THE INTERPRETATION OF NECESSITY CLAUSES IN BILATERAL INVESTMENT TREATIES AFTER THE RECENT ICSID ANNULMENT DECISIONS*

Interpretación de cláusulas de emergencia de tratados de protección a la inversión a la luz de las decisiones recientes de los comités ad-hoc del centro internacional de arreglo de controversias relativas a inversiones

Alberto Alvarez-Jiménez **

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** Phd. Profesor. Facultad de Derecho. University of Waikato. Nueva Zelanda. correo electronico. aalvarez@waikato.ac.nz.

ABSTRACT:
The recent annulment decision in Sempra Energy International v. Argentine Republic rendered by an ad hoc committee of the International Centre for Settlement of Investment Disputes (ICSID) has ratified the approach previously adopted by the ad hoc annulment committee in CMS Gas Transmission Company v. the Argentine Republic, according to which the customary rule of necessity embodied in Article 25 of the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts (Articles of State Responsibility) cannot be used, as several arbitration tribunals thought, to determine the requirements for the successful invocation of the necessity clause of the United States-Argentina bilateral investment treaty in its Article XI. To do so is an error of law, since the provisions are independent and operate in a different fashion. Further, the Sempra and CMS annulment decisions have determined that, if a necessity clause of a bilateral investment treaty (BIT) is successfully invoked by host States, the clause excludes the existence of a violation of the treaty by the actions or regulations adopted to face a given political, social, or economic crisis that has had an adverse effect on foreign investors' rights. The consequence is that no compensation is owed to foreign investors for the losses they bear as a result of these acts during the crisis.

The purpose of this article is to offer a mode of interpretation for BIT necessity clauses, which would allow a more balanced result in terms of allocation of risks while staying in line with the CMS and Sempra annulment decisions. To this end, the article proposes new requirements that should be met to successfully invoke BIT necessity clauses. It also specifies the effects of such success: The justification offered by the clause is temporary and compensation is not, in principle, owed to investors during the given crisis, but some form of indemnity can exist in certain cases even if the BIT necessity clause is successfully invoked.

DESCRIPTORS:
Foreign investment protection, emergency clauses, allocation of risks during economic crises.

SÍNTESIS:
Las decisiones recientes emitidas por los Comités Ad Hoc del Centro Internacional de Arreglo de Controversias Relativas a Inversiones (CIADI) en los casos *CMS Gas Transmission Company v. República Argentina y Sempra Energy International v. República Argentina* han establecido que la norma de costumbre internacional sobre el estado de necesidad incorporada en los Artículos sobre Responsabilidad Estatal Internacional preparados por la Comisión de Derecho Internacional no puede ser utilizado para la determinación de los requisitos de las cláusulas de emergencia de tratados de protección a la inversión. Adicionalmente, dichas decisiones han determinado que cuando se reúnen los requisitos de una cláusula de emergencia las medidas que un Estado ha adoptado para enfrentar una severa crisis económica y que han afectado los intereses de inversionistas extranjeros no violan el respectivo tratado. La consecuencia es que el Estado respectivo no está obligado a indemnizar al inversionista por los danos que ha sufrido por dicha causa. Hay implícita en esta conclusión una transferencia a los inversionistas extranjeros de gran parte de los riesgos de catástrofes económicas. El propósito de este artículo es ofrecer una interpretación de las cláusulas de necesidad en tratados de protección de la inversión que logra una distribución más balanceada de riesgos entre inversionistas y Estados, de manera que ambos comparten dichos riesgos en los mencionados eventos.

DESCRIPTORES:
Protección a la inversión, cláusulas de emergencia, distribución de riesgos durante crisis económicas.

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The recent annulment decision in *Sempra Energy International v. Argentine Republic*[1] rendered by an ad hoc committee of the International Centre for Settlement of Investment Disputes (ICSID) has ratified the approach previously adopted by the ad hoc annulment committee in *CMS Gas Transmission Company v. the Argentine Republic*[2], according to which the customary rule of necessity embodied in Article 25 of the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts (Articles of State Responsibility) cannot be used, as several arbitration tribunals thought, to determine the requirements for the successful invocation of the necessity clause of the United States-Argentina bilateral investment treaty in its Article XI. To do so is an error of law, since the provisions are independent and operate in a different fashion. Further, the *Sempra* and *CMS* annulment decisions have determined that, if a necessity clause of a bilateral investment treaty (BIT) is successfully invoked by host States, the clause excludes the existence of a violation of the treaty by the actions or regulations adopted to face a given political, social, or economic crisis that has had an adverse effect on foreign investors' rights. The consequence is that no compensation is owed to foreign investors for the losses they bear as a result of these acts during the crisis[3].

It is possible to say that the early interpretation of the BIT necessity clause by arbitration tribunals reached—as a matter of policy—the right result but on wrong legal grounds, as the annulment decisions are now stating. Both host States and investors shared the burden of critical political, social, or economic situations[4]. However, the interpretation of the necessity clause after the *CMS* annulment determination carried out by the tribunal in *Continental Casualty Company v. The Argentine Republic*[5], although based on the right legal grounds, reached a not-so-adequate policy result: The consequences of these critical situations were shouldered only by foreign investors. This means in the long run that they will react to such jurisprudence by requesting *ex ante* an additional premium for their investments from States party to BITs with similar clauses to cover the risk of losses during potential severe crises[6]. These crises do not often happen to States, and a jurisprudence that transfers all risks to investors

1 See Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, *decision on the Argentine Republic's request for annulment of the award* (June 29, 2010), available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8 (last visited January 10, 2011) [hereinafter *Sempra* annulment].

2 See CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, *decision of the* ad hoc *committee on the application for annulment of the Argentine Republic* (September 25, 2007), available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4 (last visited January 11, 2011) [hereinafter *CMS* annulment].

3 With two annulment decisions pointing in the same direction, it may be expected that this line of reasoning will influence future ICSID determinations of a similar character. It is a small sample but nonetheless sets a trend.

4 See Alberto Alvarez-Jiménez, "New approaches to the state of necessity in customary international law: Insights from WTO law and foreign investment law," 19 *American Review of International Arbitration* 463 (2008), pp. 482–84 [hereinafter Alvarez-Jiménez, "Insights"].

5 See Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/9, *award* (September 5, 2008), available at: http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf (last visited April 6, 2011) [hereinafter *Continental* award].

6 See William W. Burke-White and Andreas von Staden, "Investment protection in extraordinary times: The interpretation and application of non-precluded measures provisions in bilateral investment treaties," 48 *Virginia Journal of International Law* 307 (2008), p. 402.

may not wind up favoring host States in the long term, since they will eventually start transferring resources to investors well in advance of a crisis' taking place, and even to investors who may never be affected by them. When this situation happens, the efficiency of such transfers may not be evident from a State's perspective. On the contrary, an approach to the interpretation of BIT necessity clauses that allows States and investors to share the risks in severe, abnormal circumstances creates an incentive for the reduction of the said premium and of the associated transfers and, in the end, for a better allocation of public resources.

The purpose of this article is to offer a mode of interpretation for BIT necessity clauses, which would allow a more balanced result in terms of allocation of risks while staying in line with the *CMS* and *Sempra* annulment decisions. To this end, the article proposes new requirements that should be met to successfully invoke BIT necessity clauses. It also specifies the effects of such success: The justification offered by the clause is temporary and compensation is not, in principle, owed to investors during the given crisis, but some form of indemnity can exist in certain cases even if the BIT necessity clause is successfully invoked. The pertinence of reaching a more balanced result in the interpretation of BIT necessity clauses is higher now, not only for the existence of the cases pending from the Argentine saga, but also for the fact that the current crisis may eventually lead to the invocation of such clauses on the part of some States particularly hit by it. [7]

To develop these arguments, this article is divided into six parts. Part A briefly presents the content of the customary rule of necessity and the effects of its successful invocation. Part B shows the early interpretation of the necessity clause contained in Article XI of the U.S.-Argentina BIT adopted by arbitration tribunals dealing with disputes stemming from Argentina's 2001 crisis, according to which the requirements for the successful invocation of the clause were those of Article 25 of the Articles of State Responsibility. Part C discusses the findings and conclusions of both the *CMS* and *Sempra* annulment decisions, in which the independent character of BIT necessity clauses, and in particular of Article XI, was highlighted. Part D presents the two autonomous assessments of the said necessity clause carried out so far by the tribunals in *LG&E Energy Corp. v. Argentine Republic* and *Continental,* and considers their different approaches regarding the requirements of the clause and the effects of its successful invocation. Part E draws on these decisions and awards to show some of the general considerations that could be relevant in the future interpretation of BIT necessity clauses. Finally, the conclusions of the article are offered.

A. Necessity in public international law

Article 25 of the Articles of 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.

7 See Jacques Werner, "Revisiting the necessity concept," 10 *Journal of World Investment and Trade* 549 (2009), p. 552.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

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

(b) the State has contributed to the situation of necessity. [8]

In its judgment in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*[9] case, the International Court of Justice (ICJ) held that the above-mentioned provision had the status of customary international law[10]; that the concept had to be interpreted very narrowly[11], since it serves to excuse wrongful acts under international law; and that the requirements must be satisfied cumulatively by the State invoking necessity.[12]

In addition, the consequences of the successful invocation of necessity are set forth in Article 27 of the Articles of State Responsibility, 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[13].

The first consequence that emerges from the text of this provision is that the excuse of necessity does not preclude the possibility of compensation for the aggrieved State, an issue that the respective States must deal with. The second important consequence 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 has to comply with its obligation in full or partially. In this regard, the ICJ stated in *Gabčíkovo-Nagymaros* that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.[14]" Part of the duty to comply, says the International Law Commission (ILC), "includes cessation of the wrongful conduct.[15]" This is to say that the excuse is, in essence, temporary[16].

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8 James Crawford, *The International Law Commission's articles on state responsibility: Introduction, text and commentaries* (Cambridge: Cambridge University Press, 2002), p. 178 [hereinafter *Articles of State Responsibility commentaries*]. See also José Manuel Cortés Martín, "El estado de necesidad en materia económica y financiera," 25 *Anuario Español de Derecho Internacional* 119 (2009).

9 Gabčíkovo-Nagymaros Project (Hungary/Slovakia), *judgment* (September 25, 1997), reprinted in *I.C.J. Reports 1997*, p. 7, available at: http://www.icj-cij.org/docket/files/92/7375.pdf?PHPSESSID=18909d1a7f79078e375317366bf0e84a (last visited January 12, 2011) [hereinafter *Gabčíkovo-Nagymaros*].

10 See *Gabčíkovo-Nagymaros*, *supra* note 9, ¶ 51. However, some authors do not share this view. Kurtz, for instance, argues that the work of the International Law Commission should not be considered to be customary international law on its own, but instead an expression of the progressive development of international law, at least regarding Article 25. See Jürgen Kurtz, "Adjudging the exceptional at international investment law: Security, public order and financial crisis," 59 *International and Comparative Law Quarterly* 325 (2010), p. 335. I will not delve into this particular topic for practical reasons: the International Court of Justice put all its weight behind the customary nature of a text almost identical to Article 25, and arbitration tribunals have so far followed suit. While contesting such nature remains a valid scholarly option, the fact is that investor-State tribunals will not likely challenge this character in the future in the absence of clear, opposite State practice. I proceed on the basis of this assumption.

11 See *Gabcikovo-Nagymaros*, *supra* note 9, ¶ 51. See also Cortés, "El estado de necesidad en materia económica y financiera," *supra* note 8, p. 136.

12 See *Gabcikovo-Nagymaros*, *supra* note 9, ¶ 51. For a complete assessment of the requirements in light of recent case-law, see Andrea K. Bjorklund, "Emergency exceptions: State of necessity and *force majeure*," in Peter Muchlinski, Federico Ortino, and Christoph Schreuer, eds., *Oxford Handbook of International Investment Law* (New York: Oxford University Press, 2008), pp. 474–88.

13 *Articles of State Responsibility commentaries*, *supra* note 8, p. 189. For a detailed analysis of the history of this text, see Bjorklund, "Emergency exceptions," *supra* note 12, pp. 467–71.

14 *Gabcikovo-Nagymaros*, *supra* note 9, ¶ 101.

15 *Articles of State Responsibility commentaries*, *supra* note 8, p. 190.

16 For a detailed illustration of the interpretation of this provision in recent international judicial decisions, see Bjorklund, "Emergency exceptions," *supra* note 12, pp. 510–13.

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[17]. This is the reason why Article 25 of the Articles of State Responsibility does not transform an unlawful act carried out by the State invoking such provision into a lawful one. The act is unlawful, but the breach is excused[18]. Here lies the very important distinction between primary and secondary rules that the ILC has made. The content of States' international obligations is determined by the primary rules, while the consequences of the breach of these obligations are set by the secondary rules, those regulating State responsibility. The distinction was necessary so that the ILC would not interfere with States' sovereignty by telling them what sorts of obligations they could enter into[19]. What this distinction reveals is that the ILC's Articles of State Responsibility play a role only when there is a violation of an international obligation. If there is none, for example, because the violation is exempted by a treaty provision, the Articles are inapplicable, which is why they are considered secondary rules.[20]

The reasons for the involvement of the customary rule of necessity in disputes arising from violations of bilateral investment treaties are twofold. First, BITs contain necessity clauses that, apparently, do not set forth the requirements for their invocation. Consequently, investor-State tribunals adjudicating such disputes resort to Article 25 to fill this gap. The second reason is that these tribunals are explicitly authorized to make use of customary law by Article 42(1) of the ICSID Convention, which provides:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable[21].

Argentina's 2001 crisis and the measures adopted to face it[22] affected foreign investors and triggered litigation under the dispute settlement provisions of several BITs. So far, all the investor-State tribunals have declared that the

17 See *Gabcikovo-Nagymaros*, *supra* note 9, ¶ 48.

18 See in this regard, Vaughan Lowe, "Precluding wrongfulness or responsibility: A plea for excuses," 10 *European Journal of International Law* 405 (1999), p. 406. The ILC seems to have later adopted this terminology at least partially, when it stated that "necessity will only rarely be available to *excuse* non-performance of an obligation." *Articles of State Responsibility commentaries, supra* note 8, p. 178 (emphasis added). See also Ian Johnstone, "The plea of 'necessity' in international legal discourse: Humanitarian intervention and counter-terrorism," 43 *Columbia Journal of Transnational* Law 337 (2005), p. 339.

19 The ILC explained in detail in this regard:

> Without such a distinction, there was the constant danger of trying to do too much, in effect, of telling States what kinds of obligations they can have. However difficult it may be to draw in particular cases, the distinction allowed the framework law of State responsibility to be set out without going into the content of these obligations. That would be an impossible task in practice . . . The law relating to the content and the duration of substantive State obligations is as determined by the primary rules. The law of State responsibility as articulated in the Draft Articles provides the framework—those rules, denominated "secondary," which indicate the consequences of a breach of an applicable primary obligation.

Articles of State Responsibility commentaries, supra note 8, p. 15–16; see also Daniel Bodansky, John R Crook, and James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A retrospect," 96 *American Journal of International Law* 874 (2002), pp. 876–79. For a historical account of the origin of the distinction and for a criticism, see Philip Allott, "State responsibility and the unmaking of international law," 29 *Harvard International Law Journal* 1 (1988), pp. 6–7, 13–14.

20 As we will see below, this distinction between primary and secondary rules will play a significant role in investor-State arbitration when interpreting the customary international rule of necessity.

21 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 159, 4 ILM 532 (1965), Article 42(1), available at: http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last visited March 2, 2010) [hereinafter ICSID Convention].

22 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 some foreign investors, 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). However, economic problems resurfaced at the end of the last decade, forcing Argentina to introduce significant changes to its 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 calculation of tariffs were abolished. Tariffs were re-denominated in pesos at the rate of one peso to the dollar. See CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, *award* (May 12, 2005), ¶¶ 57, 65, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504_En&caseId=C4 (last visited January 13, 2011) [hereinafter *CMS* award].

regulations violated the given treaties[23]. Once a tribunal had considered that Argentina had breached a BIT, it dealt with Argentina's defense that the measures were justified either by the customary international rule of necessity or by the text of the treaty, since they were adopted in order to resolve a major economic crisis[24]. So far, only the *LG&E* and *Continental* tribunals have recognized that the Argentine crisis met the requirements of the U.S.-Argentina BIT Article XI necessity clause[25].

B. The early approach: Article 25 of the Articles of State Responsibility used to determine the requirements for the successful invocation of BIT necessity clauses

As was mentioned, the majority of the investor-State tribunals dealing with Argentina's 2001 crisis had been relying on the customary rule of necessity to interpret the U.S.-Argentina BIT necessity clause, mainly owing to the fact that the clause invoked by Argentina as a defense, Article XI, apparently did not contemplate the requirements for its successful invocation[26]. This provision set forth:

> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests[27].

The *CMS* tribunal held that the requirements of Article XI were those of the customary rule of necessity[28], which had to be cumulatively fulfilled[29], and that the state of necessity had to be an exceptional tool[30]. In more precise terms, the *Enron* tribunal stated that "[t]he Treaty [Article XI] becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned[31]," a statement that the *Sempra* tribunal reiterated in its award in exactly the same terms[32]. Once the *Enron* and *Sempra* tribunals found that Argentina did not meet the

23 See LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, *decision on liability* (October 3, 2006), ¶¶ 132–39, 174, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC627_En&caseId=C208 (last visited January 13, 2011) [hereinafter *LG&E* decision on liability]; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, *award* (May 22, 2007), reported in *International Investment Claims* 292 (2007), ¶¶ 265–68, 275–77 [hereinafter *Enron* award]; Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, *award* (September 28, 2007), ¶¶ 303–4, 313–14, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8 (last visited January 12, 2011) [hereinafter *Sempra* award]; National Grid P.L.C. v. Argentine Republic, UNCITRAL Award (November 3, 2008), ¶ 180, available at: http://ita.law.uvic.ca/documents/NGvArgentina.pdf (last visited January 14, 2011) [hereinafter *National Grid* award]; *CMS* award, *supra* note 22, ¶ 281.

24 For a detailed assessment of necessity in some branches of international law, see Alvarez-Jiménez, "Insights," *supra* note 4.

25 See *LG&E* decision on liability, *supra* note 23, ¶¶ 256–59; *Continental* award, *supra* note 5, ¶ 233. The *CMS*, *Enron* and *Sempra* tribunals reached the opposite conclusion. See *CMS* award, *supra* note 22, ¶ 331; *Enron* award, *supra* note 23, ¶ 339; *Sempra* award, *supra* note 23, ¶¶ 355, 388, 390. See Michael Waibel, "Two worlds of necessity in ICSID arbitration: CMS and LG&E," 20 *Leiden Journal of International Law* 637 (2007).

26 For a historical account of the U.S.-Argentina BIT, see José E. Alvarez and Kathryn Khamsi, "The Argentine crisis and foreign investors: A glimpse into the heart of the investment regime," in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2008–2009* (New York: Oxford University Press, 2009), pp. 408–17.

27 Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Argentina, November 14, 1991, 31 I.L.M. 124, Article XI [hereinafter U.S.-Argentina BIT]. The origin of provisions of this character was the U.S. Friendship, Commerce and Navigation treaties. Germany and Pakistan were the first in introducing such a clause in their bilateral investment treaty. See, in this regard, Burke-White and von Staden, *supra* note 6, p. 312.

28 See *CMS* award, *supra* note 22, ¶ 374. See also Tarcisio Gazzini, "Necessity in international investment law: Some critical remarks on CMS v Argentina," 26 *Journal of Energy and Natural Resources Law* 450 (2008).

29 See *CMS* award, *supra* note 22, ¶ 330.

30 See *CMS* award, *supra* note 22, ¶ 317. The *CMS* tribunal concluded that Argentina's crisis could not preclude the illicitness of the measures Argentina adopted to resolve it. See *CMS* award, *supra* note 22, ¶ 331. One finding of the *CMS* award was annulled by an ad hoc annulment committee established pursuant to Article 52 of the ICSID Convention. All of the findings mentioned here stood after the annulment proceeding.

31 *Enron* award, *supra* note 23, ¶ 334.

32 *Sempra* award, *supra* note 23, ¶ 376.

requirements of Article 25,[33] they declared that there was no need to assess whether Argentina had met the requirements of Article XI[34].

C. The new approach of ICSID annulment committees: BIT necessity clauses and Article 25 of the Articles of State Responsibility are independent provisions[35]

The *CMS* annulment committee and, subsequently, the *Sempra* annulment committee have made the clearest statements to date regarding the independence of BIT necessity clauses and, in particular, Article XI of the U.S.-Argentina BIT from the customary rule of Article 25. For the committees, using the latter as a means to determine the condition for the invocation of the former constitutes an error of law.

The *CMS* committee examined the content of Article XI of the BIT and Article 25 and said that, though there were some similarities in the sense that the former referred to necessary measures and the latter to the state of necessity[36], there were also substantial differences. First of all, the *CMS* annulment committee stated that Article XI was a threshold requirement: "if it applies, the substantive obligations under the Treaty do not apply[37]," which means that the measures adopted were not wrongful. On the contrary, the committee highlighted that Article 25 was an excuse and was applied only once a violation of an international rule had been found[38]. This is an important distinction in light of the committee's views, but the committee also found other differences. For instance, Article XI refers to measures necessary for the preservation of public order for the protection of an essential security interest, but it does not qualify them[39]. This is to say that they do not need to be the only ones to achieve such purpose, as is the case of those measures adopted under Article 25. In addition, Article 25 contains requirements that do not exist in Article XI, such as that according to which the lack of compliance with the international obligation cannot seriously impair an essential interest of the aggrieved State[40]. On these bases, the *CMS* annulment committee was of the view that Article IX and Article 25 had "different operation and content[41]" and the tribunal should have assessed their relationship in full detail and determined whether they were applicable in the case. Such lack of assessment, the committee stated, was an error of law[42].

Having said that, the committee specified, on the basis of the distinction between primary and secondary rules, how Article XI of the BIT and Article 25 of the ILC's Articles of State Responsibility should be applied. The committee stated:

33 For a detailed analysis of these awards in that respect, see Kurtz, "Adjudging the exceptional at international investment law," *supra* note 10, pp. 341–42.

34 See *Enron* award, *supra* note 23, ¶ 339; *Sempra* award, *supra* note 23, ¶ 388. It is important to mention that, contrary to the *CMS* and the *Sempra* tribunals, the *LG&E* tribunal, which rendered its award prior to the issuing of the *CMS* annulment decision, was of the view that Article XI was a provision independent from the customary rule of necessity. The interpretation of the BIT necessity clause carried out by this tribunal is presented below in Part D.

35 It is important to highlight, as the *CMS* annulment committee stated, that the ICSID annulment proceeding is much narrower than an appeal; thus, the annulment committee is not able to overturn the award even if it finds errors of fact or law in awards of tribunals. Quoting the annulment committee in *MTD v. Chile (annulment)*, the *CMS* annulment committee said that it:

> cannot substitute its determination on the merits for that of the Tribunal. Nor can it direct a Tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a *res judicata* but on a question of merits it cannot create a new one. . .

CMS annulment, *supra* note 2, ¶ 44. The *Sempra* committee did not feel constrained by these jurisdiction restrictions and annulled the award, as will be noted below.

36 See *CMS* annulment, *supra* note 2, ¶ 129. See, generally, Théodore Christakis, "Quel remède à l'éclatement de la jurisprudence CIRDI sur les investissements en Argentine: La décision du committé ad hoc dans l'affaire CMC c. Argentina," 111 *Revue Générale de Droit International Public* 879 (2007), p. 894.

37 *CMS* annulment, *supra* note 2, ¶ 129.

38 See CMS annulment, *supra* note 2, ¶ 129. See also Kurtz, "Adjudging the exceptional at international investment law," *supra* note 10, p. 344.

39 See *CMS* annulment, *supra* note 2, ¶ 130.

40 See *CMS* annulment, *supra* note 2, ¶ 130.

41 See *CMS* annulment, *supra* note 2, ¶ 131. For a general description of the differences between the customary rule of necessity and BIT necessity clauses in general, see Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, pp. 321–22.

42 See *CMS* annulment, *supra* note 2, ¶ 131-32. The *CMS* annulment committee expressed that, had it been an appellate court, it would have overturned the award in this regard. See *CMS* annulment, *supra* note 2, ¶ 135.

> [T]he Tribunal would have been under an obligation to consider first whether there had been any breach of the BIT and whether such a breach was excluded by Article XI. Only if it concluded that there was a conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded in whole or in part under customary international law[43].

The *Continental* tribunal acted upon this decision to declare that the conditions for the application of Article XI were not those of the customary rule of necessity[44]. However, the tribunal did not regard both provisions as totally independent of each other and held that Article 25 still could be used to interpret Article XI itself, because both sought to provide flexibility in the application of international obligations and the practical effect of both provisions were the same, that is, that of condoning actions that would otherwise be wrongful and consequently removing the responsibility of the given State[45].

The *Sempra* committee reinforced this line of reasoning. First, the committee pointed out that there were material differences between Article XI and Article 25 of the Articles of State Responsibility and that, for this reason, the latter did not offer a guide to the interpretation of the former. Second, the committee was of the view that the provisions dealt with different situations: Article XI precluded the existence of an international wrongful act, while Article 25 presupposed the existence of such act. This difference prevented the latter from being used in the interpretation of the former. Third, the committee stated that necessity had not to be interpreted and applied in exactly the same fashion and that States could well invoke the defense of necessity in whatever terms they regarded as convenient, even those contrary to customary international law. There was no *jus cogens* rule preventing them from doing so[46].

The committee declared that the tribunal had adopted Article 25 of the Articles of State Responsibility, not Article XI, as the primary rule, thereby making a fundamental error in identifying and applying the applicable law[47]. Such failure constituted an excess of power[48] that was manifest[49]. The consequence of this declaration was that the award had to be annulled[50].

The approaches of the above-mentioned arbitration tribunals and of the annulment committees have totally different outcomes for foreign investors and host States. The position adopted by the awards in *Enron*, *Sempra*, and *CMS*, in the sense that the requirements for the invocation of Article XI of the BIT are those of the state of necessity under customary international law, make it harder for the latter provision to be applied. In effect, as has been mentioned, the requirements are strict, since the state of necessity has been narrowly interpreted, which means that the necessity defense is rarely successfully invoked. Foreign investors are favored by this approach, since BIT emergency clauses would have to meet the same strict conditions to be successfully invoked.

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43 *CMS* annulment, *supra* note 2, ¶ 134. However, the committee found that, despite the errors, the tribunal had applied Article XI, and therefore, it had not incurred a manifest excess of power. See *CMS* annulment, *supra* note 2, ¶ 136.
44 See *Continental* award, *supra* note 5, ¶ 167. The grounds for the decision were similar to those proclaimed by the *CMS* committee. See *Continental* award, *supra* note 5, ¶¶ 164–66.
45 See *Continental* award, *supra* note 5, ¶ 168. For a similar reasoning, see Cortés, "El estado de necesidad en materia económica y financiera," *supra* note 8, p. 162.
46 See *Sempra* annulment, *supra* note 1, ¶¶ 198–202.
47 See *Sempra* annulment, *supra* note 1, ¶ 208.
48 See *Sempra* annulment, *supra* note 1, ¶ 209.
49 See *Sempra* annulment, *supra* note 1, ¶¶ 214–19.
50 See *Sempra* annulment, *supra* note 1, ¶ 222.

The approach adopted by the *CMS* and *Sempra* annulment committees favors host States, which see BIT emergency provisions as meaning that they do not have to comply with the already strict requisites of customary international law. The analysis of the annulment committees establishes a clear difference between primary and secondary rules and is more consistent with accepted principles of interpretation of treaties provided for in Article 31 of the Vienna Convention on the Law of Treaties (VCLT)[51]. This approach has turned the attention of future tribunals to the interpretation of BIT necessity clauses, since they have to be evaluated first and always according to their own terms and no longer on the basis of Article 25[52].

D. The interpretation of BIT necessity clauses in the *LG&E* and *Continental* awards

1. Elements for the interpretation of BIT necessity clauses

The direct consequence of the *CMS* and *Sempra* annulment decisions regarding BIT necessity clauses is that such clauses will become the central focus of the analysis of the necessity defense in pending cases of the Argentine saga[53] and in others, with Article 25 playing a residual role[54]. This approach then compels us to make an assessment of the general orientation of the interpretation of BIT necessity clauses and of the most likely requirements that a host State must satisfy to successfully invoke them. The assessment is based on what has been expressed by the two tribunals—*LG&E*[55] and *Continental*—that hitherto have autonomously interpreted Article XI of the

51 This provision reads as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 ILM 679 (1969), Article 31. In his comment on the provision, Ian Sinclair expressed that, according to the ILC, "[t]he text of a treaty must be presumed to be the authentic expression of the intentions of the parties." Ian Sinclair, *The Vienna convention on the law of treaties* (Manchester: Manchester University Press, 1984), p. 115.

52 See Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, pp. 323–24. For the latest decisions in the Argentine saga, see Suez, Sociedad General de Aguas de Barcelona S.A, and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, and AWG Group v. the Argentine Republic, UNCITRAL, *decision on liability* (July 30, 2010), available at: http://ita.law.uvic.ca/documents/SuezVivendiAWGDecisiononLiability.pdf (last visited January 13, 2011). This decision is not relevant for the purpose of this article, since the BITs in question did not contemplate a necessity clause. The only rule interpreted and applied by the tribunal was the customary norm of necessity. The same can be said as to the second most recent determination: the annulment decision in *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Argentine Republic*. There, the committee annulled the *Enron* tribunal's finding, according to which Argentina was precluded from invoking Article XI. However, the *Enron* committee did not consider it necessary to assess the interrelationships between the customary rule of necessity and Article XI. See Enron Creditors Recovery Corp. Ponderosa Assets, L.P v. Argentine Republic, ICSID Case No. ARB/01/3, *decision on the application for annulment of the Argentine Republic* (July 30, 2010), ¶ 405, available at: http://ita.law.uvic.ca/documents/EnronAnnulmentDecision.pdf (last visited January 10, 2011).

53 In addition to the *Sempra* dispute, pending cases are *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17; *Enersis S.A. and others v. Argentine Republic*, ICSID Case No. ARB/03/21; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23; and *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15.

54 The availability of Article 25 is not even always certain. Such availability exists, in practice, only when BIT necessity clauses have stricter conditions than Article 25, because it is then possible that the host country who did not meet the stringent conditions of the BIT clause could still invoke in its favor the less strict requirements of Article 25, as a defense of last resort. On the contrary, when the conditions to invoke a BIT necessity clause are less strict than those of Article 25, the availability of the latter is just theoretical, because if a host country failed to succeed in its defense under the less strict conditions of the BIT clause, it would likely not meet the most stringent requirements of Article 25. See Campbell McLachlan, "Investment treaties and general international law," 57 *International and Comparative Law Quarterly* 361 (2008), p. 390. In sum, the availability of Article 25 as a defense in practice cannot always be taken for granted: it depends on how strict the BIT clause is. According to Kurtz, BITs were negotiated with the belief that "custom was increasingly ill-equipped to deal with particular challenges faced by foreign economic actors." Kurtz, "Adjudging the exceptional at international investment law," *supra* note 10, p. 345. This suggests that BIT necessity clauses were hardly conceived to be stricter than the customary rule of necessity. Kurtz concludes that this may be the case with Article XI of the Argentina-U.S. BIT. See Kurtz, "Adjudging the exceptional at international investment law," op. cit., p. 347. The *National Grid* tribunal illustrates that Article 25 is fully available in BIT disputes when the given BIT does not provide for a necessity clause, and I agree with this approach. This dispute involved Argentina and a British investor and was thus covered by the UK-Argentina BIT, which does not contain a necessity clause similar to Article XI of the U.S.-Argentina BIT. The investor argued that such absence meant that Argentina could not raise the defense 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. The *National Grid* tribunal refused to accept this argument. First, it found that the UK had in the past accepted the defense and, second, the tribunal held that Article 25 was customary international law and that, since the parties had not explicitly excluded the defense in the BIT, "either of them is entitled to raise it." *National Grid* award, *supra* note 23, ¶ 256. Thus, in the absence of a BIT necessity clause, the availability of the customary rule of necessity exists, unless it has not been explicitly excluded. Although the tribunal did not mention it, it is a clear application of what the ICJ stated in *Elettronica Sicula S.p.A. (ELSI)*:

> The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.

Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (July 20), ¶ 50, available at: http://www.icj-cij.org/docket/files/76/6707.pdf (last visited January 11, 2011).

55 For a detailed analysis of the *LG&E* decision on liability, see Stephan W. Schill, "International investment law and the host State's power to handle economic crises: Comment on the ICSID decision in LG&E v. Argentina," 24 *Journal of International Arbitration* 265 (2007).

U.S.-Argentina BIT[56]. It can be said that some important discrepancies persist[57], which will be presented here and evaluated below in Part E.

To begin with, regarding the overall orientation of the interpretation of Article XI and, in general, of BIT necessity clauses, there has been a consensus among some tribunals that this author shares: These provisions should be narrowly interpreted. In this sense, the *Enron* and *Sempra* tribunals held that it was mandatory to strictly interpret provisions that were escape routes from the obligations provided for in the treaty, since to do otherwise would go contrary to the object and purpose of the treaty[58]. In the same vein, the *LG&E* tribunal held that the state of necessity provoked by emergencies was "strictly exceptional and should be applied exclusively when faced with extraordinary circumstances.[59]" However, the *Continental* tribunal was of a different view and stated that such exceptional character "is not necessarily the case under Art. XI according to its language and purpose under the BIT.[60]" Moreover, the *Continental* tribunal held that a significant margin of appreciation should be allowed to states facing critical situations, since "[it] is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight.[61]"

As to the types of situations that justify the invocation of BIT necessity clauses, they depend on the text of the specific clause in question. However, it is certainly not surprising that severe economic upheavals have been considered to affect essential security interests and justify the invocation of BIT necessity clauses. The *CMS*, *Enron*, and *Sempra* tribunals determined that Article XI[62] covered grave economic crises, because neither the object nor the purpose of the BIT nor of international customary law excluded this type of emergency from Article XI and because economic emergencies qualified as affecting essential security interests[63]. In addition, the *LG&E* tribunal rightly rejected the argument that Article XI was relevant only in the event of military actions or wars[64]. The *Continental* tribunal, for its part, declared that economic crises were covered by Article XI as threats to essential security interests, since the notion of international security of States in international law covered not only military and political but also economic security[65].

Concerning the requirements for the successful invocation of BIT necessity clauses, the *LG&E* tribunal pointed out that they depended on: (i) whether the factual situation justified the invocation of the protection of the provision, and (ii) whether the measures contravening the

56 It is assumed that BIT necessity provisions are not usually self-judging. Although Argentina has repeatedly made this claim regarding Article XI, arbitral tribunals have declared that their role goes beyond only examining whether the adoption of the measures to face the given crisis had been made in good faith by the host country. For instance, the *LG&E* and *Continental* tribunals determined that the provision did not have such character. See *LG&E* decision on liability, *supra* note 23, ¶ 212; *Continental* award, *supra* note 5, ¶ 187. For a detailed analysis of the non self-judging nature of Article XI, see Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, pp. 417–26; Kurtz, "Adjudging the exceptional at international investment law," *supra* note 10, p. 339; Bjorklund, "Emergency exceptions," *supra* note 12, pp. 503–05; August Reinisch, "Necessity in international investment arbitration: An unnecessary split of opinions in recent ICSID cases? Comments on CMS v. Argentina and LG&E v. Argentina," 8 *Journal of World Investment and Trade* 191 (2007), pp. 210–12. However, for an opposite view, see Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, p. 385. Finally, it is important to highlight that some BITs—prominent among them, the 1992 U.S.-Russia BIT—explicitly establish the self-judging character of their necessity clause. See Reinisch, "Necessity in international investment arbitration," op. cit., p. 210.

57 For a general criticism of inconsistent approaches and conclusions of ICSID decisions regarding claims based on identical norms and similar facts, see Reinisch, "Necessity in international investment arbitration," *supra* note 56, p. 214; Cortés, "El estado de necesidad en materia económica y financiera," *supra* note 8, p. 167.

58 See *Enron* award, *supra* note 23, ¶ 331; *Sempra* award, *supra* note 23, ¶ 373.

59 *LG&E* decision on liability, *supra* note 23, ¶ 228.

60 *Continental* award, *supra* note 5, ¶ 167.

61 *Continental* award, *supra* note 5, ¶ 181.

62 See *CMS* award, *supra* note 22, ¶ 359.

63 See *Enron* award, *supra* note 23, ¶ 332; *Sempra* award, *supra* note 23, ¶ 374.

64 See *LG&E* decision on liability, *supra* note 23, ¶ 238. See also Reinisch, "Necessity in international investment arbitration," *supra* note 56, pp. 208–09.

65 See *Continental* award, *supra* note 5, ¶ 175, 178.

treaty were necessary to preserve public order or to protect an essential security interest[66]. The latter must be understood to mean, naturally, that there must be a relation of means and ends between the measures taken by the host State and the goal of addressing the specific crisis at issue, a requirement explicitly established by the *Continental* tribunal[67].

When assessing whether the regulation in question was necessary under Article XI, the *Continental* tribunal designed a different test grounded on the General Agreement on Tariffs and Trade (GATT) Article XX necessity exception and its current interpretation[68]. Such basis existed, in the tribunal's view, because Article XI was modeled on similar provisions of Friendship, Commerce, and Navigation treaties concluded by the United States, which in turn were based on GATT Article XX[69].

Under the GATT necessity test, measures that are indispensable are certainly necessary, but these are not the only ones. To determine whether a regulation that is not indispensable is necessary, a weighing and balancing process is carried out. Such process comprises an assessment of (i) the importance of the value protected by the given GATT exception, (ii) the contribution of the measure to the objective sought, and (iii) the restrictive impact of the measure on international trade. Finally, a measure is not necessary if there is a WTO-consistent, less trade-restrictive, reasonably available alternative that achieves the desired level of protection reached by the measure in question[70].

Consequently, the *Continental* tribunal determined that, for the success of the necessity defense under Article XI of the BIT, the measures had to be the only ones available to face the crisis; that is, that the host State did not have at its disposal other reasonably available means to achieve this result[71]. Previously, though, the *LG&E* tribunal had not demanded this requirement. The tribunal specifically distinguished necessity under Article XI of the BIT and necessity under customary international law by deeming that it was not required for the respondent State to demonstrate that its measures were the only ones available to face the crisis in question. The tribunal held:

> Article XI refers to situations in which a State has not choice but to act. A State may have several responses at its disposal to maintain public order or protect its essential security interests. In this sense, it is recognized that Argentina's suspension of the calculation of tariffs in U.S. dollars and the PPI adjustment of tariffs was a legitimate way of protecting its social and economic system[72].

Another requirement that could be inferred from the *LG&E* decision on liability is that wrongful measures will not be covered by the necessity clause if they are not able to "provide immediate relief from the crisis,"[73] an issue that

66 See *LG&E* decision on liability, *supra* note 23, ¶ 205.
67 See *Continental* award, *supra* note 5, ¶ 197. This requirement was inferred from WTO law. See *Continental* award, op. cit., ¶ 197 n. 298.
68 See *Continental* award, *supra* note 5, ¶ 192.
69 See *Continental* award, *supra* note 5, ¶ 192.
70 See *Continental* award, *supra* note 5, ¶¶ 193–95.
71 See *Continental* award, *supra* note 5, ¶ 198. The tribunal concluded that Argentina did not have other means to face its 2001 crisis. See *Continental* award, op. cit., ¶¶ 199–219; 228–29.
72 See *LG&E* decision on liability, *supra* note 23, ¶ 239. Schill is of the view that the *LG&E* tribunal demanded this requirement, but that it allocated the burden of proof to claimant investors. According to this author, the following statement corroborates this assertion: "... Claimants have not provided any reason as to why such measure would not provide immediate relief from the crisis." *LG&E* decision on liability, *supra* note 23, ¶ 242, as quoted by Schill, "International investment law and the host-State's power to handle economic crises," *supra* note 55, p. 280 n. 98. I have a different understanding of this statement: it did allocate a burden of proof to investors, but only regarding the existence of the effects of the measures taken to address the crisis, as we will see next, not regarding their unique character.
73 *LG&E* decision on liability, *supra* note 23, ¶ 242.

must be proved by the investor[74]. However, the *Continental* tribunal did not share this view and explicitly emphasized "the importance of the temporal perspective in the evaluation of necessity: '[T]he results obtained from certain actions [. . .] can only be evaluated with the benefit of time.[75]'"

Finally, without relying on Article 25 and without adducing any legal ground, the *Continental* tribunal determined that measures would not receive the protection of Article XI if any of the parties had contributed to putting its essential interest at risk[76]. However, the tribunal also determined that, when a State pursuing a legitimate policy puts its essential interest at risk, measures aimed at protecting it may be covered by BIT necessity clauses[77].

2. Effects of the successful invocation of BIT necessity clauses

The *LG&E* tribunal declared that, once the crisis ended, Argentina had to reassume its obligations under international law or compensate the claimants for the losses incurred as a result of the measures[78]. The defense was then temporary. However, the *Continental* tribunal, relying too much on the effects of the WTO necessity exception, tacitly deemed that the justification offered by Article XI was permanent regardless of whether the host State, in this case Argentina, returned to political, social, and economic normality, a situation that the tribunal admitted as having taken place[79].

As to compensation, the *LG&E* tribunal held that "Article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability.[80]" Therefore, no compensation was owed. The *CMS* annulment committee endorsed this view by declaring that "Article XI, if and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period[81]." The *Continental* tribunal

74 See *LG&E* decision on liability, *supra* note 23, ¶ 242.

75 *Continental* award, *supra* note 5, ¶ 197 n. 298 (quoting from Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R (adopted December 17, 2007), ¶ 151).

76 See *Continental* award, *supra* note 5, ¶ 234.

77 The *Continental* tribunal stated:

> One could image that country A, which has a BIT in force with country B, adopts an unfriendly attitude or policy towards the latter. Country B reacts in a way that country A considers endangers some of its essential interests. In order to protect those interests, country A then considers it "necessary" to adopt measures limiting movements of funds to country B, or prohibiting investors from country B from engaging senior managerial personnel of nationality B against provisions granting such rights as those found in the Argentina-USA BIT.

Continental award, *supra* note 5, ¶ 234 n. 352.

78 See *LG&E* decision on liability, *supra* note 23, ¶ 265.

79 In effect, the tribunal recognized that Argentina's democratic institutions were reestablished in May 2003 with the election of Nestor Kirchner as President and that the economy recovered from 2002 on with a strong increase in the gross domestic product, a significant reduction in inflation, an important improvement in the exchange rate, and repayment of credits owed to the IMF in 2005 (SDR 2,415 billion) and 2006 (SDR 6,655 billion). See *Continental* award, *supra* note 5, ¶¶ 153–59.

80 *LG&E* decision on liability, *supra* note 23, ¶ 261. In opposing this conclusion, Emmanuel Gaillard points out in his analysis of the *LG&E* decision on liability:

> Lorsque l'État prend [. . .] des mesures d'urgence dans un but d'intérêt général, [. . .] ces mesures peuvent être parfaitment justifiées. Il ne serait guère compréhensible néanmoins que la charge de ces mesures d'interêt général pèse exclusivement sur l'investisseur dont la seule faute a été de croire aux assurances données par le gouvernement de l'État concerné [. . .] L'objet même des traités de protection des investissements est de rassurer les investisseurs étrangers en minimisant le risque découlant de l'instabilité économique et parfois politique du pays.

Emmanuel Gaillard, "Chronique des sentences arbitrales," 134 *Journal du Droit International* 335 (2007), p. 339. See also for a similar view, Schill, "International investment law and the host-State's power to handle economic crises," *supra* note 55, p. 282.

81 *CMS* annulment, *supra* note 2, ¶ 146. See Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, pp. 387–89. Alvarez and Khamsi oppose this conclusion thus:

> With all due respect, this conclusion is not "clear enough." Even assuming that Article XI is [. . .] a clause that when properly invoked during a period of crisis excuses a state's financial liability during that crisis, it is not at all clear why this result follows when the clause is invoked by a state long after the crisis is over and there is *no* evidence that the failure to pay compensation remains "necessary." Neither LG&E nor the CMS Annulment Committee clearly explains why the plain meaning of Article XI, not to mention the rules of equity or fundamental fairness, leads to a conclusion that it remains "necessary" for a state not to pay compensation long after the end of the threat to its essential security [. . .] We contend that the most plausible interpretation of Article XI is the opposite of what the CMS Annulment Committee suggests [. . .]

Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 456.

held a similar view as to compensation in the event of the successful invocation of a BIT necessity clause[82].

E. Autonomous interpretation of BIT necessity clauses: A general proposal

As has been illustrated, the *CMS* and *Sempra* committees established the independence of Article XI, and of BIT necessity clauses in general, from the customary rule of necessity. Alvarez and Khamsi oppose the independence of Article XI with what seems to be a compelling argument: the United States negotiated the BIT with a clear understanding of the still uncertain evolution of customary rule at the end of the 1980s and wanted to affirm in Article XI what the United States thought was a customary right that all States intended to protect[83]. It, then, could not be said that the customary rule and Article XI are independent. Nor could it be now assumed that Article XI was intended to derogate the customary rule, since there is no express manifestation in this regard[84].

As to the first argument, it could be said that it is entirely possible that a treaty provision reflecting customary international law as it existed at the time of conclusion of the treaty, which was included not because it was customary but because the rights and obligations fit the parties' interests, subsequently becomes *lex specialis* if the customary rule evolves in a somewhat different direction[85].

As to the second argument, it can be said along with these scholars and the ILC, that a mere difference in text does not imply that treaty provision must be understood to derogate from customary rules[86]. However, it seems that this statement may not be fully applicable to Article XI and Article 25, for their textual difference is not tenuous but substantial: Key requirements for the successful invocation of the latter are not explicitly contemplated in the former. It is thus not unreasonable to interpret Article XI autonomously from Article 25.

In addition, and to respond to the argument that interpreting Article XI independently from Article 25 is not possible since Article XI does not explicitly derogate from customary international law, it could be pertinent to recall what Benjamin Cardozo pointed out long ago: "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today.[87]"

Moreover, Alvarez and Khamsi argue that Article XI cannot be *lex specialist* because this would go contrary to the object and purpose of the BIT, which was the protection of investors[88]. Although these authors are right in the sense that this protection is an object and purpose of the treaty and that, as a result, interpretations of Article XI must take into account such goal, it cannot be said that this object is the only one. BITs are inter-State agreements and, therefore, States' interests must play a role in the interpretation of their precepts, necessity clauses included.

Finally, the mere fact that Article XI or BIT necessity clauses in general are considered to be

82 See *Continental* award, *supra* note 5, ¶ 303–04.
83 See Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 429.
84 See Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 433.
85 Kurtz underscores the important issue that interpreting necessity clauses in light of Article 25 ignores the fact that the protection of investors has evolved from customary international law to treaty law. See Kurtz, "Adjudging the exceptional at international investment law," *supra* note 10, pp. 344–46.
86 See Alvarez & Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 432.
87 Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917), as quoted by Lon L. Fuller and Melvin A. Eisenberg, *Basic contract law* (St Paul: West, 4th ed., 1981), p. 96.
88 See Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 433.

lex specialis should not lead to the conclusion that investors can be deprived of protection when these provisions are successfully invoked[89]. This is certainly a conclusion that goes against a key *raison d'être* of BITs. In this regard, it is possible to say that there are ways to ensure the protection of both investors and States whenever a critical situation justifies the invocation of the necessity clause in question. I will turn to this in the next section.

Finally, Bjorklund disagrees with the *CMS* annulment committee with a powerful argument:

> [This *CMS* annulment committee's finding] does not consider the fact that the ILC's distinction between primary and secondary rules post-dated the conclusion of the treaty. Thus, it is not altogether reasonable to assume that the treaty negotiators were thinking in those terms[90] .

It could be said in support of the *CMS* and *Sempra* committees that, although the issue of what international law should be used in the interpretation of treaties—that at the time of the conclusion of the treaty, as Bjorklund suggests, or that at the time of its interpretation—remains unsettled, the fact is that there have been multiples cases in which the international law existing at the time of interpretation has been used by international courts and tribunals in the assessment of the content of treaty provisions[91].

On the other hand, BITs, contrary to border treaties, seem to be perfectly suitable for this approach, given the extraordinary dynamic of the issues they deal with. However, it should also be admitted that Sinclair was clear in stating that such interpretation should not "conflict with the intentions and expectations of the parties as they may have been expressed during the negotiations preceding the conclusion of the treaty[92]." On this basis, the issue of whether the international law at the time of the conclusion of the BIT or at the time of its interpretation is the one that must be taken into account at the moment of resolving a BIT controversy should no longer be conceptual but factual. It only depends on whether the use of the latter content of international law does not contradict the parties' expectations during their negotiations, a purely factual matter. Such conclusion is also relevant in those cases in which the result is, paradoxically, the exclusion of international law, in this case Article 25 of the Articles of State Responsibility, because it has acquired a secondary character, which constitutes a significant departure from BIT necessity clauses and particularly from Article XI of the Argentina-U.S. BIT[93].

Having said this, this section proceeds with the presentation of the general proposal for the

89 Alvarez and Khamsi present a strong case for this proposition regarding Article XI of the U.S.-Argentina BIT. See Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, pp. 434–35.

90 Andrea K. Bjorklund, "Economic security defenses in international investment law," in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2008–2009* (New York: Oxford University Press, 2009), p. 498 (citation omitted) [hereinafter Bjorklund, "Economic security defenses"].

91 See, for instance, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (October 12, 1998), ¶¶ 129–130, available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (last visited April 6, 2011); Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), 2009 I.C.J., *judgment* (July 13), ¶¶ 63–64, available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=37&case=133&code=coni&p3=4 (last visited April 6, 2011).

92 Sinclair, *The Vienna Convention on the law of treaties, supra* note 51, p. 140.

93 Alvarez and Khamsi make the most cogent effort to demonstrate that the *CMS* annulment committee's approach conflicts with the intention of one of the parties to the BIT, the United States, of protecting its investors. Although care must be taken when disagreeing with such prominent scholars, it is nonetheless possible to say that their arguments are not equally strong to prove that the approach conflicts with *both* parties' intentions, which is the point Sinclair regards as relevant. In addition, making mainly use of the asymmetry of power in favor of the United States and to the "take it or leave it" character of the negotiation of the BIT certainly does not prove Argentina's intentions. Alvarez and Khamsi do certainly illustrate Argentine authorities' statements admitting the protection of investors as a key objective of the BIT. However, these statements, first, are general and do not specifically allude to Article XI, and, second, they cannot convincingly lead to the conclusion that the *only* intention of Argentina with the conclusion of the treaty was to protect investors.

interpretation of BIT necessity clauses. The section will put forward the general requirements that must be met in order to successfully invoke these clauses and will illustrate and explain why at least one of the requisites of the customary norm of necessity may still play a role in BIT necessity clauses, through other sources of international law. The section will end with an analysis of the effects of the successful invocation of the clauses in terms of temporality and compensation.

1. General requirements for the successful invocation of BIT necessity clauses

Although, as was mentioned, the recent *Sempra* annulment decision ratified that of the *CMS* ad hoc committee in the sense that BIT necessity clauses must be interpreted autonomously from the customary rule of Article 25, tribunal that have carried out such autonomous interpretation prior and subsequent to the *CMS* decision still have significant differences as to the requirements and effects of the successful invocation of such clauses, which also vary in the allocation of risks between investors and host States. Such divergences call for attempts to offer a more unified interpretation on the basis of general elements that can be applied regardless of the specific text of the BIT necessity clause[94], guided by a basic orientation: risks under situations of necessity should be borne by both investors and host States to a certain extent and not by any of these parties exclusively[95].

Before proceeding with the requirements, it is important to highlight that the view held by the *LG&E* tribunal that BIT necessity clauses must be narrowly interpreted must be endorsed[96], given the fact that they excuse violations of treaty obligations owed to investors and transfer significant risks to them[97]. A narrow interpretation certainly excludes total deference to the State invoking the clause[98] but should not result in an interpretation that makes necessity clauses virtually impossible to be applied in practice and play a role as tools that States have at their disposal to solve grave crises.

Having said this, it is worth starting by arguing that the first requirement for the successful invocation of BIT necessity clauses is the proof,

94 Any general approach has certain limitations stemming from the fact that necessity clauses may vary, and do vary, from one treaty to the other, as Alvarez and Khamsi point out. See Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, pp. 463–64. However, the fact that the general approach suggested below cannot be totally applied to all BIT necessity clauses does not deprive it of usefulness, because the approach can still be relevant in the interpretation of some of the elements of some clauses of this character, particularly those that are comprehensive in scope, such as the ones included in the U.S, Canadian and Indian BIT models. As to the different types of necessity clauses, comprehensive and narrow, see Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, pp. 331–32.

95 This is not to suggest that risks should be equally distributed between host States and investors. The specific allocation of risks between the parties depends on the particular facts of the case and of the text of the necessity clause in question. See Bjorklund, "Economic security defenses," *supra* note 90, p. 503.

96 This strict approach should not be read as a recommendation to a return to the application of the principle *in dubio mitius*, which significantly favors States. In fact, somehow the opposite is suggested here: Host States' prerogatives under BIT necessity clauses should be interpreted with the idea of refraining from expanding these prerogatives too much beyond what is required to face grave crises.

97 Kurtz considers such conclusion as flawed, because it ignores the text of the BIT necessity exceptions and because it overlooks the fact that these treaties are not negotiated to protect only foreign investors. See Kurtz, "Adjudging the exceptional at international investment law," *supra* note 10, pp. 350–51. This argument does not strictly apply to the approach to the interpretation of BIT necessity clauses advanced here, since the approach has as a point of departure the idea of protecting not only the interests of foreign investors but also those of host countries in situations of crisis. In other words, claiming that those clauses must be narrowly interpreted should not be considered as a flaw, if the interpretation of BIT necessity clauses is, on the whole, carefully carved out to incorporate States' legitimate concerns and interests.

98 As Alvarez and Khamsi illustrate, the ICJ has rejected such deference with regard to the use of the right to self-defense. The Court stated in its judgment in the *Oil Platforms (Islamic Republic of Iran v. United States of America)* case that "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any 'measure of discretion."' Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, *judgment* (November 6), ¶ 73, available at: http://www.icj-cij.org/docket/files/90/9715.pdf (last visited January 9, 2011). For a strong opposition to deference under Article XI of the U.S.-Argentina BIT, see Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, pp. 440–47. For an equally strong defense of deference to states when they invoke necessity clauses, see Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, pp. 369–70. Among the reasons the latter authors invoke to support such deference is judicial policy: arbitration tribunals, they argue, are too far from the circumstances surrounding the invocation of the clause and lack enough fact-finding capabilities to fully assess the context of government policies. See Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, p. 372. Two comments may be made to oppose these arguments. First, the distance of tribunals from the facts is one of the key factors in assuring the impartiality of the tribunal when exerting its judicial function. Rather than a flaw, the distance is a benefit for adjudication. The second argument may lose part of its appeal when seen as a burden of proof issue: Given that States must prove the defense under the necessity clause, it is up to them to provide tribunals with enough proof in order to allow them to gauge the context of the governmental policies and decisions adopted to face the given crisis. If States fail to do so, tribunals are right in rejecting the defense. Deference to States should not become, in practice, a device to diminish the allocation of burden of proof when States invoke necessity clauses and seek to transfer significant risks to investors.

by host States, of the threat to public order[99], or to an essential security interest that the particular situation is generating. The threshold of this threat or effect to these interests should not be low if one is to interpret the clauses narrowly, given the important consequences of their successful invocation. The threshold—grave and imminent risk—established by the customary rule seems to be the appropriate one, although the rule can no longer serve as a basis for this threshold after the *CMS* and *Sempra* annulment decisions. In effect, not every situation affecting public order, for instance, should justify the invocation of BIT necessity clauses. It is part of the normal operation of States to face situations that may threaten or even to a certain extent affect public order, but that could hardly be invoked by a State as a ground to seek the protection of the clause. A distinction between normality and abnormality—despite this generality—may be useful and must certainly be grounded on the text and context of the treaty in question[100]. For normal times, the operation of the BIT for the benefit of investors should be expected, with abnormal times as a qualified exception[101].

Second, economic crises should qualify as threatening essential security interests or public order[102].

Third, there should be a means-and-ends relation between the measures and the crisis that prompted the invocation of the necessity clause in the sense that the former must have to be adopted to face the latter[103]. However, this should not be enough, and the use of the proportionality principle as a requirement for the successful invocation of these clauses, which can be derived from the *Continental* tribunal's reliance on WTO law, must be commended[104]. In

99 As Burke-White and von Staden show, the notion of public order is used in necessity clauses in the U.S., German, Peruvian, Argentinian, and Turkish BITs, but without being defined. In civil law countries, the term is part of domestic law and refers to the notion of *orden público* or *ordre public*. See Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, p. 333. Alvarez and Khamsi consider that the civil law term equals the common law notion of public policy, but they deny that this is the understanding of the term in the U.S.-Argentina BIT. See Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 450. However, it must be recognized, as Burke-White and von Staden well illustrate, that the term "public order" may have different contents in different BITs, depending on how the notion is understood by the parties, since they may have different meanings on the basis of parties' diverse understanding under their domestic laws. See Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, pp. 357–61. Arbitration tribunals dealing with Argentina's crisis have interpreted the term as a synonym of public peace. The *Continental* tribunal expressed, for instance:

> The expression "maintenance of public order" indicates [. . .] that "*public order*" is intended as a broad synonym for "public peace," which can be threatened by actual or potential insurrections, riots and violent disturbances of the peace [. . .] Thus, in the Tribunal's view, actions properly necessary by the central government to preserve or to restore civil peace and the normal life of society [. . .] [and] to prevent and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten the legal order, even when due to significant economic and social difficulties, [. . .] do fall within the application under Art. XI.

Continental award, *supra* note 5, ¶ 174.

100 For a similar approach regarding Article XI of the U.S.-Argentina BIT, see Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 451.

101 Regarding the existence of the risk as an element that must be demonstrated as part of the invocation of BIT necessity clauses, it is important to highlight that WTO law can be a good source of inspiration for the interpretation of these clauses, within certain limits. On one hand, the case-law of the WTO Appellate Body is right in requesting proof of the existence of the risk. For instance, 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 GATT Article XX(d) was dismissed. See Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand*, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R, WT/DS345/AB/R (July 16, 2008), ¶¶ 317, 319, available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds343_e.htm (last visited January 13, 2011). However, this case-law cannot fully be transported to foreign investment law, since the threshold is low: Proof of any risk suffices, which is a threshold that is unworkable regarding BITs, because it would open the door to an easy invocation of necessity clauses. The risk should be significant and its materialization imminent.

102 Given that BIT necessity clauses are autonomous from the customary rule of necessity, I do not think that the case-law under the latter—in the sense that economic crises can be considered to justify the invocation of the state of necessity under customary international law only when they constitute a threat to the very existence of a state—should narrow BIT necessity clauses to the point that only those acts that pose such a threat can be considered to be putting public order or essential security interests at risk. As to the said case-law, see Reinisch, "Necessity in international investment arbitration," *supra* note 56, pp. 197–98. However, it is important to mention that Alvarez and Khamsi hold this restrictive view. See Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 431.

103 See Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 454; Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, p. 330.

104 Bjorklund makes an interesting point regarding the use of other branches of international law other than customary international law—such as WTO law or European human rights law—in the interpretation of BIT necessity clauses, and particularly Article XI of the U.S.-Argentina BIT. She is skeptical of such use, because it may have not been intended by parties when they drafted the treaty. See Bjorklund, "Economic security defenses," *supra* note 90, p. 495. It may be admitted that, for instance, the *Continental* tribunal was aware of this issue and grounded the use of WTO law on the negotiating history of Article XI. See *supra* text accompanying note 69. An alternative view that addresses Bjorklund's concerns can be put forward: arbitration tribunals could also use concepts of other branches of international law when they can demonstrate that the concept on its own can rest on an interpretation of the BIT in question according to the Vienna Convention on the Law of Treaties. The focus then shifts from the authority of the branch the concept was imported from, to the suitability of the concept or doctrine within the BIT, thereby respecting the parties' intentions which is understood to be reflected in the text of treaty. See Sinclair, *The Vienna Convention on the law of treaties, supra* note 51 and accompanying text.

effect, measures that impose significant costs on investors and that do not produce meaningful effects to combat the situation justifying the invocation of the necessity clause should not be covered by it[105]. However, I share Kurtz's views in the sense of the risks that a general application of the principle of proportionality could engender when applied by investor-State tribunals[106]. Some adjustment can be made so as to attenuate these risks. First of all, the burden of proving lack of proportionality should be borne by the investor. If investors do not raise the issue, tribunals do not need to assess proportionality. Second, the standard of proof should be high: Investors must show convincing evidence rather than mere reasonable evidence that the benefits are low and the costs for investors significant. Third, tribunals should approach this issue with a certain degree of deference to host States' decisions[107].

Fourth, and as to the immediacy of the effects yielded by the measures against the crisis, I agree with the *Continental* tribunal's finding, also grounded on WTO law[108]: BIT necessity clauses should also exculpate acts able to start producing effects against the crisis in the medium term and not only those that immediately yield such effects. The handling of crises may require a combination of regulations that can produce effects against emergency situations both immediately and in the medium term[109].

a. Can requirements under the customary rule of necessity still be relevant in BIT necessity clauses?

A more complex situation is that of the incorporation of some of the requirements of the customary rule of necessity in the interpretation of BIT necessity clauses, such as the substantial contribution of the host State as an element precluding the success of the defense and the requisite of the uniqueness of the measures to address the crisis at issue, as the *Continental* tribunal held, although not by relying on Article 25 of the Articles of State Responsibility but on WTO law.

105 The Appellate Body has stated that a measure may not be necessary under any of the GATT/GATS necessity exceptions if it produces significant trade-restrictive effects and is only able to make a marginal or insignificant contribution to the achievements of the objective sought and covered by the exception. See Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (December 3, 2007), ¶ 150, available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm (last visited January 8, 2011) [hereinafter *Brazil – Tyres*]. While this requirement and the previous one—there should be a means-and-ends relation between the measures and the crisis—may be specifically provided in BIT necessity clauses, they do not necessarily need to be so to exist. Investor-State tribunals may deduce them, as has been so far the case, as part of the interpretation of the usual open terms provided for in these clauses.

106 Kurtz states that a tribunal carries out a balancing test:

> The judicial organ becomes responsible for assessment and weighting of relative values rather than national legislatures. Yet this form of weighting often involves complex value-laden and empirical judgments. It is highly doubtful that courts, in general, are better assessors of values and empirical questions than elected representatives.

Kurtz, "Adjudging the exceptional at international investment law," *supra* note 10, p. 367. However, it is worth mentioning that Schill regards this balancing test as an appropriate element that tribunals must assess. See Schill, "International investment law and the host State's power to handle economic crises," *supra* note 55, p. 281.

107 This deference does not contradict the narrow interpretation of BIT necessity clauses suggested above as a matter of policy, for a strict interpretation can still be made by tribunals regarding other elements of these clauses.

108 This question is raised in light of the WTO case-law in which WTO-inconsistent measures that do not produce immediate effects to protect the specific value sought by the necessity exception invoked may be covered by it. Such finding was made by the WTO Appellate Body in *Brazil – Tyres*, where the protection of the environment was at issue and where the effects of the measure to achieve this goal may have taken some time to be perceived. See *Brazil – Tyres*, *supra* note 105, ¶ 155.

109 However, this conclusion needs a further analysis based on the fact that, at the time a tribunal adjudicates a dispute between an investor and a host State, several years may have passed and what was likely at the time of the adoption of the unlawful act may have already materialized as a real effect. As will be mentioned below, tribunals have the power to determine, on the basis of the evidence submitted by the parties, the length of the crisis. Thus, even if a crisis is declared to exist that justifies the invocation of a BIT necessity clause, an act adopted to face it that was conceived to produce its effects in the medium term at the time of its adoption must have done so during the span of the crisis, as determined by the tribunal, in order for it to be covered by the BIT necessity clause. If the given calamity triggered the application of the necessity clause but was overcome without the contribution of the regulation or acts affecting foreign investors—because the crisis was resolved before the effects of the act or regulation could make themselves felt—the regulation should not be covered by the necessity clause and the host State should owe full compensation for damages caused by these particular acts, even if the necessity clause is successfully invoked. The situation would take place only in circumstances in which the harm inflicted on foreign investors by the given act did not in itself contribute immediately to the solution of the situation justifying the invocation of the BIT necessity clause. The situation may not be common in foreign investment law but it could occur, as it sometimes does in the WTO, in instances of severe environmental emergencies or crises for example.

i. Absence of contribution to the situation by the host State justifying the invocation of the BIT necessity clause

As to the requirement of absence of contribution of the host State, the *Continental* tribunal assessed it without identifying its legal ground. The conclusion is right, in my view[110], although the legal basis must be identified in the treaty or in any international law source other than Article 25 of the Articles of State Responsibility[111].

Despite the fact that States do not have to demonstrate the requirements of Article 25 to successfully invoke BIT necessity clauses, as a result of the approach developed by the *CMS* and *Sempra* annulment committees, this approach does not prevent the condition of lack of substantial contribution to the situation of necessity from playing a role in the interpretation of such clauses under certain circumstances, through other sources of international law and by virtue of the phenomenon of the overlapping of international law sources, as will be seen below.

In effect, a State's active involvement in the critical situation prompting the invocation of the BIT necessity clause could still be relevant for its interpretation on the basis of another source of international law[112]. Indeed, the general principles of law embodied in the well-known Latin maxim *nullus commodum capere potest de injuria sua propria* ("no one can gain advantage by his own wrong[113]") could be at play to achieve the interpretation of BIT necessity clauses and would obtain a similar effect. The principle could be seen as comprising not only wrongs but also negligent acts, since Fitzmaurice associates it with another general principle, *ex injuria non oritur jus*, and points out that "[t]he general principle is that States cannot profit from their own wrong, or plead their own omisions [*sic*] or negligences as a ground absolving them from performances of their international obligations[114]."

On the contrary, an interpretation of BIT necessity clauses that concludes that the treaty's silence regarding the limitation embodied in Article 25(2)(b) means that those States that carelessly and significantly provoked the critical situation can succeed in invoking the BIT necessity clause offends logic. Such unreasonable result calls, instead, for an interpretation of necessity clauses of this kind in light of "any relevant rules of international law applicable in the relations between the parties," as mandated by Article 31(3)(c) of the VCLT[115].

110 For an assessment of the contribution to the situation of necessity that takes into account the reality of the contemporary regulatory State, see Alberto Alvarez-Jiménez, "Foreign investment protection and regulatory failures as States' contribution to the state of necessity under customary international law: A new approach based on the complexity of Argentina's 2001 crisis," 27 *Journal of International Arbitration* 141 (2010) [hereinafter Alvarez-Jiménez, "Regulatory Failures"].

111 Schill supports requesting that the host-country substantially contribute to the crisis, although he does not offer the legal grounds for such a requirement. See Schill, "International investment law and the host State's power to handle economic crises," *supra* note 55, p. 281.

112 See Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 438.

113 Bryan A. Garner, ed., *Black's law dictionary,* 7th ed. (St. Paul: West Group, 1999), p. 1669. Another related maxim is *commodum ex injuria sua non habere debet* ("the wrongdoer should not derive any benefit from his own wrong"). See Garner, ed., *Black's law dictionary*, op. cit., p. 1624. The Spanish translation of this maxim makes reference to error, "*nadie puede beneficiarse de su propio error*." See http://www.scribd.com/doc/3005168/diccionario-juridico-latin. According to Cheng, this maxim is a general principle of international law. See Bin Cheng, *General principles of law as applied by international courts and tribunals* (London: Stevens, 1953), pp. 151–58. As Cheng well illustrates, this principle has been applied by multiple courts: by the Permanent Court of International Justice in the *Chorzow Factory Case* (1927) and in *The Tattler Case* (1920); by the United States – Venezuela Mixed Claims Commission in the *Frances Irene Roberts Case* (1903); and by the Ecuadorian – United States Claims Commission, among others. See also Gerald Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law," in Hague Academy of International Law, ed., 92 *Recueil des Cours, Collected Courses* (Leiden: Martinus Nijhoff Publishers, 1957), p. 117.

114 Gerald Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law," *supra* note 113, p. 117.

115 This conclusion is also supported by the arbitral tribunal created by the United States and the United Kingdom by virtue of a treaty of August 18, 1920 to resolve the disputes stemming from the Court of Permanent Arbitration's decision in *North-Atlantic Coast Fisheries,* when it stated: "[A]ny Government is responsible to other governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands." Owners of the *Jessie*, the *Thomas F. Bayard* and the *Pescawha* (Great Britain) v. United States, British-American Claims Arbitral Tribunal, 6 *Reports of International Arbitration Awards* 57 (1921), p. 59, as quoted by Robert Kolb, *La bonne foi en droit international public*: *Contribution à l'étude des principles généraux de droit* (Paris: Presses universitaires de France, 2000), p. 123.

It is, then, through this provision that the above-mentioned general principle of international law is brought in to provide an interpretation of necessity clauses that prevents this absurd result[116].

However, the above-mentioned condition would not operate as a requirement that must be demonstrated by the host State for the successful invocation of necessity clauses—which investor-State tribunals would always have to assess—but the issue could be raised by investors and preclude the success of the BIT necessity defense.

Finally, by arguing that the host State's substantial involvement in the creation of the crisis may preclude the successful invocation of BIT necessity clauses, this author is not introducing customary international law through the back door to the interpretation of BIT necessity clauses. In effect, on one hand, as was mentioned, the lack of involvement is not a requirement, and if it is not raised by investors, tribunals do not need to assess it when deciding about the BIT necessity defense. But on the other hand, it is important to highlight, as Rosalyn Higgins rightly did, that the sources of international law overlap. She illustrated it with treaty and customs[117] and, as the situation assessed here reveals, the same can take place regarding customary law and general principles of international law[118]. It is this overlapping that brings into play the said general principle, also included in Article 25, within the interpretation of BIT necessity clauses, although with important differences.

It could be argued that, given that Article 25 remains potentially applicable if the violation is not justified by the BIT necessity clause, there is no need to incorporate an analysis of the contribution of the State as part of the assessment of the given necessity clause. There is a response to this argument—in addition to the fact that the availability of Article 25 is sometimes restricted, as noted above[119]. If, as both the *CMS* and *Sempra* annulment committees have highlighted, BIT necessity clauses are independent from Article 25, these clauses need to be fully interpreted—both their text and context and object and purpose included—according to the VCLT and international law, the latter comprising, to be sure, sources other than Article 25 of the Articles of State Responsibility.

ii. Uniqueness of the measures adopted as a requirement within BIT necessity clauses

The second issue is the uniqueness of the measures as an additional requirement for the successful invocation of BIT necessity clauses. The *Continental* tribunal, as we saw, relied on GATT practice as a remote model of Article XI of the U.S.-Argentina BIT to introduce the requirement of the uniqueness of the measures, a ground that may not be available in the case of other BITs to which the U.S. is not party. In the case of these BITs, another source of international law must be adduced to ground such a requirement, which in any case does not enjoy the status of general principle of international law. For this reason and given the impossibility of relying on Article 25 of the

116 I share McLachlan's views, according to which "the reference to general principles of law in the investment context more commonly [. . .] inform[s] the content of an existing, but open-textured treaty norm." McLachlan, "Investment treaties and general international law," *supra* note 54, p. 396.

117 See Rosalyn Higgins, *Problems and process: International law and how we use it* (New York: Oxford University Press, 1994), pp. 28–32.

118 It may well be highlighted that the *CMS* and *Sempra* annulment decisions stated that Article XI and, most generally, BIT necessity clauses were independent provisions from Article 25 of the Articles of State Responsibility and not that the BIT was a self-contained regime in whose interpretation international law played no role. It certainly does by virtue of Article 31(3) of the VCLT.

119 See *supra* note 54 and accompanying text.

Articles of State Responsibility, it is then this author's view that the requirement does not exist in relation with BITs other than those following the U.S. model, absent treaty law providing it[120]. There is simply no legal ground supporting such view[121]. Consequently, host States should not be required to demonstrate that the measures they adopt to face a grave crisis are the only ones that can achieve this goal[122].

Kurtz argues that the requirement of uniqueness can be introduced by giving the customary rule of necessity a residual application in the interpretation of BIT necessity clauses in the event of their silence. Consequently, if the BIT clause is silent regarding the uniqueness of the measure adopted by the host State, Article 25 acts as a residual provision and fills the gap by setting the requirement[123]. In abstract terms, this could perhaps be an option. However it is not strong enough to respond to the *CMS* annulment committee's statement that Article XI and Article 25 have "different operation and content.[124]" In this author's view, the only way for a tribunal to incorporate a requirement of Article 25 that is not included in a BIT necessity clause is on the basis of a contextual interpretation of the BIT or of other sources of international law setting forth the obligation and through Article 31(3)(c) of the VCLT[125], which, to recall, provides:

> 3. There shall be taken into account [in the interpretation of a treaty], together with the context: [. . .]
>
> (c) any relevant rules of international law applicable in the relations between the parties.

Alvarez and Khamsi are of the view that this requirement could be imposed on the basis of the principle of effective interpretation of treaties and through Article 31(3)(c) of the VCLT[126]. I agree with these authors that this provision is the vehicle to incorporate the uniqueness requirement in the interpretation of BIT necessity clauses; however, the conditions for the application of the principle, as it is traditionally understood, are not present. According to the most traditional formulation of the said principle, "[w]hen a treaty is open to two interpretations, one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purpose of the treaty demand that the former interpretation should be adopted.[127]"

It may be noted that the principle of effectiveness is only applicable when there are two interpretations: One that allows the treaty to produce effects and another that does not. The main hurdle to relying on this principle is that an investor claiming it to introduce the requirement of uniqueness must demonstrate that, for instance, an alternative interpretation of the BIT necessity clause—one that excludes this requisite but is nonetheless narrowly defined and incorporates, for instance, the requirement of absence of substantial contribution—does not enable the BIT to have appropriate effects. This

120 This is, however, not to say that the proven existence of other reasonably available means does not play any role in the interpretation of BIT necessity clauses. More on this below in Part E.2.a.

121 For a similar conclusion in this regard, see Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, p. 344.

122 Kurtz notes that the origin of this requirement was the 1841 Caroline dispute between the United States and Great Britain, in which there was a need to contain the use of force between States. In his view, this origin should not call for an easy extension of the requirement to other areas of extraordinary State action. See Kurtz, "Adjudging the exceptional at international investment law," *supra* note 10, p. 338.

123 See Kurtz, "Adjudging the exceptional at international investment law," *supra* note 10, p. 353–4.

124 See *supra* text accompanying note 40.

125 This is the safe way to avoid an annulment of the request of uniqueness on the basis of manifest excess of powers, pursuant to Article 52.1(b) of the ICSID Convention, when applicable.

126 See Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 437.

127 Sinclair, *The Vienna Convention on the law of treaties, supra* note 51, p. 118.

is certainly not the case. An alternative interpretation of this nature, that, in addition, allocates the risks of crises to both investors and host States, does allow the BIT to produce effects. Thus, room for the application of the principle of effectiveness to introduce this requirement seems to be limited. Or differently put, lack of uniqueness does not automatically lead to the conclusion that the interpretation of the BIT necessity clause as a whole does not produce effects; it all depends on how the entire clause is interpreted. On this basis, it is this author's view that the principle of effectiveness is not a strong source of international law to introduce the requirement of uniqueness of the measures as part of the interpretation of BIT necessity clauses[128] [129].

2. Consequences of the successful invocation of BIT necessity clauses

a. The justification for wrongful acts offered by BIT necessity clauses: permanent or temporary?

Article 27 of the Articles of State Responsibility provides that the necessity defense is temporary. Do the *CMS* and *Sempra* annulment decisions rejecting the possibility of relying on Article 25 to determine the requirements of BIT necessity clauses mean that the effects of Article 27 must also be rejected to conclude that the successful invocation of BIT clauses always leads to the permanent character of the regulation affecting investors? I am not of this view. The consequence that the above-mentioned decisions produce is that investors and courts and tribunals cannot rely on Article 27 to justify the temporary character of the regulations or omissions affecting foreign investors, and they must seek other legal grounds, in particular, in the BIT itself.

The issue of the permanent or temporary character of the justification afforded by BIT necessity clauses must be resolved according to the treaty, interpreted in light of the VCLT. The character can be permanent if parties to the BIT so determine[130], but it can also be temporary, in which case, the legal grounds must be found in the treaty and no longer in Article 27 of the Articles of State Responsibility, as was said. But, by definition, a necessity clause should be applicable during the time the need persists, as the *LG&E* tribunal held. When it no longer does, because the risk to the public order or essential security interest has disappeared, the justification for wrongful acts should end[131]. The

128 Another point to address is whether the requirement of uniqueness not explicitly provided for in a BIT clause can still be based on textual or contextual interpretation of the treaty. Kurtz makes such an attempt by claiming that only the less restrictive measure, and none other, can be considered to be necessary. His analysis is not based on customary international law, but is part of an interpretation of Article XI of the Argentina-U.S. BIT. See Kurtz, "Adjudging the exceptional at international investment law," *supra* note 10, pp. 368–70. This point leads to a more general question: Is it possible to infer the requirements of the customary rule from contextual interpretations of the BIT? Would this interpretation accord with the difference of operation and content between the clause and Article 25? One can expect host-States not to be sympathetic to such a finding and to seek its annulment, and can expect ICSID annulment committees to seriously scrutinize contextual interpretations of this nature and not to show, despite their jurisdictional limitations, too much deference to tribunals. However, a carefully crafted interpretation in accordance with the VCLT and, perhaps, supported by the negotiating history of the BIT in question, leading to this general result would reveal that the parties' intentions were, in fact, to contemplate some of the requirements that are also present in Article 25 ICSID ad hoc annulment committees should regard a tribunal's finding of this sort as a lawful application of the relevant treaty law. This is, though, not to return to the customary rule, since the interpretative process is totally different, for it is not based on the said rule, but on the text of the treaty alone.

129 Finally, it is important to highlight that there is a difference between the *LG&E* and *Continental* tribunals regarding the operation of BIT necessity clauses. The former started its analysis with the claims of violation of the BIT, and once it found them, it assessed whether the violation was justified by the necessity clause. The latter began with the clause and then proceeded to determine the existence of violations of the BIT. It is odd that the *Continental* tribunal chose this order of analysis, since the tribunal relied heavily on WTO law for its interpretation of the BIT necessity clause, and never has this order been used by WTO panels and the Appellate Body when assessing GATT/GATS necessity exceptions invoked by WTO members as a defense in dispute settlement proceedings. The order of analysis of the *Continental* tribunal is not the one that has been consistently applied and, in my view, does not truly reflect the fact that the invocation of a BIT necessity clause is a defense that operates to justify a violation of the investor's rights under the treaty. Thus, this character would suggest that the clause operates only once a violation of the treaty has been found. In general, it could be said that investor-State tribunals should start their analysis with the claims of violation of the BIT in question; and if they find one, they should go on with the assessment of the necessity defense under the BIT clause. If the violation is not justified by the clause, tribunals should proceed to evaluate the additional defense under the customary rule of necessity.

130 It may be worth mentioning that in WTO law, for instance, necessity exceptions—which exclude wrongful acts and operate as primary rules—have permanent character. See, for instance, Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (March 12, 2001), ¶ 192(f), available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm (last visited January 12, 2011).

131 See Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, p. 389.

preclusion of wrongful acts by host States has such an important effect—no compensation owed[132]—on foreign investors, key stakeholders in BITs, that such effect must be granted only when preclusion is justified and not beyond that[133].

Although the *Continental* tribunal tacitly held that the excuse offered by the necessity clause was permanent[134], the tribunal could not avoid dealing with the temporary character of the justification offered by Article XI when it rejected a particular measure adopted by Argentina because it was put in place when Argentina was already on the path to recovery[135]. This finding reinforces the need to recognize the importance of the temporary character of the excuse offered by BIT necessity clauses. The defense is not available to excuse measures adversely affecting foreign investors adopted well after the crisis has started and once it has been overcome; they are no longer necessary.

This conclusion leads to a further question that a tribunal following the *CMS* and *Sempra* annulment decisions may face and have to resolve regarding the interpretation of BIT necessity clauses: debates among investors and host States about when the need for the justified wrongful acts vanishes. Arbitration tribunals have the last word regarding the length of the existence of the need for the application of the BIT necessity clause and can use it to control the impact of the successful invocation of the clause[136].

This is what the *LG&E* tribunal did. Although the *LG&E* tribunal declared that the crisis met the requirements of Article XI and that no compensation was due to the investor during its duration[137], the tribunal significantly narrowed the length of the necessity when calculating the damages due by Argentina to LG&E, in comparison with what the previous tribunal had determined in the *CMS* case[138]. Full compensation was calculated from the date the *LG&E* 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.

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132 Compensation is not owed when BIT necessity clauses are successfully invoked, as the *CMS* annulment committee stated, but there may be exceptions. More on this below in Part E.2.b.

133 See, similarly, Kurtz, "Adjudging the exceptional at international investment law," *supra* note 10, pp. 364–65. Kurtz calls the *Continental* award a lodestar regarding temporality, and I respectfully disagree. What the tribunal said regarding temporality was that States could not adopt measures to face crises when they had been overcome, but the tribunal did not state that, once Article XI was successfully invoked, the effects lasted only during a defined period of time. In fact, the effects of such success were permanent for this tribunal, as was mentioned before.

134 This seems to be a conclusion inspired by the permanent effects that the successful invocation of necessity exceptions produces in WTO law. However, although this author supports the assistance that this body of law can offer to the interpretation of BIT necessity clauses, this particular conclusion takes the WTO model too far in the domain of foreign investment law. The permanent character of the successful invocation of necessity exceptions in WTO law is associated with the need to ensure that States have the possibility of pursuing at any time certain objectives other than trade. This possibility may be seen as a normal, permanent reality of the operation of States. On the contrary, BIT necessity clauses are usually included with the aim of providing host States with instruments to face grave and unusual factual situations, which are exceptional and not part of their normal operation. The use of WTO law on this particular point can then be deemed inadequate in the interpretation of BIT necessity clauses.

135 See *Continental* award, *supra* note 5, ¶ 222.

136 It is certainly difficult to determine the starting and final day of grave critical situations, which may vary depending on the criteria—political or economic—used by an international adjudicator to make such determinations, as Bjorklund rightly says. See Bjorklund, "Emergency exceptions," *supra* note 12, pp. 508–10. However, I do not go so far as she does and say that this decision is "by nature somewhat arbitrary." Bjorklund, "Emergency exceptions," op. cit., p. 509. I would prefer to label it as discretionary, with the discretion enjoyed by the tribunal limited to a certain extent by the particular facts of the case in question and by their subsequent evolution. Burke-White and von Staden argue that the disappearance of the risk may sometimes not be enough to justify the end of the necessity situation when the removal of the measures may trigger the reappearance of the risk, as with severe health or public order crises. See Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, p. 390. It should be emphasized that investor-State tribunals usually render their decisions several years after the crisis that prompted the invocation of the BIT necessity clause took place, so they may have a good account of how the critical situation evolved over time. In any case, it may be useful to draw on Cardozo's words, which although certainly unrelated to the subject matter discussed here, may certainly illuminate it: "Where the line is to be drawn between the important and the trivial cannot be settled by a formula [. . .] The question is one of degree, to be answered, if there is a doubt, by the triers of the facts [. . .]" Jacob & Youngs, Inc., v. Kent, 129 N.E. 889, 891 (N.Y. 1980), as quoted by E. Allan Farnsworth, *Contracts* (New York: Aspen Publishers, 4th ed., 2004), p. 549. Likewise, when a crisis commences and ends cannot be determined by a formula; it is a matter of degree to be determined by arbitration tribunals on the basis of the factual situation at issue.

137 See *LG&E* decision on liability, *supra* note 23, ¶ 260.

138 The duration of the Argentine crisis was 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. See *LG&E* decision on liability, *supra* note 23, ¶¶ 226 - 229; *CMS* award, *supra* note 22, ¶¶ 250, 441.

The *LG&E* tribunal used its power to determine the length of the necessity to control the consequences of the successful invocation of Article XI and its zero compensation conclusion[139]. 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 overcome its crisis in full.

A final point is that, if the contribution to the crisis by the host State did not have any place in the interpretation of BIT necessity clauses, even under the terms defined above in Part E.1, such contribution could still play a role in the estimation of the duration of the crisis. Investors could claim that, although the crisis existed, its duration would have been shorter had the host State not contributed to it. If the contribution is duly proved, a tribunal should make a reduction in the duration of the crisis on this basis[140].

A similar analysis could be made regarding whether or not other reasonably available means to face the crisis that would have had a less adverse effect on foreign investors existed and were not deployed. Although the existence of such means would not be a requirement for the successful invocation of a BIT necessity clause, save in the case of those BITs that followed the U.S. model, the demonstrated existence of such means would result in the claim that they could have attenuated the extent or duration of the crisis had they been deployed. If so, a tribunal could recognize it by reducing the length of the crisis. Tribunals should not ignore the fact that a crisis may well have been of a smaller duration had certain means been used. If the host States decided not to use these means, the investors should not bear the consequences of a longer crisis.

The narrowing of the length of the crisis is an important tool to allocate risks between investors and host States when the necessity clause is successfully invoked. By virtue of the operation of the clause, setting the dates of the crisis at the narrowest length possible allows tribunals to alleviate the burden of the risks borne by foreign investors since, once the crisis is considered finished, full compensation is due to them and the risks are shifted to host States even if their factual situation may not be totally normal[141].

b. Possible compensation when BIT necessity clauses are successfully invoked

An analysis of the effect of the successful invocation of BIT necessity clauses in light of the type of investors' rights adversely affected by the actions or regulations adopted by the host State reveals that the successful invocation of a BIT necessity clause may exclude the unlawfulness of the majority of violations of the given BIT, as the *CMS* annulment committee pointed out, but not of all of them.

The U.S.-Argentina BIT may well serve to prove this particular point. Its Article IV(3) provides:

139 More on compensation below in Part E.2.b.

140 However, it is important to mention that, regarding regulatory failures, for instance, tribunals should not simply rush to consider them as contributions to the situation of necessity. For an analysis of this specific event in light of the customary rule of necessity, but also wholly applicable to BIT necessity clauses, see Alvarez-Jiménez, "Regulatory Failures," *supra* note 110.

141 There is another important point that supports the conclusion that the *Continental* tribunal went too far in its application of the WTO necessity exceptions—especially the permanent character of their successful invocation—to the interpretation of BIT necessity clauses, and particularly, Article XI. The WTO dispute settlement has compulsory jurisdiction, which leads to the existence of repeated players within the system. This means that, if a complainant Member loses a case because the respondent successfully invokes a GATT/GATS necessity exception, the complainant may well benefit from the reasoning of the given panel or Appellate Body report in a subsequent case in which it acts as a respondent. This possibility does not exist in investor-State arbitration, in which the investor is always the complainant, never the respondent, and consequently cannot enjoy the benefits of the generous effects of the successful invocation of BIT necessity clauses put forward by the *Continental* tribunal. The lack of repeated players in foreign investment law, switching roles in litigation, calls for care when assigning all the risk of crises or emergencies to foreign investors.

> Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable that that accorded to its own nationals or companies or to nationals or companies of any other third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses[142].

Article IV(3) is a provision that, without precluding or mandating compensation, deals with it under certain circumstances. It becomes applicable whenever any of such circumstances also serve as grounds for the successful invocation of Article XI.

This is not to say that Article IV(3) only becomes relevant when there is a crisis covered by Article XI. Indeed, it is perfectly possible that an event of social disturbance, for instance, may not trigger Article XI but nonetheless prompt the application of Article IV(3). However, the opposite may be true in most cases: whenever a situation is covered by Article XI by involving issues of maintenance of public order, restoration of international peace, or protection of an essential security interest, the situation would trigger Article IV(3), since it may well be intimately related to any of the circumstances provided for in this provision.

Can it then be said that if, under a situation of emergency, Argentina or the United States compensated domestic investors and not foreign investors, in clear violation of Article IV(3), such violation could be justified by Article XI of the BIT? Apparently, it could, since according to the test for the application of Article XI, a court and tribunal must first find a violation of the BIT and then proceed to determine whether the violation is justified under Article XI, and if so, the violation is excluded. However, a more detailed analysis of the effect of primary rules in the context of BITs shows that, although BIT necessity clauses have a broad scope to justify violations of a treaty, they cannot cover all, particularly violations of a provision like Article IV(3)[143]. Two kinds of rights underlie this situation: pre-crisis rights and crisis rights, defined as those acquired by foreign investors by virtue of the existence of the given emergency or disaster.

To begin with, the most common situation is one where foreign investors hold rights protected by the BIT prior to any circumstance covered by a BIT necessity clause, which could be labelled pre-crisis rights. If the circumstance occurs and prompts the adoption of acts or regulations that adversely affect such rights, the clause can justify their violation. No compensation is then due by the host State for the amount of damage that investors bear as a result of measures adopted to face the given crisis.

But it is also possible for foreign investors to acquire new rights as a result of the crisis that impelled the invocation of the BIT necessity clause, if such a situation also falls under a provision similar to Article IV(3). For instance, if during the crisis, the host State compensated national investors to a certain extent and did not do the same for investors of a party to a BIT that included an analogous provision, these investors would acquire, by virtue of the crisis, a national treatment right regarding any compensation received by domestic investors. To be sure, this

142 U.S.-Argentina BIT, *supra* note 27, Article IV(3).
143 See Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 434.

right may not be the same as the full compensation right that would exist if the violation had not been justified by the BIT necessity clause, and the right is restricted only to the compensation that national investors in similar circumstances received[144]. In other words, it is a different kind of compensation based on a different legal ground.

The violation of this crisis right cannot be justified by the successful invocation of the BIT necessity clause, because it is the application of the clause itself that is one of the conditions for the existence of the right under Article IV(3)[145], and it is not possible for the act that contributes to creating a right for the investor to also be the one that extinguishes it.

In the end, provisions like Article IV(3) constitute limitations on host States' actions under the specific factual situations provided therein, which also operate when any of these situations prompts the invocation of BIT necessity clauses.

Conclusion

The recent *Sempra* annulment decision has ratified the autonomy of BIT necessity clauses from the customary rule of necessity embodied in Article 25 of the Articles of State Responsibility. Such ratification means that BIT necessity clauses must be autonomously interpreted according to the principles of the VCLT, but it leaves untouched the diverse views that the *LG&E* and *Continental* tribunals held regarding the requirements for and the effects of the successful invocation of such clauses. This chapter has suggested that the autonomous interpretation of BIT clauses should not prompt, save in the event of parties' express intention, a transfer of all the risks of grave social, economic, and/or political crises to foreign investors. As a matter of policy, tribunals should find interpretations that, depending on the facts, imply a sharing—albeit not in exactly equal parts—of these risks between investors and States. In this sense, this author is more inclined to support the interpretation of the U.S.-Argentina BIT necessity clause in the *LG&E* award than that in the *Continental* award, in which all risks were shouldered by the investor[146].

Under the approach put forward in this chapter, first, BIT necessity clauses should be narrowly interpreted, given that they preclude the existence of what would otherwise be violations of investors' international rights; second, there should be a relation of means and ends between the measures adopted and the goal of facing or attenuating the given grave crisis affecting public order or security interests and the measures should be in principle proportional, so that those significantly adversely affecting investors and producing only minor effects should not be justified by BIT necessity clauses; third, States should be able to adopt regulations that are able to produce immediate effects but also those that yield results in the medium term; fourth, the substantial contribution of the host State to the situation triggering the invocation of the BIT necessity clause should preclude the successful invocation of such clause by virtue of the overlap between treaties and general principles of law; finally, in the case of BITs that do not

144 For a similar argument, although grounded on a different basis, see Schill, "International investment law and the host state's power to handle economic crises," *supra* note 55, p. 284. To be sure, the right is not that of obtaining exactly the same amount of money that domestic investors received, but of obtaining a sum that implies a treatment similar to that accorded to them.

145 The second source of the specific right is the differential treatment itself.

146 The same can be said of interpretations of necessity clauses that allocate all these risks to host countries, as the one proposed by Alvarez and Khamsi in relation to Article XI of the U.S.-Argentina BIT, which is based on the assumption that the protection of foreign investors "is the *sine qua non* of that treaty." Alvarez and Khamsi, "The Argentine crisis and foreign investors," *supra* note 26, p. 471.

follow the U.S. model, States should not have to demonstrate that the regulation enacted is the only means to face the given crisis.

As to the effects of the successful invocation of BIT necessity clauses, the preclusion of wrongful acts should be temporary and last as long as the threat to the public order or essential interest persists. The chapter also recommends that tribunals take into account the existence of any host State's contribution to the crisis and of alternative means that were at its disposal and were not deployed to reduce the recognized length of the given crisis, since investors should not bear the burden of crises that lasted longer in part because of States' actions or omissions.

Regarding compensation, none is owed to investors during the length of the crisis, since the successful invocation precludes the existence of wrongful acts, as the *CMS* and *Sempra* annulment decisions have determined. However, the chapter has illustrated that the successful invocation of BIT necessity clauses does not always prevent wrongfulness and that such determination depends on the type of rights violated. In this sense, the transgression of pre-crisis rights, defined as those held by investors prior to the occurrence of the crisis, does not lead to compensation when the BIT necessity clause is successfully invoked. However, there is also the possibility of the existence of host States' obligations specifically due to investors during situations of crisis that justify the invocation of necessity clauses, as Article IV(3) of the U.S.-Argentina BIT evidences. Violations of these crisis rights are not justified by the necessity clause and could lead to compensation to investors.

In sum, this general approach to the interpretation of BIT necessity clauses has the advantage of granting host States the means to face unusual critical situations affecting their public order or security interests, without imposing all the risks of these situations on foreign investors[147]. Both end up sharing those risks to some extent, which is in general an objective consistent with the declared goal of seeking to promote foreign investment, stated in virtually all BITs.

147 Burke-White and von Staden regard in-depth assessments of necessity clauses by arbitration tribunals as leading to the transfer of risks from investors to States during crises. See Burke-White and von Staden, "Investment protection in extraordinary times," *supra* note 6, p. 402. This article suggests a way in which BIT necessity clauses can be assessed in detail without necessarily transferring all risks to investors.