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The Necessity Defence & Continental Casualty: Importation of WTO Principles at the ICSID

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Dans le domaine de l'arbitrage d'investissement, et bien que plusieurs tribunaux d'arbitrage se soient penchés sur la défense de nécessité, un concept unique de ce que la nécessité recouvre s'est avéré compliqué à définir et les tribunaux manquent encore d'uniformité dans leurs approches respectives. Les tribunaux de l'OMC, au contraire, ont développé une jurisprudence fournie en ce qui concerne le concept de nécessité sur laquelle les tribunaux d'investissement peuvent s'appuyer et s'appuient pour les aider dans leur propre tâche. L'affaire Continental Casualty c Argentina en est un exemple. Cet article se concentre sur la méthodologie de cette décision dans le contexte d'autres arrêts rendus par des tribunaux CIRDI. L'argument est qu'une approche cohérente et prédictible à la défense de nécessité en arbitrage d'investissement est possible, et qu'elle permettait d'obtenir un meilleur équilibre entre la protection des investisseurs et la souveraineté des états.

In investment arbitration, although several tribunals have dealt with the defence of necessity, a uniform concept of what necessity entails has been elusive and uniformity in the approach of tribunals has yet to be achieved. In contrast, WTO tribunals have a wealth of case law on the concept of necessity from which investment tribunals can seek and have sought guidance. An example is the case of Continental Casualty v Argentina. This article focuses on that cases methodology in the context of other ICSID tribunal rulings. It is argued that a consistent and predictable approach to the defence of necessity in investment arbitration decisions is possible, through which a better balance of investor protection and state sovereignty could be achieved.

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INTRODUCTION

States at times take actions in the domestic public interest that nonetheless adversely affect the interests of foreign commercial entities. Although international trade and investment are separately regulated in international law, a clear common trait between them lies in the form of the adjudicative bodies within which both regimes frequently rule upon such matters. While exercising this duty, these bodies often encounter the defence of necessity, which plays a key role in demarcating allowable state measures from those that violate international agreements and infringe upon protected rights.

Within the case law of investment arbitration, although several tribunals have dealt with such a defence, a uniform concept of necessity has proven elusive and a steady interpretive approach has not been collectively established.[1] In contrast, WTO tribunals have amassed a relatively rich source of jurisprudence on the concept of necessity from which investment tribunals can and indeed have gained guidance for their analyses.[2] An archetypal example of the importation of guiding principles dealing with the defence of necessity took place in *Continental Casualty v Argentina* where the tribunal departed from the traditionally narrow construction of necessity and, by importing principles from WTO case law, instead engaged in a wider, more comprehensive analysis of the concept.[3] The case was one of a series of disputes initiated by American investors against Argentina at the International Centre for the Settlement of Investment Disputes (ICSID), in relation to measures adopted by Argentina in response to its economic crisis in 2001-02.

This article focuses on the methodology utilised in the above case in light of the previous rulings by ICSID tribunals facing similar circumstances. It begins by providing a brief factual background of the dispute and proceeds onto discussing the key characteristics of the two instruments relevant to the concept of necessity, highlighting their differences and relation. It then discusses the ICSID rulings themselves (including criticisms of the *Continental* decision). It argues for a consistent and predictable approach to the defence of necessity in investment arbitration decisions, through which a better balance of investor protection and state sovereignty could be achieved.

CASE BACKGROUND

The economic crisis that eventually led to the proliferation of Bilateral Investment Treaty (BIT) claims against Argentina began between 2001 and 2002.[4] Before the colossal crash, the state had set itself along a bold path of privatisation and liberalisation and undertook a number of drastic reforms in an effort to attract foreign investment.[5] Most prominently, these reforms

1 Tarcisio Gazzini, "Foreign Investment and Measures Adopted on Grounds of Necessity: Towards a Common Understanding" (2010) 7:1 Transnational Dispute Management, online: SSRN <ssrn.com/abstract=1763355>.

2 Jürgen Kurtz, "The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents" (2009) 20:3 Eur J Intl L 749 at 767.

3 *Continental Casualty v Argentine Republic*, Award (5 September 2008), ICSID, Case No ARB/03/9 [*Continental Casualty*].

4 Martin Feldstein, "Argentina's Fall: Lessons from the Latest Financial Crisis" (2002) 81:2 Foreign Affairs 8 at 8—13 [Feldstein].

5 Christina Daseking et al, "Lessons from the Crisis in Argentina" (2005) International Monetary Fund Occasional Paper No 236 at 4.

included:

i. The sale of 90% of its holdings in state-run companies (particularly within the utilities sector) to foreign investors,[6]

ii. The enactment of the 'Law of Convertibility' that pegged the value of the Argentine Peso to that of the US Dollar, an act that enabled investors to anticipate a certain known exchange rate for their transactions.[7] This law was coupled with further legislation that allowed the signing of investment contracts in US dollars and also allowed utility providers to charge tariffs in US dollars that could be adjusted in line with US inflation.[8]

iii. Allowing unrestricted capital movement in and out of Argentina.[9]

Argentina's economy subsequently floundered due to an enormous budget deficit, towering foreign debt and a severe payments shortage.[10] In response to this crisis, its government specifically devised a detailed and complex regulatory framework that consisted of a number of emergency measures aimed at averting a possible economic and social collapse of the state.[11]

The most far-reaching of these measures was the passing of the 'Emergency Law' that, *inter alia*, abolished the 'Law of Convertibility', froze tariffs for utilities, required renegotiation of licenses, froze capital movement and converted dollar-denominated contracts, assets and debts into pesos.[12] These unilateral measures in turn did not just have a direct negative impact on the investments of many US entities but also resulted in a sharp drop in the value of the peso, which dramatically furthered their losses by devaluing their contracts.[13]

Argentina's economic crisis soon intensified with the outbreak of riots, looting, bank-runs, mass unemployment, and poverty.[14] The appointment of five presidents within ten days also marked a surge of political instability. Ultimately, the state declared that it could no longer guarantee repayment of its foreign debt, and the restructuring of over $100 billion of its sovereign debt was, at the time, the largest sovereign default in history.

Investor's Claim

The abovementioned 'Emergency Law' was one of the key state measures upon which U.S. investors based their BIT claims filed with the ICSID in the aftermath of the crisis.[15] In these claims, investors asserted that given the lack of stability in the legal environment upon

6 Cynthia C Galvez, "Necessity, Investor Rights, and State Sovereignty for NAFTA Investment Arbitration" (2013) 46:1 Cornell Intl LJ 143 at 149 [Galvez].
7 Feldstein, *supra* note 4 at 10.
8 Andrew D Mitchell & Caroline Henckels, "Variations on a Theme: Comparing the Concept of 'Necessity' in International Investment Law and WTO Law" (2015) 14:1 Chicago J Intl L 93 at 108 [Mitchell & Henckels].
9 Galvez, *supra* note 6 at 149.
10 US, Joint Economic Committee, 108th Cong, Argentina's Economic Crisis: Causes and Cures (Washington DC: US Government Printing Office, 2003) [JEC] at 29-36.
11 *Continental Casualty, supra* note 3 at paras 137—147.
12 *Ibid* at para 100.
13 Feldstein, *supra* note 4 at 9.
14 JEC, *supra* note 10 at 1, 9, 11, 15 and 35-36.
15 *Continental Casualty, supra* note 3 at paras 137—138, 142, n 203.

which they had based their investment decisions, their legitimate expectations had been frustrated and consequently Argentina's actions had breached the 'fair and equitable treatment' standard as guaranteed by the US- Argentina BIT ("the BIT").[16] The *Continental* case involved an insurance company that also suffered losses due to the Emergency Law measures, the more contributory of which were the freezing of bank deposits, foreign exchange controls and the reconversion of debts, assets and contracts from pesos to dollars.[17]

ARGENTINA'S DEFENCE

Argentina expressed that the Emergency Law's purpose was to bring under control the chaotic situation that would have followed the economic and social collapse that Argentina was facing.[18] It argued that Article XI of the US-Argentina BIT, i.e. the non-preclusive measures (NPM) clause, excused its liability for breaching the BIT standards, particularly given how the measures which led to the alleged breach were in response to the economic crisis.[19] This argument was based upon its assertion that the measures were "necessary" towards dealing with the crisis and therefore justified. It also relied upon the customary plea of necessity, arguing that the customary international law 'state of necessity' defence further justified the abrogation of its BIT commitments.[20]

US-ARGENTINA BIT ARTICLE XI – THE NPM CLAUSE

Article XI of the Argentina-US Treaty provides:

> This Treaty shall not preclude the application by either Party of measures **necessary** for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.[21]

By setting out certain circumstances under which host states may be excused for violating substantive treaty provisions, NPM clauses like the one above effectively invert the risk-burden arising from state measures from host states to foreign investors. Such clauses therefore preserve the regulatory autonomy of host states and compel tribunals to consider the circumstances in which the contended state measure was exercised, albeit to a limited extent. Most importantly, as opposed to aiding the process of ascertaining a breach of an obligation itself, NPM clauses pertain to determining whether a prima facie breach is nonetheless permissible given the specific circumstances of the state measure.

However, NPM clauses require a link between a state measure and its intended objective for the former to be permissible in the above manner. This link, known as a 'nexus requirement', tends to vary across different BITs in terms of its stringency. In the US-Argentina BIT, as highlighted

16 *Ibid* at para 246.
17 *Ibid* at paras 124—125.
18 *Ibid* at para 53.
19 *Ibid* at para 54.
20 *Continental Casualty, supra* note 3 at para 59.
21 *Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, 14 November 1991, 31 ILM 124 art 6 (entered into force 20 October 1994) [*USA-Argentina BIT*].

above, the NPM clause requires that the state measure be "necessary" to realise at least one of the specified objectives. Therefore, in order to invoke Article XI and preclude financial liability, Argentina had to, *inter alia,* establish that the passage of the Emergency Law was necessary for its objective of controlling the economic crisis. Whether or not this objective belonged to the specified categories of objectives (e.g. "maintenance of public order") under Article XI is beyond the scope of this paper as its analysis is restricted to the notion of necessity and its treatment within the context of this specific case. Within treaty-based regimes, the necessity test has been interpreted as a requirement of "the least restrictive means" under which states are compelled to "choose, from all potential measures that would advance its desired objective, the measure that would least limit the protected right or interest."[22]

Customary International Law and the State of Necessity

In evaluating Argentina's reliance on the customary plea of necessity, the tribunals referred to the International Law Commission's "Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC's DARSIWA),[23] a text commonly referred to by scholars as representing customary international law. The text has codified the necessity defence in Article 25 where the contours of the state of necessity have been shaped in the following manner:

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

In exceptional circumstances, the above article allows the adoption of an otherwise unlawful state measure and effectively imposes the resulting costs on parties other than the perpetrating state. It therefore subordinates the protections guaranteed to such parties (which could, as recognised by the official ILC commentary on the above text, include private entities) to the protection of a state's "essential interest."[24] Perceivable as an attempt to prevent its misuse, the article has been cast in a narrow, albeit vague, manner. Furthermore, its negative phrasing emphasizes the exceptional nature of the circumstances in which it may be invoked under several prerequisites.

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22 Mitchell & Henckels, *supra* note 8 at 98.
23 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) at 80 [*DARSIWA*].
24 *DARSIWA, supra* note 23 at 80.

Two such prerequisites in Article 25 are peculiarly tricky and impractical for states dealing with economic crises and hence were potentially obstructive for Argentina's use of the defence. First, the article requires that the enacted measure be the "only way" for the state to address the situation in which an essential interest is in jeopardy and that if any other option is available, regardless of its relative cost or convenience, the defence would not hold. This inflicts an extraordinarily high threshold since a state would always have, at least in theory, more than one potential economic policy employable during a crisis. Second, it is also required that "the State has [not] contributed to the situation of necessity." This is an incredibly demanding test for a state pleading necessity with reference to an economic crisis since, other than in exceptional circumstances amounting to *force majeure*, some level of contribution or causation can always be established between a state's actions and its prevailing economic climate, no matter how indirect.

DIFFERENCES BETWEEN ARTICLE XI BIT & ARTICLE 25 CIL

Given that Argentina's defence was heavily dependent on the two aforementioned contexts of necessity, both of which it relied upon, the criteria that the ICISD tribunals would utilise to evaluate whether its contended measures were necessary became crucial. More specifically, a key question that arose was whether the tribunals would consider "necessary" under Article XI as demanding the same strict prerequisites as the customary plea of necessity, codified under Article 25 DARSIWA. It is therefore imperative that at least two relevant differences between the two contexts are discussed:

A. Primary vs Secondary Rule

Within international law, primary rules serve the function of governing state behaviour by establishing their obligations. They do so either by defining the content of these obligations or by setting their limitations. As a result, primary rules not only deliver the parameters by which a breach of an international obligation can be established but also demarcate boundaries of state responsibility.

In contrast, secondary rules focus on the legal consequences for states when their actions are held to be violating the obligations set up by primary rules. Secondary rules therefore come into play once a breach of an international obligation has been established. As a result, they do not set forth any particular obligations by themselves but instead, govern when and how a state can be held liable for a breach of an international obligation by addressing basic issues such as state attribution, responsibility, general defences and remedies.

The necessity defence under Article 25 DARSIWA functions in a manner that allows it to be relied upon only where a breach of a treaty obligation has already been established, following which, within exceptional circumstances set out in its prerequisites, it can potentially shield the pleading state from liability. It therefore operates as a secondary rule by justifying a state measure otherwise determined as wrongful under an international legal instrument such as the US-Argentina BIT, based on the specific conditions under which that state measure was carried out.

In contrast, NPM clauses, such as Article XI of the US-Argentina BIT, allow the delimitation of measures adopted towards certain specified permissible objectives from wrongful measures that do not belong to such categories. By doing so, such clauses create legal exceptions or 'carve-outs'

to the overall scope of state obligations and resultantly widen the state's policy-making leeway. NPM clauses such as Article XI are therefore an example of primary rules.

B. Lex Specialis vs General Rule

In addition to acting as primary law, NPM clauses, being drafted specifically within the purpose surrounding the case at hand (i.e. investor protection) through bilateral negotiations between parties to the treaty, can be considered as '*lex specialis*.' On the other hand, Article 25, by not possessing similar characteristics and instead being drafted by a third party for a relatively universal purpose, can be regarded as a 'general rule.'

Principle of *Lex Specialis*

This second distinction was pivotal in the Argentinean defence, where the question arose whether to apply a clause contained in a BIT or a rule arising from customary international law. This is due to the existence of the 'principle of *lex specialis*,' which dictates that under such a dilemma, the law governing the specific subject matter overrides the law that only governs general matters. The principle has been recognised by Article 55 DARSIWA which states that:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.[25]

The ICJ in the case of Gabcikovo-Nagymaros has also confirmed this principle.[26] In that case, the court denied a customary law defence and noted that the relationship between the parties was regulated "above all, by the applicable rules of the…Treaty as a *lex specialis*."[27]

Based on the above, one can argue that the five ICSID tribunals, dealing with similar defences by Argentina under similar factual backgrounds but separate claims, could have been expected to rule that Article XI of the US-Argentina BIT, being primary law and *lex specialis*, held precedence over Article 25 DARSIWA. Consequently, not only was the term 'necessary' within the former materially different from the latter's articulation of "necessity," but Article XI also constituted a statutory exception to customary international law itself.

The ICSID Rulings

However, the five ICSID tribunals collectively issued arbitral awards which, unfortunately for the perceived legitimacy of their institution, were heavily inconsistent and presented conflicting determinations on whether the measures enacted by Argentina during its economic crisis were indeed necessary. More relevantly, three of the five tribunals ruled in a manner which starkly contrasted with the above-argued expectations.

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25 *DARSIWA, supra* note 23 at art 55.
26 *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 [*Gabčíkovo-Nagymaros*].
27 *Ibid* at para 132.

CMS, Enron & Sempra

The first three cases which dealt with Argentina's necessity defence, i.e. *CMS Gas Transmission,*[28] *Enron*[29] and *Sempra,*[30] adopted similar approaches to Article XI and Article 25. Interestingly, the *CMS* case presented the first instance of an arbitral tribunal ruling on a necessity-based, NPM clause defence within the context of an economic crisis.

The tribunals, emphasising the pertinence of the ILC's DARSIWA, opined that Article XI BIT reflected Article 25 DARSIWA and consequently the word 'necessary' as under the former was interpretable in the same manner as 'necessity' found in the latter.[31] This led them to adopt a narrow approach towards Argentina's Article XI necessity defence, applying to it the stringent prerequisites laid out in Article 25, but lacking in the US-Argentina BIT.

Given the strict nature of these prerequisites that, as described above, consisted *inter alia* of the "only way" requirement and the condition that "the State has not contributed to the situation of necessity,"[32] Argentina's defence of its crisis-related measures was unsurprisingly fruitless. Each of the three arbitral awards was challenged with annulment applications, provided for under Article 52 of the ICSID Convention.[33]

The *CMS* Annulment Committee

The Ad Hoc Annulment Committee dealing with the *CMS* award sharply criticized the manner in which necessity was dealt with by the tribunal that gave the award.[34] It opined that, by conflating Article XI BIT and Article 25 DARSIWA, the tribunal had failed to correctly apply the former and that rejecting Argentina's defence was a serious and manifest error of law.[35] While painstakingly detailing the tribunal's erroneous application of Article XI, which according to Stone Sweet and Della Cananea was "eviscerated,"[36] the Annulment Committee stressed that, based upon the abovementioned distinction between primary and secondary rules, Article XI and Article 25 are to be addressed separately, a point that the three tribunals missed entirely.

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28 *CMS Gas Transmission Company v The Argentine Republic*, Award (12 May 2005), ICSID, Case No ARB/01/8 [*CMS Gas* 2005].

29 *Enron Corporation Ponderosa Assets LP v Argentine Republic,* Award (22 May 2007), ICSID, Case No ARB/01/3 [*Enron* 2007].

30 *Sempra Energy International v Argentine Republic*, Award (28 September 2007), ICSID, Case No ARB/02/16 [*Sempra* 2007].

31 *Ibid; CMS Gas* 2005*, supra* note 28; *Enron* 2007, *supra* note 29.

32 *DARSIWA, supra* note 23 at art 25.

33 *CMS Gas Transmission Company v Argentine Republic,* Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic (25 September 2007), ICSID, Case No ARB/01/8 [*CMS Gas* 2007]; *Enron Creditors Recovery Corp Ponderosa Assets LP v The Argentine Republic*, Decision on the Application for Annulment of the Argentine Republic (30 July 2010), ICSID, Case No ARB/01/3 [*Enron* 2010]; *Sempra Energy International v Argentine Republic*, Decision on the Argentine Republic's Application for Annulment of the Award (29 June 2010), ICSID, Case No ARB/02/16 [*Sempra* 2010].

34 *CMS Gas* 2007, *supra* note 33 at paras 119—136.

35 *Ibid* at para 130.

36 Alec Stone Sweet & Giacinto della Cananea, "Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez" (2014) Yale Law School Public Law Research Paper No 507, online: <dx.doi.org/10.2139/ssrn.2435307> at 930 [Stone Sweet & della Cananea].

THE *CONTINENTAL* DECISION

In concurrence with abovementioned Annulment Committees, the tribunal in the *Continental* case emphasized the conceptual differences between Article XI BIT and Article 25 DARSIWA, particularly how the former represents a carve-out of the BIT's provisions, rendering them precluded if its conditions are met whereas the latter requires a breach to first be established in order for it to then potentially exclude liability.[37] The tribunal therefore concluded that the stringent prerequisites of Article 25 DARSIWA would be inapplicable to Article XI BIT.[38] However, it is worth mentioning that despite the above, the *Continental* tribunal did recognise that some elements of the customary plea may yet be of relevance to the application of treaty NPM clause based on their common overall purpose and practical outcome.

Dealing then with the notion of necessary exclusively under Article XI BIT, the *Continental* tribunal noted that the language, text and origin of the Article flowed from the 'US Friendship Commerce and Navigation' treaties originating in the early 20th century and that the same treaties had also inspired Article XX of the GATT.[39] This common factor allowed the tribunal to suggest that GATT/WTO jurisprudence could provide an interpretation methodology most pertinent to the case. The extensive experience of WTO case law in dealing with notion of necessity within the context of state measures of economic policy further strengthened the plausibility of their suggestion.

Inspired by WTO principles, the tribunal employed a comparative approach and referred to the Appellate Body's decision in *Korea-Beef,* which dealt with the concept of necessity as referred to in Article XX of the GATT.[40] There, "necessary," while stated as belonging to a continuum entailing a number of different meanings from "indispensable" to "making a contribution to," was decided to be significantly closer to, though not embodying, nor limited to, "indispensable."[41]

Next, to ascertain whether a state measure may not be "indispensable" and yet "necessary," the tribunal relied on *Brazil - Retreaded Tyres* where the WTO Appellate Body devised the "process of weighing and balancing" to determine the necessity of a measure by evaluating three factors.[42] These included "the relative importance of interests or values furthered by the challenged measures, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce."[43]

The tribunal further noted that based on WTO principles, a state measure will not be considered as necessary if an alternative measure, more consistent with the treaty, would be both available to the state and reasonably employable by it.[44] The requirement of such an alternative

37 *Continental Casualty, supra* note 3 at paras 162—167.
38 *Ibid*at para 167.
39 *Ibid* at para 176.
40 *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (11 December 2010), WTO Doc WT/DS161/AB/R, WT/DS169/AB/R (Appellate Body Report), online: WTO <docsonline.wto.org>.
41 *Ibid* at 49 para 161.
42 *Brazil-Measures Affecting Imports of Retreaded Tyres* (3 December 2007), WTO Doc WT/DS332/AB/R (Appellate Body Report), online: WTO <docsonline.wto.org> at 24 [*Brazil-Tyres*].
43 *Brazil-Measures Affecting Imports of Retreaded Tyres* (12 June 2007), WTO Doc WT/DS332/R (Panel Report), online: WTO <docsonline.wto.org> at 168.
44 *Continental Casualty, supra* note 3 at para 195.

available measure to be reasonably employable would exclude measures merely theoretical in nature, ineffective towards the state's objective or those which would place an undue burden on the state by means of prohibitive costs, technical difficulties etc.

As a result, the tribunal underlined that if such a reasonable alternative measure was not available to the state, a measure could be found to be necessary despite it grossly affecting the protected purpose of the treaty, i.e. in Argentina's case, foreign investment.[45]

Having set out an approach to necessity acutely distinct from the one employed in the three ICSID cases - *CMS, Enron* & *Sempra* - the tribunal engaged in an extensive and broad assessment of Argentina's contended measures, their contribution to Argentina's objective and their impact on the claimants' investments. This assessment also entailed a comprehensive analysis of the nature of the Argentine economic crisis itself.[46]

It is worth mentioning that the tribunal accepted that for the purpose of Article XI, similar to the prerequisite in Article 25 DARSIWA, if a state has contributed to the situation towards which the contended measures are aimed, it may not then avail itself of the BIT defence "since that Party could have pursued some other policy that would have rendered them unnecessary."[47] However, the tribunal noted that it did not consider that the Argentine Republic "because of its own conduct is barred from invoking Art XI of the BIT."[48]

Ultimately then, the *Continental* tribunal determined that, save one, all of the challenged measures materially contributed towards realising aims permissible under the US-Argentina BIT and were indeed "necessary" for the state to deal with its economic crisis and to "prevent the complete break-down of the financial system, the implosion of the economy and the growing threat to the fabric of Argentinean society and generally to assist in overcoming the crisis."[49]

CRITICISMS OF THE *CONTINENTAL* DECISION

The *Continental* tribunal took a major leap in assessing WTO law to be a more suitable source of principles when interpreting the notion of necessity within the context of state measures taken in response to economic crises. Its flexible approach allowed a wider leeway to Argentina towards insulating itself from further harm through emergency legislation. Their approach, however, was not met without criticism.

Mitchell and Henckels argue that "the *Continental* Tribunal did not properly articulate the reasons for its comparative approach, nor did it comprehensively represent how the necessity test operates in the context of GATT Article XX and GATS Article XIV" and that "while referring to weighing and balancing and the WTO's approach, the Tribunal did not undertake any balancing by explicit consideration of whether the measures' effectiveness outweighed their impact on the investment. Nor did it explicitly refer to the importance of the measures' objective."[50] While they acknowledge that investment tribunals relying on WTO jurisprudence is a "positive development,"

45 *Ibid* at para 198.
46 *Continental Casualty, supra* note 3 at 37 ff.
47 *Ibid* at para 234.
48 *Ibid* at para 236.
49 *Ibid* at para 197.
50 Mitchell & Henckels, *supra* note 8 at 116.

they warn against the "selective application" of its entailing elements and assert the importance of fully applying tools such as the suitability test "to ensure that all relevant factors are considered in analysing the necessity of the measure at issue."[51]

A more fundamental criticism arose from Alvarez and Brink that opposed the very idea of an investment arbitration tribunal having recourse to WTO case law to guide its decision on the functioning of an NPM clause.[52] The authors base their arguments on two differences between the instruments, the first relating to textual dissimilarities between Article XX of the GATT and Article XI of the US-Argentina BIT. More specifically, they highlight that, contrary to the former, the latter does not contain a chapeau which, as they argue, tends to have a subtle influence on the legal margin and policy-making leeway accorded to WTO members when they rely on the necessity defence.[53]

Sacerdoti rebuts this argument by pointing out how the concept of necessity under WTO principles is practically unrelated with the presence of a chapeau within Article XX GATT. The author, who also presided over the *Continental* tribunal, also asserts that "the latter contains the separate requirement that the application of the exception be non-discriminatory and in good faith and is subject accordingly to a separate subsequent analysis in WTO case law" and that "BITs contain a similar requirement that the treatment of protected investors be non-discriminatory."[54] Mitchell and Henckels further argue in support of this rebuttal that "the influence of the chapeau on the necessity test under Article XX is no more than a hypothesis" and that Alvarez and Brink "overstate their case by focusing too narrowly on Article XX rather than on necessity in the WTO Agreements more generally."[55]

The second difference upon which Alvarez and Brink based their critique was the separate institutional contexts within which the trade and investment regimes exist.[56] They argued that the *Continental* tribunal underestimated these differences and did not justify its recourse to WTO law through general rules of treaty interpretation. More specifically, they cite Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which states that:

> There shall be taken into account, together with the context any relevant rules of international law applicable in the relations between the parties.[57]

Stone Sweet, referring to the WTO-based approach borrowed by the *Continental* tribunal as a form of "proportionality analysis" that is "recognized as an unwritten general principle of law by many of the world's most powerful national and international courts," argues that,

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51 *Ibid* at 153.

52 José E Alvarez & Tegan Brink, "Revisiting the Necessity Defense: Continental Casualty v Argentina" in Karl P Sauvant, ed, *Yearbook on International Investment Law & Policy 2010-2011* (Oxford: Oxford University Press, 2012) 319.

53 *Ibid* at 346*;* see *US-Argentina BIT, supra* note 21 at art XI, and *General Agreement on Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 194 art XX (entered into force 1 January 1948).

54 Giorgio Sacerdoti, "BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity" (2013) 28:2 ICSID Rev 351 at 382, n 120.

55 Mitchell & Henckels, *supra* note 8 at 159.

56 Alvarez & Brink, *supra* note 52 at 349.

57 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 art 31(3)(c) (entered into force 27 January 1980).

with reference to Article 31(3)(c), "proportionality may well be a relevant rule."[58] Mitchell and Henckels, however, acknowledge that the Continental tribunal "could have bolstered its analysis by reference to rules of treaty interpretation."[59] Nonetheless, they also point out how Alvarez and Brink do not consider the prevalence of the WTO approach in other international and supranational fora that "also interpret the concept of necessity in the context of derogations, exceptions, and justifications for conduct that is inconsistent with the primary norm in a similar way."[60] By doing so, they further highlight the narrow perspective adopted by Alvarez and Brink.

Conclusion

Before the Argentina cases, a necessity defence such as that contained in Article XI had not yet been asserted before an ICSID tribunal. To collectively interpret the defence in a manner devoid of methodological discrepancies was a fairly reasonable challenge for the ICSID, particularly given how its tribunals are not bound by a *stare decisis* form of precedence. However, to apply it thrice in a blatantly erroneous fashion brought into question the very legitimacy of the institution.[61]

Moreover, it is evident that these early cases involving Argentina did not pave the way for an official approach with regard to the defence of necessity, collectively established by arbitral tribunals. Given that the choice of methodology here will inevitably be crucial for the outcome of an investment dispute, their lack of uniformity and predictability contributed to the negative perception that states have recently held towards the investment treaty regime. Argentina, after all, was liable for hundreds of millions in dollar damages despite objective evidence of legal error by tribunals.

A further part of this negative perception is the presumption that tribunals simply do not afford states with sufficient policy-making leeway required for legislating in the public interest. The decisions of the first three tribunals, the second of which, *Sempra*, was annulled for exercising manifest excess of powers[62] and the third, Enron, being partially annulled for its erroneous analysis, denied Argentina of such leeway during an economic crisis and by doing so further aggravated this perception.[63]

The *Continental* case, however, by engaging in what Stone Sweet referred to as a "far more sophisticated analysis of Article XI than the awards that came earlier,"[64] recognised the public law context of international investment arbitration and offered some optimism in regard to how future tribunals under ICSID could better balance investor protections with state sovereignty, while remaining firmly grounded in international law. Although it "glossed over certain essential elements" of it, the *Continental* tribunal also evidenced a structured and deferential approach

58 Stone Sweet & della Cananea, *supra* note 36 at 938.
59 Mitchell & Henckels, *supra* note 8 at 158.
60 *Ibid*.
61 Charles N Brower, Michael Ottolenghi & Peter Prows, "The Saga of CMS: Res Judicata, Precedent, and the Legitimacy of ICSID Arbitration" in Christina Binder et al, eds, *International Investment Law for the 21st Century* (Oxford: Oxford University Press, 2009) 843.
62 *Sempra* 2010, *supra* note 33.
63 *Enron* 2010, *supra* note 33.
64 Stone Sweet & della Cananea, *supra* note 36 at 939—940.

to least-restrictive means analysis and demonstrated how WTO principles could be effectively utilised to draw guidance within an investment arbitration case, particularly with regard to the necessity defence.[65]

It is worth mentioning that Stone Sweet regards the WTO approach borrowed by the *Continental* tribunal as "the best available doctrinal framework with which to meet the present challenges to the BIT-ICSID system."[66] The author, who as mentioned above, regards this approach as a form of proportionality analysis, refers to the *Continental* decision as the "grand entrance" of proportionality into investor-state arbitration.[67] In this regard, it is also worth mentioning that, true to the persistent tendency of investment treaty jurisprudence to adapt and evolve, the inclusion of exceptions and limits (resembling GATT Article XX) within Model BITs has been initiated by several states such as Canada and most recently, India.[68]

Lastly, the Continental decision also contributed towards diluting the perception that international investment law only exists as an "exotic"[69] and largely self-contained field. It instead demonstrated it as not just capable of being seated well within general international law but also as being open to cross-fertilisation.

65 *Mitchell & Henckels, supra* note 8 at 160.
66 Alec Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier" (2010) 4:1 Law & Ethics of Human Rights 47 at 76 [Sweet, "Proportionality"].
67 Sweet, "Proportionality", *supra* note 66 at 76.
68 Global Affairs Canada, "Canada's Foreign Investment Promotion and Protection Agreements (FIPAs)", (2016), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-apie.aspx>; India, Ministry of Finance, Model Text for the Indian Bilateral Investment Treaty (2015), online: <finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp>.
69 Martti Koskenniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law International Law Commission: Report of the Study Group of the International Law Commission*, UNGAOR, 2006, UN Doc A/CN.4/L.682 (2006) at para 8.