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The Necessity Defense in Investor-State Arbitration:

Broadening the Concept

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“Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and like”

Elletronica Sicula S.p.A (ELSI) (United States of America v. Italy), Judgment 20 July 1989, I.C.J. Reports, 1989, 15, para. 74.

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Introduction

The occurrence of extraordinary economic, environmental and social emergencies as a result of certain economic policies delivered by some States during the last decade served as a justification to revisit the plea of necessity. As a consequence of the grave peril experimented during such economic emergencies, States were trapped in a dilemma: either struggle to honor their commitments in IIA´s through the application of intrusive and frequently desperate measures to mitigate the effects of profound socio-economic crisis, or, imposing troublesome measures directly affecting investors rights at expenses of facing onerous jurisdictional and arbitral proceedings with strict and narrow thresholds to preclude their wrongdoing. As recently experienced with the Greek and Cypriot depression or the current Venezuelan crisis, actions to alleviate a collapsing economy may temporally comprise, *inter alia,* closing stock markets, severe controls on the deposits of account holders, health and education budget reductions, imposition of burdensome fiscal measures and even creating temporary parallel currencies.

Irrefutably, the burden of such painful measures may severely impair investor's rights and expectations, forcing them to seek shelter on the State-Investor arbitration clauses agreed on IIAs, habitually under the auspices of the International Center for the Settlement of Investment Disputes (ICSID). The vast number of cases brought as a result of emergency measures by States has brought into review whether the necessity plea under customary international law is available to preclude international responsibility for measures taken during economic emergencies. Over the last decade, the importance of reassessing the prominent justification for international wrongful conduct became evident with the Greek and Argentine crisis, the latter a top player in the international investment arbitration arena with over fifty claims directly arising from the disastrous economic crisis of 2000-2002[1].

Considering the aforementioned, contradictory approaches for the invocation of a state of necessity became manifest in several arbitral Tribunals which reviewed on the crucial requirements for its invocation, particularly on five similar cases: *CMS*[2], *Sempra*[3], *Enron*[4], *LG&E*[5] and *Continental*

[1] United Nations Conference on Trade and Development (UNCTAD), *Recent Developments in Investor State Dispute Settlement (ISDS).* IIA Issues Note, April 2014, No.1, p.8. Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf (Last visited 15th July 2015).
[2] CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award of May 12.
[3] Sempra Energy International v. Argentine Republic. ICSID Case No. ARB/02/16, Award of September 28, 2007.
[4] Enron Corporation Ponderosa Assets, L.P v. Argentine Republic. ICSID Case No. ARB/01/3, Award of May 22, 2007.
[5] LG&E Energy Corp. et al. v. Argentine Republic. ICSID Case No. ARB/02/01, Award of July 25, 2007.

Casualty[6] [hereforth referred as " *the Argentine Saga*"]. Those cases represent State´s efforts to question investor´s allegations of breach to International law obligations enshrined in BITs by enacting a series of measures aiming to tackle the aggravation of a financial crisis. Certainly, Argentina's unenviable position highlighted the dilemma of a state facing an economic crisis, especially in an age when foreign investment has become the largest single source of external development finance for developing countries[7].

Necessity is a highly controverted topic in international law. The International Law Commission (ILC) embarked on a half-decade assignment to harmonizing the grounds to invoke a state of necessity under customary international law in the Articles on State Responsibility[8], serving since as a valuable cardinal direction for diverse tribunals. Nonetheless, recent awards have been unable to uniformly apply coherent parameters for the invocation of necessity on investment arbitrations in remarkably similar cases affecting alike industries in the territory of the same State and under the same legal basis, thus creating skepticisms on whether the ILC work may not be entirely applicable to the realm of investment arbitration.

The importance of revisiting the necessity defense from a host state perspective becomes relevant in times where governments make great efforts to maintain a delicate balance: on one hand, designing the necessary legal, technological and infrastructural framework for luring foreign capital into their territory for investments in strategic industries, key natural resources or the necessary infrastructure to alleviate poverty, stimulate growth, and foster development. On the other hand, safeguarding their essential interests through BIT's and national legislation that foresee exceptional measures in case strategic industries for the states' economy become imperiled, or to prevent economic emergencies that may put the very system at the brink of downfall. Long story short, States' concern is to retain sufficient legal flexibility in dealing with extraordinary situations without incurring any liability towards the foreign investor[9], especially in developing economies, where Foreign Direct Investment (FDI) has experienced a sustained increase during 1995-2014[10].

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[6] Continental Casualty Company v. The Argentine Republic. ICSID Case No. ARB/03/9. Award of September 5, 2008.

[7] Song, Nicholas. *Between Scylla and Charybdis: Can a plea of necessity offer safe passage to States in responding to an economic crisis without incurring liability to foreign investors?.* American Review of International Arbitration (ARIA), Vol. 19, No.2, p.236.

[8] *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* UN Doc. A/56/10 (2001). Available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (Last visited ---)

[9] Dolzer, Rudolf & Schreuer, Christoph, *Principles of International Investment Law,* 2nd Ed., Oxford, 2012, p. 182.

[10] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015: Reforming International Investment Governance.* UN Publication, 2015, p.2

The objective of this thesis is twofold. In the first place, it will study the state of necessity as a principle enshrined in customary international law and classic international law. Secondly, it will study recent arbitral tribunal awards as a consequence of the Argentine crisis, aiming to ascertain an integrated approach for future cases considering the requirements of the state of necessity as established in customary international law.

Chapter I

The Necessity Defense in International Case Law

Definition

Necessity is not a novelty in international law. It is a principle firmly embedded within the notion of sovereignty in cases of exceptional need, whether to safeguard an important interest or to prevent its endangerment. Although necessity can take different forms –depending on the standpoint- it denotes remarkable circumstances in which States are compelled to commit an illegal act[11] with the intention to preserve, maintain and prevent an essential interest to become at risk of endangerment or impaired by a grave or imminent. As Prof. Ago notes, the concept of necessity 'is far too deeply rooted in the consciousness of the members of the international community and of the individuals within States'[12]. The term may vary 'greatly in color and content according to the circumstances and the time in which it is used'[13]. It encompasses a balance of interests which States are faced in order to preserve their territorial integrity, economical stability and under certain circumstnces, the very existence of the State. Contrary to *force majeure* or *distress*, 'it entails perfect awareness of having deliberately chosen to act in a manner not in conformity with an international obligation[14]', whether by acting against essential interests of the international community as a whole or in breach of peremptory norms of international law[15]. Depending on one's view, necessity remains as 'a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation[16]' based on 'general principles of law'[17].

Necessity has been object to criticism and debate by scholars and diverse international

[11] *A Dictionary of Law.* 5th Ed, OUP, 2001, p.327.
[12] *Yearbook of the International Law Commission*, 32nd session, excluding the report of the Commission to the General Assembly*)*. Vol. II, Part 1, A/CN.4/SER.A/1980/Add.1(Part 1), 1980, p.51
[13] Sloane, Robert D, ¨*One the Use and Abuse of Necessity in the Law of State Responsibility*¨. AJIL, Vol. 106:447, 2002. p. 448. Quoting Towne v. Eisner, 245 U.S. 418, 425 (1918).
[14] United Nations. *Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur,* Addendum, A/CN.4/498/Add.2, 1999, p.25, para.276.
[15] Gazzini, Tarcisio; Werner, Wouter & Dekker, Ige. *Necessity Across International Law: An Introduction.* Netherlands Yearbook of International Law, Vol. 41, 2010, p. 4.
[16] Gabčikovo-Nagymaros Project (Hungary v. Slovakia), Judgement, 25 Sept. 1997, ICJ, Reports, 1997, para. 51, p. 37
[17] Cheng, Bin. *General Principles of Law as Applied by International Courts and Tribunals.* Cambridge, 2006, p.77.

tribunals, who were deeply concerned its invocation could be prone to abuses and subjectivisms. Nonetheless, necessity is embodied in most modern legal regimes, particularly in criminal[18] and civil law, where it stands as a defense to preclude responsibility under strict and often cumulative requirements. In international law, is considered to be part of customary international law, a concept that has gone through constant evolution during the last centuries as a systematic expression of the law on state of necessity developed by courts, tribunals and other sources over a long period[19]. Necessity stands as a pillar for States and the international community to vindicate the protection of strategic interests and national security interests. Indeed, 'is one means for States to alter, in one degree or another, their duty to comply with treaty obligations'[20]. Furthermore, it has been largely associated with natural law, Canon law and customary international law principles. Its origins may be traced to the 18th century, where it stood as one of the most traditional principles of International Law.

By the same token, necessity may encompass different legal natures. If considered under customary international law, the plea a of necessity can only be invoked when a breach of international obligation is established in relation to a particular set of rules from a primary law, operating as a secondary rule to excuse or justification to preclude a particular wrongdoing, generally under a strict, cumulative and narrow threshold. In contrast, its scope and purpose greatly differs when applied *vis a vis* a treaty-based regime, because primary rules define which interests of rights are protected under a particular treaty.

Codification

Necessity is one of the oldest accepted principles of international law. 'Legal systems, even if ordained by a divine, omnipotent, and omniscient God have contained provisions on its application'[21]. From *necessitas legem non habet* expressed in canon law of Christianity, to Grotius classical codification, necessity remained ingrained in most cultures of the world, although its codification was commenced rather recently. After the 19th century, the invocation of necessity as a preclusion for state responsibility was largely limited to cases of self-preservation, whether to safeguard important military installations or to vindicate military occupation of a foreign territory or industries[22]. Necessity

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[18] Raimondo, Fabian. *General Principles of Law in the Decisions of International Criminal Courts and Tribunals¨,* Martinus Nijhoff, 2008, p. 185. The author notes the analogies between national and international criminal law in regards of, *inter alia*, state of necessity.
[19] *Sempra,* Supra Note 3, para. 344. The Arbitral Tribunal recognized such category before international law.
[20] Desierto, Diane. *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation,* Brill, 2012, p.2.
[21] Ibid, p.63.
[22] Crawford, James; Pellet, Alain & Olleson, Simon. *The Law of International Responsibility¨,* OUP, 2010, p. 492. Necessity was invoked to justify the annexations of Krakow by Austria in 1846; of Rome by Italy in 1870; of Bosnia-

has experienced a continuous evolution in international law, shifting between an "inherent-right" under the self-preservation principle of law to an independently accepted customary international law principle through the efforts of the ILC.

Necessity as an inherent right for self-preservation

As suggested, early case law shows a solid link between self-preservation and the notion of necessity in modern international law. In early cases and doctrine, self-preservation was profoundly related to the principle of necessity[23].

One of the most prominent cases dealing with necessity -although in the context of self-defense against an armed attack- is the *Caroline* case, where a as a consequence of the destruction of a vessel carrying US nationals to attack British forces, US Secretary of State rested upon necessity to justify the actions, stating as follows:

> '[A] necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation [and involving] nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it[24]'.

Later, In the *Neptune Case[25],* an American vessel –the *Neptune*- partly loaded with rice and nourishment on its way to France, seized by Great Britain and taken to London pursuant to a provision extended to neutral ships heading to enemy ports during the French-British war, the Commission was asked to ascertain whether Great Britain´s actions were justified by necessity insofar Great Britain had been threatened with scarcity of the seized goods. In it's reasoning, the Commission acknowledged that, certainly, an *extreme* necessity might justify such seizure, however, such necessity shall be undisputed, real, and leaving no means of action. William Pinckey, a member of the mixed commission, stated quoting Grotius' necessity principle:

> '[N]ecessity must not be imaginary, that it must be real and pressing, and that

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Herzegovina by Austria-Hungary in 1908; of Ethiopia by Italy in 1936; of Korea by Japan during the Russian-Japanese war; of Denmark, Norway, the Netherlands, Belgium and Luxemburg by Germany during the Second World War. See

[23] *Gabčikovo-Nagymaros Project,* Supra Note 17, p.76.

[24] Shaw, Malcolm. *International Law*. 6.ed, Cambridge, 2008, p.1131. Citing 29 BFSP, p. 1137 and 30 BFSP, p. 195.

[25] Moore, John Bassett, *History and Digest of the International Arbitrations to which the United States has been a party, together with Appendices containing the Treaties relating to such arbitrations, and historical legal notes¨,* Washington Government Print Off, 1898, pp. 3843-3845. Digitalized by the University of Michigan. Available at: https://archive.org/details/historyanddiges02moorgoog

> even then it does not give a right of appropriating the goods of others until all other means of relief consistent with the necessity have been tried and found inadequate'[26].

Similarly, confirming the strict threshold, Mr. Gore, a member of the commission, noted that 'Necessity must be absolute […] because whatever does but deviate the least from necessity is injustice'[27].

In essence, the commission unanimously agreed that necessity, as a customary international law principle, should be only invoked when the very existence of the State was imperiled, superseding all other laws. Important to highlight is that the Grotian view of necessity in the *Neptune* case is considered a right under the *self-preservation* doctrine, in which a State is legally allowed to performed acts otherwise unlawful should a its mere existence be at stake, a requirement that does not persist nowadays[28].

Moreover, in the *French Company of Venezuela Railroads case,* Venezuela had contracted with a French company to build numerous railroads over the country, in particular alongside the Colombian border. As fears of an armed revolution materialized, Venezuela ceased payments to continue with the railroads construction. Likewise, the French company was unable to endure its debts because of turmoil and eventually stopped the works. In assessing the issue, the French-Venezuelan Commission evaluated Venezuela´s *self-preservation* as follows:

> "[T]he umpire finds no purpose or intent on the part of the respondent Government to harm or injure the claimant company in any way or in any degree […] its first duty was to itself. Its own preservation was paramount […] the appeal of the company for funds came to an empty treasury, or to one only adequate to the demands of the war budget[29]".

Interesting, the case was evaluated as an example of *force majeure.* Nonetheless, what is particularly noteworthy is the Commission's approach on the justification for an international law

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[26] *Ibid.,* p.3843.
[27] *Ibid.,* p. 3853.
[28] Boed, Roman. *¨State of Necessity as a Justification for International Wrongful Conduct¨,* Yale Human Rights and Development Journal (YHRDJ), Vol. 3 Iss. 1, Article 1, 2000, p.9.
[29] *Reports of International Arbitral Awards.* French Company of Venezuelan Railroads Case. Award, 31 July 1905. United Nations, 2006, p.353.

breach on the basis of self-preservation, as Venezuela's imminent threat –the revolt- was perilous enough as to excuse their payment obligations towards the French company. Furthermore, important to notice is the breaking point from the *Fur Seals Case,* since, in the first half of the twentieth century, there were many judicial decisions in which subjective elements such as intention, negligence or lack of due diligence were considered definite grounds for responsibility[30].

Necessity for debts

Similarly, in the *Russian Indemnity Case,* the Ottoman Empire was due in interest payments to Russia in accordance with the Treaty of Constantinople, which ended hostilities between both nations. The Ottomans argued that the counterpart enjoyed a definite privileged position in contrast with Ottoman's struggling economy. Interesting to notice is the narrow limitations the Tribunal weighed on their award, because to their opinion, the observance to international obligations may be weakened 'if the very existence of the State is endangered, if observation of the international duty is … self destructive[31]'. In the same fashion, the Tribunal considered the *quantum* not to be as onerous as to create a collapse of the economy or to imperil their economy. As Desierto notices, 'it would clearly be exaggeration to admit that the payment (or obtaining of a loan for the payment) of comparatively small sum of six million francs due to Russian claimants would imperil the existence of the Ottoman Empire'[32].

Important to realize is that the aforementioned case preceded numerous cases where Tribunals were asked to assess whether necessity –sometimes mistaken with *force majeure-* would preclude the wrongful conducts in international law based on financial and economic crisis. As an illustration, in the *Brazilian Loans case[33], Payment of Various Serbian Loans Issued in France[34]* and *Société Commerciale de Belgique[35],* the Permanent Court of International Justice (PCIJ) had to pronounce upon certain debts acquired by the respondents, which were fixed to specific conditions to avoid depreciation of the arrears, which were not honored due to economic and security issues. In maintaining its *dictum,* the PCIJ advised in a restrictive fashion:

[30] Yamada, Takuhei. *"State of Necessity in International Law: A Study in International Judicial Cases.* Kobe Gakuin Hogaku University Law Review, Iss. 4, 2005, p.121.
[31] Pronto, Arnold & Wood, Michael. "*The International Law Commission 1999-2009, Volume IV: Treaties, Final Draft Articles and Other Materials.* OUP, 2010, p.240.
[32] Supra note 20, p.152. See *Russian Indemnity case* (Russia v. Turkey) (1912), 11 RIAA 421, *cited in* 1979 Yearbook of the International Law Commission, vol. II, p. 34, at para. 65
[33] *Brazilian Loans case*, PCIJ Series C, No. 16 (IV), *cited in* Supra note 20, p. 152-154.
[34] *Case Concerning the Payment of Various Serbian Loans in France*, PCIJ Series C, No. 16 (III) *cited in* Supra note 20, p.152
[35] *Société Commerciale de Belgique* case, Judgment of June 15th, 1939, PCIJ, Series C, No. 87, *cited in* Supra note 20, p. 153.

> '[i]t cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State, *although they may present equities, which* doubtless will receive appropriate consideration in the negotiations'[36].

Likewise, in *Forests of Central Rhodope*[37], the Council of the League of Nations decided in an arbitral award that Greece was entitled 475,000 gold leva plus interests in cash from Bulgaria. Bulgaria, albeit obliged to honor the emoluments to Greece, excused its wrongdoing as a result of a financial crisis, urging Greece to reach a settlement. As expressed by Bulgaria:

> '[I]t was not the Bulgarian Government's intention […] to evade the obligation imposed upon it by the arbitral award […] the present situation of the national finances, however, prevented the Bulgarian Government from contemplating a payment in cash. His Government was nevertheless prepared to examine with the Greek Government, any other method of payment which might suit the latter […] The Bulgarian Government hoped that a friendly settlement could be reached[38]'.

Bearing in mind Bulgaria's financial situation, Greece agreed to be paid with lumber from the Rhodopean forest. More importantly, Greece acknowledged that Bulgaria's financial crisis could justify an agreement that departs from the arbitral award. As Ago notes, "[T]he two Governments seem to have clearly recognized a situation of *necessity* such as one consisting of *very serious financial difficulties* could justify, if not the repudiation by a State of an international debt, at least a recourse to means of fulfilling the obligation other than those actually envisages by the obligation[39]". Nonetheless, some authors[40] discredit such view based on an absence of proofs by Bulgaria to demonstrate such struggles, nor an explicit plea of necessity from their representatives. Be that as it may, the case embodies several features on how a financial crisis could severely impact a State's

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[36] Desierto, *Supra Note* 20, p.154.
[37]Dispute Between Greece and Bulgaria Concerning the Forests of Rhodope, 15 League of Nations Office Journal 1432 (1934).. *Cited in* Supra Note 12, p.23, para. 24.
[38] *Ibid.* at 1432.
[39] Report; *supra note 12*, p.23, para.23.
[40] See Supra Note 13, p. 462.

international obligation and how the international community has embraced State´s sovereign right to protect their economy.

In similar terms, in the *Oscar Chinn* case[41] the PCIJ had to review whether the Belgian Government could invoke necessity based on the actions taken in the intercourse of 1930-1931, when an acute world economic crisis severely impacted raw materials and commodities prices coming from Belgian colonies. Consequently, the Belgian Government came to the conclusion that this reduction in the cost price must be affected, firstly, by a reduction of the expenses of transportation and handling, and, secondly, by an attenuation of the overhead charges of colonial producers[42]. To that end, Belgian authorities ordered several companies to reduce tariffs on transportation, assuring reimbursement for damages. Consequently, United Kingdom complained that one his nationals, Oscar Chinn, had been severely affected by such measures insofar a *de facto monopoly* was created in Congo, contrary to several navigation principles. Judge Anzilotti, contrary to the Court's position, addressed the issue:

> "[T]he situation would have been entirely different if the Belgian Government had been acting under the law of necessity, since necessity may excuse the non/observance of international obligations[43]".

Worth to mention is that Anzilotti, who had published several academic papers severely criticizing the theory of the fundamental rights of States and the lawfulness of the act of necessity[44], asserted that should Belgium had met the requirements for a state of necessity, it would have precluded their international responsibility for wrongful conduct.

The latter cases had a practical relevance to international investment law, since served as a starting point for the discussion of emergency clauses and sovereignty as a result of debts or debt-restructuring, partly because States moved from a regional economy to a globalized world as a result of the post World War II Bretton Woods Institutions. Uncontestably, such shift had a relevant importance to International Law since economic emergencies could extend for years –even decades-causing similar as much damage as an armed attacked. Furthermore, the creation of the United Nations and its peaceful settlement systems had an impact in limiting *self-preservation* claims as an

[41] The *Oscar Chinn* case, 1934 PCIJ Series A&B, No.63. Cited in Supra Note 30, p.125.
[42] Yamada; *supra note* 30, citing *Ago Report 20-30,; 1980 Report 41.: 2001 Report 198.*
[43] *Oscar Chinn* case, *supra note* 41, p. 113.
[44] Report; *supra note* 12, p.16-18.

excuse for international liability[45].

Necessity as environmental protection

Necessity can take various forms in order to protect State's interests. As a result of an increasing environmental concern since the last century, necessity has been a useful instrument to excuse measures taken to prevent environmental catastrophes that would potentially damage not only to the State's economy, but also to the lives of its citizens.

In the *Fur Seals Case*, the Russian government issued a Decree forbidding the hunting of seals in areas contiguous to its territorial sea, triggered by unsustainable and unwarranted hunting by Great Britain and American huntsmen in anticipation for the start of the hunting season. To validate their actions, the Russian government argued the measures were absolutely necessary to protect their natural interests, and due to the imminence of the hunting season, precautionary temporarily actions needed to be taken in place as a result of the exceptional circumstances. Although the parties eventually reached an agreement ending the dispute, remarkable features of necessity as a plea were confirmed. As Prof. Ago notes, 'this position is therefore interesting as an affirmation of the validity of the plea of necessity in international law[46]'. The latter because necessity comes into play when an extraordinary or absolutely exceptional situation is presented to the State, seriously threatening a valuable interest. Particularly interesting is the 'imminent character of the danger of a major interest of the state and the impossibility of averting such danger by other means'[47].

Analogously, in the *Torrey Canyon* incident, the protection of maritime environment was paramount when a convenience flag Liberian oil tanker struck submerged cliffs off the coast of Cornwall, spilling oil in coastal waters of Great Britain. Despite bending their efforts to contain the leak, British authorities ultimately bombed the vessel, igniting the oil within the tanker, as there was no other means of salvaging the ship to protect the maritime environment. As Ago noted in its Report:

> '[T]he lesson of the *Torrey Canyon* incident did not go unheeded. In view of the fact that such incidents might recur at any time, it seemed essential to ground the right of the coastal State to take protective measures […] That possibility should remain as a kind of *ultima ratio* for exceptional

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[45] See Neuhold, Hanspeter. *The United Nations System for the Peaceful Settlement of International Disputes¨*. In *The United Nations – Law and Practice,* Kluwer Law, 2001, p.59-71.

[46] Report; *supra note* 12, p. 27.

[47] Ibid.

> circumstances, and not for situations that are foreseeable in the normal course of events[48]'.

As a matter of fact, several incidents involving oil spills have happened since. To name a few, the *Amoco Cadiz*[49] and *MT Haven*[50] incidents in France and the recent *Deepwater Horizon*[51] and *Exxon Valdez*[52] Oil Spills in the coastal waters of the United States of America.

Although not disputed in an arbitral proceeding, a very interesting affirmation of the validity of necessity was put into practice when American led coalition Air forces had to perform extraordinary measures during the *Gulf War Oil Spill*. In the midst of the Gulf War, Iraqi troops tried to prevent US marines from landing in strategic positions controlled by the latter. In order to do so, eleven million barrels were either burnt or spilled[53]. In order to prevent a major environmental catastrophe, US Air-forces were ordered to destroy pipelines to prevent further leaks into the Persian Gulf[54].

More importantly, as a result of a project developed by Hungary and Czechoslovakia to install a series of damns and locks on the Danube River to generate electricity and promote commerce, the International Court of Justice (ICJ) was asked to review Hungary's alleged treaty obligations, allegedly justified by grave perils on the environments and Budapest's main water supply. In addressing this issue, albeit acknowledging not having met the necessary narrow requirements of necessity, the ICJ established that the threshold for necessity could be established if an environmental interest would be at stake[55]. The Court further noticed:

> '[T]he Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation […] such ground can only be accepted on an exceptional basis[56]'.

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[48] *Ibid.* p.29, para.36.
[49] http://www.itopf.com/in-action/case-studies/case-study/amoco-cadiz-france-1978/. Last visited May 12th 2016.
[50] http://www.shipwrecklog.com/log/history/haven-explosion/. Last visited May 12th 2016.
[51] http://www.nytimes.com/topic/subject/gulf-of-mexico-oil-spill-2010. Last visited May 12th 2016.
[52] http://www.nytimes.com/1989/11/19/business/exxon-valdez-s-sea-of litigation.html?pagewanted=all. Last visited May 12th 2016.
[53] http://www.nytimes.com/1991/02/21/world/war-gulf-fouled-sea-gulf-oil-spill-cleanup-flounders-bureaucracy.html. Last visited 12th May 2016.
[54] Dorr, Robert. *Desert Storm Air War.* Motorbooks International, Power Series. 1991, p.75.
[55] Case Concerning Gabčikovo/Nagymaros Project (Hungary v. Slovakia), Judgement 25 September 1997, ICJ Reports, 1997, para. 51-52. Cited in Waibel, Michael. *Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E.* LJIL, 20, 2007, p. 640.
[56] *Ibid,* p.51.

ILC Efforts to codify necessity

The concept and codification of the necessity phenomena acquired r recently an increased attention from academics, with first steps being taken by Prof. Jean Pierre François in 1938, who envisaged strict requirements on its application, yet defending its standing as a legal recourse to wrongful conduct under international agreements[57]. The creation of the ILC to undertake studies in the field of international law served as a starting point for Prof. Roberto Ago, Chairman of the Sub-Committee on State Responsibility –later Special Rapporteur of the ILC on State Responsibility- to delimitate and define the status of necessity in International Law within the ILC from 1963[58] to 1980[59], reflecting on previous acknowledgements by the ILC in 1958[60] by the then *Special Rapporteur* F. Garcia Amador, and drafts by the Institute of International Law (IIL), the Third Committee of the Conference for the Codification of International Law –also known as ¨The Hague Draft¨- and the Harvard Law School Draft[61], which were based on previous codification efforts by the League of Nations, as a result of an increasing debate on state responsibility. Further and final debate was carried out extensively later in 1999, with Prof. James Crawford as *Special Rapporteur,* to be finally adopted in 2001 under the ¨Draft articles on State Responsibility of States for Internationally Wrongful Acts[62] [herein indistinctively named as ASRIWA].

Uncontestably, the subject of State responsibility was surrounded with a mix of optimism and concern. After almost half a decade of discussions, each of the ILC *special rapporteurs* had to overcome the tension regularly expressed by delegations, members and Tribunals[63]. By instance, in the *Rainbow Warrior* case, the Tribunal described the ILC's necessity proposal as 'controversial'[64]. As a matter of fact, efforts to codify the requirements for the invocation of a state of necessity lasted more than half a century, encouraging different -sometimes diverging- opinions from governments. Nonetheless, most Tribunals and scholars adopted the ILC codification to reflect customary international law, despite no –or failed, perhaps- attempts to incorporate the draft into a binding treaty.

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[57] François, Jean Pierre Adrien. *¨Règles générales du droit de la paix¨*, Vol. 66, Collected Courses of the Hague Academy of International Law. RCADI. Brill Online, 2016, pp. 275-290.

[58] *Yearbook of the International Law Commission,* 55th Session, including report of the Commission to the General Assembly. Vol. II, Part. 2, A/CN.4/SER.A/1963/ADD.1, 1963, pp.227-237.

[59] United Nations, *Addendum – Eight report on State responsibility by Mr. Roberto Ago, Special Rapporteur- the internationally wrongful act of the State, source of international responsibility (part 1),* A/CN.4/318/Add.5-7, 1980. Available at http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_318_add5_7.pdf&lang=EFS Last visited May 14th 2016.

[60] *Yearbook of the International Law Commission.* Vol. II, A/CN.4/SER.A/1958/Add.I,1, 1958.

[61] *Ibid.* p. 231.

[62] Draft articles with commentaries; *supra note 8.*

[63] Crawford, Pellet & Simon; *supra note 22*, p.429.

[64] 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, UNRIAA, Vol. XX, No.E/F.93.V3, 1990, p.215. Cited in *Supra Note 62,* p.33.

The ILC codification proved fruitful to ascertain ‘extraordinary situations of responsibility preclusion’, because the ILC work would allow Tribunals to apply the principles *á la carte,* thus adding more flexibility on a case-by-case basis. In like manner, the evolutionary interpretation of the ASRIWA would allow tribunals to adjust the threshold based on a broad range of circumstances, for example, its invocation during harsh economic crisis. Similarly, the negative a narrow construction of the necessity plea under article 25 of ASRIWA faced strong resistance not only from developing countries, but to several industrialized economies that have adapted their BIT Models in a manner that protect their quintessential interests, specially national essential security interests, like the United States of America and Germany. As Kurtz notes, ‘investing them with the status of a formal source of law […] would obviate this flexibility as adjudicators would confer excessive authority to the ILC articles[65]’. With that in mind, article 25 ASRIWA remained as follows:

> **Article 25. Necessity**
> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
> (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or
> (b) The State has contributed to the situation of necessity.

It is noteworthy mentioning that the *travaux preparatoires* of the ILC sessions suggests that all *special rapporteurs,* -with the exception of Robert Ago- worked on the ASRIWA on the assumption that the acts triggering necessity would not come under scrutiny from the primary rules, but *secondary rules*. In other words, the assessment on the wrongfulness of the acts should be under scrutiny of the *primary rules*, and then –and only then- *secondary rules,* such as ASRIWA would come into play.

[65] Kurtz, Jürgen. *Adjudging the Exceptional at International Investment Law: Security, Public Order and Finance Crisis*. ICLQ, Vol.59, No.2, 2010, p.335.

The aforementioned explains the limited, narrow and exceptional nature of the threshold to successfully invoke the plea of necessity, in order to prevent abuse[66], a circumstance stated by James Crawford in his ILC report[67]. As will be noticed here forth, this particularity has created fragmentation in several investment related cases, most notably under the auspices of ICSID Tribunals.

Chapter II

State of Necessity in International Investment Law

The Necessity defense in financial, economic and social crisis

The term emergency indicates a severe and hazardous situation where urgent action is needed. An emergency might comprise a diverse range of typologies; *inter alia,* environment, health, finances, security and socioeconomics. In international investment law, necessity clauses have mainly focused on economic and national security emergencies, as a direct consequence of State sovereignty. Nonetheless, it is in economic emergencies were tribunals have had particular troublesome. From serious debt issues as occurred in Argentina during 2000-2002 and Greece in early 2014, to the current Venezuelan hyper-inflation crisis, extraordinary emergency situations have lately emerged as a result of desperate measures to alleviate economy, encourage growth and overcome poverty. Recently, emergency has arisen in the form of financial crisis causing an abrupt decline in the State's stability, strong weakening of financing institutions, unemployment, debt, a downfall in consumption, and habitually profound State's haircuts in the form of public debt. In extremely desperate situations, it might comprise uncontrolled expropriations of private companies, a drastic reduction on work shifts for governmental officials and even reversing GMT times to save energy[68].

There is not, however, a standard definition of the term "emergency", as it may involve a myriad of situations in which the State experiences a negative economic situation of an extraordinary nature. As Sacerdotti acknowledges, 'there is no single definition of what an economic crisis is and entails[69]'.

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[66] Martinez, Alex. *Invoking State Defenses in Investment Treaty Arbitration,* in *The Backlash against Investment Arbitration. Perceptions and Reality.* Michael Waibel (eds.), Kluwer, 2010, p. 315.

[67] Crawford's Report; *supra note 14*, para. 278, p. 25.

[68] https://www.theguardian.com/world/2016/apr/15/venezuela-half-hour-time-change-energy-consumption. Last visited 15 May 2016.

[69] Sacerdotti, Giorgio. *The Application of Bilateral Investment Treaties in Time of Crisis: Coverage, Exception and the relevance of WTO Law.* Cambridge, 2014, p. 6.

Although this may be true, national legislation of most countries does provide an indication on the term. For instance, Canadian legislation considers an emergency as "an urgent and critical situation of a temporary nature endangering lives, health or safety of Canadians, or threatens sovereign security and the territorial integrity of Canada, and cannot be effectively be dealt with another law of Canada[70]". In similar terms, French legislation characterizes an emergency as "an imminent peril as a result of grave danger to the public order, in which case, depending on its nature and gravity, might be circumscribed as a public calamity[71]". In greater detail, Spanish law provides three levels of emergency, all requiring a threshold consisting in an "extraordinary circumstances that makes the maintenance of the ordinary powers impossible, requiring limited and strictly necessary measures to assure overcoming the emergency and reinstalling the ordinary powers[72]". As noted, most national legislations perceive emergency as an extraordinary, limited and grave situation affecting an important interest that requires unusual measures in order to confront it.

As noted, emergency and necessity are intertwined concepts. Emergency is the cause and necessity the effect. Contrary to other fields of international law, necessity in the sphere of international investment law has latterly arisen in the form of necessity as a defense[73]. The latter as a consequence of the overwhelming amount of investment treaties signed during the last 27 years, increasing from 385 in 1989 to a staggering 3400 in 2016[74].

Consistently, the increasing number of international obligations has had an enormous impact on investors' claims over actions to relieve the State's economy, mostly incarnated into Argentina's " necessity cases" before ICSID. As expected, as States face increasing numbers of claims challenging governmental measures as violations of their obligations under their investment treaties, they are also raising defenses over those claims[75]. The question of the protection of foreign investors assets in times

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[70] R.S.C., 1985, c.22 (4th Supp.) ch.3. [1988, c.29, assented to 21st July, 1988]. Available at: http://laws-lois.justice.gc.ca/eng/acts/E-4.5/page-1.html#h-2 Last Visited 25th May 2016.

[71] Loi No. 55-385 du 3 avril 1955 relative à l´état d´urgence. Article 1. Consolidated version available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350 Last visited 25th May 2016.

[72] Ley Orgánica 4/1981 del 1 de Junio, de los Estados de Alarma, Excepción y Sitio. Publicado en el Boletín Oficial del Estado el 5 de Junio de 1981. Artículo 1. Available at http://noticias.juridicas.com/base_datos/Admin/lo4-1981.html Last visited 25th May 2016.

[73] Qureshi, Asid. *A Necessity Paradigm of ¨Necessity¨ in International Economic Law.* Netherlands Yearbook of International Law. Vol. 41, TMC Asser Instittut, 2010, p.106.

[74] United Nations Conference on Trade and Development (UNCTAD), *Investment Policy Hub: International Investment Agreement Navigator.* Available at http://investmentpolicyhub.unctad.org/IIA (last visited May 26, 2016).

[75] Bjorklund, Andrea K. *Emergency Exceptions to International Obligations in the Realm of Foreign Investment: The State of Necessity and Force Majeure as Circumstances Precluding Wrongfulness*. UC Davis Legal Studies Research Paper No. 99; OHIIL, OUP, Peter Muchlinski & Federico Ortino (eds.), 2007, p.1 Available at SSRN: http://ssrn.com/abstract=960887 (Last visited May 29, 2016).

of economic emergency is not new in international legal practice[76]. In fact, several Tribunals have dealt with this issue in the past, including remarkable cases in the midst of the Asian crisis of 1990's[77]. Nonetheless, it never had the scholar and jurisdictional attention caused by the Argentinean crisis ICSID awards, as dealt with similar object-matter yet reached different conclusions.

Non Precluded Measures

State´s may reserve their right to regulate in specific fields or essential interests by incorporating a series of exceptions in IIA´s. Such exceptions, occasionally referred with the term non-precluded measures (NPM), are a legitimate manifestation of State's right to regulate during exceptional and extraordinary economic crisis. The latter is a natural consequence of the massive BIT proliferation during the last decade, which obliged States to resort into NPM in order to limit the applicability of investment protection to the extent and scope provided in a particular BIT provision, with Germany being the pioneer to incorporate it in its BIT model[78]. Typically, States wanting to protect specific "national interests" would include such provision in a matter that nothing in the BIT would preclude the application of the necessary measures to protect such interest or to maintain the public order during a limited and justified period. Although relatively appearing in a minority of BIT's, they are becoming more widespread as a result of State's intentions to retain a degree or regulatory autonomy in key areas, including without limiting to environment, health, taxation culture, national security, public order and environmental issues[79]. *De lege lata,* or *de lege ferenda,* manifold approaches are available for the insertion of an express right to regulate in IIA's[80].

Noticeably, the underlying rationale is to allow certain margin of action to States within key policy objectives unequivocally expressed in the particular BIT or Multilateral Agreement that includes a "self-judging" character to prevent a stringent review from investment Tribunals. NPM clauses are the exteriorization of the State´s power to restrain their commitment to ensure the highest

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[76] Mola, Lorenza. *International Investment Arbitration and Serious Economic Crisis: Lessons Learned in the Argentinean Crisis of 2000-2001*, in *International Investment Law in Latin America*. Nijhoff International Investment Law Series, Vol. 5, Attile Tanzi, Alessandra Asteriti, Rodrigo Polanco Lazo & Paolo Turrini (eds.) 2016, p. 374.

[77] See *Phillipe Gruslin v. Malaysia,* ICSID Case No. ARB/99/3, Award 27 November 2002. *Himpurna California Energy Ltd v. Republic of Indonesia,* UNCITRAL Case, Interim Award, 26 September 1999.

[78] *See* Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (1959). Bundesgesetzblatt, Jahrgang 1961, Teil II (Entre into force: April 28, 1962). at Protocol, p.799. Available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1387 (Last visited May 30, 2016).

[79] United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties: 1995-2006: Trends in Investment Rulemaking*, 2007, p.80-90. Available at http://unctad.org/en/docs/iteiia20065_en.pdf (Last visited 29th May, 2016). As the author notes, NPM provisions are more common than it would appear. They can be found in every US BIT's in force, in addition to many BIT Models from Germany, Luxembourg, Canada, Argentina, New Zealand, Switzerland, and Singapure.

[80] Titi, Aikaterini. *The Right to Regulate in International Investment Law,* Hart Publishing, 2013, p.123.

possible degree of maneuverability to conducting certain measures within fields or interests expressly convened in a particular investment agreement, resorting to precluded language in order to avoid a strict review of the plea of necessity under customary international law, which threshold has been designed to insure its rare successful invocation. NPM are, long said short, contractual reservations or exceptions to limit State's liability when conducting strategic policies within important fields, and a defense rather different than the plea of necessity.

As a matter of fact, NPM provisions were regular element of U.S. Friendship, Commerce and Navigation (FCN) treaties beginning in the post-WWII era[81]. NPM clauses have been raised before the ICJ in several occasions[82]. Although NPM clauses are used by major capital exporting countries to protect their own interests by narrowing the exceptions for breach, the existence of NPM entails the idea of both States wanting to protect their own sovereign acts by legalizing certain conditions or events in which the State may take extraordinary measures to protect or repair an important feature. Irrefutably, the existence of NPM clauses has important repercussions for the international investment regime because they acknowledge the risk tolerance of the States, because State´s may transfer the risk to investors for actions taken by the government in order to reestablish public order or to prevent a serious harm or collapse of their economy, for which the State will not be internationally liable. As Burke-White notes: " NPM clauses fundamentally limit the legal regime protecting foreign investors[83]".

As an illustration, in the Latvia-Georgia BIT (2003)[84] the NPM in a very constructive manner, thus allowing State action in a broad range of emergencies:

> Article 13 (General Exceptions)
> 1.- Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations.

[81] Burke-White, William & von Staden, Andreas. *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties.* VJIL, Vol.48:2, p.312. Available at http://ssrn.com/abstract=980107 (Last visited 29th May 2016).
[82] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA), 1986, ICJ 14,15 (June 27). See also Oil Platforms (Iran v. USA), Preliminary Objection, 1996, ICJ 803, 811 (December 12).
[83] Burke-White & Staden; *supra note 81*, p. 314.
[84] Agreement between the Government of Georgia and the Government of the Republic of Latvia on the Promotion and Reciprocal Protection of Investments. Available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1322 (Last visited 29 May 2016)

> 2.- Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:
> (a) Necessary for the maintenance of public order;
> (b) Necessary to protect human, animal or plant life or health.

As can be noticed in most BIT's and investment agreements in general, the use of the term "preclude" in some treaty texts, exceptions clauses are sometimes referred as "non-precluded provisions"[85]. Nonetheless, other treaties such as Article 24 of the Energy Charter Treaty (ECT) has followed a rather different linguistic pattern[86], thus incorporating most the essential interests protected by a certain treaty.

Although normally aimed at preventing or tackling an emergency of economic nature, NPM's may theoretically protect any strategic interest State's may foresee worth to protect, even morality[87]. Important to acknowledge is that NPM's should not be treated as an arbitrary escape clause States use –and may abuse- to justify situations where other "less traumatic" means are available, but they should serve as a instrument to encourage sustainable development objectives, envisaging the role investment play in international cooperation for economic development, an idea acknowledged by the ICSID Convention Preamble[88]. Indeed, NPM´s main contribution the prevention of conflicts between investment rules and sustainable development regulation[89]. Even so, the potential for abuse is undeniable and carries the same questions as the plea of necessity envisaged in article 25 ASRIWA. Although NPM's may serve as a permissible mechanism to protect essential interests such as national security, abuse or unjustified invocation are undeniable as State's may use NPM's to circumvent their legal obligations under IIA's. The latter is particularly noticeable because of the ambiguity and

[85] Burke-White & Staden; *supra note* 81, p. 307.
[86] Salacuse, Jeswald W. *The Law of Investment Treaties,* 2nd. Ed, OUP, 2015, p. 379.
[87] Agreement Between the Federal Republic of Germany and the People's Republic of Bangladesh concerning the Promotion and Reciprocal Protection of Investments. Available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/264 (Last visited May 29, 2016).
[88] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* March. 18, 1965, 17 U.S.T. 1270, T.I.A.S No. 6090, 575 U.N.T.S 159. *See* Schreuer, Christoph H. *The ICSID Convention: A Commentary.* Cambridge, *with* Malintoppi, Loretta; Reinisch, August & Sinclair, Anthony. 2009, p.4. The author explains in great detail the importance of investment as a tool for sustainable development and the discussions of the topic during the *travaux preparatoires.*
[89] Gehring, Markus W. & Cordonier Segger, Marie-Claire. *Overcoming obstacles with opportunities: Trade and investment agreements for sustainable development.* In *International Investment Law and Development*, Stephan W. Schill, Christian J. Tams & Rainer Hofmann (eds.), Edward Elgar Publishing Limited, 2015, p.116.

vagueness of the terms protected or foreseen to protect –through evolutionary interpretation- such as "interests" or "essential", and due to the negative and narrow perception arbitral Tribunals have stated during the course of arbitration, in particular during the Argentine Saga.

Perhaps BIT's drafters may have a dose of guilt on this regard. The aforementioned statement is based on the importance of the language used to delimit NPM's clauses. Should a high percentage of risk for abusive exist, then is to the parties to prevent that from happening by incorporating the necessary safeguards that would impose "checks and balances" on State's sovereign measures to tackle certain emergencies, particularly those of a financial nature because of the broad range of intrusive actions State's may decide –rightly or not- to enact. As a consequence, interpretation on NPM's clauses by arbitral Tribunals would be less prone to controversy. For instance, the invoking party may notify the investor of its intention to invoke the NPM clause and provide pertinent information regarding the proposed measure and the alleged crisis, or, the treaty may attempt to specify the conditions that must be legitimately met to allow for the exception[90]. In other way, parties should take advantage of the continuous arbitral practice in order to understand the current interpretative standing of NPM's clauses and avoid the process of withdrawing from BIT's and the ICSID Convention that some countries, in particular developing countries within the Latin-American region, are currently undertaking[91].

Of course, one might think that a well-drafted safeguard within IIA's general exceptions might be a plausible solution. Nevertheless, it is important to take into consideration the little –if none- negotiation power developing countries *versus* the imposition of ingrained Model clauses incorporating top-of-the-line clauses specially designed to protect investors. Effective negotiation is displaced by developing countries' desire to attract foreign capital due to the pivotal role investments play in their economies, notably in Latin America[92]. Due to the economic-relief need of developing countries, they have generally entered into agreements with developed countries that they otherwise

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[90] Salacuse; *supra note* 86, p. 380. The author cites the Kuwait-Japan BIT, which states: "the public order exception may only be invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society".

[91] Venezuela, Bolivia, Nicaragua and Ecuador has either threatened or withdrawn from the ICSID Convention. Venezuela withdrew from certain BIT's, among them the Venezuelan-Netherlands BIT. By the same token, Brazil has consistently refused to ratify the ICSID Convention. *See* http://kluwerarbitrationblog.com/2014/07/24/some-notes-on-the-latin-american-countries-attitude-towards-investment-arbitration-and-icsid/ (Last visited June 1, 2016)

[92] United Nations Conference on Trade and Development (UNCTAD). *World Investment Report 2016: Investor Nationality Policies: Policy Changes.* Sales No. E.16.II.D.4, 2016, pp.196-199. Available at http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf (Last visited June 1, 2016).

would not have[93]. Illustrating this *realpolitik* matter, Prof. Alvarez, a former member of the US State Department BIT Negotiation department, explains as follows:

> "[F]or many, a BIT relationship is hardly a voluntary, uncoerced transaction. […] But the truth is to date the US Model BIT has been regarded as, generally-speaking-, a 'take it or leave it' proposition, with the United States calling the shoot and the BIT partner as supplicant […] A BIT negotiation is not a discussion between sovereign equals[94]".

Unfortunately, they assessment several Tribunals have given to NPM clauses does not corresponds to their exceptional nature. Despite an increasing tendency of States to include NPM clauses into their investment agreements to preserve their ability to legislate in the public interest in case of an unprecedented or extraordinary situation, many Tribunals have disregarded the nature of such provisions and utterly relied in customary international law, envisaged in the ASRIWA. There is great concern that Tribunals are favoring disproportionally in favour of investors, discouraging host states to sue investors[95], notably in the *Argentine Gas Saga,* where several ICSID disputed reached contradictory conclusions based on the same facts and legal sources, which will analyzed on the next chapter of this dissertation.

Diverse investment Tribunals have acknowledged Non-precluded measures to be a separate defense State´s may resort in order to avoid the narrow requirements of necessity under the ASRIWA. For instance, in *Total v. Argentina*[96], the ICSID Tribunal found that even though Argentina had failed to prove the defense of necessity under customary international law, still Argentina had a defense available under article 5(3) of the French-Argentinean BIT, which established an escape clause for an emergency case. Similarly, in *BG Group v. Argentina*[97] the Tribunal assessed separately both defenses

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[93] Hippolyte, Antonius. *Calls for National Intervention in the Toxic Waste Trade with Africa: A Contemporary Issue in the Environmental Justice Debate"*, 58 Loyola Law Review, 2012, pp.301-302. Hippolyte, Antonius. Aspiring for a constructive TWAIL approach towers the international investment regime. *International Investment Law and Development*, Stephan W. Schill, Christian J. Tams & Rainer Hofmann eds., Edward Elgar Publishing Limited, 2015, p. 200.
[94] Alvarez, José. *Remarks,* ASIL 86 Proceedings 500, 1992, pp. 552-553.
[95] John Hendy. *A threat to the sovereignty of courts and parliaments*, Graya, No. 128, 2015, p. 52.
[96] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1 (Decision on Liability), December 27, 2010, p. 103, para. 224-226.
[97] *BG Group Plc. v. Republic of Argentina,* UNCITRAL, Final Award, 24 December 2007, p.115, para. 381-383.

as separate matters, though rejecting their application. In similar terms, the Tribunal in *Suez v. Argentina*[98]*,* reviewed both defenses as separate.

As a result, the customary necessity defense under article 25 ASRIWA should become only available after NPM's clauses requirements have not been satisfied. NPM constitutes a set of primary norms, and therefore, should not be regarded as a set of secondary norms such as the customary defense of necessity. As Gourgourinis notes, 'notwithstanding the existence of NPM clauses in a regulatory ambit od treaty-established specialized regimes, secondary norms on state responsibility derived from general international law can be still independently invoked as applicable defenses in adjudication taking place in the realm of the various international regimes[99]'.

Relationship between customary international law and NPM clauses

Although this thesis does not purports to focus on treaty based defenses through NPM's, understanding the relationship between the customary plea of necessity and NPM´s clauses is paramount to elucidate recent ICSID arbitration that regarding the plea of necessity and NPM´s clauses as identical, introducing the rigorous requirements demanded of the plea of necessity under customary international law in to the BIT standards of NPM´s[100]. With that in mind, it is also necessary to acknowledge the distinction between primary and secondary laws for the purposes of State responsibility. As noted by the ILC, circumstances precluding wrongfulness were treated in ASRIWA a 'secondary rules of a general character, and not a presumptive part of every primary rule'[101]. Indeed, the existence of a hierarchy between different norms of international law has been amply pondered. In judging this fragmentation issue, Prof. Viñuales notes that 'at the very core of Necessity lies a balance between different interests and lurks the still unresolved question of whether there might be a hierarchy between international norms[102]'.

With this in mind, the importance of revisiting the relationship between NPM's clauses and the state of necessity defense as envisaged in Article 25 ASRIWA is of paramount importance. The latter because the *Argentine Saga* tribunals present important incongruities and inconsistencies in regards to the relationship between the treaty-based defense of NPM and the state of necessity under customary

[98] *Suez, Sociedad General de Aguas de Barcelona and Vivendi Universal S.A. v. Republic of Argentina*, ICSID Case No. ARB/03/19 (Decision on Liability), 30 July 2010, p. 103-104, para. 265-267.

[99] Gourgourinis, Anastasios *General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System,* EJIL, Vol. 22, No.4, p.1024.

[100] *Supra Notes* 2, 3, 4, 5 & 6.

[101] Crawford's Report; *supra note* 14, p. 6, para. 221.

[102] Viñuales, Jorge E. *State of Necessity and Peremptory Norms in International Law,* Selected Works, 2007, p.3. Available at https://works.bepress.com/jorge_vinuales/1/ (Last visited June 1, 2016).

international law reflected in the ASRIWA. The aforementioned divergences consist in two important issues. First and foremost, whether NPM's is a completely separate defense from the state of necessity. Secondly, the primary/secondary norms interplay.

In relation to the first divergence, in *Enron,* the tribunal had to resort the article 25 ASRIWA in order to ascertain the meaning of 'security interests'. The tribunal considered that in light of the complex meaning of 'security interests' and the absence of a 'specific meaning' defined by the Argentine-US BIT, it was 'necessary to rely on the requirements of state of necessity under customary international law […] so as to evaluate whether such requirements have been met in this case[103]'. Confusingly, the tribunal will later recognize, based on Prof. Slaughter and Burke-White expert opinions, that the 'treaty regime is different and separate from customary law', but the arbitral tribunal had to resort to customary international law only as a 'supplementary means', because the treaty was not precise in defining some terms, therefore the treaty 'thus becomes inseparable from the customary law standard insofar as the conditions for the operation o state of necessity is concerned[104]'. Similarly confusing is the *CMS* tribunal approach. Albeit not explicitly recognizing that customary international law reflected in article 25 ASRIWA serves to ascertain the treaty based defense of NPM's, the tribunal constantly reads the custom requirements established in article 25 ASWIRA to analyze the NPM clause. An illustration, the *CMS* tribunal considers whether the 'act in question does not seriously impair an essential interest of the States towards which the obligation exist[105]', or if the 'object and purpose of the treaty exclude necessity[106]'. Furthermore, using an identical linguistic pattern as in *CMS,* the *Sempra* tribunal found that 'the Treaty provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation[107]'.

As can be perceived, the *CMS, Sempra* and *CMS* tribunals are inconsistent in determining whether a treaty-based defense under NPM's is different from the necessity defense under customary international law, as reflected in the ASRIWA. To one degree or another, the arbitrators incorporate certain standards from the ASRIWA to review the applicability of availability of the NPM defense, thus implying the both defenses are intertwined. Nonetheless, all tribunals to one extend or another recognized that NPM's acted like *lex specialis*, which would imply that has a primary norm character.

[103] *Enron; supra note 4*, para. 333.
[104] *Ibid.* para. 334.
[105] *CMS; supra note 2,* para. 357.
[106] *Ibid,* para. 353.
[107] *Sempra, supra note 3,* para. 375-379.

On the contrary, the *LG&E* tribunal has a different view. It is very straightforward in acknowledging that the NPM clause incorporated in Article XI of the Argentina-US BIT and the state of necessity reflected in ASRIWA are independent, thus entail a different assessment[108]. Therefore, a different test should be applied. As Burke-White & Staden note, 'the NPM clause is a separate risk allocation device and an explicit part of the bargain in the US-Argentina BIT, providing states-parties with greater protection that those available under customary international law[109]'. The *LG&E* tribunal acknowledgment is also correct because of distinctive the language incorporated in NPM's clauses and the ASRIWA. Whereas Article 25 ASRIWA is framed in a negative language suggesting that under such extraordinary circumstances the act is illegal but justified, in NPM is prescribed in a rather positive manner stating that under specified circumstances affecting an essential interest, any breach thereby incorporated will be legal. In this regard, the *CMS Annulment* committee takes a similar view. In a detailed fashion, the Committee clearly express that Article XI of the US-Argentina BIT including a NPM clause is 'substantively different' from Article 25 ASRIWA. The Committee notes that *CMS* tribunal committed a manifest error of law because whereas the first is concerned with the 'maintenance of public order or the protection of each Party's own essential interest' without expressly qualifying such measures, the second is 'subordinates the state of necessity to four conditions'[110]. Additionally, the Annulment Committee later expresses that NPM's and the defense of necessity under customary international law by no means are 'on the same footing', therefore, the invocation of a state of necessity established in the ASRIWA can 'only be subsidiary to the exclusion based on Article XI'[111].

Naturally, the aforementioned leads to the issue of hierarchy between both defenses. All tribunals explicitly or implicitly strived to grasp the distinction between primary and secondary norms as stated in the ILC commentaries, yet could not reach a structured conclusion. Noticeably, the tribunals in *CMS, Enron* and *Sempra,* take an intertwined position on this regard. On the other hand, in *Continental Casualty* the tribunal takes a *lex specialis* approach in respect to the NPM clause. Lastly, in *LG&E* the tribunal takes a safer primary/secondary norm distinction.

[108] *LG&E; Note 132,* para. 245.
[109] Burke White, William & von Staden, Andreas. *Non Precluded Measures Provisions, the State of Necessity, and State Liability for Investor Harms in Exceptional Circumstances.* In *Latin American Investment Treaty Arbitration: The Controversies and Conflicts.* Mary H. Mourra (ed.) Kluwer, 2008, pp. 153-154.
[110] *CMS Gas Tranmission Company v. Argentine Republic,* Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, September 25, 2007, para. 129-130.
[111] *Ibid,* para. 131-132.

Jurgen Kurtz analyzes these positions and classifies it into three different notions. The first and most erroneous is the approach taken by *CMS, Enron* and *Sempra,* considered as 'confluence'. Although is the majoritarian approach of the *Argentine Saga* tribunals, Kurtz considers this interpretative methodology as 'mistaken', since completely overlaps both defenses to the point of being completely unrecognizable, and because are contrary to 'the emergence of investment treaty norms'[112]. Furthermore, Kurtz considers the *lex specialis* approach 'inoperative' since it 'fails to engage in the fundamental question of the scope of priority to be accorded to the treaty defense[113]'. This notion is shared by other scholars, who argue that in order to apply the *lex specialis* principle both treaty provisions and custom –reflected in Article 25 ASRIWA- would have to meet a 'sameness "test" that would conflict the qualities of primary and secondary norms[114]. The third parameter, which considers the distinction of primary and secondary norms as envisaged by the ILC and Crawford's Report, is to Kurtz the most plausible solution to end this fragmentation issue, since 'it obliges an adjudicator to interpret the treaty defense on its own terms without simply transplanting from customary law[115]'.

To summarize, although this thesis does not purports to address in depth the issue of NPM and its relationship with the state of necessity in customary international law, it is important to acknowledge the requirements envisaged in ASRIWA are completely two different defenses that should never be entangled. Therefore, the state of necessity as will be address herein should only come into play once primary norms in the form of treaty-based defenses are no longer available or have not been invoked.

The Necessity defense in Investment Law

A lawful invocation of the necessity plea under customary international law requires the fulfillment of the cumulative and narrow thresholds specified in article 25 ASRIWA. It is a most exceptional remedy subject to very strict conditions, otherwise, it would open the door to elude any international obligation[116]. The requirements for a successful invocation of the state of necessity are denoted in a negative manner to prevent abuse from the claimant in order to conserve its extraordinary nature. Necessity as a defense in investment law is a true paradigm. On one hand, it illustrates the dichotomy between State's duty to comply with its international commitments *vis á vis* foreign investors and their

[112] Kurtz; *supra note 65,* p. 325.
[113] *Ibid.* p. 371.
[114] Gourgorinis, Anastasios. *Equity and Equitable Principles in the World Trade Organization: Addressing conflicts and overlaps between the WTO and other regimes.* Routhledge, 2016, p. 63.
[115] Kurtz; *supra note 65,* p. 371.
[116] *Enron, supra note* 4, para. 304.

obligation to prevent precious social and economic values from becoming severely damaged or, at least, imminently imperiled. On the other hand, it reflects the need to comply with international responsibility as a pivotal element for the maintenance of stability in the international order. The necessity defense in the investment law context has lately become an issue of academic discussion in the context of severe social and economic crisis that occurred in the developing world, notably in Argentina. The discussion is grounded on the increasing amount of strictness surrounding the topic, accompanied by the belief that creating certain evolutionary elasticity to the concept in the form of conflating development issues with circumstances precluding wrongfulness will 'unleash the beast' in the form of numerous necessity defenses being raised by developing countries in order to excuse themselves from their international obligations. Moreover, its is based on the "necessity" of justice, sovereignty, development, proportionality and elasticity the international apparatus desperately pursuits in order for States to prevent, tackle and confront vast types of extraordinary events that would imperil, *inter alia,* the culture, environment, health and the economic pillars of a State.

Despite the latter, extensive case law from ICSID Tribunals has demonstrated a rather strong resistance to move forward on that direction. The assessment from a vast majority of Tribunals in the *Argentine Saga* lucidly denotes that satisfying the requirements of the state of necessity as laid down in article 25 ASRISA in the context of a sovereign debt crisis pose a particularly high threshold to the pleading State[117]. Investment Tribunals have recognized its strict nature in order to avoid an 'easy hatch for host states wishing to avoid treaty obligations which prove difficult[118]'. The aforementioned is based, to a certain extent, in the delusion that necessity as a defense is an inert notion operating at all levels, including international agreements[119]. These conditions mainly refer to the necessary safeguards a State should put into place in order to prevent an essential interest from becoming imperiled; the non-contribution from the State to the situation of necessity; the limited nature of the measures taken into place to prevent such interest to become imperiled and the balance of interests State´s should weight when assessing such measures.

Essential Interests

The first requirement for the invocation of necessity is that essential interests become gravely or imminently imperiled. The issue of what an interest is, and most importantly, its 'essential character',

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[117] Paliouras, Vassilis. *State of Necessity and Sovereign Insolvency,* in *The Reform of International Economic Governance*, Rouledge, Antonio Segura (ed.) 2016, p.107.

[118] *EDF International S.A., SAUR International S.A. & Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 1171.

[119] Qureshi; *supra note 73,* p.104.

has been subject to numerous discussions. Hence, 'there is no fixed catalogue listing the essential interests a State may refer to[120]'. As the ILC noted, 'the extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged'. Therefore, the scope and application of the term should be subject to assessment by third parties taking into consideration the particular constituency of a State, its economy, culture and geopolitical role. As a matter of fact, it extends to particular interests of the State and its people, as well as of the international community as a whole[121]". Noticeably, there is a high degree of subjectivism on whether a given interest is essential because the term "essential interest" may practically encompass all activities and natural resources of a State, including without limiting to sanitation, health, internal revenue and economy, environment, natural resources, religion, national security, public order and the constitutional order. For that reason, State are not competent to review what an essential interest is[122] .

In general, States have a comprehensive assortment of interests, comprised by a series of goods, services, principles and natural resources that are relevant for the State's existence, whether to keep the constitutional order or to protect the physical and economical well being of its citizens and the international community as a whole. By definition, the term "essential" evokes something that is completely necessary; extremely important in a particular situation or for a particular activity[123]. That means that not every interest of the State is essential. In its report to the ILC, Prof. Ago noted that the term could create a certain degree of abuses and subjectivisms, therefore, advocated that the essential interest must be 'absolutely of an exceptional nature'. However, he highlighted that should be limited to cases where the very existence of the State is at stake[124]. Likewise, the Committee proposed a comprehensive definition of "essential" as representing a 'grave danger to the existence of the State itself, its political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, and the preservation of the environment[125]'. Similarly, the ILC expressed that the *essentiality* of a particular interest should be judged 'in the light of a particular case into which the interest enters, rather than be predetermined in the abstract'[126].

[120] *Gabčikovo-Nagymaros Project*, *supra note* 16, para. 53.
[121] *Draft Articles with Commentaries, supra note* 8, p. 83, para. 15.
[122] *Gabčikovo-Nagymaros Project*, *supra note* 16, para. 51.
[123] Oxford Advanced Learner's Dictionary, 8th ed., Version 8.5.275, OUP, 2012 (App Edition).
[124] Ago's 8th Report; *supra note* 59, at. 19.
[125] *Ibid.* p. 14.
[126] *Ibid. para. 32.*

During the last fifty years, different Tribunals have progressively shaped the term. One of the firsts to shape the term was the ICJ in the *Gabčikovo-Nagymaros Project* case*,* where Hungary expressed its concerns about the project affecting the natural environment of the region where the project was intended, thus acknowledging that environment was of paramount importance for the lives and welfare of its people. The ICJ relied on the ILC's work on necessity to remark that safeguarding the ecological balance had, as a matter of State practice, come to be regarded as an essential interest of all States[127]. On the other hand, in the *Wall Advisory Opinion*[128]*,* the ICJ accepted Israel's national security as an essential interest, yet later dismissed the claim because of non-satisfaction of the other cumulative requirements under article 25 ASRIWA.

ICSID Tribunals have also addressed the concept of essential interests. For instance, in *BG Group v. Argentina,* the Tribunal acknowledged that essential interests encompass the economic-financial survival, as well as social and constitutional stability[129]. Likewise, the *CMS* Tribunal found that "essential interests" was open to considerations of the 'social and political implications' of the crisis, yet acknowledging that was not of such 'catastrophic proportion' as to validate the state of necessity. Moreover, in *Suez*[130]*,* the Tribunal found that the provision of water and sewage services to the metropolitan area of Buenos Aires by the claimant was 'vital to the life and well being of nearly ten million people' and was therefore an essential interest of the Argentine State. By the same token, in *Impregilo v. Argentina,* the Tribunal recognized that water and sewage services are essential interests of a State, but also the preservation of the State's broader social, economic and environmental stability, and its ability to provide for the fundamental needs of the population[131]. On the other hand, some arbitral Tribunals, such as in *Enron* and *Sempra,* have regarded the term as requiring a risk to the very existence of the State and its independence. In contrast, in *LG&E,* the Tribunal recognized the broad array of interests that might qualify as essential in the following terms:

> "What qualifies as an "essential" interest is not limited to those interests referring to the State's existence. As evidence demonstrates, economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests. Roberto Ago has stated that essential interests

[127] *Gabčikovo-Nagymaros Project*, *supra note* 16, para. 41.
[128] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004, I.C.J, Reports, 2004, p.195, para.140.
[129] *BG Group Plc.; supra note* 97, para. 393.
[130] *Suez; supra note* 98, p.101, para. 260.
[131] *Impregilo S.p.A v. Argentine Republic,* ICSID, Case No. ARB/07/17, Award, June 21, 2011, p.77, para.346.

include those related to "different matters such as the economy, ecology or other"[132].

In order to prevent a rigorous interpretation from investment Tribunals, some States have incorporated into their new BIT Models a list of essential interests that are of particular relevance for a given society. To exemplify, in the *Japan-Colombian*[133] BIT, the parties have incorporated a detailed list of essential interests under a NPM clause that includes, *inter alia,* public order, safety, historic and archeological treasures, gun regulations and military technology. Furthermore, the parties have enumerated a certain scenarios where some BIT substantive obligations would be temporally abrogated, such as in case of serious balance-of-payments, movements of capital causing or threatening to cause serious difficulties for macroeconomic management and other financial-economic policies. A similar approach is taken in the last generation Canadian BIT model[134].

Essential Security Interests and Economic Crisis

The term "essential interest" has suffered a gradual evolutionary transformation through the inclusion of NPM clauses in BIT's. Although falling apart from the condition stated in Article 25 ASRIWA, there is an increasing trend to incorporate a detailed catalogue of essential security interests within BITs. States have realized that economic emergencies can pose an enormous threat to their stability. The notion of essential security interests is associated both with strategic military interests and economic sovereignty. While historically, interpretation of the term focused on providing defenses against military attacks, it is now broad enough to encompass a range of other interests[135]. Nowadays, the term is associated with the protection of a State, its habitants and territorial integrity, especially from military hazard, espionage and terrorism, nonetheless, its discussion in the *Argentine Saga* awards have reopened scholar discussion on its application during harsh economic emergencies.

Important to realize is the distinction between essential security interest and mere essential interests, due to its intermingled use from diverse Tribunals in the *Argentine Saga.* Whereas 'essential interests' is predominantly associated with the necessity defense threshold, the word 'security' denotes rather an exceptional substantive character within the BIT, forming part of the treaty as a

[132] *LG&E et. al. v. Argentina,* ICSID Case ARB/02/1, Decision on Liability, 3 October 2006.

[133] Agreement Between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment. (Not yet in force). Available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/797 (Last visited 4 June, 2016).

[134] Agreement between Canada and the State of Kuwait for the Promotion and Protection of Investments. Available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/3242 (Last visited 4 June, 2016).

[135] United Nations Conference on Trade and Development (UNCTAD), *The Protection of National Security in IIAs, UNSIIPD, 2009, p.7.* Available at http://unctad.org/en/Docs/diaeia20085_en.pdf

whole, as a set of primary rules, instead of a secondary normative character, as would be the ASRIWA.

As a matter of fact, the ICJ had already discussed the term in the *Nicaragua case* Judgement, where agreed that "the concept of essential security interests certainly extends beyond the concept of an armed attack[136]". Likewise, the Court also noted in the *Oil Platforms* case, Nevertheless, it was until recently, in the *Argentine Saga,* where diverse Tribunals amply addressed the term. As an illustration, in *LG&E,* the Tribunal agreed that 'essential security interests' encompass economic and political interest, as well as national military interests. Furthermore, the Tribunal found that as a consequence of Argentina's financial, political and social downturn, security interests were at stake by an economic crisis of "catastrophic proportions"[137]. In like manner, the *Sempra* Tribunal found that severe economic crisis might thus qualify as affecting an essential security interest, adding "there is nothing in the context of customary international law of the object and purpose of the treaty that could on its own exclude major economic crisis[138]" Furthermore, the Tribunal acknowledged several factors that would constitute an essential security interest, including "internal security in the face of a severe economic crisis with social, political and public order implications […] notably for a development country[139].

Following the aforementioned, it is important to determine the linguistic pattern within the BIT in order to define the correct defense. Essential security interests encompass a broad range of regulatory space, whereas the term 'essential interests' is chiefly associated with the plea of necessity, and therefore, its stringent and narrow conditions to be invoked.

Grave and Imminent Peril

The preclusion of international responsibility through the plea of necessity under Article 25 ASRIWA commands wrongful measures taken by a State to be directed at safeguarding an essential interest against a 'grave an imminent peril'. In order to ascertain the nature of this requirement, separate attention should be given to the terminology of both words. From that standpoint, the adjective 'grave' indicates something "very serious; giving a reason to feel concerned[140]". On the other side, 'imminent'

[136] Military and Paramilitary Activities in and Against Nicaragua; *supra note* 82, p.117, para. 224.
[137] *LG&E; supra note 132*, para. 231-233.
[138] *Sempra; supra note* 3, p.78, para. 178-180.
[139] *Ibid.* para. 181.
[140] Oxford's Dictionary; *supra note* 123.

denotes something "likely to happen very soon[141]; a menace prompt to occur. In other words, the 'essential interest' should experiment a critical and severe threat, or at least, looming large, that would place the State into a *balancing position* in respect to their international obligations. The measures shall be absolutely necessary as a matter of precaution[142].

Perhaps the most notorious case dealing with this term, although in the context of self-preservation, was the *Caroline,* with the famous statement by the Secretary of State Webster, who in order to excuse its wrongful measures mentioned that actions of its forces had really been caused by "a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation[143]". The ICJ in *Gabčikovo-Nagymaros Project* addressed the plain meaning of this requirement in the invocation of the necessity defense as follows:

> [T]he word "peril" certainly evokes the idea of 'risk": that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time; the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the "peril" constituting the state of necessity has at the same time to be "grave" and "imminent" […] that does not exclude, in the view of the Court, that a "peril" appearing in the ling term might be held to be imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable".

The Court's idea of 'peril' was recognized by Prof. Crawford's report and most scholarly opinion, particularly for necessity pleas raised as a justification to protect environmental essential interests[144]. The standard eventually suggested in the commentary was that the peril must be determined by evidence reasonably existing at the time, under review of a Tribunal[145]. The latter because the invoking party should demonstrate that the peril affecting the essential interest is real, tangible, existent and based on the evidences analyzed considering all circumstances of a particular

[141] *Ibid.*
[142] *ILC Draft Articles; supra note* 8, p.81 (5).
[143] *Ibid.*
[144] Bjorklund K., Andrea. *Emergency Exceptions: State of Necessity and Force Majeure,* in The Oxford Handbook of International Investment Law. Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., OUP, 2008, p.482.
[145] Crawford's Report; *supra note* 14, para. 184.

case, otherwise, the danger of unsubstantial fears would serve as a lawful excuse –the well known rule of *vani timoris justa excusatio non est* [146].

The issue of immediacy remained subject to further discussion due to its elasticity. This became evident in the *Argentine Saga* awards, were the Tribunals addressed similar cases with quite divergent approaches.

For instance, during the *Argentine Saga,* Argentina presented a series of evidence that the crisis was so severe that major economic indicators had negatively fluctuated during a short period of time, causing an alarming unemployment, shortage of medicines, extreme poverty of almost half the Argentinean population and the highest country risk premium at the time. As a result of a broad range of exogenous factors, Argentina was forced to make tariff, budgetary and monetary policy changes. Nevertheless, the fiscal crisis continued to worsen and was forced to enact an emergency law during 2001-2001 that reformed, *inter alia,* the artificial peg that had kept the peso at par with the dollar, thus creating an enormous deterioration in the gross domestic product, decline in prices and value of assets of companies located in Argentina, making impossible to obtain any form of financing from international institutions. Nevertheless, albeit accepting that the economic crisis was severe[147], all *Sempra, CMS and Enron* Tribunals found that the economic crisis was not grave enough as to meet the rigid threshold of a grave and imminent peril established by article 25 ASRIWA.

Shockingly, despite abundant evidence of the extraordinary nature of the economic crisis experienced by Argentina, in *CMS* the Tribunal established an exaggerated threshold for the satisfaction of article 25 ASRIWA, when stated that " the crisis was severe but not resulted in total economic and social collapse […] the Argentine crisis is compared to other contemporary crisis affecting countries in different regions[148]". Likewise, in *Enron,* the Tribunal was not satisfied that the extraordinary and particularly harsh economic crisis would compromise the very existence of the State, allegedly because there was enough evidence to conclude that the Argentinian government continued to exist and operate even after the crisis. In rejecting the plea, the Tribunal found that there was not "convincing evidence that the events were out of control or had become unmanageable". On the other hand, in *Total,* the Tribunal only found that there was not enough evidence of the graveness and imminence of the threat[149].

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[146]Aikaterini, *supra note* 80, p. 245, citing Paul Foriers.
[147]*CMS; supra note* 2, para. 305.
[148] *Ibid.* Para. 355.
[149] *Total; supra note* 96, para. 223.

In contrast, other Tribunals assessing the same requirement reached opposite conclusions. For example, in *Impregilo,* the Tribunal relied on a series of public and well-known evidence of the massive default on the public debt reached during the crisis, including reports from the United Nations General Assembly and other international organizations such as the International Monetary Fund (IMF), experts opinions and economic indicators. After realizing the extraordinary nature of the crisis, the Tribunal recognized the graveness and imminence of the peril towards the 'essential interest' of Argentina's economic and social stability[150]. Analogously, in *LG&E* the Tribunal recognized Argentina's unprecedented economic crisis to face an 'extremely' serious threat to its existence, making very difficult, if not impossible, to maintain its essential services in operation, consequently its internal peace[151].

The implications of these divergent approaches by ICSID Tribunals are relevant for several reasons. On one hand, it denotes that notwithstanding the particular causes of the imperilment, the threat should be extremely grave, or at least, unmanageable. An ordinary peril or threat will not suffice. On the other hand, it conveys the high cumulative threshold of the necessity plea under article 25 ASRIWA. More importantly, it confirms the stringent review of ICSID Tribunals towards the requirements of the necessity plea under customary international law applied in economic and social crisis because of the complexity to objectively asses all circumstances ratifying the gravity of a threat affecting an essential interest. Furthermore, it creates a great burden for socioeconomic crisis, since crisis developing over time have to be tackled only when the situation has become desperate, uncontrollable and up to the ultimate peril, in order to be able to enact remedial measures contrary to previous international commitments without incurring responsibility[152]. ICSID Tribunals have not allowed an evolutionary interpretation of the term, in contrast, the requirement has remained undeveloped since the first self-preservations pleas of classic international law, under the *jus ad bellum* doctrines, perhaps because of the continuous skepticisms to protect the plea against abuse.

The 'Only Way' requirement

A successful invocation of the state of necessity as a justification to preclude a wrongful act requires the State to demonstrate that no other reasonable means were available to safeguard an essential interest. If other steps could safeguard the interest, even if such other steps would be more difficult or

[150] *Impregilo; supra note* 131, para. 347-350.
[151] *LG&E; supra note* 137.
[152] Sacerdotti, Giorgio. *BIT Protections and Economic Crisis: Limits to their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity,* ICSID Review, Vol. 28, No.2, 2013, p.374.

costly to the State, then the plea should be rejected[153]. Whereas the word 'only' suggests that no other means should be available, the term 'way' is designed to emphasize that is not limited to unilateral action, but may also comprise other forms of conduct available through cooperative action with other States[154]. In other words, 'the only way' requirement is intended to demonstrate that the State could not have reasonably resorted to other actions rather than wrongful measures that ultimately breached an international obligation.

Precisely because of such narrow interpretation given to the term, this requirement has proved practically impossible to satisfy in practice, remarkably if the measures were taken as a result of an economic crisis. As Prof. Reinisch observes, it is indeed 'a very problematic aspect under Article 25 ASRIWA[155]'. The latter because as a matter of fact, there is a *margin of appreciation* States have before choosing different alternatives to alleviate or prevent an essential interest. States, as sovereign entities, are free to adopt whatever policies they believe are the most certain to prevent or tackle an essential interest to become imperiled or seriously affected. It is very challenging to imagine that there is only one way to tackle an economic crisis, in fact, States normally develop a series of economic packages, which normally includes a mix of fiscal, monetary and financial policies and regulations[156]. As Prof. Sornarajah notes on its Expert Opinion in *El Paso,* 'in situations of public emergency, by reason of their direct contact of the pressing needs of the moment, the national authorities are in principle better placed than the international judge […] on the derogations necessary to avert it[157]'.

Likewise, the assessment of which measure is necessary or may be more successful can scarcely make unanimity *ex ante[158]*. The only way requirement is intrinsically related with the notion of which measures a necessary or viable in particular emergency, in special economic and financial emergencies. Albeit in the context of self-defense, the ICJ drew attention on the term in the *Nicaragua case.* The Court found that the intended measures to protect and essential interest must not purely be "useful" but particularly "necessary"[159]. In addition, the Court stressed the importance of judicial

[153] Bjorklund; *supra note* 144, p. 483, citing Crawford's Report.
[154] *Draft Articles; supra note* 8, p. 83 (15).
[155] Reinisch, August. *Necessity in Investment Arbitration,* Netherlands Yearbook of International Law. Vol. 41, TMC Asser Instittut, 2010, p.153.
[156] United Nations Conference on trade and Development (UNCTAD), *Development and Globalization: Facts and Figures,* UNS, 2012. Available at http://dgff.unctad.org/chapter3/3.1.html (Last visited June 10, 2016).
[157] *El Paso Energy International Company v. Republic of Argentina,* ICSID Case No. ARB/03/15, Legal Opinion of M. Sornarajah, 5th March, 2007, p. 98, para. 119. Available at http://www.italaw.com/sites/default/files/case-documents/ita0970.pdf (Last visited June 10, 2016)
[158] Sacerdotti, Giorgio. *The application of BITs in time of economic crisis: limits to their coverage, necessity and the relevance of WTO law,* in General Interests of Host States in International Investment Law, Giorgio Sacerdotti, Pia Acconci, Mara Valenti & Anna de Luca eds., Cambridge, 2014, p.12.
[159] *Military and Paramilitary Activities; supra note 82,* p. 117, para. 224.

review to assess the “necessary” character of this requirement by expressing that ‘whether a given measure is “necessary” is not purely a question for the subjective judgment of the party’ but should be ‘assessed by the Court’[160].

In the context of the *Argentine Saga,* the ‘only way’ requirement posed an enormous threshold due to the variety of measures available before an essential interest becomes imperiled. In assessing this requirement, the *Argentine Saga* Tribunals had different positions. In *CMS,* the Tribunal did not hesitate to confirm that other alternatives were available, yet acknowledged that reviewing the available policy alternative was beyond the scope of its task[161]. Likewise, the *Sempra* and *Enron* Tribunals found, almost in equal terms, that “a rather sad world comparative experience in the handling of economic crisis shows that there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available to Argentina[162]. Moreover, the *Sempra* Tribunal rejected the idea of exploring in detail whether other means were available to Argentina. Rather, the Tribunal ended its analysis by stating that ¨it is instead the Tribunal´s duty only to determine whether the choice made was the only one available, and this does not appear to have been the case[163]. In *Total,* the Tribunal recalled that there were ‘reasonable alternatives’ to the monetary policies carried out by Argentina, yet did not review what kind of measures were available[164]. More concise was the *Suez* Tribunal, which carefully analyzed all available options for Argentina in order to prevent burdensome measures that ultimately affected the investors, and stated that there were more ‘flexible’ options that would have protected ‘both interests’[165]. In *Impregilo,* the Tribunal recognized that whether Argentina’s overall management of its public finances and social unrest would have been conducted more successfully through other means remained ‘inconclusive’[166].

On that basis, all Tribunals concluded that Argentina was responsible, therefore rejecting the necessity defense, because other less harmful or even costlier policies were available to tackle the then on going economic crisis. Nonetheless, none of them dare to support their statements under a series of tests and principles that would have motivated such intransigent position. Under that *rationale,* one may be enticed to affirm that under such standard any measure adopted by a State would fail the test of Article 25, because there will always be more than one alternative to a financial crisis, particularly

[160] *Ibid.* para. 282.
[161] *CMS; supra note* 2, para. 323.
[162] *Sempra; supra note* 3, para. 350.
[163] *Ibid. 351.*
[164] *Total; supra note* 96, para. 223.
[165] *Suez; supra note* 98, para. 235-260.
[166] *Impregilo; supra note* 131, para. 353.

in the context of current globalized and intermingled financial world[167]. The latter differs greatly from the approach given by the ICJ in the *Gabčikovo-Nagymaros Project* case, where albeit rejecting the necessity plea, the Court carefully scrutinized the available options Hungary had to prevent the Treaty suspension with Slovakia while ensuring the protection of its essential interests[168]. Conversely, these Tribunals took the ICJ's approach given in the *Wall Advisory Opinion,* where the court limited its analysis to saying that Israel had probably other ways available to prevents its security interests, thus also rejecting the necessity defense[169].

In contrast, other ICSID Tribunals radically diverged on that approach. In *LG&E* and *Continental Casualty,* the Tribunal upheld, although recognizing its jurisdictional limitations to evaluate other means available, that there might have been a number of ways to draft a similarly successful economic recovery plan that would have prevented a breach of international obligations. Both Tribunals recognized the *theoretical* alternatives available to rapidly tackle the crisis, or at least, to prevent it's spreading[170]. With this in mind, the Tribunals acknowledged the difficulty of assessing, *ex post facto,* the alternatives available. This is related with several human and psychological factors that should be analyzed to determine the particular reasons for a State to favor a certain measure from others available. As Prof. Bjorklund explores, "it is easy to overlook the sense of urgency that animates decisions makers in times of crisis once the immediate emergency has passed[171]", which was completely overlooked in *CMS, Sempra, Total, Suez, Impregilo* and *Enron*. These Tribunal's decisions are sincerely discouraging, since it was confirmed that the Tribunal does not have to assess all other available ways. On the contrary, the Tribunal is free to accept or not the plea on the sole basis of the existence of another available measure. As noted before, in during economic crisis there will always an alternative measure, and a broad range of options to choose from. Such interpretation of the requirement would seem to defeat any defense[172]. Most of the times, States facing an unprecedented crisis, would act desperately with any means available to prevent a major catastrophe, often unknowingly that three arbitrators, sitting in their chairs in Paris or Washington would scrutinize, with abundant resources both handled by parties and experts, whether a particular measure was the 'only way' available. The Tribunal usually adjudicates the matter without any pressure, with the privilege of

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[167] Reinisch; *supra note* 155, p. 153.
[168] *Gabčikovo-Nagymaros Project; supra note* 16, para. 49-57.
[169] *Wall; supra note* 128, para. 140.
[170] *LG&E; supra note* 5, para. 257.
[171] Bjorklund, Andrea K. *The necessity of sustainable development?* in *Sustainable Development in World Investment Law*, Segger, Gehring & Newcombe (eds.), Kluwer, 2011, p.371.
[172] Bkorlund; *supra note 144, p.485.*

comfortably listening to a variety of experts and opinions, with the advantage of possessing significantly more information about the crisis[173]".

With this in mind, certainly a balance of weights is required. An appropriate approach would be to incorporate certain elasticity to this requirement. As an example, the *Enron Annullment Committee* proposed a test based on adequacy, proportionality and evolutionary interpretation. In addressing the findings made by the Enron Tribunal, the Committee hinted that the Tribunal should have been entitled to assess in deep not only whether other available ways were available to tackle the crisis, but to examine if such other measures to safeguard the essential interest were effective, and most importantly, the economic methodology employed to ensure the wrongful measure is the most effective, balanced and proportionate action to implement[174]. The Committee addressed the issue in the following terms:

> "If there are three possible alternatives measures that a State might adopt, all of which would involve violations of the State's obligation under international law, the State will not be prevented from invoking the principle of necessity if it adopts the measure involving the least grave violation of international law[175]".

As noticed, the Committee's methodology clearly takes a different -yet evolutionary- approach to the ILC commentaries on article 25 ASRIWA, and most prominently, to the methodology taken by the ICJ in both *Gabčikovo-Nagymaros* and the *Wall Advisory Opinion.* The Committee clearly conjures for an elastic methodology of the 'only way' requirement under customary international law, moving from the classical inflexible concept of 'absolutely no other means available' to one that noticeably considers the particular circumstances of the enactment of a measure on a case by case basis, based on an '*alleviating/palliative* dichotomy' that captures the right balance between the need to recognize a genuine circumstance precluding wrongfulness and a State pursuing an abusive invocation[176]. With this in mind, the Committee even examines a hypothetic situation in which a State

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[173] Kent, Avidan & Harrington, Alexandra R. *The Plea of Necessity under Customary International Law: a critical review in light of the Argentine cases,* in *Evolution Investment* Treaty Law *and Arbitration,* Chester Brown & Kate Miles (eds.), 2011, p. 253.
[174] *Enron Creditors Recovery Corp. Ponderosa Assests, L.P v. Argentine Republic.* ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 369-373.
[175] *Ibid,* para. 370.
[176] *See* Qureshi, *supra note 73, p.105.*

has to choose from two different measures, confronted in efficiency *versus* illegality dilemma, a *rationale* that none of the *Argentine Saga* Tribunals explored. The Committee refers as follows:

> "For instance, suppose that there are two possible measures that a State might take in order to seek to safeguard an essential interest. One is 90 per cent probable to be 90 per cent effective to safeguard that essential interest, while the other is 50 per cent probable to be 60 per cent effective. Suppose that the former measure would (subject to the potential application of the principle of necessity) be inconsistent with obligations of the State under international law, while the latter measure would not. Would the State be precluded from invoking the principle of necessity if it adopted the former measure, on the basis that there was an alternative available? Or could the State claim that the measure taken was the "only way" that stood a very high chance of being very effective[177]?"

Noticeably, the Committee unmistakably applies a high degree of flexibility and proportionally to the 'only way' requirement. This is particularly important in the context of an economic crisis; otherwise, the defense would not have no '*raison d'être',* it would be dead before even being born. As Professor Reinisch argues, there should be a more adequate approach by Tribunals in the context of economic crisis, 'incorporating considerations of adequacy and proportionality[178]'. Unquestionably, there is no reason why a Tribunal would not apply a proportionality test, especially considering that it even applies in the context of self-preservation. Such conception is definitely unwarranted. The *margin of appreciation* the Committee grants to the State in order to assess whether a measure is more effective than other one is a key indication of such adequacy. This is particularly important because neither does it contributes to an abusive invocation of the necessity plea, nor entices a rigorous application from a Tribunal assessing a case. For instance, in *Continental Casualty,* the Tribunal rightly pointed towards that direction by calling upon a significant margin of appreciation for the State applying certain measures, by acknowledging that 'a time for crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight[179]'.

Equally important is the Committee's view regarding the most indicated person to evaluate

[177] *Enron Annulment; supra note 174*, para. 371.
[178] Reinisch, August. *Necessity in International Investment Arbitration – An Unnecessary Split of Opinion in Recent ICSID Cases? Comments on CMS v. Argentina and LG&E v. Argentina*, Vol. 8, JWIT, 2007, p. 201.
[179] *Continental Casualty; supra note 6,* para. 180.

whether an adequate, efficient and proportionate alternative exists, but more significantly, the test such person should practice to reach a final conclusion. The latter brings into mind Prof. Bjorklund's appreciation[180] on overlooking the sense of urgency one the crisis has passed. This is particularly important because the Tribunal assessing the 'only way' requirement not only should corroborate that a reasonable and proportionate alternative was available to the State, but also attempt in 'to put itself in the State's shoes' at the moment the it was forced to enact or apply a particular measure. The 'other ways' available shall be judged in light of the particular circumstances that led to its performance. This approach has been suggested in the context of the 'essential interests' by the ILC[181], and there is nothing that suggests its inapplicability to the 'only way requirement'. As the *Enron Annulment Committee* notes:

> "The relevant question for the Tribunal might be whether it was reasonably open to the State, in the circumstances as they pertained at the relevant time, to form the opinion that no relevant alternative was open".

Undeniably, this adequacy to the necessity plea in customary law proves creates an additional burden to Tribunals, because is not an easy task nor its mandate to evaluate in depth the particular circumstances of a case, nonetheless, it is clear step forward to assess the necessity plea as a result of an extraordinary social, cultural and financial crisis. Similarly, the Expert Report of Prof. Benedict Kingsbury proposed such approach in *Metalpar*[182]. In its report, Prof. Kingsbury advocates for a combined proportionality and rational alternative test where the Tribunal "would assess whether the measures had a legitimate aim, were well-focused measures for the pursuit of that aim, and there was not a manifestly less rights restricting alternative policy similarly effective". Incontrovertibly, such test can only be carried out if the Tribunal is able to 'visualize' the State's political and economic conditions at the time the measures affecting international obligations were put into place.

Finally, it is important to elucidate the appropriate qualified opinions that Tribunals should contemplate when assessing whether there was an alternative measure was available to the State. Normally, those opinions will come in the form of economical or legal reports, depending on the party submitting such evidence, however, a correct evaluation on whether 'another way' was available should come in by a amalgam of technical, legal, sociological, political and economic evidence. This

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[180] Bjorklund; *supra note 171*
[181] ILC Draft with commentaries; supra note 8, p.83, para. 15.
[182] *Metalpar S.A. y Buen Aire S.A. v. Republic of Argentina*, ICSID Case No. ARB/03/5, Expert Report of Benedict Kingsbury. Available at http://www.italaw.com/cases/documents/1270 (Last visited June 14 2016).

issue was firstly and amply discussed, within the necessity defense argued by Argentine during the economic crisis, by the *Enron Annulment Committee.* According to the Committee, the relevant evidence presented to a Tribunal should be integrated by a multidisciplinary report that would comprise different evaluations on whether there were other means available. The Committee found that the claimant's expert opinion was based from an economist standpoint, and therefore, is not purported to address whether the requirements for a lawful invocation of a state of necessity under customary international law, in the sense of article 25 ASRIWA, was met. The Committee addressed this issue as follows:

> "When Professor Edwards states that Argentina had other options for dealing with the economic crisis, he so states as an economist, and does not suggest that these other options would have amounted to relevant alternatives for purposes of the "only way" requirement of Article 25 of the ILC Articles […] the Tribunal was required to determine whether, on the proper construction of Article 25(1)(a) of the ILC Articles, the "only way" requirement in that provision was satisfied, and not merely whether, from an economic perspective, there were other options available for dealing with the economic crisis[183].

The latter marks breaking point from previous assessments by different ICSID Tribunals in the *Argentine Saga* in respect to the 'only way' requirement under article 25 ASRIWA. Firstly, because albeit rejecting the necessity defense invoked by Argentina, none of them argued in depth the particular reasons leading to such decisions, and secondly, because those who upheld the necessity defense –namely *Continental Casualty* and *LG&E*- did not set such precedent in their arguments leading to their award.

Non-serious impairment of essential interests of other States

Lawful invocation of a state of necessity under the requirements of Article 25 ASRIWA requires the act not to seriously impair an essential interest of the State towards which the obligation exists, or of the international community as a whole. Noticeably, an act impairing an essential interest would be permitted under this requirement, unless it is serious. The term 'serious' refers to an act "demanding or characterized by careful consideration or application […] something bad or dangerous[184]". Therefore,

[183] *Enron Annulment; supra note 174,* para 374.
[184] Oxford Dictionary; *supra note 123.*

it should comply with such gravity for a successful invocation. As the ILC notes, "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 collective or individual[185]". In essence, there is a proportionality element in the requirement, because article 25(1)(b) ASRIWA bans a State from defending its own essential interests to the detriment of other State´s essential interests. Although this requirement has drawn few interest among investment arbitration tribunals and commentators –as will be discussed hereafter- the requisite appears to be directed at prevented and narrowing the usage of the necessity in the context of international human rights obligations and *erga omnes* obligations[186].

The first Tribunal to address this issue, albeit succinctly, was the ICJ in the *Gabčikovo-Nagymaros* case, where the Court merely provided that it was a requirement under customary international law, although not expressly assessed the particular essential interests affected against those of the other State, as a result of non-satisfaction of the previous cumulative requirements[187].

In the context of investment arbitration, in particular within the *Argentine Saga* cases, the issue has received very little attention, yet caused great controversy due an expansive and burdensome interpretation by some investment Tribunals. Using different linguistic approaches, all Tribunals agreed that such essential interest of other States had not been impaired. For example, in *LG&E,* the Tribunal concluded, although not explicitly expounding the topic or the legal implications to the case, that it could not 'be said that any other State's rights were seriously impaired by the measures taken by Argentina during the crisis[188]'. Similarly, in *CMS* the Tribunal found that, as a matter of logic, that 'if the Treaty was made to protect investors it must be assumed that this is an important interest of the States parties'. Later, despite recognizing that such requirement had been met, the Tribunal considered that investors are specific beneficiaries of an investment treaty, and therefore, implied that an essential interest should be protected[189]. Controvertibly, in *Sempra* and *Enron,* the Tribunals used a practically identical language to consider that, in respect to investment agreements, is necessary to consider whether the essential interests of the investors, or private parties, had been seriously impaired[190]. The Tribunal found that 'the essential interest of the Claimant would certainly be seriously impaired by the

[185] ILC Draft with commentaries; *supra note 8,* pp. 83-84, para. 17.
[186] Ryngaert, Cedric. *State Responsibility, Necessity and Humans Rights,* Netherlands Yearbook of International Law. Vol. 41, TMC Asser Instittut, 2010, p. 83-84.
[187] Gabčikovo-Nagymaros Project; *supra note 16,* para. 58.
[188] *LG&E; supra note 132*, para. 257.
[189] *CMS; supra note 2, para. 357-358.*
[190] *Enron; supra note 4,* para. 342

operation of the state of necessity[191]".

The aforementioned evaluation not only was controverted in nature, but also added an already burdensome requirement to Article 25 ASRIWA. As Titi illustrates, "this consideration is […] a digression from the letter of Article 25 ILC[192]". Furthermore, the Tribunal's approach is inconsistent with Article 31 of the VCLT[193] because a 'good faith' interpretation, in accordance with the ordinary meaning and the context of this requirement set forth in Article 25 ASRIWA, denotes that the ILC intended an evaluation of the competing public interests. Undoubtedly, it is challenging to contend that investors are not ingrained within the international community; nevertheless, the language of Article 25(1)(b) seems to incorporate only States, rather than individual investors of another State. Nonetheless, some scholars argue that the *Sempra* and *Enron* Tribunals might have had other reasons to reach to such conclusion. Firstly, because one must consider that Article 25 ASRIWA was not foreseen for its application in the investor-State context, although it is clearly not precluded[194]. On the other hand, because a 'balance of interests' is needed against the investor's interests and those of the State invoking the necessity plea[195]. In similar terms, Bjorklund recognizes that it would be unsuitable not to balance the parties' interests, because otherwise the State would find himself in a privileged position that contradicts the very hybrid nature of investor-State dispute settlement[196].

Of course, in order to assess the plea of necessity under Article 25 ASRIWA one should remember to consider 'all circumstances', including a 'balancing test'. Nonetheless, assuming that an essential interest from a State has been impaired because an investor is the beneficiary of an international agreement greatly differs form the language used in Article 25(1)(b) ASRIWA. It emphasizes the latent unseemliness of applying Article 25 ASRIWA to an investor-State dispute settlement context[197]. This is also addressed in Crawford's Report, which explicitly contends that 'the balance to be struck in paragraph 1(b) is not a balance between the interests of the respondent State and the individual interests of the State or States complaining the breach[198]'. This was discussed by the *Suez* Tribunal, which found 'difficult to see how Argentina's actions impaired an essential interest of France, Spain, the United Kingdom, or the international community[199]'. Similarly, the *Enron*

[191] *Sempra; supra note 3,* para. 391.
[192] Titi; *supra note 80*, p. 247.
[193] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M 679, *entered into force* January 27, 1980.
[194] Bjorklund; *supra note 144*, p. 487.
[195] Bücheler, Gebhard. *Proportionality in Investor-State Arbitration*, OUP, 2015, p. 270.
[196] Bjorklund; *supra note 144,* p. 487.
[197] Titi; *supra note 80,* p. 247.
[198] Crawford's Report; *supra note 14,* p.73-74, para. 292 (c).
[199] *Suez; supra note* 98, para. 261.

Annulment Committee found such interpretation of Article 25(1)(b) by the *Enron* Tribunal 'to contrast with the language of Article 25, which speaks of a situation where *the act of the State* invoking the principle of necessity would seriously impair a relevant essential interest[200]'.

With this in mind, the term 'international community as a whole' does ring a bell. The phrase was pointed out by the ICJ in the *Barcelona Traction* case in the context of differentiating between *erga omnes* obligations of States and the treatment to foreign investors. The Court found that:

> 'An essential distinction should be drawn 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. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*[201]'

The above said does supports the language of Article 25(1)(b). The necessity plea is rejected if 'essential interests' affecting the 'intentional community as a whole', are in breach, impairment or violation of fundamental values of the international community and peremptory norms of international law*,* not only because of article 25 ASRIWA, but also 26 ASRIWA, as the commission deliberately chosen to include it in a separate article that would cover Chapter V ASRIWA as a whole.

Undoubtedly, the topic has been object to scholar debate, yet has been undervalued by most tribunals of the *Argentine Saga.* Had the language of Article 25(1)(b) been more comprehensive, there would be room for interpreting the inclusion of private investors within its context, specially considering that although necessity might exclude international responsibility, the obligation to compensate remains intact, therefore allowing a more appropriate satisfaction to the investors essential interest[202]. Nonetheless, as Bücheler notes, it is very difficult to assume the 'international community' to be composed only by States, but also other entities and individuals[203].

Exceptions within Article 25 ASRIWA

[200] *Enron Annulment; supra note 174*, para. 383-384.

[201] *Case concerning the Barcelona Traction Light and Power Company Limited*, (Belgium v. Spain), Judgment, I.C.J. Reports (1970) 5 February 1970, para. 33.

[202] Newcombe, Andrew & Lluis Paradell, *Law and Practice of Investment Treaties, Standards of Treatment,* Kluwer, 2009, p. 520.

[203] Bücheler; *supra note 195*, p. 271.

The necessity plea under customary international law is conditioned on the satisfaction of two negative general exceptions stated in Article 25(2). The usage of the term 'exception' has been referred by various commentators, who rightly recognized the 'negative' sense of paragraph 2 of Article 25, contrasted with the 'positive nature' of paragraph 1[204]. The ILC notes the clear exceptional language of this provision due to the inclusion of the term 'in any case'[205]. Important to acknowledge is that only two general exceptions have survived the original text proposed in Prof. Ago's Report, as compliance with the a peremptory norm of international law was moved to a separate norm established Article 26 ASRIWA. The reason for such change might in intrinsically linked with the addition of the term 'international community as a whole' in Article 25(1)(b) which has been discussed before.

The international obligation in question excludes the invocation of necessity

The first of the two main general exceptions laid down in Article 25(2)(a) provides that an international obligation should not reject the possibility of invoking the necessity plea as a ground for precluding wrongfulness. The general exception stated in Article 25(2)(a) is therefore, in nature, a treaty-based exception. Irrefutably, a treaty provision containing a non-derogation clause would clearly indicate the drafter's intentions to exclude the possibility for an excuse for wrongful action of a State, nonetheless, a question remains on whether an implicit reliance on necessity would be enough to reject the plea, as was set forth in Article 33 of the 1980 ILC Draft.

The ILC commentaries on the ARISWA and Prof. Crawford's Report suggest that should an international agreement expressly or implicitly preclude the possibility of invoking the necessity plea under customary international law, then it would not be available for the pleading State. The latter seems legally obvious since it would comply with the Latin maxim of *pacta sunt servanda* established in Article 26 VCLT[206]. However, 'it is not limited to a treaty based obligation[207]'. The aforesaid could be exemplified by a treaty implicitly protecting some humanitarian law rules –the so called *jus in bello-,* such as how to conduct hostilities, civilian protection and other circumstances 'designed to be implemented in situations of grave and imminent peril'[208] thus rejecting military necessity. The ILC commentaries on the ASRIWA demonstrate that the Commission also considered the object and purpose of a treaty as an implicit preclusion for the invocation of necessity, as are envisioned to pertain

[204] *See,* Bjorklund; *supra note 144,* p. 487. Boed; *supra note 28*, p. 36.
[205] ILC Draft Articles; *supra note 8*, p. 84, para. 19.
[206] Article 26 'Pacta Sunt Servanda': Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
[207] Crawford's Report; *supra note 14,* p.73, para. 292 (b).
[208] Bjorklund; *supra note 144*, p. 488, *citing* Crawford's Report.

in ‘abnormal situation of peril for the responsible State[209]’. That would be the case, *inter alia,* of a Convention on the rules of engagement or the treatment of prisoners during *jus in bello*. To exemplify, Article 4 of the ICCPR[210] provides both an implicit and explicit derogation from specific obligations. On one hand, it allows derogations to the extent that they would not be inconsistent with other international obligations, or potentially those affecting the very ‘object and purpose’ of the convention during public emergencies. On the other hand, it explicitly prescribes derogation from ‘core obligations’ such as those prohibiting cruel, inhuman or degrading treatment[211]. The 1980 Ago’s Report also shed some light on this regard. Ago noted that there could situations in which the treaty remains silent on whether the invocation of necessity could be excluded, and in such case, ‘should not be automatically construed as allowing the possibility of invoking the state of necessity[212]’. Furthermore, Ago noticed that the most efficient way to acknowledge whether a treaty barred or not the invocation of necessity would be to ascertain whether it ‘emerged implicitly, but with certainty, form the object and purpose of the rule, and also in some cases form the circumstances in which it was formulated and adopted[213]’.

In the realm of investment arbitration there are few indications of IIA’s expressly precluding the application of the necessity defense. A careful examination of several BIT Models from capital-exporting countries sustains the latter[214]. A natural reason for that is, on one hand, the proliferation of NPM’s clauses in IIA’s, and on the other hand, the stringent cumulative threshold imposed by the ASRIWA in comparison to the flexible interpretation of NPM’s clauses. Nonetheless, some authors argue that, in the context of BIT’s, the ‘obligation in question’ implicitly precludes the use of the necessity doctrine[215].

The rationale behind the aforesaid is whether the object and purpose of an IIA may implicitly exclude the possibility of invoking the necessity plea, as would happen to some human rights conventions. Indeed, the object and purpose of an IIA’s encompasses, *inter alia,* the ‘promotion of

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[209] ILC Draft Articles; *supra note 8*, p. 84, para. 19.
[210] International Covenant on Civil and Political Rights, UNGA Dec. 19, 1966, G.A. Res. 2200 (XXI), U.N GAOR 21 sess. Doc. A/6316, UNTS No. 14668, 1966. Available at https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf (Last visited June 18, 2016)
[211] *See* Boed; *supra note 28,* p. 34-35.
[212] *Yearbook of the International Law Commission*, 32nd session, of the Commission to the General Assembly on the work of tis thirty-second session. Vol. II, Part 2, A/CN.4/SER.A/1980/Add.1 (Part 2), 1980 pp. 50-51, para. 38.
[213] *Ibid.*
[214] US BIT Model (2012), UK BIT Model (2008), Indian BIT Model (2003), Italian BIT Model (2003), Austrian BIT Model (2008), Canadian BIT Model (2012).
[215] Reinisch; *supra note 178,* p. 204.

economic cooperation' by 'encouraging reciprocal protection of investments[216]'. As Prof. Reinisch notes, 'if this rationale is accepted it is accepted it is hard to see why it should be abandoned once the economic difficulties grow even worse and thus the risk of investor-adverse measures is even increased[217]'.

Nonetheless, there is no indication that State's -should they foresee an implicit derogation from the necessity defense- would have a reason not to incorporate an explicit clause providing the limits of such derogation. As noted before, the aforementioned would contradict IIA's evolution in the form of NPM's clauses and State's sovereign rights –especially in times of economic emergencies- to apply wrongful measures to protect and essential interest. Furthermore, it would include an already troublesome satisfaction of the necessity plea and possible abuse in its rejection from investment tribunals. Additionally, the core purpose of the necessity plea is to excuse a State from responsibility during extraordinary, catastrophic and unforeseeable scenarios. By the same token, such investor-driven approach would be burdensome for States enacting measures to tackle a harsh socio-economic crisis, because basically the object of purpose of any IIA would tackle every invocation of the necessity plea as a result of an extraordinary financial emergency. As Kent & Harrington commentate, 'States, in all likelihood, would not easily forego the necessity doctrine and the assumption of implicit concession of this important safeguard by a State Party […], is simply unrealistic[218]'.

In addressing this issue, all tribunals in the *Argentina Saga,* except *CMS,* found that there was not any provision precluding the Argentina's right to invoke necessity. In contrast, the *CMS* Tribunal addressed the debate on whether the object and purpose of an IIA might prevent the invocation of the necessity plea. Firstly, the Tribunal recognized general existence of treaties designed to apply during emergencies, and those with a framework that prevents it. Later, the Tribunal implied that in the absence of a catastrophic crisis the 'Treaty will prevail over any plea of necessity[219]'.

The latter is an overreaching and exaggerated statement. First and foremost, because such assessment implies that the necessity defense is only available in situations of 'total collapse', and secondly, because the notion of 'investment as a key to development' will be severely impaired by equating the object of purpose of a human rights treaty with an IIA. The rationale lying behind the

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[216] *See* US BIT Model (2012). https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (Last visited 14 June, 2016).
[217] Reinisch; *supra note 178*, p. 205.
[218] Kent, & Harrington; *supra note 173,* p. 256-257.
[219] *CMS; supra note 2*, p.102, para. 353-354.

CMS conclusions would clearly jeopardize an important defense against financial emergencies, completely ignoring State's duty to protect an essential interest during times of crisis. The aforesaid is aggravated if considered that such interpretation is without a State explicit consensus. In today's intermingled world, it is difficult to assume that such interpretation reflects State's intention when signing an IIA. As Kent & Harrington note, 'it is within the international community's interest to exonerate a State for the wrongfulness of preventive measures under extreme circumstances […] and thus, the necessity doctrine should not be assumed to be excluded in the interpretation of BITs[220]'. Furthermore, it highlights the necessity of applying an evolutionary interpretation to the ASRIWA requirements on the necessity plea, since is obvious from its *travaux preparatoires* that the ILC did not intended to be directly applicable to the realm of investment arbitration.

Contribution to the situation of Necessity

The last and by far the most problematic requirement to successfully invoke a state of necessity under Article 25 ASRIWA is the exception of contribution to the situation of necessity. In accordance with Article 25(2)(b), the plea will not be available if 'the State has contributed to the situation of necessity'. Some commentators refer this requirement indistinctively as 'own contribution' or 'non-contribution[221]'. All other requirements and exceptions will not suffice the plea if contribution to the situation of necessity –namely the financial, economic or social crisis- is proven. Nonetheless, such contribution must be directly attributable to the State, or at least, adequately significant as to preclude its application. This issue was recognized by the ILC, which mentioned that such contribution 'should be sufficiently substantial and not merely incidental or peripheral[222]'. Although not included in today's ASRIWA, it is worth mentioning that Prof. Crawford's Report included the term 'material contribution' in its 1999 Draft -inexistent in the ILC Draft of 1980[223]-, observing that the nature of the plea would deduct the State's contribution to the situation of necessity, and therefore, the question should be how 'material' such contribution was[224]. The ICJ in the Gabčikovo-Nagymaros Project case took a similar approach. In reasoning its judgment, the Court found that the state of necessity would not be available to Hungary because 'it had helped, by act or omission' to bring about the case under review.

The latter *dictum* exemplifies the particular obstacles a State may encounter to substantiate the

[220] Kent & Harrington; *supra note 173,* p. 257.
[221] *See* Paliouras; *supra note 117,* p. 107.
[222] ILC Draft Articles; *supra note 8*, p. 84, para. 20.
[223] Ago's Report; *supra note 212,* p. 33.
[224] *See* Crawford's Report; *supra note 14,* p. 88-89, Note (2).

plea of necessity during an economic crisis. As has been argued before, a financial crisis is triggered by a myriad of reasons, including actions or omissions from a government while directing its economic policy. The *leitmotiv* behind the exception is clear: nobody may benefit from its own illegal act –the well-known Latin aphorism *nullus commodum capere potest de injuria sua propria*[225]-. However, such contribution does not necessarily preclude the necessity plea invocation unless is significant. Unquestionably, the level of contribution by a State to the imperilment of an essential interest during an economic crisis is tangible. If somehow the State has managed to satisfy the latter stringent conditions under Article 25 ASRIWA, the final exception of 'non-contribution' will surely suppose the biggest challenge to successfully preclude its wrongful behavior under international law. The aforesaid was object to contradicting discussion from several ICSID tribunals assessing similar facts during the *Argentine Saga.*

As a matter of fact, the *Suez* tribunal addressed this issue, albeit laconically, taking into consideration several exogenous and endogenous factors. On one hand, the tribunal recognized the patent difference between the term "contribute" and to "cause". On the other hand, though recognizing domestic and external factors as a contribution to the Argentine crisis, the tribunal found that the crisis' origins were to be found some decades before the economic emergency's outbreak, suggesting that several governmental administrations could have diverted such economic policies in order to avoid the catastrophic consequences reached by the crisis[226]. Furthermore, the arbitrators found that, albeit exogenous factors were to be pondered, Argentina's unwarranted public spending, 'inefficient tax collection, delays in responding to the early signs of the crisis and insufficient efforts at developing an export market' played a pivotal role in contributing to the crisis, particularly if compared with other countries' responses to the international financial crisis[227].

Similarly, in *Impregilo,* the Tribunal found that the term "contributed" could be interpreted to encompass 'deliberate, reckless, negligent or lesser degree fault'[228]. Moreover, the arbitrators incorporated a standard of review to the requirement, by expressing that 'State's contribution to its necessity situation need not to be specifically intended or planned', including 'well intended but ill-conceived policies[229]'. Later, the tribunal adds that such interpretation is a 'result of common sense'. Finally, applying a remarkably similar linguistic pattern from *Suez,* the tribunal considers both the

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[225] Alvarez-Jimenez, Alberto. *The Political Economy of Crisis and the International Law of Necessity after the Great Recession,* in *Yearbook on International Law & Policy 2013-2014,* Andrea Bjorklund (ed.), Oxford, 2015, p. 489.
[226] *Suez; supra note 98,* para. 264.
[227] *Ibid.*
[228] *Impregilo; supra note 131,* para. 356.
[229] *Ibid.*

internal and external factors that directly or indirectly contributed to the situation of necessity, noting that similar financial forces had affected other countries from Asia, America and Europe, yet resulted in unalike outcomes[230]. Surprisingly, one of the three arbitrators expressed her disagreement on the general evaluation of the contribution. Although concurring with the decision on the merits, Prof. Stern was not persuaded that compelling evidence had objectively proved a substantial contribution by Argentine. In his belief, 'a State's contribution to a situation of economic crisis should not be lightly assumed[231]'.

Correspondingly, in *CMS, Sempra, Enron*, *EDFI, El Paso*[232] and *National Grid*[233] the Tribunal reached similar conclusions. Although slightly varying on the crisis consequences and foundations, all tribunals upheld Argentina's contribution to the crisis.

In *EDFI* and *El Paso*, the tribunal's assessment on the level of contribution of Argentina was profoundly grounded in economic articles from renowned economists, expert opinions submitted by the parties and even a *Washington Post* statement by Argentine's President, Eduardo Duhalde, suggesting a 'domestic' mishandling'[234]. As occurred in *Impregilo,* Arbitrator Stern severely criticized the majority's opinion, arguing contradicting reports from the experts and very little analysis from the Tribunal on the IMF and World Bank recommendations to Argentina, which were diligently applied by the latter[235].

The *Enron* tribunal's conclusion was alike. The tribunal did not evaluate in depth the level of contribution to the crisis, but implied a 'balance of reasons' that precipitated the crisis, which were 'either endogenous or exogenous[236]'. Furthermore, it noted that Article 25(2)(b) echoes a general principle of law 'devised to prevent a party taking legal advantage of its own fault[237]'. In like manner, the *Sempra* tribunal did not appraise in detail the particular degree of contribution by Argentine, but was able to ascertain a 'mix' of domestic and exogenous causes that contributed to the situation of necessity, ultimately rejecting the plea[238]

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[230] *Ibid,* para. 358.
[231] *Ibid,* para. 360.
[232] *El Paso Energy International Company v. The Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011.
[233] *National Grid P.L.C v. Argentine Republic*, UNCITRAL, Award, November 3, 2008.
[234] *EDF; supra note 118,* para. 1173. *El Paso; supra note 232,* para. 661.
[235] *Ibid.* para. 667-669.
[236] *Ibid.*
[237] *Enron; supra note 4*, para. 311.
[238] *Sempra; supra note 3,* para. 353.

Conversely, the *Continental Casualty* and *LG&E* had a different criterion. As expected, they relied on different standards to reach a different conclusion, some very intriguing. To exemplify, the *LG&E* tribunal introduced a debatable burden of proof principle conferring the claimant's obligation of proving that the invoking State had not contributed to the crisis[239]. In addition, the tribunal disregarded previous administration's contributions on the crisis, focusing on the measures taken by the then administration alone[240]. On the other hand, in *Continental Casualty,* the Tribunal introduced an unclear concept of 'contribution to endangering', which did not manage to clarify or to compare with the current requirement[241]. Furthermore, the tribunal adjudged that Argentina's contribution to the crisis was not substantial insofar the measures concerned were 'praised by the international financial community and by many qualified observers[242]', thus stressed the pivotal role international financing organizations, such as the IMF, play in assessing whether a particular measure could be substantially attributable to a State.

Considering the aforementioned, these positions should be individually assessed because the tribunal's considerations are far from coherent.

First and foremost, the burden of proof standard set by the *LG&E* tribunal is unwarranted. Certainly, it is a well known principle that the actor should is responsible to present the evidence that demonstrate its claim –derived from the Latin aphorism *semper necessitas probandi incumbit ei qui agit* -, nonetheless, when a defense is raised the invoking party has to validate his pretension, as he becomes the actor of its plea. As Reinisch notes, 'normally a State wishing to rely on necessity, or any other ground precluding wrongfulness of its behavior, has to establish the preconditions for such a defense[243]'. Other ICSID tribunals have addressed this issue. As an illustration, in *Metal-Tech,* the tribunal sustained that every party should be responsible to prove the facts on which it relies, which 'is characterized as a general principle of law[244]'. Despite the Claimant is the *actor*, when a party raises a defense it automatically shift the *onus probandi* to his allegation, and the duty to prove the facts on which it relies fall upon him. As Cheng notes, 'the term *actor* […] is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issues involved[245]'. This

[239] *LG&E; supra note 5,* para. 256.
[240] *Ibid.* para. 256-257.
[241] *Continental Casualty; supra note 6*, para. 234.
[242] *Ibid.* para. 235.
[243] Reinisch; *supra note 155,* p. 155.
[244] *Metal-Tech Ltd. V. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 237.
[245] Cheng; *supra note 17*, p. 332.

issue was also highlighted in depth in the *Asian Agricultural Products* case[246]. Finally, the tribunal's conclusion ignores important commentaries of the ILC drafters in the preparatory works of the ASRIWA. The *onus probandi* was subject to discussion by Prof. Crawford's second report, where the State's obligation to prove allegations based on the necessity defense was left very clear. Prof. Crawford mentions as follows:

> 'Where a conduct in conflict with an international obligation of a State is attributable to that State and it seeks to avoid its responsibility by relying on some circumstances under chapter V, the position changes and the onus lies on that State to justify or excuse its conduct […] it seems that this result is sufficiently achieved by the existing language of chapter V, and that no further provision is required[247]'

There is no reason to for the *LG&E* tribunal to reach such an unjustified conclusion unless the intention was to avoid an intricate analysis on the level of contribution required to satisfy the plea. Assuming that is not the original motivation, the tribunal should have been aware of the potential consequences of such assessment for future arbitration, since Ago's ' delicate balance' of the plea would be disrupted. Furthermore, there is a practical reason of imposing the *onus probandi* to the State: The invoking party is in the best position to demonstrate, especially in the context of investor-State arbitration, that the measures taken in the containment of a particular emergency were indeed the only means to avoid or confront the grave and imminent threat. As Alvarez & Brink argues, 'A respondent State is also in a better position to prove that it did not contribute to the underlying crisis[248]'.

Secondly, the tribunals missed a 'golden opportunity' to ascertain the role international financing community play in the contribution of a particular economic emergency. Although the *Continental Casualty* tribunal relied on Argentina's compliance with the IMF and the international financial community assistance to conclude the satisfaction of the contribution requirement, the tribunal does not purport to clarify whether acquiescence with such financial organisms or the international community as a whole would itself satisfy the stringent contribution requirement. As a natural consequence of this approach, a question arises: is non-compliance with an international

[246] *Asian Agricultural Products Ltd. v. Sri Lanka,* ICSID Case No. ARB/87/3, Final Award, 27 June 1990, para. 56.
[247] Crawford's Report; *supra note 14,* p. 85, para. 351.
[248] Alvarez, José E. & Brink, Tegan. *Revisiting the Necessity Defense: Continental Casualty v. Argentina,* in *Yearbook on International Law & Policy 2010-2011,* Karl P. Sauvant (ed.), Oxford, 2012, p. 331.

financial organization a presumption of contribution to the economic crisis?.

In *National Grid,* the Tribunal relied several times on reports issued by the IMF to evaluate the parties' positions, especially in regards to the origins of the crisis[249]. Based on the IMF report –also cited in *El Paso*[250], *Sempra*[251] and *EDFI*[252]- the tribunal recognized several external and internal factors to have contributed in the aggravation of the crisis. However, the Tribunal dismissed the necessity plea based on the IMF allegation that the crisis was 'exacerbated by a series of policy mistakes […] notably the capital controls, the *corralito* and *corralon,* and the asymmetrical pesoization and indexation' all which were directly attributable to Argentina's economic policy measures[253]'.

As noticed, there is an incoherent evaluation on the weight international financial organizations should have in the *onus probandi* of the wrongdoer to assess whether there was a substantial contribution or not. Curiously, the IMF and other international financial institutions had continuously celebrated Argentina's economic policy, to the point of encouraging other Latin American countries to follow such policy[254]. As a matter of fact, most of the measures taken by Argentina to tackle the crisis were directly "recommended" by the IMF and the World Bank, as a precondition for further emergency financing[255]. Intriguingly, the IMF later admitted its acts and omissions 'helped plunge Argentina deeper into the red' during the extraordinary financial instability crisis that led several companies to seek shelter in ICSID arbitration[256]. In its report –conducted by the Independent Evaluation Office- the IMF recognized that the crisis would have been 'not quite as bad if the fund had supported a change in strategy earlier[257]'. As a commentary, similar recommendations were also "proposed" by the IMF to some Asian countries during the Asian financial crisis in late 1990's, which were later rejected by the vast majority of countries directly affected by the emergency –South Korea, Thailand, the Philippines, Indonesia and particularly Malaysia- based on the onerous conditions poured

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[249] *National Grid; supra note 233,* para. 229-233, 260-262.
[250] *El Paso; supra note* 232, para. 89, 629, 635, 657-670.
[251] *Sempra; supra note 3,* para. 353. The Tribunal referred to it as 'international agencies'.
[252] *EDF; supra note 118,* para. 573.
[253] *Ibid.* para. 260-262.
[254] Cortés Martín, José. *El Estado de Necesidad en Materia Económica y Financiera,* A.E.D.I, Vol. XXV, 2009, p. 146-147. *citing* Schlemmer-Schulte, S. *Sovereign Debt: The Argentine Bond Case,* in *Frieden in freiheit – Peace in Liberty – Paix en liberté: Festschrift für, Michael Bothe zum 70. geburstag,* N. Ronzitti, A. Fishcer-Lescano, H.P. Gasser, T. Marauhn (eds.) Nomos/Dike, 2008, pp. 972-1017.
[255] Kurtz; *supra note 65,* p. 332.
[256] http://www.telegraph.co.uk/finance/2891368/IMF-admits-mistakes-in-Argentina-crisis.html (Last visited July 7, 2016).
[257] Independent Evaluation Office of the International Monetary Fund. *Report on the Evaluation of the Role of the IMF in Argentina, 1991-2001.* IMF, 2004. Available at: http://www.imf.org/External/NP/ieo/2004/arg/eng/pdf/report.pdf (Last visited July 7, 2016).

by the IMF, which would have ultimately aggravated the crisis, as occurred in Argentina.

Undeniably, the abovementioned does not purports to underrate the important role major international financial organizations play in evaluating whether an economic emergency could have been avoided or deflated by applying other less harmful economic and political policies. In fact, their mandate suggests their importance in assisting countries facing economic problems, thus contributing with development and the prevention of future global scale emergencies[258]. Nevertheless, giving excessive weight to their reports is neither proportionate nor balanced. Primarily, their function during arbitration is providing the arbitrators with an economic evaluation based on the parties' allegations and the overall facts surrounding a specific crisis, in order for the latter to have an *economic basis* to apply *legal* principles. As mentioned by the *Enron Annulment Committee:*

> 'While 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 necessariliy mean that as a matter of law, the State had *"contributed to the situation of necessity"* such as to preclude reliance on the principle of necessity under customary international law[259]'

The idea behind the aforesaid is that, at the end, States are sovereign in the application of any given measure. As recognized in *Continental Casualty,* they are 'basically free to adopt economic and monetary policies of their choice[260]', which means that no State is obliged -unless violating a *jus cogens* norm- to comply with economic recipes suggested by international financial organization in order to demonstrate their non-substantial contribution in a given emergency. As Sornarajah notes, 'what the tribunals were saying was that there was no way that a State could choose the solution it preferred[261]'. Third party reports, including studies from international financial organizations, should only confer the Tribunal with the necessary elements to adjudge whether the State has made *reasonable efforts* to act in good faith when addressing its economic policy.

Unquestionably, a proportionality and balance test is thus required, especially in today's

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[258] International Monetary Fund. *The Fund's Mandate – The Legal Framework.* Legal Department, IMF, February 22, 2010. Available at: www.imf.org/external/np/pp/eng/2010/022210.pdf (Last visited July 7, 2016).
[259] *Enron Annulment; supra note 174,* para. 393.
[260] *Continental Casualty; supra note 6,* para. 227.
[261] Sornarajah, M. *The International Law on Foreign Investment,* Cambridge, 3ed., 2010, p. 462.

globalized world. It is very difficult to conclude that an emergency occurred as a consequence of a sole State's policy. For example, the current 'oil price crash' has severely affected major "rich" oil-exporting countries, such as Azerbaijan, Mexico, Iran, Venezuela and Nigeria, causing them, *inter alia,* to drastically reduce public spending, dramatic interest rate hikes, unemployment, among others[262], as a result of exogenous factors. In analyzing this facts, a Tribunal should not only assess the commodities market and the stocks markets overall, but the measures taken by those States regardless on whether they have complied or not with international financial organization's "recipes and pills". As Cortés Martín rightly mentions, 'any State's crisis can be analyzed as a failure of that State's financial system, but also as a crisis of the international financial system[263]. Therefore, as recognized in *Metalpar's* expert opinion, tribunals assessing multiple –often contradicting- economic reports should cultivate a coherent criteria of '*casualty and remoteness',* concentrating on the main and proximate causes of 'those elements of the state of necessity to which the contested measures were a response[264]'. In conclusion, such proposed test should first unravel the external or 'endogenous' factors from those as a consequence of internal policies and subsequently assess the extent, level and 'substantial' contribution directly attributable to the State[265].

Thirdly, the tribunals had different assessments on whether measures under evaluation can be traced back to previous administrations. As noted before, whereas the *CMS* Tribunal stressed other administration's involvement in the crisis, the *LG&E* tribunal focused on the current administration alone[266]. On this regard, it is undeniable that a financial crisis as catastrophic as the Argentine emergency could perfectly encompass several administrations' terms, especially if in a short period of times numerous Presidents are put and dismissed from office. Of course, a prolonged absence of measures or policies to rectify a State's economy could naturally imply a certain degree of "omission" and negligence, therefore precluding the necessity plea. Nonetheless, Tribunals should carefully evaluate on a case-by-case basis whether measures enacted should focused on a single administration, particularly when such administration has been in office during a reasonable period of time, which would infer a higher potential for maneuver. The latter because applying a rigid assessment, as Kent & Harrington notice, would be troublesome for the sole reason that 'the policies of current administration may, in some instances, be seen as continuing practices of the former administration, and the fact that

[262] International Monetary Fund. *Global Implications of Lower Oil Prices,* IMF, SDN/15/15, July 2015, p. 17. Available at: https://www.imf.org/external/pubs/ft/sdn/2015/sdn1515.pdf (Last visited July 8, 2016).
[263] Cortés Martín; *supra note 254,* p. 148.
[264] *Metalpar; supra note 182,* para. 77.
[265] Gazzini, Tarcisio. *Foreign Investment and Measures Adopted on Grounds of Necessity: Towards a Common Understanding,* TDM, Provisional Issue, June 2009, p. 22.
[266] Kent & Harrington; *supra note 173,* p. 258.

recent administration did not reform previous policies may be seen as a contribution in itself'.

Fourthly and lastly, I should mention the rather marginal role the level of contribution has played in all arbitrations. Although the tribunals have been adamant is reaching their conclusions on whether the State has 'substantially' contributed or not to the State of necessity, it left behind an interesting opportunity to discuss the intensity of the contribution by a State. The tribunals slightly referred to the topic, in sort of an *obiter dictum*, although no specific precedent was dictated. Some commentators argue that a plain interpretation to Article 25(2)(b) only refers to 'contribution' as such, implying that such minor role would be as a consequence of the latter[267]. Nonetheless, as noted before, there are clear indications -both in Ago and Crawford's report- that the ILC was well aware that a 'substantial' or 'material' contribution was indeed necessary to conclude whether a peripheral or significant contribution to the state of necessity existed.

If there is something all arbitrators and parties to the dispute have unanimously admitted is that financial emergencies are typically a result of domestic and exogenous factors, sometimes very difficult to assess separately to the current intertwined global economy. As a consequence, it is quite challenging for all parties involved to disentangle which particular factors 'substantially' contributed to a particular crisis. For that reason, Tribunals should consider a more coherent approach that prevents future fragmentation.

An interesting solution to the abovementioned conflicting parameters would be to apply a three-tier test. At first, considering that every major financial crisis is nowadays related to 'exogenous' factors, the Tribunal should rather focus on the particular 'endogenous' factors that originated a particular financial emergency in light of the international financial situation. In parallel, the Tribunal should determine if the crisis was prolonged enough to weight the State's possible actions. In analyzing the aforesaid, the Tribunal would consider *economic* expert opinions and reports from international financial organizations, as a matter of *amicus curiae* without giving weight to whether that particular State complied or not with their recommendations or 'prescriptions'. This will serve to reach a *legal* conclusion. If the Tribunal is confronted with evidence of a protracted international crisis where different measures were available to tackle it, then moves to the second step. Should the Tribunal have the absolute certainty that the emergency was caused as a result of 'domestic' reasons, and the State had the necessary economic and legal considerations to prevent it during a reasonable period of time, but failed to do it because of incapacity or reluctance -action or omission- then the plea

[267] Reinisch; *supra note 155*, p. 155.

should be rejected.

On the other side -as considered in *Metalpar*[268]- the tribunal should balance whether the investor was mindful of the current and historical risks undertaken before the investment took place in that particular State. As a matter of fact, the analysis of an excessive risk undertaken by investors has and should continue to be of paramount importance in the assessment of the particular "investment environment" before and after a crisis emerges, as could be relevant for the correct assessment of the necessity plea. This is by far not new in the investment arbitration arena. As an illustration, in *Eudoro Armando Olguín v. Paraguay,* the tribunal emphasized the prudence investors should have before investing in a country that had historically or recently suffered economic tempest[269]. Similarly, although in the context of a *post crisis* investment, the arbitral tribunal in *Fireman's Fund Insurance Company v. United Mexican States* carefully analyzed the situation of the country before the investment was made[270].

Considering the aforesaid balance appreciations, the test continues if the Tribunal asserts that no 'substantial' or 'material' contribution is evident. As Alvarez-Jimenez acknowledges, 'if the Tribunal reaches the conclusion that the contribution was not substantial, such a conclusion cannot be the end of the evaluation of this requirement, in the event of a long-lasting crisis[271]. The second tier emphasizes on the realistic alternatives available to Argentina when the emergency had threatened the essential interest considering the psychological and political environment at this particular moment, not *ex post facto*. Similarly to the approach in *Continental*, the wrongdoer should present enough evidence to demonstrate 'due diligence' by implementing the reasonable measures that could have prevented the emergency in a reasonable period of time[272]. Should the tribunal ascertain that no reasonable efforts were undertaken in *good faith* with a certain *margin of appreciation* the plea is rejected on the grounds 'material' contribution.

As a matter of fact, the acceptance of a *margin of appreciation* to State's while conducting their economic policies is not a novelty in international investment arbitration. For example, in *Saluka v. Czech Republic,* the UNCITRAL tribunal cited *S.D. Myers v. Canada* to point out State's 'legitimate

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[268] *Metalpar S.A. & Buen Aire S.A v. The Argentine Republic.* ICSID Case No. ARB/03/5, Award on the Merits, June 8 2008, para. 204.
[269] Mr. Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5, Award, July 26, 2001 (Unofficial translation), para. 75.
[270] Fireman's Fund Insurance Company v. United Mexican States, ICSID Case No. ARB(AF)/02/01, Awards, 17 July 2006, para. 179-180.
[271] Alvarez-Jimenez; *supra note 225,* p. 498.
[272] Gazzini; *supra note 265,* p. 21.

right to regulate domestic matters in the public interest[273]'. As Kolo & Wälde advice, 'this approach also finds support in the jurisprudence of the ECtHR, the ECJ and the ICJ on the principle of margin of appreciation[274]. Therefore, there should not be a limitation from investment tribunals to assess the implication of such margin of appreciation in the context of the State's contribution to the situation of necessity.

Lastly, the conclusion should ascertain the reasonable efforts in conducting and implementing the wrongful measures. This is particularly important because if the measures taken to ameliorate the situation are not correctly implemented due to negligence, incapacity or unwillingness, then a substantial contribution is demonstrated. Of course, the latter test is difficult in nature, because most tribunals have already expressed their lack of jurisdiction over economic measures[275], and such test would require going beyond a superficial evaluation of the crisis. Furthermore, there is undeniable complexity in recognizing the precise 'ratio of endogenous and exogenous factors' instigating an extraordinary economic emergency, which 'logically suggests that this is a poor candidate for justiciable resolution[276]. Nonetheless, it also exemplifies the role arbitrators should assume in order to acclimatize Article 25(2)(b) to modern investment investor-State disputes.

Beyond the abovementioned acknowledgments, it seems that the only common ground the *Argentine Saga* tribunals have recognized is that contribution to an emergency would prevent the necessity plea to be accepted.

Compliance with peremptory norms (*jus cogens*)

Although not a requirement stipulated in Article 25 ASRIWA, Article 26 ASRIWA expressly bans a successful invocation of the state of necessity if 'any act of a State is not in conformity with an obligation arising under a peremptory norm of general law'. Although the exact concept of what a peremptory norm is and how they are created remains one of the most intense debates among the international legal literature[277], there seems to be a general agreement between commentators that peremptory norms, or *jus cogens* norms, are comprised by such norms 'generally accepted and

[273] Saluka Investments BV (The Netherlands) v. The Czech Republic, Partial Award, 17 March 2006, para. 305. Citing *S.D. Myers, Inc. v. Canada (UNCITRAL, NAFTA)* Award on the Merits, 13 November 2000, para. 263.
[274] Kolo, Abba & Wälde, Thomas. *Capital Transfer Restrictions under Modern Investment Treaties,* in *Standards of Investment Protection,* August Reinisch (ed.), OUP, 2008, p. 222.
[275] CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, para. 63; Enron Corporation Ponderosa Assets, L.P v. Argentine Republic. ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 2007, para. 12-13.
[276] Kurtz, Jürgen. *The WTO and International Investment Law, Converging Systems.* Cambridge, 2016, p. 216.
[277] *See* Vadi, Valentina. *Public Health in International Investment Law and Arbitration,* Routledge, 2013, p. 35.

recognized by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by subsequent norms of general international law having the same character[278]'.

The ILC had envisaged in Ago's report that any possible application of the state of necessity as a circumstance precluding wrongfulness that clashed with a *jus cogens* provision would entirely be 'ruled out as a ground for failure to comply with them[279]'. In like manner, the ILC commentaries on ASRIWA noted that the 'necessity plea cannot excuse the breach of a peremptory norm[280]'. In other words, as long as the norm breached by the State invoking the necessity plea protects an "essential interest" of the State, which happens to be a peremptory norm, the plea will not serve as an excuse to preclude its obligations[281].

The idea behind is to protect the quintessential values of the international community that are enshrined in peremptory norms, which would otherwise be imperiled by the unlawful measures intended to protect an essential interest of the State alone. As a matter of fact, the protection of a peremptory norm is highly rooted in the concept underlying the necessity defense: the legal order contemplates an excuse envisioned to safeguard an important interest that is higher in significance – and thus *legal status*- than that protected by the contravened norm. Although not purported to analysis in this academic thesis, the aforesaid inevitably revives the idea of 'hierarchy' within the international legal order, which has been widely fueled by article 53 and 64 of the VCLT and the ICJ's precedent in the *Barcelona Traction* case[282].

In contrast, the issue of compliance with peremptory norms as a preclusion to successfully invoke the necessity plea in the realm of investment arbitration has rather been object to limited attention among scholars and investment tribunals. The latter because, as Bjorklund notes, 'it would be difficult to imagine in the investment context any situation in which a *jus cogens* norm would come

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[278] Ago's Report; *supra note 212,* p. 37, para. 54.
[279] *Ibid,* para. 54.
[280] ILC Draft; *supra note 8,* p.85, para. (4).
[281] Viñuales; *supra note 102,* p. 3.
[282] *Case Concerning The Barcelona Traction, Light and Power Company Limited; (New Application: 1962)(Belgium v. Spain) Second phase, Judgment, February 5 1970, ICJ Reports, 1970, p.32, para. 33.* The Court delivered the controversial statement: "When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn 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. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".

into play to defeat an otherwise successful invocation of a necessity defense[283]. Nonetheless, some tribunals assessing the *Argentine Saga* noticed the importance of such norms to conclude whether a State is entitled to successfully invoke the necessity plea.

As an illustration, in *CMS,* the Tribunal laconically concluded that no peremptory norm of international had been compromised[284]. Although the Tribunal ultimately refused the necessity plea, it shed no light on the importance or legal transcendence of *jus cogens* norms in the realm of investment arbitration and its relation to the necessity defense. By the same token, in *Continental Casualty* the tribunal remarked in a footnote that the necessity plea could be invoked to contest any international obligation, except 'those arising under a peremptory norm of general international law, as stated in Article 26 ASRIWA[285]'.

Although not serving as a biding precedent, an interesting approach is given by the legal expert opinion of Prof. Sornarajah in *El Paso* arbitration. In his opinion, Prof. Sornarajah brings into question an unusual situation not envisaged in article 26 ASRIWA: peremptory norms not only having a limiting effect for the invocation of necessity, but also *being the core* part of the necessity defense. Prof. Sornarajah implies State's sovereignty to protect its natural resources can encompass a peremptory norm[286]. He adds that such conflict 'comes about in times of economic crisis when a State is under a duty as a result of this peremptory norm to ensure that the natural resources' are properly used to overcome the emergency leading to the measures to safeguard that essential interest[287]. The argument is that the *negative* requirement can also become a positive requirement when the protected interest can encompass a *jus cogens* principle that has emerged in a particular emergency, considering that article 26 VCLT mandates that 'when a peremptory norm of general international law emerges, any existing treaty which is in conflict with it becomes void and terminates'. Some commentators share the aforesaid position[288], arguing that the very notion of essential interests of a State is enshrined by peremptory norms. That position, albeit theoretically possible, appears challenging in practice.

For example, in *LG&E* the Tribunal subtlety implied that important human rights of paramount importance to the international community, such as access to health care and food, were severely

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[283] Bjorklund; *supra note 144,* p. 492.
[284] *CMS; supra note 2,* para. 325.
[285] *Continental Casualty; supra note 6,* para. 167, (243).
[286] Sornarajah Expert Opinion; *supra note 157,* p. 101, para. 126.
[287] *Ibid.*
[288] Viñuales, Jorge E. *Sovereignty in Foreign Investment Law,* in *The Foundations of International Investment Law: Bringing Theory Into Practice,* Zachary Douglas, Joos Pauwelyn and Jorge Viñuales (eds.), OUP, 2014, p. 355.

threatened to the 'brink of collapse[289]'. Nonetheless, albeit accepting the necessity plea, the Tribunal did not shed some light on the consequences of such approach as to the invocation of the necessity plea. As a consequence, one can conclude that the issue of peremptory norms in the realm of investment arbitration has received very little attention; therefore, it has played a minor role in adapting the customary international rules on necessity within the investment arbitration arena.

Chapter III

Consequences of the necessity defense

If a State has somehow managed to *preclude* its *wrongful* conduct as a consequence of a successful invocation of necessity through the stringent review of an investment arbitral tribunal, it does not automatically means a State is given a *carte blanche* to disregard full responsibility from the breached obligation. Indeed, common legal sense would signpost a victorious invocation of the plea to inevitably convert a wrongful act into a lawful conduct. Nonetheless, due to the extraordinary nature of the plea and the sacrosanct principle of compensation even for legal measures, the consequences of a successful invocation of the necessity plea are thus circumscribed by *temporal* and *compensatory* boundaries.

Article 27 ASRIWA provides a without prejudice clause for tribunals to determine the effects of a successful invocation. First, a temporary relief in the form of a suspension of the obligation, which once ceases to have its preclusive effect, full compliance from the State will be expected. Secondly, whether the affected State or investor is entitled to compensation as a result of the wrongful conduct during that preclusive period of time. The ILC commentaries note that the without prejudice character of this article is based on the assertion that a successful invocation may give rise to the termination of the obligation and because is difficult to determine whether every successful invocation implies payable compensation[290].

Temporal limitation

Article 27(a) ASRIWA makes clear that a successful invocation of any circumstance precluding wrongfulness, including state of necessity, will only persist for a limited period of time. Crawford's Report noticed that state of necessity will only 'preclude wrongfulness for as long as the circumstances in question continue to exist and to satisfy the conditions laid down for their invocation'[291]. Important

[289] LG&E; *supra note 132,* para. 234.
[290] Draft articles with commentaries; *supra note 8,* p. 86, para. 1.
[291] Crawford's Report; *supra note 14,* p. 85, para. 350.

to notice is that current Article 27(a) suffered a major change from the original 1999 Draft. Current Article 27(a) ASWRISA mentions that the invocation is without prejudice of 'compliance with the obligation in question, if and to the extent that circumstance precluding wrongfulness no longer exists[292]' whereas the 1999 draft contained 'to the cessation of any act not in conformity with the obligation, and subsequent compliance[293]'. As Prof. Crawford notes, this reasoning has been designed to make clear that a successful invocation of a circumstance precluding wrongfulness 'has a merely preclusive effect[294]'. Furthermore, the ILC commentaries make clear that the term "and to the extent" are designed to 'cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation'[295]

The rationale behind the aforementioned is the ICJ's former *dictum* in the *Rainbow Warrior* and *Gabčikovo-Nagymaros Project case.* First, in the *Rainbow Warrior* arbitration the Court made clear that both the VCLT and customary law of State Responsibility 'are relevant and applicable[296]'. By that, the Court implicitly referred on the rules of supervening impossibility of performing a treaty envisaged in article 61 VCLT, which expressly indicated that 'if the impossibility is temporary, it may be invoked only as a ground for *suspending* the operation of a treaty[297]'. Additionally, the Court expanded its previous criteria in the *Gabčikovo-Nagymaros Project case,* where in the context of Hungary's allegations of halting the works on the Project, found that 'as soon as the state of necessity ceases to exist, the obligation to comply with the treaty obligations revives'[298].

The idea behind establishing temporal boundaries on a successful necessity defense is clear: States may only suspend their treaty obligations during the period when extraordinary measures had to be taken to protect an essential interest. This was confirmed by the *CMS* tribunal, which judged that 'any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events[299]'. Once the States returns to the pre-crisis situation there is no excuse of non-performance, unless the obligations have ceased to exist. As soon as the extraordinary

[292] Draft articles with commentaries; *supra note 8,* p. 85.
[293] *Yearbook of the International Law Commission,* Documents of the 51st Session, United Nations, A/CN.4/SER.A/1999/Add.1 (Part.1), p. 89.
[294] Crawford, James. *Revisiting the Draft Articles on State Responsibility,* EJIL, Vol. 10, No. 2, 1999, p. 460.
[295] Draft articles with commentaries; *supra note 8,* p. 86, para. 2.
[296] *Rainbow Warrior; supra note 64,* p. 251, para. 75.
[297] Vienna Convention on the Law of Treaties; *supra note 193.*
[298] *Gabčikovo-Nagymaros Project case; supra note 16,* p. 63, para. 101.
[299] *CMS; supra note 2,* para. 392

circumstances no longer exist, the duty to observe IIA's obligations is renewed[300]. As the *EDF* tribunal noticed, when a state of necessity has been successful, the invoking state 'remains obligated to return to the pre-necessity *status quo* when possible[301]In this regard, Schreuer & Dolzer recognize that, in fact, there is not apparent reason from a State not to renew their commitments as soon as the circumstances giving rise to the plea ceased to exist. They note that 'there is no reason for the host State to benefit from the necessity and for the investor to bear the consequences[302]'.

Nevertheless, the real challenge is not whether a successful necessity plea should have temporal limitations, but how to determine the exact duration of the measures. Arbitral tribunals assessing the *Argentine Saga* unanimously agreed that compliance is expected once the temporal limitations are defined. Nevertheless, they greatly differed on when the crisis started to gravely affect the essential interest and whether national legislation in the form of an emergency law could provide guidance to this end.

As an illustration, after accepting Argentina's allegations in the *LG&E* case, the arbitrators were required to assess on the consequences and duration of Argentina's economic crisis. The tribunal considered the duration of the crisis to be from 1 December until 26 April 2003[303], remarkably dissimilar to the actual period of the Emergency Law, which was enacted once the crisis was uncontrollable. The *LG&E* arbitrators buttressed that the duration of a crisis is not necessarily pegged to the existence of an emergency law because that would disrupt the very comprehension of the nature of an economic crisis. Although the tribunal acknowledged that 'emergency periods should be only strictly exceptions and should be applied exclusively when faced with extraordinary circumstances[304]', it later found that an historic overview of Argentina's legislative activity demonstrated that had 'issued a record number of decrees since 1901, accounting for the fact that the emergency periods in Argentina have been longer than the non-emergency periods'[305]. As a result, the tribunal considered the exceptional emergency had ended at the time President Kirchner was elected[306].

The *LG&E* tribunal conclusions arise some queries. First and foremost, it questions whether the

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[300] Chubb, Kelley. *The "State of Necessity" Defense: A burden, not a blessing to the International Investment Arbitration System,* Cardozo Journal of Conflict Resolution, Vol. 14, p. 550. Available at: http://cardozojcr.com/wp-content/uploads/2013/03/CAC208.pdf (Last visited July 20, 2016).
[301] EDF; *supra note 118,* para. 1177.
[302] Schreuer & Dolzer; *supra note 9,* p. 186.
[303] *LG&E; supra note 132*, para. 228.
[304] *Ibid.* para, 226-227.
[305] *Ibid.*
[306] *Ibid.*

enactment of an emergency law during the severest moment of an economic emergency may shed some light to determine the duration of a crisis. This was noted in *Funnekotter v. Zimbabwe,* where the tribunal emphasized that domestic law in the form of an emergency law may 'provide the tribunal useful information on the situation which prevailed' in the respondent State[307]. Although the tribunal ultimately rejected Zimbabwe's allegations, it found the enactment of an emergency law essential to demonstrate the existence of an extraordinary crisis[308]. On the other hand, the *LG&E* tribunal's conclusion on the irrelevance of an emergency law to determine the duration of the crisis might be well supported in the context of an economic crisis. Although theoretically emergency laws are purported to cover the grimmest moments of a crisis, in practice its lifetime may extent to large periods of times, even when the crisis has started to lessen. As Hood notes, 'with the erosion of the temporal limits around emergencies, it has become increasingly common for the life-spans of emergency laws to be extended and in some cases pieces of domestic emergency legislation have become permanent fixtures in legal systems'[309].

The rationale behind the aforementioned is that emergency legislation to confront an economic crisis is not only intended to endure the toughest moments of a crisis, but to build the foundations of a post-crisis environment. For that reason, some States have envisioned different emergency scenarios in their Constitutional Law designed to be invoked depending on the gravity, nature and characteristics of a given crisis[310]. Additionally, on one way or another, the tribunal is faced with an enormous challenge to apply a consistent criteria on this regard because limiting to the lifespan of an emergency law could tantamount to an abusive interpretation of article 27(a), since it would very likely extend the original duration of a crisis. In contrast, obviating the emergency law duration would cause an opposite effect. For that reason, the most reasonable would be to consider 'balance' the emergency law provisions with the economical, technical, political and legal backgrounds of the crisis in a case-by-case basis, in order to find the most asserted possible conclusion on this regard. As the *Enron* tribunal found, there can be "uncertainty" in regards to the legal consequences of the emergency law[311].

Secondly, the State's role to determine the duration of a particular emergency could be taken into consideration. Theoretically, a State should notify the other IIA party on the end of a particular

[307] Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award, 22 April 2009, para. 103.
[308] *Ibid.*
[309] Hood, Anna. *The United Nations Security Council's legislative phase and the rise of emergency international law-making,* in *Legal Perspectives on Security Institutions,* Hitoshi Nasu & Kim Rubenstein (eds.), Cambridge, 2015, p. 145.
[310] Gross, Oren & Ni Aolain, Fionnuala. *Law in Times of Crisis,* CSICL, 2006, p. 44. The authors note the Spanish Constitution to have three different escenarios involving a "state of alarm".
[311] *Enron; supra note 4,* para. 343.

crisis. Although Bjorklund notes this is unlikely to occur[312] due to a myriad of political, legal and economic considerations, a similar provision can be found in article 65 VCLT. Albeit operating on a different context, in accordance with such provision a State suspending the operation of a treaty would have to indicate the measures and reasons for such suspension.

Thirdly, the tribunal can consider economic indicators in order to reach a conclusion on the end of a crisis. The end of a crisis is particularly important because of the difficult to assess it. As the tribunal in *Hochtief v. Argentina* found:

> 'Fixing a date for the "end" of an economic crisis 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[313]'.

As a matter of fact, several economic organizations and scholars have proposed economic formulas and standards in order to perform an comprehensive test to identify the "end" of a crisis. To exemplify, the IMF created an empirical analysis on the evaluation of the duration of a crisis, concluding that 'at the beginning of a crisis, key indicators such as spreads on sovereign bonds, international reserves, and exchange rates tend to move sharply and in a highly correlated fashion[314]'. In the same fashion, albeit applying different parameters, evaluations and indicators, the end of a crisis might be perceived. Nevertheless, as previously asserted when analyzing the evolution of the "only way" requirement, a multidisciplinary approach on a case-by-case basis would be require to acknowledge the boundaries of a crisis, an not only economic indicators or trends.

Compensation

The last effect envisaged in Article 27(b) is the "question" of compensation for "any material loss" by the act in question. The ILC commentaries noted that this provision contains 'a reservation as to questions of possible compensation for damages in cases covered' in the circumstances precluding wrongfulness[315]. The latter implies that investors *might* have a right to claim *damnum emergens* but not *lucrum cessans.* The ILC emphatically expressed that a difference shall be taken into consideration

[312] Bjorklund; *supra note 144,* p. 509.
[313] Hochtief AG v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Liability, December 29, 2014, para. 293.
[314] IMF. *The Duration of Capital Account Crises – An Empirical Analysis.* WP/07/258, IMF, Mauro Mecagni, Ruben Atoyan, David Hofman & Dimitri Tzanninis (eds). 2007, p.5.
[315] Draft articles with commentaries; *supra note 8,* p. 86, para. 4.

between "compensation" as such and reparation, since the latter covers the consequences of illegal acts an not excuses under customary international law[316]. The language of "material damage" supports the aforementioned, since as the ILC notes, 'article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V[317]'. The linguistic construction of article 27(b) suggests that doors are open for the arbitrators or jurisdictional tribunal to assess whether a particular situation of necessity can derive in compensation being paid for the breached obligations, therefore, it would be up for the tribunal in a case-by-case basis to determine whether compensation for "material loss" is due. As a reference, the commentaries cite the ICJ's judgment in *Gabčikovo-Nagymaros Project Case,* where it found that 'in any event, such a state of necessity would not exempt it form its duty to compensate its partner[318].

In the realm of investment arbitration, the question of compensation for the material losses or damage caused by lawful acts is far from strange. As an example, public purpose acts in the form of expropriation will habitually entail the obligation to compensate the affected investor[319]. Nonetheless, controversy is far from finished since the divergent applications and conceptualization of compensation in the *Argentine Saga* arbitrations.

For example, in *CMS* the tribunal found that, albeit article 25 ASRIWA may preclude wrongful international conduct, 'it does not exclude the duty to compensate the owner of the right which had to be sacrificed[320]'. The idea behind that statement is indeed that, as stated before, there is no reason to assume the necessity defense is exempted from compensation if other similar public order actions, such as lawful expropriation, would carry a similar burden. Similarly, it departs from the notion that imposing a burden to an innocent party seriously affects the very foundations of the general principles of law. As stated by *CMS,* tribunal it would be unfair for the investors 'to bear the cost of the plea of the essential interests of the other party', since it would disrupt the very 'meaning of international law or the principles governing most domestic legal systems'[321]. By the same token, the *EDF* tribunal noted that the successful invocation of the necessity defense 'does not per se preclude payment of compensation to the injured investor for any damage suffered as a result of the necessity measures enacted by the State[322].

[316] *Ibid.*
[317] *Ibid.*
[318] *Ibid.*
[319] Ripinsky, Sergey & Williams, Kevin. *Damages in International Investment Law,* BIICL, 2008, p. 342.
[320] *CMS; supra note 2,* para. 388
[321] *Ibid,* para. 390.
[322] *EDF; supra note 118*, para. 1177.

The aforementioned assertions are valid but not entirely faithful to the spirit and linguistic approach of article 27(b) ASWIRA and the ILC commentaries. On one hand, assuming that investors should automatically carry the burden for a successful invocation of the necessity plea is unwarranted. But on the other side, interpreting article 27(b) to carry a *duty* to compensate is unbalanced. This language seems to follow the Umpire decision in the *Company General of the Orinoco* case, where the tribunal also referred as 'the *duty* of compensation'[323]. The ILC commentaries clearly state that article 27(b) carries a *reservation,* therefore, tribunals should assess on a case-by-case basis whether the injured party is entitled to such compensation. Furthermore, as noted by the *CMS Annulment,* article 27(b) does not 'attempt to specify in which circumstance compensation could de due, notwithstanding the state of necessity', since it expressly refers to "the question" of compensation[324]. Neither an exemption to the question of compensation nor a *duty* to compensate is embedded in article 27(b).

In contrast, the conclusions of the arbitral tribunals in *LG&E* and to certain extend in *Metalpar* are similarly discouraging. They take an opposite approach by completely rejecting any question of compensation without expressing a coherent and uniform line of reasoning. In *LG&E,* the tribunal concluded that 'Article 27 of the ILC Draft Articles […] does not specify is payable to the party affected by the losses during the state of necessity', and therefore, no compensation should be granted during the period were the emergency took place[325]. Nonetheless, it is worth mentioning that such conclusion was taken in light of the tribunal's assumption that Argentina was not found liable under the treaty based defense of NPM's. In like manner, the *Metalpar* tribunal referred in an *obiter dictum* that such losses from measures taken during the exceptional emergency period as a result of the state of necessity would 'extinguish the liability that could be attributed to the respondent[326]'. These awards are the expression of an abusive interpretation of article 27(b), which clearly favors the *excusing* party rather than offering a *balanced* approach that would weight both parties' conduct. Whereas the *CMS* and *EDF* tribunals take a disproportionate and far reaching interpretation of article 27(b) ASRIWA that clearly sides with the investor, in *LG&E* and *Metalpar* the tribunals take a divergent position by acknowledging that all material losses should be borne by the injured party.

The latter illustrates the complexity of adapting article 27 ASRIWA to the realm of investor-State arbitration, in which compensation is one of the most important issues to be clearly and

[323] *Copmany General of the Orinoco Case,* 31 July 1905, X RIAA, para. 184.
[324] *CMS Annulment; supra note 110,* para. 148.
[325] *LG&E; supra note 132,* para. 264.
[326] *Metalpar; supra note 268,* para. 211.

coherently elucidated. The true is that neither a *duty* nor an exemption to compensate is envisaged in such article. Article 27(b) acts like a cardinal point for arbitrators to analyze whether the particular circumstances of a successful invocation of the state of necessity would carry an obligation to compensate for material loss. It acts like a *balancing* and *proportionate* article because the amount of the compensation is limited. As Binder & Reinisch note, 'the compensation in cases of successful invocation of necessity is thus diminished as compared to the concept of damage in cases of breach, with the latter also including lost profit[327]'. This is supported by Crawford, who explains that 'the term "compensation" is not connected with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34'[328].

The *Enron* tribunal does take a balanced opinion to the question of compensation. Albeit rejecting the state of necessity claimed by Argentina, the tribunal acknowledges that article 27 'does not specify the circumstances in which compensation should be payable because of the range of possible situations […] therefore does not excludes the possibility of an eventual compensation for past events'[329]. The tribunal later found that is up to the tribunal assessing the particular plea to address whether the investor is entitled or not to compensation[330]. In addition, the tribunal seems to propose that, ideally, is up to the parties to negotiate the amount due for material loss. Should the parties not find an amicable solution, the issue of compensation and its *quantum* has to be addressed by a tribunal. Using an identical linguistic pattern, the *Sempra* tribunal found, yet ultimately rejecting the necessity plea, that article 27(b) did not was ambiguous in regards to the obligation to compensate[331]. This is more in accordance with the explicit language of article 27(b). As the ILC commentaries note, article 27(b) does not purports to detail in which scenarios will a specified compensation be expected. The commentary clearly suggests that States should agree on the possibility and degree of compensation expected to be due.

Of course, it is very convenient to analyze article's 27(b) ambiguity when a tribunal has rejected the plea. It is not surprising that the *Sempra* and *Enron* tribunals took that approach since they had stringently rejected the invocation of the plea by Argentina. The tribunals were no longer expected to specify both the duration of the crisis and whether a compensation was payable to the investor.

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[327] Reinisch, August & Binder, Christina. *Debts and State of Necessity,* in *Making Sovereign Financing and Human Rights Work,* Juan Pablo Bohoslavsky & Jernej Letnar Černič (eds), Hart Publishing, 2014, p. 124.
[328] Kulick, Andreas. *Global Public Interest in International Investment Law,* CSICL, Cambridge, 2012, p. 145. *Citing* Crawford, James. *The ILC's Articles on State Responsibility,* p.190, para. 4.
[329] *Enron; supra note*
[330] *Ibid.*
[331] *Sempra; supra note 3,* para. 394.

Nonetheless, it could prove useful for future cases dealing with the necessity plea.

Conclusions

In spite of ILC's efforts to codify the state of necessity under customary international law as well several cases being brought before the ICJ, necessity as a defense remains a highly controverted topic in international investment law. Recent interpretation by some ICSID tribunals on the requirements envisaged in ASRIWA in the realm of investment arbitration has proven unsuccessful to provide a coherent, consistent and integrated test for its successful invocation, particularly in the context of an economic emergency.

Although State's have opted to incorporate NPM clauses into their BIT models as *primary norms* to avoid a stringent review under the customary requirements enshrined in the ASRIWA, an integrated approach on the requirements for the invocation of the necessity plea by the *Argentine Saga* tribunals would have created certainty on future disputes arising as a result of extraordinary economic crisis. As a result, reasonable doubts remain on the convenience of importing the requirements established in ASRIWA to the investment arbitration arena.

The ambiguity of the term "essential interests" reflected in Article 25 ASRIWA has obliged State's to incorporate a comprehensive list of "essential interests" into their new BIT models, aiming to provide a reference to the term in future investment disputes. Furthermore, the approach taken by the *Argentine Saga* tribunals to comply with the "grave and imminent" requirement denotes that an almost catastrophic situation is required to meet the tribunals criteria, which prevents State's to take the necessary measures in an early stage of a particular crisis. Likewise, the "only way" proved to be almost insurmountable to comply in the context of a financial crisis, with the exception of *LG&E* and *Contitnental Casualty's* view, which acknowledged that many measures are available to tackle an incipient crisis, thus recognizing State's *margin of appreciation* to choose the most viable options in the midst of a crisis. By the same token, they recognized the minor role economic reports should have in assessing whether the "only way" requirement has been fulfilled. Similarly, some tribunals, particularly in LG&E, established a margin of appreciation in the form of a "balancing test".

Furthermore, none of the tribunals acknowledged the object and purpose of a BIT to encompass an implicit preclusion of the obligation in question, which proves helpful for the future of the state of necessity in the realm of investment arbitration. By the same token, although some tribunals were very strict on the level of contribution from a State to the situation of necessity, a balanced approach was

proposed in the *LG&E* tribunal, which proves helpful to surmount this challenging requirement under the stringent and cumulative requirements of article 25 ASRIWA.

Lastly, the future seems promising for future invocations of the state of necessity under customary international law, considering the *Enron* and *CMS Annulment* decisions on the manifest errors taken by the *CMS and Enron* tribunals, which leaves the door open to future arbitrators to create a coherent and durable approach on the state of necessity in investment arbitration. Surely, the debate will not take another fifty years to be over.

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Abstract (English)

The state of necessity is one of the oldest principles of international law. The International Law Commission (ILC) efforts to codify its invocation in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ASRIWA) served as a cardinal direction for tribunals to assess its invocation and requirements under customary international law. Nonetheless, recent arbitral awards under the auspices of the International Center for the Settlement of Investment Disputes (ICSID) in the context of the 2000-2002 Argentine financial crisis revived the debate on whether the ASRIWA would be entirely applicable in the context of investor-State arbitration.

Under customary international law, a State may not invoke a state of necessity as a ground for precluding the wrongfulness of an act not in conformity with an international obligation unless a cumulative threshold is complied under the stringent review of a tribunal. However, complying with such rigorous conditions proved insurmountable in the context of an economic emergency because of the conflicting opinions of several ICSID tribunals assessing Argentina's economic crisis. From measures being the "only way" for the State to safeguard an essential interest against a grave an imminent peril, to adequate the level of "contribution" to the situation of necessity, the conditions to invoke a state of necessity in the realm of international investment law continues to generate great controversy.

As a consequence, the objective of this thesis is twofold. In the first place, it will study the state of necessity as a principle enshrined in customary international law and classic international law. Secondly, it will study recent arbitral tribunal awards arising as a result of the 2000-2002 Argentine crises, aiming to ascertain an integrated approach considering recent scholar and academic discussion on the application of the ASRIWA in the realm of investor-State arbitration.

Abstract (German)

Der Notstand ist einer der ältesten Prinzipien des internationalen Rechts. Die Bemühungen der International Law Commission (ILC) deren Draft Articles on Responsibility of States for Internationally Wrongful Acts (ASRIWA) zu kodifizieren, diente Schiedsgerichten als Model um deren Aufruf und Voraussetzungen nach internationalem Gewohnheitsrecht zu beurteilen. Die jüngsten Schiedsurteile unter dem Dach des International Center for the Settlement of Investment Disputes (ICSID) mit Bezug zur argentinischen Finanzkrise von 2000-2002, hat die Debatte wiederbelebt, ob ASRIWA in Staat-Investor Schiedsprozessen vollständig anwendbar ist.

Nach Völkergewohnheitsrecht kann sich ein Staat nicht auf den Notstand berufen, um die Rechtswidrigkeit einer Handlung, welche nicht im Einklang mit einer internationalen Verpflichtung steht, zu begründen, es sei denn dass eine kumulative Schwelle unter der strengen Überprüfung eines Gerichts eingehalten wird. Allerdings hat sich das Befolgen solch rigoroser Bedingungen im Kontext der wirtschaftlichen Notwendigkeit als unüberwindbar erwiesen, da die ICSID Schiedsgerichte wie Wirtschaftskrise Argentiniens widersprüchlich bewerteten. Von Maßnahmen, welche der einzige Weg für Staaten sind um ihre Interessen gegen immanente Gefahren zu schützen, bis hin zu einem angemessenen Beitrag zur Situation des Notstandes, haben die Bedingungen um einen Notstand nach internationalem Recht auszurufen, für große Kontroversen gesorgt.

Die vorliegende Arbeit verfolgt zweierlei Ziele. Erstens wird sie das Prinzip des Notstandes nach Völkergewohnheitsrecht und klassischem Völkerrecht untersuchen. Zweitens wird es die Schiedsentscheidungen unter die Lupe nehmen, welche in Folge der argentinischen Wirtschaftskrise von 2000-2002 aufgekommen sind. Das Ziel ist ein integrierter Ansatz, welcher die Meinungen von Wissenschaftler, sowie die wissenschaftliche Diskussion über die Anwendung des ASRIWA im Bereich des Investorenschutzes berücksichtigt.