NEW APPROACHES TO THE STATE OF NECESSITY IN CUSTOMARY INTERNATIONAL LAW: INSIGHTS FROM WTO LAW AND FOREIGN INVESTMENT LAW*

Nuevas aproximaciones al estado de necesidad en derecho consuetudinario internacional: Contribuciones del derecho de la organización mundial de comercio y del derecho de la proteccion de las inversiones

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ABSTRACT

Both the International Court of Justice ("ICJ") in the Case Concerning The Gabcikovo-Nagymaros Project (Hungary/Slovakia), and the International Law Commission ("ILC") in its commentaries to its Articles on State Responsibility have pointed out that the requirements for the successful invocation of the defense of necessity embodied in Article 25 of the ILC's Articles on State Responsibility ("ILC's Articles") need to be interpreted narrowly in order to prevent the abuse of this provision and the ensuing effect of justifying wrongful international acts. The result is that Article 25 is a provision the availability of which to States seems very limited, even in extreme circumstances. This article has shown that the recent case law in foreign investment law regarding the state of necessity under customary international law mainly follows the ICJ and the ILC and is, therefore, marked by a strict approach to the interpretation of Article 25 of the ILC's Articles. However, the article reveals that this approach is not the only one possible regarding Article 25, and that the WTO model of necessity could also be applied in the context of this provision.

DESCRIPTORS:

Customary international law, state of necessity, foreign investment law, WTO law.

SINTESIS

Tanto la Corte Internacional de Justicia en su sentencia en el caso Proyecto Gabcikovo-Nagymaros Project (Hungría/Eslovaquia) como la Comisión de Derecho Internacional han establecido que los requisitos para invocar válidamente el estado de necesidad definidos en el Articulo 25 deben ser interpretados estrictamente con el fin de evitar el abuso de este precepto y la consiguiente justificación de un acto contrario al derecho internacional. El resultado de esta aproximación es que el Artículo 25 se halla muy excepcionalmente a disposición de los Estados, aún en circunstancias extremas. La presente contribución ilustra que un punto de vista similar ha sido adoptado por Derecho de la Protección de Inversiones, aun cuando con algunas modificaciones. Sin embargo, el artículo muestra que la forma cómo el concepto de necesidad ha sido entendido en el Derecho de la Organización Mundial de Comercio podría ser aplicado en la interpretación del Artículo 25, sin que ello genere condiciones para el abuso de esta norma.

DESCRIPTORES:

Derecho consuetudinario internacional, estado de necesidad, derecho de la protección de las inversiones, derecho de la Organización Mundial de Comercio

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Both the International Court of Justice ("ICJ") in the Case Concerning The Gabcikovo-Nagymaros Project (Hungary/Slovakia)[1], and the International Law Commission ("ILC") in its commentaries to its Articles on State Responsibility have pointed out that the requirements for the successful invocation of the defense of necessity embodied in Article 25 of the ILC's Articles on State Responsibility ("ILC's Articles") need to be interpreted narrowly in order to prevent the abuse of this provision and the ensuing effect of justifying wrongful international acts. The result is that Article 25 is a provision the availability of which to States seems very limited, even in extreme circumstances.

There are, however, other approaches to necessity that are being developed in international law that differ from the traditional one of customary international law. On the one hand, WTO law, although for a different type of "necessity," has developed an approach that is more lenient and that makes GATT necessity exceptions available to WTO Members to justify unlawful measures pursuing values other than trade, without generating the abuse of such exceptions. On the other hand, foreign investment law has fashioned another approach regarding Article 25 that responds to the particularities of investor/State disputes. It is strict, like that of the ICJ in the sense that the defense of necessity is not available to States even when they face crises of significance, but does not leave States to bear all the risk of such proven crises. In addition to illustrating the new approaches to necessity in international law, this article shows how the WTO model can also be deployed in the interpretation and application of Article 25, without creating the conditions for its abuse.

The article is divided into five parts. The first part analyzes Article 25 on the basis of its interpretation by the ICJ and the ILC. The second part illustrates the approach adopted by the WTO Appellate Body ("AB") regarding the necessity exceptions in the WTO. The third part presents the results of the disputes stemming from Argentina's crisis of 2000 and the main approach to Article 25 that investor/State tribunals have created to resolve such conflicts. The fourth part shows how the WTO model can be transplanted to the interpretation of Article 25 and be applied by courts and investor/State tribunals. Finally, the fifth part provides the conclusions of the article.

Necessity in Public International Law

The Requirements of Necessity in Customary International Law

Article 25 of the International Law Commission's Articles on State Responsibility provides as follows:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) is the only means 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 State 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 precludes the possibility of invoking necessity; or
   (b) the State has contributed to the situation of necessity[2].

1 International Court of Justice, Case Concerning The Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment of Sept. 25, 1997 I.C.J. 7. [hereinafter Gabcikovo-Nagymaros]. The dispute arose from a joint project between Hungary and Czechoslovakia to build a system of locks on the Danube River for the purpose of generating energy, improving navigation, and preventing flooding. At a time when the work in Czechoslovakia was well advanced, Hungary stopped work in its territory due to its environmental concerns, which led the former to carry out an alternative project that Hungary considered to have adversely affected its access to the river.

2 JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY. INTRODUCTION, TEXT AND COMMENTARIES 66 (2002) [hereinafter ILC's Commentaries].

In its judgment in Gabcikovo-Nagymaros, the ICJ held that the above-mentioned provision has the status of customary international law[3], that the occurrence of the state of necessity does not terminate treaties, and that it is a temporary situation. Violations of international obligations may be excused during the existence of the conditions of necessity, but once it is over the party that invoked necessity must comply with such obligations[4].

A paramount feature of necessity under public international law is that the concept must be interpreted very narrowly[5], since it serves to excuse wrongful acts under international law. In order to ensure that it is so interpreted, the ICJ has strictly interpreted some of the above-mentioned requirements. To begin with, it has determined that all the requirements listed below must be satisfied by the State invoking necessity[6].

First, necessity can be invoked regarding the protection of a broad set of interests that may qualify as being essential. Relying on the work of the ILC, the ICJ held in Gabcikovo-Nagymaros that essential interests are not only those associated with the existence of States[7]; for instance, the environment was regarded by the Court as one such interest. The Court also stated that the essential nature of an interest is a matter to be judged on the basis of the particular case at hand[8].

Second, the nature of the peril that may justify the use of this rule of customary international law is strictly defined. Article 25 refers to "grave and imminent peril," and the ICJ declared in the foregoing judgment that this kind of peril denotes a sense of immediacy and proximity[9]. This is not to say, though, that grave risks that are definite and will inevitably take place in the long run cannot qualify as a peril that may trigger the declaration of the state of necessity. The ICJ explicitly expressed that perils of this type may also be regarded as imminent[10]. The threshold is quite high, however, since the ICJ has stated that grave risks that are only probable cannot serve as a basis for the declaration of the state of necessity[11].

In addition to proof of the existence of "grave and imminent peril," the State invoking necessity must demonstrate, as the third requirement provided for in Article 25, that non-compliance with the international obligation is the only means the State has to protect the essential value at issue[12]. The State invoking necessity has to prove that there are no other lawful alternatives to safeguard the essential interest in question[13]. Relevant to an assessment of the existence of other alternatives is the finding made by the ICJ that alternatives will be evaluated without regard as to their costs. Consequently, lawful alternatives prevent the invocation of necessity even if opting for them would be more costly for the State invoking necessity[14].

The fourth requirement contemplated by customary international law for the declaration of necessity, and embodied in Article 25(1)(b) of the ILC's Articles, is that the actions taken on the ground of necessity cannot gravely affect an essential interest of the State or States towards which the international obligation in question exists. Not only does this mean that necessity cannot be invoked if a serious impairment of the latter State's essential interest takes place, but the ILC has pointed out that the essential interest of the State invoking necessity must offset that of the other State or States that are affected by the wrongful act.[15] Consequently, a balancing test must be conducted regarding the competing essential interests, and the requirement is satisfied if the interest of the State claiming necessity is the most important of those involved[16].

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3. See Gabcikovo-Nagymaros, supra note 1, 51. However, necessity as an excuse for wrongful international acts had been contested previously. See PATRICK DALLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 786-87 (7th ed. 2002), as was its customary status. See Laurence Boisson de Chazournes & Sarah Heathcote, The Role of the New International Adjudicator, in PROCEEDINGS OF THE 95TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 129-33 (David J. Bederman & Lucy Reed eds., 2001).
4. See Gabcikovo-Nagymaros, supra note 1, 101.
5. See id. 51.
6. See id.
7. See id. 53. For the origin of necessity, see Roman Boed, State of Necessity as a Justification for International Wrongful Conduct, 3 YALE HUM. RTS. & DEV. L.J. 1, 4 (2000).
8. See Gabcikovo-Nagymaros, supra note 1, 53
9. See id. 54.
10. See id.
11 .See id.
12. See ILC'S COMMENTARIES, supra note 2, at 184.
13. See Gabcikovo-Nagymaros, supra note 1, 55.
14. See id. See also ILC'S COMMENTARIES, supra note 2, at 184.
15. See ILC'S COMMENTARIES, supra note 2, at 184.
16. See id.

As the ILC stresses, Article 25 of the Articles imposes two conditions to the invocation of necessity. The first, provided for in paragraph 25(2)(a), is that necessity cannot be invoked if it is explicitly excluded by the given international obligation[17]. The second limitation established by Article 25 is that a State cannot invoke necessity if it has contributed to the situation that created it. This was, for instance, one of the reasons why necessity could not be invoked in Gabcikovo-Nagymaros. There, the ICJ determined that Hungary had contributed to the situation that engendered the environmental perils on which it had based its invocation of necessity: prior to the suspension and abandonment of the project in 1989, Hungary had asked for the project to be speeded up[18]. The Court did not delve into the threshold of the contribution that would preclude the invocation of necessity; however, the ILC has stated that the contribution must be substantial, not merely incidental or peripheral, to preclude the plea of necessity[19].

In sum, necessity is considered to be a justification for otherwise wrongful international acts under customary international law, although the requirements that a State must meet to lawfully claim necessity are strict. Indeed, despite the fact that there is a flexible approach to the type of interest that would qualify as being essential, the threshold the peril must meet—grave and imminent and not merely probable—is high. The essential interest of the State must weigh much more than those of the other States towards which the obligation is directed; the State invoking necessity cannot have substantially contributed to the situation that triggers such invocation and may be precluded from doing so when the obligation at issue so provides. Once a respondent State satisfies the strict requirements of the plea of necessity, it is important to highlight the consequences that follow from it.

Consequences of the Invocation of Necessity

The consequences of the invocation of necessity are set forth in Article 27 of the ILC's Articles, which provides: The invocation of a circumstance precluding wrongfulness in accordance with this Chapter is without prejudice to:

(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) the question of compensation for any material loss caused by the act in question[20].

The first consequence that emerges from the text of this provision is that the violation of an international obligation by the State claiming necessity does not disappear if the State succeeds in demonstrating the necessity. Therefore, if the circumstances that created the grave and imminent peril disappear or change for the better, the State must comply with its obligation in full or partially. In this regard, the ICJ stated in Gabcikovo-Nagymaros that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives." Part of the duty to comply, according to the ILC, "includes cessation of the wrongful conduct." In essence, then, the defense is temporary.

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The second important consequence is that the defense of necessity does not preclude the possibility of compensation for the aggrieved State, an issue that the respective States must deal with. However, the ILC felt limited in defining those situations in which compensation should be made[23], although it reduced the scope of the compensation: in the event of the successful plea of necessity, the scope is narrower than that stemming from international wrongful acts and should be restricted to material losses. The ILC pointed out:

17. See id. at 185.
18. See Gabcikovo-Nagymaros, supra note 1, 57.
19. See ILC'S COMMENTARIES, supra note 2, at 185.
20. Id. at 189.
21. See Gabcikovo-Nagymaros, supra note 1, 101.
22. ILC'S COMMENTARIES, supra note 2, at 190.
23. See id. at 190

> [A]lthough article 27(b) uses the term "compensation," it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference to "material loss" is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by Chapter V[24].

The consequences of the successful declaration of necessity by the State show that such declaration affects the responsibility of the State invoking it but has no impact on the existence of the infringed international obligation in question. In this regard, the ICJ stated:

> [T]he state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner[25].

In sum, the state of necessity under customary international law has four requirements, all of which must be satisfied; its successful invocation does not excuse the invoking State from complying with the obligation totally or partially once the situation justifying the emergency has disappeared or receded and from compensating—under a narrow concept of damages—the State to which the obligation is owed. Finally, the state of necessity must be interpreted narrowly in order to prevent its abuse.

Necessity in WTO Law

WTO law contemplates several necessity exceptions aimed at the pursuit of various goals other than trade, and although they differ in many ways from the notion in customary international law, they produce an identical result for the State invoking it: the justification of a wrongful international act. Despite this significant similarity, the WTO Appellate Body has interpreted necessity exceptions more leniently, with the result that, broadly speaking and barring one exception, WTO members that have invoked a necessity exception have successfully preserved their unlawful trade-restrictive measure, or in WTO parlance, their WTO-inconsistent measure.

The most notable provision involving necessity is the General Agreement on Tariffs and Trade ("GATT") Article XX, which provides in relevant part:

> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> …
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices[26];

24. Id. According to the ILC, the extent of the compensation is a matter for the States involved to agree upon. See id. Regrettably, authors commenting on reparations within the ILC's articles have not dealt with this difference between compensation under Article 27 and that of Article 35. See, e.g., Dinah Shelton, Righting Wrongs: Reparations in the Articles on State Responsibility 96 A.M. J. INT'L. L 833 (2002).
25. Gabcikovo-Nagymaros, supra note 1, 48.
26. Available at http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm. Article XXI also contemplates necessity within the security exception. However, this provision has never been applied by GATT panels or the Appellate Body. The General Agreement on Trade in Services contains a similar provision to GATT Article XX: GATS Article XIV, also containing various necessity exceptions.
It is important to highlight that the GATT/GATS exceptions have been available to excuse only violations of obligations provided for in the GATT 1994 and GATS. GATT 1994 exceptions have not been recognized by the Appellate Body to excuse also transgressions of obligations contemplated by other WTO-covered agreements. Nonetheless, this possibility could eventually exist, since the Appellate Body has not explicitly rejected it. In fact, the Appellate Body avoided pronouncing on this complex issue in its report in United States—Measures Relating to Shrimp from Thailand, United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties. See United States—Measures Relating to Shrimp from Thailand, United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties ¶¶ 310 & 319, WT/DS343/AB/R, WT/DS345/AB/R (July 16, 2008). See Alberto Alvarez-Jiménez, The WTO Appellate Body's Exercise of Judicial Economy, 12 J. INT'L ECON. L. 393, 408 (2009).

From the text of this provision, it is evident that some of the requirements for the defense of necessity in customary international law have no place, or a limited one, under WTO law. First, it is not required under WTO law that the value in question must be safeguarded against a grave and imminent peril in order to justify the adoption of the given trade-restrictive measures. Second, also absent is the customary international law requirement that the adoption of the measures necessary to protect any of the values included in Article XX not impair an essential interest of the State towards which the obligation exists. Third, the "necessity" exceptions of Article XX do not contain an explicit limitation that the State invoking the necessity of the measures taken must not have contributed to the need to adopt the inconsistent trade-restrictive measures in question.

In addition, there are substantial differences in the effects of the successful invocation of the necessity defense under the two regimes regarding compensation. As discussed above, according to Article 27 of the ILC's Articles, certain compensation may be owed to the State harmed by the breach of the international obligation excused by the state of necessity. Such possibility does not exist under WTO law, whose remedies are generally prospective[27]. Finally, the successful invocation of a necessity exception is not temporary under WTO law and jurisprudence. If the trade-restrictive measure is justified by any of the necessity exceptions, the effect of such declaration is permanent. It is up to the WTO member that invoked the exception to determine when, if ever, the conditions requiring the measure no longer exist.

Despite all these important differences, WTO case law regarding necessity can still be valuable to the assessment of necessity under customary international law. Both defenses of necessity have common requirements: (i) there must be a risk to a State interest and (ii) the only means to safeguard such risk is through the adoption of the wrongful international act. Also, both the GATT necessity exceptions and the customary defense of necessity share the key common feature of serving as a justification for wrongful international acts.

In interpreting GATT Article XX, the AB has established that it contains a two-tier test. The first tier assesses whether the measure at issue falls under any of the exceptions, namely, that the regulation in question is necessary to achieve any of the objectives specified in the particular exception invoked. Once the measure is found to be covered by a given exception, the second part of the test determines whether the regulation is applied in a way that satisfies the requirements of the chapeau of Article XX[28].

The relevance of looking at WTO law for a comparative assessment of necessity is that, despite the fact that the GATT Article XX necessity exceptions also justify wrongful international acts, the AB has been able to ensure that the exceptions remain available to WTO Members, without prompting their abuse. The AB has achieved this result, first, by adopting a more lenient approach to necessity in the first tier of the test, and second, by using the chapeau as the true instrument to prevent the abuse of the Article XX necessity exception. In other words, to control abuse, the AB can rely on another provision, the chapeau, and does not have to rely on a stringent interpretation of the necessity test under the first tier of the evaluation for compliance with Article XX. This general approach could also be transplanted to customary international law, as will be seen below in Part IV.

The First Tier of Article XX: The Loosening of the Strictness of the Necessity Test

under Article XX Exceptions

The AB has adopted a relatively lenient approach regarding the requirements of the first tier of the necessity test in the assessment of the WTO-inconsistent measure in light of GATT Article XX. This approach has made it possible for Members to establish initially that their inconsistent, trade-restrictive measures are necessary.

To pass the first tier of the necessity test of Article XX, four requirements must be met:

1. There is a risk to the interest or value that needs to be protected;

27. See Robert E. Hudec, Broadening the Scope of Remedies in WTO Dispute Settlement, available at http//www.worldtradelaw.net/articles/hudecremedies.pdf. For the most notable exception to the rule of prospective remedies in recent years, see WTO Panel Report, Australia—Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States, 6.32, 6.38 & 6.44, WT/DS126/RW (Jan 21, 2000), available at http://www.sice.oas.org/DISPUTE/wto/ds126/ds126r1e.asp.

28. See Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, at 22, WT/DS2/AB/R (adopted May 20, 1996) [hereinafter U.S. – Gasoline AB Report], available at www.worldtradelaw.net/reports/wtoab/us-gasoline(ab).pdf.

2. The inconsistent measure must pursue the objective defined by the exception invoked;
3. The measure in question makes a material contribution to the pursuit of the particular goal or interest;
4. There is no reasonable alternative available to achieve the goal other than the WTO-inconsistent measure in question.

It is important to mention that the AB stated in Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef that a necessary measure does not have to be indispensable to achieving the particular goal in question. However, the measure must be located closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to" the pursuit of the given goal[29].

Turning, then, to the first requirement of the necessity test, it is possible to say that, although WTO Members invoking a necessity exception do not have to demonstrate that there is an imminent risk to the value the exception seeks to protect, they do have to prove that there is a risk to such a value as a precondition for the successful invocation of the relevant exception. However, the risk does not have to be quantified. For instance, in the context of the necessity exception[30] aimed at protecting health, the AB declared in EC – Asbestos that the health risk the inconsistent measure in question sought to prevent could be proved on the basis of qualitative analysis[31].

With regard to the third requirement, the contribution made by the measure to the pursuit of the goal sought, the AB expressed in Brazil – Retreaded Tyres that such contribution does not need to be quantified and that it can be demonstrated in qualitative and quantitative terms. The AB based this conclusion on two grounds: (i) Article XX(b) does not clearly impose only a quantitative analysis, so panels have the discretion to conduct either a qualitative or quantitative analysis[32]; and (ii) there are measures whose impact may only be gauged after a long period of time, which could force panels to rely on qualitative assessments regarding the necessity of such measures[33].

An additional feature that reveals the more lenient approach adopted by the AB regarding the requirement of a material contribution made by the measure undertaken, is the fact that respondent Members do not only satisfy the requirement when they are able to prove an immediate contribution, but also when they demonstrate that the action taken will likely lead to the material contribution in question. The AB so stated in Brazil – Retreaded Tyres[34].

The fourth requirement, namely, that the WTO-unlawful measure be the only means to protect the interest in question, is satisfied if it is proven that there is no less restrictive, reasonably available alternative. The AB has established high thresholds for alternatives to possess such qualifications, thereby making the unlawful measure adopted by respondent Members unnecessary:

(i) In U.S. – Gambling, the AB established that reasonably available alternatives must always achieve the same level of protection of the objective pursued[35]. Possible alternatives that do not ensure the desired level of protection of the value in question are, for good reasons, not considered reasonably available to the WTO member invoking the necessity exception[36].

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29. Appellate Body Report, Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, 161. WT/DS161/AB/R (Dec. 11, 2001) [hereinafter Korea – Various Measures on Beef AB Report], available at http://docsonline.wto.org/DDFDocuments/t/WT/DS/169abr.doc.
30. The EC and Korea satisfied this requirement in European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, 166, WT/DS135/AB/R (March 12, 2001) [hereinafter EC – Asbestos AB Report]), and Korea – Various Measures on Beef, supra note 29, 158, respectively. On the other hand, the United States failed to do so in United States—Measures Relating to Shrimp from Thailand, United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties and its defense based on Article XX(d) was dismissed. See WTO Appellate Body Report, United States—Measures Relating to Shrimp from Thailand, United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, 317 & 319, WT/DS343/AB/R WT/DS345/AB/R (Jul. 16, 2008) [hereinafter US—Customs Bond Directive AB Report].
31. See EC – Asbestos AB Report, supra note 30, 167.
32. See Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, 146, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter Brazil – Retreaded Tyres AB Report] (quoting EC – Asbestos AB Report, supra note 30, 229-30.
33. See id. 151.
34. Id. 155. However, respondent Members have to demonstrate that there are real conditions in the respondent Member that make the trade-restrictive measure capable of achieving the goal sought by the necessary measure. See id. 149 & 153.
35. Appellate Body Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, 308, WT/DS285/AB/R, (April 7, 2005) [footnotes omitted]. [hereinafter U.S. – Gambling AB Report] ("[A] 'reasonably available' alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.").
36. In EC – Asbestos the AB refused to regard the controlled use of asbestos fibres as an alternative to the ban on asbestos, because such use still posed a risk to human health for workers in the building industry, and France, by adopting the inconsistent measure banning such products, was seeking to halt this risk in its entirety. See EC – Asbestos AB Report, supra note 30, 174. In U.S. – Gambling, the AB stated that consultations or negotiations with the complaining State

(ii) However, achieving the same level of protection is not enough for an alternative to render a WTO-inconsistent measure unnecessary. Alternatives that do so are not thought to be reasonably available if they cannot be adopted for practical reasons or if they involve undue administrative difficulties[37]. As to costs of alternatives, WTO law follows customary international law to a great extent: an alternative is available even if its costs are higher than those of the inconsistent measure. However, WTO law has a cap that is not yet explicit in customary international law: prohibitive costs. An alternative that entails costs of such magnitude is not considered reasonably available and does not make the measure in question unnecessary[38]. As can be seen, the AB has put in place important limitations on alternatives that would render the unlawful trade-restrictive measure unnecessary under the first tier of the test of Article XX exceptions[39].

In addition, the AB made the burden of proof for the defense of necessity less significant for respondent Members invoking it when, in U.S. – Gambling, the AB allocated to complaining Members the burden of proof of demonstrating the existence of reasonably available alternatives. Such allocation constitutes in itself the most revealing evidence of the relatively lenient approach towards the test of necessity in WTO law that the AB has adopted for the benefit of respondent Members[40].

So far, the record of WTO-inconsistent measures that have been attempted to be justified under any of the necessity exceptions demonstrates that the AB has agreed that the measure was necessary[41] and that it passed the first tier of the test of Article XX in three cases: EC – Asbestos, U.S. – Gambling, and Brazil – Retreaded Tyres. In four other cases, all of them related to Article XX(d), the measure was not regarded as necessary: Korea – Various Measures on Beef, Dominican Republic – Import and Sales of Cigarettes and U.S. — Customs Bond Directive[42].

This record confirms that the first tier of the legal test of Article XX exceptions has not been interpreted too strictly. The explanation may be related to the fact that, in WTO law, to regard a WTO-inconsistent measure as necessary is not the last word. The measure still must pass the second tier of the test under the chapeau. There is, then, no need for the AB to interpret tightly the necessity test, given that it has the chapeau to control abuse of the necessity exceptions. Thus, the AB has been able to allow the necessity exceptions to be operative provisions for WTO Members.

The Second Tier of the Legal Test of Article XX Exceptions: The Chapeau of Article XX as the Tool to Prevent the Abuse of Necessity Exceptions[43]

The AB has itself repeatedly declared that one of the main functions of the chapeau is to prevent abuse of the exemptions provided for in Article XX. Since its first report, in US – Gasoline, the AB stated:

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cannot be considered as an alternative, because they "are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case." U.S. – Gambling AB Report, supra note 35, 317.

37. On other occasions, dealing with the Article XX(d) exception, the AB has found that less trade-restrictive alternative measures did exist, because they ensured the level of enforcement of domestic regulations that the given member sought to achieve with the adoption of the WTO-inconsistent measure in question. See Korea – Various Measures on Beef AB Report, supra note 29, 180, and Appellate Body Report, Dominican Republic – Measures Affecting the Importation and Internal Sales of Cigarettes, 72-3. WT/DS302/AB/R (April 25, 2005) [hereinafter Dominican Republic – Import and Sales of Cigarettes].
38. See U.S. – Gambling AB Report, supra note 35, 308.
39. See id. 308, and Brazil – Retreaded Tyres AB Report, supra note 32, 175.
The AB has developed a particular process of weighing and balancing to assess whether a measure is necessary. I omit a particular assessment of this process since it is not used in the comparative analysis carried out in this article. See, regarding that process, U.S. – Gambling AB Report, supra note 35, ¶ 307, and Brazil – Retreaded Tyres AB Report, supra note 32, 143. For a critical approach to the balancing test, see Donald H. Regan, The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancingiiii, 6 WORLD TRADE REV. 347, 347 (2007).
40. U.S. – Gambling AB Report, supra note 35, 309. See also Brazil – Tyres AB Report, supra note 32, 156.
41. It is understandable that the AB has been significantly strict with Article XX(d) exceptions. States have at their disposal a broad set of domestic instruments to enforce regulations, and it may be hard to prove that the adoption of a WTO-inconsistent, trade-restrictive measure is the only means to ensure compliance with the regulation in question.
42. There was another case related to GATT Article XX(d) in which this defense was also unsuccessful. The reason was that Mexico sought to enforce with its inconsistent, trade-restrictive measure an international treaty, NAFTA, and not domestic regulation, the one covered by the exception. See Appellate Body Report, Mexico—Tax Measures on Soft Drinks and Other Beverages, 5 WT/DS308/AB/R (March 6, 2006), available at, http://www.internationaltraderelations.com/Case.U.S. - Mexico (Syrup AB 3.3.2006).htm. See in this regard, Alberto Alvarez-Jiménez, The Appellate Body Report on Mexico—Tax Measures on Soft Drinks and Other Beverages and the Limits of the WTO Dispute Settlement System, 33 LEGAL ISSUES OF ECONOMIC INTEGRATION 319 (2006). The most recent case in which Article XX(d) was invoked was Colombia—Indicative Prices and Restrictions on Ports of Entry. The panel found that the requirements for the invocation of this exception had not been met. See Panel Report, Colombia—Indicative Prices and Restrictions on Ports of Entry, 7.610 – 7.620, WT/DS366/R (April 27, 2009). This report was not appealed.
43. To recall, the chapeau of Article XX provides as follows:
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

> [I]t is ... important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of "abuse of the exceptions of ... Article XX." ... The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned[44].

A basic analysis of the invocation of GATT Article XX exceptions reveals that it is usually the chapeau the hurdle that has prevented measures from being fully justified[45]. The measures may have passed the first tier of the test, but failed the second. Examples are U.S. – Gasoline and United States — Import Prohibition of Certain Shrimp and Shrimp Products[46] under GATT Article XX(g), Brazil – Retreaded Tyres under Article GATT XX(b), and U.S. – Gambling under GATS Article XIV(a). Although a deep analysis of the case law regarding the chapeau is beyond the scope of this article, it suffices to look at the strict approach taken in this regard by the AB in the last mentioned report, in which the AB made significant general findings that consolidated its prior decisions.

In Brazil – Retreaded Tyres, the AB tightened the requirements that the application of a WTO-inconsistent trade-restrictive measure must satisfy to be covered by the chapeau of Article XX. Such tightening is evidenced by the AB's decision to reduce in two ways the sphere of justification for discrimination resulting from the application of trade-restrictive health measures. First, the AB determined that, to exonerate discrimination either between Members or between imported and domestic products, the respondent Member must show that the resulting discrimination is related to the goal[47] to be achieved by the exception invoked or that the discrimination does not go against such goal. Discrimination unrelated to or adverse to the given objective would be deemed as unjustified or as arbitrary and, therefore, contrary to the chapeau. In this sense, the AB held that even discrimination that has a rationale can be arbitrary or unjustified if it is not related to or goes against the goal. Second, the AB also determined that the degree of discrimination has no bearing on its justification and, therefore, that discrimination between Members or products cannot be justified on the ground that the level of discrimination is not significant enough to put at risk the attainment of the objective sought by the trade-restrictive necessary measure in question[49].

On this basis, it is possible to say that the AB has limited the scope of justification for discrimination resulting from the application of trade-restrictive measures in question to those that are consistent with the goals pursued or do not work against them, and it has refused to sanction discrimination just because it has a rationale or it does not significantly affect the achievement of the desired goal[48].

The result of the two-tier test of the GATT/GATS necessity exceptions developed by the AB is the following: the WTO-inconsistent measure is usually regarded as necessary[50] under the first tier of the test, and therefore, the measure stands, despite its unlawfulness[51]. Adverse rulings based on a rigorous approach under the chapeau will mean that members will mainly introduce changes to the way in which the measure is applied[52]. Consequently, the necessity exceptions are available to WTO members, not only on the books but also in reality, to excuse violations of the GATT obligations. The AB has achieved this result,

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44. U.S. – Gasoline AB Report, supra note 28, at 22. [footnotes omitted]. The AB ratified this function of the chapeau in Brazil – Retreaded Tyres. See Brazil – Retreaded Tyres AB Report, supra note 32, 224.
45. It was seen, however, that regarding Article XX(d) exceptions, the first tier has been the main hurdle.
46. Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 2000) [hereinafter US – Shrimp AB Report].
47. See Brazil – Retreaded Tyres AB Report, supra 32, 225 & 227.
48. See id. 232.
49. See id. 229.
50. Save in the case of those related to Article XX(d).
51. This has recently been the case in U.S. – Gambling and Brazil – Retreaded Tyres, in which the measures were not totally justified under the chapeau.
52. However changes to the measures can also be possible For instance, full compliance by the U.S. in U.S. – Gambling and by Brazil in Brazil – Retreaded Tyres seems to require and will probably require the enactment of new legislation or regulations. See Award, Brazil—Measures Affecting Imports of Retreaded Tyres, Arbitration Under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 54, WT/DS332/16 (Aug. 29, 2008) and Award, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Arbitration Under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 10, WT/DS285/13 (Aug. 19, 2005).
It may be important to highlight that the United States has not complied with the adopted panel and AB reports of the case yet. See WTO, Summary of the Dispute to Date: (January 19, 2009) available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm. See also Simon Lester, The WTO Gambling Dispute: Antigua Mulls Retaliation as the U.S. Negotiates Withdrawal of its GATS Commitments, ASIL Insights. April 8, 2008. Volume 12, Issue 5. available at http://www.asil.org/insights080408.cfm.

without having created the conditions for the abuse of such exceptions.

As will be seen below, the WTO model of necessity—which justifies a wrongful international act in a permanent way and without providing for any compensation—differs radically from that of customary international law, which, by establishing strict requirements, makes, as a matter of fact, the customary rule of necessity barely operative and available to States, even under difficult circumstances.
Foreign Investment Law's Approach to Necessity under Customary International Law

Foreign investment law, understood as comprising not only bilateral investment treaties ("BITs"), but also their case law, incorporates an approach to the state of necessity under customary international law that partially follows that of the ICJ and the ILC but has, nonetheless, a particularity that constitutes a contribution to the application of Article 25 of the ILC's Articles.

The reasons for the involvement of the customary rule of necessity in litigation related to violations of bilateral investment treaties are twofold. First, BITs contain necessity clauses that do not set out the requirements needed to invoke them. Consequently, investor/State tribunals adjudicating such disputes have resorted to Article 25 to fill this gap.

Second, these tribunals are explicitly authorized to apply customary law by Article 42(1) of the ICSID Convention, which provides:

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Second, these tribunals are explicitly authorized to apply customary law by Article 42(1) of the ICSID Convention, which provides:

> [I]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable.

So far, foreign investment law, or at least the case law resulting from disputes involving Argentina's crisis of 2000, follows the ICJ's and the ILC's restrictive approach to the state of necessity under customary international law, but with a very important variation: the unavailability of the defense to Argentina has not meant that this country has borne all the risks during the crisis.

The Argentine Crisis: Its Context, Measures to Address it, and Assessment in Light of the BIT.

In order to deal with hyperinflation early in the 1990s, Argentina enacted regulations fixing the Argentine peso at par with the U.S. dollar, and carried out a massive privatization program. Attracting foreign investment was a key component of the program, and to this end, Argentina granted the gas distribution industry, among others, the following rights: (i) tariffs were to be estimated in U.S. dollars; (ii) conversion to Argentine pesos would take place at the time of billing; and (iii) tariffs would be adjusted every six months according to the United States Producer Price Index ("PPI").

53. For instance, the Enron tribunal stated that customary international law had a complementary role to perform. See Award, Enron Corporation and Ponderosa Assets v. Argentina, 207, ICSID Case No. ARB/01/3, IIC 292(2007) (May 22, 2007) [hereinafter Enron Award].
54. See Award, CMS Gas Transmission Company v. the Argentine Republic, 57, ICSID Case No. ARB/01/8 (May 12, 2005) [hereinafter CMS Award], available at.

However, Argentina's economic crisis reemerged at the end of the last decade, and one of the measures Argentina adopted to sort out the crisis was to negotiate with foreign investors to suspend the PPI adjustment for six months during the first half of 2000. As the economic crisis deepened, provoking political upheavals that led to the appointment of successive presidents within weeks, Argentina enacted Emergency Law No. 25.561 on January 6, 2002, introducing significant changes to the foreign exchange system. The Argentine currency was no longer pegged to the U.S. dollar; the peso was devalued; and both the U.S. PPI adjustment and U.S. dollar calculations of tariffs were abolished. Tariffs were redenominated in pesos at the rate of one peso to the dollar[55]. Such measures were considered by the affected investors as a violation of the 1991 Treaty between the U.S. and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment and prompted litigation before the International Centre for the Settlement of Investment Disputes.

So far, all the investor/State tribunals have declared that the suspension of the guarantees violated the treaty. In particular, the suspension was held to infringe the fair and equitable treatment embodied in Article II(2)(a) of the Argentina-U.S. BIT[56] and the umbrella clause provided for in Article II(2)(c) of the BIT[57].

Once the tribunals found that Argentina had breached the BIT, they dealt with Argentina's defense that the measures were justified either under the customary international rule of necessity or under the text of the treaty, since such measures were adopted in order to resolve a major economic crisis[58].

The Strict Approach Toward Necessity under Customary International Law Adopted by Tribunals Applying Foreign Investment Law

In general, the approach to the state of necessity under customary international law adopted by the investor/State tribunals has followed that of the ICJ and the ILC. In effect, the Argentine crisis has not been regarded as justifying the violations of the Argentina – U.S. BIT, as already mentioned. Three tribunals have so declared[59], although one took the opposite view and found that the crisis met the requirements of the state of necessity under customary international law[60].

In its analysis of Article 25 of the Articles on State Responsibility, the CMS tribunal held that the conditions for its application had to be cumulatively fulfilled[61] and that the state of necessity had to be an exceptional tool[62]. In this sense, the CMS tribunal recognized that there was a grave crisis in Argentina[63]. However, two requirements were not met. First, the tribunal considered that the measures were not the only ones available to solve the crisis[64]. Second, it considered that Argentina had contributed to the crisis[65]. Absent two requirements of Article 25, the tribunal concluded that Argentina's crisis could not excuse the illicitness of the measures Argentina adopted to resolve it[66].

An opposing view was taken by the LG&E tribunal, for which the crisis met the requirements of Article 25 of the ILC's Articles. In effect, the LG&E tribunal declared that the situation "constituted the highest

55. See id. 65.
56. See id. 244, 281; Decision on Liability, In the Proceedings Between LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. and Argentine Republic, 121, 132 – 39, ICSID Case No. ARB/02/1 (Oct. 3, 2006) [hereinafter LG&E Decision on Liability]; Enron Award, supra note 53, 265 – 8; and Award, In the Proceeding between Sempra Energy International and Argentine Republic, 290, 303 – 4, Case No. ARB/02/16 (Sept. 28, 2007) [hereinafter Sempra Award].
57. See LG&E Decision on Liability, supra note 56, 169-70, 174; Enron Award, supra note 53, 275 – 7; and Sempra Award, supra note 56, 313 – 4.
58. This article deals exclusively with the interpretation and application of the state of necessity in customary international law carried out by the CMS, LG&E, Enron and Sempra tribunals.
59. This conclusion is based on the results of the disputes, which speak for themselves regarding the approach adopted by investor/State tribunals. Due to space limitations, this article does not explore in detail the arguments expressed by the tribunals with regard to each of the conditions of Article 25 of the ILC's Articles.
60. The differences are not restricted to the assessment of whether the crisis falls under the scope of Article 25 of the ILC's Articles. There are other issues that tribunals differ widely about, such as the scope of the requirements of Article 25 and the relations between BIT necessity clauses and Article 25. An analysis of the distinct approach of the tribunals to these issues goes beyond the scope of this article.
61. See CMS Award, supra note 54, 330.
62. See id. 317.
63. See id. 320.
64. See id. 324.
65. See id. 328-9.
66. See id. 331. The decision of the Ad Hoc Committee on Annulment reversed some findings and conclusions of the CMS tribunal, but not this one. Ad Hoc Committee, CMS Gas Transmission Company v. Argentine Republic, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 121, 128 - 36 (ICSID Case No ARB/01/8). Annulment Proceeding. (Sept. 25, 2007) [hereinafter CMS Decision on Annulment].
67. See LG&E Decision on Liability, supra note 56, 231.

degree of public disorder and threatened Argentina's essential security interests," and that the measures adopted did not seriously impair the rights of other States.

The tribunal did not fully analyze whether the measures were the only ones available to alleviate the crisis. It said, though, that tariffs on public utilities had to be addressed by those measures. Finally, the tribunal declared that LG&E had failed to demonstrate that Argentina had contributed to the situation of necessity. On this basis, the tribunal concluded that Argentina did not owe any compensation to LG&E during the time of the emergency and that Argentina had to comply fully with its obligations or fully compensate the investor once the emergency was over. The tribunal ruled that this occurred on April 26, 2003.

In the third chronological award regarding the Argentine crisis, the Enron tribunal applied the strict approach to necessity. The tribunal considered the risk of grave and imminent peril to an essential interest as requiring proof of a situation compromising "the very existence of the State and its independence ..." The tribunal concluded that this was not the case. The tribunal also held that the measures were not the only ones available to Argentina and determined that, although both internal and external factors had triggered the crisis[77], Argentina had made a significant contribution to it[78]. On this basis, the Enron tribunal determined that the requirements of the state of necessity under customary international law had not been met[79].

Finally, the Sempra tribunal reached an identical conclusion to the Enron tribunal. Although the tribunal found that the measures did not affect an essential interest of any other State or that of the international community[80], it held, like the Enron tribunal, that the crisis, although severe, did not comprise "the very existence of the State and its independence ... thereby qualify[ing] as one involving an essential State interest[81]."

Regarding the requirement that the measures taken be the only means available, the tribunal made both general and specific statements. In general, the tribunal held that "[q]uestions of public order and social unrest could have been handled, as in fact they were, just as questions of political stabilization were handled under the constitutional arrangements in force.[82]" More specifically, the tribunal maintained that there were usually a set of alternatives to handle emergencies and that it was difficult to justify that only one was available in this case[83].

Turning to an appraisal of the limitation on the plea of necessity of Article 25(2)(b), the Sempra tribunal recognized that the crisis resulted in part from internal factors and in part from external causes[84]. It held, therefore, that Argentina had substantially contributed to the crisis, and thus that the crisis,[85] was not exclusive the result of exogenous factors[86]. For all these reasons, the tribunal concluded that the requirements of necessity under customary international law had not been fully met[87].

77. See id. 311.
78. See id. 312.
79. See id. 313.
80. See Sempra Award, supra note 56, 352, 390.
81. Id. 348.
82. Id.
83. See id. 350.
84. See id. 353.
85. See id. 354.
86. See id.
87. See id. 355. The most recent decision regarding Argentina's crisis is the award in National Grid P.L.C. v. Argentine Republic. The Tribunal found that Argentina's measure had violated the fair and equitable treatment embodied in Article 2.2 of the Argentina-U.K. Treaty. (See Award, In the Matter of an UNCITRAL Arbitration, National Grid P.L.C. v. Argentine Republic, 180, (Nov. 3, 2008) [hereinafter National Grid Award]). There the Tribunal was faced with a particular situation stemming from the fact that the treaty does not contain a necessity clause similar to Article XI of the Argentina-U.S. BIT. The investor argued that such absence meant that Argentina could not raise the defence of necessity, because the UK had consistently opposed it, and the absence of a necessity exception in the BIT was additional proof of such opposition. (See id. 256). The National Grid Tribunal refused to accept this argument. First, it found that the UK had in the past accepted the defence (See id. 256), and second, the Tribunal held that Article 25 was customary international law and that, since the parties had not explicitly excluded the defence in the BIT, "either of them is entitled to raise it."(Id. 256).

Having said this, the Tribunal concluded that Argentina could not succeed in its necessity defence, since it had substantially contributed to the situation causing it. In effect, for the Tribunal—relying on the International Monetary Fund—there were internal and external causes to the crisis. Among the internal ones, the Tribunal listed external indebtedness, fiscal policies, and labor market rigidity, which were aggravated by some of the measures adopted to face the crisis, such as "capital controls ... and the asymmetrical pesoization and indexation."(Id. 260). On this basis, the Tribunal concluded that Argentina had made substantial contributions to the crisis and stopped its analysis of Article 25 there, since the absence of the requirement was enough for the Tribunal to declare that the state of necessity, as defined by customary international law, did not exist.(See id., 262).

As can be inferred even from this brief account, investor/State arbitration tribunals, save the LG&E tribunal, have restrictively interpreted the state of necessity under customary international law and subjected its conditions to such strict thresholds. The approach is in general terms similar to that of the ICJ and the ILC. However, foreign investment law has added an important contribution to the resolution of conflicts involving an economic crisis: the unavailability of the defense of necessity under customary international law has not meant that the tribunals have ignored the crisis.

Investor/State Tribunals' Complement to Their Restrictive Approach Regarding Necessity under Customary International Law: Their Recognition of the Crisis When Calculating Damages

The fact that the Argentine crisis produced litigation related to long-term contracts has led investor/State tribunals to try to achieve a balance in the protection of the parties' interest. While tribunals have adopted a strict interpretation of the customary rule of necessity, they have taken into account the crisis when calculating damages. Thus, crisis has not been ignored and investors have been required to bear some risks stemming from its occurrence. This approach developed in foreign investment law could be considered strict but balanced.

It is possible to say that the CMS tribunal set the tone regarding the approach to be taken when deciding whether a crisis was justified by the state of necessity under customary international law and what consequences followed if the crisis did not meet the requirements of Article 25. The following passage indicates this general orientation of the award:

> The question for the Tribunal is then how does one weigh the significance of a legal guarantee in the context of a collapsing economic situation. It is certainly not an option to ignore the guarantee, as the Respondent has advocated and done, but neither is it an option to disregard the economic reality which underpinned the operation of the industry[88]

The expression of this perspective in the award was twofold: first, customary international law did not allow Argentina to disregard previous commitments made to CMS; second, Argentina's economic crisis was not ignored when the tribunal estimated the amount of compensation due to CMS.

The reality of the crisis was taken into account by the tribunal at the time it estimated the level of compensation Argentina had to pay to the investor:

> [T]he crisis had in itself a severe impact on the Claimant's business, but this impact must to some extent be attributed to the business risk the Claimant took on when investing in Argentina, this being particularly the case as it is related to decrease in demand. Such effects cannot be ignored as if business had continued as usual. Otherwise, both parties would not be sharing some of the costs of the crisis in a reasonable manner and the decision could eventually amount to an insurance policy against business risk, an outcome that ... would not be justified. On the other hand, a number of the measures adopted did indeed contribute to such hardship and the burden of those ought not to be placed on the Claimant alone ...[89]

In order to reflect this finding in the estimate of the compensation due to CMS, the tribunal determined the duration of the crisis and the business effects that the company could not avoid. The tribunal considered that the crisis started on August 17, 2000, when a judge suspended the agreements postponing the tariff adjustments[90], and it ended some time between the end of 2004 and the beginning of 2005[91]. The reduction in gas demand during these years was taken into account by the tribunal when it estimated TGN's gas revenues during the time of the license[92]. This was the concrete impact that the crisis had on CMS.

Without embarking on a similar analysis, the Enron tribunal adopted a comparable approach. Although, as was seen, it did not declare that the situation in Argentina fell under Article 25 of the ILC's Articles, it took the situation into account at the time of the calculation of the compensation for equity damage owed to Enron. The tribunal recognized three types of

88. CMS Award, supra note 54, 165.
89. Id. 248.
90. See id. 62 & 441.
91. See id. 250.
92. See id. 444 – 7.
93. See Enron Award, supra note 52, 380 & 386 – 9. The panel compared the value of Enron's investment when the pesification of tariffs began (December 31,

damage: equity damage, loss in value of Enron's investment due to the pesification of tariffs[93], and loss in value stemming from the PPI adjustment[94]. In particular, the tariff base, the weighted average costs of capital, and the period over which tariff adjustment had taken place were adjusted to reflect the crisis[95]. Such adjustment was made at the time of estimating the loss on the value of Enron's investment due to the pesification of tariffs[96].

Finally, the Sempra tribunal also took the crisis into account when it used the fair market value as the method to calculate the damages suffered by Sempra[97]. To this end, the tribunal calculated the damages by comparing the value of the firms, had the pesification of tariffs not taken place ("the but-for scenario," in the tribunal's words), with the same value under the pesification scenario[98]. In the calculation of the value of the investment under the but-for scenario, the Sempra tribunal explicitly recognized that the crisis had to have an impact on such value:

> [T]he Tribunal has held above that there was quite evidently a major crisis in Argentina and while this crisis does not excuse the wrongfulness of the measures taken in respect of the investment, it does have an incidence on the issue of valuation and compensation[99].

The calculation of the damages in the but-for scenario was based on a discount cash flow ("DCF") model based on the following factors: the asset base, the discount rate under the but-for scenario, the tariff increases that would have been approved under the but-for scenario, and the consumption effect under the but-for scenario1[00]. The Sempra tribunal adjusted Sempra's asset base[101], the tariff changes[102], and consumption[103] for the period 2001–2002 in a way that reflected the crisis and based on the fact that Sempra would have been called by Argentina to bear some of the costs of the crisis.

From the CMS, Enron, and Sempra awards, it is possible to say that the strict but balanced approach to necessity developed in foreign investment law is, in a nutshell, to interpret strictly the conditions for the successful invocation of the state of necessity under customary international law without ignoring the existence of the proven crisis. Consequently, States have not benefitted from the defense of the customary rule, but they have not shouldered all the risks associated with the crisis[104].

This is one of the contributions that foreign investment law has made to the interpretation and application of the state of necessity under customary international law. The question that could be raised now on the basis of the comparative analysis carried out here is whether the WTO model for necessity can be transplanted to customary international law and also be applied by investor/State tribunals. The answer is yes and, even more, the main constitutive elements are already present, although unconnected, in the recent case law rendered by tribunals of this kind.

How to Transplant the WTO Law Model of Necessity to Customary International Law

One of the virtues of the WTO law model developed by the AB is that the necessity exceptions are operative provisions in the sense that they are available to WTO Members, as a matter of reality, to justify WTO-inconsistent measures, but without creating the conditions for their abuse. As was seen, this outcome is possible because a finding that an inconsistent measure satisfies the requirements of the first tier of the necessity test of Article XX is not the final word regarding the justification of the measure. The measure still must satisfy the requirement of the chapeau, which is the provision relied on to prevent the abuse of the necessity exceptions. The WTO model can be transplanted to customary international law to be applied by, among others, investor/State tribunals if another provision that can be interpreted to prevent abuse of Article 25 is found. This provision certainly

2001) and the value at the time of the award. See id. 403.
94. See id. 365.
95. See id. 407 & 420.
96. See id. 379.
97. See Sempra Award, supra note 56, 404.
98. The total amount of damages resulted from adding to this difference the amount that corresponded to the damages caused by Argentina as a consequence of the lack of application of the U.S. PPI adjustment. See id. 411 & 416.
99. See id. 417.
100. See id. 416
101. See id. 422 & 426.
102. See id. 441 & 445.
103. See id. 448–9.
104. See id. 436. It is worth mentioning that the National Grid Tribunal also followed this general trend (See National Grid Award, supra note 87, 274 & 283, 293) and stated that its method of calculation of compensation "appropriately reflects the impact of the Measures, while still recognizing that, because of the economic and social crisis, the situation of the Argentine economy was definitely not 'business as usual.'" (Id. 290)

exists and is Article 27 of the ILC's Articles, which regulates, as was seen above, the effects of the successful invocation of the former precept.

Article 27 sets forth two effects, as was illustrated: (i) the state of necessity can be temporary; and (ii) some form of compensation can be negotiated by the parties. Article 27 can play the role of preventing the abuse of Article 25, because adjudicators have full control over these two above-mentioned issues so as to attenuate the impact that the successful declaration of the state of necessity may have on the investor—if the case is one associated with the application of customary international law in the context of BIT disputes—or on the State towards which the international obligation exists. In effect, adjudicators can determine the length of the state of necessity and, absent agreement between the parties, can also determine the appropriate compensation during the state of necessity.

An approach partially similar to the WTO model was used by the LG&E tribunal in the sense that it used its power to determine the length of time that the state of necessity existed so as to control the effects of the successful invocation of Article 25. Differently put, although the LG&E tribunal declared that the crisis met the requirements of the state of necessity under customary international law and that no compensation was due to the investor during such crisis, the tribunal significantly narrowed the length of time during which the necessity existed when calculating the damages due by Argentina to LG&E. Full compensation was calculated from the date the tribunal declared that the state of necessity had ceased to exist and Argentina should have started meeting its obligations to the investor, which it had not.

The tribunal estimated the damages as being the decrease in revenue to the licensees and the consequent reduction in dividends for LG&E[105]. The tribunal calculated the dividends received by LG&E between August 18, 2000, and February 28, 2005, had the measures not been adopted, taking into account growth in its business[106]. It subtracted from this amount the dividends during the state of emergency (December 2001–April 26, 2003)[107]. The resulting amount owed by Argentina to LG&E was U.S.$ 57,4 million[108].

As can be seen, the duration of the Argentine crisis was considered to be much shorter for the LG&E tribunal than for the CMS tribunal. For the former it ran from December 1, 2001, until April 26, 2003, while for the latter, it ran from August 17, 2000, to some time at the end of 2004 or beginning of 2005. The LG&E tribunal used its power to determine the length of the necessity to control the consequences of the successful invocation of Article 25 and its zero compensation conclusion. By narrowing the length of the state of necessity, the tribunal granted full compensation once the necessity ended, regardless of the fact that Argentina had not fully overcome its crisis.

However, this is not the only instrument to control abuse, because courts and tribunals applying Article 27 can also determine the level of compensation owed during the state of necessity[109]. This is what the Enron tribunal stated in the following terms:

> The Respondent's view appears to be based on the understanding that Article 27 would only require compensation for the damage that arises after the emergency is over and not for that taking place during the emergency period. Although that Article does not specify the circumstances in which compensation should be payable because of the range o possible situations, it has been considered that this is a matter to be agreed with the affected party, thereby not excluding the possibility of an eventual compensation for past events. In the absence of a negotiated settlement between the parties, this determination is to be made by the Tribunal to which the dispute has been submitted[110].

The existence of this kind of compensation will certainly be assessed on a case-by-case basis, but some general ideas suggest that it can be related to the

105. See Award. In the Proceedings between LG&E Energy Corp., LG&E Capital Corp., LG&E International. Inc (Claimants) and Argentine Republic (Respondent), 48 & 58, ICSID Case No. RB/02/1. (July 25, 2007) [hereinafter LG&E Award on Damages].
106. See id. 95, 100.
107. See id. 2, 106.
108. See id. 109.
109. It is worth recalling that this compensation differs from the one stemming from wrongful international acts that are not justified. The scope of the former is narrower than that of the latter. See text accompanying supra note 24.
Enron Award, supra note 53, 345. It is important to notice that the LG&E tribunal declared that Article 27(b) did not impose compensation and that this issue had to be resolved according to the BIT. See LG&E Decision on Liability, supra note 56, 260. The CMS Ad Hoc Committee is of a similar view regarding Article 27(b). See CMS Decision on Annulment, supra note 66, 146-47. This conclusion is based on the following ILC statement:
Paragraph (b) does not attempt to specify in what circumstances compensation should be payable. Generally the range of possible situations covered by Article

requisites of Article 25. For instance, if the state of necessity has been produced exclusively by exogenous factors, a tribunal may decide that compensation is not due. However, if the State has contributed to some extent, although not substantially, a tribunal may decide that some compensation is owed due to such contribution.

Consequently, if the dots of the LG&E and Enron awards are connected, tribunals can use Article 27 to control the effects of recognizing that a particular situation meets the requirement of necessity under customary international law. If they do this, first, the recognition does not mean that the investors bear all risks; and second, the use of Article 27 is deployed in a way that prevents the abuse of Article 25: the wrongful international act can be justified, but the State invoking it bears some costs. Either the length of the necessity is narrowly defined so that full compensation is due afterwards, and/or the invoking State may be declared to owe some compensation to the given investor or to the State towards which the international obligation existed during the state of necessity.

As can be seen, Article 27 of the ILC's Articles can play the role in customary international law that the chapeau of GATT Article XX plays in WTO law to control the abuse of the necessity exceptions in this legal system. This possibility could open the door for a less strict approach regarding the interpretation of Article 25, which would become an operative provision without imposing all burdens on investors or the State towards which the international obligation at issue exists.

The main elements of this approach have already been put in place by the LG&E and Sempra awards in foreign investment law, so a step further in this regard would be merely putting them together on the basis of the inspiration that courts and tribunals may find from the WTO law model of necessity.

Conclusion

Both the ICJ in Gabcikovo-Nagymaros and the ILC have pointed out that Article 25—a customary international rule—needs to be interpreted narrowly in order to prevent its abuse and the ensuing effect of justifying wrongful international acts. The result is that Article 25 is a provision whose availability to States seems very limited, even in extreme circumstances.

In contrast, and despite the significant differences in terms of requirements, the GATT/GATS necessity exceptions, that also justify WTO-inconsistent measures adopted by Members, are mostly available to the membership[111]. The article has shown that the AB has adopted a relatively lenient approach to the necessity test in WTO law, regarding the first tier of the legal test of Article XX exceptions. The AB has been able to do so because it has used the chapeau of Article XX to control any potential abuse of the said exceptions. The result of this approach is that when the necessity test is satisfied the WTO-inconsistent measure stands to a significant extent, but its application or design must be adjusted by the respondent Member to comply with the chapeau. As a consequence, the necessity exceptions remain operative provisions, without the door being opened for their abuse.

This article has shown that the recent case law in foreign investment law regarding the state of necessity under customary international law mainly follows the ICJ and the ILC and is, therefore, marked by a strict approach to the interpretation of Article 25 of the ILC's Articles. However, this case law evidences an important contribution: a strict but balanced approach. In the application of Article 25 to investor/States relations, the lack of availability of the justification provided by this provision has not meant that the crisis—when proved—has been ignored: tribunals have taken the crisis into account when calculating the amount of damages due to claiming investors by the wrongful international act. In sum, Article 25 has not been available to States to justify wrongful

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V is such that to lay down a detailed regime for compensation is not appropriate....

ILC'S COMMENTARIES, supra note 2, at 190.

However, in my view, arbitration tribunals should be cautious when relying on this ILC statement. What the ILC is saying is that it cannot lay down abstract rules regarding compensation under necessity which can be applied in particular cases. The ILC has limitations in the scope of its codification effort, and Article 27(b) is a clear expression of them.

Adjudicators, though, are in a different situation. They do have particular facts and lack the limitation that the ILC has. In consequence, adjudicators should read the ILC Commentary, not as ordering or precluding ex ante compensation, but simply as leaving the question open for adjudicators to answer, as was the view of the Enron tribunal.

For a recognition of the ILC's limitations, see Alain Peller's intervention in An Overview of the International Law-Making Process and the Role of the International Commission in MAKING BETTER INTERNATIONAL LAW: THE INTERNATIONAL LAW COMMISSION AT 50 at 69, 81 (1998).

Save in the case of the exception provided for in GATT Article XX(d).

international acts—to the benefit of investors—but the risks during the crisis have not been borne exclusively by the Host State invoking necessity.

However, the article reveals that this approach is not the only one possible regarding Article 25, and that the WTO model of necessity could also be applied in the context of this provision. In effect, Article 27 of the ILC's Articles can play the role in customary international law that the chapeau of Article XX plays in WTO law. This article has illustrated how investor/State tribunals applying Article 25 can use the calculation of the length of the state of necessity and/or the compensation owed to investors to attenuate the consequences of the successful invocation of this provision. Consequently, the norm becomes available to Host States, not only on the books, but also in reality, without transferring all the risks during the state of necessity to investors. Finally, this article has also shown how the main elements of this approach have already been applied and formulated by the LG&E and the Enron awards, respectively.

Both approaches—that of recent investor/State case law and that based on the WTO law of necessity—could be deployed regarding the interpretation of Article 25 of the ILC's Articles. While the economic consequences of both approaches cannot be assessed here, they differ widely regarding the availability of the state of necessity under customary international law. Under the first approach, Article 25 remains mainly out of reach for States; under the second, inspired by the WTO model, this provision becomes more available, without the creation of the conditions for its abuse.