The Necessity Defense in International Investment Law

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ABSTRACT

More than fifty investor-state arbitration claims have been filed by foreign investors against the Republic of Argentina due to the country's adoption of measures to mitigate the consequences of a severe financial crisis that struck the country in the early 2000s. Argentina invoked the Non-Precluded Measures (NPM) clause in the U.S.-Argentina Bilateral Investment Treaty (BIT) and the necessity defence in customary international law as its defense in these arbitrations. As a result of taking divergent approaches to interpreting the NPM clause in the U.S.-Argentina BIT, the tribunals reached inconsistent decisions on Argentina's liability for damages incurred by foreign investors, which intensified the legitimacy crisis in the investment arbitration regime. Consequently, the tribunals' approaches to interpreting the nexus requirement of the treaty NPM clause (the "necessary for" term) caused a fierce academic debate among scholars.

This thesis studies the issues related to the inconsistent interpretation of treaty NPM clauses and the customary necessity defense in the investment arbitration regime. It presents a detailed examination of the necessity defense in customary international law and treaty NPM clauses through the lens of regime theory. By applying relevant concepts of regime theory, such as regime formation, regime attributes, regime consequences and regime dynamics, this work explores the origins and evolution of the necessity doctrine, and provides a comparative analysis of the attributes, structural elements and the consequences of invoking the customary necessity defense and treaty NPM clauses.

This thesis analyses the interpretative issues in the Argentine cases, and based on the dynamics of developments in the practice of states, it arrives at concrete proposals that will

contribute to the coherent practice of investment arbitration tribunals in interpreting treaty NPM clauses. By applying the concept of interaction of regimes, this thesis provides a comparative analysis of tests suggested by scholars for interpreting Article XI of the U.S.-Argentina BIT. It examines whether the interpretative tests–margin of appreciation, proportionality and less restrictive means–used by dispute settlement bodies in other specialized treaty regimes have the potential to serve as an optimal standard for interpreting Article XI. This work explains the contents of these tests and inquires as to the advantages and criticisms related to their application in the investment arbitration regime. This thesis further advances the argument that the interpretation of treaty NPM clauses (Article XI of the U.S.-Argentina BIT) should be performed with strict adherence to the general rules of interpretation as established under Article 31 of the Vienna Convention on the Law of Treaties (VCLT). Specifically, it argues that in cases when tribunals fail to define the meaning of a treaty provision under Article 31 (1) and (2) of VCLT, they should not look for guidance from other specialized treaty regimes, but rather, must have recourse to general international law, specifically, customary rules of international law. As a methodology for performing this interpretation, this thesis proposes to apply a systemic integration approach through operationalizing Article 31(3)(c) of VCLT.

Furthermore, this thesis advances the argument that the interpretation of the only means requirement of the customary necessity defense (Article 25 of Articles on the Responsibility of States) does not accurately reflect the contemporary customary rules on necessity. Thus, by applying the concept of regime dynamics, it proposes to reconceptualise the interpretation of the only means requirement through incorporating the elements of a more progressive version, which is found in the international trade regime. Unlike the scholars who rejected the application of the customary necessity elements, and proposed the direct importation of the LRM test from

the international trade regime to interpret Article XI, this thesis proposes a different approach to taking advantage of the WTO jurisprudence. Specifically, it argues that WTO jurisprudence can be incorporated into the investment regime indirectly by serving as a source from which we can identify the development of state practice in examining the "only means" nature of state measures adopted in emergency (necessity) circumstances. It is contended that such state practice represents a more progressive and practical approach to interpreting the only means requirement of customary necessity defense, and thus, should be incorporated into the interpretation practice of investment arbitral tribunals.

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List of Acronyms

ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
AB	Appellate Body
BIT	Bilateral Investment Treaty
DSB	Dispute Settlement Body
EC	European Communities
ECHR	European Convention on Human Rights
ECtHR	European Court for Human Rights
ICJ	International Court of Justice
IIAs	International Investment Agreements
ILC	International Law Commission
IR	International Relations
LRM	Less-Restrictive Means
NPM	Non-Precluded Measures
PCIJ	Permanent Court of International Justice
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Introduction

The extraordinary increase in the number of international investment agreements (IIAs) observed over the last two decades dramatically expanded the international investment regime.[1] As of today, the investment regime is composed of a network of over 3200 IIAs, mainly representing bilateral investment treaties (BITs) and investment chapters in free trade agreements.[2] In these IIAs, sovereign states commit to protecting investments made by each other's nationals by granting certain substantive rights.[3] Specifically, the treaty parties agree to accord foreign investments "fair and equitable treatment", "full protection and security" and provide adequate compensation in case of expropriation.[4] Most importantly, by concluding IIAs, states confer on foreign investors the right to regain their losses through investment treaty arbitration.[5] Being a "unique creature of international law",[6] investment treaty arbitration

[1] José E. Alvarez, "The Once and Future Foreign Investment Regime", in Mahnoush Arsanjani, ed., *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman* (Leiden: Nijhoff, 2010); José E. Alvarez, Karl P. Sauvant, Kamil Gerard Ahmed & Gabriela P. Vizcaino, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011); José E. Alvarez, *The Public International Law Regime Governing International Investment* (Hague: Hague Academy of International Law, 2011); Jeswald Salacuse, "The Emerging Global Regime for Investment", (2010) 51 Harvard International Law Journal 427 [Salacuse, Global Regime for Investment]; Nicolas Perrone, "The International Investment Regime and Foreign Investor Rights: Another View of a Popular Story", (2014) 11 (3) Manchester Journal of International Economic Law 397.

[2] According to the World Investment Report (2015), the International Investment Agreement universe contains 3,271 agreements, including 2,926 BITs and 345 "other IIAs", principally free trade agreements (FTAs) with investment provisions, economic partnership and regional agreements. *See* World Investment Report 2015 (WIR), available online at : <http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf> (last visited on June 1, 2016).

[3] As Professor Salacuse observes, IIAs "are essentially instruments of international law by which states: (1) make commitments to other states with respect to the treatment they will accord to investors and investments from those other states, and (2) agree on some mechanism for the enforcement of those commitments." Salacuse, Global Regime for Investment, *supra* note 1, at 427. For the detailed explanation of the role of IIAs, specifically BITs, in the investment treaty regime, *see* also Jeswald Salacuse, "The Treatification of International Investment Law: a Victory of Form over Life? A Crossroads Crossed?", (2006) 3 (3) Transnational Dispute Settlement 1.

[4] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2nd ed. (Oxford: Oxford University Press, 2012) at 130; Christopher Dugan, Don Wallace, Noah Rubins & Borzu Sabahi, *Investor-State Arbitration*, reprint edition (Oxford: Oxford University Press, 2011) at 429, 491, 531.

[5] *See* Andrea Bjorklund, "The Emerging Civilization of Investment Arbitration", (2009) 113 Penn State Law Review 1269; Laurence Shore, Campbell McLachlan & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007); Gus Van Harten, *Investment Treaty Arbitration and*

provides private investors with a direct route to neutral dispute resolution, and thus depoliticizes the process of resolving international investment disputes.[7] In this respect, the International Center for Settlement of Investment Disputes (ICSID)[8] plays an important role as the main venue for settling investment disputes.[9] The role of ICSID has increased dramatically in the last two decades,[10] mainly due to the rising number of investment claims against developing states in different sectors of the economy.[11] With the increase of the ICSID caseload emerged immense academic literature trying to explain the nature of the regime, its levels of effectiveness, and

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Public Law (Oxford; Oxford University Press, 2007), [Van Harten, *Investment Treaty Arbitration and Public Law*]; Judith Gill, "Investment Treaty Arbitration", (2006) 17(2) European Business Law Review 417.

[6] Susan Franck, "The ICSID Effect? Considering Potential Variations in Arbitration Awards", (2011) 51 Vanderbilt Journal of International Law 825 at 833-834. *See* also, Stephan Schill, "System Building in Investment Treaty Arbitration and Lawmaking", (2011) 12 German Law Journal 1083.

[7] Susan Franck, "Development and Outcomes of Investment Treaty Arbitration", (2009) 50 Harvard International Law Journal 435 at 437.

[8] It was first established in 1966 under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States March 18, 1965, 575 U.N.T.S. 159. For some brief background on ICSID, *see*, Andreas Lowenfeld, "ICSID Convention: Origins and Transformation", (2009) 38 (1) Georgia Journal of International and Comparative Law 47; Stephan Schwebel, "A BIT about ICSID", (2008) 23(1) ICSID Review: Foreign Investment Law Journal 9; Jean-Marc Loncle & Jean Babtiste Morel, "Emanations of States and ICSID Arbitration", (2008) 1 International Business Law Journal 29.

[9] Commenting on the role of ICSID, Professor Kingsbury and Schill observe as follows: "The implementation of an investor-state dispute settlement mechanism under the ICSID Convention aimed at reducing the political risk connected with investing in a developing country with weaker domestic institutions and a less stable legal and political infrastructure in the interest of growth and development." Benedict Kingsbury and Stephan Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law", International Law and Justice Working Papers 2009/6, (Global Administrative Law Series) at 21. Available online at: <http://www.iilj.org/publications/documents/2009-6.kingsburyschill.pdf> (last visited on June 8, 2016).

[10] As of December 31, 2015, ICSID had registered 549 cases under the ICSID Convention and Additional Facility Rules. For comparison, 377 cases were registered from 2005 to 2016 (480 cases from 2000 to 2016), and only 81 cases between 1965-2000 under the ICSID Convention and Additional Facility Rules, *The ICSID Caseload-Statistics* (Issue 2016-1) at 7. Available online at:
https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf> (last visited on June 8, 2016).
See also, David Sedlak, "ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?", (2004) 23 Penn State International Law Review 147.

[11] Most investment claims filed were related to the oil, gas and mining sector (26%), following by the electric power and other energy sector (17%), transportation (9%), construction (7%), finance (7%), information & communication (6%), water, sanitation & flood protection (5%) agriculture, fishing & tourism (4%), tourism (4%), services and trade (3%) and other industry (12%). *Ibid* at 12.

payoffs.[12] As of today, the international investment regime has become one of the fastest growing areas of international law. Although it emerged relatively recently, it already faces considerable challenges and serious critiques that have put the legitimacy of investment treaty arbitration into question.[13]

The legitimacy crisis that investment treaty arbitration is undergoing is mainly explained by the inconsistent decisions rendered by arbitral tribunals on contentious issues. In turn, this serves as a main cause for emerging calls for increased consistency in the investment arbitration regime.[14] Such calls intensified after a wave of inconsistent decisions rendered in cases brought against Argentina.[15] In these investor-state disputes, the arbitral tribunals challenged the

[12] *See* note 1. One of the most influential academic trends argues that the system is taking regulatory space away from states, and as such, has become part of what they classify as "global administrative law". *See* Armin Von Bogdandy & Ingo Venzke, "On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority", (2013) 26 Leiden Journal of International Law 49; Gus Van Harten & Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law", (2006) 17 European Journal of International Law 121; Sabino Cassese, "Administrative Law without the State? The Challenge of Global Regulation", (2005) 37 New York University Journal of International Law & Politics 663; Daniel Esty, "Good Governance at the *Supra*national Scale: Globalizing Administrative Law", (2006) 115 Yale Law Journal 1490.

[13] Susan Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions", (2005) 73 Fordham Law Review 1521; Charles Brower & Jeremy Sharpe, "The Coming Crisis in the Global Adjudication System", (2003) 19 (4) Arbitration International 415; M. Sornarajah, "A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration, in Karl Sauvant, *Appeals Mechanism in International Investment Disputes* (Oxford, Oxford University Press, 2008) at 39; Charles N. Brower & Stephan W. Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?", (2009) 9 Chicago Journal of International Law 471; Stephan W. Schill, "Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach", (2011-2012) 52 Virginia Journal of International Law 57; Mark Jennings, "The International Investment Regime and Investor-State Dispute Settlement: States Bear the Primary Responsibility for Legitimacy", (2016) 17 (2) Business Law International 127.

[14] Céline Lévesque, "Inconsistency in Investor-State Awards and the Role of State Interpretations: The Example of the Mexican Sweetener Trio of Cases under NAFTA", in Andrea Bjorklund, ed., *Yearbook on International Investment Law & Policy 2013-2014* (Oxford: Oxford University Press, 2015) at 361; Irene Ten Cate, "The Cost of Consistency: Precedent in Investment Treaty Arbitration", (2012-2013) 51 Columbia Journal of Transnational Law 418; Gabrielle Kaufmann-Kohler, "Is Consistency a Myth", in Emmanuel Gaillard & Yas Banifatemi, *Precedent in International Arbitration* (New York: Juris Publishing, 2008); Gabrielle Kaufmann-Kohler, "In Search of Transparency and Consistency: ICSID Reform Proposal", (2005) 2(5) Transnational Dispute Management 5.

[15] *CMS Gas Transmission Co. v Argentine Republic*, (12 May 2005) Award, ICSID Case No. ARB/01/8, [*CMS* Award]; *Enron Corp et al v The Argentine Republic,* (22 May 2007) Award, ICSID Case No. ARB/01/3 [*Enron* Award]; *Sempra Energy Int'l v Argentina,* (28 September 2007) Award, ICSID Case No. ARB/02/16 [*Sempra* Award]; *LG&E Energy Corp. v Argentine Republic*, (3 October 2006) Decision on Liability, ICSID Case No. ARB/02/1 [*LG&E*, Decision on Liability]; *Continental Casualty Co. v Argentine Republic*, (5 September 2008) Award, ICSID Case No. ARB/03/9 [*Continental* Award].

measures adopted by the Government of Argentina to tackle a severe economic crisis that hit the country at the beginning of 2000s. As a result of taking different approaches to interpreting the non-precluded measures (NPM) clause[16] in the U.S.-Argentina BIT, the tribunals reached inconsistent decisions regarding the liability of Argentina for damages incurred by foreign investors. This thesis is part of an attempt to research the inconsistency issues in the investment arbitration regime, specifically those arising in the Argentine cases. The main purpose pursued in the thesis is to analyse the interpretative issues in these cases, and ultimately, by working out proposals for resolving such inconsistencies, to contribute to the coherent practice of investment arbitration tribunals on interpreting treaty NPM clauses. Before moving to the main discussion, I found it appropriate first to present background information on the origins of the investor-state disputes against Argentina, as it helps the reader understand the main issues that will be addressed further in the thesis.

(i) Factual Background

In the late 1980s, Argentina experienced an economic crisis characterised by deep recession and hyperinflation.[17] In response, the Argentinean Government worked out an economic recovery plan that included measures in different areas directed at stabilizing the economy of the country. Since attracting foreign investments was seen as one of the priorities to help the economy recover, the Government enacted the State Reform Law in August 1989, by which it began the

[16] The treaty NPM clause provides states with freedom to act against their treaty responsibilities in certain circumstances that pose a threat to their essential interests in different public policy areas. A detailed explanation of the NPM clause and its structural elements will be presented in Chapter IV.

[17] The hyperinflation was long-term and peaked at a rate of 3,079.5 % *per annum* in 1989. For the economic statistics of the financial crisis, s*ee* Robert M. Ziff, "The Sovereign Debtor's Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law", (2010-11) 10 Richmond Journal of Global Law and Business 345 at 350.

privatization of state-owned entities.[18] This privatization was mainly carried out in the public utilities sector. In this respect, the country's natural gas industry was subject to significant reforms. The privatization of *Gas del Estado S.E.*, a national monopoly in natural gas transportation and distribution, was one of state's major reform. To provide a legal framework for regulating privatization in the gas sector, Argentina enacted the Gas Law in 1992, which established a regulatory structure for this newly privatized sector and created a public agency, *Ente Nacional Regulador del Gas* (ENARGAS), to oversee the industry.[19] The largest percentage of shares, which belonged to companies created by restructuring the *Gas del Estado S.E.*, were sold to consortia of private investors. In order to attract foreign investors—especially American investors—into this sector of the economy, the Argentinean Government granted them legal protection and guarantees under its Gas Law. Specifically, under this law, investors had a right to calculate tariffs in U.S. dollars, a right to semi-annual tariff review based on changes to the U.S. Producer Price Index (PPI), and the licenses could not be rescinded or modified without the consent of licensees. In case the Government did so, it was obliged to compensate the licensees for their losses in full.[20]

In the late 1990s, Argentina began to experience a serious economic crisis which continued until the end of 2002.[21] The crisis was caused by Argentina's record high default on

[18] According to *LG&E* tribunal, "[t]he privatization scheme created by Respondent targeted foreign investors because foreign capital was deemed essential for the successful operation of the Government's economic recovery plan." *LG&E*, Decision on Liability, *supra* note 15, para 49.
[19] *Ibid*, paras 37, 38.
[20] *Ibid*, paras 41, 53, *CMS* Award, *supra* note 15, paras 144, 145. For the history of currency crises in Argentina, *see* Graciela Kaminsky, Amini Mati & Nada Choueiri, "Thirty Years of Currency Crises in Argentina: External Shocks or Domestic Fragility?", (2009) 10 (1) Economía at 81-123.
[21] For economic readings on the Argentine financial crisis, *see* Andres Velasco, "Argentina's Bankruptcy Foretold", Time, Latin American edition, July 23, 2001; Domingo F. Cavallo, "The Fight to Avoid Default and Preserve Convertibility", April 25, 2002; M. Barrow, "Argentina Puts Bankers to the Test", *The Times* (7 August 2001); P. Wheatcroft, "Argentina loan", *The Times* (23 August 2001); Martin Feldstein, "Argentina Doesn't Need the IMF", May 28, 2002, The Wall Street Journal; L. Paterson, "Argentina holds make-or-break talks with IMF", *The Times* (8 December 2001).

sovereign debt, totalling more than $95 billion.[22] Besides destabilising the whole economy, the crisis also induced grave financial, political and social ramifications.[23] The impact of the crisis on the country was so immense that it was likened to the Great Depression of the 1930s in the United States,[24] and was regarded as "the worst economic crisis since Argentina's inception in 1810."[25]

In response to such a severe economic crisis, the Argentine authorities took several urgent measures directed at stabilizing the economy and political situation in the country.[26] Specifically, Argentina adopted the Emergency Law in 2002, according to which the tariffs and

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[22] Kenneth Rogoff & Karmen Reinhardt, *This Time It's Different: 700 Years of Financial Folly* (Princeton: Princeton University Press, 2009) at 10-2.

[23] *CMS* Award, *supra* note 15, para 59.

[24] *See* Survey, "Liberty's Great Advance", *Economist*, June 28, 2003, at 4.One of the negative consequences of the crisis was that, throughout the economic collapse, "income per person in dollar terms…shrunk from around $7 000 to just $3 500" and "unemployment rose to perhaps 25%." *See* "Argentina's Collapse: A Decline without Parallel", *Economist*, (March 2-8, 2002), at 26.

[25] *LG&E*, Decision on Liability, *supra* note 15, para 59.

The situation was described as follows:

> Argentina's crisis deepened at the end of 2001. The Government experienced increased difficulties in its foreign debt. As poverty and unemployment soared, Argentines feared that the Government would default on its debt and immobilize bank deposits. Therefore, savings were massively withdrawn from the banks. In response, the Government issued the Decree No.1570/01 known as 'Corralito' on 1 December 2001, restricting bank withdrawals and prohibiting any transfer of currency abroad. Amid widespread discontent and public demonstrations, including violence that claimed tens of lives, President De la Rua and his cabinet resigned on 20 December 2001. A succession of presidents took office and resigned.

LG &E, Decision on Liability, *supra* note 15, para 63.

The negative impacts of the crisis were of large scale indeed. A high unemployment and poverty rate, substantial collapse of the healthcare and banking system, the highest degree of public disorder and the resignation of five presidents in one month signal the gravity of its consequences. *See* Paul Blustein, *And The Money Kept Rolling In (And Out): Wall Street, The IMF And The Bankrupting Of Argentina* (New York: Public Affairs, 2005) at 1; Van Harten, *Investment Treaty Arbitration and Public Law*, *supra* note 5, at 1. For a factual background of the Argentine cases, also *see* R. Doak Bishop & Roberto Aguirre Luzi, "Investment Claims: First Lessons from Argentina", in Todd Weiler, ed., *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May, 2005) at 425. Nigel Blackaby, "Testing the Procedural Limits of the Treaty System: The Argentinean Experience", in Federico Ortino, Audley Sheppard & Hugo Warner, *Investment Treaty Law: Current Issues*, Volume 29 (London: British Institute of International and Comparative Law, 2006). For the history of currency crises in Argentina, *see* Graciela Kaminsky, Amini Mati & Nada Choueiri, "Thirty Years of Currency Crises in Argentina: External Shocks or Domestic Fragility?", (2009) 10 (1) Economía at 81-123.

[26] These government measures included (1) the elimination of the dollar-peso parity and free exchangeability established in the early 1990s, (2) drastic limitations on bank withdrawals, (3) the prohibition of dealings in and transfers of foreign currency, including remittance of corporate profits, and (4) the indefinite freeze on tariffs on privatized public utilities, such as gas, electricity, telephone and water. *See* Andreas F. Lowenfeld, *International Economic Law*, 2nd edition (Oxford: Oxford University Press, 2008) at 489, 719-733.

prices for gas and other public utility services and all other debts under private agreements were to be calculated in pesos instead of U.S. dollars, as previously contracted.[27] It also abrogated the previous one-to-one peg of the Argentine peso to the US dollar. This change had a huge negative impact on foreign investors' interests whose activities were based on private contracts, which guaranteed the calculation of service tariffs in US dollars and tariff adjustment according to US producer price index (PPI).[28] As a result, these measures triggered an unprecedented wave of investment claims against Argentina in the history of investor-state arbitration.[29] The majority of the claims were brought by U.S. investors who had invested in sectors of public services and utilities such as gas, electricity, water and telecommunications.[30] Using the U.S.-Argentina BIT as a legal basis,[31] the U.S. investors claimed violations of its various substantive provisions by Argentina.[32]

In arbitration, Argentina invoked the NPM clause (Article XI) of the U.S.-Argentina BIT and the necessity defense in customary international law to justify its measures.[33] In these

[27] It should be noted that by that time, the Argentine currency had dramatically been devalued by more than 40%.

[28] The semi-annual PPI adjustments guaranteed to foreign investors were first postponed twice and then were completely abolished by the Emergency Law.

[29] By January 31, 2017, Argentina was still the state against which the largest number of investment arbitration claims have been filed (53 claims). The list of all claims is available at: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?rntly=ST> (last visited June 14, 2015).

[30] *See* E. Kentin, "Economic Crisis and Investment Arbitration: The Argentina Cases", in Philippe Kahn & Thomas Walde, *New Aspects of International Investment Law* (2007) at 635. *See* also Mercedes Ales, Leonardo Granato & Carlos Nahuel Oddone, "Argentina Facing International Claims over Foreign Investments", (2008) 18(3) Law and Business Review of the Americas 481.

[31] For the sake of statistics, it worth noting that the U.S.-Argentina BIT is regarded as the most frequently invoked BIT in the history of investment arbitration. *See* Inna Uchkunova, "ICSID: Curious Facts", (25 October 2012). Available at: <http://kluwerarbitrationblog.com/blog/2012/10/25/icsid-curious-facts/> (last visited on June 14, 2015).

[32] Although the actual sums sought by foreign investors, especially regarding the claims that have not been public, are uncertain, the face value of the publicly available claims is said to exceed US$80 billion. *See* Wailin Wong, "Argentina Treasury Attorney: World Bank Claims Could Reach $80 Billion", *Dow Jones Int'l News* (21 January 2005).

[33] Article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts is considered to reflect the customary necessity defense. It provides as follows:

disputes, the *ad hoc* tribunals were primarily tasked with interpreting Article XI of the U.S.-Argentina BIT, which provides as follows:

> 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.[34]

The tribunals took different approaches to interpreting the nexus requirement (found in the term "necessary for") of the NPM clause of the Argentina-U.S. BIT (Article XI),[35] which caused them to reach inconsistent decisions with respect to Argentina's liability. In this respect, the *CMS*, *Enron*, and *Sempra* tribunals applied the requirements of the necessity defense in customary international law.[36] The *LG&E* and *Continental Casualty* tribunals considered the treaty NPM clause and the customary necessity defense as two distinct defenses, and thus interpreted Article XI without applying the elements of customary necessity defense.[37] As a result of the divergent approaches taken to interpreting Article XI of the U.S.-Argentina BIT, the first group of tribunals rejected Argentina's defense under the treaty NPM clause and found it

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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.

Available online at: <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf>.

[34] Article XI, the U.S.-Argentina BIT, signed 14 November 1991; entered into force 20 October 1994 (emphasis added). Available online at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127>.

[35] The nexus requirement of the NPM clause and other elements of treaty NPM clauses will be explained in Chapter IV.

[36] *CMS* Award, *supra* note 15, at para 374; *Enron* Award, *supra* note 15, at para 334; *Sempra* Award, *supra* note 15, at para 375.

[37] *LG&E*, Decision on Liability, *supra* note 15, para 245; *Continental* Award, *supra* note 15, paras 166, 167. The interpretative approaches applied by these tribunals will be discussed in Chapter IV.

liable for the damages incurred by foreign investors, while the second group of tribunals accepted it and exempted Argentina from liability.

Later, the decisions of the first group of tribunals were reviewed by ICSID annulment committees,[38] which found that the tribunals had not performed a proper analysis of the relationship between the treaty NPM clause and the customary necessity defense, and thus failed to apply Article XI properly. Although the annulment committees clarified the distinction between the treaty NPM clause and the customary necessity defense, there are still several interpretative issues that need further clarification. For instance, some investment claims against Argentina were based on other BITs, which do not contain an NPM clause like the U.S.-Argentina BIT.[39] In those cases, Argentina invoked the customary law necessity defense to justify its anti-crisis measures.[40] However, the decisions of tribunals on whether Argentina was entitled to invoke the customary necessity defense in the absence of a treaty NPM clause were also inconsistent, and this issue will also be touched on. Since there are several research

[38] *CMS Gas Transmission Co. . Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, (September 25, 2007**)**, para 136. [*CMS* Annulment]; *Sempra Energy International v Argentine Republic*, Decision on the Argentine's Republic Application for Annulment of the Award (June 29, 2010), paras. 173, 74; *See Enron Creditors Recovery Corp. v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (July 30, 2010**)**, para 403.

[39] These investment claims were mainly based on Argentina's BITs with France, U.K., Spain, Italy and Germany. *See* Argentina-France BIT, signed on July 3, 1991, entered into force on March 3, 1993; Argentina-U.K. BIT, signed on December 11, 1990, entered into force on February 19, 1993; Argentina-Germany BIT, signed on April 9, 1991, entered into force on November 8, 1993; Argentina-Italy BIT, signed on May 22, 1990 and entered into force on October 14, 1993; Argentina-Spain BIT, signed on October 3, 1991, entered into force on September 28, 1992. All BITs are available online at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/8#iiaInnerMenu>.

[40] *BG Group and the Republic of Argentina*, UNCITRAL Award, (24 December 2007); *National Grid P.L.C. v Argentine Republic*, UNCITRAL Award (3 November 2008); *Total SA v Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability (27 December 2010); *EDF International S.A., SAUR International S.A. and Leon Participciones Argentina S.A. v Argentina Republic* (ICSID Case No. ARB/03/23), Award (11 June 2012); *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v The Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Liability (30 July 2010); *Impregilo Spa v Argentina Republic* (ICSID Case No. ARB/07/17), Award (21 June 2011); *Hochtief AG v Argentine Republic*, (ICSID Case No.ARB/07/31), Decision on Liability (29 December 2014).

questions to be addressed in the thesis, for the sake of brevity, in the following paragraph I will briefly explain three most important ones.

(ii) Main Research Questions and Originality

The first research question relates to identifying the self-judging character of the NPM clause (Article XI) of the U.S.-Argentina BIT. The existence of the language "it considers necessary" or other similar formulations[41] in the treaty NPM clause is the hallmark of its self-judging nature.[42] Self-judging treaty clauses confer on a state the right to unilaterally declare certain treaty obligations as non-binding, if, according to its subjective determination, respecting treaty obligations will harm its essential interests.[43] By being self-judging, the NPM clause allows a state to take any action it considers necessary to protect its essential interests stated in the clause. However, there is an initial question of whether the state measures taken under the self-judging NPM clause are completely barred from the arbitral review. By analysing the opinions of different scholars and examining the relevant evidence from the international case law, I will argue that the self-judging treaty clauses do not oust the jurisdiction of arbitral tribunals, but rather, affect the standard of review applied by them to examine the state measures claimed to be justified under such clauses. In this respect, good faith review will be argued to be the preferred standard to be applied by arbitral tribunals.

[41] The comparative analysis of treaties shows that alternative languages of nexus requirement of the NPM clauses are also used. The examples are: "measures deemed appropriate" (1982 U.S.-Egypt BIT, Art.X(1)), "action directed to" (1988 China-New Zealand BIT, Art.XI), "taking actions for the protection of"(2007 Greece-India BIT, Art.XII(2)), "apply prohibitions or restrictions in circumstances of" (1996 India-Kazakhstan BIT, Art XII(2)).

[42] *Certain Questions of Mutual Assistance in Criminal Matters* (Djibuti v. France), Judgement, 2008 ICJ 177, at 226, 230.

[43] Stephan Schill & Robyn Briese "If the State Considers: Self-Judging Clauses in International Dispute Settlement", (2009) 13 Max Plank Yearbook of United National Law at 67.

The question of whether the NPM clause of the U.S.-Argentina BIT (Article XI) is self-judging has also prompted controversy among scholars. This controversy is mainly observed in the contrasting views of José Alvarez and Anne-Marie Slaughter, who had been requested to give their expert opinions in certain Argentine cases. Their opinions were quite controversial, and relying on different grounds, the scholars presented divergent arguments on the self-judging character of Article XI. Specifically, Professor Alvarez argues that Article XI is not self-judging, as it does not contain in its text explicit language ("it considers") concerning its self-judging nature, similar to that found in NPM clauses of other U.S. BITs.[44] Conversely, relying on the evidence from the negotiating history of the U.S.-Argentina BIT, Professor Slaughter, argues that explicitly self-judging language included in the NPM clauses of the U.S. BITs concluded at a later time was not a new policy, but rather, was a step towards making explicit the implicit understanding that a state's measures adopted under the NPM clause are self-judging in nature.[45] Taking these arguments into account, I will explore the self-judging aspect of treaty clauses and analyse to what extent the scholars' arguments are reasonable from an approach to treaty interpretation that ensures the balance of interests of treaty parties.

The second research question relates to choosing an appropriate methodological framework and a potential test for interpreting the nexus requirement (the “necessary for” term) of the NPM clause of the Argentina-U.S. BIT. Since Article XI of the treaty does not contain explicit self-judging language (the phrase "it considers"), the arbitral tribunals in the Argentine cases

[44] *See* Opinion of José E. Alvarez, *Sempra Award*, *supra* note 15, at para 38.
[45] *See* Rejoinder Opinion of Anne-Marie Slaughter and William Burke-White, *Sempra* Energy International & Camuzzi International, S.A. v. The Republic of Argentina, ICSID ARB/03/02, December 2, 2005, at paras 6, 7, 13-15. Rejoinder Opinion of Anne-Marie Slaughter and William Burke-White, *El Paso Energy International Company v. The Republic of Argentina*, ARB/03/15, March 4, 2007, at para 11, 18-24.

found it to be non self-judging.[46] Therefore, there arises a question of what test (approach) should be applied to interpreting the nexus requirement of Article XI if it is considered to be non self-judging.[47] This question has caused academic debate among scholars and split them into four main groups. The first group, including scholars such as Andrea Bjorklund,[48] Rudolf Dolzer, Christoph Schreuer,[49] Jose Alvarez, Kathryn Khamsi,[50] Christina Binder,[51] Tarcisio Gazzini,[52] and Fransisco Orrego Vicuna,[53] argue that the necessity rule of customary international law can serve as the best framework for interpreting Article XI. The second group, including scholars such as William Burke-White, Andreas Von Staden,[54] and Barnali Chouhury,[55] contend that the application of the margin of appreciation doctrine would be the best solution to this issue. The third group of scholars, August Reinisch,[56] Gebhard Bücheler,[57] Benedict Kingsbury and Stephan

[46] *CMS* Award, *supra* note 15, at para 370; *LG&E* Award, *supra* note 15, at para 212; *Enron* Award, *supra* note 15, at para 332; *Sempra* Award, *supra* note 15, at para 374; *Continental* Award, *supra* note 15, at para 187.

[47] In case the treaty clause is found to be self-judging, arbitral tribunals should examine the necessity measures of a State under good faith review. A detailed discussion on the self-judging feature of treaty clauses and good faith is presented in Chapter V.

[48] Andrea Bjorklund, "Economic Security Defenses in International Investment Law", in Karl P. Sauvant, ed., *Yearbook on International Investment Law & Policy* 2008-2009 (New York: Oxford University Press, 2008) at 495.

[49] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) at 167.

[50] José Alvarez & Kathryn Khamsi, "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime", in Karl P. Sauvant, ed., *Yearbook on International Investment Law & Policy 2008-2009* (New York: Oxford University Press, 2009) at 387.

[51] Cristina Binder, "Non Performance of Treaty Obligations in Cases of Necessity: From 'Necessity Knows no Law' via the 'Law(s) of Necessity' to Interfaces between Different 'Laws of Necessity'", (2008) 13 Austrian Review of International and European Law 3 at 29.

[52] Tarcisio Gazzini, "Foreign Investment and Measures Adopted on Grounds of Necessity: Towards a Common Understanding", (2010) 7(1) Transnational Dispute Management 1 at 12.

[53] Fransisco Orrego Vicuna, "Softening Necessity" in Mahnoush Arsanjani, eds., *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden: Martinus Nijhoff, 2011) 741 at 744.

[54] William Burke White & Andreas Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", (2007-2008) 48 Vanderbilt Journal of International Law 307; William Burke White & Andreas Von Staden, "Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State arbitrations", (2010) 35 Yale Journal of International Law 283.

[55] Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?", (2008) 41 Vanderbilt Journal of Transnational Law 670 at 775.

[56] August Reinisch, "Necessity in International Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on *CMS v. Argentina and LG&E v. Argentina*", (2007) 8 Journal of World Investment and Trade 191at 201.

Schill,[58] advocate proportionality as a potential test for solving the interpretative issue. The fourth group of scholars, Jürgen Kurtz,[59] Giorgio Sacerdoti,[60] Andrew Mitchell, and Caroline Henckels[61] consider it appropriate to seek guidance from the coherent and authoritative jurisprudence of the WTO on interpreting "necessity" clauses. Specifically, the main proponent, Jürgen Kurtz, argues that importating the less restrictive means test (LRM) from WTO jurisprudence into the practice of investment tribunals can offer the optimal solution to interpreting the nexus requirement of Article XI.[62]

In this thesis, I will perform a comparative analysis of these approaches to interpreting the nexus requirement of non-self-judging NPM clause of the U.S.-Argentina BIT, [63] and examine to what extent the arguments of the above mentioned scholars are appropriate from the perspective of treaty interpretation under the *Vienna Convention on the Law of Treaties* (VCLT). Through this analysis, I will be able to propose a potential interpretative methodology for future arbitral tribunals, and this will constitute one part of the originality of the thesis. In this respect, I will argue that, in interpreting the NPM clause, the tribunals should adhere to Article 31(1) and (2) of the VCLT.[64] In cases when the tribunals fail to define the meaning under Article 31 (1)

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[57] Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford: Oxford University Press, 2015) at 281.
[58] Benedict Kingsbury & Stephan Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality", in Stephan W. Schill, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) at 79.
[59] Jürgen Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis", (2010) 59 International Comparative Law Quarterly at 361 [Kurtz, Adjudging the Exceptional]; Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: Cambridge University Press, 2016) at 168-228.
[60] Giorgio Sacerdoti, "The Application of BITs in Time of Economic Crisis: Limits to their Coverage, Necessity and the Relevance of WTO Law", in Giorgio Sacerdoti, Pia Acconci, Mara Valenti & Anna De Luca, *General Interests of Host States in International Investment Law* (Cambridge: Cambridge University Press, 2014) at 20.
[61] Andrew Mitchell & Caroline Henckels, "Variations on a Theme: Comparing the Concept of 'Necessity' in International Investment Law and WTO Law", (2013) 14 Chicago Journal of International Law 93 at 101.
[62] Kurtz, Adjudging the Exceptional, *supra* note 59, at 366.
[63] *See*, Valentina Vadi, "The Role of Comparative Law in Investment Treaty Arbitration", (2011) 39 Denver Journal of International Law and Policy 67 at 89.
[64] Article 31(1) and (2) of VCLT provide that,

and (2), they should not look for guidance directly in other treaty regimes such as the European Court of Human Rights (ECtHM) and the World Trade Organization (WTO), but rather must have recourse to general international law, specifically customary rules of international law through operationalizing Article 31(3)(c) of VCLT.[65] Acknowledging the "gap-filling" function of customary rules, I will support the arguments of scholars who consider it appropriate to apply the elements of the customary necessity defense to interpreting Article XI of the U.S.-Argentina BIT. However, unlike these scholars, I argue in favour of applying a more developed approach to interpreting its "only means" element.[66] The proposals that I advance in this respect constitute my original contribution to researching the thesis topic. Thus, the third research question is whether dispute settlement bodies in other treaty regimes have developed a more progressive

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1. A treaty shall be interpreted in good faith *in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) any instrument which was made by one or more of the parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Vienna Convention on the Law of Treaties, January 27, 1980. Article 31 [emphasis added] [VCLT]. Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.>

[65] Article 31 (3) of VCLT provides as follows:
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) *any relevant rules of international law applicable in the relations between the parties.*

Ibid.

[66] In order to successfully invoke the necessity defense, a State's measures in question must be "the only way" to safeguard its essential interests. In this regard, the ILC clearly indicated that a State bears a substantial burden in making the claim that it had no other alternatives to protect its essential interests except the one it had adopted. It further stated that this rule would also apply even if such lawful alternatives are more costly or less convenient. James Crawford, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) at 83, para 15.
Available online at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>
See also, Roman Boed, "State of Necessity as a Justification for Internationally Wrongful Conduct", (2000) 3(1) Yale Human Rights and Development Law Journal 1 at 17, 28.

approach to examining the "only means" character of state measures adopted in necessity circumstances.

As will be explained in Chapter IV, the interpretation of the only means requirement by arbitral tribunals in the Argentine cases proved to be static and too strict in the sense that the availability of any alternative, irrespective of its viability and reasonableness, made it impossible for a state to invoke it successfully in practice. Thus, this kind of interpretation of the "only means" element has been considered by some scholars to be "ill-suited" to economic emergencies.[67] I argue that such interpretation of the only means requirement of the customary necessity defense (as codified in Article 25 of Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)) is not correct, as it does not accurately reflect the evolving contemporary customary rules on necessity. Thus, I propose to reconceptualise it by incorporating the elements of its progressive version which, in my view, is found in emerging state practice within the international trade regime.

In the WTO regime, states have a right to adopt the measures necessary to protect their public interests under the exception clauses found in certain WTO agreements.[68] In examining the necessity for adopting these measures, the WTO dispute settlement bodies (DSB) apply the

[67] Giorgio Sacerdoti, "BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defense of Necessity", (2013) 28 (2) ICSID Review 351 at 374; Christina Binder, "Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns: Or the Benefits of a Public International Law Approach to Investment Arbitration", in Tullio Treves, Francesco Seatzu & Seline Trevisanut, *Foreign Investment, International Law and Common Concerns* (London and New York: Routledge, 2014) at 78; Ibironke T. Odumosu - Ayanu, "International Law and Disasters: Necessity, Peoples, and the Burden of (Economic) Emergencies", in David Caron, Michael Kelly & Anastasia Telesetsky, *The International Law of Disaster Relief* (Cambridge: Cambridge University Press, 2016) at 327; Stephan W. Schill & Yun-I Kim, "Sovereign Bonds in Economic Crisis: Is the Necessity Defense under International Law Applicable to Investor–State Relations? A Critical Analysis of the Decision by the German Constitutional Court in the Argentine Bondholder Cases", in Karl P. Sauvant, ed., *Yearbook on International Investment Law & Policy* (2010/2011) 485-512, at 513.

[68] Article XX, General Agreement on Tariffs and Trade 1994; Article XIV, General Agreement on Trade in Services, April. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 United Nations Treaty Series 183, 33 I.L.M. 1167 (1994); Article 5.6., Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994); Article 2.2., Agreement on Technical Barriers to Trade (15 April 1994) WTO Agreement, Annex IA.

less restrictive means (LRM) test.[69] According to WTO jurisprudence, under the LRM test, the measures are found necessary if a state has no other alternatives which are less restrictive on trade and achieve the same level of protection as the adopted measures.[70] The most important feature of the LRM test is that the alternative measures must be "reasonably available", which means that they must not be "merely theoretical in nature" and a state should be capable of adopting them in real circumstances.[71] In this respect, I argue that this feature of the LRM test represents a "developed" or "dynamic" form of state practice on examining whether measures adopted by a state to protect its essential interests were the only means to achieve the pursued objectives. Thus, unlike the scholars who reject the application of customary necessity elements and propose direct importation of the LRM test from the international trade regime to interpreting Article XI, I suggest a different approach to obtaining the advantage of WTO jurisprudence. Specifically, I argue that the WTO jurisprudence can be imported into the investment regime indirectly, that is, by serving as a source of identifying the development of state practice on examining the "only means" nature of state measures adopted in emergency (necessity) circumstances. Therefore, I contend that state practice represents a more progressive and practicable approach to interpreting the only means requirement of the customary necessity defense, and thus should be incorporated into the practice of investment arbitral tribunals.

[69] For a detailed explanation of the LRM test, *see* Chapter VI.

[70] Alan Sykes, "The Least Restrictive Means", (2003) 70 (1) University of Chicago Law Review 403; Deborah Akoth Osiro, "GATT/WTO Necessity Analysis: Evolutionary Interpretation and its Impact on the Anatomy of Domestic Regulation", (2002) 29(2) Legal Issues of Economic Integration 123; Gisele Kapterian, "A Critique of WTO Jurisprudence on 'Necessity'", (2010) 59 International Comparative Law Quarterly 89.

[71] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161 and 169/AB/R (adopted 10 January 2001), at para 166; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/ DS135/AB/R (adopted 5 April 2001), at paras 167-174; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted 20 April 2005), at para 308; *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/ DS302/AB/R (19 May 2005), at para 70.

Another original element of this thesis is that it is the first attempt to research this topic through the prism of regime theory, which entails a detailed examination of treaty NPM clauses and customary necessity defense under the following closely related concepts: regime formation, regime attributes, regime consequences, and regime dynamics.[72] Thus, the content of the thesis is structured within the framework of these theoretical concepts.

(iii) Thesis Structure

The thesis consists of six chapters. The first chapter provides an overview of the theoretical framework for the thesis topic. First, it explains the benefits of international relations theories in researching international law issues and suggests regime theory as a potential theory for researching the thesis topic. Then, it describes the notion and main attributes of regime theory. Afterwards, it discusses the application of regime theory to the thesis topic. Particularly, it explains how the content of the thesis and its main arguments could be framed within the theoretical concepts of regime theory.

Chapter II presents a historic background on the doctrine of necessity and explains the origins and evolution of this doctrine. First, it inquires into how the sources of Divine Law deal with the concept of necessity and provides analysis of the concept of necessity in Islamic and Canon Law. Then, it discusses theoretical concepts related to necessity in the works of natural law and the historical school of scholars of the XVII century and describes major developments in the evolution of the necessity concept in the Middle Ages. Finally, it elucidates the formation and development of the necessity concept in modern times.

Chapter III presents an overview of the doctrine of necessity in public international law. First, it attempts to identify customary rules on necessity. In this regard, it analyses relevant

[72] The application of regime theory and of its concepts to the thesis topic will be explained in Chapter I.

cases in which international dispute settlement bodies have addressed the concept of necessity, and identifies relevant state practice with respect to the customary necessity defense. Then, it discusses a modern concept of necessity as codified in Article 25 of ARSIWA. In particular, it explains the definition and specific features of necessity, and examines the constituent elements serving as requirements for its successful invocation. Afterwards, it presents a comparative analysis distinguishing features of necessity from other closely related circumstances precluding wrongfulness, such as distress and *force majeure*.

Chapter IV gives a detailed overview of exceptions found in international investment agreements, which are also called NPM clauses. First, it explains the nature and constituent elements of NPM clauses. Then, it presents an analysis of issues related to the application and interpretation of NPM clauses by investment arbitration tribunals in the Argentine cases. Afterwards, it provides discussion clarifying the distinction between the treaty NPM clauses and the customary necessity defense in terms of application and the effects of invocation in the practice of investment arbitration tribunals.

Chapter V inquires into the self-judging nature of NPM clauses. First, it examines the characteristics and categories of self-judging clauses. Then, using examples of self-judging clauses found in international trade and investment agreements, it explains the distinction between self-judging and non self-judging clauses. Afterwards, it presents discussion of the possible standard of review applied to measures examined under self-judging NPM clauses. It will be argued that invoking self-judging NPM clauses does not constitute a bar to the jurisdiction of arbitral tribunals, but rather, modifies the standard of review applied to examining the state measures justified under such clauses. In the end, the chapter presents a discussion on determining the self-judging character of the NPM clause in the U.S.-Argentina BIT. In

attempting to determine whether the NPM clause at issue is self-judging or not, it examines the decisions of arbitral tribunals and the opinions of different scholars on this issue.

Chapter VI provides a comparative analysis of tests suggested by scholars for interpreting Article XI of the U.S.-Argentina BIT as a non self-judging treaty NPM clause. Particularly, it examines whether these tests, such as margin of appreciation, proportionality and LRM have the potential to serve as an optimal standard for interpreting Article XI. In this respect, the chapter surveys the content of these tests and enquires into the advantages and criticisms related to their application in the investment arbitration regime. It will be argued that the interpretation of the non-self-judging NPM clauses should be performed under Article 31 of the VCLT. Specifically, it will be contended that in cases when arbitral tribunals fail to define the treaty term under Article 31(1) and (2), they must have recourse to customary rules as required under Article 31(3)(c) of VCLT. In this respect, I will attempt to show how customary international law can be effective in filling the gaps and lacunae in investment treaties. Moreover, based on the findings from WTO jurisprudence, I will develop a sophisticated approach to interpreting the only means requirement of the customary necessity defense.

(iv) Research Methodology

To research the topic comprehensively, the following methodologies will be used: historical, comparative and case study.

Since researching the origins and evolution of the necessity concept is one of the main purposes of the thesis, the historical approach is of great use in this respect. It allows not only for identifying the origins of the necessity concept, but also for illuminating the development of theoretical concepts related to necessity and the expanding circumstances of its application as a

defense. Generally, it helps to enquire into relevant historical evidence explaining the formation of the modern concept of the necessity defense in public international law.

Given that a substantial part of this research involves a comparative analysis of the customary necessity defense and the treaty NPM clauses, the application of a comparative method is useful in determining their common and distinctive features. This method is also of great value in performing a comparative analysis of tests applied by DSBs in other treaty regimes (WTO, ECtHR) to interpreting treaty provisions, which involve the assessment of necessity circumstances.

Researching the interpretative issues related to treaty NPM clauses and the customary necessity defense cannot be accomplished without examining the cases in which the concept of necessity has been addressed. Thus, case studies will be used as an essential method both in identifying state practice on the customary necessity defense and in examining the interpretative issues in the practice of investment arbitration tribunals.

Chapter I. Theoretical Framework

Choosing an appropriate theoretical framework for research plays an important role in its productive accomplishment. In my view, an efficient theory should meet the following requirements. First, the relevant theory should correspond to the content and purpose of the research. In other words, it should ensure that the research questions are addressed in a consistent manner throughout the thesis, so that in the end, the purpose of the research is accomplished in one coherent framework. Second, a potential theory should contain relevant conceptions through the prism of which the main research questions can be explored. Put simply, it should contain the conceptions that could be applicable to the object of research and correspond to the main arguments made by a researcher in addressing research questions. Given the foregoing, and since the thesis topic mainly deals with specific norms of two closely connected regimes (NPM clauses in investment treaties and the necessity defense in customary international law), I found the application of regime theory in international relations scholarship and its relevant conceptions, especially the conception of "interaction of regimes", the most relevant in this respect.

Generally, the regime theory serving as the overall theoretical framework for my research questions is considered to be interdisciplinary in nature. Since scholars underline several uses of applying such an interdisciplinary approach to researching international law issues, in this chapter, I will first shed light on these uses of the interdisciplinary approach. Then, I will elaborate on the definition and elements of regime theory. After that, I will attempt to explain how regime theory can be applied to addressing the research questions put forward in the thesis.

1.1. Interdisciplinary Approach to Research: Drawing on International Relations Theories

In the late twentieth century, international relations scholars specializing in law began writing on interdisciplinary approaches to legal research. Their work mainly centered on drawing on international relations scholarship more in exploring international law issues.[1] Besides calling for a "joint discipline that would bridge the gap"[2] between international relations and international law, scholars such as Kenneth Abboth and Anne-Marie Slaughter argued that such an interdisciplinary approach would offer multiple benefits in studying international law.[3] Particularly, the scholars emphasize that the concepts found in international relations might fill perceived inadequacies in legal analysis and produce better research results.[4] In this respect, they identify three approaches from international relations theories that international law scholars can draw on in analysing international law and institutions: 1) to diagnose substantive problems and frame better legal solutions; 2) to explain the function and structure of particular international

[1] Louis Henkin explains the close relationship between international law and international relations by the fact that compliance with international obligations constitutes a routine part of international relations. *See* Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1968) at 256-57; emphasizing the role of international law in this relationship, Bull Hedley notes that, "International law can contribute to international order by stating the basic rules of coexistence among States...." Bull Hedley, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 2012) at 143.

[2] Anne-Marie Slaughter, Andrew Tulumello & Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 American Journal of International Law 367 [Slaughter, Tulumello & Wood].

[3] Kenneth W. Abbot, "Modern International Relations Theory: A Prospect for International Lawyers", (1989) 14 Yale Journal of International Law 335 [Abbot]; Anne-Marie Slaughter, "International Law and International Relations Theory: A Dual Agenda", (1993) 87 American Journal of International Law 205 [Slaughter, Dual Agenda].

[4] Generally, turning to an interdisciplinary approach in analysing law can be understood as a response to law's perceived "reality deficit." Annelise Riles explains it as follows: "If we understand legal scholarship as incomplete, then intellectual productivity depends on taking steps toward completeness ... [i]t might involve the development of subdiscipline or the building of a forum of interdisciplinary conversation." Annelise Riles, "Representing In-Between: Law, Anthropology and the Rhetoric of Interdisciplinarity", (1994) 3 University of Illinois Law Review 597 at 633; in commenting on the benefits of international relations, Kenneth Abbot also noted that "modern international relations theory incorporates just those modes of inquiry and analysis in which international law scholarship has been weakest." Abbot, *supra* note 3, at 340.

legal rules or institutions; and 3) to reconceptualise or reframe particular rules, institutions or international law generally.[5]

The first category provides legal scholars with "powerful theoretical and rhetorical tools" that purportly specify the nature and causes of particular substantive problems in international law, and identify possible institutional responses.[6] Economics-based models such as collective goods, market failures and prisoner's dilemma usually provide a theoretical framework for diagnosing international problems and prescribing solutions to them. Professor Slaughter notes that international law scholars have also used similar international relations theories to diagnose and resolve different international problems, ranging from international terrorism to trade wars.[7] As a clear example, she refers to David Wippman, who drew on the theory of consocianalism[8] to examine effective legal solutions to ethnic conflicts in the domain of international security.[9] Generally, international law scholars are mainly considered to benefit from this use of international relations in generating theoretical accounts of certain substantive issues in international law. The emphasis is on making policy recommendations directed to solve specific international issues.[10]

The second approach is less concerned with exploring solutions to specific policy problems and making policy recommendations. Rather, it elevates research to a new level through "reason[ing] forward from a theoretical understanding of particular issue areas ....to

[5] Slaughter, Tulumello & Wood, *supra* note 2, at 373.
[6] *Ibid* at 375.
[7] *Ibid* at 374. For a list of scholarship on the application of international relations theories, *see* footnote 49.
[8] Consocionalism (also called as a theory of elite cooperation) signifies a stable democratic system in deeply divided societies that is based on power sharing between elites from different social groups. *See* Jurg Steiner, "The Consociational Theory and Beyond", (1981) 13 (3) Comparative Politics 339; Pierre du Toit, "Consociational Democracy and Bargaining Power", (1987) 19 (4) Comparative Politics 419.
[9] David Wippman, "Practical and Legal Constraints on Internal Power Sharing", in David Wippman, *International Law and Ethnic Conflict* (Ithaca: Cornell University Press, 1998) at 211.
[10] For the detailed discussion, *see* Slaughter, Dual Agenda, *supra* note 3.

richer explanations of the meaning and function of international agreements, procedures and institutions."[11] As Abbot puts it, it can help international law scholars "to illuminate ....the social phenomena of international rules, regimes and institutions by describing and interpreting them more richly even if the theory's potential deductive power is not fully tapped."[12] In this regard, Abbot notes that "as a social science, IR [international relations] does not purport to be ....a true 'legal method' capable of asking doctrinal questions."[13] Rather, as he emphasizes, IR is capable of performing the "intellectual tasks" of "description, explanation, and institutional design."[14] He himself took advantage of this approach in examining the functions of international trade agreements through the lens of regime theory.[15]

A third approach uses international relations to review particular rules, institutions, or international law as a whole from a critical perspective, and reconceptualise them according to developments in a specific area of international law. For instance, Richard Shell used this approach in critiquing the organizational structure of the WTO.[16] Similar critical analyses were also advanced by scholars who wrote on the structural and functional deficiencies of the investment arbitration institution, ICSID. Scholars such as Karl Sauvant and Gus Van Harten put forward proposals on reconceptualising the structure of investment arbitration institutions, such

[11] Kenneth W. Abbot, "Trust but Verify: The Production of Information in Arms Control Treaties and Other International Agreements", (1993) 26 Cornell International Law Journal 1, at 2.
[12] Abbot, *supra* note 3, at 353-54.
[13] *Ibid* at 361.
[14] *Ibid* at 362. Slaughter explains it as such: "IR can supply the *how* and the *why*; IL can then focus on the *what, where* and *when*." Anne-Marie Slaughter, "The Technology: Principal Theories of International Relations", (2000) 285 Recueil des cours 21, at 25 [Slaughter, Principal Theories].
[15] Kenneth W. Abbot, "The Trading Nation's Dilemma: The Functions of the Law of International Trade", (1985) 26 Harvard International Law Journal 501.
[16] Richard Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization", (1995) 44 Duke Law Journal 829.

as creating an appellate body and establishing a permanent court dealing with investor-states arbitration issues.[17]

These three approaches of using international relations theories offer several benefits for scholars researching international law issues. In particular, the latter two approaches have strong potential in researching the thesis topic. The second approach, in my view, will be highly valuable in explaining the structure and function of international norms, such as the customary necessity defence and treaty NPM clauses, which are the main objects of this research. As for the third approach, it will help analyse both international law norms from a critical perspective and to put forward proposals on reconceptualising them based on new developments found in the practice of states and institutions. Successfully accomplishing this requires the application of a particular international relations theory and of its relevant concepts. In this respect, as stated above, I decided to apply regime theory, as it offers an appropriate theoretical framework for researching issues in the domain of international investment law. Additionally, concepts contained within regime theory can be used as efficient theoretical models (or tools) for resolving interpretative issues that exist in investment arbitration practice regarding the customary necessity defense and treaty NPM clauses. In subsequent sections, I will shed more light on the definition, elements and concepts of regime theory and explain how they can be applied to researching the thesis topic.

[17] Karl P. Sauvant, *Appeals Mechanism in International Investment Disputes* (Oxford: Oxford University Press, 2008); Gus Van Harten, *Investment Treaty Arbitration and Public Law*, (Oxford: Oxford University Press, 2007).

1.2. Regime Theory

1.2.1. Purpose and Benefits of Regimes

Regime theory is considered to be one of the main theories in international relations scholarship, and is derived from the liberal tradition that argues that international institutions or regimes affect the behaviour of states (or other international actors).[18] It assumes that cooperation is possible in the anarchic system of states, as regimes are by definition instances of international cooperation.[19] According to regime theory, States are regarded as principal actors in the international system, and regimes affect their behaviour, furthering cooperation among them and facilitating the achievement of common ends.[20] According to regime theory scholars, "[r]egimes are deliberately constructed, partial international orders on either a regional or a global scale, which are intended to remove specific issue-areas of international politics from the sphere of self-help behaviour."[21] They further note that, "[b]y creating shared expectations about appropriate behaviour and by upgrading the level of transparency in the issue area, regimes help states (and other actors) to cooperate with a view to reaping joint gains in the form of additional

[18] *See* Volker Rittberger & Peter Mayer, *Regime Theory and International Relations* (Oxford: Clarendon Press, 1995). It is argued that "[r]egimes help (self-interested) states to coordinate their behaviour such that they may avoid collectively subioptimal outcomes." Andreas Hasenclever, Peter Mayer & Volker Rittberger, *Theories of International Regimes* (Cambridge: Cambridge University Press, 1997) at 4.

[19] Regime theory is considered to be one of the interest-based approaches to international cooperation. For an extensive review of the taxonomy of conceptual approaches to international cooperation, *see* James Dougherty & Robert Platzgraff, *Contending Theories of International Relations: A Comprehensive Survey*, 5th ed (New York: Longman, 2002).

[20] It should be noted that, Robert Keohane, through his works, is considered to develop regime theory into institutionalism, the basic features of which are as follows:
(1) The primary actors in the international system are States.
(2) Absent institutions, States engage in pursuit of power, but in many areas their underlying interests do not necessarily conflict.
(3) Institutions can modify anarchy sufficiently to allow States to co-operate over the long-term to achieve their common interests.
(4) In assessing the factors that determine international outcomes, institutions "are as fundamental as the distribution of capabilities among states". Robert Keohane, *International Institutions and State Power: Essays in International Relations Theory* (Boulder: Westview Press, 1989) at 8.

[21] Andreas Hasenclever, Peter Mayer & Volker Rittberger, "Integrating Theories of International Regimes", (2000) 26 Review of International Studies 3 at 3.

welfare or security."[22] The benefits of regimes are best explained by Robert Keohane. In his famous book on the main approaches to regimes, Keohane explains that regimes:

> [E]nhance the likelihood of cooperation by reducing the costs of making transactions that are consistent with the principles of the regime ... create the conditions for orderly multilateral negotiations, legitimate and delegitimate different types of state action, and facilitate linkages among issues within regimes and between regimes. They increase the symmetry and improve the quality of information that governments receive.[23]

Regimes offer many benefits to states. Generally, they decrease the transaction costs of states in their relations and increase information to reduce uncertainty, thereby facilitating communication among them. Most importantly, as Slaughter points out, regimes "can enhance the value of a State's reputation for honouring commitments, facilitate monitoring of State behaviour, and make decentralized enforcement possible by creating conditions under which reciprocity can operate."[24] Taken together, these benefits enhance state compliance to international agreements, which comprise the keystones of each specific international regime.[25] However, the creation and sustenance of regimes is conditioned by the existence of common interests among states. In the absence of interests around which state expectations converge, it is less likely to achieve that. It is usually observed that common interests of states converge in different issue-areas of international relations. By identifying the dominant value in each such issue-area, we can classify regimes into several categories. Based on that classification, we find that there are security regimes, such as the nuclear non-proliferation regime[26]; economic regimes,

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[22] *Ibid*.
[23] Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, Princeton University Press, 1984) at 244 [Keohane, *After Hegemony*].
[24] Slaughter, Principal Theories, *supra* note 14, at 38.
[25] Keohane, *After Hegemony*, *supra* note 23, at 245.
[26] This regime is based on the Treaty on the Non-Proliferation of Nuclear Weapons, which was signed in 1968 and entered into force in 1970. As of the present, a total of 191 states have joined this treaty. For detailed discussion on this regime, *see* Bradley Thayer, "The Causes of Nuclear Proliferation and the Utility of the Nuclear Non-

such as the international trade[27] and investment regimes[28]; environmental regimes, such as the international regime for the protection of the stratospheric ozone layer[29]; and human rights regimes, such as the regime of human rights protection under the ECHR.[30]

1.2.2. Definition of "Regime" in International Relations Scholarship

The essence of regime theory is built upon the concept of "regime". So, what does "regime" mean? The original definition of a "regime" was formulated by Stephen Krasner. He defines "regime" as a "set of implicit or explicit principles, norms, rules, and decision making procedures around which actors' expectations converge in a given area of international relations."[31] He further clarifies that,

> Principles are beliefs of fact, causation, and rectitude, *norms are standards of behaviour defined in terms of rights and obligations*, rules are specific prescriptions or proscriptions

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Proliferation Regime", (1995) 4(3) Security Studies 463; Helen Cousineau, "The Nuclear Non-Proliferation Treaty and Global Non-Proliferation Regime: A US Policy Agenda", (1994) 12 (2) Boston University International Law Journal 407.

[27] Stephen Krasner, "The Tokyo Round: Particularistic Interests and Prospects for Stability in the Global Trading System", (1979) 23 (4) International Studies Quarterly 491; Richard Blackhurst, Nicolas Marian & Jan Tumlir, *Trade Liberalization, Protectionism, and Interdependence* (Geneva: GATT, 1977);

[28] José E. Alvaréz, "The Once and Future Foreign Investment Regime", in Mahnoush Arsanjani ed et al. *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman* (Leiden: Nijhoff, 2010); José E. Alvaréz, Karl P. Sauvant, Kamil Gerard Ahmed & Gabriela P. Vizcaino, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011); Jeswald Salacuse, "The Emerging Global Regime for Investment" (2010) 51 Harvard International Law Journal 427 [Salacuse, Global Regime for Investment].

[29] Osamu Yoshida, *The International Legal Regime for the Protection of the Stratospheric Ozone Layer: International Law, International Regimes, and Sustainable Development* (The Hague: Kluwer Law International, 2001); Brendam Seaver, "Stratospheric Ozone Protection: IR Theory and the Montreal Protocol on Substances that Deplete the Ozone Layer", (1997) 6 (3) Environmental Politics 31.

[30] Andreas Føllesdal, Johan Karlsson Schaffer & Geir Ulfstein, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2013); Laurence Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", (2008) 19 (1) European Journal of International Law 125; Murray Hunt, "The European Convention on Human Rights", (2003) 22 (1) Yearbook of European Law 483; Andrew Moravcsik, "The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights", (2011) 90 (6) Foreign Affairs 185.

[31] *See* Stephen Krasner, "Structural Causes and Regime Consequences: Regime as Intervening Variables", in Stephen Krasner ed., *International Regimes* (Ithaca: Cornell University Press, 1983) at 2 [Krasner, *International Regimes*]

for action and decision making procedures are prevailing practices for making and implementing collective choice.[32]

Other theorists have also offered definitions of the concept of regimes. For instance, Ernst Haas defines regimes as "a mutually coherent set of procedures, rules and norms,"[33] while Hedley Bull, referring to the important role played by rules and institutions in international society, explicates that regimes constitute "general imperative principles which require or authorize prescribed classes of persons or groups to behave in prescribed ways."[34] The definition provided by Puchala and Hopkins seems to render the meaning more elaborate and clear. According to them, regimes "constrain and regularize the behaviour of participants, affect which issues among protagonists are on and off the agenda, determine which activities are legitimized or condemned, and influence where, when and how conflicts are resolved."[35] Observing different definitions of this concept, Kratochwil notes that there are many ways to explain the concept, including through the rules, prescriptions, norm and practices constituting the main elements of regimes. In his view, choosing any of these explanations may have a substantial impact on subsequent analyses.[36]

Other scholars also express similar criticisms regarding the clarity of the concept of international regimes. For instance, Strange remarks that the notion of regimes "is yet one more woolly concept that is a fertile source of discussion simply because people mean different things

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[32] *Ibid* [emphasis added]. Robert Keohane defines regimes as "institutions with explicit rule, agreed upon by governments that pertain to particular sets of issues in international issues." *See* Robert. Keohane, "Neoliberal Institutionalism: A Perspective on World Politics", in Robert Keohane, ed, *International Institutions and State Power: Essays in International Relations Theory* (Boulder: Westview Press, 1989) at 4.

[33] Ernst Haas, "Technological Self-Reliance for Latin America: the OAS Contribution", (1980) 34 (4) International Organization 541 at 553.

[34] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1977) at 553.

[35] Donald Puchala & Raymond Hopkins, "International Regimes: Lessons for Inductive Analysis", (1982) 36 International Organization 245 at 246.

[36] Friedrich Kratochwil, "The Force of Prescriptions", (1984) 38 International Organization 685 at 705.

when they use it."[37] In this respect, she emphasizes the flexible nature of the regime concept when applied in the real practice of international relations. As an example, Strange notes that the formulation of the concept of regime by Keohane and Nye as a "network of rules, norms and procedures that regularize behaviour and control its effects"[38] makes it likely to be construed narrowly as "internationally agreed arrangements, usually executed with the help of an international organization."[39] She points out that, while in formulations explaining regimes as "decision making procedures around which actors' expectations converge", its meaning can be broadened to some extent, this would mean embracing "almost any fairly stable distribution of power to influence outcomes."[40] In her view, such a varied approach to explaining the regime concept obscures the distinctions between international regimes and the entire domain of international relations. Thus, she warns that "[e]xperience with the use of these or other, equally woolly words... do not actually mislead and misrepresent, they often serve to confuse and disorient us."[41]

Generalising the definition of regimes by different scholars, another theorist, Oran Young, considers it as "conceptually thin ....provid[ing] a checklist of elements whose occurrence at the same time and in the same space is sufficient to place any phenomenon in the category labeled "regime"."[42] Moreover, in his view, "it does not tie the concept into any larger system of ideas that would help to solve the [abovementioned] definitional ambiguities ....that would offer guidance in formulating key questions and hypotheses regarding international

[37] Susan Strange, "Cave! Hic Dragones: A Critique of Regime Analysis", in Krasner, *International Regimes*, *supra* note 30, at 342-343 [Strange, A Critique of Regime Analysis].
[38] Robert Keohane and Joséph Nye, *Power and Interdependence* (Boston: Little, Brown, 1977) at 19.
[39] Strange, A Critique of Regime Analysis, *supra* note 37, at 343.
[40] *Ibid*.
[41] *Ibid*.
[42] Oran Young, "International Regimes: Toward a New Theory of Institutions", (1986) 39 (1) World Politics 104 at 106 [Young, International Regimes].

regimes."[43] Therefore, he recommends against an overreliance on definitions, warning that "definitions that are not clearly integrated into some larger conceptual system inevitably lead to trouble."[44] Based on these considerations, Young proposes his own formulation of the concept, which states that regimes are "social institutions governing the actions of those involved in specifiable activities or sets of activities."[45] He clarifies further that, "[s]ocial institutions are recognized practices consisting of identifiable roles, coupled with collections of rules or conventions governing relations among the occupants of these roles."[46]

1.2.3. Special Regimes in International Law

At this point, it should also be noted that the list of definitions of the concept of regime is not limited to international relations scholarship. There has also been attempt to define the notion of regime in the domain of international law. According to James Crawford and Penelope Nevill, the use of the term "regime" dates back to the nineteenth century, where it had a specific legal meaning of a "legal framework which governed and controlled a particular area of conduct, usually concerning an area of territory."[47]Due to various factors, the application and usage of the term "regime" later expanded to areas of international law established by treaties and institutions.[48] In the beginning of the twenty-first century, the ILC Study Group on the

[43] *Ibid*.
[44] *Ibid* at 107.
[45] Oran Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (Ithaca and London: Cornell University Press, 1989) at 12.
[46] Young, International Regimes, *supra* note 42, at 107. As for the occupants of roles, Young gives simple examples such as husband and wife in the institution of marriage, buyer and seller in market institutions etc. Rules and conventions "grow up around these roles and constitute the superstructure of social institutions ....encompass[ing] sets of rights and entitlements as well as sets of behavioural prescriptions." *Ibid*.
[47] James Crawford & Penelope Nevill, "Relations between International Courts and Tribunals: the 'Regime Problem'", in Margaret A. Young, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012) at 258 [Crawford & Nevill].
[48] *Ibid*. As for the factors, Crawford and Nevill explain that "it was partly a leakage from the things that one could reasonably describe as regimes in that they had a set of rules governing a specific activity and administrating body;

fragmentation of international law summarized a detailed explanation of the regime concept.[49] Chaired by Martti Koskenniemi, the study group took advantage of the concept of "special regimes" in conceptualising the operation of *lex specialis* norms. In this respect, the ILC identified three potential meanings of the concept:

> 1) [narrowly, where] violation of a particular group of (primary) rules is accompanied by a special set of (secondary) rules concerning breach and reactions to breach;[50]
>
> 2) [more broadly, where there is] a set of special rules, including rights and obligations, relating to a special subject matter. Such rules may concern a geographical area (e.g. a treaty on the protection of a particular river) or some substantive matter (e.g. a treaty on the regulation of the uses of a particular weapon). Such a special regime may emerge on the basis of a single treaty, several treaties, or a treaty and treaties plus non-treaty developments (subsequent practice or customary law);
>
> 3) [most broadly, where] all the rules and principles that regulate a certain problem area are collected together so as to express a "special regime". Expressions such as "law of the sea", "humanitarian law", "human rights law", "environmental law" and "trade law", etc. give expression to some such regimes. For interpretative purposes, such regimes may often be considered in their entirety.[51]

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partly a result of loose language; and partly a result of international relations scholars who started to be interested in norms but could not really buy into international law as a norm-narrative for itself...". *Ibid*.

[49] The ILC Study Group, "The Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission finalized by Martti Koskenneimi", (13 April 2006) (A/CN.4/L.682 and Corr.1).

[50] The ILC study group provides the US v. Iran case under Article 55 of the ILC Articles on State Responsibility in which the court held : "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse." The ILC Study Group, "The Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Conclusions of the Work of the Study Group", (18 July 2006) (A/CN.4/L.702), at 11, para 12 [ILC, Fragmentation(Conclusions)].

[51] *Ibid* at 11, para 12.

According to Margaret Young, these definitions of "special regimes" contain certain principal sets of assumptions that diverge from one another.[52] The first set of assumptions relates to the actors that make up regimes. In this respect, as was mentioned above, states are considered the main participants of regimes. Depending on the scope of membership of a particular treaty, regimes may apply to all states (universal), while others may apply only to certain groups of states that consented to be bound by a particular treaty. The consent of states to be bound by certain treaties is the most important element of participation in regimes. Apart from states, there are private entities that also constitute the main actors of special regimes (ex. the international investment regime).[53] In this regard, Oran Young points out that, "[i]n formal terms, the members of international regimes are always sovereign states, though the parties carrying out the actions governed by international regime are often private entities."[54]

The second set of assumptions relates to the institutional nature of regimes. As Young explains, the ILC's conceptions of special regimes "implicitly rely on some kind of institutional background to the relevant rules and principles."[55] In other words, the maintenance of regimes depends on an "institutionalized system of dealing with a particular field of behaviour."[56] The effectiveness of rules regulating the behaviour of states in certain areas (for instance, the environmental regulation of transnational waters) highly depends on administrative bodies. In

[52] Margaret A. Young, "Introduction: The Productive Friction between Regimes", in Margaret A. Young, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012) at 5-10 [Margaret Young].
[53] Even though this regime is built on different investment treaties concluded by sovereign states, the beneficiaries of the legal rights and guarantees established in these treaties remain mainly private entities of these sovereign states (foreign investors).
[54] For instance, fishing companies, banks, or private airlines, etc. Oran R. Young, "Regime Dynamics: the Rise and Fall of International Regimes", in Krasner, *International Regimes*, *supra* note 31, at 93.
[55] Margaret Young, *supra* note 52, at 8.
[56] Crawford & Nevill, *supra* note 47, at 259.

this respect, the European Commission of the Danube established by the agreement of the Danube riparian states serves as a good example.[57]

The third set of assumptions is concerned with the "stages of legal development and application" within a regime.[58] These stages include the making, implementation and enforcement of international law. Since specific areas of international law constantly experience normative changes and development, the broadest conception of regimes allows for a more dynamic understanding of legal rules and processes within those areas of international law.[59] In this regard, Professor Young emphasizes that the understanding of stages of legal development within regimes must be compounded with "a legal sense for the cross-fertilization between relevant stages."[60]

Although these assumptions center on the specific attributes of regimes, they should not be understood as rejecting the generality of international law. This kind of understanding is primarily premised on the contention that specialized regimes of international law are not "self-contained", and cannot exist and function in isolation from general international law. This matter will be addressed further in the following paragraph, where I explain the application of regime theory to the thesis topic.

[57] The rules established in this agreement mainly govern the management and use of the Danube river by states located on the banks of the river, as well as by third states. *See* Convention Regarding the Regime of Navigation on the Danube, (18 August, 1948), 33 U.N.T.S. 181.
[58] Margaret Young, *supra* note 52, at 9.
[59] *Ibid* at 10. The development of international trade law through multilateral negotiations and state practice is a good example.
[60] *Ibid*.

1.3. Application of Regime Theory to Thesis Topic

1.3.1. Framing Thesis Content within Theoretical Concepts

As discussed above, international relations theories offer several benefits in researching international law issues. In this respect, in his article titled "The Emerging Global Regime for Investment", one distinguished scholar in international investment law, Professor Jeswald Salacuse, underlined certain advantages of examining issues in the domain of international investment law through the lens of regime theory.[61] According to him, regime theory first "offers an analytical framework to understand and capture the essential, common elements of the 3000 legally separate and distinct treaties and to understand the systemic nature of what states have created through the treaty making process."[62] Second, it may "enable observers and scholars to better understand the dynamics of the relationships established by these treaties among states and between states and foreign investors."[63] Professor Salacuse further notes that applying traditional treaty analysis alone to examining investment treaties "often yields a static picture that does not fully reflect the dynamism and fluidity of the system that such treaties have created."[64] Third, since political issues make up the core of investment relationships between states and are profoundly at the root of investor-state disputes, regime theory "may make more visible the political nature and dimensions of these treaties," which is often overlooked by a pure legal analysis.[65]

Based on the definitions of the concept of regimes in international relations scholarship, Professor Salacuse notes that it may be argued that

[61] Salacuse, Global Regime for Investment, *supra* note 28.
[62] *Ibid* at 436.
[63] *Ibid*.
[64] *Ibid*.
[65] *Ibid*.

> [I]nternational investment treaties as a group represent a convergence of expectations by states as to how host governments will behave toward investments from other regime members [and] [t]he norms and rules embodied in investment treaties are intended to constrain and regularize such behaviour in order to fulfill those expectations.[66]

Professor Salacuse's argument on the application of regime theory in the domain of international investment law serves as a starting point for designing a theoretical framework for the research topic. Thus, based on the above-mentioned, I will attempt to explain how the thesis's content can be researched within the framework of regime theory. In this respect, I will take advantage of relevant concepts of regime theory that can provide a systematic order for examining research questions efficiently within one consistent framework.

The main discussion in the thesis is centered on the NPM clauses in investment treaties and the necessity defense in customary international law. Thus, for the purpose of this research, both investment treaties and customary international law can be considered as two distinct regimes that have their own norms and rules,[67] whereas NPM clauses in investment treaties and the necessity defence in customary international law can be regarded as specific norms within these regimes. Therefore, the regime theory concepts used to analyse specific regimes will not be applied to the investment and customary international law regimes as a whole, but rather to specific norms (treaty NPM clauses and the customary necessity defense) contained within these regimes. Based on this, the term "regimes" will be conditionally applied to these two norms.

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[66] *Ibid* at 431. For an extensive review of international relations theories in the context of international investment regime, *see* Nicholls Esteban, "Bilateral Investment Treaties in the Developing World: A Discursive Approach to the Analysis of Regime Formation", Master's Thesis submitted to Department of Political Studies, University of Manitoba (2008).

[67] Both treaty law and customary international law are considered to promote cooperation in different ways. Regime theory identified mechanisms in both regimes that promote cooperation among states and influence their behaviour. It is contended that both treaty and customary international law "minimize uncertainty, promote efficiency and reduce rent-seeking behaviour by egoistic states." William Aceves, "Institutionalist Theory and International Legal Scholarship", (1997) 12 American University Journal of International Law & Policy 227 at 260.

The examination of treaty NPM clauses and the customary necessity defense will be performed under the following closely related concepts of regime theory: regime formation; regime attributes; regime consequences; and regime dynamics.[68]

Under regime formation, I will examine the formation of the customary necessity defense and treaty NPM clauses in the practice of states. I will explain how these two regimes originated, evolved over time, and have reached their present form. This discussion will help identify the development of relevant state practice regarding the formation of customary and treaty rules dealing with necessity circumstances. It will be beneficial not only to explain the main driving forces and circumstances behind the formation of these regimes, but also to understand important factors of their development in the practice of states.

The concept of regime attributes will allow me to perform the content analysis of the customary necessity defense and treaty NPM clauses. It will serve as an efficient tool to explain the nature, features and constituent elements of these two regimes. Since both norms contain standards of behaviour for states in similar circumstances (emergency or necessity circumstances), drawing a distinction between them constitutes one of the purposes of examination under this concept. Thus, establishing the attributes specific to each regime will facilitate drawing distinctions between the two. In addition,, it will be useful in clarifying the relationship between both regimes in terms of their interpretation and application by investor-state arbitration tribunals, which are discussed in subsequent chapters.

Drawing further distinctions between the customary necessity defense and treaty NPM clauses will also be accomplished under the concept of regime consequences. I will attempt to explicate the consequences arising from the operation of two regimes in the realm of investor-

[68] Oran Young & Michael Zurn, "The International Regime Database: Designing and Using a Sophisticated Tool for Institutional Analysis", (2006) 6(3) Global Environmental Politics 121 at 123.

state arbitration. Specifically, through applying this concept, I will identify possible effects of the invocation of both regimes in the realm of investor-state arbitration. In this regard, the main focus will be on answering the following questions: a) whether the successful invocation of the customary necessity defense and treaty NPM clauses will trigger the payment of compensation by respondent states to the claimants (foreign investors) in investment disputes; b) how it will impact on construing the interaction of both regimes in terms of their application and interpretation by arbitral tribunals. I will continue examining these and other interpretative issues related to both regimes further under the concept of regime dynamics.

Examining certain research questions under the concept of regime dynamics is the most important part of the thesis, as it deals with the development of regimes for the purpose of their adjustment to contemporary practice of states.[69] By revisiting the practice of states in different regimes of international law, I will attempt to work out certain proposals on developing a balanced approach to interpreting the constituent elements of the customary necessity defense and treaty NPM clauses that meet the expectations of investment regime participants and ensure consistency in investor-state arbitration practice. In this respect, I will take advantage of another concept of regime theory, which is the "interaction of regimes." In her book dedicated to the interaction of regimes, Margaret Young argues that regime interaction can play an essential role in providing coherence among different treaty regimes in the international legal system.[70] Particularly, Professor Young underscores the benefits of using regime interaction in understanding the strategic dimensions of fragmentation and the ways in which different elements of international law interact. Against the background of confronting global problems,

[69] *Ibid* at 135.
[70] Margaret A. Young, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012).

such as the fragmentation of international law giving rise to the potential for conflicting norms between regimes, she contends that a "productive friction of regime interaction may lead to a more responsive and effective international legal system than the sum of the constituent regimes."[71]

1.3.2. Summary of Main Thesis Arguments under the Regime Interaction Concept

As can be assumed from the above-mentioned, the concept of regime interaction is based on the fact that international legal regimes usually interact in ongoing and constant relationships and sometimes overlap on specific legal issues, which, in turn, create conflicts between them. According to Jeffrey Dunoff, these interactions can take different forms and tend to focus on the legal issues that arise from different fact patterns.[72] Although the interaction of regimes is a broad concept, for the purpose of our research, I have decided to shed light on its benefits in the area of norm interpretation in international law regimes.[73] In that sense, according to this conception, treaty parties and dispute settlement bodies may specify the meaning of treaty norms by referring to other international rules and regulations, which are called "extrinsic norms".[74] In other words, under the interaction of regimes, the treaty interpreters may interpret unclear and open-textured norms of a particular legal regime in light of norms which are part of another

[71] *Ibid* at 11.
[72] Dunoff L. Jeffrey, "A New Approach to Regime Interaction", in Margaret A. Young , *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012) at 136 [Dunoff].
[73] For a detailed analysis of different functions of regime interaction such as regulative, administrative, operational and conceptual, *see Ibid*, at 158-172.
[74] Nele Matz-Luck, "Norm Interpretation across International Regimes: Competences and Legitimacy", in Young A. Margaret, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012) at 202.

regime.[75] This kind of regime interaction occurs when the legal issues arise from the following fact patterns:[76]

1) When norms from two or more international legal regimes are potentially applicable to a situation; [77]

2) When a court or other body embedded in one legal regime is asked to interpret or apply a norm originating in a different regime; [78]

3) When the same or a related fact pattern comes before multiple courts or institutions; [79]

4) When different international tribunals or courts adopt different approaches to the meaning or application of a legal concept.[80]

Researching interpretative issues related to treaty NPM clauses and the customary necessity defense under the framework of the first and fourth patterns is especially beneficial for the purposes of this thesis. This can be explained as follows. First, as was mentioned above, the arbitral tribunals in the Argentine cases were mainly tasked with specifying the relationship between the norms of two different regimes, the NPM clause of the treaty regime and the necessity defense of the customary international law regime. The application of the first fact

[75] It does not mean that the dispute settlement bodies would apply only a norm of another regime (extrinsic norm) as a primary norm instead of the norm being interpreted. Rather, it means that they would interpret the norm at issue by only taking into consideration the extrinsic norm. Put simply, extrinsic norms are used only as guidance for interpretative purposes and not applied as primary norms.
[76] Dunoff, *supra* note 72, at 137.
[77] For instance, human rights and/or international humanitarian law are applicable in specific fact patterns or the norms of treaty and customary international law are applicable to specific factual circumstances.
[78] For instance, a WTO panel is asked to apply an international environmental norm. *See EC-Measures Concerning Meat and Meat Products* (Hormones), WT/SD26/AB/R (16 January 1998). In this case the WTO dispute settlement body refused to apply the precautionary principle in international environmental law. *See* also Petros Mavrodis, "No Outsourcing of Law? WTO Law as Practiced by WTO Courts?" (2003) 102 American Journal of International Law 421; Joel Trachtman, "The Domain of WTO Dispute Resolution", (1999) 40 Harvard International Law Journal 333.
[79] The Swordfish dispute which was filed at both WTO and the International Tribunal for the Law of the Sea (ITLOS) is a good example. *See* Marcos Orellana, "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO", (2002) 71 Nordic Journal of International Law 55.
[80] For example, when the ICJ and International Criminal Tribunal for the former Yugoslavia disagree over the correct legal test for the attribution of conduct by non-state actors to states. *See* Richard Goldstone & Rebecca Hamilton, "Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia", (2008) 21 Leiden Journal of International Law 95.

pattern will allow us to research all issues related to the application of treaty NPM clauses and the customary necessity defense to circumstances arising from economic emergencies. Specifically, it will help us to draw the distinctions between these two norms in terms of their application by arbitral tribunals to necessity circumstances arising from economic emergencies, and to identify possible consequences of their invocation in the realm of investor-state arbitration. Additionally, under this fact pattern we will be able to look into interpretative issues related to treaty NPM clauses and the customary necessity defense, and resolve them by applying theoretical forms of interaction between these norms of both regimes.[81] In this respect, it will be argued that to resolve the issues related to interpretation of the NPM clauses in IIAs, investment treaty regime norms should not interact directly with the norms of other treaty regimes, such as international trade or human rights regimes, but rather with the relevant norms of general international law, specifically customary rules of international law.[82]

The position that I advance in this research is that the norms of general international law should serve as a "mother source" for all specialized treaty regimes, and play a suppletory (gap-filling) function when separate treaty regimes fail to solve a particular legal issue. This is premised on the perception that international law is a unified legal order containing different specialized treaty regimes that should always sustain interaction with general international law. The necessity of their interaction is supported by the fact that these specialized treaty regimes are

[81] By applying this conception of regime theory, I suggest that the issue related to interpreting the ambiguous norm in investment treaty regime (NPM clause) be resolved through its interaction with the extrinsic norm (necessity defense) in the customary international law regime. As explained in the previous section, the harmonized full-back interaction is suggested as a potential form of interaction between the treaty and customary international law regimes. This and other forms of interaction between the treaty and customary norms will be explained in Chapter VI.

[82] To put it another way, in interpreting ambiguous treaty NPM clauses the investment arbitral tribunals should not apply the tests used in other treaty regimes such as the WTO and ECtHR, but rather, should rely on the norms of general international law.

not "self-contained"[83] and always rely (resort to) on general international law in case they fail to address a particular legal issue.[84] This is especially true when it comes to the issues of state responsibility in international law. As Bruno Simma and Dirk Pulkowski observe, even though "such special treaty regimes provide innovative procedures of dispute settlement, surveillance and reporting, leading to remedies that did not previously exist under general international law, ... *rules of special regimes are often less comprehensive than the established canon rules on state responsibility*."[85] Therefore, it is argued that in cases where "the rules and procedures of special systems [regimes] fail, a fallback on general international law ... is justified."[86] Furthermore, Simma and Pulkowski consider the coexistence of special regimes in isolation from the remainder of international law as "inconceivable", and argue that "[t]here will always be some degree of interaction, at least at the level of interpretation."[87] This view is further supported by Martti Koskenniemi, the Chairman of the ILC's Study Group on fragmentation of international law, who notes as follows:

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[83] Regarding "self-contained" regimes, Abi-Saab notes as follows:

> [How] autonomous and particular these [specialized regimes] may be, there cannot be a totally self-contained regime within the legal order. If the special regime is to remain part of the legal order, some relationship, however tenuous, must subsist between the two. Otherwise, if all links are severed, the special regime becomes a legal order into itself - a kind of legal Frankenstein, or Kelsen's "gang of robbers" - and no longer partakes in the same basis of legitimacy and formal standards of pertinence.

Georges Abi-Saab, "Fragmentation or Unification: Some Concluding Remarks", (1999) 31 New York University Journal of International Law & Policy 919 at 926 [emphasis added].

[84] Simma and Pulkowski observe that "the notion of 'self-contained regimes' has been misconceived as an argument in favour of entirely autonomous legal subsystems. Social systems cannot exist in splendid isolation from their environment ... [t]his point is conceded even by ardent proponents of regime specialization." Bruno Simma & Dirk Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law", (2006) 17 (3) European Journal of International Law 483 at 492 [Simma & Pulkowski].

[85] *Ibid* at 484 [emphasis added].

[86] *Ibid* at 485 [emphasis added]. It is also explained by the fact that "international investment law has its roots in general international law, despite its undeniable specificities." Alain Pellet, "The Case Law of the ICJ in Investment Arbitration", (2013) 28 ICSID Review - Foreign Investment Law Journal 223 at 240.

[87] *Ibid* at 492. As Simma and Pulkowski observe, "[w]ithout the omnipresence of "'general law" a special legal subsystem may, as Georges Abi-Saab put it, mutate into 'a legal Frankenstein' that 'no longer partakes in the same basis of legitimacy and formal standards of pertinence'." Simma & Pulkowski, *supra* note 84, at 492.

> No treaty, however special its subject-matter or limited the number of its parties, applies in a normative vacuum but refers back to a number of general, often unwritten principles of customary law concerning its entry into force and its interpretation and application. Moreover, this normative environment includes principles that determine the legal subjects, their basic rights and duties, and the forms through which those rights and duties are modified or extinguished.[88]

Based on the above, and taking into account the fact that the international dispute settlement bodies in special regimes acknowledge a residual application of general international law,[89] as well as admitting the potential of customary rules of international law in filling the gaps in the treaties,[90] I posit that unclear and open-textured terms of treaty provisions (BITs) should be interpreted consistently with general international law, specifically, customary rules of international law.[91] In particular, I contend that the nexus requirement of the NPM clause of the U.S.-Argentina BIT should be interpreted in light of the elements of the customary rule of the necessity defense, which represents a norm of general international law. As a methodology for performing this kind of interpretation, I propose to apply a systemic integration approach through

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[88] Martti Koskenniemi, "Study on the Function and Scope of the *lex specialis* Rule and the Question of "Self-Contained Regimes"', Preliminary Report by the Chairman of the Study Group submitted for consideration during the 2004 session of the International Law Commission, (4 May 2004) UN Doc. ILC(LVI)SG/FIL/CRD.1 and Add. 1, at 7 [emphasis added].

[89] For instance, the WTO Appellate Body noted that the GATT remain firmly embedded in the fabric of general international law and thus, "is not to be read in clinical isolation from public international law." The AB Report, *US – Standards for Reformulated and Conventional Gasoline*, (29 April 1996), WT/DS2/AB/R at 17; also in the AB Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, (6 Nov. 1998), WT/DS58/AB/R, at 154-157. For cases in the ECtHR regime, *see Golder v. the United Kingdom*, Judgment 21 February 1975, ECHR Series A (1975) No. 18, p. 13-14, at paras. 27-31; *Loizidou v. Turkey* (Merits) Judgment of 18 December 1996, ECHR 1996-VI, p. 2231, at para. 44. *Fogarty v. the United Kingdom*, Judgment of 21 November 2001, ECHR 2001-XI, p. 157; and *McElhinney v. Ireland*, Judgment of 21 November 2001, ECHR 2001-XI, p. 37. For ICJ case, *see Case Concerning Oil Platforms (Islamic Republic of Iran v. United States)*, Judgement on the Merits, November 6, 2003;

[90] Tarcisio Gazzini, Wouter Werner & Ige Dekker, "Necessity across International Law: An Introduction", (2010) Netherlands Yearbook of International Law 3 at 7.

[91] The useful role of customary rules was underlined by the Iran-US claims tribunal in the *Amoco* case as follows: "... the rules of customary international law *may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions*." *Amoco International Finance Corporation v. Iran*, Iran-U.S. C.T.R., vol. 15, 1987-II, p. 222, at para 112 [emphasis added], available online at: <http://www.trans-lex.org/231900>.

operationalizing Article 31 (3) (c) of VCLT. This constitutes the interpretative methodology part of my thesis.

There is another main issue that needs to be addressed in this research, which relates to working out a balanced approach to interpreting the "only means" requirement of customary rule of necessity. As was noted in the introduction, the interpretation of the only means requirement by arbitral tribunals has proved to be static (serving no purpose as it is impossible to successfully invoke it in practice), and thus is considered to be "ill-suited" to economic emergencies.[92] Thus, I argue that the interpretation of the only means requirement of the customary necessity defense as codified in Article 25 of ARSIWA does not accurately reflect the contemporary customary international law on necessity. I propose to reconceptualise it by incorporating the elements of its progressive version, which, in my view, is found in the emerging state practice of the international trade regime.[93] This issue will be examined by applying the fourth fact pattern of regime interaction.

The application of the fourth fact pattern allows us to inquire into how dispute settlement bodies in other treaty regimes have dealt with interpreting the concept of necessity in their practice. Looking into the practice of other treaty regimes does not assume a direct importation

[92] Giorgio Sacerdoti, "BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defense of Necessity", (2013) 28 (2) ICSID Review 351 at 374; Christina Binder, "Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns: Or the Benefits of a Public International Law Approach to Investment Arbitration", in Tullio Treves, Francesco Seatzu & Seline Trevisanut, *Foreign Investment, International Law and Common Concerns* (London and New York: Routledge, 2014) at 78; Ibironke T. Odumosu - Ayanu, "International Law and Disasters: Necessity, Peoples, and the Burden of (Economic) Emergencies", in David Caron, Michael Kelly & Anastasia Telesetsky, *The International Law of Disaster Relief* (Cambridge: Cambridge University Press, 2016) at 327; Stephan W. Schill & Yun-I Kim, "Sovereign Bonds in Economic Crisis: Is the Necessity Defense under International Law Applicable to Investor–State Relations? A Critical Analysis of the Decision by the German Constitutional Court in the Argentine Bondholder Cases", in Karl P. Sauvant ed., *Yearbook on International Investment Law & Policy* (2010/2011) 485-512, at 513.

[93] There is also a view suggesting to "abandon the 'only way' requirement and instead ask whether the State measure was a 'proportionate means' to protect its 'essential interests' - and include the State's 'contribution' as one factor in this analysis." *See* Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford: Oxford University Press, 2015) at 281.

of potential approaches to interpreting the nexus requirement of the NPM clause ("necessary for" term) of the BIT at issue (U.S.-Argentina BIT). Rather, the main goal is to identify the relevant state practice in other treaty regimes that reflect developments on interpreting necessity (emergency or exception) clauses. In turn, analysing the relevant jurisprudence of these treaty regimes, particularly the WTO regime, proves that the interpretation of the "only means" requirement of the customary rule of necessity has evolved from its static form (useless, serving no purpose as it is almost impossible to invoke successfully) into a dynamic form (useful, practicable and feasible to employ), which makes it practicable for states to invoke in necessity circumstances. By revisiting the WTO jurisprudence on interpreting necessity clauses in international trade instruments, I will argue that there is a development of state practice in the WTO regime that contains a progressive approach to examining whether state measures adopted in economic emergencies were the "only means" to protect its essential interests.

The thesis chapters are structured within the framework of regime theory's concepts. Thus, in the next chapter, I will explore the origins and evolution of the necessity doctrine under the first concept, which is regime formation. In particular, I will discuss the evolution of the necessity doctrine through different stages of history and explain the main developments that contributed to shaping the modern concept of necessity in contemporary international law.

II. Historical Origins and Evolution of the Necessity Doctrine

In this chapter, I will explore the historical origins and evolution of the necessity doctrine through the lens of regime formation, the first concept of regime theory. In the first section, I will inquire into how the sources of Divine law dealt with the concept of necessity. This section will give a detailed analysis of the concept of necessity in Islamic and Canon law. Specifically, they will focus on the definition and features of necessity as well as limitations and consequences of its invocation according to religious prescriptions developed by Islamic and Canon law scholars. The purpose of this section is to explore the sources of Divine law where the concept of necessity first originated and to explain how its fundamental rulings have been developed by scholars. It will help us understand the dynamics of the progressive development of the necessity concept, which will form background knowledge for further analysis in subsequent sections of this chapter.

The second section of the chapter will shed light on the works of scholars who viewed the necessity doctrine as a state's right to self-preservation. In this section, I will analyse two main approaches to the doctrine of necessity, which were developed by the natural law and historical schools of scholars. The main goal of this section is to present a comparative analysis of the theoretical concepts related to necessity in the works of natural law and historical scholars of the XVIIth century and to describe major developments in the evolution of the necessity concept in the Middle Ages. The last section will elucidate the formation and development of a modern doctrine of necessity. In particular, I will describe three main stages through which the concept of necessity underwent substantial notional and structural changes in modern times. The main purpose of this section is analysing the history of codification of the ARSIWA by the

International Law Commission (ILC) and identifying major notional and structural developments to the necessity concept made by modern scholars.

2.1. Religious Origins of Necessity: Islamic and Canon Law Approaches

This section will present how the concept of necessity is viewed in Divine law. In particular, it will illustrate the approaches of Islamic and Canon law to the notion, features, and limitations of necessity, as well as possible consequences of its invocation. The main task of this section is to explain the relevant prescriptions of the main sources of Islamic and Canon law for the state of necessity and draw initial understandings about how Divine law is important in explaining the historical evolution of necessity. For this purpose, addressing the works of Islamic and Canon law scholars is helpful in understanding the religious position on the necessity doctrine.

2.1.1. Necessity in Islamic Law

2.1.1.1. Definition and Types of Necessity

Before acquiring its present doctrinal shape in international law, the concept of necessity underwent a long process of evolution, the origins of which go back to medieval times. The first appearance of the necessity concept is found in Divine Law (*Jus Divinum*) in the form of God's commands imposed upon people. The holy book Qur'an,[1] which was revealed to the Prophet Muhammad in the 7th century, is a clear example highlighting a state of necessity and prescribing specific rules to exercise in such circumstances. There are numerous verses explicitly or implicitly tackling the topic of necessity. Before looking into the details of the Qur'anic verses where the Almighty God explicitly mentions necessity, it is appropriate to first shed light on the

[1] The Holy Qur'an was the revelation given to Prophet Muhammad (Peace be upon Him) from Allah (God) via the Angel Gabriel in the VIIth century. *See* The Qur'an (Oxford World Classics), (Oxford University Press, USA; Reissue edition June 15, 2008); *The Holy Qur'an: English Translation, Commentary and Notes with Full Arabic Text*, by Abdullah Yusuf Ali (New Delhi: Kitab Bhavan, 2001) [*The Holy Qur'an*].

linguistic definition of necessity, as it helps clarify the true meaning of the concept and serves as an essential tool in defining it in terms of legal interpretation.

Necessity is translated as "Darurah" from the Arabic language and is derived from the word "darar", which is translated as "an injury that cannot be avoided".[2] It is noteworthy that the word 'injury' (darar) is mentioned, on different occasions and forms, seventy times in the Holy Qur'an. For the sake of brevity, I will present only one verse which explicitly mentions necessity:

> He has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah. *But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit]*, there is no sin upon him. Indeed, Allah is Forgiving and Merciful.[3]

Relying on the above-mentioned Qur'anic verse, classical Islamic jurists gave the following definitions to the concept of necessity as a legal term in Islamic Law. Abu Bakr Al-Jassas (died in 370 A.H)[4] from the Hanafi school defined necessity as "the fear of injury to one's life or some of one's organs if one refrained from eating".[5] Al-Zarkashi (d. 794 A.H), Al-Suyuti (d. 911 A.H) and Al-Hamawi Al-Hanafi (d. 1098 A.H) defined necessity as follows: "It is a situation in which one reaches a limit where if one does not take a prohibited thing, one will die

[2] Wehr Hans, *A Dictionary of Modern Written Arabic*, 4th Ed, (Lebanon: Librairie du Liban, 1980), sub verbo "darar", at 537-38.
[3] *The Holy Qur'an*, English Meanings (Sahih International), (Jeddah: Abul-Qasim Publishing House, 1997), Chapter 2, verse 173 [emphasis added]. Available online at: <http://www.islamwb.com/books/Quran-Saheeh-International-English-Translation.pdf> (last visited 26 November 2013).
[4] "After hijrah". The Muslim calendar begins from the day of "Hijra". The "Hijra" (Arabic: هِجْرَة *hijrah*), also Hijrat or Hegira, is the migration or journey of Prophet Muhammad and his followers from Mecca to Medina between June 21 and July 2 in 622 CE . *See* Fazlur Rehman Shaikh, *Chronology of Prophetic Events*, (London: Ta-Ha Publishers Ltd., 2001) at 52.
[5] Mansour Al-Mutairi, "Necessity in Islamic Law", PhD Thesis (University of Edinburgh) at 9 [Al-Mutairi], Available online at: <https://www.era.lib.ed.ac.uk/handle/1842/7384> (last visited 26 November 2013).

or be about to die".[6] Ibn Qudamah (d. 613 A.H) gave the following definition: "Necessity is the state in which one fears losing one's life if one abstained from eating".[7]

It can be noticed from these classical Islamic definitions of necessity that its meaning was confined to the preservation of human life or health, and was not developed comprehensively. However, this work was performed by later scholars of Islamic law, who elaborated the necessity concept and expanded its usage from saving human life into preserving five fundamentals (al-daruriat al khams), which are religion (din), life (hayah), reason (aql), offspring (nasl) and material wealth (mal). They also developed the circumstances when necessity arises from the state of starvation to compulsion (ikrah), aggression (siyal) and changes in circumstances in contracts (jawaih).[8]

The most comprehensive definition of necessity in Islamic law, which is more relevant to this research is considered to have been given by a renowned scholar Al –Ghazzali in the XIth century. According to him, "all prohibited things become permissible by necessity."[9] The civil code of the Ottoman Empire (Majallah),[10] which is a more modern source of Islamic jurisprudence, also incorporates necessity in Article 21 as a following general maxim: "Necessity permits prohibited things."[11] In general, the rule of necessity in Islamic law is regarded as a norm

[6] *Ibid*.
[7] *Ibid* at 10-11.
[8] *Ibid* at 15. The advantage of such ordering within the principle of necessity is to set the most important before the less important at a time when there may be conflicting claims of the different fundamentals.
[9] Muhammad Muslehuddin, "Islamic Jurisprudence and the Rule of Necessity and Need", (1973) 12(3) Islamic Studies 213 at 220 [Muslehuddin].
[10] The Majallah, a Civil Code of Ottoman Empire [The Majallah]. Available online at: <http://www.global-islamic-finance.com/2009/07/al-majallah-al-ahkam-al-adaliyyah.html> (last visited 10 May 2014).
[11] Muslehuddin, *supra* note 9. This kind of exemption can be explained by examples such as the eating of dead animal's meat by the hungry, the drinking of wine by the thirsty or by the sick as a medicine (note: Drinks which contain alcohol or cause people to lose their mind are forbidden in Islam).

mitigating the severity of the hardship by providing facility in such circumstances.[12] Therefore, the rule of necessity has been described by Islamic scholar Al-Marwardi (Qadi Husayn) "as one of the four pillars supporting the structure of jurisprudence."[13]

The Islamic scholar Mahmassani lists numerous examples of necessity circumstances. According to him, these examples include "those legal excuses which exempt from legal duties, such as minority, lunacy, illness, duress, forgetfulness and ignorance."[14] He also points out the example of leniency with a debtor who is in financial straits. He notes that upon establishing the inability of a debtor to pay his debt, payment by installments may be permitted.[15] If the debtor's situation is very critical, the Almighty orders people in the Qu'ran to postpone paying off the debt by the debtor to the time of ease.[16]

Mahmassani also stresses the application of necessity to addressing public need, and gives an example of the sanctioning of certain transactions that are essential to satisfy the peoples' needs in their economic life.[17] These transactions are exempted from the general rulings of Shariah Law in order to satisfy the urgent needs of society. One of them is the transaction of *bai-bil-wafa,* or redeemable sale of real property, which had been permitted to meet the needs of the heavily indebted population of Bukhara.[18] In this regard, the *Majalah* states the following: "Need, whether of a public or private nature, is treated as necessity. The validity of sale subject

[12] There are many verses in the Holy Qur'an which mention easiness for men in their lives. For instance: "Allah intends for you ease and does not intend for you hardship" (Ch. 2, verse 185); "He has chosen you and has not placed upon you in the religion any difficulty" (Ch. 22, verse 78).
[13] Muslehuddin, *supra* note 9, at 221.
[14] Subhi Rajab Mahmassani, *Falsafat al-tashrī fī al-Islām: The Philosophy of Jurisprudence in Islam* (Leiden: Brill, 1961) at 154–156 [Mahmassani].
[15] *Ibid*.
[16] *The Holy Qur'an*, *supra* note 1, Chapter 2, verse 280. "And if the debtor is in straitened circumstances then let there be postponement to the time of ease"; According to Mahmassani, this postponement and payment by installments have been called in the Lebanese law of obligations *terme de grace. See* Mahmassani, *supra* note 14, at 154.
[17] Mahmassani, *supra* note 14, at 155. Public need can be explained as a situation in which the whole community faces some sort of hardship due to certain social benefits being neglected.
[18] Bukhara is an ancient city which is located in the territory of Uzbekistan.

to a right of redemption is of this nature. The inhabitants of Bukhara having fallen badly into debt, this procedure was put into operation in order to meet their need for it."[19] Mahmassani explains that the reason behind the sanctioning of such redeemable sales was to avoid the law prohibiting interest.[20]

Another example is the permission of the conclusion of contracts called 'Salam'. It involves selling non-existent products (items) for an advanced price. As it is prohibited by Shariah law to sell non-existent items at the time of sale, the 'Salam' contract is an exception, because it helps satisfy the needs of the numerous people engaged in activities such as farming and gardening who are paid before the harvest of their crops is due.[21]

From the above mentioned examples, it can be seen that the application of the necessity concept in Islamic law is not limited to preserving the interests of individuals but is also equally applied to public needs in relevant circumstances.

2.1.1.2. Limitations to Necessity

Although necessity renders prohibited things permissible, it is not a free license, and Islamic law sets certain limitations to its validity. These limitations can be best explained by the Quranic verse mentioned at the beginning of this section.[22] The limitation is derived from the key words "neither desiring, nor transgressing". Summarizing the scholars' interpretations of these key words, Mahmassani gives three categories of dimensions limiting the invocation of necessity: a) text; b) extent; c) time.[23]

[19] The Majallah (Article 32) cited by Mahmassani, *supra* note 14, at 155.
[20] *Ibid*. Usury (Interest), which is called 'Riba', is prohibited in Islamic Law.
[21] This exception to Shariah Law is based upon the narration which mentions the Prophet forbade the sale of an object that does not exist at the time of sale but permitted 'salam' as an exception. *See* Al-Mutairi, *supra* note 5, at 67.
[22] *See footnote* 3, (Ch. 2, verse 173).
[23] Mahmassani, *supra* note 14, at 155.

In explaining the limitation by text, he refers to Ibn Nujaym, who has said, "Hardship may be pleaded only where no texts exist."[24] This means that hardship may be pleaded where there is no hadith that forbids or permits such action. As for the limitation by extent, the necessity claimed must be within the limits of meeting the hardship. The focus in estimation is made not on the necessity itself but on "what became permissible on the account of necessity".[25] It means that the action(s) taken in case of necessity "should be to the extent required for meeting hardship".[26] For example, the theft of a loaf of bread can be accepted on a plea of hunger, while the theft of one ton of flour would not be accepted under any circumstances. The case of a starving person would be another example. If there is no lawful food for that person, he is allowed to eat food otherwise prohibited, such as a dead animal. But he should only eat from such food the amount which enables him to stay alive until he finds lawful food. This means that the starving person is allowed to eat prohibited food to the extent of his necessity, which is to preserve his life. Excessive consumption would fall outside of necessity, since the fear of death would no longer exist.[27]

Limitation by time is also one of the essential criteria in invoking the state of necessity. According to this limitation, necessity circumstances remain effective so long as the excuse or the cause of the urgency exists. Mahmassani notes that "[i]f the exceptional circumstance ceases, the license also ceases and there would be a return to the original principle."[28] In this regard, the *Majallah* provides: "Whatever is permissible owing to some excuse ceases to be permissible with the disappearance of that excuse" (Article 23); and "When a prohibition is removed the thing to

[24] *Ibid*. The term "text" in Islamic jurisprudence refers to texts of the Qur'an and Hadith (record of sayings, actions and traditions of Prophet Muhammad).
[25] *Ibid*.
[26] *Ibid*.
[27] Al-Mutairi, *supra* note 5, at 183.
[28] Mahmassani, *supra* note 14, at 156.

which the prohibition attaches reverts to its former status of legality" (Article 24).[29] This kind of time limit of necessity circumstances may be regarded as an essential element in preventing abuse of the necessity plea, which may cause substantial injury to competing interests and fail to provide justice and equality among them. Therefore, determining the extent and time of necessity plays an important role in assessing the validity of its invocation. According to Mahmasani, the determination of these dimensions "depends in individual cases upon one's conscience and *taqwa* or fear of God which is the true measure of judgement of human actions, but in matters relating to community these factors may be decided in the manner suggested by Ghazzali - *ijma'* of the community for the fundamentals and *ijma'* of the scholars for the matters of the detail."[30] It can be assumed that there is no uniform approach to assessing the proportionality of actions to the extent of necessity and its duration.

From the explanation of the above-mentioned limitations, it can be said that the state of necessity in Islamic law does not grant full freedom to act in addressing such circumstances, but rather, aims at attaining justice and equality among conflicting interests and thus sets certain constraints to balance them.

2.1.1.3. The Issue of Damages in Necessity

In necessity circumstances, people are usually compelled to infringe the interests of others (usually property interests). Necessity excuses a person for the encroachment, but does it also mean that he/she should not compensate for the loss of another person(s) interests? For

[29] The Majallah, *supra* note 10.
[30] Mahmassani, *supra* note 14, at 156. Ijma is an Arabic term referring to the consensus or agreement of the Muslim community, especially of Muslim scholars on religious issues. It is regarded as the third of four sources of Islamic jurisprudence.
For comprehensive explanation of 'Ijma', visit online: <http://www.islamicperspectives.com/meaningofijma.htm> (last visited 25 May 2014).

instance, if a person eats another person's food to avert his hunger, should he be liable to compensate that person for it? The schools of thought in Islamic jurisprudence differ in their views regarding this issue. According to scholars of the Hanafi school, the person consuming the food must make good the loss, whereas the Maliki and the Hanbali school scholars reject the requirement of compensation in this case. Their rulings on this issue are mainly based on ensuring the principle of equality and the duty of preserving life.[31] However, the *Majallah* seems to incorporate the view of the Hanafi school. As Article 33 says, "Necessity does not invalidate the right of another. Consequently, if a hungry person eats bread belonging to another, such person must later pay the value thereof."[32]

It is evident that the view of the majority of Islamic scholars on the need for compensation for the loss (injury) caused in necessity circumstances is positive. This kind of approach allows us to conclude that necessity is a justification only for committing an illegal act, and it does not justify wasting the property of others without being liable for compensating them for it.[33]

2.1.2. Necessity in Canon Law

2.1.2.1. The Concept of Necessity

Canon law also has its own historical roots regarding the legal maxim *Necessitas legem non habet* ("necessity knows no law"). The maxim is attributed by legal historians to Roman law, although it was unknown to ancient Roman law. It first appeared in the twelfth-century

[31] *Ibid*.
[32] *Ibid*.
[33] The basis for compensation is the saying of Prophet Muhammad: "It is unlawful to take the property of a Muslim without his express consent". This means that compensation is required for damaging anyone's property except in the case where the owner of the property has shown his consent. Al-Mutairi, *supra* note 5, at 61.

Concordia Discordantium Canonum (later renamed *Decretum Magistri Gratiani*), which was written by a Benedictine monk, Gratian, who was said to be greatly influenced by the Roman law in writing his work.[34] Therefore, Gratian is considered as the first jurist to give the maxim its classic form in a dictum: "*Quia enim necessitas non habet legem, set ipsa sibi facit legem* (necessity knows no law but makes law).[35] He mentioned necessity in the realm of resorting to war in order to sustain peace in society. In this regard, Canon III of the *Dicretum* states:

> We should wish for peace and make war only because of necessity, in order that God may deliver us from this necessity and preserve us in peace. For we do not seek peace in order to prepare for war, but we make war in order to obtain peace. Be then peace-able even in fighting, in order through victory to bring back to the happiness of peace those whom you are fighting... Let it then be necessity and not the will which overthrows the enemy whom we fight ...[36]

It can be inferred that the concept of necessity initially served as a derogation from the law only in very exceptional circumstances, which seems similar to self-defense. It can also be noticed that these circumstances were commonly assessed on the criterion of urgency or extremity.[37]

2.1.2.2. Distinguishing Characteristics of Necessity

In analysing the roots of necessity in Canon law, Georgio Agamben clearly distinguishes the concept of necessity from the state of exception. He places the concept of necessity at the foundation of the state of exception by contending that the legitimacy of the latter is conditioned

[34] Available online: <http://www.columbia.edu/cu/lweb/digital/collections/cul/texts/ldpd_6029936_001/index.html> (last visited 28 May 2014); *See* also Anders Winroth, *The Making of Gratian's Decretum* (Cambridge: Cambridge University Press, 2000) at 146–174 [Winroth].
[35] Winroth, *supra* note 34, at 150.
[36] *Ibid* at 150-51.
[37] Interestingly, according to Christian theologians, the existence of such features in a particular case should have been determined "as in the sight of God". *See* Cardinal Manning, *Necessity has no Law and a Starving Man has a Right to his Neighbor's Bread* (Chicago: International Labor League, 1899) at 3–4.

by the existence of the former.[38] He also comments in detail on the principle of *necessitas legem non habet,* which was formulated in Gratian's *Decretum*. In Agamben's view, by stating that "many things are done against the rule out of necessity or for whatever cause", Gratian "appears to attribute to necessity the power to render the illicit licit."[39] Agamben also observes similar comments in *Summa theologica*, where Thomas Aquinas discussed it in relation to the sovereign's power to grant dispensations from the law:

> If observing the letter of the law does not entail an immediate danger that must be dealt with at once, it is not in the power of any man to interpret what is of use or of harm to the city; this can be done only by the sovereign who, in a case of this sort, has the authority to grant dispensations from the law. If there is, however, a sudden danger, regarding which there is no time for recourse to a higher authority, the very necessity carries a dispensation with it, for necessity is not subject to the law [*ipsa necessitas dispensationem habet annexam, quia necessitas non subditur legi*].[40]

Commenting on the above, Agamben notes that "[h]ere, the theory of necessity is none other than a theory of the exception (*dispensatio*) by virtue of which a particular case is released from the obligation to observe the law." In his view, "[t]he ultimate ground of the exception here is not necessity but the principle according to which 'every law is ordained for the common well-being of men, and only for this does it have the force and reason of law; if it fails in this regard, it has no capacity to bind."[41] As he clarifies further, "[i]n the case of necessity, the *vis obligandi* [binding force] of the law fails, because in this case, the ground of *salus hominum* [salvation of

[38] Giorgio Agamben, *State of Exception* (Translated by Kevin Attell), (Chicago: University of Chicago Press, 2005) at 24.
[39] *Ibid* at 24.
[40] *Ibid*.
[41] *Ibid*.

mankind] is lacking."[42] Thus, Agamben rejects necessity as a source of law and only states that "it merely releases a particular case from the literal application of the norm."[43]

It is also noteworthy to mention how Thomas Aquinas developed the characteristics of the concept of necessity through its application to property rights. He explained that private ownership of common things is justified in relation to the power to procure and dispense things. In this regard, he thought that a "man ought to possess external things, not as his own, but as common, so that, to wit, he is ready to communicate to others in their need."[44] Based on this, Aquinas developed his argument related to considering unlawful theft lawful due to necessity. He points out that "in cases of need, all things are common property. It is not, therefore, a crime to take another's property in a case of extreme need because that which a man takes for the support of his life becomes his own property by reason of that need."[45] Having analysed Aquinas's ideas on this, a modern scholar, Brian Tierney, noted that "common property was a permanent feature of Christian society, informing it with charity and justice."[46]

The above-mentioned comments allow us to draw the following conclusions on understanding the necessity concept in early Canon law writings. First, the main attribute of necessity is its being an exceptional situation which renders the illicit licit. Second, it functions as a justification only for a single specific case of trespassing against the law (Divine law). Third, the specific necessity case is released from the obligation to observe the law. Fourth, as law is

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[42] *Ibid* [emphasis added].
[43] In this regard, he quotes the following: "He who acts beyond the letter of the law in a case of necessity does not judge by the law itself but judges by the particular case, in which he sees that the letter of the law is not to be observed [*non iudicat de ipsa lege, sed iudicat de casu singulari, in quo videt verba legis observanda non esse*]." *Ibid* at 25.
[44]Thomas Aquinas, *On Law, Morality, and Politics* (ed. W.P. Baumgarth and R.J. Reagan; Indianapolis: Hackett Publishing, 1988), ST II-II, Question 66, second article, at 179.
[45] *Ibid*, seventh article, at 187.
[46] Brian Tierney, *The Idea of Natural Rights* (Atlanta: Scholars Press, 1997) at 333. By "common property", Tierney means that in times of need, goods were to be shared with the poor. *Ibid*.

ordained for the common welfare of people, non-observance of law in case of necessity is not illicit, since it also pursues peoples' well-being. The last feature of necessity plays an important role in distinguishing the reason behind the laws enacted, which is to serve the benefit of people. Thus, the state of necessity may be regarded as a specific situation when the observance of laws results in harming people. It leads to a conclusion that an illicit act committed at that time becomes licit due to the necessity of not only ensuring the benefit of people, but also implementing the reason of law.

2.2. Necessity as a Right to Self-Preservation

This section will address the works of scholars who viewed the necessity doctrine as a right of self-preservation. It will discuss two main approaches, natural law and historical, in understanding necessity in the context of self-preservation. Specifically, it will present both the theoretical concepts and practical application of cases given in the works of the natural law and historical schools of scholars. The discussion will center on how the scholars of each school looked at the notion of necessity and will present a comparative analysis of the limitations to its usage that they elaborated. Then, it will illustrate the impact of the works of both schools on the views of later scholars in the Continental and Anglo-American legal systems with respect to the necessity doctrine.

2.2.1. Necessity from a Natural Law Perspective

2.2.1.1. *Hugo Grotius*

According to the writing of an early XX century scholar,[47] Hugo Grotius, "the father of international law", was the early founder of the doctrine of necessity. By basing his ideas on classic and post-classic Roman sources, Grotius was regarded as transfering this doctrine from the realm of municipal law to the domain of international law.[48] Most importantly, he is credited for explaining the origin of the necessity doctrine, presenting certain illustrations of its application in practice as well as laying down "some general rules for the purpose of imposing limitations upon its practice."[49] Grotius's views on the notion of necessity are briefly described as follows:

> ...given certain premises of human impulse and external circumstances, man has been compelled to resort to certain rules....[I]t is essential to note that to [Grotius] the idea of necessity does not always imply the absence or denial of law but may under some circumstances *be invoked to justify actions which otherwise would appear to be outside the pale of law*.[50]

By referring to its natural law origins, Grotius viewed necessity as a genuine "right", not a mere excuse, which was applicable in very limited circumstances.[51] He explained the "right of

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[47] Burleigh C. Rodick, *The Doctrine of Necessity in International Law* (New York: Columbia University Press, 1928) at 2 [Rodick]. Other contemporary international law scholars also refer to this book when they point out this fact. *See* ; Paul Weidenbaum, "Necessity in International Law", (1938) 24 Transactions of the Grotius Society 105 at 113-114 [Weidenbaum]; Roman Boed, "State of Necessity as a Justification for Internationally Wrongful Conduct", (2000) 3 Yale Human Rights and Development Law Journal 1 at 4-7 [Boed]; Julio Barboza, "Necessity (Revisited) in International Law", in Jerzy Makarczyk ed., *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague: Martinus Nijhoff, 1984) at 29–30 [Barboza]; Andrea Bjorklund, "Emergency Exceptions: State of Necessity and *Force Majeure",* in Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (New York: Oxford University Press, 2008) at 464.

[48] Weidenbaum, *supra* note 47, at 113.

[49] Rodick, *supra* note 47, at 2-3.

[50] Rodick, *supra* note 47, at 3 [emphasis added]. However, Grotius also points out that necessity does not always result in the suspension of all law, but may result in the suspension of a particular rule and the revival of an older rule in its place.

[51] Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (First published in 1625, translated by Francis W. Kelsey, William S. Hein & Co. Inc., 1995), Vol. II, at 193–205 [Grotius], available online: <http://www.constitution.org/gro/djbp.htm> (last visited 2 June 2014). As Weidenbaum explains:

> This right exists even against the innocent party, especially against the neutral. The moral justification of such right – important in a system based on the law of nature – has been given in Book III, Ch. I, 2: quare si vitam aliter servare non possum licet mihi vi qualicumque arcere eum qui eam impetit, etiamsi is peccato

necessity" by giving limited examples in various contexts. For instance, in the military context, he wrote that when the exigencies of war make it necessary for one power to occupy neutral soil, such as when the enemy's occupation of that territory would pose a threat to its power, it may occupy the territory in the exercise of a right of necessity.[52] In the property law context, in circumstances of necessity, taking property "necessary to preserve [one's] own life" was not considered theft, since that individual ownership is recognized with a "benign reservation in favour of the primitive right."[53]

While explaining the usage of "right of necessity" in these contexts, Grotius also argued in favour of imposing certain limitations to it. For example, with regards to wartime necessity, he argued as follows:

> [W]e can understand how it is permissible for one who is waging a just war to take possession of a place situated in a country free from hostilities. Such procedure, of course, implies these conditions, *that there is not an imaginary but a real danger* that the enemy will seize the place and cause irreparable damage; further, that *nothing be taken except what is necessary* for protection, such as the mere guarding of the place, the legal jurisdiction and revenues being left to the rightful owner; and finally, that possession be had with *the intention of restoring the place as soon as the necessity ceased* . . . [i]n war things which are necessary to attain the end in view are permissible [and only as a matter of self-preservation]..if otherwise I cannot save my life, I may use any degree of violence to ward off him who assails it, even if he should happen to be free from wrong . . . [t]he

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vacet: If I cannot otherwise save my life I may use any degree of violence to ward off him who endangers it ... Later again Grotius asserts that "this right originates not in the fault of a third party, but flows from my right to preserve my life. Weidenbaum, *supra* note 47, at 114.

It should also be noted that such a right to self-preservation has found its support among modern writers. For example, Hershey wrote that "[i]n order to protect and preserve this right, [a State] may in extreme cases of necessity commit what would ordinarily be an infraction of the Law of Nations and violate the territorial sovereignty or international right of another State....". *See* Hershey S. Amos, *The Essentials of International Public Law and Organization* (New York: Macmillan, 1927) at 231.

[52] Grotius, *supra* note 51, Book II, Ch. II, para X.

[53] Grotius, *supra* note 51, Book II, Ch. II, para VI, 4.

reason is that this right does not properly arise from another's wrong, but from the right which nature grants me on my own behalf.[54]

This shows that Grotius attempted to formulate certain constraints with regard to the nature, extent and timing of necessity circumstances, which could prevent the abuse of that "right" by nation states. However, in the context of military necessity, Grotius acknowledged that the prerogative to make a final judgement on these limitations must be left to the will of the individual state itself.[55]

Even though Grotius suggested certain limitations to the usage of the "right of necessity", granting sovereigns the right to make the final judgement on its limitations seems contradictory and to a large extent arbitrary, because there is no doubt that nation states, by their own estimation, could use military violence which would be in excess of their military needs. Thus, this may result in the possibility of abuse of the advocated "right of necessity".

As for other limitations, it is appropriate to refer to Rodick's book, in which he analysed the works of Grotius and identified the following six general limitations inherent in Grotius's concept of necessity:

1. There must be an absence of *means rea* ["guilty mind" or intention of wrongdoing] on the part of one who exercises the alleged right;
2. There must be a real and vital danger, either to life, or to property;
3. The danger must be imminent in point of time;
4. In seizing the property of neutrals the amount seized should be no greater than is necessary for the particular object in view;

[54] Grotius, *supra* note 51, Book III, Ch. I, para II, 1 [emphasis added].
[55] In this regard, Grotius noted: "... it can scarcely be known by external indications, in a just war, what is the proper limit of self-defense, or recovery of property, or of exaction of punishment; so that it is by all means better, to leave this to the conscience of belligerents than to appeal to extraneous decision." Grotius, *supra* note 51, Book III, Ch. IV, para IV.

5. Consideration must be given to the equities involved. The plea of necessity, for example, cannot be admitted when the person against whom the action is directed is in an equal state of necessity himself;

6. The person who has exercised the right is bound whenever possible to make restitution or give an equivalent to the owner.[56]

As can be seen, the limitations suggested by Grotius mainly relate to clarifying the criteria that could justify the use of the "right of necessity" in practice. It is also not difficult to notice that these criteria are specifically concerned with the nature, extent and timing of necessity circumstances, as well as taking into consideration the balanced ratio of interests at stake.

The above mentioned general limitations to the "right of necessity" evidence that Grotius's formulation of necessity as an international legal principle only applied to limited restrictions on property ownership and use of force in self-defense. Thus, Grotius' "right of necessity" should be viewed not as a full license to act in necessity, but rather, as a conditional, restrictive and temporary plea for justifying the sovereign's illegal acts in an international system of nation states.

2.2.1.2. *Samuel Pufendorf*

Samuel Pufendorf is also regarded as a distinguished scholar who greatly contributed to the doctrine of necessity. In his *De Jure Naturae Et Gentium Libri Octo*,[57] he devoted a whole chapter to a right of necessity. He began by asking "[w]hether...we sometimes do what the laws forbid, or neglect to do what they command, when, through no fault of our own, we are in such

[56] Rodick, *supra* note 47, at 6 [emphasis added]. According to Rodick, "these limited circumstances in which Grotius permits the plea of necessity to be raised relate chiefly to resistance of illegal acts and may therefore be classified as examples of excusable self-defense." *Ibid* at 7.

[57] Samuel Pufendorf, *De Jure Naturae Et Gentium Libri Octo* (First published in 1729, translated by C.H. Oldfather and W.A. Oldfather, Oxford: Clarendon Press, 1934), Book II, Chapter VI (On the Right and Privilege of Necessity), at 295–309 [Pufendorf].

straights that we cannot secure our own safety in any other way."[58] He then observed that whatever right or privilege is allowed in such a case "proceeds only from the fact that a man cannot avoid straining every nerve for his own preservation, and therefore it is not easy to presume such an obligation to be resting upon him, as ought to outweigh the zeal for his own safety."[59]

Unlike Grotius, Pufendorf argued that the "right of necessity" does not merely arise as a right of self-preservation, but "it is presumed from the benevolent mind of the legislator, and from the consideration of human nature, [it] is not included under a law which has been conceived with a general scope."[60] He further argued that the actions compelled by the force of necessity are not voluntary and are not the result of operation of free will. Thus, these actions are involuntary insofar as the will is subjected to act "contrary to its own inclination".[61] It follows that such necessity circumstances compel the actor to make a choice inconsistent with his own free will. In this regard, Salter stresses Pufendorf's argument that "a person is fit to receive an obligation if he is subject to superior, and if he has a free will that enables him to conform to the law should, therefore, be within the powers of an individual to perform."[62]

As for the source of the right of necessity, Pufendorf's explanation differed from that of Grotius's.[63] His arguments were mainly centered on the importance of the moral duty to help the needy in the context of property ownership. According to Pufendorf, "property ownership is

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[58] *Ibid* at 296.
[59] *Ibid*.
[60] *Ibid* at II.VI.1–2.
[61] *Ibid* at I, IV, 8-9.
[62] John Salter, "Grotius and Pufendorf on the Right of Necessity", (2005) 26(2) History of Political Thought 284 at 294. Therefore, Pufendorf argued that "[a] person cannot be responsible for failing to do what exceeds his powers and it is 'absurd and cruel' to attempt to require it." *Ibid*.
In his article, Salter gives a detailed comparative analysis of Grotius' and Pufendorf's arguments on the right of necessity.
[63] As was discussed above, Grotius argued that the right of necessity is a natural right.

conditional upon carrying out the duty to help others, and that owners who refuse to carry out this humanitarian duty forfeit the rights to their property, which are transferred to the person in need."[64] Salter notes that this kind of approach to the "right of necessity":

> [P]laced so much emphasis on the humanitarian duties of the rich and the corresponding gratitude of the poor. The reciprocal relationship between kindness and gratitude, which the introduction of private ownership made possible, was a valuable social bond that would help to overcome the instability arising from the wickedness and selfishness of human beings.[65]

Through his approach, Pufendorf seems to introduce a broader conception of sociability to explain the "right of necessity". Sociability encompasses notions such as benevolence and kindness, and puts greater emphasis on the humanitarian duties of property owners.[66] Furthermore, Pufendorf argued that among all other rights to property, the right to use force to secure its use is also transferred from the owner to the person in need. It follows that, in necessity circumstances, the person in need has a right to use force against the owner of the property as his last resort.[67]

Another novelty that Pufendorf has to be credited for is the distinction he made between the real causes giving rise to necessity circumstances. In his view, if an individual who claims to experience the state of necessity has fallen into dire need because of his own fault, such as idleness, negligence, lack of industry, he should not be allowed to benefit from invoking

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[64] Salter, *supra* note 62, at 301. Through his ideas, Pufendorf appears to make an attempt to modify Grotius' "right of necessity". It also seems that Pufendorf moves the focus from the worthiness of the recipient to the moral duty of the giver.

[65] Salter, *supra* note 62, at 297.

[66] *Ibid* at 299. In this regard, Rodick remarks that Pufendorf "based his doctrine of necessity upon the element of human reason which he held to be inherent in natural law; and since later writers adopted this principle and held that human reason was a factor of universal validity, the net result of his work was to leave the doctrine of necessity still more strongly entrenched in the mire of natural law and to make confusion worse confounded." *See* Rodick, *supra* note 47, at 19.

[67] Salter, *supra* note 62, at 301. Comparing it with Grotius's natural right, Salter points out that the latter has a limited scope and does not allow the use of force against the owner, even in cases of extreme necessity. *Ibid*.

necessity as a right of self-preservation. Taking into account this subjective factor that may bring about the dire need, he noted that:

> [A] distinction should be made between the case in which a man fell under such necessity through no fault of his, and that in which his own sluggishness and negligence are to blame. Unless such a distinction is drawn, a right apparently is given to lazy scoundrels who have fallen upon want through idleness, whereby they may appropriate to themselves by force what has been secured by the others. [68]

Moreover, based on his arguments, Pufendorf eventually classified the rights of invoking necessity into perfect and imperfect ones. He explained it as follows:

> [I]n my opinion, this matter is better explained on our theory, if we say that a man of means is bound to come to the aid of one who is in innocent want, by an *imperfect obligation*, which no one should, as a rule, be forced to meet; and yet the urge of supreme necessity makes it possible for such things to be claimed, on the same ground as those which are owed by a *perfect right*, that is, a special appeal may be made to a magistrate, or, when time does not allow anything of the sort, the immediate necessity may be met by taking the thing through force or stealth. For the reason why only an *imperfect right* is allowed, especially to such things as are owed on the grounds of humanity, is that thereby man finds the opportunity to show that his mind is intent upon voluntarily doing his duty, and at the same time possesses the means to bind others to him by his kindness. [69]

From these ideas, it follows that perfect rights can be claimed by force only in extreme circumstances of necessity. They are also mentioned as active rights, which means that a possessor can demand a thing or an action of another, while imperfect rights are regarded as passive, meaning that the possessor can lawfully receive something from another "not in such a way that it can be extorted by force against his will, unless a chance necessity requires it, but

[68] Pufendorf, *supra* note 57, Book II, Ch. VI at 304.
[69] *Ibid* at 304-305 [emphasis added]. Grotius called imperfect rights as 'aptitudes'. *See* Salter, *supra* note 62, at 299.

only in so far as he is obliged by some moral virtue to give it."[70] The most important point that needs to be emphasized is the consequences of not satisfying such passive rights by the owner of the property. The property owner who is not charitable towards a poor person in dire need is condemned to lose his property and all rights over it at the time when he declares his unwillingness to do so. In this respect, Pufendorf underlines that "whoever refuses to show humanity should lose his property as well as his merit."[71]

Moreover, Paul Weidenbaum remarks that Pufendorf also distinguished between two levels of "dire" necessity:

> [P]lain, physical necessity, on the one hand, excludes the free will and therefore the delictual character of any act committed under it. On the other hand, a person may still have the choice between evading an attack or facing it at a high risk. This relative necessity ... may be irrelevant by express or implied command of the Sovereign – or of God. It has to be faced by the martyr, and by the soldier.[72]

Such a distinction, in my view, seems to be similar to the distinction between force majeure and necessity in contemporary international law.[73] Therefore, it allows us to assume that Pufendorf was one of the scholars who first laid the foundations for the distinction between these two concepts.

At the end of his chapter on the right of necessity, Pufendorf touched upon the limitations that restrict the use of necessity in the context of property ownership. In his view:

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[70] Pufendorf, *supra* note 57, Book I, Ch. VII.7.
[71] *Ibid* at Book II, Ch. VI.6.
[72] Weidenbaum. *supra* note 47, at 114.
[73] In *force majeure*, the irresistible external force compels a state to act against its international obligation. Thus, the breach of the obligation in question is not encompassed by the intent of an acting state which deprives it of free choice of action. In the state of necessity, a state intentionally fails to conform to its obligations as it deliberately chooses the measures which insure the protection of its essential interests versus its international obligations. For the discussion on the distinctions between *force majeure* and necessity, *see* Chapter III.

> A necessity that touches our own property apparently allows one the permission to destroy or to appropriate the property of another, but with the following restrictions: that the threatened loss to our property came through no fault of ours; that it cannot be averted in any more convenient way; that we do not destroy another's article of greater value for one of our own of less value; that we make good the value of the article, if it would not have been lost anyway; and, finally, that we bear a part of the loss, if the other's property, which now is sacrificed to preserve ours, would otherwise have been lost along with ours.[74]

It can be seen that Pufendorf mainly elaborated on those limitations suggested by Grotius by clarifying the details of each restriction.[75] However, having analysed the conditions formulated by Grotius, he argued in the context of military necessity that further limitations be established to justify military takings in wartime necessity of self-preservation. In this respect, Pufendorf noted:

> Now Grotius, Bk. II, chap. ii, §10, deduces from the laws given above that one who wages a just war may guard a place in territory at peace with him, if the danger is not imaginary but real, that his enemy will seize the place and from there do him irreparable damage provided nothing is taken which is not necessary for his precautions, for instance, he will merely secure the place, while its jurisdiction as well as its products are left to the sovereign, and provided, finally, he intends to hand back the place as soon as his necessity is past. *To these conditions it should be added* that the sovereign should first be warned that he may himself guard the place, the expenses for such an undertaking being offered him, or, if he prefers, he may render the place untenable for defence. Furthermore, if some expense has been incurred in fortifying the same place, the rightful lord is not bound to refund it, unless he has intended to go to the same expense anyway; nor should the expense incurred serve as an excuse for holding the place when the necessity is past, since the

[74] Pufendorf, *supra* note 57, Book II, Ch. VI, at 308, para 8.
[75] It is also not difficult to notice that his arguments in favour of these conditions were mainly aimed at insuring the equity of competing interests in necessity circumstances.

possessor in going to this expense had an eye only to the defence of his own territory, and not to the improvement of the place.[76]

From the above mentioned ideas advocated by Pufendorf, it can be concluded that even though he attempted to analyse the "right of necessity" comprehensively, his arguments appear to be a mere redefinition of Grotius' legal concepts. Moreover, a comparative analysis of both scholars' arguments allows us to note that despite the fact that Pufendorf elaborated on different aspects of necessity, he appears not to present adequate reasoning in support of the lawfulness of his advocated imperfect rights and duties. Therefore, as Salter remarks, "he was unable to produce a coherent alternative to the Grotian theory."[77]

2.2.1.3. *Emer de Vattel*

Another great scholar, Emer de Vattel, is also considered to have contributed to the advocacy of the State's natural right of self-preservation. In his famous work, *The Law of Nations*, Vattel placed great emphasis on the obligation of every nation to perform the duty of self-preservation.[78] According to him, "[t]his obligation, so natural to each individual of God's creation, is not derived to nations immediately from nature, but from the agreement by which civil society is formed ..."[79] Vattel argued that the nation has a right to everything without which it would be impossible to fulfill that obligation.[80] At the same time, he also pointed out that this right of self-preservation is not absolute, and subject to specific conditions. According to him, a

[76] Pufendorf, *supra* note 57, Book II, Ch. VI, at 308-309, para 8 [emphasis added].
[77] Salter, *supra* note 62, at 302.
[78] Emer de Vattel, *The Law of Nations* (*or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*) (First published in 1797, newly edited by Béla Kapossy and Richard Whatmore) (Indianapolis: Liberty Fund Inc., 2008) at Book I, Ch. II, para 16 [emphasis added], [Vattel]. Available online at: < http://oll.libertyfund.org/titles/2246> (last visited 2 June 2014).
[79] Vattel, *supra* note 78, Book I, II, para 16.
[80] *Ibid*.

State's actions can be justified under this right of self-preservation if they are "just" and have "weighty reasons".[81]

He further argued that the means of fulfilling the obligation of self-preservation "ought not to be unjust in themselves, or such as are absolutely forbidden by the law of Nature."[82] Even though the sovereign ruler has *regal prerogatives*,[83] as Vattel contended, this right does not exempt him from following legal regulations related to all acts of his administration.[84]

Like Grotius and Pufendorf, Vattel also gave examples of measures that might be exercised in necessity circumstances in different contexts.[85] As for military necessity, in order to counter the unjust war, he argued that,

> We have a right to put in practice, against the enemy, every measure that is necessary in order to weaken him, and disable him from resisting us and supporting his injustice: and we may choose such methods as are the most efficacious and best calculated to attain the end in view, provided they be not of an odious kind, nor unjustifiable in themselves, and prohibited by the law of nature.[86]

From the above-mentioned arguments it can be assumed that even though Vattel placed greater emphasis on the indispensability of the nation state's obligation to self-preservation, he attempted to formulate the "right of necessity" narrowly by subjecting the validity of unlawful

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[81] *Ibid*.
[82] Vattel, *supra* note 78, Book I , Ch.II, at 88, para 18.
[83] *Ibid* at 100, para 45.
[84] *Ibid* at 102, para 18.
[85] For example, necessity may justify a State acting on its liberal humanitarian impulses to fulfil "offices of humanity", which are "due only in necessity, and by a nation which can comply with them without being wanting to itself." (Vattel, Book II, Ch. I, at 266, para 9); to procure provisions by force (only when "a nation is in absolute want of provisions"), (Vattel, Book II, Ch. IX, at 320, para 120); to make use of things that belong to others (provided that the owners are "not under the same necessity", and payment is made for such property use), (Vattel, Book II, Ch. IX, at 321 and 324, paras 121 and 127); to undertake passage through another State's territory to escape from imminent danger or when there is no other way to satisfy an indispensable obligation (Vattel, Book II, Ch. IX, at 322, para 123); to temporarily dwell and seek refuge in a foreign country when facing persecution (Vattel, Book II, Ch. IX, at 323, para 125); to procure women (by a nation of men) who are absolutely necessary to its preservation (Vattel, Book II, Ch. IX, at 321, para 122).
[86] Vattel, *supra* note 78, Book III, Ch. VIII, at 543, para 138.

measures to certain conditions. His most important contribution, in my view, was the clarification of the essential feature of a measure used to fulfill the obligation of self-preservation. In Vattel's view, apart from the "indispensability" of the obligation, the measures or acts used must be *the only means* to attain its fulfillment.[87] In other words, if there are several options to address the situation of necessity at the sovereign's disposal, then the chosen measures cannot be justified under the right of necessity.

Although the natural law writers elaborated on the concept of necessity, they confined the discussion of the problem to abstract situations. Meanwhile, the scholars of the historical school, who made a detailed analysis of concrete cases dealing with the issue, performed work on how the right of necessity worked in actual situations of self-defense.

2.2.2. Necessity from the Perspective of Historical School Scholars

2.2.2.1. Shifting from Theoretical Conceptions to Practical Facts

Unlike the natural law scholars, the representatives of the historical school explained the necessity doctrine on the basis of actual case analysis. By relying on historical facts and putting greater emphasis on practical examples, they expanded the discussion on the notion of necessity and its limitations beyond theoretical concepts. Thus, their works are credited for complementing the theoretical thoughts of natural law writers discussed above.

Albericus Gentilis, the founder of the historical school, gave a detailed discussion of one case in which an English ship was captured in the fight with a Tuscan ship, and each of the parties invoked a plea of self-defense.[88] By making a detailed analysis of the case, unlike the

[87] Vattel, *supra* note 78, Book II, Ch. IX, at 320, para 119 [emphasis added].
[88] Rodick, *supra* note 47, at 21-22.

previous writers, who relied upon the general rules of natural law, Gentilis could lay down the rules related to weighing the competing interests at stake.[89]

Another representative of the historical school, Sir Richard Zouche, also presented his discussion on the right of self-defense in a historical context. He gives the example of England, which assumed the protection of the Netherlands against the King of Spain.[90] He explained the justification of England's undertaking to protect the Netherlands by following:

> [F]earing ... lest the power of the Spaniard might spread more dangerously than ever in territories which were almost contiguous to her own realm and conveniently situated for effecting an invasion of England, she resolved...to take thought for the safety of the people committed to her charge by frustrating the machinations of her enemies. Accordingly she openly undertook the protection of the Netherlands.[91]

By linking this example with the case of alleged necessity in modern times, Rodick noted that "the writer intimates that the need of defending the national jurisdiction against a potential attack may excuse an act of intervention to prevent its consummation."[92]

Other historical writers, such as Bynkershoek and G.F. von Martens, supported Zouche's argument by elaborating on the extent of necessary measures used against the act of intervention.

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[89] Rodick presents the analysis as follows:

1) ...he is presumed to be aggressor who thought that he had suffered some wrong. Gentilis concludes that the Tuscan might have thought he was being wronged by the commerce of England with the Turks.
2) He is presumed to be aggressor who is stronger than his opponent. Gentilis adds that the Tuscan ship was stronger than our merchant vessel.
3) He is presumed to be the aggressor who is accustomed to brawl and who carries weapons. Gentilis implies that the Tuscan was a fighting ship but the English ship was a merchant vessel.
4) ... that person is presumed to be the aggressor who, besides fitting the hypotheses just mentioned is the victor.
5) Who he gave the challenge to battle and to wrath is held to have begun it, and Gentilis adds that even the verdict recites that the Tuscan vessel fired two broadsides first.
6) Or suppose that the offense the Tuscans was justified also. At least in the doubtful conflict between a justified offense and a justified defense there is no one who will not give such a beneficent defense the preference over offense. The more just surpasses the just, the more equitable the equitable, the more beneficent, and the more just is given the preference over the just. *See* Rodick, *supra* note 47, at 22.

[90] Rodick, *supra* note 47, at 23.

[91] *Ibid*.

[92] *Ibid*.

In this regard, Bynkershoek pointed out that "the nature of self-defense and the extent to which it may be employed will vary from time to time with the nature and range of the weapons employed,"[93] while G.F. von Martens noted that "if a sovereign sees himself menaced with an attack, he may take up arms in order to ward off the blow, and may even commence the exercise of those violences that the enemy is preparing to exercise against him, without being chargeable with having begun an offensive war."[94] At the same time, he emphasizes that "every sovereign is obliged to confine himself to the employment of the lowest degree by which he can obtain satisfaction."[95]

As can be seen, the approach taken by historical writers on necessity was different from that of theoretical writers, and was mainly based upon the analysis of actual cases that reflect the usage of necessity in practice. As Rodick observes in this regard, "there is a marked tendency among the historical writers ... to insist upon the principle that the doctrine of necessity is the product, not of theoretical conceptions, but of facts in the actual world of international relations."[96]

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[93] *Ibid* at 24.

[94] *Ibid*. Weidenbaum notes:

In the province of warfare Martens established a complicated doctrine which by the distinction between *raison de guerre* and *maniere de guerre* did much to influence theories and controversies of the nineteenth century. Two kinds of actions are forbidden in warfare. Actions which are not necessitated by the military aims of warfare are clearly illegal. Actions which infringe certain customs of warfare are unlawful only in ordinary circumstances. They may be permitted in cases of urgent military necessity. This view prevailed in Germany up to the time of The Hague Convention. The classic theory as explained by Martens and modified by Feuerbach's and Liszt's conceptions became the doctrine held by most German authorities. *See* Weidenbaum, *supra* note 47, at 116.

[95] *Ibid*. Von Martens also gave an explicit illustration of limitations for the justification of military necessity. He stated that "except in cases of necessity, it is now admitted that the besiegers ought to direct their artillery against the fortifications only, and not, intentionally, against the public edifices, or any other buildings, either within or without rampants."; but he added that: - "There are cases, however, which justify the besieger in threatening to burn the public edifices, for instance to deter the besieged from making signals from the towers or steeples, by the tolling of bells, etc. This was done formerly much oftener than in our day. We find one instance of it at the siege of Vienna by Turks." *See* Rodick, *supra* note 47, at 24.

[96] *Ibid* at 25.

2.2.2.2. Concluding Remarks

A comparative analysis of arguments put forward by both natural law and historical school writers allows us to draw the following conclusion. The natural law writers (Grotius, Pufendorf, Vattel) laid down the theoretical foundations for the modern doctrine of necessity. Particularly, they worked out a more detailed description of the right of necessity, and introduced precise limitations to its usage. In other words, they formulated a more sophisticated approach to explaining the necessity doctrine by highly restricting the sphere of its application to specific circumstances. The historical school writers (Gentilis, Zouche, Bynkershoek, von Martens), on the other hand, attempted to explain the necessity doctrine by analysing relevant cases. By basing their arguments on the analysis of actual cases in which the plea of necessity was used, they could pave the way for a more rational approach to its application in the relations among nation states. Even though the writers of both schools of thought approached the issue from different angles, in my view, both approaches complement each other in explicating the doctrine of necessity more comprehensively.

2.2.3. Necessity Doctrine in the Works of Continental and Anglo-American Legal Scholars

The early works discussed above left a noticeable impact on the works of later scholars in both the Continental and Anglo-American legal systems. Differently inspired, the scholars in both legal systems formed various approaches to understanding the necessity doctrine. In Continental law, a majority of French and Italian modern writers opposed a right of necessity, while Anglo-American scholars took a more restrictive approach to it and mainly differed on the extent of its application in practice.

2.2.3.1. Continental Law Scholars

According to French writers, "the whole doctrine of necessity is nothing but a subterfuge for illegal acts."[97] In defining the right of necessity, Hautefeuille remarked that "[it] is a power given to each belligerent to take all kinds of measures against all kinds of people with the sole exception of their respective enemies."[98] According to another French writer Pradier-Fodéré, "[t]he law is based on the doctrine of freedom of determination; it cannot or ought not....to recognize the influence of force."[99] He further argues that "no right of 'necessity' can exist in a sphere where another one has obtained a right, as there cannot be 'a collision of rights'."[100]

On the other hand, Italian writers have recognized the right of necessity to different extents. For instance, Fiori argued that "[a] right exists in all cases in which the State cannot protect its 'natural sphere' in any other way."[101] However, Cavaretta refused to give a common definition of necessity which applies to all cases and argued that there are certain attributes that specify necessity circumstances. In his view, to justify the illegal actions of a state and qualify as an exception, the necessity must be sudden and morally irresistible.[102] Contrary to these views, Cavaglieri totally denied the necessity doctrine by arguing that "[it] is neither recognised by State practice nor as a desirable legal doctrine."[103] Most notably, he disapproved of the role of a state in determining the existence of the necessity of circumstances.[104]

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[97] Weidenbaum, *supra* note 47, at 117.
[98] *Ibid*.
[99] *Ibid*.
[100] *Ibid*. Using the right of necessity by one state usually harms the rights of another state. Thus, Pradier-Fodéré argued that two rights cannot be reconciled. Weidenbaum remarks that there might not exist any collision of rights, as the existence of the right of necessity excludes any other right. He also notes that this "must be understood as a term of philosophy and not of law". Weidenbaum, *supra* note 47, at 117
[101] *Ibid*. He also contends that the state, if possible, has to compensate for the damage.
[102] *Ibid*.
[103] *Ibid* at 118.
[104] *Ibid*. It appears that his view on this feature of necessity can be regarded as an initial step towards introducing a self-judging feature pertinent to necessity circumstances. This feature will be discussed in the context of BIT NPM clauses in international investment law (*See* Chapter V).

2.2.3.2. Anglo-American Legal Scholars

As for Anglo-American legal scholars, they have taken a qualitatively more restrictive approach to the doctrine of necessity. Apart from making theoretical articulations, most of them have attempted to elaborate on this doctrine with the help of jurisprudential developments. Scholars such as Westlake and Oppenheim theoretically argued against the doctrine of necessity. For instance, basing his arguments on an analysis of the case of 1904, Westlake contended that "[it] is based on municipal law, in so far as 'it attributes to necessity a legal effect which it may have had in Roman but certainly not in British law'."[105] He also added that "[it] reduces law from controlling to a registering agency."[106] However, from his discussion of the case related to military necessity, it can be inferred that states must have the right of self-preservation in emergency circumstances. On the contrary, Oppenheim argued that the doctrine should not be applied in the context of military necessity. However, taking account of its inseparable connection with the state's duty of self-preservation, he argued that such duty may be deemed to exist in certain cases.[107] Commenting on this argument, Weidenbaum emphasizes that "[it] can

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[105] Weidenbaum, *supra* note 47, at 119. *See* also original source, John Westlake, *International Law*, (Cambridge: Cambridge University Press, 1904), Part II, at 127-128 [Westlake].
According to Weidenbaum:

> He discusses-in 1904-the "case of a belligerent having sure information that the enemy in order to obtain a strategic advantage is about to march an army across the territory of a neutral State too weak to resist". In these circumstances "it would be impossible to deny him the right of anticipating the blow on neutral territory". In these cases the neutral State is at fault, "for when a State is unable to prevent a hostile use being made of its territory or its resources, it ought to allow proper measures of self-preservation to be taken or else must be deemed to intend that use as a necessary consequence of refusing the permission". But the fiction that the neutral State intends what it has expressly refused, and what is a necessary consequence of the very refusal, does not recommend itself. It shows the difficulties of even the most prominent writers to arrive at satisfactory results if they oppose the doctrine of necessity. Nor can the neutral be deemed to act wrongfully. It is no fault of the Grand Duchy of Luxembourg or of Lithuania if they are not sufficiently prepared to resist the forces of France or Germany or Russia, nor if they decline to permit that their territories become a theatre of war [emphasis added]. *Ibid*.

[106] Westlake, *supra* note 105, at 128. Giving careful consideration to Westlake's argument, Weidenbaum notes that "[l]aw, while primarily a controlling force, must take cognisance of human activities as well as of their limitations." Weidenbaum, *supra* note 47, at 119. .

[107] Weidenbaum, *supra* note 47, at 119. *See* also original source, Lassa Francis Lawrence Oppenheim, *International Law: A Treatise* (London: Longmans, Green, and Co., 1905), Part I at 185. In this respect, Weidenbaum notes that

only have the effect of reducing the character of necessity *from a right to a mere excuse*, a difference ... without considerable practical importance."[108]

In contrast to Westlake and Oppenheim, Phillimore argued in favour of the doctrine of necessity. Impressed by the arguments made in cases decided by Lord Stowell, he laid down the rules that specify "a clear necessity".[109] In his view,

> A clear necessity is a sufficient justification for everything done under it fairly with good faith...[The Judge]... must follow where the law leads, in a general, unbending course. But the law itself, and the administration of it, must yield to that to which everything else must bend – necessity. The law in its most positive and peremptory injunction is understood to disclaim... all intention of compelling men to perform impossibilities; and the administration of the law must adopt that general exception in the consideration of all particular cases.[110]

In defining necessity Phillimore formulated a new criterion for its invocation, which seems quite distinct from other conditions discussed in previous sections. It is a "good faith" analysis of the measures taken in necessity circumstances. Even though he does not give a full description of what "good faith" includes in his subsequent reasoning, it is enough to assume that he meant that in protecting the interests under threat, the measures taken due to necessity must not be unreasonable and excessive in their nature and extent. In spite of the fact that it seems to

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"[w]here a State cannot prevent criminal activities in its territory from endangering a neighbour it can be assumed that a duty to tolerate a police action exists." *Ibid* at 119.

[108] *Ibid* [emphasis added].

[109] According to Weidenbaum,

> Lord Stowell was confronted with the problem in two cases. In both cases his language was not confined to the special circumstances under consideration, but he delivers judgment on a broad and general principle. In The *Christiansberg*, a case of breach of blockade in distress, he lays down that if "it was merely an act of necessity and if that is proved a clear necessity will be a sufficient justification for everything that is done, fairly and reasonably, under it". In *The Gratitudine* he gives a definite reason why illustrations and precedents can be found only with extreme difficulty: ". . . It is not improper to observe that the law of necessity is not likely to be well founded with rules; necessity creates the law; it supersedes rules; and whatever is reasonable and just in such cases is likewise to be considered legal..... *Ibid*.

[110] Robert Phillimore, *Commentaries upon International Law*, 3d (London: 1879), Volume III, at 71.

resemble the limitations advocated by other scholars in general terms, this idea, in my view, might be of great value in developing the arguments related to the interpretation of the customary necessity defense and treaty emergency clauses in contemporary international law.[111]

There were also totally different ideas among Anglo-American scholars. In contrast to most scholars' views, who argued in favour of limitations on the use of necessity as a right to self-preservation, Carl Schmitt advocated that the sovereign ruler must have unlimited discretion to act in circumstances requiring the state's self-preservation.[112] In this respect, he points out,

> What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes ... Unlike the normal situation, when the autonomous moment of the decision recedes to a minimum, the norm is destroyed by the exception.[113]

In his view, even though the acts of the sovereign contradict legal norms, they should still be regarded as legal, as the exception overrides the law in such circumstances.[114] His arguments make it clear that as a primary juristic reality, the state's existence should supersede the law in all terms when it comes to self-preservation. In my view, Schmitt's reasoning appears to be authoritative in this respect. It is doubtless that when a state does not act to preserve its existence by exceptionally violating the law, it will not also be able to preserve the existence of law. Therefore, Schmitt was correct in noting that the existence and maintenance of law are dictated

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[111] A detailed discussion on "good faith" and other interpretative standards will be given in Chapters V and VI.

[112] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (translated by George Schwab), (Cambridge, MA: Massachusetts Institute of Technology, 2005) [Schmitt].
Available online: <https://idepolitik.files.wordpress.com/2010/10/schmitt-political-theology.pdf> (last visited 9 June 2014).

[113] *Ibid* at 12.

[114] He explains it as follows, "[t]he rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives the exception only from. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition." *Ibid* at 15.

by the exception. It appears that Schmitt's explanation was also quite logical in terms of securing the existence of both a state and legal rules as a whole.

2.2.4. Concluding Remarks

In this section I have presented two main approaches to explaining the doctrine of necessity as a right to self-preservation. It was found that scholars such as Grotius, Pufendorf and Vattel, even while differing in their explanations, viewed it as part of the fabric of natural law and developed theoretical concepts related to certain criteria for its invocation in terms of nature, extent and timing of necessity circumstances. Meanwhile, the scholars of the historical school elaborated on the practical approach to explaining a right of necessity in the realm of self-preservation. Relying on historical facts and experience, they showed how this right can be made of use in actual practice. This section also presented the views of later modern scholars in Continental and Anglo-American legal systems, who received considerable food for thought from the early authoritative works. The comparative analysis showed that besides developing the ideas of earlier writers on the necessity doctrine, some of them were also able to formulate the limitations to its application, which more or less are similar to modern conceptual standards for its invocation in contemporary international law.

This section finishes the discussion of the historical evolution of the doctrine of necessity until the modern times. In the next section of the chapter, I will present a historical overview of the formation of modern doctrine of necessity. By analysing the history of codification of the Articles on State Responsibility by the International Law Commission (ILC), I will attempt to explain how the doctrine of necessity has been transformed from a "right" to self-preservation to an "excuse" to protect state's essential interests.

2.3. Formation of the Modern Necessity Doctrine: Detailed Historical Overview

The work on codifying State responsibility, particularly the necessity doctrine, began in the early twentieth century. In 1924, the League of Nations adopted a resolution to establish a Committee of Experts which would be tasked with contributing to the progressive development of international law.[115] In 1925, the topic of State responsibility for injuries to aliens was selected by the Committee as ready for codification.[116] This topic was studied in detail, *inter alia,* in the Hague Conference of 1930, which was dedicated to the codification of international law.[117] The Responsibility Committee in charge of dealing with this matter could not complete its study on the topic and failed to make any report to the Conference.[118] Thus, the work of the 1930 Conference on this topic ended unsuccessfully.

The most substantial amount of work towards accomplishing the codification of State responsibility issues in international law has been done by the International Law Commission (ILC), which was established by the United Nations in 1948.[119] Unlike its predecessor, the ILC played a very important role in doing comprehensive research on the matter of State responsibility, particularly on the formation of a modern doctrine of necessity. In this regard, within quite a long period of time a number of Special Rapporteurs appointed by the Commission accomplished immense work on the development and codification of the necessity

[115] *See* generally, United Nations Documents on the Development and Codification of International Law, (1947) 41 American Journal of International Law 29 at 102–103.
[116] Shabtai Rosenne (ed.), *The International Law Commission's Draft Articles on State Responsibility* (Boston and London: Martinus Nijhoff Publishers, 1991) at 2.
[117] The matter was discussed within the topic of "Responsibility of States for damage caused in their territory to the person or property of foreigners".
[118] F.V. García Amador, "International Responsibility", in *The ILC Yearbook* (1956) Vol. II, Doc. A/CN.4/96 at 178. [García Amador, *First Report*],
Available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1956_v2_e.pdf> (last visited 15 June 2014).
[119] Summary Records and Documents of the First Session Including the Report of the Commission to the General Assembly, in *The ILC Yearbook* (1949), Doc.A/CN.4/SR.1-38 at 278–281, avilable online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1949_v1_e.pdf> (last visited 15 June 2014).

doctrine within the framework of State responsibility. This process includes three main stages, which, to various extents, contributed to developing a modern doctrine of necessity and to accomplishing the whole work of codifying State responsibility issues in international law. The subsequent paragraphs will look at these three stages through which the modern necessity concept has undergone its formation process. Considering the general purpose pursued in all three stages, I will focus on presenting specific features of the work performed in each period.

2.3.1. The Period between 1955 and 1961: García Amador

The period between 1955 and 1961 represents the first stage of the ILC's work on State responsibility. F.V. García Amador (Cuba) was appointed as the first Special Rapporteur to work on this matter. He started the work in 1956 and submitted six reports through 1961.[120] Apart from working on general aspects of State responsibility, he mainly concentrated the ILC's work on State responsibility for injuries to aliens and their property.[121]

[120] F.V. Garcia Amador, *International Responsibility: Report,* (1956) U.N. Doc. *A/CN.4/96, reprinted in* (1956) 2 *The ILC Yearbook* 173, U.N. Doc. A/CN.4/SER.A/19- 56/Add.1*;* F.V. Garcia Amador, *International Responsibility: Second Report,* (1957) U.N. Doc. *A/CN.4/106, reprinted in* (1957) 2 *The ILC Yearbook* 104, U.N. Doc. A/CN.4/SER.A/1957/ Add.1 [Amador, *Second Report*]*;* F.V. Garcia Amador, *International Responsibility: Third Report,* (1958) U.N.Doc. A/CN.4/Il1, *reprinted in* (1958) 2 *The ILC Yearbook* 47, U.N. Doc. A/CN.4/SER.A/1958/Add.1 [Amador, *Third Report*]; F.V. Garcia Amador, *International Responsibility: Fourth Report,* (1959) U.N. Doc. A/CN.4/119, *reprinted in* (1959) 2 *The ILC Yearbook* 1, U.N. Doc. A/CN.4/SER.A/1959/Add.1*;* F.V. Garcia Amador, *International Responsibility: Fifth Report,* U.N. Doc. *A/CN.4/125* (1960), *reprinted in* (1960) 2 *The ILC Yearbook* 41, U.N. Doc. A/CN.4/SER.A/1960/Add.1*;* F.V. Garcia Amador, *International Responsibility: Sixth Report,* (1961) U.N. Doc. A/CN.4/134, *reprinted in* (1961) 2 *The ILC Yearbook* 1, U.N. Doc. A/CN.4/SER.A/1961/Add.1 [Amador, *Sixth Report*].
The reports of all Special Rapporteurs on State Responsibility and other ILC documents on this matter can be found online at: <http://www.legal.un.org/avl/ha/rsiwa/rsiwa.html> (last visited 17 June 2014).

[121] Crawford James, *Articles on Responsibility of States for Internationally Wrongful Acts*, (2012) United Nations at 1 [Crawford, *Articles on State responsibility*], available online: <http://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf > (last visited 17 June 2014).

2.3.1.1. Differentiating the Necessity Defense from the Right of Self-Preservation

The state of necessity was addressed by Garcia-Amador in his third Report submitted on January 2nd, 1958.[122] Along with the *force majeure*, Amador viewed the state of necessity as an extenuating and aggravating circumstance that exonerates a State from responsibility.[123] In Article 13 of his proposed Articles on State Responsibility, he put it as follows: "Force majeure, state of necessity and the fault imputable to the alien shall, if not admissible as grounds for exoneration from responsibility, constitute extenuating circumstances in the determination of the quantum of reparation."[124] Amador defined the state of necessity as "one of the grounds permitting a State to disclaim the responsibility imputed to it, or as one of circumstances which may be considered extenuating for the purposes of reparation."[125] In support of this, he referred to the opinions of different scholars who argue on whether to consider it as a ground for exonerating responsibility in positive international law. In this regard, Amador referred to Basedevant and Anzilotti, whose views contradicted each other on this matter.[126] Having analysed their conflicting views, Amador concluded that a "state of necessity, which is sometimes similar to, and may even be indistinguishable from, *force majeure*, is a principle which is recognized in the practice of States and is not limited to the so-called 'international law

[122] Amador, *Third Report*, *supra* note 120, at 50-55.
[123] *Ibid* at 50.
[124] *Ibid*.
[125] *Ibid* at 52.
[126] According to Basedevant,
"There does not appear to be a rule of positive international law which would justify the non-observance of a rule of that law on the alleged ground of necessity. A State may take the view that, in a particular case, the circumstances override strict adherence to the law; it may consider that it has political or moral reasons for departing from the observance of international law. Nevertheless, there would still be a violation of positive international law capable of engaging the responsibility of the State to which it is imputable." Anzilotti argues that "a study of diplomatic documents shows that States are very far from denying that necessity may justify acts which *per se* contravene international law." He further contends that "While interested States have challenged, very often with justice, the existence [in a particular case] of an alleged necessity to act in a certain way, they have also specifically declared, or clearly implied, that in other circumstances the defence would have been completely valid." *Ibid* at 52.

in time of war'."[127] This view on the state of necessity evidences that its application is not restricted only to wartime, but expands to a wide array of circumstances. In this regard, Amador further clarified the distinction between the necessity defense in peacetime and the right of self-defense in wartime. He pointed out that his proposed necessity defense is exclusively applied to cases of responsibility in peacetime, while the right of self-defense, which is addressed in armed conflicts, is governed by a specific instrument, Article 51 of the UN Charter.[128] It appears that Garcia Amador was the first modern scholar who started viewing the doctrine of necessity detached from the right of self-preservation practiced by states in wartime. While he does not exclude the application of his proposed necessity defense to other instances of self-defense within the context of Article 13,[129] he did not clarify what "other instances of self-defense" were. Unlike the right to self-preservation, where a state's existence must be under the threat, Amador's necessity doctrine requires that "some vital interest of the State" must be threatened by a grave and imminent peril in order to be qualified within the definition.[130] To clarify "some vital interest of the State", Amador referred to Karl Strupp's definition of the state of necessity, which lists some such interests. According to Strupp, a state of necessity is

> ... a situation, objectively judged, in which a State is threatened by a grave peril, present or imminent, capable of affecting its *territorial status or identity, its Government or its form of government*, or of curtailing or destroying *its independence or international capacity to act* and from which it cannot escape except by violating foreign interests protected by the law of nations.[131]

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[127] *Ibid*.
[128] *Ibid* at para 15.
[129] *Ibid*.
[130] *Ibid* at 53.
[131] *Ibid* at 53, para 14 [emphasis added]. Amador notes that although Strupp's list of vital interests is comprehensive to a certain extent, "it is possible that it does not cover all the interests which come within the category of those justifying the plea of state of necessity." Therefore, he explained it as a reason for his using the expression of 'some vital interest'. *Ibid*.

It is difficult to draw a line between the threat to the existence of the state and its vital interests, as Strupp's definition of necessity is quite detailed and encompasses many instances of self-defense. It appears to me that sometimes the state's existence could also be under the threat when some of the state's vital interests are threatened.[132] On the one hand, I do not consider these vital interests as completely separate from the state's main interest, which is the preservation of its existence. On the other hand, it seems that both Strupp and Amador meant these "vital interests" to be possible examples of interests that any state considers as essential for its normal functioning. All in all, in my view, Amador seems to elevate the necessity doctrine from the context of self-defense in armed conflicts to the domain of state's vital interests, which are protected only in peacetime and assessed on the basis of individual cases.

As for the conditions for invoking the necessity defense, Amador notes that besides a state's vital interest being under the threat, the peril itself must first be grave and imminent.[133] Second, it must not be provoked by the state invoking it, since "any fault or culpability on its part would rob the plea of all substance."[134] Third, there must not be other means, except the one contrary to law, to counteract to peril giving rise to the state of necessity.[135]

[132] I can agree with the view that the consequences of a threat to one of these vital interests of the state may be different than those to a state's existence in self preservation. However, I cannot agree with the view that threatening some of the listed vital interests cumulatively would not result in a threat to a state's existence in self-preservation. Thus, to some extent, such differentiation between the preservation of a state's existence and it vital interests seems doubtful.

[133] It must not be "a simple threat". The "grave and imminent" features of the peril will be discussed in detail in Chapter III.

[134] Amador, *Third Report*, *supra* note 120, at 53.

[135] Amador also refers to the *Neptune* case of 1797, which stated that necessity must be "absolute and irresistible". *Ibid*.

2.3.1.2. Necessity as a Circumstance Extenuating State Responsibility

It should be noted that among the above mentioned conditions, the second one was explained by Amador in detail. According to him, "any fault attributable to the injured alien in the occurrence of the injurious act may also operate as a ground for exoneration from international responsibility or as an extenuating circumstance..."[136] In this respect, Garcia Amador also noted its recognition in international case law and referred to many cases dealing with this element of necessity. For instance, he mentioned the *Delagoa Bay Railway* case (1900),[137] where the tribunal held that "all the circumstances imputable to the concessionary company and favourable to the [Portuguese] Government extenuate the responsibility of the latter and justify a reduction in the amount of reparation."[138] To support the argument that the fault or culpability imputable to the injured affects the amount of reparation, Amador also mentions the *Garcia and Garza*[139] and *Lillie S. Kling*[140] cases, which were resolved by the General Claims Commission between the United States and Mexico established in 1923. For instance, in the *Garcia and Garza* case, in which the parents of the Mexican young girl shot by the American border officer claimed reparation,[141] the tribunal held that "... whether the shooting was justified or not, it ought to influence the amount of damage to which they are entitled."[142]

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[136] Amador, *Third Report*, *supra* note 120, at 53

[137] *Delagoa Bay Railway* case award, (1900) 62(4) The Advocate of Peace at 88. Available online at: <http://www.jstor.org/stable/25751563?seq=1#page_scan_tab_contents> (last visited 18 June 2014).

[138] Amador, *Third Report*, *supra* note 120, at 53.

[139] *Teodoro García and M. A. Garza (United Mexican States) v United States of America*, (3 December, 1926) 4 Reports of International Arbitral Awards at 119-134 [*García & Garza*].

[140] *Lillie S. Kling (U.S.A.) v United Mexican States*, (8 October, 1930) 4 Reports of International Arbitral Awards at 575-586.

[141] The claim was presented by the United Mexican States against the United States on behalf of Teodoro Garcia and Maria Apolinar Garza, Mexican nationals, father and mother of Concepciôn Garcia, who was shot by American Officer Second Lieutenant Robert L. Gulley.

[142] *García & Garza*, *supra* note 139, at 123, para 9. It was further noted that "In fixing this amount the Commission does not consider reparation of pecuniary loss only, but also satisfaction for indignity suffered." *Ibid*.

On the other hand, Garcia Amador referred to the draft of the Institute of International Law that argues in favour of completely exonerating the state from reparation in cases of internal disturbance if the fault of the injured alien is the cause of the injurious act.[143] As to whether the fault on the part of the injured alien extenuates or exonerates State responsibility, Amador pointed out that the opinions of governments differed on this issue. These opinions formed the basis of the draft prepared by the Preparatory Committee of the Hague Conference on this matter, which in Amador's view, did not clearly explain the distinction.[144] Instead, he argued that greater emphasis must be placed on the nature of the conduct imputable to the alien. Taking into account the divergent international practice on this aspect of necessity and putting much weight on the culpability feature of the act, Garcia Amador appears to be inclined towards viewing the necessity doctrine not as an absolute justification, but as a circumstance that extenuates a State's responsibility in case of its wrongful conduct.[145]

In his last report (January 26, 1961), Garcia Amador revised draft articles on exoneration and extenuating circumstances, where he distinguished the concepts of force majeure and the state of necessity for greater clarity.[146] As a result, it acquired the following formulation:

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[143] The Institute of International Law recognized that "the obligation to indemnify disappears if the injured persons are those who caused the act which gave rise to the injury . . . for example, in the case of a particularly provocative attitude towards the mob". *See* (1900) 18 *Annuaire de I'Institut de droit international* at 255.

[144]The Hague Conference draft №19 was formulated as follows: "The extent of the State's responsibility depends upon all the circumstances and, in particular, upon whether the act of the private individual was directed against a foreign as such and upon whether the injured person had adopted a provocative attitude." Amador, *Third Report*, *supra* note 120, at 53, para19.

[145] Amador drew much attention to the culpability of the act on the part of the alien. According to him, "A vague reference to some act on the part of the alien would not do, for the conduct of the alien may not always justify the injurious even if it was provoked by his conduct. It must be a culpable act, i.e. an act the consequences of which could or should have been foreseen by the alien." *Ibid.*

[146] In the first draft, necessity was coupled with force majeure, although the report acknowledged that each had peculiar features. It looked as follows:

Article 13

1. Notwithstanding the provisions of the article last preceding, the State shall not be responsible for injuries caused to an alien if the measures taken are the consequence of force majeure or of a state of necessity due to

Article 17. — Exonerating and extenuating circumstances

1. An act or omission shall not be imputable to the State if it is the consequence of *force majeure* which makes it impossible for the State to perform the international obligation in question and which was not the consequence of an act or omission of its own organs or officials.

2. Likewise, an act shall not be imputable to the State if it is the consequence of a state of necessity involving a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke that peril and was unable to counteract it by other means and so to prevent the injury.

3. Similarly, the act or omission shall not be imputable to the State if it was provoked by some fault on the part of the injured alien himself.

4. *Force majeure,* state of necessity and the fault imputable to the alien, if not admissible as grounds for exoneration from responsibility, shall operate as extenuating circumstances for the purposes mentioned in article 26, paragraph 4, of this draft.[147]

As can be seen, the last version of draft articles by Garcia Amador made clear that necessity should be specific and subjected to certain limitations.

2.3.2. The Period between 1963 and 1980: Roberto Ago

By 1961, García Amador had ceased to be a member of the Commission, and the work he began was continued by his successor, Roberto Ago. Taking into account the limited character of its previous work on State responsibility, the ILC decided to broaden its scope in order to

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a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke the peril and was unable to counteract it by other means.

2. Similarly, the State shall not be responsible for the injuries caused if the injurious act was provoked by some fault on the part of the alien himself.

3. Force majeure, state of necessity and the fault imputable to the alien shall, if not admissible as grounds for exoneration from responsibility, constitute extenuating circumstances in the determination of the quantum of reparation.

[147]Amador, *Sixth Report*, *supra* note 120, at 48. It also should be noted that the ILC started distinguishing necessity and force majeure beginning in 1957, when it stated that a state should be liable for non-performance of contractual obligations and acts of expropriation unless it was "justified on grounds of public interest or of the economic necessity of the State." *See* Amador, *Second Report*, *supra* note 120, at 116–117.

examine the breach of international obligations. Thus, it formed a Sub-Committee on State Responsibility in 1963, and appointed Roberto Ago as a chairman. As the second Special Rapporteur on the subject, Ago submitted eight reports as well as a substantial addendum through 1980.[148] The majority of Ago's reports were completed in the 1970s. Given that in the 1960s, the ILC changed the course of its work from State responsibility for injuries to aliens to State responsibility generally, Ago mainly centered his work on general principles of State responsibility. Therefore, in his first report submitted in 1971, Professor Ago presented a detailed analysis of the general principles regarding State responsibility and attribution.[149] Only in 1980 did Professor Ago complete an addendum to his eighth report on State responsibility, where he presented a full analysis of the necessity concept. In his draft articles, he placed necessity within the circumstances precluding wrongfulness, in Article 33 of Chapter V.[150] It is noteworthy that the detailed analysis he presented in his eighth report greatly contributed to the development of the necessity concept and served as the basis for the formation of the modern concept of necessity defense. Therefore, I will attempt to shed light on the analysis he made regarding the attributes of necessity, distinct from those advanced by Garcia Amador.

2.3.2.1. Does Necessity Preclude State Responsibility?

The first doctrinal aspect that Professor Ago dealt with was whether a state of necessity, along with other circumstances, would preclude wrongfulness of the conduct or act of the state in question, or whether it would preclude the responsibility of a state regardless of the wrongfulness

[148] Crawford, *Articles on State responsibility*, *supra* note 121, at 1.
[149] Roberto Ago, Third Report on State responsibility, in *The ILC Yearbook* (1971) Vol. 2 (1), Doc.A/CN.4/246 & Add.1-3, at 199.
[150] Roberto Ago, "The Internationally Wrongful Act of the State, Source of International Responsibility", *Eighth Report on State Responsibility*, Addendum (1980), Doc. A/CN.4/318/Add.5, *the ILC Yearbook* (1980) Vol. II (1) at 14-51 [Ago, Eighth Report (Addendum)].
available online at: <http://legal.un.org/ilc/documentation/english/a_cn4_318_add5-7.pdf> (last visited 25 May 2015).

of its conduct. He examined this question by taking into account the historical development of the necessity concept, including replies from governments to the questionnaire of the Preparatory Committee for the Hague Conference on the Codification of International Law in 1930. After deliberate examination, he asserted that all circumstances listed in Chapter V, including a state of necessity, "should preclude *wrongfulness* of a State's conduct, namely, the source of its international responsibility, and not be related to the preclusion of international responsibility *per se*."[151] Professor Ago based his explanation on the premise that each of these circumstances "by its presence, precludes the international wrongfulness of an act of a State which would otherwise be a breach of an international obligation towards another State."[152]

2.3.2.2. Placing Necessity outside the Self-Preservation Context

In his report, Professor Ago made great effort to comment on two main issues concerning a state of necessity. The first one relates to distinguishing the concept of necessity from self-preservation, while the second one is characterised by an alleged conflict between two international subjective rights in a state of necessity. As for the first issue, Ago viewed self-preservation as the origin of clearly lawful acts, the lawfulness of which can be established without resorting to state of necessity. In this respect, he gives the example of acts of retorsion.[153] But most importantly, he emphasises that

[151]Jagota S.P., "State Responsibility: Circumstances Precluding Wrongfulness", (1985) 16 Netherlands Yearbook of International Law 249 at 254. Every wrongful act of a state entails international responsibility of that state. The preclusion of wrongfulness does not terminate a state's obligations and thus exclude its responsibility. Rather, it excuses a state from complying with its obligations for the period of necessity circumstances. As soon as the necessity situation ceases to exist, a state's duty to comply with its obligations revives. *See* paragraph 3.2.1.4. in Chapter III.

[152] *The ILC Yearbook* (1979) Vol. II (1), Doc. A/CN.4/318 & Add. 1-4, at 30, available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1979_v2_p1_e.pdf> (last visited 20 September 2014).

[153]Ago, Eighth Report (Addendum), *supra* note 150, at 17. Retorsion is an act perpetrated by one nation upon another in retaliation for a similar act perpetrated by the other nation.

> [t]he concept of self-preservation can only be used to explain actions taken with a view to averting an extreme danger threatening the very existence of the State, whereas.....the concept of state of necessity can be invoked above all to preclude the wrongfulness of conduct adopted in certain conditions in order to protect an essential interest of the State, without its existence being in any way threatened.[154]

It can easily be noticed from this distinction that a state may invoke necessity when its essential interests are under threat. Moreover, recourse to its invocation is subjected to certain conditions, whereas self-preservation is a notion that can only by invoked in cases where the very existence of the state is in danger, which is not the case with necessity. It should also be noted that Professor Ago, to support his view regarding such distinction, refers to earlier authorities, which greatly clarified the distinction.[155] Thus, he rejected the notion that the state of necessity could be founded in self-preservation. In this regard, Barboza emphasizes that Professor Ago was strongly convinced that "some inherited conceptions distorted the correct understanding of this matter, in particular the natural law notion that the inherent problem of necessity was that stemming from a conflict of two subjective rights, one of them being the right of 'self-preservation'."[156]

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[154] *Ibid*.

[155] Prof. Ago dismisses the idea of self-preservation from the context of necessity as he thinks that it "has no basis in any 'subjective right' or at least in any principle for which there is room in the field of law." Therefore, he refers to Schwarzenberger who noted the following with regards to self-preservation:

> It is a psychological denominator: the instinct of self-preservation. ... Regrettably, it links not only action alleged to be taken on grounds of self-defence, self-help or necessity, but also any breaches of international law which, otherwise, it would be impossible to justify even on the dubious level of quasi-legal terminology. Whatever, subjectively, may be the intentions of individual international lawyers, who endow self-preservation with the dignity of a legal principle, the function of this 'principle" is purely ideological. It is one of the ironies of the situation that legal 'purists' should elevate into a legal principle this category of group psychology, which as a legal principle, is devoid of any sustaining rule of international law, lacks any supporting evidence and serves merely as one of the backdoors through which to escape with a show of good conscience from the restraints imposed on instincts by international law. *Ibid*.

[156] Julio Barboza, "Necessity (Revisited) in International Law", in Makarczyk, J. (ed.), *Essays in Honour of Manfred Lachs*, (The Hague: Martinus Nijhoff, 1984) at 28 [Barboza].

Unlike Professor Ago, another scholar, Bin Cheng, in his sixty-year-old treatise defined necessity by reference to a state's self-preservation and threats to its very existence.[157] In spite of the fact that Professor Ago insists that "the concepts of self-preservation and state of necessity are in no way identical, nor are they indissolubly linked in the sense that one is merely the basis and justification of the other,"[158] Cheng considers self-preservation to be the justification for necessity.[159] But, the most interesting thing in his analysis is that he uses both justification and excuse with reference to necessity. According to him, "[t]he necessity of self-preservation justifies and excuses an otherwise unlawful act, exempting it from the legal consequences normally resulting from acts of this kind. But it does not render the commission of the act a matter of right."[160] It appears that like Professor Ago, Cheng also viewed necessity as an "excuse" rather than a "right", but he does not consider it important to distinguish between justification and excuse.

2.3.2.3. Transformation from a "Right" to an "Excuse"

Professor Ago also argued against viewing both self-preservation and necessity as the rights of states. Regarding self-preservation, by shedding light on its historical roots, he explains that "the right to self-preservation" was considered by many scholars of the nineteenth century as one of "fundamental rights of States" which should prevail over any right of a foreign state.[161]

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[157] Bin Cheng, *General Principles of Law As Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1953) at 74 [Cheng].

[158] Ago, Eighth Report (Addendum), *supra* note 150, at 51, para 8.

[159] Cheng, *supra* note 157, at 74. His formulation of necessity echoes the classical concept, which was intertwined with self-preservation. In this respect, he says that "If, after every conceivable legal means of *self-preservation* has first been exhausted, the *very existence* of the State is still in danger, and if there exists only one single means of escaping from such danger, the State is *justified* in having recourse to that means in self-preservation, even though it may otherwise be unlawful." *Ibid* at 74 (emphasis added).

[160] *Ibid*.

[161] Ago, Eighth Report (Addendum), *supra* note 150, at 16. Ago notes that according to the theory of fundamental rights of States, "any conduct on the part of the State deemed necessary to ensure the preservation of its existence was bound to be considered juridically legitimate, even if it was undeniably contrary to international obligation of that State." *Ibid*. It should be noted that Grotian understanding of necessity as a right had an enormous impact on the

However, Ago rejects this theory of "fundamental rights of States" by arguing that it "as then conceived, was the product of pure abstract speculation with no basis in international legal reality, and has since become outdated; in particular, the idea of a right of 'self-preservation' has been completely abandoned."[162] Roman Boed notes that there are other scholars who share Professor Ago's view.[163] For instance, according to Professor Bowett, "[the] view, by which the whole of the duties of states are subordinated to the 'right' of self-preservation or the 'right' of necessity, is destructive of the entire legal order."[164] Schwarzenberger concedes that "[i]f self-preservation were an absolute and overriding right, the rest of international law would become optional, and its observance would depend on self-denying ordinance, revocable at will by each State, not to invoke this formidable super-right."[165]

As for the "right" of necessity, admitting that this terminology was used by writers of earlier ages such as Grotius and Vattel in relation to a state's right conferred over foreign-owned property, Professor Ago considers it a general concept rather than one which "conflicts with the 'subjective right' of a foreign State which it is argued, must yield to it."[166] Therefore, Ago thinks that "the idea of a subjective right of necessity, which may have been marginally acceptable in times when the science of law had not yet refined its concepts, is absolute nonsense today."[167]

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thinking of nineteenth century scholars who advocated the notion of 'fundamental rights of States'. *See* Boed, *supra* note 47, at 6.

[162] Ago, Eighth Report (Addendum), *supra* note 150, at 16.

[163] Boed, *supra* note 47, at 7.

[164] Derek W. Bowett, *Self-Defense in International Law* (New York: Praeger, 1958) at 10 [Bowett].

[165] Georg Schwarzenberger, "The Fundamental Principles of International Law", (1955-I) 87 Recueil Des Cours 191 at 344 [Schwarzenberger].

[166] Ago, Eighth Report (Addendum), *supra* note 148, at 18.

[167] *Ibid*. Both Schwarzenberger and Bowett support the position that necessity is not a right but an excuse. Schwarzenberger notes that "[s]ufficient evidence exists to permit the statement that, in international law, necessity may excuse non-observance of international obligations...[it] does not give any right, but may provide a good excuse." *See* Schwarzenberger, *supra* note 165, at 343, while Bowett contends that the conduct or act of a State in necessity "though not lawful (and therefore distinct from self-defense) is yet excusable....", *see* Bowett, *supra* note 164, at 10.

Based on this analysis, Professor Ago objects to the idea of conflicting subjective rights in the state of necessity.[168] In his view, if necessity is regarded as a "right", then it should have a correlative obligation or duty, which cannot be found here. Professor Ago further explains that "[t]he term 'subjective right' denotes the possibility at law of requiring a particular service or course of conduct from another subject of law, but a person who invokes a situation of necessity as justification for his act makes no 'claim' on others for service or conduct."[169] Therefore, Professor Ago contends that necessity must be viewed not as a right, but rather, as an excuse for breaching a state's international obligation to protect its essential interests.[170] Respectively, the conflict of rights must be regarded as a conflict between an essential interest on the one hand and a subjective right on the other.[171] To make the distinction clearer, in invoking necessity as an excuse, the acting state merely seeks to excuse its denial of another state's legitimate legal claim against it, while when necessity is viewed as a right, the acting state's reliance on it would amount to a legal claim against the other state.[172]

However, to be properly invoked, "the excuse of necessity" must be of an exceptional nature. In other words, the interest that a state wants to protect in contesting a subjective right of

[168] As mentioned before, earlier writers argued that there exists a conflict between two "subjective rights", one of which must inevitably be sacrificed to the other.

[169] *The ILC Yearbook* (1980) Vol. 2 (2), Doc. A/CN.4/SER.A/1980/add.1 at 35, available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1980_v2_p2_e.pdf> (last visited 25 June 2014).

[170] *Ibid*. Anzilotti also contests the assertion that a State in a state of necessity exercises a "subjective right" that involves an "obligation" on the part of the State injured by its acts. In his view, in such case, necessity simply legitimates those acts, although they are contrary to an international obligation. *See* Ago, Eighth Report (Addendum), *supra* note 150, at 18.

[171] *Ibid*. Moreover, ILC discussed another approach towards this conflict. The Commission suggested that "the situation should be described as a conflict between two separate abstract norms which, owing to a fortuitous set of circumstances, cannot be observed simultaneously and that one of these norms governs the state of necessity." *Ibid*.

[172] Ago, Eighth Report (Addendum), *supra* note 150, at 18. According to Boed, "the 'excuse' conception of necessity provides a partial way out of Fenwick's quagmire: in invoking necessity, a State does not assert a right in defense of its violation of the right of another State, but rather asserts that, under the circumstances, international law should excuse its conduct." *See* Boed, *supra* note 47, at 7-8.

another state must be 'exceptionally important' for the state asserting it.[173] With respect to the scope of necessity, Professor Ago notes that the essential interests of the state should not be limited to the "existence" of the state, while also considering it useless to establish categories of interests which should be regarded as essential in assessing a state of necessity.[174] The only thing that is clearly stated by Ago relates to the balancing of two conflicting interests of States. According to him, the "interest protected by the subjective right vested in the foreign State, which is to be sacrificed for the sake of an 'essential interest' of the obligated State, must obviously be inferior to that other interest."[175] In this respect, Julio Barboza considers such a conflict between these legally protected interests as the most essential feature of necessity and, therefore argues that "the magnitudes [of the interests] involved must be of the same quality in order to allow a decision in favour of any one of them."[176]

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[173] Ago, Eighth Report (Addendum), *supra* note 150, at 19.

[174] *Ibid*. Ago abstains from predetermining them in the abstract and leaves much room for interpreters to assess all the conditions of each individual case in deciding the 'essential' character of the interest at stake.

[175] Ago, Eighth Report (Addendum), *supra* note 150, at 20. In this respect, Buza also emphasises that "the protected right must be more important than the injured." *See* Buza L.,"The state of necessity in international law", (1959) 1 *Acta juridica Academiae Scientiarum Hungaricae* (Budapest: Akademiai Kiado) at 213.

[176] Barboza, *supra* note 156, at 30. Barboza presents the following schematic analysis on competing interests of states in state of necessity which , in my view, are worth stating:

> 1) There are, on the one hand, certain interests of States A and B, and on the other certain legal norms protecting those interests.
> 2) If State A has an obligation towards State B, that means that B has certain right as a counterparty. This right protects an interest of State B.
> 3) Complying with its obligation, State A puts in jeopardy one of its essential interests (hypothesis of Art.33 of the project).
> 4) The interest of State B could, for instance, be a piece of its property if A's obligation is a financial one. In the abstract, the law protects the property of States. The non-compliance of A with its obligation would damage State B in its property.
> 5) Let us suppose that the essential interest of State A, which would be prejudiced if A complies with its obligation, concerns its existence. Whatever our position regarding self-preservation, it seems unobjectionable that international law protects the existence of States.
> 6) There is, then, a conflict between the property of State B and the existence of State A, both opposing interests protected by law.
> 7) The legal rules that protect the existence and property of States are not in themselves incompatible. There is no conflict between them in the abstract.
> 8) However, in certain concrete cases the above opposition of interests takes place and a situation of necessity arises for one of the States concerned. Law solves the conflict by deciding in favour of one of

As can be seen from the detailed explanation presented by Professor Ago, in the middle of the twentieth century, the concept of necessity broke free from its historical roots intertwining it with self-preservation, and experienced a notional transformation from a "right" to an "excuse". This undoubtedly evidences the formation of a new stage in the historical development of the necessity concept in international law.

At the end of his comprehensive analysis, Professor Ago suggested his own version of the state of necessity formulated in Article 33 of the ARSIWA as follows:

> *Article 33. State of necessity*
>
> 1. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if the State had no other means of safeguarding an essential State interest threatened by a grave and imminent peril. This applies only in so far as failure to comply with the obligation towards another State does not entail the sacrifice of an interest of that other State comparable or superior to the interest which it was intended to safeguard.
>
> 2. Paragraph 1 does not apply if the occurrence of the situation of "necessity" was caused by the State claiming to invoke it as a ground for its conduct.
>
> 3. Similarly, paragraph 1 does not apply:
>
> (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law, and in particular if that act involves noncompliance with the prohibition of aggression;
>
> (b) if the international obligation with which the act of the State is not in conformity is laid down by a conventional instrument which, explicitly or implicitly, precludes the applicability of any plea of "necessity" in respect of non-compliance with the said obligation.[177]

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dissenting interests, i.e., iin the case of Art.33, in favour of 'essential interest' of the State. Or, as Anzilotti puts it, one of the States is left at liberty not to comply with its obligation. *Ibid* at 31.

[177] Ago, Eighth Report (Addendum), *supra* note 150, at 51.

2.3.2.4. Critical Remarks on Ago's Work

Despite the fact that Professor Ago made a great effort to contribute to the development of a modern concept of necessity during his office in ILC,[178] there were other ILC members who expressed critical opinions with regard to shortcomings of the above-mentioned version of necessity. For instance, Mr. Sahovic said that the content of Article 33 lacked examination from the perspective of general international law, and that the limits of necessity needed to be specified more clearly.[179] Mr. Verosta opined that in order to underline the exceptional nature of necessity, the wording of the first paragraph of Article 33 should be more restrictive. He pointed out that it was not clear that the examples of financial difficulties mentioned by Professor Ago fall within the ambit of state of necessity.[180] The most important remark was made by Mr. Ushakov, who emphasized the danger of self-judgement of Article 33 by the state pleading necessity.[181] Another ILC member, Mr. Yankov also touched upon this drawback. According to him, "subjective judgement would be paramount in determining whether the act in question was indeed entirely beyond the control of the State whose interest was threatened."[182] Therefore, in his view, Article 33 lacked a "reliable basis on which that element could be accepted as part of

[178] In this regard, President Stephen Schwebel noted that "Mr. Ago's report was a model of scholarship, discernment, analysis and, indeed, courage, for it took moral courage to advocate that a state of necessity precluded the wrongfulness of an act of a State." *Summary record of the 1616th meeting* (Topic: State responsibility), (A/CN.4/318/Add.5- 7, A/CN.4/328 and Add.1-4), *The ILC Yearbook* (1980) Vol. I., at 171, para 9. Available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1980_v1_e.pdf> (last visited 25 June 2014).

[179] *Ibid* at 166, para 5.

[180] *Ibid* at 172, para 20.

[181] *Ibid* at 171, para 10. It means that Article 33 did not include objective criteria for assessing the "gravity" of the peril, which opens leeway for states to decide it based on their subjective judgement. In such a case, there may arise concerns related to the validity of claims about the real existence of a state of necessity.

[182] *Ibid* at 173, para 3. Mr. Yankov considers necessity as a "vulnerable concept" due to its dubious parameters which rely more on subjective judgement than on objective criteria. Therefore, he rightly defines the subjective judgement as "the backdoor through which unjustified breaches of international obligations could enter." *Ibid*. para 7.

the concept of necessity."[183] He also criticised the absence of criteria for measuring the relative interests at stake in a state of necessity.[184] In my view, he was correct to point out this problem, because without measuring the relativity of interests using concrete criteria, the decision on which of these interests prevails would be arbitrary. Other members such as Jagota, Barboza and Sahovich expressed concerns about the high risk of abuse of the necessity concept by States.[185] The ILC Committee Chairman, C.W. Pinto, summarized the critical opinions of all members regarding the most vulnerable aspects of the necessity concept formulated by Professor Ago. He noted that "the term 'interest' could be given many meanings" and the "need to compare interests ... in the absence of a universally accepted scale of values, could pose problems which would seriously impair the utility of the concept of necessity." [186]

2.3.2.5. The ILC's Work after Roberto Ago

In 1979, due to Mr. Ago's election as a judge of the International Court of Justice, at its thirty-first session the ILC appointed Mr. Willem Riphagen as a Special Rapporteur to continue work on this topic.[187] During his tenure, Mr. Riphagen presented seven reports.[188] From 1987 to 1996, Mr. Gaetano Arangio-Ruiz continued Mr. Riphagen's work and presented eight reports on

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[183] *Ibid*.
[184] *Ibid* at para 2.
[185] *Ibid* at paras 10-25.
[186] He also made the following remarks:
> 3. *Even more troubling was the fact that the concept of necessity, by its very nature, imported a subjective element so pervasive as to make a rule based upon it incapable of proper application by a tribunal*. For all the references to a 'state of necessity' cited in the report, and for all the rules with which lawyers had tried to confer objectivity and precision on the concept, it might well be that necessity was not a state or condition of things, but rather an interpretation or evaluation of a situation, and therefore a state of mind. Moreover, the *content of the notion might be so subjective as to be unhelpful in the ordering of relations between States*. Alternatively, its application might be so circumscribed as to deprive it of usefulness altogether . . .*Ibid* at 177, para 2-3 [emphasis added].

[187] Crawford, *Articles on State Responsibility* , *supra* note 121, at 2.
[188] *Ibid*. All seven reports of the Special Rapporteur, Riphagen are available online at: <http://legal.un.org/ilc/guide/9_6.htm> (last visited 26 June 2014).

the topic.[189] The work of these two Special Rapporteurs mainly focused on the content, forms, degrees and implementation of international responsibility, as well as the settlement of disputes. They did not touch upon the circumstances precluding wrongfulness, specifically, the issues related to a state of necessity.

It should be noted that after Professor Ago's last report, Article 33 and its commentary were submitted to member States for comments. The comments made by States from 1982 to 1998 were mainly concerned with the possible misuse of the term 'essential interest' due to its expansive interpretation.[190] However, in spite of critical comments made by States, there was not any substantial textual difference between the later 1996 version and that put forward in 1980.[191]

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[189] *Ibid*. All eight reports of the Special Rapporteur, Gaetano Arangio-Ruiz are available online at: <http://legal.un.org/ilc/guide/9_6.htm> (last visited 26 June 2014).

[190] For instance, Czechoslovakia's comments are worth mentioning. It pointed out that "inclusion of this Article raises serious doubts, since with reference to safeguarding an 'essential interest', it actually enables States to violate their international obligations.... The wording of article 33 is also disputable with regard to the principle of sovereign equality, which prohibits a State to decide unilaterally which interests it can consider to be an "essential interest" of another State ". Comments and Observations of Governments on Part 1 of the Draft Articles on State Responsibility for Internationally Wrongful Acts, *The ILC Yearbook* (1983) Vol. 2 (1), Doc A/CN.4/362 at 2, available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1983_v2_p1_e.pdf> (last visited 26 June 2014). *See* also Comments and Observations of Governments on Part 1 of the Draft Articles on State Responsibility for Internationally Wrongful Acts, *The ILC Yearbook* (1988) Vol. II (1), Doc A/CN.4/414 at 5. Available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1988_v2_p1_e.pdf> (last visited 26 June 2014).

[191] The version of 1996 read as follows:

1. A State of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that
State not in conformity with an international obligation of the State unless:
(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.
2. In any case, a State of necessity may not be invoked by a State as a ground for precluding wrongfulness:
(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the State of necessity with respect to that obligation; or
(c) if the State in question has contributed to the occurrence of the State of necessity.

2.3.3. The Period between 1997 and 2001: James Crawford

2.3.3.1. James Crawford: Clarifying Conditions for Invoking the Necessity Defense

In 1997, the ILC appointed Professor Crawford as a Special Rapporteur to complete the work on the topic of State responsibility. During his tenure, Professor Crawford submitted four reports that served as the basis for the Commission to complete the second reading of the draft articles in 2001.[192] His work mainly focused on the "secondary" rules of the law of State responsibility, which identify the consequences of a breach of a "primary" obligation and serve as a source of the "content and duration of substantive State obligations".[193] According to such a "primary-secondary" rule, necessity can be invoked as a circumstance precluding wrongfulness when a claimant establishes the breach of a primary obligation.[194] Professor Crawford made a significant contribution to reshaping the modern concept of necessity. In this respect, Professor Bjorklund notes that his version of necessity introduced two aspects that distinguish it from previous versions.[195] First, Crawford's version suggests that states not be permitted to raise a necessity plea if any obligation, whether found in a treaty or another international law source, expressly or implicitly prohibits such a plea. Second, it includes the provision which establishes the conditions where a state cannot invoke necessity. According to these conditions, a state cannot invoke necessity if breaching the obligation would impair an essential interest of the state to which the obligation is owed or would impair the interests of other states.[196] This was taken into account by the addition of "or of the international community as whole" to part 1(b) which

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[192] Crawford, *Articles on State responsibility*, *supra* note 121, at 3. All eight reports of the Special Rapporteur, Crawford are available online at: <http://legal.un.org/avl/ha/rsiwa/rsiwa.html> (last visited 26 June 2014).
[193] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, New York: Cambridge University Press, 2002) at 14-16 [Crawford, *Commentaries*].
[194] *Ibid*.
[195] Andrea Bjorklund , "The Necessity of Sustainable Development?", in Marie-Claire Cordonier Segger, Markus W. Gehring & Andrew Paul Newcombe, *Sustainable Development in World Investment Law* (The Hague: Kluwer Law International, 2011) at 381.
[196] *Ibid*.

was included in the final draft of the Article.[197] In addition, the statement that a necessity plea may not serve to excuse a violation of a peremptory norm was placed in a separate article.[198]

With the above-mentioned modifications, Professor Crawford drafted the final version of modern necessity concept. In 2001, the Commission completed its second reading of the draft of the ARSIWA. After having been adopted by the Commission, the Articles were submitted to the General Assembly with the recommendation that the latter take note of them in a resolution and annex them to the resolution.[199] Necessity was placed in Article 25 of the ARSIWA, and its final adopted version 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.[200]

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[197] James Crawford, *Second Report on State Responsibility: Addendum*, (1999) UN Doc A/CN.4/498/Add.2, at 178, online: UN < http://legal.un.org/ilc/documentation/english/a_cn4_498.pdf> (last visited 30 September 2014).
[198] *Ibid* at 187.
[199] ILC, *Report of the Commission at its Fifty-Third Session*, (2001) Doc. A/56/10 at para 11, available online at: <http://legal.un.org/ilc/reports/english/a_56_10.pdf> (last visited 30 September 2014).
Moreover, the Commission also suggested that the General Assembly convene an international conference at a later stage with a view towards adopting a convention on the topic. *Ibid*.
[200] The ILC Articles on Responsibility of States for Internationally Wrongful Acts, available online at: <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> (last visited 20 September 2014).

2.3.4. Concluding Remarks

In this section, I presented the process of the formation and codification of the modern necessity concept in three stages. Each of the Special Rapporteurs of the ILC accomplished enormous work that contributed to understanding necessity as a separate concept from self-preservation in modern international law. Besides drawing the line between these two historically intertwined concepts, they also presented strong arguments which, in my view, could convincingly explain the transformation of the necessity concept from its classical notion of a "right" to a modern meaning of "excuse". Thus, it can be said that the work done by the ILC played a very important role in the formation of a modern doctrine of necessity.

This paragraph concludes the discussion on the process of formation of a modern necessity concept as well as the whole chapter on the historical evolution of the necessity concept. In the next chapter, I will attempt to give a comprehensive description of the modern necessity concept, its elements, and limitations to its invocation. The relevant sections of the next chapter will grapple with the contentious issues of a modern necessity defense not only from the theoretical perspective, but also from the perspective of practice of international adjudicative bodies. Therefore, I will thoroughly explore and analyse the relevant case law in international law dealing with examining the necessity circumstances. Most importantly, I will explain the constituent elements of necessity defense and clarify its features distinctive from other closely related circumstances precluding wrongfulness such as distress and *force majeure*.

III. Necessity as a Defense under Public International law

This chapter presents a comprehensive overview of the doctrine of necessity in public international law. It will examine the specific features and constituent elements of the necessity doctrine through the lens of the second concept of regime theory, regime attributes. First, I will look into the existence of customary rules related to the necessity concept. In this respect, I will analyse relevant cases in which international dispute settlements bodies addressed the concept of necessity and will attempt to identify relevant state practice with respect to the customary necessity defense. Then I will inquire into the modern concept of the necessity defense as codified in Article 25 of the ARSIWA. In particular, I will shed light on the definition and specific features of necessity, and will examine elements of the necessity defense serving as the requirements for its successful invocation. Specifically, I will analyse the affirmative conditions of the invocation of necessity defense and the exceptions that preclude its invocation in any circumstances. Afterwards, I will perform a comparative analysis of other circumstances precluding wrongfulness, such as distress and *force majeure*, and distinguish them from the defense of necessity.

3.1. Necessity as a Rule of Customary International Law

From the previous chapter, we learned that the concept of necessity underwent a long evolutionary process. It was found that the earliest notions of necessity were used in the military context as a State's right to self-preservation. Moreover, the concept of necessity has also been found in the domestic legal traditions of different countries, such as Japan, Germany and France.[1] Therefore, giving due regard to the prevalence of this concept during various times and in various legal systems, Professor Ago was to a certain extent correct when he stated that the concept of necessity is "so deeply rooted in the consciousness of the members of the international community...[i]f driven out the door it would return through the window."[2]

The status of the necessity defense (reflected in Article 25 of the ARSIWA) as a customary rule is considered by a few scholars as debatable. For instance, Daniel Bodansky and John Crook observe that the "confident and direct quality" of the text of the ILC Articles "adds to their seeming authority and certainty..... [and] their seeming clarity and formal presentation may lead readers to take the articles too much at face value, believing that they indeed state "the law"."[3] Both scholars further note that this impression can be "deceptive", as the ARSIWA sometimes "embody either elements of progressive development or the Commission's

[1] Japanese *Kinkyu-hinan*, German *Notstand* and French *état de nécessité*. *See* Gregory A. Raymond, "Necessity in Foreign Policy", (1998-99) 113 Political Science Quarterly 673 at 675. In general terms, necessity can be considered one of the emergency doctrines found in most domestic legal systems, such as *frustration* in English law, *force majeure or imprévision* in French law, *rebus sic stantibus* in Swiss law, impracticability in American law, or *Wegfall der GeschÄftsgrundluge* in German law. *See* Matthew Parish, "On Necessity", (2010) 11(2) Journal of World Investment and Trade 169 at 176.

[2] Roberto Ago, "The Internationally Wrongful Act of the State, Source of International Responsibility", *Eighth Report on State Responsibility*, Addendum (1980), *The ILC Yearbook* (1980) Vol. II (1), Doc. A/CN.4/318/Add.5, at 51 [Ago, Eighth Report (Addendum)].
Available online at: <http://legal.un.org/ilc/documentation/english/a_cn4_318_add5-7.pdf> (last visited 25 May 2015).

[3] Daniel Bodansky & John Crook, "Symposium: The ILC's State Responsibility Articles: Introduction and Overview", (2002) 93 American Journal of International Law 773 at 787.

judgements regarding the state of existing law."[4] Underlining the powerful effect of the ILC's texts on the law before their formal adoption, they argue that Article 25 of the ARSIWA "had a bootstrapping quality, helping to shape the law to match the draft."[5]

However, the prevalence of necessity as a defense in the practice of states also gives a sufficient basis to believe that it has already been elevated to the status of a customary rule of international law. In this regard, the International Court of Justice (ICJ) in the *Gabčíkovo-Nagymaros Project* case held that necessity is "a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation."[6] However, the Court neither referred to any authority to support its finding nor analysed the relevant state practice and *opinio juris* in this respect. Most interestingly, four years later, the ILC itself referred to the ICJ's above mentioned assertion to support that Article 25 represents customary international law.[7] The only thing that the ILC mentioned in support of its assertion was a few cases in which "the plea of necessity has been accepted in principle, or at least not rejected."[8] Therefore, in this section of the chapter, I will address those cases and attempt to inquire into the evidence supporting the claim that the necessity defense is a rule of customary international law.

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[4] *Ibid*.
[5] *Ibid* at 788.
[6] *Gabčíkovo-Nagymaros Project* case (Hungary v. Slovakia) Judgment, (25 September 1997) *ICJ Reports* at 40, [*Gabčíkovo-Nagymaros*], available online at: < http://www.icj-cij.org/docket/files/92/7375.pdf> (last visited 20 May 2015).
[7] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge and New York: Cambridge University Press, 2002) at 181-182 [Crawford, *Commentaries*]. It should be noted that some ILC members were not of the opinion that Article 25 represented the codification of custom. *See* Sarah Heathcote, "Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity", in James Crawford, Alain Pellet, Simon Olleson & Kate Parlett, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 491 at 492-94 [Heathcote].
[8] Crawford *Commentaries*, *supra* note 7, at 179. These cases will be examined in detail for the purpose of identifying state practice confirming the necessity defense as a rule of customary international law.

3.1.1. Defining Customary International Law

Before delving into whether a state of necessity qualifies as a rule of customary international law, I first found it appropriate to briefly elucidate the definition of customary international law. Customary international law is defined as a general and consistent practice of states which is followed by those states out of a sense of legal obligation (*opinio juris sive necessitatis*).[9] There are two conditions for the practice of states to become a customary legal norm binding on all states: (a) the practice must be consistent among states and must endure over some period of time, and (b) states must believe that the practice is legally mandated.[10] According to Professor Gazzini, "[s]tate practice must be extensive, uniform and representative, although not necessarily unanimous. Sporadic objections do not prevent the formation of a customary rule."[11] As for what constitutes state practice, he mentions different kinds of acts and

[9] The International Court of Justice Statute defines customary international law in Article 38 (1)(b) as "evidence of a general practice accepted as law." As Yoram Dinstein states, it is determined through two factors: the general practice of states and what states have accepted as law. *See* Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004) at 5. For further literature, *see* Anthony A. D'Amato, *The Concept of Custom in International Law* (Ithaca, New York: Cornell University Press, 1971) at 12; Michael Akehurst, "Custom as a Source of International Law", (1976) 47 British Yearbook of International Law 1. Recent revisionist scholarship includes, most prominently, Jack L. Goldsmith & Eric Posner, "A Theory of Customary International Law", (1999) 66 University of Chicago Law Review 1113; Jack L. Goldsmith & Eric Posner, "Understanding the Resemblance Between Modern and Traditional Customary International Law", (2000) 40 Vanderbilt Journal of International Law 639.

[10] *See* Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010) at 6.

As for state practice, there is an opinion that the formation of custom does not require any particular length of time, but "an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform." *See North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, (20 February 1969) I.C.J. 3 at 43, available online at: < http://www.icj-cij.org/docket/files/52/5561.pdf> (last visited 27 July 2014).

As for *opinio juris*, the ICJ similarly considers it as indispensable to custom, since "[t]here are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty." *Ibid* at 44.

[11] Tarcisio Gazzini, "The Role of Customary International Law in the Field of Foreign Investment", (2007) 8(5) Journal of World Investment and Trade 691 at 692. For detailed analysis identifying the rules of customary international law in the field of international investment law, *see* Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge: Cambridge University Press, 2016). *See* also, The ILC Reports on Identification of Customary International law (by Special Rapporteur Michael Wood), available online at: < http://legal.un.org/ilc/guide/1_13.htm> (last visited 20 May 2015).

omissions attributable to states that fall under this concept.[12] The decisions of international courts and tribunals as to the existence of customary rules and their formulation are not considered to be state practice, but they can serve as "subsidiary means for the determination of [customary rules]."[13] Professor Gazzini also emphasizes the role of decisions made by international tribunals with respect to customary rules. In his view, international decisions are "valuable insofar as they confirm the existence of customary rules and contribute to clarify their content.... [t]hus they are certainly important as guides to future decisions and may even influence subsequent State practice."[14] Taking account of this and the purpose of this section of the chapter, which is to identify the state practice that confirms the existence of customary rules on a state of necessity, I found it important to examine the relevant practice of international courts and tribunals. Given the fact that the practice of international tribunals contains several cases in which the governments of disputing parties made official statements concerning a state of necessity, I will examine these cases[15] and attempt to identify the content of those statements. In my view, the identification of the relevant state practice in the decisions of international dispute settlement

[12] Gazzini gives the following list of examples which fall within this concept: executive acts, legislation, regulations, judicial decisions, international treaties, verbal acts (official declarations or protests), and public and diplomatic statements. *Ibid*. Professor Crawford presents the following list which could be considered as state practice:
diplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, official manuals on legal questions (e.g. manuals of military law), executive decisions and practices, orders to military forces (e.g. rules of engagement), comments by governments on ILC drafts and corresponding commentaries, legislation, international and national judicial decisions, recitals in treaties and other international instruments (especially when in 'all states' form), an extensive pattern of treaties in the same terms, the practice of international organs, and resolutions relating to legal questions in UN organs, notably the General Assembly. *See* James Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford: Oxford University Press, 2012) at 24.

[13] The ILC, *Second Report on Identification of Customary International law* (2014) Doc. A/CN.4/672 at para 46, online at: <http://legal.un.org/ilc/documentation/english/a_cn4_672.pdf> (last visited 20 May 2015).

[14] *Ibid*.

[15] For the detailed analysis of early cases on necessity in French language, *see* Sarah Heathcote, "Est-Ce Que L'État De Nécessité Est Un Principe De Droit International Coutumier?" / "Is State of Necessity a Principle of Customary International Law?", (2007) *Revue Belge De Droit International* 1, Edition Bruylant, Bruxells; The article can also be found in The Australian National University College of Law Research Paper No.09-22; Salmon, J. J. A., "Faut-il codifier l'état de nécessité en droit international", in J. Makarczyk, (ed.), *Essays in Honour of Judge Manfred Lachs* (The Hague: Martinus Nijhoff, 1984) 235-70.

bodies will serve as sufficient evidence confirming that the state of necessity is a rule of customary international law.

3.1.2. Humanitarian Necessity

3.1.2.1. *The Neptune* Case

The earliest assertion of the necessity defense is considered to have been made in the humanitarian context. The *Neptune* case[16] was the first arbitration case that grappled with the concept of necessity. This case arose from an incident during the war between Great Britain and France in 1795. The dispute developed as follows: the American vessel the Neptune, which was carrying food products on board, was seized by the British army on its way to France.[17] Even though the British paid the invoice price for the products that they took from the vessel with 10 per cent profit, the Americans also demanded the difference of the price that they would have received on the open market in France.[18] This led to the dispute, which was brought before the Mixed Commission established under the Jay Treaty in 1797. In the arbitration process, Great Britain argued that its actions were taken out of necessity, since Britain had been experiencing a shortage of food due to the war with France.[19] In response, one of the American commissioners, referring to Grotius, stated that "the necessity must not be imaginary, that it must be real and pressing, and that even then it does not give a right of appropriating the goods of others until all other means of relief consistent with necessity have been tried and found inadequate."[20] He also noted that in order to justify the measures under a state of necessity, a state must prove that the

[16] *The Neptune*, reprinted in IV International Adjudications: Modern Series 372 (John Basset Moore ed., 1931), cited in Roman Boed, "State of Necessity as a Justification for Internationally Wrongful Conduct", (2000) 3(1) Yale Human Rights and Development Law Journal 1, footnote 28 [Boed]; also in Ago's Eighth Report (Addendum), *supra* note 2, at 34.
[17] Boed, *supra* note 16, at 8.
[18] *Ibid*.
[19] *Ibid*.
[20] *Ibid* at 8-9.

necessity was of an extreme nature.[21] The Commission acknowledged the existence of the right of necessity defense in international law, but rejected Britain's argument, since it found that Britain had not experienced "extreme necessity" and had not exhausted all other means of self-preservation as required by the doctrine. Based on this, the Commission upheld the American shipowners' claim and granted the requested relief.[22]

3.1.2.2. *The Properties of the Bulgarian Minorities in Greece* Case

In his eighth report, Professor Ago mentions the case concerning *the properties of the Bulgarian Minorities in Greece*,[23] which I found appropriate to classify under humanitarian necessity. According to the details, after losing the war with Turkey, the Greek Government settled Greek refugees from Asia Minor on properties that were temporarily left by their Bulgarian owners.[24] Since Bulgarians were entitled to return to those properties on the basis of provisions of the Treaty of Sèvres, these actions of the Greek government were claimed to be in breach of its treaty with Bulgaria.[25] The dispute was handled by the Commission of the League of Nations, which accepted the plea of *force majeure* invoked by the Greek government as a justification for its actions. Particularly, it noted that "....under the pressure of circumstances, the Greek Government employed this land [the ex-Bulgarian district] to settle refugees from Turkey.

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[21] In this respect, the American commissioner Mr. Pinkney stated as follows: "I shall not deny that extreme necessity may justify such a measure [seizure of foodstuffs]. It is only important to ascertain whether that extreme necessity existed on this occasion and upon what terms the right it communicated might be carried into exercise." *Ibid*.

[22] *Ibid*. Boed refers to Bin Cheng who drew out several aspects of the Neptune decision that share common features with the decisions of modern adjudicative bodies. Even though all aspects mentioned by Cheng have equal importance, two of them seem to reflect the fundamental features of necessity defense invoked in the Neptune case. a) This necessity "supersedes all laws,""dissolves the distinctions of property and rights" and justifies the "seizure and application to our own use of that which belongs to others"; b) This necessity must be "irresistible" in that all legitimate means of self-preservation have been exhausted and proved to be of no avail. *Ibid*.

[23] Ago, Eighth Report (Addendum), *supra* note 2, at 26, para 32.

[24] *Ibid*.

[25] *The ILC Yearbook* (1979) Vol. II (1), Doc. A/CN.4/318 and Add. 1-4, at 53, para 115, available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1979_v2_p1_e.pdf> (last visited 20 September 2014).

To oust these refugees now in order to permit the return of the former owners would be impossible."[26]

Despite the fact that in the previous report of Professor Ago, the defense invoked by Greece had been classified under *force majeure*, one can observe that in the eighth report, the Professor changed the terminology to a state of necessity. Contrary to his earlier view, Professor Ago considered the Greek government to have acted in breach of its obligations due to the humanitarian necessity that it experienced at that time. According to him, the government viewed "the provision of immediate shelter for its nationals who were pouring in to its territory in search of refuge" as one of the essential interests of Greece that needed to be protected at that time.[27] Taking this into account, Professor Ago considered that, in such a case, the wrongfulness of the conduct at issue had to be precluded. However, he noted that "it still entailed the obligation to compensate the individuals whom the act committed in a state of necessity had deprived of their properties."[28]

3.1.3. Military Necessity

3.1.3.1. *The Anglo-Portuguese* Dispute of 1832

The Anglo-Portuguese dispute dating from 1832 is the first authority cited in the ILC commentaries mentioning the concept of necessity in a military context.[29] In this dispute, property owned by British subjects was appropriated by the Portuguese under the "necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances."[30] The action committed was claimed to be in violation of the treaty by which

[26] *Ibid*.
[27] Ago, Eighth Report (Addendum), *supra* note 2, at 26, para 32.
[28] *Ibid*.
[29] Crawford *Commentaries*, *supra* note 7, at 179.
[30] *Ibid*.

Portugal was bound respecting the property of British nationals residing in its territory. However, after having consulted with its law officers on this matter, the British government received an opinion stating that treaties between the two countries could not be "so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or .... so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be *absolutely and indispensably necessary* to the safety, and even to the very existence of the State."[31] The opinion also touched on the extent of necessity that will justify the appropriation of property. It specified that the extent of necessity "must depend upon circumstances of the particular case, but it must be *imminent and urgent*."[32] Accordingly, Professor Ago attributed due importance to the usage of terminology in this case, which he thought was unusual for those times. In his view, the terms "imminence" and "urgency" contributed to specifying the concrete conditions of invoking the plea of necessity.[33]

The details of the case allow us to conclude that the constituent elements of necessity were first developed in the military context in relation to a state's necessity of self-preservation. Therefore, this case is noteworthy since it contains state practice on certain conditions for invoking a state of necessity.

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[31] Lord McNair, *International Law Opinions*, Vol. II (Cambridge: Cambridge University Press, 1956) at 231-232. [emphasis added] [McNair]. As can be ascertained, the necessity of preserving its population and its self-preservation are argued to serve as justification for the actions committed by Portugal. In support of his opinion, the author referred to Vattel, who pointed out in "The Law of Nations" that "If the sovereign, in order to preserve his own nation, has occasion for the things he has promised in the treaty . . . he ought without hesitation to give preference to his own nation . . . . Necessity here forms an exception, and he does not violate the treaty, because he cannot fulfill it." Emer de Vattel, *The Law of Nations* (or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury), (First published in 1797, newly edited by Béla Kapossy and Richard Whatmore) (Indianapolis: Liberty Fund Inc., 2008), at Book I, Ch. II,. §16, online at: <http://oll.libertyfund.org/titles/2246> (last visited 25 September 2014).

[32] McNair, *supra* note 31, at 232 [emphasis added].

[33] Ago, Eighth Report (Addendum), *supra* note 2, at 30, para 40.

3.1.3.2. *The Caroline* Case

In the military context, the state of necessity was also invoked in another case called the "Caroline" incident, which was actually a diplomatic dispute between Great Britain and the United States which happened in Upper Canada in 1869. Professor Jennings associated the beginning of the modern doctrine of necessity under customary international law with the Canadian Rebellion of 1837 against British rule, which prompted this incident.[34] During this insurgency, the British armed forces entered the territory of the United States, then attacked and destroyed a steamship, "The Caroline", owned by American citizens. The steamship was carrying recruits and military materials to Canadian insurgents.[35] In response to this incident, Americans arrested a Canadian citizen by the name of Alexander McLeod, and charged him with arson of the ship and the murder of two Americans. Eventually, this incident caused a serious diplomatic dispute between the two countries.[36] The British Government justified its actions on the ground of the "necessity of self-defense and self-preservation."[37] The American Government stated that such a justification must be grounded on "a clear and absolute necessity", and demanded that the British government prove these actions had actually been caused by "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[38] In the course of negotiating the resolution of the case, Lord Ashburton stated that "up to the last minute before the seizure of the vessel, Captain Drew had expected to find it moored at Navy Island,

[34] Robert Y. Jennings, "The Caroline and McLeod Cases", (1938) 32 American Journal of International Law 82 at 82 [Jennings]. Jennings observes a transformation of self-defense from a political excuse to a legal doctrine in the Caroline case. *Ibid*.
[35]Ago, Eighth Report (Addendum), *supra* note 2, at 40, para 57. For details of the incident, *see* Rogoff Martin & Collins Edward, "The Caroline Incident and The Development of International Law", (1990) 16 Brooklyn Journal of International Law 493 [Rogoff & Collins].
[36] Jennings, *supra* note 34, at 85.
[37] Ago, Eighth Report (Addendum), *supra* note 2, at 39, footnote 117.
[38] *Ibid*.

within Canadian territory; therefore there had been no moment for deliberation."[39] According to Lord Ashburton, "Drew's expedition was not planned with a premeditated purpose of attacking the enemy within the jurisdiction of the United States, [rather that necessity] arose from altered circumstances at the moment of execution."[40] In the end, the governments of the disputing countries found themselves agreeing on the basic principle that the territory of an independent nation is inviolable, and on the fact that "a strong overpowering necessity may arise when this great principle may and must be suspended."[41] The representative of the British government further stated that "it must be so for *the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity*."[42] As for the settlement of this dispute, Lord Ashburton (Britain) acknowledge in a letter that "a violation of the territory of the United States, whether justified or not, was a serious matter, and that an apology for the violation was due at the time of its occurrence."[43] On August 6, 1842, Daniel Webster (U.S.) accepted this apology.[44]

This case evidences that the statements made by the governments of disputing parties contained the concept of limitations to the necessity of self-preservation, which defined boundaries within which it can be exercised. The foregoing demonstrates the evolution of the doctrine of necessity from the primeval and loosely defined natural right conception of a state's right to self-preservation into the concrete and strictly determined framework of a state's military necessity of self-defense.

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[39] Rogoff&Collins, *supra* note 35, at 499.
[40] *Ibid*.
[41] Ago, Eighth Report (Addendum), *supra* note 2, at 39, footnote 117.
[42] *Ibid*, [emphasis added]. *See* also Jennings, *supra* note 34, at 91.
[43] Rogoff&Collins, *supra* note 35, at 500.
[44] *Ibid*.

3.1.3.3. *The S.S. Wimbledon* Case

The last case that can be classified into the group of disputes arising from military necessity circumstances is the *S.S. Wimbledon*.[45] This case involved the English vessel "Wimbledon", which was carrying 4,200 tons of munitions and other military materials to the Polish naval base at Danzig during the Russo-Polish war of 1920-21. The vessel, chartered by a French company, was refused passage through the Kiel Canal by German authorities on the ground that it would be against the neutrality orders issued by Germany.[46] This act of Germany was claimed to contradict Article 380 of the Peace Treaty of Versailles, which established that "[the] Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."[47] In its judgement of 17 August 1923, the Permanent Court of International Justice found that the S.S. Wimbledon, "belonging to a nation at that moment at peace with Germany, was entitled to free passage,"[48] and held that "[Germany] could not advance her neutrality orders against the obligations which she had accepted under this [Art.380] Article."[49]

However, in their dissenting opinion, Anzilotti and Huber noted that the extraordinary circumstances that Germany faced at that time could have been viewed as a state of necessity that could allow Germany to protect its interests as a neutral power and abrogate their treaty

[45] *S.S. Wimbledon case*, (U.K. v Germany) (1923) PCIJ (ser.A) No. 1 (Aug 17) at 36 [*Wimbledon*], available online at: <http://www.icj-cij.org/pcij/serie_A/A_01/03_Wimbledon_Arret_08_1923.pdf> (last visited 17 August 2014).
[46] During the Russo-Polish war, Germany declared itself neutral and on July 25, 1920 it issued Neutrality Orders that prohibited passage to the ships carrying munitions destined for Poland or Russia through the Kiel Canal. *Ibid* at 19.
[47] Treaty of Versailles, Article 380, June 28 (1919).
Available online at: <http://www.foundingdocs.gov.au/resources/transcripts/cth10_doc_1919.pdf> (last visited 17 August 2014)
[48] *Wimbledon*, *supra* note 45, at 22.
[49] *Ibid* at 29-30 [emphasis added]. Accordingly, the PCIJ held that Germany was required to pay all costs with interest related to the delay of the vessel's passage through the Canal.

obligations under Article 380.[50] In support of their assertion, the Judges pointed out the following:

> If, as the result of war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application [of a treaty] in order to protect its neutrality or for the purposes of national defense, it is entitled to do so even if no express reservations are made in the convention.[51]

Furthermore, they noted that in a state of necessity, when emergency circumstances put State interests under threat, a state has a right to unilaterally decide which measures to adopt in order to protect its essential interests, such as state security and integrity, in an effective way.[52] In their opinion, this right "is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it."[53]

The specific contributions the *S.S. Wimbledon* case to the development of the doctrine of necessity are also worth attention. In this respect, Jonathan Bellish points out two important features of this case that, in his view, advance the doctrine of necessity under customary international law.[54] First, unlike the *Caroline* case, which identified necessity as an exception to uncodified custom, the *S.S. Wimbledon* case denoted that treaty obligations of a state can be excused under a state of necessity.[55] Second, the dissenting opinions rendered in the case introduced the notion that "the protection of essential state interests was the underlying rationale

[50] *Ibid* at 40.
[51] *Ibid* at 36.
[52] *Ibid.*
[53] *Ibid* at 37.
[54] Jonathan Bellish, "In Principle but not in Practice: The Expansion of Essential State Interests in the Doctrine of Necessity under Customary International Law", (2012) 41 Denver Journal of International Law and Policy 127 at 131.
[55] Bellish notes that the *Caroline* case did not clarify whether necessity "would have been valid if the actions taken in the Caroline case contradicted an express treaty obligation." *Ibid.*

for invoking necessity in abrogating international obligations."[56] In my view, these observations made by Bellish seem useful from the perspective of determining particular aspects of early cases that contributed to developing the features specific to the doctrine of necessity.[57]

The three cases discussed above are the only cases considered to address the concept of necessity in the military context. In the next paragraph, I will present cases which deal with a state of necessity in an environmental setting. These case studies are intended to demonstrate the expanding usage of the necessity defense, from the protection of a state's security interests to the protection of other essential interests, including those of an environmental character.

3.1.4. Environmental Necessity

3.1.4.1. *The Russian Fur Seals* case

The ILC commentaries mention a few cases[58] in which the doctrine of necessity has been accepted in environmental disputes between states. This kind of environmental necessity, which is also called ecological necessity, was first invoked in the *Russian Fur Seals* case of 1893.[59] In 1892, a Russian cruiser, the *Zabraka*, seized three British sealing vessels in waters close to the Commander Islands, which were beyond Russia's territorial sea waters.[60] After this incident, the Government of Russia, in 1893, fearing extermination of the fur seal population caused by unrestricted hunting by British and North American fishermen near Russian territorial waters,

[56] *Ibid*.
[57] It should be noted that the comparative approach used in his case analysis was especially helpful in distinguishing features of each case dealing with necessity in the military context.
[58] These cases will be presented below.
[59] James Crawford, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) at 81, para 6 [Crawford, *ARSIWA*].
Available online at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>
[60] Robert D. Sloane, "On the Use and Abuse of Necessity in the Law of State Responsibility", (2012) 106 American Journal of International Law 447 at 466. It should be emphasized that the maritime area where British vessels had been captured were beyond Russia's territorial sea waters, as well as the fact that Russia did not have any treaty with Great Britain which prohibits predatory sealing in that area. *Ibid*.

issued a decree prohibiting sealing in an area of the high seas.[61] In his letter to the British Ambassador dated 24 February 1893, the Russian Foreign Minister, Chickline, explained that the measures had been taken due to the "absolute necessity of immediate provisional measures" in view of the imminence of hunting season.[62] Emphasizing the precautionary nature of the vessels' seizures, the Minister further justified the actions under "the pressure of exceptional circumstances."[63] Professor Ago found the statements made by the Russian "Tsarist Minister" as contributing to the development of the plea of necessity from the perspective of establishing specific features related to a state of necessity.[64] In his view, it introduced several conditions of invoking the necessity plea, which in turn served as a confirmation for its validity in international law.[65]

3.1.4.2. The *Fur Seal* case

There was also another case involving circumstances similar to the *Russian Fur Seals* case, but in which the claimant took a different position.[66] In this case, the *Fur Seal* case, the United States seized British fishery ships in the high seas of the Bering Sea, claiming that the

[61] Ago, Eighth Report (Addendum), *supra* note 2, at 27, para 33.
[62] *Ibid*.
[63] *Ibid*. Along with this statement, the Government of Russia declared its willingness to permanently settle the dispute in question with the British Government. In May 1893, the two Governments concluded an agreement which put an end to the dispute. *Ibid*.
[64] The interesting thing in this case is that the Russian Foreign Minister suggested that the measures in question "may be regarded as a case of force majeure and assimilated to cases of self-defense." *See* Survey of State Practice, International Judicial Decisions and Doctrine: State Responsibility, *Yearbook of International Law Commission*, Vol.2 (1978) U.N. Doc. A/CN.4/315 at 155. It should be noted that Professor Ago observes the distinction of these defenses from a state of necessity by rightly classifying the measures under the latter circumstance. *See* Ago, Eighth Report, *supra* note 2, at 27, footnote 66.
[65] Ago mentions the following conditions: a) Absolutely exceptional nature of an alleged situation; b) imminent character of the danger threatening a State's essential interest; c) impossibility of averting such danger by other means; d) temporary nature of necessity circumstances. *Ibid*.
[66] Ago, Eighth Report (Addendum), *supra* note 2 at 27, para 34.

seizures were executed for the purpose of protecting its own fur seal industry.[67] The United States tried to justify its actions under self-defense by claiming that it was entitled to apply its own fishery regulations beyond its territorial waters.[68] By objecting to this application of the United States' fisheries regulations, the British Government stated that the United States cannot extend its jurisdiction beyond its territorial waters. On the basis of the Treaty of 29 February 1892, the dispute was submitted to a tribunal of arbitration. Before the tribunal, the agent of the United States asserted that "the sea is free only for innocent and inoffensive use, not injurious to the just interests of any nation which borders upon it."[69] The most interesting aspect of his observation relates to the right of self-defense on which all justifications of the United States were based. In this regard, the agent asserted that the right of self-defense may be "exercised upon the high sea as well as upon the land, and even upon the territory of other and friendly nations, *provided only that the necessity for it plainly appears*."[70] The tribunal rejected these claims and held that the United States did not have "any right of protection or property in the fur seals frequenting the islands of the United States in the Bering Sea, when such seals are found outside the ordinary three-mile limit."[71]

The details of the *Fur Seal* case show that, even though its circumstances were similar to the *Russian Fur Seals* case, the claimants in the two cases relied on different defenses in

[67] *The Fur Seal* case (1893) in Yamada Takuhei, "State of Necessity in International Law: A Study of International Judicial Cases", at 114, available online at: < http://www.law.kobegakuin.ac.jp/~jura/hogaku/34-4/34-4-04.pdf> (last visited 21 August 2014)

[68] One of the main purposes of extending its regulations to the high seas was to put a stop to the devastating hunting operations of Canadian sealers, which resulted in a massacre of seals in the Bering Sea. As a justification for the measures, the United States claimed that "the right of self-defense on the part of a nation is a perfect and paramount right, to which all others are subordinate...; and that wherever an important and just national interest of any description is put in peril for the sake of individual profit by an act upon the high sea, even though such act would otherwise justifiable, the right of the individual must give way, and the nation will be entitled to protect itself against the injury, to whatever force may be reasonably necessary, according to the usages established in analogous cases ... *All rights of self-defense are the result of necessity*." *Ibid* [emphasis added].

[69] Ago, Eighth Report (Addendum), *supra* note 2, at 27, para 34.

[70] *Ibid* [emphasis added].

[71] *Ibid* at 28.

justifying their measures directed to avert the imminent ecological danger. Unlike the Russian Government, which asserted the existence of an exceptional circumstance of necessity, the United States relied on the concept of self-defense, which differs from the former in many ways. The most interesting aspect of the right of self-defense that the United States invoked is that it was claimed to apply outside the military context.[72] Since the measures taken by the United States were primarily intended to protect its own economic interests against foreign competitors in the fur seal industry, its reliance on self-defense in such circumstances seems to inauthentically broaden the scope of its application. Therefore, the tribunal acted correctly when it denied the admissibility of this concept in international law.

3.1.4.3. The *Torrey Canyon* Incident

Incidents dealing with protecting the ecological balance in extraordinary circumstances were also witnessed in the twenty-first century, with the *Torrey Canyon* incident being among the important ones.[73] On March 18th 1967, the *Torrey Canyon*, a ship under the Liberian flag carrying a cargo of 117,000 tons of crude oil, became grounded on submerged rocks outside British territorial waters, spilling a large amount of oil (30,000 tons) into the sea, which threatened the English coastline. To prevent the disastrous consequences of oil spillage, the British government took several measures, which did not give the expected results.[74] To prevent the spill of the remaining oil on board, the British bombed the ship, which burned up the oil and averted the damage to the coast. To justify its actions, the British government made a statement in which it pointed out that there was a circumstance of extreme danger to the environmental

[72] As was discussed, self-defense is usually invoked to justify the wrongful conduct of a state directed at protecting its existence as a sovereign, or its own population from the peril of military character.
[73] For details of the incident, *see* Paul Burrows, Charles Rowley & David Owen, "Torrey Canyon: A Case Study in Accidental Oil Pollution", (1974) 21(3) Scottish Journal of Political Economy 237.
[74] By using special detergents, they tried to disperse the oil that had spread over the sea surface. The salvage firm's plan to refloat the tanker was also given up after the Torrey Canyon broke up into three pieces. *Ibid* at 250.

interests of Britain, and the decision to bomb the ship was made *only after the failure of all other means used to prevent the threat*.[75] Even though the measures were taken in an area outside Britain's jurisdiction, Professor Ago, in his analysis of the circumstances, considers the measures to be "internationally lawful" due to fulfillment of a state of necessity conditions.[76] Further, this incident prompted the codification of customary rules in maritime law. Shortly after the incident, on 29 November 1969, the Inter-Governmental Maritime Consultative Organization (presently: International Maritime Organization) adopted the International Convention Relating to Intervention on High Seas in Cases of Oil Pollution Casualties.[77] By the provisions of this Convention, the member states were granted a right to take necessary measures in international waters "to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil."[78]

3.1.4.5. The *Gabčíkovo-Nagymaros Project* Case

The other case related to the protection of a state's essential interests in the environmental sector in modern times is the *Case Concerning the Gabčíkovo-Nagymaros Project*.[79] This dispute arose out of a treaty signed in 1977 between Czechoslovakia and Hungary, which

[75] Ago, Eighth Report (Addendum), *supra* note 2, at 28, para 35 [emphasis added].
[76] *Ibid*.
[77] International Convention Relating to Intervention on High Seas in Cases of Oil Pollution Casualties, Article I(1), November 29, 1969, (1975) 970 U.N.T.S. 211.
Available online at: <https://treaties.un.org/doc/Publication/UNTS/Volume%20970/volume-970-I-14049-English.pdf> (last visited 28 August 2014)
[78] Article I of the Convention. *Ibid*. The concept of necessity was also included in the Convention's provisions governing the proportionality of the measures taken. For instance, Article V established the following: "In considering whether the measures are proportionate to the damage, account shall be taken of: (a) the extent and probability of imminent damage if those measures are not taken; and (b) the likelihood of those measures being effective; and (c) the extent of the damage which may be caused by such measures." *Ibid*.
[79] *Gabčíkovo-Nagymaros*, *supra* note 6. *See* also, Johan Lammers, "Gabcikova-Nagymaros Case Seen in Particular from the Perspective of the Law of International Watercourses and the Protection of the Environment", (1998) 11(2) Leiden Journal of International Law 287; Rene Lefeber, "*Gabcikova-Nagymaros Project* and the Law of State Responsibility", (1998) 11(3) Leiden Journal of International Law 609.

provided for the construction of a dam on the Danube River.[80] Twelve years after commencing construction, under the pressure of people's criticisms of the project's negative ecological impact,[81] Hungary suddenly postponed the venture, completely disregarding its obligations under the treaty.[82] As a result, Czechoslovakia petitioned the ICJ to issue an opinion on the issue.[83]

When the case came before the ICJ, to justify its conduct, Hungary invoked "a state of ecological necessity."[84] It argued that non-performance of obligations was due to "fundamental" political and economic changes in the region at the time, which put the economic and environmental viability of the project into question.[85] By contrast, Czechoslovakia asserted that it could not serve as justification for invoking a state of necessity, since it was doubtful that "ecological risk" would constitute a circumstance precluding wrongfulness of an act under the law of state responsibility.[86] In its analysis of Hungary's necessity defense, the ICJ applied the doctrine of necessity established in Article 33 of ILC Draft Articles on State Responsibility by expanding the concept of essential state interests to encompass the ecological interests of a state.[87] In support of its stance, the ICJ noted that between 1960 and 1980, "safeguarding the

[80] According to the treaty, the system of locks had to be constructed on both sides of the river Gabčíkovo (Czechoslovakia) and Nagymaros (Hungary) to generate hydroelectricity, improve navigation on the river, and protect against flooding. The project had to be jointly and equally financed, constructed, and operated by both contracting parties. *Ibid* at 24.

[81] The people worried particularly about the expansion of the planned reservoir, which increased the ecological danger of discharge, artificial flooding, creation of stagnant water, degradation of water quality, and eutrophication (the process as a result of which the oxygen in the water is depleted causing the death of other organisms, such as fish in the water). *Ibid* at 35, para 40.

[82] It should be noted that the 1977 treaty did not allow the unilateral suspension or abandonment of the project. *Ibid* at 35, para 39.

[83] *Ibid* at 27, para 24.

[84] *Ibid* at 35, para 40. Ecological necessity was primarily based on fears concerning reduced groundwater levels, the contamination of groundwater coming from an increase of silt, the extinction of flora and fauna relying on silt-free water supply, threats to aquatic ecosystems originating from the irregular flow of water coming from the dams, erosion of downstream riverbeds, and a limitation and contamination of Budapest's water supply. *Ibid* at 36, para 40.

[85] *Ibid* at 64, para 104.

[86] *Ibid* at 37, para 44.

[87] In this regard, the Court held: "The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the *Gabčíkovo-Nagymaros Project* related to an

ecological balance has come to be considered an 'essential interest' of all States,"[88] and therefore the concept of essential state interests should not be limited to existential interests of a state. However, the tribunal eventually found that Hungary could not rely on a state of necessity to justify its failure to observe the treaty obligations at issue, since "it had helped, by act or omission to bring it about."[89] In my view, even though the necessity defense was not successfully invoked in this case, the ICJ must be credited for contributing to the development of doctrine of necessity. Particularly, the tribunal's consideration of a state's ecological interests as an "essential" interest for the purpose of invoking the necessity defense indicates the expansion of the concept of essential interests beyond its military use.

3.1.5. Economic Necessity

The cases discussed above showed that the necessity defense is not limited to military self-defense. Besides the above mentioned cases, in which the necessity defense was raised in an environmental context, necessity has also been invoked in the context of economic (financial) crises. This section will analyse the cases arising from non-performance of international obligations due to extraordinary circumstances of economic (financial) character.

"essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission." *Gabčíkovo-Nagymaros, supra* note 6, at 41, para 53.

[88] *Ibid* at 41, para 53.

[89] According to Article 33(2), a state cannot rely on the necessity defense "if the occurrence of the situation of "necessity" was caused by the State claiming to invoke it as a ground for its conduct." ILC Draft Article on State responsibility (Article 33), *see* Ago, Eighth Report (Addendum), *supra* note 2, at 51.

3.1.5.1. The *Russian Indemnity* Case

The *Russian Indemnity* case[90] is the first case in the economic (financial) context mentioned in the ILC (Ago) report.[91] In 1879, Russia and the Ottoman Empire concluded a treaty that put an end to their hostilities. According to the treaty, the Ottoman Empire agreed to indemnify Russia for its losses in the amount of 350,000 Turkish pounds.[92] The Ottoman Empire made payments in installments until 1894, when Russia required the immediate repayment of the balance by refusing further extensions that it had granted before.[93] Even though Turkey paid the principal of its debt by 1900, it could not pay the interest due to financial difficulties it experienced at that time.[94] As a result of unsuccessful negotiations, the two states submitted the dispute to the Permanent Court of Arbitration, which had to decide on how much interest Turkey owed Russia.[95]

In arbitration, the Ottoman Empire tried to justify the delay of debt payment by extremely difficult financial circumstances, which it described as "*force majeure*".[96] The tribunal accepted the plea in principle by holding that necessity (*force majeure*) could only be invoked if compliance with the international obligation at issue would be "self-destructive" in the sense that it would put the very existence of the state in danger.[97] However, the tribunal also found that Turkey had sufficient means to pay its public debt,[98] and thus rejected its defense by holding as

[90] *Russian Indemnity* (1912), (1912)11 Reports of International Arbitral Awards 431, translated in (1913) 7 American Journal of International Law 178 [*Russian Indemnity*].
[91] Ago, Eighth Report (Addendum), *supra* note 2, at 22-23, para 22.
[92] *Ibid* at 183-84.
[93] *Ibid* at 185.
[94] The financial difficulties were prompted by mobilization of large part of its revenues to stop insurrections and wars in different parts of the Empire. *Ibid*.
[95] *Ibid* at 178.
[96] In their reports, Ago and Crawford qualify it as a state of necessity. *See* Ago, Eighth Report (Addendum), *supra* note 2, at 22, para 22; Crawford, *ARSIWA*, *supra* note 59, at 81, para 7.
[97] Ago, Eighth Report (Addendum), *supra* note 2, at 23.
[98] As for possible ways of tackling the financial difficulties, the tribunal pointed out that Turkey could have obtained loans at favourable rates to pay off its outstanding debt to Russia. *Ibid*.

follows: "It would clearly be exaggeration to admit that the payment (or the obtaining of a loan for the payment) of the comparatively small sum of about six million francs due to the Russian claimants would *imperil the existence of the Ottoman Empire or seriously compromise its internal or external situation*."[99]

An analysis of this case shows that the defense of *force majeure* mistakenly raised by Turkey corresponds to the concept of a state of necessity. In this respect, Professor Ago noted that even though the tribunal used different language for the invoked defense, it accepted the existence of the necessity plea in international law. In his view, the tribunal formulated the limitations within which the defense can be successfully invoked.[100] According to it, a state is allowed to derogate from its international obligations if compliance is "self-destructive" in terms of imperiling the existence of the state or seriously jeopardizing its internal situation.[101] In my view, the tribunal appears to expand the circumstances in which the necessity defense can be invoked. As was noted, a state was initially allowed to invoke the necessity defense when there was a threat to its existence. The tribunal's finding further clarified that the necessity defense can also be relied on when there is a serious threat to the internal situation in a state. It can be regarded as a substantial contribution to the development of necessity concept, because it introduced a new essential state interest, which is stability in the internal political, social-economic situation of the state.[102]

[99] *Russian Indemnity*, *supra* note 90, at 196, para 6 [emphasis added].
[100] Ago, Eighth Report (Addendum), *supra* note 2, at 23, para 22.
[101] *Ibid*.
[102] This kind of essential interest can be classified as less important than the existence of a State in terms of the degree of serious negative consequences when these two interests are threatened. However, it should also be taken into account that threat to the internal political and social-economic situation, along with other factors, may cumulatively result in threat to the existence of a State.

3.1.5.2. The *Société Commerciale de Belgique* Case

The *Société commerciale de Belgique* dispute is another case[103] in which the defense of *force majeure* was invoked to justify a state's wrongful conduct on the basis of economic necessity. In this case, the Greek government owed money to a Belgian company under two arbitral awards, which required the former to pay it in repayment of a debt contracted with the latter.[104] Since the Greek side delayed compliance, the Belgian Government applied to the Permanent Court of International Justice (PCIJ) for a declaration that, by not respecting the awards, the Greek Government was in breach of its international obligations. In the arbitration, Greece tried to justify its conduct under *force majeure*. It argued that its failure to comply with the arbitral awards was due to "its budgetary and monetary situation" which made it "materially impossible for the Greek Government to execute the awards as formulated."[105] In its counter memorial of 14 September 1938, the Greek Government argued that it is a state's duty "to suspend the execution of *res judicata* if its execution may disturb *order or social peace....or if the normal operation of its public services may be gravely jeopardized or gravely hampered thereby*."[106]

The argument of necessity was especially developed in the oral statements made by Mr. Youpis, counsel for the Greek government.[107] He pointed out that due to the limited resources

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[103] *Société Commerciale de Belgique* (June 15, 1939), Permanent Court of International Justice (ser. A/B) No. 78 at 160 [*Société Commerciale de Belgique*]. Available online at: <http://www.icj-cij.org/pcij/serie_AB/AB_78/01_Societe_commerciale_de_Belgique_Arret.pdf> (last visited 2 September 2014).

[104] In 1925, Greece contracted with *Société commerciale de Belgique (SCdB)* to construct railway lines. The financing of the project was carried out by issuance of bonds to *SCdB.* Greece defaulted on its sovereign debt after the global financial crisis hit it in 1932. As a result of stopping receiving interest or amortization payments from Greece, the *SCdB* could no longer pay its subcontractors which compelled it to terminate the project and to bring the dispute to arbitration. *See Société Commerciale De Belgique*, *supra* note 103, at 166.

[105] *Ibid* at 164.

[106] *The ILC Yearbook* (1978) Vol. II, Part 1, Doc. A/CN.4/SER.A 1978/Add.1 at para 276 [emphasis added].

[107] The Oral Statements are presented in detail in *The ILC Yearbook* (1978), Vol. II (1), at para 281.

available, it was impossible for the government to pay the debt to creditors in full while guaranteeing the normal administration of public services within the country.[108] Giving predominance to the latter, he claimed that the government has a right "to suspend or even to reduce the service of debt" if the payment of the debt "endangers economic life or jeopardizes the administration" of the country's public services.[109] After analysing the relevant literature and judicial precedents on a state of necessity, the Greek counsel opined that "the debtor State does not incur responsibility if it is in such a situation [of economic necessity]."[110] The Belgian counsel did not contest the above mentioned arguments and the court "implicitly accepted the basic principle, on which the two parties were in agreement."[111]

Analysis of the *Société commerciale de Belgique* case allows us to identify state practice concerning the concept of essential state interests. It can be assumed from the statements made by the government representatives in this case that the normal functioning of a state's public services can also be considered one of the state's essential interests. Therefore, if a state experiencing difficult financial circumstances considers that non-compliance with its international pecuniary obligations would endanger the normal functioning of its public services, then that state will not incur responsibility for such non-compliance, due to the existence of economic necessity.

[108] *Ibid*.
[109] *Ibid* at 132.
[110] *Ibid* at 134. In drawing this conclusion, the Counsel was of the view that the concept of force majeure is identical to a state of necessity. *Ibid*.
[111] Ago, Eighth Report (Addendum), *supra* note 2, at 26, para 31.

3.1.5.3. The *Oscar Chinn* Case

The issue of economic necessity was also touched upon in the *Oscar Chinn* case.[112] This dispute arose from the measures adopted by the Belgian Government in response to the severe economic crisis that seriously affected trade in the Belgian Congo.[113] Among others, Oscar Chinn, a subject of the United Kingdom, was harmed by the measures.[114] The claimant argued that the adopted measures had created a "de facto monopoly" of fluvial transport in the Congo, which was asserted to be contrary to the principles of "freedom of navigation," "freedom of trade" and "equality of treatment" provided for in articles 1 and 5 of the Convention of Saint Germain-en-Laye of 10 September 1919.[115] The PCIJ rejected these arguments and held that the measures taken by Belgium were not "in conflict with the international obligations of the Belgian Government towards the Government of the United Kingdom."[116] Even though a state of necessity was not raised as a defense in this dispute, it was considered by Judge Anzilotti in his separate opinion.[117] Contrary to the Court's decision, Anzilotti did not consider Belgium's conduct lawful, but argued that the wrongfulness of measures could have been precluded, "if the Belgian Government had been acting under the law of necessity, since necessity may excuse the non-observance of international obligations."[118]

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[112] The *Oscar Chinn* case (U.K. v. Belgium), (12 December 1934) Permanent Court of International Arbitration (Series A/B) No.63 [*Oscar Chinn*], available online at:
<http://www.icj-cij.org/pcij/serie_AB/AB_63/01_Oscar_Chinn_Arret.pdf> (last visited 3 September 2014).

[113] The measures adopted by the Belgian Government related to the reduction of 50% in the cost of all transportation, granting premiums for the benefit of traders, and establishing government control of production. *Ibid* at 72.

[114] According to the details of the case, Mr. Chinn was the only fluvial transporter in the Belgian Congo. Therefore, he might have been seriously harmed by the reduction of transportation costs. *Ibid*.

[115] *Ibid* at 81-82.

[116] *Ibid* at 89.

[117] For Anzilotti's separate opinion, *see* paras 148-194. *Ibid.*

[118] *Ibid* at para 187. Anzilotti also remarked on some features specific to a state of necessity. In particular, he pointed out the availability of several other options available to Belgium to tackle the economic crisis. In this regard, he noted the following: "It may be observed, moreover, that there are certain undisputed facts which appear inconsistent with a plea of necessity. To begin with, there is the fact that, when the Belgian Government took the

3.1.5.4. The *Serbian Loans* Case

In contrast to arbitration decisions in the above-mentioned cases, the tribunal in the case *Concerning the Payment of Various Serbian Loans Issued in France*[119] issued a totally different judgement regarding the effects of *force majeure* invoked due to an economic crisis. In addressing the question of whether the economic crisis caused by World War I could release the Serb-Croat-Slovene State from paying its debt to France, the PCIJ held as follows: "It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and French bondholders. The economic dislocations caused by the war did not release the debtor State...."[120] In coming to this conclusion, the PCIJ appears to have considered that paying the debt in full would not result in the collapse of a debtor state's financial situation. At the same time, the Court admitted in principle that a real state of necessity might, in some cases, be invoked to preclude the wrongfulness of conduct not in conformity with an international financial obligation.[121]

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decision....it chose, from among several possible measures....that which it regarded as the most appropriate in the circumstances." *Ibid* at 114, para 190.

[119] *Case Concerning the Payment of Various Serbian Loans Issued in France*, (12 July 1929) Permanent Court of International Arbitration (Series A) No.20 [*Serbian Loans*], available online at: <http://www.icj-cij.org/pcij/serie_A/A_20/62_Emprunts_Serbes_Arret.pdf> (last visited 5 September 2014).

[120] *Ibid* at 39-40. Moreover, an identical decision was also made in a similar case, in which the tribunal rejected the claimant's plea of force majeure (in fact necessity). *See Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France*, (12 July 1929) Permanent Court of International Arbitration (Series A) No.21 [*Brazilian Loans*]. In this case the PCIJ held: "The economic dislocation caused by the Great War has not, *in legal principle*, released the Brazilian Government from its obligations." *Ibid* at 120, para 66 [emphasis added], available online at: < http://www.icj-cij.org/pcij/serie_A/A_20/64_Emprunts_Bresiliens_Arret.pdf> (last visited 16 October 2014).

[121] *Serbian Loans*, *supra* note 119, at 21, para 44. For a discussion of this case in the context of investment arbitration, *see* William Walde, "The Serbian Loans Case - A Precedent for Investment Treaty Protection of Foreign Debt", (2004) 1(4) Transnational Dispute Management 1.

3.1.5.5. The *Forests of Central Rhodope* case

Unlike the cases mentioned above, the *Forests of Central Rhodope* case[122] is regarded as including state practice acknowledging, in circumstances of financial difficulty, the discharge of international debt not in cash as contemplated by the obligation, but by deliveries in kind.[123] The government of the respondent state (Bulgaria) stated before the Council of the League of Nations that the difficult financial situation in the country "prevented the Bulgarian Government from contemplating a payment in cash",[124] but further noted that "[h]is Government was nevertheless prepared to examine immediately, with the Greek Government [claimant] any other method of payment [particularly deliveries in kind] which might suit the latter."[125] In response, the representative of Greece stated that "[t]he Greek Government, taking into consideration of Bulgaria's financial difficulties, assented to that proposal and was prepared to settle immediately.... the nature and quantity of the deliveries which it could conveniently accept in payment of its claim."[126] These statements demonstrate that the disputing parties may seek alternative forms of discharging their treaty obligations when the economic (financial) situation of the respondent state does not allow its fulfillment in a pecuniary form.

To summarize, the analyses of cases related to economic necessity show that in these disputes, the respondent states tried to justify the non-fulfillment of their treaty obligations under difficult financial (economic) circumstances. The dispute settlement bodies in question took different approaches to assessing the facts related to economic crisis circumstances relied on by

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[122] *Forests of Central Rhodope* case (Greece v. Bulgaria), (29 March 1933) 3 Reports of International Arbitral Awards at 1405-1436, available online at: < http://legal.un.org/riaa/cases/vol_III/1405-1436.pdf> (last visited 10 September 2014); also cited in Ago's Eighth Report (Addendum), *supra* note 2, at 23, para 23. In this case, Bulgaria was ordered to pay reparations to Greece in the sum of 475,000 gold leva, plus interest of 5 per cent from the date of the 29 March 1933 award.
[123] Ago, Eighth Report (Addendum), *supra* note 2, at 23.
[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.*

the respondent state. Therefore, their decisions, with respect to state acts taken in circumstances of economic necessity, differed significantly. Furthermore, from the discussion of the last case, we also learned that sometimes there might be alternative ways of fulfilling pecuniary obligations in times of economic (financial) difficulties, through which the disputing parties may reach a compromise on the issue. Overall, the discussion of these cases helped identify the relevant state practice on a state of necessity arising from economic (financial) crises, and thus has greatly contributed to the purpose of the research.

3.1.6. Concluding Remarks

The analysis of the above mentioned cases demonstrated that a plea of necessity has been used by states as a defense in a variety of circumstances. We learned that this concept was initially invoked in the humanitarian context, and later expanded into the military, ecological and economic (financial) domains. The statements made by governments in the humanitarian necessity cases did not include elaboration on the elements of the necessity defense. However, development in this regard was noticeable in the government statements made in disputes related to military and economic necessity. Particularly in cases of military necessity, the government statements contained new terms such as "urgency" and "imminence", which clearly specified the conditions of successfully invoking the necessity defense. Moreover, the statements contained some clarifications regarding the features of a state of necessity. To preclude wrongfulness, a state of necessity must bear an "instant" and "overwhelming" character leaving "no choice of means, and no moment for deliberation" for states to address it. Meanwhile, the statements made in cases related to economic necessity contributed to the expansion of the concept of "essential state interests". Specifically, they clarified that the stability of the internal political, social-

economic situation of the state and normal operation of state public services fall under the "essential interests" of a state.

In my view, the state practice found in the statements made by the governments in the above mentioned cases helped develop the doctrine of necessity from its original primitive context, which was confined to a state's self-preservation, to a pre-modern version of necessity, which has a concrete and clearly determined framework for protecting state interests in several areas. Therefore, these statements can be considered as making a substantial contribution to the evolution of the doctrine of necessity.[127] Most importantly, the state practice identified in the above mentioned cases also confirms the contentions that necessity is a rule of customary international law.

[127] It should also be noted that the respondent states that tried to justify the non-fulfillment of their treaty obligations under difficult economic (financial) circumstances invoked *force majeure* as a defense, instead of a state of necessity. In this regard, Professor Ago several times noted that in these cases, the term "force majeure" "bore the hallmark of a state of necessity." Ago, Eighth Report (Addendum), *supra* note 2, at 22.

3.2. The State of Necessity as a Circumstance Precluding Wrongfulness of the Act

The study of the early cases in the previous paragraphs demonstrated that necessity has been invoked to protect a wide variety of state interests. It was found that states raised this defense mainly to safeguard the environment, to preserve a state's existence, to protect the safety of the civilian population, as well as to sustain normal political, economic and social life in the country. In this section, I will inquire into the final version of the modern concept of necessity, which was adopted by the ILC under Article 25 of Chapter V of the ARSIWA.[128] In particular, I will explain the notion of necessity as a circumstance precluding wrongfulness, discuss the requirements (conditions) of its invocation, and examine the characteristics distinguishing it from other closely related circumstances precluding wrongfulness, such as distress and *force majeure*. But before going into the details of the modern notion of necessity in international law, I found it appropriate to briefly comment on the notion of circumstances precluding wrongfulness.

3.2.1. Defining the Concept of Circumstances Precluding Wrongfulness

3.2.1.1. Historical Background

The law of international responsibility has always included special provisions which, by virtue of the occurrence of certain circumstances, have the effect of relieving a state's responsibility for not fulfilling its obligations. In the history of the codification of state responsibility, the number of such provisions varied from one draft to the next. For instance, the Preparatory Committee of the 1930 Hague Conference listed two circumstances, self-defense and

[128] The ILC Articles on Responsibility of States for Internationally Wrongful Acts, [ARSIWA]. Available online at: <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> (last visited 20 September 2014). *See* generally, Chusei Yamada, "Revisiting the International Law Commission's Draft Articles on State Responsibility", in Mauricio Ragazzi ed., *International Responsibility of Today: Essays in Memory of Oscar Schachter* (Leiden: Brill, 2005).

reprisals, "under which States can decline their responsibility,"[129] while more than thirty years ago, the second Special Rapporteur on State Responsibility, Professor Ago, identified six such circumstances excluding state responsibility.[130] In the 2000s, the last Special Rapporteur, James Crawford, excluded "fortuitous event" from the list of such circumstances, and introduced Article 26, which provided that none of these circumstances would exclude the wrongfulness of an act not in conformity with the obligation arising under a peremptory norm of international law.[131] Therefore, Professor Crawford is considered to have played an important role in clarifying and improving certain aspects of the ARSIWA, which had initially been elaborated by his predecessors. Particularly, his Chapter V on circumstances precluding the wrongfulness of an act was "one of the permanent contributions of the draft articles and a major contribution to international law."[132] As was presented in the previous chapter, the circumstances precluding the wrongfulness of an act have been exposed to thorough analysis by distinguished scholars over many years, and subjected to changes at different stages of their development.

3.2.1.2. Attributes of Circumstances Precluding Wrongfulness

The core essence of the phrase "circumstances precluding wrongfulness" is articulated in Articles 1 and 2 of ARSIWA. These articles include two basic conditions justifying a state's international responsibility. Article 1 establishes that: "Every internationally wrongful act of a

[129] *The ILC Yearbook*, (1956) Vol. II, Doc. A/CN.4/96 at 224-225.
Available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1956_v2_e.pdf> (last visited 24 September 2014).
"[T]he immediate necessity of self-defence against the danger with which the foreigner threatened the State or other persons" (Basis of Discussion No. 24); "[C]ircumstances justifying the exercise of reprisals against the State to which the foreigner belongs" (Basis of Discussion No. 25).
[130] These circumstances were: consent; countermeasures; force majeure and fortuitous event; distress; state of necessity; and self-defense. *See* Ago, Eighth Report (Addendum) (Addendum), *supra* note 2.
[131] Crawford, *ARSIWA*, *supra* note 59, at 71.
[132] *See* Summary record of the 2587th meeting (June 15, 1999), *The ILC Yearbook*, (1999) Vol. I. Doc. A/CN.4/SER.A/1999 at 137, para 4.
Available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1999_v1_e.pdf> (last visited 25 September 2014).

State entails the international responsibility of that State,"[133] whereas Article 2 attributes that international wrongful act to a subject of international law, which is a state.[134] However, Professor Ago excluded the possibility of claiming the existence of these conditions by inference. In this respect, he emphasized that "....despite the apparent fulfillment of the two conditions for the existence of an internationally wrongful act, its existence cannot be inferred owing to the presence of a circumstance which stands in the way of such an inference."[135]

3.2.1.3. The Notion of Circumstances Precluding Wrongfulness

As for the notion of circumstances precluding wrongfulness itself, the law of international responsibility has used different terminology, such as circumstances excluding responsibility, justification causes or causes that attenuate responsibility, and even "defenses" or "excuses".[136] In spite of the diverse terminology used in both scholarly works and judicial practice regarding these circumstances, the ILC eventually labelled them as "circumstances precluding wrongfulness". In so doing, it introduced uniformity in defining the concept and clarified the confusion created in previous writings.[137]

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[133] ARSIWA, *supra* note 128.

[134] The failure to comply with the international obligation and the attribution of an act to a State are identified as the objective and subjective elements. For the different doctrinal approaches towards circumstances precluding wrongfulness, *see* Sandra Szurek, "The Notion of Circumstances Precluding Wrongfulness", in James Crawford, Alain Pellet, Simon Olleson & Kate Parlett, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) at 434.

[135] *The ILC Yearbook*, (1979) Vol. II (2), Doc. A/CN.4/SER.A/1979/Add.1 at 106, para 1, available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1979_v2_p2_e.pdf> (last visited 28 September 2014).

[136] James Crawford, *Second Report on State Responsibility: Addendum*, (1999) UN Doc A/CN.4/498/Add.2, at para 214 [Crawford, *Second Report*]. Available online at: < http://legal.un.org/ilc/documentation/english/a_cn4_498.pdf> (last visited 30 September 2014).

These grounds included notions not only the concepts attributable to international legal order, such as 'self-defense' and 'countermeasures', but also concepts found in the domestic law of many countries, such as force majeure, distress and necessity.

[137] Phillip Aust, "Circumstances Precluding Wrongfulness", SHARES Research Paper 33 (2014) at 1. Online: <http://www.sharesproject.nl/publication/circumstances-precluding-wrongfulness/>

According to Professor Crawford, these circumstances do not preclude the responsibility that "would otherwise result from an act wrongful in itself", but rather preclude "the characterization of the act as wrongful in the first place."[138] The title and basic idea of Chapter V, which includes the notion "circumstances precluding wrongfulness", comes from the fundamental distinction "between the idea of 'wrongfulness', indicating the fact that certain conduct by a State conflicts with an obligation imposed on that State by a 'primary' rule of international law, and the idea of 'responsibility', indicating the legal consequences which another ('secondary') rule of international law attaches to the act of the State constituted by such conduct."[139] In this respect, Professor Crawford points out that "there could be circumstances precluding responsibility which did not preclude the wrongfulness of the act in question, but which preclude the State in question from being held responsible for it .... [but at the same time] it denies that there would be any point in characterizing an act as wrongful without holding some State responsible."[140] To clarify, Professor Crawford makes further comments on the distinguishing features of this concept. First, these circumstances do not have any relation to the jurisdictional or the admissibility issues of a dispute. Second, they have to be distinguished from the "constituent requirements of the obligation", the elements "which have to exist for the issue of wrongfulness to arise in the first place, and which are in principle specified by the obligation itself."[141] According to Crawford, in this context, circumstances precluding wrongfulness "operate like general defenses or excuses in national legal systems and, indeed many of the circumstances identified in Chapter V are similar to defenses or excuses recognized by some or

[138] Crawford, *Second Report*, *supra* note 136, para 221.
[139] *Ibid.*
[140] *Ibid.*
[141] *Ibid* at para 223.

many legal systems (e.g., self-defense, necessity, *force majeure*)."[142] Moreover, the successful invocation by a state of any of these circumstances does not "strike down the obligation, and the underlying source of obligation, the primary rule, is not affected by them as such."[143] In other words, they do not cause the termination of the obligation in question. On the contrary, as Crawford notes, the function of these circumstances is to "protect the State against an otherwise well-founded accusation of wrongful conduct."[144]

3.2.1.4. Differentiating "Wrongfulness" and "Responsibility"

It should be pointed out that the idea of "wrongfulness", which reflects the conflict between a state's conduct and an international obligation, differs from the idea of "responsibility", which deals with the legal consequences of such state conduct. In this respect, Fitzmaurice's formulation on this distinction is worth mentioning. According to him,

> [S]ome of the grounds justifying non-performance of a particular treaty obligation are identical with some of those causing or justifying the *termination* of a treaty. Yet ... the two subjects are quite distinct, if only because in the case of termination .... the treaty ends altogether, while in the other [case] ... it does not in general do so, and (if a paradox is permissible) the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present.... [145]

By analysing Fitzmaurice's formulation, it can be said that upon the existence of the circumstances precluding wrongfulness, states are authorized not to observe their treaty obligations temporarily until the reasons justifying their non-observance cease to exist. In such a case, the obligation in question would somehow be suspended under the effect of a circumstance

[142] *Ibid*.
[143] *Ibid* at para 224.
[144] *Ibid*. Therefore, they have been considered to operate "as a shield rather than a sword." *Ibid*.
[145] Fitzmaurice, Fourth Report, *The ILC Yearbook*, (1959) Vol. II, Doc. A/CN.4/120 at 41. Available online at: < http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1959_v2_e.pdf> (last visited 3 October 2014).

precluding the wrongfulness of the non-performance, but must be resumed as soon as the factors of non-observance cease or have been overcome.

The distinction between non-performance and termination of an obligation was also underlined in international case law. For instance, in the *Gabčíkovo-Nagymaros Project* case,[146] where the state of necessity was relied upon, the tribunal held that the existence of a state of necessity does not serve as a ground for terminating a treaty, even in the case of its justification.[147] According to the tribunal, "the Treaty may be ineffective as long as the condition of necessity continues to exist ....as soon as [the circumstance precluding wrongfulness] cease to exist, the duty to comply with treaty obligations revives."[148]

To summarise the opinions of scholars and holdings of arbitration tribunals, it can be said that this aspect of circumstances precluding wrongfulness can be regarded as a limitation to the scope of the state's obligation in question and an important element in rendering that obligation temporarily ineffective.

3.2.2. Definition and Elements of the Necessity Defense

3.2.2.1. Definition of Necessity

The modern concept of necessity has been placed in Article 25 of ARSIWA as one of circumstances precluding the wrongfulness of an act.[149] According to the ILC commentaries, the

[146] *Gabčíkovo-Nagymaros*, *supra* note 6.
[147] *Ibid* at 63, para 101.
[148] *Ibid* [emphasis added].
[149] The final adopted version of its text looked 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:

term "necessity" (*état de nécessité*) is used to denote those exceptional situations where the sole means by which a state, or possibly the international community as a whole, can safeguard an essential interest threatened by a grave and imminent peril, is temporarily not to respect an international obligation protecting an interest of lesser value.[150] As a circumstance precluding wrongfulness, necessity entails a situation where a state or a group of states acting unilaterally handles an urgent situation that had not been envisioned by the law at the time the act in necessity is taken. These definitions imply that necessity arises from a clash of interests. In this regard, Professor Crawford rightly notes that necessity is a consequence of "an irreconcilable conflict, between an essential interest on the one hand and an obligation of the State invoking necessity on the other."[151] As for the interests being protected, he points out that "necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave

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

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

Crawford, *ARSIWA*, *supra* note 59, at 80.

[150] *Ibid* at 80. The doctrine of necessity has been characterised differently by various scholars. For instance, Stowell noted that "[the] doctrine of necessity strikes at the very root of international society, and makes the preservation of the separate states of greater importance than the preservation of the community of states." Ellery C. Stowell, *Intervention in International Law* (J. Bryne & Company, 1921) at 392-93. Higgins stated that necessity is "a concept which cannot be kept within proper bounds". *See* Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford: OUP, 1963) at 218. Waldock described it as "rejection of law". *See* Claud Humphrey Meredith Waldock, "The Regulation of the Use of Force by Individual States in International Law", (1952) 2(81) Recueil des Cours 455 at 461-62. Brownlie and Jiminez de Arechaga rejected the existence of such a defense. Brownlie saw it as a relic from previous centuries and open to selfish interpretation. *See* Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) at 42-49. Jiminez totally rejected the existence of general principle allowing the necessity defense. *See* Eduardo Jiménez de Aréchaga, "International Responsibility", in Max Sorensen, *Manual of Public International Law* (London/New York: MacMillan/St.Martin's Press, 1968) at 542. Allot was of the same view. He was to some extent exaggerative when he stated that necessity is "the most persistent and formidable enemy of a truly human society". Describing the negative aspects of necessity defense, he emphasized that this concept is "enough to destroy any possibility of an international rule of law." Philip Allot, "State Responsibility and the Unmaking of International Law", 29 Harvard International Law Journal 1988, at 17, 21. Contrary to these views, Julio Barboza found all the negative thoughts as erroneous and viewed necessity doctrine as "a useful concept". Julio Barboza, "Necessity (Revisited) in International Law" in Jerzy Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague: Martinus Nijhoff, 1984) at 28. The abovementioned sources have also been cited by Andreas Laursen, "The Use of Force and the State of Necessity", (2004) 37 Vanderbilt Journal of Transnational Law 485 at 499-500; *See* also Jacques Werner, "Revisiting the Necessity Concept", (2009) 10(4) The Journal of Word Investment and Trade 549.

[151] Crawford, *Commentaries*, *supra* note 7, at 178. It is interesting to note that after the ILC Draft Articles were adopted, James Crawford wrote that "[i]t has been doubted whether necessity exists as an omnibus category." James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 564.

danger either to the essential interests of the State or of the international community as a whole."[152]

The text of Article 25 has been described as "deliberately vague," "open ended," and overly dependent on the specific circumstances of each individual case.[153] For instance, in analysing the definition of necessity, Sarah Heathcote emphasizes the abstractness of the text of Article 25. She notes the absence of specific ends to be protected by an act in necessity and the means by which the act may be affected.[154] Thus, she points out the possibility of its abuse by states and views it as a potential threat to legal stability on international scale.[155] Similar concerns have also been expressed by governments of several states through the drafting process of ARSIWA.[156] For instance, the United Kingdom commented that "[a] defense of necessity would be open to very serious abuse across the whole range of international relations. There is grave risk that the provision would weaken the rule of law."[157] However, Professor Crawford emphasises that to prevent its possible abuse, the invocation of necessity is subject to strict limitations and states do not have unconditional access to benefit from it.[158] Based on the text of Article 25 of ARSIWA, these limitations can be divided into two groups. The first group contains the conditions of invoking the necessity defense, while the second group includes the

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[152] *Ibid*.
[153] Daniel Bodansky & John Crook, "Symposium: The ILC's State Responsibility Articles: Introduction and Overview", (2002) 93 American Journal of International Law 773 at 789.
[154] Heathcote, *supra* note 7, at 491. She also points out the subjective character of necessity which includes its unilateral application by States. *Ibid*.
[155] *Ibid*.
[156] For comments of the Governments made in previous stages of codification of the ILC articles, *see Comments from Governments*, Czechoslovakia, *The ILC Yearbook* (1983) Vol. II., Doc. A/CN.4/362 at 2, available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1983_v2_p1_e.pdf>
(last visited 5 October 2014); comments from Governments, Belorussia, *Ibid* at 18.
[157] Comments from Governments, United Kingdom, International Law Commission 53rd session, *The ILC Yearbook* (2001) Vol. 2(1), Doc. A/CN.4/515 at 32-33.
Available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_2001_v2_p1.e.pdf> (last visited 6 October 2014).
[158] Crawford, *Commentaries*, *supra* note 7, at 178.

instances where the invocation of necessity is absolutely prohibited. Since the explanation of these elements is helpful in understanding the whole concept of necessity, I found it appropriate to present them in the following paragraphs.

3.2.2.2. General Description and Classification of Necessity Elements

For the purpose of our discussion, it would be appropriate to present the whole text of Article 25 of ARSIWA. According to it,

> 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.[159]

The text of Article 25 has a negative formulation. Explaining the reason behind this formulation, the ILC points out that "to emphasize the exceptional nature of necessity and concerns about its possible abuse, Article 25 is cast in negative language."[160] As can be seen from the text, states do not have unconditional access to the necessity defence. It may be invoked by states only when certain conditions or requirements set by the article are met. Emphasizing the essence of these requirements, the ILC noted that "necessity will only rarely be available to excuse the non-performance of obligation and that it is subject to strict limitations to safeguard

[159] ARSIWA, *supra* note 128.
[160] Katia Yannaca-Small, "Essential Security Interests under International Investment Law", OECD (2007) at 100. Available online: OECD <http://www.oecd.org/investment/investmentpolicy/40243411.pdf> (last visited 6 October 2014).

against possible abuse."[161] This position was also endorsed by the ICJ in the *Gabcikovo-Nagymaros Project* (Hungary/Slovakia)[162] case, in which the requirements of invoking the necessity defence were clarified. The ICJ held that the above mentioned provision has the status of customary international law and that the concept had to be interpreted very narrowly, since it served to excuse wrongful acts under international law.[163] Most importantly, the ICJ emphasized that the requirements must be satisfied cumulatively by the state invoking necessity.[164]

In explaining each element of necessity, I relied on scholars' classification of these elements. For instance, Professor Bjorklund lists six elements of necessity and categorizes them into two groups:[165] the affirmative requirements in Article 25(1): essential interest of invoking state, grave and imminent peril, only means and impairment of essential interests of other states, and the exceptions in Article 25(2): the international obligation in question precludes the use of defense and the state has contributed to the situation of necessity. Sarah Heathcote identifies the requirements of the first group as balancing the conflicting interests at stake, and the second group as conditions absolutely precluding the possibility of invoking the defense.[166] Taking this classification into account, I will discuss the affirmative requirements first, while the remaining two requirements will be explained in the subsequent paragraphs in the framework of absolute limitations to invoking the necessity defense.

[161] Crawford, *ARSIWA*, *supra* note 59, at 80, para 2.
[162] *Gabcikovo-Nagymaros*, *supra* note 6.
[163] *Ibid* at para 51.
[164] *Ibid*.
[165] Andrea K. Bjorklund, "Economic Security Defenses in International Investment Law", in Karl P. Sauvant, *Yearbook of International Investment Law & Policy 2008-2009*, (New York: Oxford University Press, 2008) at 479.
[166] Heathcote, *supra* note 7, at 496.

3.2.2.3. Essential Interest

In order to successfully invoke the necessity defense, the interests of states that are being protected must first be of an essential character. In this regard, Professor Ago noted that the essential interest must be "absolutely of an exceptional nature."[167] To avoid a broad interpretation of necessity, which may easily trigger its invocation by states, Professor Ago and the Committee stated that an

> [E]ssential State interest that allows the State to breach its obligation must be a vital interest, such as political or economic survival. Such grave dangers would include threats to a State's 'political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof, etc.[168]

This confirms the opinion predominant through the drafting periods of ARSIWA that a state of necessity may be invoked to preclude the wrongfulness of conduct that was adopted under certain circumstances in order to protect one of the above mentioned essential interests of a state, without its existence being in any way threatened. This has also been supported by the early cases discussed in previous sections. However, it should be pointed out that the above-mentioned interests must not be labelled as an exhaustive list of essential interests of a state, since there is no specifically established criteria for deciding whether a particular interest is essential or not. In this respect, Professor Crawford also emphasized that "no a priori definition of an essential interest can be offered."[169] According to him,

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[167] Ago, Eighth Report (Addendum), *supra* note 2, at 19. From the historical evolution of necessity, we have learned that at the initial stages it was invoked in the context of a state's self-preservation. Therefore, Professor Ago clarified the distinction between the two concepts by declaring as follows: "It should be stressed that the concept of self-preservation and necessity are in no way identical, nor are they indissolubly linked in the sense that one is merely the basis and justification of the other." *Ibid* at 17, para 8.
[168] *Ibid.*
[169] Crawford, *Second Report*, *supra* note 136, at para 281.

> The extent to which a given interest is 'essential' naturally depends on all the circumstances in which the State is placed in different specific situations; the extent must, therefore, be judged in the light of the particular case into which the interest enters, rather than be predetermined in the abstract.[170]

However, it should be noted that dispute settlement bodies have also relied on state practice in finding a particular interest to be "essential". For instance, in examining the "essential" character of Hungary's ecological interests in the *Gabčíkovo-Nagymaros Project* case, the ICJ referred to the ILC Report of 1980, which stated that "[i]t is primarily in the last two decades that safeguarding the ecological balance has come to be considered an "essential interest" of all States."[171]

3.2.2.4. Grave and Imminent Peril

The successful invocation of necessity also requires a state to demonstrate that it faced a situation of "a grave and imminent peril". In other words, the peril threatening the essential interest of a state must be extremely serious and endangering at the time.[172] The ICJ in the *Gabcikovo-Nagymaros Project* case noted that the peril must be "duly established at the relevant point of time [and] the mere apprehension of a possible 'peril' could not suffice...."[173] As for the gravity of the peril, Boed suggests that "grave peril" can be interpreted as "any threat likely to destroy the possibility of realising an essential interest."[174]

In addition to being grave, the peril must be imminent. The analysis of early cases performed in the previous paragraphs evidences that from the initial stages of the doctrine's

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[170] *Ibid.*
[171] *Gabcikovo-Nagymaros*, *supra* note 6, para 53. This statement of the ILC was primarily based on the state practice. *See The ILC Yearbook* (1980), Vol. II (2), Doc. A/35/10 at 39, para 14 [*The ILC Yearbook* (1980), Vol. II (2)]. Available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1980_v2_p2_e.pdf> (last visited 20 August 2014).
[172] Ago, Eighth Report (Addendum), *supra* note 2, at 19.
[173] *Ibid.*
[174] Boed, *supra* note 16, at 28.

evolution, the imminent nature of peril has been an important criterion for successfully invoking the necessity defense. The term "imminence" was first mentioned in the *Anglo-Portuguese Dispute of 1832*. The opinion of legal counsel to the British Government specified that to justify the appropriation of a foreign property, the extent of necessity "must depend upon circumstances of the particular case, but it must be *imminent and urgent*."[175] Further, in the *Caroline* case it was argued that the danger must be "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[176] The imminence of peril was also underlined in the *Russian Fur Seals* case.[177] In this dispute, Russia argued that the measures at issue were adopted due to *the imminence of the hunting season which could pose the danger of extermination of seals* in the Northern Pacific Ocean.[178]

However, the most comprehensive interpretation of "imminence" was offered in the *Gabcikovo-Nagymaros Project* case. In this case, the ICJ defined that "'imminence' is synonymous with 'immediacy' or 'proximity' and goes far beyond the concept of 'possibility'."[179] However, it does not mean that only peril proximate in time qualifies under this term. The ICJ pointed out that peril appearing in the long term may also be found to be "imminent" "as soon as it is established, at the relevant point in time, that the realisation of that peril, however far off it might be, is not thereby any less certain and inevitable."[180] In this respect, the Court held that Hungary failed to prove the imminence of the peril to invoke the necessity defense successfully. Specifically, it pointed out that even if the negative environmental (ecological) effects of the

[175] McNair, *supra* note 31, at 231-232 [emphasis added].
[176] Ago, Eighth Report (Addendum), *supra* note 2, at 39, footnote 117.
[177] *The ILC Yearbook* (1980), Vol. II (2), *supra* note 171, at 39, para 14.
[178] *Ibid*.
[179] *Gabcikovo-Nagymaros, supra* note 6, at 42. Professor Ago adds that the occurrence of the peril must be "entirely beyond the control of the State whose interest is threatened." *See* Ago, Eighth Report (Addendum), *supra* note 2, at 20.
[180] *Ibid* at para 54.

project constituted a grave peril, such effects were not imminent, because the completion of the project was remote, and thus the negative ecological effects would only be realized in the long term, leaving their specific nature uncertain.[181] Taking this into consideration, it can be implied that the most important thing that is required from the invoking state is that, based on the evidence available at that time, it must establish that the peril will at some point inevitably be realised.[182]

Summarizing the aforementioned, it can be concluded that, like in the "essential interests" requirement, the determination of the gravity and imminence of the peril depends on the specific facts of each case, and thus, must be established on a case-by-case basis.[183]

3.2.2.5. The Only Means

In order to successfully invoke the necessity defense, a state's measures in question must be the "only way" available to safeguard its essential interests.[184] In this regard, the ILC clearly indicated that a state bears a substantial burden in making the claim that it had no other alternatives to protect its essential interests except the one it had adopted.[185] It further stated that this rule would also apply even if such lawful alternatives are more costly or less convenient.[186] Therefore, extra costs involved in complying with the international obligation cannot serve as a justification for non-compliance and will not result in preclusion of the wrongfulness of state

[181] *Ibid* at 43. The Tribunal also emphasized Hungary's acknowledgement that the expected damage would primarily be "the result of some relatively slow natural processes, the effects of which could not easily be assessed." *Ibid* at 44, para 56.
[182] *Ibid* at para 56.
[183] Boed, *supra* note 16, at 28.
[184] Crawford, *ARSIWA*, *supra* note 59, at 83, para 15; Boed, *supra* note 16, at 17, 28.
[185] *Ibid*. These alternative means must be lawful in the sense that they can be adopted without a breach of international obligations in question. *See* Ago, Eighth Report (Addendum), *supra* note 2, at 20, para 14.
[186] *Ibid*. In its Thirty-second Session, the ILC emphasised that "the adoption by the state of a conduct not in conformity with an international obligation binding it to another state must definitely have been its only means of warding off the extremely grave and imminent peril which is apprehended; in other words, the peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance with international obligations." *See The ILC Yearbook* (1980), Vol. II (2), *supra* note 171, at 49, para 33.

conduct. The ILC emphasized that if a state's conduct in question does not fall within the limits of what is "strictly necessary" for that purpose, it will fail the only means requirement and will be considered a wrongful act.[187] This refers not only to the unilateral actions of a state, but also to actions taken in cooperation with other states or international organizations.[188]

As for the practical application of the "only means" requirement, it found its clear formulation in older precedents such as the *Neptune* and the *Oscar Chinn* cases. Mr. Pinkney, one of the arbitral commissioners in the *Neptune* case, emphasized that the roots of the "only means" test could already be found in the works of Grotius.[189] He wrote in his opinion as follows: "We are told by Grotius that the necessity must be real and pressing, and that even then it does not give a right of appropriating the goods of others *until all other means of relief consistent with necessity have been tried and found inadequate*."[190] The "only means" requirement was also endorsed in the *Oscar Chinn* case.[191] Discussing the Belgian Government's freedom of choice in adopting measures to tackle the economic crisis, Judge Anzilotti noted in his separate opinion that "freedom is incompatible with the plea of necessity which, by definition, *implies the impossibility of proceeding by any other method than the one contrary to law*."[192] Similarly, in the *Russian Fur Seals* case, in justifying its measures concerning the prohibition of sealing in the high seas adjacent to Russian territorial waters, the Russian Government underlined *the impossibility of averting the danger of extermination of seals with other means*.[193] The same arguments were also made in the *S.S. Wimbledon* case. The Agent of the Italian Government, Mr. Pilotti, criticising Germany's refusal to permit the passage of the

[187] Crawford, *Commentaries*, *supra* note 55, at 83, para 15.
[188] *Ibid*.
[189] Boed, *supra* note 16, at 8 [emphasis added].
[190] *Ibid* [emphasis added].
[191] *Oscar Chinn*, *supra* note 112.
[192] *Ibid* at para 190.
[193] *The ILC Yearbook* (1980) Vol. II (2), *supra* note 171, at 39, para 14.

British vessel through the Kiel Canal, admitted that Germany faced a danger "against which she would have *had no other means of protection but the general prohibition of the transit of arms through her territory*."[194]

In my view, the most important case worth noting in the discussion of the "only means" requirement is the *Torrey Canyon* incident. In this case, all alternative means available were taken prior to taking the measure that posed an extreme danger to the ecological interests of Britain. The measure at issue, the decision to bomb the vessel threatening spillage of large amounts of oil it carried on board, was taken *only after all other means employed*, such as attempts to salvage the vessel and to disperse the oil by using special detergents, *had failed*.[195] In spite of the fact that necessity was not invoked as a defense to justify the above mentioned act in this case, it was recognized by the international legal community as "internationally lawful", since it distinctly met the requirements of the necessity defense.[196]

The "only means" requirement has also been confirmed in modern cases dealing with the conditions of necessity defense. A perfect example is the *Gabčíkovo-Nagymaros Project* case, in which the tribunal adopted the position of the ILC regarding the "only means" requirement. After examining the "only means" requirement of the necessity defense invoked by Hungary, the ICJ remained unconvinced that the unilateral suspension and abandonment of the dam project on the Danube River was the only way to safeguard the ecological balance in the region as well as the supply of drinking water to Budapest. Therefore, the tribunal rejected Hungary's defense of necessity. In coming to this conclusion, the tribunal relied in part on its findings that to safeguard its ecological interests and that of the region, Hungary had means available to it other than

[194] *Ibid* at 42, para 21.
[195] Ago, Eighth Report (Addendum), *supra* note 2, at 28, para 35.
[196] *Ibid.*

breaching its obligations under the treaty with Czechoslovakia.[197] Most importantly, the tribunal identified the alternative means Hungary could have adopted to avoid the threat and achieve the protection of its environmental interests.[198] Moreover, in clarifying the alternative measures that Hungary could resort to, the ICJ also reaffirmed that the cost of those alternatives could not be regarded as a determinative factor in assessing the wrongful conduct at issue under the "only means" requirement. In particular, it held that to meet the "only means" requirement, a state is obliged to resort to alternative means available, such as purification of the river water in this case, even though a state will incur additional expenses through its application.[199]

Finally, the "only means" requirement of necessity defense was also touched on by international tribunals in the 21st century. It was addressed by the ICJ in the *Israel's Security Walls* case, in which the tribunal examined the possibility of Israel invoking a state of necessity in customary international law to preclude the wrongfulness of its act, the construction of the wall in the Palestinian territories.[200] Referring to the *Gabćikovo-Nagymaros Project* case, the ICJ in its Advisory Opinion once again pointed out the exceptional character of the customary necessity defense, particularly accentuating its "only means" requirement. After examining whether Israel could rely on a state of necessity to preclude the wrongfulness of its acts, the tribunal held as follows: "In the light of the material before it, *the Court is not convinced that the*

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[197] *Gabčíkovo-Nagymaros, supra* note 6, para 56. ("The Court moreover considers that Hungary could....have resorted to other means in order to respond to the dangers that it apprehended.")

[198] *Ibid* at para 55. In this respect, the ICJ held:

> The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. *It could for example have proceeded regularly to discharge gravelinto the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner*.

Ibid [emphasis added]

[199] *Ibid*.

[200] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (9 July 2004) I.C.J., Advisory Opinion, (2004) ICJ Reports at 136 [*Construction of a Wall*].

construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction."[201] The tribunal concluded that Israel could not rely on a state of necessity since it failed the "only means" requirement, and found the construction of the wall in Palestinian territories and the entire regime associated with that construction to be contrary to international law.[202]

The analysis of all early and modern cases addressing the state of necessity in international law shows that in almost all of them, the disputing parties invoking the necessity defense could not meet its strict "only means" requirement, and thus failed to preclude the wrongfulness of their acts. This difficulty is mainly explained by the existence of alternative means at the disposal of states, with which they can attain the same purpose sought by the acts contrary to their international obligations.

3.2.2.6. Impairment of Essential Interests of other States

The last affirmative requirement of invoking the necessity defence is that the conduct in question must not seriously impair an essential interest of the other state or states concerned, or of the international community as a whole. Since this requirement of the necessity defense deals with examining whether a balance between the interests of the acting and victim states has been maintained, it is considered to be its "balance of interests" element.[203] In clarifying this element, the ILC pointed out that, "the interest relied on must outweigh all other considerations, not

[201] *Ibid* at 140 [emphasis added].
[202] *Ibid* at 142. The tribunal also paid due regard to Israel's right to protect its civilian population from any kind of acts of violence. However, it stated that the measures directed to accomplish this purpose must be within the boundaries of international law. *Ibid*.
[203] Although the language of Article 25 of ARSIWA does not explicitly suggest a balancing test in its textual formulation, as Roman Boed notes, "balancing of the competing interests has been an element of the concept of necessity at least since the time of Grotius". *See* Boed, *supra* note 16, footnote 92, where he quotes the following from Grotius: "[N]o emergency can justify any one taking and applying to his own use what the owner stands in equal need of himself."

merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective."[204] More specifically, the interest of a victim state towards which the obligation existed must be of lesser importance than the essential interest of the state invoking a state of necessity.[205] The state will fail the balancing requirement if the essential interest it seeks to protect is comparable and equally essential to the interests of a victim state. With regard to the comparative assessment of competing interests, Professor Ago remarks that it is "a matter of relation of proportion, rather than of absolute value".[206]

The importance of the balancing element was also underlined by Bin Cheng in his analysis of international practice related to a state of necessity. Viewing necessity as a means of preserving social values, Cheng explained the balancing requirement as "the great disparity in the importance of the interests actually in conflict that alone justifies a reversal of the legal protection normally accorded to these interests, so that a socially important interest shall not perish for the sake of respect of an objectively minor right".[207] Emphasising the central role it plays in successfully invoking the necessity defense, he further noted that "[i]n every case, a comparison of the conflicting interests appears to be indispensible."[208] Furthermore, another scholar, Okowa, stresses the importance of paying due regard to the factors which are decisive in

[204] Crawford, *Commentaries*, *supra* note 7, at 184.
[205] *The ILC Yearbook* (1980), Vol. II (2), *supra* note 171, at 50, para 35. The ILC formulates the balancing requirement in the following way: "[T]he interest sacrificed on the altar of "necessity" must obviously be less important than the interest it is thereby sought to save." *Ibid*.
[206] Ago, Eighth Report (Addendum), *supra* note 2, at 20, para 15.
[207] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: CUP, 1953) at 74.
[208] *Ibid*.

balancing the competing interests.[209] According to her, the content of the substantive rules of international law and the values they seek to protect are the main factors in this respect.[210] She further argues that if the values which are sought to be protected are fundamental, it may "dictate that they cannot be sacrificed, whatever the circumstances confronting a state."[211]

Despite the fact that Cheng's concept of "social values" was initially subjected to criticisms in the context of competing interests,[212] in my view, this conception corresponds with the ILC's position regarding the balancing requirement of Article 25 of ARSIWA. It can be explained by the presence of the phrase "international community as whole" in the wording of the present Article 25, which was absent in the content of its predecessor, Article 33.[213] As legal theorists describe, the term "international community" is most frequently used to "denote the repository of interests that transcend those of individual states *ut singuli* and thus are not....fully comprehensible within the classic bilateralism."[214] In this regard, the ILC commentaries clearly state that "[the ARSIWA] apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole."[215] Based on this, it can be argued that Cheng was correct

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[209] *See* Phoebe Okowa, "Defenses in the Jurisprudence of International Tribunals" in Guy S. Goodwin-Gill & Stefan Talmon, *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford: Clarendon Press, 1999) [Okowa].

[210] *Ibid* at 390.

[211] *Ibid*. By fundamental values, Okowa means the social values related to the protection of human rights, environment and humanitarian law. *Ibid*.

[212] Roman Boed criticises the concept of "social values" by putting its content in question. According to him, the plea of necessity arises only in a bilateral context, and the balancing requirement is intended to apply in assessing only the interests of two States that directly conflict. *See* Boed, *supra* note 16, at 19.

[213] By this phrase, the ILC refers to certain internationally protected rights of individuals, particularly to human rights. This supposition is mainly based on the holding of the tribunal in the *Barcelona Traction* case, in which the ICJ distinguished between the "obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in diplomatic protection". *See Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase)* (Belgium v. Spain), (1970) ICJ Reports 3, at 32, para 33.

[214] Bruno Simma & Andreas Paulus, "The 'International Community': Facing the Challenge of Globalization", (1998) 9 European Journal of International Law 266 at 268.

[215] Crawford, *ARSIWA*, *supra* note 59, at 32, para 5.

when he included the concept of "social values" within the context of competing interests in a state of necessity, since he could foresee the expansion of such interests into broader categories in the future development of a balancing element of the necessity defense.[216] Therefore, it can be concluded that the balancing requirement is not limited to assessing the interests of states, but also involves evaluating other complex social values entailed by the interests of individuals and international community as a whole.

3.2.2.7. International Obligation in Question Precludes the Invocation of Necessity

According to Article 25(2)(a), a state cannot invoke the necessity defense if the international obligation in question excludes its invocation. This element of the necessity defense absolutely precludes the possibility of invoking it. Such an exclusion is valid in situations where the primary obligation itself expressly states that no derogation is permitted under any circumstances. In this respect, Professor Crawford notes that "an international agreement can, whether explicitly or implicitly, preclude the invocation of necessity as an excuse for breach and then the plea will not be accepted."[217] According to the ILC, this exception mainly concerns certain humanitarian conventions applicable to armed conflict that manifestly exclude reliance on military necessity.[218] This was confirmed in the *Israel's Security Walls* case. In its advisory opinion, the ICJ emphasised the existence of such exceptions in the domain of humanitarian and

[216] On the other hand, the critical views of his concept cannot be totally rejected, because they were related to the previous version of Article 25(Article 33 at that time), which had a different formulation and did not include phrases similar to 'international community'. Therefore, I admit that these critical views were appropriate and had great impact on the development of scholarship concerning the doctrine of necessity at that time.
[217] Crawford, *Commentaries*, *supra* note 7, at 185 (emphasis added); Sarah Heathcote also notes that such an exclusion may be explicit or implicit, either because the primary rule contains a *lex specialis*, or because its interpretation does not leave room for the defense. *See* Heathcote, *supra* note 7, at 498.
[218] *Ibid.*

human rights law regarding the state of necessity.[219] The ILC further specified that military necessity cannot be invoked except in cases when it is specifically envisaged by international humanitarian law.[220]

In situations when humanitarian conventions do not explicitly exclude reliance on the necessity defense, the non-availability of the necessity defense as a circumstance precluding wrongfulness is usually derived from the text of the treaty.[221] In other words, if it is concluded that the use of the necessity defense would contradict the object and purpose of the treaty, then the invocation of necessity will be excluded. The ILC further clarifies that instruments containing implicit exceptions apply in abnormal situations of peril for the state that clearly involve its essential interests.[222] However, even though the plea of necessity was invoked in early cases cited in the commentaries to justify military action abroad, the ILC eventually made it clear that the necessity defense as established in Article 25 of ARSIWA does not apply to conduct regulated by the provisions of the Unites Nations (UN) Charter on the use of force.[223] The ILC's approach was its response to being confronted with critical views from modern international law scholars who argued in favour of using the doctrine of necessity as a justification or excuse for the limited use of force in the humanitarian context.[224] In this respect, the ILC admitted that in a

[219] *Construction of a Wall*, *supra* note 200, at 135-136.
[220] Crawford, *ARSIWA*, *supra* note 59, at 84, para 21.
[221] *Ibid*.
[222] *Ibid* at para 19.
[223] *Ibid* at para 21. These *lex specialis* provisions are Article 2(4) and Chapters VII or VIII of the Charter of United Nations. Specifically, Article 2(4) of the UN Charter prohibits military incursions into the territory of a foreign State without its consent, since it would impair State's territorial integrity and political independence. *See* The UN Charter, *supra* note 155. However, in its 1980 Report, the ILC pointed out the possibility of justifying certain acts of less serious character related to the use of force under a state of necessity. Specifically, these acts include "certain actions by States in the territory of other States, which although they may sometimes be of a coercive nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression." *See* Ago, Eighth Report (Addendum), *supra* note 2, at 39, para 56.
[224] For instance, Ian Johnstone argues in favour of using a plea of necessity embodied in Article 25 of ARSIWA as a secondary rule to excuse or mitigate State responsibility arising from the unilateral use of force in circumstances of extreme humanitarian crises. *See* Ian Johnstone, "The Plea of Necessity in International Legal Discourse:

few cases, states relied upon the necessity defense to justify humanitarian intervention and gave a relevant example found in state practice.[225]

Despite criticisms, by paying due regard to the *jus cogens* [226] character of the UN Charter provisions, the ILC decided to exclude the application of the necessity doctrine from the domain of *jus ad bellum*. As a solution to the issue, it noted only that "considerations akin to those underlying Article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations."[227] As Ian Johnstone observes, the ILC "deliberately left open the possibility that some uses of force short of aggression, though unlawful, might not constitute violations of peremptory norms, and that therefore necessity may be pleaded."[228] From this observance, it can be inferred that Professor Crawford did not deviate from the course taken by the ILC in 1980 regarding this issue. It should be noted that in its 1980 Report, the ILC did not exclude the possibility of justifying certain acts of less serious character related to the use of force under the state of necessity.[229] Thus, based on Johnstone's observation,

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Humanitarian Intervention and Counter-terrorism", (2005) 43 Columbia Journal of Transnational Law 337 [Johnstone].

[225] As an example, the ILC cited Belgium's intervention in Congo in 1960. *See* Crawford, *ARSIWA*, *supra* note 59, Article 25, para 20.

[226] *Jus Cogens*, the literal meaning of which is "compelling law," is the technical term given to those norms of general international law that are argued to be hierarchically superior. These are, in fact, a set of rules, which are peremptory in nature and from which no derogation is allowed under any circumstances. *See* Kamrul Hossain, "The Concept of Jus Cogens and the Obligation under the U.N. Charter", (2005) 3(1) Santa Clara Journal of International Law 72 at 73.

[227] Crawford, *Commentaries*, *supra* note 55, Article 25, para 20.

[228] Johnstone, *supra* note 224, at 348. In footnote 33, Johnstone noted that "James Crawford hinted at the ASIL Annual Conference in 2004 that the issue of the use of force was left out of Article 25 as a device for the ILC to avoid dealing with the most difficult question in international law." *Ibid*. For the source, *see* James Crawford, "The Problems of Legitimacy - Speak", (2004) 98 American Society of International Law and Procedure 271.

[229] Specifically, the ILC pointed out that these acts may include "certain actions by States in the territory of other States, which although they may sometimes be of a coercive nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression." *See* Ago, Eighth Report (Addendum), *supra* note 2, at 39, para 56.

it can be assumed that there might be the possibility of invoking the necessity defense in circumstances of using force bearing much less serious character.[230]

3.2.2.8. Contribution to a State of Necessity

Article 25(2)(b) of the ARSIWA further requires that a state cannot rely on the necessity defense if it has contributed to the situation of necessity. In other words, the wrongfulness of state conduct will not be precluded if the state itself contributed to the creation or development of a situation of necessity. The ILC also stressed that it does not matter whether a state invoking the necessity defense has provoked the occurrence of a state of necessity, either deliberately or by negligence.[231] This concept was also found in the Eighth Report of Roberto Ago, where he indicated that the occurrence of the state of necessity must be entirely beyond the control of the state, whose essential interests are threatened.[232] The ILC further clarified that the state's contribution is required to be "sufficiently substantial and not merely incidental or peripheral."[233]

It can be assumed that in most cases states contribute to the creation or development of the state of necessity by their negligence. In other words, states do not take precautionary measures in time to prevent the occurrence of the state of necessity in time, even though they had sufficient resources and time to avert it. However, it should not be disregarded that in some circumstances, it is difficult for states to foresee the inception of emergency circumstances requiring the complex assessment of several factors. In this respect, it is worthwhile to note Professor Reinisch's views, which emphasise the importance of applying a "sufficiently

[230] I am not intending to research the details of categories of such uses of force, as it is not the purpose of this chapter.
[231] *The ILC Yearbook* (1980), Vol. II (2), *supra* note 171, at 50, para 34.
[232] Ago, Eighth Report (Addendum), *supra* note 2, at 20, para 13.
[233] Crawford, *Commentaries*, *supra* note 7, at 185.

substantial" threshold of contribution with regard to necessity circumstances arising from economic (financial) crises. He particularly notes that this threshold plays an essential role in assessing economic policy measures addressed at tackling economic crises entailing "a combination of external and internal factors". Therefore, he thinks that "it would be appropriate to require a certain substantial degree of contribution in order to trigger its exclusionary effect."[234]

In the practice of international tribunals, the issue of contribution to necessity was addressed in the *Gabčíkovo-Nagymaros Project* case, in which the ICJ rejected the necessity defense invoked by Hungary.[235] After examining all circumstances, the tribunal held that "even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, *as it had helped, by act or omission, to bring it about*."[236] Based on this formulation of "contribution", it can be concluded that the respondent state invoking the state of necessity cannot rely on that defense to preclude the wrongfulness of its conduct unless it proves that it had not "helped, by act or omission to bring about" that situation of necessity.

[234] August Reinisch, "Necessity in Investment Arbitration", (2010) 41 Netherlands Yearbook of International Law 137 at 155.
[235] The details of the case were presented in previous paragraphs.
[236] *Gabčíkovo-Nagymaros, supra* note 6, at 46, para 57 [emphasis added].

3.3. The Necessity Defense and Other Circumstances Precluding Wrongfulness

The explanation of the necessity elements presented above, in my view, does not seem to be sufficient for identifying its distinguishing features from other closely related circumstances precluding wrongfulness, such as *force majeure* and distress. Therefore, in order to clarify the borderline between these circumstances precluding wrongfulness, I found it important to present a comparative analysis, which I think will shed more light on the distinctive features of the necessity defense. Fleshing out the content of *force majeure* and distress will also help reduce the confusion among them.[237] To accomplish the analysis, I found it appropriate to briefly explain *force majeure* and distress first, and then clarify how they are distinct from necessity.

3.3.1. *Force majeure*

It is widely known that *force majeure* occupies an important place in most domestic legal systems. As a circumstance precluding the wrongfulness of an act in international law, *force majeure* is defined as "the occurrence of an irresistible force or an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation."[238] From this definition, it can be observed that *force majeure* involves the situation where a state is, in effect, compelled to act against its international obligations. External forces beyond a state's control make it materially impossible for it to carry out the obligations

[237] Confusion is mainly found between *force majeure* and necessity, and is mainly observed in older cases, which were discussed in previous paragraphs.

[238] According to Article 23 of ARSIWA,

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

See ARSIWA, *supra* note 124.

incumbent on it.[239] To successfully invoke *force majeure*, three requirements must be met. First, the act committed in *force majeure* must be brought about by an irresistible force or by an unforeseen event.[240] Second, the external forces that caused *force majeure* must be beyond the control of the state concerned.[241] Third, due to these external forces, it must be materially impossible for a state concerned to perform the obligation incumbent on it.[242] As for the first condition, the notion of "irresistible force" entails the idea of compulsion, which constrains the concerned state to avoid or oppose it by its own means available.[243] As for the unforeseeable nature of the event, it must be "neither foreseen nor of an easily foreseeable kind."[244] In such a case, the occurrence of the event cannot be realized in advance by the means available to the state concerned, and is determined by external forces that are considered not to be under a state's control. Therefore, this qualification is causally linked to the second requirement, which demands the event in question to be beyond a state's control. This link is usually explained by the sudden nature of an event falling outside the control of the state responsible to prevent it. In such a case, the state will not be held responsible for failing to prevent it.[245]

The third requirement relates to the "material impossibility" of performing the obligation in question. In this regard, the ILC emphasized that the situation must involve actual

[239] It should be noted that force majeure may seem similar to the 'supervening impossibility of treaty performance' laid down in Article 61 of the VCLT. However, the latter serves as a ground for the suspension or termination of treaty obligations, whereas the former leaves intact the underlying obligation which has to be complied with as soon as the situation of *force majeure* is no longer occurring. *See* VCLT, available online at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>
[240] Crawford, *ARSIWA*, *supra* note 59, at 76.
[241] *Ibid*.
[242] *Ibid*.
[243] *Ibid*.
[244] *Ibid*.
[245] In this regard, Professor Bjorklund gives the example of Venezuela, which failed to prevent the looting by Indian tribes of property of the U.S. consul that was on a vessel sailing up an unfrequented part of the Venezuelan coast. Venezuela was not responsible for its failure, because "the raid was one of those occasional unexpected outbreaks against which ordinary and reasonable foresight could not provide." *See* Andrea Bjorklund, "Emergency Exceptions: State of Necessity and Force Majeure*",* in Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) at 501.

impossibility and it should be distinguished from "an increased difficulty of performance" which usually leads to the failure of *force majeure* plea.[246] For instance, in the *Rainbow Warrior* case,[247] the difficulty in performance which was relied on by France was not accepted as adequate to successfully invoke its plea of *force majeure*. The tribunal upheld New Zealand's assertion that "the test of applicability [of *force majeure*] is of absolute and material impossibility, and.... a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*."[248]

As for the causes of material impossibility of performing obligations in *force majeure*, they might be "natural or human intervention, or a combination of the two, so long as it is outside the control of the acting State."[249] Examples of natural events include earthquake, floods and draught, whereas human intervention entails events brought about by military operations in war or different kinds of public violence, such as riots and insurrections. As for natural disasters, it is difficult to forecast the exact time of their occurrence. In such a case, several factors, such as the exceptional character of the event, the kind of state obligations in question, and the means available at the disposal of the state to prevent it, must be taken into account.[250] As for human

[246] As an example, the ILC mentions a situation in which a State aircraft is forced, due to damage or loss of control of the aircraft owing to weather, into the airspace of another State without the latter's authorization. Crawford, *ARSIWA*, *supra* note 59, at 77.
[247] *Case concerning the 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*, (30 April 1990) *Reports of International Arbitral Awards*, Vol. XX at 215-284 [*Rainbow Warrior*], available online at: <http://legal.un.org/riaa/cases/vol_XX/215-284.pdf> (last visited 10 October 2014).
[248] *Ibid* at 253 [emphasis added].
[249] Crawford, *Second Report*, *supra* note 136, at 16-17.
[250] Sandra Szurek, "Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: *Force Majeure*", in James Crawford, Alain Pellet, Simon Olleson & Kate Parlett, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) at 477.

intervention, the *Gould Marketing Inc*[251] case is a clear example in which *force majeure* was based on the unpredictable attacks of rebels. By imputing "social and economic forces" beyond the state's control to *force majeure*, the tribunal held that, "[i]njuries caused by operation of such forces are therefore not attributable to the state for purposes of its responding for damages."[252] In another case, having generalised all the facts with regards to the fulfillment of *force majeure* conditions, the tribunal held that "[b]y December 1978, strikes, riots and other civil strife in the course of the Islamic Revolution had created classic *force majeure* conditions at least in Iran's major cities."[253]

In addition to the affirmative requirements explained above, there are exceptions according to which the defense of *force majeure* cannot be available even if a state has met the affirmative requirements.[254] First, a state may not rely on *force majeure* if the situation arises due to the actions of the state invoking it. This does not mean that the situation must arise from completely exogenous factors. Rather, any case of contribution by a state to the occurrence of *force majeure* that makes it materially impossible to perform the obligation in question results in the failure of this defense.[255] It should be noted that the state's contribution in this regard must have been determinative. The mere fact of contribution does not satisfy the requirements of this

[251] *Gould Marketing, Inc v Ministry of National Defense of Iran*, (July 27 1983) Interlocutory Award № ITL 24-49-2, 3 Iran-US Claims Tribunal 147, available online at: <http://www.trans-lex.org/230700> (last visited 14 October 2014).
[252] *Ibid* at 153. *Force majeure* was also relied on in the *Lighthouses* case, in which the lighthouse owned by a French company was requisitioned by Greece during World War I and was subsequently destroyed by enemy action. The tribunal upheld Greece's claim of force majeure. *See Ottoman Empire Lighthouses Concession (France v Greece)*, (1956) 12 *Reports of International Arbitral Award* at 219-20, available online at: <http://legal.un.org/riaa/cases/vol_XII/155-269_Concession.pdf> (last visited 14 October 2014).
[253] *Anaconda-Iran, Inc v The Government of the Islamic Republic of Iran, et al*, Interlocutory Award No ITL 65--167-3, (10 December 1986) 13 Iran-US Claims Tribunal at 213, available online at: <http://www.trans-lex.org/231800> (last visited 14 October 2014).
[254] These exceptions are laid down in paragraph 2 of Article 23 of ARSIWA, *supra* note 128.
[255] The ILC commentaries put it as follows: "This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen." Crawford, *ARSIWA*, *supra* note 59, at 78, para 9.

exception.[256] Second, *force majeure* cannot be invoked if the state has already accepted the risk of its occurrence. States usually waive their right to invoke it either by an agreement or obligation that assumes the risk of the particular *force majeure* event.[257] In this respect, the assumption of the risk "must be unequivocal and directed towards those to whom the obligation is owed."[258] As soon as a state accepts the responsibility for a particular risk, it loses the right to rely on *force majeure* to avoid responsibility.

Moreover, it should be pointed out that states cannot rely on *force majeure* when they experience difficult financial circumstances. In the past, such circumstances were claimed by states to justify their non-compliance with international obligations. For instance, in the *Russian Indemnity* case[259] the Ottoman Government claimed that the extremely difficult financial situation that it faced would justify its delay in paying its debt to the Russian Government on the ground of *force majeure*.[260] However, the tribunal rejected its plea of *force majeure*, since the necessary conditions of applicability of this defense had not been fulfilled. Likewise, in the

[256] *Ibid*. The ILC quotes the *Libyan Arab Foreign Investment Company v The Republic of Burundi* case, in which the tribunal rejected Burundi's defense of force majeure. In this case, Burundi wanted to liquidate a joint venture company in which the Libyans were shareholders and managers, by justifying it on the ground force majeure. The tribunal rejected it, since "the alleged impossibility is not the result of irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of unilateral decision of the State and therefore falls within paragraph 2 which excludes force majeure where the State in question has contributed to the occurrence of the situation of material impossibility." *See Libyan Arab Foreign Investment Company (LAFICO) v. Burundi*, (1991) 96 International Law Reports 282 at 318.

[257] In such a case, the agreement includes a special provision establishing responsibility for force majeure or providing for its termination in the event of particular occurrence. *See* "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", study prepared by the Secretariat, *The ILC Yearbook* (1978) Vol. II (1), Doc. A/CN.4/315 at para 31, available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1978_v2_p1_e.pdf> (last visited 15 October 2014).

[258] Crawford, *ARSIWA*, *supra* note 59, at 78, para 10.

[259] *Russian Indemnity* case (Russia v. Turkey), (1912) *Reports of International Arbitral Awards* Vol. XI. at 431, available online at: <http://legal.un.org/riaa/cases/vol_XI/421-447.pdf> (last visited 16 October 2014).

[260] Crawford, *ARSIWA*, *supra* note 59, at 81, para 7. The Ottoman Government was obliged to repay its debt to Russia under Article 5 of the Treaty of Constantinople, concluded on 27 January and 8 February 1879, which brought to an end the war between the two countries.

Serbian Loans[261] and the *Brazilian Loans*[262] cases, in which similar difficulties in financial circumstances formed the basis of the claim, the arbitral tribunals refused to accept the plea of *force majeure*. In this respect, the ILC noted in its reports several times that the situation brought about by difficult circumstances of economic or financial character could best be explained by the state of necessity, not by *force majeure*.[263]

3.3.2. Distress

Pursuant to Article 24(1) of ARSIWA, distress is a specific circumstance in which an individual acting as a state organ, or in any other manner which is imputable to a state, finds himself/herself in a situation of peril and "has no other reasonable way.... of saving the author's life or the lives of other persons entrusted to the author's care."[264] In such a situation, the author of the wrongful act has no choice but to breach an international obligation, and the act will not entail international responsibility.

The characteristics of distress can be derived from the content of Article 24, which is set out in a negative way. First, in distress, there must be a grave and imminent peril to the life of physical persons.[265] Second, the person who finds himself in such a situation must not have other

[261] *Serbian Loans*, *supra* note 119. This case was cited in Ago's Eighth Report at 24-25. In this case, the French Government claimed that the Kingdom of Serbs,Croats and Slovenes was obliged to pay the sums of Serbian loans due to the French national creditors in gold francs. The latter invoked *force majeure* by justifying its non-payment with the economic crisis caused by World War I.
[262] *Brazilian Loans*, *supra* note 120, at 120.
[263] Ago, Eighth Report (Addendum), *supra* note 2, at 22; Crawford, *ARSIWA*, *supra* note 59, at 81, para 7.
[264] ARSIWA, Article 24, *supra* note 128. It should be noted that instead of clearly formulating the characteristics of a situation of distress, the provision defines the situation in which the subject of the obligation must find itself in distress, which in turn subjects that determination to self-judgment.
[265] The initial version of distress had quite a different formulation. The drafters used "extreme distress" in formulating the first part of Article 32, which caused ardent debate among Committee members. *See* Crawford, *Second Report*, *supra* note 132, at 21, para 264. However, in the end, they decided to delete the word 'extreme' as it was found not to contribute anything to the content of the Article. In making their decision, Committee members reasoned that this wording created the possibility of abuse by States, which could argue that the situation in question was not "sufficiently extreme." *Ibid* at para 274.

"reasonable" means to save his or other persons' lives except by acting contrary to an international obligation.[266] It should be noted that, in addition to these characteristics, the drafters also discussed the inclusion of a psychological element. This element is found in the fact that the acting person must be reasonably justified in believing that there was no other means to save the lives in peril but to breach international law. The drafting committee did not consider the inclusion of such a subjective aspect necessary, concluding that "the author of the wrongful act should not be judged on its intentions, but on its acts."[267] Taking this into consideration, it can be said that in distress, the author must evaluate the gravity of a situation and the risk of the threat assumed for his life and the lives of other persons under his care. This kind of subjective assessment is carried out based on the personal reasonable belief of the author. In this respect, Professor Crawford emphasized that in a situation of distress, the author should act on the basis of a reasonable belief despite the fact that "the threat to life must be apparent and have some basis in fact,"[268] since, in circumstances of genuine distress, "there may be neither the time nor the personnel to conduct a proper medical or other examination before acting."[269]

In international practice, distress, as a circumstance precluding the wrongfulness of an otherwise wrongful act of a state, "has been invoked and recognised primarily in cases involving the violation of a frontier of another State, particularly its airspace and its sea."[270] In such cases,

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[266] Szurek identifies these features as material elements of distress. *See* Sandra Szurek, "Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Distress", in James Crawford, Alain Pellet, Simon Olleson & Kate Parlett, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) at 482 [Szurek, Distress].

[267] *See* M. Kamto's comments, *The ILC Yearbook* (1999) Vol. I. Doc. A/CN.4/SER.A/1999 at 179, para 31, available online at: < http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1999_v1_e.pdf> (last visited 18 October 2014).

[268] Crawford, *Second Report*, *supra* note 136, para 271.

[269] *Ibid*.

[270] *The ILC Yearbook* (1979) Vol. II (2), Doc.A/CN.4/SER.A/1979/Add.1 (part 2) at 134, para 4, available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1979_v2_p2_e.pdf> (last visited 18 October 2014). In most cases, it occurs in the framework of the law of the sea. Therefore, there are specific instruments including provisions regulating such circumstances. For instance, Article 14(3) of the 1958 Geneva Convention on

aircraft or ships are usually compelled to enter another state's territory without authorization due to extraordinarily bad weather conditions, mechanical failures, or navigational difficulties.[271] It should be pointed out that the purpose of these actions is primarily explained by the intention of avoiding an otherwise inevitable disaster that may happen to the aircraft or vessel by not acting in such manner. For example, the *Alliance* case[272] is one classic dispute in which the plea of distress was raised. In this case, the Dominican vessel "*Alliance*", running out of coal and provisions, entered the territorial waters of Venezuela, where it was detained by Venezuelan authorities. Taking into account the extraordinary circumstances that the Alliance had experienced, the American-Venezuelan commission found that the vessel had been in a situation of distress exempting it from subjection to the territorial jurisdiction of Venezuela.[273] A similar

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the Territorial Sea and Contiguous Zone sets out that "[p]assage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress." (*See* Convention on the Territorial Sea and Contiguous Zone, Geneva, (29 April 1958), 516 United Nations Treaty Series 205, online:
< http://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf> (last visited 19 October 2014). The United Nations Convention on the Law of the Sea also includes the same provisions. *See* United Nations Convention on the Law of the Sea, Montego Bay, (10 December 1982) 1833 United Nations Treaty Series 3, Articles 18(2), 39(1)(c) and 109).
Available online at: <http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf> (last visited 19 October 2014). International Convention for the Prevention of Pollution of the Sea by Oil, article IV, paragraph 1 (*a*) of which provides that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place "for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea". Online at: <http://www.admiraltylawguide.com/conven/oilpol1954.html> (last visited 19 October 2014). *See* also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, article V, paragraph 1 of which provides that the prohibition on dumping of wastes does not apply when it is necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea … in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat".
Available online at: <http://www.imo.org/en/OurWork/Environment/LCLP/Documents/LC1972.pdf> (last visited 19 October 2014). *See* also Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (15 February 1972) (art. 8, para. 1).
Available online at: http://sedac.ciesin.columbia.edu/entri/texts/marine.pollution.dumping.ships.aircraft.1972.html> (last visited 19 October 2014).

[271] Crawford, *ARSIWA*, *supra* note 59, at 78.

[272] The *Alliance* case, (1903) 9 Reports of International Arbitral Awards at 140-44, online at: <http://legal.un.org/riaa/cases/vol_IX/113-318.pdf> (last visited 20 October 2014).

[273] In clarifying the attributes and legal consequences of distress (which helped to make the decision), the Commission referred to the *Enterprise* case, in which the American-British Claims Commission held that "[a] vessel driven by a stress of weather into a foreign port is not subject to the application of the local laws, so as to render the

claim of distress related to the violation of maritime boundaries was made in a case between the United Kingdom and Iceland. The incident happened in December 1975, when British naval vessels were in the territorial waters of Iceland. The British Government justified the entrance of British vessels by claiming that the vessels sought "shelter from severe weather conditions, as they have the right to do under customary international law."[274] Although Iceland asserted that the vessels entered its waters to provoke an incident, it did not reject the right of British vessels to enter its territorial waters in the case that they found themselves in a situation of distress.[275]

In the *Rainbow Warrior*[276] case, the arbitrators dealt with a plea of distress outside the context of territorial intervention. In this dispute, involving France and New Zealand, France was held responsible for the destruction of a Greenpeace vessel, the *Rainbow Warrior*, by two of its agents in the port of Auckland. The agents were found guilty by the New Zealand courts and were sent to the Isle of Hao to serve their sentences. However, France repatriated its agents to its metropolitan territory, which caused New Zealand to bring an accusation against the former for breaching the terms of the agreement concluded between the two states in 1986. The French Government justified its actions by invoking a situation of distress with regard to the physical health of its agents. The tribunal held that "the circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the

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vessel liable to penalties which would be incurred by having voluntarily come within the local jurisdiction.....It would be manifest injustice to punish foreigners for a breach of certain local laws, unintentionally committed by them, and by reason of circumstances over which they had no control." *Ibid* at 142.

[274] "'Force majeure' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine - Study prepared by the Secretariat", *The ILC Yearbook* (1978) Vol. II (1), Doc. A/CN.4/SER.A 1978/add.1 at 102, para 136.
Available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1978_v2_p1_e.pdf> (last visited 20 October 2014).

[275] Crawford, *ARSIWA*, *supra* note 59, at 79.

[276] *Rainbow Warrior* case, *supra* note 248.

State may exclude wrongfulness in this case."[277] This approach to distress was criticised by Professor Crawford. In his view, the tribunal in the *Rainbow Warrior* case took "the broader view, although the health risk to [one of France's agents] might have been life-threatening."[278] Taking into account the circumstances precluding wrongfulness, and the existence of other solutions for cases that are not manifestly life-threatening, Professor Crawford seems to disagree with the necessity of extending the scope of distress in such a way.[279] In his view, which was strongly supported by the Commission members, the application of distress "should not be extended too far beyond [its] specific context (ships and aircraft), and certainly not into the general field of humanitarian intervention."[280] Thus, despite the claims of extension of the notion of distress to other situations,[281] it can be concluded that distress has a narrow scope of application and can be pleaded only in certain circumstances related to territorial intervention.

It should also be noted that like other circumstances precluding wrongfulness, distress also contains a balancing element, whereby the interests that are intended to be protected must outweigh the other interests conflicting with the former. As was pointed out, saving the life of a person or lives of people is top priority in a situation of distress. However, there might be situations where the conduct sought to be excused endangers more lives than it may save, or creates a greater threat to other interests at stake. Therefore, such conduct will not fall within the scope of distress and its wrongfulness will not be precluded.

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[277] *Ibid* at para 78.
[278] Crawford, *Second Report*, *supra* note 136, para 271 [emphasis added].
[279] *Ibid*.
[280] *Ibid* at para 272 [emphasis added]. He points out that such issues of humanitarian intervention are regulated in the domain of necessity. Many States were also against such an expansion of the application of the notion of distress. Their concern was that this kind of humanitarian intervention could serve as a pretext for interfering into their internal affairs and be a potential threat for breaching sovereignty.
[281] In discussing the possible examples concerning the extension of its scope, Sandra Szurek argues that the refusal of the Burmese Government to allow rescuers to help the victims of the earthquake that struck Burma in May 2008, is "the most recent and most crucial example." *See* Szurek, Distress, *supra* note 267, at 489.

3.3.3. Drawing Distinctions

3.3.3.1. Voluntariness: Necessity and Distress vs. *Force majeure*

Distress, *force majeure* and necessity share a common feature, according to which the breach of international obligations by a state is caused by external factors. These external causes, which are not subject to the will of the acting state, compel it to commit a wrongful act. In such circumstances, the prior wrongful conduct of the injured state is irrelevant, and the wrongful behaviour of the injuring state is totally induced by external factors that put its interests in peril. Even though these three defenses share commonalities, they have peculiar features distinguishing them from each other. These distinctions can be made based on the criteria of voluntariness, intent and the character of interests threatened.

As for voluntariness, the distinction is made between distress and necessity on the one side, and *force majeure* on the other. In distress and necessity, a wrongful act of a state is performed voluntarily, while in *force majeure,* factual circumstances render the performance of the obligation impossible, which excludes voluntariness from the wrongful conduct of an acting state. The situation of *force majeure* compels a state to breach an international obligation since it leaves no other way to act in conformity with the international obligation in question.[282] Therefore, in *force majeure,* a state acts against its will due to irresistible force compelling it to act, whereas in distress and necessity, the wrongful conduct is performed according to the will of a state and the performance of the international obligation in question is materially possible.

[282] It should be noted that there is debate on whether impossibility involves voluntariness. It is argued that the conduct of a subject is voluntary if there was no impossibility. However, it is also argued that an act may be voluntary in cases when it is impossible to act otherwise. *See* Szurek, Distress, *supra* note 266, at 483.

3.3.3.2. Intent: Necessity vs. *Force majeure*

The criterion of intent can also be used to further clarify the distinction between necessity and *force majeure*. Before proceeding to an extensive overview of distinctions between *force majeure* and necessity, I found it appropriate to briefly note the commonalities between the two defenses. The fundamental feature that they share is that both of them are invoked by states when extraordinary circumstances (calamities) strike them. Moreover, the application of both defenses is often restricted to a certain period of time, which demonstrates the temporary nature of their effect. In other words, the wrongfulness of the measures of a state taken after both circumstances in question cease to exist is not precluded and results in a state's responsibility.

Turning to the distinctions, in *force majeure,* an irresistible external force compels a state to act against its international obligation. Thus, the breach of the obligation in question is not encompassed by the intent of an acting state, and the state is also deprived of free choice in acting. In the state of necessity, a state intentionally fails to conform to its obligations, as it deliberately chooses the measures ensuring the protection of its essential interests versus its international obligations. In such circumstances, a state is usually able to respect its obligations, since at that time a state has several alternative ways at its disposal to accomplish them. In other words, it is absolutely impossible for a state to respect its international obligation in *force majeure*, while in necessity, the impossibility is relative. This relative impossibility enables a state to make a free choice between suffering grave and imminent peril and violating the obligation that protects the interests of lesser importance. However, in cases of *force majeure*, there is no such "element of free choice".[283]

[283] Crawford, *ARSIWA*, *supra* note 59, at 76, para 1. With regard to distress, this kind of 'free choice' is argued to exist in a different way. According to the ILC report, in distress, "the State organ admittedly has a choice, even if it is only between conduct not in conformity with an international obligation and conduct which is in conformity with

3.3.3.3. Foreseeability: Necessity vs. *Force majeure*

It should be noted that the external force in *force majeure* compelling a state to act against its international obligation also excludes the possibility of a state foreseeing the situation about to happen. In other words, a situation of *force majeure* cannot be foreseeable by a state, as it is brought about by external forces beyond its control, while the state of necessity can be predicted in advance by several means at a state's disposal at that time. For instance, by observing macroeconomic and other economic data, states are able to foresee the possibility of different economic or financial crises occurring.[284] Thus, to foresee necessity circumstances in the future, states usually have a wide array of alternative means under their control. This demonstrates the absence of the element of suddenness in the state of necessity, which, in contrast, is found in *force majeure*. This also leads to a conclusion that states cannot resort to *force majeure* as a justification when they are faced with serious economic crises or difficult financial circumstances. Rather, they should invoke the necessity defense to justify the measures adopted to tackle financial crises. The earlier cases analysed in the previous sections also provide evidence that states mistakenly invoked *force majeure* instead of necessity in justifying their failure to fulfill treaty obligations due to financial difficulties they had faced.

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the obligation but involves a sacrifice that it is unreasonable to demand". However, "this choice is not a 'real choice' or 'free choice' as to the decision to be taken, since the person acting on behalf of the State knows if he adopts the conduct required by the international obligation, he, and the persons entrusted to his care, will almost inevitably perish. In such circumstances, the 'possibility' of acting in conformity with the international obligation is therefore only apparent. In practice it is nullified by the situation of extreme peril which, as we have just said, characterizes situations of distress." (*The ILC Yearbook* (1979) Vol. II (2), *supra* note 271, at 133, para 2.)

[284] Since economic and other kind of financial crises have a creeping character, there is a high possibility of foreseeing their occurrence. For instance, Professor Alberto Alvarez-Jimenez argues that economic (financial) crises could be predicted and thus be avoided through the use of "Early Warning Models". *See* Alberto Alvarez-Jimenez, "The Great Recession and the New Frontiers of International Investment Law: The Economics of Early Warning Models and the Law of Necessity", (2014) 17 Journal of International Economic Law 517.

3.3.3.4. Effect on other State's Interests: Necessity vs. *Force majeure*

In addition to distinctions which were drawn on the basis of my analysis, scholars also note another distinction between necessity and *force majeure*. According to them, " necessity requires examining the effect of the state's 'wrongful' act on other parties – a requirement wholly missing from the inquiry under *force majeure*."[285] To my understanding, this distinction relates to examining whether the measures taken in a state of necessity seriously impair essential interests of the state or states towards which the obligations exists, or of the international community as a whole. The successful invocation of necessity requires a negative answer to this question; otherwise, the wrongfulness of an act will not be precluded. Meanwhile, this kind of requirement concerning the effect (or the extent of effect) of the measures at issue on the competing interests of the other party (parties) is not present when invoking *force majeure*. The wrongfulness of a state's conduct in *force majeure* is precluded even if the interests of other states are negatively affected by that wrongful conduct. Therefore, arbitration tribunals do not test a state's wrongful conduct under this criterion, but rather, they test it under other criterion specific to *force majeure,* as established in Article 23 of ARSIWA.

3.3.3.5. The Nature of Interests Threatened: Necessity vs. Distress

A distinction between distress and necessity can also be made according to the objectives or the interests intended to be protected by their invocation. Put differently, the criteria used in making this distinction focus on the character of interests threatened in both circumstances. For instance, in distress, the interest to be protected is "the immediate one of saving people's lives,

[285] Mark Augenblick & Alison Rousseau, "Force Majeure in Tumultuous Times: Impracticability as the New Impossibility It's not as Easy to Prove as You Might Believe", (2012) 13 Journal of World Investment and Trade at 64.

irrespective of their nationality."[286] In contrast, the objective of invoking necessity is to protect essential interests of a state or of the international community as a whole.[287] From the aforementioned, one can easily observe that the interests threatened in both circumstances differ significantly in terms of their nature and dimensions.

The tribunal in the *Rainbow Warrior* case further explained the distinction between distress and necessity on the basis of imputing necessity circumstances to different subjects. According to the tribunal, in distress, the situation of necessity exists "with respect to the actual person of the State organs or of persons entrusted to his care, and not any real necessity of the State."[288] It can be understood as attributing necessity to different subjects, who experience it at different levels. In other words, in distress, a person and not a state as a sovereign entity finds himself in a situation of necessity to save his own life or persons entrusted to his care, while in a state of necessity, a state and not a person is considered to be in a situation of necessity to safeguard its essential interests against a grave and imminent peril. The person in distress cannot be regarded as a sovereign state even though he/she acts as a state organ or his action is imputable in any other way to a state. In this case, I assume that the interests that he/she intends to protect (a person's life or the lives of people entrusted to his/her care) cannot be regarded as the essential interests of a sovereign state regardless of the person's connection (being an agent of a state) with a state. Thus, the interests threatened in a situation of distress are distinguished from those in a state of necessity, since they belong to two different subjects.

[286] Crawford, *Second Report*, *supra* note 136, para 265.
[287] It should be noted that the interests intended to be protected in distress are not limited to the very existence of a person. It can also be invoked to safeguard other essential rights of a person, such as his/her physical integrity. Therefore, one must also be cautious in differentiating between essential interests of a State and essential rights of a person. *See Rainbow Warrior*, *supra* note 248, at 254.
[288] *Rainbow Warrior*, *supra* note 248, at 254.

3.4. Concluding Remarks

In this chapter, I presented a detailed overview of the doctrine of necessity in public international law. In particular, I explored customary rules related to the necessity defense, its modern concept as a circumstance precluding the wrongfulness of an act, the constituent elements required for its successful invocation, and the exceptions precluding its invocation in international law. Moreover, I presented a comparative analysis on distinguishing a state of necessity from other defenses precluding wrongfulness, such as *force majeure* and distress, in terms of the content, requirements, and effects of invocation.

Through studying the early cases on necessity in international law, we learned that though initially invoked in the humanitarian context, the plea of necessity expanded into other domains in which it was used to justify state actions taken in necessity circumstances of a military, environmental and economic character. Besides identifying the expansion of the necessity defense into other settings, it was also found that the official statements of governments of disputing parties in early cases clarified the conditions of invoking the necessity defense. This type of state practice was also found in the analysis of the elements of necessity in subsequent sections. They included developments concerning the features and elements of a state of necessity, which, in my view, elevated the doctrine of necessity from its original setting confined to a state's self-preservation into its pre-modern version providing a clearly determined framework for its invocation. Most importantly, state practice with respect to the necessity defense presented sufficient evidence to confirm that the necessity defense is a rule of customary international law.

Chapter IV. The Non-Precluded Measures (NPM) Clauses in International Investment Agreements

Like customary international law, specialized treaty regimes of international law also have exceptions and reservations specifically designed to regulate emergency circumstances in the relationships between treaty parties. These exceptions specify matters to which certain or all treaty obligations do not apply. Taking into account their vital role in regulating necessity circumstances, in this chapter I will present a detailed overview of exceptions found in IIAs, which are also called "non-precluded measures" (NPM) clauses. By applying the concept of regime attributes, I will examine the structure and constituent elements of NPM clauses, as well as issues relating to their application and interpretation in the practice of investor-state arbitration tribunals. A substantial part of the chapter will be dedicated to explaining the relationship between treaty NPM clauses and the customary necessity defense in terms of their interpretation and application by investment tribunals in practice. Since the interpretative issues related to NPM clauses and their relationship with the customary necessity defense were mainly addressed in the investor-state disputes involving Argentina, the focus of the discussion and analysis in this regard will be on the investment disputes arising from the Argentinean financial crisis. The arbitration decisions will be presented in two consecutive steps. First, I will give an overview of the arbitral tribunals' analyses on the application of the treaty NPM clause. Then, I will present the decisions of the annulment committees on the distinction between treaty NPM clauses and the customary necessity defense. Afterwards, I will elaborate on the Argentine cases involving the application of the customary necessity defense in the absence of a treaty NPM clause. Finally, by applying the concept of regime consequences, I will analyse the effects of invoking both defenses in terms of providing compensation for the damage resulting from the state actions

triggering their invocation. Since the discussion on the self-judging nature of NPM clauses entails a wide array of research questions, I found it appropriate to analyse them in a separate chapter (chapter V).

4.1. General Description of NPM Clauses

4.1.1. Definition of NPM clauses

IIAs contain certain types of provisions allowing states to adopt measures necessary for protecting their essential interests in different public policy areas. Generally, these provisions are called exceptions and reservations. Despite a slight difference between the two, both have the same function, which is to exempt a state from complying with its treaty obligations.[1] As scholars put it, "[i]f there is an applicable exception or reservation, no [international investment agreement] obligation exists with respect to a measure within the scope of the exception or reservation."[2] Exceptions and reservations are also considered to play an important role in sustaining the stability of the international investment regime, since they provide states with freedom to act against their treaty responsibilities in certain circumstances posing a threat to their essential interests in different public policy areas. As Jürgen Kurtz observes, these treaty provisions "elucidate the socio-political values that are so vital and compelling to the parties that

[1] Exceptions usually refer to particular subjects completely excluded from the scope of the international investment agreement. For instance, Canadian investment agreements manifestly state that they do not apply to investments in cultural industries. Reservations refer to narrower limitations to the scope of treaty obligations, for example, to exclude a specific law or regulation from the prescriptions of the treaty. *See* Andrew Newcomb & Llouis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Hague: Kluwer Law International, 2009), Chapter 10-Exceptions and Defenses, at 483 [Newcomb & Paradell]. According to Professor VanDuzer, "unlike exceptions, reservations are separately listed for each party and typically are not symmetrical. They are customized to reflect the national policies and priorities of each party". Besides the aforementioned, reservations can be used "to exclude whole sectors from the scope of the treaty or particular obligations." *See* Anthony VanDuzer, Penelope Simons & Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2013) at 225 [VanDuzer, Simons, Mayeda].

[2] Newcomb & Paradell, *supra* note 1, at 483.

they transcend economic and commercial interests," and their inclusion in investment treaties by treaty negotiators "clearly signal[s] that investment liberalization and protection are not the exclusive goals of the [investment treaty] network."[3] Thus, exceptions are considered to be "an *ex ante* choice to limit the zone of adjudicatory discretion afforded to investment arbitrators."[4]

In contemporary scholarship, different names have been attributed to the exceptions found in IIAs. For instance, Professor Dolzer defines them as "emergency clauses",[5] while Professor Bjorklund classifies them under the terms "emergency exceptions" and "economic security provisions".[6] Other scholars identify these exceptions as "essential security provisions"[7], "derogation clauses"[8] and "non-precluded measures clauses".[9] Such provisions are found in most BITs of states that have large shares in worldwide investment flows, such as the United States, Germany, Canada and India.[10] Germany is regarded as being the first state to include NPM

[3] Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: Cambridge University Press, 2016) at 169 [emphasis added]. According to Professor Kurtz, treaty negotiators take into account multiple and competing objectives in the drafting process of a treaty. He further argues that "[b]y nudging adjudicatory choices, flexibilities of this sort extend base assurances to states that public regulation, properly tailored and implemented, will not trigger state responsibility under the treaty regime at issue." *Ibid* at 171.

[4] *Ibid* at 171.

[5] Rudolf Dolzer, "Emergency Clauses in Investment Treaties: Four Versions", in Mahnoush Arsanjani et al (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden, Martinus Nijhoff, 2011) at 705.

[6] Andrea Bjorklund, "Emergency Exceptions: State of Necessity and Force Majeure", in Peter Muchlinski, Federico Ortino, Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) at 459 [Bjorklund, Emergency Exceptions]; Andrea Bjorklund, "Economic Security Defenses in International Investment Law", in Karl P. Sauvant, *Yearbook of International Investment Law & Policy 2008-2009* (New York: Oxford University Press, 2008) at 479 [Bjorklund, Economic Security Defenses].

[7] Katia Yannaca-Small, "Essential Security Interests under International Investment Law", (OECD 2007, Part I Chapter 5); Newcomb & Paradell, *supra* note 1, at 497.

[8] August Reinisch, "Necessity in Investment Arbitration", (2010) 41 Netherlands Yearbook of International Law at 137 [Reinisch, Necessity in Investment Arbitration].

[9] William Burke White & Andreas Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", (2007-2008) 48 Vanderbilt Journal of International Law at 307 [Burke-White & Von Staden, NPM Clauses].

[10] *Ibid* at 318. The texts of BITs of these and other countries are available online at: <http://investmentpolicyhub.unctad.org/IIA/> (last visited 20 June 2015).
According to the OECD survey, the following states have included an NPM clause most of the time (in more than fifty percent of their BITs): Germany, India, Mexico and Belgian-Luxemburg Economic Union, with the United States being the only state that included the NPM clause all the time. There are some countries that have never included it in their BITs. They are Denmark, Greece, Iceland, Ireland, Italy, Norway, Slovenia and South Africa. *See*

clauses in its BITs. The first BIT concluded between Germany and Pakistan in 1959 contained such a provision,[11] while the United States started including NPM clauses in its IIAs from the time it concluded its first BIT with Panama in 1982.[12] As for Canada, it did not include such a clause in its BITs until the mid-1990s.[13] Similarly, India began to include NPM clauses in its BITs starting from 1994, when the country's BIT program commenced.[14] Other countries also have included such provisions in their BITs, but only in BITs with certain countries.[15] Furthermore, apart from IIAs, these kinds of provisions can also be found in other international treaties of bilateral, multilateral and regional character.[16]

NPM clauses are mostly included in the main treaty text. In the treaty practice of most states, they are usually not formulated within other accompanying parts of IIAs, such as an

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Organization for Economic Cooperation and Development (OECD), *International Investment Perspectives: Freedom of Investment in a Changing World* (2007) at 98-99 [OECD 2007 Report].

[11] Germany-Pakistan BIT (1959), Protocol, para 2.
Available online at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1386> (last visited 5 October 2014).

[12] U.S.-Panama BIT (1982), Article X. Available online at:
<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3353> (last visited 5 October 2014).

[13] When such a clause was first included in Canadian BITs, its scope was limited to the environmental measures necessary to protect human, plant and animal life, as well as the conservation of living and non-living exhaustible natural resources. *See* Article XVII of Canada-Armenia BIT (1997), Canada-Egypt BIT (1996), Canada-Barbados BIT (1996), Canada-Ecuador BIT (1996), Canada-Lebanon BIT (1997), Canada-Panama BIT (1996). All BITs concluded by Canada are available online at:
<http://investmentpolicyhub.unctad.org/IIA/CountryBits/35#iiaInnerMenu.> (last visited 20 May 2015).
Later, in the investment agreements based on its 2004 Model BIT, Canada included much more expansive provisions with several different types of permissible objectives, ranging from public order to the integrity of financial system. For example, *see* Article X of Canada-Jordan BIT (2009), Article IX of Canada-Slovakia BIT (2010), Article 17 of Canada-Tanzania BIT (2013), Article XVII of Canada-Romania BIT (2009).

[14] The first BIT concluded with the United Kingdom included the NPM clause in Article XI. *See* India-United Kingdom BIT (1994).

[15] *See* the BITs of China, New Zealand, Sri Lanka, United Arab Emirates, Morocco, Turkey, Venezuela, etc.

[16] *See* Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (Aug 1, 2005), Article 2.13.
Available online: UNCTAD <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2707> (last visited 20 October 2014); Article XX and XXI of the General Agreement on Tariffs and Trade 1994 [GATT], available at: http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20>;
Article XIV of the General Agreement on Trade in Services 1994 [GATS]; the North American Free Trade Agreement (NAFTA) Art. 2101 and 2102 (Dec 17, 1992) [NAFTA]; Comprehensive Investment Agreement of the Association of Southeast Asian Nations (2009), Article 17; Investment Agreement of Common Market for Eastern and Southern Africa (COMESA) (2007), Article 22.

attached protocol or exchange of notes, which are primarily intended to clarify interpretative issues of meaning and the scope of investment treaty provisions.[17] However, contrary to the mainstream course, the IIAs concluded by Germany include NPM clauses in protocols annexed to the main treaty text. Since the protocol is regarded as being an integral part of a treaty, the NPM clauses included therein have equal legal force to those included in the main treaty text.[18]

The first bilateral investment treaty, which was concluded between Germany and Pakistan in 1959, is regarded as being the first IIA to include a provision on exceptions.[19] It provided that "measures taken for reasons of public security and order, public health and morality shall not be deemed as discrimination within the meaning of Article 2 [the article containing national and most-favourite nation treatment standards]."[20] Another example defines the essence of such clauses more clearly. The NPM provision of the U.S.-Ukraine BIT (1994) reads as follows:

> This Treaty shall not preclude the application either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respects to the

[17] This kind of provision has been subjected to clarification in a number of cases. This was mainly observed in BITs concluded by the United States. For instance, in the process of negotiation of the U.S.-Panama BIT, due to the vulnerable political situation, the Panamanian side insisted on a separate exchange of notes clarifying the provision on exceptions to specify that it would exempt measures adopted to protect the public order. In the exchanged notes, the Parties agreed that "this exception is not meant to authorise either Party to take such measures in the territory of the other." *See* U.S.-Panama BIT, *supra* note 12. *See* also The U. S.-Russia BIT, June 17, 1992, para 8 of treaty Protocol. The treaty is not in force.
Available online at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2236> (last visited 20 October 2014).
The importance of the negotiating history of BITs as a supplementary means of interpreting non-precluded measures clauses will be addressed in Chapter V in the context of the self-judging feature of the NPM clauses.

[18] Burke-White and Von Staden identify only three German BITs that have placed the NPM clauses in the main treaty body. *See* Thailand-Germany BIT (2002) Article 3(2); Germany-El Salvador BIT (1997) Article 3(7); Germany-India BIT (1995) Article 12. *The texts of all BITs cited in this chapter are available online*: UNCTAD <http://investmentpolicyhub.unctad.org/IIA>. Therefore, the sources of each BIT will not be provided thereafter.

[19] Exception provisions are considered to have migrated to IIAs from the treaties of Friendship, Commerce and Navigation (FCN) concluded after World War II. The earliest one appears in the U.S.-China FCN treaty. *See* Treaty of Friendship, Commerce and Navigation, U.S.-P.R.C., Article 26, November 4, 1946, in (1949) 43 American Journal of International Law (Supplement) 27 at 47.

[20] Germany-Pakistan BIT, Protocol, *supra* note 11, at para 2.

maintenance or restoration of international peace or security, or the protection of its own essential security interest.[21]

As can be seen from the wording of the provision, the treaty drafters used the language of "non-preclusion" regarding treaty exceptions. Since the focus of our analysis in subsequent chapters will be on the relevant provisions of U.S. BITs, particularly the U.S.-Argentina BIT, for the purpose of uniform treatment, I found it appropriate to use the term "non-precluded measures clause" (NPM) with respect to such treaty provisions throughout the dissertation.

The language used in the NPM clauses also allows the conclusion that the protection of public security, order, health, morality and a state's essential interests is considered the main purpose of such clauses. When there is a necessity for a particular state to protect these objectives, it can rely on the NPM clause to justify its measures. The most important point is that the states experiencing necessity can resort to such measures even if they breach their treaty obligations and violate the interests of foreign investors. The protection of foreign investment is regarded as a main purpose of IIAs, upon conclusion of which host states have an obligation not to impair foreign investment, or else bear the costs in case they do. The NPM clauses in IIAs bring in an exception to this obligation, allowing a host state some freedom to act against its treaty obligations in circumstances when it is necessary to protect the objectives listed in the clause. In such a case, the cost of harming foreign investments is transferred from a host state to foreign investors, which means that a state will not be liable for the actions that would otherwise breach its responsibilities under the treaty.

[21] The U.S.-Ukraine BIT (1994), Article IX. It should be noted that the NPM clauses of U.S. BITs concluded after 2004 are based on Article 18 of U.S. 2004 Model BIT and have different language from its previous versions. The difference is in that, the NPM clauses in these BITs contain self-judging language ("it considers"). In comparison to the U.S.-Ukraine BIT, *see* Article 18(2) of the U.S.-Uruguay BIT (2005).

However, a mere reliance on the NPM clause in the relevant IIA does not exempt a state from liability. A state invoking the NPM clause to justify its actions contrary to its treaty obligations is required to prove that its freedom of action in necessity circumstances was exercised within the limits of the clause. There may be arbitrary cases when states are considered to have abused the NPM clause, resulting in disputes with foreign investors. The international investment regime has its own mechanism of dispute settlement; thus, in disputes with respect to the abuse of NPM clauses, the question of a state's liability when invoking the NPM clause to justify wrongful actions is exclusively decided by ad hoc arbitration tribunals. More specifically, the successful invocation of the NPM clauses mainly depends on how the arbitration tribunals interpret them in practice. Given that the interpretative issues related to NPM clauses form the most important part of the research, I will discuss them in detail in a separate section of this chapter.

4.1.2. Structural Elements of NPM Clauses

Before discussing the interpretative issues, it is important to understand the structural elements of NPM clauses. In this section, I will give a brief overview of the structural elements of NPM clauses, which will serve as a basis for our further analysis of issues related to the interpretation of them.

Even though there are slight differences in the formulations of NPM clauses in BITs of various countries, they contain similar structural attributes. According to William W. Burke-White,[22] NPM clauses generally contain the following three elements: 1) Nexus requirement; 2) Scope; 3) Permissible objectives.

[22] William W. Burke-White, "The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of ICSID System", (2008) 3 Asian Journal of WTO and International Health Law and Policy 199 at 206 [Burke-White].

4.1.2.1. Nexus Requirement

First, NPM clauses provide for a nexus requirement. This requirement mandates that measures taken by a state be appropriately related to the permissible objectives listed in the clause. In other words, there must be a link between the measures adopted by a state and the permissible objectives listed in the clause. For instance, the NPM clause of the U.S.-Argentina BIT,[23] which is the subject of this research, requires that measures taken by states must correspond to one of specified permissible objectives and be "necessary" to attain the objectives. Otherwise, the measures cannot be covered by the clause. As can be seen, the term "necessary" is a key word of the nexus requirement in the NPM clause of the U.S.-Argentina BIT. However, NPM clauses in other BITs use different language regarding the nexus requirement. They include formulations such as "required",[24] "directed to"[25] and "have to be taken for reasons of."[26] These formulations of the nexus requirement serve as an important link between the adopted measures and the permissible objectives in the NPM clause. Significantly, they specify a framework for the reasonable and non-abusive application of such measures. Different language used in the nexus requirement may establish different frameworks offering host states different levels of freedom in adopting measures to achieve the permissible objectives. As compared to the language of "necessary", nexus requirements with less stringent standards of formulation provide states a wider scope of freedom in reacting to emergency circumstances and offer more chances for

[23] *See* The U.S.-Argentina BIT (1994), Article II, signed 14 November 1991; entered into force 20 October 1994. Available online: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127>.
[24] This language is mostly found in the BITs concluded by Belgium-Luxemburg Economic Union. *See* Lebanon-Belgium-Luxemburg BIT (1999) Article 3(3); Libya- Belgium-Luxemburg BIT (2004) Article 3(2); Macedonia-Belgium-Luxemburg BIT (1999) Article 3(2); Kazakhstan- Belgium-Luxemburg BIT (1998) Article 3(3); Belgium-Luxemburg-Mexico BIT (1998) Article 3(2).
[25] Sri-Lanka-China BIT (1986) Article 11; China-Singapore BIT (1985) Article 11; New Zealand-China BIT (1988) Article 11; China-Singapore BIT (1985) Article 11.
[26] This language is mostly found in the BITs concluded by Germany. *See* Germany-Israel BIT (1976) Protocol 2(a); Germany-Bangladesh BIT (1981) Protocol 2 (a); Germany-Benin BIT (1978) Protocol 2(a); Germany-China BIT (2003) Protocol 4(a); Germany-Egypt BIT (2005) Article 3(2); Germany-Indonesia BIT (2003) Protocol 3(a).

successfully invoking NPM clauses. Thus, arbitration tribunals must pay careful attention to interpreting the wording of the nexus requirement, since successful invocation of the NPM clause mostly depends on the formulation of the nexus requirement and on the approaches taken to interpreting them by arbitration tribunals.

4.1.2.2. Scope

Second, states that include the NPM clauses in IIAs usually specify the scope of their applicability to the provisions of an IIA. The specification can be broad, encompassing all treaty obligations, or narrow, including only certain substantive provisions of the treaty. The NPM clauses in Indian BITs are a good example of broadly formulated ones and are applied to preclude violation of any substantive provision of the treaty. For instance, the NPM clause in the India-China BIT states that "[n]othing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests..." [27] In an NPM clause, this language indicates that the clause has a broad scope and applies to all obligations established in the treaty.[28] We can also observe this approach in most U.S. and Canadian BITs, which include a broad list of exceptions relating to health and the environment, prudential measures, cultural industries, and essential security interests.[29]

On the contrary, German BITs provide examples of NPM clauses with limited scope, the application of which precludes the violation of only certain treaty obligations specified by the parties. The protocols to German BITs provide that parties may take measures to attain public policy objectives, and that such measures will not be regarded as "treatment less favourable" with regard to the treaty obligations of providing fair and equitable treatment, national and most-

[27] India-China BIT (2006), Article 14.
[28] *See* also Croatia-India BIT (2001) Article 12 (2); Finland-India BIT (2002) Article 12(2); Hungary-India BIT (2003) Article 12(2).
[29] For instance, *see* Canada-Jordan BIT, Article 10.

favoured nation treatment to foreign investments.[30] This means a state that adopted the measures "for reasons of" attaining public policy objectives such as public security and order, public health or morality will not incur liability with regards to violating the above mentioned treaty obligations. The scope of the clause does not apply to all treaty obligations and is limited only to three specific provisions (obligations) of the BIT, which are fair and equitable treatment, national and most-favoured nation treatment. Therefore, a state that adopted the measures in question will be liable for its actions if they violate treaty provisions other than the abovementioned three obligations.[31]

There are also NPM clauses limiting both the scope of treaty responsibilities and permissible objectives. For instance, the Uganda-Belgium-Luxemburg BIT includes a provision providing that "[e]xcept for measures required to maintain public order, investments shall enjoy continuous protection and security..."[32] On one hand, the provision allows host states to take necessary measures only to protect and maintain public order, and excludes other emergency circumstances encompassing a state's need to protect public health, environment and other essential security interests. On the other hand, the scope of the provision is limited only to the particular treaty obligation to ensure continuous protection and security under the provision of fair and equitable treatment.[33] According to this NPM clause, in order to preclude liability, a host state can adopt measures directed only at protecting public order. The adoption of measures

[30] *See* Protocol to China-Germany BIT (2003), section 4.

[31] The scope of NPM clauses can also be limited to other treaty provisions such as expropriation or nationalization (Belgian-Luxemburg-China BIT), non-discrimination (Japan-China BIT), dispute settlement (Austria-Mexico BIT), or application of host country law to foreign investment (U.K.-India BIT). *See* OECD 2007 Report, *supra* note 10, at 98-99.

[32] Uganda - Belgium-Luxembourg BIT (2005), Article 3(2).

[33] A similar provision is also found in Turkey-Morocco BIT. Article 2(2) provides: "Each Contracting Party shall ensure fair and equitable treatment and subject to the strictly necessary measures to maintain the public order provide full protection and security for investments of investors of the other Contracting Party." *See* Turkey-Morocco BIT (1997).

directed at attaining other public policy objectives such as public health and environment cannot be justified under this clause, and will eventually trigger state liability. Moreover, the state measures taken to protect public order can preclude liability only with respect to the treaty obligation of providing fair and equitable treatment for foreign investments. It cannot preclude state liability for violating other treaty obligations, such as national and most-favoured nation treatments, even if the adopted measures were directed at protecting public order, and not other public policy objectives.

It should be noted that states usually formulate the scope of the NPM clause according to their intentions of securing relative flexibility in protecting public policy objectives versus providing security and predictability for foreign investments. In other words, if states want to leave more freedom and flexibility for protecting their public policy objectives, they include NPM clauses with wider scope that apply to all treaty obligations. Conversely, if states want to allow for greater certainty and some protection for foreign investors, they provide for NPM clauses with narrower scope that apply only to particular treaty obligations. In such a case, in order to provide at least some protection for foreign investments, states exclude other treaty obligations from the application of the NPM clause. NPM clauses with a broad scope give significant discretion to host states to protect their essential interests and offer little protection for foreign investments, while those with a narrower scope seem to offer protection for both host state interests and foreign investments in a balanced way. However, it should be pointed out that it is almost impossible to predict all policy measures a state may adopt in emergency circumstances, and it is difficult to identify which treaty obligations are likely to conflict with them.[34]

[34] VanDuzer, Simons, & Mayeda, *supra* note 1, at 235.

4.1.2.3. Permissible Objectives

The last element of the NPM clause is a list of permissible objectives, which are considered the ultimate goal for the adoption of measures contrary to state's treaty obligations. Permissible objectives cover certain public policy areas that states consider essential to protect. These public policy areas are excluded from restrictions imposed by the treaty obligations. Therefore, states are usually afforded a great deal of freedom in taking measures directed at achieving the permissible objectives enumerated in the NPM clause. In other words, state actions aimed at attaining public policy objectives specified in the NPM clause shall remain permissible even if they contravene the obligations established in the treaty. Since permissible objectives "delineate the boundaries of state sovereignty that will not be compromised by the state's IIA obligations", the nature and formulation of this element of the NPM clause is considered to be important.[35]

Public policy objectives in the areas of protecting public order, health, morality, security and other essential state interests are regarded as permissible objectives prevalent in most IIAs. For instance, the NPM clause of the U.S.-Argentina BIT provides as follows:

> 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 security interests.[36]

[35] Barnali Choudhury, "Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements", (2010-11) 49 Columbia Journal of Transnational Law 670 at 688 [Choudhury].
It should be noted that in recent years, states usually try to formulate NPM clauses more clearly by including as many permissible objectives as possible. On one hand, this ensures a lot of freedom for states to take necessary measures in protecting a wide range of essential state interests; on the other hand, it helps avoid issues related to the interpretation of NPM clauses by arbitration tribunals.
[36] Article XI, the U.S.-Argentina BIT (1994), *supra* note 23 [emphasis added].

As can be seen, this NPM clause specifies three permissible objectives, which are public order, international peace or security and state security interests. In order to successfully invoke the NPM clause, a state's adopted measures must be intended to attain one of these three public policy objectives. If the measures are not aimed at achieving the permissible objectives listed, they cannot be justified under the NPM clause and will not preclude a state's liability in case of damage done to foreign investments. Therefore, it is essential to identify whether the adopted measures were aimed at achieving state public policy goals falling within the permissible objectives specified in the NPM clause.

It should be noted that permissible objectives listed in NPM clauses are not always identical and may differ from one treaty to another. Such differences can easily be observed between the old and new generation of IIAs.[37] Furthermore, unlike the IIAs similar to the U.S.-Argentina BIT, where only a few permissible objectives are listed, the NPM clauses in other IIAs may list only one[38] or quite a broad range of permissible objectives.[39] Therefore, by taking into account this feature of permissible objectives, I found it important to briefly elaborate on the major permissible objectives that can be observed in the NPM clauses of most IIAs.

[37] The practice of inclusion of a wide range of permissible objectives has become more prevalent in the new generation of IIAs. On one hand, an increase in the number of permissible objectives in the new generation of IIAs can easily be observed. On the other hand, unlike older IIAs, the NPM clauses of the new generation of IIAs include a variety of new state public policy areas. These areas, considered distinct in nature from their older counterparts, include the protection of public health, public safety, the environment, financial services, cultural patrimony and morality. *See* UNCTAD, International Investment Arrangements: Trends and Emerging Issues (2006) at 23–25. Available online at: <:http://www.unctad.org/endocs/iteiit200511_en.pdf> (last visited 15 October 2014).

[38] Uganda-Belgium-Luxembourg BIT (2005), Article 3(2); Turkey-Morocco BIT (1997) Article 2(2).

[39] *See* all Canadian BITs concluded after 2004, in which Canada included much more expansive provisions with several different types of permissible objectives ranging from public order to the integrity of the financial system.

A) Public Order

"Public order" is one of the permissible objectives found in the majority of NPM clauses. Despite its common inclusion in most IIAs, the term "public order" is not defined in the NPM clauses or other provisions of IIAs.[40] However, the meaning of "public order" can be apprehended from its usage in the legal systems of different states, particularly in civil law countries. For example, under French law, the term "public order" ("ordre public") is conceived to mean the rules enacted by states to protect the fundamental values of society.[41] It is also regarded as encompassing legislative, departmental and judicial conditions that maintain the normal functions of the state.[42] In international law, "public order" is seen to be "a specific concept directed to the preservation of the fundamental interests of a given society, which would include the maintenance of the rule of law."[43] Even though these definitions explain the concept of "public order", they do not seem to clarify specific circumstances that may fall within the scope of this term. Moreover, the question of what may constitute a fundamental value of society remains susceptible to different interpretations, since societies may have different cultural, social and religious values.[44]

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[40] However, one exception is worth noting. The U.S.-Kyrgyzstan BIT (1993) contains an additional document defining the term "public order". To be specific, the letter of transmittal of the U.S. President issued with regard to the U.S.-Kyrgyzstan BIT clarifies that the maintenance of public order, as established by Article X of the treaty, entails "measures taken pursuant to a Party's police powers to ensure public health and safety." *See* Letter of Transmittal, U.S.-Kyrgyzstan BIT, Article X, January 19, 1993, S. Treaty Doc. No. 103-13. Available online at: <http://www.state.gov/documents/organization/43567.pdf> (last visited 16 October 2014).

[41] Catherine Kessedjian, "Public Order in European Law", (2007) 1 Erasmus Law Review 25 at 26.

[42] MJB Bernier, "Droit Public and Ordre Public", (1929) 15 Transactions of the Grotius Society 83 at 84. Cited in Jürgen Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis", (2010) 59 International Comparative Law Quarterly at 361 [Kurtz, Adjudging the Exceptional].

[43] *Ibid*. Moreover, the Multilateral Agreement on Investment (MAI) also provided some explanation on the "public order" exception. According to its draft text, "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society." *See* Multilateral Agreement on Investment, Draft Consolidated Text, OECD Doc. DAFFE/MAI (98)7/REV I (Apr. 22, 1998), Part VI(2)(c), at 77, footnote 2. Available online at: <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> (last visited 18 October 2014).

[44] In one case, the WTO dispute settlement body noted that the difficulty in interpreting "public order" is mainly explained by the fact that this concept "can vary in time and space, depending upon a range of factors including

B) Security

Protection of a state's security interests is also one of the most common permissible objectives included in NPM clauses. There are various formulations of security in IIAs. For instance, U.S., Chinese and Indian BITs mostly use the term "essential security interests",[45] while German BITs use "public security",[46] and some BITs concluded between Latin American countries include the wording "national security"[47] or "internal or external security".[48] Despite the different wording within the clause, the term "security" means protecting a state's own security interests. The practice of international tribunals has generated two interpretations of this term. The first suggests that it extends only to state measures directed to opposing any kind of physical threats to the territorial integrity of a state.[49] According to the second interpretation, the "security interests" of a state can be threatened not only by only military attacks, but can also be endangered by economic, public health and other kinds of emergency situations.[50] In this respect, the interpretative approach taken by the ICJ in the *Oil Platforms* case serves as a good example. By acknowledging that "the uninterrupted flow of maritime commerce" could be an "essential security interest",[51] the Court seems to have included state interests of an economic character

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prevailing social, cultural, ethical and religious values." *See*, *WTO United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Report of the Panel* (Nov 10, 2004) WT/DS285/R., para 6.461.

[45] *See* U.S.-Panama BIT (1982) Article X; India-U.K. BIT (1994) Article 11(2); China-New Zealand BIT (1988) Article XI. *See* also Uzbekistan-Belgium-Luxemburg BIT (1998), Article 3(2).

[46] Germany-Pakistan (1959), Protocol, *supra* note 11, para 2.

[47] Peru-Paraguay BIT (1994) Article 11(1)

[48] Peru-Venezuela BIT (1996) Article 3(5); Peru-Bolivia BIT(1993) Article 3(5).

[49] Choudhury, *supra* note 35, at 695. This approach was taken by some investment arbitration tribunals in the Argentine cases. *See LG&E Energy Corp. v Argentine Republic*, (Oct. 3, 2006) Decision on Liability, ICSID Case No. ARB/02/1 at para 203 [*LG&E*, Decision on Liability]; *CMS Gas Transmission Co. v Argentine Republic*, (May 12, *2005*) Award, ICSID Case No. ARB/01/8, at para 359 [*CMS* Award].

[50] The following observation made by the ICJ in the Nicaragua case serves as a basis for this approach: "[T]he concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past." *See Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. U.S.), (27 June 1986) Judgement, ICJ at 116 [*Nicaragua*], available online at: <http://www.icj-cij.org/docket/files/70/6503.pdf> (last visited 19 October 2014).

[51] *See Case Concerning Oil Platforms (Islamic Republic of Iran v. United States),* Judgement, (6 November 2003) Judgement, ICJ , at 196, para 73 [*Oil Platforms*], available online at:

within the concept of "essential security interests". This broad approach to construing "essential security interests" gives states a great deal of freedom to act in addressing different kinds of emergencies threatening them, while leaving less predictability for the protection of foreign investments.

However, there is a view arguing in favour of applying an individual approach to defining the concept of "security" or "essential security interests".[52] The essence of this approach is that each sovereign state defines the term "security" on an individual basis, since their apprehension of the term may differ due to the existence of different factors (different level of development, public security and democracy) peculiar to each individual state. In such cases, states are usually given sovereign autonomy to decide what "security" or "essential security interests" means for them.[53] In this respect, two examples are worth noting. In one of its judgements, the Federal Constitutional Court of Germany defined the term "public security" as follows:

> The term "public security" comprises the protection of central legal interests such as the *life, health, freedom, honor, property and assets of the individual as well as the integrity of the legal order and of the institutions of the state*; a threat to public security will commonly be assumed in the face of an impending criminal violation of these protected interests.[54]

<http://www.icj-cij.org/docket/files/90/9715.pdf> (last visited 19 October 2014).

[52] The scholars Schloemann and Ohlhoff note that "the concept of national security, or 'essential security interests,' is a function of contemporary sovereignty, and as such demands individualization, or individual definition, by the state concerned before its juridical application is possible...Any panel dealing with such issues will have to defer to the government concerned in that regard." *See* Hannes L. Schloemann & Stefan Ohlhoff, "'Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competence", (1999) 93 American Journal of International Law 424 at 450.

[53] *Ibid*.

[54] Brokdorf Judgment, *Bundesverfassungsgericht [BVerfG]* [Federal Constitutional Court] May 14, 1985, 69 BVerfGE 315, 352 (F.R.G.), translation available online at: < http://www.ucl.ac.uk/laws/global-law/german-cases/cases-bverg.shtm?14may1985> (last visited 22 November 2014) [emphasis added].

In contrast to German courts, Indian courts equate the term "security" with "the security of the state".[55] They explain it within broader concepts such as "law and order" and the "public order". Based on the level of gravity, Indian courts place these concepts in a hierarchical order, regarding circumstances affecting the "security of the state" as the gravest.[56] Put simply, the term "security of the state" can be invoked only in most grave situations. These individual approaches to defining the concept of "security" evidence that in interpreting the "security" concept, states have different preferences, depending on a variety of factors peculiar to each individual state.[57]

C) International Peace and Security

The protection of "international peace and security" is frequently included as a permissible objective in NPM clauses. According to this objective, states carry out actions in pursuance of their obligations under the UN Charter for the maintenance of international peace and security.[58] Particularly, states are allowed to adopt measures authorised by the UN Security Council in promoting its "primary responsibility of the maintenance of international peace and security."[59] Since the member states of the UN are required to "accept and carry out the decisions

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[55] *Ibid*.

[56] Supreme Court Justice Hidayatullah explains it as follows: "One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of state. It is then easy to see that an act may affect law and order but not public order just as an act might affect public order but not security of state." *Ram Manohar Lohia v State of Bihar*, A.I.R. 1966 S.C. 740 (1965) (India). Cited in Burke-White & Von Staden, NPM Clauses, *supra* note 9, at 354.

[57] As can be seen, states understand "security" either broadly (Germany) by including several interests within the concept, or narrowly (India) by limiting it to a particular state interest.

[58] For instance, the NPM clause of the 2004 U.S. Model BIT provides that "nothing in this treaty shall preclude the application by either Party of measures necessary for ... the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security." *See* 2004 U.S. Model BIT art. 18 [2004 U.S. Model BIT], available online at: < http://www.ustr.gov/assets/Trade-Sectors/nvestment/Model-BIT/asset-upload-fie847-6897.pdf> (last visited 23 October 2014).

[59] The U.N. Charter, Article 24. States also may take actions to pursue this permissible objective under the mandate of regional organizations, rather than by the Security Council. In such a case, the actions must be taken pursuant to Chapter VIII of the U.N. Charter. Available online at: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> (last visited 23 October 2014).

of the Security Council",[60] they will not be held responsible for breaching their treaty obligations under IIAs if state measures have been directed at accomplishing the Security Council decisions. U.S. treaty practice also confirms the relation of this permissible objective to accomplishing state obligations under Chapter VIII of the UN Charter. For example, the Protocol to the U.S.-Argentina BIT concerning its NPM clause provides that, "'obligations with respect to the maintenance or restoration of international peace or security' means obligations under the Charter of the United Nations."[61]

D) Public Health

Public health is also regarded as one of the permissible objectives of NPM clauses found in many IIAs. It is considered "a salient public value and lies at the heart of state sovereignty."[62] Given that "public health is functional to the very existence of the state",[63] its protection is viewed as one of the primary duties of states. Therefore, states usually include it in the list of public policy objectives intended for protection by the NPM clauses of their IIAs.[64] As Burke-White and Von Staden note, public health differs from other permissible objectives in that the threat to it needs to be proven by objective scientific evidence.[65] If the threat in question meets

[60] *Ibid* at Article 25.
[61] The U.S -Argentina BIT, *supra* note 36, Protocol, para 6.
[62] Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Abingdon: Routledge, 2013) at 30.
[63] *Ibid*.
[64] Public health is included in all of Germany's BITs, and in Canadian BITs based on its 2004 Model BIT. However, it is formulated differently in the NPM clauses of Canadian BITs. It does not only cover the protection of the health of humans but also the protection of animal and plant life in the country ("…nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary to (a) protect human, animal or plant life or health;") *See* Canadian 2004 Model BIT. Similarly, Indian and Chinese BITs include the wording "the prevention of diseases and pests in animals and plants." *See* India-Czech Republic BIT (1996) Article 12; China-Singapore BIT (1986) Article 11.
[65] Burke-White &Von Staden, NPM Clauses, *supra* note 9, at 361.

the relevant scientific standard, then the state measures adopted to protect public health can be justified under the NPM clause.

The WTO regime is considered to offer such a standard. Under Article XX of the GATT, states may adopt measures "necessary to protect human, animal or plant life or health", even if they are inconsistent with provisions of the GATT.[66] The Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) to some extent clarifies the standard for justifying public health actions. In particular, it provides that, "[m]embers shall ensure that any sanitary and phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, *is based on scientific principles and is not maintained without sufficient scientific evidence,* except as provided for in paragraph 7 of Article 5."[67]

In several cases, the WTO dispute settlement bodies (DSB) clarified specific requirements with regard to the application of the above-mentioned provision of the SPS Agreement. First, the Appellate Body (AB) pointed out that it requires an "objective assessment of facts", rather than giving complete deference to a state to make determinations in adopting SPS measures.[68] Second, the AB required that "there be a rational or objective relationship

[66] GATT, *supra* note 16, Article XX. However, the chapeau of Article XX provides that measures undertaken in pursuit of the permissible objectives are "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." *Ibid*.

[67] *See* Agreement on the Application of Sanitary and Phytosanitary Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, Article 2(2) [emphasis added]. Available online at: <https://www.wto.org/english/docs_e/legal_e/15-sps.pdf> (last visited 25 October 2014).
As for Article 5(7), which is an exception to this standard, it permits provisional measures under the "precautionary principle" in cases where sufficient scientific evidence is lacking.

[68] Appellate Body Report, *European Communities-Measures Concerning Meat and Meat Products (Hormones)*, (Jan. 16, 1998), WT/DS26/AB/R & WT/DS48/AB/R at paras 116-19 [*EC- Hormones*].
Available online at: <https://www.wto.org/english/tratop_e/dispu_e/hormab.pdf> (last visited 25 October 2014);
Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, (Mar. 12, 2001), WT/DSI35/AB/R at para 178 [EC-Asbestos]. Available online at: <https://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf> (last visited 25 October 2014).

between the SPS measures and the scientific evidence."[69] Third, such "risk assessments" and the SPS measures adopted based on them need not be based on majority views within the scientific community, but may also be grounded on minority views, provided they come from respected sources, are reasonable, and the rational link between risk assessment and adopted measures is preserved.[70]

E) Public Morality

The IIAs of several states provide for state actions considered necessary to protect public morality. Specifically, it can be found in the list of permissible objectives in the NPM clauses of BITs concluded by the United States,[71] Germany,[72] Switzerland,[73] Peru[74] and Turkey[75]. Unlike public health, public morality is considered to be a relative concept. Based on the fundamental religious values and cultural traditions of each particular society, public morals are conceived differently from one society to the other.[76]

As a legal concept, it is defined as a set of values regulating the conduct of people of a given society on the basis that what they do is conceived to be morally wrong.[77] In the adjudicative practice of the WTO regime, "public morality" has been defined as "standards of

[69] The Appellate Body Report, *Japan-Measures Affecting Agricultural Products*, (Feb. 22, 1999), WT/DS76/AB/R at para 84. Online at: < https://www.wto.org/english/tratop_e/dispu_e/542d.pdf> (last visited 25 October 2014) ("Whether there is a rational relationship between an SPS measure and the scientific evidence is to be determined on a case-by-case basis and will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence.") *Ibid*.
[70] *EC-Asbestos*, *supra* note 68, at para 178; *EC- Hormones*, *supra* note 68, at para 194.
[71] *See* The U.S.-Egypt BIT (1986) Article X; U.S.-Senegal BIT (1982) Article X.
[72] *See* Germany-China BIT (2003) Protocol 4(a).
[73] *See* Switzerland-Chad BIT (1967) Article 2(3).
[74] *See* Peru- Bolivia BIT (1993) Article 3 (5).
[75] *See* Turkey-Qatar BIT (2001) Article 7
[76] *See* Jeremy C. Marwell, "Trade and Morality: The WTO Public Morals Exception after Gambling", (2006) 81 New York University Law Review 802 at 815.
[77] Christopher Wolfe, "Public Morality and the Modern Supreme Court", (2000) 45 American Journal of Jurisprudence 65 at 65-66.

right and wrong conduct maintained by or on behalf of a community or nation,"[78] while in the ECtHR regime, public morality has not been given a specific meaning and arguably lacks a uniform definition due to its varying meanings in time and place.[79] Thus, considering the relative nature of this concept, states are afforded broad discretion and flexibility in taking appropriate measures to protect public morals in their societies.[80] Based on the approach taken by the ECtHR and WTO DSBs, Burke-White and Von Staden argue that a state invoking a public morality exception would need to show evidence that its adopted measures "reflect or respond to prevailing moral views within its own polity and are intended to protect them."[81]

F) Environment and Financial Services

To avoid vagueness in the content of NPM clauses and provide predictability for foreign investors, some developed states have started including a more detailed list of permissible objectives in the NPM clauses of their IIAs. This can be observed especially in the U.S. BITs concluded after 2004. Specifically, U.S. IIAs based on its 2004 Model BIT offer more detailed and well-drafted exceptions on the protection of the environment and a state's financial system.[82]

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[78] WTO Panel Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, (10 November 2004), WT/DS285/R, at 6.465.
Available online: <https://www.wto.org/english/tratop_e/dispu_e/285r_e.pdf> (last visited 26 October 2014).

[79] In one of its judgements, the European Court for Human Rights noted as follows:

> [I]t is not possible to find in the domestic law of the various Contracting States *a uniform European conception of morals*. The view taken by their respective laws of *the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject*. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.

See Handyside v United Kingdom, (1976) 24 European Court for Human Rights at 22, para 48 [emphasis added].

[80] Burke-White & Von Staden, NPM Clause, *supra* note 7, at 364.

[81] *Ibid* at 366.

[82] The U.S. 2012 Model BIT also contains similar provisions.
Available online: <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last visited 27 October 2014).

Unlike Canadian BITs, which include all these permissible objectives under one treaty NPM clause,[83] the U.S. BITs define them as fact-specific exceptions in three separate treaty provisions.[84] As a result of this division, the following clauses appear: environmental security, financial security and essential security.

The most notable aspect is that, besides providing for the substantive content of measures directed at protecting the state's financial system, the provision also establishes procedural mechanisms for applying it in practice. In this regard, the provision allows the treaty parties to jointly decide on its scope of application without resorting to an arbitral panel.[85] To accomplish this, both parties are required to hold consultations of their financial authorities where they shall attempt in good faith to jointly determine the validity of the defense to the claim. The parties'

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[83] For instance, the NPM clause of the Canada-Jordan BIT (Article 10), which is based on the its 2004 model BIT, describes these two permissible objectives as follows:

> 1. ... nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: a) to protect human, animal or plant life or health; ....c) for the conservation of living or non-living exhaustible natural resources.
>
> 2. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining reasonable measures for prudential reasons, such as:
>
> a) the protection of investors, depositors, financial market participants, policy holders, policy claimants, or persons to whom a fiduciary duty is owed by a financial institution;
>
> b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
>
> c) ensuring the integrity and stability of a Party's financial system.

[84] *See* The U.S.-Uruguay BIT (2005), The U.S.-Rwanda BIT (2008), Articles 12, 18 and 20.

Article 12 with a heading "Investment and Environment" provides as follows: "Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

Article 18 with a heading "Essential Security" provides: "Nothing in this Treaty shall be construed.....to preclude a Party from applying measures that it considers necessary for 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."

Article 20 with a heading "Financial Services" provides as follows:

> Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty.

(*It should be noted that the term " 'prudential reasons' includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions, as well as the maintenance of the safety and financial and operational integrity of payment and clearing systems*.") *Ibid*, footnote 17.

[85] *Ibid*, Article 20, 3(a).

joint determination "shall be binding on the tribunal."[86] This aspect of the provision permits the treaty parties to agree on the effects of its invocation and authorizes them to completely overrule the foreign investor's decision to bring a claim. Furthermore, the provision sets out special procedures requiring disputing parties to choose arbitrators with expertise or experience in finance.[87] The inclusion of this requirement ensures the effective assessment of facts related to financial emergency and the attainment of well-reasoned decisions on financial matters. Taken altogether, these procedural mechanisms take into account the concerns of states with respect to invoking the necessity plea in financial emergencies, while also offering greater predictability to foreign investors in advancing their claims in such circumstances.

[86] *Ibid*, Article 20, 3(b). In case the parties' competent financial authorities have not made such a determination, "the tribunal shall decide the issue or issues left unresolved by the competent financial authorities." *Ibid*.

[87] The provision states: "In the appointment of all arbitrators not yet appointed to the tribunal, each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to the particular sector of financial services in which the dispute arises shall be taken into account in the appointment of the presiding arbitrator." *Ibid*.

4.2. The Interpretation of NPM Clauses: Inconsistent Decisions in the Argentine Cases

Investment arbitration tribunals had not been intensely involved in interpreting NPM clauses until they decided the investment disputes arising from the 2001-2002 Argentine financial crisis. Even though the practice of international investment tribunals included a few cases involving the necessity defense, they had mainly arisen from non-economic emergency situations and had not drawn attention by prompting much criticism.[88] The investment disputes arising from the Argentine financial crisis introduced economic emergencies as a ground for invoking treaty NPM clauses in the realm of investor-state arbitration. Additionally, the Argentine cases have brought many other issues into the practice of investment arbitration tribunals. Specifically, inconsistent interpretations by arbitral tribunals with regard to the NPM clause of the U.S.-Argentina BIT have been severely criticised for potentially threatening the legitimacy of the investment regime.[89] Moreover, they caused much debate among academics and legal practitioners.[90] Thus, in the following sections I will present a detailed overview of the

[88] In these cases, the necessity defense arose from substantive treaty provisions providing for compensation to the investor, in accordance with national and most favored nation treatment, for losses incurred by armed conflict, insurrections, internal disorder and natural disasters. However, none of these necessity defenses of a non-economic character have been successful. *See Asian Agricultural Products Ltd v. Sri Lanka*, (1991) Final Award on Merits and Damages, ICSID Case No. ARB/87/3; *American Manufacturing & Trading Inc. v. Zaire*, (1997) Award and Separate Opinion, ICSID Case No. ARB/93/1; *Consortium RFCC v Morocco*, (2003) Award, ICSID Case No. ARB/00/6; *Bernardus Henricus Funnekotter & ors v Zimbabwe*, (2009) Award, ICSID Case No. ARB/05/6; *Mitchell v. Democratic Republic of Congo*, (2006) Decision on the Application for Annulment of the Award, ICSID Case No. ARB/99/7. T**he decisions of all referred to investment arbitration cases are available online**: <http://www.italaw.com/> (last visited 20 June 2015).

[89] *See* José Alvarez, *The Public International Law Regime Governing International Investment*, (The Hague: Hague Academy of International Law, 2011) [Alvarez, *Investment Regime*]; David Schneiderman, "Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?", (2011) 2(2) Journal of International Dispute Settlement 471; Susan Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions", (2005) 73 Fordham Law Review 1521.

[90] José Alvarez & Kathryn Khamsi, "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime", in Karl P. Sauvant, ed., *Yearbook on International Investment Law & Policy 2008-2009* (New York: Oxford University Press, 2009) 379 [Alvarez & Khamsi]; José Alvarez and Tegan Brink, "Revisiting the Necessity Defense: Continental Casualty v. Argentina", in Karl P. Sauvant ed, *Yearbook on International Investment Law & Policy 2011-2012* (New York: Oxford University Press, 2011) 319 [Alvarez & Brink]; Antoine Martin, "Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-Precluded Measures and the Doctrine of Necessity under Customary International Law", (2012) 29 (1) Journal of International Arbitration 49;

interpretative issues addressed by arbitral tribunals in the Argentine cases. I decided to examine the Argentine cases by grouping them into two categories. The first category includes cases involving the invocation and interpretation of the NPM clause (Article XI) of the U.S.-Argentina BIT.[91] The issues addressed in this category of cases are mainly related to interpreting Article XI by reference to elements of the customary necessity defense (conflation approach) and clarifying the relationship between treaty NPM clauses and the customary necessity defense (primary-secondary rule approach) in terms of their application by investment arbitration tribunals. Since an examination of the self-judging character of Article XI caused a fierce debate at the experts' level and entails the clarification of several other issues, the analysis of interpretative issues related to this aspect of NPM clauses will be presented in a separate chapter (Chapter V). The second category includes cases in which investment claims were based on other Argentinean BITs not containing an NPM clause.[92] In this category of cases, I will examine questions such as whether states can justify their emergency measures under the "war and disturbance" clauses

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Tarcisio Gazzini, "Necessity in International Investment Law: Some Critical Remarks on CMS v Argentina", (2008) 26 Journal of Energy and Natural Resources Law 450 [Gazzini, *CMS v. Argentina*]; Andrea Bjorklund, Economic Security Defenses, *supra* note 6, at 495; Burke-White & Von Staden, NPM Clauses, *supra* note 9; Jürgen Kurtz, Adjudging the Exceptional, *supra* note 42.

[91] *CMS* Award, *supra* note 49; *Enron Corp et al v The Argentine Republic*, (22 May 2007) Award, ICSID Case No.ARB/01/3 [*Enron* Award]; *Sempra Energy Int'l v Argentina,* (28 September 2007) Award, ICSID Case No. ARB/02/16 [*Sempra* Award]; *LG&E*, Decision on Liability, *supra* note 49; *Continental Casualty Co. v Argentine Republic*, (5 September 2008) Award, ICSID Case No. ARB/03/9 [*Continental* Award]; *CMS Gas Transmission Co v The Argentine Republic*, (25 September 2007) Annulment Decision, ICSID Case No.ARB/01/8 [*CMS* Annulment]; *Enron Creditors Recovery Corp. Ponderosa Assets. LP v Argentine Republic*, (30 July 2010) Decision on Annulment, ICSID Case No.ARB/01/3 [*Enron* Annulment]; *Sempra Energy Int'l v Argentine Republic*, (29 June 2010) Decision on Annulment, ICSID Case No.ARB/02/16 [*Sempra* Annulment].

[92] In these cases, Argentina attempted to justify its measures under the customary necessity defense and the tribunals were tasked with the issue of whether the customary necessity defense is still available when the BIT at issue does not contain an NPM clause. To enquire into this issue, the following cases will be examined: *BG Group and the Republic of Argentina*, (24 December 2007) Award, UNCITRAL [*BG Group*]; *National Grid P.L.C. v Argentine Republic*, 3 (3 November 2008) Award, UNCITRAL [*National Grid*]; *Total SA v Argentine Republic*, (27 December 2010) Decision on Liability, ICSID Case No. ARB/04/1 [*Total*]; *EDF International S.A., SAUR International S.A. and Leon Particicpciones Argentina S.A. v Argentina Republic*, (11 June 2012) Award, ICSID Case No. ARB/03/23) [*EDF*]; *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v The Argentine Republic*, (30 July 2010) Decision on Liability, ICSID Case No. ARB/03/17 [*Suez*]; *Impregilo Spa v Argentina Republic*, (21 June 2011) Award, ICSID Case No. ARB/07/17 [*Empregilo*]; *Hochtief AG v Argentine Republic*, (December 29, 2014) Decision on Liability, ICSID Case No.ARB/07/31 [*Hochtief*].

granting states a right to adopt necessity measures in situations of armed conflict and national emergencies, and whether states can invoke the customary necessity defense in a subsidiary way when the treaty does not include an NPM clause.

Before discussing these cases, I found it appropriate to first give a brief background on the tribunals' interpretative approaches, since it will be helpful to understanding the further discussion on the interpretative issues related to the treaty NPM clauses, as well as their relationship with the customary necessity defense.

4.2.1. Factual Background: Diverging Approaches to Interpreting Treaty NPM Clauses

Argentina experienced a severe financial crisis at the beginning of the 2000s.[93] To tackle the crisis, the Government of Argentina took different measures, which had negative consequences for foreign investors' interests and resulted in several investor-state disputes. To justify its measures in the arbitrations submitted against it, Argentina invoked the NPM clause of the U.S.-Argentina BIT and the necessity defense in customary international law. In these disputes, the ad hoc tribunals were primarily tasked with interpreting Article XI of the U.S.-Argentina BIT, which provides as follows:

> 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*.[94]

[93] For a detailed description of the financial crisis, *see* Introduction of this thesis.
[94] Article XI, the U.S.-Argentina BIT, *supra* note 36 (emphasis added).

Interestingly, tribunals have taken inconsistent approaches to interpreting the nexus requirement of the NPM clause of Argentina-U.S. BIT (Article XI).[95] For instance, the tribunals in *LG&E v. Argentine Republic (LG&E)*[96] and *Continental Casualty v. Argentine Republic (Continental Casualty)*[97] examined the NPM clause independently from the customary necessity defense. Both tribunals considered the treaty NPM clause and the customary necessity defense as being distinct, and did not apply the requirements of the latter to interpreting the former. As for the *LG&E* tribunal, it separated its analysis of the treaty NPM clause from the necessity defense under customary international law. Even though the *LG&E* tribunal referred to the customary necessity defence to reinforce its conclusion, it excused Argentina from liability for a period of time on the basis of the treaty NPM clause.[98] Similarly, the *Continental* tribunal also emphasised the difference between the two defenses in terms of content and conditions of application.[99] Therefore, the tribunal held that Argentina's measures taken under the NPM clause "would lie outside the scope of the Treaty so that the party taking it would not be in breach of the relevant

[95] As previously explained, the nexus requirement of this NPM clause, the "necessary for" term, requires that the measures taken by states correspond to one of specified permissible objectives highlighted in bold and be 'necessary' to attain these objectives.

[96] *LG&E*, Decision on Liability, *supra* note 49. *See* also, David Foster, "Necessity Knows No Law! - LG&E v. Argentina", (2006) 9 International Arbitration Law Review 149.

[97] *Continental* Award, *supra* note 91.

[98] The Tribunal noted as follows:

> The concept of excusing a State for the responsibility for violation of its international obligations during what is called a "state of necessity" or "state of emergency" also exists in international law. While the Tribunal considers that the protections afforded by Article XI have been triggered in this case, and are sufficient to excuse Argentina's liability, the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in Article 25 of the ILC's Draft Articles on State Responsibility) supports the Tribunal's conclusion.

LG&E, Decision on Liability, *supra* note 49, at para 245.

[99] *Continental* Award, *supra* note 91, at paras 166-167.

BIT provision",[100] and a foreign investor "could therefore not succeed in its claim for responsibility and damages in such an instance."[101]

The tribunals in *CMS Gas Transmission Company v. Argentine Republic (CMS),*[102] *Enron v. Argentine Republic (Enron),*[103] and *Sempra v. Argentine Republic (Sempra)*[104] took a different approach. In reviewing Argentina's measures under Article XI of the BIT, the tribunals applied the requirements of the necessity defense in customary international law. The tribunals held that the treaty is "inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned",[105] and thus found that the requirements of the customary necessity defense were "relevant" in establishing whether the necessary conditions had been met for invoking the NPM clause of the BIT.[106] Accordingly, the tribunals found that the treaty NPM clause could not operate as a general exception for Argentina's measures and exclude its duty to pay compensation for the damages incurred by foreign investors.[107]

In this section, I will shed light on the analyses performed by the above-mentioned arbitral tribunals with regard to interpreting the NPM clause in the U.S.-Argentina BIT. First, I will discuss how the tribunals dealt with the interpretative issue of whether economic

[100] *Ibid* at para 164.
[101] *Ibid*. Later, the *CMS* and *Sempra* Annulment committees also emphasized that Article XI of the BIT and the customary necessity defense are two distinct defenses. Analysis of the annulment committees' decisions will be presented in a following section of this chapter.
[102] *CMS* Award, *supra* note 49. For analysis of the tribunals' decisions, *see* José Rossel, "The CMS Case: A Lesson for the Future", 25(4) Journal of International Arbitration 493; Graham Mayeda, "International Investment Agreements between Developed and Developing Countries: Dancing with the Devil? Case Comment on the *Vivendi*, *Sempra* and *Enron* Awards", (2008) 4 McGill International Journal of Sustainable Development, Law & Policy 189; Alexis Martinez, "Invoking State Defenses in Investment Treaty Arbitration", in Michael Waibel, Asha Kaushal & Kyo-Hwa Liz Chung, *The Backlash Against Investment Arbitration: Perceptions and Reality* (The Hague: Kluwer Law International, 2010) at 315.
[103] *Enron* Award, *supra* note 91.
[104] *Sempra* Award, *supra* note 91.
[105] *Enron* Award, *supra* note 91, at para 334.
[106] *Sempra* Award, *supra* note 91, at para 375.
[107] In this respect, the *CMS* tribunal opined that "the plea of state of necessity may preclude the wrongfulness of an act, but it does not exclude the duty to compensate the owner." *See CMS* Award, *supra* note 49, at para 388. Similarly, the *Enron* tribunal held that even if the provision was found applicable, compensation could still be due to the investor, absent a negotiated settlement between the parties. *See Enron* Award, *supra* note 91, at para 345.

emergencies can be covered by treaty NPM clauses. Then, I will present the tribunals' analyses on interpreting Article XI of the BIT under the requirements of the customary necessity defense.

4.2.2. Placing Economic Emergencies within a State's Essential Security Interests

4.2.2.1. Are Economic Crises Covered by Treaty NPM Clauses?

The inclusion of economic emergencies within the context of a state's essential interests was one of the primary interpretative issues addressed by arbitration tribunals in the Argentine cases. Specifically, the tribunals were tasked with clarifying whether a permissible objective in the NPM clause (Article XI) of the U.S.-Argentina BIT, a state's "essential security interests", could encompass emergencies of an economic nature.[108] Even though all of the tribunals answered in the affirmative, the reasoning provided differed. For instance, the *LG&E* tribunal held that "essential security" interests could not be read as covering only military or defence concerns. The tribunal noted that,

> [t]o conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. When a state's economic foundation is under siege, the severity of the problem can equal that of any military invasion.[109]

Thus, the *LG&E* tribunal held that "economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external

[108] Asif H. Qureshi, "A Necessity Paradigm of 'Necessity' in International Economic Law", (2010) 41 Netherlands Yearbook of International Law 99 at 119-120. In all cases, the U.S. investors claimed that the NPM clause does not encompass economic emergencies.

[109] *LG&E*, Decision on Liability, *supra* note 49, at para 238. In reaching this conclusion, it pointed to coalescing economic, political and social conditions that cumulatively triggered Argentina's ability to invoke the protections of the NPM clause. Particularly, the tribunal noted that economic indicators had reached 'catastrophic proportions' by December 2001, including a severe decline in the gross domestic product, a widespread decline in stock prices and in the value of assets located in Argentina, and capital outflows resulting in the banking system's loss of 25 percent of its total deposits. *Ibid* at para 233.

situation, are also considered essential interests."[110] Similarly, the *CMS* tribunal also determined that the BIT's NPM clause could encompass an economic crisis, despite the absence of an explicit reference to such in the text of the Article. The tribunal did not perform any separate analysis supporting this conclusion. Rather, it held that "there is nothing in the context of customary international law or object and purpose of the treaty that could on its own exclude major economic crises from the scope of Article XI."[111] By putting more emphasis on treaty parties' concerns with regard to interpretation, the tribunal held as follows:

> If the concept of essential security interests were to be limited to immediate political and national security concerns, particularly of an international character, and were to exclude other interests, for example major economic emergencies, it could well result in an unbalanced understanding of Article XI. Such an approach would not be entirely consistent with the rules governing the interpretation of treaties.[112]

The *Enron* and the *Sempra* tribunals also followed this approach. In particular, the *Enron* tribunal held that "there is nothing that would prevent an interpretation allowing for the inclusion of economic emergency in the context of Article XI."[113] Confirming the *Enron* tribunal's stance, the *Sempra* tribunal also determined that the NPM clause of the U.S.-Argentina BIT could indeed extend to economic crises, since essential security interests "could encompass situations

[110] *Ibid* at para 251.
[111] *CMS* Award, *supra* note 49, at para 359.
[112] *Ibid* at para 360. The approach taken by the *CMS* tribunal in this respect is also regarded by a scholar, Sarah Hill, as one of contributions to the development of necessity defence in customary international law. She notes that "[a]lthough the tribunal ultimately found that the economic crisis did not rise to the level of an essential security interest, its determination that necessity is not limited to military action is significant the advancement of necessity as a defense in customary international law." *See* Sarah Hill, "The 'Necessity Defense' and the Emerging Arbitral Conflict in its Application to the U.S-Argentina Bilateral Investment Treaty", (2007) 13 Law and Business Review of the Americas 547 at 559.
[113] *Enron* Award, *supra* note 91, at para 332.

other than the traditional military threats for which the institution found its origins in customary law."[114]

4.2.2.2. Gravity of the Peril as an Essential Factor

In spite of the fact that all tribunals agreed on the inclusion of economic emergency in the context of the NPM clause, their views with regard to the degree of gravity of the economic crisis required for threatening a state's essential interests differed. Based on this criterion, the tribunals decided whether the economic crisis actually threatened the essential interests of Argentina. The *CMS* tribunal was first to consider this issue. It acknowledged that the financial crisis and the accompanying "need to prevent a major breakdown, with all its social and political implications, might have entailed an essential interest of the State."[115] The tribunal was "convinced that the crisis was indeed severe and the argument that nothing happened is not tenable."[116] However, it further pointed out that the economic crisis was "severe but did not result in total economic and social collapse."[117] As a result, the tribunal found that Argentina had not demonstrated that an essential interest was affected by economic crisis, concluding that "the relative effect that can be reasonably attributed to the crisis does not allow for a finding on

[114] *Sempra* Award, *supra* note 91, at para 374. The *Continental* tribunal also took the same approach by supporting the holdings of the abovementioned tribunals. Particularly, the tribunal pointed out the following:

> It is well known that the concept of international security of States in the Post World War II *international order was intended to cover not only political and military security but also the economic security of States and of their population*. The Preamble to the Charter of the United Nations and, even more relevant for the present case, that of the International Monetary Fund support this approach. As noted by the International Law Commission, States have invoked necessity "to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population."

See Continental Casualty, *supra* note 91, at para 175, 178 [emphasis added].

[115] *CMS* Award, *supra* note 49, at para 319.

[116] *Ibid* at para 320.

[117] *CMS* Award, *supra* note 49, at para 355.

preclusion of wrongfulness."[118] The *Sempra* and *Enron* tribunals also made similar findings. For example, the *Sempra* tribunal held that "the argument that such a situation compromised the very existence of the State and its independence, and thereby qualified as one involving an essential State interest, is not convincing."[119]

As for the *LG&E* and the *Continental* tribunals, they made different findings in spite of the fact that all of them dealt with the same facts concerning the emergency measures. The *LG&E* tribunal noted that Argentina 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."[120] Therefore, the *LG&E* tribunal held that the situation in Argentina "constituted the highest degree of public disorder and threatened Argentina's essential security interests."[121] It further concluded that "[e]xtremely severe crises in the economic, political and social sectors reached their apex....threatening total collapse of the Government and the Argentine State."[122] As for the *Continental* tribunal, by referring to serious social and political effects flowing from the financial crisis, it held that the severity of the circumstances put the essential security interests of Argentina under threat.[123]

It can be concluded that, even though the tribunals held that economic emergencies could be encompassed by the state's "essential security interests", they must be of substantially serious nature to qualify as a grave threat to essential security interests of a state.

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[118] *CMS* Award, *supra* note 49, at para 321.
[119] *Sempra* Award, *supra* note 91, at para 348; *Enron* Award, *supra* note 91, at para 306.
[120] *LG &E*, Decision on Liability, *supra* note 49, at para 257.
[121] *Ibid* at para 231.
[122] *Ibid*.
[123] The tribunal held as follows:

> [T]he leap in unemployment; the social hardships bringing down more than half of the population below the poverty line; [and] the immediate threats to the health of young children, the sick and the most vulnerable members of the population .... [constituted] a situation where the maintenance of public order and the protection of essential security interest of Argentina as a state and as a country was vitally at stake. *Ibid*.

4.2.3. Conflating Treaty NPM Clauses and the Customary Necessity Defense

Unlike the *LG&E* and *Continental Casualty* tribunals, which considered the NPM clause of the U.S.-Argentina BIT as distinct from the customary necessity defense, the *CMS*, *Enron* and *Sempra* tribunals took a different approach to interpreting the NPM clause at issue. Finding "no specific guidance" with respect to interpreting the NPM clause under the treaty,[124] the tribunals found it "necessary to rely on the requirements of the state of necessity under customary law."[125] Thus, in interpreting the treaty NPM clause, they put much emphasis on the requirements of the customary necessity defense and gave little consideration to the treaty clause itself. As a result, they effectively imported the requirements of the customary international law defense of necessity into the treaty NPM clause, and hence conflated the two defenses.

In the following paragraphs, I will present the tribunals' analyses on applying the requirements of customary necessity defense (Article 25 of ARSIWA) to interpreting the NPM clause at issue.[126] Specifically, I will touch upon those requirements that were not analysed thoroughly by the arbitral tribunals in the Argentine cases. In the conclusive part of the section, I will attempt to identify the factors influencing the tribunals to take divergent approaches to interpreting the treaty NPM clause and thus arrive at inconsistent decisions about the liability of Argentina. But first, I found it important to inquire into whether Article 25 of ARSIWA applies exclusively to inter-state relations, and thus becomes inapplicable due to the involvement of non-state (private) actors (foreign investors) in investment arbitration.

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[124] *Enron* Award, *supra* note 91, at para 333.

[125] *Sempra* Award, *supra* note 91, at para 378.
The *Sempra* tribunal noted that "the treaty itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity...the rule governing such questions will thus be found under customary law." *Ibid* at para 378. Similarly, the *Enron* tribunal held that, "....the Treaty itself did not deal with these elements. The Treaty thus becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned." *Enron* Award, *supra* note 91, at para 334.

[126] A detailed presentation of all requirements of the customary necessity defense was offered in the context of public international law in the previous chapter.

4.2.3.1. Questioning the Applicability of Article 25 to Public-Private Relations

The question of whether the customary necessity defense (article 25 of ARSIWA) can be applied in the relations between states and private parties was touched upon in one of the Argentine cases. The *BG Group* tribunal briefly noted that "Article 25 may relate exclusively to international obligations between sovereign States."[127] However, that conclusion seems to contradict the view of the ILC, which describes the scope of Articles on state responsibility as follows:

> [T]he present articles are concerned with the whole field of State responsibility... [which makes them] not limited to breaches of obligations of a bilateral character ... and apply to the whole field of international obligations of States, whether is owed to one or several States, to an *individual or group*, or to the international community as a whole.[128]

The ILC clarified that part one of ARSIWA, which includes Article 25, applies to all international obligations irrespective of whether they are owed to other states or non-state actors. This can be observed in the ILC's comment that "state responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a state."[129] However, contrary to the ILC's view, the decision of the German Constitutional Court rendered in 2007 regarding the claims of private individuals against Argentina gave rise to a debate on the availability of the customary necessity defense in investor-state arbitration.[130] While recognizing that Article 25 reflects an accurate codification of

[127] *BG Group*, *supra* note 92, at para 408.
[128] James Crawford, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) at 32, para 5 [emphasis added] [Crawford, *Commentaries*].
[129] *Ibid* at 87, para 3 (Commentary on Article 28).
[130] The default of Argentina as a result of financial crisis did not only give rise to investor-state arbitrations, but also to domestic court proceedings brought by private individuals against Argentina. As a consequence of these private claims, the German Constitutional Court rendered a decision in 2007 on the question of whether Argentina could invoke necessity as a defence in German court proceedings against private bondholders' claims arising from the country's 2002 default. Stephan W. Schill & Yun-I Kim, "Sovereign Bonds in Economic Crisis: Is the Necessity Defense under International Law Applicable to Investor–State Relations? A Critical Analysis of the Decision by the

customary international law, the Court found that it applies only to relationships regulated by international law, not to those regulated by private law.[131] The Court also emphasized the divergence of views in legal scholarship on the possibility of invoking necessity under international law in relations governed by private law. Thus, the German Constitutional Court held that there is no rule of international law that empowers a state to adjourn the performance of its private law obligations with respect to individuals in a state of necessity.[132] In support of its conclusion, the Court referred to a few decisions by international courts and tribunals addressing the necessity plea. The disputes in these cases (*Serbian Loans, French Company of Venezuela Railroads, and Russian Indemnity*)[133] involved contract claims in which states invoked their right of diplomatic protection, the exercise of which is pertinent to only states. Therefore, the Court concluded that these decisions of international tribunals, as "purely international proceedings cannot be used as indicia in the assessment of state practice concerning the direct defense of state necessity vis-à-vis private persons."[134]

The views of distinguished scholars in investment arbitration also seem to support this approach of the German Constitutional Court. For instance, Andrea Bjorklund generally observes that the ARSIWA, including Article 25, "were drafted to serve general purposes; they were not drafted to serve the interests of investor-state arbitration, or even of investment generally."[135] Another scholar, Professor Sornarajah, also seems to put the usage of the

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German Constitutional Court in the Argentine Bondholder Cases", in Karl P. Sauvant ed., *Yearbook on International Investment Law & Policy* (2010/2011) 485-512, at 487 [Schill & Kim]; On financial crises and sovereign default, s*ee* Michael Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge: Cambridge University Press, 2011); Sean Hagan, "Designing a Legal Framework to Restructure Sovereign Debt", (2005) 36 Georgetown Journal of International Law 299.

[131] Schill & Kim, *supra* note 130, at 497-498.

[132] *Ibid* at 498.

[133] These cases were discussed in detail in Chapter III.

[134] Schill & Kim, *supra* note 130, at 498.

[135] Bjorklund, Emergency Exceptions, *supra* note 6, at 522.

customary necessity defense in investment arbitration in doubt by emphasizing that "[t]he limits of defenses such as necessity in terms of customary international law and its application in the investment context remain to be worked out."[136]

However, it should also be noted that one of the judges of the German Constitutional Court, Lübbe-Wolff, did not agree with the majority's conclusion and criticized it in her dissenting opinion. In her view, the necessity defense constitutes a general principle of law and its invocation cannot be limited to inter-state relations.[137] Lübbe-Wolff gave a different line of reasoning with respect to existing state practice and international jurisprudence. According to her, state practice as documented by the ILC during its work on ARSIWA suggested that "necessity always has been viewed as a principle of law independent of the legal basis of claims asserted against a State in domestic or international law."[138] In support of her argument, she referred to the *Russian Indemnity* case, in which the tribunal transposed the private law concept of *force majeure* to international law.[139] Thus, contrary to the majority's restrictive position, Lübbe-Wolff concluded that this and other abovementioned decisions did not distinguish between different legal spheres, confirming that the "purpose and meaning of the legal principle of necessity do not suggest that it offers less protection to the debtor State as against a private, foreign creditor than against a foreign country."[140]

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[136] Muthucumaraswamy Sornarajah, "Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness", in Chester Brown & Kate Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) at 656.

[137] According to Lübbe-Wolff, necessity grants States the right "in certain narrowly defined circumstances, to give precedence to concerns of common welfare over the repayment of monetary obligations, even if these obligations are based on private law contracts and are governed by the municipal law of a foreign State." Schill & Kim, *supra* note 130, at 499.

[138] Schill & Kim, *supra* note 130, at 499.

[139] As was discussed in Chapter III, the term *force majeure* was used at that time for circumstances that today would be considered to be necessity.

[140] Schill & Kim, *supra* note 130, at 499.

As can be seen, the majority in the German Constitutional Court found that necessity under international law cannot be applied to relations between the Argentinean state and private bondholders. Stephan Shill and Yun-I Kim describe this dualistic approach, based on the distinction between inter-state relations and those between states and private parties, as a legal anachronism.[141] In this regard, they bring the following argument:

> After all, the fact that necessity under international law, before the advent of investment treaty arbitration, has mainly played a role in inter-State proceedings is not a consequence of the fact that the concept is exclusively applicable to inter-State relationships, as the German Constitutional Court suggests, but rather to be explained by the limited standing individuals traditionally have had in most international dispute settlement fora.[142]

Summarizing the above mentioned, it should be pointed out that the participation of private parties in relations with sovereign states has become a widespread phenomenon in modern international relations and part of international law. The observance of the great number of claims made by private parties against states in different specialized regimes of international law truly reflects and confirms this phenomenon.[143] Thus, taking into account the above mentioned, it can be concluded that the involvement of private parties in the investor-state arbitration regime does not result in the inapplicability of the necessity defense as established under Article 25 of ARSIWA. That being said, in the following subparagraphs, I will shed light on how the arbitral tribunals in the Argentine cases applied the elements of Article 25 to interpreting the treaty NPM clause in question.

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[141] Schill & Kim, *supra* note 130, at 501. In the scholars' view, the court interpreted the decisions of international tribunals restrictively and they consider the court's dualistic approach as alien to modern international law. *Ibid*.
[142] Schill & Kim, *supra* note 130, at 505.
[143] Rosalyn Higgins argues that there are no subjects or objects but only participants in international law, and thus individuals (private parties) are considered to be participants. *See* Rosalyn Higgins, *Problem and Process: International Law and How we Use It* (Oxford: Oxford University Press, 1995) at 50.

4.2.3.2. The Only Means Requirement

(i) Tribunals' Findings and Analyses

As was discussed in the previous chapter, to successfully invoke the customary necessity defense, states need to meet all of its requirements cumulatively.[144] The "only means" element of the customary necessity defense requires a state to demonstrate that it had no means to protect its essential interests other than breaching its international obligation.[145] In other words, a state will fail this requirement if there are other (otherwise lawful) means available to respond to emergency situations, even if they are more costly or less convenient.[146] The tribunals interpreting Article XI of the BIT under the requirements of the customary necessity defense (*CMS, Enron, Sempra*) found that Argentina's measures taken as a response to the crisis failed to meet the "only means" requirement. Below, I will present an analysis of how the tribunals examined the measures of Argentina under the "only means" requirement and develop a discussion on possible approaches to clarifying the inherent ambiguity in the application of these words.

In the *CMS* case, based on conflicting views of the parties, the tribunal found the question of whether Argentina's measures adopted to tackle the crisis were the only means to safeguard its essential interests to be contentious. In spite of the fact that other alternatives such as dollarization of the economy or granting direct subsidies to the affected population or industries were discussed, the tribunal found it beyond its task to decide which alternative was better for

[144] The requirements are: (1) a threat to an "essential interest" of a particular state; (2) a "grave and imminent peril" to that interest; (3) the action taken is the "only way" to preserve that essential interest; (4) that the situation was not caused by the state in question seeking to invoke the plea; (5) that action does not impair the interests of other states; and (6) the action lasts only as long as the situation persists.
[145] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) at 184 [Crawford, ILC Articles].
[146] *Ibid*.

Argentina. Therefore, it only concluded that the measures adopted by Argentina were not the only steps available.[147]

The *Enron* tribunal also abstained from recommending to Argentina an alternative way to deal with the crisis. As in the *CMS* case, the tribunal held that Argentina had other choices and that it was far from clear that the measures chosen were the only way to achieve the desired objective. Immensely affected by the report of the economics professor who presented a comparative experience of other countries in handling economic crises, the tribunal held that there were always many ways to tackle such critical circumstances and it was difficult to establish that none of them were available to Argentina.[148] Similarly, the *Sempra* tribunal also adhered to this approach, holding that: "A rather sad global comparison of experiences in the handling of economic crises shows that there are always many approaches to addressing and resolving such critical events... therefore [it is] difficult to justify the position that only one of them was available in the Argentine case."[149]

As for the *LG&E* tribunal, even though it did not apply the requirements of the customary necessity defense in interpreting Article XI of the treaty, the comments made by the tribunal in that regard are worth mentioning. As for the "only means" requirement, the *LG&E* tribunal did not elaborate on possible alternative measures that Argentina could have been taken to mitigate

[147] *CMS* Award, *supra* note 49, at paras 323-324.

[148] *Enron* Award, *supra* note 91, at para 308. The most interesting aspect of the *Enron* tribunal's decision in this respect is that the tribunal totally relied on the opinion of the expert on economics. To be specific, the tribunal was immensely affected by the report of Professor Sebastián Edwards, who argued that Argentina had other alternatives available in addressing the economic crisis. In his view, the devaluation of the peso without pesification of contacts denominated in US dollars, accompanied by other measures, could have served as a potential alternative to tackling the crisis. *See Enron* Annulment, *supra* note 91, at para 366. The *Enron* annulment committee criticized the tribunal's approach for putting too much emphasis on the economic opinion and for not performing further legal analysis. *Ibid* at paras 374-76.

[149] *Sempra* Award, *supra* note 91, at para 350. In her comment on this analysis, Catherine Gibson notes that, "[u]nder this analysis, seemingly no state could ever establish a plea of necessity in a financial crisis because economic theory will never offer a single theory to address a financial crisis." *See* Catherine H. Gibson, "Beyond Self-Judgement: Exception Clauses in U.S. BITs", (2015) 38 Fordham International Law Journal 1 at 9 [Gibson, Beyond Self-Judgement].

the crisis, but rather, limited itself to commenting on the nature of the crisis generally. The tribunal explained that the gravity of the crisis was so severe that it necessitated Argentina to implement “an economic recovery package [which] was the only means to respond to the crisis."[150] It further noted that, "[a]lthough 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”[151] to deal with the extremely serious economic crisis.[152]

Professor Bjorklund criticised the tribunals' analyses with respect to the "only means" requirement. She found the decisions of all four tribunals with respect to "only means" as "deeply dissatisfying."[153] According to her,

> The *CMS*, *Enron*, and *Sempra* tribunal decisions suggest that a simple way to defeat any necessity defence is simply to show that a State could have taken steps other than the ones it chose. As other alternatives will nearly always be available, such a strict interpretation of the requirement would seem to defeat any defence. The *LG&E* decision is also dissatisfying, however, because the level of generality at which it suggested the step taken be analysed would nearly always permit the defence to succeed, even if the steps taken were wholly inadequate to respond to the crisis.[154]

In my view, the criticism made by Professor Bjorklund is mainly caused by the deficiency in the tribunals' legal analysis of the "only means" requirement. In other words, the tribunals did not elaborate on the alternative measures that could have been adopted instead of

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[150] *LG&E*, Decision on Liability, *supra* note 49, at para 257.
[151] *Ibid*. The tribunal also held that "[t]he severe devaluation of the peso against the dollar renders the Government's decision to abandon the calculation of tariffs in dollars reasonable." *Ibid*. In this respect, Alan Sykes underlines that "the measures taken by Argentina in the face of this crisis were, in important particulars, non-discriminatory. Foreign investors were not targeted, nor were particular sectors targeted. Nothing in the course of events suggests that the measures taken were other than measures of general applicability applied in a reasonably even handed fashion." Alan Sykes, "Economic "necessity" in International Law", (2015) 109 The American Journal of International Law 296 at 318.
[152] As for the *Continental* tribunal, it chose a different approach by stating that a different economic policy would not have put the claimant in a better position. Continental Award, *supra* note 91, at para 230.
[153] Bjorklund, Emergency Exceptions, *supra* note 6, at 484.
[154] *Ibid* at 485.

the actual measures. The tribunals merely stated alternative options and did not inquire into their potential to reach the objective pursued by the actual measures. This was clearly observed in the analyses of the *CMS*, *Enron* and *Sempra* tribunals. Examining the tribunals' conclusions on this issue, Professor Stephan Schill also pointed out that the tribunals failed to indicate "which alternative measures Argentina could have taken" to successfully invoke the necessity defense.[155] Similarly, the *LG&E* tribunal also did not enquire into the alternative ways available to Argentina to respond to an economic crisis, and without any deliberation, merely stated that the "across-the-board" response was the only way to deal with the situation. Thus, the lack of elaboration in the tribunals' analyses on alternative ways of dealing with the situation resulted in either acceptance or rejection of Argentina's necessity plea.[156] It should be noted that, unlike the above-mentioned tribunals, the *Continental* tribunal performed a detailed analysis of whether Argentina's measures were the only means to achieve the permissible objectives under the treaty NPM clause. Since the tribunal examined the measures under a standard other than the customary law of necessity, it is considered appropriate to discuss in the relevant section of this chapter.[157]

(ii) Developing Approaches to Interpreting the "Only Means" Requirement

As was noted above, the tribunals did not perform a thorough legal analysis of the "only means" requirement of the customary standard of necessity. However, sometime later, the *Enron* annulment committee challenged the decision of the *Enron* tribunal and clarified the issue by

[155] Stephan Schill, "From Calvo to CMS: Burying an International Law Legacy - Argentina's Currency Reform in the Face of Investment Protection: The ICSID Case CMS v. Argentina", (2005) 3 Zeitschrift für Schiedsverfahren/German Arbitration Journal (SchiedsVZ) 285 at 291.
[156] The factors substantially influencing the tribunals' divergent approaches will be discussed in the conclusive paragraph of this section.
[157] A detailed analysis of the *Continental* tribunal on this matter is presented in section 4.3.2.3 of this chapter.

suggesting two possible options for how the expression "only way" in Article 25 (1)(a) of ARSIWA could be interpreted.[158] According to the committee, one potential approach to interpreting "only means" would be based on its literal meaning. As the committee noted, under this approach, the necessity defense "could be relied on by Argentina if there were genuinely no other measures that Argentina could possibly have adopted in order to address the economic crisis."[159] The committee explained it further as follows:

> As Argentina points out, there will almost inevitably be more than one way for a Government to respond to any economic crisis, and if this interpretation were correct, the principle of necessity under customary international law *could rarely if ever be invoked* in relation to measure taken by a Government to deal with an economic crisis. However, that would not mean that it would not be open to a Tribunal to find that this is the correct interpretation, although there are other interpretations that would equally be open to a Tribunal.[160]

In regards to another interpretation, the *Enron* committee notes that it "would be that there must be no alternative measures that the State might have taken for safeguarding the essential interest in question that did not involve a similar or graver breach of international law."[161] As the committee explains further, under this approach, the necessity defense "will only be precluded if there is an alternative that would not involve a breach of international law or which would involve a less grave breach of international law."[162]

As for the first approach, scholars have expressed views contrary to those of the tribunals. For instance, Sahib Singh notes that, "[i]f one was to follow a literal interpretation of the words

[158] Enron Annulment, *supra* note 91. For the explanation of the annulment mechanism in the ICSID system, see footnotes 297, 298.
[159] Enron Annulment, *supra* note 91, at para 369.
[160] *Ibid* [emphasis added].
[161] *Ibid* at para 370.
[162] *Ibid*.

"only means" then any alternative, irrespective of its viability and reasonableness, is available to exclude the operation of necessity defense."[163] Therefore, he argues that the interpretation of "only means" needs to be "pragmatic but not overly inclusive."[164] A similar view was expressed in an expert opinion given by Anne-Marie Slaughter and William Burke-White.[165] They argued that "[i]n applying the no other means available aspect of the necessity defense, it is therefore appropriate *not to ask merely if other means were available to Argentina*, but if Claimants have shown that other lawful means were available to prevent a grave and imminent peril."[166] Therefore, the scholars emphasize the necessity of looking into the effectiveness of alternative lawful means in achieving the goals pursued by Argentina. To support their argument, they refer to the ICJ's approach in the *Gabcikovo-Nagymaros* case, where the court was tasked with determining whether the measures taken by Hungary were the only means to protect its environmental interests.[167] As Slaughter and Burke-White note, the ICJ considered in detail Hungary's contention of "the absence of any 'means' to respond" to the potential environmental harm, and rejected it "only after a careful determination that other lawful means of avoiding the harm were readily available...."[168] Based on this, they argue that,

> [I]t is not sufficient to merely assert ... that other means were available to Argentina ... [but] [r]ather, before second-guessing the determinations of a national government, a

[163] Sahib Singh, "The Enron Annulment Decision's Exposure of Necessity's Endemic Uncertainty: A Welcome Critique, Blog of European Journal of International Law, published on October 25, 2010 [Singh, Only Means]. Available online at: <http://www.ejiltalk.org/the-enron-annulment-decision%E2%80%99s-exposure-of-necessity%E2%80%99s-endemic-uncertainty-a-welcome-critique/>.
[164] *Ibid*.
[165] Witness Statement of Anne-Marie Slaughter and William Burke-White, (December 2, 2005) in *Sempra Energy International & Camuzzi International, S.A. v. The Republic of Argentina*, Case No.ARB/03/02 [Slaughter & Burke-White, Expert Opinion].
[166] *Ibid* at 45 [emphasis added].
[167] *Gabčíkovo-Nagymaros Project* case (Hungary v. Slovakia) Judgment, (25 September 1997) *ICJ Reports* at 40, [*Gabčíkovo-Nagymaros*], online at: < http://www.icj-cij.org/docket/files/92/7375.pdf> (last visited 20 May 2015).
[168] Slaughter & Burke-White, Expert Opinion, *supra* note 165, at para 47 [emphasis added].

tribunal must assure itself that alternative and otherwise lawful means available to the state would have been *effective in alleviating the grave and imminent peril to the state*.[169]

In a similar vein, Sahib Singh argued that the necessity doctrine "is aimed at legitimating those measures which a State must take to effectively deal with a situation which threatens its essential interests or its very existence."[170] He further point out that "[t]he need for the measure to adequately and effectively address the "peril" in question is at the heart of the [necessity] doctrine."[171] Thus, I support his view that "[i]f the doctrine does not permit the State to take those measures which would best protect it against further chaos (in this case economic chaos) and harm in a particular situation - then the doctrine serves little purpose at all."[172]

Another scholar, Benedict Kingsbury, also underlines the potential of alternative lawful means to achieve the objectives pursued by a respondent state in a state of necessity. In his expert report, Professor Kingsbury criticised the *CMS* tribunal's approach to interpreting the only means requirement by pointing out that it did not follow the ICJ's approach in the *Gabcikovo-Nagymaros* case, where the court "looked carefully and in detail at what the realistic policy options really were"[173] available for Hungary to protect its environmental interests. Therefore, he argued that the application of the only means requirement of the necessity defense in practice rejects its literal interpretation as performed by some tribunals in the Argentine cases.[174]

As for the second approach, in my view, it appears similar to the first approach, but with one additional feature. According to it, under alternative means one must consider not only lawful means, but also illegal means involving less grave breaches of international law than

[169] *Ibid* at para 48 [emphasis added].
[170] Singh, Only Means, *supra* note 163 [emphasis in original].
[171] *Ibid* [emphasis added].
[172] *Ibid*.
[173] Expert Report of Benedict Kingsbury (15 August 2006), in *Metalpar SA and Buen Aire SAv. Argentine Republic*, (6 June 2008) Award, ICSID Case No.ARB/03/5 at para 74 [Kingsbury, Expert Report].
[174] *Ibid*.

those caused by the measures at issue.[175] If explained by applying it to the investment arbitration context, under this approach the tribunals should look at whether a respondent state had other alternative means to tackle the economic crisis which would not harm the foreign investors' interests (lawful means) or would inflict less harm (illegal less-restrictive means) than those means at issue. To understand this more clearly, it is important to differentiate between lawful (does not involve a breach of international law, completely non-harmful to foreign investments) and illegal (involves the breach of international law, but less harmful to foreign investments) alternative means. The application of the former does not affect (harm) the interests of foreign investors, while the latter inflicts less harm than the measures which were actually applied by a respondent state.

The addition of an illegal less-restrictive alternative means inquiry into the interpretation of the "only means" requirement of necessity can be understood as a method of examining whether the respondent state made its best efforts to mitigate any harm to foreign investors' interests in case there were no alternative means which would not harm them at all. In my view, the inclusion of this less restrictive element into the "only means" test serves a reasonable purpose if looked at through the prism of protecting foreign investments. Under this approach, a respondent state may not justify its actions by claiming that there were no otherwise lawful alternative means (that do not harm foreign investors' interests at all) to achieve its pursued goals, although there were alternative means that could achieve those pursued goals and at the same time be less harmful on foreign investors' interests than its actually applied measures.[176]

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[175] As the *Enron* annulment committee stated in this regard, the necessity defense "will only be precluded if there is an alternative that would not involve a breach of international law or which would involve a less grave breach of international law." *Enron* Annulment, *supra* note 91, at para 370.

[176] The responding party must demonstrate that it had no other lawful means to address the situation. However, when the claimant identifies the other alternative measure (illegal) which is less restrictive on foreign investments, the

However, this approach seems to deviate from the ILC's commentary, which states that "[t]he plea is excluded if there are other (otherwise lawful) means available."[177] The ILC does not clarify further whether the only means requirement would not be met if there were other illegal alternative means that could achieve the pursued objective and be less harmful to competing interests than the measures actually applied. It should also be noted that the "lawfulness" of alternative means can be relative when assessed with respect to the interests of foreign investors other than claimants. In this respect, Slaughter and Burke-White appear to warn that "lawful" alternative means that do not harm the interests of claimant investors could actually be harmful to the interests of other investors. Thus, they argue that the application of such "lawful" means "would potentially put Argentina in breach of other BIT obligations *and hence would not be a lawful alternative means* that precludes the necessity defense."[178] In their view, in such circumstances "[t]o suggest otherwise would create a vicious circle in which necessity would never be available."[179]

Furthermore, it should be pointed out that when acting in emergency circumstances, states mostly concentrate on safeguarding their essential interests against grave and imminent

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burden of proof shifts to the claimant to demonstrate the reasonable availability of that alternative. *See* Chapter VI for a detailed explanation.

[177] Crawford, *Commentaries*, *supra* note 128, at 83, para 15.

[178] Slaughter & Burke-White, Expert Opinion, *supra* note 165, at para 45 [emphasis added].

Professor Kurtz attempted to explain such alternative means that could not be harmful to a claimant investor, but would harm the interests of other investors. In this regard, he proposed the application of individual assessment of contracts instead of the "across the board" measures. According to him,

> Individual assessment would presumably entail the assessment of whether rights under a *particular utility contract should be abrogated given their likely contribution to the continuation and scope of the crisis.* A contractual right that would entitle a foreign investor to increase the tariff rate for electricity or gas supply might be treated differently to a contract involving the provision of telecommunications services. There could be a sensible case for abrogation of the latter but retention of the former. In this case, individual assessment is clearly a less restrictive alternative to the 'across the board' measure; it offers review of each case on its own merits and the possibility that some public utility contracts may escape abrogation of rights.

Kurtz, Adjudging the Exceptional, *supra* note 42, at 370 [emphasis added].

However, Professor Kurtz himself acknowledges that time constraints to set up such a system in an emergency situation would prevent Argentina from making a prompt response to the financial crisis and thus, could serve as a potential critique of his proposal. *Ibid*.

[179] *Ibid*.

peril. In such critical circumstances, it is usually difficult (if not impossible) for them to take into account all interests that might be affected by its adopted measures. In other words, in emergency circumstances such as economic crises, it is almost impossible to adopt lawful alternative means that would not harm the interests of anyone. Moreover, there could also be circumstances where it is practically impossible to find a lawful alternative means that would not harm even the interests of the claimant investor itself. Therefore, in my view, in interpreting the ILC commentary on applying the only means requirement of the necessity defense, it would be more realistic and pragmatic to assume that it entails the consideration of only lawful alternative means that are not harmful to foreign investments. Moreover, the "lawful" character of alternative means should not be determined in a relative manner, as Burke-White and Von Staden argue. Rather, the alternative means should be considered "lawful" only when their adoption does not breach a state's obligations under the BIT in question. As for the interests of other foreign investors, the "lawfulness" of alternative means can be determined by arbitral tribunals separately, only after they bring investment arbitration claims under other BITs.

Besides the above-mentioned issues related to alternative means, there is another issue requiring further clarification in interpreting the only means requirement. It is concerned with the costs and conditions of adopting alternative means. In this respect, the ILC only notes that the alternative means must be considered available "even if they may be more costly or less convenient."[180] However, the committee did not explicitly clarify how much higher the costs could be in adopting the alternative measures than that of the actually adopted measure. In my view, this ambiguity makes it impractical and unrealistic for respondent states to satisfy the only means requirement, as the availability of any lawful alternative means involving costs beyond

[180] Crawford, *Commentaries*, *supra* note 128, at 83 para 15.

their financial capacity (especially in financial crises) will cause them fail to successfully invoke the necessity defense. Professor Kingsbury's view also supports my argument. He observes that "even if the only alternative for the state would have been a policy involving insupportable cost and utter foolhardiness, that would be a sufficient alternative making necessity plea unjustified, provided that the alternative policy was lawful."[181]

Thus, it can be assumed that the existence of such ambiguity has led some scholars to conclude that the only means requirement is almost impossible to satisfy in economic emergencies.[182] Taking into account this problematic aspect of the only means requirement, I will develop this issue in Chapter VI, demonstrating that there is state practice in the WTO regime in the process of formation that clarifies criteria with respect to the level of costs in adopting alternative means. I will argue that the state practice found in the WTO jurisprudence corresponds to the realities of economic emergencies and represents the development of customary rules on necessity, especially of its only means requirement. Particularly, I will propose that the present static version of the only means requirement of the customary necessity defense, which is based on its literal interpretation, should be replaced by the dynamic version being developed and crystallized in the WTO jurisprudence.

[181] Kingsbury, Expert Report, *supra* note 173, at para 75.
[182] Giorgio Sacerdoti, "BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defense of Necessity", (2013) 28(2) ICSID Review 351 at 374; Christina Binder, "Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns: Or the Benefits of a Public International Law Approach to Investment Arbitration", in Tullio Treves, Francesco Seatzu & Seline Trevisanut, *Foreign Investment, International Law and Common Concerns* (London and New York: Routledge, 2014) at 78; Ibironke T. Odumosu - Ayanu, "International Law and Disasters: Necessity, Peoples, and the Burden of (Economic) Emergencies", in David Caron, Michael Kelly & Anastasia Telesetsky, The International Law of Disaster Relief (Cambridge: Cambridge University Press, 2016) at 327; Schill & Kim, *supra* note 130, at 513.

4.2.3.3. Impairment of Essential Interests of other States

(i) Tribunals' Findings and Analyses

In order to successfully invoke the customary necessity defense, the state measures in question must not seriously impair an essential interest of the other state or states concerned, or of the international community as a whole. According to this requirement, "the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective."[183] Generally, the tribunals in the Argentine cases did not examine Argentinean measures under this requirement in great depth. For instance, the *LG&E* tribunal briefly noted that "it cannot be said that any other State's rights were seriously impaired by the measures taken by Argentina during the crisis."[184] As for the *CMS* tribunal, it first found that the measures taken by Argentina had not impaired the interests of the international community as a whole.[185] Regarding the impairment of interests of another state to whom the obligation was owed, the tribunal decided to examine it in the context of applicable treaty provisions, since the interest in question arose from the treaty.[186] However, by regarding foreign investors as "specific beneficiaries" of the treaty, the tribunal focused on considering "essential" only the interests of foreign investors.[187] Based on this assumption, the tribunal concluded that there was no

[183] Crawford, ILC Articles, *supra* note 145, at 184.
[184] *LG&E*, Decision on Liability, *supra* note 49, at para 257.
[185] *CMS* Award, *supra* note 49, at para 325.
[186] *CMS* Award, *supra* note 49, at para 327. In this case, the other state is the U.S. and the applicable treaty provisions are those of the Argentina-U.S. BIT.
[187] Assuming that the interest at issue was that of foreign investors, the tribunal noted that it was difficult to say whether that was an essential interest, "particularly at a time when this interest appears occasionally to be dwindling." *CMS* Award, *supra* note 49, at para 357.

impairment of other state's (the United States') interests, and accordingly the necessity plea would not be precluded on that basis.[188]

As for the *Enron* and *Sempra* tribunals, both of them found that Argentina's measures had not impaired the interests of the international community.[189] As for the impairment of other states' interests, the *Enron* tribunal also stated that it would analyse this requirement in its discussion on the applicable treaty obligations. By doing so, it concluded that the invocation by Argentina of either the NPM clause of the U.S-Argentina BIT or the customary necessity defence "would not be taken by the other party [in this case the U.S.] that such impairment does arise."[190] However, the tribunal took into account the interests of private entities by regarding them as the ultimate beneficiaries of treaty obligations, and found that their essential interests had been impaired.[191] Similarly, the *Sempra* tribunal also took the same approach and pointed out that interests of private entities should be taken into account as they are ultimate beneficiaries of the treaty obligations. Therefore, it held that the essential interest of *Sempra*, as a private entity, "would certainly be seriously impaired by the operation of Article XI or a state of necessity in this case."[192]

In the same vein, the arbitrators in the *Suez-Vivendi* case stated that "Argentina may have injured the Claimants' interests, but it is difficult to see how Argentina's actions impaired an essential interest of France, Spain, the United Kingdom, or the international community,"[193] while the *Impregilo* tribunal held that "[t]he interests of a small number of a Contracting State's

[188] *CMS* Award, *supra* note 49, at para 358. In my view, the *CMS* tribunal failed to determine which interests are of a State, the USA in this case, and which are of investors.
[189] *Enron* Award, *supra* note 91, at para 310; *Sempra* Award, *supra* note 91, at para 352.
[190] *Enron* Award, *supra* note 91, at para 341.
[191] *Ibid* at para 342.
[192] *Sempra* Award, *supra* note 91, at para 390.
[193] *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v The Argentine Republic*, (30 July 2010), ICSID case No. ARB/03/19, at para 261 [*Suez-Vivendi*].

nationals or legal entities are not consistent with or qualify as an 'essential interest' of that State."[194] Based on this, the tribunal found "any impairment of those interests [to be] irrelevant for purposes of the paragraph."[195]

Contrary to the state-centric approaches of tribunals, it could also be argued that the foreign investors' interests could have been considered under the term "international community", since this term encompasses not only states, but also other entities and human groups.[196] However, the interpretation of the term "international community as a whole" contained in Article 25 leads to another conclusion, which needs further explanation. According to Professor Crawford, "there are standards of conduct in international law that cannot be reduced to the interstate realm..... [t]hey are not just obligations owed by States to each other."[197] In this respect, the ICJ in the *Barcelona Traction* case noted that there is "essential distinction between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection."[198] The Court further clarified that "[b]y their nature the former the concern of all States..... [and depending on] the importance of the rights involved, all States can be held to have a legal interest in their protection."[199] Crawford argues that the conception of "'the international community as a whole' needs to be an inclusive and open-ended."[200] At the same time, he further notes that it is difficult to "conceive of

[194] *Impregilo*, *supra* note 92, at para 354.
[195] *Ibid*.
[196] James Crawford, "Responsibility to the International Community as a Whole", (2001) 8(2) Indiana Journal of Global Legal Studies 303 at 314 [Crawford, International Community as a Whole].
[197] *Ibid* at 306.
[198] *Case Concerning The Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, Judgement (February 5, 1970), ICJ reports 1970, p.3 at 32 para 33.
[199] *Ibid*. These obligations are *erga omnes*, and "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.." *Ibid* at para 34.
[200] Crawford, International Community as a Whole, *supra* note 196, at 315. It should also be noted that Professor Crawford also considers "the international community as a whole" as an abstraction, by arguing that there is no legal entity by that name. In this regard, he refers to Fitzmaurice's dissenting opinion in the *Namibia* case (1971), in which

these obligations as owed to a wide and disparate group, as it were singularly or separately."[201] As can be assumed from the above mentioned, the damage caused to the interests of single actors of the international community cannot be qualified as an impairment of the interests of the international community as a whole.

Based on the above analysis, it should be noted that the tribunals' analyses of this requirement of the necessity defense seem to be superficial. Particularly, they did not touch upon this element as a balancing of competing interests.[202] In this regard, Professor Bjorklund observes that the tribunals did not "engage in any balancing of the respective interests, nor did they identify precisely what those interests were."[203] She also notes that the examination of individual investors' interests would be "a departure from the language of Article 25",[204] since it suggests the balancing of state interests. At the same time, emphasizing the hybrid nature of investor-state arbitration, she views it "inappropriate only to consider the interests of the State parties."[205] This argument is also advanced by scholars such as Christina Binder and August Reinisch, who contend that Article 25(1)(b) "should be read in a way that also includes

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the judge opined that "the so-called organized world community is not a separate juridical entity with a personality over and above, and distinct from, the particular international organizations in which the idea of it may from time to time find actual expression." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), I.CJ. Reports 56 (Jan.29) (Request for Advisory Opinion), Dissenting opinion of Fitzmaurice, at 241 para 33.

[201] *Ibid.*

[202] As was explained in the previous chapter, this requirement of the customary necessity defense is also called the "balance of interests" element. According to it, "the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective." *The ILC Yearbook*, (1980) Vol. II (2), Doc. A/35/10, at 50, para 35. Available online: UN <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1980_v2_p2_e.pdf> . (last visited 20 November 2014).

[203] *See* Bjorklund, Economic Security Defenses, *supra* note 6, at 488. The *LG&E* tribunal merely touched upon the balancing element, and explained that its main purpose was "to prevent against the possibility of invoking the state of necessity only for the safeguard of a non-essential interest." *LG&E*, Decision on Liability, *supra* note 49, at para 254. However, Professor Bjorklund remarks that the language used by the *LG&E* tribunal in this regard "seems to dispense with any balancing requirement to focus only on the interest of the invoking State." *Ibid*.

[204] *Ibid.*

[205] *Ibid.*

individuals' (i.e. investors') interests."[206] Given the nature of interests of foreign investors who might seem disadvantaged as compared to those of a state, Professor Bjorklund suggests a mixed (hybrid) form of balancing as an appropriate measure to solve a possible imbalance of interests.[207] According to it, "the investor's actual interests, the protections negotiated on its behalf by its home country, and the interests of the investor's home country itself as illustrated by the object and purpose of the treaty" should be balanced against the interests of the host state alone.[208] To support her suggestion, Professor Bjorklund points out that the ARSIWA leaves open the possibility of its application beyond a state-to-state context.[209] In this regard, she notes that the most important requirement for such an application is "the ability of a non-state actor to assert a primary right to invoke responsibility on her own account...under an investment treaty."[210] This assertion opens the discussion to another research question, which involves clarifying whether the rights and obligations in investment treaties essentially belong to states concluding these treaties or to foreign investors who are the actual beneficiaries of investment treaties.

(ii) Distinguishing Derivative vs. Direct/Substantive vs. Procedural Rights

The question of whose rights must be taken into account in interpreting the "impairment of essential interests of the state or states towards which the obligation exists", investors' or those of the home state, urges us to inquire further into theories about the characteristics of investment

[206] Christina Binder & August Reinisch, "Economic Emergency Powers: A Comparative Law Perspective", in Stephan W. Schill, International Investment Law and Comparative Public Law (Oxford: Oxford University Press, 2010) at 539 [Binder & Reinisch].
[207] Bjorklund, Economic Security Defenses, *supra* note 6, at 488.
[208] *Ibid*. Unlike Professor Bjorklund, who suggests a hybrid form of balancing, Christina Binder and August Reinisch appear to suggest a different form. They argue that "the rights and interests of individuals [investors] may have to be balanced against the interests of the state taking necessity measures." Binder & Reinisch, *supra* note 206, at 539.
[209] She refers to the ILC commentaries, which state: "This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State." Crawford, ILC Articles, *supra* note 145, at 209.
[210] Bjorklund, Emergency Exceptions, *supra* note 6, at 487.

treaty claims. In investor-state arbitration, unlike in inter-state arbitration, private entities, both individual and corporate, have the right to bring claims against states on their own behalf.[211] This practice is considered consistent with the idea that states may confer upon individuals "international rights *stricto sensu*, i.e. rights which they acquire without the intervention of municipal legislation and which they can enforce in their own name before international tribunals."[212] In the investor-state arbitration context, construing treaty rights in such a way represents a third-party-beneficiary paradigm, which creates enforceable rights for investors as third parties to investment treaties.[213] The treaty parties (states) use this paradigm to: (1) enable investors to bring direct claims; (2) disable home states from engaging in diplomatic protection; and/or (3) immunize investors' claims from any interference by the treaty parties.[214] However, the question whether these rights as established in BITs are essentially owed to states as treaty parties, or to foreign investors as third party beneficiaries, is quite contentious.

[211] In specifying the differences between inter-state and state-non-state privities, Professor Reisman observes that the latter "functions to 'equalize' the non-state entity by transferring the dispute to a setting which may be designed to minimize or to ignore the sovereign character of the other party to a greater extent than would - or could - a national court." Michael Reisman, "The Diversity of Contemporary International Dispute Resolution: Functions and Policies", (2013) 4(1) Journal of International Dispute Settlement 47 at 56-57.

[212] Robert Jennings & Arthur Watts, *Oppenheim's International Law*, 9th ed (London: Longmans, 1992) at 847, para 375. It should be noted that it is the opposite of diplomatic protection theory, under which an injury to a foreign national is regarded as an injury to that national's home state, giving the latter complete discretion over the claim's handling. *See Barcelona Traction, Light & Power Co. Ltd.* (Belgium. v. Spain), Judgment, 5 February 1970, (1970) I.C.J. Reports 3 at 44, 46, paras 77-78, 85.

In the *Mavrommatis Palestine Concessions* case, the Permanent Court of Justice also held that in diplomatic protection, the home state has full authority to decide whether to bring or not to bring a claim on behalf of its investors: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf**,** *a State is in reality asserting its own rights* - its right to ensure, in the person of its subjects, respect for the rules of international law." *Mavrommatis Palestine Concessions* (Greece v. Britain) Judgement (30 August 1924), (1924) P.C.I.J (Ser.B) No.3. p.7 at 13 para 21 [emphasis added].

[213] Anthea Roberts, "Triangular Treaties: The Extent and Limits of Investment Treaty Rights", (2015) 56(2) Harvard International Law Journal 353 at 396.

[214] *Ibid*. Anthea Roberts argues that in such triangular paradigm "[s]tates are not benevolent actors; rather they grant enforceable rights to investors as third parties in order to effectuate their own goals." *Ibid* at 357.

According to Professor Zachary Douglas, there are two theories suggesting differing approaches to these rights: derivative rights theory and direct rights theory.[215] Under derivative rights theory, the primary obligations contained in an investment treaty are regarded as being owed only to the home state of a foreign investor.[216] This reflects the traditional view under which BITs are considered as "international legal instrument[s] representing common sovereign will of the signatories defining their rights and obligations vis-à-vis one another."[217] In such a case, the responsibility of a host state is invoked by a foreign investor on behalf of the home state to which the treaty obligations are exclusively owed.[218] Anthea Roberts explains it in a different way. She observes that the treaty parties (home and host states) are granted both substantive and procedural rights under investment treaties, while "investors are permitted for the sake of convenience to enforce their states' substantive rights."[219] In making this observation, Professor Roberts mainly draws from third-party-beneficiary doctrines under contract law. In this regard, she refers to Melvin Eisenberg, who argues that "the purpose of allowing suit by a third party is

[215] Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", (2003) 74 *British Yearbook of International Law* 151 at 184 [Douglas, Hybrid Foundations]; Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) at 11-16 [Douglas, *Investment Claims*]. For terminological convenience, Professor Bjorklund uses the terms "diplomatic espousal" and "third-party beneficiaries" theories, while Professor Paparinskis uses the terms "agency" and "beneficiary" rights theories. *See* Andrea Bjorklund, "Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working", (2007-2008) 59 Hastings Law Journal 241 at 264 [Bjorklund, Private Rights]; Martins Paparinskis, "Investment Treaty Arbitration and Customary Investment Law: Preliminary Remarks", in Chester Brown & Kate Miles, Evolution in Investment Treaty Law and Arbitration (Cambridge: Cambridge University Press, 2011) at 81 [Paparinskis, Remarks].

[216] Douglas, Hybrid Foundations, *supra* note 215, at 184. It looks similar to diplomatic protection, but there is a difference between these types of claims and those of diplomatic protection. Diplomatic protection (espousal) is considered a legal fiction, according to which an injury to a state's national is viewed as an injury to the state itself. In such circumstances, the home state steps into shoes of its national and brings claim against the other (host) state alleging direct injury to its interests. *See* Andrea Bjorklund, "Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims", (2005) 45 Virginia Journal of International Law 809 at 821-825.

[217] Jamal Seifi, "Investor-State Arbitration v. State-State Arbitration in Bilateral Investment Treaties", (2003) 4 Oil, Gas and Energy Law Journal 1 at 3 [Seifi].

[218] As Professor Bjorklund explains, in such a case "[a] State that negotiates the ability for its national to bring a claim on his or her own behalf is thus delegating its espousal capability to its national." Bjorklund, Private Rights, *supra* note 215, at 264.

[219] Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States", (2010) 104 American Journal of International Law 179 at 184 [Roberts, Power and Persuasion].

not to ensure that the third party realizes a benefit, but to ensure the contracting parties' performance objectives are effectuated."[220] Based on this contention, Roberts distinguishes between treaties that create rights and those that create mere benefits for third parties. In her view, where a treaty creates mere benefits for a third party, the treaty parties may amend it any time, as the third party has no enforceable rights in the matter. However, where a treaty confers a right on a third party, the right of a third party "may not be revoked or modified by the parties if it is established that the right was *intended* not to be revocable or subject to modification without the consent of the third State."[221] Relying on the above mentioned, Professor Roberts emphasizes that "third-party-beneficiary rules should be conceived of as remedial rather than substantive,"[222] and thus concludes claims brought by foreign investors against a host state should not be considered as investors' asserting their own rights conferred under BITs, but rather as "a necessary and important means of effectuating the contracting parties' [home and host state] performance objectives."[223] As can be seen, the derivative rights theory—also called the third-party-beneficiary theory—excludes the assumption of conferring any rights on foreign investors under the treaty, including the right to arbitrate, since all treaty rights and obligations are considered owed only at the inter-state level.[224]

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[220] *Ibid* at 367. For original source, *see* Melvin Aron Eisenberg, "Third Party Beneficiaries", (1992) 92 Columbia Law Review 1358 at 1386.

[221] Roberts, Power and Persuasion, *supra* note 219, at 370. Anthea Roberts further explains that:

> In both cases, the focus is on the *intention* of the treaty parties, which accords with the approach that treats the relevant transaction as the interstate treaty and the relevant question as whether it was in the interests of the treaty parties to create enforceable rights for third parties. The intentions and actions of the third party may be relevant in so far as they provide important context for informing the interests and intentions of the treaty parties. *Ibid*

[222] *Ibid* at 372.

[223] *Ibid* at 372 [emphasis added]. In commenting on the nature of BITs, Jamal Seifi also observed that "it is a law between States, for States, by States and therefore, subject to extensive sovereign prerogative to set up, abolish and modify international investment treaties, as instruments under unfettered control of only States." Seifi, *supra* note 217, at 3.

[224] Regarding the derivative rights theory, Kate Parlett points out that "neither the language of BITs (which indicate that the right to invoke arbitration is conferred directly on qualifying investors) nor the practice of investment treaty

As for direct rights theory, Professor Douglas suggests two alternative models: the substantive-direct rights and procedural-direct rights model. In the substantive-direct rights model, the substantive obligations contained in the treaty are considered owed to the investor, directly to the exclusion of the home state.[225] Put another way, investment treaties grant both substantive and procedural rights to investors, and investors use a procedural right to enforce their own substantive rights.[226] According to this model, "the direct legal relationship between an individual [investor] and a host state crystallises at the time when the individual qualifies under the BIT as an investor."[227] Since the investor acquires substantive-direct rights from the moment a qualifying investment exists, "any circumstance precluding wrongfulness which applies as between contracting states to the treaty will not apply in the determination of an investor's treaty claim."[228] The tribunal in the *Corn Products v. Mexico* case supported the substantive-direct rights model. The tribunal held that NAFTA confers upon investors the procedural rights to enforce their own substantive rights, which is separate and distinct from those of its home state.[229] The tribunal found it "counterintuitive" that investors were merely enforcing substantive rights owed to their home state,[230] and reasoned as follows:

> [W]hen a State claimed for a wrong done to its national it was in reality acting on behalf of that national, rather than asserting a right of its own. The pretense that it was asserting a

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tribunals support [it]." Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge: Cambridge University Press, 2011) at 110 [Parlett].

[225] Douglas, Hybrid Foundations, *supra* note 215, at 162-4. For the advantages of the direct rights model in ensuring the protection of private interests in the context of globalization, s*ee* Tillman Rudolf Braun, "Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law: An Inquiry into the Nature and Limits of Investor Rights", (2014) 15 The Journal of World Investment & Trade 73.

[226] Comparing BITs with human rights treaties, Jamal Seifi also observes that "an investor-state arbitration provision in investment treaty should not be merely seen as a matter of procedural convenience, but as a mechanism for direct enforcement by the investor of its rights, quite on comparable scale to judicial bodies established some human rights treaties." Seifi, *supra* note 217, at 4-5.

[227] Parlett, *supra* note 224, at 111.

[228] *Ibid*.

[229] *Corn Products International, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/04/01, (15 January 2008) Decision on Responsibility at paras 169, 173.

[230] *Ibid*.

> claim of its own was necessary, because the State alone enjoyed access to international dispute settlement and claims machinery. *However, there is no need to continue that fiction in a case in which the individual is vested with the right to bring claims of its own*.[231]

Under the procedural-direct rights model, the substantive obligations of the treaty are owed to the home state, and the investor has only a procedural right to invoke a claim before the international tribunal.[232] As Paparinskis observes, the procedural autonomy of investors under this model "makes the reading of direct rights intuitively attractive."[233] It should be noted that this procedural right is considered crystallised upon invocation by the investor of the dispute resolution clause in the relevant treaty. In other words, by filing a notice of arbitration against a host state, the investor acquires exclusive control of the claim that does not require the consent of its state of nationality (home state).[234] This procedural right is not a (home) state's right, but rather "[i]t is a right independently held by any individual who qualifies under the BIT."[235] Therefore, the damages claimed by a foreign investor are assessed solely on the basis of harm caused to the interests of the investor, and thus paid directly to it, not to its state of nationality.[236]

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[231] *Ibid* at para 173 [emphasis added].

[232] Douglas, Hybrid Foundations, *supra* note 215, at 162-4. In this regard, Professor Crawford also observes that "one might argue that bilateral investment treaties in some sense institutionalize and reinforce (rather than replace) the system of diplomatic protection, and that in accordance with the *Mavrommatis* formula, the rights concerned are those of the state, not the investor." James Crawford, "The ILC Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", (2002) 96 American Journal of International Law 874 at 888-89.

[233] Martins Paparinskis, "Investment Treaty Arbitration and the (New) Law on State Responsibility", (2013) 24(2) European Journal of International Law 617 at 626.

[234] The dispute resolution clauses of BITs provide that the investor "has the right", "may" or "may choose to" submit a dispute to arbitration. By submitting a dispute to arbitration, the investor accepts the host state's offer to arbitrate and it does not require the consent of its state of nationality. *See*, Christopher Dugan, Don Wallace, Noah Rubins, *Investor-State Arbitration* (Oxford: Oxford University Press, 2008) at 221.

[235] Parlett, *supra* note 224, at 106-107. In this respect, Parlett refers to the conclusion of the English Court of Appeal in the *Occidental v. Ecuador* case, which made the following observations about the investors' right to arbitrate on their own behalf: "First, ...the State Parties to the BIT intended to give investors the right to pursue, in their name and for themselves, claims against the other State party. Second, ...those rights are granted under public international law and must be determined on principles of public international law, as they were by the Tribunal in this case." *Ibid*.

[236] Paparinskis doubts Professor Douglas's argument that "the injury is caused exclusively to the investor" corresponds to the essence of the direct rights approach. According to Paparinskis,

However, Anthea Roberts argues that "the idea that investment treaties create substantive rights for treaty parties only seems hard to reconcile with investors' entitlement to direct damages awards, which is clearly more than procedural in nature."[237] As for the substantive obligations owed to the home state, they represent the standards of treatment contained in the treaty and can be construed as "the applicable adjudicative standards for the claimant's cause of action rather than binding obligations owed directly to the investor."[238] In this respect, the arbitral tribunal in the *ADM v. Mexico* case found that investors had only the procedural right to bring a claim under NAFTA, while the substantive rights established in the treaty were granted on an inter-state basis.[239] Thus, the procedural-direct rights model leaves open the possibility for a state to claim a

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> if the investor is invoking responsibility on its own behalf, and the primary obligations are owed only to home State, then either there is no responsibility to invoke by the investor in the first place because the host State has committed no wrongful act in its regard, or this direct model is actually a derivative model *sub silentio* and the investor invokes responsibility on the home State's behalf.

Paparinskis, Remarks, *supra* note 215, at footnote 63.

[237] Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretative Authority", (2014) 55(1) Harvard International Law Journal 1 at 39 [Roberts, A Hybrid Theory].

[238] Douglas, *Investment Claims*, *supra* note 215, at 35.

[239] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, Award (21 November 2007), ICSID Case No. ARB(AF)/04/05, at para 168**.** The tribunal held as follows:

> … the rights provided by Section A only exist at the international plane between the NAFTA Parties. Investors are the objects or mere beneficiaries of those rights. Accordingly, under Chapter Eleven, the Member States have an obligation to treat investors of the other NAFTA Parties under the standards addressed in Section A, but this obligation is only owed to the state of the investor's nationality.

Ibid at para 178. The only individual rights investors enjoy under Chapter Eleven is the procedural right under Section B to invoke responsibility of the host State. *Ibid* at para 179.

However, the Tribunal in *Cargill v. Mexico* reached a different decision on this issue. The tribunal first acknowledged that the rights of investors under NAFTA Chapter 11 derive from the agreement of State Parties and "that they may to some extent, at least as far as the reach of Chapter 11, be dependent on the continuation of that agreement." But then it held as follows:

> That the origin of individual rights may be found in the act of a sovereign, or in the joint act of sovereigns, does not negate the existence of the rights conferred. It is the view of this Tribunal that Chapter 11 creates a framework within which it is the investor that acts upon and benefits from the obligations which are set forth in Chapter 11. *It is not fruitful, in the Tribunal's view, to characterize the issue as whether the rights conferred upon the investor are substantive or merely procedural.* The fact is that it is the investor that institutes the claim, that calls a tribunal into existence, and that is the named party in all respects to the resulting proceedings and award.

Cargill Inc. v United Mexican States, ICSID Award (ARB (AF)/05/2), 18 September 2009, at para 426.

circumstance precluding wrongfulness (for instance, countermeasures) with respect to a state conduct that does not conform to treaty standards prior to filing the notice of arbitration.[240]

In comparing the substantive-direct and procedural-direct models, Parlett observes that they represent "rather polarized conceptual frameworks for the characterization of investment treaty rights."[241] Anthea Roberts also considers the arguments that investment treaties create substantive rights only to investors or only to home states to be "unconvincing".[242] Therefore, she advances the theory of interdependent rights, according to which investment treaty rights are granted both to investors and home states.[243] Emphasizing the hybrid nature of the investment treaty system, Professor Roberts argues that "this co-existence makes the rights qualified and shared, rather than absolute and exclusive, in nature."[244] Thus, these rights are conceptualized as "being shared or jointly held on an 'interdependent' rather than an 'independent' basis."[245] To support her argument, Professor Roberts further notes that the independent rights approach is "problematic..... [since] it is difficult to conceptualize investment treaty obligations as giving rise to independent rights because the rights of investors and home states substantially overlap."[246] Parlett also observes that some of the substantive rights of a BIT can be characterized as direct

[240] Parlett, *supra* note 224, at 110. For a detailed analysis, *see* Martins Paparinskis, "Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law", in Tomer Broude & Yuval Shany, *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing, 2011) at 259; Sergio Puig, "The Merging of International Trade and Investment Law", (2015) 33 Berkeley Journal of International Law 1.
[241] Parlett, *supra* note 224, at 112.
[242] Roberts, A Hybrid Theory, *supra* note 237, at 39.
[243] However, Professor Roberts notes that investment treaties do not clearly identify which substantive rights correspond to foreign investors and which to a home state. As for the procedural rights, she states that they "clearly belong to both investors and states." *Ibid.*
[244] *Ibid*.
[245] *Ibid*. In this conceptualisation, Professor Roberts seems to have drawn from Robert Volterra, who also made similar observations: "Generally, one would have to say that the rights contained in an investment treaty are, at best, the rights of investors that are shared with the State party and their State of nationality." Robert Volterra, "International Law Commission Articles on State Responsibility and Investor-State Arbitration: Do Investors Have Rights?", (2010) 25(1) ICSID Review-Foreign Investment Law Journal 218 at 220 [Volterra].
[246] Roberts, A Hybrid Theory, *supra* note 237, at 40.

rights and others as state rights by referring to them as "Avena-style interdependent rights".[247] She also denies the possibility that substantive treatment provisions of a BIT could refer to "separate rights for states and their nationals, distinct or interdependent,"[248] as she considers it difficult to conceive of circumstances "where violation of rights of states under a BIT could necessarily entail a violation of the rights of individuals, or vice versa."[249] Advancing the interdependent approach to investment treaty rights, Roberts argues that it opens "two avenues for redressing violations of the same substantive obligations",[250] which are investor-state and state-to-state arbitration. While admitting there is little use in pursuing both options simultaneously or sequentially, she underlines that "there might be advantages in pursuing investor-state arbitration over state-to-state arbitration or vice versa in a given case."[251]

In my view, these last determinations made with regard to attribution of the rights and obligations in IIAs on an interdependent basis seem to be more convincing and should be taken into account in applying Article 25 of ARSIWA. This in turn supports the application of the hybrid model approach advanced by Professor Bjorklund to assessing the impairment of interests, under which the host state interests are balanced against investor's actual interests and the interests of its home state. Such an approach to applying the impairment of interests

[247] Parlett, *supra* note 224, at 112. According to "Avena-style interdependent rights", "the relevant treaty provision, Article 36 of the Vienna Convention, incorporated rights of sending states (for example, to have access to their nationals) and rights of nationals (for example, to have access to the consular post of their sending state) which bear a direct relationship each to the other." *Ibid*. *See Avena and Other Mexican Nationals (Mexico v. United States)*, Judgement (31 March 2004), (2004) ICJ Reports 12 at 36, para 40 [*Avena*].

[248] Parlett, *supra* note 224, at 112.

[249] *Ibid*. Therefore, taking into account the differences in the language and context of BITs, Parlett concludes that "the question whether investors acquire direct substantive rights from a particular BIT can only be determined on a case-by-case (or BIT-by-BIT) basis." *Ibid*.

[250] Roberts, A Hybrid Theory, *supra* note 237, at 43.

[251] *Ibid*. Caroline Foster expresses critical views towards considering the investor-state arbitration as "a new, specialized subsystem of State responsibility [which, in her view,] tends to overlook the underlying legal interest and status of home States." Therefore, she argues that "[i]n designing law to govern investor remedies in future, it will be important to preserve the position of the State as the primary right-holder under investment treaties." Caroline Foster, "A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law' ", (2015) 64 International Comparative Law Quarterly 461 at 479 [emphasis added].

requirement of Article 25 rejects the argument that investors or states are sole possessors of rights and obligations under IIAs. It also supports the conclusion made by Robert Volterra in this respect: "is there room in the house that the ILC built for the concept of investor rights under investment treaties? The answer I think is that there is *some* room, but there is not *a* room."[252]

4.2.3.4. Contribution to a State of Necessity

(i) Tribunals' Findings and Analyses

The other interpretative issue with regard to the invocation of the necessity defense was related to Argentina's contribution to the state of necessity.[253] In order to satisfy this requirement, a state's contribution to the state of necessity is required to be "sufficiently substantial and not merely incidental or peripheral."[254] The tribunals' approaches also differed on this point. The tribunals in the *CMS*, *Enron* and *Sempra* cases found that Argentina's measures contributed to the crisis, while the *LG&E* tribunal concluded otherwise.

The *CMS* tribunal noted in its findings that, in a global economy where domestic and international factors interact, the roots of the crisis in most situations similar to that experienced by Argentina "extend both ways and include a number of domestic as well as international dimensions."[255] Having analysed these two factors as main contributing sources, the tribunal held 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."[256] Based on this finding, the *CMS* tribunal

[252] Volterra, *supra* note 245, at 223.
[253] The "non-contribution" requirement of customary necessity is also referred to as "clean hands" requirement. *See* Gibson, Beyond Self-Judgement, *supra* note 149, at 12.
[254] Crawford, ILC Articles, *supra* note 145, at 185.
[255] *CMS* Award, *supra* note 49, at para 328.
[256] *Ibid*.

concluded that the contribution by Argentina to the crisis had been "sufficiently substantial", and thus, its invocation of necessity defense was precluded.[257]

The *Enron* tribunal also reached similar conclusions. Initially, it explained the reason behind the "non-contribution" requirement. Referring to a general principle of law, the tribunal noted that this requirement is "devised to prevent a party [from] taking legal advantage of its own fault."[258] As for the factors that gave rise to the crisis, the tribunal found that ".....it cannot be claimed that the burden falls entirely on exogenous factors"; also, the crisis could not be attributed "to a particular administration as it is a problem that had been compounding its effects for a decade."[259] However, the tribunal concluded that "there has been a substantial contribution of [Argentina] to the situation of necessity", and thus, the present Argentine government was responsible for having contributed to the crisis.[260] It should be noted that the decision of the *Enron* tribunal on the requirement of "non-contribution" was challenged by Argentina in the annulment stage.[261] The *Enron* annulment committee found that the tribunal failed to apply Article 25(2)(b) of ARSIWA.[262] It held that the tribunal did not perform a legal analysis with regard to the "non-contribution" requirement of the customary necessity defense, but rather,

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[257] *Ibid*.
[258] *Enron* Award, *supra* note 91, at para 311.
[259] *Ibid* at para 312. The endogenous factors were also considered by the Argentina's President as a primary source of the crisis. He wrote the following: "In the case of Argentina, no one bears more of the blame for the crisis than Argentina itself. We spent more than we earned; we failed to complete the full cycle of economic reforms; and we tied ourselves to the most productive economy in the world without building our own productivity..... *Argentina's crisis is largely home grown.*" Eduardo Duhalde, "Argentina Regrets", *Financial Times* (2 July 2002) [emphasis added].
[260] *Ibid*. Similarly, the *Sempra* tribunal rejected Argentina's claim that burden falls entirely on exogenous factors, and found both endogenous and exogenous factors to have played substantial role in contributing to the crisis. The tribunal also noted that the problems were not the fault of any Argentinean administration, but had been accumulated for over a decade. However, in the result, the tribunal held Argentina responsible for contributing to the crisis. *Sempra* Award, *supra* note 91, at para 354.
[261] Unlike other international adjudicative bodies that have the appeals mechanism, the ICSID has the mechanism of annulment of awards on narrow grounds. A detailed explanation of the annulment mechanism is provided in the next section of this chapter.
[262] *Enron* Annulment, *supra* note 91, at para 393.

applied an expert opinion, relying on the evidence presented by the economics expert.[263] Concerning this point, the annulment committee noted the following: "[w]hile an economist might regard a State's economic policies as misguided, and might conclude that such policies led to or amplified the effects of an economic crisis, *that would not itself necessarily mean that as matter of law, the State had* "*contributed to the situation of necessity*" such as to preclude the reliance on the principle of necessity under customary international law."[264] To support its argument further, the annulment committee drew attention to what will amount to a "fault" in the context of considering the "contribution" requirement as a general principle that is used to prevent a party from taking advantage of its own fault. In this respect, the committee listed possible standards such as deliberate conduct, recklessness and negligence that could have been applied by the *Enron* tribunal instead of the expert opinion of an economist.[265]

The standards mentioned by the *Enron* annulment committee were addressed later by the *Impregilo* tribunal. Questioning whether the conduct under the definition of "contributed" should be "deliberate (*i.e.* intended to bring about the state of necessity) or reckless or negligent, or even caused by a lesser degree of fault", the tribunal held that it need not be "specifically intended or planned."[266] Rather, in the tribunal's view, "it can be the consequence, *inter alia*, of well-

[263] *Ibid.*

[264] *Ibid* [emphasis added]. Most notably, the annulment committee suggested how the legal analysis should have been performed by the tribunal as follows:

> The Tribunal's process of reasoning should have been as follows. First, the Tribunal should have found the relevant facts based on all of the evidence before it, including the Edwards Report. Second, the Tribunal should have applied the legal elements of the Article 25(2)(b) to the facts as found (having if necessary made legal findings as to what those legal elements are). Third, in the light of the first two steps, the Tribunal should have concluded whether or not Argentina had "*contributed to the situation of necessity*" within the meaning of Article 25(2)(b). *For the Tribunal to leap from the first step to the third without undertaking the second amounts in the Committee's view to a failure to apply the applicable law.* This constitutes a ground of annulment under Article 52(1)(b) of the ICSID Convention.

Ibid [emphasis added].

[265] *Ibid* at para 389.

[266] *Impregilo*, *supra* note 92, at para 356.

intended but ill-conceived policies."[267] In this respect, the tribunal referred to the ICJ's decision in the *Gabčíkovo-Nagymaros Project* case, where the Court found that "because Hungary had 'helped, *by act or omission* to bring about' the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness."[268]

Unlike other tribunals, the *LG&E* tribunal took a different approach to the "non-contribution" requirement of the necessity defense. First, the tribunal decided that the burden to prove Argentina's contribution to the crisis lay on the claimant. By shifting the burden of proof from the respondent to the claimant, the tribunal held that *LG&E* had not proved that Argentina had contributed to a severe crisis faced by the country.[269] It further held that there was "no serious evidence in the record that Argentina had contributed to the crisis resulting in the state of necessity." The tribunal found that "the attitude adopted by the Argentine Government has shown a desire to slow down by all the means available the severity of the crisis."[270]

The *Continental* tribunal also addressed the non-contribution requirement of the necessity defense in its decision. Interestingly, its findings on this question were totally different than those of the above mentioned tribunals, and thus worth noting. First, the tribunal stated that the question of Argentina's absence of contribution to the state of necessity was not relevant to the application of Article XI of the U.S.-Argentina BIT. In this respect, the tribunal emphasized that Argentina may invoke necessity under Article XI "even if the need to protect its essential

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[267] *Ibid*.
[268] *Ibid* at note 93 [emphasis added]. The details of this case were discussed in Chapter III.
[269] *LG&E*, Decision on Liability, *supra* note 49, at para 256. This approach appears to be contrary to what the ILC had in mind when drafting Article 25. The ILC's Special Rapporteur James Crawford clarified that the "onus of proof" for all circumstances excluding wrongfulness lies with the State invoking the relevant defence. *See* James Crawford, *Addendum to Second Report on State Responsibility*, UN Doc. A/CN.4/498/Add.2 (1999), para. 349.
[270] *Ibid*.

security interest has materialized as a consequence of a deliberate but still legitimate policy of that very State."[271] It further noted that,

> If a Contracting Party [Argentina] to a BIT has contributed to endangering its essential security interest, for the protection of which it has then adopted the challenged measures, those measures may fail to qualify as 'necessary' under Art. XI, since that Party could have pursued some other policy that would have rendered them unnecessary.[272]

Most interestingly, the tribunal found that the economic policies of Argentina, which were claimed to have contributed to the crisis, were "recommended by the IMF and received its massive financial assistance, as well as the political support of the United States."[273] Therefore, the *Continental* tribunal found that Argentina was not barred by its own conduct from invoking Article XI, since the most appropriate way to address the crisis "would have been to adopt different policies years before, against the advice and support that Argentina was receiving from the outside."[274]

The shortcomings in the government's internal policies as a main factor for the crisis were mentioned in more detail by other tribunals. For instance, the *Suez* and the *Suez-Vivendi* tribunals clarified that "excessive public spending, inefficient tax collection, delays in corresponding to the early signs of the crisis, insufficient efforts at developing an export market, and internal political dissension and problems inhibiting effective policy making" made a substantial contribution to the crisis.[275] Likewise, the *National Grid* tribunal also acknowledged the role played by external factors, but found in the end that internal factors such as "external

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[271] *Continental* Award, *supra* note 91, at para 234.
[272] *Ibid*.
[273] *Continental* Award, *supra* note 91, at para 235. The tribunals also stressed the fact that Argentina's policies in question were "regarded as sound economic policies which had been beneficial for years to Argentina's economy... [and were] praised by the international financial community and by many qualified observers." *Ibid*.
[274] *Ibid* at para 236.
[275] *Suez*, *supra* note 92, at para 242; *Suez-Vivendi*, *supra* note 193, at para 264.

indebtedness, fiscal policies or labour market rigidity [which] were under control of [Argentinean Government]..... created a fertile ground for the crisis to develop when in the late nineties the external factors adduced by [Argentina] came to play."[276]

As can be seen, most tribunals could not examine the "contributory" nature of Argentina's measures to a state of necessity under a certain test that has specific steps and criteria. Thus, in the next subsection I will discuss the views of scholars on the shortfalls of tribunals' analyses with respect to the "non-contribution" requirement and their proposals for designing the test that is able to serve as an efficient tool for examining state measures under this requirement of the necessity defense.

(ii) Suggesting a Test for Examining the Non-Contribution Requirement

The tribunals' analyses with regard to the non-contribution requirement drew criticism from scholars. For instance, Professor Bjorklund considers them to be "dissatisfying", since the tribunals did not explain their conclusions in detail.[277] Another scholar, Professor Reinisch, also criticizes the tribunals' conclusions for lack of an "in-depth-analysis of the required degree of contribution in order to trigger the exclusion of the necessity defense."[278] In his comment to the *LG&E* tribunal's approach, Professor Reinisch argues that shifting the burden of proof from the respondent to the claimant "was rather unorthodox because normally a State wishing to rely on necessity, or any other ground precluding the wrongfulness of its behaviour, has to establish the

[276] *National Grid*, *supra* note 92, at para 260. The *Impregilo* tribunal also touched upon these internal factors by holding as follows:

> Argentina's long-term failure to exercise fiscal discipline, including control of provincial spending and of the subsidization of the Provinces by the central Government; and its inability to adopt labor and trade policies consistent with the country's currency board. The resulting high public indebtedness and inflexibility in Argentina's markets hampered substantially the country's ability to cope with external shocks, leading to the 2001 crisis.

Impregilo, *supra* note 92, at para 358.

[277] Bjorklund, Economic Security Clauses, *supra* note 6, at 491.

[278] August Reinisch, "Necessity in International Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? *Comments* on *CMS v. Argentina and LG&E v. Argentina*", (2007) 8 Journal of World Investment and Trade 191 at 203 [Reinisch, Split of Opinions].

preconditions for such a defence."[279] Moreover, he rightly notes that the tribunal did not specify the degree of contribution required to bar the invocation of the necessity defense, which gives rise to an assumption that any contribution is sufficient for its exclusion.

In my view, the criticisms of the tribunals' approaches to the issue of contribution to a state of necessity are appropriate for several reasons. Firstly, the tribunals did not effectively perform the assessment of facts, and thus could not present thorough legal analyses on the required elements of contribution.Such inadequacy in legal analysis can especially be observed with regard to determining the extent of contribution to the crisis. In this respect, the tribunals did not make efforts to properly inquire into the question of whether Argentina's contribution was "sufficiently substantial" as explained in the ILC commentaries. Secondly, the tribunals did not develop the arguments supporting their conclusions, and failed to ground them on a sound legal basis. The approach taken by the *LG&E* tribunal with regard to shifting the burden of proof is a clear example. In support of its decision to put the burden of proof on the claimant, the tribunal did not provide any authority from which it derived this burden of proof rule.[280] Rather, it made a conclusion that contradicts the rules prescribed in the ILC commentaries.[281] On this

[279] Reinisch, Necessity in Investment Arbitration, *supra* note 8, at 155. Professor Bjorklund also points out that the *LG&E* tribunal's placement of this burden of proof on the claimant, *LG&E* in this case, contradicts the intent of the ILC Articles' drafters. She notes that, according to the ILC commentaries, "where conduct in conflict with an international obligation of a State is attributable to that State and seeks to avoid its responsibility by relying on some circumstance under Chapter V, the position changes and the onus lies on that State to justify or excuse its conduct." Bjorklund, Emergency Exceptions, *supra* note 6, at 491. *See* also James Crawford, *Second Report on State Responsibility: Addendum*, (1999) Doc. A/CN.4/498/ Add.2, para. 349,
Available at: <http://legal.un.org/ilc/documentation/english/a_cn4_498.pdf> (last visited 30 September 2014).

[280] In Professor Reinisch's point of view, this "in effect turns this aspect of the necessity defense into quasi-self-judging defense - something the *LG&E* tribunal had denied with regard to the necessity defense earlier in its decision." Reinisch, Split of Opinions, *supra* note 278, at 203.

[281] According to the ILC Articles, the burden of proof has to fall on the party invoking the exception. In this case, the state (Argentina) had to show convincingly that the measures taken were necessary and legitimate and that it did not contribute to the crisis. As a general principle of law, this rule was widely accepted in the jurisprudence of international courts and tribunals. *See* Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) at 326, 332 (with particular reference to the case entertained by the ICJ in the *Case Concerning Rights of Nationals of the United States of America in Morocco* (France v. United States), (August 27, 1952) Judgement, ICJ Reports (1952) at 176, available online: < http://www.icj-cij.org/docket/files/11/1927.pdf> (last

point, a distinguished scholar, Stephan Schill, contends that, "[i]nstead of shifting the burden of proof to the investor, the tribunal should have established criteria that add certainty to this element of necessity."[282] As a viable test, he suggests "a criteria of foreseeability of certain consequences of a state's politico-economic measures" chosen by a state to tackle the crisis.[283] Another scholar, Professor Benedict Kingsbury, in his expert report in the *Metalpar v Argentina* case, argues that "the proper test as to whether the government itself caused the crisis and so should be unable to make a claim of necessity, should be one of *bad faith and egregious unreasonableness*."[284] He further explains it as follows:

> [I]f a government has pursued economic policies in good faith, without an aim or intention of precipitating a crisis or disrupting particular legal regimes, and *the policies were not egregiously unreasonable choices having regard to economic orthodoxies and understandings prevalent at the time*, then reliance on the doctrine of necessity should not be precluded, where an economic crisis results in which the state finds itself required to take urgent action to preserve the economy and the welfare of the affected community.[285]

Another scholar, Alberto Alvarez-Jiménez, suggests a more sophisticated test for examining the non-contribution requirement. He argues that "a fair evaluation of the contribution should go further and must include an analysis of the dynamics of the interactions between

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visited 28 November 2014); Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (The Hague: Kluwer Law International, 1996).

[282] Stephan Schill, "International Investment Law and the Host State's Power to Handle Economic Crises - Comment on the ICSID Decision in *LG&E v. Argentina*", (2007) 24 (3) Journal of International Arbitration 265 at 281 [Schill, *LG&E v. Argentina*]. In his view, if any kind of state's contribution were regarded sufficient to exclude the necessity, then "the emergencies that originate from political and economic crises would be virtually excluded from the scope of necessity since a certain (political) contribution or responsibility on the part of the host state can frequently be identified that later materializes in the state of necessity." *Ibid*.

[283] *Ibid*. Stephan Schill does not explain in detail what its suggested test actually includes and how it can be applied in examining the contribution to the crisis.

[284] Kingsbury, Expert Report, *supra* note 173, at 35 para 77 [emphasis added].

[285] *Ibid* [emphasis added].

regulatory failures and external factors."[286] According to the two-tier test suggested by Alvarez-Jiménez, tribunals should first determine whether the regulatory measures taken as a response to the crisis were adopted and applied with reasonable diligence. If the result is affirmative, a state should not be considered to have substantially contributed to a situation of necessity. Conversely, if a regulatory failure results from some degree of negligence such as "significant corruption or careless practices", a state should be deemed as failing this requirement.[287] Second, tribunals should establish whether "the regulation was properly functioning before external factors played a role, triggering or aggravating its collapse and prompting the crisis."[288] If the answer is affirmative, the tribunal should not conclude that a state's contribution had been substantial, because it could be expected that the regulation would have operated properly in the absence of external elements.[289] If the tribunal finds that the regulation has already shown "the signs of deterioration" before or at the time of appearance of external factors, then it should proceed to the next step: to determine whether the state was "diligent in keeping a regulation that was indicating clear signs of faulty design or implementation."[290] If the tribunal finds that the host state has retained the faulty regulation, which was subsequently aggravated by external factors, the state will be considered to have made substantial contribution to the crisis, and thus its necessity defense should be rejected.[291]

[286] Alberto Alvarez-Jiménez, "Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law - A New Approach Based on the Complexity of Argentina's 2001 Crisis", (2010) 27(2) Journal of International Arbitration 141 at 148.
[287] *Ibid.*
[288] *Ibid.*
[289] *Ibid.*
[290] *Ibid* at 149.
[291] *Ibid.*

4.2.4. Concluding Remarks

The analysis of interpretation of the treaty NPM clause by the tribunals in the Argentine cases shows that they reached different conclusions despite assessing similar facts related to the Argentine economic crisis. However, it also evidences that the tribunals' decisions concurred on two points. First, all of the tribunals found that economic emergencies can be encompassed by treaty NPM clauses, as they are considered to pose a threat to a state's "essential security interests." Yet, the tribunals pointed out that an economic emergency must be of a serious nature to qualify under this permissible objective. Even though the tribunals agreed on the required degree of threat constituting economic emergencies, their findings on its gravity diverged. Second, the tribunals made similar conclusions with regard to the impairment of other state's interests or the international community as a whole. The analysis of theoretical models to determine the actual possessors of rights and obligations established in IIAs suggests the application of a hybrid approach to examining the requirement on the impairment of other state's interests. It was found appropriate that the tribunals should balance the interests of investors and those of their home states against the interests of host states.

Despite agreeing on these interpretative points, the tribunals disagreed on other requirements of the customary necessity defense. Particularly, the *CMS*, *Enron* and *Sempra* tribunals interpreted the "only means" and the "non-contribution" requirements narrowly, which led them to find that Argentina failed to meet these requirements of the customary necessity defense. By contrast, the *LG&E* tribunal, in applying these requirements, took the approach that was more deferential to Argentina. As a result, the tribunals ended up with diverging conclusions: the former rejected and the latter accepted the necessity defense of Argentina. Even though all of the tribunals were criticized for the lack of legal analysis, it appears that both

approaches are biased towards protecting the interests of disputing parties. Thus, there arises a question of why the tribunals reached contradictory conclusions, even though they assessed similar facts, and what kind of factors could have played an important role in explaining such divergent interpretative approaches.

In this respect, the opinions of Yuongjin Jung and Sangwook Daniel Han are worth noting. Taking a critical approach, they argue that "the *LG&E* tribunal still failed to escape from the analysis framework, which guided the arbitrators of all four tribunals resort to their own value judgements instead of the objective concrete standards in determining whether the relevant measure was sufficiently necessary to meet the purported objective."[292] Therefore, they contend that one of the major factors that influenced them to reach opposing conclusions was the structure of the analytical framework applied to interpreting the nexus requirement of the treaty NMP clause at issue.[293] To be specific, in interpreting the treaty NMP clause of the U.S.-Argentina BIT, both scholars argue that the *LG&E* tribunal adopted a cost-benefit balancing test just like the other three tribunals (*CMS*, *Enron*, *Sempra*) did, which caused the tribunal to reach the opposite conclusion. However, in balancing the costs and benefits of competing interests, the *LG&E* tribunal took "a more lenient view of economic crisis by placing more value on public order than on the value of investment protection."[294] According to them, this analytical framework gives "a wide scope of discretion over value choice and priorities of purposes of the BIT to arbitrators", and thus is a major structural cause for inconsistency in interpreting treaty NPM clauses by investment arbitrations tribunals.[295] Moreover, they think that the tribunals'

[292] Youngjin Jung and Sangwook Daniel Han, "What to do with the Dilemma facing the State of Necessity Defense under the Investment Treaties and How to Interpret the NPM Clause?", (2011) 12(3) Journal of World Investment and Trade 397 at 401 [Jung & Han].
[293] *Ibid*.
[294] *Ibid* at 404.
[295] *Ibid*.

"different understandings of the nature of the function of the NPM clauses and the values behind the BIT" was another reason for these divergent decisions.[296]

It should be noted that the annulment committees later reviewed the decisions of tribunals that rejected Argentina's necessity defense (*CMS*, *Enron*, and *Sempra*). Since the decisions of the annulment committees clarified the relationship between treaty NPM clauses and the customary necessity defense, I will present the analysis of these annulment decisions in the next section of the chapter. Particularly, I will look at how the annulment committees analysed the legal nature and effects of invocation of treaty NPM clauses and the customary necessity defense, and thus contributed to clarifying a distinction between the two.

[296] *Ibid*, footnote 39.

4.3. Clarifying the Relationship between Treaty NPM Clauses and the Customary Necessity Defense

The rejection of Argentina's necessity defense by the *CMS*, *Enron* and *Sempra* tribunals prompted it to seek the annulment of awards in accordance with Article 52 of the ICSID Convention.[297] At the annulment stage, Argentina mainly argued that the tribunals had manifestly exceeded their powers and failed to state the reasons on which the awards were based.[298] In this section, I will present the analyses of the annulment committees on the above-mentioned claims of Argentina. Particularly, I will examine the committees' approaches taken to

[297] Unlike other international adjudicative bodies that have the appeals mechanism, the ICSID has the mechanism of annulment of awards on narrow grounds. This mechanism is a unique element of the ICSID system that gives it an advantage over other investor-state arbitral forums by removing the possibility of judicial review by domestic courts and replacing it with a system of review by ad hoc annulment committees established by the ICSID Secretariat. An ad hoc annulment committee consists of three members, none of whom may have served on the arbitral tribunal that rendered the award being challenged, while in non-ICSID arbitrations, each award rendered is subject to the control of, or review by, domestic courts at the seat of the arbitration. Further, the New York Convention narrowly confined the scope of review by domestic courts at the seat of arbitration. However, under the New York Convention, domestic courts have broader discretion to limit the enforcement of awards. Unlike the ICSID annulment committees, domestic courts may set aside an award, the enforcement of which would go against the public policy of a state in which the court's seat is located. Therefore, the ICSID annulment committees are regarded to be more effective in resolving disputes than domestic courts, since they block the adjudication of ICSID awards in "investor-unfriendly" domestic courts. *See* Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2008) at 52 [Van Harten]; Hans Van Houtte, "Article 52 of the Washington Convention: A Brief Introduction", in Emmanuel Gaillard and Yas Banfatemi eds., *Annulment of ICSID Awards* (New York: Juris, 2004) at 11; Dohyun Kim, "The Annulment Committees Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away From an Annulment Based System", (2011) 86 New York University Law Review 242 at 250; However, it should also be noted that there are doubts about future successful functioning of the ICSID due to lack of consistency in the awards rendered by this institution. Some thoughts have been put forward to reconceptualise its structure by creating an appellate body and establishing a permanent court dealing with investor-states arbitration issues. *See* generally, Karl P. Sauvant, *Appeals Mechanism in International Investment Disputes* (Oxford: Oxford University Press, 2008).

[298] According to Article 52 of ICSID, an award issued by an ICSID tribunal can be annulled on five limited grounds: 1) when the tribunal is improperly constituted; 2) when the tribunal manifestly exceeds its powers; 3) when a member of the tribunal engages in corruption; (4) when there is a serious departure from the fundamental rules of procedure; and 5) when the award fails to state the reasons on which it is based.
It should be noted that the ICSID Convention neither provides for review of the tribunals' legal determinations nor allows annulment committees to overrule an award even on the most egregious errors of law. In this regard, the *MINE* annulment committee noted that, "a Tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorised to function....Disregard of applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment." *See Maritime Int'l Nominees Establishment v. Republic of Guinea*, (Dec. 22, 1989) Decision of the *ad hoc* Committee on the Application by Guinea for Partial Annulment, ICSID Case No. ARB/84/4, (1989) 4 ICSID Reports 79 at 104.

distinguish treaty NPM clauses from the customary necessity defense. In this respect, I will look into the questions related to the sequence of invoking both defenses, the application of the conditions of the customary necessity defense to interpreting the nexus requirement of a treaty NPM clause, and a supplementary invocation of the customary necessity defense in the absence of a treaty NPM clause.

4.3.1. Distinguishing Primary and Secondary Rules: The *CMS* and *Sempra* Annulments

4.3.1.1. *CMS* Annulment

As was discussed, in interpreting Article XI of the U.S.-Argentina BIT, the *CMS*, *Sempra* and *Enron* tribunals imported the requirements of the customary necessity defense, and thus conflated these two defences. The annulment committees subsequently inquired into this issue and solved it within their authority given under Article 52 of the ICSID Convention.[299] The *CMS* annulment committee was the first to address the issue. Its findings laid down the foundations of the distinction between these two defenses and served as valuable guidance for subsequent tribunals. Before the *CMS* annulment committee, Argentina claimed that the *CMS* tribunal manifestly exceeded its power since it had not properly applied the NPM clause (Article XI) of the U.S.-Argentina BIT, and failed to state the reasons for its decision.[300] The committee first stated that both the parties to the dispute and the tribunal had "conflated" a treaty NPM clause and the customary necessity defense by applying the elements of the latter to interpreting the former.[301] Looking into the question of whether the tribunal stated the reasons for its decision on

[299] For the detailed analysis of annulment committees' decisions, *see* Andreas Von Staden, "Towards Greater Doctrinal Clarity in Investor-State Arbitration: The *CMS*, *Enron*, and *Sempra* Annulment Decisions", *Law and Economics Research Paper Series*, Working paper No. 2010-13 (November 2010), available online: <http://ssrn.com/abstract=1725909> (last visited 1 December 2014).

[300] *CMS* Annulment, *supra* note 91, at para 136.

[301] *Ibid* at para 123. Thus, the committee held that,

> The Tribunal evidently considered that Article XI was to be interpreted in the light of the customary international law concerning the state of necessity and that, if the conditions fixed under that law were not

the application of Article XI, the committee noted that "[t]he Tribunal should certainly have been more explicit in specifying, for instance, that the very same reasons which disqualified Argentina from relying on the general law of necessity meant that the measures it took could not be considered "necessary" for the purpose of Article XI either."[302] Most importantly, the committee emphasized that Argentina did not contest the tribunal's incorporation of the customary necessity requirements into the interpretation of Article XI, as both parties accepted that the application of Article XI was subject to the same conditions available under customary international law. Rather, Argentina claimed only that the tribunal had not performed the required substantive analysis of Article XI. In respect of this claim, the committee held that ".....although the motivation of the Award could certainly have been clearer, a careful reader can follow the implicit reasoning of the Tribunal."[303] Thus, the *CMS* annulment committee did not uphold Argentina's claim on this point of the award.

The committee then proceeded to question whether the tribunal manifestly exceeded its powers by failing to give effect to a treaty NPM clause (Article XI) invoked by Argentina as a defense. The committee first examined the content of Article XI of the BIT and Article 25 of ARSIWA, and held that despite the similarities in the language, both defenses are separate and distinct legal standards.[304] The committee explained this distinction as follows:

> met, Argentina's defense under Article XI was likewise to be rejected. Accordingly, having considered *the arguments eventually developed by the Parties with respect to Article XI*, it did not find it necessary to revert to its previous assessment concerning the application of customary international law and to repeat the conclusions it had arrived at during the course of examination of Argentina's first defense.

Ibid at para 124 [emphasis added].

[302] *Ibid* at para 127. As for stating the reasons for applying the requirements of customary necessity defense (Article 25 of ARSIWA), the Committee noted that the tribunal "examined one by one the conditions enumerated in that Article, [and] took a decision on each of them *giving detailed reasons*." Thus, the Committee held that, "[i]n that part of the Award, *the tribunal clearly stated its reasons* and the Committee has no jurisdiction to consider whether, in doing so, the Tribunal made any error of fact or law." *Ibid* at para 121 [emphasis added].

[303] *Ibid*.

[304] *Ibid* at para 129.

> Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25 is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.[305]

To further clarify this distinction, the committee noted that Article XI "covers measures necessary for the maintenance of public order or the protection of each Party's own essential interests, without qualifying such measures.....[while Article 25] subordinates the state of necessity to four conditions"[306] that do not exist in Article XI.[307] Emphasizing the distinct conditions required for invocation of these two defenses, the committee pointed out that, "it was necessary for the Tribunal *to take a position on their relationship* and to decide whether they were both applicable.....[however], the Tribunal did not enter into such an analysis, simply assuming [the two provisions] on the same footing."[308] Based on this, the *CMS* annulment committee found that, "[o]n that point, the Tribunal made a manifest error of law."[309]

Holding as such, the committee substantially clarified the relationship between Article XI of the BIT and Article 25 of ARSIWA in terms of their application. By introducing the distinction between primary and secondary rules, the committee specified how these two defenses should be applied by investment tribunals.[310] Based on such a distinction, the committee construed Article XI as a primary rule of international law (*lex specialis*). Relying on

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[305] *Ibid*. For the distinction and relationship between these two defenses, *see* S.R. Subramanian, "Too Similar or Too Different: State of Necessity as a Defense under Customary International Law and the Bilateral Investment Treaty and their Relationship", (2012) 9 (1) Manchester Journal of International Economic Law 68.
[306] *Ibid* at para 130.
[307] The requirement that is considered to be absent in Article XI is the impairment by measures at issue of the essential interests of other states or the international community as a whole. *Ibid*.
[308] *Ibid* at para 131 [emphasis added].
[309] *Ibid* at para 130.
[310] *Ibid* at para 133.

the ICJ's holding in the *Oil Platforms* case,[311] the committee held that, "if the Tribunal was satisfied by the arguments based on Article XI, it should have held that there had been 'no breach' of the BIT."[312] As for Article 25, the committee, relying on the ILC position, identified it as a secondary rule[313] and held that, "the excuse based on customary international law *could only be subsidiary* to the exclusion based on Article XI."[314] Put differently, the *CMS* annulment committee suggests that the tribunal should first consider whether an act was excluded from potential treaty breaches by a treaty NPM provision (Article XI) which is applied as *lex specialis*, and only then should it consider the preclusion of Argentina's responsibility for a breach under customary international law (Article 25) applied as *lex generalis*.[315]

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[311] *See Oil Platforms, supra* note 51, at para 34. The Tribunal particularly noted as follows:

> If in the present case the Court is satisfied by the argument of the United States that the actions against the oil platforms were, in the circumstances of the case, "measures . . . necessary to protect [the] essential security interests" of the United States, within the meaning of Article XX, paragraph 1 (d), of the 1955 Treaty, it must hold that no breach of Article X, paragraph 1, of the Treaty has been established. *Ibid*.

[312] *CMS* Annulment, *supra* note 91, at para 133.

[313] The ILC Study Group on the Fragmentation of International Law explains it as follows: "[T]he point of the *lex specialis* rule is to indicate which rule should be applied . . .[T]he special, as it were, steps in to become applicable instead of the general. Such replacement remains, however, always only partial. The more general rule remains in the background providing interpretative direction to the special one." *See* ILC, *Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (4 April 2006), Doc. A/CN.4/L.682 [ILC *Fragmentation Report*], online at: < http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> (last visited 25 December 2014).

[314] *CMS* Annulment, *supra* note 91, at para 132 [emphasis added]. According to Professor Gazzini,

> This holds true regardless of whether necessity under customary international law goes to the issue of wrongfulness (primary rule), or to the issue of responsibility (secondary rule). In the first case, both Article XI and draft Article 25 would cover the same field and the tribunal should have applied the former as *lex specialis.* In the second case, which would be in line with the position of the ILC, draft Article 25 would have come into play only after determining that there was a breach of the treaty, which determination was not precluded by the application of Article XI.

Gazzini, *CMS v. Argentina, supra* note 90, at 456-57.

[315] The committee held that,

> [T]he Tribunal would have been under an obligation to consider first whether there had been any breach of the BIT and whether such a breach was excluded by Article XI. Only if it concluded that there was conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded in whole or in part under customary international law. *Ibid* at para 133.

Professor Desierto explained such secondary application of the customary necessity defense as follows: 1) The tribunal should determine the existence of any breach of the treaty (BIT); 2) If the breach is found, then the tribunal must determine whether the breach is excluded by NPM clause of the treaty; 3) if there is any remaining breach that cannot be excluded under the treaty NPM clause, then the tribunal should determine whether the state's responsibility for the breach can be precluded under customary necessity defense (Article 25 of ARSIWA). *See* Diane Desierto, "Necessity and 'Supplementary Means of Interpretation' for Non-Precluded Measures Bilateral

Based on the above-mentioned findings, the *CMS* annulment committee held that the *CMS* tribunal had committed another error of law by failing to first consider whether there had been a breach of the BIT and whether that breach was excluded by its NPM clause. However, despite these errors, the committee held that, "the tribunal applied Article XI of the Treaty... [a]lthough applying it cryptically and defectively, it applied it."[316] Thus, the committee found no manifest excess of power, and refused Argentina to annul the award in this respect.[317]

4.3.1.2. *Sempra* Annulment

The findings of the *CMS* annulment committee had a substantial impact on the analyses of subsequent annulment committees. For instance, the *Sempra* annulment committee took the same approach and made similar findings with regard to the relationship between the two defenses. However, it reached a different conclusion by finding that the tribunal's failure to apply Article XI of the BIT was a manifest excess of powers. Unlike the *CMS* committee, the *Sempra* annulment committee performed a detailed analysis to ground its decision. The committee's clear

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Investment Treaties", (2009-2010) 31 University of Pennsylvania Journal of International Law 827 at 864, [Desierto]. For further detailed observations on the issue of primary/secondary rules in the framework of the law of State responsibility, *see* Jürgen Kurtz, "Delineating Primary and Secondary Rules on Necessity at International Law" in Broude Tomer & Shany Yuval, *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing, 2011); Jean Combacau & Denis Alland, "Primary and Secondary Rules in the Law of State Responsibility: Categorizing International Obligations", (1985) 16 Netherlands Yearbook of International Law at 81–109; Ulf Linderfalk, "State Responsibility and the Primary-Secondary Rules Terminology. The Role of Language for an Understanding of the International Legal System", (2009) 78(1) Nordic Journal of International Law at 53–72; Lindroos, Anja, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis", (2005) 74 Nordic Journal of International Law 27.

[316] *CMS* Annulment, *supra* note 91, at para 136. Commenting on the decision of the *CMS* annulment committee, Professor Burke-White noted that it performed "an extensive substantive consideration of the Tribunal's findings." He further observed that the Committee's critique of the tribunal's award was "so blatant and at times even confrontational that the Committee may have been attempting to call into question the legitimacy of the *CMS* tribunal and, more generally, a system that lacks appellate review to reverse gross and outcome determinative errors of law." Burke-White, *supra* note 22, at 227.

[317] It should be noted that the mistake made by the *CMS* tribunal amounted only to a "manifest error of law" and not a "manifest excess of power" as required by Article 52(1)(b) of ICSID Convention. Due to a narrow discretion granted under Article 52, the Committee cannot substitute its own view of the law and its own assessment of the facts for those of the tribunal. Therefore, the committee was correct by acting within the limits of its discretion. In this regard, the Committee noted that, "[i]f the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground." *CMS* Annulment, *supra* note 91, at para 135.

determination of the distinction between erroneous application of law and failure to apply the law played an important role in this regard. By referring to other annulment committees' holdings, the *Sempra* annulment committee pointed out that the erroneous application of law would not result in the annulment of the award, but rather, would serve as a ground for appeal.[318] It further emphasized a material difference between Article XI of the BIT and Article 25 of the ARSIWA and held that the treaty would take precedence over customary international law.[319] Based on this, the committee found it "illogical" to consider the customary defense of necessity before Article XI of the BIT, and criticized the tribunal for failing to follow the appropriate sequence in its analysis.[320]

Moreover, the committee stated that the difference between the treaty NPM clause and the customary necessity defense prevented the latter from being used in the interpretation of the former.[321] By comparing the texts of these two defenses, the committee found that "Article 25 cannot therefore be assumed to 'define necessity and conditions for its operation' for the purpose of interpreting Article XI."[322] Taking the above mentioned into account, the *Sempra* annulment committee found that, the *Sempra* tribunal adopted the customary necessity defense (Article 25 of ARSIWA) as a primary law instead of Article XI of the BIT, and thereby made a fundamental

[318] *Sempra* Annulment, *supra* note 91, at paras. 173-74. For a detailed analysis of the *Sempra* annulment decision, *see* Federica Cristani, "The *Sempra* Annulment Decision of 29 June 2010 and Subsequent Developments in Investment Arbitration Dealing with the Necessity Defense", (2013) 15 International Community Law Review 237.
[319] *Ibid* at para 176.
[320] *Ibid* at para 177. It should be noted that instead of examining Argentina's measures under Article XI of the BIT first, the *Sempra* tribunal applied the conditions of the customary necessity defense, which Argentina failed to meet. By assuming that Article XI did not establish conditions different from customary law, the tribunal found no need to undertake further examination under this treaty provision. *Sempra* Award, *supra* note 91, at para 388.
[321] As was discussed, initially, finding no guidance which could specify the legal elements for invocation of the state of necessity in the treaty, the *Sempra* tribunal decided to apply the conditions (requirements) of the customary necessity defense to the interpretation of the treaty NPM clause (Article XI of the BIT). *See Sempra* Award, *supra* note 89, at para 378.
[322] *Sempra* Annulment, *supra* note 91, at para. 200.

error in identifying and applying the applicable law. Thus, the committee held that such a failure constituted a manifest excess of power that resulted in the annulment of the award.[323]

In contrast to the *CMS* and *Sempra* annulment committees, the *Enron* annulment committee took a different approach on this issue. It avoided the issue of determining the appropriate relationship between Article XI of the BIT and the customary necessity defense by holding that "the substantive operation and content of Article XI and the customary international law principles of necessity, and the interrelationship of the two, are issues that fall for decision by the tribunal",[324] and thus were beyond the committee's consideration.[325]

4.3.1.3. Concluding Remarks

The analysis of the decisions rendered by the *CMS* and *Sempra* annulment committees showed that the tribunals failed to distinguish a treaty NPM clause and the customary necessity defense, thereby committing an error of law by fusing the elements of the latter to interpreting the former. The committees clearly determined the line between these two defenses, and thus designed a fundamental interpretative framework that could be used as guidance for investment arbitration tribunals in dealing with similar interpretative issues. However, they did not provide a solution to the important question of what exactly needs to be shown to successfully invoke the treaty NPM clause (Article XI of the BIT) if not the requirements of the customary necessity defense (Article 25 of ARSIWA). One emerging scholar, Sahib Singh, in his comments on the *Sempra* annulment committee's decision with regard to an interpretative value of Article 25 of ARSIWA, argues that "[i]t is hard to adopt the conclusion that Article 25 offers no value

[323] *Ibid* at para 208-209.

[324] The *Enron* annulment committee found that the *Enron* tribunal's reasons for concluding that Article 25 of ARSIWA had "the same or similar meaning" as Article XI of the U.S.-Argentina- BIT were "sufficiently clear", and therefore refused to determine the appropriateness of the tribunal's interpretation. *Enron* Annulment, *supra* note 91, at para 403.

[325] Thus, the Enron committee disagreed with the *CMS* annulment committee's decision that both defenses were different, considering this analysis to be outside of the scope of the committee's authority. *Ibid* at para 405.

whatsoever..... [t]he fact that there exists the primary-secondary rule distinction, does not preclude custom's interpretative value, but rather goes towards the normative weight provided to the latter."[326] Criticising the approach taken by the *Sempra* annulment committee in interpreting Article XI, he further notes that it "nullifies the purpose of Article 31(3)(c) and essentially allows Article XI to operate by itself and without recourse to other rules of international law."[327] Therefore, Singh argues that although the *Sempra* annulment committee drew a distinction between primary and secondary rules, it did not give due weight to a residual role of the customary necessity defense in interpreting Article XI, and failed to "identify other rules of international law which may assist in interpreting quite a vague provision", if it is not Article 25 of ARSIWA.[328]

In a similar vein, it can be concluded that, even though the *CMS* and *Sempra* annulment committees clarified the relationship between treaty and customary defenses, they failed to provide a test or concrete criteria that could be used in interpreting an ambiguous NPM clause of the U.S.-Argentina BIT. Later, the other tribunal, the *Continental*, by taking a different interpretative approach, attempted to provide the answer to this question. Thus, in the next sub-section, I will shed light on this case and discuss specific features related to the interpretative approach taken by the *Continental* tribunal.

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[326] Sahib Singh, "Necessity in Investor-State Arbitration: The Sempra Annulment Decision", Blog of European Journal of International Law, published on August 16, 2010. Available online at: <http://www.ejiltalk.org/necessity-in-investor-state-arbitration-the-sempra-annulment-decision/>

[327] *Ibid*. At the same time, he also criticises the conflation approach taken by initial arbitration tribunals in *CMS*, *Sempra* and *Enron* cases: "The conflation methodology essentially jumps straight to that envisaged by Article 31(3)(c) VCLT. As a matter of treaty interpretation this is a clearly incorrect approach, since the starting point has to be Article 31 (1) VCLT and its tripartite test. Identifying the operative primary rule enables the logical application of Article 31 through its step-by-step analysis." *Ibid.*

[328] *Ibid*. The role of "other rules of international law" played in the interpretation of vague treaty clauses, specifically Article XI through operationalising systemic integration principle under Article 31(3)(c) VCLT, will be discussed in detail in Chapter VI of the thesis.

4.3.2. Interpreting Treaty NPM Clauses by Reference to the WTO Jurisprudence: The *Continental Casualty* case

4.3.2.1. The *Continental* Tribunal's Analysis

As was discussed, the *CMS* and *Sempra* annulment committees clarified the distinction between Article XI and the customary necessity defense in terms of their content and invocation, and thus rejected the conflation of their elements in interpretation. However, neither indicated possible standards that could be applied to interpreting Article XI of the treaty, if not the requisites of the customary necessity defense. Later, the *Continental* tribunal used a totally different approach to interpreting the treaty NPM clause. In this respect, the tribunal went far beyond the earlier decisions in giving content to the meaning of Article XI of the treaty, and decided that Article XI should be interpreted in light of the WTO jurisprudence on the necessity standard for interpreting Article XX of the GATT.[329]

Unlike other tribunals, the *Continental* tribunal started its analysis by examining Article XI of the BIT, instead of finding a breach of specific provisions of the treaty submitted by the claimant.[330] First, it pointed out specific characteristics of Article XI and noted that "[it] restricts

[329] The decision of the *Continental* tribunal is considered the first decision in relation to treaty NPM clauses that engages in "cross-fertilization" type analysis, demonstrating the increasing willingness of investment tribunals to acknowledge the interconnection among different regimes of international economic law. For example, Professor Reinisch remarks that the tribunal's reference to the WTO jurisprudence in interpreting the treaty NPM clause and its analysis in this regard "demonstrates an increasing willingness of investment arbitration panels to take into account other fields of international (economic) law, thereby acknowledging their interconnectedness." *See* Reinisch, Necessity in Investment Arbitration, *supra* note 8, at 156. *See* also Jürgen Kurtz, "The Use and Abuse of WTO Lawin Investor-State Arbitration: Competition and its Discontents", (2009) 20 (3) European Journal of International Law 749; Jürgen Kurtz, "The Merits and Limits of Comparativism: National Treatment in International Investment Law and the ITO", in Stephen Schill ed., *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) at 243; Benedict Kingsbury & Stephan Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality", in Stephan Schill ed., *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) at 75.

[330] However, Professor Gazzini seems not to impute much importance to the order of analysis in applying a primary rule. According to him, "[i]f the relevant clause is treated as a primary rule, the tribunal has two options: to apply first the necessity clause and then, if required, establish any breach of the treaty; or to find provisionally any breach of the treaty and then considered the necessity plea." *See* Tarcisio Gazzini, "Foreign Investment and Measures

or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met..... it has been defined as a safeguard clause..... [and] recognizes 'reserved rights', or contemplates 'non-precluded' measures to which a contracting state party can resort."[331] Then, the tribunal stressed the existence of a link between Article XI of the BIT and Article 25 of ARSIWA, pointing out that "both intend to provide flexibility in the application of international obligations, recognizing that necessity to protect national interests of a paramount importance may justify setting aside or suspending an obligation, or preventing liability from its breach."[332] Afterwards, the tribunal dealt with the question of whether the measures adopted by Argentina fell within the permissible objectives set out in the text of Article XI. First, it interpreted the "public order" objective. By equating this term with "public peace", the tribunal held that Argentina's measures necessary "to preserve and restore civil peace and the normal life of society.... [as well as] to prevent and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten legal order, *even when due to economic and social difficulties*, do fall within the application under Article XI."[333] Then, the tribunal interpreted the "essential security interests" objective. In order to examine whether the measures adopted by Argentina could be covered by essential security interests under Article XI, the tribunal imposed a threshold that was lower than that of the "grave and imminent peril" requirement in customary international law. It held that,

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Adopted on Grounds of Necessity: Towards a Common Understanding", (2010) 7(1) Transnational Dispute Management 1 at 9 [Gazzini, Necessity].

[331] *Continental* Award, *supra* note 91, at para 164.

[332] *Ibid* at para 168. As for the effect of applying Article XI, the tribunal further noted that "the practical result of applying [Article XI rather than Article 25] may be the same: condoning conduct that would otherwise be unlawful and thus removing the responsibility of the State." *Ibid*. In my view, this holding of the tribunal seems to be incorrect, as the invocation of these two defenses have different consequences. The effects of their invocation will be discussed in the following sections.

[333] *Ibid* at para 174 [emphasis added].

> The protection of "essential security interests" recognized by Article XI does not require that "total collapse" of the country or that a "catastrophic situation" has already occurred before responsible national authorities may have recourse to its protection. The invocation of the clause does not require that the situation has already degenerated into one that calls for the suspension of constitutional guarantees and fundamental liberties.[334]

4.3.2.2. Seeking Assistance from the WTO Jurisprudence

The tribunal was subsequently tasked with determining the content of the term "necessary" in Article XI, and based on that finding, deciding whether the measures adopted by Argentina were indeed necessary to achieve the pursued objectives. To accomplish this, the tribunal first emphasized the distinction between Article XI and the customary necessity defense, stating that it does not share the opinion of other early tribunals that "the treaty thus becomes inseparable from the customary law standard, insofar as to the conditions for the operation of the state of necessity are concerned."[335] However, surprisingly, instead of referring to the elements of the customary necessity defense, the *Continental* tribunal decided to look for the solution elsewhere. The tribunal found it "*more appropriate to refer to the GATT and WTO case law* which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating from the obligations contained in the GATT."[336] To justify its reference to the GATT and WTO jurisprudence, the tribunal pointed out that Article XI derived

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[334] *Ibid* at para 180.
[335] *Ibid* at para 192. However, the *Continental* tribunal conceded that Article 25 (customary necessity defense) may "assist" in the interpretation of Article XI of the BIT. *Ibid* at para 168.
[336] *Ibid* at para 192 [emphasis added]. According to Mark Wu, a key reason for the *Continental* tribunal adopting this approach was that a former member of the WTO Appellate Body, Giorgio Sacerdoti, headed the tribunal. Wu notes that "familiarity [of Sacerdoti] with the applicable trade law jurisprudence as well as his preference for it over the customary international law norm for the necessity defense is likely to have played an important role." Mark Wu, "The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime", in Zachary Douglas, Joost Pauwelyn & Jorge Vinuales, The Foundations of International Investment Law: Bringing Theory into Practice (Oxford: Oxford University Press, 2014) at 207. For a further elaboration of Sacerdoti's views on this matter, *see* Giorgio Sacerdoti, "BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity", (2013) 28 ICSID Review 1.

from the U.S. Model BIT and the U.S. Friendship, Commerce and Navigation (FCN) treaties, which are supposed to derive from Article XX of GATT (1947).[337]

The *Continental* tribunal started the interpretation of Article XI by specifying the definition of its term "necessary". In this respect, the tribunal referred to the WTO AB's holding in the *Korea-Beef* case, which stated the following:

> As used in Article XX(d), the term "necessary" refers in our view to a range of degrees of necessity. At a one end of this continuum lies "necessary" understood as "indispensible;" at the other, is "necessary" taken to mean as "making contribution to." We consider that "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensible" than to the opposite pole of simply "making contribution to."[338]

However, the tribunal pointed out that a measure which is not indispensable, may be necessary at the same time. In that case, dor determining the necessity of a measure, the tribunal suggested applying the less-restrictive means test (LRM), which entails balancing the competing interests at stake. This test, which has been used in the practice of the WTO DSBs, includes the assessment of the following: 1) the importance of the interest (value) protected by the given GATT exception; 2) the contribution of the measure to the objective sought; 3) the restrictive impact of the measure on international trade.[339] Upon assessment of these three factors, the tribunal should not find the measures "necessary" if there is a WTO consistent, less trade

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[337] *Ibid* at para 192.

[338] *Ibid* at para 193. *See* also WTO Appellate Body Report, in *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, (11 December 2000) WT\DS161/AB/R, WT/DS169/AB/R at para. 161. Available online: <https://www.wto.org/english/tratop_e/dispu_e/161-169abr_e.pdf> (last visited 15 November 2014).

[339] *Ibid*. *See* also *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, (12 March 2001) WT/DS135/AB/R at para. 172. Online at: <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=1236&CurrentCatalogueIdIndex=0&FullTextSearch=> (last visited 15 November 2014); *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, (7 April 2005) WT/DS285/AB/R at para. 306, online: <https://www.wto.org/english/tratop_e/dispu_e/285abr_e.pdf> (last visited 15 November 2014); *Dominican Republic–Measures Affecting the Importation and Internal Sale of Cigarettes*, (25 April 2005) WT/ DS302/AB/R at para. 70. *Ibid*, footnote 294. Online at: <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=69911&CurrentCatalogueIdIndex=0&FullTextSearch=> (last visited 15 November 2014).

restrictive, reasonably available alternative that achieves the same level of protection attained by the measure at issue.[340]

4.3.2.3. Applying the LRM Test

In applying this standard, the *Continental* tribunal first had to assess whether the measures adopted by Argentina contributed to the realization of the permissible objectives found in Article XI of the BIT. In this respect, the tribunal found "a genuine relationship" between the means used and the end pursued, and held as follows:

> [T]he Measures at issue (the *Corralito*, the *Corralon*, the pesification, the default and the subsequent restructuring of those debt instruments....) were in part inevitable, or unavoidable, in part indispensable and in any case material or decisive in order to react positively to the crisis, to prevent the complete break-down of the financial system, the implosion of the economy and the growing threat to the fabric of Argentinean society and generally to assist in overcoming the crisis.[341]

Next, the tribunal had to examine whether there were other reasonably available alternative measures that could achieve the desired level of protection of the pursued objectives. Here, the tribunal took a deferential approach and stated that it would not substitute its judgement for Argentina's, but rather, would determine whether Argentina had other reasonable alternative means to achieve the protection of its public interests.[342] The tribunal looked into the availability of alternatives to the following measures of Argentina: a) the *Corralito* (the imposition of the bank freeze in December 2001); b) the devaluation of the peso; c) the

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[340] *Ibid* at para 195.
[341] *Continental*, Award, *supra* note 91, at para 197.
[342] The *Continental* tribunal noted that:

> In evaluating whether these alternatives were in fact reasonably available and would have avoided the adoption of the challenged Measures, the Tribunal is mindful that it is not its mandate to pass judgment upon Argentina's economic policy during 2001- 2002, nor to censure Argentina's sovereign choices as an independent state. Our task is more modestly to evaluate only if the plea of necessity by Argentina is well-founded, in that Argentina had no other reasonable choice available, in order to protect its essential interests at the time, than to adopt these Measures. *Ibid* at para 199.

pesification of the U.S. dollar denominated contracts and deposits; and d) the suspension of payments (default) and rescheduling of the governmental financial instruments held by CNA.[343]

As for the first measure, the tribunal noted that negotiations between federal authorities, provinces, and multilateral institutions cannot be considered as an alternative to the *Corralito*, as argued by claimant.[344] Based on this, it concluded that "the *Corralito* was necessary to prevent exactly the outflow of funds to which the *Continental* would have contributed,"[345] and thus was justified under Article XI of the BIT. In examining the second measure, the tribunal found that neither a voluntary debt exchange, nor full dollarization of the economy—which was advanced by the claimant—could be considered as an alternative to devaluation of Argentine's currency.[346] Commenting on the full dollarization of the economy, the tribunal stated that "even if implemented [it] would not have solved Argentina's problems, nor restored confidence in its debt sustainability."[347] The tribunal also rejected the claimant's arguments related to pesification of contracts and found that the "de-dollarization was inevitable in the situation facing Argentina."[348] However, the *Continental* tribunal rejected Argentina's defense of necessity with respect to

[343] CNA Financial Inc. (CNA) is a leading financial services provider which has its head offices in Chicago. *Continental* is a company incorporated in Illinois (USA) and is a subsidiary of CNA.

[344] The tribunal stated as follows:

> The *ex post facto* evaluation indicates that a restructuring of Argentina's debt without sacrificing in part creditors' rights in breach of same (as was finally the case in 2002-2003) was probably already impossible by 2000. In late 2001, Argentina had already carried out various restructurings of its debt, both external (through the mega-swap) and domestic (through the issuance of GGLs), but had not obtained any meaningful relief.

Continental, Award, *supra* note 91, at para 204. The tribunal was also doubtful that "consultations and negotiations can be considered as 'measures' at all, due to their uncertain results." *Ibid*.

[345] *Ibid* at para 205. The tribunal pointed out that the *Corralito* was effective "to prevent further fall in bank deposits that would have brought about the banks' bankruptcy, as well as the exhaustion of the country's reserves." *Ibid*.

[346] *Ibid* at para 210. In this regard, the Tribunal noted that it has not received evidence that would sustain either argument. *Ibid* at para 208.

[347] *Ibid* at para 209. In making such a statement, the tribunal seems to be greatly influenced by the economics article referred to by Argentina. Footnote 316.

[348] *Ibid* at para 214. The tribunal pointed out that pesification was necessary "to achieve a balanced distribution of the burden of the devaluation and of the abandonment of the convertibility at par with the dollar..." *Ibid*.

restructuring of governmental financial instruments held by CNA, because "Argentina's financial situation was evolving towards normality when [they were] restructured...."[349]

After performing the LRM test, the tribunal went on to examine whether Argentina contributed to the state of necessity under Article 25 ARSIWA. By inquiring into this question, the tribunal appears to have taken a wrong approach, since examining the non-contribution to the situation of necessity is not conditioned by the text of Article XI of the BIT, but rather, required under the customary necessity defense. Moreover, this kind of examination is not included in the LRM analysis of the international trade law regime. In the beginning, the tribunal acknowledged that the requirements of the customary necessity defense (Article 25 of ARSIWA) "cannot be the yardstick for the application of Article XI of the BIT [the treaty NPM clause]". But right after, it held that

> *If a Contracting Party to the BIT has contributed to endangering its essential security interest*, for the protection of which it has then adopted the challenged measures, *those measures may fail to qualify as "necessary" under Article XI*, since that Party could have pursued some other policy that would have rendered them unnecessary.[350]

In examining the facts, the tribunal found that the economic policies at issue had been recommended from the outside, particularly by the IMF and the United States, which committed "massive financial assistance" and political support to Argentina in realizing them.[351] Taking this into account, the *Continental* tribunal concluded that Argentina did not contribute to the state of necessity.[352]

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[349] *Ibid* at para 222.
[350] *Ibid* at para 234 [emphasis added].
[351] *Ibid* at para 235.
[352] *Ibid* at para 236.

4.3.2.4. Concluding Remarks

The analysis performed by the *Continental* tribunal shows that it failed to apply the LRM test properly in interpreting the treaty NPM clause. By including elements of customary international law in its analysis, the tribunal committed a two-fold mistake. First, it "invented" an additional step within the LRM test. Second, it conflated the elements of the customary necessity defense with the requirements of the treaty NPM clause. However, one may argue that the tribunal performed the analysis on the non-contribution due to the claimant's argument that Argentina cannot rely on necessity, since it contributed to the state of necessity. In my view, the tribunal could have followed a different approach in such a case. Instead of performing a full examination of facts related to the measures' contribution to a state of necessity, the tribunal should have expressly stated the irrelevance of considering this question for the purpose of analysing Article XI of the treaty due to its pertinence to the customary necessity defense.[353] Moreover, in interpreting Article XI, the *Continental* tribunal applied the test found in the WTO regime, which is in many ways different from the investment arbitration regime. Even though this interpretative approach conforms to a primary-secondary rule specified by the *CMS* and *Sempra* annulment committees, it does not seem to conform to the general rules of interpretation established by Articles 31-32 of the VCLT.[354]

This section finishes the discussion of the Argentine cases involving interpretation of the treaty NPM clause (Article XI) of the U.S.-Argentina BIT. In the next section, I will discuss other cases involving the Argentinean BITs that do not contain NPM clauses. Specifically, I will

[353] Some scholars consider it as an introduction of customary international law elements to interpreting treaty NPM clauses by a "backdoor method". *See* Jung & Han, *supra* note 292, at 406.

[354] In this respect, I agree with Professor Desierto when she criticises the *Continental* tribunal's approach by noting that "the Tribunal, as treaty applier broadened its reach of interpretative sources in a manner seemingly inconsistent with the clear delimitations prescribed in Articles 31 and 32 of the VCLT." Desierto, *supra* note 315, at 832.
The criticisms with regard to applying the WTO LRM test to interpreting Article XI are presented in Chapter VI.

inquire into another important issue with respect to relationship of the treaty NPM clause and the customary necessity defense, which is the possibility of invoking the customary necessity defense in the absence of NPM clauses in IIAs.

4.3.3. The Application of the Customary Necessity Defense in the Absence of Treaty NPM Clauses: *BG Group, National Grid* and other cases

As was discussed above, the *CMS* annulment committee made an important contribution to clarifying the relationship between treaty NPM clauses and the customary necessity defence. Notably, the *CMS* annulment committee's approach, which was based on the primary- secondary rules distinction, also had a great impact on the decisions of subsequent investor-state arbitration tribunals. Especially, this impact was observed in the decisions of the *BG Group* and the *National Grid* tribunals. These two cases were unique in that, the treaty (the Argentina-U.K BIT) at issue did not contain an NPM clause equivalent to Article XI of the U.S.-Argentina BIT. Therefore, the tribunals faced the challenging task of clarifying an important question: whether the customary necessity defense applies if the treaty at issue does not include an NPM clause.

4.3.3.1. "War and Disturbance" Clauses vs. NPM Clauses

In both cases, the claimants argued that Argentina had to compensate them for the losses incurred as a result of its measures adopted to tackle the crisis. Absent an NPM clause in the Argentina-U.K. BIT, Argentina attempted to justify its actions under Article 4 of the BIT and the necessity defense in customary international law. Since Argentina's defense under Article 4 of the treaty had some important features, it is important to present them before discussing the tribunals' decisions on the application of the customary necessity defense in the absence of a treaty NPM clause.

First, Argentina argued that its actions could be "legitimized" under Article 4 of the BIT, which, in its view, grants the host state a right to take necessary measures in situations of national emergency.[355] The provision provides for equal treatment of foreign investors with other domestic and third country investors with respect to losses incurred as a result of war or civil unrest in the territory of the host state. In its analysis of the provision, which was based on the Dictionary of the Spanish Royal Academy, Argentina contended that "the term 'emergency' implies to a situation of danger or of disaster which, irrespective of its cause, requires immediate action at the national level..... [and thus] its meaning cannot logically be limited to physical insurrection."[356] However, the claimants objected to Argentina's submission that Article 4 of the BIT is not limited to cases of physical destruction of property caused by force in circumstances of an armed conflict. Rather, they contended that "Article 4 of the BIT is in the nature of provisions which commonly referred to as "war and civil disturbance" or "losses due to war" clauses,"[357] and thus does not have the same effect of covering economic crises as found in Article XI of the U.S.-Argentina BIT.

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[355] Article 4 of the Argentina-U.K.BIT reads as follows:

> Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favorable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.

The Argentina-U.K. BIT, signed 11 December 1990, entered into force 19 February 1993.

[356] *National Grid*, *supra* note 92, at para 235; Analyzing the context in which national emergency is used in the provision under Article 31(1) of the Vienna Convention on the Law of Treaties, Argentina observed further that, "the circumstances covered in Article 4 of the Treaty are unusual or exceptional circumstances in general and not only situations derived from a war or civil unrest; national emergency is a wider concept and may come about because of economic, financial, social or institutional questions." *See* also *BG Group*, *supra* note 92, at para 372.

[357] *National Grid*, *supra* note 92, at para 215; *BG Group*, *supra* note 92, at para 377. To support its argument that the term "national emergency" may not cover economic crises, the *National Grid* referred to UNCTAD Report (1998), which states the following in this regard:

> The inclusion of a provision on compensation for losses by war and civil disturbance in BITs is justified because situations of war or civil war are often exceptions to insurance contracts (or may need specific coverage) and are often treated differently from government action in time of peace. Requisition by the army in time of war may not be covered by provisions on expropriation in normal circumstances.

In the *BG Group* case, Argentina objected to the claimant's comparison between Article IV and Article XI of respective BITs by arguing that "the principle enshrined in Article XI of the Argentina-U.S. BIT exists regardless of its inclusion in the BIT."[358] It further noted that the BIT "cannot prevent a State party from adopting such measures as it deems necessary to maintain the public order and guarantee the protection of its own essential security interests."[359] Having analysed the arguments of both parties, the *BG Group* tribunal found that "no state of emergency defense is available to Argentina under Argentina-U.K BIT.... neither Article 4 of the treaty, nor the BIT as a whole, exonerate Argentina's breaches on grounds of state of emergency or state of necessity."[360] The tribunal also held that, "there is no support for Argentina's submission that, in the absence of an express provision, Article XI of the U.S.-Argentina BIT should automatically be read into the Argentina-U.K. BIT."[361] Moreover, the tribunal held that Argentina cannot justify its measures under Article 4 of the BIT, since it does not provide for derogation from treaty provisions, but is only concerned with ensuring that foreign investors receive the national and most favored nation treatments when compensating the incurred losses.[362] As for the *National Grid* tribunal, it also found that "the purpose of Article 4 is not to exclude

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Ibid at para 216.

[358] *BG Group*, *supra* note 92, at para 373.

[359] *Ibid*.

[360] *BG Group*, *supra* note 92, at para 381.

[361] *Ibid* at para 386.

[362] To support its decision, the tribunal referred to the *CMS* tribunal, which held the following with regard to Article 4:

The plain meaning of Article[Article IV(3)] is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner. *CMS* Award, *supra* note 49, at para 375.

compensation for losses arising from, among other situations, national emergency but rather the contrary."[363]

4.3.3.2. Subsidiary Application of the Customary Necessity Defense

In addition to Article 4 of the BIT, Argentina invoked the necessity defense in customary international law under Article 25 of ARSIWA. The tribunals' decisions, however, differed on this point. The *National Grid* tribunal held that the customary necessity defense still applied when the BIT was silent on this issue, while the *BG Group* tribunal held the opposite. As for the *National Grid* tribunal, it first addressed the argument of the claimant concerning the existence of traditional practice of the United Kingdom to oppose the necessity defense, and the absence of an NPM clause in the BIT as additional proof for such opposition. In this regard, the tribunal referred to evidence from case law (cases such as the 1832 *Anglo-Portuguese dispute*, the *Caroline* and the *Torrey Canyon*) which could serve as exceptions to this tradition. Despite the claimant's contentions, the tribunal held that it was "*not convinced* even if the practice was not subject to known exceptions, that *this would prevent the other Contracting Party from raising necessity defense*."[364] Furthermore, taking into account the absence of an agreement between contracting parties on excluding the customary necessity defense under the BIT, the tribunal held that "either of them is entitled to raise it."[365] However, in examining whether Argentina met the requirements of Article 25 of ARSIWA, the *National Grid* tribunal found that it made a

[363] *National Grid*, *supra* note 92, at para 253. In *Impregilo*, the other case against Argentina, the tribunal also faced the issue of interpreting a similar provision in the Argentina-Italy BIT. It noted that "Article 4 provides for no exception from the obligations of the State in whose territory an investment was made but merely gives the investor a right to national treatment and most-favored-nation treatment in respect of damages." *Impregilo*, *supra* note 92, at para 339. The tribunal further held that "*Article 4 cannot be read so as to exclude the application of customary international law to an emergency situation*." *Ibid*, at para 343 [emphasis added].
[364] *Ibid* at para 256 [emphasis added].
[365] *Ibid*.

substantial contribution to the crisis, and thus failed to successfully invoke the necessity defense in customary international law.[366]

By contrast, the *BG Group* tribunal emphasized the exclusive application of the defense to international obligations between sovereign states, and based on this, held that "Article 25 would be of little assistance to Argentina as it would not disentitle BG, a private investor, from the right to compensation under the Argentina-U.K. BIT."[367] Furthermore, referring to one of the limitations to invoking the necessity defense,[368] the tribunal argued that the Argentina-U.K. BIT implied the exclusion of applying the customary necessity defense.[369] The tribunal also noted that, even if it were to apply Article 25 of ARSIWA, Argentina would not be able to meet its "very restrictive conditions."[370] Therefore, the *BG Group* tribunal held that the customary necessity defense raised by Argentina would fail in any case, whether the tribunal rejects or accepts its application.[371]

4.3.3.3. The Invocation of the Necessity Defense under other Argentinean BITs

Besides the *National Grid* and *BG Group* cases, there were other cases against Argentina involving BITs not containing NPM clauses. In those cases, Argentina relied on the customary rule of necessity as a defense. Even though all of the tribunals accepted the applicability of the

[366] *Ibid*, para 262.The tribunal did not proceed to examining other requirements of Article 25, since the failure to meet any of them, seeing as they have to be satisfied cumulatively, was sufficient to reject the customary necessity defense.
[367] *BG Group*, *supra* note 92, at para 408.
[368] This limitation excludes the reliance on the necessity defense "when the international obligation in question explicitly or implicitly excludes reliance on [it]."*Ibid*.
[369] *Ibid*. It should also be noted that the claimant argued that the ILC Articles were a "non-binding codification of customary international law" and that Article 25 had no application in bilateral relations between Argentina and the United Kingdom. Moreover, the claimant argued that the United Kingdom had been "formally opposed to the inclusion by the ILC of a provision on "necessity" ... [and thus] characterized the U.K. as a "persistent objector" to the rule set forth in Article 25 of the ILC Draft Articles." *Ibid* at para 400. For the concept of "persistent objector", *see* Patrick Dumberry, "Incoherent and Ineffective: The Concept of Persistent Objector Revisited", (2010) 59 International Comparative Law Quarterly 779.
[370] *Ibid* at paras. 410-411.
[371] *Ibid* at paras. 407, 412.

customary necessity defense in the absence of the treaty NPM clause, they found that Argentina had failed to meet its requirements. For instance, in the *Total* case[372] involving the Argentina-France BIT,[373] the tribunal examined the measures at issue according to the criteria laid out in Article 25 of ARSIWA. The tribunal found Argentina's defense of necessity to be "groundless" since it "did not provide any evidence that the limitation of the gas export placed upon Total in 2004 (when the emergency of 2001 had been overcome) was correlated to a grave and imminent peril to consumers' access to essential gas supply."[374] Similarly, in the *EDF* case,[375] the tribunal rejected Argentina's defense of necessity, as it had failed to demonstrate that its measures were the only way to safeguard Argentina's essential interests and that it had not contributed to the state of necessity.[376]

Moreover, in the *Suez* case,[377] where the claimants alleged breaches by Argentina of its obligations under the Argentina-France and the Argentina-Spain BITs,[378] the tribunal also denied Argentina's necessity defense, since its measures "were not the only means to satisfy its essential interests, and because Argentina itself contributed to the emergency situation that it was facing in 2001-2003."[379] The tribunal noted that the respondent "could have attempted to apply more flexible means to assure the continuation of the water and sewage services to the people of Santa

[372] *Total*, *supra* note 92. Total, a French company which had invested in Argentina, mainly in the gas transportations sector, alleged that the emergency measures adopted by Argentina to cope with its financial and economic crisis were in breach of several provisions of the Argentina-France BIT.
[373] Argentina-France BIT, signed on July 3, 1991, entered into force on March 3, 1993.
[374] *Ibid* at para 484.
[375] *EDF*, *supra* note 92.
[376] *Ibid* at paras. 1171-1172. In this regard, the tribunal also pointed out that the "[n]ecessity must be construed strictly and objectively, not as an easy escape hatch for host states wishing to avoid treaty obligations which prove difficult." *Ibid*.
[377] *Suez*, *supra* note 92.
[378] Argentina-Spain BIT, signed on October 3, 1991, entered into force on September 28, 1992.
[379] *Suez*, *supra* note 92, at para 243.

Fe and at the same time respected its obligations of fair and equitable treatment."[380] As for Argentina's contribution, the tribunal listed several factors, such as "excessive public spending, inefficient tax collection, delays in responding to the early signs of the crisis, insufficient efforts at developing an export market, and internal political dissension and problems inhibiting effective policy making."[381] Furthermore, in the *Empregilo* case, in which an Italian company claimed that Argentina breached its obligations under the Argentina-Italy BIT,[382] the tribunal accepted the application of the customary necessity defense, in spite of the argument that the "war and disturbance" clause of the treaty would exclude its application.[383] As to the assessment of Argentina's measures under the requirements of Article 25 of ARSIWA, the tribunal accepted that there was a grave and imminent peril to the "essential interests" of Argentina.[384] However, it found that "the requirement that the State has not contributed to the crisis, has not been satisfied",[385] and thus rejected Argentina's defense of necessity.[386]

[380] *Ibid* at para 238. In this respect, the claimants argued that "there were a variety of other measures that Argentina and the Province might have taken with respect to the Concession, such as cross subsidies, temporary relief of ....investment obligations, or differentiated freezing of certain tariffs among different categories of consumers, which would have allowed it to deal with the crisis and still respect its commitments to [foreign] investors." *Ibid* at para 234.

[381] *Ibid* at para 242.

[382] Argentina-Italy BIT, signed on May 22, 1990 and entered into force on October 14, 1993.

[383] *Impregilo*, *supra* note 92, at paras. 343-344. For detailed comments on the tribunal's decision, *see* Julien Fouret & Dany Khayat, "The ICSID Case Law Review", (2012) 11 The Law and Practice of International Courts and Tribunals 137 at 187-195.

[384] *Ibid* at para 350.

[385] *Ibid* at para 353. The tribunal's examination focused mainly on the "non-contribution" requirement of the customary necessity defense. Among Argentina's contributions, the tribunal noted its "long-term failure to exercise fiscal discipline, including control of provincial spending and of the subsidization of the Provinces by the central Government; and its inability to adopt labor and trade policies consistent with the country's currency board. The resulting high public indebtedness and inflexibility in Argentina's markets hampered substantially the country's ability to cope with external shocks, leading to the 2001 crisis." *Ibid* at para 358. Accordingly, the tribunal held that "Argentina contributed significantly to the situation of necessity" within the meaning of para. 2(b) [of Article 25 of ARSIWA] and therefore failed to meet the criterion [of customary necessity defense]." *Ibid.*

[386] The *Impregilo* tribunal did not continue inquiring into the question of whether Argentina's measures were the only way to safeguard its essential interests, since a successful invocation of the customary necessity defense requires cumulative satisfaction of all of its conditions.

In the most recent case, *Hochtief AG v. Argentina*,[387] involving claims of breach of the Argentina-Germany BIT provisions,[388] the tribunal also considered the question of whether the measures adopted by Argentina with respect to addressing the economic crisis might be excused under the customary necessity defense.[389] In this regard, the tribunal concentrated its analysis on the timing of the adoption of measures and the incurrence of damages by foreign investors. The tribunal started its analysis by identifying the ending point of the crisis. it In so doing, the tribunal noted that it is "a highly subjective exercise, overwhelmingly influenced by the precise factors or indicia upon which one focuses and the degree of change or stability that one regards as qualifying as a return to a normal, non-crisis situation."[390] Therefore, it pointed out that the determination of such a date does not mean the "possibility of making a precise objective determination", but rather, "signifies the exercise by a tribunal of its power to decide a case on the evidence before it, and the need to stipulate a particular date in order to give effect to the tribunal's reasoned judgement."[391] Based on the evidence presented by the parties and taking into account the "practicalities of financial accounting and calculation", the tribunal fixed May 1st of 2003 as the date at which the crisis ended.[392] Then, the tribunal found that the adoption of the measure in question occurred after May 23, 2003, and that the investors incurred the losses after

[387] *Hochtief, supra* note 92. The dispute arose from the breach by Argentina of a concession agreement the object of which was to construct, maintain, and operate a 608-meter long, four lane, cable-stayed bridge, 12 smaller bridges and embankments, and a toll road linking the cities of Rosario, in Santa Fe province, and Victoria, in Entre Ríos province, through a crossing over the Paraná river. *Ibid* at para 61.

[388] Argentina-Germany BIT, signed on April 9, 1991, entered into force on November 8, 1993. The claimant, *Hochtief AG*, alleged the breach by Argentina of several provisions of this treaty. The main claim related to the measures defended under customary necessity defense was the breach of fair and equitable treatment ('FET') under Article 2(1) of the BIT.

[389] It should be noted that Argentina-Germany BIT also does not contain the NPM clause.

[390] *Hochtief, supra* note 92, at para 293.

[391] *Ibid* at para 294.

[392] *Ibid* at para 295. In making such determination, the tribunal found persuasive the expert evidence suggesting that 2003 saw a resumption of growth in the economy and that the worst of the crisis in macroeconomic terms was over by mid-2003. At the same time, the tribunal accepted that the social and other effects on Argentine society identified by Dr Kliksberg persisted well after that time. *Ibid* at para 294.

this date.[393] Relying on this chronology of facts, the tribunal held that "[t]he economic crisis had ended by the time that the losses for which reparation is due were sustained."[394] Thus, the tribunal rejected Argentina's submission that its adopted measures "can be excused or exculpated by reason of economic crisis and the doctrine of 'necessity' under customary international law."[395]

4.3.3.4. Concluding Remarks

Different perspectives informed the tribunals' approaches to a subsidiary application of the customary necessity defense, and this led them to reach different conclusions. The approaches taken by the *National Grid, Total, EDF, Suez, Impregilo* and *Hochtief AG* tribunals seem to be more consistent, as they substantially adhered to the primary-secondary rule specified by the *CMS* annulment committee.[396] While the *BG Group* tribunal appears to deviate from that rule and fails to ground its decision on a sound reasoning, in my view, the *BG Group* tribunal, together with the *Impregilo* tribunal, should be credited for clarifying the distinction between the treaty NPM and "war and disturbance" clauses. By performing a thorough content analysis of Article IV of the BIT, the tribunals determined that "war and disturbance" clauses are limited to the emergencies of military nature, and thus, emergencies of an economic character cannot be

[393] The measure in question was the Resolution 14 issued on June 30, 2003 by the Secretariat of Public Works of Argentina, which changed the terms of the Loan Agreement between the Parties. It modified the applicable interest rate and compounded interest on a daily basis. Moreover, it pesified the maintenance and operation expenses that actually had to be calculated in US dollars. For more details, *see* paras. 112, 259-265.
[394] *Ibid* at para 301.
[395] *Ibid.*
[396] It is also supported by Alberto Alvarez-Jiménez, who agrees with the *National Grid* tribunal's decision to allow the invocation of the customary necessity defense in the absence of the treaty NPM clauses. *See* Alberto Alvarez-Jiménez, "The Interpretation of Necessity Clauses in Bilateral Investment Treaties after the Recent ICSID Annulment Decisions", in Karl P.Sauvant, *Yearbook on International Investment Law and Policy 2010/2011* (New York: Oxford University Press, 2012) at 429, footnote 54 [Alvarez-Jiménez, Interpretation of treaty NPM clauses].
However, Professor McLachlan notes that, as compared to treaty NPM clauses, the "customary rule lays down a stricter test, [and thus] it is unlikely that there will be a need for separate resort to custom." *See* Campbell McLachlan, "Investment Treaties and General International Law", (2008) 57 International and Comparative Law Quarterly 361 at 390.

covered under these provisions. They also clarified that, unlike NPM clauses, "war and disturbance" clauses do not allow for derogation from treaty obligations, and thus do not have the effect of excluding the liability to pay compensation in cases of breach of treaty provisions. Rather, they have the effect of providing the treatment to foreign investors that is not less favorable than that accorded to domestic and other third country investors in terms of compensating the losses incurred due to wars, insurrections and other emergencies of military character.[397]

However, it should be noted that compensation under "war and disturbance" clauses has a different context and should not be conflated with compensation issues under NPM clauses. It only establishes a host state's obligation to provide equal treatment to foreign investors along with other domestic and third country investors in terms of paying compensation. Under the treaty NPM clause, it is only assumed that a host state should be obliged to compensate for losses incurred by foreign investors, in case the measures in question are found not "necessary" to achieve the pursued objectives. Compensation may also be due when the NPM clause is successfully invoked, but only for the period that is outside of necessity situation. However, the practice of awarding compensation in such cases was not uniform, consequently causing much debate around arbitral tribunals' decisions in this respect. Thus, taking into account the determinative role of compensation issues in investment disputes, I will discuss the effects of invoking NPM clauses in the next section. Specifically, I will look into how both customary international law and treaty law on foreign investments deal with compensation issues in the state of necessity, and thus allocate risks between a host state and a foreign investor.

[397] It should be emphasized that such clauses do not require the payment of compensation, but merely establish the right of foreign investors to a non-discriminatory treatment with respect to reparation for incurred losses.

4.4. Distinguishing the Effects of Invocation of the Customary Necessity Defense and Treaty NPM Clauses

Since the effects of invoking the customary necessity defense played a determinative role in the Argentine cases,[398] I find it appropriate to discuss them in this chapter. In my view, analyzing the consequences of invoking both defenses in a comparative way will be helpful to draw further distinctions between them. Thus, I will first explain the effects of invoking the customary necessity defense and e treaty NPM clauses in sequence. Then, I will present the analysis of how arbitral tribunals in the Argentine cases approached the issue of compensation.

4.4.1. Compensation upon Invocation of the Customary Necessity Defense

First, it should be noted that successfully invoking circumstances precluding wrongfulness does not have the effect of annulling or terminating the obligation *per se*. Rather, it serves as a justification or an excuse for non-performance of the obligation in question for the period of existence of that circumstance.[399] This was confirmed by the ICJ in the *Gabčíkovo-Nagymaros Project* case,[400] in which Hungary claimed that the wrongfulness of its conduct was precluded by the state of necessity. In that case, the ICJ held that "a state of necessity.....may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty."[401] At the same time, the ICJ pointed out that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives",[402] which means that a state is obliged to provide compensation for the damage caused outside the period of necessity.

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[398] This is mainly explained by the initial mistake the tribunals committed in interpreting Article XI of the U.S.-Argentina- BIT. As was mentioned, the tribunals conflated the requirements of these two distinct defenses: the customary necessity defense and a treaty NPM clause.
[399] Crawford, ILC Articles, *supra* note 145, at 160.
[400] *Gabčíkovo-Nagymaros*, *supra* note 167.
[401] *Ibid* at 39, para 47.
[402] *Ibid*.

However, the question of whether or not a state is obliged to provide compensation for the damage inflicted by a claimant within the period of necessity still requires clarification. Professor Ripinsky notes that there are two approaches to solving this issue.[403] The first approach is based on the logical interpretation of the term "circumstances precluding wrongfulness". According to this approach, the measures adopted in a state of necessity cease to be wrongful upon its successful invocation. Thus, there can be no obligation to provide compensation if there is no international wrongful act.[404] The second approach is derived from the interpretation of Article 27 of ARSIWA, which establishes the consequences of invoking the necessity defense in customary international law. It provides as follows:

> The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:
> (*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
> (*b*) the question of compensation for any material loss caused by the act in question.[405]

In his commentaries, the ILC's Special Rapporteur, James Crawford, noted that Article 27 "does not attempt to specify in what circumstances compensation would be payable."[406] Moreover, Professor Ripinsky points out that the clause's formulation "without prejudice.... to the question of compensation" is soft, as it does not expressly state the requirement to provide

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[403] Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* (London: British Institute of International and Comparative Law , 2008) at 341 [Ripinsky, Damages].
[404] This was affirmed in the *Gabčíkovo-Nagymaros Project* case. The ICJ held that, "[t]he state of necessity claimed by Hungary – supposing it to have been established – [….] would only permit the affirmation that, under the circumstances, Hungary *would not incur international responsibility* by acting as it did." *Gabčíkovo-Nagymaros*, *supra* note 167, at para 48 [emphasis added].
[405] Article 27, The ILC Articles on Responsibility of States for Internationally Wrongful Acts. Available online at: <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> (last visited 20 September 2014).
[406] *Ibid* at 178. Professor Crawford pointed out that it was a deliberate choice on the part of the ILC: "Whether [circumstances precluding wrongfulness] exonerate a state acting otherwise than in conformity with its obligations is uncertain, at least as a matter of drafting." *See* James Crawford, "Revising the Draft Articles on State Responsibility", (1999)10 European Journal of International Law 435 at 444.

compensation in all circumstances.[407] In this respect, the ILC noted that there is "the possibility of compensation in certain cases", but at the same time it rejected the possibility "to specify in general terms when compensation is payable."[408] In clarifying those cases, the Commission suggested that there should be no compensation in circumstances such as self-defense, countermeasures, consent and *force majeure*.[409] However, it noted that "there is a strong case for compensation for actual loss where a state relies on necessity, provided at least that the other state has not itself through its own default or neglect produced the situation of necessity."[410] In this respect, Professor Alvarez-Jimenez observes that awarding compensation in such circumstances "will certainly be assessed on a case-by-case basis, but some general ideas suggest that it can be related to the requisites of Article 25."[411] He explains it as follows: "[I]f the state of necessity is produced exclusively by exogenous factors, a tribunal may decide that compensation is not due. However, if the state has contributed to some extent, although not substantially, a tribunal may decide that some compensation is owed, due to such contribution."[412]

To clarify this issue further, the ILC emphasized that the term "compensation" in Article 27 has a different meaning from compensation as a form of reparation for internationally wrongful acts, which is dealt with in Article 34 of ARSIWA. According to the Commission, Article 27 is "concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any

[407] Ripinsky, Damages, *supra* note 403, at 342.
[408] Crawford, ILC Articles, *supra* note 145, commentary to Article 27, para 1. The ILC did not consider it "appropriate" to clearly establish a detailed regime of compensation for all possible situations. *Ibid* at para 6.
[409] James Crawford, *Second Report on State Responsibility: Addendum*, (1999) UN Doc. A/CN.4/498/Add.2 at paras. 342-343, available online: <http://legal.un.org/ilc/documentation/english/a_cn4_498.pdf> (last visited 30 September 2014), [Crawford, Second Report]. The ILC stressed that these circumstances are mainly prompted by the prior wrongful conduct of the 'target' state which incurs losses as a result of these measures. *Ibid*.
[410] *Ibid* at para 343. The same conclusion was also reached with respect to distress. *Ibid* at para 344.
[411] Alberto Alvarez-Jiménez, "New Approaches to the State of Necessity in Customary International Law: Insights from WTO Law and Foreign Investment Law", (2008) 19 American Review of International Arbitration 463 at 487 [Alvarez-Jimenez, New Approaches to Necessity].
[412] *Ibid*.

State directly affected."[413] Under this approach, compensation as a form of reparation cannot be claimed in case the wrongfulness of the act is precluded. At the same time, certain compensation for the material loss should be provided despite the absence of wrongfulness.[414] Based on this, it can be said that a state's obligation to compensate for the caused material loss remains unaffected even if the wrongfulness of state conduct is precluded by a successful invocation of a state of necessity.[415]

The provision of compensation in such circumstances was also acknowledged in a number of cases in which the state of necessity was raised as a defense. For instance, in the *Gabčíkovo-Nagymaros* case, the ICJ accepted Hungary's view that the finding of a state of necessity "would not exempt it from its duty to compensate its partner."[416] In the Argentine

[413] Crawford, Second Report, *supra* note 407, at para 4. The ILC notes that the concept of "material loss" is narrower than the concept of "damage". Therefore, it can be assumed that Article 27 applies only to losses incurred during the period of a state of necessity, not including losses caused as a consequence of applied measures during necessity.
Moreover, it should be pointed out that this kind of differentiation between reparation for the wrongful conduct and compensation for the material loss is mainly explained by the existence of distinction between *international responsibility* and *international liability*. The availability of an internationally wrongful act suffices to establish a State's responsibility and damage is not regarded as a required element for this purpose, while the existence of any kind of damages or injurious consequences which result from a State's acts serve as a basis for international liability. For further details, *see* Sompong Sucharitkul, "State Responsibility and International Liability Under International Law",(1996) 1 The Legal Scholarship Repository, Golden Gate University School of Law 821 at 834 [Sucharitkul]; *See* also, Srilal Perera, "State Responsibility: Ascertaining the Liability of States in Foreign Investment Disputes", (2005) 6(4) Journal of World Investment and Trade 499.

[414] Ripinsky, Damages, *supra* note 403, at 343. It corresponds to the ILC approach, which states that "international liability is based on the proposition that absence of wrongfulness does not prejudge the question of compensation for damage caused by an act of a State." Sucharitkul, *supra* note 413, at 828. *See* also *Report of the International Law Commission on the Work of Its Thirty-Seventh Session*, (1985) U.N. Doc.N40/10 at paras. 108-163.
It should also be noted that during the ILC debate on the draft text of Article 27 (at that time, Article 35), the Commission expressed a completely different view with respect to this issue. The ILC noted that "the main consequence of invoking a circumstance precluding wrongfulness was that *no compensation was due*, inasmuch as the normal consequences of a breach of obligation had been ruled out". *The ILC Yearbook* (1999) Vol. II (2), Doc. A/CN.4/SER.A/1999/Add.1 at 85, para.409 [emphasis added].
Available online at: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1999_v2_p2_e.pdf> (last visited 20 December 2014).

[415] However, in such a case, the extent of compensation should be different from that of full reparation, and thus, the consequential damages, even if established, do not come within the scope of Article 27. Ripinsky, Damages, *supra* note 403, at 343.

[416] *Gabčíkovo-Nagymaros*, *supra* note 167, at para 48. In several cases, the state parties agreed that the obligation to pay compensation would not be exempted regardless of whether states are found to have succeeded or failed to meet the requirements of circumstances precluding wrongfulness. For instance, in; Or in the *Properties of the Bulgarian minorities in Greece* case, Bulgaria endorsed the proposal of the League of Nations Commission of Enquiry to

cases, the *Enron* tribunal also did not exclude the possibility of granting compensation in such circumstances by holding as follows:

> The Respondent's view appears to be based on the understanding that Article 27 would only require compensation for the damage that arises after the emergency is over and not for that taking place during the emergency period. Although that Article does not specify the circumstances in which compensation should be payable because of the range of possible situations, it has been considered that this is a matter to be agreed with the affected party, *thereby not excluding the possibility of an eventual compensation for past events*. In the absence of a negotiated settlement between the parties, this determination is to be made by the Tribunal to which the dispute has been submitted.[417]

Distinguished scholars of international law also support this approach. For instance, Professor Ago referring to earlier writings emphasized that

> The preclusion would therefore in no way cover consequences to which the same act might give rise under another heading, in particular the creation of an obligation to compensate for damages caused by the act of 'necessity' would be incumbent on that State on a basis other than that of *ex delicto* responsibility.[418]

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compensate the nationals who had been deprived of their property. *See Report of the Commission of Enquiry into the Incidents on the Frontier between Bulgaria and Greece*, (1926) 2 League of Nations, Official Journal, annex 815, cited in *The ILC Yearbook* (1980), Vol. II (2), Doc. A/35/10 at 80, footnote 110. Available online: <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1980_v2_p2_e.pdf> (last visited 20 December 2014). Also *see Compagnie Générale de l'Orinocco* case, (31 July 1905) 10 Reports of International Arbitral Awards at 184. Available at: <http://legal.un.org/riaa/cases/vol_X/184-285.pdf> (last visited 21 December 2014).

[417] *Enron* Award, *supra* note 91, at para 345 [emphasis added]. However, the *LG&E* tribunal and the *CMS* annulment committee noted that Article 27(b) did not impose compensation and this issue had to be resolved according to the BIT. *See LG&E*, Decision on Liability, *supra* note 49, at para 260; *CMS*, Annulment Decision, *supra* note 91, at paras. 146-47.

[418] Roberto Ago, "The Internationally Wrongful Act of the State, Source of International Responsibility", *Eighth Report on State Responsibility*, Addendum (1980), *The ILC Yearbook* (1980) Vol. II (1), Doc. A/CN.4/318/Add.5 at 21, para 18, <http://legal.un.org/ilc/documentation/english/a_cn4_318_add5-7.pdf> (last visited 25 May 2015). In making such conclusion, Professor Ago relied on many sources written by Twiss, Hall, Rivier, Sereni, Favre, Sorensen etc. For instance, he cites Favre, who clearly specified that, "[i]n any case, the State which performs the act of necessity is obliged to compensate for the damage, even though the consequence of the state of necessity was to preclude wrongfulness." *Ibid*, footnote 35. Original source: Antoine Favre, *Principes du droit des gens* (Paris, Librairie de droit et du jurisprudence, 1974) at 644.

At the same time, Ago noted that the recognition of the existence of such an obligation to compensate in customary international law "cannot wrongly be adduced as a basis for concluding that *the act producing it is even partially wrongful*, and for arguing that *the state of necessity has no value as a circumstance precluding the wrongfulness* of an act of the State in international law."[419] International investment law scholars such as Professor Dolzer and Schreuer, also consider that the duty to compensate for the caused material damage remains in a state of necessity "[b]ecause there is no reason for the host state to benefit from the necessity and for the investor to bear the consequences."[420]

However, Professor Ripinsky argues that even though the state is not getting rid of its obligation to compensate upon a successful invocation of the necessity defense, the temporary suspension of this obligation "would not have any practical value for a responsible state" due to the short duration.[421] In his arguments, Ripinsky seems to draw special attention to the implicit character of Article 27. According to him, the ILC failed to distinguish between compensation for a wrongful conduct and compensation for the conduct "that is excusable, in terms of both specific criteria triggering compensation and the appropriate measure and extent of

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[419] *Ibid* [emphasis added].

[420] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) at 170.

[421] Sergey Ripinsky, "State of Necessity: Effect on Compensation", (2007) 4 Transnational Dispute Management 1 at 6 [Ripinsky, Compensation]. In my view, this argument of Professor Ripinsky is unreasonable on two grounds. First, specific kinds of emergencies, such as emergencies of economic character, may last longer than expected and may have serious negative consequences for respondent states even if they are short-lived. Second, there is a high possibility that the amount of compensation would be less under the successful invocation of a state of necessity than that of full reparation in circumstances when state conduct is found wrongful. Professor Bjorklund's view seems to be supportive in this respect. According to her,

> Limiting the compensation available suggests that there could be some benefit to a State in establishing a successful defence, but that the investor or her home State would not bear the entire burden of the damages flowing from the wrongful conduct. Moreover, one of the effects of a successful necessity plea could be the postponement, rather than the extinguishment, of a payment obligation. Such relief might be very welcome for a State in the grip of an economic crisis.

Bjorklund, Emergency Exceptions, *supra* note 6, at 516.

compensation."[422] This argument is mainly guided by the fact that under certain lawful acts in international investment law, such as expropriation, the amount of compensation paid under the lawful expropriation is clearly specified, as compared to full compensation in cases of unlawful expropriation.[423] Therefore, Ripinsky argues that the ILC did not clearly specify the standard of compensation that should be provided for the material loss caused in the period of necessity circumstances as compared to full reparation provided when the wrongfulness of the act is not precluded.[424] Contrary to his arguments, Alberto Alvarez-Jiménez contends that due to the limitations in the scope of its codification efforts, the ILC "cannot lay down abstract rules regarding compensation wider necessity which can be applied in particular cases."[425] Therefore, in his view, the arbitration tribunals should be "cautious" when relying on the ILC's statement on Article 27[426] and should read it "not as ordering or precluding *ex ante* compensation, but simply as leaving the question open for adjudicators to answer...."[427]

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[422] Ripinsky, Damages, *supra* note 403, at 343. Vaughan Lowe also draws attention to this issue. According to him, "[s]ince such acts are by definition not wrongful, it appears that compensation in such cases would have to be sought in the form of compensation for injurious consequences arising out of acts not prohibited by international law....*the 'injurious consequences' regime is, however, not in place*..." Vaughan Lowe, "Precluding Wrongfulness or Responsibility: A Plea for Excuses", (1999) 10 European Journal of International Law 405 at 410 [emphasis added], [Lowe].

[423] It is known that states should compensate for losses caused as a result of lawful expropriation. In such circumstances, states pay less than the full compensation (which also includes any consequential losses) paid in cases of unlawful expropriation. *See* UNCTAD *Expropriation*: *A Sequel* (United Nations, New York and Geneva, 2011) at 41.
Ripinsky notes that "[e]ven though not fully settled, international law is clear that lawful expropriation should be accompanied by the payment of compensation, usually equivalent to the market value of the assets taken." *See* Ripinsky, Compensation, *supra* note 421, at 5.

[424] The ILC seems to have left the discretion of specifying the extent of compensation to the tribunals that are directly involved in assessing the facts. Therefore, the Commission limited itself by stating only that "article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V." *See* Crawford, *ILC Articles*, *supra* note 145, commentary to Article 27, para 4.

[425] Alvarez-Jiménez, New Approaches to Necessity, *supra* note 411, at footnote 110.

[426] In its commentaries, the ILC states that: "Paragraph (b) does not attempt to specify in what circumstances compensation should be payable. Generally the range of possible situations covered by Article V is such that to lay down a detailed regime for compensation is not appropriate... ". Crawford, *ILC Articles*, *supra* note 145, at 190.

[427] Alvarez-Jimenez, New Approaches to Necessity, *supra* note 411, at footnote 110.

If the arbitral tribunals decide to award compensation in circumstances of successful invocation of necessity, the standard that should be applied, as Ripinsky noted, is still unclear. In this regard, another scholar, Mathew Parish, appears to suggest one possible formula on the standard of compensation in such circumstances.[428] He proposes that, in cases when the necessity defense is successfully invoked, "investors can claim *damnum emergens* (i.e. the costs of the investments) rather than *lucrum cessans* (i.e. the value of their investments - the amount of profit they would have made had their investments not been interfered with)."[429] He thinks that such a distinction "would be tolerably clear, but would not necessarily be grounded in any rational policy principle beyond the desire to provide a less burdensome measure of damages to respondents in dire straits."[430]

An analysis of commentaries to Article 27 of ARSIWA shows that when a state invokes the customary necessity defense, it should compensate for the material loss caused by its actions during the state of necessity. The preclusion of the measures' wrongfulness does not exempt a state from providing compensation, but rather, temporarily excuses it for the duration of necessity situation.[431] Even though Article 27 does not establish a specific standard of compensation that should be provided for the incurred material loss, this issue can be resolved by arbitral tribunals and may differ case by case. The suggestion in this regard is that the amount of compensation should be "substantially" less than the amount of full compensation, since a state's

[428] Like other scholars, Parish notes that from the ILC commentaries "[i]t is not immediately clear what a reduced measure of damages might be" in case of successful invocation of necessity defense. He further argues that the ILC "gives no insight into its substance other than proposing that the affected states could agree compensation levels between themselves." *See* Matthew Parish, "On Necessity", (2010) 11(2) Journal of World Investment and Trade 169 at 192.

[429] *Ibid* at 193. He explains it as follows: "If an investor has spent US$10m in an investment expected to earn $100m,, the former figure is the *damnum emergens*, the latter the *lucrum cessans*." *Ibid*.

[430] *Ibid*.

[431] Professor Gazzini finds it "interesting" when the obligation to compensate in cases when the acts are lawful due to the preclusion of their wrongfulness by necessity circumstances coexist with a similar obligation in cases when the acts are unlawful. *See* Gazzini, Necessity, *supra* note 330, at 468.

act justified by the necessity defense involves a lower degree of illegality than a wrongful act.[432] Moreover, states usually experience exceptionally difficult economic circumstances in a state of necessity and lack the resources to compensate large amounts of damages, and it would make the invocation of necessity useless for states if it induces the same amount of compensation as in the case of a wrongful act. Therefore, in deciding the amount of compensation, arbitration tribunals are advised to take into account the financial situation of a respondent state and other factors that could on aggravate the whole situation in the country.

4.4.2. Compensation upon Invocation of Treaty NPM Clauses

Unlike in the customary international law regime, the investment treaty law regime has different rules regarding compensation. As was explained in the first section of the chapter, NPM clauses function as exceptions to substantive provisions of the treaty, and their successful invocation does not have the effect of justifying or excusing treaty violations as is the case with the customary necessity defense. In case the state measures at issue fall within the scope of the NPM clause, their wrongfulness will be precluded, and a state will be exempted from liability to foreign investors, and thus will not have any duty to pay compensation for the inflicted damage.[433] It should be noted that this kind of scenario is mainly observed when the NPM clause covers all substantive provisions of the treaty. But there are certain BITs, especially concluded by Germany, which include the NPM clause with a limited scope that do not apply to all treaty

[432] This can be likened to a standard of compensation payable for lawful expropriation. For the difference between standards of compensation for lawful and unlawful expropriations, *see* Andrea K. Bjorklund, *Yearbook of International Investment Law & Policy 2012-2013* (New York: Oxford University Press, 2014) at 172; Newcomb & Paradell, *supra* note 1, at 379; *See* also generally, Sebastiàn Lopez Escarcena, *Indirect Expropriation in International Law* (Cheltenham; Northampton: Edward Elgar Publishing Limited, 2014).

[433] Burke-White & Von Staden, NPM Clauses, *supra* note 9, at 386-87. The scholars point out that the wrongfulness of state measures is precluded under the treaty NPM clause "not because a violation of a particular obligation is justified under the circumstances, but because the obligation does not apply to that action in the first place." *Ibid*.

provisions.[434] In that case, if the measures in question breach the treaty obligations, which are not covered by the NPM clause of the BIT, then a state will incur liability and be responsible to provide compensation.

However, there arises a question of whether a state has some "residual liability" to investors for material losses inflicted during the preclusion of measures' wrongfulness.[435] According to Burke-White and Von Staden, "both the legal formulation and the function of the NPM clauses.... indicate that they must relieve a state of any such residual liability to investors as well as primary responsibility to the other treaty party, at least in the ICSID forum."[436] First, they point out that such "residual liability" must originate from the treaty itself. In their view, since "the NPM clause specifies that the BIT 'shall not preclude' state actions that fall under it and excludes them from the scope of the BIT's protections, *no residual liability can be left under the BIT*."[437] It can be concluded that treaty NPM clauses preclude both state responsibility to the other state party and liability to foreign investors. Upon successful invocation of treaty NPM clauses, states are exempted from paying compensation, and foreign investors end up bearing the costs of state actions.

However, this effect of the NPM clause can be sustained only for the time the state measures remain necessary to achieve one of the permissible objectives listed in the clause. Once the necessity for keeping the measures enforced ceases to exist, the preclusion of measures' wrongfulness will end, and a state will bear the liability for the damage caused from that

[434] As was mentioned in the first section of this chapter, some BITs concluded by Germany include NPM clauses with limited scope and do not apply to the whole treaty. Their scope is mainly limited to treaty provisions such as fair and equitable treatment, national and most-favoured nation treatment.
[435] As was discussed above, the invocation of the customary necessity defense causes such liability and respondent states are obliged to compensate for the material loss inflicted during circumstances precluding wrongfulness.
[436] Burke-White & Von Staden, NPM Clauses, *supra* note 9, at 388.
[437] *Ibid* [emphasis added].

moment.[438] Thus, a state cannot incur liability from the moment it takes necessary measures until the time such measures are no longer necessary to protect the permissible objectives covered by the treaty NMP clause.[439] As can be seen, the determination of both starting and ending points of necessity circumstances play an important role in attributing the liability to the state in question. Since the measures adopted in a state of necessity may have a continuous impact on the interests of the other treaty party or foreign investors, the determination of the ending point is considered more important in this regard. According to Burke-White and Von Staden, in the context of assessing necessary measures taken to address the economic crises,

> [A] legal analysis of the end point [of the effect of the treaty NPM clauses] should be based either on the state's own termination of the measures taken in response to the crisis or on economic and social evidence and analysis demonstrating that such measure have become unnecessary to prevent a return to the conditions that initially gave rise to the invocation of the NPM clause.[440]

The scholars also specified that measures that have a long-term impact on the competing interests, in spite of their termination, would not inflict liability for damage caused outside the period of the NPM clause's applicability. In this respect, they draw special attention to the definition of the term "measure" as "an action taken as means to an end" and as a "legislative bill or enactment".[441] In their view, the consequences of acts taken to address emergency

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[438] Different factual developments play a determinative role in removing the necessity of keeping the adopted measures in force. Once the threat to permissible objectives (public order, essential security interests) protected by the adopted necessary measures ceases to exist, the treaty NPM clause would no longer apply and state measures might again give rise to liability.

[439] The same opinion was also expressed by Professor Sofaer in the *El Paso v. Argentina* case. Contrary to Professor Reisman's opinion, he opined that "as long as the actions taken by Argentina are not precluded and applied in a manner consistent with Article XI, no liability will attach and compensation will be due to Claimant.... [however] Argentina might remain liable if its actions were not applied in accordance with Article XI [NPM clause] or if they ceased to be necessary under that article." Rejoinder Opinion of Anne-Marie Slaughter and William Burke-White, (March 4, 2007) at para. 95, in *El Paso Energy International Company v. The Republic of Argentina*, (November 5, 2006) ICSID Case No. ARB/03/15. [Slaughter & Burke-White, Rejoinder].

[440] Burke-White & Von Staden, *supra* note 9, at 390.

[441] *Ibid*.

circumstances covered by the treaty NPM clause may last beyond the ending point of its applicability. By taking this aspect into account, scholars seem to exclude the liability of a state both for the period of enforcement of those acts and for possible residual consequences that may be brought about after the termination of their adoption.[442]

4.4.3. The Analysis of Compensation Issues in the Argentine Cases

The arbitral tribunals in the Argentine cases also touched upon the effects of invoking NPM clauses in relevant BITs. Even though the tribunals agreed that, where the requirements of the customary necessity are met under Article 25 of ARSIWA, a state is not liable for wrongful actions taken during the period of necessity under Article 27,[443] their conclusions on compensation issues varied. The divergence of tribunals' positions in this regard mainly stems from their contradictory approaches taken to interpreting the NPM clause of the U.S.-Argentina BIT. The *CMS*, *Enron* and *Sempra* tribunals, which viewed the customary necessity defense and the NPM clause of the treaty as identical and used the requirements of the former in interpreting the latter, also applied the rules of customary international law on compensation (Article 27 of ARSIWA), and thus held that a host state must compensate the investor. Particularly, the *CMS* tribunal, relying on Article 27, held that "necessity may preclude the wrongfulness of an act, but it does not exclude the duty to compensate the owner of the right which had to be sacrificed."[444] In its analysis, the tribunal also noted that "the States concerned should agree on the possibility

[442] The scholars explain it as follows: "As long as the act itself occurred under the NPM clause, even if its long-term impact continues to such a time when the act itself would not have been initially justified under the NPM clause, no liability should attach as there was no internationally wrongful act by the state outside the period of NPM applicability." *Ibid*.
[443] *CMS* Award, *supra* note 49, at paras 379-82; *Enron* Award, *supra* note 91, at para 344; *Sempra* Award, *supra* note 91, at para 392; *LG&E*, Decision on liability, *supra* note 49, at para 261.
[444] *CMS* Award, *supra* note 49, at para 388.

and extent of compensation payable in a given case,"[445] and after having found no such agreement, held that "in the absence of agreement between the parties the duty of the Tribunal in these circumstances is to determine the compensation due."[446] This approach was also endorsed by the *Enron* and *Sempra* tribunals.[447] Even though all three tribunals awarded compensation to the claimants for the damage caused, they all took into account the crisis conditions in determining the amount of compensation for the liability found with respect to the breach of treaty provisions.[448]

However, the *LG&E* tribunal, the *CMS* and *Sempra* annulment committees, and the *Continental* tribunal, which viewed the treaty NPM clause as distinct from the customary necessity defense, clearly stated that a successful invocation of the treaty NPM clause precludes the existence of a breach, and thus exempts a state from the liability to compensate a claimant for losses caused during the necessity period.[449] For instance, the *LG&E* tribunal established that "Article of ILC's Draft Articles, as well as Article XI of the Treaty, does not specify if any

[445] *Ibid* at para 393.
[446] *Ibid* at para 394.
[447] *See Enron* Award, *supra* note 91, at para 345; *Sempra* Award, *supra* note 91, at para 394-95.
In this context, the expert statement of Professor Reisman made before the *Sempra* tribunal is worth mentioning. Professor Reisman explained that "of course governments in these circumstances must take measures to restore public order, but from the investment law standpoint - and this is for the future of all investments - *international investment law says you may do it, but you must pay compensation*." He further stated that if exceptions are made for the state of necessity or other similar circumstances, then "the entire purpose of modern investment law.....will be frustrated." *Sempra* Award, *supra* note 91, para 396. Also in the *El Paso v. Argentina*, Professor Reisman expressed similar position: "The BIT confirms that Argentina maintains the right to take the measures it deems 'necessary' for these purposes but in so far as these measures violated rights secured elsewhere in the BIT, *Argentina must compensate El Paso for the losses they caused*." Opinion of Michael Reisman, cited in Slaughter & Burke-White, Rejoinder, *supra* note 439, at para 86.
[448] *CMS* Award, *supra* note 49, at para 356*; Enron* Award, *supra* note 91, at para 407; *Sempra* Award, *supra* note 91, at para 346,397. It should be emphasized that in calculating the amount of damages, the tribunals took into account the impact of economic crisis on Argentina, even though it had failed to meet the requirements of the customary necessity defense.
[449] *LG&E*, Decision on Liability, *supra* note 49, at para 261; *CMS* annulment, *supra* note 91, at para 145-46. It should be pointed out that unlike other tribunals, the *Continental* tribunal absolved Argentina from liability and to pay compensation permanently. *Continental*, *supra* note 91, at para 304.

compensation is payable to the party affected by losses during the state of necessity."[450] Based on this finding, the tribunal held that "the damages suffered during the state of necessity should be borne by the investor."[451] Therefore, it exempted Argentina from liability for the period of necessity between December 1, 2001 and April 26, 2003, and found it liable only for the damages caused before and after the period of necessity.[452] In reaching this conclusion, the *LG&E* tribunal relied on Article XI of the BIT, which "establishe[d] the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State was exempted from liability."[453] At the same time, the tribunal found that as soon as a state of necessity ceased to exist, Argentina was "no longer exempted from responsibility for any violations of its obligations under the international law and shall reassume them immediately."[454]

Similarly, the *CMS* and *Sempra* annulment committees also found that a successful invocation of Article XI of the U.S.-Argentina BIT absolves the respondent from an obligation to compensate the claimant for the losses caused during necessity. The *CMS* annulment committee criticised the approach taken by the *CMS* tribunal and pointed out that Article 27 was not relevant to the question of compensation when Article XI of the BIT applies, as Article 27 only "covers cases in which state of necessity precludes wrongfulness under customary international

[450] *LG&E*, Decision on Liability, *supra* note 49, at para 264.
[451] *Ibid* at para 264. This approach was also supported by the decision of the *Metalpar* tribunal, *see Metalpar SA and Buen Aire SA v. Argentine Republic*, (6 June 2008) Award, ICSID Case No.ARB/03/5, at para 211.
[452] *Ibid* at para 229, 265. In the damages award that followed, the *LG&E* Tribunal compensated for the loss of dividends suffered by the claimants since the introduction of the first measure at issue in August 2000 but excluded from the awarded amount the "would-be" dividends that had been lost during the established period of necessity. Thus, the compensation due was reduced by US$ 28.8 million. *Ibid* at para 106, 108.
It should also be noted that the duration of the Argentine crisis was much shorter for the *LG&E* tribunal (December 1, 2001 - April 26, 2003) than for the *CMS* tribunal (August 17, 2000 - end of 2004).
[453] *Ibid* at para 261.
[454] *Ibid*. According to *LG&E* tribunal, "once the state of necessity was over on 26 April 2003....the very following day (27 April)....[Argentina] should have reestablished the tariff scheme offered to *LG&E* or, at least, it should have compensated Claimants for the losses incurred on account of the measures adopted before and after the state of necessity." *Ibid* at para 265.

law."[455] The committee further stated that instead, the tribunal "should have considered what would have been the possibility of compensation under the BIT if the measures taken by Argentina had been covered by Article XI."[456] According to the committee, the question of compensation under the BIT, if the measures taken by Argentina had been covered by Article XI, was "clear enough: Article XI, if and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period."[457] Using the same reasoning, the *Sempra* annulment committee also noted that in case "Article XI is found to apply, no compensation is payable."[458]

The *Enron* annulment committee took a similar position regarding the compensation issue, even though it had not decided on the distinction between Article XI of the BIT and the customary necessity defense, as the *CMS* and *Sempra* annulment committees did. Since the committee annulled the decision of the *Enron* tribunal on liability, it also found that "there can be no obligation to pay compensation in absence of any liability."[459] As a result of annulling the *Enron* tribunal's decision on liability, Argentina owed no compensation to the foreign investor regardless of its failure to invoke the necessity defense.[460]

As for the *Continental* tribunal, it was greatly influenced by the holdings of the *CMS* annulment committee as to the effect of applying the "primary rule", and rejected all claims of compensation for measures taken by Argentina during the state of necessity except the one,

[455] *CMS* Annulment, *supra* note 91, at para 145.
[456] *Ibid*.
[457] *Ibid* at para 146.
[458] *Sempra* Annulment, *supra* note 91, at para 118.
[459] The Committee held that "[f]ollowing the annulment of the Tribunal's finding on liability, its finding on damages can simply no longer stand." *Enron* Annulment, *supra* note 91, at para 414.
[460] In this regard, the Committee found that "the Tribunal's original decision with respect to damages must also be annulled in consequence of the annulment of the Tribunal's finding on liability." *Ibid*.

which was related to Argentina's measures concerning the restructuring of the LETEs.[461] Nevertheless, it held that a successful invocation of the treaty NPM clause entirely removes any possibility of state liability and the duty to pay compensation respectively.[462] There is one important feature of this approach that needs to be underlined. Unlike other tribunals (*LG&E*, *CMS* annulment), which excluded the liability of Argentina only for the period of necessity circumstances, the *Continental* tribunal completely (permanently) absolved Argentina of liability, regardless of the duration period of necessity circumstances.[463] Therefore, the *Continental* tribunal's interpretation of the effect of invoking the treaty NPM clause seems to be reasonable, since the determination of a duration period of necessity circumstances is quite complicated and requires the consideration of many factors that may impact it.[464]

At this point, it should be stated that scholars also have drawn attention to the issue of determining the duration of necessity. For instance, Professor Alvarez-Jiménez points out that even though tribunals have the last word with respect to determining the period of a state of necessity, there are still factors that might impact its duration.[465] According to him, a host state's contribution to the state of necessity could still play a role in determining the duration of emergency situation. He suggests that investors could claim that the duration of emergency circumstances would have been shorter had the host state not contributed to it. In case this

[461] The *Continental* tribunal decided that, "Argentina is entitled to avail itself of the defense based on necessity under Article XI of the BIT. For the above reasons, the only claim of breach of the BIT on which the Claimant prevails is that of the breach of the Fair and Equitable Treatment obligation of Art. II(2)(a) concerning the restructuring of the LETEs." *Continental* Award, *supra* note 91, at para 304.
[462] *Continental* Award, *supra* note 91, at para 199.
[463] Alvarez, *Investment Regime*, *supra* note 89, at 283. Professor Alvaréz argues that this effect still applies "even if the underlying crisis used to justify its breaches was entirely due to the State's own actions." *Ibid* at 334.
[464] Alvarez-Jiménez observes that the conclusion of the *Continental* tribunal on the permanent effects of successful invocation of Article XI of the BIT was "inspired" by similar effects of invocation of general exceptions in WTO law. Even though he supports the assistance of the WTO jurisprudence in interpreting treaty NPM clauses, in his view, "this particular conclusion takes the WTO model too far in the domain of foreign investment law." Alvarez-Jiménez, Interpretation of treaty NPM clauses, *supra* note 395, at 445, footnote 134.
[465] *Ibid* at 447.

contribution is proved, a tribunal should reduce its duration period.[466] Moreover, he suggests applying a similar analysis with respect to alternative means that had been reasonably available to a host state to address the emergency situation. In his view, if a tribunal finds that the adoption of those alternative means would have resulted in the reduction in duration of the necessity situation, then it should make appropriate corrections to the amount of compensation due, as the investors should not bear the consequences of the longer crisis.[467]

4.4.4. Scholars' Opinions on Tribunals' Approaches to Compensation Issues

Even though it may seem that the approach taken by the second group of tribunals (*LG&E, Continental* tribunals, the *CMS* and *Sempra* annulment committees) is more balanced in terms of allocating the costs between a host state and foreign investors, scholars expressed contradictory views on its potential to provide an optimal solution. For instance, Burke-White and Von Staden argue that the approach taken by the second group of tribunals, especially by the *LG&E* tribunal, could allocate the burden of losses between a state and foreign investors in a balanced way. In their view, the tribunal could establish a true nature of the treaty NPM clause that was implicit in the treaty, and thus found a middle ground for balancing the risks borne by both parties.[468] Another scholar, Sarah Hill, also supports the approach taken by the *LG&E*

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[466] *Ibid* at 447.

[467] *Ibid*.

[468] Burke-White and Von Staden give much credit to the approach taken by the *LG&E* tribunal in this regard:

> Given that the very purpose of the NPM clause was to guarantee states greater freedom of action in the face of extraordinary circumstances in exchange for enhanced protections for investors, *the approach taken by the LG&E Tribunal appears to far better reflect the bargain inherent in NPM clauses*. *If such clauses were not intended to prevent liability, they would not in fact serve the purpose of guaranteeing greater freedom of action to states in cases of emergency*.

Burke-White & Von Staden, *supra* note 9, at 398 [emphasis added].

Professor Ripinsky also supports the approach taken by the *LG&E* tribunal. According to him, if the breach has a continuing character and "the damage is being inflicted gradually and spread in time, some of it occurring during the period of necessity and some outside this period, like the situation in *LG&E*, then the balanced distribution of the burden of negative economic consequences can be achieved by awarding no compensation for the damage suffered

tribunal and proposes a "balancing" or "necessity discount" test as an optimal solution to this issue. She argues that:

> [A] fairer proposal seems to be a "balancing test" or "necessity discount" approach that entails a weighing of the social, political, and economic interests of Argentina and the risks assumed by the investor against LG&E's lost profits in crisis, then calculating the total amount of the damages for which Argentina would have been responsible in the absence of crisis and discounting them for the urgency of the necessity measures involved.[469]

On the other hand, scholars such as José Alvarez, Kathryn Khamsi, Diane Desierto, and Stephan Shill oppose that approach. Particularly, Alvarez and Khamsi, by relying on the holdings of certain tribunals,[470] contend that "neither [Article XI], nor customary defenses which underlie it permanently excuse a state invoking this exception from the duty to pay compensation that would otherwise be due under international law."[471] Most interestingly, they argue that if viewed in connection with all other provisions of the BIT, "successful invocation of Article XI provides a state with an excuse, without proscribing the legal consequences of that excuse."[472] Diane Desierto also points out that Article XI of the BIT "does not contain any definitive text on the

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during the period of necessity but by compensating for all other damage." Ripinsky, Compensation, *supra* note 421, at 16.

[469] Sarah Hill, "The 'Necessity Defense' and the Emerging Arbitral Conflict in its Application to the U.S-Argentina Bilateral Investment Treaty", (2007)13 Law and Business Review of the Americas 547 at 565.

[470] They refer to the Annulment Committee in *Mitchell* v. *DRC*, which stated in dicta that:

> ....even if the Arbitral Tribunal has examined Article X(1) of the Treaty.... and if it had concluded that they were not wrongful, this would not necessarily have had any impact.... on the need for compensation; possibly, it could have had an influence on the calculation of the amount of such compensation, ...even if it were assumed that the Arbitral Tribunal had examined Article X(1) and had agreed that the measures undertaken were not wrongful, this would not have ruled out the need for compensation.

Patrick Mitchell v. Democratic Republic of Congo (November 1, 2006) Decision on the Application for Annulment of the Award, (ICSID Case No. ARB/99/7 at paras. 57, 59) in relation to the NPM clause in the U.S.–Zaire BIT,; Also in *BG Group v. Argentina*, the tribunal stated *in dicta* that "assuming that necessity were to justify some fair and non-discriminatory measures by Argentina, an obligation to compensate would still obtain by virtue of the BIT." *BG Group*, *supra* note 92, at para 409.

[471] José Alvarez & Kathryn Khamsi, *supra* note 90, at 456.

[472] *Ibid* at 457.

effects of applying [it]."[473] From a different perspective, Professor Schill also points out that "[t]he wording of Article XI of the BIT does not exclude subsidiary application of customary international law as to consequences of an exemption from obligations under the BIT."[474] Therefore, in contrast to the approach taken by the *LG&E* tribunal, he suggests that "it would have been plausible to apply Article 27(b) of the ILC Draft Articles in a subsidiary way on the question of compensation."[475]

However, Avidan Kent and Alexandra Hurrington raise an important question regarding this issue. They draw attention to the question of whether a state of necessity established in customary international law "indeed precludes wrongfulness of actions or only excuses actions which are considered as wrong."[476] By referring to Professor Lowe's distinction of necessity as a "defense" and an "excuse",[477] they argue that in case it is interpreted as a "defense", then the action is not considered wrongful by nature, and thus should not induce compensation.[478] When interpreted as an "excuse", the actions are considered wrongful, but are excused under the necessity circumstances. In this case, compensation will not be due for the period of necessity, but once the necessity circumstances cease to exist, the excuse is no longer valid and the

[473] Desierto, *supra* note 315, at 904. Desierto further contends that none of the tribunals in the Argentine cases "cite any authority or *travaux preparatoire* to the Argentina-U.S. BIT supporting the position that Article XI meant non-applicability of any of the Argentina-U.S.'s BIT's substantive obligations, or that "no breach" of a BIT obligation would ever arise when Article XI was invoked." *Ibid.*

[474] Schill, *LG&E v. Argentina, supra* note 282, at 282.

[475] In his view, in that case, "[t]he scope of application of the BIT emergency clause would then be restricted to establishing circumstances under which the failure to observe BIT obligations was to be excused, without proscribing the legal consequences of such a breach." *Ibid.*

[476] Avidan Kent & Alexandra Harrington, "The Plea of Necessity under Customary International Law: A Critical Review in Light of the Argentine Cases", in Chester Brown & Kate Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) at 262.

[477] Vaughan Lowe defines the distinction as follows: "There is a behaviour that is right; and there is behaviour that, though wrong, is understandable and excusable. The distinction between the two is the very stuff of classical tragedy. No dramatist, no novelist would confuse them. No philosopher or theologian would conflate them. *Yet the distinction practically disappears in the Draft Articles.*" Lowe, *supra* note 422, at 406 [emphasis added].

[478] *Ibid*. They argue, "[i]ndeed, why should one compensate a party if one did nothing wrong?." *Ibid* at 263.

obligation to compensate will revive again.[479] Having found evidence supporting both approaches to interpretation, the scholars found the effects of the necessity doctrine "confusing".[480]

In my view, even though the above-mentioned scholars present convincing arguments in support of their positions, the issue of compensation in a state of necessity needs further clarification. This is particularly true with respect to treaty NPM clauses, since they do not contain specific provisions on compensation. Accordingly, tribunals look for the answer in other sources, especially in customary international law. One possible solution to this issue can be assumed from the analysis by Stephan Schill made on the decisions of international tribunals concerning the impact of emergency situations on the requirement to observe financial obligations entered into with foreigners.[481] Professor Schill points out that "one would have expected a clear statement of the contracting state parties to BITs had they intended to exclude an obligation to compensate for material losses under customary international law."[482] Diane Desierto is also of the view that "[i]t is better for contracting States to negotiate the effects of a necessity or exceptions clause into their treaty regimes."[483] Consequently, it could be suggested that, in order to avoid the application of an alternative approach to solve the issue of compensation (Article 27 of ARSIWA in this case), the treaty parties should clearly state in relevant provisions of the treaty the rules which can be applied in case the question of compensation would arise. In the absence of such clarity, it will be quite challenging for arbitral

[479] *Ibid.*
[480] *Ibid.* The scholars point out that there is no point of invoking the customary necessity defense, since compensation will be due regardless of its success or failure. *Ibid.*
[481] Schill, *LG&E v. Argentina, supra* note 282, at 282.
[482] *Ibid.*
[483] Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Leiden: Martinus Nijhoff, 2012) at 199.

tribunals to decide on this issue, which will prompt them to inevitably rely on "what they see as equitable and reasonable in the circumstances of a particular case."[484]

4.4.5. The Issue of Interest in a State of Necessity

The function of interest is to compensate an aggrieved party for losing an opportunity "to invest and receive income on the amount of compensation that has not been paid to it in time."[485] The obligation to pay interest for delaying compensation for the damage caused exists in almost all legal systems of the world.[486] In the investment arbitration context, interest may be awarded both in case of lawful and unlawful measures. The expropriation measures are a good example.[487] The date from which the interest should accrue plays an important role in determining the amount of interest due. In this regard, Article 38(2) of ARSIWA provides that the obligation to pay interest starts "from the date when the principal sum should have been paid until the date the obligation is fulfilled."[488] Based on this provision, the obligation to pay interest in investment arbitration runs across these periods starting from the date of an act until the date of payment, regardless of the lawful or unlawful character of the act. In cases of treaty breaches, the interest starts from the date of the breach.[489]

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[484] Ripinsky, Compensation, *supra* note 421, at 17. Professor Bjorklund is also of the view that in such a case "[t]he appropriate measure of compensation in any particular case will be heavily fact-dependent." Bjorklund, Emergency Exceptions, *supra* note 6, at 516.
[485] Ripinsky, Compensation, *supra* note 421, at 16. The ILC emphasizes that the interest is not "an autonomous form of reparation, nor is it necessary part of compensation in every case." Crawford, *ILC Articles*, *supra* note 145, Commentary to Article 38, para 1.
[486] Some Islamic jurisdictions are exception to it, since Shariah law prohibits awarding interest, which is called "Riba".
[487] *See* Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford: OUP, 2011) at 149. For detailed overview of issues related to interest, *see* Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford, 2009).
[488] Crawford, *ILC Articles*, *supra* note 145.
[489] Ripinsky, Compensation, *supra* note 421, at 16.

As for the state of necessity, Professor Ripinsky identifies three scenarios that can be applied to determining the interest in investment disputes involving necessity circumstances. These scenarios correspond to the approaches taken by the above-mentioned arbitral tribunals in deciding compensation issues. The first scenario corresponds to the approach taken by the *CMS*, *Enron* and *Sempra* tribunals, which held that a state's obligation to pay compensation for the period of necessity is not terminated, but rather, suspended during that period. In that case, the interest should stop running for the duration of necessity circumstances and resume once it is over.[490] The second scenario corresponds to the approach taken by the *LG&E* and *Continental* tribunals, which excludes a state's obligation to pay compensation for the period of necessity. In Ripinsky's view, in such cases "the question of interest does not arise,"[491] since compensation is not awarded at all. It should be noted that this scenario does not completely correspond to the *Continental* tribunal's approach, which permanently absolves a state from compensating regardless of duration of necessity circumstances.[492]

The third scenario differs slightly from the second one in that it addresses the necessity circumstances where the damage is inflicted gradually and extends outside the necessity period by starting before and continuing after it, like in the *LG&E* case. In such instances, the calculation of interest for the period before the necessity circumstances will be problematic, as the necessity period commences sometime after, which excludes the payment of compensation. According to Ripinsky, in that case, "interest on the 'before' damage should run throughout the

[490] *Ibid.*
[491] *Ibid.*
[492] But it can logically be assumed that a question of interest will not arise either in this case, since the obligation to pay compensation is excluded entirely.

period of necessity because as a matter of law, compensation for that damage was due at the time of the breach."[493]

4.4.6. Concluding Remarks

The analysis of tribunals' approaches to solving the compensation issues showed that, despite assessing similar facts and interpreting similar treaty provisions, the tribunals reached contradictory decisions, largely because they relied on different legal sources. The first group of tribunals (*CMS*, *Enron* and *Sempra*) decided to apply the customary rules established in Article 27 of ARSIWA, while the second group of tribunals (*LG&E*, *CMS* annulment, *Continental*) applied the interpretative approach, which was quite autonomous of customary rules. Nevertheless, the analysis of tribunals' decisions on the issues of compensation suggests that the effects of invoking of treaty NPM clauses (particularly Article XI of the U.S.-Argentina BIT) can take three forms. First, successful invocation of the treaty NPM clause only temporarily precludes state responsibility and does not absolve a state from liability and the duty to pay compensation for its actions adopted during the state of necessity due to a residual application of the customary rules on compensation (Article 27 of ARSIWA). Second, a state's liability and duty to pay compensation is excluded, but only for its actions committed within the period of necessity circumstances. In this case, liability is excluded only temporarily, and a state will be liable for its wrongful conduct before and after the period of necessity. Third, a state is entirely (permanently) absolved from liability and duty to pay compensation, regardless of duration period of necessity. As can be seen, in all of these three approaches the tribunals achieved the distribution of risks, albeit to different extents, between the host state and foreign investors.

[493] *Ibid.*

This paragraph finishes the discussion on the consequences of invoking treaty NPM clauses and the customary necessity defense. It also finishes the whole chapter in which I presented the analysis of the Argentine cases where the arbitral tribunals were involved in interpreting treaty NPM clauses and in clarifying their distinctions from the customary necessity defense. However, in this chapter I did not address one of the main interpretative issues which was touched upon by arbitral tribunals in the Argentine cases and caused fierce debate among scholars. This issue relates to examining the self-judging character of treaty NPM clauses, particularly of Article XI in the U.S.-Argentina BIT. Thus, in the next chapter I will discuss the issues concerning the self-judging nature of NMP clauses and examine whether Article XI of the U.S.-Argentina BIT is self-judging or not.

Chapter V. The Self-Judging Nature of Treaty NPM Clauses: Clarifying the Standard of Review for Self-Judging NPM Clauses

As mentioned in the introduction, identifying the self-judging character of the NPM clause (Article XI) of the U.S.-Argentina BIT was one of the contentious issues that the arbitral tribunal had to tackle. Moreover, it caused fierce academic debate at the expert level among scholars such as Professor Jose Alvarez and Anna-Marie Slaughter. But before discussing their arguments on the self-judging nature of Article XI, I will present background information on self-judging clauses, as it will help the reader to understand the issues related to choosing an appropriate standard for interpreting them, which will be discussed subsequently. Thus, in this chapter I will first provide an overview of the notion, nature, features and types of self-judging clauses. Then, I will address specific issues related to the effects of self-judging NPM clauses. The initial question in this respect is whether the state measures taken under a self-judging NPM clause are completely barred from the arbitral review, or subjected to the standard of review, which is different from the substantive review applied in cases when the treaty clause is non-self-judging. By analysing the opinions of different scholars and examining the relevant evidence from the international case law on this issue, I will argue that the self-judging clauses do not oust the jurisdiction of arbitral tribunals, but rather, affect the standard of review applied by them to examine State measures alleged to be justified under such clauses. Since good faith is argued as the potential applicable standard in this respect, I will shed more light on the main features and elements of this standard. After that, I will discuss the issues related to the application of good faith review. In particular, I will address the issue of possible abuse by states of their rights granted under a self-judging treaty clause. In this respect, by applying the concept of regime dynamics, I will examine possible approaches suggested by scholars with regard to developing a

practical good faith test for future arbitral tribunals that could prevent the abuse of state rights under a self-judging NMP clause. In the end, I will present the analysis of academic debate on establishing the self-judging character of the NPM clause of the U.S-Argentina BIT.

5.1. General Information on Self-Judging Clauses

5.1.1. Definition and Characteristics of Self-Judging Clauses

As previously noted, identifying the self-judging character of the NPM clauses plays an important role in investment arbitration, since it affects the standard applied by arbitral tribunals to examine the legitimacy of state measures at issue. According to Rose-Ackerman and Benjamin Billa, self-judging clauses are defined as clauses that allow states to reserve themselves a right of non-compliance with international obligations in circumstances in which they consider that the compliance will harm their sovereignty, security, public policy, or more generally, their essential interests.[1] Relying on such clauses, a state has the right to unilaterally declare certain treaty obligations as non-binding, if, according to its subjective determination, respecting treaty obligations will harm its essential interests at issue.[2] Thus, by means of the self-judging clauses, a state is conferred with discretion to prioritize its domestic interests over its international responsibilities.[3]

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[1] Susan Rose-Ackerman & Benjamin Billa, "Treaties and National Security", (2008) 40 New York University Journal of International Law and Politics at 437.

[2] On one hand, the self-judging clause has the function of allowing states to enter into international cooperation on the basis of binding international obligations. On the other hand, it provides them with the right to escape from such obligations in certain circumstances. As such, it is considered as a "safety valve" for "reconciling international cooperation and for state's occasional preference for unilateralism within cooperative regimes." *See* Stephan Schill & Robyn Briese "If the State Considers: Self-Judging Clauses in International Dispute Settlement", (2009) 13 Max Plank Yearbook of United National Law at 67 [Schill & Briese].

[3] *Ibid* at 64. The collision between national interests and international obligations is defined as "the Achilles' heel of international law". It is observed that "[w]herever international law is created, the issue of national security gives rise to some sort of loophole, often in the form of an explicit national security exception. The right of any nation-state to protect itself in times of serious crisis by employing otherwise unavailable means has been a bedrock feature of the international legal system. As long as the notion of sovereignty exerts power within this evolving system,

The existence of the terms “if the state considers” in the language of the clause is the hallmark of its self-judging nature.[4] Article 2(c) of the Convention concerning Judicial Assistance in Criminal Matters between Djibouti and France[5] is a good example of a self-judging clause. It provides that assistance in proceedings related to criminal offences "may be refused .... *if the requested State considers* that the execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests."[6] As can be observed, the wording of this clause clarifies that a state may derogate from its obligation under the Convention if it considers that compliance will harm the state's national interests.[7]

Based on the above mentioned definition, Stephan Schill and Robyn Briese identify two major characteristics of a self-judging clause. First, such clauses confer a state discretion "to unilaterally opt out (in a non-technical and broad sense) from an international obligation, including through exceptions to treaty obligations, justifications for breaches, circumstances precluding wrongfulness and full derogations from treaty regimes."[8] Through this feature, self-judging clauses "have the effect of shielding a state from .... [different forms] of global

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national security will be an element of, as an exception to, the applicable international law." *See* Hannes Schloemann & Stefan Ohlhoff, "'Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competence", (1999) 93 American Journal of International Law 424 at 426.

[4] The international agreements also include other formulations such as "that it considers", "if the state determines", etc. The overview of the self-judging language of the NPM clauses in IIAs will be presented in the following paragraphs.

[5] Convention concerning Judicial Assistance in Criminal Matters, signed on September 27, 1986 (entered into force 1 August 1992), 1695 UNTS 297, [*Mutual Assistance Convention*].

[6] *Ibid* [emphasis added]. It should be noted that this provision was on the focus of the ICJ tribunal in *Djibouti v. France*. *See Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgement, 4 June 2008 [*Mutual Assistance in Criminal Matters*]. Available at: <http://www.icj-cij.org/docket/files/136/14572.pdf>.

[7] The self-judging nature of the clause can also be easily identified if compared with the non self-judging clause. For example, another exception to the duty to grant assistance in proceedings related to criminal matters in the same Mutual Assistance Convention provides for the refusal of such assistance, "if the request concerns an offense which is not punishable under the law of both the requesting state and the requested state." Article 2(b), *Mutual Assistance Convention*.

[8] Schill & Briese, *supra* note 2, at 67.

governance[9] that exercise normative constraints over states in international cooperation."[10] Second, the evaluation of circumstances that give rise to derogation from an international obligation is not performed "fully objectively from an external point of view, but primarily from the point of view of the state concerned."[11] This means that the determination of whether the self-judging elements of the clause have been fulfilled or not is not established by an independent third party, such as an international court or tribunal. Rather, it is established based on subjective appreciation of circumstances by the state experiencing the need for invoking the clause. This characteristic of the self-judging clause provides states with discretion to subjectively evaluate the circumstances bringing about the claim for derogation. In general, both features of the self-judging clause provide states with a means of self-determination in regards with certain sovereign interests, through which they retain "the power of interpretation of the clause, in full or in part."[12]

5.1.2. Categories of Self-Judging Clauses

Self-judging clauses are found in various types of international agreements, including treaties on mutual assistance and extradition, trade and investment, or private international law and arbitration.[13] As previously mentioned, they are mainly intended to provide states with wide discretion to act in protecting their fundamental values and public policy objectives in certain areas. Based on this, Schill and Briese classify self-judging clauses into four types: 1) clauses

[9] Schill & Briese, *supra* note 2, at 68, footnote 11.
[10] The form and actors of international cooperation may be international organizations, inter-governmental bodies, hybrid public-private, or purely private bodies. On the system of global governance, *see* generally Benedict Kingsbury, Nico Krisch and Richard Stewart, "The Emergence of Global Administrative Law", (2005) 68 Law and Contemporary Problems 15; Carol Harlow, "Global Administrative Law: The Quest for Principles and Values", (2006) 17 (1) The European Journal of International Law187; Karl-Heinz Ladeur, "Emergence of Global Administrative Law and Transnational Regulation", (2012) 3(3) Transnational Legal Theory 243.
[11] Schill & Briese, *supra* note 2, at 68.
[12] *Ibid*.
[13] *Ibid* at 63-64.

concerning the restriction of, or derogation from, international obligations; 2) clauses permitting exit from an entire treaty regime; 3) clauses providing for limitations to the consent of states to international dispute settlement; 4) clauses concerning reservations to international treaties.[14]

The first category of clauses provides states with a "partial exit" from an international obligation, while retaining them under the scope of the applicability of the respective treaty regime. In other words, states do not fully exit from the treaty regime, but in certain circumstances, they are allowed to derogate from their international obligations. Such carve-outs to international obligations allow states to act against their treaty obligations, but only in situations, when, according to their consideration, the compliance will negatively affect the state's sovereign, public policy and other essential interests. Article V (2) (b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[15] serves as a clear example for this type of self-judging clause. According to this Article, a member state of the Convention may refuse the recognition and enforcement of the award in its jurisdiction, if it is found by the competent authority of that state to be contrary to state's public policy.[16] The self-judging nature of the clause is that, in invoking the exception, the Contracting Parties are allowed to unilaterally determine the scope of "public policy" under Article V (2) (b).[17]

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[14] *Ibid* at 81.

[15] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed June 10, 1958 (entered into force June7, 1959). Available online: UN <https://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch_XXII_01p.pdf> (last visited 2 February 2015).

[16] Courts of the state concerned usually act as a competent authority in this respect. This kind of public policy exception is regarded by Professor Junker as "the greatest single threat to the use of arbitration in international commercial disputes", since "a court might disregard a foreign arbitral award for virtually any reason..." Joel Junker, "The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards", (1977) 7 California World International Law Journal 228 at 228.

[17] It should be noted that contrary to Junker' arguments, Courts in most states give due importance to the goal sought by the Convention, which is to allow for cross-border enforcement of awards, and thus tend to interpret the meaning of "public policy" restrictively. Schill & Briese, *supra* note 2, at 83.

The second type of clause, which allows a state to exit the treaty regime permanently, rather than providing for temporal or subject matter restrictions, is rarely found. On the basis of such clauses, states may unilaterally terminate their obligations under the treaty if they consider that it jeopardizes their supreme national interests. Article X (1) of the Treaty on the Non-Proliferation of Nuclear Weapons[18] is illustrative in this regard. It provides that "[e]ach Party shall in exercising its national sovereignty have the right to withdraw from the Treaty *if it decides* that extraordinary events, related to subject matter of this Treaty, have jeopardized the supreme interests of its country."[19]

The third class of self-judging clause relates to the exclusion of disputes that entail state vital interests from the jurisdiction of international dispute settlement bodies.[20] For example, Article 22(2)(b) of the Peru-U.S. Free Trade Agreement provides for derogation from treaty obligations if a Contracting Party "considers it necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its essential security interests."[21] On first reading, one may classify this clause under the first type of self-judging clause. However, the footnote provided to Article 22 (2)(b) further clarifies that "if a Party invokes [this provision] in an arbitral proceeding ... the tribunal or panel hearing the matter shall find that the exception applies."[22] Besides conferring a state full discretion to

[18] Treaty on the Non-Proliferation of Nuclear Weapons, signed July 1, 1968 (entered into force March 5, 1970) U.N.T.S. Vol.729, No.169.
[19] *Ibid* [emphasis added].The provision further states that a Contracting Party "shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of extraordinary events it regards as having jeopardized its supreme interests." *Ibid*. Available at: <http://www.un.org/disarmament/WMD/Nuclear/NPTtext.shtml>.
[20] For the detailed discussion, *see* Michael Hahn, "Vital Interests and the Law of the GATT: An Analysis of GATT's Security Exception", (1991) 12 Michigan Journal of International Law 558 [Hahn].
[21] Peru-U.S. Free Trade Agreement, Article 22 (2) (b), signed on April 12, 2006. Available at: <http://www.ustr.gov./Trade_Agreements/Bilateral/Peru_FTA/Final_Texts/Section_Index.html>.
[22] Footnote 2 to Article 22 (2)(b), *Ibid*.

invoke the security exception, this clause also deprives an arbitral tribunal of jurisdiction under the treaty.

The last type of self-judging clause relates to reservations to international treaties which intend to exempt a state from becoming bound by an international obligation *ex ante*. The reservation that the United States attached to its ratification of the Convention on the Prevention and Punishment of the Crime of Genocide is a good example. It provides that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States *as interpreted by the United States*."[23] Since constitutional provisions are often vague and susceptible to different interpretations, this clause establishes that the scope of the U.S. Constitution is determined solely by the United States.[24]

The brief description of the categories of self-judging clauses presented above provides helpful guidance for classifying the NPM clauses of IIAs, which are the focus of this research. Thus, the following paragraph examines examples of self-judging clauses in international trade and investment regimes. This survey will not only help us classify them under the above-mentioned categories, but it will also distinguish them from non self-judging clauses.

[23] ILM 28 (1988) at 754, cited in Schill & Briese, *supra* note 2, at 91(footnote 74).

[24] It should also be noted that IIAs also include reservations to treaty obligations. They are usually listed in a negative way and are intended to exclude specific sectors or measures from the application of some or all treaty obligations. Through reservations, states usually preserve their freedom to regulate certain policy areas which they consider to be sensitive to state interests. *See* for example Article 9 of the Canadian FIPA and Article 14 of U.S. model BIT.

5.1.3. Examples of Self-Judging Clauses in International Trade and Investment Agreements

Like in other international law regimes, certain agreements in international trade and investment regimes also contain self-judging clauses. For instance, in Article XIV *bis* of the General Agreement on Trade in Services (GATS) essential security exceptions related to nuclear materials or the supply of services for the purpose of provisioning a military establishment, or taken in time of war or other emergencies in international relations are provided for: "Nothing in this Agreement shall be construed… to prevent any Member from taking action *which it considers necessary* for the protection of its essential security interests".[25]

As for regional agreements, NAFTA Chapter XXI ("Other Provisions") also contains an exception for essential security interests in its Article 2102. This Article, which applies to the Agreement as a whole, including the Investment Chapter (Chapter 11), provides as follows:

> 1. Subject to Articles 607 (Energy – National Security Measures) and 1018 (Government Procurement Exceptions), nothing in this Agreement shall be construed:
> […] (b) to prevent any Party from taking any actions *that it considers necessary* for the protection of its essential security interests
> (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials,
> services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,
> (ii) taken in time of war or other emergency in international relations, or

[25] General Agreement on Trade in Services, Article XIV*bis*, April. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 United Nations Treaty Series 183, 33 I.L.M. 1167 (1994), [emphasis added]. A similar clause is also found in GATT Article XXI (b). However, Professors Newcombe and Paradell note that "[n]o GATT or WTO panel has made a definitive interpretation of this provision and there is disagreement amongst commentators over whether the application of the exception is completely self-judging." *See* Andrew Newcombe & Llouis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Hague: Kluwer Law International, 2009), Chapter 10-Exceptions and Defenses, at 492.

(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or
other nuclear explosive devices; [26]

In the investment regime, the NPM clauses found in some IIAs also contain self-judging language. Self-judging NPM clauses are mostly found in U.S. and Canadian IIAs concluded after 2004.[27] For instance, Article 18 (2) of the U.S.-Uruguay BIT (2005) provides:

Nothing in this Treaty shall be construed: ... to preclude a Party from applying measures *that it considers necessary* for 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.[28]

Another example of a self-judging NPM clause can be found in the BIT concluded by Japan and the Republic of Korea. Article 16 of the Treaty allows the Contracting Parties to take any measures they consider necessary to protect their essential security interests. Unlike the NPM clause in the U.S.-Uruguay BIT, this clause clearly establishes concrete circumstances for

[26] The North American Free Trade Agreement between the United States, Canada and Mexico (January 1, 1994), available at: <http://www.nafta-sec- alena.org/en/view.aspx?x=343&mtpiID=ALL#mtpi120>.
Even though this provision has explicitly self-judging language, its scope is limited only to certain measures relating to arms traffic, taken in time of war or other emergencies in international relations, relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons.
For a similar self-judging clause, *see* also Article 24(3) of the Energy Charter Treaty.

[27] It should be noted that a couple of U.S. BITs concluded before 2004 also contain self-judging NPM clauses. *See* the U.S.-Bahrain BIT (September 19, 1999), Article 14; The U.S.-Mozambique BIT (December 1, 1998) Article 14; the U.S.-Russia BIT (June 17, 1992), at para. 8 of the Protocol (The BIT is not in force). All IIAs are available at: <http://investmentpolicyhub.unctad.org/IIA>.

[28] Article 18(2), the U.S.-Uruguay BIT (November 4, 2005). *See* also Article 12(2) of the U.S.-Rwanda BIT (February 19, 2008). It should be pointed out that the exception clauses of these treaties intended for environmental and labour concerns also contain self-judging language. Article 12 (2) of both treaties read as follows:
"Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that *it considers appropriate* to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." *Ibid*.

the protection of State's essential security interests in a paragraph separate from that of other public interests, such as public health and public order.[29]

It should also be noted that in the recent treaty practice of states, one can observe treaties with both self-judging and non-self-judging clauses. For instance, Article 2 of chapter 15 of the ASEAN-Australia-New Zealand Free Trade Agreement contains the following self-judging clause with respect to state measures related to protect its essential security interests:

> Nothing in this Agreement shall be construed:
> (a) to require any Party to furnish any information the disclosure of which *it considers contrary* to its essential security interests;
> (b) to prevent any Party from taking any action which *it considers necessary* for the protection of its essential security interests:
> (i) relating to fissionable materials or the materials from which they are derived;…
> (iv) taken in time of national emergency or war or other emergency in international relations.[30]

However, Article 1(4) of chapter 15, which involves measures related to protection of other public interests, lacks such self-judging language, and reads as follows: "[n]othing in these

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[29] Article 16 provides:

> Notwithstanding any other provisions in this Agreement other than the provisions of Article 11, each Contracting Party may:
> (a) take any measure **which it considers necessary** for the protection for the protection of its essential security interests:
> (i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or
> (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;
> (b) take any measure in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security;
> (c) take any measure necessary to protect human, animal or plant life or health; or
> (d) take any measure necessary for the maintenance of public order. The public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

Article 16, Japan-Republic of Korea BIT (May 22, 2002), [emphasis added].

[30] Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, (signed on 27 February, 2009; entered into force in 2012), Chapter 15 (General provisions and exceptions), Article 2 [emphasis added].
Available online at: <https://www.mfat.govt.nz/assets/_securedfiles/FTAs-agreements-in-force/AANZFTA-ASEAN/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area-1.pdf>

chapters shall be construed to prevent the adoption or enforcement by a Party of measures *necessary* to protect national treasures or specific sites of historical or archaeological value or measures *necessary* to support creative arts of national value." [31]

Similarly, the Canada-Czech Republic BIT[32] also contains provisions with both self-judging and non self-judging language. Article IX (5) of the BIT, which involves state measures to protect essential security interests, contains a self-judging nexus clause.[33] Meanwhile, the treaty's Article IX (1), which involves state measures intended to protect human, animal, plant life, as well as other living or non-living exhaustible natural resources, lacks such self-judging language.[34]

As can be seen, the self-judging clauses found in international trade and investment treaties provide States with a "partial exit" from the treaty regime by allowing for derogations from treaty obligations in certain circumstances. If classified under the categories of self-judging clauses previously presented, it is evident that the self-judging clauses found in both regimes

[31] *Ibid*, Article 1(4), [emphasis added].
[32] Canada-Czech Republic BIT (signed on May 6, 2009; entered into force on January 22, 2012). Available online at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/606> (last visited on February 10, 2016).
[33] Article IX (5) reads as follows:

> [n] othing in this Agreement shall be construed:
> (a) to require any Contracting Party to furnish or allow access to any information the disclosure of which *it determines* to be contrary to its essential security interests;
> (b) to prevent any Contracting Party from taking any actions that it *considers necessary* for the protection of its essential security interests:
> (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,
> (ii) taken in time of war or other emergency in international relations, or
> (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices[.] [emphasis added] *Ibid*.

[34] Article IX (1) reads as follows:

> nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures *necessary*:
> (a) to protect human, animal or plant life or health;
> (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
> (c) for the conservation of living or non-living exhaustible natural resources. [emphasis added] *Ibid*.

mainly fall within the first category. Treaties containing provisions with both self-judging and non-self-judging language can also be found. This demonstrates the tendency in the treaty practice of some states to clarify specific sensitive public policy areas in which they want to retain substantial latitude of freedom on one side, and at the same time, subject state measures in other areas to full scrutiny by third parties (tribunals). Hence, there arises the question of whether a state's measure adopted on the legal basis of a self-judging clause completely bars the jurisdiction of third parties (arbitral tribunals) or limits their review to certain extent. If it is subject to such limited review, then what standard should be applied? In the following section, I will present the discussion on these issues.

5.2. Interpretative Framework for Self-Judging NPM Clauses

5.2.1. Effect on Jurisdiction or on Standard of Review?

Within NPM clauses, some scholars regard the language "that it considers" or other similar formulations to be "an absolute bar to judicial or arbitral review."[35] This argument is advanced on the basis of the existence of a general principle in international law that excludes disputes involving state's essential interests from the review of international courts and tribunals.[36] According to Akande and Williams, the alleged absence of "judicially manageable

[35] William Burke-White & Andreas Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", (2007-2008) 48 Vanderbilt Journal of International Law 307 at 376 [Burke-White & Von Staden].

[36] As early as 1756, Emer de Vattel had noted that "[a]rbitration is a very reasonable mode ....for the decision of every dispute *which does not directly interest the safety of the nation."* Emer de Vattel, II *The Law of Nations* (Joséph Chitty ed., T. & J.W. Johnson & Co. 1858) (1758), at 278 (emphasis added); Hersch Lauterpacht**,** *The Function of the Law in the International Community* (Oxford: Oxford University Press, 2011) at 6-48; Thomas J. Bodie, *Politics and The Emergency of an Activist International Court of Justice* (Westport, Conn: Praeger, 1995); Ian Brownlie, "Justiciability of Disputes and Issues in International Relations", (1967) 42 British Yearbook of International Law 142; Robert Yorke Hedges, "Justiciable Disputes", (1928) 22 American Journal of International Law 560; William H. Thayer, "International Arbitration of Justiciable Disputes", (1912-1913) 26 Harvard Arbitration Law review 416. Cited in Burke-White & Von Staden, *supra* note 35.

standards" for assessing a state's essential interests is considered to be a main rationale behind the non-justiciability of self-judging clauses.[37] However, scholars note that international adjudicative bodies have always rejected this principle in practice and exercised their jurisdiction over disputes involving the invocation of self-judging clauses.[38] Here, the statements made *obiter dicta* by the ICJ in the *Nicaragua* case with respect to the effect of GATT Article XXI is worth mentioning.[39] In that case, the ICJ was tasked with interpreting Article XXI of the 1956 FCN Treaty between the U.S. and Nicaragua, which provided for non-preclusion of measures "necessary to protect [a state's] essential security interests."[40] The ICJ held that it had jurisdiction to determine whether the measure at issue fell within that exception clause by reasoning that it did not include self-judging language similar to Article XXI of the GATT.[41] However, Judge Schwebel dissented on this, opining that "where a treaty excludes from its regulated reach certain areas, those areas do not fall within jurisdictional scope of the treaty."[42] As for the GATT dispute settlement practice, it should be noted that there is substantial amount of state practice arising

[37] Dapo Akande & Sope Williams, "International Adjudication of Security Issues: What Role for the WTO? (2003) 43 Vanderbilt Journal of International Law 365 at 374 [Akande & Williams].
[38] *Ibid* at 382-83.
[39] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (Merits), ICJ Reports, 1986, at 14, at paras. 222-236 [*Nicaragua* case].
[40] Treaty of Friendship, Commerce and Navigation between Nicaragua-United States, signed January 21, 1956, entered into force May 24, 1958)., U.N.T.S. Vol. 367 №3.
[41] In this regard, the ICJ held as follows:

> That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of "necessary" measures, **not of those considered by a party to be such**.

Nicaragua case, *supra* note 39, at para. 222 [emphasis added].
[42] *Nicaragua* case, *supra* note 39, Jurisdiction (1984), at 392, 558, 634. Similarly, in his commentary on the *Nicaragua* case, Professor Reisman observed: "In the face of such explicit language [referring to the essential security clause], it is difficult to see how any tribunal could use the Treaty to subject to its own jurisdiction matters that had been expressly excluded.." Michael Reisman, Comment: Has The International Court Exceeded its Jurisdiction?, (1986) 80 American Journal of International Law 128 at 130-131.

from disputes under GATT 1947 that supports the interpretation of Article XXI as "either a bar to the jurisdiction of any third-party dispute resolution mechanism, or as rendering reliance on [it] entirely non-justiciable."[43] For instance, at the third session of GATT Contracting Parties (1949), at which a Czechoslovak complaint against U.S. national security export controls was at the center of discussion, the British delegate stated that "every country must be the judge in the last resort on questions regarding to its own security."[44] Likewise, in 1961, on the occasion of the accession of Portugal, Ghana stated that its boycott of Portuguese goods was justified under the provisions of Article XXI:(b)(iii), noting as follows:

> [U]nder this Article *each contracting party was the sole judge of what was necessary in its essential security interest.* There could, therefore, be no objection to Ghana regarding the boycott of goods as justified by security interests. It might be observed that a country's security interests might be threatened by a potential as well as an actual danger. The Ghanaian Government's view was that the situation in Angola was a constant threat to the peace of the African continent and that any action which, by bringing pressure to bear on the Portuguese Government, might lead to a lessening of this danger, *was therefore justified in the essential security interests of Ghana*.[45]

In a similar vein, during the 1982 the Falkland crisis, the EC Community, the EC Member States, Australia and Canada justified trade restrictions against Argentina on the basis of GATT Article XXI. During the Council discussion of these restrictions, the EC representative stated the following:

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[43] Schill & Briese, *supra* note 2, at 99. The scholars do not further discuss the difference between the two, since they take the view that "no treaty subject is immune from judicial review in international law under concepts analogous to the political questions doctrine or other non-justiciablity doctrines." *Ibid*.

[44] Summary Record of the Twenty-Second Meeting, GATT/CP.3./SR.22 (8 June 1949) at 3. Mr Shackle (British delegate) also noted that, "[o]n the other hand, the CONTRACTING PARTIES should be cautious not to take any step which might have the effect of undermining the General Agreement." *Ibid*.
Available online at: <http://www.worldtradelaw.net/reports/gattpanels/usexportrestrictions.pdf.download#page=1>. (last visited on September 12, 2015)

[45] GATT, Analytical Index: Guide to GATT Law and Practice, 6th Edition 1995, Vol. I, at 600 [emphasis added]. Available online at: <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf>. (last visited on September 12, 2015)

> [T]he EEC and its member States had taken certain measures on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. *The exercise of these rights constituted a general exception, and required neither notification, justification, nor approval,* a procedure confirmed by thirty-five years of implementation of the General Agreement ... this procedure showed that that *every contracting party was - in the last resort- the judge of its exercise of these rights*."[46]

Likewise, the representative of the United States stated that "[t]he General Agreement left to each contracting party the judgement as to what it considered to be necessary to protect its security interests ... [and thus] the CONTRACTING PARTIES had no power to question that judgement."[47]

However, in a more recent case involving a dispute between France and Djibouti (*Mutual Assistance in Criminal Matters* case),[48] the ICJ introduced an important clarification to its jurisprudence with respect to the effect of self-judging exception clauses. In that case, the ICJ was tasked with examining whether France's denial of legal assistance requested by Djibouti was in breach of the mutual assistance conventions between the two countries.[49] Relying on Article 2(c) of the Mutual Assistance Convention,[50] the French courts denied the request by noting that it "was considered to be 'contrary to the essential interests of France,' in that the file [that was requested by Djibouti to be transmitted] contained declassified 'defence secret' documents, together with information and witness statements in respect of another case in progress."[51] Even

[46] *Ibid* [emphasis added].
[47] *Ibid* at 600-601.
[48] *Mutual Assistance in Criminal Matters*, *supra* note 6.
[49] For a detailed analysis, *see* Robyn Briese & Stephan Schill, "Self-Judging Clauses Before the International Court of Justice: Djibouti v France", (2009)10 Melbourne Journal of International Law 308.
[50] It provides that assistance in proceedings relating to criminal offences "may be refused ....**if the requested State considers** that the execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests." Mutual Assistance Convention, *supra* note 5, [emphasis added].
[51] *Mutual Assistance in Criminal Matters*, *supra* note 6, at 191-92, 226, 230 [emphasis added]. The file requested was related to the investigation of the death of a French judge in Djibouti. *Ibid* at 187-89.

though the ICJ accepted that Article 2(c) conferred a wide discretion on a state to refuse mutual assistance, without any reference to its *obiter dicta* statement in the *Nicaragua* case, it held that France's exercise of that discretion remained subject to good faith review as established in Article 26 of the VCLT.[52] As scholars note, this approach taken by the ICJ "supports the conclusion that self-judging treaty exceptions, unless they are framed otherwise, do not constitute a bar to jurisdiction but merely modify the standard of review an international Court or Tribunal should apply."[53]

The jurisprudence of investor-state arbitration tribunals also underlines the view that self-judging NPM clauses do not constitute a bar to the jurisdiction of international dispute settlement bodies, but rather, affects the standard of review by lowering it from substantive to good faith analysis. For instance, the tribunals in the Argentine cases, which are the focus in this research, expressed in *obiter dicta* that even though they had been tasked with assessing Argentina's measures under a self-judging NPM clause of the U.S.-Argentina BIT, they would have had the power to review them for good faith.[54]

Generally, the approach supporting the conclusion that self-judging clauses do not bar the jurisdiction of arbitral tribunals seems to be coherent with the general principle of law of *nemo*

[52] In respect to self-judging clause at issue the ICJ held: "The Court begins its examination of Article 2 of the 1986 Convention by observing that, while it is correct, as France claims, that the terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, **this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties.**" *See Mutual Assistance in Criminal Matters*, *supra* note 6, at 135, [emphasis added].

[53] Schill & Briese, *supra* note 2, at 139. The authors also point out that the standard of review in such a case should be good faith. *Ibid*.

[54] The *LG&E* tribunal noted that "[w]ere the Tribunal to conclude that the provision is self-judging, Argentina's determination would be subject to a good faith review anyway." *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, (Oct. 3, 2006), at para 214 [*LG&E*]. Similarly, the *Continental* tribunal also stated that "[i]f Art. XI [NPM Clause of Argentina-U.S. BIT] granted unfettered discretion to a party to invoke it," this discretion would be subject to "good faith ....[and] then that tribunal would be prevented from entering further into the merits." *Continental Casualty Co. v. Argentine Republic,* Award, ICSID Case No. ARB/03/9 (5 September 2008), at para 182 [*Continental* Award]. *See* also *Sempra Energy Int'l v Argentina,* ICSID Case No. ARB/02/16, Award, 28 September 2007, at para. 388 [*Sempra* Award]; *Enron Corp et al v The Argentine Republic,* ICSID Case No.ARB/01/3, Award, 22 May 2007, at para 339 [*Enron* Award].

iudex in sua cause, according to which no one may be a judge in his own cause,[55] as well as conforming to the principle of *competenz-competenz* enshrined in both the ICJ Statute and the ICSID Convention.[56] Under the c*ompetenz-competenz principle*, arbitral tribunals (arbitrators) are authorized to decide their own jurisdiction, at least as an initial matter.[57] Therefore, the self-judging nature of the NPM clause does not deprive arbitral tribunals of such authority. In other words, states cannot obstruct arbitral tribunals from reviewing their measures by claiming that tribunals do not have jurisdiction to review state measures because of a self-judging nature of the NPM clause. Rather, the self-judging character of the treaty clause only affects the standard that is applied in reviewing state measures under a self-judging NPM clause. Furthermore, limiting state discretion in the invocation of self-judging clauses by reviewing its actions under a good faith standard ensures the observance by states of general principle of *pacta sunt servanda*. Taking this into consideration, I will shed light on the features and content of good faith analysis in the next paragraph.

5.2.2. Examining the Self-Judging NPM Clauses under Good Faith Review

The statements made by investment arbitral tribunals evidence that, even though self-judging NPM clauses allow states to unilaterally derogate from treaty obligations, their actions are not completely exempt from a third party review. In order to prevent the abuse by states of self-judging NPM clauses, Article 26 of VCLT requires that "[e]very treaty in force is binding

[55] *See* Bin Cheng, *General Principles of Law as Applied by the International Court and Tribunals* (Cambridge: Cambridge University Press, 1953) at 279-89 [Bin Cheng].
[56] *See* Article 36(6) of ICJ Statute and Article 41(1) of ICSID Convention.
Available at: <https://www.icj-cij.org/documents/?p1=4&p2=2>.
<https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf>.
[57] John Barcelo III, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective", (2003) 36 Vanderbilt Journal of Transnational Law 1115 at 1118.

upon the parties to it and must be performed by them in good faith."[58] Based on this rule, the actions of the state in question are not subjected to full substantive review like in non self-judging clauses, but rather, are examined under a good faith standard.

(i) Definition and Elements of Good Faith

Good faith can be defined both subjectively and objectively. In a subjective sense, good faith is thought to be "nothing more than a psychological concept, making reference to some sort of inner knowledge and correctness ... [therefore it] seems to be a properly moral concept, searching to introduce into the law a measure of rectitude, correctness, fair dealing, honest belief, absence of malice."[59] In an objective sense, good faith is regarded as a general principle of law.[60] In that sense, the principle of good faith is considered to include three aspects: protection of legitimate expectations of treaty parties; prohibition of abuse of rights and of non-loyal conduct.[61] Besides being a core principle of international law, it can also serve as a standard for reviewing state behaviour.[62] As a standard of review, good faith is regarded to function as a

[58] Article 26, *Vienna Convention on the Law of Treaties*, January 27, 1980.
Available online at: <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.
Moreover, the Draft Declaration on the Rights and Duties of States also includes similar provision. According to its Article 13, "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty." *See*, Draft Declaration on Rights and Duties of States, G.A. Res. 375(IV), Annex, art. 13**,** U.N. GAOR, 4th Sess. (Dec. 6, 1949).
Available at: <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/2_1_1949.pdf>.
[59] Robert Kolb, "Principles as Sources of International Law (with Special reference to Good Faith)", (2006) 53 Netherlands International Law Review 1 at 14 [Kolb].
[60] Although appearing similar to the principle of *pacta sunt servanda*, good faith is regarded as a different principle of international law. *See* generally, John O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth, 1991).
[61] Kolb, *supra* note 59, at 17-18.
[62] William W. Burke-White & Andreas von Staden, "Private Litigation in Public Law Sphere: The Standard of Review in Investor-State arbitrations", (2010) 35 Yale Journal of International Law at 312 [Burke-White & Von Staden, Standard of Review]; Kolb, *supra* note 59, at 16.

"reasonable link" between the actions of a state and the legal norm upon which those actions are based.[63]

As a legal concept, good faith has been given several definitions. According to Hahn, good faith "requires[s] parties who are in special legal relationship to refrain from dishonesty, unfairness and conduct that takes undue advantage of another."[64] Judge Keith has equated good faith with other principles such as abuse of rights and misuse of power (*détournement de pouvoir*).[65] According to the Harvard Research on the Law of Treaties (1935), "[t]he obligation to fulfill in good faith a treaty engagement requires that its stipulations be observed in their spirit as well as according to their letter, and that what has been promised be performed without evasion or subterfuge, honestly, and to the best of the ability of the party which made the promise."[66] In a similar vein, the International Whaling Commission has observed in its evaluation of the good faith requirements of the UN Convention on the Law of the Sea[67] that

[63] Kolb, *supra* note 59, at 16. Kolb further explains that "reasonableness, in turn, asks from the law-applier to weigh up a series of contextual aspects: teleological aspects (policy reasons), efficacy, reasons of the rule and nature of things, equity *intra legem*, *effet utile*, practicability, consideration of the consequences of a course taken, etc." *Ibid*.

[64] Hahn, *supra* note 20, at 599. In describing good faith as a general principle of international law, Kolb notes that its aim is "to blunt the excessively sharp consequences sovereignty and its surrogates may have on the international society, in ever-increasing need for cooperation." Kolb, *supra* note 59, at 18.

[65] *Mutual Assistance in Criminal Matters*, *supra* note 6, Declaration (Separate Opinion) of Judge Keith, at 279. The abuse of right doctrine is considered "to consist of the prohibition of the exercise of a right for an end different from that for which the right was created, to the injury of another person or the community." While misuse of power (*détournement de pouvoir*) is said to exist in Civil law countries at the municipal level "if an administrative power or discretion has been exercised for some object other than that for which power or discretion was conferred by the statute." *See* Babatunde O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law" (1975)16 Harvard International Law Journal 47 at 48 and 51 [Iluyomade].
It should be noted that the "good faith" standard is not being discussed from a procedural perspective. On the procedural perspectives of "good faith" and "abuse of process", *see* Eric De Brabandere, " 'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims", (2012) 3 (3) Journal of International Dispute Settlement at 1-28.

[66] *See* Harvard Research on the Law of Treaties, *Codification of International Law: Part III-Law of Treaties*, 29 American Journal of International Law (Supplement) 653 (1935) at 981.

[67] *See United Nations Convention on the Law of the Sea*, December 10, 1982, 1833 U.N.T.S. 397, 137 (Article 300 provides that "States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right").

good faith requires "fairness, reasonableness, integrity and honesty in international behaviour."[68] Generally, in the context of treaties, good faith is considered to serve as a safety mechanism in protecting the object and purpose of the treaty against any acts intended to abuse its provisions.[69]

In their analysis on the application of good faith by investment arbitration tribunals, Burke-White and Von Staden describe it as "an extremely lenient standard ... [which] allows states to balance conflicting rights and interests and defers to the state's own resolution of that balancing, as long as the state's determination was made in good faith and was reasonable."[70] Put simply, under good faith review, tribunals do not engage in the weighing and balancing of competing interests directly, but rather, examine "whether the respondent state has rationally balanced conflicting rights and interests and acted with honesty and fair dealing."[71]

Scholars have identified two basic elements of good faith as a standard of review.[72] The first element is that, to justify its measures under the treaty clause, a state must invoke the clause with honesty and fair dealing. As for the second element, the invocation of the clause must meet a reasonableness requirement, which means that the measures adopted by a state must have a rational basis that does not frustrate the object and purpose of the treaty.[73]

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[68] International Whaling Commission, Resolution 2001-1 (2001).
Available at: <http://www.iwcoffice.org/meetings/resolutions/resolution2001.htm.>.

[69] Kolb, *supra* note 59, at 19-21. Acknowledging good faith as a fundamental rule of international law is also supported by the jurisprudence of international tribunals. For example, in the *Norwegian Loans* case, Judge Lauterpacht stated that "[u]nquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law." Separate Opinion of Judge Sir Hersch Lauterpacht, in Case of *Certain Norwegian Loans* (France v. Norway), Judgement, 6 July 1957: ICJ Reports (1957) at 53.

[70] Burke-White & Von Staden, Standard of Review, *supra* note 62, at 312.

[71] *Ibid*.

[72] This also applies to examining the invocation of treaty NPM clauses under the good faith standard.

[73] Michael D. Nolan and Frederick G. Sourgens, "The Limits of Discretion? Self-judging Emergency Clauses in International Investment Agreements", in Karl P.Sauvant ed., *Yearbook on International Investment Law and Policy 2010/2011* (New York: Oxford University Press, 2012) at 408. Nolan and Sourgens point out that "depending on the context and object and purpose of the treaty, both elements of the good faith analysis will differ [from treaty to treaty] and provide the host state with broader or narrower freedom of action." *Ibid* at 408-409 [Nolan & Sourgens].
The content of good faith was also clarified in the jurisprudence of international tribunals. In the *Gabčíkovo-Nagymaros* case, the tribunal concluded that good faith principle implies that: "[i]t is the purpose of the Treaty and

(ii) Honesty and Fair Dealing Prong

The honesty and fair dealing prong is considered to constitute the main element of a good faith analysis. In this regard, Bin Cheng rightly remarked that the "[p]erformance of a treaty obligation in good faith means carrying out the substance of this mutual understanding honestly and loyally."[74] The honesty and fair dealing element[75] requires that a state made a subjective decision that its measure was in fact necessary to achieve the permissible objective in the treaty. It does not suffice to meet the honesty requirement if a measure in question was merely prudent or precautionary.[76] In other words, in adopting a measure directed to achieve any permissible objective listed in the treaty, a state, to the best of its ability, must gain sufficient factual evidence that prompts it to decide that the adoption of the measure is necessary. In the context of invoking the treaty NPM clause, the tribunal would be competent to determine that a state failed the honesty requirement of good faith if there is evidence that "a state uses [the treaty clause] just as a pretext for ulterior economic motives, or where the connection between the measures taken and national security is so spurious as to clearly breach the good faith requirement."[77] As can be seen, in order to meet the honesty requirement, there must be a logical link between the adopted

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the intentions of the parties in concluding it, which should prevail over its literal application ... [and that the principle] obliges the parties to apply it in a reasonable way in such a manner that its purpose can be realised." *Gabčíkovo-Nagymaros Project* case (Hungary v. Slovakia), (25 September 1997) Judgment, *ICJ Reports* at 142 [*Gabčíkovo-Nagymaros*].

[74] Bin Cheng, *supra* note 55, at 159.

[75] This element (requirement) of good faith analysis was summarized as follows by the ICSID tribunal in the *Phoenix Action* Case:

> The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties '*to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage . . .*' This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused.

Phoenix Action Ltd v Czech Republic, (ICSID Case No ARB/06/5, Award, 15 April 2009), at para 107[emphasis added], [*Phoenix Action*].

[76] Nolan & Sourgens, *supra* note 73, at 408.

[77] Burke-White & Von Staden, *supra* note 35, at 379.

measures (means) and pursued ends. In other words, the state that adopted the measures must prove that they had been directed to achieve the permissible objectives listed in the treaty clause. In case the arbitral tribunal establishes that the state did not actually pursue the achievement of those permissible objectives, but only deliberately pretended to do so, then a state will fail the honesty and fair dealing prong of the good faith test. Generally speaking, a state's invocation of the NPM clause would pass the honesty and fair dealing prong of good faith test "as long as there is no obvious and deliberate misuse of it."[78]

(iii) The Reasonableness Prong

Reasonableness constitutes the second element of good faith review. This requirement involves a determination of whether a state that invoked a self-judging treaty NPM clause had adopted its measures on a rational basis.[79] In this regard, Judge Keith (in his separate opinion to the ICJ's analysis in *Mutual Assistance in Criminal Matters* case) noted that the principle of good faith "obliges the Parties [to a treaty] to apply it in a reasonable way and in such a manner that its purpose can be realized."[80] According to the ILC, the purpose of the reasonableness requirement of good faith analysis is to ensure "that [treaty] obligations must not be evaded by a merely literal application of the [exception] clauses."[81]

[78] *Ibid* at 380. It seems that by using the word "misuse", the authors mean the "abuse" of the NPM clauses. Since NPM clauses are generally invoked to protect the essential interests of a state in emergency circumstances, several factors are given due consideration in assessing the honesty and fairness of state measures. The possible relevant factors might be "[a] state's general conduct, the declaration of a national emergency, relevant national legislation, and the transparency of the state's decision making process." *Ibid*.

[79] This was also emphasized by the International Whaling Commission in its evaluation of the good faith requirements of the UN Convention on the Law of the Sea. *See* International Whaling Commission, Res. 2001-1 (2001), available at: <http://www.iwcoffice.org/meetings/resolutions/resolution2001.htm.>.

[80] *Mutual Assistance in Criminal Matters*, *supra* note 6, Declaration (Separate Opinion) of Judge Keith, at 279. *See* also *Gabčíkovo-Nagymaros*, *supra* note 73, at 142.

[81] The ILC, "Draft Articles on the Law of Treaties with Commentaries", (1966) at 211. Available at: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf>.

For the NPM clause to be invoked reasonably, the question a tribunal must ask is "whether a reasonable person in the state's position *could have* concluded that there was a threat to national security or public order sufficient to justify the measures taken."[82] To explain it more clearly, Burke-White and Von Staden give the following examples which clarify what measures can be considered to have a rational basis:

> If a landlocked state such as Switzerland were to invoke an NPM clause and claim a security threat from increasingly severe tidal ranges and the attendant threats of flooding, a tribunal would have to conclude there was no rational basis to believe such a landing was likely and, hence the clause had not been invoked in good faith. In contrast, should an island state invoke an NPM clause to build sea barriers citing the potential for global warming to raise sea levels, notwithstanding potentially contradictory scientific evidence, the tribunal would have to conclude that the state had a rational basis for its determination and the self-judging NPM clause had, in fact, been invoked in good faith.[83]

However, it should be noted that besides a rational basis approach, the reasonableness requirement of good faith is considered to contain the elements of the abuse of right principle.[84] According to Iluyomade, "because of the imprecise nature of the term 'good faith,' it is thought that the use of 'abuse of right' is preferable in certain circumstances, even though both terms may be said to have the same connotation."[85] With regard to the interrelation between two principles, Bin Cheng notes that "the exercise of [a] right in such a manner as to prejudice the interests of the other contracting party is unreasonable and considered inconsistent with the bona fide

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[82] Burke-White & Von Staden, *supra* note 35, at 380

[83] Burke-White & Von Staden, Standard of Review, *supra* note 62, at 313. In my view, examining only the rationality of a measure cannot be sufficient to prove its reasonableness. Therefore, I decided to broaden the discussion on this element of good faith into the abuse of rights doctrine.

[84] The doctrine of abuse of right has been mainly developed within civil law systems. The concepts of *ultra vires*, equity, reasonableness and good faith are considered to be its counterparts in common law system. For the relationship between good faith and abuse of right principles, *see* Gillian Triggs, "Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?" (2000) 5 Asia Pacific Journal of Environmental Law 33.

[85] Iluyomade, *supra* note 65, at 50-51.

execution of the treaty obligation, and a breach of the treaty. In this way, the principle of good faith establishes the interdependence between the rights of a State and its obligations."[86] The tribunal in the *Phoenix Action* case also confirmed that this principle applies to the rights and obligations of foreign investors under IIAs by stating that "[t]here is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused."[87]

Based on the above mentioned, it can be said that a state must exercise its right under a treaty NPM clause in a reasonable way, as inferred by the letter and spirit of the clause, and must not abuse it in any way. Put simply, a state must use its treaty right only for what it has been intended.[88] Most importantly, the abuse of rights approach of the reasonableness prong requires that the invocation by a state of the treaty NPM clause be consistent with the treaty as a whole, which means that it must not deprive the entire treaty of its meaning by frustrating its object and purpose. As is known, the object and purpose of IIAs is to protect the interests of foreign investors, and host states have certain treaty obligations in this respect. But in almost all cases, foreign investors bear significant losses as a result of breaching those treaty obligations by state measures adopted under a state's treaty right conferred by the NPM clause. Evidently, in such a case, treaty rights and the obligations of a state conflict. Thus, there arise several questions as to how these rights and obligations can be reconciled. Particularly, how can tribunals identify the unreasonable prejudice of foreign investors' rights when a state exercises the right to protect its essential security interests by invoking the NPM clause? In other words, what are the criteria to

[86] Bin Cheng, *supra* note 55, at 125. Bin Cheng defines an abuse of legal right as "the fictitious exercise of a right for the purpose of evading a rule of law or a contractual obligation." *Ibid* at 121.
[87] *Phoenix Action*, *supra* note 75, at para 108.
[88] In the international trade regime, there is also persuasive authority confirming that a state's right under the self-judging essential security clause of the GATT "must be exercised reasonably and in a manner which is appropriate for the purpose of that right." *See* Akande & Williams, *supra* note 37, at 392.

determine the limits of invoking treaty NPM clauses and the abuse by a state of this right in terms of the reasonableness prong of good faith review?

In this regard, certain scholars acknowledge that a "workable standard of good faith review has yet to be fully developed," and given the paucity of the jurisprudence on this standard, they suggest that "arbitral tribunals will have to develop [in practice] their own approaches to whether the good faith requirement has been met."[89] Taking this issue into account, the scholars attempt to suggest potential criteria which could concretize the content of the reasonableness prong of good faith analysis. In the next paragraph, I will present their suggestions, and attempt to reflect on those which, in my view, have the potential to solve the issue of possible abuse by states of their rights under self-judging treaty NPM clauses.

5.2.3. Developing (Concretizing) the Good Faith Standard

In their article devoted to the self-judging nature of NPM clauses, Michael Nolan and Frederic Sourgens emphasize that "good faith analysis cannot occur in a vacuum ....rather, it must be applied to the actual wording of the clause",[90] which means that a measure taken in good faith must also meet the requirements of a specific treaty NPM clause. Furthermore, they note that "[a] good faith analysis also must take into account the broader context of the clause and the object and purpose of the treaty." [91] As was pointed out, the object and purpose of almost all investment agreements entails the protection of foreign investors' interests. Thus, in applying a good faith analysis to measures claimed to be justified under treaty NPM clauses, the tribunals should take into account not only the nature of the NPM clause (which in certain circumstances

[89] Burke-White & Von Staden, *supra* note 35, at 378.
[90] Nolan & Sourgens, *supra* note 73, at 408.
[91] *Ibid*.

confers a state the right to protect its essential interests by adopting measures contrary to its treaty obligations)' but should also consider the object and purpose of the whole treaty (which constitutes the protection the interests of foreign investors). In other words, a good faith analysis should not be applied in a manner which emphasises only a state's right to invoke a treaty's self-judging NPM clause by overlooking its possible abuse by the state. Rather, it should be performed such that it is able to reconcile a state's right under a self-judging NPM clause with its treaty obligations to respect foreign investor interests.[92] Unfortunately, as previously noted, tribunals have not yet developed such a good faith analysis.

So, how is it possible to prevent the abuse by a host state of its right to protect its essential interests under a self-judging NPM clause, and thus balance its freedom of action and the protection of foreign investor interests? Some scholars have suggested several options to resolve this issue. For instance, Stephan Schill, Robyn Bryse, Michael Nolan and Frederic Sourgens consider that reconciling the competing interests through applying a proportionality test, "possibly in connection with granting the state invoking a self-judging clause a margin of appreciation", will be "the most useful way" to prevent the abuse of state's right under the self-judging NPM clause.[93] Meanwhile, Burke-White and Von Staden suggest that a tribunal can

[92] In this regard, other scholars also emphasize that one of the reasons "for subjecting even explicitly self-judging NPM clause to good faith review is that *such review ensures a balance between state freedom of action and investor protection*." Burke-White & Von Staden, *supra* note 35, at 378 [emphasis added].

[93] Schill & Bryse, *supra* note 2, at 123-124; Nolan & Sourgens, *supra* note 73, at 415. Also in Stephan Schill, "International Investment Law and the Host State's Power to Handle Economic Crises - Comment on the ICSID Decision in *LG&E v. Argentina*", (2007) 24 (3) Journal of International Arbitration 265 at 277.
At the same time, the scholars warn that "[e]quating good faith review concerning self-judging clauses with the principle of deference, however, could mitigate differences between self-judging clause and non-self-judging clauses, as international Courts and Tribunals regularly grant a margin of appreciation or pay deference to states in the context of matters that pertain to particularly sensitive areas, even when they are not protected by the inclusion of a self-judging clause." Schill & Bryse, *supra* note 2, at 124.
Contrary to this argument, Yuval Shany argues that there is difference between self-judging and non-self-judging clauses in terms of the extent of deference granted to states that invoke such treaty clauses. According to him, states should be granted a wider margin of appreciation in relation to self-judging clauses than with respect to non-self-

perform a balanced good faith analysis "by looking to efforts by the state to reconcile competing interests through negotiation, the timing of a state's actions, the availability of less restrictive measures, and the duration of measures taken."[94]

Reversing the burden of proof in the context of self-judging clauses, as compared to that applied in the context of non-self-judging clauses, is proposed as another approach to solving this issue. Under such an approach, the state alleging the breach of the treaty, besides bearing the burden of proving the breach, also bears the burden of establishing a lack of good faith on the part of state invoking a self-judging treaty clause.[95] As Schill and Briese contend, such reversal of the burden of proof "would confer significant flexibility on the state invoking [a self-judging clause]."[96] Specifically, they argue that in situations where the measure adopted is justified to prevent prejudice to essential security interests, such an approach:

> [W]ould practically remove all accountability *vis-à-vis* an international Court or Tribunal and the other Contracting State Party, because it will regularly be difficult, if not impossible, for the state seeking redress for the breach of an international obligation to obtain the information necessary to show a violation of good faith in such a sensitive area.[97]

The options suggested seem to be reasonable in terms of ensuring a balanced good faith analysis. However, other views do not approve of the proportionality test in this respect. For instance, Professor Kurtz notes that, since the proportionality test "often involves the weighing of 'complex value-laden and empirical judgements', it is highly doubtful that courts (tribunals) will

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judging ones. *See* Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?", (2005) 16 European Journal of International Law 907 at 916.

[94] Burke-White & Von Staden, Standard of Review, *supra* note 62, 313.

[95] Schill & Bryse, *supra* note 2, at 122. In the context of non-self-judging clauses, a state alleging the breach bears the burden of proving the breach, while a state invoking the NPM clause bears the burden of proving the exception.

[96] *Ibid* at 123.

[97] *Ibid*.

be able to assess them adequately."[98] As for the state's efforts to reconcile competing interests through negotiation, it appears doubtful that a state which faced emergency situations requiring prompt actions would allow time for negotiations with several different treaty parties. In my view, the factors that play an important role in identifying whether the state measures were adopted in good faith are the timing and duration of their adoption. Any state action extending beyond the period of the emergency (necessity) situation should not be considered to be adopted in good faith.[99] As for the measures falling within the period of emergency (necessity), they still have to be examined under other criteria. In this regard, I consider that the combination of the less restrictive means test (as proposed by Burke-White and Von Staden) and the reversal of the burden of proof approach might be effective in performing a balanced good faith analysis.

First, I will start the discussion with the following question: would it be honest, fair, and reasonable if a state, to protect its essential interests, adopts a measure restrictive on foreign investments when there are other reasonably available alternative measures that are able to achieve the pursued objective, while being less restrictive on foreign investments at the same time? The answer, certainly, will be no. Therefore, I think that a state acting in such a way must be found to fail the good faith test, as it neglects its treaty obligations to protect foreign investor interests although it is capable of accomplishing them. Moreover, in my view, even though the adoption of less restrictive measures might not completely avoid the damage to foreign investor

[98] Jürgen Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis", (2010) 59 International Comparative Law Quarterly 361at 367 [Kurtz, Adjudging Exceptional].

[99] The overview of Indian BITs shows that the India-Czech Republic BIT (1996) includes explicit reference to the duration of emergency as an important requirement to meet in invoking NPM clause of the BIT. Article 12 of the BIT reads as follows:

> The provisions of this Agreement shall not in any way limit the right of either Contracting Party in cases of extreme emergency to take action in accordance with its laws applied in good faith, on a non-discriminatory basis, and only *to the extent and duration necessary for the protection of its essential interests*, or for the prevention of diseases and pests in animals and plants.

See Czech Republic-India BIT, (signed on 11 October 1996, entered into force on 6 February 1998), [emphasis added]. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/940>.

interests, it would still not be fair and reasonable not to adopt them, because their adoption can substantially mitigate that damage. Thus, through applying a less restrictive means test, arbitral tribunals will be able to examine whether a respondent state acted in good faith by making all efforts to minimize the deviation from the treaty obligations and mitigate harmful consequences on foreign investor interests.[100]

However, it can be argued that when a state invokes a self-judging clause to justify its measures, a tribunal is not authorised to replace the state's own determination by finding that the adopted measures were not the only means reasonably available to achieve the objective pursued. In this respect, it should be noted that, in examining state measures under the good faith test, the tribunal does not engage in determining the availability of less restrictive measures by requiring the respondent state to prove that the adopted measures were the only means to protect its essential interests. Rather, it only reviews whether the state invoking a self-judging clause abused its right under the clause by deliberately neglecting the adoption of alternative measures that were reasonably available to it. It is suggested that the tribunal reverse the burden of proof from the treaty party invoking a self-judging NPM clause to the party alleging the breach of treaty obligations to establish that there were other alternative measures that a state could adopt to achieve its pursued objective. In this respect, a foreign investor has a burden to prove three elements with regard to alternative measures. First, the alternative measures must have the potential to achieve the objectives pursued by the adopted measure. Second, the measures must be less restrictive on foreign investments than the state measures actually adopted. Third, those

[100] The NPM clause of the Israel-Myanmar BIT contains an explicit language with regards to treaty parties' efforts to minimize such deviation. Article 7 provides that "[e]ither Contracting Party may take measures strictly necessary for the maintenance or protection of its essential security interests. Such measures shall be taken and implemented in good faith, in a non-discriminatory manner *and so as to minimize the deviation from the provisions of this Agreement*." The Israel-Myanmar BIT (2014), [emphasis added].
Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3161>.

alternative measures claimed by the foreign investor to exist must be reasonably available to the respondent state for adoption. The tribunals must pay due attention to the third element, since it plays a significant role for the measures to pass good faith test, especially in emergency circumstances. The alternative measures claimed to be less restrictive must also be reasonably available, which means that their adoption must be within the capacity of the respondent state in terms of financial costs and timing.[101]

All in all, the combination of the less restrictive means test and the reverse of the burden of proof approaches, in my view, seem to be effective in developing the good faith test. Integrating these approaches into the good faith analysis might be helpful for arbitral tribunals in examining the honesty and reasonableness of state measures efficiently, and might serve as a safety valve against abuse by states of their discretion granted under self-judging NPM clauses.

5.2.4. Summary

In this section, I presented a theoretical background on self-judging treaty clauses. Particularly, I shed light on the notion and taxonomy of self-judging clauses, as well as providing examples. Moreover, I analysed jurisdictional issues upon the invocation of self-judging clauses. The analysis showed that the invocation of self-judging clauses does not oust the jurisdiction of tribunals, but rather, affects the standard of review applied by tribunals to examine the state measures which are alleged to be justified under such clauses. In this case, arbitral tribunals apply a good faith test, which limits their discretion to inquire into the determinations made by states in adopting the measures under a self-judging clause and only allows for an examination of the honesty and reasonableness of those measures. The review of relevant cases showed that

[101] A detailed analysis of the less restrictive means test and its requirement of "reasonably available" will be presented in Chapter VI.

arbitral tribunals have not developed a practical good faith test that could prevent the abuse by a state of its discretion under a self-judging clause and ensure the balance of interests of treaty parties. In this respect, after having discussed potential approaches suggested by different scholars, it was proposed that the integration of the less restrictive means test and the reverse of burden of proof approaches into the good faith analysis might be effective in solving this issue.

This section finishes the discussion on the essential characteristics of the self-judging treaty clauses. Based on what has been covered, in the next section I will present the discussion on determining the self-judging nature of the NPM clause of the U.S.-Argentina BIT.

5.3. Determining the Self-Judging Character of the NPM clause in the U.S.-Argentina BIT

5.3.1. Introductory Remarks

Reading Article XI of the U.S.-Argentina BIT, it is easy to notice that it lacks explicit self-judging language similar to the treaty clauses presented in the previous sections. Indeed, the NPM clause of the Argentina-U.S. BIT lacks such self-judging language ("it considers")[102] and thus, has been found by arbitral tribunals in the Argentine cases to be non-self-judging. Even though the tribunals rejected Argentina's right under the NPM clause to unilaterally decide whether its actions to tackle the crisis were necessary, the reasoning they gave differed. For instance, the *CMS* tribunal held that "when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly."[103] Similarly, emphasising the unclear language of the NPM clause and taking account of expectations of the parties upon signing the treaty, the *LG&E* tribunal also concluded that the provision is not self-judging.[104] Commenting on the Parties' intention with regards to a self-judging nature of the clause, in a more recent case,

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[102] Article XI of the BIT reads as follows:

> 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. [Emphasis added].

The U.S.-Argentina BIT (1994), signed 14 November 1991(entered into force 20 October 1994), available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127>.

[103] *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, (May 12, *2005*), at para 370 [*CMS* Award]. Argentina did not merely claim that it could neither judge by itself the necessity of emergency measures it had taken under relevant BIT provisions nor had it power to decide on the existence of a state of necessity under customary international law. Argentina only suggested that the jurisdiction review of ICSID tribunals should be limited in such case. The CMS tribunal refused this claim by referring to its task to check Argentina's compliance with the requirements of invoking necessity defence under Article 25 of ILC Draft Articles on State Responsibility. Therefore, the tribunal concluded by following:

> [T]his judicial review is not limited to an examination of whether the plea has been invoked or the measures have been taken in good faith. It is a substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness. *Ibid* at para 374.

[104] *LG&E*, *supra* note 54, at para 212.

El Paso Energy International v The Argentine Republic,[105] the tribunal noted that it "is of particular interest because it emphasizes ... that what matters is the Parties' common intention at the time of signature in 1991, when negotiations had been concluded, rather than subsequent events."[106] Furthermore, the *El Paso* tribunal emphasized that, in establishing the meaning of a treaty clause, any interpretation should begin with examining the ordinary meaning of the term as required under Article 31(1) of VCLT, and thus held as follows:

> The wording of the treaty is deemed to express the intention common to the Parties, and what the Parties effectively agreed to, even though a Party might have wished otherwise on one or another point. *As long as such wishes are not expressed, the content of the treaty's provisions is* at para*mount, and what is not there cannot be read into them*. This prompts the further conclusion that in principle treaty rules must be regarded as being objective in nature, which means that, unless the contrary is specified, they are not self-judging.[107]

By contrast, the reasoning of the *Enron* and *Sempra* tribunals was based on the object and purpose of the treaty, and both tribunals concluded that interpreting Article XI as self-judging would be inconsistent with the object and purpose of the treaty, thus depriving it of any substantive meaning.[108] In a similar vein, the *Continental* tribunal also held that "caution must be exercised in allowing a party unilaterally to escape from its treaty obligations in the absence of clear textual or contextual indications."[109] The tribunal further noted that, since the invocation of an allegedly self-judging clause has the effect of removing the claim of a treaty breach from

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[105] *El Paso Energy International Company v. The Republic of Argentina*, ICSID Case No. ARB/03/15, (31 October, 2011), at para 590 [*El Paso*, Award].
[106] *Ibid* at 596
[107] *Ibid* at 590 [emphasis added].
[108] *Enron* Award, *supra* note 54, at para 332; *Sempra* Award, *supra* note 54, at para 374.
The *El Paso* tribunal also held that "[s]o far as the 1991 BIT between Argentina and the United States is concerned, it may be argued that its preamble and the body of the text show that this Treaty aims at creating a stable and prosperous investment climate in both countries. That aim could not be attained if the exceptions allowed by Article XI were considered self-judging." *El Paso*, Award, supra note 105, at para 600.
[109] *Continental* Award, *supra* note 54, at para 187.

arbitral review, it "would conflict in principle with the agreement of the parties to have disputes under the BIT settled compulsory by arbitration."[110]

As can be noticed, the reasoning of most tribunals in the Argentine cases is mainly based on the absence of clear self-judging language in the text of Article XI. A similar line of argumentation was also expressed by José Alvarez, who gave expert opinion in the Argentine cases. However, other scholars, such as Anne-Marie Slaughter and William Burke-White, who also participated as experts, oppose that contention, arguing that Article XI of the Argentina-U.S BIT is self-judging. Since the issue of whether the NPM clause of the above mentioned treaty is self-judging prompted a strong academic debate, it is important to shed light on the main arguments made by both sides.

5.3.2. Controversy of Opinions: José Alvarez vs. Anne-Marie Slaughter and William Burke-White

First, it should be noted that Professor Alvarez participated in the Argentine cases as an expert from the claimant's side, and was requested to give his expert opinion on several points related to Article XI. Dean Anne-Marie Slaughter and William Burke-White participated as experts from the respondent's side, and submitted their witness statement against the opinion of Professor Alvarez. Among other issues, the scholars also expressed views on the self-judging nature of Article XI of the Argentina-U.S. BIT. Expectedly, their approaches and arguments regarding the self-judging nature of Article XI varied on several points. I found it appropriate to present their divergent opinions on two main points that, in my view, constitute the essence of the academic polemic around the self-judging nature of Article XI.

[110] *Ibid.*

A) Text, Context and Negotiating History

First, Professor Alvarez argues that the text of Article XI does not contain explicit language such as "it considers", which would directly indicate the self-judging nature of the clause.[111] Alvarez mainly supports his argument by referring to the ICJ's decision in the *Nicaragua* case, in which the Court found the essential security clause of U.S.-Nicaragua FCN Treaty as non self-judging due to the absence of explicit self-judging wording, as found in GATT Article XXI.[112] Moreover, he refers to the NPM clauses of the U.S. BITs with other states, especially with Russia[113] and Bahrain,[114] which contain explicit self-judging language.

In response to Alvarez's argument, Professor Slaughter and Burke-White contend that "where the text of the treaty is ambiguous, as it is in this case, it is appropriate to turn to the context of the treaty and any protocols that may accompany it."[115] According to them, the State Department submitted the Argentina-U.S. BIT with a "lengthy protocol" which listed all items that contain departures from the U.S. model BIT. Since the Protocol did "not include any mention of a different understanding of Article XI from [its counterpart (Article X) in the 1992 U.S.] model BIT" on which it was based, they logically conclude that the parties understood both

[111] In this respect, he points out that "[t]here is nothing in the text of the essential security clause in Article XI stating or suggesting that each contracting State is the judge of the application of the clause." Opinion of José E. Alvarez, *Sempra* Award, *supra* note 54, at para 38.
[112] *Ibid*.
[113] The U.S.-Russia BIT, June 17, 1992, At para. 8 of the Protocol, as cited in Claimant's Reply, note 442. The treaty is not in force. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2236>.
[114]The U. S.-Bahrain BIT, September 19, 1999, as cited in Claimant's Reply, note 443. Article 14. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/261>.
[115] Rejoinder Opinion of Anne-Marie Slaughter and William Burke-White, *Sempra Energy International & Camuzzi International, S.A. v. The Republic of Argentina*, ICSID ARB/03/02, December 2, 2005, at para 13 [Rejoinder Opinion, *Sempra*]. Shifting by the scholars of the interpretative framework from the "ordinary meaning" (Article 31 of VCLT) to the "context" (Article 32 of VCLT) is mainly based on the experts' agreement on the inherent ambiguity of Article XI. For instance, Sir Arthur Watts recognizes, "the text on which the Respondent relies is capable of a variety of meanings." Professor Sofaer also admits that "it is theoretically possible to argue that the language of Article XI is ambiguous, in that it does not explicitly state who should determine whether the measures taken were required for the protection of the state's 'essential security interests.'" While Professor Reisman notes that "[n]o state would (or could) surrender the right to take measures deemed necessary to its internal and external security." *See* Rejoinder Opinion of Anne-Marie Slaughter and William Burke-White, *El Paso Energy International Company v. The Republic of Argentina*, ARB/03/15, March 4, 2007, at para 11 [Rejoinder Opinion, *El Paso*].

clauses as identical, that is as self-judging.[116] Most importantly, the scholars further note that the State Department in its commentary on the model BIT of 1992 clearly stated that "it regarded the essential security clause to be self-judging and that it had communicated that view to all its negotiating partners."[117] As for the explicit self-judging language found in other U.S. BITs referred to by Alvarez, they argue that it was not a change of the 1992 policy of the U.S. government with respect to considering the clause self-judging, but rather, "was simply a way of making that interpretation more explicit in the text."[118] In support of this argument, Slaughter and Burke-White refer to the State Department's Letter of Submittal dated from April 24, 2000 which was included with the U.S.-Bahrain BIT (1999). In this letter, the U.S. government clearly states that the explicitly self-judging language in the treaty "was not representative of a new policy, but ..... *makes explicit the implicit understanding that measures to protect a Party's*

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[116] Rejoinder Opinion, *Sempra*, *supra* note 115, at para 14 [emphasis added]. The description of Model Article X states:

> A Party's essential security interests include actions taken in times of war or national emergency, as well as other actions bearing a clear and direct relationship to the essential security interests of the Party concerned. *Whether these exceptions apply in a given situation is within each Party's discretion. We are careful to note, in each negotiation, the self-judging nature of the protection of a Party's essential security interests.*

United States Model Bilateral Investment Treaty (BIT) – February 1992 [hereinafter 1992 Model BIT] (with descriptions), Submitted by the State Department, July 30, 1992, included in Bilateral Investment Treaties With the Czech and Slovak Federal Republic, The People's Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and Two Protocols to Treaties with Finland and Ireland, Hearing Before the Committee on Foreign Relations United States Senate, One Hundred Second Congress, Second Session, August 4, 1992. Cited in Rejoinder Opinion, *El Paso*, *supra* note 115, at para 18.

[117] Rejoinder Opinion, *Sempra*, *supra* note 115, at para 15. The scholars explain it as follows:

> Hence, prior to the ratification of the U.S.-Argentina BIT, the U.S. Senate understood the non-precluded measures provision of the treaty to be self-judging, precisely because the State Department, which had negotiated the treaty for the U.S., told the Senate, in sworn testimony, that the provision was self-judging and that it had communicated this interpretation to its treaty partners. The LG&E Tribunal looked to the signature date of Argentinean treaty, not the ratification date to fix the meaning of the treaty's terms. Given the retrospective nature of the State Department's testimony to the Senate, there is strong reason to believe that even at the time of signature of the U.S.-Argentina BIT, both the U.S. and Argentina understood Article XI as self-judging.

Rejoinder Opinion, *El Paso*, *supra* note 115, at para 19.

[118] Rejoinder Opinion, *Sempra*, *supra* note 115, at para 6. As for the self-judging language found in GATT Article XXI and the U.S.-Nicaragua FCN Treaty, the scholars refer to Professor Sofaer's opinion, in which he provides that "[n]either of these sources is directly relevant to the interpretation of the U.S.-Argentina BIT nor does either constitute the treaty's context for the purposes of Article 31 of the Vienna Convention." Rejoinder Opinion, *El Paso*, *supra* note 115, at para 17.

essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith."[119] As for the Protocol to the U.S.-Russia BIT, which was concluded soon after the ratification of the U.S.-Argentina BIT and contained an explicit statement that the NPM clause of the treaty is self-judging, the scholars refer to Professor Kenneth Vandevelde, who notes that such clarification was included in the protocol at the request of Russian treaty negotiators in order to make the self-judging nature of the provision explicit.[120] All in all, Slaughter and Burke-White conclude that even though the documents they refer to appeared after the Argentina-U.S. BIT had been signed (1991), in their view, "they demonstrate a long-standing policy of the U.S., stretching back at least as far as the *Nicaragua Case* in 1984, that such clauses are self-judging."[121]

B) The Object and Purpose of the Treaty

Second, Professor Alvarez argues that interpreting Article XI as self-judging would be contrary to the object and purpose of the treaty, as it allows for derogations from the obligations imposed by the treaty for the promotion and protection of foreign investment. According to him, such derogations which are exercised by a host state under the self-judging NPM clause would undermine the whole purpose of the treaty as well as make it "a less useful instrument of investor protection than the traditional customary international law rules governing state responsibility for

[119] Rejoinder Opinion, *Sempra*, *supra* note 115, at para 7 [emphasis added].

[120] Kenneth J. Vandevelde, "Of Politics And Markets: The Shifting Ideology Of The BITs", (1993)11 International Tax and Business Law 160 at 174 (noting: "indeed, the protocol language apparently was inserted in the Russia BIT not because of any considerations peculiar to that BIT, but merely because the Russian negotiators suggested its inclusion"). Cited in Rejoinder Opinion, *El Paso*, *supra* note 115, at para 21.

[121] Rejoinder Opinion, *El Paso*, *supra* note 115, at para 24. Contrary to these views, the *El Paso* tribunal made the following comparative observation with regards to the ICJ decision in the *Nicaragua* case and Article XI:

> The *Nicaragua* judgement was rendered in 1986: the Argentina-U.S. BIT was concluded in 1991, barely five years later. It is most unlikely that within this short time-span the U.S. could have forgotten the lesson of Nicaragua which amounted to saying that if one wishes a treaty clause to be self-judging, one has to say so and obtain the other Party's assent. The conclusion emerging from these elements is that at the relevant time, the US did not seek to attribute self-judging character to Article XI of the 1991 BIT.

El Paso, Award, supra note 105, at 594.

alien property which recognize no such open-ended discretion for states."[122] However, Slaughter and Burke-White contend that the protection and promotion of foreign investments should be performed within the background of a state's freedom to act in exceptional circumstances and that freedom is provided by the treaty's self-judging NMP provision.[123] According to them, any treaty regulating foreign investments contains several trade-offs between the interests of both or all parties to the treaty. As a result of these trade-offs, the treaty parties acquire both the obligations to protect the interests of the other party (foreign investment) and the rights to safeguard their own essential security interests in certain circumstances. Thus, they conclude that the protection of foreign investments is not the sole object and purpose of BITs. In support of their stance, the scholars refer to the comments made by the U.S. Senate on Article X (NPM clause) of the 1988 model treaty, in which it is stated that "the rights this article accords to the United States, to take whatever steps deemed necessary by the President for national security reasons, notwithstanding any other provisions of the treaties."[124] Moreover, statements made by officials of the U.S. government under President Bush's administration in 1992 provide that BITs must not "close off options that we may need to address security concerns that we cannot foresee today."[125] Based on these statements, Slaughter and Burke-White underline that the actual bargain that lies behind BITs generally, and the Argentina-U.S. BIT specifically, is "the desire of both states to balance the competing interests of investor protection and state freedom

[122] José Alvarez & Kathryn Khamsi, "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime", in Karl. P. Sauvant, *Yearbook on International Investment Law & Policy 2008-2009* (New York: Oxford university Press, 2009) at 420 [Alvarez & Khamsi]
[123] Rejoinder Opinion, *El Paso*, *supra* note 115, at para 39.
[124] *Ibid.*
[125] *Ibid* at para 39.Bilateral Investment Treaties with the Czech and Slovak Federal Republic, the Peoples' Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and Two Protocols to Treaties with Finland and Ireland (1992). Cited in Rejoinder Opinion, *El Paso*, *supra* note 115, at para 40.

of action ... [and] the self-judging interpretation of the non-precluded measures provision ensures that balance."[126]

As can be seen, this academic debate is mainly prompted by the absence of clear self-judging language in the text of the treaty clause. Therefore, as a policy recommendation, it is proposed that states include self-judging language clearly in the NPM clauses of their IIAs. Moreover, if states are able to agree on preserving more regulatory space for the protection of their essential public interests in the negotiation of IIAs, they can make the treaty NPM clause non-justiciable by denying the arbitral tribunals review of the merits of a state's decision to adopt the necessity measures.[127]

5.3.3. Concluding Remarks

The analysis of scholars' arguments on the self-judging nature of Article XI of the Argentina-U.S. BIT shows that the absence of clear self-judging language in the text of the clause induced them to address supplementary means of interpretation, such as the negotiating history of the treaty and the circumstances of its conclusion. This is especially seen in the interpretative approach taken by Professors Slaughter and Burke-White. In general, the arguments and reasoning presented by all these scholars are based on concrete evidence, and thus merits attention. But if viewed from a neutral perspective, their arguments appear to be biased towards the interests of the party they represented in arbitration. Thus, I found it important to reflect on a few points which need closer consideration.

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[126] *Ibid* at para 40.

[127] *See* for example, Article 6.12 (4) of the India-Singapore Comprehensive Economic Cooperation Agreement:

> . . . any decision of the disputing Party taken on such security considerations shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.

See also Article 22.2 of the U.S.-Colombia FTA; Article 21.2. of the U.S.-Panama TPA (2007).

The first thing that I want to note is related to the object and purpose of investment agreements. It is known that the protection of foreign investments and the promotion of foreign investors' rights is not the sole purpose of BITs. There is another purpose, which is the promotion of development of host states.[128] States do not conclude BITs just to bind themselves to treaty obligations to protect foreign investors' interests, but also to develop their economies through attracting foreign investments. In this respect, the inclusion of various kinds of exceptions in IIAs, such as Article XI of the U.S.-Argentina BIT, is considered to be "a common device aimed at promoting the development of developing countries", since it grants host states "a certain freedom to waive or postpone the application of particular provisions of the instrument, with a view to taking action to promote their development."[129] If analysed from this perspective, the arguments made by Professor Alvarez in relation to the object and purpose of BITs seem to be biased towards complete protection of foreign investors' interests by overlooking the developmental purpose of BITs. Moreover, they appear not to take into account the purpose and functions of treaty NPM clauses, which is to grant states the freedom to act in emergency circumstances. By refusing the self-judging character of Article XI, Professor Alvarez tends to totally neglect a state's freedom under the clause and to achieve its interpretation under the strict requirements of the customary rule of necessity. Given that it is

[128] These two purposes can easily be found in the text of BITs.

[129] UNCTAD, *Trends in International Investment Agreements: An Overview* (1999) at 89. Available at: <http://unctad.org/en/Docs/iteiit13_en.pdf>.

Campbell McLachlan also emphasizes the deceptive character of the statements made in the preamble of most BITs which have a mention only on the promotion of investments. Thus, in his view, special care should be exercised in this regard, since "[t]he overall objective in fact requires a balanced approach." McLachlan Campbell, "Investment Treaties and General International Law", (2008) 57 International and Comparative Law Quarterly 361at 371. In this regard, he refers to the *Saluka v. Czech Republic case* in which the tribunal noted that ". . . an interpretation which exaggerates the protection to be accorded to foreign *investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations*." *See Saluka Investments BV (The Netherlands) v Czech Republic* (Partial Award)(UNICTRAL, March 17, 2006) at para 300, [emphasis added], [*Saluka*].

almost impossible to satisfy its "only means" requirement in the context of economic emergencies, such an approach to interpreting Article XI can deprive a state of its freedom to act in emergency circumstances granted under this treaty clause.[130]

As for the arguments of Slaughter and Burke-White, they also seem to be biased towards protecting the freedom of states to act in exceptional circumstances and neglect the protection of foreign investors' interests. Most importantly, it contradicts what they argue with regards to ensuring the balance of competing interests. Although they repeatedly point out that the measures of Argentina justified by Article XI must be reviewed under a good faith test, the scholars fail to further explain how such balance can be achieved under a good faith analysis. In other words, they do not express any suggestions on how to ensure whether the state's actions had been exercised within the boundaries of self-judging clauses, and whether the state had abused its discretion granted under Article XI. As previously mentioned, the tribunals have not developed a practical good faith analysis which could prevent the abuse by states of their rights under the self-judging NPM clause. This issue is mainly related to concretizing the reasonableness prong of good faith analysis. It was argued that examining state measures only under the rationality criterion cannot prevent the abuse of rights under a self-judging NPM clause. Therefore, the integration of the LRM test and the reversal of burden of proof approaches have been proposed to solve this issue. But I think that the good faith analysis meant by Professor Slaughter and Burke-White is not a developed (concretized) type of good faith analysis as suggested in this thesis. Thus, it can be assumed that the main purpose of scholars' effort to argue for considering Article XI as self-judging is to achieve the examination of state

[130] The discussion on "softening" the approaches to interpreting the "only means" requirement of customary necessity defense will be presented in Chapter VI.

(Argentina) measures at issue under the good faith test, which allows for possible abuse of state's right under the NPM clause.

Evidently, as it was argued, applying the good faith test without integrating the LRM and reversal of burden of proof into it seems not to exclude the possibility that states invoking self-judging NPM clauses would abuse their freedom of action under the clause and harm the interests of foreign investors. As a result, the arbitral tribunals might not ensure the balance between the state's right to protect its essential interests and its obligations to protect foreign investment within interpreting the NPM clauses. Although both scholars note that examining necessity measures under a good faith review involves some kind of deference given to states in applying them, they do not provide any clues on how arbitral tribunals will identify the limits of that deference.[131] This gap allows for leeway in transgressing the boundaries of freedom that a state exercises in adopting its necessity measure, and might harm the interests of foreign investors.

In this section of the chapter, I provided suggestions with regard to developing a practical good faith analysis that could be applied by future arbitral tribunals in interpreting self-judging NPM clauses. However, I did not address the other main issue related to choosing an appropriate test which could be applied to interpreting non self-judging NPM clauses, particularly Article XI of U.S.-Argentina BIT. Therefore, assuming that Article XI of the U.S.-Argentina BIT is not self-judging, in the next chapter (Chapter VI), I will examine different tests suggested by scholars for interpreting Article XI as a non self-judging treaty clause.

[131] Rejoinder Opinion, *El Paso*, *supra* note 115, at para 60. Slaughter and Burke-White only suggest that "[s]pecifying the nature of a good faith review as a supervisory function *akin to the margin of appreciation* of the European Court of Human Rights can enhance the stability of the international financial infrastructure by ensuring the protection of investment in ordinary circumstances, but also preserving for states the freedom of action so urgently needed to respond to extraordinary crises." *Ibid* at para 105 [emphasis added].

Chapter VI. The Interpretative Framework for Non Self-Judging NPM Clauses

6.1. Introduction

As was mentioned in the previous chapter, all tribunals in the Argentine cases found the NPM clause (Article XI) of the U.S.-Argentina BIT to be not self-judging, and examined Argentina's measures under a substantive review. Chapter IV also explained that the arbitral tribunals took different approaches to interpreting the nexus requirement of the NPM clause of U.S.-Argentina BIT. The inconsistency of the tribunals' decisions in this respect also caused academic debate over choosing the appropriate approach to interpreting a non self-judging NPM clause of the U.S.-Argentina BIT, and split scholars into four main groups. The first group, including scholars such as Andrea Bjorklund,[1] Rudolf Dolzer, Christoph Schreuer,[2] José Alvarez, Kathryn Khamsi,[3] Christina Binder,[4] Tarcisio Gazzini[5] and Fransisco Orrego Vicuna[6] argues that the necessity rule of customary international law serves as the best framework for interpreting non self-judging NPM clauses. The second group, including scholars such as William Burke-White, Andreas Von Staden[7] and Barnali Chouhury,[8] contends that the margin of

[1] Andrea Bjorklund, "Economic Security Defenses in International Investment Law", in Karl P. Sauvant, *Yearbook of International Investment Law & Policy* 2008-2009 (New York: Oxford University Press, 2008) at 495, [Bjorklund].

[2] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) at 167 [Dolzer & Schreuer].

[3] José Alvarez & Kathryn Khamsi, "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime", in Karl P. Sauvant, ed., *Yearbook on International Investment Law & Policy 2008-2009* (New York: Oxford University Press, 2009) at 387 [Alvarez & Khamsi].

[4] Cristina Binder, "Non Performance of Treaty Obligations in Cases of Necessity: From 'Necessity Knows no Law' via the 'Law(s) of Necessity' to Interfaces between Different 'Laws of Necessity'", (2008) 13 Austrian Review of International and European Law 3 at 29 [Binder, Cases of Necessity].

[5] Tarcisio Gazzini, "Foreign Investment and Measures Adopted on Grounds of Necessity: Towards a Common Understanding", (2010) 7(1) Transnational Dispute Management 1 at 12 [Gazzini].

[6] Fransisco Orrego Vicuna, "Softening Necessity" in Mahnoush Arsanjani eds., *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden: Martinus Nijhoff, 2011) 741 at 744 [Vicuna, Softening Necessity].

[7] William Burke White & Andreas Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", (2007-2008) 48 Vanderbilt Journal of International Law 307 [Burke-White & Von Staden, NPM Clauses]; William Burke White &

appreciation of the ECtHR, which allows deference to states in adopting their measures, would be the best solution to this issue. The third group of scholars, including August Reinisch,[9] Gebhard Bücheler,[10] Benedict Kingsbury and Stephan Schill,[11] advocates proportionality as a potential test for solving the interpretative issue. Finally, the fourth group of scholars, including Jürgen Kurtz,[12] Giorgio Sacerdoti,[13] Andrew Mitchell and Caroline Henckels,[14] considers it appropriate to seek guidance from the coherent and authoritative jurisprudence of the WTO on interpreting "necessity" clauses. Specifically, the main proponent, Jürgen Kurtz, argues that the importation of the less-restrictive means test (LRM) from the WTO jurisprudence into the practice of investment tribunals offers the optimal solution to interpreting the nexus requirement of Article XI.[15]

The purpose of this chapter is to provide a comparative analysis of the approaches suggested by all four groups of scholars to interpreting the nexus requirement of non-self-

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Andreas Von Staden, "Private Litigation in Public Law Sphere: The Standard of Review in Investor-State arbitrations" (2010) 35 Yale Journal of International Law 283 [Burke-White & Von Staden, Standard of Review].

[8] Bamali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?", (2008) 41 Vanderbilt Journal of Transnational Law 670 at 775 [Choudhury].

[9] August Reinisch, "Necessity in International Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on *CMS v. Argentina and LG&E v. Argentina*", (2007) 8 Journal of World Investment and Trade 191at 201 [Reinisch].

[10] Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford: Oxford University Press, 2015) at 281 [Bücheler].

[11] Benedict Kingsbury & Stephan Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality", in Stephan W. Schill, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) at 79 [Kingsbury & Schill, Proportionality].

[12] Jürgen Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis", (2010) 59 International Comparative Law Quarterly at 361 [Kurtz, Adjudging the Exceptional]. Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: Cambridge University Press, 2016) at 168-228 [Kurtz, *Converging Systems*].

[13] Giorgio Sacerdoti, "The Application of BITs in Time of Economic Crisis: Limits to their Coverage, Necessity and the Relevance of WTO Law", in Giorgio Sacerdoti, Pia Acconci, Mara Valenti & Anna De Luca, *General Interests of Host States in International Investment Law* (Cambridge: Cambridge University Press, 2014) at 20 [Sacerdoti].

[14] Andrew Mitchell & Caroline Henckels, "Variations on a Theme: Comparing the Concept of 'Necessity' in International Investment Law and WTO Law", (2013) 14 Chicago Journal of International Law 93 at 101 [Mitchell & Henckels].

[15] Kurtz, Adjudging the Exceptional, *supra* note 12, at 366.

judging NPM clauses, particularly Article XI of the Argentina-U.S. BIT, and to propose an appropriate interpretative approach that corresponds to the customary rules of interpretation under Article 31 of VCLT. By applying the concepts of regime dynamics and regime interaction, I will argue that in cases where arbitral tribunals fail to define a treaty term under Article 31(1) and (2), they must have recourse to the customary rules as required under Article 31(3)(c) of VCLT. Specifically, I explain how the interaction with the customary international law regime, and not with other treaty regimes, will be effective in filling the gaps and lacunae in the investment treaties. Joining the first group of scholars, I suggest that only the interaction of investment regime with the regime of customary international law, and not its interaction with other separate treaty regimes, will be able to provide a consistent approach to interpreting non self-judging NPM clauses, including Article XI of the U.S.-Argentina BIT. In my view, this approach will not only ensure the performance of interpretation within the framework of general rules on treaty interpretation established under VCLT, but it will also prevent a broader systemic risk of conflict of norms within the international legal system, and thus, to some extent, contribute to the de-fragmentation of international law.[16]

This chapter is structured as follows. First, I will present an overview of Article 31(3)(c) of VCLT,[17] which contains the reference to customary international law, and discuss its potential forms of interaction with treaty rules in terms of interpreting unclear or open-textured provisions of BITs in the realm of investor-state arbitration. Specifically, I will discuss the potential form of interaction of treaty norms with customary norms for the purposes of interpreting Article XI. In

[16] Ian Brownlie, "The Rights of Peoples in Modem International Law", in James Crawford ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988) at 15. *See* generally, Joost Pauwelyn *Conflict of Norms in Public International Law: How WTO Law Relates to the Other Rules of International Law* (Cambridge: Cambridge University Press, 2003), [Pauwelyn, *Conflict of Norms*].

[17] For the sake of brevity and taking into account the fact that textual and contextual interpretations performed by arbitral tribunals in the Argentine cases could not clarify the meaning of "necessary" in Article XI, I will not discuss these elements of treaty interpretation.

this respect, customary rules of international law are not advocated as an applicable law replacing treaty norms, but rather, they are argued to offer interpretative guidance for clarifying unclear norms of investment treaties (Article XI) which are applied as *lex specialis*. Then, I will examine the potential of using the margin of appreciation doctrine as an optimal approach to interpreting Article XI. Specifically, I will shed light on the notion, uses, and application of the margin of appreciation within the realm of investor-state arbitration, as suggested by its advocates. After that, I will discuss the proportionality analysis as a possible way of interpreting Article XI. By reviewing scholars' views on its merits and flaws, I will demonstrate that even though some of its elements could offer efficient tools for interpreting Article XI, its last balancing stage may undermine its potential to be an optimal test in the investment arbitration context. Lastly, I will inquire into the possibility of transplanting the LRM test applied in the WTO practice into the investment arbitration regime for the purposes of interpreting non self-judging NPM clauses, particularly Article XI. In addition to revisiting the WTO jurisprudence on the application of the LRM test, I will address scholars' criticisms against such transplantation. Most importantly, I will argue that, although the tests developed in WTO practice on interpreting the exception clauses (necessity) cannot be imported directly into the practice of investment arbitration tribunals, it can offer a more developed approach to interpreting the "only means" requirement of the customary necessity defense. To be specific, I argue that the LRM test applied by the WTO DSBs contains a "developed" form of state practice on examining whether the necessity measures adopted by a state to protect its essential interests were the only means to achieve the pursued objectives, and thus can be efficiently used to reconceptualise (replace) the "literal" interpretation of the "only means" element of customary necessity defense.

6.2. Interpreting Non-Self-judging NPM clauses in Light of Customary International Law

6.2.1. The Principle of Systemic Integration under Article 31(3)(c) of the VCLT

The rules of customary international law codified in Articles 31 and 32 of the VCLT provide for the general rules of treaty interpretation, and are considered to be a starting point for the interpretation of treaties under international law. Article 31 provides as follows:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) any instrument which was made by one or more of the parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) *any relevant rules of international law applicable in the relations between the parties.*
> 4. A special meaning shall be given to a term if it is established that the parties so intended.[18]

Besides providing for general criteria, such as good faith, ordinary meaning, context and object and purpose of the treaty, Article 31 of VCLT includes other factors which must be taken

[18] *Vienna Convention on the Law of Treaties*, January 27, 1980. Article 31 [emphasis added]. Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>

into account in treaty interpretation.[19] Customary international law is one such factor, and is encompassed under section 3, sub-paragraph (c) as "any relevant rules of international law applicable in the relations between the parties."[20] Most importantly, all of these additional factors under section 3 comprise "a mandatory part of the interpretation process,"[21] and Article 31(3)(c) alone represents a more general principle of treaty interpretation, which is widely believed to reflect customary international law.[22]

According to the ILC Study Group Report, Article 31(3)(c) operates as the "master key" to the house of international law, and has given the "clearest formal expression to the systemic nature of international law because when no other interpretative means provide resolution to

[19] All these means of interpretation established under Article 31 are of equal value and there is no hierarchy among them. However, their sequential construction within Article 31 reflects a certain logic and order of consideration. ILC, *Commentaries on the Law of Treaties*, Articles 27–28, para 9.
Available at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf
In contrast, Villiger argues that only the ordinary meaning of the term enjoys some priority in the order of consideration, while the other means of interpretation are to be taken into account simultaneously. *See* Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Boston: Martinus Nijhoff, 2009) at Article 31, para 30 [Villiger, *Vienna Convention on the Law of Treaties*].

[20] The phrase "rules of international law" in Article 31(3)(c) is usually considered to refer to all sources of international law as reflected in Article 38 (1) of ICJ Statute. Villiger, *Vienna Convention on the Law of Treaties*, *supra* note 19, Article 31, para 25. Professor McLachlan clarifies the content of Article 31(3)(c) in more detail:

> (a) It refers to *'rules* of international law'- thus emphasizing that the reference for interpretation purposes must be to rules of law, and not to broader principles or considerations which may not be firmly established as rules;
> (b) The formulation refers to rules of international law in general. The words are apt to include all of the sources of international law, *including custom*, general principles, and, where applicable, other treaties;
> (c) Those rules must be both *relevant and 'applicable* in the relations between the parties'. The sub-at paragraph does not specify whether, in determining relevance and applicability one must have regard to all parties to the treaty in question, or merely to those in dispute;
> (d) The sub-at paragraph contains no temporal provision. It does not state whether the applicable rules of international law are to be determined as at the date on which the treaty was concluded, or at the date on which the dispute arises.

Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", (2005) 54 International and Comparative Law Quarterly 279 at 290-91 [emphasis added], [McLachlan, Systemic Integration].

[21] *Ibid* at 290. It means that although the first stages of interpretation of a treaty include ordinary meaning of the term, the context, object and purpose of the treaty, the means of interpretation listed in paragraph 3 are not considered in any way inferior to those listed in preceding paragraphs. ILC, *Commentaries on the Law of Treaties*, *supra* note 19, Articles 27–28, para. 9.

[22] Report of the Study Group of the International Law Commission, *"Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law"*, finalized by Professor Martti Koskenniemi, (2006) UN. Doc.A/CN.4/L.682 at 215, at para 427 [ILC Report on Fragmentation (2006)].

inconsistency, conflict or overlap between two or more norms, recourse to Article 31(3)(c) would resolve the problem in a reasoned manner."[23] Therefore, Article 31(3)(c) is considered to incorporate the principle of systemic integration, which requires the interpretation and application of treaties to be in conformity with the overall framework of international law.[24] According to the principle of systemic integration, treaties are considered to be "creatures of international law ... [and] they are all nevertheless limited in scope and are predicated for their existence and operation on being part of the international law system."[25] As the ILC notes, "[a]ll treaty provisions receive their force and validity from general law, and set up rights and obligations established by other treaty provisions and rules of customary international law."[26] Therefore, to ensure a coherent relationship, the treaty provisions must be "applied and interpreted against the background of general international law."[27] The feature of systemic integration in the interpretation of treaties is best explained by Professor McLachlan as follows:

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[23] *Ibid* at 211, at para 420.

[24] In accordance with Article 31 (3)(c), "[e]very treaty provision must be read not only in its own context, but in the wider context of general international law, whether conventional or customary." Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984) at 139. For the detailed explanation of systemic integration, *see* McLachlan, Systemic Integration, *supra* note 20, at 280; Ahmad Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration* (The Hague: Kluwer Law International, 2015) at 103-148.

[25] Martti Koskenniemi, "Study on the Function and Scope of the *lex specialis* rule and the question of self-contained regimes", (4 May 2004) UN Doc.ILC(LVI)/SG/FIL/CRD.1 and Add 1 at para 160. Higgins also notes that no treaty can exist in isolation from general international law. *See* Rosalyn Higgins, "A Babel of Judicial Voices? Ruminations from the Bench", (2006) 55 (4) International Comparative Law Quarterly 791.

[26] ILC Report on Fragmentation (2006), *supra* note 22, at 208, at para 414.

[27] Arnold Duncan McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1961) at 466. This is mainly explained by the proposition that BITs and other multilateral investment agreements are not self-contained regimes and they always sustain the relationship with the main source, general international law, which supplement them in certain circumstances. In this regard, the first ICSID tribunal in *Asian Agricultural Products Ltd v. Republic of Sri Lanka* noted that a BIT

> ... is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.

Asian Agricultural Products Ltd v. Republic of Sri Lanka, Award, ICSID Case No. ARB/87/3 (June 27, 1990) at para 21.

> [A] treaty will normally be capable of interpretation and application according to its own norms and context. But in hard cases, it may be necessary to invoke and express justification for looking outside the four corners of a particular treaty to its place in the broader framework of international law...[28]

Scholars also point out possible reasons for referring to other rules of international law in treaty interpretation. Besides being an effective means for clarifying an ambiguous treaty provision, referring to other rules of international law is argued to have potential "to encourage a more coherent approach to legal reasoning and prevent disintegration of legal rules into their various (and ultimately artificial) sub-disciplines."[29] Emphasizing the role of Article 31(3)(c) in this context, the ILC assessed it as "quite essential for promoting harmonization and guaranteeing the unity of international legal system."[30] Moreover, it is also viewed as a safety valve in treaty interpretation, which permits a tribunal "to ensure that the narrow application of a rule [in a treaty] is not allowed to overrule broader notions of justice" provided in other rules of international law.[31]

The ILC clarifies two aspects of systemic integration which should be taken into account in treaty interpretation:

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[28] McLachlan, Systemic Integration, *supra* note 20, at 281. On such function of customary international law Professor Bilder also noted that, "even where customary international law is displaced by treaty law, it may lie dormant waiting to fill gaps or aid in the interpretation of the conventional law." *See* Richard Bilder, "Disentangling Treaty and Customary International Law", (1987) 81 American Society of International Law Proceedings 157 at 157.

[29] Duncan French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules", (2006) 55 International & Comparative Law Quarterly 281 at 285 [French]. Phillippe Sands also notes that such systemic integration approach in treaty interpretation "tend[s] to unify rather than fragment the international legal order." Philippe Sands, "Environmental Protection in the Twenty-First Century: Sustainable Development and International Law", in Richard Revesz eds., *Environmental Law, the Economy and Sustainable Development: The United States, the European Union and the International Community* (Cambridge: Cambridge University Press, 2000) at 405.

[30] Report of the Study Group of the International Law Commission, *"Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law"*, Report on Fifty-Sixth Session (2004) Supplement No. 4(A/59/10) at para 301 [ILC Report, 2004].

[31] French, *supra* note 29, at 286.

1) The parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms [or in a different way];
2) In entering into treaty obligations, the parties do not intend to act inconsistently with generally recognized principles of international law.[32]

Based on these fundamental aspects, the ILC noted that "[a]s a general rule, there would be no room to refer to other rules of international law unless the treaty itself gave rise to a problem in its interpretation."[33] Since our argument is centered on applying customary rules of international law to interpreting unclear treaty provisions (specifically Article XI of the U.S.-Argentina BIT), the ILC further clarified the circumstances which give rise to their application under the systemic integration approach. They include the circumstances where:

(a) The treaty rule is unclear or open-textured;
(b) The terms used in the treaty have a recognized meaning in customary international law or under general principles of law;
(c) The treaty is silent on the applicable law and it is necessary for the interpreter, applying the presumption in conclusion (19) (a) above, to look for rules developed in another part of international law to resolve the point.[34]

The presence of the above mentioned circumstances do not still allow the tribunals to benefit from other rules of international law. The other rules of international law that are relied upon must also be "relevant" and "applicable" in order to be used (incorporated) in the process of treaty interpretation. According to Sands, relevance means that "[i]t should be related in some

[32] The ILC, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, ILC, 58th Sess., Doc. A/61/10 (2006), at para 19 [ILC Conclusions]. Professor McLachlan defines them as positive and negatives aspects of systemic integration, *see* McLachlan, Systemic Integration, *supra* note 20, at 311.
[33] ILC Report (2004), *supra* note 30, at 300.
[34] ILC Conclusions, *supra* note 32, at 20. These circumstances are also regarded as forms of interaction between a treaty and customary international law. The description of these interaction forms will be presented in the following paragraphs.

way to the treaty norm being interpreted."[35] Relevance is explained as a circumstance where two norms of international law (specific and general rule) deal with the same subjective matter.[36] Bücheler argues against imposing a rigid meaning on "the inherently flexible term 'relevant'," and thus considers that it "should depend on the particular circumstances of each individual case."[37] In this respect, Professor McLachlan observes that external rules are especially relevant for the interpretation process when the treaty provision is unclear and a more developed area of international law may clarify the meaning of its terms and resolve the ambiguity.[38] As for applicability, it refers to the "legally binding [nature of customary international law] (other than *qua* treaty) upon the parties disputing the interpretation to be given to a particular treaty."[39] It is very important to emphasize the difference between the wording of "taking into account" and "application". According to Sands, under Article 31(3)(c), "a customary norm is to be interpreted into a conventional norm, not applied instead of it."[40] He further explains that in this case, "the treaty being interpreted retains a primary role, [while] the customary norm has a secondary role,

[35] Philippe Sands, "Treaty, Custom and the Cross-Fertilization of International Law", (1998)1 Yale Human Rights and Development Law Journal 85 at 102 [Sands, Treaty & Custom]; Villiger, *Vienna Convention on the Law of Treaties*, *supra* note 19, Article 31, para 25. These circumstances are considered to reflect the forms of interaction between treaties and customary international law. In the subsequent paragraphs, I will describe each form of interaction and analyze their application to the Argentine cases. Particularly, I will argue that the residual application of the relevant rule of customary international law (Article 25 of ARSIWA) to interpreting Article XI of Argentina-U.S. BIT is the best option to clarify the term "necessary" in the clause and to ensure balance between the interests of treaty parties.

[36] Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points", (1957) 23 British Yearbook of International Law 203.

[37] Bücheler, *supra* note 10, at 119. In this respect, Bücheler rightly notes that, "[i]f the wording of a treaty term is self-explanatory and unambiguous, the role of external rules in the interpretation process will be minor. Similarly, if the context strongly supports a particular interpretation of the treaty term that is compatible with its ordinary meaning, it will be difficult for external rules to steer the interpretation process in a different direction." *Ibid*.

[38] McLachlan, Systemic Integration, *supra* note 20, at 312.

[39] Sands, Treaty & Custom, *supra* note 35, at 102. However, Bruno Simma and Theodore Kill argue that "equating the concept of 'applicability' with the concept of 'bindingness' has undesirable consequences as concerns international human rights law." For detailed explanation, *see* Bruno Simma & Theodore Kill, "Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology", in Christina Binder eds., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009) at 700.

[40] Sands, Treaty & Custom, *supra* note 35, at 101.

in the sense that there can be no question of the customary norm displacing the treaty norm, either partly or wholly."[41] This explanation found its clear reflection in Orakhelashvili's comment on Article 31(3)(c). According to him, "the purpose of interpreting by reference to "relevant rules" is, normally, not to defer the provisions being interpreted to the scope and effect of those "relevant rules", but to clarify the content of the former by referring to the latter."[42]

The views expressed by Sands and Orakhelashvili appear to make significant clarifications to the relationship between primary and secondary rules specified by the Annulment Committees in the Argentine cases with regard to the treaty NPM clause and customary necessity defense. By applying the elements of the customary necessity defense under Article 25 of ARSIWA, the tribunals do not apply customary law as a *lex specialis*, but rather, use them to give content to an ambiguous treaty provision. In other words, using the elements of the customary necessity defense for interpretative guidance is distinguished from applying it as a separate defense. The latter gives rise to the effects of defense's invocation, while the former merely fills the lacunae in the treaty provision by clarifying its content. As was discussed in the previous chapter, successfully invoking the customary necessity defense does not relieve a state from liability to pay compensation. By contrast, successful invocation of the treaty NPM clause exempts a state from liability and paying compensation. Hence, the tribunals that use elements of the customary necessity defense in interpreting the treaty NPM clause should not be considered

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[41] *Ibid* at 102 [emphasis added].

[42] Alexander Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights", (2003) 14 European Journal of International Law 529 at 537.
In one case the arbitral tribunal also emphasized this effect of Article 31(3)(c) by stating as follows:

> ... [as for] "any relevant rules of international law applicable in the relations between the parties".... [they] 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.

See RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. Arb. V079/2005, Award on Jurisdiction, October 2007, at para. 39.
Available at: <http://opil.ouplaw.com/view/10.1093/law:iic/315-2007.case.1/IIC315%282007%29D.pdf>

to be displacing (overriding) the treaty NPM clause, which is applied as a primary rule (*lex specialis*). Rather, they should be regarded as attempting to realize the effects of invoking the treaty NPM clause as a *lex specialis* through clarifying its content.

This feature of a *lex specialis* rule was also emphasized by the ILC. It noted that in cases when the treaty provision is applied as a primary (special) rule, "[t]he more general rule remains in the background providing interpretative direction to the special one."[43] It reflects one of the forms of interaction between the two rules, and is called a harmonized fall-back interaction.[44] In the following paragraph, I will explain this form of interaction and argue that it can serve as the best approach to interpreting the nexus requirement of the NPM clause in the U.S.-Argentina BIT. Furthermore, I will present legal and academic authority supporting the application of the harmonized fall-back form of interaction under the systemic integration principle in the investment arbitration regime.

6.2.2. Application of the Harmonized Fall-Back Interaction under Systemic Integration

Under the harmonized fall-back form of interaction, the customary international law rule is applied when the treaty provision under interpretation is *unclear*, *open-textured*, *undefined*, *too general*, *obscure* or *ambiguous* and its terms *have a recognized meaning in customary international law*.[45] In this case, the treaty provision (the NPM clause) functions as "weak *lex specialis*", and the customary international law rule (the necessity defense under Article 25)

[43] ILC Report on Fragmentation (2006), *supra* note 22, at para 102.
[44] *See* Pauwelyn, *Conflict of Norms*, *supra* note 16; Javier El-Hage, "How May Tribunals Apply Customary Necessity Rule to the Argentine Cases?: An Analysis of ICSID Decisions with Respect to the Interaction of between Article XI of the U.S.-Argentina BIT and the Customary Rule of Necessity", in Karl P. Sauvant ed., *Yearbook of International Investment Law & Policy 2011/2012* (New York: Oxford University Press, 2013) at 447 [El-Hage]. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480059> (last visited 20 May 2015).
[45] El-Hage, *supra* note 44, at 17.

continues to be applied in a residual way.[46] Thus, enjoying a "suppletory function", the customary rule "may additionally fill lacunae in the conventional rules" by providing a plausible meaning to treaty terms.[47] This kind of approach to construing the relationship between treaty and customary rules in the interpretation of a treaty has been adopted by the Iran-US claims tribunal in the *Amoco* case, in which it stated:

> As a *lex specialis* in the relations between the two countries, the treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, *the rules of customary international law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions*.[48]

The legal rationale behind this form of interaction is to ensure consistency with the principles of systemic integration, harmonization and the strong presumption against conflict. As for the practical rationale, one scholar explains it as follows:

> When the rule of customary international law is comprised of terms that are more specific or more clearly defined than those of the similar rule of the treaty, tribunals may feel compelled to interpret such rule consistent with customary international law because otherwise, they would have the burden of justifying that the intention of the parties was to waive these outstanding features of the customary rule when such intention is not expressly stated in the treaty.[49]

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[46] Jürgen Kurtz, "Delineating Primary and Secondary Rules on Necessity at International Law" in Broude Tomer & Shany Yuval, *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing, 2011) at 246.
[47] Mark Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, 2nd edition (The Hague: Kluwer Law International, 1997) at 266, at para 421 [Villiger, Customary International Law & Treaties].
[48] *Amoco International Finance Corporation v. Iran*, Iran-U.S. C.T.R., vol. 15, 1987-II, p. 222, at para 112 [emphasis added], [*Amoco*]. Available online at: <http://www.trans-lex.org/231900>
[49] El-Hage, *supra* note 44, at 18.

The application of harmonized fall-back interaction is accomplished in the following interpretative steps: a) the tribunal is first tasked with interpreting a treaty provision that is unclear (undefined, obscure or ambiguous), open-textured (too general or incomplete) and the terms of which have a recognized meaning in customary international law; b) the tribunal then finds that the rule of customary international law has a recognized meaning and is more specific than the treaty provision; c) in the end, the tribunal interprets and applies the treaty provision with the customary rules. Its application with regard to Article XI of the U.S.-Argentina BIT and Article 25 of ARSIWA can be justified by the following. First, there is no clear definition of what the term "necessary" means under Article XI, and other provisions of the BIT do not provide any clarification. Second, Article 25 of ARSIWA contains customary rules that provide all requirements of the necessity defense. Third, the only way for the tribunal to give content to Article XI and apply it is to clarify the meaning of "necessary" by interpreting it under the more specific rules of the customary necessity defense.

The analysis of cases presented in chapter IV shows that the tribunals took approaches different from the suggested one. For instance, the *CMS*, *Enron* and *Sempra* tribunals fully applied the customary rule of necessity instead of applying Article XI consistently with customary rules. Their approach reflects the full fall-back form of interaction, which allows for the application of customary rules only when the treaty is silent on the applicable rule.[50] Despite the fact that the U.S.-Argentina BIT contained an applicable provision (Article XI), the tribunals fully applied the customary necessity defense, and thus failed to apply the treaty rule (Article XI)

[50] This means that the treaty does not contain the provision exempting a state from liability for actions taken in necessity circumstances (the NPM clause); consequently, the tribunal applies the customary rule relating to the necessity defense, which precludes the wrongfulness of the state's conduct if its requirements are satisfied.

as a *lex specialis* rule.[51] On one hand, the legal reasoning provided by the tribunals was not consistent with their decision to fully apply the customary necessity defense. In other words, the tribunals failed to follow the interpretative steps for applying the full fall-back interaction.[52] On the other hand, even though the tribunals made the findings which could lead to interpreting Article XI under harmonized fall-back interaction,[53] they failed to provide legal reasoning justifying the interpretation under this form of interaction. If the tribunals thought, as they seemed to suggest, that the necessity rule under Article XI was too general, undefined or incomplete in relation to the equally applicable customary rule of necessity, it would have been expected that they interpret the nexus requirement (term "necessary") of Article XI consistently with the customary rule of necessity (harmonized fall-back).[54]

Conversely, the *LG&E* tribunal interpreted Article XI to the exclusion of the customary rule of necessity, which reflects a contract-out form of interaction.[55] However, later, in *dicta* the

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[51] Commenting on this, Christina Binder makes the following observations: "The *CMS*, *Enron* and *Sempra* tribunals' approach is thus difficult to recognize as treaty interpretation and application of Article 31 (3.c) VCLT, as it *disregards the wording and structure of Article XI of the Argentina-US BIT and de facto 'replaces' the treaty standard with necessity defense under customary law*."
Binder, Cases of Necessity, *supra* note 4, at 29 [emphasis added].

[52] The *CMS* tribunal did not provide legal reasoning for its decision at all, and the *Enron* and *Sempra* tribunals' legal reasoning was not compatible with the requirements of full fall-back interaction. *See Enron Corp et al v The Argentine Republic,* ICSID Case No.ARB/01/3, Award, 22 May 2007, at para 334 [*Enron* Award]; *Sempra Energy Int'l v Argentina,* ICSID Case No. ARB/02/16, Award, 28 September 2007, at para 389 [*Sempra* Award]. As for the required interpretative steps for full fall-back interaction, they are as follows: a) First, the tribunal is faced with a customary international rule - in our case, the necessity defense under Article 25 of ARSIWA; b) then the tribunal finds that the treaty is silent about such rule, which means that it does not contain the provision which exempts a state from liability for actions taken in necessity circumstances (the NPM clause); c) at the same time, the tribunal determines the existence of a relevant customary rule under Article 25 of ARSIWA; d) the tribunal finally applies the rule of customary international law (Article 25) to resolve the issue at hand. As can be evident, unlike a harmonized full-back interaction, this form of interaction is possible only when the treaty at issue does not contain the NPM clause and the host state invokes the customary necessity defense under Article 25 of ARSIWA

[53] *See* Enron Award, *supra* note 52, at para 339; *Sempra* Award, *supra* note 52, at para 389.

[54] El-Hage, *supra* note 44, at 34.

[55] In this form of interaction, the treaty provision (the NPM clause) functions as hard *lex specialis*. In other words, the treaty rule resolves the issue at hand in express terms and in a different way than a recognized rule of customary international law, and thus excludes the application of the latter. *See* Kurtz, Primary and Secondary Rules, *supra* note 219, at 246. In such a case, the treaty contains clear, complete and comprehensive provisions that preclude any application of general international law. As El-Hage notes, the treaty rule, in such a case, is applied "as if the contracting states had meant to derogate from their customary obligations." El-Hage, *supra* note 44, at 19. In this

tribunal separately applied the elements of the customary necessity defense by stating that it "supported" its conclusion under Article XI.[56] Due to such confusion, the tribunal did not follow the interpretative steps pertinent to contract-out interaction, and thus failed to provide consistent legal reasoning for applying Article XI to the exclusion of the customary necessity defense.[57] In other words, if the *LG&E* tribunal thought that the treaty rule (Article XI) was clear and close-textured, then there would have been no need for the tribunal to fully apply the customary necessity defense in dicta, since the application of Article XI itself could resolve the issue without the support of Article 25 of ARSIWA.[58]

As for the *Continental* tribunal, even though it found, like the *CMS* and *Sempra* annulment committees,[59] that Article XI of the U.S.-Argentina BIT and the customary necessity defense are two defenses with distinct subject-matters,[60] it noted that there is a "link" between "the two types of regulation" in terms of their purpose and effects of application.[61] The *Continental* tribunal further stated that this "link" continues to exist "if Art. XI is viewed as ....*lex specialis*, pre-empting recourse to the more restrictive customary exception of necessity."[62]

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regard, Pauwelyn notes that contracting out of general international law through a treaty "must take place 'explicitly' in the sense that silence means 'contracting in'." Pauwelyn, Conflict of Norms, *supra* note 16, at 215.

[56] *LG&E Energy Corp et al v The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, at para 245 [*LG&E*, Decision on Liability].

[57] A *contract-out* interaction contains the following interpretive steps: a) the tribunal is first faced with a rule of a treaty that is expressly defined; b) the tribunal then *ascertains* the existence of a rule of customary international law that is equally applicable (Article 25 of ARSIWA); c) at the same time, the tribunal finds that the rule of the treaty leads to a different result than the customary rule, inasmuch as it incorporates the necessity elements which are more specific than that of its customary counterpart; d) finally, the tribunal interprets and applies the rule of the treaty in exclusion of the rule of customary international law.

[58] As Professor Binder notes in this regard, "[f]or a proper treaty interpretation, reference to the elements of Article 25 to elucidate the meaning of Article XI of the Argentina-US BIT would have been necessary *before* applying Article XI to the Argentine case." Binder, Cases of Necessity, *supra* note 4, at 29.

[59] The *CMS* and *Sempra* annulment committees found Article XI and the customary necessity rule to be two distinct defenses, and ended up applying Article XI as *lex specialis* in exclusion of the customary necessity rule (contract out interaction). *See* Chapter IV.

[60] *Continental Casualty Co. v. Argentine Republic*, Award, ICSID Case No. ARB/03/9, 5 September 2008, at para 167 [*Continental* Award].

[61] *Ibid* at para 168.

[62] *Ibid*.

Following this argument, the tribunal held that it would refer to the customary necessity defense "only insofar as [it] assist in the interpretation of Art. XI."[63] Thus, the tribunal seemed to suggest that it would possibly apply a harmonized fall-back interaction and thus interpret Article XI consistently with the customary rule of necessity as established under Article 25 of ARSIWA. However, in the end, the tribunal referred to WTO jurisprudence and interpreted Article XI under its LRM test,[64] and thus, the tribunal ended up applying a contract out interaction.[65]

The *El Paso v the Argentine Republic* case is considered the only Argentine case in which the tribunal applied harmonized fall-back interaction under Article 31(3)(c) of the VCLT. Although it was limited to examining the contribution by the Argentine Republic to the state of necessity, it demonstrates that investment tribunals started construing the relationship between customary and treaty rules properly in terms of using the customary rule of necessity as interpretative guidance for the purpose of filling lacunae in Article XI. In this respect, the *El Paso* tribunal held as follows:

> (i) there is a rule of general international law which provides that necessity may not be invoked as a ground for precluding wrongfulness if the State concerned has significantly contributed to creating that necessity;
>
> (ii) there also seems to be a general principle of law recognized by civilized nations that necessity cannot be recognized if a Party to a contract has contributed to it. *This means that*

[63] *Ibid*.
[64] The discussion on the LRM test is presented in Chapter VI.
[65] Leonhardsen is also critical with respect to the approach taken by the *Continental* tribunal. First, referring to WTO jurisprudence, he observes that the tribunal "did not seem to regard itself engaged in interpretative activity within the confines of Articles 31-32 of the VCLT." Second, he notes that, "[i]t is possible to argue that Art. 31(3)(c) of the VCLT, representing so-called 'systemic interpretation', could have allowed for the incorporation of GATT - jurisprudence into the interpretation of the BIT, *but if that is what the Tribunal intended, they did not explain it*." Erlend Leonhardsen, Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration", (2012) 3(1) Journal of International Dispute Settlement 95 at 129 [emphasis added], [Leonhardsen, Exploring Proportionality].

the rule or principle in question may be used, under Article 31(3) of the Vienna Convention, to ascertain the meaning of Article XI of the Argentina–US BIT. [66]

The analysis of the Argentine cases show that almost all of the tribunals did not interpret Article XI consistently with the customary international law rule of necessity under Article 31(3)(c) of VCLT. Since this analysis itself cannot serve as a strong evidence to support my argument, in the following paragraph, I will present legal and academic authority that further supports the suggestion to interpret ambiguous treaty rules consistently with customary international law (Article 31(3)(c)) through applying a harmonized fall-back interaction in investment disputes involving the U.S.-Argentina BIT.

6.2.3. Legal and Academic Authority for Applying Customary Rules of International Law under Article 31(3)(c)

(i) Treaties

As mentioned above, by referring to "any relevant rules of international law", Article 31(3)(c) of the VCLT serves as a general legal basis for applying the rules of customary international law in cases when the treaty text remains ambiguous after a contextual interpretation. In the context of investment disputes, Article 42(1) of the ICSID Convention provides for a default rule that calls for recourse to the host state's domestic law and "such rules

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[66] *El Paso Energy International Company v. The Republic of Argentina*, (November 5, 2006) ICSID Case No. ARB/03/15, at para 624 [emphasis added], [*El Paso*, Award]. Christina Binder also advocates such way of construing the relationship between Article XI and customary necessity, and explains it as follows:

> The necessity defense, as codified in Article 25 of the ILC Articles, is generally considered a rule of customary international law and thus *may be viewed as a 'relevant rule' which is 'applicable in the relations between the parties' within the meaning of Article 31 (3)(c) VCLT*. Hence one may integrate elements of general customary law standard (Article 25 of the ILC Articles) by means of treaty interpretation ... [and it] might for instance *be used to elucidate unclear or open textured treaty terms: 'necessity' in a treaty text might thus be concretized by reference to Article 25 of the ILC Articles*.

Binder, Cases of Necessity, *supra* note 4, at 28 [Emphasis added].

of international law as may be applicable," when the treaty itself has failed to clearly provide for the applicable law.[67] Moreover, the U.S.-Argentina BIT includes a specific provision establishing that "[a]ny dispute between the Parties concerning the interpretation or application of the Treaty... [a decision of] an arbitral tribunal [shall be] binding ...in accordance with the applicable rules of international law."[68]

As can be seen, both the ICSID Convention and the U.S.-Argentina BIT expressly incorporate references to the rules of customary international law into their treaty texts. However, the tribunals may apply Article 31(3)(c) insofar as the specific treaty under interpretation does not exclude the application of customary rules. Professor McLachlan points out that, in this respect, the treaty in question must expressly provide for derogation from customary international law.[69] Since neither the ICSID Convention nor the Argentina-U.S. BIT expressly exclude the application of customary rules of international law, it can be concluded that the interaction of treaties and customary international law in the investment regime generally, and the application of customary necessity defense rules to interpreting Article XI of the U.S.-Argentina BIT specifically, are both possible.

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[67] Article 42(1) of the ICSID Convention provides as follows: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable." As for the supremacy of international law over domestic law, the *LG&E* tribunal held that "International law overrides domestic law when there is a contradiction since a State cannot justify non-compliance of its international obligations by asserting the provisions of its domestic law." *LG&E*, Decision on Liability, *supra* note 56, at para 94. For the "supplemental and corrective" function of international law, *see* Christoph Schreuer, *The ICSID Convention: A Commentary*, 2nd edition (Cambridge: Cambridge University Press, 2009) at 620.

[68] Article 8(1) of the U.S.-Argentina BIT provides as follows: "Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision *in accordance with the applicable rules of international law*." [Emphasis added]. It should be noted that other Argentina's BITs which do not contain the NPM clause, also include similar provisions allowing for application of international law principles. *See* Article 8(4) of the Argentina-U.K. BIT; Article 10(4) of the Argentina-Chile BIT.

[69] McLachlan, Systemic Integration, *supra* note 20, at 313.

(ii) Cases

To support this argument further, I will also bring relevant evidence from the case law of different treaty regimes. There have been several cases in separate treaty regimes in which tribunals sought guidance from relevant rules of international law (Article 31(3)(c) of VCLT) in interpreting ambiguous and open-textured treaty provisions. This can mainly be observed in cases under the ECtHR and WTO regimes, as well as in the practice of the ICJ.

The ECtHR has routinely referred to Article 31(3)(c) in determining the content of treaty provisions.[70] For instance, in the *Al-Adsani v. the United Kingdom* case, the tribunal was tasked with deciding whether the rules of State immunity might conflict with the right of access to the court under Article 6(1) of the European Convention.[71] The Court noted that "[t]he Convention, including Article 6, cannot be interpreted in a vacuum .....[but] should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including to those relating to the grant of State immunity."[72] Thus, by applying Article 31(3)(c), the Court, by majority, decided to give effect to State immunity.[73]

As for the international trade regime, the WTO Appellate Body also utilized principles of customary and general international law in interpreting the open-textured provisions of WTO agreements. The *Shrimp-Turtle* case serves as a good example in this respect.[74] In this case, by

[70] *See Golder v. the United Kingdom*, Judgment 21 February 1975, ECHR Series A (1975) No. 18, p. 13-14, at paras 27-31; *Loizidou v. Turkey* (Merits) Judgment of 18 December 1996, ECHR 1996-VI, p. 2231, at para 44. *Fogarty v. the United Kingdom*, Judgment of 21 November 2001, ECHR 2001-XI, p. 157; and *McElhinney v. Ireland*, Judgment of 21 November 2001, ECHR 2001-XI, at 37.

[71] *Al-Adsani v. the United Kingdom*, Judgment of 21 November 2001, ECHR 2001-XI, at 79.

[72] *Ibid* at 100, at paras 55-6.

[73] The Court reasoned as follows: "It follows that measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 (1)." *Ibid*.

[74] *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R (12 October 1998) [AB, *US-Shrimp*], available at: <http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf>.
In this case. the measure under consideration was a United States ban on the importation of a commercial seafood, shrimp, in order to protect against the incidental killing of another species, sea turtles. *See* also *EC - Measures*

referring to international environmental law texts, the Appellate Body found that the terms "natural resources" and "exhaustible" in paragraph (g) of Article XX were "by definition evolutionary."[75] Taking account of Article 56 of UNCLOS, which reflected customary international law, the Appellate Body also found that natural resources could include both living and non-living resources.[76] Most importantly, in interpreting the chapeau of Article XX, the Appellate Body totally relied on Article 31(3)(c) when it emphasized that its task "is to interpret the language of the chapeau, seeking interpretative guidance, as appropriate, from the general principles of international law."[77]

Among all other dispute settlement bodies, the ICJ is regarded as making a substantial contribution to the practice of using Article 31(3)(c) as guidance for interpreting treaty provisions. This was particularly observed in the *Oil Platforms case*.[78] In that case, the Court was tasked with interpreting the provision of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, which provided as follows:

> The present Treaty shall not preclude the application of measures: .... (d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.[79]

The United States argued that this provision had the effect of excluding all such measures from the scope of the treaty. It further argued that the tribunal should interpret this provision in accordance with its ordinary meaning by granting a state the margin of appreciation to determine

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Affecting the Approval and Marketing of Biotech Products (7 February 2006) WT/DS291-293/INTERIM, at 299, at para 7.68.

[75] AB, *US-Shrimp*, *supra* note 74, at paras 126-134.

[76] *Ibid* at para 130.

[77] *Ibid* at para 158. In this respect, the AB pointed out that the chapeau of article XX was "but one expression of the principle of good faith", which it found to be a general principle of international law. *Ibid*.

[78] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States),* Judgement on the Merits, November 6, 2003 [*Oil Platforms*], available at: <http://www.icj-cij.org/docket/files/90/9715.pdf>.

[79] Article XX, at para 1(d), Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran (1955), online: <http://www.parstimes.com/law/iran_us_treaty.html>

its essential security interests.[80] However, the ICJ took a different interpretative approach by inquiring into whether such necessary measures could include a use of armed force, and, if so, whether the conditions under which such force could be used under international law (including any conditions of legitimate self-defense) applied.[81] The ICJ reasoned its interpretative approach as follows:

> Under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account "any relevant rules of international law applicable in the relations between the parties" (Article 31, 3 (c)). The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty.[82]

After having applied those general rules of international law to the U.S. measures at issue, the ICJ concluded that they could not be justified as necessary under the Treaty, "since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defense, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty."[83]

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[80] *Oil Platforms*, *supra* note 78, Rejoinder of the United States, 23 March 2001, Part IV, pp. 139-140. 1 It also submitted that there was no place to read into the treaty rules derived from the customary international law on the use of force (as Iran had argued). Available online at :
http://www.icj-cij.org/icjwww/idocket/iop/ioppleadings/ iop_ipleadings_20010323_rejoinder_us_04.pdf
[81] *Ibid* at para. 40.
[82] *Ibid* at para 41.
[83] *Ibid* at para 78.

(iii) Academic Authority

It should also be noted that a majority of distinguished scholars support the view that Article XI of the U.S.-Argentina BIT should be interpreted consistently with the relevant rules of customary international law, particularly the rule of necessity. For instance, Professor Bjorklund, based on the ICJ's above mentioned reasoning in the *Oil Platforms* case, considers it "reasonable to conclude that the drafters of the U.S.-Argentina BIT intended the NPM clause to incorporate by reference 'the much-better-developed customary international law principle'."[84] She points out that such a conclusion is also consistent with the ILC's systemic integration approach, which encourages harmonization between the rules of separate treaty regimes and general international law.[85] José Alvarez and Kathryn Khamsi[86] further argue that interpreting Article XI in the background of customary rules on necessity also corresponds to the text, object and purpose of the treaty, as well as to the intent of treaty parties. To support their position, the scholars first approach the issue from a historical perspective. They contend that the U.S.-Argentina BIT is identical to the 1987 U.S. Model BIT, which in turn derives its roots from U.S. treaties of Friendship, Commerce and Navigation (FCN).[87] Based on this link of inheritance, Alvarez and Khamsi argue that "like earlier FCN treaties, U.S. BITs, including the U.S.-Argentina BIT were drafted against the backdrop of customary international law, particularly the rules of state responsibility to aliens and intentionally sought to incorporate and reaffirm that law."[88] In the

[84] Bjorklund, *supra* note 1, at 496.
[85] *Ibid*.
[86] Alvarez & Khamsi, *supra* note 3, at 387.
[87] *Ibid* at 408.
[88] *Ibid* at 428. In support of their stance, the authors provide a detailed history of U.S. BIT program negotiations. Moreover, Alvarez and Khamsi note that, viewed in historical context, permissible objectives found in Article XI of US-Argentina BIT are regarded to be consistent with the elements of customary necessity defense. They argue that the grounds for taking 'necessary' measures "were intended to address security threats posed by (1) internal outbreaks of disorder (that is a threat to "public order" posed by civil war or riots) (2) external security threats that

same vein, the scholars contend that Article XI was "the United State's attempt to include a general cross-reference to customary international law defenses, particularly necessity, which had been by the 1980s articulated in a number of cases but not yet codified."[89]

As for the context, object and purpose of the U.S.-Argentina BIT, Alvarez and Khamsi contend that like other U.S. BITs, it has many explicit references to other protections of customary international law. For instance, investors' right to "prompt review" of disputes related to expropriation in Article IV (2) also seems to be interpreted in light of principles of customary international law such as denial of justice, the international minimum standard.[90] Moreover, Article IV (3) of the BIT provides investors with the better of national and most-favored nation treatment should a state compensate anyone for losses incurred "owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or other similar events."[91] In their view, as such events have the potential to trigger a state's invocation of the NPM clause (Article XI), it will annul investors' rights under Article IV (3) and other guarantees in the BIT if the NPM clause is interpreted as a *lex specialis* (by not addressing the customary international law), which would result in violation of the treaty's object and purpose.[92] Alvarez and Khamsi also draw attention to the interplay of certain articles within the treaty. For instance,

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could imperil the very existence of the state ("essential security interests"), and (3) certain threats to the international community of states." *Ibid* at 432.

[89] *Ibid* at 429. Both scholars argue that "there was evidence presented to the tribunals in the [Argentine] cases that U.S. BIT negotiators routinely told prospective BIT partners familiar with European BIPOs that contained no NPM clause that the United States *included such a clause out of an excess of caution* in order to affirm customary rights that it was confident all states, including Europeans, intended to protect ..." *Ibid*. [Emphasis added]

[90] *Ibid*. The tribunals established that terms such as "public purpose" and "due process of law" Article IV (1) are intended to be read with a gloss of customary international law. In support of this view, s*ee Saluka Investments BV (The Netherlands) v Czech Republic* (Partial Award) (UNICTRAL, March 17, 2006) at para 291 [*Saluka*].

[91] Article IV of the U.S.-Argentina BIT (1994), signed 14 November 1991; entered into force 20 October 1994, [U.S.-Argentina BIT]. Available online: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127>.

[92] As was mentioned in Chapter IV, the distinction between primary and secondary rules was first clarified by the *CMS* Annulment Committee. According to the Committee, if a *lex specialis* Article XI of US-Argentina BIT is applied as a primary rule, the substantive obligations of the state under the treaty will not apply and foreign investors will not be able to benefit from them.

Article II(2)(a) of the U.S.-Argentina BIT provides that, "Investment …. shall in no case be accorded treatment less than that required by international law."[93] However, Article X explicitly provides that the BIT shall not derogate from national law or international legal obligations "that entitle investments or associated activities to treatment more favorable than that accorded by [the BIT] in like situations."[94] In their view, this kind of interdependence of articles within the BIT itself also indicates the impossibility for interpreter to avoid treaty interpretation in light of the customary international law.[95]

Furthermore, as noted above, the treaty parties must expressly provide in the treaty that they intended to derogate from the customary international law. In this respect, Professor Gazzini rightly admits that "[c]ustomary law ceases to be applicable when the relevant treaty provision departs from it or excludes its applicability."[96] Thus, Professor Gazzini is convincing when he argues that the application of the customary international law "may contribute to fill the gaps and lacunae of Article XI,"[97] as the U.S.-Argentina BIT neither provides for the exclusion of the

[93] U.S.-Argentina BIT, *supra* note 91.
[94] *Ibid*.
[95] Alvarez and Khamsi, *supra* note 3, at 434. Dolzer and Schreuer also emphasize that "such an emergency clause should not be construed in a manner that places the investor into less favorable legal situation than that accorded under customary law." Dolzer & Schreuer, *supra* note 2, at 169.
[96] Gazzini, *supra* note 5, at 12. In this regard, Professor Bjorklund notes that, "... it would be contrary to the established principles of treaty interpretation to find a waiver of customary international law defenses, including that of necessity, in the absence of an explicit textual provision suggesting the Parties had intended that result." Andrea Bjorklund, "The Necessity of Sustainable Development", in Marrie-Claire Cordonier Segger, Markus W. Gehring & Andrew Newcomb, *Sustainable Development in World Investment Law* (The Netherlands: Kluwer Law International, 2011) at 392. In a more specific context, Bruno Simma and Dirk Pulkowski observe that "[d]erogation from the general international law on state responsibility is only accepted to the extent that the states parties have clearly states such an intention." Bruno Simma & Dirk Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law", (2006) 17 (3) European Journal of International Law 483 at 495 [Simma & Pulkowski].
[97] Gazzini, *supra* note 5, at 12. As noted above, the tribunal in *Amoco International Finance Corporation v. Iran* case also emphasized similar benefits of utilizing customary rules of international law in the interpretation of ambiguous and open-textured treaty provisions. In this respect, the tribunal expressly stated that "... the rules of customary law may be useful in order to fill in the possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions." *See Amoco*, *supra* note 48, at para 112.

customary international law nor clarifies the meaning of "necessary" in Article XI.[98] As Alan Sykes explains, "investment treaties cannot address all possible contingencies clearly and expressly, any more than trade treaties or private contracts."[99] Considering them to be "inevitably incomplete", Sykes emphasizes that the interpretation of the vague obligations of investment treaties requires "possible gap fillers derived from sources such as CIL."[100] Professor Vicuna also underlines this "suppletory" function of customary international law, which can be beneficial in clarifying an ambiguous treaty provision. According to him, if the treaty "provides for an exception [the NPM clause] and this is not defined, its examination under customary international law [customary necessity defense] will be *the first and only shot* supplementing the treaty vacuum."[101] This is premised on his contention that it is "quite natural to search for the missing meaning in the mother source .... general international law"[102], if the treaty provision is

[98] Paparinskis observes that "even when treaty rules do not make a reference to customary law, customary law can be brought into the interpretative process by the default operation of Article 31(3)(c)." Martins Paparinskis, "Investment Treaty Interpretation and Customary International Law: Preliminary Remarks", in Chester Brown and Kate Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2012).

[99] Alan Sykes, "Economic "necessity" in International Law", (2015) 109 The American Journal of International Law 296 at 312 [Sykes].

[100] *Ibid*. The fundamental importance played by customary international law in contemporary international law has been summarized by ILC Special Rapporteur Wood as follows:

> Even in fields where there are widely accepted "codification" conventions, the rules of customary international law continue to govern questions not regulated by the conventions and continue to apply in relations with and between non-parties. *Rules of customary international law may also fill possible lacunae in treaties, and assist in their interpretation*.

ILC, *First Report on Formation and Evidence of Customary International Law*, by Michael Wood, Special Rapporteur, Sixty-fifth session, Geneva, UN doc.A/CN.4/663, 17 May 2013, at 20 [emphasis added], [ILC, First Report on Formation of CIL].

[101] Vicuna, Softening Necessity, *supra* note 6, at 744 [emphasis added]. Also *see* Patrick Dumberry, "Are BITs Representing the 'New' Customary International Law in International Investment Law?", (2009-2010) 28 Pennsylvania State International Law Review 675 at 700; Cai Congyan, "International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules", (2008) 7(3) Chinese Journal of International Law 659 at 670.

[102] One renowned Soviet (Russian) scholars, the former ILC member (President in 1961), Grigory Tunkin argued that "[g]eneral international law is customary law only." In his view, "[c]onventional norms, even if all States are parties to a treaty, need the *opinio juris* of these States to become norms of general international law. In other words, treaty provisions must be converted into customary norms, in order for them to become norms of general international law." Grigory Tunkin, "Is General International Law Customary Law Only?", (1993) 4 European Journal of International Law 534 at 535.

"somehow incomplete."[103] Based on these arguments, Professor Vicuna appears to support the application of customary rules of international law under the systemic integration approach in the interpretation practice of investment arbitration tribunals, and most importantly, he considers it the only way to resolve the interpretative issue with respect to Article XI and the customary necessity defense.[104]

There are also other more general views on the benefits of customary international law for treaty regimes. For instance, Jean D'Aspremont argues that customary international law can offer "the best alternative pedigree" for treaty law, and serve as "the fall-back option in terms of law ascertainment."[105] He underlines several advantages of applying customary international law in the realm of the investment treaty arbitration. First, he points out "a reverberating effect" of the customary international law on treaty law, which presupposes that the primary treaty norm can be "streamlined or substantiated" by the customary norm which was derived from it.[106] Second, he contends that besides serving as an interpretative yardstick for the interpretation of treaty provisions, customary international law is also considered to provide "a uniform platform

[103] In this regard, he noted as follows: "If an instrument done under the aegis of international law is somehow incomplete, it appears quite natural to search for the missing meaning in the mother source that is general international law." Vicuna, Softening Necessity, *supra* note 6, at 743. In this respect, Bruno Simma and Dirk Pulkowski also argue that when "the rules and procedures of special systems fail, a fallback on general international law ... is justified." Simma & Pulkowski, *supra* note 96, at 485.

[104] *Ibid*. Michale Nolan and Frederic Sourgens also emphasize that, "[f]undamentally, ... it would be incorrect to submit that the non precluded measures provision should be interpreted without any reference to customary international law." In their view, "such an approach may fail to apply the international law of treaty interpretation." Michael Nolan & Frederick Sourgens, "The Limits of Discretion? Self-judging Emergency Clauses in International Investment Agreements", in Karl P.Sauvant ed., *Yearbook on International Investment Law and Policy 2010/2011* (New York: Oxford University Press, 2012) at 399.

[105] Jean d'Asperemont, "International Customary Investment Law: Story of Paradox", in Tarcisio Gazzini & Eric De Brabandere, *International Investment Law: The Sources of Rights and Obligations* (Leiden, Boston: Martinus Nijhoff, 2012) at 6-46 [d'Asperemont]. Rahmat Muhamad also argues that "customary rules may provide greater precision since they evolve in response to concrete situations and cases..." Rahmat Muhamad, "Some Reflections on the International Law Commission Topic "Identification of Customary International Law"," (2016) 16 Chinese Journal of International Law 41 at 42 [Rahmat Muhamad].

[106] *Ibid* at 26-27.

of interpretation for all individual BITs" when subjected to interpretations by arbitral tribunals.[107] Therefore, it is regarded as "instrumental in the converging interpretations of each individual BIT by each individual arbitral tribunal."[108] Third, in his view, the "paramount advantage of customary international law is the adjudicative neutrality and immanent intelligibility which it provides to decisions of arbitral tribunals, which commonly refer to other arbitral decisions."[109] He explains it more clearly as follows:

> Customary international law endows the de facto *stare decisis* and *jurisprudence constante* witnessed in the practice of international arbitral tribunals with greater legitimacy and authority, and helps to shroud the practice of precedents in a source based rationality, thereby giving the impression of a minimized choice in law-application and maximized predictability.[110]

Moreover, D'Aspremont further argues that customary international law has the advantage of ensuring immanent rationality and predictability in judicial reasoning. According to him, custom "allegedly endows the exercise of discretion by judges with some rationality by providing a pedigree to the rules applied by [them] .....[and] contributes to the emergence of a sense of greater adjudicative neutrality in international legal argument and international legal education."[111]

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[107] *Ibid*.
[108] *Ibid*.
[109] *Ibid* at 28.
[110] *Ibid*. For arguments that advocate for customary international law as a persuasive way of formalizing *jurisprudence constante*, *see* Martins Paparinskis, "Sources of Law and Arbitral Interpretations of Pari Materia Investment Protection Rules", in Ole Kristian Fauchald & Andra Nollkaemper, *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Oxford: Hart Publishing, 2012) at 87-115; Andrea Bjorklund, "Investment Treaty Arbitral Decisions as *Jurisprudence Constante*", in Colin B. Picker et al. eds., *International Economic Law: The State and Future of the Discipline* (Oxford: Hart Publishing, 2008) at 265.
[111] D'Asperemont, *supra* note 105, at 32.

In sum, scholars present convincing arguments on the gap-filling, harmonizing and legitimizing benefits of customary international law.[112] All of these support the argument that in interpreting unclear provisions of investment agreements, such as Article XI of the U.S.-Argentina BIT, investment arbitral tribunals should seek guidance from general international law, particularly the customary rules of international law, rather than referring to different doctrines and tests used in specialized treaty regimes.

6.2.4. Concluding Remarks

The analysis performed in this chapter demonstrated the potential of a systemic integration approach in treaty interpretation. Besides explaining the main characteristics of the systemic integration approach, the relevant paragraphs of this chapter elaborated on specific features of applying this approach in the realm of the investor-state arbitration regime. Specifically, based on relevant legal and academic authority, it was suggested that using the customary rule on the necessity defense as a source of interpretation under the systemic integration principle (Article 31(3)(c) of VCLT) would serve as an appropriate methodological approach to interpreting the NPM clause (Article XI) of the U.S.-Argentina BIT. In this respect, it drew special attention to the distinction between applying the customary necessity rule as a *lex specialis* and using it for interpretative guidance. It has been emphasized that interpreting the treaty NPM clause in light of the customary necessity defense does not lead to the application of customary necessity as a primary rule, thereby giving rise to the effects of its invocation. Rather, it was argued that by importing the elements of the customary rule on necessity into the

[112] For arguments that customary international law posses more jurisprudential power than treaty law, *see* Michael Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge: Cambridge University Press, 2013) at 30.

interpretation process, the treaty interpreter retains the *lex specialis* application of the treaty NPM clause, giving effect only to the consequences of invoking the treaty clause itself. Thus, the customary rule on necessity plays a "suppletory" function in the interpretation process, filling the vacuum in the treaty NPM clause. As the analysis showed, this way of construing the interaction between the treaty NPM clause and the customary necessity defense does not result in the conflation of these rules, and they remain two distinct defenses. Moreover, it ensures the interpretation of treaties in accordance with the general rules of interpretation under Article 31 of VCLT, and thus helps to achieve consistency in the adjudicative practice of arbitral tribunals. The case studies demonstrated that in interpreting ambiguous and open-textured treaty provisions, the dispute settlement bodies in different treaty regimes did not search for interpretative guidance from other treaty regimes, but rather looked for it within the general body of international law, specifically in the customary rules of international law through operationalising Article 31 (3)(c) of VCLT. As a result, this kind of interpretative approach allowed them to resolve the interpretative issue effectively. All of these factors, taken as a whole, present sufficiently convincing evidence confirming the potential of a systemic integration approach to serve as an efficient interpretative methodology for investment arbitration tribunals. It also supports the argument that tribunals should use the customary rules of international law for interpretative guidance in clarifying unclear and open-textured provisions in IIAs, specifically Article XI of the U.S.-Argentina BIT, rather than referring to different doctrines and tests used in specialized treaty regimes.

6.3. The Margin of Appreciation Doctrine

6.3.1. Definition and Uses of the Margin of Appreciation

The margin of appreciation is a doctrine that is widely used in the realm of ECtHR. It is a word-for-word English translation of the French phrase “marge d’appréciation”, which roughly means “the range of discretion”.[113] Most definitions of the margin of appreciation are centered on the deference that the doctrine provides to states.[114] Scholars articulate deference with different formulations. For instance, Yurow describes it as "freedom to act; manoeuvring, breathing or “elbow room”; or the latitude of deference or error, which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a violation of the Convention."[115] Greer formulates it as a "room for manoeuvre the Strasburg institutions are prepared to accord national authorities in fulfilling their obligations and bandwidth."[116] Arai-Takahashi explains it as a "latitude a government enjoys" in applying the provisions of a treaty.[117] Benvenisti also illustrates it in a similar way by considering deference as a "certain latitude [each society has] in resolving the inherent conflicts between individual rights and national interests or among different moral convictions."[118]

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[113] *See* Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?", (2005) 16 European Journal of International Law 907 at 926 [Shany].

[114] According to Caroline Henckels, "[d]eference involves an adjudicator exercising restraint where the adjudicator's judgement is different from that of the primary decision-maker in circumstances where there is uncertainty as to what the right conclusion should be, or there is no objectively correct answer to an issue." Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge: Cambridge University Press, 2015) at 34 [Henckels, *Proportionality & Deference*].

[115] Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (The Hague: Kluwer Law International, 1996) at 13.

[116] Steven Greer, *The Margin of Appreciation : Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2000) at 5 [Greer].

[117] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerpen/Oxford: Intersentia, 2002) at 2.

[118] Eyal Benvenisti, “Margin of Appreciation, Consensus, and Universal Standards”, (1998-1999) 31 New York University Journal of International Law and Politics 843 at 843 [Benvinisti].

As these definitions show, this doctrine essentially provides that state authorities enjoy a degree of latitude in balancing treaty obligations against other pressing societal concerns.[119] In other words, the doctrine encourages adjudicators to give state authorities deference in determining an appropriate method for fulfilling their international law obligations.[120] The adjudicators consider "whether the qualities of and discretion enjoyed by the primary decision-maker [states] make that decision maker better qualified to have primary responsibility for deciding or determining a particular issue."[121] According to Tor-Inge Harbo, when the court invokes the doctrine, "it thereby declares itself (relatively) incompetent to rule on the subject matter..... [and] considers the state's authorities to be better equipped to make a decision in the pending case."[122] The margin of appreciation doctrine therefore discourages international tribunals from replacing the discretion and independent evaluation exercised by national state authorities by arguing against *de novo* review of state decisions by them.[123] This in turn provides for normative flexibility and grant states an extensive "zone of legality" within which they can freely operate.[124]

Scholars also differ in explaining the uses of the doctrine. For instance, Letsas illustrates two uses of the doctrine: substantive and structural.[125] The substantive use addresses the

[119] *See* generally, Laurence R. Helfer, "Adjudicating Copyright Claims under the TRIPS Agreement: The Case for a European Human Rights Analogy", (1998) 39 Harvard International Law Journal 357 at 404; Elyse M. Freeman, Note, "Regulatory Expropriation under NAFTA Chapter 11: Some Lessons from the European Court of Human Rights", (2003) 42 Columbia Journal of Transnational Law 177 at 195-99.
[120] Shany, *supra* note 113, at 909-910.
[121] Henckels, *Proportionality & Deference*, *supra* note 114, at 35.
[122] Tor-Inge Harbo, *The Function of Proportionality Analysis in EU Law* (Leiden: Brill Nijhoff, 2015) at 68 [Harbo].
[123] Shany, *supra* note 112, at 909-910. This aspect of the doctrine is explained as "judicial deference". According to Stephen Tully, "judicial deference to a national decision maker enables international courts or tribunals to address the reality of pluralism within a legal order, thereby respecting constitutional traditions and national legislative or policy choices." Stephen Tully, "'Objective Reasonableness' as a Standard for International Judicial Review", (2015) 6 Journal of International Dispute Settlement 546 at 549.
[124] Shany, *supra* note 113, at 909-910.
[125] George Letsas, "Two Concepts of the Margin of Appreciation", (2006) 26 (4) Oxford Journal of Legal Studies 705 at 706 [Letsas].

relationship between individual freedoms and collective goals, while the structural use focuses on the limits or intensity of international tribunal's review.[126] Meanwhile, Greer distinguishes between the following uses of the doctrine: (a) when the court needs to strike a balance between public interests and individual rights, which he calls the "heartland of the margin of appreciation";[127] (b) identifying and fulfilling positive obligations; and (c) in the interpretation of vague terms of the Convention such as "reasonable" or "promptly".[128] In this context, he points out the doctrine's application in balancing only between the interests of individuals and the public.

By summarizing the descriptions of commentators on the uses of the margin of appreciation, Kratochvil notes that the doctrine has two primary uses: (a) as a deference to states where the court will not substitute the decisions of states on how to apply the Convention rights to concrete factual circumstances; (b) as a tool to affect the definitions of the rights themselves, and thus the obligations put on states by the Convention.[129] However, Yuval Shany notes that "the margin of appreciation afforded to states is never unlimited - i.e., there is no total deference to the national decision-making process."[130] Therefore, it is argued that even though states are granted wide latitude to act, they must show that they exercised such discretion in good faith.[131]

6.3.2. The Forum and Conditions of its Application

The margin of appreciation doctrine has been mostly used by ECtHR in the application of Article 1 of the First Protocol of the European Convention on Human Rights. According to

[126] *Ibid*.
[127] Greer, *supra* note 116, at 33.
[128] *Ibid* at 30.
[129] Jan Kratochvil, "The Inflation of the Margin of Appreciation by the European Court of Human Rights", (2011) 29 Netherlands Quarterly of Human Rights 324 at 328.
[130] Shany, *supra* note 113, at 910.
[131] *Ibid*.

Article 1, every person is guaranteed the right not to be "deprived of his possessions except in the public interest."[132] As for the interpretation of this provision by the ECtHR, legal deprivation requires several conditions to be fulfilled. First, the deprivation must be in the public interest.[133] National authorities are given a margin of appreciation in determining this issue in light of their superior knowledge of their society and its needs, which makes them better placed to assess this than the international adjudicator.[134] Their determinations will be respected unless they manifestly lack a reasonable foundation. Second, the deprivations must be in conformity with the domestic law and general principles of international law. Third, there must be a reasonable proportional relationship between the means employed, state regulations at issue, and the aims sought. In other words, there should be "a fair balance" to be struck between the demands of the general interests of the community and the requirements of protecting an individual's fundamental rights; a fair balance does not exist where an individual bears an unreasonably large burden.[135] Thus, it would be a disproportionate interference by a state if the taking of the property does not follow by payment reasonably related to its value.

[132] The European Convention on Human Rights (ECHR) provides that contracting states may promulgate measures restricting the right to property in the public interest. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), 213 United Nations Treaty Series 262, Protocol 1, Art. 1 (May 18, 1954).
[133] *James v. United Kingdom*, ECtHR (1986), at para 39, available at: <http://hudoc.echr.coe.int/sites/eng>.
[134] Eirik Bjorge, "Been There, Done That: The Margin of Appreciation and International Law", (2015) 4 (1) Cambridge Journal of International and Comparative Law 181-190; Eva Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", (1996) 56 Zeitschrift fur Auslandisches Offentliches Recht Und Volkerrecht 230 at 241; Douglas Lee Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights", (2001) 15 (2) Emory International Law Review 391; Thomas O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights", (1982) 4 Human Rights Quarterly 474 at 475-79; Ignacio de la Roasilla del Moral, "Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine", (2006) 7 (6) German Law Journal 611; Simon Baughen, "Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven", (2006) 18 Journal of Environmental Law 207 at 213-14.
[135] *Sporrong v. Sweden*, ECtHR(1982), at para 73. Available at: <http://hudoc.echr.coe.int/sites/eng>.

6.3.3. Application of the Margin of Appreciation to Interpreting Treaty NPM clauses

(i) Relevant Cases

There have been a few cases in investor-state arbitration in which tribunals addressed the margin of appreciation in their analysis. For instance, in the investment dispute involving the Russian Federation, the tribunal held that the reliability of investment protection treaties should not be diluted by the same notions of "margin of appreciation" that apply to human rights conventions.[136] In another case, which involved the determination of the existence of a treaty-required nationality, the tribunal noted that the state conferring nationality must be given a "margin of appreciation" in deciding upon the factors that it considers necessary to grant nationality.[137] In another ICSID case, *Biwater Gauff v. Tanzania*,[138] in which the British investors claimed the restrictions imposed by the government of Tanzania on their investments to violate the guarantees in the U.K.-Tanzania BIT, the respondent argued that it "was entitled to a measure of appreciation."[139] As the government's interference at issue was in respect to foreign investments related to improving water and sewage systems, the respondent further contended that "[w]ater and sanitation services are vitally important, and that the Republic [of Tanzania] has more than a right to protect such services in case of a crisis: it has a moral and perhaps even a legal obligation to do so."[140] By referring to several ECtHR judgements, the respondent claimed that the measures adopted to protect the water supply in its capital city of Dar es Salaam

[136] *Quasar de Valors SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. Russian Federation*, SCC Case No.24/2007, Award 20 July 2012, at para 22.
[137] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, at para 94-95.
[138] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008).
[139] *Ibid* at para 434.
[140] *Ibid.*

were "well within the Republic's margin of appreciation under international law."[141] However, even though the U.K.-Tanzania BIT did not contain the NPM clause, the tribunal rejected this argument on factual grounds and did not pay due regard to the jurisprudence related to the margin of appreciation. Therefore, it only held that "there was no necessity or impending public purpose to justify the Government's intervention in the way that took place."[142] Similarly, in the more recent *Quasar de Valores v. Russia* case, the tribunal observed that unlike human rights treaties, investment treaties "contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them ... [and thus, they] should not be diluted" through the application of the margin of appreciation.[143]

The margin of appreciation doctrine was also touched upon in the context of regional treaties on the protection of foreign investments. The *Chemtura Corp. v. Canada*[144] case is a good example in this regard. In this case, the tribunal touched upon the margin of appreciation when it found it necessary to address the question "whether the protection granted under [NAFTA Article 1105] is lessened by a margin of appreciation granted to domestic regulatory agencies and, if so, to what extent."[145] Pointing out the importance of assessing all facts in this regard, the tribunal stated further that "[t]his is not an abstract assessment circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies, [but rather] it is an assessment that must be conducted *in concreto*."[146]

In the Argentine cases, the *Continental* tribunal put substantial emphasis upon the margin of appreciation in its analysis of the NPM clause of the U.S.-Argentina BIT. The tribunal

[141] *Ibid* at para 436.
[142] *Ibid* at para 515.
[143] *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A.* v. *The Russian Federation*, (20 July 2012) Award, at para 22.
[144] *Crompton (Chemtura) Corp. v. Government of Canada,* NAFTA Case, Award, 2 August 2010, at para 123.
[145] *Ibid*.
[146] *Ibid*.

manifestly recognized "a significant margin of appreciation for the state applying" measures under Article XI of the BIT by emphasising that "a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight."[147] The tribunals in other Argentine cases rejected Argentina's contentions on giving it a margin of appreciation. Moreover, by merely referring to the ECtHR practice, they have not elaborated on this doctrine in their analyses. For instance, in the *National Grid* case, the tribunal rejected Argentina's invocation of the margin of appreciation, and relying on the findings of the *Gabdikovo-Nagymaros Project* case, applied the necessity defense of customary international law.[148] While in the *Siemens AG v. Argentine Republic* case,[149] referring to the jurisprudence of ECtHR, Argentina argued that under this jurisprudence lesser compensation are allowed in cases where property deprivations are motivated by compelling social reasons. However, the tribunal rejected this contention by holding that the margin of appreciation afforded by the ECtHR is found neither in the Argentina-Germany BIT nor in customary international law.[150]

The controversy regarding the margin of appreciation was also addressed in the recent *Phillip Morris v. Uruguay* case.[151] The tribunal held that it "agrees the Respondent that 'the margin of appreciation' is not limited to the context of the ECHR but 'applies equally to claims

[147] *Continental*, Award, *supra* note 60, at para 181. This conclusion seems to be mainly inspired by the Argentina's reference to the ECtHR's justification that national authorities are better positioned than the international judge in terms of having "direct knowledge of their society and of its needs…" *Ibid* at footnote 270.
This holding of the *Continental* tribunal was also referred to by the *EDF* International tribunal, *see EDF International S.A., SAUR International S.A. and Leon Participciones Argentina S.A. v. Argentina Republic* (ICSID Case No. ARB/03/23), Award (June 11, 2012), at para 489, footnote 56 [*EDF*]. Similar references were also made by the *Azurix* tribunal which cited a few cases from the jurisprudence of the ECtHR in its discussion related to issues of expropriation for public purposes. *See Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006), at paras 308-313 [*Azurix*].
[148] *National Grid P.L.C. v. Argentine Republic*, UNCITRAL Award (3 November 2008), at paras 205-262 [*National Grid*].
[149] *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (Feb. 6, 2007), [*Siemens*].
[150] *Ibid* at para 354.
[151] *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, Award (July 8, 2016) ICSID case No. ARB/10/7 [*Philip Morris*, Award].

arising under BITs,' at least in contexts such as public health."[152] The tribunal further noted that "[t]he responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgements of national needs in matters such as the protection of public health."[153] However, in his dissenting opinion, Gary Born disagreed with the tribunal by stating that it is not "mandated or permitted by the BIT or applicable international law."[154] According to him, " the 'margin of appreciation' is a specific legal rule, developed and applied in a particular context, that cannot properly be transplanted to the BIT (or to questions of fair and equitable treatment more generally)."[155]

(ii) Advantages of the Margin of Appreciation

William Burke-White and Andreas von Staden are the main advocates of importing the margin of appreciation doctrine into investor-state arbitration. They argue that it may serve as an alternative for arbitral tribunals in interpreting NPM clauses, which will help them to move away from the "no other means available" test and provide a means to resolving disputes without putting arbitral tribunals in the position of undertaking direct balancing without a frame of reference.[156] They point out that the margin of appreciation doctrine allows a tribunal to set an appropriate space within which national authorities are able to take regulatory measures without tribunal's second-guessing of those decisions.[157] They also argue that national authorities are

[152] *Ibid* at para 399.
[153] *Ibid*.
[154] Dissenting Opinion of Gary Born, *Philip Morris*, Award, *supra* note 151, at 21, para 87.
[155] He further noted that "[t]here are well-considered legal rules, already applicable to questions of fair and equitable treatment, which serve similar purposes to those of the "margin of appreciation," but in a more nuanced and balanced manner." *Ibid*.
[156] Burke-White & Von Staden, Standard of Review, *supra* note 7, at 337.
[157] In such a case, an adjudicator exercises restraint with respect to the primary decision-maker's (State) judgment and considers whether the discretion enjoyed by the latter makes it better qualified to have primary responsibility for deciding or determining a particular issue. *See* Julian Rivers, "Proportionality and Variable Intensity of Review", (2006) 65 (1) Cambridge Law Journal 174 at 199, 204; Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory", (2010) 126 Law Quarterly Review 222 at 241.

better positioned than an international arbitral tribunal in terms of expertise within the domestic polity to engage in an explicit balancing between rights and interests at stake.[158] In other words, national governments are better placed to have primary responsibility for making certain decisions or undertaking certain functions such as gathering and assessing information, monitoring the development of circumstances, and investigating alternative courses of action. By contrast, courts and tribunals usually lack the time and resources that would help them thoroughly examine the circumstances at issue.[159]

According to Burke-White and Von Staden, by placing national authorities at the center of decision-making and according arbitral tribunals a more limited supervisory position, the margin of appreciation promotes legitimacy and perhaps even accountability.[160] In this regard, Yuval Shany also contends that this doctrine "improves the quality and perceived legitimacy of legal pronouncements,"[161] as it no longer has to convince potentially sceptical audiences of the accuracy of a direct balancing process. However, Choudhury argues that the use of the margin of appreciation on a case by case basis allows for the inclusion of public interest issues into

[158] *Ibid*. Professor Van Harten also points out two main rationales for considering the views of national decision-makers more reliable than those of adjudicators in circumstances of normative and empirical uncertainty: 1) the desirability of regulatory autonomy and decision-making by actors that are proximate to or embedded in the national polity; 2) the practical advantages of relying on the decisions of actors with greater institutional competence and expertise. *See* Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford: Oxford University Press, 2013) at 3-6. In this respect, Shany and Letsas also emphasize that national governments may be more competent than adjudicators to perceive and assess local conditions, as they are usually more closely acquainted with local conditions and traditions. Shany, *supra* note 112, at 919; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007) at 80-4, 90-1.

[159] Janneke Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine", (2011) 17 European Law Journal 80 at 98. It is also argued that courts and tribunals are disadvantaged as compared to national authorities, since they make decisions only in relation to the narrow matter at issue, and through the lens of legal norms. Specifically, due to the binary nature of their adjudicative function, courts and tribunals may have difficulties in fully apprehending the ramifications of a particular decision that has "polycentric effects". Shany, *supra* note 113, at 918-19. Polycentric decisions are considered the decisions that have implications for a large network of relationships so that change to any one relationship causes changes to the others. *See* Lon Fuller, "The Forms and Limits of Adjudication", (1978) 92 Harvard Law Review 353 at 395, 401.

[160] Burke-White & Von Staden, Standard of Review, *supra* note 7, at 337.

[161] Shany, *supra* note 113, at 939.

investment treaties, which mostly do not provide for the consideration of non-investment issues. In her view, "[w]ithout the doctrine's use, tribunals can easily dismiss public interest issues as they do not find textual support in most treaty provisions."[162] In a specific context, Rosalyn Huggins has emphasized that the margin of appreciation approach of the ECtHR has been developed precisely for situations of public emergencies that may cause the invocation by states of security exceptions in different treaty regimes.[163]

(iii) The Content of Analysis under the Margin of Appreciation

The margin of appreciation analysis, as proposed by Burke-White and Von Staden, entails two stages. It begins with a determination of the appropriate level or breadth of deference that has to be accorded to respondent states in a particular case. By referring to the practice of the ECtHR, they argue that based on the nature of interests at stake, deference would have to be highest with respect to issues of "public morality," lowest in areas most susceptible to scientifically validated evidence, such as "public health," and somewhere in between for intermediate concerns, such as threats to "security."[164] They point out that in the ECtHR practice, property rights are less fundamental than other private rights, such as the right to life.[165] Thus, the breadth of deference afforded to the state affecting property rights must be wider than that

[162] Choudhury, *supra* note 8, at 827.
[163] Rosalyn Higgins, "Derogations under Human Rights Treaties", (1976-77) 48 *British Yearbook of International Law* 281. Dominik Eisenhut also argues that the margin of appreciation is "very well suited to balance national security concerns and the interest in functioning treaty regimes with regard to security exceptions." Dominik Eisenhut, "Sovereignty, National Security and International Treaty Law: The Standard of Review of International Courts and Tribunals with regard to 'Security Exceptions'", (2010) 48 (4) Archiv des Völkerrechts 431 at 461.
[164] Burke-White & Von Staden, *supra* note 7, at 376. Eva Brems also points out that the margin adopted in every individual case varies depending on the comparative advantage of the local authorities in assessing the factual situation and the nature of contested interests. *See* Eva Brems, "The Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights", (1996) 56 Heidelberg Journal of International Law 240 at 256.
[165] It means that the protection of property rights carries lesser normative force than the protection of other ECtHR rights. For such a difference in ECtHR system, *see* Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2006) at 192–3.

affecting the right to life. Given that the Argentine cases involve a state's fundamental social and economic policies on one side, and foreign investors' property rights on the other, they argue that a respondent state should be accorded a wider margin in adopting its socioeconomic policies.[166] As to the condition that the measures granted a wide margin must have a reasonable basis, they note that the measures adopted by Argentina had a clearly reasonable foundation, which was to mitigate economic crisis and promote recovery of the whole economic system. These, as a consequence, fall within the permissible margin of appreciation provided by Article XI of the U.S.-Argentina BIT.[167]

The second stage is called a residual proportionality test. It comes after the primary determinations of the width of the margin and a finding that the state's regulatory measures fall within that margin are established. It entails a balancing between the interests of the state and the interference with a foreign investor's rights. In the margin of appreciation analysis, this residual balancing (not direct) is informed and guided by the previous stage – determination of the breadth of the margin.[168] The interrelation between these two stages of the margin of appreciation is explained in the following way: where the margin of appreciation is broad and the state's activity explicitly within it, the residual proportionality test can be relatively light, and likely tilt in favour of the state's determination of what it considers as an appropriate balance; if the margin is narrow or the state's measures are found to fall closer to the bounds of that margin,

[166] Antoine Martin also contends that "granting states certain autonomy would overall not constitute a threat to investors." He further argues that "tribunals will always have the possibility to refer to customary law as back up where doubts are raised as to the good faith of the state."*See* Antoine Martin, "Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-Precluded Measures and the Doctrine of Necessity under Customary International Law", (2012) 29 (1) Journal of International Arbitration 49 at 70.
[167] Burke-White & Von Staden, *supra* note 7, at 343.
[168] *Ibid* at 238.

proportionality balancing can be "stricter", and likely tip in favour of the aggrieved foreign investor.[169]

According to Burke-White and Von Staden, residual proportionality can offer an easier balancing analysis for investment tribunals than the proportionality test in isolation, as it is performed in the framework and context established by the determined width of the margin. In their view, the main merit of the margin of appreciation test over the proportionality approach is its potential to provide a safety valve against overlooking (by arbitral tribunals) the real conditions and circumstances under which the dispute arises. This safety valve is contended to give due weight to a specific right at stake based on its nature and to contribute to equal treatment by arbitral tribunals of competing interests in the balancing stage.[170]

6.3.4. Criticisms on Applying the Margin of Appreciation in the Investment Regime

Despite its advantages, the margin of appreciation is alleged to have deficits. Scholars such as José Alvarez and Kathryn Khamsi present several arguments in this respect.[171] They argue that Burke-White and von Staden are not clear enough in articulating the content of their proposed margin of appreciation.[172] As previously mentioned, the proponents argued that in applying this test, assessing the character of permissible objectives would mean the highest deference will be given to subjective determinations, such as those relating to "public morality",

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[169] *Ibid.*

[170] The ECtHR in *Grigoriades v. Greece* case underlined this aspect of the margin of appreciation as follows:

> [The margin of appreciation] does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine *whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient*'.

Grigoriades v. Greece, (1997) ECHR Reports 2575 at 2589 [emphasis added].

[171] Alvarez & Khamsi, *supra* note 3, at 441-47.

[172] *Ibid* at 442.

while the lowest deference will be given to such "technical" or "objective" determinations such as those relating to "public health", and in between for determinations relating to "security".[173] Alvarez and Khamsi contend that while describing such allocation of diversified deference, Burke-White and Von Staden failed to explain the reason why public morality is more subjective than security, and "how the other factors would apply or how the laconic text of Article XI of Argentina-U.S. BIT leads to such conclusions."[174] Most importantly, it appears to be unclear why the doctrine developed in the ECtHR regime should be relevant to the interpretation of the U.S.-Argentina BIT, as it has never been claimed to constitute a rule of customary international law or a general principle of law.[175]

Alvarez and Khamsi's reasons for rejecting the importation of the margin of appreciation to interpreting Article XI are mainly related to (1) possible problems with the margin of appreciation doctrine itself, (2) the different goals of the two treaty regimes at issue, and (3) the risk of duplicating other forms of "balancing" that are already emerging in the interpretation of the substantive investment rights.[176] They argue that this doctrine threatens the rule of law due to its lack of clarity in what the adjudicators are entitled to consider relevant, its unpredictability in application, and its uneven and inconsistent treatment of comparably situated states.[177] The scholars support their stance by referring to Jeffrey Brauch, who contends that the margin of

[173] As regards the scope and degree of deference due to national decision-makers, Julian Arato considers the margin of appreciation as "*contentless*", as it "does not entail any concrete linguistic standard or specific test". Even though the scope of the margin of appreciation will vary according to circumstances and dependent on several factors, in his view, "it provides no doctrinal explanation for how it weighs these factors in particular cases." Julian Arato, "The Margin of Appreciation in International Investment Law", (2013-2014) 54 (3) Virginia Journal of International Law 545 at 558-59.
[174] Alvarez & Khamsi, *supra* note 3, at 442.
[175] For instance, in the *Siemens v. Argentina* case, the tribunal clearly held that the margin of appreciation doctrine does not form part of customary international law. *See Siemens*, *supra* note 148, para 354.
[176] Alvarez & Khamsi, *supra* note 3, at 442.
[177] *Ibid* at 443.

appreciation violates Lon Fuller's key elements of the rule of law[178] and deploys "slippery" variables such as "acceptable", "good faith", and "legitimate aims", which have never been sufficiently defined and change from case to case.[179] Eyal Benvenisti is also of view that this doctrine suggests a "moral relativism" which is simply inconsistent with the notion that human rights are universal, encourages national institutions to resist external review, and "reverts difficult policy questions back to national institutions, in complete disregard for their weakness."[180]It follows that, perhaps for this reason, the application of the margin of appreciation doctrine is also found to be controversial even within the realm of the ECtHR regime. For example, in his partial dissenting opinion in the *Z v Finland* case, Judge De Meyer severely criticized it:

> The empty phrases concerning the State's margin of appreciation - repeated in the Court's judgements for too long already - are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights. Such terminology, as wrong in principle as it is pointless in practice, should be abandoned without delay.[181]

According to Alvarez and Khamsi, using the margin of appreciation as a test may be inconsistent with certain treaty goals such as protecting the legitimate expectations of investors by providing a predictable and stable legal framework and clarifying vague guarantees in the relevant customary international law. Based on these criticisms, they consider that the

[178] These key elements are the following: (1) general applicability; (2) public availability (promulgation); (3) prospective operation; (4) reasonable clarity; (5) internal consistency (coherence of laws with one another); (6) capable of being complied with (genuine congruence between the ought and the can); (7) relative stability; (8) congruence between the word of law and its enforcement. *See* Lon Fuller, *The Morality of Law* (New Haven and London: Yale University Press, 1964) at 38-9. Cited in Jeffrey A. Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law", (2004-2005) 11 Columbia Journal of European Law 113 at 123 [Brauch].

[179] Brauch, *supra* note 178, at 126.

[180] Benvenisti, *supra* note 118, at 853.

[181] *Z v. Finland*, ECtHR, Reports 1997-I, Judgment (Merits and Just Satisfaction), 25 February 1997, at 358.

importation of this doctrine would not, as argued by Burke-White and von Staden, have the "benefit of helping structure the expectations of all actors in the international investment system."[182]

Moreover, they emphasize the distinction between the European human rights regime and the investor-state arbitration regime. Given that the margin of appreciation doctrine is widely used in deciding human rights disputes in the domain of ECtHR, they mainly focus on the specificity of democratic systems of government in European countries that is different from "democracies" in other countries. In this context, the margin of appreciation doctrine serves the goals of the European human rights system, which is to find and apply standards that European nations share in common. In that respect, this doctrine is applied to determine "what is necessary in a democratic society" and whether there is a "consensus" among the democracies of Europe about a particular practice.[183] Conversely, a treaty like the U.S.-Argentina BIT is not premised on finding a "consensus" among a particular set of like-minded states, either with respect to how they define the rights of investors or how they balance the competing interests of a foreign investor and a sovereign state. Thus, bestowing great emphasis on the application of the margin of appreciation in a specific democratic regime, as Alvarez and Khamsi consider, leaves little prospect to claim that this doctrine is some kind of general principle of law or a general principle of common international procedure available to investor-state arbitrators.[184] Most importantly, the scholars underline the distinction in the objects of regulation of both regimes.[185] Investment treaties underline the free market and protection of foreign investors' rights, while the European

[182] Burke-White & Von Staden, *supra* note 7, at 405.
[183] Alvarez & Khamsi, *supra* note 3, at 445.
[184] *Ibid.*
[185] For similar critical views, *see* Kassi Tallent, "The Tractor in the Jungle: Why Investment Arbitration Tribunals Should Reject a Margin of Appreciation Doctrine", (2011) 3 Investment Treaty Arbitration & International Law 111 at 123.

human rights system addresses more general deficiencies of democracies and not the rights of foreign investors.[186] In this respect, they refer to Ratner, who also argues that the European Convention is not intended to protect property specifically, which leaves no room to think about the protection of alien property.[187]

Furthermore, both scholars note the absence in the U.S.-Argentina BIT and in most investment treaties of specific notions of European federalism and subsidiarity[188] on which the European margin of appreciation is founded. As an example, they mention the exhaustion of local remedies before challenging the state measure in the ECtHR, which is required by the European Convention. They argue that neither the U.S.-Argentina BIT as a whole, nor its Article XI, is premised on the assumption that national governmental authorities are better positioned to protect the rights that it enshrines.[189]

Lastly, Alvarez and Khamsi point out the difference in timing of applying the margin of appreciation doctrine in the two compared regimes. They argue that the ECtHR applies this doctrine to determine whether a state has engaged in a substantive breach of the European Convention, according to which rights are defined in ways that require weighing distinct

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[186] However, Dr. Domenik Eisenhut, a proponent of using the margin of appreciation doctrine across different treaty regimes, argues that "the transfer of this concept must not be schematic but pay respect to particularities and special requirements of each individual treaty regime." Dominik Eisenhut, "Sovereignty, National Security and International Treaty Law: The Standard of Review of International Courts and Tribunals with regard to 'Security Exceptions'", (2010) 48 (4) Archiv des Völkerrechts 431 at 465.

[187] Steven Ratner, "Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law", (2008) 102 (3) American Journal of International Law 475 at 496.

[188] It should be noted that there is a difference between the margin of appreciation and the principle of subsidiarity. It is explained as follows:

> The subsidiarity principle of EU law is more of a clean-cut procedural nature. Subsidiarity is about deference by the Community political institutions to the advantage of national political institutions or deference by the European Community judiciary branch to the advantage of national courts. The doctrine of margin of appreciation concerns the limitation of the competences of international/ *supra*national courts to the advantage of national judicial, but also of political authorities.

Harbo, *supra* note 122, at 69.

[189] Alvarez & Khamsi, *supra* note 3, at 446. Instead, the main purpose of the treaty is to enable foreign investors to avoid, at their option, presumptively biased national courts.

individual rights vis-à-vis one another and balancing those rights against the rights of others and other state interests. Put simply, the margin of appreciation is used by the court as a direct tool for determining whether the substantive breach has actually occurred. By contrast, in interpreting Article XI, the application of the margin of appreciation is performed presumably after a determination of substantive breach has been made. By making such a comparison, in the view of both scholars, the importation of the margin of appreciation doctrine at this later stage – "by way of an excuse to an investment treaty breach" may raise a serious question of consistency in the practices of compared regimes' adjudicative bodies.[190]

Critical views with respect to granting a margin of appreciation to treaty parties are also expressed by other scholars. For instance, Gebhard Bücheler argues that giving a margin of appreciation to one of the treaty parties once a dispute has arisen would undermine the capacity of states to "harden" their international obligations by agreeing on neutral third-party adjudication.[191] Therefore, he proposes several ways to ensure treaty compliance if states want to grant each other a "margin of appreciation." According to Bücheler, states can do it either by setting out the "self-judging" character of a provision or by concluding subsequent agreements between themselves within the meaning of Article 31(3)(a) of the VCLT.[192] Most interestingly, he contends that the importation of the margin of appreciation as developed in the ECtHR regime to interpreting Article XI of the U.S.-Argentina BIT "would probably not so much affect the interpretation of the nexus requirement, but rather the question of whether there was indeed a

[190] Alvarez & Khamsi, *supra* note 3, at 447.
[191] Bücheler, *supra* note 10, at 237. He draws upon the differentiation between "hard" and "soft" law, and refers to Abbott and Snidal, who view "delegation" as one of the three main indicators of "hard law", *see* Kenneth Abbot & Duncan Snidal, "Hard and Soft Law in International Governance", (2000) 54 (3) International Organization 421.
[192] Bücheler, *supra* note 10, at 237.

threat to the host State's 'essential security interest' or the 'public order'."[193] In this regard, he refers to cases from the ECtHR practice, in which the court held that "Contracting States have a certain margin of appreciation in assessing *whether* such a need exists, but it goes hand in hand with European supervision both the legislation and the decision applying it."[194] This kind of assumption is considered to be in line with the reasoning of the *Continental* tribunal, which held as follows:

> [I]nterests such as 'ensuring internal security in the face of a severe economic crisis with social, political and public order implications' may well raise for such a party … *issues of public order and essential security interest objectively capable* of being covered under Art. XI. An interpretation of a bilateral reciprocal treaty that accommodates the different interests and concerns of the parties in conformity with its terms accords with an effective interpretation of the treaty. Moreover, in the Tribunal's view, *this objective assessment* must contain a significant *margin of appreciation*.[195]

Furthermore, Bücheler also observes that the margin of appreciation doctrine does not find much support in the jurisprudence of the ICJ. He refers to the *Oil Platforms* case, where the ICJ was tasked with interpreting the provision of the U.S.-Iran Treaty of Amity, Economic Relations and Consular Rights, which was similar to Article XI of the U.S.-Argentina BIT.[196] In this case, the U.S. acts, which claim to have been adopted to protect its essential security interests, were examined under its right to self-defense as established in Article 51 of the UN Charter. In this regard, the court required the United States to show that its actions exercised

[193] Bücheler, *supra* note 10, at 237.
[194] *Ibid*. For details, *see Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, ECtHR, Applications nos. 29221/95 and 29225/95, Judgment, 2 October 2001, para 87. In James case, the Court also held that it "will respect the legislature's judgement as to what is "in the public interest" unless that judgement be manifestly without reasonable foundation." *James v. United Kingdom*, ECtHR, A 98, Judgment, 21 February 1986, para 46.
[195] *Continental*, *supra* note 60, para 181 [emphasis added].
[196] *Oil Platforms*, *supra* note 78.

under self-defense were "necessary and proportional".[197] Specifically, Judge Higgins, who dissented on most issues, concurred with the court that the meaning of the term "necessary" in the provision should be interpreted under the proportionality test, without any mention of affording a margin of appreciation to the United States.[198] Judge Kooijmans concurred on this issue, and further added that "although the choice of means to be taken to protect those interests will also be politically motivated, *that choice lends itself much more to judicial review and thus to a stricter test*, since the means chosen directly affect the interests and rights of others."[199]

Based on the above mentioned criticisms, it can be said that, although the application of the margin of appreciation doctrine in ECtHR regime has certain advantages, its importation into investment arbitration for the purpose of interpreting the nexus requirement ("necessary") of the NPM clause in the U.S.-Argentina BIT seems to be inappropriate.

6.3.5. Concluding Remarks

In this section, I presented the main characteristics of the margin of appreciation doctrine, discussed the advantages of its application in the context of investment arbitration, and inquired into its potential to solve the issues related to interpretation non self-judging NPM clauses (particularly Article XI of the U.S.-Argentina BIT). In this respect, I gave an overview of the main arguments advanced by different scholars on applying the margin of appreciation in interpreting Article XI. The analysis of their arguments showed that the examination of state necessity measures by arbitral tribunals under this doctrine allows states certain types of

[197] *Ibid* at para 51.
[198] Judge Higgins opined that: The Court should next have examined—*without any need to afford a* '*margin of appreciation*'— the meaning of 'necessary'. In the context of the events of the time, it could certainly have noticed that, in general international law, 'necessary' is understood also as incorporating a need for "proportionality".
Oil Platforms, *supra* note 78, at 161 (Judge Higgins, concurring), para 48 (emphasis added).
[199] *Oil Platforms*, *supra* note 78, (Judge Kooijmans, concurring) at para 44 [emphasis added].

autonomy to address necessity circumstances by acknowledging that national governments are better positioned to assess the situation in their counties and adopt appropriate measures based on that assessment. However, the application of this doctrine in the realm of investor-state arbitration is severely contested, due to the different nature of the legal regime where it is practiced. It also seems that the doctrine lacks the criteria for determining the concrete dimensions of deference allowed for states in each specific situation. Furthermore, the controversies in arbitrators' views observed in the most recent cases[200] with regard to its application in the investment arbitration context do not allow us to consider it as a sophisticated standard for interpreting the treaty NPM clauses.

[200] For example, *Philip Morris v. Uruguay* case, *supra* note 151.

6.4. The Principle of Proportionality

6.4.1. The Origins and Definition of Proportionality

The theory of proportionality dates back to Aristotle's time. His idea – that the just is a ratio between two parties mediated by an abstract principle[201] – is still a part of contemporary law, as shown by the general principle of proportionality.[202] However, the practice of proportionality jurisprudence, which involves the practical legal implementation of the general concept, has evolved over several centuries, refining and modifying Aristotle's original theory along the way and eventually starting to represent a key aspect of contemporary legal thought.[203]

The proportionality principle was further refined by Aquinas in the context of the law of self-defense, and was given its present shape as a multi-step proportionality procedure.[204] In the context of self-defense, Aquinas argued that there are conditions that must exist for the use of force to be just: force must be necessary, when used, must be proportional, rather than excessive, and force must be exercised by the sovereign according to these rules.[205] Hugo Grotius developed Aquinas's theory on self-defense into a general principle of law by describing its application not only to mutual relations among states, but also to relations among individuals.[206] Grotius is credited for transposing this concept into modernity and linking the idea

[201] Aristotle's idea of justice evolved to the right relationship between the state and the citizen, adjudicated by the rule of law. *See Aristotle, The Nicomachean Ethics: Book III*, Ch. 10-12. Available online at: <http://www.constitution.org/ari/ethic_03.htm>.

[202] Proportionality first appears in his Nicomachean Ethics, Book V. Available online at: <http://classics.mit.edu/Aristotle/nicomachaen.5.v.html>.

[203] Eric Engle, "The History of the General Principle of Proportionality: An Overview", (2012) 10 Dartmouth Law Journal 1 at 2 [Engle].

[204] Thomas Aquinas, *Summa Theologica, Treatise on Law* (Beziger Bros. Ed. 1947), Questions 90-97, available at: <http://www.ccel.org/ccel/aquinas/summa/FS.html>.

[205] Engle, *supra* note 203, at 5.

[206] Hugo Grotius, T*he Rights of War and Peace, Including the Law of Nature and of Nations*, translated from the Original Latin of Grotius, with Notes and Illustrations from Political and Legal Writers, by A.C. Campbell, A.M. with an Introduction by David J. Hill (New York: M. Walter Dunne, (1901). Available at: <http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=553&chapter=90737&layout=html&Itemid=27#a_2052898>.

of justice to the idea of balanced interests. Through his works, the unification of concepts in three historical times can be observed: the ancient concept of justice as ratio, the medieval concept of proportional self-defense, and the modern concept of balancing interests.[207]

In the eighteenth century, proportionality was mainly developed as a legal concept in the context of German Police Law, and was related to interference with civil liberties by administrative authorities.[208] German courts used the concept of proportionality to determine whether police measures were more intrusive than necessary to attain a certain objective.[209] Thus, in German administrative law, proportionality developed as a device controlling the discretion of the administration. Later, the principle was introduced into constitutional law to control the discretion of legislators in enacting laws.[210]

Proportionality is explained as the "quality, character, or fact of being proportional", which in turn is defined as "corresponding in degree, size, amount, etc."[211] From a legal perspective, the concept of proportionality has several meanings of varying breadth, depending on the context. In the broadest sense, proportionality entails the requirement for "proper or balanced relationship between competing considerations".[212]

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[207] *Ibid*, *Chapter XXIV: Precautions Against Rashly Engaging in War, Even Upon Just Grounds.*
V. In all cases of deliberation, not only the ultimate but the intermediate objects leading to the principal ends are to be considered. The final object is always some good, or at least the evasion of some evil, which amounts to the same. The means are never to be considered by themselves, but only as they have a tendency to the proposed end. Wherefore in all cases of deliberation, the proportion, which the means and the end bear to each other, is to be duly weighed by comparing them. Cited by Engle, *supra* note 203, at 5.

[208] Jürgen Schwarze, "The Principle of Proportionality and the Principle of Impartiality in European Administrative Law", (2003) 1 *Rivista Trimestrale Di Diritto Pubblico* 53 [*Quarterly Journal of Public Law*] [Schwarze].

[209] Mads Andenas & Stefan Zleptnig, "Proportionality: WTO Law: in Comparative Perspective", (2007) 42 (3) Texas International Law Journal 371 at 383 [Andenas & Zleptnig].

[210] *Ibid*. For the detailed analysis of proportionality as a general principle of law and its application by the judicial bodies of Germany, Canada, USA, South Africa and Israel, *see* Bücheler, *supra* note 10, at 29-83.

[211] Enzo Cannizzaro, "The Role of Proportionality in the Law of International Countermeasures", (2001) 12 European Journal of International Law 889 at 906.

[212] Peter Nygh & Peter Butt eds., *Australian Legal Dictionary* (Sydney: Butterworths, 1997) *sub verbo* "proportionality", at 941.

As a legal principle, proportionality is explained as a reasonable relationship between the means employed and the aims sought. Its underlying meaning is to balance conflicting or competing benefits.[213] Even though the principle of proportionality is found in a vast range of legal systems, discerning the principle at the universal level is considered difficult.[214] Being an important principle of administrative law in many jurisdictions, proportionality entails a method of defining the relationship between the state and its citizens.[215] It requires that administrative power not be exercised in a way that inflicts injury on private interests out of proportion to public needs.[216] Thus, proportionality "sets material limits to the interference of public authorities in the private sphere of the citizen",[217] and "provide[s] a tool to define and to restrain the regulatory freedom of governments."[218]

Arbitral tribunals and dispute settlement bodies also use proportionality as a tool of analysis for reviewing the conduct of states.[219] In such cases, proportionality "can restrain the exercise of public authority, shape judicial review and manage private actors' expectations."[220] In this respect, being one of trade-off devices, proportionality operates as an aid tool to problem solving and expressing the reasoning processes of adjudicators.[221] It is also defined as "a method of legal interpretation and decision-making in situations of collisions or conflicts of different

[213] Jost Delbrack, *Proportionality*, in Rudolf Bernhardt ed., Encyclopaedia of Public International Law, 2nd edition, Vol. 3 (North-Holland, 1997) at 396.
[214] Andrew D. Mitchell, *Legal Principles in WTO Disputes* (Cambridge: Cambridge University Press, 2008) at 184 [Mitchell].
[215] *See* Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe* (Oxford, Portland: Hart Publishing, 1999).
[216] In case it does, it may be annulled for being unreasonable. Thus, it can also be regarded as one of the several categories of unreasonableness. Itzhak Zamir, "Unreasonableness, Balance of Interests and Proportionality", (1992) 11 Tel Aviv University Studies in Law 131 at 135.
[217] Schwarze, *supra* note 208, at 53.
[218] Andenas & Zleptnig, *supra* note 209, at 383.
[219] Benedict Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study* (Groningen: Europa Law Publishing, 2013) at 61.
[220] Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge: Cambridge University Press, 2015) at 196 [Vadi, *Analogies in International Investment Law*].
[221] Henckels, *Proportionality & Deference*, *supra* note 114, at 26.

principles and legitimate public objectives."[222] More specifically, in the investment arbitration context, a proportionality analysis is helpful in reviewing the excessive character of State measures,[223] which are alleged to be taken within the limits of provisions in investment agreements related to expropriation,[224] fair and equitable treatment (FET)[225] and non-precluded measures (NPM) clauses.[226] In case of a dispute, the measures, which are alleged to be taken within a state's regulatory powers, are subjected to an arbitration tribunal's analysis (proportionality), the main purpose of which is to identify the abuse of its regulatory power in protecting a state's public interests.[227] In such a case, the state in question must justify its measures under the concrete elements of proportionality.[228]

6.4.2. The Elements of Proportionality

The principle of proportionality comprises three elements: suitability, necessity and proportionality *stricto sensu.*[229] In order to be proportional, a measure at issue must satisfy all these three elements cumulatively.

(i) Suitability

As a first step, suitability requires that the adopted measure be suitable or appropriate to achieve the objective it pursues. It consists of two subtests. First, to be effective (suitable), the

[222] Kingsbury & Schill, Proportionality, *supra* note 11, at 79.
[223] In this respect, proportionality is considered to reflect a "deliberative methodology" under which all of the relevant factors must be taken into account, and then a balance must be struck according to their relative importance depending on contextual circumstances. Iddo Porat, "Some Critical Thoughts on Proportionality", in Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini, *Reasonableness and Law* (Heidelberg: Springer, 2009) at 243-44.
[224] *Tecmed v Mexico, ICSID Case No. Arb/(AF)/00/2 Award* (2003), at para 122; *Azurix*, *supra* note 146, at para 311.
[225] *Saluka*, *supra* note 90, at paras 304-306.
[226] *LG&E*, Decision on Liability, *supra* note 56, at para 195; *Continental* Award, *supra* note 60, at para 152.
[227] Han Xiuli, "On the Application of the Principle of Proportionality in ICSID Arbitration and Proposals to Government of the People's Republic of China", (2006) 13 James Cook University Law Review 233 at 243.
[228] Therefore, as some scholars argue, proportionality is based on a "culture of justification" which "requires that governments should provide substantive justification for all their actions ..." Moshe Cohen-Eliya & Iddo Porat, "Proportionality and the Culture of Justification", (2011) 59 American Journal of Comparative Law 463 at 467.
[229] Jan H. Jans, "Proportionality Revisited", (2000) 27 Legal Issues of Economic Integration 239 at 240-41 [Jans]; Eric Engle, "The General Principle of Proportionality and Aristotle", in Liesbeth Huppes-Cluysenaer & Nuno Coelho, *Aristotle and the Philosophy of Law: Theory, Practice and Justice* (New York: Springer, 2013) at 272-73.

measure has to be capable of fostering the realization of a legitimate policy goal.[230] Second, there must be "a causal relationship between the measure and its object."[231] This element is efficient in that it helps the tribunal decide, at an early stage, whether the measure furthers the stated purpose in any way and qualifies to proceed to the next step of assessment. Almost all measures will pass this part of the suitability test, since government actions adopted in good faith will not usually involve the use of means that are wholly ineffective in pursuing the stated purpose.[232]

Under the suitability test, all illegitimate purposes are filtered out at an early stage, since they constitute "*per definitionem* a disproportionate interference with the right or interest protected."[233] The measures at issue do not have to guarantee the realization of particular policy objective, but it is sufficient that it should be able to support the attainment of the objective. In the context of EC law, if the means of reaching the goal are rather complex, European Court of Justice grants Members a certain degree of discretion to decide on appropriate means and disfavour only clearly ineffective measures.[234] In WTO practice, DSBs have given deference to governments' assessments as to the suitability of a measure[235] or found a measure to be suitable in case its potential to achieve the pursued objective is uncertain.[236]

Thus, from the third party's (arbitral tribunal, court) viewpoint, the suitability element of the proportionality test is "merely a rough grid to exclude obviously disproportionate

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[230] Harbo, *supra* note 122, at 23-36; Jan Neumann & Elisabeth Turk, "Necessity Revisited: Proportionality in World Trade Organization Law after Korea-Beef, EC-Asbestos and EC-Sardines", (2003) 37 Journal of World Trade 199 at 203 [Neumann & Turk].

[231] Jans, *supra* note 229, at 240. In the context of investor-state arbitration, both subtests of suitability set a relatively undemanding standard for the state measure to meet.

[232] Kingsbury & Schill, Proportionality, *supra* note 11, at 86.

[233] *Ibid*.

[234] Neumann & Turk, *supra* note 230, at 203.

[235] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, (20 April 2005), at para 304 [AB, *US-Gambling*].
Available at: <https://www.wto.org/english/tratop_e/dispu_e/285abr_e.pdf>.

[236] AB Report, *Mexico-Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, (March 6, 2006) para.74. Available at: < https://www.wto.org/english/tratop_e/dispu_e/308abr_e.doc>.

measures."[237] From the government's perspective, it is "a safeguard for judicial restraint and against judicial activism that grants considerable leeway in making policy decisions."[238]

(ii) Necessity

As a second step of the proportionality analysis, necessity requires that the adopted measure be the only means of achieving the objective. It cannot be attained by other alternative measures that are less restrictive than the adopted measure. Where there is a choice between several appropriate measures, the least onerous but equally effective one must be selected.[239] It is also called the "least restrictive alternative" criterion.[240] If applied in the context of investor-state arbitration, it would mainly involve assessing all available alternative measures under two main criteria: whether they are equally effective in reaching the objective of protecting essential public interests, and which of them would entail the least negative effects on foreign investment. In this respect, the underlying objective of the necessity element of proportionality is to ensure that in protecting the essential public interests of the host state, the adopted measure will make a minimal harm to the interests of foreign investors.[241] It should also be noted that the host state government is not limited to choosing only one specific measure, but may employ several or plenty of them, provided they are all equally effective.[242] Scholars also point out that some legal systems allow the consideration of additional factors in determining the necessity of a measure, whereby a government may choose a measure other than the least-restrictive one due to good

[237] Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge: Cambridge University Press, 2012) at 187 [Kulick].
[238] *Ibid.*
[239] Jukka Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms* (Oxford: Oxford University Press, 2002) at 198.
[240] Jans, *supra* note 229, at 240.
[241] It is also argued that a deferential approach to the necessity test is appropriate in circumstances where there is uncertainty with respect to the availability, feasibility or potential effectiveness of alternative measures. *See* Alan Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge: Cambridge University Press, 2012) at 68.
[242] Kulick, *supra* note 237, at 188.

reasons such as significant administrative complexities, fiscal implications or the existence of risk to harm other rights and interests.[243]

(iii) Proportionality *Stricto Sensu*

The last step, determining what is called "proportionality in the true sense", is resorted to only once the measures at issue have been found suitable and necessary to achieve the objective. According to Robert Alexy, proportionality *stricto sensu* requires that the measure is not excessive with regard to the objective pursued and that relative weight is given to each principle.[244] Professor Van den Bosche explains that this element of the proportionality analysis "involves an assessment of whether the effects of a measure are disproportionate or excessive in relation to the interests involved."[245] It is regarded as being the most problematic element of proportionality, as it requires a true weighing and balancing of conflicting interests by focusing on the relationship of adopted measures and pursued legitimate government objectives.[246]

[243] Andenas & Zleptnig, *supra* note 209, at 392-3; Neumann & Turk, *supra* note 230, at 210-11; Mark Elliott, "Proportionality and Deference: The Importance of a Structured Approach", in Christopher Forsyth, Mark Elliott, Swati Jhaveri, Michael Ramsden & Scully Hill eds., *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford Univerity Press, 2010) at 277-8; Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) at 191.

[244] Robert Alexy, "On the Structure of Legal Principles", (2000) 13 (3) Ratio Juris 294 at 298. Alexy further explains that proportionality *stricto sensu* is "... necessary whenever the fulfilment of one principle leads to the non-fulfilment of another, hence, whenever one principle is only realizable at the cost of another. For this kind of case the following balancing law can be formulated: The more intensive the interference in one principle, the more important the realization of the other principle." *Ibid*.

[245] Peter Van den Bosche, "Looking for Proportionality in WTO Law", (2008) 35 (3) Legal Issues of Economic Integration 283 at 285. If explained in the context of investment arbitration, it can be said that proportionality *stricto sensu* would involve the balancing between the objectives related to protecting public interests of a state and a harm incurred by foreign investors. In this respect, the measures adopted to achieve the objectives of protecting essential public interests are supposed to be considered proportionate when they marginally affect the interests of foreign investors by avoiding excessive harm.

[246] Andenas & Zleptnig, *supra* note 230, at 390. According to them: "It is at this stage that a true weighing and balancing of competing objectives takes place. The more intense the restriction of a particular interest, the more important the justification for the countervailing objective needs to be." *Ibid*.

6.4.3. Academic Debate on Applying the Proportionality Analysis to Interpreting Article XI: *Pros and Cons*

The analysis of the Argentine cases showed that the interpretative means listed in Article 31(1) and (2) of VCLT offer limited guidance on the interpretation of the term "necessary" in Article XI. Therefore, the tribunals looked for interpretative guidance from different legal regimes of international law, which ignited an academic debate. Some scholars suggested that the solution could be found by applying the general principles of international law, particularly proportionality, by virtue of Article 31(3)(c) of VCLT. For instance, Professor Reinisch argues that the most appropriate approach in the realm of economic emergencies "would probably have to incorporate considerations of adequacy and proportionality."[247] Similarly, Gebhard Bücheler contends that "one way to facilitate recourse to the necessity defense, would be to abandon the 'only way' requirement, and instead ask whether the State measure was a 'proportionate means' to protect its 'essential interests' - and include the State's 'contribution' as one factor in this analysis."[248] Generally, scholars such as Benedict Kingsbury and Stephan Schill consider proportionality to be a "methodologically workable and more coherent" tool for investment arbitral tribunals that has the potential to "facilitate[s] balancing between interests of foreign investors, or more generally property rights, and conflicting public interests."[249] It is also argued that as a method of review, proportionality analysis "can rationalize decision-making by restricting reasoning and argumentation to a pre-determined analytical structure."[250] Particularly, adopting proportionality in the investor-state arbitration regime "at a minimum establishes

[247]Reinisch, *supra* note 9, at 201.
[248]Bücheler, *supra* note 10, at 281.
[249] Kingsbury & Schill, Proportionality, *supra* note 11, at 78 [emphasis added].
[250] Henckels, Proportionality & Deference, *supra* note 113, at 26; Alec Stone Sweet & Jude Mathews, "All Things in Proportion? American Rights Doctrine and the Problem of Balancing", (2011) 60 Emory Law Journal 797; Harbo, *supra* note 122, at 66.

criteria and a framework to ensure that tribunals consider the relevant interests under the applicable principles,"[251] which in the scholars' view, "may produce better and more convincing reasoning, and enable clearer assessment, critique, and accountability of tribunals."[252] Accordingly, a proportionality analysis is considered to be "preferable as a rational process for balancing investment protection and competing [public] interests."[253] Thus, the scholars strongly advocate it as an optimal test that has potential to resolve interpretative issues related to examining state measures under treaty provisions on expropriation, fair and equitable treatment and non-precluded measures.[254]

One emerging scholar, Gebhard Bücheler, also seems to present sound arguments in favour of using a proportionality analysis to interpret Article XI. Although he emphasizes the general caveats related to proportionality, in his view, these concerns do not apply in relation to interpreting Article XI.[255] First, he argues that proportionality "provides for transparency by obliging arbitrators to identify the different factors that play a role in their decision and explain how they relate to each other under the particular circumstances of the relevant case."[256] Second,

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[251] Kingsbury & Schill, Proportionality, *supra* note 11, at 11. In general, Kingsbury and Schill seem to strongly advocate the proportionality analysis as a preferable methodological tool for resolving interpretative issues related to examining state measures under treaty provisions on expropriation, fair and equitable treatment and non-precluded measures.

[252] Kingsbury & Schill, Proportionality, *supra* note 11, at 103.

[253] *Ibid*. Besides emphasising the potential of a proportionality analysis to enhance accountability and justification for government action and the activity of arbitral tribunals, Kingsbury and Schill point out that it can also "constitute a gateway for non-investment law principles to enter into the argumentative framework of investment treaty arbitration and thereby help to overcome the fragmentation of international law into functional and special- interest-related sub-systems." *Ibid* at 104.

[254] In this respect, Kingsbury and Schill clarify that:

> Proportionality analysis is not proposed as an alternative to the rules on treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT), but rather as informing the exercise of interpreting a treaty *with a view to resolving conflicts between competing rights and interests when the rules of treaty interpretation do not indicate priority of one right or interest over the other*.

Ibid at 78 [emphasis added].

[255] He notes that in certain legal settings, a proportionality analysis might (1) constitute a threat to the rule of law, (2) give rise to unwarranted judicial lawmaking, and/or (3) risk being arbitrary, as it is unclear what interests enter the balancing process due to the lack of a relevant value system. Bücheler, *supra* note 10, at 238.

[256] Bücheler, *supra* note 10, at 243.

in his view, proportionality has the potential to take a balanced account of both private and public interests. As he contends, in the investor-state arbitration context, its application "ensures that none of the interests involved (i.e. the private property rights of the claimant and the public interest) suffers more than necessary for the benefit of the other."[257] Third, the application of proportionality to interpreting Article XI is considered to be compatible with Alexy's theory on rules and principles.[258] In his view, since the obligation to compensate a foreign investor for direct and indirect expropriations constitutes a rule under Alexy's theory, the same can be true with regards to Article XI. He explains it as follows:

> Article XI of the Argentina - US BIT is a rule that constitutes an exception to rules (i.e. the substantive BIT provisions), and at the same time refers to principles. After all, Article XI enumerates certain goals in the public interest, and clarifies that measures 'necessary' to protect those goals do not violate the treaty. Proportionality is an appropriate judicial tool in such situations.[259]

Bücheler further argues that the application of proportionality in the context of Article XI finds support in the jurisprudence of ICJ.[260] In the *Oil Platforms* case, where the ICJ was tasked with interpreting the provision similar to Article XI,[261] the Court found that the parties could rely

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[257] *Ibid*. In this respect, Sadursky observes that proportionality as a type of analysis "is consensus-oriented because it acknowledges explicitly that there are valid constitutional arguments on both sides, and that the arguments outweighed by the opposing ones do not lose thereby their constitutional weight." Wojciech Sadursky, "Reasonableness and Value Pluralism in Law and Politics", in Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini, *Reasonableness and Law* (Heidelberg: Springer, 2009) 129 at 145. Whereas, Professor Vadi emphasizes that "[p]roportionality also limits the subjectivity of the adjudicator, empowering courts and tribunals to review state conduct in a significant fashion and providing a structured, formalized and seemingly objective test." Vadi, *Analogies in International Investment Law*, *supra* note 220, at 197.

[258] *Ibid* at 242.

[259] *Ibid*.

[260] *Ibid* at 239.

[261] In that case, the Court was tasked with interpreting the provision of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, which provided as follows: "The present Treaty shall not preclude the application of measures: ... (d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." Article XX, at para 1(d), Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran (1955), available at: <http://www.parstimes.com/law/iran_us_treaty.html>.

on this provision only if and to the extent that the relevant measures were proportionate.[262] Judge Higgins, in her separate opinion, considered the term "necessary" to bring into effect a proportionality analysis as a matter of general international law.[263] Since this case involved the examination of necessary measures in the context of use of force, it would be both appropriate and beneficial to briefly elaborate on the peculiarities of applying the proportionality analysis in that context.

According to Gardam, "theories legitimizing the use of force beyond self-defense all regard proportionality as an essential component."[264] Thus, she notes that the status of proportionality is considered "one of determinants of the legality of a state's use of force," in spite of its potential to undermine pleas of self-defense.[265] Generally, in the use of force context, a proportionality analysis is mainly used to determine whether it was necessary for a state to use force in achieving the legitimate ends pursued through using it.[266] As David Kretzmer explains, two questions arise in relation to such force. The first relates to the meaning of "necessary" in this context, and the second relates to weighing the harm caused by necessary measures against pursued legitimate ends.[267] In the context of *jus ad bellum*, in Kretzmer's view, the interpretation of the term "necessary" first entails a question of whether there were non-forcible means of

[262] *Oil Platforms*, *supra* note 78, at para 51.
[263] *Ibid*, (Higgins, J, concurring), para 48.
[264] Judith Gail Gardam, "Proportionality and Force in International Law", (1993) 87 (3) American Journal of International Law 391 at 403.
[265] *Ibid* at 404.
[266] Oliver Corten explains it as follows: "What is a disproportionate measure if not a measure that goes beyond what its purpose requires, that is, which is not necessary for the pursuit of that same purpose?". *See* Oliver Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2010) at 488. For further readings, *see* Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963); Anthony Arend & Robert Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge, 1993); Enzo Cannizzaro, "The Role of Proportionality in the Law of International Countermeasures", (2001) 12 European Journal of International Law 889.
[267] David Kretzmer, "The Inherent Right to Self-Defense and Proportionality in *Jus Ad Bellum*", (2013) 24 (1) European Journal of International Law 235 at 276 [Kretzmer].

dealing with the armed attack.[268] As Dinstein notes, in such a case, a state does not have to show that it has exhausted all available non-forcible means, but rather, it must only show that it made a reasonable attempt to defend itself by non-forcible means before resorting to force.[269] Once the resort to force has been established, a second necessity test arises: whether the means used by the state acting in self-defense were necessary to achieve the legitimate ends of self-defense in the specific context. Kretzmer further explains that this question is answered by asking whether there is a rational connection between the force used and the legitimate ends of its use. In examining this question, he observes that the reference is usually made to use of "excessive force", but admits that "[i]t is not clear whether the implications are that the same legitimate ends could have been achieved by less force, or whether the reference is to the final peg of the three pronged test [weighing and balancing prong]."[270] The last stage of proportionality is referred to as "narrow proportionality", and is used to examine whether the harm caused was excessive in relation to the benefits of using force. Although this stage is regarded as the very essence of proportionality test, it involves comparing values that are not quantifiable, and is considered an "inherently difficult issue".[271]

In a similar vein, the "weighing and balancing" prong is also considered problematic, and is viewed as a main obstacle for applying the proportionality test to interpreting Article XI of the

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[268] *Ibid* at 277.

[269] Yoram Dinstein, *War, Aggression and Self-Defense*, 3d ed (Cambridge: Cambridge University Press, 2001) at 207.

[270] Kretzmer, *supra* note 267, at 277.

[271] *Ibid*. Kretzmer explains this problematic aspect of "weighing and balancing" as follows:

> The problem in such statements is not the consideration of the damage caused as a factor in assessing proportionality, but the absence of a serious analysis of the other side of the coin: the necessity of the force which caused the damage in advancing the legitimate ends of self-defence. It is perhaps inevitable that such an analysis is likely to be biased. The states using force will invariably tend to give undue weight to the contribution of the force used to achieving their 'war aims', while outside observers will tend to see the concrete damage caused as the determining factor. Courts and other decision-making bodies do not seem equipped to decide between the conflicting perspectives. *Ibid* at 279.

U.S.-Argentina BIT. In this respect, Andrea Bjorklund observes that it would be difficult for arbitral tribunals to perform the analysis necessary under this prong, as it requires "a sophisticated analysis of the values a legislature or executive sought to balance in taking measures to address a crisis."[272] Burke-White and Von Staden seem to support this view by arguing that investment tribunals do not have sufficient "contextual knowledge, the expertise in the particular issues at stake as well as embeddedness in the social fabric of the dispute necessary in this balancing process."[273] Elaborating on concerns related to the last "weighing" stage of proportionality analysis, Caroline Henckels also observes that it involves balancing "incommensurable values - values that do not share a common measure, and therefore cannot be ranked in terms of importance."[274] Henckels further notes that at this stage of proportionality analysis, an adjudicator "must attempt to ascribe values on the same scale to competing interests and then judge their relative importance."[275] In her view, balancing the interests in this way "assumes either that these interests will be commensurable, or that it will always be possible to make rational judgements about incommensurable interests."[276] She further argues that the balancing of competing interests is "a highly subjective matter that is open to different interpretations," and performing it in a legitimate way requires adjudicators "to have a high degree of familiarity with the values held dear by local communities and the circumstances that

[272] Bjorklund, *supra* note 1, at 487.
[273] Burke-White & Von Staden, Standard of Review, *supra* note 7, at 340.
[274] Henckels, *Proportionality & Deference, supra* note 114, at 27.
[275] *Ibid* at 28. However, Xiuli argues that the balancing of competing interests under proportionality could also lead "to protecting the right of private property ***excessively*** and ***encroaching*** upon regulatory discretion of the host country stealthily." Han Xiuli, "The Application of the Principle of Proportionality in *Tecmed v. Mexico*", (2007) 6 Chinese Journal of International Law 635 at 635 [emphasis added].
[276] *Ibid* at 28. Sweets and Mathews also express their concerns with respect to the fact that proportionality allows adjudicators freedom in selecting their own value system, which will impact on finding one value more important than another. Alec Stone Sweet & Jude Mathews, "Proportionality Balancing and Global Constitutionalism", (2008) 47 Columbia Journal of Transnational Law 73 at 89.

preceded the introduction of the measure."[277] Therefore, Henckels doubts that adjudicators are able to perform such balancing efficiently, which in her view, may give rise to legitimacy concerns.[278] Similarly, Jürgen Kurtz also considers that adjudicators do not have potential to adequately assess "complex value-laden and empirical judgements" in the balancing stage of the proportionality analysis.[279] Thus, he suggests limiting judicial review of exception clauses such as Article XI to the first two steps of proportionality analysis, which he calls as "reasonable less restrictive means" test.[280] In the next chapter I will discuss the test suggested by Professor Kurtz, arguing that it may represent the development of state practice on examining whether state measures adopted to protect public interests were the only means to achieve the pursued objectives.

6.5. Importation of the Lest Restrictive Means (LRM) Test from the WTO Regime

6.5.1. The LRM Analysis Explained

According to Professor Kurtz, the LRM analysis focuses not on the relative importance between the measures chosen and the goal pursued by an invoking state, but rather, on the availability of alternative measures that achieve *the same level of benefit* (the same permissible

[277] *Ibid*. Burke-White and Von Staden also express similar concerns and argue that "prioritization of the values chosen by the polity requires both familiarity with those values and a degree of embeddedness within that polity." Burke-White & Von Staden, Standard of Review, *supra* note 7, at 336.

[278] Referring to other scholars, Henckels concludes as follows:

> [E]mploying proportionality analysis places too much discretion in adjudicators to engage in value judgements when deciding cases. Proportionality analysis can be a very far-reaching method of review in terms of its intrusiveness into governmental policy-making because the method permits adjudicators to substitute their judgment with respect to each stage of review. *Ibid*.

Contrary to this view, Leonhardsen argues that employing proportionality analysis by investment arbitral tribunals "may be regarded as an adjudicative response to the putative 'legitimacy crisis in investment treaty arbitration'." Leonhardsen, Exploring Proportionality, *supra* note 65, at 98.

[279] Kurtz, Adjudging the Exceptional, *supra* note 12, at 367.

[280] *Ibid* at 367. Caroline Henckels also suggests that, "adopting an appropriately deferential approach to proportionality analysis" provide a more lenient standard for examining the necessity of State measures to protect its essential interests. Henckels, *Proportionality & Deference*, *supra* note 114, at 29, 45.

objectives) as the chosen measure. Thus, the LRM analysis considers the impact of alternatives measure relative to the impact of a state's chosen measure on foreign investment.[281] It should also be noted that the LRM test is only relevant where the achievement of the objective is possible by more than one alternative measure, which would impair the right or interest to a lesser degree.[282] The existence of such alternative measures allows arbitral tribunals to find a state's adopted measure as not "necessary", which will result in the rejection of a state's defense under the NPM clause of the treaty.[283] In determining whether the measure at issue is "necessary" under the LRM test, tribunals must perform "a detailed appreciation of the measure's context, its objective and the probability of this being achieved through alternative means."[284] This, in turn, requires them to assess the potential (capacity) of the alternative measure to achieve the desired level of the pursued public policy goal with less restriction on foreign investments than the actual measure.

Professor Kurtz also attempts to explain the application of the LRM in the context of the Argentine cases. In this regard, he gives the example of one of the alternative measures identified by the *CMS* tribunal, which was "granting of direct subsidies to the affected population".[285] Under the LRM test, the adjudicator would assess whether the alternative measure (subsidization of consumers of utility services) achieves the same level of benefit with less restriction to foreign investment than the chosen measure (abrogation of investor rights under utility contracts). Kurtz

[281] Kurtz, Adjudging the Exceptional, *supra* note 12, at 368 (emphasis added). In general, as a constituent element of proportionality, the least restrictive means test requires a state to choose from all potential measures that would advance its desired objective as well as would least limit the protected right or interest under the relevant treaty. *See* Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012) at 317 [Barak].
[282] Julian Rivers, "Proportionality, Discretion and the Second Law of Balancing", in George Pavlakos ed., *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart, 2007**)** at 177.
[283] Kurtz, Adjudging the Exceptional, *supra* note 12, at 368. Also in Barak, *supra* note 270, at 317.
[284] Mitchell & Henckels, *supra* note 14, at 101.
[285] *CMS Gas Transmission Co v. The Argentine Republic*, ICSID Case No.ARB/01/8, Award, 12 May 2005 at para 323 [*CMS* Award].

acknowledges that the assessment will result in the state bearing the costs of subsidization, which might be burdensome for a state in terms of its budgetary constraints during the crisis. Therefore, taking into account the onerous nature of the LRM test from the perspective of respondent states' interests, Kurtz offers another version, which he calls a reasonable LRM analysis. This kind of test is similar to a previous one, with an additional feature. In addition to being less restrictive, the measure must be reasonable among the alternatives given the different costs involved for unreasonable administration and enforcement. According to the reasonable LRM test, the adjudicator is entitled to balance the different enforcement costs of alternative measures with their restriction on foreign investment, rather than balancing the benefit of the goal against the restriction to foreign investment, like in proportionality test.[286] To put it in another way, a state's chosen measure will be necessary under this test if every alternative measure achieves the same level of benefit with less restriction, but requires unreasonable administration and enforcement costs.[287] Kurtz notes that there will be no possibility for the adjudicator to substitute her own

[286] Kurtz, Adjudging the Exceptional, *supra* note 12, at 367. Unlike Kurtz, Peter Muchlinski argues for a presumption of reasonableness of a State's measure at issue, which has to be rebutted by prima facie evidence. *See* Peter Muchlinski, "Trends in International Investment Agreements - Balancing Investor Rights and the Right to Regulate the Issue of National Security", in Karl Sauvant, ed, *Yearbook on International Investment Law & Policy* 2008-2009, at 70-77.

[287] Professor Kurtz refers to *LG&E* tribunal's award in which it noted that Argentina's measure – suspension of contractual rights of foreign investors - was applied 'across the board' rather than through individual assessment of specific utility contracts. (*LG&E* Award, *supra* note 56, at para 241). Kurtz explains it as follows:

> Individual assessment would presumably entail the assessment of whether rights under a *particular utility contract should be abrogated given their likely contribution to the continuation and scope of the crisis*. A contractual right that would entitle a foreign investor to increase the tariff rate for electricity or gas supply might be treated differently to a contract involving the provision of telecommunications services. There could be a sensible case for abrogation of the latter but retention of the former. In this case, individual assessment is clearly a less restrictive alternative to the 'across the board' measure; it offers review of each case on its own merits and the possibility that some public utility contracts may escape abrogation of rights. Moreover, the enforcement cost of such an alternative is clearly far less than the extreme option of direct subsidization.

Kurtz, Adjudging the Exceptional, *supra* note 12, at 370 (emphasis added).

judgement for that of the state as to the appropriate level of benefit to flow from the chosen measures.[288]

In support of his stance, Kurtz notes that "sophisticated understanding of the appropriate and modest role implicit in the LRM test, as compared with proportionality review" was shown by the *Continental* tribunal,[289] which stated:

> In evaluating whether these alternatives were in fact reasonably available and would have avoided the adoption of the challenged measures, the Tribunal is mindful that it is not its mandate to pass judgment upon Argentina's economic policy during 2001- 2002, nor to censure Argentina's sovereign choices as an independent state. Our task is more modestly to evaluate only if the plea of necessity by Argentina is well-founded, in that Argentina had no other reasonable choice available, in order to protect its essential interests at the time, than to adopt these measures.[290]

Besides the aforementioned advantages, Jeremy Marwell also points out that the least restrictive means test can offer the benefits of transparency and predictability by requiring a "particularised comparison between the measure in question and a specific proposed alternative."[291] Thus, taking these into consideration, I found it important to revisit the practice of WTO dispute settlement bodies (DSB) with regard to interpreting the provisions similar to the NPM clauses in IIAs. In this respect, I will look into how the WTO DSBs applied the LRM test in interpreting such clauses in certain trade disputes.

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[288] Jürgen Kurtz, "Delineating Primary and Secondary Rules on Necessity at International Law", in Tomer Brude and Yuval Shany, *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing, 2011) at 254 [Kurtz, Primary and Secondary Rules].

[289] *Ibid* at 255.

[290] *Continental*, *supra* note 60, at 199.

[291] Jeremy Marwell, "Trade and Morality: The WTO Public Morals Exceptions after Gambling", (2006) 81 New York University Law Review 802 at 829. In a general context, Yuongjin Jung and Sangwook Daniel Han argue that diverging from the rules of International Trade Law may lead to "a general problem of fragmentation of international law and other associated issues such as forum shopping, overlapping of jurisdictions, lack of finality of decisions and risk of conflicting judgements." *See* Youngjin Jung and Sangwook Daniel Han, "What to do with the Dilemma facing the State of Necessity Defense under the Investment Treaties and How to Interpret the NPM Clause?" (2011) 12 Journal of World Investment and Trade at 407.

6.5.2. "Necessity" Provisions in WTO Agreements

Similar to treaty NPM clauses found in the international investment regime, the WTO regime also contains exceptions under which states may avoid responsibility if certain conditions are satisfied. Article XX of the GATT, which is regularly invoked by WTO members in relation to violations of this agreement's provisions, is such an exception. GATT Article XX reads as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, *nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures*:
> (a) necessary to protect public morals;
> (b) *necessary* to protect human, animal or plant life or health;
> (d) *necessary* to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement, including those relating to customs enforcement, enforcement of [lawful] monopolies … , the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.....[292]

As can be seen, the text of Article XX lists several public policy objectives, particularly non-economic societal values, which can be safeguarded by the adoption of certain state measures in circumstances of necessity. It is well known that the underlying objective of WTO regime is to pursue trade liberalization. However, at the same time, it must provide states with the freedom to pursue their legitimate national policies. Taking this into account, the drafters included general exceptions (Article XX) into the GATT to balance these competing interests.[293]

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[292] Article XX, General Agreement on Tariffs and Trade 1994 [emphasis added] [GATT]. Available at:< http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20>.

[293] To ensure the balance of interests, the drafters included the chapeau, which is an introductory part of the clause. The Appellate Body in the U.S.-Shrimp case noted that the chapeau: "...embodies the recognition on the part of

Therefore, the purpose of this provision is to "enumerate the various categories of government acts, laws or regulations, which WTO members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization."[294]

Reliance on GATT Article XX involves a two-tier process. The party invoking the exception must first establish the substantive consistency of its measure with one of the sub-paragraphs. In this regard, the measure must fall within the scope of policies mentioned in the sub-paragraph and it must be proved necessary to achieve the specific policy objective. Second, the measure must be applied consistently with the chapeau,[295] which means that the invocation of the exception is conditioned by subsequent compliance with the chapeau's substantive requirements.[296] The purpose of this requirement is to prevent the abuse of exceptions by ensuring that the measures were not adopted in an arbitrary or discriminatory manner.[297] In other words, discrimination will be arbitrary or unjustifiable if it is not rationally connected to the

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WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in at paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand." *See United States - Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R (12 October 1998) at para 156 [AB, *US-Shrimp*]. Available at: <https://www.wto.org/english/tratop_e/dispu_e/58abr.pdf>.

[294] *United States-Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, [WT/DS2/R, (Panel Report), at para 65[*U.S.-Gasoline*]. Available at: <http://www.wto.org/english/tratop_e/dispu_e/2-9.pdf>.

[295] The introductory words of Article XX are called the "chapeau" of the clause, which prohibits measures falling within the permissible public policy objectives from constituting: 1) arbitrary discrimination; 2) unjustifiable discrimination; or 3) a disguised restriction on international trade. All three requirements are deemed to "impart meaning into each other" and "can be read side by side". *Ibid* at para 25**.**

[296] Thus, the chapeau effectively acts as a second check to determine whether the measure is actually being applied in good faith by Member State in circumstances where it is necessary to achieve a legitimate objective.

[297] Peter Van Den Bossche, *The Law and Policy of World Trade Organization: Text, Cases and Materials*, 2nd ed (Cambridge: Cambridge University Press, 2008) at 620. Even if the respondent demonstrates that its measure is "necessary" under one of the sub-clauses of GATT Article XX or GATS Article XIV, the exception is not made out unless the respondent can also show that the measure is not applied in a manner constituting "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade". It should also be noted that these requirements may be equated with the nexus requirement of NPM clauses in BITs.

objective according to which the measure has been provisionally justified under one of the sub-clauses of GATT Article XX.[298]

The other WTO agreements, such as the GATS,[299] SPS[300] and TBT[301] agreements also contain similar provisions. Even though their texts may have some commonalities with GATT Article XX,[302] there are several significant differences which need to be pointed out.[303] For instance, Article 2.2 of the TBT agreement requires technical regulations at issue to be "not more trade-restrictive than necessary to fulfill a legitimate objective", which evidences an automatic importation of a LRM test, which is not present in the text of GATT Article XX.[304] A similar provision is also contained in the SPS agreement, which requires the SPS measures to be "not more trade-restrictive than required to achieve their appropriate level of ....protection, taking into account technical and economic feasibility."[305] The most important distinction is that, unlike GATT's necessity provision, which is phrased as an exception to States' obligations, the SPS and TBT necessity requirements impose positive obligations, which shift the burden of proof from

[298] Appellate Body Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 03/12/2007, at para 227 [AB, *Brazil-Tyres*].
[299] General Agreement on Trade in Services, April. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 United Nations Treaty Series 183, 33 I.L.M. 1167 (1994).
[300] Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) [SPS].
[301] Agreement on Technical Barriers to Trade (15 April 1994) WTO Agreement, Annex IA [TBT].
[302] The SPS preamble echoes the chapeau of article XX and sub-clause **(b),** indicating from the outset that the purpose of the agreement is to achieve a balance between allowing Members sufficient policy space to regulate with regard to SPS measures while disciplining protectionist measures. The TBT preamble also contains a very similar paragraph with an additional paragraph affirming the Members' desire to ensure that such regulations do not constitute "unnecessary obstacles to international trade". *See* TBT preamble, at paras 5 and 6.
[303] This does not concern GATS Article XIV, since its content is identical to GATT Article XX.
[304] Another difference is that the list of permissible public policy objectives under TBT agreement is open-ended. They are "inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment." TBT, *supra* note 301, Article 2.2.
[305] SPS, *supra* note300, Article 5.6. This provision also contains a footnote which requires that the measure at issue be applied in the absence of reasonably available alternative measures.

the defending state to the complaining state to show that the measures were more trade restrictive than necessary.[306]

The textual differences in the content of necessity provisions in WTO agreements show that they are more developed in the TBT and SPS agreements.[307] In particular, the relevant provision of the SPS agreement clarifies the requirements of the LRM test much further and provides the tribunals with a detailed framework for interpreting the necessity clauses. Specifically, it establishes the requirements which need to be met cumulatively to find the alternative measure necessary: an alternative measure must: a) achieve the appropriate level of ....protection; b) be significantly less restrictive to trade; c) be technically and economically feasible.[308] These elements provide only a theoretical background on the features of the LRM test and do not present its practical aspects. Therefore, in the next section I will look into the relevant cases in which WTO DSBs dealt with the application of the LRM test in practice.

[306] To be precise, the complainant must make a *prima facie* case that alternative approaches are reasonably available and that the measure is therefore not necessary before the burden shifts to the respondent to demonstrate that the proposed measures are not reasonably available.

[307] It should be noted that both agreements are actually intended to expand and supplement the disciplines contained in the GATT 1994. One of the stated purposes of the TBT Agreement is to "further the objectives of GATT 1994," while the SPS Agreement is designed to "elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)." TBT, *supra* note 301, Preamble; SPS, *supra* note 300, Preamble.

[308] Meeting these requirements for successfully invoking the necessity clause was also confirmed in *Australia-Salmon* case, which involved Australia's import ban on uncooked salmon intended to keep fish diseases out of Australia. *See* AB Report, *Australia-Measures Affecting Importation of Salmon*, WT/DSl8/AB/R, 20 October 1998, at para 199 [AB, *Australia-Salmon*]. Available at: < https://www.wto.org/english/tratop_e/dispu_e/367abr_e.doc>.

6.5.3. Revisiting WTO Cases on Interpreting the Meaning of "Necessary"

The interpretation of "necessary" has played an essential role in the successful invocation of Article XX in practice of WTO DSBs. It was first interpreted by the GATT Panel in *US- Section 337 of the Tariff Act of 1930*[309] when the U.S. claimed that the measure in question was necessary under GATT article XX (d) to secure compliance with domestic patent laws. The U.S. argued that section 337 provided the only means of enforcement of U.S. patent rights against imports of products manufactured abroad by means of a process patented in the U.S. In this regard, the Panel stated:

> A contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" if an alternative measure which it could *reasonably* be expected to employ and which is *not inconsistent* with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures *reasonably available* to it, that which entails the *least degree of inconsistency* with other GATT provisions.[310]

In determining whether such alternatives existed, the Panel cited the existence of other possible measures without regard to whether these alternatives could achieve the level of protection desired by the U.S.[311] Significantly, the Panel stated that the LRM requirement did not require a change in either the Member's chosen level of enforcement or the substance of the law, provided that the law did not distinguish between domestically produced and imported goods.[312] The holdings of the tribunal laid the foundation for interpreting the meaning of "necessary", and thus contributed to the formation of the LRM test in WTO practice. Two main elements of the LRM test can be drawn from the tribunal's holdings: the alternative measure must be 1)

[309] *US- Section 337 of the Tariff Act of 1930*, BISD 365/345, November 7, 1989 [*US- Section 337*]. Available at: <http://www.wto.org/english/tratop_e/dispu_e/87tar337.pdf>.
[310] *Ibid* at para 5.26.
[311] *Ibid* at para 5.33.
[312] *Ibid* at para 6.1.

consistent with treaty obligations or entail the least degree of inconsistency; 2) be reasonably available to employ.

The same elements were mentioned by the dispute settlement Panel in the *Thai-Cigarettes* case.[313] In this case, Thailand argued that the import prohibition that it had instituted on tobacco and tobacco products while simultaneously allowing the sale of domestic cigarettes was necessary "to protect human life or health" under article XX(b).[314] The Panel noted that article XX(b) "clearly allowed contracting parties to give priority to human health over trade liberalization" and accepted this to be Thailand's goal.[315] It further stated that any measures implemented to achieve this goal could only be considered necessary if "there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives."[316] The Panel found that alternatives existed with regard to both Thailand's qualitative and quantitative aims.[317] Particularly significant was the Panel's acceptance of the U.S.-proposed alternative to reduce demand: a ban on the advertisement of both domestic and foreign cigarettes, despite Thailand's arguments and evidence suggesting that such measures were ineffective to achieve its stated aims.[318] However, it did not give further consideration on the viability of these alternatives in Thailand's social, political and economic circumstances.

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[313] *Thai-Cigarettes*, DS10/R- 37S/200, adopted on 7 November 1990.
Available at: <http://www.wto.org/english/tratop_e/dispu_e/90cigart.pdf>.
[314] Thailand defended its adopted measures on two grounds. First, it argued that the government was concerned about the adverse health impact from the growing use of cigarettes by the Thai population. Second, it argued that imported cigarettes contained certain additional chemicals, such as those designed to lower tar and nicotine content, which might pose a health risk. *Ibid* at para 21, 28.
[315] *Ibid* at para 76.
[316] *Ibid* at para 75.
[317] *Ibid* at paras 77-81.
[318] *Ibid* at para 27. As for the argument that imported cigarettes contained potentially dangerous chemicals or additives, the panel also concluded that an outright ban on imports was not "necessary" to address the problem, and suggested that Thailand could simply ban cigarettes containing specific additives that were dangerous or unhealthy.

Analysing the approaches taken by these Panels, Gisele Kapterian points out two significant pitfalls of applying the LRM test.[319] First, she notes that, by deciding in favour of alternatives without enquiring into their ability to achieve the pursued objectives, Panels judged the value of the policy goal in an indirect way, which undermined the Member's right to choose its own level of protection. In her view, the implication of this kind of reasoning is to limit a WTO member's freedom to pursue non-trade goals if they negatively affect trade to a degree that a Panel establishes as unacceptable. Second, she views such decisions as lacking sensitivity to the practical regulatory experience of governments in protecting their public interests, and thus evokes intense criticism towards them.[320] In this regard, Carlos Correa also criticizes the Panels for putting themselves in the position of policy-makers in determining the necessity of WTO members' public policy measures.[321] According to him, the Panels "had to second-guess domestic regulators without necessarily possessing the expertise and an adequate knowledge of the particular circumstances in which a measure has been adopted."[322]

Gisele Kapterian further argues that the decisions do not contain any substantive consideration of the term "reasonably available" and the manner of its application, which means that the claim of necessity could be defeated in the mere existence of a hypothetically available alternative.[323] This issue is mainly related to the legal uncertainty that prevails due to a WTO

As to other additives, it could employ non-discriminatory labeling requirements that ensured disclosure to the consumer. *Ibid* at para 77.

[319] Gisele Kapterian, "A Critique of WTO Jurisprudence on 'Necessity'", (2010) 59 International Comparative Law Quarterly 89 [Kapterian].

[320] *Ibid* at 103.

[321] Carlos Correa, "Implementing National Public Health Policies in the Framework of the WTO Agreements", (2000) 34 (5) Journal of World Trade 89 at 96 [Correa].

[322] *Ibid.*

[323] Kapterian, *supra* note 319, at 103. Correa also notes that "the application of the "necessity" test has not involved a consideration of whether the alternative less restrictive measures were reasonably available", Correa, *supra* note 321, at 96.

member's inability to determine in advance which measures involved the least degree of inconsistency with other GATT provisions.[324]

Another scholar, Alan Sykes, considers that the cases in which the LRM test was used are consistent with one exception.[325] In his view, "the test is a crude cost-benefit balancing that is highly attentive to error costs and uncertainty."[326] He classifies it as "crude" because WTO decision makers are not actually involved in quantifying the costs and benefits of alternative regulatory policies in dollars or other metric units. Instead, their approach in assessing the effect of alternative policies on trade, which precedes the weighing stage, has an impressionistic and qualitative character. The administrative difficulties and resource costs of alternative policies are also of concern.[327] He explains this by comparing measures adopted to pursue objectives differing in degree of importance. In his view, if the regulatory objective entails some highly valued interest, such as the protection of human life, then the challenged regulation will be upheld if there is any doubt that the proposed alternative can achieve the same level of efficacy. He notes that the costs of an erroneous decision—in this case, the loss of life—would be extremely high, and even a minor erroneous decision will not cause the adopted measure to be a breach.[328] Conversely, when the regulatory objective is related to some less important interest and the alternative measure is substantially less restrictive on trade, decision makers are supposed to be able to condemn a challenged measure even if the efficacy of the alternative measure may be less than that of the challenged measure.[329]

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[324] Deborah Akoth Osiro, "GATT/WTO Necessity Analysis: Evolutionary Interpretation and its Impact on the Anatomy of Domestic Regulation", (2002) 29 (2) Legal Issues of Economic Integration 123 at 127.
[325] Alan Sykes, "The Least Restrictive Means", (2003) 70 (1) University of Chicago Law Review 403 at 415 [Sykes, LRM].
[326] *Ibid.*
[327] *Ibid* at 416.
[328] *Ibid.*
[329] *Ibid.*

It can be observed from the analysis of these early cases on necessity that the LRM test in the WTO context is mainly biased towards protecting free trade, as opposed to giving more deference to its member states to protect their threatened public interests. The method of balancing the interests at stake seems to be one-sided by only taking into account the less restrictive character of alternative measures on trade and the level of seriousness of objectives pursued by challenged measures of member states. It does not put sufficient emphasis on the capacity of those proposed alternative measures to perform the same level of efficacy in protecting the public policy objectives of member states. Thus, the panels appear to overlook this aspect when balancing the benefits of both challenged and alternative measures.

6.5.4. Development of WTO Jurisprudence on the LRM Analysis

(i) The *Korea-Beef, EC-Asbestos* and *US-Gambling* Cases

The approach of WTO DSBs to interpreting the meaning of "necessary" contained in the regime's agreements has been developed in subsequent cases. After the *Thai-Cigarettes* decision, WTO tribunals have examined the issue of necessity with a much "softer" balancing approach. This new approach was applied by the AB in the *Korea-Beef* case.[330] In that case, Korea claimed that a requirement that domestic and imported beef be sold in separate stores was necessary to prevent retailers from fraudulently labeling imported beef as domestic.[331] Korea relied on GATT Article XX (d), which applies to measures "necessary to secure compliance with laws or

[330] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161 and 169/AB/R (adopted 10 January 2001), [AB, *Korea-Beef*]. Available at: < https://www.wto.org/english/tratop_e/dispu_e/161-169abr_e.pdf>.
[331] In this case, Korea unsuccessfully claimed that its dual retail system segregating imported and domestic produced beef was justified under article XX(d), alleging that such differential treatment was necessary to protect consumers against fraudulent practices prohibited under its Unfair Competition Act.

regulations which are not inconsistent with" GATT, including measures concerning "the prevention of deceptive practices."[332]

In determining whether the measure was "necessary",[333] the AB identified two factors for consideration when adopting the "weighing and balancing" approach. The first is the extent to which a measure contributes to the realization of the end pursued, and the second is the extent to which the compliance measures produces restrictive effects on international commerce.[334] As a result of this test, measures with a lesser impact on international commerce "might more easily be considered 'necessary' than a measure with intensely restrictive effects."[335] The AB pointed out that a "weighing and balancing" approach contributes to determining the existence of reasonable availability of an alternative measure.[336] Since Korea had failed to prove that the alternative measures were not reasonably available to it, the AB concluded that the measure in question failed under Article XX (d).[337]

[332] GATT Article XX (d), *supra* note 292.

[333] In defining the meaning of 'necessity', the AB made the following finding: "We believe that, as used in the context of Article XX(d), the reach of the word 'necessary' is not limited to that which is 'indispensable' or 'of absolute necessity' or 'inevitable'. Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfill the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception." AB, *Korea-Beef*, *supra* note 330, at para 161.

[334] *Ibid* at para 163. However, the AB pointed out the relative importance of the objective pursued by the actual measure, and held that "in appropriate cases [tribunals could] take into account the relative importance of the common interests or values that the law or regulation" is intended to protect. The AB further explained that "[t]he more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument." *Ibid* at para 162.

[335] *Ibid*. Unlike in previous cases, the adjudicators in *Korea-Beef* employed an analysis that puts emphasis not on the relative importance of the competing interests at stake (protecting policy objectives of Member States versus trade liberalization) but on the measures' (both the actual and the alternative) potential to achieve the pursued policy objective at less restriction on free trade.

[336] *Ibid* at para 166.

[337] However, some scholars criticize the AB's finding related to giving broad discretion to WTO tribunals in assessing the importance of the policy objective pursued by the respondent's measure. They consider it to undermine the right of the responding state to determine its own level of protection against the issue to which the measure is directed. *See* Neumann and Turk, *supra* note 230, at 232-233; Kapterian, *supra* note 319, at 1101.

The AB in the *EC-Asbestos* case[338] is also considered to have significantly contributed to the development of the LRM test.[339] Here, the AB paid special attention to the concept of "reasonably available". First, it affirmed the LRM test used by the AB in *Korea-Beef* as an integral part of determining whether a public policy objective could be achieved by a reasonably available, less trade-restrictive alternative measure.[340] In this regard, the AB held that this test must also take account of factors such as the extent to which an alternative measure would achieve the pursued end and the importance of the interest and values pursued by the member.[341] Second, it clarified the meaning of "reasonableness" by stating that a measure with less restriction on trade could not be considered as "a reasonable alternative" if it does not have the potential to achieve the same level of protection sought.[342] The AB also noted that an "alternative measure did not cease to be reasonably available simply because the alternative measure involved administrative difficulties for the Member."[343] At the same time, the AB afforded a great extent of deference to the respondent, and held that every Member had an "undisputed right to choose the level of protection they consider in a given situation."[344] Based on this, the AB

[338] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/ DS135/AB/R (adopted 5 April 2001) [AB, *EC-Asbestos*].
Available at: < https://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf>.
[339] The appeal involved an examination of whether a French ban on the manufacturing, sale and import of asbestos fibres introduced to protect human life and health was 'necessary' under article XX(b).
[340] AB, *EC*-Asbestos, *supra* note 336, at para 172. The AB in *Brazil-Retreaded Tyres* case stated that even if the consideration of the relevant factors gives rise to the conclusion that the measure is necessary, "*this must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued*." AB, *Brazil-Tyres*, *supra* note 298, at para. 156 [emphasis added].
[341] *Ibid*.
[342] AB, *EC-Asbestos*, *supra* note 338, at para 174.
[343] *Ibid* at para 169.
[344] *Ibid* at para 168. The determination of the appropriate level of protection is considered by the AB to be "a prerogative of the Member concerned and not of the panel or of the Appellate Body." Therefore, the AB in the *Australia-Salmon* case also rejected the Panel's assertion that it could substitute its own reasoning on determining the level of protection and held that the adjudicating body had to accept the Member's expressed level of protection without regard to the level actually achieved by the chosen measure. AB, *Australia-Salmon*, *supra* note 308, at para 199. Also *see* AB, *Korea-Beef*, *supra* note 330, at para 176, 178.

established the level of protection chosen by respondent as a benchmark for other reasonably available alternative measures.[345]

As can be seen, the AB in the *EC-Asbestos* case introduced two main clarifications to the LRM test. First, the alternative measure, besides being less trade restrictive, is considered "reasonably available" if it achieves the same level of protection sought by the measure at issue. Second, states are given some degree of deference in choosing the level of protection, and the alternative measure should have the potential to achieve that level. Thus, the question remaining in determining whether a member state successfully invoked GATT Article XX is whether a state has proven that there is no such reasonably available alternative measure.[346]

In the *US-Gambling* case, in which the U.S.'s defence was based on the public moral exception under GATS Article XIV(a), the AB reaffirmed that "a reasonably available" alternative measure must be a measure that would preserve for the responding member state its right to achieve its desired level of protection with respect to the pursued policy objectives.[347] Most importantly, the AB made further clarifications to the meaning of "reasonably available" by finding that "....an alternative measure may be found not to be "reasonably available," however,

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Also under the SPS Agreement, each WTO Member is free to determine its own appropriate level of sanitary or phytosanitary protection (SPS Article 2). The chosen level of protection is generally not questioned by the panels, and WTO Members could well pursue a zero-risk approach (if it complies with the other conditions of the SPS Agreement). However, the measure chosen to attain that level of protection will be assessed as to whether it is adequate and complies with the necessity requirements laid down in the SPS Agreement.

[345] *Ibid* at para 174. It should be noted the degree of deference given to a Member States to choose the level of protection varies with the importance of the pursued policy goal. In certain circumstances, mainly observed in the defining the concept of 'public morals', the tribunals refrain from giving absolute deference to Members States. *See* AB, *US-Gambling*, *supra* note 235, at para 6.461.

[346] John Emslie argues that, by holding that the determination of whether an alternative measure is reasonably available turns on the extent to which the alternative measure contributes to the realization of the end pursued, the AB in *EC-Asbestos* case "took a more narrow view of the term "reasonably available"." He further notes that "by incorporating the holdings of various other panel reports that struck down assorted Article XX defenses, [the AB] did not provide much opportunity for subsequent attempts to eliminate reasonably available alternatives." John J. Emslie, "Labelling Programs as Reasonably Available Least Restrictive Trade Measure under Article XX's Nexus Requirement", (2005) 30 Brooklyn Journal of International Law 485 at 523.

[347] AB, *US-Gambling*, *supra* note 235, at para 308. *See* also *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/ DS302/AB/R (19 May 2005), at para 70.

where *it is merely theoretical in nature*, for instance, where *the Responding Member is not capable of taking it,* or where *the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties*."[348] This finding of the AB contains the main features required for the alternative measure to be "reasonably available". First, it should be practically applicable at the time of necessity circumstances, and a member state must be capable of adopting it right at that time without any delay. This is mainly related to the practical availability of the measure and its adoption at the reasonable timing framework. Second, the adoption of that measure must not put excessive or unreasonable burden on the state in terms of implementation costs and technical difficulties. This finding of the AB substantially developed the requirements of the LRM test, and therefore was used by the *Continental* tribunal as supportive evidence from the WTO jurisprudence in applying the LRM test to interpreting the nexus requirement of the NPM clause in the U.S.-Argentina BIT.[349] It should be noted that the WTO Secretariat commented that the decisions discussed above shifted the interpretation of the meaning of "necessary" from a "least-trade restrictive" approach to a "less-trade restrictive" one.[350] As Neumann and Turk observe, this kind of approach creates a more "relaxed" necessity test, which provides a greater margin of appreciation to WTO members.[351]

[348] AB, *US-Gambling*, *supra* note 235, at para 308 [emphasis added].
[349] *Continental* Award, *supra* note 60, at para 195. The analysis of the *Continental* tribunal's decision was presented in detail in Chapter IV.
[350] Note by the Secretariat, "GATT/WTO Dispute Settlement Practice relating to GATT Article XX, at paragraphs (b), (d) and (g)"', WTO Doc. WT/CTE/W/203, 8 March 2002, at 42.
[351] Neumann & Turk, *supra* note 230, at 211.

(ii) *China-Audiovisual Products* and *EC-Seals* cases

The issues of alternative measures to the objectives pursued and their reasonable availability for adoption were at the center of the AB's assessment in two more recent cases, *China-Audiovisual Products*[352]and the *EC-Seals*,[353] in which the AB had to decide on the public morals exception in Article XX(a) of the GATT. In the *China-Audiovisual Products* case, the AB was tasked with assessing the Panel's finding on the measure involving a state plan regulating the total number and structure of companies importing publications. The AB held that the Panel erred when it found that China satisfied its burden of proof with respect to the "material contribution" of this measure to the protection of public morals.[354] In examining whether China could have used a less restrictive means to protect its public morals, the AB held that such alternative means may not be found "reasonably available" if it is "*merely theoretical in nature*, for instance, where the responding party is not capable of taking it, or where the measure imposes an undue burden on that Member, such as 'prohibitive costs or substantial technical difficulties'."[355] The AB clarified the relevant burden of proof as follows:

> This burden does not imply that the responding party must take the initiative to demonstrate that there are *no* reasonably available alternatives that would achieve its objectives. *When, however, the complaining party identifies an alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains "necessary" in the light of that alternative* or, in other words, why the proposed alternative is not a genuine alternative

[352] The AB Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, (21 December 2009) at para 240 [AB, *China-Audiovisual Products*]. Available at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm>.
[353] The AB Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, 22 May 2014 (WT/DS400/AB/R-WT/DS401/AB/R) [AB, *EC-Seals*].
Available at: < https://www.wto.org/english/tratop_e/dispu_e/400_401abr_e.pdf>.
[354] AB, *China-Audiovisual Products*, *supra* note 352, at paras 297–299.
[355] *Ibid* at para 318 [emphasis added]. The AB also noted that at the same time the "reasonably available" alternative means "must be a measure that would preserve the responding party's right to achieve its desired level of protection with respect to the objective pursued under Article XX GATT 1994." *Ibid.*

> or is not "reasonably available". If a responding party demonstrates that the alternative is not "reasonably available", in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be "necessary".[356]

As for the alternative means, the U.S. suggested protecting public morals through putting content review under the sole responsibility of the Chinese Government. However, China argued that this proposal would involve "tremendous restructuring" and would "obviously put on China an excessively heavy financial and administrative burden."[357] The AB held that China did not provide sufficient evidence to the Panel "substantiating the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system."[358] The AB further noted that in its appeal China did not point to "specific evidence in the Panel record that would allow us to conclude that the Panel erred in failing to attribute sufficient significance to the evidence of financial and administrative burden that may attach to the proposed alternative measure."[359] As for China's arguments, the AB held that "adopting any alternative measure will, by definition, involve some change, and this alone does not suffice to demonstrate that the alternative would impose an undue burden."[360]

A more complex analysis of the "necessity" of state measures within the meaning of GATT Article XX(a) was performed in the *EC-Seals* case, in which the AB examined complaints made by Canada and Norway regarding the Panel's analysis with respect to the EU seal regime. Particularly, the AB had to assess the Panel's analysis on the importance of the objective of addressing EU public morals concerns regarding seal welfare, the trade-

[356] *Ibid* at para 319. [emphasis added]
[357] *Ibid* at para 328.
[358] *Ibid.*
[359] *Ibid.*
[360] *Ibid.*

restrictiveness of the EU seal regime, the contribution of the prohibitive and permissive aspects of the EU seal regime to the objective, and whether the alternative measure proposed by the complainants was reasonably available.[361]

In its analysis, the AB first observed that the necessity of the measure "cannot be determined by the level of contribution alone, but will depend on the manner in which the other factors of the necessity analysis, including a consideration of potential alternative measures, inform the analysis."[362] Referring to the AB's decision in the *Brazil-Retreaded Tyres* case, the AB found it "consistent with [its] understanding that the EU Seal Regime, even if it were highly trade-restrictive in nature, could still be found to be "necessary" within the meaning of Article XX(a), subject to the result of a weighing and balancing exercise under the specific circumstances of the case and in the light of the particular nature of the measure at issue."[363] Thus, the AB rejected the complainants' contention that the Panel was required to apply a standard of "materiality" as a generally applicable pre-determined threshold in its contribution analysis.[364]

Then, the AB assessed Canada's and Norway's claims related to the Panel's finding that the alternative measure was not reasonably available. The complainants requested that the AB reverse the Panel's finding that the proposed alternative measure (which consisted of market access for seal products that would be conditioned on compliance with animal welfare standards,

[361] AB, *EC-Seals*, *supra* note 353, at 174.
[362] *Ibid* at 153, para 5.215. It should be noted that most of the AB analysis dealt with examining the claims and arguments of Canada and Norway, which were related to the Panel's contribution analysis in the context of Article 2.2 of the TBT Agreement.
[363] *Ibid*. The AB noted that "the very utility of examining the interaction between the various factors of the necessity analysis, and conducting a comparison with potential alternative measures, is that it provides a means of testing these factors as part of a holistic weighing and balancing exercise, whether quantitative or qualitative in nature." *Ibid*.
[364] *Ibid* at para 5.216.

and certification and labelling requirements) was not reasonably available.[365] They argued mainly that the Panel failed to assess the alternative measure against the actual contribution of the EU seal regime, but did so against a standard of complete fulfillment of the objective. The complainants argued that the Panel erred in finding the alternative measure as not reasonably available, because complete fulfillment of the objective involves a higher degree of contribution than what was found under the EU seal regime.[366] In this regard, the AB held as follows: "[H]aving identified certain conceptual limitations of any certification system in fulfilling the objective of addressing EU public moral concerns regarding seal welfare, the Panel expressly refrained from making a finding regarding the contribution of the alternative measure."[367] Accordingly, the AB did not agree with the complainants that the Panel "erroneously considered the EU Seal Regime to have achieved complete fulfillment of the objective, and then to have measured the alternative measure against such an inflated benchmark."[368]

Moreover, the AB noted that it does not consider the Panel's reference to more stringent hypothesized regimes "as somehow suggesting that it was comparing the alternative measure against a benchmark of complete fulfillment of the objective,"[369] but rather it understood "the Panel to have suggested that even more stringent certification systems presented significant difficulties, in terms of both their reasonable availability and their contribution to the objective."[370] In sum, having assessed the Panel's reasoning and findings with respect to the

[365] *Ibid*, Canada's appellant's submission, para 299; Norway's appellant's submission, para 580.
[366] *Ibid*, Canada's appellant's submission, para 261; Norway's appellant's submission, paras 554, 579.
In this respect, the AB notes as follows: "In Canada's and Norway's view, by requiring that the alternative measure limit market access to only those seal products that were derived from humanely killed seals, the Panel holds the alternative measure to a higher standard that the EU Seal Regime could not meet." AB, *EC-Seals*, *supra* note 353, at 168, para 5.3.2.5.1.
[367] AB, *EC-Seals*, *supra* note 353, at 169, para 5.267.
[368] *Ibid*.
[369] *Ibid* at 170, para 5.272
[370] *Ibid*. In this respect, the AB further stated as follows:

alternative measure, the AB held that "the Panel undertook considerable efforts to understand what impact hypothetical variations of the alternative measure might have on the objective of the EU Seal Regime,"[371] and found that the Panel had not erred in concluding that "the alternative measure is not reasonably available."[372] Finally, noting the Panel's finding, the AB held as follows:

> [A]lthough the contribution of the EU Seal Regime to the fulfillment of its objective is lowered by the implicit and explicit exceptions of the measure, the complainants have not clearly defined an alternative measure in respect of its separate components and their cumulative capability to address the moral concerns of the EU public.[373]

Based on the foregoing, the AB rejected Canada's and Norway's arguments related to the Panel's analysis under GATT Article XX(a) and upheld the Panel's finding that "the EU Seal Regime is provisionally deemed necessary within the meaning of Article XX(a) of the GATT 1994."[374]

As the Panel stated, more stringent certification systems would likely present difficulties in terms of ensuring adequate animal welfare standards and accurately distinguishing between humanely and inhumanely killed seals, and lead to increased market access accompanied by more seal killings, and, consequently, more inhumanely killed seals. Indeed, the Panel did not suggest that the stringent alternative measure achieved complete fulfilment, but rather that it would be difficult to implement and enforce, and would lead to increased numbers of inhumanely killed seals. Alternatively, the Panel noted, a more lenient regime might very well attenuate some of these limitations, but then would have the consequence – by more weakly enforcing animal welfare standards and any distinctions drawn between humanely and inhumanely killed seals – of achieving a weak contribution in respect of EU public moral concerns regarding seal welfare. *Ibid*.

[371] *Ibid* at para 5.279.

[372] *Ibid*.

[373] *Ibid* at para 5.280. The AB further noted that:

> Under the circumstances of this case, it is not clear to us how much more could have been required of the complainants in articulating the nature and scope of the alternative measure. We have certain doubts about the Panel's criticism, particularly given what seems to be substantial engagement between the Panel and the parties regarding the features of such a certification scheme and its ability to contribute to the objective. *Ibid*.

[374] *Ibid* at 191.

6.5.5. The LRM Analysis under TBT and SPS Agreements

The more "relaxed" approach of WTO DSBs to interpreting the meaning of "necessary" was also observed under TBT and SPS agreements. The AB's findings in the *U.S.-Tuna II*[375] and the *U.S.-COOL*[376] cases under Article 2.2 of the TBT agreement significantly contributed to the elaboration of the LRM test. In *U.S.-Tuna II*, the AB noted that the analysis to determine whether the challenged measure is more trade restrictive than necessary involves the following:

> [A] comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with that of possible alternative measures that may be reasonably available *and* less trade restrictive than the challenged measure, *taking account of the risks non-fulfillment would create*.[377]

Unlike the LRM test under GATT Article XX, the LRM analysis under TBT Article 2.2 entails the assessment of an additional factor, which relates to evaluating "the nature of the risks at issue and the gravity of consequences that would arise from non-fulfillment of the objective(s) pursued by the Member through the measure."[378] Therefore, the AB pointed out that member states are obliged to consider such risks of non-fulfillment when comparing the challenged measure with a possible alternative measure.[379]

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[375] *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 16 May 2012 [AB, *U.S.-Tuna II*].
Available at: < https://www.wto.org/english/tratop_e/dispu_e/381abr_e.pdf>.

[376] *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/DS386/AB/R, 29 June 2012, [AB, *US-COOL*]. Available at: < https://www.wto.org/english/tratop_e/dispu_e/384_386abr_e.pdf>.

[377] AB, *U.S.-Tuna II*, *supra* note 375, at para 320 [emphasis added]. This requirement is contained in TBT Article 2.2.

[378] *Ibid* at para 322. According to TBT Article 2.2, the assessment of such risks involves, *inter alia,* consideration of following elements: "available scientific and technical information, related processing technology or intended end-uses of products."

[379] *Ibid* at para 321. The AB emphasized that such comparison should be made "*in the light of* the nature of the risks at issue and the gravity of consequences that would arise from non-fulfillment of the legitimate objective." *Ibid.* However, the assessment of this factor must be accomplished with other two factors cumulatively: the trade-restrictiveness of the technical regulation; the degree of contribution that it makes to the achievement of a legitimate objective.

The AB finding in the *U.S.-COOL* case is also worth noting, as it contains important observations of an inappropriate application of the LRM test by the WTO Panel under the TBT agreement. The AB dealt with examining the complaint of the U.S. on the improper analysis of its COOL measures by the Panel under Article 2.2 of TBT agreement. The U.S. argued that its measures cannot be found to be inconsistent with Article 2.2 "*solely* because it does not meet some minimum threshold of contribution to its objective."[380] It contended that the determinations of the objective and the measure's contribution to achieve its desired level "are not an end in themselves.....[but] rather these determinations are relevant *in order to* assess whether the complaining party has met its burden of showing that the same level of fulfillment could be achieved by a significantly less-restrictive alternative measure."[381] The AB considered this argument, found that the Panel had not proceeded to identifying the availability of less trade restrictive alternative measures, and held that the Panel "never reached the stage of comparing the COOL measure against less-restrictive alternative measures."[382] Moreover, the U.S. argued that Article 2.2 requires a complainant to prove that there is a less trade-restrictive alternative available. The AB agreed with the U.S. on this point and held that "by finding the COOL measure to be inconsistent with Article 2.2 of the TBT Agreement *without examining the proposed alternative measures*, the Panel erred by relieving Mexico and Canada of this part of their burden of proof."[383]

The cumulative satisfaction of the above mentioned three elements was also emphasized by the AB in the *Australia-Salmon* case in finding the measure's inconsistency under Article 5.6 of the SPS Agreement. The AB noted that measures will be consistent with Article 5.6 of the

[380] AB, *U.S.-COOL*, *supra* note 376, at para 456 [emphasis added].
[381] *Ibid* [emphasis added].
[382] *Ibid* at para 459.
[383] *Ibid* at para 469 [emphasis added].

SPS agreement if there is no alternative measure available, if the alternative measure does not achieve the appropriate level of protection, and if it is not significantly less trade-restrictive.[384] The burden of establishing the existence of the alternative measure that cumulatively meets all these requirements lies on the complainant. Relying on the cumulative satisfaction of all three elements of the LRM test, the complainant member state will be able to prove a *prima facie* inconsistency of the measure at issue with the SPS agreement. It is argued that, the examination of the measures under the above mentioned elements of the LRM test, particularly under the requirements of being reasonably available and significantly less trade-restrictive, indicate a "relaxed necessity" test under the SPS agreement.[385] This allows an inference that the LRM test, applied in the context of the SPS and TBT agreements, offers a sophisticated form of necessity analysis in terms of ensuring the balance of interests of member states in the WTO regime.

6.5.6. Clarifying "Weighing and Balancing" under the LRM Test

It should also be noted that the less restrictive means test applied by DSBs is considered to include the last "weighing and balancing" stage.[386] The interpretation of this kind of balancing has been quite contentious. It has been expressed in different ways and seemed to change each time it was articulated, despite the AB's assertions that it has maintained "the same approach" even though "the language used is not identical."[387] In this regard, Andrew Mitchell and Caroline Henckels observe that "the exact interaction of the individual elements of the weighing and

[384] AB, *Australia - Salmon*, *supra* note 308, at para 194.
[385] Andenas & Zleptnig, *supra* note 209, at 419.
[386] As for the 'weighing and balancing', the AB in *Brazil-Retreaded Tyres* case found that it was properly "holistic operation" of "putting all the variables of equation together and evaluating them in relation to each other." AB, *Brazil – Tyres*, *supra* note 298, at para 182.
[387] AB, *China-Audiovisual Products*, *supra* note 352, at para 240.

balancing test is unclear."[388] However, it is generally believed that the cost-benefit test established by the AB in the *Korea-Beef* and the *U.S.-Gambling* cases is intended to balance the benefits from the measure in the achievement of the pursued goal against the cost of the measure in reduced trade.[389] This obviously corresponds to the last prong of the proportionality analysis, which is proportionality *stricto sensu*. However, contrary to this general belief, Regan argues that this kind of balancing is not pertinent to the LRM test and "logically contradictory", since it would be "a serious intrusion on the Members' regulatory autonomy" to choose their own level of protection.[390] Rather, he contends that the balancing in the LRM test is different from that of proportionality *stricto sensu*, and is performed between the measure's enforcement costs and trade costs. Put simply, if the alternative measure achieves the same level of the pursued goal at a lesser trade cost and without unreasonable enforcement cost, then the actual measure will not be found "necessary". Conversely, if the alternative measure that achieves the same level of pursued objective at lesser trade costs entails unreasonable enforcement costs, then the actual measure will be found "necessary".[391]

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[388] Mitchell & Henckels, *supra* note 14, at 155.

[389] Gabrielle Marceau & Joel Trachtman, "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods", (2002) 36 (5) Journal of World Trade 811 at 826–828, 851–853; WTO, World Trade Report 2005: Exploring the Links between Trade, Standards and the WTO, at 135, 137–139. Available online at:
<https://www.wto.org/english//res_e/booksp_e/anrep_e/world_trade_report05_e.pdf>.
The AB in *Brazil-Tyres* and *China-Audiovisuals* also seem to misinterpret the "balancing" in a similar way. *See* AB, *Brazil - Tyres*, *supra* note 298, at para 156; AB, *China Audiovisual Products*, *supra* note 352, at paras 240-42.

[390] Donald H. Regan, "The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost–Benefit Balancing", (2007) 6 (3) World Trade Review 347 at 349.

[391] *Ibid* at 349. It should be noted that the mere fact that an alternative measure would entail some additional cost does not, alone, mean that such a measure is not reasonably available to a Member. In order to qualify for not being "reasonably available" in terms of financial resources (capacity) of the Member State, the enforcement/administrative costs of the alternative measure must be of excessive amount, which could put undue burden on it. *See* AB, *China –Audiovisual Products*, *supra* note 352, at para 327 (referring to Appellate Body Report, *U.S. – Gambling*, at para 308; and AB, *Korea-Beef*, at para 181).

Andrew Mitchell, who seems to have clarified the different nature of balancing in the proportionality and LRM tests, advanced the same view. He notes that, "by considering the importance of the interest that a Member is pursuing when determining necessity, WTO tribunals are blurring the lines between necessity on one hand, and proportionality *stricto sensu* on the other."[392] He further argues that GATT Article XX does not include a reference to proportionality. Thus, in interpreting this provision, WTO tribunals should be confined to its textual basis and apply the necessity test.[393]

The arguments of these scholars show that examining the necessity of measures should be focused not on the assessment of policy objectives pursued by them, but rather on determining whether reasonably available alternative measure is less restrictive on trade than the actual measure and whether it can be enforced at a reasonable cost without putting undue burden on a member state. Viewing the balancing test as such evidences that the WTO regime could develop a test that puts sufficient emphasis on striking the balance between the member states' prerogative to protect their public policy objectives and their obligations to respect the rights of other member states under WTO treaties.

[392] Mitchell, *supra* note 214, at 199.
[393] *Ibid*. As was explained at the beginning of the chapter, the test of necessity is considered the second stage of the proportionality analysis, which is also called the LRM test.

6.5.7. Importation of the WTO LRM test into the Investment Arbitration Regime: *Critics vs. Proponents*

The analysis of WTO cases shows that the test related to examining states' measures under necessity provisions in the international trade regime has developed in two stages. In the first stage, WTO DSBs used the least-restrictive means test to interpret the meaning of "necessary for" in GATT Article XX. According to this test, a member state's measure at issue would not be found "necessary" if there were other alternative measures that could achieve the pursued goals with the least restriction on trade. Initially, in applying this test, the DSBs put more emphasis on the least restrictive character of such alternative measures and did not sufficiently inquire into their potential to achieve the desired level of protection of pursued objectives. However, they later (second stage) started applying a "more balanced" version of the necessity test, which is called the less-restrictive means test. Unlike its previous version, the less-restrictive means test contained elements that could ensure the balance of competing interests upon its application. Under this test, the measure at issue would not be considered necessary if there were other reasonably available alternative measures that could achieve the desired level of protection with less restriction on trade. This less-restrictive means test was directly incorporated into relevant provisions of TBT and SPS agreements.

The case studies showed that application of the less-restrictive means test offers two important advantages over the least-restrictive means test. First, its application by DSBs ensured sufficient consideration of the alternative measure's potential to achieve the desired level of protection sought by the member state. Second, under this test, states are allowed to choose from alternatives which are less-restrictive than the actual measure and less burdensome among reasonably available alternative measures. In other words, application of the less-restrictive

means test not only ensures taking account of a trade-restrictive character of the alternative measure, but also gives much freedom and flexibility for member states to choose the measure which incurs less enforcement costs. Therefore, it can be said that the less-restrictive means test has the potential to ensure the balance of competing interests in interpreting necessity clauses in WTO agreements.

The analysis of WTO cases also provides enough evidence to conclude that the reasonable LRM test suggested by Professor Kurtz corresponds to the less-restrictive means test used in the WTO jurisprudence, and seems to have the potential to serve as an appropriate test for investment arbitration tribunals in interpreting the NPM clauses in IIAs. The application of the less-restrictive means test in the investment arbitration regime appears to more efficiently reconcile a host state's right to protect its essential public interests and its treaty obligations on the protection of foreign investors' interests.

The foregoing also supports the approach taken by the *Continental* tribunal in interpreting the nexus requirement of the U.S.-Argentina BIT. As was discussed, by referring to the WTO jurisprudence, the tribunal imported the less-restrictive means test to interpreting the meaning of "necessary to" in Article XI of the BIT.[394] This approach to interpreting treaty NPM clauses also found support in scholarly writings. For instance, Alec Stone Sweet considers that the approach taken by the *Continental* tribunal is a "rich piece of jurisprudence, far more sophisticated than the awards produced in four previous [Argentine] cases."[395] Professor Stone Sweet further argues that it "offers to arbitrators the best available doctrinal framework with which to meet the present

[394] It should be noted that the main rationale behind having recourse to the WTO regime is "to look for a reliable and steady ally whose internal rationality differs little from the investment regime ... [and] to enhance [the] legitimacy [of the investment regime]." *See* David Schneiderman, "Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?", (2011) 2(2) Journal of International Dispute Settlement 471 at 490.
[395] Alec Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier", (2010) 4(1) Law and Ethics of Human Rights 48 at 73-74.

challenges to the BIT-ICSID system" in dealing with interpreting treaty necessity clauses.[396] Burke-White and Von Staden also consider that the WTO's LRM test "offers perhaps the best middle ground for balancing the legitimate expectations of both states and investors."[397] However, although the approach taken by the *Continental* tribunal could take a balanced account of both host states' and foreign investors' interests in the dispute, it was criticised by other scholars who do not approve the importation of the less-restrictive means test into the investor-state arbitration regime. Scholars such as José Alvarez, Kathryn Khamsi and Tegan Brink argue against such an approach, due to several reasons that I will discuss below.[398]

As was mentioned, to justify its reference to GATT Article XX, the *Continental* tribunal noted that "the text Article XI [of the Argentina-U.S. BIT] derives from the parallel model clause of the U.S. FCN treaties, [which] in turn reflect the formulation of Article XX of GATT 1947."[399] According to Professor Alvarez, this type of justification is considered "unsatisfactory as a matter of straightforward treaty interpretation", because as he contends, the arbitrators in the *Continental* tribunal had to interpret Article XI of the BIT under provisions of VCLT instead of WTO law.[400] Alvarez first notes that the *Continental* tribunal made "no attempt to compare the actual texts of Article XI of the U.S.-Argentina BIT and the GATT's Article XX or to consider

[396] *Ibid* at 76.
[397] Burke-White & Von Staden, *supra* note 7, at 349
[398] José Alvarez & Tegan Brink, "Revisiting the Necessity Defense: *Continental* Casualty v. Argentina", in Karl P. Sauvant ed., *Yearbook on International Investment Law & Policy 2010-2011* (New York: Oxford University Press, 2012) at 319 [Alvarez & Brink]; Alvarez & Khamsi, *supra* note 3; José Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law, 2011) [Alvarez, Investment Regime].
[399] *Continental* Award, *supra* note 60, at para 192.
[400] Alvarez, Investment Regime, *supra* note 398, at 301. According to Article 31 of VCLT, the ordinary meaning of the terms found in Article XI BIT had to be interpreted in light of the context, object and purpose and, if necessary the negotiating history of the BIT. Specifically, Alvarez and Tegan Brink argued that the *Continental* tribunal should have interpreted the nexus requirement of the NPM clause of the Argentina-U.S. BIT under Article 31(3)(c) of the VCLT, which provides for "any relevant rules of international law applicable between the parties" as well as other general rules of treaty interpretation. *Ibid* at 335-38.

the histories of respective provisions."[401] Instead, the tribunal merely assumed that "with little textual and even less actual historical support, that the two provisions are comparable and share common objectives."[402] Based on the textual comparison, Alvarez contends that the elements of Article XI can be found only in GATT Article XXI, and the "model for the essential security clause of the FCN's was.... the essential security clause of the GATT (Article XXI) and not its "general exceptions" clause at Article XX."[403] Therefore, in his view, the tribunal's contention that Article XI is comparable to GATT Article XX "makes little sense."[404] By contrast, Professor Vadi argues that "[a]lthough, at first sight, Article XXI of the GATT seems to provide a better analogue to the non-precluded measures clause, it strictly refers to the maintenance of peace and security. *Given the fact that Argentina took measure to protect public order, rather than peace and security, reference to Article XX on general exceptions seems plausible.*"[405] In this respect, I am sympathetic to Professor Vadi's contentions. In my view, Article XXI is not a better analogue, because unlike the NPM clause at issue, it contains self-judging language. Moreover, the main issue here is not interpreting the permissible objective of "essential security interests", but rather, to give meaning to the nexus requirement ("necessary for") of the NPM clause at issue. Since there is almost no WTO jurisprudence on interpreting Article XXI, it would have been quite illogical for arbitral tribunals to seek interpretative guidance from it.

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[401] *Ibid* at 302.
[402] *Ibid*.
[403] *Ibid*. According to Alvarez, Article XI of the Argentina-U.S. BIT is a far more limited clause and does not contain an extensive list of legitimate public policy objectives like in GATT Article XX. Additionally, the list of legitimate objectives in GATT Article XX does not include exceptions for either "public order" or "essential security". *Ibid*.
[404] *Ibid* at 307. Moreover, he points out that the historical evolution of the text of Article XI does not provide any evidence that supports the relevance of interpreting the meaning of "necessary" under GATT Article XX to the interpretation of Article XI of the BIT. *Ibid*.
[405] Vadi, *Analogies in International Investment Law*, *supra* note 220, at 215.

However, the scholars further argue that there are significant differences in the structural design of both clauses. First, they point out that besides being "necessary", the measures must also comply with the chapeau clause of GATT Article XX, which is absent in Article XI of the BIT. Under this clause, the arbitrators assess whether the necessary measure is not applied in an arbitrary or unjustifiably discriminatory manner, or poses "disguised restriction on international trade."[406] In other words, the chapeau clause subjects the state measures at issue to an additional requirement absent in BIT's Article XI, and serves as an important tool to "distinguish.... between legitimate regulatory choices and excuses for protectionism."[407] Consequently, Alvarez argues that the *Continental* tribunal failed to take into account this aspect of WTO law, and proceeded directly to balancing by affording the deference to the respondent state, without screening the arbitrary and discriminatory character of the measures.[408]

Second, Professor Alvarez notes the absence of an important feature in Article XI, which is available under GATT Article XX. This feature concerns the relative importance of the regulatory objectives listed in GATT Article XX, which affects the balancing applied by WTO adjudicators under this provision.[409] The attribution of different degrees of importance to the regulatory objectives enumerated in Article XX allows the adjudicators to apply a balancing test with different degrees of strictness. Put simply, if the regulatory objective entails some highly

[406] *Ibid* at 309. Alvarez & Brink, *supra* note 398, at 13.
[407] Benn McGrady, "Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures", (2008) 1 Journal of International Economic Law 1 at 2.
[408] Alvarez, Investment Regime, *supra* note 398, at 309. Professor Bjorklund also criticizes the Continental tribunal's analysis and argues that "importing the interpretation of 'necessary' from Article XX without importing the chapeau ignores the careful balance struck by the GATT between the ability of States to regulate to protect important domestic interests and the overarching policy objectives of the treaty." Andrea K. Bjorklund and Sophie Nappert, "Beyond Fragmentation", in Todd Weiler & Freya Beatens, *New Directions in International Economic Law* (Leiden, Boston: Martinus Nijhoff, 2011) at 476.
[409] Alvarez notes that "[n]o such nuance exists among the types of actions identified in Article XI of [Argentina-U.S. BIT] - all of which are presumably of equal importance to the State invoking them...[a]ccordingly, no such nuance dull the blunt impact of what the tribunal does with GATT Article XX balancing in the radically different context of investor-State arbitration." Avalrez, Investment Regime, *supra* note 398, at 313.

valued interest, such as the protection of human life, then the challenged regulation will be upheld "if there is any doubt that the proposed alternative can achieve the same level of efficacy."[410] Conversely, when the regulatory objective is related to some less important interest and the alternative measure is substantially less restrictive on trade, decision makers are supposed to be able to condemn a challenged measure even if the efficacy of alternative measure may be less than that of the challenged measure.[411] The scholars conclude that the absence of characteristics peculiar to GATT Article XX in Article XI, as well as other differences between the international trade and investment regimes,[412] makes the application of WTO standards in interpreting NPM clauses in investment treaties "illogical".[413] Valentina Vadi also seems to support the position advocated by these scholars. As she argues, "[b]y nurturing a dialogical interpretation - meaning a general willingness on the part of arbitrators to discuss, analyse and distinguish as well as borrow WTO jurisprudence - arbitrators are in danger of overemphasizing economic values vis-à-vis other values."[414] Professor Vadi further contends that "there is a risk

[410] Sykes, LRM, *supra* note 325, at 416. Also cited in Thomas Frank, "On Proportionality of Counter-measures in International Law", (2008) 102 American Journal of International Law 715 at 751, footnote 601.
[411] Case law also confirms this fact. *See* for instance, the AB holdings in *Korea-Beef* case, *supra* note 330, at paras 162, 163. This type of trade law approach to interpreting the meaning of necessity is called "a consequentialist analysis", which focuses its assessment on the effects of the state measure on the WTO system. Conversely, investment tribunals focus on the whole situation experienced by the state in question. *See* Kathleen Claussen, "The Casualty of Investor Protection in Times of Economic Crisis", (2008-2009) 118 Yale Law Journal 1545 at 1552-53 [Claussen].
[412] Kathleen Claussen also identifies differences between two regimes, especially in terms of the parties involved and the availability of remedies. Particularly, Claussen argues that "the object and purpose of investment law is distinct from that of trade law and should be treated as such for dispute resolution." Claussen, *supra* note 411, at 1550. Since the specificities of the subject matter of two regimes impact the relative weight given to textual principles in interpretation, it is also argued that the dispute settlement bodies of both regimes have developed their own practice of judicial activity peculiar to the system's specificities. *See* Georges Abi-Saab, "The Appellate Body and Treaty Interpretation", in Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds., *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge: Cambridge University Press, 2006) at 460-61.
[413] Alvarez, Investment Regime, *supra* note 398, at 311.
[414] Vadi, *Analogies in International Investment Law*, *supra* note 220, at 213.

that arbitral tribunals will misunderstand the WTO acquis, eventually leading to incoherence and inconsistency."[415]

However, other scholars have challenged these critical arguments, which are mainly based on differences in the wording of the compared provisions and the treaty regimes. For instance, Mitchell and Henckels argue that "the difference between the wording of the treaty provisions does not necessarily preclude investment tribunals from adopting aspects of WTO necessity analysis."[416] Most importantly, both scholars contend that in rejecting the relevance of the WTO tribunals' approach to necessity, these scholars do not take into account the prevalence of interpreting the concept of necessity in the context of treaty derogations and exceptions that exists in the "other international and *supra*national fora".[417] In their view, the critics (Alvarez, Khamsi and Brink) "overstate their case by focusing too narrowly on Article XX rather than on necessity in the WTO Agreements more generally."[418] Therefore, they suggest that a broader perspective should be taken in order to find out how dispute settlement bodies in other international treaty regimes deal with similar interpretative issues.[419] Mitchell and Henckels further argue that the flaws related to applying the LRM test by the *Continental* tribunal could have also served as one possible reason giving rise to arguments against limiting its extensive use in the investment arbitration regime. In this regard, they point out that in referring to WTO jurisprudence, the *Continental* tribunal "did not properly articulate the reasons for its

[415] *Ibid.*
[416] Mitchell & Henckels, *supra* note 14, at 158.
[417] *Ibid.*
[418] *Ibid.*
[419] Professor Kurtz also admits that there is an environment existing beyond the borders of each system, and thus "much can be learned within both systems". *See* Jürgen Kurtz, "The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents", (2009) 2 European Journal of International Law 749 at 770.

comparative approach, nor did it comprehensively represent how the necessity test operates in the context of GATT Article XX and GATS Article XIV."[420]

Another scholar, Giorgio Sacerdoti, also argues that the different setting of the WTO cannot serve as a bar against relying on its jurisprudence in investment disputes.[421] Rather, in his view, "[r]eference to established WTO concepts concerning exceptions and necessity can represent a useful yardstick to reach balanced solutions."[422] Sacerdoti considers it "preferable" to refer to WTO law for interpreting concepts found in investment instruments for the following structural reasons.[423] First, he contends that interpreting the term of "necessity" in Article XI of the U.S.-Argentina BIT "in the light of the most similar provision, namely the one found in a trade instrument *sharing the same origin* such as the GATT, seems quite justified."[424] Secondly, Sacerdoti objects against using the concept of necessity as developed under GATT Article XX due to the fact that BITs, specifically the U.S.-Argentina BIT, lack antidiscrimination prescriptions, as found in the chapeau of GATT Article XX. In this regard, he argues that "the constant case law of the Appellate Body has been in the direction of *separating the analysis of necessity under any of the exceptions listed in Art. XX from the subsequent analysis* of whether the domestic measure defended as necessary has been applied in breach of those requirements."[425] He further observes that BITs also contain provisions relating to the non-

[420] Mitchell & Henckels, *supra* note 14, at 116. Similar criticism is also expressed with regard to the *Continental* tribunal's application of the "weighing and balancing" element of the LRM test. Mitchell and Henckels contend that the tribunal "did not undertake any balancing by explicit consideration of whether the measures' effectiveness outweighed their impact on the investment... [n]or did it explicitly refer to the importance of the measures' objective." *Ibid* at 117.
[421] Sacerdoti, *supra* note 13, at 20.
[422] *Ibid* at 19.
[423] *Ibid*. Sacerdoti means the preference of relying on WTO law over those of general administrative law principles such as margin of appreciation, deference, etc.
[424] *Ibid* at 20 [emphasis added].
[425] *Ibid* at 20 [emphasis added]. I also agree with Giorgio Sacerdoti in this respect, since the separateness of analyses under both the "chapeau" of GATT Article XX and "necessity" are clearly noticeable in every AB decision.

discriminatory treatment of foreign investors, which function separately from the treaty NPM clause.[426] Lastly, Sacerdoti's main argument is based on the legitimacy of the WTO regime which, in his view, can be exemplary for the investment regime.[427] This leads him to suggest that, in appropriate cases, investment arbitration tribunals should look for guidance from consistent and authoritative jurisprudence of the AB under WTO agreements to promote consistency in investment case law.[428]

As can be seen, scholars present contradictory arguments on whether to import WTO jurisprudence on interpreting treaty "necessity" clauses into the investment arbitration regime. In my view, the arguments of both sides have certain merits and need to be given due consideration. On one hand, I agree with the first group of scholars (Alvarez, Brink) that WTO jurisprudence cannot be imported directly into the investment arbitration regime for the purposes of interpreting non self-judging treaty NPM clauses, particularly Article XI of the U.S.-Argentina BIT. On the other hand, I do not reject the benefits of looking to WTO jurisprudence in resolving the interpretative issues related to the necessity defense. Unlike the above mentioned scholars, I propose a different approach to taking advantage of WTO jurisprudence for the purpose of resolving the interpretative issues in the investment arbitration regime. I argue that WTO jurisprudence can be imported indirectly by serving as a source for identifying the development of state practice with respect to the criteria on the availability of alternative means for a State to

[426] *Ibid*. For a comparative analysis of similar legal-economic concepts found in both WTO and Investment agreements, *see* Nicholas DiMascio & Joost Pauwelyn, "Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?", (2008) 102 American Journal of International Law 48.

[427] In this respect, Sacerdoti observes that "that the WTO offers a multilateral setting of comprehensive interconnected agreements and its dispute settlement system represents a multilateral, inter-State (and hence naturally balanced) permanent judicial mechanism (in substance), contrary to the bilateral contest of BITs and their ad hoc tribunals." Sacerdoti, *supra* note 13, at 21.

[428] *Ibid* at 21. In a broader context, taking into account the strict requirements of customary necessity defense and the lack of clarity in the text of Article XI of the U.S-Argentina BIT, Sacerdoti even suggests that states consider introducing in their BITs "appropriate flexibilities and exceptions, such as an Art. XX GATT type clause", as a policy solution to addressing the risks related to protection of their public interests. *Ibid* at 19.

safeguard its public policy objectives in emergency circumstances. I contend that the state practice being developed within the WTO jurisprudence in this respect contains an important element that represents a developed practical approach to examining whether the measures applied by a State in necessity circumstances were the only way to protect its essential interests. Thus, in the next section, I will present the discussion on how state practice found in the WTO regime will help in developing an efficient approach to interpreting the only means requirement of the customary necessity defense.

6.6. Using the WTO Jurisprudence as a Source of Emerging (Developing) State Practice

In chapter IV, I presented the discussion on developing the approaches to interpretation of the only means requirement of the customary necessity defense. The analysis primarily focused on the following commentary of the ILC concerning the interpretation of the only means requirement: "the plea is excluded if there are other (otherwise lawful) means available, even if they may be *more costly or less convenient*."[429] It was noted that the ILC did not provide any further clarification with respect to the extent of costs in adopting the alternative means. In other words, the ILC did not clarify a manner for determining the maximum cap for costs involved in adopting the alternative means. As I argued, this ambiguity gives rise to serious questions on proving the availability of alternative means in economic emergencies. In the face of such ambiguity, it is impractical and unrealistic for respondent states to satisfy the only means requirement, as the availability of any lawful alternative means involving costs beyond financial capacity of a respondent state (especially in financial crises) will cause any state fail to

[429] James Crawford, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), at 83, para 15 [emphasis added] [Crawford, *Commentaries*].

successfully invoke the necessity defense.[430] Most importantly, the existence of such ambiguity makes the customary rule of necessity purposeless (useless) for states to invoke it in practice. This contention is also supported by other scholars, for whom this problematic aspect of the only means requirement leads to the conclusion that the only means requirement is almost impossible to meet in economic emergencies.[431] Therefore, I assume that it could serve as a main reason for scholars to look for interpretative guidance not in customary international law, but rather, in other sources of international law, such as general principles (proportionality) and other treaty regimes (ECtHR, WTO).

In this section, I will demonstrate that the analysis of WTO jurisprudence on interpreting treaty necessity clauses, which was presented above, allows us to identify the development of state practice on criteria with respect to examining the availability of alternative means to safeguard state essential interests in necessity circumstances. In particular, by applying the concept of regime dynamics in regime theory, I will argue that the state practice being developed in WTO jurisprudence with respect to examining the availability of alternative means represents evolution of the interpretation of the only means requirement of the customary necessity defense. Based on this contention, I propose a more developed approach to interpreting the only means

[430] Professor Kingsbury explains it more clearly: "[e]ven if the only alternative for the state would have been a policy involving insupportable cost and utter foolhardiness, that would be sufficient alternative making necessity plea unjustified, provided that the alternative policy was lawful." Expert Report of Benedict Kingsbury (15 August 2006), in *Metalpar SA and Buen Aire SAv. Argentine Republic*, (6 June 2008) Award, ICSID Case No.ARB/03/5 at para 75 [Kingsbury, Expert Report].

[431] Giorgio Sacerdoti, "BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defense of Necessity", (2013) 28 (2) ICSID Review 351 at 374; Christina Binder, "Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns: Or the Benefits of a Public International Law Approach to Investment Arbitration", in Tullio Treves, Francesco Seatzu & Seline Trevisanut, *Foreign Investment, International Law and Common Concerns* (London and New York: Routledge, 2014) at 78; Ibironke T. Odumosu - Ayanu, "International Law and Disasters: Necessity, Peoples, and the Burden of (Economic) Emergencies", in David Caron, Michael Kelly & Anastasia Telesetsky, *The International Law of Disaster Relief* (Cambridge: Cambridge University Press, 2016) at 327; Stephan W. Schill & Yun-I Kim, "Sovereign Bonds in Economic Crisis: Is the Necessity Defense under International Law Applicable to Investor–State Relations? A Critical Analysis of the Decision by the German Constitutional Court in the Argentine Bondholder Cases", in Karl P. Sauvant ed., *Yearbook on International Investment Law & Policy* (2010/2011) 485-512 at 513.

requirement, since the approach taken by the Argentine tribunals to examining state's emergency measures under this requirement of necessity defense does not conform to the present realities and practices of addressing economic crises.

6.6.1. Identifying the Customary Nature of the "Reasonably Available" Aspect of Alternative Means

The analysis of the WTO jurisprudence revealed that WTO DSBs developed a more sophisticated and balanced approach to interpreting the "necessity" clauses than the investment arbitration tribunals. In particular, the test used by the DSBs to examine whether states had other alternative means to achieve the pursued public policy objectives contains an element that, in my view, represents the emergence of new state practice on the development of the only means requirement of the customary necessity defense. This element relates to the "reasonable availability" of alternative means in the context of adopting measures that are necessary to protect state's public interests. In my view, this element reflects the criterion for assessing the realistic potential of the respondent state to adopt the alternative means alleged to have existed in necessity circumstances. In other words, the "reasonably available" criterion helps adjudicators take into account the realistic capacity of respondent states to apply the alternative means alleged by claimants. This includes both the administrative and financial capacity of a state to adopt the alternative measures in emergency circumstances, such as financial crises. It should be noted that this element is absent in both the text and commentaries on the only means requirement of customary necessity. Thus, I propose to incorporate the "reasonably available" element into the interpretation of the "only means" requirement, since it reflects a developed form of state practice on examining alternative means. But first, it is appropriate to answer the question of

whether there is state practice and *opinio juris* on the "reasonably available" aspect of alternative means, which would be sufficient to give it the status of a customary rule of international law.

(i) Defining International Custom

Article 38(1) of the Statute of the ICJ serves as a starting point for further discussion.[432] This provision enumerates "international custom" as one of the formal sources of international law and uses the following wording: "international custom, as evidence of a general practice accepted as law."[433] Since this formulation is considered to have shortcomings,[434] a better definition is offered by the ILC Special Rapporteur, Michael Wood: customary international law "means those rules of international law that derive and reflect a general practice accepted as law."[435] As for the constitutive elements of customary international law, they are two: general practice of states, which is referred to as the "material" (objective) requirement, and *opinio juris* (subjective requirement), which is the state's belief that such practice is required by law.[436] This double requirement has been recognized by different international tribunals, such as the ICJ, International Tribunal for the Law of the Sea, the Panels and AB of WTO and investment tribunals. For instance, in the *Continental Shelf* case, the ICJ stated that "it is of course axiomatic that the material customary international law to be looked for primarily in the actual practice and *opinio juris* of States."[437]

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[432] Statute of the ICJ, Available online at: <http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf>.
[433] Article 38 of the Statute of the ICJ. *Ibid.*
[434] In this respect, Villiger notes that "the Court cannot apply a custom, [but] only customary law." Villiger, Customary International Law & Treaties, *supra* note 47, at 15.
[435] International Law Commission, *Second Report on Identification of Customary International Law*, by Michael Wood, Special Rapporteur, Sixty-sixth session, Geneva, 5 May - 6 June and 7 July - 8 August 2014, A/CN.4/672, at 13 [Wood, Second Report].
[436] Michael Wood explains that this double requirement is "generally adopted in the practice of States and the decisions of international courts and tribunals including the [ICJ] ...[is] widely endorsed in the literature." *Ibid* at 8.
[437] *Continental Shelf* Case (Libya v. Malta), Judgement, (1985) ICJ Reports, at 13 para 27. However, the ILC's Special Rapporteur on the identification of customary international law, Sir Michael Wood, emphasizes that "in recent years there have been calls, mainly from academics, to abandon the two-element approach and, essentially, to abandon custom as we know it: several writers have called for a reduced role for "acceptance as law", arguing that in

(ii) State Practice

State practice is considered the most important requirement of customary international law and is not limited to state conduct and omissions.[438] Professor Crawford gives the following list of sources of state practice for the purpose of creation of a customary rule:

> [D]iplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, official manuals on legal questions (e.g. manuals of military law), executive decisions and practices, orders to military forces (e.g. rules of engagement), comments by governments on ILC drafts and corresponding commentaries, legislation, international and national judicial decisions, recitals in treaties and other international instruments (especially in 'all states' form), an extensive pattern of treaties in the same terms, the practice of international organs, and resolutions relating to legal questions in UN organs, notably the General Assembly.[439]

Moreover, Philippe Sands notes that "*the pleadings of states before national and international courts tribunals*, parliamentary debates, collections of diplomatic materials and the records and *travaux préparatoires* of international conferences and treaty negotiations"[440] can serve as other sources of state practice. This view is supported by several scholars. For instance, Paparinskis contends that pleadings are in fact the "clearest example of State practice."[441] The ILC also clarified its position on this point by stating that, "[t]he attitude of States to the

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most cases widespread and consistent State practice alone is sufficient for constructing customary international law." Michael Wood, "The Present Position within the ILC on the Topic "Identification of Customary International Law": in partial response to Sienho Yee, Report on the ILC Project in "Identification of Customary International Law","(2016) 15 Chinese Journal of International Law 3 at 8 [Wood, Position of ILC on Identification of Customary International Law].

[438] In this respect, Michael Wood points out that "[i]t is no longer contested ... that verbal acts, and not just physical conduct, may count as "practice"." Wood, Position of ILC on Identification of Customary International Law, *supra* note 437, at 8.

[439] James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University press, 2012) at 24.

[440] Philippe Sands, Jacqueline Peel, Adriana Fabra & Ruth MacKenzie, *Principles of International Environmental Law*, 3d edition (Cambridge: Cambridge University Press, 2012) at 112.

[441] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford: Oxford University Press, 2013) at 16;

formation and evidence of customary international law may be seen in their pleadings before international courts and tribunals."[442] In this respect, the ILC's Special Rapporteur, Michael Wood, notes that special care needs to be shown when considering pleadings as reflecting a State's position on particular issue, as States "are in advocacy mode" when they make their position in their pleadings known.[443] By contrast, Anthea Roberts argues that the fact that such pleadings are self-interested does not render them irrelevant *per se*, and since the actual weight that should be given to pleadings will depend on the context, they should be considered as a form of State practice.[444] Since investment tribunals also support the position that pleadings provide a unique opportunity for a state to explain what it believes to be the law on a given issue,[445] they will be used as a main source for identifying state practice on the "reasonably available" feature of alternative means. If sought in WTO jurisprudence, they are usually found in WTO Panel and AB decisions.[446] Thus, below I will present statements made by several states in WTO disputes concerning the "reasonably available" feature of alternative means.

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[442] The ILC notes that "[i]n such pleadings, States regularly adopt the two-element approach, arguing both on State practice and *opinio juris* .....". ILC, First Report on Formation and Evidence of Customary International Law, (17 May 2013) Doc.A/CN.4/663, at 20 [emphasis added]. However, Michael Wood notes that "[i]t is sometimes suggested, chiefly by writers, that in such fields as international human rights law, international humanitarian law and international criminal law, among others, one element may suffice in constituting customary international law, namely *opinio juris*." Wood, Position of ILC on Identification of Customary International Law, *supra* note 437, at 9.

[443] ILC, *First Report on Formation and Evidence of Customary International Law*, (17 May 2013) Doc.A/CN.4/663, at 20.

[444] Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States", (2010) 104 American Journal of International Law 172 at 218-19.

[445] In the investment arbitration context, for instance, the *Cargill* tribunal stated that "the statement of States can - with care - serve as evidence of the content of custom." *Cargill, Inc. v. Mexico*, ICSID case No. ARB (AF)/05/02, Award 18 September 2009, at para 275. The arbitral tribunal in the *Glamis* case also listed pleadings made by governments as an evidence of state practice. In this regard, it held as follows: "The evidence of such 'concordant practice' undertaken out of sense of legal obligation is exhibited in very few authoritative sources: treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes pleadings..." *Glamis Gold Ltd v. United States*, UNCITRAL, Award, 14 May 2009, at para 603.

[446] It should be pointed out that the decisions and awards themselves do not represent State practice. In this respect, the arbitral tribunal in the *RDC v. Guatemala* case stated as follows:

> The Tribunal notes further that, as such, arbitral awards do not constitute State practice, but it is also true that parties in international proceedings use them *in their pleadings* in support of their arguments of what the law

The "reasonably available" feature of alternative means was underlined in submissions made by states in certain cases discussed above. For instance, in the *Korea-Beef* case, Australia made the following submission before the AB:

> Australia submits that the burden is on Korea to demonstrate a *prima facie* case that the dual retail system fall within one of the exceptions of Article XX, and that it meets the requirements of the introductory clause. Korea has to demonstrate that *there was no other alternative measure it could reasonably employ*, which was WTO-consistent or less WTO-inconsistent, to secure compliance with the *Unfair Competition Act*.[447]

Korea also argued on appeal that the Panel erred in applying Article XX(d), as it failed to "pay due attention to the level of enforcement sought."[448] Thus, Korea submitted that the Panel had to "examine whether *a means reasonably available* to the WTO Member could have been used in order to reach the objective sought without putting into question the level of enforcement sought."[449] As for the "reasonable availability" of the alternative means (policing fraud in beef retail market), Korea submitted that it "believes that *this option is not 'reasonably available*', because Korea lacks the resources to police thousands of shops on a round-the-clock basis."[450]

The "reasonable availability" of alternative measures was also subjected to the AB's thorough analysis in the *EC-Seals* case. As was discussed above, in this case Canada and Norway pleaded before the AB to reverse the Panel's finding that the proposed alternative measure (which consisted of market access for seal products that would be conditioned on

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> is on a specific issue. There is ample evidence of such practice in these proceedings. *It is an efficient manner for a party in a judicial process to show what it believes to be the law ...*

Railroad Development Corporation (RDC) v. Guatemala, ICSID Award, ARB/07/23 29 June 2012, para 217 [emphasis added]. Rahmat Muhamad also argues that "customary rules may provide greater precision since they evolve in response to concrete situations and cases, and *are often articulated in the written decisions of international courts and tribunals*." Rahmat Muhamad, *supra* note 105, at 42 [emphasis added].

[447] AB, *Korea-Beef*, *supra* note 330, at para 39 [emphasis added].

[448] *Ibid* at para 175 [emphasis added].

[449] *Ibid* [emphasis added].

[450] *Ibid* [emphasis added].

compliance with animal welfare standards, and certification and labelling requirements) was not reasonably available.[451] Similarly, in the *Brazil-Tyres* case, Brazil submitted that "if the measure can make a contribution to its objective, and no *reasonably available alternatives* exist, then the measure is necessary."[452] The EC also pleaded before the AB that in examining certain measures of Brazil the Panel "did not inquire whether the proposed [alternative] options *exist and are reasonably available*, but instead, examined whether those options are actually being employed."[453]

Generally, in all above mentioned disputes, where the Panels and the AB were tasked with interpreting the necessity provisions of relevant WTO agreements, states made unequivocal statements that in examining the necessity of state measures at issue, the alternative means alleged to exist must be reasonably available. Moreover, in their submissions, states also clarified the meaning of the concept "reasonably available". In this respect, they all refer to the AB finding in the *U.S. - Gambling* case, which reads as follows:

> [A]n alternative measure may be found not to be "reasonable available," however, where it is *merely theoretical in nature*, for instance, where the Responding Member *is not capable of taking it*, or where the measure *imposes an undue burden on that Member*, such as prohibitive costs or substantial technical difficulties.[454]

As can be seen, this finding of the AB contains the main features required for the alternative measure to be "reasonably available". First, it must be practically applicable and

[451] AB, *EC-Seals*, *supra* note 353, Canada's appellant's submission, para 299; Norway's appellant's submission, para 580.
[452] AB, *Brazil-Tyres*, *supra* note 298, at para 53 [emphasis added].
[453] *Ibid* at para 18 [emphasis added].
[454] AB, *U.S.-Gambling*, *supra* note 235, at para 308 [emphasis added].

readily available at the time of necessity circumstances.[455] Put simply, a member state must be capable of adopting it in realistic terms immediately at the time of necessity. If the proposed alternative means are "merely theoretical" and are not practically applicable and readily available, then they must not be considered as "reasonably available".[456] Second, the adoption of alternative means must not put excessive or unreasonable burden on a state in terms of prohibitive implementation costs and technical difficulties.[457] Third and most importantly, the alternative means must ensure the same level of protection as the actual measure at issue being deemed "necessary". These criteria are summarized in the submission made by the European Communities (EC) in the *EC-Asbestos* case. In that case, the EC pleaded that "[i]n deciding whether an alternative measure is reasonably available, Panels have to examine whether it is objectively available, feasible, effective and proportional to the pursued legitimate objective ".[458] It should also be noted that the examination of alternative means under such criteria plays an essential role in terms of emergency circumstances, especially economic crises. Therefore, in its third party submission in the *Brazil-Tyres* case, Argentina stated that "when a developing country invokes [the necessity provision], the necessity test and the "reasonably available" alternatives must be looked at in light of the actual possibilities available to developing

[455] For instance, in the *U.S.-Gambling* case the United States pleaded that the "theoretical" alternative means "such as a possible negotiated outcome following consultations - cannot be regarded as 'reasonably available'." AB, *U.S.-Gambling*, *supra* note 235, at para 30.

[456] In this respect, Canada argued in EC-Asbestos case that "an alternative measures is only excluded as 'reasonably available' alternative if implementation of this measures is 'impossible'." The AB, *EC-Asbestos*, *supra* note 338, at para 169. The Panel in the *U.S.-Gasoline* case also held that an alternative measure did not cease to be reasonably available because it involved administrative difficulties for a Member state. Panel Report, *U.S.-Gasoline*, *supra* note 292, at paras 6.26 and 6.28.

[457] The implementation costs and difficulties must be of prohibitive character, that is, beyond a State's capacity. In this respect, Canada argued in EC-Asbestos case that "[t]o assess ....whether an alternative measure is reasonably available in the light of existence or otherwise of practical difficulties in implementing it would be a dangerous precedent which would weaken the test of necessity, produce Kafkaesque results and lead to pernicious effects on a systemic scale." Panel Report, *EC-Asbestos* (Addendum), 18 September 2000 (WT/DS135/R/add.1) at para 224, 227, 228.

[458] *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products,* Panel Report (Addendum) 18 September 2000, WT/DS135/R/Add.1, at 66, para 234 [*EC-Asbestos*, Panel Report].

countries, and in particular their economic cost and technical complexity in relation to scarcity of financial and technical resources characteristic of such countries."[459] Argentina's position also finds support in the Panel's interim review in the *EC-Asbestos* case. The Panel first noted that "the availability of a measure should not be examined theoretically or in absolute terms .....[and] the word "reasonably" should not be interpreted loosely either."[460] It further stated that "the existence of a reasonably available measure must be assessed in light of the economic and administrative realities facing the Member concerned but also by taking into account the fact that the State must provide itself with the means of implementing its policies."[461]

As can be seen, the pleadings of different States before WTO Panel and the AB reflect the consistency and uniformity of their position with respect to the "reasonably available" aspect of alternative means. This, in fact, evidences that the practice of states in this respect satisfies the "uniformity" and "consistency" requirement of customary rule.[462] As for the requirement to be of general nature, state practice should be shared by a sufficient number of states.[463] In this respect, Mendelson notes that there is "no precise number or percentage of State" required to show general practice.[464] It means that the universality of state practice is not required,[465] but rather it

[459] *Brazil-Tyres*, Panel Report, *supra* note 298, at 115, para 5.12. [emphasis added].
[460] *EC-Asbestos*, Panel Report, *supra* note 458, Interim Review at 443, para 8.207.
[461] *Ibid*.
[462] According to ILA, "if there is too much inconsistency between States in their practice, there is no general custom and hence no general customary rule." International Law Association, "Statement of Principles Applicable to the Formation of General Customary International Law", Final Report of the Committee on the Formation of Customary International Law, Conference Report (London, 2000) at 22.
[463] Abdullah Al Farouqe, "Creating Customary International Law through Bilateral Investment Treaties: A Critical Appraisal", (2004) 44 Indian Journal of International Law 292 at 295.
[464] Maurice Mendelson, "The Formation of Customary International Law", (1998) 272 Recueil de Cours 155 at 219-224 [Mendelson].
[465] Yoram Dinstein, The Interaction between Customary International Law and Treaties, (2006) 322 Recueil de Cours 243 at 282. Dinstein notes that "[t]he requirement that the practice of States be general does not mean that the practice has to be shared by all nations: custom is not grounded on unanimity." *Ibid*.

should be "widespread"[466] and "sufficiently extensive and convincing."[467] Based on these factors, it can be said that although the practice of States on the "reasonably available" aspect of alternative means is not widespread among all WTO member states, it is, however, sufficiently convincing and representative to be considered as a general practice.[468] The reason for not being widespread among all WTO member states is that not all disputes involved the interpretation of "necessity" provisions in WTO agreements. Nevertheless, there is no doubt that other states will make similar pleadings on the "reasonably available" aspect of alternative means in future disputes, if they involve the interpretation of such provisions.

(iii) *Opinio Juris*

As was noted, in order for a customary norm to emerge, evidence of states' *opinio juris*, which is a subjective requirement, should also be established. This was explained by the ICJ in the *North Sea Continental Shelf* case as follows:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the evidence of a rule of law requiring it. The need for such a belief, i.e. the

[466] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgement, (2001) ICJ Reports at 102, para 205.
[467] *Delimitation of the Maritime Boundary on the Gulf of Maine Area (Canada v. United States)*, Judgment, (1984) at 299, para 111.
[468] The inclusion of States from "all major political and social-economic systems" defines the representative practice. Villiger, Customary International Law & Treaties, *supra* note 47, at 29. As for its criteria, Michael Wood notes as follows:

> Representativeness should be fitting representativeness, based on a fitting criterion, rather than superficial or mechanical representativeness. A fitting criterion is informed by the subject matter and the context for the application of the rule under consideration. A corollary of fitting representativeness is the requirement of giving due consideration to the practice of specially affected States. In the light of these considerations and the jurisprudence of the International Court of Justice, *due weight should be given to the role and practice of the specially affected States in the identification of customary international law*.

Wood, Position of ILC on Identification of Customary International Law, *supra* note 437, at 15 [emphasis added].

existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*.[469]

The necessity of the *opinio juris* requirement has also been acknowledged by numerous states in the context of the ILC's work and in their pleadings before the ICJ.[470] However, as Professor Dumberry observes, this subjective element remains problematic in many respects, since "states rarely explain their intention and the reasons for acting in one way or another."[471] Acknowledging the difficulty of ascertaining the "internal motivation" of states, Mendelson notes that "we cannot know what States believe", because as institutions "they do not have minds of their own."[472] Therefore, he clarifies that *opinio juris* "is more a question of the *positions* taken by the organs of States about international law, in their internal processes and in their interactions with other States, then of their *beliefs*."[473] Nevertheless, there arises a further question: how can states' positions about international law (*opinio juris*) be ascertained? According to Professor Dumberry, a state's *opinio juris* manifests itself either "when a state makes an express statement to the effect that it believes that a given rule is obligatory" or when it "clearly indicates that a certain conduct is not obligatory."[474] If we analyse the statements made by WTO member states on the "reasonably available" aspect of alternative means through this

[469] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands*, ICJ Rep. 1969, at 44, para77.
[470] International Law Commission, *Second Report on Identification of Customary International Law*, by Michael Wood, Special Rapporteur, Sixty-sixth session, Geneva, 5 May-6 June and 7 July-8 August 2014, UN doc. A/CN.4/672, at 9-10 [ILC, Second Report, 2014].
[471] Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge, Cambridge University Press, 2016) at 295. [Dumberry, *Formation & Identification of CIL*]. He further notes that States "seldom expressly clarify whether or not they believe that they are acting out of a sense of obligation." *Ibid*. For the detailed discussion of controversial views on the nature and function of *opinio juris* in international law, *see* Karol Wolfke, *Custom in Present International Law*, 2nd ed (Dordrecht: Nijhoff, 1993); Brigitte Stern, "Custom at the Heart of International Law", (2001) 11 Duke Journal of Comparative and International Law 95.
[472] Mendelson, *supra* note 464, at 269.
[473] *Ibid*, [emphasis in the original].
[474] Dumberry, *Formation & Identification of CIL*, *supra* note 471, at 310.

prism, it is evident that all of them include a clear position acknowledging that the examination of the "reasonably available" nature of alternative means is obligatory in the context of interpreting the necessity clauses.[475] Most importantly, I have not found any single express statement by other WTO member states (usually respondent states in these disputes) opposing the examination of the "reasonably available" aspect of alternative means under necessity clauses.[476] All of these indicate that states believe in the obligatory nature of examining the "reasonable availability" of alternative means and accept it as a binding rule within the context of interpreting the necessity (exception) clauses. The identification of *opinio juris* from state practice in such a way may seem unlikely, as they come from the same unique source, namely, the pleadings of states before WTO DSBs. However, Professor Dumberry observes that "interpreting a statement as evidence of *both* state practice and *opinio juris* is not really 'double counting'; it is in fact counting two different things."[477]

Although all of the above mentioned may not be sufficient to prove the existence of a customary rule on the "reasonably available" aspect of alternative means, it nevertheless allows us to argue that it is in the process of formation and needs some time for crystallization as a

[475] Such analysis is based on the contention that *opinio juris* can also be discovered by examining some form of State practice, and statements before international courts and tribunals are considered as one of forms of State practice for the purpose of assessing the subjective element. *See* Dumberry, *Formation & Identification of CIL*, *supra* note 471, at 311-14.

[476] In examining the WTO jurisprudence, I could not find any statements made by the respondent states rejecting the pleadings that alternative means must be "reasonably available". The respondent states only argued against the contentions that the alternative means "were" or "were not" "reasonably available", but did not reject the "reasonably available" aspect of alternative means itself.

[477] Dumberry, *Formation & Identification of CIL*, *supra* note 471, at 321. It should be noted that there is also a position that does not require the demonstration of a subjective element. According to the International Law Association (ILA), in general "it is not necessary to prove the existence of an *opinio juris*", when there is uniform, consistent, extensive and representative State practice. As for the rationale, the ILA explains that the beliefs of States "may often be present, or it may be possible to infer it; but it is not a requirement that its existence be demonstrated." International Law Association, "Statement of Principles Applicable to the Formation of General Customary International Law", Final Report of the Committee on the Formation of Customary Law, Conference Report London (2000) at 31. Mendelson also considers it "unnecessary, either in theory or (particularly) in practice, to establish the presence either of *opinio juris* or of consent, in most cases." Mendelson, *supra* note 464, at 285.

customary rule. But, in any case, such state practice which is being developed in WTO jurisprudence provides us with an appropriate criterion on the level (boundaries) of costs and convenience of applying the alternative means for the purpose of assessing whether the measures adopted in necessity circumstances were the only means to protect state's essential interests. Since such criteria are not clarified in the ILC commentaries, the incorporation of "reasonably available" aspect into the interpretation of the "only means" requirement of the customary necessity defense is considered appropriate.

6.6.2. Incorporating the "Reasonably Available" Aspect into Interpretation of the "Only Means" Requirement of Customary Necessity Defense

The pleadings of states presented above demonstrate that states developed a uniform and consistent practice of attributing a "reasonably available" feature to alternative means within the framework of interpreting the "necessity" provisions in the WTO regime. It was also shown that the WTO Panels and the AB not only confirmed this practice, but also clarified what the term "reasonably available" means. Furthermore, the analysis of WTO cases showed that examining the "reasonable availability" of alternative means in the interpretation of "necessity" clauses in WTO agreements takes into account the actual practical circumstances and potential (financial, technical) of respondent states to adopt those alternative means in emergency situations. All of these factors made it possible (practical) for states to invoke the "necessity" clauses in protecting their essential public interests in emergency circumstances, and contributed to consistency on interpreting such clauses by WTO DSBs. Taking these advantages into account, and considering the fact that it is being developed as an emerging customary rule, I propose incorporating a "reasonably available" aspect into the interpretation of the "only means" requirement of the

customary necessity defense. In my view, such an incorporation will be of great use in resolving the interpretative issues in the investment arbitration regime, and thus will ensure the consistency of arbitral decisions on the interpretation of treaty NPM (necessity) clauses.

In order to understand to what extent such incorporation is helpful in clarifying the interpretation of the only means requirement, it is appropriate to refer to the previously mentioned commentary of ILC: "the [necessity] plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient."[478] As was pointed out above, the ILC did not provide any further commentary on this point, leaving the level of costs of adopting alternative means ambiguous. The incorporated "reasonably available" aspect clarifies the interpretation of the only means requirement by setting an appropriate level (boundaries) for such costs. As was explained above, it is reflected in the prohibitive costs which are beyond the financial, administrative and technical capacity of a state to adopt the alternative means. The examination of a state's necessity measures under the above mentioned ILC commentary will prevent any alternative means (irrespective of its costs and circumstances of its application) from meeting the only means requirement. The assessment of such measures under the proposed "reasonably available" only means requirement will take into account the actual financial, administrative and technical capacity of a state to adopt the alternative means. It will exclude consideration of those alternative means, the adoption of which are found to be beyond that capacity. Thus, the examination of state measures under the developed standard of the only means requirement will enable arbitral tribunals to consider only reasonably available (practical) alternative means and exclude all other theoretical (non-practical, prohibitive in terms of financial, administrative and technical capacity (limitations) of a state) ones, the mere existence

[478] Crawford, *Commentaries*, *supra* note 429, at 83, para 15.

of which make the whole defense impossible to invoke. In my view, it will not only facilitate a coherent interpretation of the only means requirement by arbitral tribunals, but will also make the necessity defense practical (possible, feasible to employ) for states by enabling them to invoke it successfully.

Furthermore, a closer look at the tribunals' analysis on the only means requirement of the necessity defense shows that there have been attempts to examine the "reasonable availability" of alternative means. As Professor Kingsbury argues, such an approach to interpreting the only means requirement was taken by ICJ in the *Gabcikovo-Nagymaros* case. As he points out, "the Court looked carefully and in detail at what the realistic policy options really were" that Hungary could adopt in order to protect its environmental interests.[479] Indeed, from the Court's analysis, it appears that it took into account the reasonable availability of alternative means that Hungary could employ in protecting its environmental interests, but it did not use the concrete language of "reasonably available" in its reasoning.[480] Therefore, it can be assumed that due to the absence of clear language on "reasonable availability" both in the relevant cases of ICJ and in the ILC commentaries, the investment arbitration tribunals (*CMS*, *Sempra*, *Enron*) did not find clear guidance in them and interpreted the only means requirement under its literal meaning.[481]

This assumption is further supported by the *Continental* tribunal's approach. As discussed in previous chapters, in examining the necessity of Argentina's measures, the *Continental*

[479] Kingsbury, Expert Report, *supra* note 430, at 34, para 74.

[480] This can be ascertained from the following:

> In holding that Hungary could have pursued its legitimate environmental and water protection aims without suspending implementation of the treaty with Slovakia, *the Court noted specific physical features of the upstream dam works that meant Hungary had the legal and operational capacity unilaterally to protect its interests without suspending the treaty*. This was possible partly because a great deal of the building work at the upstream Gabcikovo end had already been completed. With regard to the downstream dam works, the Court emphasized that *Hungary had itself accepted that enhanced water processing was an adequate and practicable solution to water quality problems in the Budapest*, so suspension of the works under the treaty was not necessary. *Ibid* [emphasis added]

[481] The literal meaning approach was discussed in Chapter IV.

tribunal applied the LRM test found in WTO jurisprudence which, in my view, enabled the tribunal to examine the alternative means by taking into account their reasonable availability. However, the tribunal did not present any methodological justification for resorting to the LRM test in the WTO regime. Moreover, the tribunals invented an additional step in the LRM test by examining whether Argentina's measures contributed to a state of necessity, and thus, conflated the elements of the LRM test with those of the customary necessity defense. In my view, the tribunal would not have been criticized so much if it had framed its interpretation within the elements of customary necessity and justified it using the interpretative methodology under Article 31(3)(c). In this respect, it should be noted that the *Continental* tribunal seemed to initially interpret Article XI of U.S.-Argentina BIT in light of the customary necessity elements when it stated that it would refer to them "only insofar as [it] assist in the interpretation of Art. XI,"[482] but did not substantiate it by reference to Article 31(3)(c) of VCLT. It can be assumed that the *Continental* tribunal's reason for not using the customary necessity elements as interpretative guidance could be the ambiguity around the interpretation of its only means requirement due to lack of guidance in the ILC commentaries and case law. Moreover, since the *Continental* tribunal was aware of the results of the approach taken by previous tribunals (*CMS*, *Sempra*, *Enron*) in interpreting the only means requirement of customary necessity, it can be assumed that the tribunal feared repeating the same mistake by following that approach.[483] However, as was pointed out above, the *Continental* tribunal could have followed another

[482] *Continental*, Award, *supra* note 60, at para 168.

[483] I assume that the Continental tribunal was aware of the CMS annulment committee's decision, as it was rendered prior to the Continental Award. As was discussed in Chapter IV, the annulment committee criticized the CMS tribunal for conflating the requirements of Article XI of the U.S.-Argentina BIT with those of customary necessity defense. My assumption finds support in Professor Vadi's observation, where she notes that "*Continental Casualty* relied on the complex hermeneutics of the WTO and *avoided the mistakes of earlier arbitral awards* which were subsequently annulled by *ad hoc* committees." Vadi, *Analogies in International Investment Law*, *supra* note 220, at 217 [emphasis added].

approach with regards to using the elements of the customary necessity defense as interpretative guidance. It could have justified the interpretation of Article XI in light of the customary necessity elements by operationalizing Article 31(3)(c) of VCLT. If that was the case, it can also be assumed that the tribunal could have adopted the literal interpretation of the only means requirement and thus, failed to take into account the reasonable availability of alternative means due to the lack of clarity in the ILC commentaries.[484] All in all, the reason for the inconsistency in the investment tribunals' approaches to examining whether the measures adopted by Argentina to address the financial crisis were the only means is primarily explained by lack of guidance on the interpretation of the only means requirement of the customary necessity defense. Therefore, this reason seems to be a main driving force that caused the *Continental* tribunal to look for the guidance elsewhere (WTO jurisprudence), for which it has been severely criticized. Nevertheless, the approach applied by the *Continental* tribunal demonstrates the importance of the "reasonably available" aspect of alternative means in examining whether the measures adopted by Argentina were the only means to protect its essential interests. Most importantly, it suggests the importance of identifying emerging state practice in WTO jurisprudence with regard to the "reasonably available" aspect of alternative means, which, if proved to be a developing customary rule, could be incorporated into the textual content of the only means requirement of the customary necessity defense in Article 25 of ARSIWA.[485]

[484] I assume that the *Continental* tribunal might fear that by applying a literal approach to interpreting the only means requirement (like *CMS*, *Sempra*), it could fail to give due consideration to the public interests of Argentina, as under the literal approach a mere (theoretical) availability of alternative means causes a respondent State to fail to satisfy the only means requirement. Moreover, the absence of sufficient jurisprudence in the investment arbitration regime on the efficient interpretation of the only means requirement of customary necessity might also have played an important role in the tribunal's recourse to WTO jurisprudence.

[485] The new version of Article 25 of ARSIWA could be drafted in the following way:

> 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:

However, I do not exclude the possibility that investment arbitration tribunals can also develop their own approaches to interpreting the "only means" requirement without textual clarification or recourse to WTO jurisprudence. Although we have not yet seen this in the tribunals' decisions, there is a possibility that future arbitral tribunals in the pending Argentine cases might adopt an interpretative approach that is independent of references to WTO jurisprudence. In this respect, the arbitral tribunals might independently use "reasonably available" language or other criteria that allows them to examine whether it was realistically possible for a state to adopt alternative means in protecting its essential interests in necessity circumstances.

6.7. Concluding Remarks

In this chapter, I presented a comparative analysis of different tests suggested by scholars for interpreting the non self-judging NPM clause of the U.S.-Argentina BIT (Article XI). The analysis mainly centered on examining the potential of tests such as proportionality, margin of appreciation, less restrictive means, and customary necessity defense to serve as an appropriate standard for interpreting the above mentioned treaty clause. Although the analysis revealed contradictory arguments on the application of standards, in my view, it presented sufficiently convincing evidence that support the usage of the customary rule of necessity as an interpretative guidance in resolving the current issue.[486] Particularly, relying on academic authority and evidence from case law, it showed the importance and efficiency of customary rules in filling the

(*a*) Is the only way **reasonably available** for the State to safeguard an essential interest against a grave and imminent peril; ....

[486] One of the main reasons for referring to customary rules of international law is explained by my argument that the treaties as *lex specialis* rules should be interpreted in light of general international law, and customary international law is considered a part of it.

gaps and lacunae in treaties. In this respect, the analysis demonstrated how the customary rule of necessity can be effective in clarifying ambiguous terms in treaty NPM clauses (specifically Article XI) and thus, ensure consistency in the interpretation of such treaty provisions in the investment arbitration regime. It was also proposed that to achieve this purpose, the application of a systemic integration approach through operationalizing Article 31(3)(c) of VCLT would serve as an appropriate interpretative methodology for investment arbitration tribunals.

At the same time, other standards proposed by scholars were also given due consideration. Despite their certain advantages in resolving the interpretative issue, they were found inappropriate due to specific deficiencies in their structural content or because of the different nature of the legal and institutional settings in which they are applied. However, it is worth noting that they played a decisive role in resolving another main issue in this research, which is related to interpreting the only means requirement of the customary necessity defense. This was particularly true with respect to the LRM test found in WTO jurisprudence. Although the importation of the LRM test into interpretation of Article XI was found debatable, in my view, it provided an important clue on the existence of emerging (developed) state practice in the WTO regime, which could be used as a source for clarifying the interpretation of the only means requirement of the customary rule of necessity. Thus, by surveying the WTO jurisprudence on the interpretation of necessity provisions, I was able to identify uniform and consistent state practice on one important aspect of the alternative means, which must be taken into account in assessing the necessity of state measures. Specifically, in examining whether state measures adopted in necessity circumstances were the only means to protect its essential interests, the alleged alternative means must not be theoretical in nature (as in literal interpretation), but rather be "reasonably available" for that state to employ. Since I found no objections made by WTO

member states and WTO DSBs in this respect, I suggested considering it to be a reflection of the development of state practice on the only means requirement of the customary necessity defense. Based on this argument, I proposed to incorporate "reasonably available" language into the interpretation of the only means requirement. Thus, in assessing whether a state satisfied the only means requirement of customary necessity, the arbitral tribunals should apply the following criteria:

a) whether a state **had other alternative means** to protect its essential interests;

b) whether those alternative means **were reasonably available** for a state to employ.

As was pointed out above, the interpretation of the only means requirement of customary necessity under this approach will introduce substantial clarifications on the boundaries (levels) of costs involved in the adoption of alternative means and thus, will facilitate the interpretation of this requirement by arbitral tribunals.[487] Specifically, it will enable arbitral tribunals to exclude from their consideration those alternative means that are merely theoretical in nature and those involving prohibitive costs that are beyond the financial, administrative and technical capacity of a state. Most importantly, this approach will transform the customary necessity defense from its static form (which does not accurately reflect contemporary customary international law, useless, serves no purpose as it is almost impossible to invoke successfully) into a dynamic form (accurately reflects contemporary customary international law, useful, practicable and feasible to employ), making it practicable for states to invoke it in necessity circumstances.

[487] As was noted above, such clarification does not exist either in the text of Article 25 of ARSIWA nor in the ILC commentaries on the only means requirement of necessity defense.

Conclusion

This thesis presented a detailed examination of the necessity defense in customary international law and the non-precluded measures clauses in IIAs through the lens of regime theory. By applying relevant concepts of regime theory, such as regime formation, regime attributes, regime consequences and regime dynamics, this work explored the origins and evolution of the necessity doctrine, and provided a comparative analysis of the attributes, structural elements and consequences of invoking the customary necessity defense and treaty NPM clauses.

First, by applying the concept of regime formation, this study explored the formation of the necessity doctrine through different historical periods and explained the transitions it went through. This study found that the necessity doctrine originated from Divine Law, in particular, from Islamic and Canon Laws. The necessity doctrine in Divine Law follows the general maxim: "Necessity permits prohibited things". Instituted as a norm under Divine Law, necessity mitigates the severity of hardship by providing facility in extreme circumstances. Later, in the Middle Ages, the necessity doctrine underwent a transformation, when it started to function as a right of self-preservation in the relations among states. During this stage, the necessity doctrine did not operate as a norm granting states absolute freedom to act in emergency circumstances. Rather, to provide justice among conflicting interests, it set out certain limitations in its invocation. Finally, the development of the necessity doctrine ended with the formation of the modern concept of necessity, which is invoked by states as a ground for precluding the wrongfulness of their acts not in conformity with their international obligations.

Second, the thesis addressed legitimacy crisis issues in the investment arbitration regime resulting from the interpretation of the customary necessity defense and treaty NPM clauses by

the investor-state arbitration tribunals. It presented a thorough analysis of the Argentine cases, in which Argentina invoked both the customary necessity defense and treaty NPM clauses as defenses in justifying the emergency measures it adopted to mitigate the consequences of the financial crisis that struck the country in the beginning of 2000s. In this respect, the analysis drew insights from international relations theories in analyzing international law; specifically, approaches by international law scholars a) to explain the function and structure of particular international legal rules or institutions; and b) to reconceptualise or reframe particular rules, institutions or international law generally.[1] Thus, this analysis mainly focused on: a) explaining the function and structural elements of customary necessity defense and treaty NPM clauses, as well as the relationship and distinctions between these two defenses in terms of their application by the investment arbitration tribunals; and b) working out proposals to reconceptualize the customary necessity defense and treaty NPM clauses according to the developments in the contemporary practice of states.

The analysis performed through the lens of the regime attributes concept revealed that the customary necessity defense and treaty NPM clause are two separate and distinct legal rules: a treaty NPM clause is a primary rule (*lex specialis*) that is applied first, and if it applies, the substantive obligations under a treaty do not apply; and the customary necessity defense is a secondary rule (*lex generalis*) that only applies when it has been decided that there was a breach of substantive obligations.[2] Moreover, by applying the concept of regime consequences, this study clarified the distinction between the customary necessity defense and treaty NPM clauses in terms of the consequences of their invocation in investment arbitration practice. The analysis

[1] *See* Chapter I.
[2] As was explained in Chapter IV, it means that arbitral tribunals should first consider whether state measures at issue were excluded from treaty breaches by the treaty NPM clause, and then they should consider the state's responsibility for a breach under the customary necessity defense.

showed that the preclusion of the measures' wrongfulness under the customary necessity defense does not exempt a state from providing compensation, but rather, temporarily excuses it for the duration of necessity circumstances. Put simply, a state must compensate foreign investors for the material loss caused by its actions during a state of necessity, even though it has successfully invoked the customary necessity defense.[3] In contrast, a successful invocation of the treaty NPM clause exempts a state from liability, and thus relieves it from paying compensation for the damage inflicted during the state of necessity.[4] However, the analysis showed that some arbitral tribunals applied the consequences of invoking the customary necessity defense when the treaty NPM clause was invoked. This result was explained by the fact that, neither the NPM clause (Article XI) nor the BIT (U.S.-Argentina BIT) contained the definitive text on the effects of its application. Therefore, as part of the reconceptualization of treaty NPM clauses, this thesis proposed that states should negotiate and clearly provide for the effects of invocation of the NPM clauses in their investment agreements. The realisation of this policy recommendation in the treaty practice would prevent states from undermining the expectations of other treaty participants. It would also stabilize their behaviour and help them gain expected benefits from the investment arbitration regime.

Third, a substantial part of this thesis dealt with clarifying how arbitral tribunals should interpret the elements of customary necessity defense and the NPM clause of the U.S.-Argentina BIT. Since the arbitral tribunals in the Argentine cases interpreted them inconsistently, these interpretations were analyzed to come up with specific proposals on developing approaches to interpreting the elements of both defenses. In particular, the analysis focused on the "only

[3] However, it was found that there is no clarification on the standard of compensation that should be provided for the loss incurred as result of a state's necessity measures.

[4] As was explained in Chapter IV, this is due to the fact that NPM clauses function as exceptions to substantive provisions of the treaty, and their successful invocation does not have the effect of justifying or excusing treaty violations as that of the customary necessity defense.

means" element of the customary necessity and the nexus requirement of the treaty NPM clause in the U.S.-Argentina BIT, proving that the interpretation practice of investment arbitration tribunals requires greater consistency. Thus, it was argued that the interpretative approaches taken to arbitral tribunals in the Argentine cases on the "only means" element of the customary necessity defense and nexus requirement of the U.S.-Argentina BIT needs to be reconceptualised according to developments in the contemporary practice of states. Moreover, they must be applied with strict adherence to the general rules of interpretation established under Article 31 of VCLT. In this respect, applying the concepts of regime dynamics and the interaction of regimes, this study explored potential interpretative tests in different specialized treaty regimes that could be used in developing an optimal approach on interpreting the customary necessity defense and treaty NPM clause within the investment arbitration regime.

The analysis showed that the interpretation of the only means element of customary necessity defense by most arbitral tribunals in the Argentine cases proved to be "ill-suited" to economic emergencies. Arbitral tribunals interpreted the only means element according to its literal meaning, which does not take into consideration the viability and practical availability of alternative means. It was argued that interpreting the only means element as being satisfied only when a state has no alternative, without regard to whether alternatives are reasonably available to the state, makes it impractical and unrealistic for respondent states to satisfy this requirement of customary necessity. For example, if alternative means involve costs beyond the financial capacity of a respondent state (especially in financial crises), a state will not be able to successfully invoke the whole defense, and the defense will have limited, if any, applicability. Therefore, it was argued that such an interpretation of the only means element of the customary necessity defense does not accurately reflect the contemporary customary rules on necessity. In

this regard, this thesis proposed to reconceptualise it through incorporating the elements of a more progressive version, as developed in the international trade regime. In this respect, this thesis suggested taking advantage of WTO jurisprudence as a source of developing state practice on an important criterion related to examining the availability of alternative means. It has presented sufficient evidence on the existence of uniform and consistent state practice on such criterion, which relates to the level of costs and convenience of applying the alternative means in necessity circumstances. In examining whether state measures adopted in necessity circumstances were the only means to protect its essential interests, the alleged alternative means must not be theoretical in nature (as in the literal interpretation), but rather, must be "reasonably available" for that state to employ in actual circumstances.[5] The adoption of alternative means must also not put an excessive burden on the state in terms of prohibitive implementation costs. Most importantly, the alternative means must ensure the same level of protection as the actual "necessary" measure at issue. This study proposed that state necessity measures must be examined under this developed standard of the only means element, which incorporates these requirements on the "reasonable availability" of alternative means. The examination of alternative means under these requirements would not only contribute to the effective interpretation of the only means element of customary necessity defense, but also make it practicable for states by enabling them to successfully invoke the defence in practice.

As for developing an appropriate standard on interpreting the NPM clause (Article XI) of the U.S.-Argentina BIT, this study found it important to analyze the self-judging nature of the treaty provision first, because whether it is self-judging affects the interpretative standard to be

[5] As was argued, in order to be "reasonably available", the alleged alternative means must be practically applicable and readily available for adoption at the time of necessity circumstances.

applied, requiring the application of good faith review. Thus, the thesis addressed this issue first, and then presented a comparative analysis of potential standards suggested by scholars for interpreting Article XI as a non self-judging clause. The analysis revealed that the self-judging nature of a treaty clause does not oust the jurisdiction of arbitral tribunals, but rather, affects the standard of review applied by tribunals. The good faith review was argued to be required in such a case. However, the review of relevant cases showed that there is a possibility for a state to abuse its discretion under a self-judging clause, as arbitral tribunals have not developed a practical good faith test that could prevent it. As a possible solution, this study proposed incorporating the less restrictive means test and the reversal of the burden of proof into good faith analysis. The LRM test includes examining alternative means, which are less restrictive on claimant's interests than the actually adopted measures, through the adoption of which a respondent state could attain the pursued objectives. The reversal of the burden of proof obliges the claimant investor (not the respondent state) to prove that those alternative means were reasonably available to the respondent state and the respondent state neglected them. The potential of incorporating these two elements into a good faith analysis might serve as a safety valve against abuse by states of their discretion under a self-judging NPM clause and be helpful for arbitral tribunals in examining the honesty and reasonableness of state measures in a more efficient way.

Moreover, this thesis elucidated the academic debate on whether the NPM clause of U.S-Argentina BIT is self-judging. Since this treaty clause does not contain explicit language (such as "it considers") concerning its self-judging nature (like NPM clauses in other U.S. BITs that were concluded later), contradictory arguments have been advanced on its self-judging character.[6] In

[6] For a detailed discussion of the arguments, s*ee* Chapter V, Section 5.3.

order to avoid such issues in the future, the thesis proposed that, as part of reconceptualising the treaty NPM clauses and as a policy recommendation, states clearly formulate the self-judging language of the NPM clause, as observed in recent treaty practice of states, or completely deny the justiciability of a host state's assertion of necessity in the texts of their investment agreements.[7]

Fourth, this thesis advanced concrete proposals for applying the appropriate methodology for treaty interpretation. In the comparative analysis of the interpretative standards to be applied to Article XI as a non self-judging clause, this thesis argued that the interpretation of any treaty clause should be performed by strictly adhering to the general rules of interpretation as established under Article 31 of VCLT. It was contended that the interpretation of a treaty clause should not frustrate the expectations of treaty parties. In a case where arbitral tribunals fail to define the treaty terms in accordance with its ordinary meaning and context under Article 31(1) and (2), they should not look for guidance from other special treaty regimes, but rather, must have recourse to general international law, specifically, customary rules of international law. This was explained by the fact that the rules of special regimes are less comprehensive than general international law, and cannot always encompass all issues that must be regulated in a particular regime. In such a case, the norms of general international law should serve as a "mother source" for all specialized treaty regimes and play a suppletory (gap-filling) function when separate treaty regimes fail to solve a particular legal issue.[8] Thus, this thesis advanced the argument that unclear and open-textured terms of treaty provisions, in particular, Article XI of the U.S.-Argentina BIT, should be interpreted consistently with general international law,

[7] As was explained in Chapter V, this means that any decision of a state taken on necessity considerations shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of such a decision.

[8] The comparative analysis of interpretative standards in different treaty regimes also revealed that these treaty regimes have their own peculiar institutional settings, which renders importing their interpretative standards into investment regime inappropriate.

specifically, customary rules of international law. As an interpretative methodology, the thesis proposed applying a systemic integration approach through operationalizing Article 31(3)(c) of VCLT. In this regard, the thesis clarified that interpreting the treaty NPM clause (Article XI) by reference to relevant rules of international law (the customary necessity defense) does not involve the application of the latter as a *lex specialis*, and thus, does not induce the effects of its application (such an approach was taken by the *CMS*, *Sempra* and *Enron* tribunals). Rather, it involves the interpretative process, where the treaty NPM clause is clarified through the elements of the customary necessity defense. In this case, the treaty clause retains its primary role, and the residual application of the customary necessity elements does not give rise to the effects of application of the latter.[9] Hence, the tribunals using the customary necessity elements to interpret the treaty NPM clause (Article XI) should not be considered to be displacing (overriding) the treaty NPM clause as *lex specialis*, but rather, should be regarded as attempting to realize the effects of the treaty NPM clause through clarifying its content.

To summarize, the analysis performed in this thesis through the lens of regime theory concepts shows that legal regimes are not static, and develop continuously according to the dynamics of realties and challenges in the practice of states. The customary rule of necessity and the treaty NPM clauses are not exceptions in this regard. The examination of the Argentine cases confirmed that the investment arbitration regime is undergoing a legitimacy crisis with regard to ensuring consistency in the interpretation of the customary necessity defense and treaty NPM clauses. Thus, it needs an efficient approach to interpreting their elements that corresponds to the dynamics of developments in the practice of states. Relying on such dynamics of development,

[9] As was explained, there is a stark difference between the effects of invoking both defenses. A successful invocation of the customary necessity defense does not relieve a state from liability to pay compensation. Conversely, a successful invocation of the treaty NPM clause exempts a state from liability and paying compensation.

this thesis advanced concrete methodological approaches and substantive proposals to attain coherency in the interpretation of these two rules in the practice of investment arbitration tribunals. Most importantly, the proposals in this thesis were made from the perspective of ensuring a balance between protecting foreign investors' interests and providing host states with regulatory space sufficient to protect their essential public interests. The ideas and proposals advanced in this thesis might have the potential to, in the future, provide investment arbitration tribunals with an efficient interpretative framework that meets expectations of the investment regime's participants and fosters cooperation among them. This will further contribute to the building of a legitimately strong investment arbitration regime.

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