The Applicability of the 'Necessity' Standard to Invoke 'Non-Precluded Measure' Defenses under International Investment Law

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Abstract

The 'necessity' standard is established as a centerpiece of the laws of state responsibility that enable states to justify unlawful measures under international law. However, the application of the standard has witnessed significant controversy in the invocation of 'non-precluded measure' defenses under international investment law. This controversy is best demonstrated in the series of investor-state arbitral proceedings initiated by numerous foreign investors against Argentina as a result of the 2002 Argentinian financial crisis. Here, different arbitral tribunals assessed the 'necessity' standard in different ways, hence producing differing conclusions regarding the responsibility of Argentina in invoking non-precluded measures. This paper will examine the extent to which 'necessity' is an appropriate standard to invoke non-precluded measure defenses under international investment law.

Intisari

Standar 'keharusan' dianggap sebagai salah satu inti dari hukum tanggung jawab negara yang memungkinkan negara untuk membenarkan tindakan yang melanggar hukum di bawah hukum internasional. Namun, penerapan standar tersebut telah menimbulkan kontroversi yang signifikan dalam penerapan pertahanan 'tindakan yang tidak dihalangi' di hukum investasi internasional. Kontroversi ini terlihat dalam rangkaian proses arbitrase investor-negara yang diprakarsai oleh banyak investor asing terhadap Argentina sebagai akibat dari krisis keuangan Argentina tahun 2002. Di sini, dewan-dewan arbitrase yang berbeda menilai standar keharusan melalui cara yang berbeda, sehingga menghasilkan kesimpulan yang berbeda terkait pertanggungjawaban Argentina dalam menerapkan tindakan yang tidak dihalangi. Riset ini akan memeriksa sejauh mana 'keharusan' adalah standar yang tepat untuk meminta pertahanan tindakan yang tidak dihalangi dalam hukum investasi internasional.

Keywords*: Necessity, non-precluded measures, state responsibility, international investment law*

Kata kunci: *Keharusan, tindakan yang tidak dihalangi, pertanggungjawaban negara, hukum investasi internasional*

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A. Introduction

The legal framework of international investment law ("**IIL**") concerns the protection of the rights and obligations of foreign investors from the actions of the host state. However, IIL also addresses contentious issues that may be construed as somewhat putting the host state's interest over that of the foreign investors' in specific circumstances. This gives states an avenue to 'detract' from their obligations under bilateral investment treaties ("**BIT**"). Avenues such as these are known as non-precluded measure ("**NPM**") that may be invoked by a state when it determines that it has a discretion to exercise its obligation to protect its citizens when, for example, circumstances dictate the potential to create economic instability or pose a threat to a state's essential security interests.[2] Invocation of such avenues may be conducted through a claim employing the necessity defense.[3]

The issues surrounding NPM first came to light after the International Court of Justice ("**ICJ**") ruled in several landmark cases concerning essential security interests.[4] However, NPM was further explored by various tribunals administered by the International Centre for the Settlement of Investment Disputes ("**ICSID**") when a plethora of cases were brought by United States ("**US**") investors against Argentina in the aftermath of the Argentinian government's invocation of necessity during the 1998-2002 financial crisis. The issue proved to be highly controversial due to the differing analyses and outcomes that were drawn up by the tribunals with respect to the application of the necessity standard. As the standard is an important aspect of the field of public international law ("**PIL**"), the question of whether or not 'necessity' is an appropriate standard to be used in invoking a 'non-precluded measure' defense under IIL warrants further examination.

This paper will argue that the doctrine of necessity is, to a limited extent, an appropriate standard to invoke NPM in IIL. Such premise can be supported from the standard's extremely strict requirements or thresholds that need to be fulfilled for it to be invoked, and due to its rather problematic application by ICSID tribunals in several cases. These factors may prompt suggestions for tribunals to adopt 'alternative' approaches.

B. The Essence of the Necessity Standard

The Articles of Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**") codified by the International Law Commission views necessity as a 'last resort' measure. The International Law Commission ("**ILC**") defines the measure as something that can only be invoked when the state has no other way to "*safeguard an*

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[2] David Collins, *An Introduction to International Investment Law* (Cambridge: Cambridge University Press, 2017): 284.
[3] Cynthia C. Galvez, ""Necessity," Investor Rights, and State Sovereignty for NAFTA Investment Arbitration", *Cornell Journal of International Law* 43(146) (2013): 147.
[4] David Collins, "An Introduction to International Investment Law", 286.

essential interest against a grave and imminent peril".[5] The standard also requires the measure not to 'impair' or damage the essential interests of any contracting state.[6] In other words, the measure can only be invoked on an "*exceptional basis*",[7] that is when the potentially threatening situation occurs beyond the state's control. The consequence of invoking the said measure is that the state's action may be excused and the state may be relieved from their responsibilities under the agreement.[8] Nevertheless, the legal consequence also means that the state will have the burden of proof to prove the legitimacy of invoking the measures in question.

Although the doctrine of necessity, which has been accepted as customary international law ("**CIL**"), commonly refers to as the standard codified under ARSIWA, practices from ICSID tribunals shows that necessity can also be examined from the perspective of the written provisions from BITs concluded between contracting states as an NPM clause.[9] As an example of a NPM clause in a BIT, Article XI of the US-Argentina BIT reads:

> "*This treaty shall not preclude the application of either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own national security interests*".[10]

It may be argued that the necessity standard under Article 25 of ARSIWA is *lex generalis* as it is generally applicable under the realm of PIL, while necessity embedded in Article XI is *lex specialis* as it specifically adheres to the laws of IIL in accordance with the object and purpose of the US-Argentina BIT.[11] These two perspectives bear significance in analyzing the relevance of the necessity standard to be applied in IIL.

The Argentinian financial crisis is a prime example to understand the application of necessity. Here, the Argentinian government conducted several measures such as devaluing the Argentinian peso in order to stabilize the state's declining economy, which harmed numerous foreign investors.[12] Although relying on similar facts, different tribunals reached different views on to what extent the invocation of

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[5] *ILC Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/83 (2001): Art. 25(1)(a).
[6] *Ibid*., Art. 25(1)(b).
[7] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 7 (September 25), para. 51.
[8] David Collins, "An Introduction to International Investment Law", 298; Jorge Viñuales, 'Sovereignty in Foreign Investment Law' in Zachary Douglas et. al., *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014): 348.
[9] Cynthia C. Galvez, ""Necessity," Investor Rights, and State Sovereignty", 147.
[10] *Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment* (14 November 1991) 31 ILM 124 (1992): Art. XI.
[11] *El Paso Energy International Company v Argentine Republic, Award*, ICSID Case No. ARB/03/015 (31 October 2011): para. 552.
[12] David Collins, "An Introduction to International Investment Law", 300.

necessity was lawful or not.[13] The differing views thus sparked debate regarding the application of the necessity standard within IIL.

C. Strict Requirements to Lawfully Invoke the Necessity Standard

Since the necessity standard can be examined from the perspective of the BIT and CIL, it is highly important to examine the cumulative criteria of the necessity standard enshrined under Article 25 of ARSIWA. Mindful that the essence of the two-fold cumulative criteria has been briefly discussed above, the current analysis will only focus on the first criteria, due to its debated and somewhat controversial character. As the ICSID tribunals easily concluded that the context of the situation, along with the application of the BIT, did not impair the interest of the states nor the international community but rather the foreign investors,[14] it can be argued that impairment of the foreign investor's interest does not exactly fall under the scope of the necessity standard.[15]

Within the requirement of safeguarding essential security interests, there are several aspects of the necessity standard that are crucial to be examined: (a) whether the NPM clause to invoke necessity is self-judging; (b) whether economic emergency is sufficient to be characterized as 'grave and imminent peril' to allow the invocation of an essential security interest, and (c) the determination of what constitutes a 'last resort' measure.

a. Non-self-judging nature of NPM clauses

Self-judging clauses are treaty provisions that may give states full discretion to decide when to invoke claims of national security exceptions embedded within the treaty.[16] Invoking such may allow states to claim the necessity defense, especially to show that the situation is a "grave and imminent peril" in accordance with the necessity defense under CIL. Nevertheless, the ICJ in *Gabčíkovo-Nagymaros* opined that when states invoke necessity, the determination of the fulfilment of the cumulative requirements shall not be left to the subjective opinion of the state but rather is to be based on the objective assessment of the Court.[17] The World Trade Organization ("**WTO**") concurred with the ICJ's view.[18] In *Russia-Measures Concerning Traffic in Transit*, the Panel emphasized their power to objectively determine whether or not the action

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[13] *Ibid*., 301, 303.
[14] *CMS Gas Transmission Company v Argentine Republic, Award*, ICSID Case No. ARB/01/8 (12 May 2005), paras. 357-358; *Enron Cooperation and Ponderosa Assets, L.P v Argentine Republic, Award*, ICSID Case No. ARB/01/3 (22 May 2007), paras. 341-342.
[15] Robert Sloane, "On the Abuse of Necessity in the Law of State Responsibility", *The American Journal of International Law* 106(447) (2012): 506.
[16] David Collins, "An Introduction to International Investment Law", 288.
[17] *Gabčíkovo-Nagymaros Project,* paras. 51-52.
[18] Sebastián Mantilla Blanco & Alexander Pehl, *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review* (Switzerland: Springer, 2020): 34.

conducted by a state falls under the requirement of Article XXI(b) of the General Agreement on Trades and Tariff.[19]

The views of the ICJ and the WTO can be closely compared with the perspective of the ICSID tribunals, though with a slightly different approach, regarding the relevance of the self-judging nature of NPM clauses to invoke necessity. In *El Paso International Energy Company v. Argentine Republic* ("***El Paso***"), the tribunal rejected Argentina's claim that the invocation of Article XI is self-judging, as Argentina claimed is evident from the treaty's preparatory works.[20] Several reasons can be advanced in support of the verdict reached by the tribunal . Firstly, from a treaty law perspective, it is undisputed that a treaty shall be interpreted in light of its object and purpose.[21] *In casu*, since the US-Argentina BIT was drafted to "*maintain a stable framework for investment*" in both Argentina and the US, the tribunal indeed made a reasonable decision when it opined that the BIT's purpose would not be realized if Article XI were self-judging.[22] The tribunal opined that it must first objectively examine the situation that Argentina claimed made it necessary to invoke the NPM clause.[23] The findings of the *El Paso* tribunal are similar to the findings made by the ICJ and WTO. In this sense, if the invocation of necessity is left to the state's discretion, any state would find themselves an easy 'escape route' from their responsibilities, which in turn could damage investors.

Secondly, the tribunal also opined that the treaty must be explicit if a provision were to be self-judging.[24] Here, the *El Paso* tribunal's decision on the explicit nature of the BIT to indicate the self-judging nature of the NPM clause is the main difference between the ICSID tribunal's view and that of the ICJ's and the WTO's, in which the tribunal's reasoning leaves room for state parties to claim Article XI as self-judging. The view of the *El Paso* tribunal is shared among other tribunals adjudicating cases against Argentina. For example, the tribunal in *CMS Gas Transmission Company v. Argentine Republic* ("***CMS***") ruled that "when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly".[25]

These views conveyed by the ICJ, WTO, and ICSID affirm the non-self-judging nature of NPM clauses. When claiming necessity, it is undisputed that the invocation of a NPM clause embedded in a BIT shall be subjected to an objective assessment conducted by the adjudicating institution that may act as a representative of the international community. Nevertheless, the view of the ICSID tribunals may hint at

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[19] *WTO Russia: Measures Concerning Traffic in Transit-Report of the Panel* (5 April 2019) WT/DS512/R, paras. 7.28, 7.101-7.104.
[20] *El Paso*, para. 610.
[21] *Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331, Art. 31(1).
[22] *US-Argentina BIT* (n 9), Preamble; *El Paso* (n 10) [604].
[23] *El Paso*, para. 610.
[24] *Ibid.,* paras. 594-595.
[25] *CMS*, para. 370; Katia Yannaca-Small, "Essential Security Interests under International Investment Law" (2007) OECD, 104-105.

the importance and relevance of using the necessity standard in IIL. On the one hand, the ruling of a tribunal on the non-self-judging nature of the NPM clause upholds the principle of legal certainty. The ruling upholds the one of the many functions of a BIT: protecting the interests of the foreign investor from the actions of the state. On the other hand, the requirement for a treaty to be explicit, which must be mutually agreed by the parties to the treaty, may also provide protection to the host state without arbitrarily depriving the interests of foreign investors should the state deem it necessary to invoke necessity at its discretion. That being said, it can be concluded that the need for an objective assessment of the invocation of an NPM clause by a dispute settlement forum represents one of the features of necessity as an appropriate standard to be used in IIL.

b. Economic emergency as a 'grave and imminent peril'

The ICJ's remark that necessity can only be invoked when the "*extremely grave and imminent*" peril must "*have been a threat to the interest at actual time*" will serve as the basis to determine the severity of the situation on one's interest.[26] However, even the ICJ's contention, in the context of necessity from ARSIWA, seems to be inconsistent to a certain extent. For example, scholars such as Robert Sloane argued that Turkey's declining economy in the case of *Russian Indemnity* - not to the extent that it poses a threat to the existence of the state - could have been identified as an essential interest that may be protected by the necessity standard under CIL.[27] These inconsistent views from *Gabčíkovo-Nagymaros* and *Russian Indemnity* may assist in comparing how the severity of the situation is interpreted in IIL.

As the US-Argentina BIT highlights the scope of a state's essential security interests,[28] and mindful that the context that the Argentinian government had endured an economic crisis, a question worth investigating is whether the existence of an economic crisis or emergency can first be considered as a state's essential security interest. Many tribunals have positively affirmed this premise within the meaning of Article XI of the US-Argentina BIT.[29] For example, the tribunal in *Continental Casualty v. Argentine Republic* ("***Continental Casualty***") reasoned that if economic emergency were not to be interpreted as an essential security interest, it would defeat the purpose of the United Nations in ensuring "*international cooperation in solving international problems of an economic...character*",[30] which reasoning is logical considering that both the US and Argentina are member states.

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[26] *Gabčíkovo-Nagymaros Project*, para. 54.
[27] James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013): 308; Robert Sloane, "On the Abuse of Necessity in the Law of State Responsibility", 461.
[28] *US-Argentina BIT*, Arts. VI(3); XI.
[29] *Continental Casualty Company v Argentine Republic, Award*, ICSID Case No. ARB/03/9 (5 September 2008), para. 175; *CMS*, para. 360; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic, Decision on Liability*, ICSID Case No. ARB/02/1 (3 October 2006), para. 238; *Enron*, para. 333.
[30] *Continental Casualty*, para. 175; *Charter of the United Nations* (24 October 1945) 1 UNTS XVI, Art. 1(3).

Despite the acceptance that an economic crisis or emergency can be considered as a state's essential security interest, the severity of the economic crisis was the focal point of debate in determining when a situation can be categorized as an imminent or grave threat. This is seen from the contrasting views between the tribunals in *CMS* and *Enron Cooperation and Ponderosa LP v. Argentine Republic* ("***Enron***") that heavily relied upon the assessment of the necessity standard under CIL,[31] and the tribunal in *Continental Casualty* and *LG&E Energy Corp. v. Argentine Republic* ("***LG&E***") that adopted a more balanced assessment of Article XI of the US-Argentina BIT. With regards to the former, the *CMS* and *Enron* tribunals stated that the severity of the economic crisis was not sufficient for Argentina to excuse their conduct. The tribunals require the 'total collapse' of the economy for it to be identified as a 'grave and imminent peril' as a condition of Argentina being allowed to invoke necessity.[32] Such clearly affirms the tribunals' concurrence with the ICJ's perspective in accordance with the necessity standard under CIL. Interestingly, however, the 'total collapse' criteria was opposed by the latter tribunals for two reasons, showing that the latter tribunals implicitly followed Sloane's argument in the *Russian Indemnity* case.

Firstly, the tribunal in *LG&E* opined that when invoking necessity, a state's essential security interest should not only be limited to situations that would severely threaten the state's existence, but should also include any essential interests that are at risk or require protection.[33] This is supported by the tribunal's reasoning that the existence of the "*highest degree of public disorder*" in Argentina caused by the economic crisis, and which could potentially cause the total collapse of the state as a whole, was sufficient to prompt the application of Article XI of the US-Argentina BIT.[34] Such reasoning resembles a deviation from the earlier view of how the economic crisis must be in the nature of a 'total collapse' to fulfill the 'extremely grave and imminent' threshold adopted by the ICJ and the previous tribunals. In other words, the *LG&E* tribunal made a less-restrictive interpretation in emphasizing the extent of the severity of the situation required. Secondly, the *LG&E* tribunal's view is validly elaborated by the *Continental Casualty* tribunal, stating that if necessity can only be invoked if the state's economy is in a situation of 'total collapse', it would be meaningless for a state to invoke necessity in the first place, as there would be "*nothing left to protect*" by the state after the collapse.[35] Additionally, the two tribunals made reference to Article XI of the US-Argentina BIT, arguing that the BIT "*does not require that "total collapse" of the country or that a "catastrophic situation" has already occurred*",[36] supporting the notion that the existence of an economic crisis, regardless its degree of severity, does not negate the fact that the BIT permits the state to invoke the NPM clause.

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[31] William Burke-White & Andreas von Staden, "Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations", *The Yale Journal of International Law* 35(283) (2010): 297.
[32] *CMS*, paras. 354-355; *Enron*, paras. 306-307.
[33] *LG&E*, para. 251.
[34] *LG&E*, paras. 231, 237, 245.
[35] *LG&E*, para. 195; *Continental Casualty*, para. 180.
[36] *Continental Casualty*, para. 180.

Therefore, the reasoning of the *Continental Casualty* and *LG&E* tribunals may be argued as rendering the necessity standard under CIL extremely high and challenging to be invoked by states. It is worth noting that although the necessity standard is indeed an important standard to be upheld in preventing abuse from states, it is not to be interpreted narrowly or limited to the requirements stipulated under CIL or Article 25 of ARSIWA, nor shall tribunals equate the meaning of necessity under CIL with the BIT. As the purpose of a BIT is also to protect the host state, the decision of the *CMS* and *Enron* tribunals would set an unsafe precedent–if consistently followed– that may hinder states from maintaining their sovereign interests. Thus, in determining the scope of essential security interest to apply amidst an economic crisis, the application of the necessity standard must take into account the applicable treaties that allow the state to claim a defense when it is necessary for them to safeguard essential security interests. In the context of IIL, the necessity-related provision stipulated under the BIT, which can be argued as a *lex specialis*, must also be examined considerably, separately and impartially with the threshold set by CIL.[37]

c. The need for the measure to be 'last resort'

It can be argued that adopting measures to maintain sovereignty is to be regarded as a part of the state's ability to exercise its police powers.[38] That said, the final strict requirement that states need to fulfill when claiming necessity is that the measure invoked is the 'the only way' for the state to protect the identified essential security interest. Referring again to *Gabčíkovo-Nagymaros*, Hungary's decision to suspend construction of a dam was ruled by the Court, putting it simply, as not the only way open to Hungary to prevent the risks that could have potentially emerged,[39] suggesting that there were other measures that could have been taken having regard to the magnitude of the project. The Court unfortunately did not take full account of the gravity of the measure, meaning that the Court merely took a plain interpretation of the necessity standard under CIL. Similar to the debate on the severity of an economic crisis to invoke necessity, there were differing views on how the ICSID tribunals interpreted the measures adopted by Argentina resulting from the extent of reliance on Article 25 of ARSIWA on the necessity defense.

Relying on a narrow interpretation of the threshold tests under CIL, the *CMS* and *Sempra Energy International v. Argentine Republic* ("***Sempra***") tribunals ruled that Argentina did not satisfy the threshold by demonstrating that the measure imposed by Argentina was the only way that could be implemented to save its economy. Such ruling stemmed from the traditional idea that necessity cannot be accepted if there are alternative measures that the state could exhaust, regardless of their efficiency and cost.[40] For example, responding to the differing views of the parties on the alternative

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[37] Zachary Douglas et. al., "The Foundations of International Investment Law", 350.
[38] *Ibid*., 328; *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) ICJ Rep 624 (November 19), para. 80.
[39] *Gabčíkovo-Nagymaros Project*, para. 57.
[40] *CMS*, para. 324.

measures available, the *Sempra* tribunal concluded that the promulgation of the Emergency Law was simply not the only measure that Argentina could carry out to cope with the economic crisis.[41] The *CMS* tribunal echoed the same ruling, stating that alternatives such as "*the dollarization of the economy, granting of direct subsidies to the affected population or industries*" and other measures would have been available.[42] From this reasoning, arguments from scholars such as Jürgen Kurtz and even the tribunals in *Sempra* and *Enron* validly pointed out that the strict test provided by CIL is extremely high to the extent that it would need great sophistication and be almost impossible to determine which one of many available measures can be deemed as 'the only way' to respond to the crisis.[43] Consequently, the NPM clause provided under the US-Argentina BIT would not be effective if the tribunals interpreted the necessity standard narrowly.

Alternatively, the *Continental Casualty* and *LG&E* tribunals, as with the matter of the severity of an economic crisis, used a more flexible and broad approach in determining this intricate requirement. The tribunals evaluated the urgency and reasonableness of the measure instead of focusing on whether the measure was plainly the 'only way'. Firstly, the tribunal in *LG&E* mainly relied on the assessment of necessity having regard to Article XI of the US-Argentina BIT,[44] to which the tribunal, upon extensive assessment of the causes of the severe economic crisis, determined that the swift promulgation of the Emergency Law was indeed necessary.[45] Although the measure was not the 'only way', the tribunal's assessment of the 'across-the-board' approach of the Emergency Law to cope with numerous public utility contracts, including evidence of the government's considerations to protect the interests of foreign investors, rendered the measure as necessary and legitimate within the meaning of Article XI in order to maintain public order.[46] The decision of the *LG&E* tribunal can be observed as a balanced approach in harmonizing between the necessity standards under the BIT and CIL. Although the measure did not fulfil the 'only way' threshold, supporting Kurtz's and the *Sempra* and *Enron* tribunals' argument, it was nevertheless the most legitimate measure that Argentina could invoke.

On the other hand, the tribunal in *Continental Casualty* used a two-tier standard that had been adopted by the WTO. The said standard involves the assessment of the

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[41] *Sempra Energy International v Argentine Republic, Award*, ICSID Case No. ARB/02/16 (28 September 2007), paras. 350-351.
[42] *CMS*, para. 323.
[43] Jürgen Kurtz, 'Building Legitimacy Through Interpretation in Investor-State Arbitration' in Zachary Douglas, et. al., "The Foundations of International Investment Law", 288; *Sempra*, para. 350; *Enron*, para. 308.
[44] Andrew Mitchell & Caroline Henckels, "Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law", *Chicago Journal of International Law* 14(1) (2013): 112.
[45] *LG&E,* para. 240.
[46] *LG&E*, paras. 226, 240-241; Andrew Mitchell & Caroline Henckels, "Variations on a Theme: Comparing the Concept of "Necessity"", 113.

importance of the measure from a 'least-restrictive' view.[47] For the first tier of the standard, the tribunal ruled that the imposition of a bank freeze, devaluation of the Argentinian peso, and the de-dollarization of the US Dollar were necessary measures to be utilized by Argentina in order to "*react positively to the crisis*".[48] The ruling dismissed the Claimant's contention that there were alternatives to the three measures that it claimed had escalated the crisis,[49] which would have not allowed Argentina to invoke necessity.[50] As for the second tier of the standard, the tribunal also affirmed the reasonableness of the measures invoked by Argentina, arguing that the measures represented the government's balanced approach in positively responding to the crisis while also ensuring its obligations to protect its citizens.[51] Such an approach from *Continental Casualty* emphasizes how an assessment of the proportionality of the measures may result in a successful plea of necessity, rather than assessing whether the measure was simply the 'only way' the state could have employed to protect its interests, as expressed by the *CMS* and *Sempra* tribunals.

That being said, the approach taken in *Continental Casualty* and *LG&E* demonstrates how tribunals can strike a balance between the application of necessity in the context of the US-Argentina BIT and the necessity standard under CIL in order to protect the interests of the state on the one hand, and also the interests of the foreign investor on the other. This is also to consider whether such measures can only be used or only serve to excuse the state from their BIT responsibilities as long as the relevant circumstance is still ongoing.[52] Hence, the application of necessity from this viewpoint is only appropriate in supplementing analysis of the BIT and the relevant circumstance with strict requirements that would permit the invocation of necessity. Necessity, therefore, may not be interpreted narrowly or solely based on CIL.

D. Concerns on the Application of Necessity by ICSID Tribunals

Further arguments suggest that there are indeed issues related to how necessity is assessed and applied by tribunals. It must be made clear that sources of IIL are drawn directly from the universally accepted Article 38(1) of the ICJ Statute, with scholars such as Collins arguing that treaties are "*by far the most important source*" of IIL.[53] And in this case, scholars have affirmed that there is a significant distinction between the concept of necessity under treaty law and under CIL. William Burke-White and Andreas von Staden have notably stated that necessity under treaty law aims to permit states to act to protect their sovereign objectives, while necessity under CIL aims to

[47] William Burke-White & Andreas von Staden, "Private Litigation in a Public Law Sphere", 325; *Continental Casualty*, paras. 194-196.
[48] *Continental Casualty,* paras. 205, 210, 214.
[49] *Ibid.*
[50] *ILC Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 25(2)(b).
[51] *Continental Casualty*, para. 227.
[52] *LG&E*, para. 261; *LG&E, Award*, para. 86; *Continental Casualty, Annulment Committee*, para. 236.
[53] *Statute of the International Court of Justice* (18 April 1946) 33 UNTS 993, art 38(1); David Collins, "An Introduction to International Investment Law", 28, 31.

exempt liability for a state's breach of its obligations towards investors.[54] As the application of treaty law and CIL are different, equating NPM clauses under a treaty with the concept understood in the context of CIL will significantly degrade the treaty's provisions from its original and intended meaning in accordance with their object and context.[55] This is especially true considering that an interpretation of the ordinary meaning of NPM clauses should mean that BITs are supposed to balance the rights of investors with the state's objectives.[56]

The underlying concern of the ICSID tribunals' approach when adjudicating the Argentina disputes was the extent of assessment of the necessity standard provided under CIL and the standard provided within the BIT.[57] This was demonstrated by the *CMS*, *Enron*, and *Sempra* tribunals who relied heavily upon the necessity standard provided under CIL to the extent that the application of Article XI of the US-Argentina BIT was treated synonymously with CIL.[58] That is to be compared with precedents from PIL, most notably *Gabčíkovo-Nagymaros*, in which case the 1977 Treaty between Czechoslovakia and Hungary did not contain an NPM clause that would explicitly preclude the parties' actions inconsistent with the treaty if necessity were to be invoked,[59] and nor was it made it possible for the parties to invoke necessity based on the provisions of the treaty. Such absences may be argued as a valid reason for the ICJ to fully assess the claim through the necessity standard under CIL.

This is strikingly different from the Argentina cases, in which the government mainly based its plea of necessity on Article XI of the US-Argentina to justify its invocation of the NPM clause. In that instance, the BIT, as a *lex specialis*, should be treated as the primary legal basis of the dispute. Even though the necessity standard under CIL carries great significance to avoid abuse by states, the tribunal's missed opportunity to comprehensively assess necessity separately in the context of the BIT may in future result in an excess of power by tribunals. This was plainly demonstrated by the *Sempra* Annulment Committee that annulled the *Sempra* award as a result of the tribunal's failure to engage in a detailed assessment of the NPM clause under the US-Argentina BIT. The *Sempra* Annulment Committee noted that the BIT's appropriate application to the dispute supports the general rule of international law that "*a treaty will take precedence over CIL*".[60]

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[54] William Burke-White & Andreas von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", *Virginia Journal of International Law* 48(2) (2008): 320-324.
[55] Oliver Dörr & Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer, 2012): 527, 539-540.
[56] William Burke-White & Andreas von Staden, "Private Litigation in a Public Law Sphere", 295.
[57] Cynthia C. Galvez, ""Necessity," Investor Rights, and State Sovereignty", 151.
[58] *Enron*, para. 334; *Sempra*, para. 376.
[59] *Treaty Between the Hungarian People's Republic and the Czechoslovak Socialist Republic Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks* (16 September 1977) 1109 UNTS 235.
[60] *Sempra, Annulment Proceedings* (29 June 2010), paras. 174-176, 229.

E. Alternative Approaches to Assess Necessity

As part of the ICSID tribunals' rather-problematic approach in applying necessity in earlier cases, scholars have argued that there may be alternative approaches that may provide support to action by states to invoke necessity. It must be noted that although distinct from the standard provided under CIL, these approaches nevertheless reflect the essence of necessity.

One alternative suggested by scholar Alec Stone Sweet is to approach necessity using the 'proportionate framework' theory, which would requires tribunals to evaluate the appropriateness of the measure imposed from the least restrictive view.[61] That said, the proportionate framework may be regarded as a broader interpretation of the 'only way' requirement under the necessity standard established by ARSIWA. Despite the paucity of the use of the approach, the *Continental Casualty* tribunal had positively demonstrated how the proportionality assessment of the measure resulted in a successful plea for necessity by Argentina. The outcome of the test was that the measures imposed by Argentina were reasonable and legitimate to achieve the purpose of maintaining public order in accordance with Article XI of the US-Argentina BIT as the applicable law determined by the *Sempra* Annulment Committee.

Another approach was recommended by Burke-White and von Staden and relies on the 'margin of appreciation' standard formulated by the European Court of Human Rights. That standard excuses any measures issued by a state government when it is "relevant and sufficient" to safeguard values such as national security or public order.[62] This points to the niche feature of the standard which is the determination of the 'breadth of deference' of the magnitude between two factors. In the case of investment law, the breadth of deference would be the interest of foreign investors and the state's socio-economic policies related to protecting the state's interest.[63] If applied correctly without interpreting the necessity threshold narrowly, the use of this standard in the Argentina cases may be conclusive of the fact that, for example, the promulgation of economic policy does inherently result in a wide margin, and thus must be respected as a means to respond positively to the crisis.[64] This would allow a successful invocation of necessity.

F. Conclusion

It can be concluded that necessity is, to a limited extent, an appropriate standard to invoke NPM in IIL. Although the standard provided under CIL is crucial in the sense that the strict requirements provide a high degree of protection to foreign investors,

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[61] Cynthia C. Galvez, ""Necessity," Investor Rights, and State Sovereignty", 153; Alec Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier", *Law & Ethics of Human Rights* 4(1) (2010): 70.
[62] *Handyside v United Kingdom* (App. No. 5493/72) (1976) ECtHR, paras. 48, 50; William Burke-White & Andreas von Staden, "Private Litigation in a Public Law Sphere", 305.
[63] *Ibid.*, 337, 342.
[64] *Ibid.*; *Broniowski v Poland* (App. No. 31443/96) (2004) ECtHR, para. 149.

the heavy reliance on such a standard imposes a severe burden on the host state for it to invoke a NPM clause in a situation deemed as an emergency to the extent that it may render the NPM clause useless. This in turn may not create a healthy investment climate, as envisioned by the US-Argentina BIT. The requirements or thresholds of the necessity standard would also seem to be inapplicable in the context of IIL, as the party whose interest would be impaired by invocation of the NPM are the foreign investors, not the state nor the international community.

Such conclusion does not mean that the necessity standard should be ignored in its entirety. The standard, on the contrary, somewhat provides a fundamental rationale in determining when it is necessary to invoke NPM, which may act to supplement the tribunals' analysis. Nevertheless, when states invoke NPM clauses from a BIT, it is encouragement for future tribunals to adopt a more flexible approach by proportionately and separately viewing claims for the necessity defense from the perspective of both the NPM clause from the BIT and also that of the standard under CIL. Tribunals may also assess the application of necessity through alternative approaches adopted by different dispute resolution fora or even those suggested by scholars that may provide a more balanced assessment between the rights of investors and the interests of the state.

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