The Use and Misuse of the Customary International Law Doctrine of Necessity in International Investment Arbitration

C h o v a n c o v á, K. *

CHOVANCOVÁ, K.: The Use and Misuse of the Customary International Law Doctrine of Necessity in International Investment Arbitration. Právny obzor, *102*, 2019, special issue, pp. 55-71.

The Use and Misuse of the Customary International Law Doctrine of Necessity in International Investment Arbitration. Within the realm of international law, there are two types of the state of necessity doctrine in customary international law (CIL) and treaty-based regimes, including the regime subordinated to international investment law. The concept of necessity defence, based on the CIL is embedded in Article 25 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts as one of several circumstances, which guarantee preclusion of the wrongfulness of the state's conduct in international law. The CIL necessity defence as a secondary rule of state responsibility may be invoked only after the breach of any international obligation (except for the peremptory norm of international law) was established according to primary rules of the particular regime of one of many areas of international law. The threshold for passing the Article 25 necessity test is extremely high and resulted in its rare use in practice, yet the host state's success with invoking the bilateral investment treaty (BIT) necessity defence may be achieved easier, but also depends on the wording of the non-precluded measure (NPM) clause in the BIT. The NPM clause serves as an additional layer of protection for BIT parties and should be formally and substantially distinguished from the CIL necessity. Actually, the nature of NPM provisions in BITs has been recently conflated with the CIL necessity in five famous international investment arbitrations against Argentina, when the nexus requirement in Article XI. of the US - Argentina BIT was mixed up with that of the CIL necessity doctrine. The thesis of this article is that as a part of *lex specialis*, the treaty based necessity defence in international investment law, included in the BIT's NPM provision under no account can be perceived as having some inferior status to the CIL necessity unless the BIT parties explicitly agreed on such NPM clause's status in the BIT.

Keywords: *customary international law, necessity defence, bilateral investment treaties, international investment law, responsibility of states, non-precluded measures, investment arbitrations*

„Meine Herren, das widerspricht den Geboten des Völkerrechts. Meine Herren, aber wir sind jetzt in der Notwehr; und Not kennt kein Gebot! ... Wer so bedroht ist wie wir und um sein Höchstes kämpft, der darf nur daran denken, wie er sich durchhaut!" [1]

Von Bethmann Hollweg,[2] the 4th of August 1914

* doc. JUDr. Katarína Ch o v a n c o v á, PhD., LL.M., MCIArb, Institute of International and European Law at the Faculty of Law of the Pan European University in Bratislava and Institute of State and Law of the Slovak Academy of Sciences. This publication was released within the grant scheme of APVV-15-0456 (Long Term and Recent Tendencies of Development of Positive Law in Selected Fields of Legal Order).

[1] Sirs, this breaks the rules of international law. Sirs, but we are now in a state of self-defence; and necessity knows no law! When someone is as much threatened as we are, when fighting for their highest goal, one should think only of how to sustain!"

[2] The German Councillor, well known for preaching his justification of the invasion of Belgium by German troops in 1914 through a slightly twisted state of necessity doctrine.

1. Introduction

With all the due respect paid both to followers[3] as well as die-hard opponents[4] of the application of the customary international law (CIL) necessity concept in the international investment arbitration, or rather the application of the treaty (BIT) based necessity instead,[5] honestly, is it then an intentional blast, or should an above stated, notoriously famous historical statement be perceived only as a precarious attempt to draw some similarities between the customary international law necessity (the CIL necessity) and the BIT based necessity, when perhaps there are none? Or is there some deeper uneasiness hidden[6] that deserves to be deciphered with a truckload of patience, because scratching just a surface may not pay off in the end, especially, when even the ICJ has been ambushed by the criticism for its "*selective*"[7] and prudent reliance[8] on ILC Draft Articles[9] when bringing the necessity doctrine into the limelight of international community in its watershed precedent in 1997?[10]

[3] VINUALES, J. E.: State of Necessity and Peremptory Norms in International Investment Law. *Law & Business Review of Americas*, Vol. 14, 2008, pp. 79-103.

[4] MARTIN, A.: Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-precluded Measures and the Doctrine of Necessity under Customary International Law. *Journal of International Arbitration*, Vol. 29, 2012, No. 1, pp. 49-70. Similarly KURTZ, J.: Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis. *International & Comparative Law Quarterly,* Vol. 59, 2010, p. 368, pp. 325-371.

[5] See e.g. the decision in *Sempra Energy International v. Argentine Republic*, Award, ICSID Case No. ARB/02/16, September 28, 2007.

[6] For comparison, see e.g. the latest decision of the ICJ on preliminary objections in high profiled *Certain Iranian Assets* (Iran v. U.S.), Preliminary Objections**,** 2019 I.C.J. (February 13), para 54. Here the Court has stated the Iran's argument on incorporation by reference of the CIL on sovereign immunities into Article IV, para.2 of the 1955 US-Iranian Treaty of Amity, Economic Relations and Consular Rights, whereas the US strenuously opposes this interpretation, pointing to the real content of the abovementioned Article, which pertains to the keeping up with the IMS standard in paragraph 2 and binds both parties to the treaty with the obligatory FET standard in paragraph 1 without any hint to any immunity whatsoever. See more on the IMS and the FET standard in CHOVANCOVÁ, K.: The Fair and Equitable Treatment and Its Current Status in International Investment Law," In GEISTLINGER, M., ROTH, M. (eds.): *Yearbook on International Arbitration*. Vol. VI. Wien: Neuer Wissenschaftlicher Verlag, 2019, pp. 171-187.

[7] VILLALPANDO, S.: On the International Court of Justice and the Determination of Rules of Law - Leiden Journal of International Law, *Leiden Journal of International Law*, Vol. 26, 2013, No. 2, pp. 243-251.

[8] KURTZ, J.: Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis. p. 335. Kurtz in his comprehensive treatise openly questions the weight of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts as a codification customary law, especially with regard to the doctrine of necessity. Similarly CARON, D. D.: The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority. *American Journal of International Law*, Vol. 96, 2002, pp. 857-893.

[9] International Law Commission*, Draft Articles on the Responsibility of States for Internationally Wrongful Acts,* U.N. Doc. A/56/10 (2001).

[10] „*The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulnesscan only be accepted on an exceptional basis*." See in detail *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25. September 1997, I.C.J. Reports 1997, para. 51.

Naturally, investment tribunals, which prioritize the BIT based necessity doctrine, when interpreting non-precluded measures provisions (NPM clauses),[11] relied on by the host states in international investment disputes are far from being shameless rogues of the Bethmann Hollweg's kind, as they definitely have never defended (nor promoted on purpose) any invasion of one state by another state. However, it may be observed that arbitrators actually might find themselves in their own private state of self-defence, when putting forward an idea, that necessity in the treaty based international investment arbitration undoubtedly does know the law, and this law has been clearly embedded nowhere else but in the relevant BIT.[12]

Of significance in this respect is the fact that within the realm of international law, there are two different[13] types of the state of necessity doctrine (or to put it simply, two concepts of necessity) living in parallel worlds in customary international law and in treaty-based regimes,[14] including the regime subordinated to the international investment law. As Jung and Han[15] succinctly noted, "*The treaty state of necessity defence (the NPM provision in this case) controls the scope of primary obligations owed under the BIT, whereas the CIL state of necessity defence only looks to provide an excuse or justification once a primary obligation is found to be breached.*"

The legal "non-precluded measure" provision (an NPM clause, or "an exception clause") in the bilateral investment treaty (the BIT) with its objectives listed in detail restricts the protection of foreign investors, embedded in the BIT to the advantage of the host state, granting it a certain regulatory space, even if it is to the investor's disadvantage in exceptional circumstances. Typically, under the NPM clause, the BIT will not prevent ("preclude") its parties from taking e.g. "*the actions, which are necessary for the protection of essential security, the maintenance of public order, or to respond to a public health emergency*."[16] Consequently, the clause reduces the scope of the arbitral tribunal's review of state policies, which allow for actions, embedded in it.

Inclusion of a well drafted NPM clause as an expression of the state of necessity defence in BIT has a strong effect. It keeps the host state, following its objectives,

[11] See an in-depth analysis of NPM clauses in e.g. BURKE-WHITE, W., VON STADEN, A.: Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties. *Virginia Journal of International Law*, Vol. 48, 2007-2008, No. 2, pp. 307-410.

[12] Similarly SLOANE, R.: On the Use and Abuse of Necessity in the Law of State Responsibility. *The American Journal of International Law*, Vol. 106, 2012, No. 3, p. 485.

[13] See the correct observation of judge Tomka, properly distinguishing between NPM clauses in BITs as substantially different from, though related to the CIL necessity in Peter TOMKA, P.: Defences Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties. In KINNEAR, M. N., GERALDINE, R. F. et al. (eds.): *Building International Investment Law: The First 50 Years of ICSID.* The Hague: Kluwer Law International, 2015, pp. 477-494.

[14] Equally TOMKA, P.: Defences Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties. p. 492.

[15] See e.g. JUNG, Y., HAN, S. D.: Sovereign Debt Restructuring under the Investor-State Dispute Regime. *Journal of International Arbitration*, Vol. 31, 2014, No. 1, p. 92.

[16] BURKE-WHITE, W., VON STADEN, A.: Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties. p. 311.

included in NPM provision away from breaching on its own treaty obligations toward investors from the other party to the BIT.[17] Within a broader context, the NPM clause serves as an additional layer of protection for the parties to the BIT,[18] being substantially and formally different from the CIL necessity. Simply put, NPM clauses as *lex specialis* not only differ from the CIL necessity defence, but even more, they are separated from it by their content and theoretical reasonableness, as well as by their scope of applicability and the basic source of legal authority, which is a treaty law, expressed in the BIT.[19]

The NPM clause may be included in the main text of the treaty, or in the attached protocol to the treaty. Traditionally, a basic form and structure of the NPM clause always incorporate several essential elements.[20] On the whole, the wording of NPM clauses in various BITs depends on the consensus of negotiators and the NPM clause covers wither the whole BIT, or its selected provisions only.[21] As for permissible objectives of the NPM clause (either non-self-judging or self-judging), they may be divided into two categories, being security related and non - security related objectives.

Unlike the BIT based necessity defence, the concept of necessity defence, based on the customary international law has been embedded (as generally understood, in spite of occasional criticism)[22] in Article 25 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (the ILC Draft Articles) as one of several circumstances, which guarantee preclusion of the wrongfulness of the state's conduct in international law.[23] The CIL necessity defence as a secondary rule[24] of state responsibility,[25] which serves to identify the possibility of the preclusion of the wrongful act, may be invoked only after the breach of any international obligation (except for a peremptory norm of international law) has been established according to primary rules of the particular regime, be that the environmental law, or other areas of international law.[26]

[17] See in detail CHOVANCOVÁ, K.: Non-Precluded Measures in International Investment Arbitration. *Czech Yearbook of Public & Private International Law*, Vol. 7, 2016, pp. 391-410.

[18] DESIERTO, D.: Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties. *University of Pennsylvania Journal of International Law*, Vol. 31, 2009-2010, p. 918.

[19] BURKE-WHITE, W., VON STADEN, A.: Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties. p. 322.

[20] These are as follows: "*the nexus*" required between the measure taken by the host state and a desirable objective, which should be attained by the measure, the scope of applicability of the clause and objectives that may be followed by the host state through adoption of the NPM clause. See in detail CHOVANCOVÁ, K.: Non-Precluded Measures in International Investment Arbitration. p. 402.

[21] Ibidem, p. 403.

[22] SLOANE, R.: On the Use and Abuse of Necessity in the Law of State Responsibility. pp. 454-470.

[23] Apart from necessity, circumstances, guaranteeing preclusion of the wrongfulness of the state's conduct in international law, contained in Articles 20 – 25 of the ILC Articles contain also *force measure,* distress, consent, self-defence and countermeasures.

[24] TOMKA, P.: Defences Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties. p. 493.

[25] KURTZ, J.: Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis. p. 336.

[26] See generally on necessity e.g. in HENCKELS, C., MITCHELL, A.D.: Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law. *China Journal of International Law*, Vol. 14, 2013-2014, No. 1, p. 97.

According to Article 25, Section 1 of the ILC Draft Articles, necessity may be invoked as a ground for precluding the wrongfulness of an act, which has violated an international obligation of this state only in two extraordinary circumstances (or conditions), which have to be cumulatively fulfilled, while "*the State concerned is not the sole judge of whether those conditions have been met*."[27] It is notable that the first condition, addressed in Article 25, Section 1 letter a) has been composed of no less than three multiple requirements, which have to be satisfied at once.[28]

First and foremost, the violating act thus must be the only way for the state to safeguard the state's essential interest against a grave and imminent peril. Second, under a subsequent letter b), at the same time, under no condition may this act endanger an essential interest of the entitled state (which is the state or states toward which the obligation exists), or an interest of the whole international community.[29] Nonetheless, under Article 25, Section 2, necessity will be out of the question in every case where an international obligation, which has been breached on by the act of the state, excluded the possibility of invoking the necessity, or the state, contemplating to invoke the necessity defence itself has contributed to the situation of necessity.

As Desierto[30] observed, "*The joint effect of the positive conditions under Article 25 (1) is to create potentially the most difficult standard for a State to exculpate itself from responsibility on the ground of necessity*." Apparently, the threshold for passing the necessity test, set up in Article 25 is extremely high, and resulted in its very rare use in international legal practice. In contrast, this feature of the test may seem only natural, as the test itself has originated from the necessity defence, concerning the use of force in self-defence.[31] On the other hand, once the threshold is being passed, an unlawful measure, taken by the state, while infringing on its international obligation in order to protect its own essential interests against grave and imminent danger in exigent circumstances, will be excused. [32]

As startling as it appears when considering all the differences between the BIT based and the CIL necessity, the very nature of NPM provisions in BITs has been recently not confluenced, but conflated outright with the CIL necessity in five notoriously famous and highly debated ICSID[33] arbitrations[34] against Argentina when

[27] *Gabcikovo-Nagymaros Project (Hungary/Slovakia),* Judgment of 25 September 1997, I.C.J. Reports 1997, para. 51.

[28] See e.g. MARTIN, A.: Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-precluded Measures and the Doctrine of Necessity under Customary International Law. p. 51.

[29] JUNG, Y., HAN, S. D.: Sovereign Debt Restructuring under the Investor-State Dispute Regime. p. 90.

[30] DESIERTO, D.: Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties. p. 900.

[31] KURTZ, J.: Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis. p. 338.

[32] The host state's success with invoking the treaty based necessity defence, expressed in the relevant BIT, may be achieved easier, but also depends on the wording of more or less skilfully drafted NPM clause in the BIT. See e.g. REINISCH, A.: Necessity in Investment Arbitration. *Netherlands Yearbook of International Law*, Vol. 41, 2010, p. 156.

[33] International Centre for Settlement of Investment Disputes.

[34] *CMS Gas Transmission Company v Argentine Republic*, Award, ICSID Case No. ARB/01/8, 12 May 2005, *Enron Creditors Recovery, L.P. v. Argentine Republic*, Award, ICSID Case No. ARB/01/3, 22 May

the nexus requirement in Article XI. of the US - Argentina BIT was unwittily mixed up with that of the CIL necessity doctrine.[35] Confusion has spread around in spite of genuine (but scattered) efforts of all involved ICSID arbitral tribunals, which tried hard to choose the proper reasoning of their decisions with a remarkable interpretative approach.[36] Unfortunately, as Jung and Han[37] observed, all that their efforts brought about were only "*conflicting interpretations and applications of the law concerning the treaty state of necessity defence, especially vis-à-vis the meaning of what constitutes necessary in the context of ISDS*."

The aim behind this article is not to sweep the reader off their feet with in-depth analyses of arbitral awards, rendered in five aforementioned cases. All of them are mind provoking treatises and their punctual dissection is far beyond the content of this article. Rather, an emphasis is on depiction of the reasons why the CIL necessity should not aspire on becoming the domineering replacement, instead of an occasional adjunct to the treaty based necessity in investment tribunals' methods of reasoning and an overall decision making. The thesis of this article is that as a part of *lex specialis*, the treaty based necessity defence in international investment law, involved in the BIT's NPM provision under no account can be perceived as having some inferior status to the CIL necessity, unless the BIT parties explicitly agreed on such NPM clause's status in the text of the relevant BIT.

This article is divided into five chapters, starting with this introduction. The second chapter paints with a broad brush a weird reasoning of investment tribunals in *CMS*, *Sempra* and *Enron* cases, focusing on conflation of the CIL necessity and the BIT necessity doctrine, an anomaly, which was later rectified by annulment committees in all three cases. In addition, it has incorporated a sketchy insight into the historical development of the doctrine of necessity in international law, building an imaginary bridge with the introductory statement that has marked the beginning of the article.

Serving as a prelude to the fourth chapter, which postulates a polemic discussion on the reasons of unsuitability of the CIL necessity application in the treaty based investment arbitration, the next chapter examines briefly a more acceptable interpretative approach of arbitrators in *LG&E* and *Continental* cases, while pointing to several distinct features of tribunals' reasoning, including an unexpected application of the weighing and balancing test, inherent in the WTO necessity doctrine by the arbitral tribunal in *Continental* award. At the very end, the article predicts the future use of the CIL necessity in international investment disputes, similar to those already reviewed.

2007, *LG&E Energy Corp and others v Argentine Republic*, Award, ICSID Case No. ARB/02/1, 25 July 2007, *Sempra Energy International v. Argentine Republic*, Award, ICSID Case No. ARB/02/16, 28 September 2007, *Continental Casualty Company v. Argentine Republic*, Award, ICSID Case No. ARB/03/9, 5 September 2008.

[35] SLOANE, R.: On the Use and Abuse of Necessity in the Law of State Responsibility. p. 498.

[36] KURTZ, J.: Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis. p. 327.

[37] JUNG, Y., HAN, S. D.: Sovereign Debt Restructuring under the Investor-State Dispute Regime. p. 91.

2. A Recent Revival of Interest in the CIL and BIT Based Necessity Doctrine

A recent revival of interest in the CIL and the treaty based necessity both in international legal theory and arbitration practice has been the consequence of the torrent of claims, brought by foreign investors against Argentina due to its economic crisis and several drastic economic reforms, which Argentina launched to avert it.[38] As Sloane[39] put it, it made the foreign investment law and arbitration "*the most visible area in which necessity has drawn renewed international attention in the past decade*…"

The latest Argentinian fiscal and currency crisis at the end of 2001 was a prelude to a mass of investment arbitrations, initiated on the grounds of expropriation of foreign investments in Argentina. Substantial financial amounts awarded by ICSID tribunals, which Argentina refused to pay are a warning for every country that enthusiastically jumps on the bandwagon of pleasing foreign investors in a haphazard way while obstructing alarming prospects of the crisis, prophesied by its own national economists.

Several dozens of claims have been filed hitherto in various ICSID arbitrations against Argentina with the prospects of facing up to ten billions of US dollars worthy liability. Argentina swiftly rejected all violations of its treaty obligations, alleged by foreign investors, and has defended its exceptional measures by building its defences in all ICSID arbitrations basically on two arguments. An invocation of the BIT necessity, expressed in the NPM clause was followed by the second argument, excusing broad economic reforms on the grounds of preclusion of their wrongfulness under the CIL necessity doctrine.

Virtually, three alternative interpretations were created about the concept of necessity defence in BITs in conjunction with the CIL necessity. The first way of the most restrictive interpretation,[40] strongly influenced by the CIL necessity was applied by investment tribunals in *CMS*, *Sempra* and *Enron* arbitration proceedings against Argentina. Being in uncomfortable interpretative haste, all three tribunals (especially the *Sempra* tribunal) more or less have ironed the treaty based necessity, included in NPM clause in Article XI. of the US-Argentina BIT,[41] with the CIL necessity. This

[38] Early in 2002 Argentina enacted an Emergency Law, which deprived the foreign investors of all their business advantages and favours they were accustomed to after Argentina had restructured its economy in 1990 in order to attract a stable inflow of foreign investments into the country. Through the privatization of state-owned companies, adoption of the Currency Convertibility law, which made an Argentinian peso suddenly a viable option especially for the US investors and a promise of periodic adjustments of tariffs in concession contracts without any possibility of freezing the tariff rates, the country used to be relatively economically stabilized in 1990s before the next crises hit it hard and the dawn of the new millennium has shown a far more disappointing future economic perspectives. For a detailed description of Argentinean crisis see e.g. KASENETZ, E. D.: Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID. *George Washington International Law Revue*, Vol. 41, 2009-2010, pp. 709-747.

[39] SLOANE, R.: On the Use and Abuse of Necessity in the Law of State Responsibility. p. 497.

[40] KURTZ, J.: Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis. p. 329.

[41] US-Argentina Bilateral Investment Treaty 1994. Under Article XI., "*This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its*

attitude positioned an interpretation of Article XI. under Articles 31 and 32 of the VCLT[42] as unnecessary, or even superfluous, with arbitrators showing obviously no respect for the primacy of the treaty.[43]

At the end of the day, arbitrators came to conclusion that the threshold, set up in Article 25 of the ILC Draft Articles had not been passed, as there was neither "*the case of grave an imminent peril*", nor "*the only way*" requirement satisfied by Argentina in its defence.[44] Unlike their predecessors in older cases, arbitrators in *LG&E* and *Continental* case turned out to be more deferent to Argentina in their prudent decisions, while interpreting Article XI. in the US-Argentina BIT with certain congruence, not traceable in *CMS*, *Sempra* and *Enron* cases, in which tribunals ruled against Argentina. Both in *LG&E* and *Continental*, the BIT rooted necessity and the CIL necessity doctrine had been clearly separated, before the reasoning of both tribunals, nonetheless, was later propped up either with the direct reference to Article 25, or at least with an application of the CIL necessity by an imaginary interpretative bypass.[45]

Before getting the reader familiarized with the aforementioned cases' sketchy outcomes, a definition of the act of necessity may be helpful. According to Sykes,[46] "*The act is done to avert some harm that threatens the defendant's or a third party's interests and that emanates from a source other than the plaintiff*." Generally, the act of necessity is conducted by the defendant on the basis of expression of his free will and as such violates up to certain extent the claimant's right. The court in *State of Arizona v H.E. Wooton*[47] expanded the definition of the act of necessity as early as in 1920, when distinguishing between the self- defence and necessity: *"The distinction between necessity and self-defense consists principally in the fact that while self-defense excuses the repulse of a wrong, necessity justifies the invasion of a right."*

Within the realm of international law, the first definition and explanation of necessity have been found in Grotius.[48] Grotius transferred the necessity as applied by authorities in municipal law to the international law and determined its limitations, considering the

obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its essential security interests."

[42] The Vienna Convention on the Law of the Treaties (1969).

[43] Arbitrators held that Argentina was not in a state of necessity during the severe economic crisis and a preclusion of the wrongful Argentinean acts was unjustified under the CIL necessity doctrine. For instance SWEET, A. S.: Investor- State Arbitration: Proportionality's New Frontier. *Faculty Scholarship Series*, Yale Law School, 2010, paper 69, pp. 1-25.

[44] See e.g. *CMS Gas Transmission Company v The Argentine Republic*, Award, ICSID Case No. ARB/01/8, 12 May 2005, sec. 321-322.

[45] LOWENFELD, A.F.: *International Economic Law.* Oxford: Oxford University Press, 2008, p. 581.

[46] SYKES, A.: Economic "Necessity" in International Law. *The American Journal of International Law*, Vol. 109, 2015, No. 2, p. 298.

[47] Necessity as a Defense. *Columbia Law Review*, Vol. 21, 1921, No.1, p. 71.

[48] See Hugo Grotius *On the Law of War and Peace* (1625), bk. II, ch. 2, part. 6 "*That in case of necessity men have the right to use things which have become the property of another, and whence this right comes."* Available at http://lonang.com/library/reference/grotius-law-war-and-peace/gro-202/. See also GROTIUS, H.: *On the Law of War and Peace* [De Jure Belli Ac Pacis]. (A. C. Campbell trans., 1814) available at: http://www.bartleby.com/172/202.html.

necessity as a genuine right instead of an excuse only.[49] It may be submitted that an invocation of necessity in the international law over the years gradually covered not only cases of incursion into the other state's territory,[50] but extended its scope of applicability also to the measures, taken in order to protect endangered animals, threatened with extinction,[51] an inevitable destruction of the ship[52] and the requisition of the foreign property.[53]

Later cases, such as *Société Commerciale de Belgique*,[54] the *Russian Indemnity* case[55] or the *Serbian Loans* case[56] only confirmed the hypothesis, which assumed an aptness of the state's economic exigent circumstances to create the state of necessity a very long time before the latest Argentinian colossal arbitral affair took place. However, it is notable that shortly before the World War II it was generally thought that the state of necessity doctrine originated from Germany. Likewise, at that time necessity was looked down on by Anglo-American authorities, and suffered from a bad reputation, due to a courtesy of the Hollweg's imprudent exclamation from 1914, with which he unintentionally proved his own political disability of the strangest kind.

As Weidenbaum[57] scornfully reported on necessity, "*A virtual subterfuge it is sometimes thought to be, rather than a genuine legal theory.*" Naturally, this dictum was - even in 1938 - treated with caution. Nevertheless, "*necessity was perceived as 'an inherent in the right to self-preservation of a state'...*"[58] Academics at that time differentiated between the military necessity and an overruling "*dire*" or "*genuine*" necessity,[59] which could have emerged only in cases of the state's extreme emergencies. For instance, French and Italian writers opposed a right of necessity completely, disparaging its value almost with quixotic fervour,[60] while English and American academics and practitioners[61] (or at least their majority) embraced the doctrine of necessity.[62]

[49] WEIDENBAUM, P.: Necessity in International Law. *Transactions Grotius Society,* Vol. 24, 1938, p. 114.

[50] *The Caroline* case. See a brief overview in SLOANE, R.: On the Use and Abuse of Necessity in the Law of State Responsibility. p. 456.

[51] *Fisheries Jurisdiction (Spain v. Can*.), 1998 ICJ REP. 432 (December 4).

[52] The *"Torrey Canyon,"* Cmnd. 3246 (1967) (UK).

[53] See e.g. SYKES, A.: Economic "Necessity" in International Law. p. 309.

[54] *Société Commerciale de Belgique (Belg. v. Greece*), 1939 PCIJ (Ser. A/B) No. 78, at 160 (June 15).

[55] *Russian Indemnity (Russia v. Turkey)* (1911) 11 R.I.A.A. 421.

[56] *Serbian Loans*, 1929, PCIJ, Series A, No. 20, 39/40.

[57] WEIDENBAUM, P.: Necessity in International Law. p. 105.

[58] BINDER, C.: Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited. *Leiden Journal of International Law*, Vol. 25, 2012, No. 4, p. 917.

[59] Shortly before the World War II. started, it had been perceived that the dire necessity as a power itself overrules any law, including the law of the Hague Conventions. See a detailed explanation in WEIDENBAUM, P.: Necessity in International Law. p. 110.

[60] French authors opined that the doctrine of necessity served only to excuse illegal acts.

[61] For instance, the necessity was recognized as a defence to a criminal charge in Arizona in 1920. See an analysis of *State of Arizona v H.E. Wooton* in Necessity as a Defense. *Columbia Law Review*, Vol. 21, 1921, No.1, pp. 71-74.

[62] The doctrine – and especially the right to necessity has been around 1940 accepted also by Japan, Russia and finally by France.

As already noted, there were three alternative interpretations created about the BIT based necessity defence and its relationship with the CIL necessity, none of which seems to be flawless.[63] As for decisions, rendered in *CMS*, *Sempra* and *Enron* arbitrations, arbitrators in their awards *in merit* assimilated improperly the treaty based necessity, included in the NPM clause in Article XI. of the US-Argentina BIT with the CIL necessity. They have seen Article XI. as a reflection of the CIL necessity and flagrantly conflated the treaty based necessity with the CIL necessity. In particular, the *Sempra* tribunal considered precipitously the treaty necessity as inseparable from the customary law, because it was clearly defined in the customary law, and not in the US-Argentina BIT.[64]

Equally, upon conclusion that the threshold of Article 25 for the successful invocation of the CIL necessity defence was not met by Argentina, arbitrators opined that an additional analysis of the treaty based necessity in Article XI. could be dispensed with as unnecessary and irrelevant.[65] Similarly, although not omitting Article XI. and a treaty based necessity entirely, the *CMS* tribunal as a more constrained predecessor of *Sempra* tribunal nevertheless analysed the Argentinian defence primarily under Article 25 of the ILC Draft Articles[66] and finally rejected the defence, because it did not consider the economic crisis in Argentina grave enough for passing the threshold of Article 25.

However, arbitrators in the *CMS* case at least recognized the concept of economic emergencies as included in the essential security objective in the NPM clause in Article XI. of the US-Argentina BIT.[67] Heroic efforts of arbitrators in *CMS* case were amusingly evaluated by Kurtz[68]: *"This Tribunal seems simply to crave the same sort of guidance relation to the treaty exception, without even considering the construction relationship between the two legal standards.*"

Many of the inadequacies of the *CMS* award were later commented on by the annulment committee in the setting aside procedure, but interestingly enough, without the committee's annulment of the tribunal's ruling. At least, the committee separated the requirements of BIT based necessity from the CIL necessity in Article 25 and - what is more important- considered an excuse, granted to the acting state under Article 25 as subsidiary to the exclusion of the wrongfulness, based on the treaty necessity doctrine, enacted in Article XI. of the US-Argentina BIT.[69]

[63] SLOANE, R.: On the Use and Abuse of Necessity in the Law of State Responsibility. p. 498.

[64] *Sempra Energy International v. Argentine Republic*, Award, ICSID Case No. ARB/02/16, September 28, 2007, paras. 375-76.

[65] DESIERTO, D.: Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties. p. 844.

[66] See a detailed analysis of the CMS award in ROSELL, J.: The CMS Case: A Lesson for the Future? *Journal of International Arbitration*, Vol. 25, 2008, No. 4, pp. 493 - 502.

[67] *CMS Gas Transmission Company v The Argentine Republic*, Award, ICSID Case No. ARB/01/8, 12 May 2005, sec. 359- 360.

[68] KURTZ, J.: Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis. p. 341.

[69] See also REINISCH, A.: Necessity in Investment Arbitration. p. 149.

As Martin[70] explained, "*As the CMS Annulment Committee suggests, the tribunal would first be under an 'obligation' to consider whether an act was excluded from potential treaty breaches by the treaty NPM provision, and would only then consider whether Argentina's responsibility for a breach could be precluded in whole or in part under customary international law*." Consequentially, Article XI. in the US-Argentina BIT is definitely the main operative tool in all similar cases. The supplementary character of Article 25 in the relation of the treaty base necessity and the CIL necessity was accentuated also by Desierto[71]: "*Any normative weight attributable to Article 25 could therefore only be in a supplementary sense to Article XI*."

An equally important finding was made with regard to the questionable issue of establishing the liability of the host state, which has adopted a necessary measure according to the NPM clause in the relevant BIT. The annulment committee has expressed it crystal clear – as long as the necessary measure is compatible with the NPM clause, no compensation shall be required while the situation of necessity lasts. In contrast, all measures outside the scope of the NPM clause will be evaluated under the CIL necessity doctrine and face the challenge of passing the threshold of Article 25. If they fail, the host state's obligation to compensate the foreign investor for the violation of the BIT is unavoidable.[72]

3. Revelation of Unlikeable Misuse of the CIL Necessity

Unlike a little sly investment tribunals in three cases discussed in the previous chapter, arbitrators in the *LG&E* and *Continental* case partially accepted the arguments of the Argentinian defence. It is now common knowledge among international arbitration experts that the arbitral tribunal in *LG&E* award showed a generous deference towards Argentina, while paying respect to the ability of Argentina to rely on Article XI. of the US-Argentina BIT, which was obviously accepted by the tribunal without any unsolicited caustic remarks. Simultaneously, the tribunal clearly separated the BIT from the CIL necessity defence, identifying them as different sources of international law, with the treaty based necessity far from being subordinated to the CIL necessity doctrine.

Moreover, the arbitral tribunal subsumed economic necessity under the broadly perceived concept of necessity to the advantage of Argentina,[73] almost assimilating dreadful turns of the Argentinian economic crises with the military invasion.[74] On the

[70] MARTIN, A.: Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-precluded Measures and the Doctrine of Necessity under Customary International Law. p. 55.

[71] DESIERTO, D.: Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties. p. 894.

[72] See *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision, Sept. 25, 2007, paras. 129-134.

[73] REINISCH, A.: Necessity in Investment Arbitration. *Netherlands Yearbook of International Law*, Vol. 41, 2010, p. 145.

[74] *LG&E Energy Corp and others v The Argentine Republic*, Award, ICSID Case No. ARB/02/1, 25 July 2007, paras. 237-238.

other hand, even this decision used to be criticised for being not convincing[75], and "committing" a confluence between Article XI. and Article 25 of the ILC Draft Articles when firstly separating them,[76] only to put into effect later almost the whole analysis, required for evaluation of the wishful passing of the threshold in Article 25.

Be that as it may, there was a remarkable equilibrium of arbitrators' opinions in stand, taken by the tribunal in *LG&E* case with respect to the interpretation of Article XI. and its applicability by the host state, defending itself against several dozens of utterly disgruntled foreign investors, which resulted in rendering a much more empathic arbitral award than the verdicts rendered in *CMS*, *Sempra* and *Enron* cases with their - what seemed to be acutely ill mannered - "*smash the defendant*" approach. It perhaps comes as no surprise that these awards were later successfully challenged, with annulment committees commenting on their total failure to examine properly the relationship between the treaty necessity defence and the CIL necessity defence.[77]

Unlike its more constrained predecessors, the arbitral tribunal in *Continental* case has gone completely to the other side when supporting its interpretation of the BIT based necessity unexpectedly with the very core of the WTO necessity doctrine, rooted in Article XX. of the GATT, thus applying, according to Kurtz,[78] "*a distinct method of its own*." Apparently, here the investment tribunal did not show even the slightest inclination to explain its methodology, which ultimately left the whole CIL necessity to fall into oblivion.[79] Quite opposite in fact, as arbitrators held that "*the WTO law was a more appropriate comparator than the customary plea as a source of interpretation of the concept and requirements of necessity in the context of economic measures*."[80]

When addressing the nature of the NPM clause in the US-Argentina BIT, the tribunal came to the conclusion that Article XI. as a safeguard clause "*restricts or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met.*"[81] True to its unprecedented methodology, the tribunal shouldered its interpretation of the BIT based necessity with the WTO jurisprudence, relying on the WTO Appellate Body report in *Korea-Beef*[82] case, when

[75] See numerous critical remarks in SLOANE, R.: On the Use and Abuse of Necessity in the Law of State Responsibility. p. 356.

[76] Arbitrators recognised the US-Argentina BIT as the primary applicable law and a general international law as the secondary applicable law, with the least important being the Argentinian law.

[77] KURTZ, J.: Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis. p. 328.

[78] Ibidem, p. 334.

[79] Interestingly enough, unlike its predecessors in older cases, the tribunal did not consider the BIT necessity and the CIL necessity as interwoven concepts, but at the same time made no attempt to distance itself from the consideration of the CIL necessity either. See a balanced annotation in REINISCH, A.: Necessity in Investment Arbitration. p. 151.

[80] HENCKELS, C., MITCHELL, A.D.: Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law. p. 114.

[81] *Continental Casualty Company v. Argentina*, Award, ICSID Case No. ARB/03/9, para 164.

[82] WTO, Report of the Appellate Body, *Korea-Measures Affecting lmports of Fresh, Chilled and Frozen Beef,* WTO Doc Nos WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) *(Korea-Beef)*.

it partially - and not particularly efficiently - applied[83] the WTO weighing and balancing necessity test.[84]

In truth, the tribunal held all alternative measures either ineffective or impractical. In the end, it came to conclusion that almost all non-precluded measures, adopted by Argentina in its economic crisis were partially indispensable and inevitable in order to avert "*the complete break-down of the financial system, the implosion of economy and the growing threat to the fabric of Argentinean society and generally to assist in overcoming the crisis*."[85]

Understandingly, the *Continental* award was heavily criticized for seriously deviating from the treaties' unitary system of interpretation, enacted in Article 31 of the VCLT, while interpreting the BIT necessity doctrine with the virulent WTO weighing and balancing test instead.[86] However, it has gradually become more than clear that the investment tribunal's turn to the WTO law was nothing more than a by-product of the omnipresent partial convergence of the international investment and international trade. Indeed, today a neutral listing of the *Continental* case as an example of the investment arbitration, in which arbitrators referred to the international trade law, appears frequently in various international legal writings, especially when researching the convergence of the international investment law and international trade law.

4. Favouring the CIL Necessity by Investment Tribunals? (The Standoff and the Aftermath)

When considering a high threshold of Article 25, which is almost unpassable, what struck most are two prerequisites of the CIL necessity doctrine, embedded in Article 25 that can hardly ever be satisfied by any host state – the defendant in investment arbitration, regardless of its most honest efforts. First and foremost, the "*only way*" requirement is close to being unrealistic. There is always another choice,[87] whether for the better or for worse - the logic, though tedious is inescapable. In addition, when exigent circumstances call for swift economic emergencies, there is usually no time for interlocutions, mulling over the question, whether the state will be later capable of passing the "only way" requirement.

Surprisingly enough, there was at least an investment tribunal in *LG&E* case, being one out of five arbitral tribunals, which went to the great lengths to state in its verdict that the necessary measures, taken by Argentina, did not flunk the "*only way*"

[83] For instance, the tribunal started with application of the first stage of the WTO weighing and balancing test but skipped the second suitability stage before reviewing an occurrence of alternative measures. See more in *Continental Casualty Company v. The Argentine Republic*, Award, ICSID Case No. ARB/03/9, para 196.

[84] See in detail CHOVANCOVÁ, K.: The WTO Necessity Doctrine and its Applicability in the International Investment Arbitration. *Slovak Yearbook of International Law*, Vol. 6, 2016, pp. 95-116.

[85] *Continental Casualty Company v. The Argentine Republic*, Award, ICSID Case No. ARB/03/9, para 197.

[86] DESIERTO, D.: Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties. p. 882.

[87] REINISCH, A.: Necessity in Investment Arbitration. p. 153.

requirement of the CIL necessity test in Article 25. Secondly, the requirement of the state's contribution has turned out to be equally enigmatic. Where tribunals in *CMS*, *Enron* and *Sempra* cases found a more or less considerable substantial contribution of Argentina[88] to its own economic crisis (without measuring the level of this contribution), the *LG&E* tribunal apparently saw no evidence of Argentina's contribution whatsoever.[89]

On the other hand, arbitrators in *Continental* case approached the issue of contribution quite originally, by blaming the IMF's financial advice and passing the buck to the US political injections for Argentina instead, thus enabling Argentina to invoke the BIT necessity defence in spite of some contribution to the crisis. Suffice it to say, that all that conflicting conclusions of investment tribunals on the issue of contribution of the host state to the situation of necessity under Article 25 have only revealed, was another proof of discomfort of applying the CIL necessity concept instead of the right one - the proper one, enacted in the BIT's NPM clause.

In addition, trying to install the requirement of "grave and imminent peril" from Article 25 into the BIT based necessity proved to be equally farcical. As Kurtz[90] criticised, "*There is no textual equivalent of the ILC standard of 'grave and imminent peril' in the treaty exception; these tribunals are simply importing from the customary norm an exceedingly stringent standard of operation*." Equally, Desierto[91] - when considering the role Article 25 of the ILC Draft Articles might play in the interpretation of Article XI. (which she excludes completely due to several conceptual and methodological incompatibilities between two necessity doctrines) - has been even more brush[92] and direct: *"The necessity defense under Article 25 cannot be admitted within the text of the U.A.- Argentina BIT. Nor can it form part of the context of the U.S. Argentina BIT...*"

5. Conclusion

As should be clear from the previous chapters, this article intended to identify and explain the CIL necessity's secondary role in the investment treaty arbitration in all cases, in which the issue of the BIT necessity defence has been put forward as an

[88] Ibidem, p. 155. Reinisch suggests a special threshold for the state's contribution to a state of necessity, that would signal, when an invocation of necessity is excluded under Article 25, Section 2 b), depending on the level and intensity of contribution.

[89] *LG&E Energy Corp and others v The Argentine Republic*, Award, ICSID Case No. ARB/02/1, 25 July 2007, para 257.

[90] KURTZ, J.: Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis. p. 342.

[91] DESIERTO, D.: Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties. p. 909.

[92] See for comparison e.g. a separate opinion of ad hoc judge Charles Brower in *Certain Iranian Assets* (Iran v. U.S.), Preliminary Objections**,** 2019 I.C.J. (February 13), para 17. In his resourceful opinion, Brower forcefully accentuated it is downright impossible to import into the 1955 Treaty of Amity the CIL rules on state entities' immunities on the basis of Article 31, para 3 *(c)*, of the VCLT, without rewriting the Treaty of Amity itself. See also e.g. a related debate on denial of sovereign immunity as a countermeasure under the ILC criteria, shouldered by David Caron's warnings in DAMROSCH, L. F.: The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts. *Ecology Law Quarterly*, Vol. 45, 2019, pp. 106-108.

argument by the defendant - the host state, while the claimant was applying purposely a dubious "*what the spirit sees, the mind will follow*" approach by opposing the defence with the trumpeted CIL necessity predominance. Shrewd arbitrators should recognize these situations instantly, and when being confronted with the incorrect conflation of the CIL and treaty based necessity, simply resist.

As I have characterised it elsewhere in this article, as a part of *lex specialis*, the treaty based necessity defence in international investment law, involved in the BIT's NPM provision under no condition should be regarded as having an inferior status to the CIL necessity, unless the BIT parties explicitly agreed on such NPM clause's status in the text of the relevant BIT. Secondly, the BIT based necessity has to come first and as such ought to be reviewed and considered firstly, still before contemplating a possible applicability of the CIL necessity doctrine.

In particular, due to the *lex specialis* character of the BIT with the NPM clause, being one of its provisions, the host state, which has adopted necessary measures within the NPM provision's frame, should not be held liable for its wrongful act, as the necessary emergency measures are excluded from the breaches of the treaty by its very nature.[93] Short of the complete conclusion, it may be submitted that regardless of the question, whether the NPM clause was drafted as self-judging, or not, the state definitely deserves to be embraced with some space to manoeuvre in order to decide, *whether* and *when* it is in situation, which calls for employing necessity.[94] And above all, it may be assumed, that when allowing the foreign investor to enter its own territory, the host state has no desire to pay the ransom in the future, especially when its most imminent interests are at stake. Suffice it to say, nor has this ever been its objective.

In concluding this article, it may be assumed, that positioning a single judge into the middle of the fictitious judicial proceeding to review a legal justification of the CIL necessity application in investment treaty arbitration could end up with three realistic outcomes. First and foremost, the judge would probably avoid convicting the culprits on the count of malicious preferring the CIL necessity to the treaty based necessity. It is also highly likely, that he would act repetitively again, and found the accused not guilty on the ground of imaginary conspiracy to make always the host state's defence in investment arbitration a miserable failure.

On the other hand, at the end of the day, perhaps nothing in this world would have been able to diverge a sensible observer's attention from the fact that on the conduct unbecoming with the due diligence of every astute arbitrator, which if not maintained, may result in such a legal rubbish as conflation of the CIL and the BIT based necessity, the wise judge briskly found the accused guilty, as charged. The treaty based necessity's Siegfried line in investment arbitration thus holds apparently strong, touching the wood – at least for the time being.

[93] MARTIN, A.: Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-precluded Measures and the Doctrine of Necessity under Customary International Law. p. 69.

[94] See TOMKA, P.: Defences Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties. p. 493.

Bibliography

BINDER, C.: Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited. *Leiden Journal of International Law*, Vol. 25, 2012, No. 4, pp. 909-934

BURKE-WHITE, W., VON STADEN, A.: Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties. *Virginia Journal of International Law*, Vol. 48, 2007-2008, No. 2, pp. 307-410

CARON, D. D.: The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority. *American Journal of International Law*, Vol. 96, 2002, pp. 857-893

CHOVANCOVÁ, K.: Non-Precluded Measures in International Investment Arbitration. *Czech Yearbook of Public & Private International Law*, Vol. 7, 2016, pp. 391-410

CHOVANCOVÁ, K.: The WTO Necessity Doctrine and its Applicability in the International Investment Arbitration. *Slovak Yearbook of International Law*, Vol. 6, 2016, pp. 95-116

CHOVANCOVÁ, K.: The Fair and Equitable Treatment and Its Current Status in International Investment Law," In GEISTLINGER, M., ROTH, M. (eds.): *Yearbook on International Arbitration*. Vol. VI. Wien: Neuer Wissenschaftlicher Verlag, 2019, pp. 171-187

DAMROSCH, L. F.: The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts. *Ecology Law Quarterly*, Vol. 45, 2019, pp. 95-110

DESIERTO, D.: Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties. *University of Pennsylvania Journal of International Law*, Vol. 31, 2009-2010, pp. 827-934

HENCKELS, C., MITCHELL, A.D.: Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law. *China Journal of International Law*, Vol. 14, 2013-2014, No. 1, pp. 93-164

HERDEGEN, T.: *Principles of International Economic Law.* Oxford: Oxford University Press, 2013

GROTIUS, H.: *On the Law of War and Peace* [De Jure Belli Ac Pacis]. (A. C. Campbell trans., 1814) available at: http://www.bartleby.com/172/202.html

JUNG, Y., HAN, S. D.: Sovereign Debt Restructuring under the Investor-State Dispute Regime. *Journal of International Arbitration*, Vol. 31, 2014, No. 1, pp. 75-96

KURTZ, J.: Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis. *International & Comparative Law Quarterly,* Vol. 59, 2010, p. 368, pp. 325-371

LOWENFELD, A.F.: *International Economic Law.* Oxford: Oxford University Press, 2008

MARTIN, A.: Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-precluded Measures and the Doctrine of Necessity under Customary International Law. *Journal of International Arbitration*, Vol. 29, 2012, No. 1, pp. 49-70

Necessity as a Defense. *Columbia Law Review*, Vol. 21, 1921, No.1, pp. 71-75.

PAPARINSKIS, M.: Investment Treaty Arbitration and the (New) Law of State Responsibility. *European Journal of International Law*, Vol. 24, 2013, No. 2, pp. 617-647

REINISCH, A.: Necessity in Investment Arbitration. *Netherlands Yearbook of International Law*, Vol. 41, 2010, pp. 137-158

SLOANE, R.: On the Use and Abuse of Necessity in the Law of State Responsibility. *The American Journal of International Law*, Vol. 106, 2012, No. 3, pp. 447-508

SWEET, A. S.: Investor-State Arbitration: Proportionality's New Frontier. *Faculty Scholarship Series*, Yale Law School, 2010, paper 69, pp. 1-25

SYKES, A.: Economic "Necessity" in International Law. *The American Journal of International Law*, Vol. 109, 2015, No. 2, pp. 296-323

TOMKA, P.: Defences Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties. In KINNEAR, M. N., GERALDINE, R. F. et al. (eds.): *Building International Investment Law: The First 50 Years of ICSID.* The Hague: Kluwer Law International, 2015, pp. 477-494

VILLALPANDO, S.: On the International Court of Justice and the Determination of Rules of Law - Leiden Journal of International Law, *Leiden Journal of International Law*, Vol. 26, 2013, No. 2, pp. 243-251

VINUALES, J. E.: State of Necessity and Peremptory Norms in International Investment Law. *Law & Business Review of Americas*, Vol. 14, 2008, pp. 79-103
WEIDENBAUM, P.: Necessity in International Law. *Transactions Grotius Society,* Vol. 24, 1938, pp. 105-182

Table of Cases (arbitral awards, court decisions)

Certain Iranian Assets (Iran v. U.S.), Preliminary Objections, 2019 I.C.J. (February 13)
Continental Casualty Company v. Argentine Republic, Award, ICSID Case No. ARB/03/9, 5 September 2008
CMS Gas Transmission Company v Argentine Republic, Award, ICSID Case No. ARB/01/8, 12 May 2005
Enron Creditors Recovery, L.P. v. Argentine Republic, Award, ICSID Case No. ARB/01/3, 22 May 2007
Fisheries Jurisdiction (Spain v. Can.), 1998 ICJ REP. 432 (December 4)
Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25. September 1997, I.C.J. Reports 1997
LG&E Energy Corp and others v Argentine Republic, Award, ICSID Case No. ARB/02/1, 25 July 2007
The *"Torrey Canyon,"* Cmnd. 3246 (1967) (UK)
Russian Indemnity (Russia v. Turkey) (1911) 11 R.I.A.A. 421
Sempra Energy International v. Argentine Republic, Award, ICSID Case No. ARB/02/16, September 28, 2007
Société Commerciale de Belgique (Belg. v. Greece), 1939 PCIJ (Ser. A/B) No. 78 (June 15)
Serbian Loans, 1929, PCIJ, Series A, No. 20, 39/40