precluded measures/BIT defence**	**Necessity at CIL**	**Ground of annulment and result**	**Comment**
		CIL).		should consider BIT first, then CIL (at [176]).	in interpreting BIT. Takes approach that BIT is *lex specialis*.
Siemens v. Argentina	ICSID Case No ARB/02/8 (Germany/Argentina BIT), 6 February 2007.	-	-	-	-
Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.	ICSID Case No ARB/03/17, ARB/03/19 (France/Argentina and Spain/Argentina BITs), Decision on Liability, 30 July 2010. Note dissent of Pedro Nikken on FET.	-	Denied. Not made out as Argentina's measures were not the only available means, and because Argentina contributed to the emergency situation (ARB/03/17 at [243] and ARB/03/19 at [265]).	-	CIL relevant where not provided for in BIT. But not made out.
Total S.A. v. The Argentine Republic	ICSID Case No ARB/04/01 (France/Argentina BIT), Decision on Liability, 27 December 2010.	Art 5(3) of BIT – NT/MFN obligation still in force in situation of emergency, war etc (at [227]) offers no defence (at [231]).	Denied. Not made out (at [224], [345], [484]) - Argentina failed to show no other reasonable means.	-	CIL was dealt with first, no discussion of whether CIL precluded by art 5