

Mühlthal den 23.1.2006

An das
Amtsgericht
Frankfurt am Main

Gerichtsstr. 2
60313 Frankfurt am Main
Telefon: (0 69) 1367 -xxxx
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Klage im Urkundsprozess

- 32 C 3052/02 – 22 -

In Sachen

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- Kläger -

gegen

Die **Republik Argentinien**, vertreten durch den Präsidenten, Nestor Kirchner, Balcarce 50, 1064 Buenos Aires, Argentinien. Zustellungsbevollmächtigte: FIDEUROP Treuhandgesellschaft für den gemeinsamen Markt mbH., Marie-Curie-Str. 30, 60439 Frankfurt am Main; jetzt nach Umzug unter der Adresse : Bockenheimer Anlage 15, Mozartplatz 60322 Frankfurt a. M. Telefon: +49-69-75 60 95-0 Telefax: +49-69-75 60 95-512. Im Falle der Annahmeverweigerung: Botschaft der Argentinischen Republik, S.E. Herr Enrique Jose Alejandro Candioti, Dorotheenstr. 89, 10117 Berlin.

Verfahrensbevollmächtigte und Vertreter der Republik Argentinien:
Rechtsanwälte/Anwaltsbüro Coutandin & Strba Rechtsanwälte GbR, Eschenheimer Anlage
28, 60318 Frankfurt a. M., Tel. 069/ 91 50 97 – 0, Fax. 069/ 91 50 97 - 20

Achtung: Zustellung an Beklagte, hier Zustellungsbevollmächtigte FIDEUROP
Treuhandgesellschaft für den gemeinsamen Markt mbH., an die neue Adresse (nach Umzug)
unter: Bockenheimer Anlage 15, Mozartplatz 60322 Frankfurt a. M. Telefon: +49-69-75 60
95-0 Telefax: +49-69-75 60 95-512. (in den Räumlichkeiten von BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH.)

- Beklagte-

Vorlage der „Notstandsgesetzes“-verlängerung per 2006

Antrag auf Wiederaufnahme des Verfahrens und Antrag auf mündliche Verhandlung zu diesem Punkt

Weitere Begründung auf Grund des ICSID¹-Awards in Sachen CMS Gas Transmission Company vom April 2005

Ich stelle folgende Anträge:

1. Wiederaufnahme des nach § 148 ZPO ausgesetzten Verfahren.
2. Mündliche Verhandlung über die Frage der Wiederaufnahme.

Begründung:

In seinem Urteil aus dem April 2005 (Date of dispatch to the parties: May 12, 2005) zu Gunsten des Klägers CMS vs. Argentinien geht das organisatorisch der Weltbank zugeordnete Schiedsgericht (ICSID) u. a. auch ausführlich auf den Artikel 25 des Regelungsentwurfs der International Law Commission zur Staatenverantwortlichkeit ein. Dieser Artikel wird regelmäßig von der Beklagten Argentinien in ihren knapp 60-seitigen Schriftsätzen als Grundlage für ihre Verteidigungsstrategie genommen.

¹ „...INTERNATIONALES ZENTRUM FÜR DIE BEILEGUNG VON INVESTITIONSTREITIGKEITEN
Das Internationale Zentrum für die Beilegung von Investitionsstreitigkeiten (International Centre for Settlement of Investment Disputes, **ICSID**) schlichtet Investitionsstreitigkeiten zwischen Regierungen und ausländischen Investoren. Das ICSID wurde 1966 gegründet und hatte Mitte 2004 140 Mitglieder. 2003 wurden 26 Anrufungen zur Schlichtung von Investitionsstreitigkeiten bearbeitet. ICSID 1818 H Street, N.W. Washington, DC 20433 USA Telefon: 001 / 202 / 458-1534 Fax: 001 / 202 / 522-2615...“; zitiert von der Website des BMZ (http://www.bmz.de/de/wege/multilaterale_ez/akteure/weltbank/icsid/)
<http://www.worldbank.org/icsid/>

So heißt es dort:

„...Die völkergewohnheitsrechtlich anerkannten Voraussetzungen eines Staatsnotstandes sind in Art. 25 des Regelungsentwurfs der International Law Commission zur Staatenverantwortlichkeit formuliert.

Nach dem klaren Wortlaut des Art. 25 des Regelungsentwurfs zur internationalen Staatenverantwortlichkeit (im Folgenden „ILC-Entwurf“) der Völkerrechtskommission der Vereinten Nationen ist die von einem Staat getroffene Maßnahme zur Abwehr einer Gefahr für wichtige Staatsinteressen nicht rechtswidrig:

„ / . 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. "

Die deutsche Übersetzung (durch den Unterzeichner²) lautet:

„1. Auf den völkerrechtlichen Notstand kann sich ein Staat zum Ausschluss der Rechtswidrigkeit eines im Widerspruch zu seinen internationalen Verpflichtungen stehenden Handelns nur berufen, wenn:

(a) es sich um die einzige Möglichkeit des Staates zum Schutz wichtiger Interessen gegen eine schwere und nahe bevorstehende Gefahr handelt, und

(b) nicht ein wichtiges Interesse einzelner oder mehrerer Staaten, denen gegenüber die Verpflichtung besteht, oder der gesamten Staatengemeinschaft beeinträchtigt.

² Unterzeichner ist in diesem Falle RA Strba; Gleichwohl bin ich der Meinung, dass diese Schriftsätze, und somit auch diese Übersetzung von Cleary, Gottlieb stammen.

2. Ein Staat kann sich nicht auf den völkerrechtlichen Notstand als Rechtfertigungsgrund berufen, falls:

(a) Die internationale Verpflichtung eine Berufung auf den völkerrechtlichen Notstand nicht zulässt; oder

(b) der Staat die Entstehung des Notstands mitverursacht hat "

Die Voraussetzungen des völkerrechtlichen Staatsnotstandes lassen sich anhand des ILC-Entwurfs wie folgt zusammenfassen:

- Der Staatsnotstand muss durch ein wichtiges Staatsinteresse hervorgerufen sein.
- Dieses Staatsinteresse muss durch eine schwere und unmittelbar bevorstehende Gefahr bedroht sein.
- Die fragliche Handlung muss das einzig mögliche Mittel zum Schutz dieses essentiellen Interesses sein und darf kein wichtiges Interesse des Gläubigers in ernster Weise beeinträchtigen.
- Der notleidende Staat darf den Staatsnotstand nicht selbst herbeigeführt haben.

Völkergewohnheitsrecht entsteht unter anderem aus einer allgemeinen, als Recht anerkannten Übung der Staaten (*Opinio Juris*) (siehe Artikel 3S(b) des IGH-Statuts, Anlage B 12). Die Entstehung von Völkergewohnheitsrecht setzt also — per definitionem - eine Kodifizierung nicht voraus....."

Dieser Kriterien-Katalog wird in dem ICSID-Urteil (Schiedsspruch) minutiös abgearbeitet und führt zu dem Ergebnis, **dass die kumulative Erfüllung nicht gegeben ist** und deshalb zu einer Zurückweisung der Notstandseinrede führt.

Auf den Seiten 91 bis 96³ heißt es:

„...30. *The Tribunal's Findings in Respect of the State of Necessity under Customary International Law*

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. This Article, in turn, is based on a number of*

³ Das Dokument hat insgesamt 147 Seiten und besteht aus 472 (RN) Absätzen und 231 Fußnoten. Um das Gericht nicht mit zuviel Papier zu belasten, sind in der Anlage nur etwa 10 Seiten daraus beigefügt. Auf Wunsch stelle ich natürlich gerne das komplette Papier dem Gericht und der Beklagten zur Verfügung. Ansonsten kann es auch im www abgerufen werden: http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf. [Die ita stellt ihre Ziele unter der Web-Adresse <http://ita.law.uvic.ca/about.htm> dar: „...**International treaty arbitration (ita)** serves as a resource for lawyers, academics, government officials, researchers and members of civil society who are interested in international investment law. ita provides: * access to all publicly available investment treaty awards; * information and resources relating to investment treaties and investment treaty arbitration; and * links to further resources. ita welcomes submission of investment treaty materials for posting. Please email materials to Professor Andrew Newcombe...“

relevant historical cases discussed in the Commentary,¹⁶⁶ with particular reference to the *Caroline*,¹⁶⁷ the *Russian Indemnity*,¹⁶⁸ *Société Commerciale de Belgique*,¹⁶⁹ the *Torrey Canyon*¹⁷⁰ and the *Gabcikovo-Nagymaros* cases.

316. Article 25 reads as follows:

"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."

317. While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse. The very opening of the Article to the effect that necessity "may not be invoked" unless strict conditions are met, is indicative of this restrictive approach of international law. Case law, state practice and scholarly writings amply support this restrictive approach to the operation of necessity.¹⁷¹ The reason is not difficult to understand. If strict and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law.

318. The Tribunal must now undertake the very difficult task of finding whether the Argentine crisis meets the requirements of Article 25, a task not rendered easier by the wide variety of views expressed on the matter and their heavy politicization. Again here the Tribunal is not called upon to pass judgment on the measures adopted in that connection but simply to establish whether the breach of the Treaty provisions discussed is devoid of legal consequences by the preclusion of wrongfulness.

319. A first question the Tribunal must address is whether an essential interest of the State was involved in the matter. Again here the issue is to determine the gravity of the crisis. The need to prevent a major breakdown, with all its social and political implications, might have entailed an essential interest of the State in which case the operation of the state of necessity might have been triggered. In addition, the plea must under the specific circumstances of each case meet the legal requirements set out by customary international law.

320. *In the instant case, the Respondent and leading economists are of the view that the crisis was of catastrophic proportions; other equally distinguished views, however, tend to qualify this statement. The Tribunal is convinced that the crisis was indeed severe and the argument that nothing important happened is not tenable. However, neither could it be held that wrongfulness should be precluded as a matter of course under the circumstances. As is many times the case in international affairs and international law, situations of this kind are not given in black and white but in many shades of grey.*

321. *It follows that the relative effect that can be reasonably attributed to the crisis does not allow for a finding on preclusion of wrongfulness. The Respondent's perception of extreme adverse effects, however, is understandable, and in that light the plea of necessity or emergency cannot be considered as an abuse of rights as the Claimant has argued.*

322. *The Tribunal turns next to the question whether there was in this case a grave and imminent peril. Here again the Tribunal is persuaded that the situation was difficult enough to justify the government taking action to prevent a worsening of the situation and the danger of total economic collapse. But neither does the relative effect of the crisis allow here for a finding in terms of preclusion of wrongfulness.*

323. *A different issue, however, is whether the measures adopted were the "only way" for the State to safeguard its interests. This is indeed debatable. The views of the parties and distinguished economists are wide apart on this matter, ranging from the support of those measures to the discussion of a variety of alternatives, including dollarization of the economy, granting of direct subsidies to the affected population or industries and many others. Which of these policy alternatives would have been better is a decision beyond the scope of the Tribunal's task, which is to establish whether there was only one way or various ways and thus whether the requirements for the preclusion of wrongfulness have or have not been met.*

324. *The International Law Commission's comment to the effect that the plea of necessity is "excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient," is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.¹⁷²*

325. *A different condition for the admission of necessity relates to the requirement that the measures adopted do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. As the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation governed by Article 26 of the Articles.*

326. *In addition to the basic conditions set out under paragraph 1 of Article 25, there are two other limits to the operation of necessity arising from paragraph 2. As noted in the Commentary, the use of the expression "in any case" in the opening of the*

text means that each of these limits must be considered over and above the conditions of paragraph 1.173

327. *The first such limit arises when the international obligation excludes necessity, a matter which again will be considered in the context of the Treaty.*

328. *The second limit is the requirement for the State not to have contributed to the situation of necessity. The Commentary clarifies that this contribution must be "sufficiently substantial and not merely incidental or peripheral". In spite of the view of the parties claiming that all factors contributing to the crisis were either endogenous or exogenous, the Tribunal is again persuaded that similar to what is the case in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions. This is the unavoidable consequence of the operation of a global economy where domestic and international factors interact.*

329. *The issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of the present dispute, must conclude that this was the case. The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.*

330. *There is yet another important element which the Tribunal must take into account. The International Court of Justice has in the Gabčíkovo-Nagymaros case convincingly referred to the International Law Commission's view that all the conditions governing necessity must be "cumulatively" satisfied.¹⁷⁴*

331. *In the present case there are, as concluded, elements of necessity partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test. This in itself leads to the inevitable conclusion that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts...."*

Ab hier in Kürze⁴ eine deutsche Zusammenfassung der Argumente und Bewertungen im ICSID-Award:

⁴ Am MPI for Research on Collective Goods Kurt-Schumacher-Str. 10 D-53113 Bonn Phone: +49-(0) 2 28 / 9 14 16-0 Fax: + 49-(0) 2 28 / 9 14 16-55 (<http://www.mpp-rdg.mpg.de/index.html>) wird zu diesem Thema von Dr. iur. Lic.rer.pol Anne van Aaken unter dem Titel Working Papers: 36) AAKEN, ANNE VAN (2006): Staatsnotstand und Internationaler Investitionsschutz. Eine Anmerkung zur ICSID-Entscheidung CMS Gas Transmission Company v. Argentinien. bzw. 41) AAKEN, ANNE VAN: State Necessity and International Investment Protection gearbeitet. (http://www.mpp-rdg.mpg.de/van_aaken_public.html Dr. iur. Lic.rer.pol. Anne van Aaken Position: Senior Research Fellow Email: vanaaken@coll.mpg.de Tel: ++49- (0)228-91416-52 Fax: ++49- (0)228-91416-55 (please note name) Main Research Focus: Public International Law, especially international economic law, investment law and human rights, Theories of International Law; (Behavioral) Law and Economics, Legal Theory, Deliberative Theories Regulation of Financial Markets, Theories of Regulation,

Unter der **RN 315** stellt das Gericht (Tribunal) fest, dass die Parteien und es selbst den Art. 25 als zutreffend Stand des internationalen Rechts zur Frage des Notstandes ansieht/ansehen. Dieser Art. 25 wiederum basiert auf einer Anzahl historischer Fälle, die in den Kommentaren⁵ diskutiert sind mit speziellen Referenzen zu den Fällen Caroline⁶, Russian Indemnity⁷, Société Commerciale de Belgique⁸, Torrey Canyon⁹ und Gabčíkovo-Nagymaros. (Die meisten dieser historischen Fälle sind uns auch aus der Verteidigungsschrift im hiesigen Verfahren bekannt.)

Unter der **RN 316** wird der Art. 25 wiedergegeben. Zur deutschen Übersetzung siehe weiter vorn (Courtesy Klageerwiderung Argentinien).

Unter der **RN 317** wird hervorgehoben, dass die Berufung auf den Notstand gemäß diesem Artikel nur sehr restriktiv, vorsichtig und zurückhaltend anzuwenden sei. Der Eingangssatz des Art. 25 „...*Necessity may not be invoked... // ... Handelns nur berufen, wenn...*“ legt dieses bereits eindringlich nahe. Weiterhin wird betont, dass das Fall Recht und die Schriften der Lehre diesen restriktiven Ansatz belegen.

In der **RN 318** wird darauf hingewiesen, dass das Gericht die schwierige Aufgabe hat, zu prüfen ob die argentinische Krise diese Erfordernisse des Art. 25 erfüllt.

Die **erste Frage** wird in den **RN 319/320/321** geprüft. Es handelt sich um die Frage, ob ein **essentielles Interesse des Staates** berührt ist. Das Gericht weist darauf hin, dass auch diese Frage eine Frage der Schwere der Krise ist. Es kommt zu der Bewertung, dass die Krise in der Tat schwer war. Gleichwohl sagt das Gericht, **dass es keinesfalls eine Selbstverständlichkeit** (matter of course) sei, **daraus auf die Rechtfertigung der Notstandseinrede zu schließen**. Gleichzeitig äußert das Gericht Verständnis für die Sichtweise und den Vortrag der Beklagten Argentinien.

Die **zweite Frage** wird in der **RN 322** gestellt und beantwortet. Es ist die Frage nach der **Schwere und Unmittelbarkeit der drohenden Gefahr**. Hier kommt das Gericht zu dem Schluss, dass die Situation schwierig genug war damit die Regierung Handlungen vornahm, um eine Verschlimmerung der Situation und einen vollständigen wirtschaftlichen Zusammenbruch zu verhindern. Gleichwohl stellt das Gericht heraus, **dass der relative Effekt der Krise keine Rechtfertigung der Notstandseinrede erlaubt**.

Administrative Law Corruption Regulatory Impact Assessment). Das Papier soll in den nächsten Wochen fertig gestellt sein. Ich werde es dann gegebenenfalls nachreichen.

⁵ **James Crawford**: The International Law Commission's Articles on State Responsibility, 2002, at 178 et seq. (Diese Fußnoten sind aus dem ICSID-Award zitiert)

⁶ The **Caroline incident of 1837** and related diplomatic correspondence of 1842, as discussed in Crawford, at 179-180.

⁷ **Russian Indemnity case**, UNRIAA, Vol. XI, 431 (1912)

⁸ Permanent Court of International Justice, **Société Commerciale de Belgique**, 1939, Series A/B, No. 78.

⁹ The **Torrey Canyon**, Cmnd. 3246, 1967

Die **dritte Frage** wird in den **RN 323/324** behandelt. Es ist die Frage, ob es die **einzige Möglichkeit des Staates ist, seine essentiellen Interessen zu schützen**. Das Gericht kommt zu dem Schluss, dass diese Frage durchaus diskussionsfähig ist. Die Sichtweise und Einschätzung dieser Frage ist weit gespannt zwischen denen der Regierung und bedeutenden Ökonomen. Es wird eine Vielzahl von weiteren Möglichkeiten angesprochen, die hätten ergriffen werden können. Es wird gleichzeitig vom Gericht festgestellt, dass es außerhalb seiner (Aufgaben)-Reichweite (scope) liegt, zu bewerten, welche Alternative die bessere wäre. **Das Gericht kommt zu der Überzeugung, dass die ergriffenen Maßnahmen** (also die Ausrufung des Notstandes / meine Hinzufügung) **nicht die einzig möglichen bzw. verfügbaren waren**.

Die **vierte Frage** wird in der **RN 325** erörtert. Es ist die Frage **ob nicht ein wichtiges Interesse einzelner oder mehrerer Staaten oder der gesamten Staatengemeinschaft beeinträchtigt wird**. Diese Frage wird vom Gericht im Lichte des Vertrages (Investitionsschutzabkommen Argentinien-USA / von mir hinzugefügt) erörtert und verneint. Dieser Punkt ist für uns nicht relevant.

In **RN 326** wird auf darauf hingewiesen, dass neben den Basis-Konditionen des Paragraphen 1 zwei weitere Ausschlussbedingungen in § 2 formuliert sind, die gemäß der Kommentierung **jede für sich einzeln erfüllt sein müssen um keinen Ausschlussgrund zur Rechtfertigung einer Notstandseinrede darzustellen**.

Eine dieser Bedingungen wird als **fünfte Frage** in **RN 327** nur kurz behandelt. Es ist die Frage ob eine internationale Verpflichtung eine Berufung auf den völkerrechtlichen Notstand nicht zulässt. Das ist hier wiederum nicht einschlägig; höchstens in so weit, als es überhaupt fraglich ist, ob völkerrechtliche Notstandseinreden überhaupt Privatpersonen adressieren können.

Die **sechste Frage**, die in **RN 328/329** behandelt wird, ist dagegen von viel größerer Tragweite. Es ist die Limitierung, **dass der Staat die Entstehung des Notstandes nicht mit¹⁰ verursacht haben darf**. Einleitend stellt das Gericht fest, dass bei einer globalisierten Wirtschaft wohl bei jeder Krise innere und äußere Faktoren bedingend sind. Das Gericht kommt zu dem Schluss, dass Argentinien einen ausreichend substanziellen Beitrag zur Entstehung der Krise geleistet hat, **um eine Rechtfertigung durch die Notstandseinrede auszuschließen**. Das Gericht sieht die Wurzeln zur Entstehung der Krise bis in die Krisen der 80er Jahre zurückreichend.

In der **RN 331** wird (wenn man so will als **siebte Frage**) eine weitere wichtige Bedingung zur Berufung auf einen Notstand eingeführt. Mit Bezug auf die Entscheidung des **International Court of Justice** in Sachen Gabcíkovo-Nagymaros¹¹, [in der aus Sicht des ICSID-Schiedsgerichtes der International Court of Justice sich überzeugend auf die Sicht der International Law Commission bezogen hat], wird hervorgehoben, **dass alle Bedingungen (Regelungssätze) (conditions) kumulativ erfüllt sein müssen**.

¹⁰ Diese Begrenzung geht in meinen Augen sehr weit. Es ist von der **Mitverursachung** die Rede. Eine Mitverursachung einer verantwortlichen Regierung und ihrer Vorgängerregierungen im Zusammenhang mit wirtschaftspolitischen Entscheidungen im weitesten Sinne **ist immer gegeben**.

¹¹ Gabcikovo-Nagymaros Project, pars. 51-52

In der **RN 331** wird die Schlussfolgerung aus der Prüfung der sechs bzw. sieben Fragen gezogen:

In dem gegenwärtigen Fall sind, wie geschlossen, Elemente eines Notstandes teilweise hier und da gegenwärtig, aber wenn die verschiedenen Elemente, Konditionen und Begrenzungen als Ganzes geprüft werden, kann daraus nicht geschlossen werden, dass all diese Bestandteile dem kumulativen Test standhalten. Diese führt in sich zu der unvermeidlichen Schlussfolgerung dass die Erfordernisse eines Notstandes unter dem gewohnheitsrechtlichen, internationalen Recht nicht vollumfänglich erfüllt sind, um die Rechtswidrigkeit der Handlungen auszuschließen.

Auf Gut Deutsch:

Der ICSID-Schiedsspruch verneint die Möglichkeit Argentiniens sich gemäß der Notstandsregel aus dem Art. 25 auf eine Nicht-Rechtswidrigkeit seiner Handlungen zu berufen¹².

Unabhängig davon, ob das BVerfG die abstrakte Frage der Existenz einer Völkerrechtsregel bezüglich der Notstandseinrede im Zusammenhang mit Zahlungen auf verbriefte Inhaberteilschuldverschreibungen an private Investoren entschieden (bejahend oder verneinend) hat, müssen die Instanzgerichte bereits jetzt die (in Wirklichkeit vorgreifliche) Frage nach Art 25. des Regelungsentwurfs zur internationalen Staatenverantwortlichkeit der Völkerrechtskommission der Vereinten Nationen prüfen und entscheiden. Aus diesem Grunde ist unbedingt geboten, die ausgesetzten Verfahren wieder aufzunehmen und fortzusetzen.

Rolf Koch

Anlage:

Einige Seiten aus dem ICSID-Award Case No. ARB/01/8 April/Mai 2005 CMS GAS TRANSMISSION COMPANY (CLAIMANT) AND THE ARGENTINE REPUBLIC (RESPONDENT)

¹² Sich sozusagen zu exkulpieren.

Date of dispatch to the parties: May 12, 2005

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

CMS GAS TRANSMISSION COMPANY
(CLAIMANT)

AND

THE ARGENTINE REPUBLIC
(RESPONDENT)

CASE NO. ARB/01/8

AWARD

Members of the Tribunal

Professor Francisco Orrego Vicuña, President
The Honorable Marc Lalonde P.C., O.C., Q.C., Arbitrator
H.E. Judge Francisco Rezek, Arbitrator

Secretary of the Tribunal

Ms. Margrete Stevens

cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met... ..Those conditions reflect customary international law.”¹⁶⁵

314. The Claimant asserts next that neither has the Respondent complied with the conditions set down for the operation of state of necessity under Article 25 of the Articles on State Responsibility. In the Claimant’s view, severe as the crisis was, it did not involve “grave” or “imminent” peril nor has it been established that the Respondent State did not contribute to the emergency as most of the causes underlying the crisis were endogenous. Moreover, it is asserted that the Respondent has not shown that the measures adopted were the only means available to overcome the crisis.

30. *The Tribunal’s Findings in Respect of the State of Necessity under Customary International Law*

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. This Article, in turn, is based on a number of relevant historical cases discussed in the Commentary,¹⁶⁶ with particular reference to the *Caroline*,¹⁶⁷ the *Russian Indemnity*,¹⁶⁸ *Société Commerciale de Belgique*,¹⁶⁹ the *Torrey Canyon*¹⁷⁰ and the *Gabcíkovo-Nagymaros* cases.

316. Article 25 reads as follows:

“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
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317. While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse. The very opening of the Article to the effect that necessity “may not be invoked” unless strict conditions are met, is indicative of this restrictive approach of international law. Case law, state practice and scholarly writings amply support this restrictive approach to the operation of necessity.¹⁷¹ The reason is not difficult to understand. If strict and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law.

318. The Tribunal must now undertake the very difficult task of finding whether the Argentine crisis meets the requirements of Article 25, a task not rendered easier by the wide variety of views expressed on the matter and their heavy politicization. Again here the Tribunal is not called upon to pass judgment on the measures adopted in that connection but

simply to establish whether the breach of the Treaty provisions discussed is devoid of legal consequences by the preclusion of wrongfulness.

319. A first question the Tribunal must address is whether an essential interest of the State was involved in the matter. Again here the issue is to determine the gravity of the crisis. The need to prevent a major breakdown, with all its social and political implications, might have entailed an essential interest of the State in which case the operation of the state of necessity might have been triggered. In addition, the plea must under the specific circumstances of each case meet the legal requirements set out by customary international law.

320. In the instant case, the Respondent and leading economists are of the view that the crisis was of catastrophic proportions; other equally distinguished views, however, tend to qualify this statement. The Tribunal is convinced that the crisis was indeed severe and the argument that nothing important happened is not tenable. However, neither could it be held that wrongfulness should be precluded as a matter of course under the circumstances. As is many times the case in international affairs and international law, situations of this kind are not given in black and white but in many shades of grey.

321. It follows that the relative effect that can be reasonably attributed to the crisis does not allow for a finding on preclusion of wrongfulness. The Respondent's perception of extreme adverse effects, however, is understandable, and in that light the plea of necessity or emergency cannot be considered as an abuse of rights as the Claimant has argued.

322. The Tribunal turns next to the question whether there was in this case a grave and imminent peril. Here again the Tribunal is persuaded that the situation was difficult enough to justify the government taking action to prevent a worsening of the situation and the danger

of total economic collapse. But neither does the relative effect of the crisis allow here for a finding in terms of preclusion of wrongfulness.

323. A different issue, however, is whether the measures adopted were the “only way” for the State to safeguard its interests. This is indeed debatable. The views of the parties and distinguished economists are wide apart on this matter, ranging from the support of those measures to the discussion of a variety of alternatives, including dollarization of the economy, granting of direct subsidies to the affected population or industries and many others. Which of these policy alternatives would have been better is a decision beyond the scope of the Tribunal’s task, which is to establish whether there was only one way or various ways and thus whether the requirements for the preclusion of wrongfulness have or have not been met.

324. The International Law Commission’s comment to the effect that the plea of necessity is “excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient,” is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.¹⁷²

325. A different condition for the admission of necessity relates to the requirement that the measures adopted do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. As the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation governed by Article 26 of the Articles.

326. In addition to the basic conditions set out under paragraph 1 of Article 25, there are two other limits to the operation of necessity arising from paragraph 2. As noted in the Commentary, the use of the expression “in any case” in the opening of the text means that each of these limits must be considered over and above the conditions of paragraph 1.¹⁷³

327. The first such limit arises when the international obligation excludes necessity, a matter which again will be considered in the context of the Treaty.

328. The second limit is the requirement for the State not to have contributed to the situation of necessity. The Commentary clarifies that this contribution must be “sufficiently substantial and not merely incidental or peripheral”. In spite of the view of the parties claiming that all factors contributing to the crisis were either endogenous or exogenous, the Tribunal is again persuaded that similar to what is the case in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions. This is the unavoidable consequence of the operation of a global economy where domestic and international factors interact.

329. The issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of the present dispute, must conclude that this was the case. The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly

contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.

330. There is yet another important element which the Tribunal must take into account. The International Court of Justice has in the *Gabcikovo-Nagymaros* case convincingly referred to the International Law Commission's view that all the conditions governing necessity must be "cumulatively" satisfied.¹⁷⁴

331. In the present case there are, as concluded, elements of necessity partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test. This in itself leads to the inevitable conclusion that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts.

31. *The Emergency Clause of the Treaty*

332. The discussion on necessity and emergency is not confined to customary international law as there are also specific provisions of the Treaty dealing with this matter. Article XI of the Treaty provides:

"This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

NOW THEREFORE THE ARBITRAL TRIBUNAL
DECIDES AND AWARDS AS FOLLOWS

1. The Respondent breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II (2) (a) of the Treaty and to observe the obligations entered into with regard to the investment guaranteed in Article II (2) (c) of the Treaty.
2. The Respondent shall pay the Claimant compensation in the amount of US\$133.2 million.
3. Upon payment of the compensation decided in this Award, the Claimant shall transfer to the Respondent the ownership of its shares in TGN upon payment by the Respondent of the additional sum of US\$2,148,100. The Respondent shall have up to one year after the date this Award is dispatched to the parties to accept such transfer.
4. The Respondent shall pay the Claimant simple interest at the annualized average rate of 2.51% of the United States Treasury Bills for the period August 18, 2000 to 60 days after the date of this Award, or the date of effective payment if before, applicable to both the value loss suffered by the Claimant and the residual value of its shares established in 2 and 3 above. However, the interest on the residual value of the shares shall cease to run upon written notice by Argentina to the Claimant that it will not exercise its option to buy the Claimant's shares in TGN. After the date indicated above, the rate shall be the arithmetic average of the six-month U.S. Treasury Bills rates observed on the afore-mentioned date and every six months thereafter, compounded semi-annually.

5. Each party shall pay one half of the arbitration costs and bear its own legal costs.
6. All other claims are herewith dismissed.

The Arbitral Tribunal

(signed)

Marc Lalonde, Arbitrator

Date: 15/04/05

(signed)

Francisco Rezek, Arbitrator

Date: 25/04/05

(signed)

Francisco Orrego Vicuña, President

Date: 20/04/05