

**NECESSITY AND “SUPPLEMENTARY MEANS OF  
INTERPRETATION” FOR NON-PRECLUDED MEASURES IN  
BILATERAL INVESTMENT TREATIES**

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ABSTRACT

This Article scrutinizes varying interpretive methodologies used by different tribunals of the International Centre for Settlement of Investment Disputes (“ICSID”) in relation to Article XI of the US-Argentina bilateral investment treaty (“BIT”), which, in different degrees, had referred to the customary doctrine of “necessity” to derive Article XI’s substantive meaning and legal effects. Neither *Sempra v. Argentina*, *LG&E v. Argentina*, *CMS Gas v. Argentina*, nor most recently in 2008, *Cont’l Cas. Ins. Co. v. Argentina*, evince a demonstrably adequate interpretive methodology within the framework of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”). Accordingly, this Article proposes a return to these fundamental rules of treaty interpretation. Given conceptual and methodological incompatibilities between the customary doctrine of “necessity” and Article XI, this Article holds that the customary doctrine has no interpretive utility for Article XI. Rather, treaty applicors of Article XI (and other similarly-worded treaty clauses on non-precluded measures) should abide by the components of the unitary system of interpretation under the VCLT, particularly the treaty text and context. A State invoking an Article XI-type Non-Precluded Measure (“NPM”) utilizes Article XI to address potential international responsibility vis-a-vis the other State Party

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to the BIT, and cannot use Article XI to remove its *lex specialis* substantive duties under the BIT to that State Party's investors. Finally, this Article recommends that treaty appliers should privilege a holistic reading of the *lex specialis* as the governing law whenever the host State claims an economic emergency to plead outright exculpation from substantive obligations in bilateral investment treaties.

## 1. INTRODUCTION

All interpretation pursues meaning within a penumbra of discursive formations.<sup>1</sup> With respect to the interpretation of treaties, modern international law has substantially settled its interpretive rules and accepted methodology through the 1969 Vienna Convention on the Law of Treaties. Due to the VCLT's modalities of interpretation, treaty appliers do not have an unlimited universe of sources, texts, symbols, and significations from which to elicit the meaning intended by State parties to a treaty. Article 31(1) of the VCLT provides the definitive general formulation for treaty interpretation to be "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>2</sup> Context, according to Article 31(2) of the VCLT, can be composed of: (1) "the text [of the treaty], including its preamble and annexes;" (2) "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;" and (3) "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."<sup>3</sup> Other phenomena that may be taken into account together with context include: (1) "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;" (2) "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;" and (3) "any relevant rules of

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<sup>1</sup> See MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 23-70 (A.M. Sheridan Smith trans.) (1972); see also ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* 285-392 (2008) (evaluating the conceptual aspects of interpretation).

<sup>2</sup> Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>3</sup> *Id.* art. 31(2).

international law applicable in the relations between the parties.”<sup>4</sup> If it is established that the parties intended so, a special meaning will be given to a term.<sup>5</sup> Article 31 of the VCLT has thus been understood to refer to a unitary system or rule of interpretation, such that those undertaking the task of treaty interpretation must collectively consider “the text, its context, and the object and purpose of the treaty.”<sup>6</sup> As the International Law Commission (“ILC”) stressed, Article 27 of the Draft Articles on the Law of Treaties (now Article 31 of the VCLT) makes text, context, subsequent agreement regarding the interpretation, subsequent practice establishing the understanding of the parties regarding the interpretation, and relevant rules of international law, as being all “of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them [in the logical progression of Article 27].”<sup>7</sup>

On the other hand, Article 32 of the VCLT permits supplementary means of interpretation for two alternative purposes: (1) to *confirm* the meaning resulting from the application of Article 31; or (2) to *determine* meaning when the Article 31 interpretation “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable.”<sup>8</sup> Supplementary means include, but are not limited to, the *travaux préparatoires* and the “circumstances of its conclusion.” The *travaux préparatoires* is generally “understood to include written material, such as successive drafts of the treaty, conference records, explanatory statements by an expert consultant at a codification conference, uncontested interpretative statements by the chairman of a drafting committee and ILC Commentaries,” whose value depends on several factors, particularly “authenticity, completeness and availability.”<sup>9</sup> Other “supplementary” techniques of treaty interpretation are based on domestic legal orders’ principles on statutory construction (e.g. *ejusdem generis*,

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<sup>4</sup> *Id.* art. 31(3).

<sup>5</sup> *Id.* art. 31(4).

<sup>6</sup> ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 234 (2d ed. 2007).

<sup>7</sup> International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. Int’l L. Comm’n 220, U.N. Doc. A/CN.4/190 [hereinafter ILC, *Draft Articles on the Law of Treaties*].

<sup>8</sup> Vienna Convention, *supra* note 2 art. 32.

<sup>9</sup> AUST, *supra* note 6, at 246.

*expression unius est exclusio alterius, lex posterior derogat legi priori, lex specialis derogat legi generali*, to name a few).<sup>10</sup> Clearly, Articles 31 and 32 of the VCLT both provide reasonable delineations for a treaty applier. The International Court of Justice has declared both of these norms as likewise bearing the status of customary international law.<sup>11</sup>

Despite the relative clarity of Articles 31 and 32 of the VCLT, however, treaty appliers' liberal methodologies could still subvert the unitary system of treaty interpretation.<sup>12</sup> In the September 5, 2008 Award in *Cont'l Cas. Co. v. Argentina*,<sup>13</sup> the International Centre for Settlement of Investment Disputes ("ICSID") Tribunal had occasion to again interpret Article XI of the Treaty Between the United States and Argentina concerning the Reciprocal Encouragement and Protection of Investment ("U.S.-Argentina BIT"). Article XI, in its entirety, states: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to maintenance or restoration of international peace or security, or the Protection of its own essential security interests."<sup>14</sup> Argentina invoked Article XI, specifically its "essential security

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<sup>10</sup> JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 38-39 (1996).

<sup>11</sup> *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.)*, Judgment, 2002 I.C.J. 645 (Dec. 17).

<sup>12</sup> See Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 358-59 (2008):

While it has been argued convincingly that 'the dispute resolution system devised by [the international] society must make available both centralized and decentralized mechanisms for attending to the social needs of [the] evolving structure [of the international society]', it is the opinion of this author that international tribunals' approaches to interpretive issues should to a significant degree be 'centralized'. *The way in which ICSID tribunals use interpretive arguments in practice is often quite far removed from the structures set out in Articles 31-32 of the VCLT.*

*Id.* (emphasis added).

<sup>13</sup> *Cont'l Cas. Co. v. Argentina*, ICSID Case No. ARB/03/9 (Sep. 5, 2008). See also Damon Vis-Dunbar, *Continental Casualty Company moves to annul award favourable to Argentina*, INVESTMENT TREATY NEWS, Jan. 16, 2009, <http://www.investmenttreatynews.org/cms/news/archive/2009/01/16/continental-casualty-company-moves-to-annul-award-favourable-to-argentina.aspx> (explaining that the tribunal held that Argentina had successfully applied the essential security provision found in the U.S.-Argentina BIT).

<sup>14</sup> Treaty Between United States of America and Argentina Concerning the Reciprocal Encouragement and Protection of Investment [hereinafter U.S.-Argentina BIT], art. XI, Nov. 14, 1991, 31 I.L.M. 124.

interests,” to deny liability for a series of legislated economic measures imposed during the Argentine financial crisis from 2000–2002 (the “Capital Control Regime”), that had unilaterally pesified (converted to pesos) formerly dollar-denominated contracts, frozen bank deposits and prohibited the transfer of funds abroad, terminated peso convertibility and pegged the U.S. dollar at a fixed one-to-one exchange rate, rescheduled term deposits and reduced interest rates, and defaulted on and unilaterally rescheduled government debt. In interpreting the scope of “essential security interests,” the Tribunal in *Continental* declared that it would not use the customary law doctrine of necessity, as codified in Article 25 of the International Law Commission’s Articles on State Responsibility. Instead, the Tribunal explored GATT and WTO case law to determine the scope of “essential security interests” as contemplated in the U.S.-Argentina BIT:

For the reasons stated above relating to the different role of Art. XI and of the defense of necessity in customary international law, the Tribunal does not share the opinion that “the treaty thus becomes inseparable from the customary law standard insofar as to the conditions for the operation of the state of necessity are concerned,” as stated in the *Enron Case* and submitted also by the Claimant. Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law.<sup>15</sup>

Despite the foregoing declaration, the Tribunal’s reasoning in *Continental* ultimately used the concept of necessity under customary international law as a supplementary means of interpreting Article XI. Apart from this supplementary reference, the Tribunal also uniquely expanded the sources of possible interpretation of Article XI to import doctrines from completely distinct legal regimes such as the GATT and the WTO.

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<sup>15</sup> *Cont’l Cas. Co.*, para. 192.

Inexplicably, the Tribunal as treaty applier broadened its reach of interpretive sources in a manner seemingly inconsistent with the clear delimitations prescribed in Articles 31 and 32 of the VCLT.

The Tribunal's construction of "essential security interests" within the framework of Article XI of the US-Argentina BIT sets a troubling precedent for the interpretation of analogously-worded provisions on NPM in other bilateral investment treaties. According to a recent survey, NPMs are present in over two hundred bilateral investment treaties.<sup>16</sup>

Considering the increasing proliferation of similarly-worded NPMs in investment treaty regimes, treaty appliers are challenged to construe a *lex specialis* treaty term—"essential security interests"—with utmost fidelity to the settled interpretive rules in Articles 31 and 32 of the VCLT. As this Article shows, there are conceptual and methodological problems in using the customary norm of necessity as a supplementary means of interpreting the *lex specialis* treaty term of "essential security interests," whether to confirm a meaning reached under the system of interpretation in Article 31 of the VCLT, or to itself provide basis to determine treaty meaning permitted in Article 32 of the VCLT. Conceptually, the content of "necessity" as a norm precluding wrongfulness under customary international law vastly differs from the content of "essential security interests" as *lex specialis* in Article XI of the U.S.-Argentina BIT. The legal consequences flowing from each type of norm, (and as corollaries, the duties assumed by the host State under each norm), are also separate and distinct. Methodologically, "necessity" under customary international law also envisions a more restrictive range of state action than "essential security interests" in the *lex specialis* of Article XI. The inherent incompatibility between the customary law doctrine of

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<sup>16</sup> William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L. L. 307, 318-20 (2008) (detailing the presence of non-precluded measures in bilateral investment treaties). NPMs have also been built into multilateral treaty regimes. For example, the Association of Southeast Asian Nations ("ASEAN") Framework Agreement on Investment Area, Member States are not prevented from adopting or enforcing measures "necessary to protect national security and public morals," or to take "necessary safeguard measures" when a Member State "suffers or is threatened with any serious injury or threat," which is the "result of the implementation of the liberalization programme under this Agreement." Framework Agreement on the ASEAN Investment Area arts. 13, 14, Oct. 7, 1998, <http://www.aseansec.org/7994.pdf>.

“necessity” and “essential security interests” in the *lex specialis* of Article XI ought to militate against any use of “necessity” as a supplementary means of interpretation of non-precluded measures in bilateral investment treaties. The interpretive havoc wrought by using “necessity” as a supplementary means of interpretation to *lex specialis* NPMs thus poses serious policy consequences for the stability of the international legal investment regime, and raises serious moral hazards that incentivizes higher-risk economic and investment policy-setting by host States.

Dissociating Article XI from the customary norm of necessity, however, does not reduce Article XI to a *non liquet* situation of norm-inoperability. Instead, the brief text of Article XI should be contextually viewed from its limited understanding within the framework of the international obligations subsisting between the states parties to the BIT. Given the text of Article XI in relation to the structural design of the U.S.-Argentina BIT, this analysis proposes an interpretive bifurcation of the duties of a host State vis-a-vis investors under the U.S.-Argentina BIT, from the international obligations that give rise to state responsibility between the United States and Argentina as treaty parties.<sup>17</sup> A State invoking an Article XI-type NPM utilizes Article XI to address potential international responsibility vis-a-vis the other State Party to the BIT, and cannot use Article XI to remove its *lex specialis* substantive duties under the BIT to that State Party’s investors. This crucial point of differentiation should result in a better-nuanced appreciation of international legal consequences in an Article XI-type situation (e.g. when a host State asserts that it is “not precluded from taking a measure necessary to ‘essential security interests’”) that does not violate the unitary system of interpretation under the VCLT.

Section 1 of this Article scrutinizes the methodology and reasoning employed in various ICSID decisions on the

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<sup>17</sup> See MOHAMMED M. GOMAA, *SUSPENSION OR TERMINATION OF TREATIES ON GROUNDS OF BREACH* 62-65 (1996).

International responsibility is independent of the reaction a wronged party may take. Even if that party decides to waive its right to react to the wrongful act for any reason, the defaulting party is not relieved from its responsibility. . . . The injured party has to be one to whom an international obligation arising from the treaty is due. If not, it may not bring a claim in respect of the breach.

*Id.*

interpretation of “essential security interests” of Article XI of the U.S.-Argentina BIT, culminating with the latest September 5, 2008 Award in *Cont'l Cas. Co. v. Argentina*. A comparative examination of the interpretive methodologies reached in these decisions by separate ICSID Tribunals shows that “essential security interests” have been parsed within an entire spectrum of meanings, from the most restrictive to the most expansive reading in *Continental*. Section 2 then examines conceptual and methodological problems arising within the framework of Articles 31 and 32 of the VCLT when the customary norm of necessity is used as a “supplementary” means of interpreting the *lex specialis* of Article XI of the U.S.-Argentina BIT, more so in the context of the *Continental* award. Section 3 sets forth a distinct choice of law proposal for future cases, favoring exclusive use of the *lex specialis* and abandoning the confusing “supplementary” use of necessity under customary international law to explicate the meaning of “essential security interests,” except in the circumscribed instance that the parties to a treaty textually provide the customary norm to be a “relevant rule of international law applicable in the relations between the parties” within the contemplation of Article 31(3) of the VCLT. This deliberate choice of law in favor of the *lex specialis* should more predictably affect how future Tribunals appreciate the duties of the host State; assess the standards of reasonability, proportionality, fair and equitable treatment; exact the quantum of evidence to prove the existence of a situation warranting non-precluded measures under the *lex specialis*; and evaluate the host State’s subsequent conduct in situations of possible mitigation and/or contribution to situations implicating “essential security interests.” To complete interpretive scrutiny of Article XI, Section 3 also proposes a reading of Article XI that reconciles the expressed intent of the States Parties to the U.S.-Argentina BIT within the structure, policy, and design of the treaty. In the Conclusion, this Article outlines various inimical policy consequences from using the customary norm of “necessity” as a supplementary means of interpretation of *lex specialis* non-precluded measures, including threats to the rule of law and the reciprocity of stable expectations between host States and investors, increased volatility in the international legal regime for investment, and provoking moral



hazards that incentivize higher-risk economic policy-setting of host States.<sup>18</sup>

2. "ESSENTIAL SECURITY INTERESTS" IN ARTICLE XI OF THE U.S.-  
ARGENTINA BIT VIS-A-VIS THE CUSTOMARY INTERNATIONAL LAW  
DOCTRINE OF "NECESSITY" IN ICSID JURISPRUDENCE: FROM *SEMPRA*,  
*CMS GAS*, *LG&E* TO *CONTINENTAL*

Prior to *Continental*, no ICSID Tribunal had ever treated the 2001–2002 Argentine financial crisis, and the measures undertaken by the Argentine government during this period, as a legitimate basis to claim exculpation from liability to a broad range of foreign investors.<sup>19</sup> As will be shown in this section, *Continental* would not just be a singular triumph for Argentina, but it would also mark a deliberate departure from the interpretive practice of previous ICSID Tribunals in three cases likewise involving the same plea of economic emergency: (1) *Sempra Energy International v. Argentina*;<sup>20</sup> (2) *CMS Gas Transmission Company v. Argentina*;<sup>21</sup> and (3) *LG&E Energy Corporation v. Argentina*.<sup>22</sup> Before proceeding to a comparative analysis with the Tribunal's latest interpretive methodology in *Continental*, the following subsections briefly discuss the relevant facts and legal reasoning for each of these three cases.

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<sup>18</sup> See William E. Scheuerman, *The Economic State of Emergency*, 21 CARDOZO L. REV. 1869 (2000) (expounding upon the dangers inherent in the reliance upon economic emergency powers as a basis for regulation).

<sup>19</sup> See William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 199 (2008) (presenting an argument on the position that the ICSID Tribunals' narrow interpretation of Article XI has made the latter "essentially unavailable to any state," prior to *Continental*).

<sup>20</sup> *Sempra Energy Int'l v. Argentina*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/16 (May 11, 2005); *Sempra Energy Int'l v. Argentina*, Award, ICSID Case No. ARB/02/16 (Sept. 28, 2007).

<sup>21</sup> *CMS Gas Transmission Co. v. Argentina*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/01/8 (July 17, 2003); *CMS Gas Transmission Co. v. Argentina*, Award, ICSID Case No. ARB/01/8 (May 11, 2005); *CMS Gas Transmission Co. v. Argentina*, Decision on Request for Stay of Enforcement of Award, ICSID Case No. ARB/01/8 (Sept. 1, 2006); *CMS Gas Transmission Co. v. Argentina*, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Award, ICSID Case No. ARB/01/8 (Sept. 25, 2007).

<sup>22</sup> *LG&E Energy Corp. v. Argentina*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/1 (Apr. 30, 2004); *LG&E Energy Corp. v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1 (Oct. 3, 2006); *LG&E Energy Corp. v. Argentina*, Award, ICSID Case No. ARB/02/1 (July 25, 2007).

### 1.1. *Sempra*

*Sempra Energy International*, a company established in California, brought suit against Argentina as a 43.09% shareholder of two companies (*Sodigas Sur S.A.* and *Sodigas Pampeana S.A.*), with another company, *Camuzzi*, owning the remaining 56.91% of shares in both companies. These two companies in turn owned the majority shares in two Argentine natural gas distribution companies (*Sodigas Sur S.A.* held 90% of shares in *Camuzzi Gas del Sur S.A.*, while *Sodigas Pampeana* held 86.09% of shares in *Camuzzi Gas Pampeana S.A.*).<sup>23</sup> Both natural gas distribution companies held licenses from Argentina to supply and distribute natural gas in seven provinces in Argentina.

Argentina raised the following objections: (1) there was no legal dispute; (2) the measures in question were not directly related to an investment; (3) no national of another contracting State to the U.S.-Argentina BIT was directly harmed; (4) the claim is premature; (5) *Sempra* had no *jus standi* as it was not qualified to bring suit as a mere minority shareholder in *Sodigas Sur* and *Sodigas Pampeana*; and (6) the dispute had already been submitted to other tribunals.

Applying only the requirements of Article 25 of the ICSID Convention and the U.S.-Argentina BIT in order to reach a determination on jurisdiction, the Tribunal rejected each of Argentina's objections. The Tribunal held that *Sempra* could submit a claim as a national of the U.S., insofar as it meets the requirements laid down in the ICSID Convention and the U.S.-Argentina BIT. *Sodigas* also had the option "to complain as a company incorporated in Argentina, if it is established that this company is under foreign control, and through it, the licensee companies too."<sup>24</sup> The Tribunal clarified that the second sentence of Article 25(2)(b) of the Convention,<sup>25</sup> as well as Article VII(8) of

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<sup>23</sup> *Sempra Energy Int'l*, Decision on Objections to Jurisdiction, para. 19.

<sup>24</sup> *Id.* para. 42.

<sup>25</sup> The Tribunal explained that "Nationals of another Contracting State" means:

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the

the U.S.-Argentina BIT,<sup>26</sup> merely “provides an additional or different alternative which does not in this case prevent an investor from opting to act under the first sentence of the Convention article if it meets the pertinent requirements.”<sup>27</sup> Even if the second sentence were to be applied, *Sempra* would still have the requisite nationality to bring suit, since, as the Tribunal noted, both *Sempra* and *Camuzzi* exercised joint control and management of *Sodigas Sur* and *Sodigas Pampinea* pursuant to their respective shareholders’ agreements and company by-laws.<sup>28</sup>

The Tribunal further held that there was a legal dispute which arose directly from *Sempra*’s investment. The Tribunal adopted the standard in the *Gami* case<sup>29</sup> to conclude that the extent that the treaty on which the protection or guarantee is based provides the shareholder with the possibility to resort to arbitration, where direct or indirect ownership is considered and a broad definition of investment is made under Article I(1)(a) of the U.S.-Argentina BIT.<sup>30</sup> The Tribunal characterized *Sempra*’s claim as founded on

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parties have agreed should be treated as a national of another Contracting State for purposes of this Convention.

ICSID Conventions Rules and Regulations, art. 25 ¶ 2.

<sup>26</sup> U.S.-Argentina BIT, *supra* note 14, art. 7, ¶8.

For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.

*Id.*

<sup>27</sup> *Sempra Energy Int’l*, Decision on Objections to Jurisdiction, para. 45.

<sup>28</sup> *Id.* paras. 54–57.

<sup>29</sup> *GAMI Invs. Inc. v. Mexico*, Final Award (Nov. 15, 2004), 13 ICSID (W. Bank) 147.

<sup>30</sup> 1. For purposes of this Treaty,

(a) ‘investment’ means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts, and includes without limitation

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

both contract and the U.S.-Argentina BIT, holding that the dispute “arises from how the violation of the contractual commitments with the licensees, expressed in the license and other acts, impacts the rights the investor claims to have in the light of the provisions of the Treaty and the guarantees on the basis of which it made the protected investment.”<sup>31</sup>

Finally, the Tribunal disposed of the other objections to jurisdiction by holding that: (1) the pendency of renegotiation proceedings between Argentina and its foreign investors was not a basis for deferment of the arbitration; (2) the determination and quantification of losses is an issue for the merits phase of the arbitration; (3) Sempra’s evidence shows that it is a foreign investor; and (4) the pendency of disputes before national courts would not prevent the Tribunal from exercising jurisdiction over claims arising from alleged breaches of the U.S.-Argentina BIT. Significantly, in ascertaining whether Argentina had expressed its consent to submit to arbitration under the U.S.-Argentina BIT, the Tribunal affirmed Article 31 of the VCLT as the “principal means of interpretation” of the U.S.-Argentina BIT, describing the U.S.-Argentina BIT as having been concluded by the parties in order to provide “full protection to investors.”<sup>32</sup>

The Tribunal’s Award in the Merits phase on September 9, 2007<sup>33</sup> was issued in Sempra’s favor. The Tribunal concluded that Argentina had breached its obligations to accord the investor fair and equitable treatment guaranteed under Article II(2)(a) of the U.S.-Argentina BIT and to observe the obligations entered into with regard to the investment as guaranteed in Article II(2)(c) of

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(iii) a claim to money or a claim to performance having economic value and directly related to an investment;

(iv) intellectual property which includes, *inter alia*, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavour, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law.

U.S.-Argentina BIT, *supra* note 14, art. I(1)(a) (emphasis added).

<sup>31</sup> *Sempra Energy Int’l*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/16, para. 100.

<sup>32</sup> *Id.* para. 142.

<sup>33</sup> *Sempra Energy Int’l*, Award, ICSID Case No. ARB/02/16.

the same treaty. It ordered Argentina to pay Sempra compensation in the amount of \$128,250,462 (USD), with semi-annually compounded interest at the six month successive LIBOR rate plus two percent for each year, from January 1, 2002 until the date of the Award.

Sempra had argued that various measures undertaken by the Argentine government from 2000 to 2002 abrogated and repudiated most of the rights Sempra had under the regulatory framework and the terms of the licenses issued to Camuzzi Gas Pampeana and Camuzzi Gas del Sur. Sempra's decision to invest in these companies relied specifically on the conditions offered by such legislative and regulatory enactments, which included conditions that: (1) licenses would be for a term of thirty-five years, with a possible ten-year extension; (2) calculation of tariffs would be made in U.S. dollars and their semi-annual adjustment would be made according to changes in the U.S. Producer Price Index ("PPI"); (3) there would be no price freeze applicable to the tariff system, and if one was imposed, the licensee had the right to compensation; (4) the license would not be amended by the Argentine government, without the prior consent of the licensee; (5) the Argentine government committed not to withdraw the license except in case of specific breaches; and (6) the principle of indifference would operate with respect to subsidies granted by the Argentine government so that the distributor's income would not be altered.<sup>34</sup>

Argentina argued its defense of emergency from three separate legal streams: (1) Argentine law and jurisprudence which supposedly contemplates the rebalancing of contracts during a state of economic emergency; (2) general international law which includes the customary norm on the state of necessity as codified under Article 25 of the International Law Commission's Draft Articles on State Responsibility; and (3) Articles IV(3) and XI of the US-Argentina BIT.<sup>35</sup>

The Tribunal initially examined the allegations of breach of the U.S.-Argentina BIT. The Tribunal held that Argentina's measures did not breach Article IV(1) (no expropriation);<sup>36</sup> Article II(2)(b) (no arbitrariness or discrimination);<sup>37</sup> and Article II(2)(a) (there being

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<sup>34</sup> *Id.* paras. 85, 93.

<sup>35</sup> *Id.* paras. 98, 338, 356.

<sup>36</sup> *Id.* para. 286.

<sup>37</sup> *Id.* paras. 311-14.

no specific allegation of failure to provide full protection and security to the investment).<sup>38</sup> However, the Tribunal held that Argentina's emergency measures breached Article II(2)(a) by failing to provide fair and equitable treatment to investors, reasoning that:

The measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented. Where there was business certainty and stability, there is now the opposite. The tariff regime speaks for itself in this respect. A long-term business outlook has been transformed into a day-to-day discussion about what is next to come. The guarantees given are no longer available.<sup>39</sup>

The violation of this specific treaty obligation also triggered a breach of the umbrella clause in Article II(2)(c) of the U.S.-Argentina BIT.<sup>40</sup>

The Tribunal then proceeded to consider, and in turn reject, the defense of emergency as asserted by Argentina from the standpoint of Argentine law and jurisprudence, general international law, and the U.S.-Argentina BIT. With respect to Argentine law, the Tribunal adopted the standard that emergency restrictions on the normal exercise of patrimonial rights must be "reasonable, limited in time, and constitute a remedy and not a mutation in the substance or essence of the right acquired by judicial decision or contract."<sup>41</sup> Argentina's emergency measures failed to meet the temporality requirement when it extended the emergency legislation beyond the period of the financial crisis.<sup>42</sup> The emergency measures also caused an essential mutation of the rights under the licenses, to the point that "in reality . . . the rights granted under the License shall be permanently eliminated, at least insofar as the calculation of tariffs in U.S. dollars and their PPI adjustment are concerned." According to the Tribunal, this result

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<sup>38</sup> *Id.* paras. 321-24.

<sup>39</sup> *Id.* para. 303 (citation omitted).

<sup>40</sup> *Id.* paras. 311-14.

<sup>41</sup> *Id.* para. 247.

<sup>42</sup> *Id.* paras. 251-52.

could not be permitted, since the “natural outcome of the operation of ‘emergency’ is not . . . a legal exemption from liability.”<sup>43</sup>

Finally, Argentina’s unilateral determination of tariff adjustments, undertaken outside the adjustment mechanisms provided under the terms of the licenses themselves, proved Argentina’s measures to be inconsistent with the requirement of reasonableness.<sup>44</sup> In the words of the Tribunal:

[T]he real issue in the instant case is whether the constitutional order and the survival of the State were imperiled by the crises, or instead whether the Government still had many tools at its disposal to cope with the situation. The Tribunal believes that the constitutional order was not on the verge of collapse as evidenced by, among many examples, the orderly constitutional transition that carried the country through five different Presidencies in a few days’ time, followed by elections and the reestablishment of public order. Even if emergency legislation became necessary in this context, legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation.<sup>45</sup>

The Tribunal also rejected the defense of necessity under customary international law (reflected by Article 25 of the Articles of State Responsibility), questioning the alleged existence of a grave and imminent peril that could threaten the essential interest. According to the Tribunal, while there was “no doubt that there was a severe crisis, and that, in such a context, it was unlikely that business could have continued as usual,” the argument that:

[S]uch a situation compromised the very existence of the State and its independence, and thereby qualified as one involving an essential State interest, is not convincing. Questions of public order and social unrest could have been handled, as in fact they were, just as questions of political stabilization were handled under the constitutional arrangements in force.<sup>46</sup>

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<sup>43</sup> *Id.* para. 254.

<sup>44</sup> *Id.* paras. 255–61.

<sup>45</sup> *Id.* para. 332.

<sup>46</sup> *Id.* para. 348.

The Tribunal was careful to point out that it was not its task to substitute its view of what the Argentine government's choice ought to have been among various economic options, but that for purposes of Article 25, the Tribunal's duty is "only to determine whether the choice made was the only one available."<sup>47</sup>

Turning to the U.S.-Argentina BIT, the Tribunal first clarified the scope of Article IV(3), one of the treaty pillars of Argentina's emergency defense. Article IV(3) states in its entirety:

Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favourable than that accorded to its own nationals or companies of any third country, whichever is the more favourable treatment, as regards any measures it adopts in relation to such losses.<sup>48</sup>

This provision, according to the Tribunal, was only intended to refer to corrective measures, or the "minimum level of treatment for foreign investments that suffer losses in the host country by the simultaneous interplay of national and most favored nation treatments, and then only in respect of measures which the State 'adopts in relation to such losses.'"<sup>49</sup> The Tribunal categorically emphasized that Article IV(3) could not be read as a "general escape clause from treaty obligations," and "consequently does not result in the exclusion of wrongfulness, liability and eventual compensation."<sup>50</sup>

Moving on to Article XI of the U.S.-Argentina BIT as the crux of the interpretive controversy, the Tribunal held at the outset that:

[T]he object and purpose of the Treaty is, as a general proposition, for it to be applicable in situations of economic difficulty and hardship that require the protection of the internationally guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route

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<sup>47</sup> *Id.* para. 351.

<sup>48</sup> U.S.-Argentina BIT, *supra* note 14, art. IV(3).

<sup>49</sup> *Id.* para. 362 (quotations omitted).

<sup>50</sup> *Id.* para. 363.



from defined obligations cannot be easily reconciled with that object and purpose.<sup>51</sup>

The Tribunal then accepted the inclusion of economic emergencies as reasonably within the standard of “essential security interests” in Article XI.

The interpretive problem commences with the Tribunal’s use of Article 25 of the Articles of State Responsibility to provide the content of “essential security interests” in Article XI of the U.S.-Argentina BIT:

In addition, in view of the fact that the Treaty does not define what it is to be understood by an “essential security interest,” the requirements for a state of necessity under customary international law, as outlined above in connection with their expression in Article 25 of the Articles on State Responsibility, become relevant to the matter of establishing whether the necessary conditions have been met for its invocation under the Treaty. Different might have been the case if the Treaty had defined this concept and the conditions for its exercise, but this was not the case.

The Tribunal notes that in the view of Dean Slaughter and Professor Burke-White, which the Respondent shares, the CMS award was mistaken in that it discussed Article XI in connection with necessity under customary law. This Tribunal believes, however, that the Treaty provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined. Similarly, the Treaty does not contain a definition concerning either the maintenance of international peace and security, or the conditions for its operation. Reference is instead made to the Charter of the United Nations in Article 6 of the Protocol to the Treaty.<sup>52</sup>

The Tribunal did not cite any legal authority to support its decision to use Article 25 to provide substantive content for the

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<sup>51</sup> *Id.* para. 373.

<sup>52</sup> *Id.* paras. 375-76 (citation omitted).

clause on “essential security interests” in Article XI. While it conceded that the treaty regime as *lex specialis* prevails over general customary international law, the Tribunal summarily concluded that the absence of specified legal elements to determine the invocation of “essential security interests” in Article XI of the U.S.-Argentina BIT simply warranted the infusion of the legal elements under Article 25 of the Articles of State Responsibility.<sup>53</sup> Significantly, the Tribunal made no reference whatsoever to the unitary interpretive system of Article 31, much less the interpretive rules on the use of supplementary means under Article 32 of the VCLT.

After reviewing the competing evidence on the nature of Article XI (and noting some reference to Articles 31 and 32 of the VCLT),<sup>54</sup> the Tribunal held that Article XI was not intended by the parties to be self-judging. It reiterated that:

[Because] the crisis invoked does not meet the customary law requirements of Article 25 of the Articles of State Responsibility, [the Tribunal] concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under Article XI given that this

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<sup>53</sup> *Id.* para. 378.

It is no doubt correct to conclude that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. The problem here, however, is that the Treaty itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity. The rule governing such questions will thus be found under customary law. As concluded above, such requirements and conditions have not been fully met in this case. Moreover, the view of the Respondent’s legal expert, as expressed at the hearing, contradicts the Respondent’s argument that the Treaty standards are not more favourable than those of customary law, and at the most should be equated with the international minimum standard. The Tribunal does not believe that the intention of the parties can be described in the terms which the expert has used, as there is no indication that such was the case. Nor does the Tribunal believe that because Article XI did not make an express reference to customary law, this source of rights and obligations becomes inapplicable. International law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle.

*Id.*

<sup>54</sup> *Id.* para. 381.

Article does not set out conditions different from customary law in such regard.<sup>55</sup>

With the defense of emergency and/or necessity rejected for all three legal streams (Argentine law and jurisprudence, customary international law, and Articles IV(3) and XI of the U.S.-Argentina BIT), the Tribunal held that Argentina had a duty to compensate for its breaches of Articles II(2)(a) and (c) of the U.S.-Argentina BIT. While recognizing that Article IV of the U.S.-Argentina BIT constituted the legal standard for compensation,<sup>56</sup> the Tribunal nevertheless held that it would “take into account the crisis conditions affecting Argentina when determining the compensation due for the liability found in connection with the breach of the Treaty standards.”<sup>57</sup> The Tribunal ordered Argentina to compensate Sempra in the total amount of \$128,250,462 (USD), an aggregate amount that represented the sum of Sempra’s equity value loss, its loss on a December 2001 loan, unpaid PPI adjustments, and nonpayment of subsidies within the terms of the Licenses.

### 1.2. *The LG&E Cases*

The three LG&E corporations who filed a claim against Argentina in *LG&E Energy Corp.*, *LG&E Capital Corp.*, and *LG&E International Inc.* (collectively “the LG&E Group”) are all corporations organized under the laws of the United States. The LG&E Group has shareholdings in three local gas distribution companies in Argentina (45.9% in Distribuidora de Gas del Centro, 14.4% in Distribuidora de Gas Cuyana S.A., and 19.6% in Gas Natural BAN S.A.).<sup>58</sup> The LG&E Group participated in Argentina’s privatization process, where foreign investors were:

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<sup>55</sup> *Id.* para. 388.

<sup>56</sup> Article IV(1) states:

Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.”

U.S.-Argentina BIT, *supra* note 14, at VII(8).

<sup>57</sup> *Sempra Energy Int’l*, Award, ICSID Case No. ARB/02/16, para. 397.

<sup>58</sup> *LG&E Energy Corp.*, *LG&E Capital Corp.*, and *LG&E Int’l Inc. v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1, para. 52 (2006).

[E]ncouraged to purchase shares with guarantees, such as tariffs calculated in U.S. dollars, automatic and periodic adjustments to the tariffs based on the PPI, a clear legal framework that could not be unilaterally modified, and the granting of “licenses” instead of “concessions” with a view to offering the highest degree of protection to prospective investors.<sup>59</sup>

Following the Argentine economic and financial crisis, the Argentine government announced the mandatory renegotiation of all public service contracts, without offering to restore the legal guarantees that were eliminated by the 2002 Emergency Law and other governmental measures. In its request for arbitration, the LG&E Group asserted Argentina’s breach of the following U.S.-Argentina BIT obligations: Article II(2)(c) (umbrella clause); Article II(2)(a) (failure to accord fair and equitable treatment); Article II(2)(b) (taking arbitrary and discriminatory measures that impair the use and enjoyment of the Claimants’ investment; and Article IV(1) (indirect expropriation). The LG&E Group filed a claim against Argentina for \$248 million or, in the event the Tribunal concludes that there was expropriation, \$268 million.

The Tribunal rejected all of Argentina’s jurisdictional objections in its April 30, 2004 Decision on Objections on Jurisdiction.<sup>60</sup> The Tribunal held that the LG&E Group had *jus standi* as foreign investors, even if they did not directly operate the investment in Argentina.<sup>61</sup> It also held that the LG&E Group’s claims involved a dispute of a legal nature arising directly from an investment, since, at the jurisdictional phase, it was to be presumed that the claims were based on the alleged breaches of the U.S.-Argentina BIT.<sup>62</sup> Argentina also gave its consent to the arbitration through Article VII(4) of the U.S.-Argentina BIT, while the LG&E Group gave its consent when it decided to submit their investment disputes to ICSID jurisdiction.<sup>63</sup> Finally, the Tribunal held that LG&E Group’s

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<sup>59</sup> *Id.* para. 49.

<sup>60</sup> LG&E Energy Corp., LG&E Capital Corp., & LG&E Int’l Inc. v. Argentina, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/1, para. 84 (Apr. 30, 2004).

<sup>61</sup> *Id.* para. 63.

<sup>62</sup> *Id.* para. 66.

<sup>63</sup> LG&E Energy Corp. v. Argentina, Decision on Liability, ICSID Case No. ARB/02/1, para. 22.

claims were also not time-barred or precluded by the pendency of negotiations by license holders with the Argentine government.<sup>64</sup>

In its Decision on Liability, the Tribunal first established the applicable law to settle the dispute to be the second part of Article 42(1) of the ICSID Convention—"the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of International Law as may be applicable."<sup>65</sup> The Tribunal laid a hierarchy of applicable laws to the dispute: 1) the U.S.-Argentina BIT; 2) "in the absence of explicit provisions" in the U.S.-Argentina BIT, general international law; and 3) Argentine domestic law.<sup>66</sup>

The Tribunal's Decision on Liability began its analysis on the LG&E Group's claims of breaches of the U.S.-Argentina BIT. With respect to Article II(2)(a) (fair and equitable treatment), the Tribunal initially examined the nature of Argentina's guarantees to investors, particularly in the gas industry, and concluded that Argentina's legislative acts and the terms of the licenses had made four specific guarantees to investors in the gas transport and distribution centers: tariffs would be calculated in U.S. dollars before conversion into pesos; tariffs would be subject to semi-annual adjustments according to the PPI; tariffs were to provide an income sufficient to cover all costs and a reasonable rate of return; and the tariff system would not be subject to freezing or price controls without compensation.<sup>67</sup> Considering the impact of these industry-specific guarantees in generating investor expectations, the Tribunal held that Argentina violated Article II(2)(a) of the U.S.-Argentina BIT by failing to accord fair and equitable treatment to investors when it unilaterally abrogated such guarantees.<sup>68</sup>

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<sup>64</sup> *Id.* para. 23.

<sup>65</sup> *Id.* para. 82.

<sup>66</sup> *Id.* para. 99.

<sup>67</sup> *Id.* para. 119.

<sup>68</sup> *Id.* para. 133.

Emerging from the economic crisis of the late 1980s, Argentina created an economic recovery plan mainly dependent upon foreign capital. Argentina prepared with the investment banks an attractive framework of laws and regulations that addressed the specific concerns of foreign investors with respect to the country risks involved in Argentina. In light of these risks, Claimants relied upon certain key guarantees in the Gas Law and implementing regulations, such as calculation of the tariffs in US dollars before their conversion into pesos, the semi-annual PPI adjustments, tariffs set to provide sufficient revenues to cover all the costs and a reasonable rate of return, and compensation in the event that

Despite Argentina's economic hardship, the Tribunal insisted that Argentina "went too far by completely dismantling the very legal framework constructed to attract investors."<sup>69</sup> As a corollary, the abrogation of these guarantees under Argentina's statutory framework also breached the umbrella clause under Article II(2)(c) of the U.S.-Argentina BIT. In the words of the Tribunal, the abrogation of guarantees gave rise to corresponding violations of Argentina's obligations to the LG&E Group's investments:

Argentina made these specific obligations to foreign investors, such as LG&E, by enacting the Gas Law and other regulations, and then advertising these guarantees in the Offering Memorandum to induce the entry of foreign capital to fund the privatization program in its public service sector. These laws and regulations became obligations within the meaning of Article II(2)(c), by virtue of targeting foreign investors and applying specifically to their investments . . . .<sup>70</sup>

On the other hand, the Tribunal ruled that Argentina did not breach Article II(2)(b) (discriminatory and arbitrary treatment). Noting that the U.S.-Argentina BIT did not define the term "arbitrary," the Tribunal located its meaning between the plain meaning of the term under international law ("a willful disregard of due process of law")<sup>71</sup> and the apparent intent of the parties in the preambular clause of the U.S.-Argentina BIT ("consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments"),<sup>72</sup> to conclude that Argentina's measures were not "arbitrary or discriminatory" because they were "the result of

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the Government altered the tariff scheme. Having created specific expectations among investors, Argentina was bound by its obligations concerning the investment guarantees vis-à-vis public utility licensees, and in particular, the gas-distribution licensees. The abrogation of these specific guarantees violates the stability and predictability underlying the standard of fair and equitable treatment.

*Id.*

<sup>69</sup> *Id.* para. 139.

<sup>70</sup> *Id.* para. 175.

<sup>71</sup> *Id.* para. 157.

<sup>72</sup> *Id.* para. 158.

reasoned judgment rather than simple disregard of the rule of law.”<sup>73</sup>

The Tribunal also rejected the LG&E Group’s claim of indirect expropriation in violation of Article IV(1) of the U.S.-Argentina BIT. The Tribunal held that Argentina’s abrogation of guarantees “did not deprive the investors of the right to enjoy their investment . . . the true interests at stake here are the investment’s asset base.”<sup>74</sup> Since the LG&E Group retained control of their shares despite fluctuations in share value, there could not have been any expropriation. As contemplated by the Tribunal, expropriation could only have occurred if there was a “permanent, severe deprivation of LG&E’s rights with regard to its investment, or almost complete deprivation of the value of LG&E’s investment.”<sup>75</sup>

Having determined the existence of a breach of Articles II(2)(a) and II(2)(c) of the U.S.-Argentina BIT, the Tribunal then proceeded to examine Argentina’s alternative defense of necessity under Argentine law, Articles XI and IV(3) of the U.S.-Argentina BIT, as well as customary international law. Consistent with its earlier ruling establishing a hierarchy of applicable law to the dispute, the Tribunal first turned to the claims brought under Articles XI and IV(3) of the U.S.-Argentina BIT.

The Tribunal first concluded that Article XI was not self-judging, “[b]ased on the evidence before the Tribunal regarding the understanding of the Parties in 1991 at the time the Treaty was signed. . . .”<sup>76</sup> The Tribunal then made a largely *factual* analysis to conclude that Argentina was “excused under Article XI from liability for any breaches of the Treaty between 1 December 2001 and 26 April 2003,”<sup>77</sup> characterizing Argentina’s measures of suspending the calculation of tariffs in U.S. dollars and the PPI adjustment of tariffs, as well as the enactment of its Emergency Law as a “legitimate way of protecting its social and economic system.”<sup>78</sup> Without clarifying the precise content of Article XI (or its substantive authority for interpreting “essential security interests”), the Tribunal simply rejected the LG&E’s narrow

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<sup>73</sup> *Id.* para. 162.

<sup>74</sup> *Id.* para. 198.

<sup>75</sup> *Id.* paras. 199–200.

<sup>76</sup> *Id.* para. 212.

<sup>77</sup> *Id.* para. 229.

<sup>78</sup> *Id.* para. 239.

interpretation of “essential security interests” to circumstances amounting to military action and war.<sup>79</sup> Without citing any legal authority, the Tribunal tautologically concluded that “Article XI refers to situations in which a State has no choice but to act. A State may have several responses at its disposal to maintain public order or protect its essential security interests.”<sup>80</sup> With respect to Article IV(3) of the U.S.-Argentina BIT, the Tribunal’s interpretive emphasis was likewise largely factual:

Article IV(3) of the Treaty confirms that the States Party to the Bilateral Treaty contemplated the state of national emergency as a separate category of exceptional circumstances. That is in line with the Tribunal’s interpretation of Article XI of the Treaty. Furthermore, the Tribunal has determined, as a factual matter that the grave crisis in Argentina lasted from 1 December 2001 until 26 April 2003. It has not been shown convincingly to the Tribunal that during that period the provisions of Article IV(3) of the Treaty have been violated by Argentina. On the contrary, during that period, the measures taken by Argentina were “across the board.”<sup>81</sup>

At this juncture, it is noteworthy that the Tribunal had simply accepted Argentina’s plea that its economic emergency could verily be subsumed under the “essential security interests” standard in Article XI, or the “state of national emergency” standard in Article IV(3). The Tribunal did not cite any legal authority for this interpretation, nor did it provide a legal standard for the *effect* of the applicability of Article XI, other than the Tribunal’s own conclusion that this “excused” Argentina from liability for breaches under the Treaty. This conclusion as to the effect of the applicability of Article XI (e.g., to excuse a party from liability for breach) is found nowhere in the text of Article XI, much less the rest of the provisions of the U.S.-Argentina BIT.

Compounding the paucity of clear explanation on the interpretive methodology and seemingly “legal” standards used by the Tribunal in relation to Article XI and Article IV(3) of the U.S.-Argentina BIT, the Tribunal still proceeded to refer to the

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<sup>79</sup> *Id.* para. 238.

<sup>80</sup> *Id.* para. 239.

<sup>81</sup> *Id.* para. 244.



customary law doctrine of necessity represented by Article 25 of the Articles on State Responsibility in a “supportive”<sup>82</sup> sense:

The essential interests of the Argentine State were threatened in December 2001. It faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace. There is no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity. In this (*sic*) circumstances, an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed. It cannot be said that any other State’s rights were seriously impaired by the measures taken by Argentina during the crisis. Finally, as addressed above, Article XI of the Treaty exempts Argentina of responsibility for measures enacted during the state of necessity.

While this analysis concerning Article 25 of the Draft Articles on State Responsibility alone does not establish Argentina’s defense, *it supports the Tribunal’s analysis with regard to the meaning of Article XI’s requirement that the measures implemented by Argentina had to have been*

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<sup>82</sup> See *id.* para. 245.

In the previous analysis, the Tribunal has determined that the conditions in Argentina from 1 December 2001 until 26 April 2003 were such that Argentina is excused from liability for the alleged violation of its Treaty obligations due to the responsive measures it enacted. The concept of excusing a State for the responsibility for violation of its international obligations during what is called a ‘state of necessity’ or ‘state of emergency’ also exists in international law. While the Tribunal considers that the protections afforded by Article XI have been triggered in this case, and are sufficient to excuse Argentina’s liability, *the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in Article 25 of the ILC’s Draft Articles on State Responsibility) supports the Tribunal’s conclusion.*

*Id.* (emphasis added).

necessary either for the maintenance of public order or the protection of its own essential security interests.<sup>83</sup>

Clearly, the Tribunal had already conflated the substantive content of Article 25 of the Articles on State Responsibility towards a supplementary means of interpretation of Article XI of the U.S.-Argentina BIT. Noting the duty to compensate under Article 27 of the Articles on State Responsibility, the Tribunal stated that it:

. . . considers that Article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability. This exception is appropriate only in emergency situations; and once the situation has been overcome, i.e. certain degree of stability has been recovered; the State is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately.<sup>84</sup>

The effects of the Tribunal's finding of the existence of a state of necessity were threefold. First, the Tribunal held that "[a]ll measures adopted by Argentina in breach of the Treaty before and after the period during which the state of necessity prevailed, shall have all their effects and shall be taken into account by the Tribunal to estimate the damages."<sup>85</sup> The Tribunal also introduced distinctions on the scope and reckoning point for determining compensation. Damages suffered during the state of necessity "should be borne by the investor."<sup>86</sup> However, once the state of necessity was over on April 26, 2003, Argentina "should have re-established the tariff scheme offered to LG&E or, at least, it should have compensated Claimants for the losses incurred on account of the measures adopted before and after the state of necessity."<sup>87</sup>

The dispositive portion of the Tribunal's Decision on Liability thus introduced a temporal dichotomy to the determination of Argentina's liability. Argentina would be exempt from the payment of compensation for damages incurred from the period of December 1, 2001 to April 26, 2003, when Argentina was in a state

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<sup>83</sup> *Id.* paras. 256-58 (emphasis added).

<sup>84</sup> *Id.* para. 261.

<sup>85</sup> *Id.* para. 263.

<sup>86</sup> *Id.* para. 264.

<sup>87</sup> *Id.* para. 265.

of necessity. However, it would be liable for damages for violations occurring outside the period of necessity.

The amount of compensation Argentina owed to the LG&E Group was finally determined in the Tribunal's July 25, 2007 Award.<sup>88</sup> The LG&E Group had claimed full compensation for damages sustained in the amount of either \$268 million (USD) or \$248 million (USD),<sup>89</sup> including: the full market value of their loss, pre- and post-Award compound interest at a reasonable commercial rate, and the costs and expenses associated with the arbitration proceedings.<sup>90</sup> Argentina opposed the LG&E Group's valuation, citing the inadequacy of the methods used, the arbitrariness of the choice of valuation dates, the unjust enrichment of the LG&E Group, and the effect of the country risk premium in excluding compensation for the LG&E Group.<sup>91</sup>

The Tribunal held that the applicable standard for reparation is "full reparation" as set out in the *Chorzów Factory* case and Article 31 of the Articles on State Responsibility.<sup>92</sup> The Tribunal rejected the fair market value standard in Article IV of the U.S.-Argentina BIT as inapplicable to the breach of other treaty standards.<sup>93</sup> Instead, it adopted the standard of "actual loss" incurred "as a result" of the wrongful acts as the appropriate measure of compensation—or the amount of dividends that the LG&E Group would have received but for the abrogation of the specific guarantees.<sup>94</sup> Using this metric, the Tribunal awarded \$57.4 million (USD) to the LG&E Group "for the damages suffered as a result of Respondent's continuing breach of its Treaty obligations between 18 August 2000 and 28 February 2005, including interest up until the date of the Award."<sup>95</sup>

### 1.3. *The CMS Gas Cases*

CMS Gas Transmission Company ("CMS") is another American company that pursued claims against Argentina for its

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<sup>88</sup> LG&E Energy Corp. v. Argentina, Award, ICSID Case No. ARB/02/1 (July 25, 2007).

<sup>89</sup> *Id.* para. 15.

<sup>90</sup> *Id.* para. 10.

<sup>91</sup> *Id.* para. 22.

<sup>92</sup> *Id.* para. 31.

<sup>93</sup> *Id.* para. 37.

<sup>94</sup> *Id.* paras. 41-53.

<sup>95</sup> *Id.* para. 109.

suspension of the tariff adjustment formula for gas transportation. CMS is a 29.42% shareholder of *Transportadora de Gas del Norte* (TGN), an Argentine company with a license for gas transportation. CMS alleged that beginning in late 1999, the Argentine government had taken measures which had an adverse impact on CMS's business and breached the guarantees which protected CMS's investment in TGN, and that such measures subsequently led to the devaluation of the currency and the adoption of additional financial and administrative measures also alleged to have an adverse impact on the investor.<sup>96</sup>

In its Decision on Objections to Jurisdiction, the Tribunal clarified the threshold of its review, stating that "it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong."<sup>97</sup> The Tribunal also concludes, however, that it "has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts."<sup>98</sup> The Tribunal then rejected each of Argentina's objections to jurisdiction, stating that: (1) CMS has *jus standi* as a foreign investor, there being "no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders,"<sup>99</sup> and that "[w]hether the protected investor is in addition a party to a concession agreement or a license agreement with the host State is immaterial for the purpose of finding jurisdiction [under the U.S.-Argentina BIT], since there is a direct right of action of shareholders;"<sup>100</sup> (2) the dispute arises directly from an investment made, because the rights of CMS "can be asserted independently from the rights of TGN and those relating to the License, and because [CMS] has a separate cause of action under the Treaty in connection with the protected

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<sup>96</sup> CMS Gas Transmission Co. v. Argentina, Decision on Objections to Jurisdiction, ICSID Case No. ARB/01/8, para. 20 (July 17, 2003).

<sup>97</sup> *Id.* para. 33.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* para. 48.

<sup>100</sup> *Id.* para. 65.

investment;”<sup>101</sup> (3) “the clauses in the License or its Terms referring certain kinds of disputes to the local courts of the Republic of Argentina are not a bar to the assertion of jurisdiction by an ICSID tribunal under the Treaty, as the functions of these various instruments are different,”<sup>102</sup> and in this connection, “contractual claims are different from treaty claims even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration;”<sup>103</sup> and (4) the pendency of negotiations between the Argentine government and various classes of investors would not prevent the arbitration from proceeding.<sup>104</sup>

In the merits phase, CMS advanced similar legal arguments as those in the LG&E cases. CMS maintained that the Argentine government’s measures violated commitments made to foreign investors in the offering memoranda, relevant laws and regulations, and the terms of License, which commitments include: (1) the calculation of tariffs in U.S. dollars; (2) the semi-annual adjustment in accordance with the U.S. PPI and the general adjustment of tariffs every five years; and (3) the Argentine government’s express agreement not to freeze the tariff structure or subject it to further regulation or price controls, and the duty to compensate in the event such price controls were introduced.<sup>105</sup> The collective and continuous violation of these commitments, according to CMS, breached the following provisions of the U.S.-Argentina BIT: Article IV (wrongful expropriation), Article II(2)(a) (fair and equitable treatment standard), Article II(2)(b) (prohibition against arbitrary and discriminatory measures), and Article II(2)(c) (umbrella clause). As compensation, CMS claimed \$261.1 million (USD) for breaches of the U.S.-Argentina BIT plus interests and costs.

In turn, Argentina raised the following factual defenses: (1) the license and its concomitant legal and regulatory framework only provide for the right of a licensee to a fair and reasonable tariff, but

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<sup>101</sup> *Id.* para. 68.

<sup>102</sup> *Id.* para. 76.

<sup>103</sup> *Id.* para. 80.

<sup>104</sup> *See id.* para. 86 (“The Centre had made efforts to avoid a multiplicity of tribunals and jurisdictions, but that it was not possible to foreclose rights that different investors might have under different arrangements.”).

<sup>105</sup> CMS Gas Transmission Co. v. Argentina, Award, ICSID Case No. ARB/01/8, paras. 84–88 (May 12, 2005).

did not contain guarantees of convertibility, currency devaluation, and the risk inherent to the investment;<sup>106</sup> (2) CMS should bear the consequences of its own investment strategies;<sup>107</sup> and (3) the tariff structure already carried a premium (and, higher profits) for the added risk of investing in an unstable economy, and because the contractual regime was incomplete (the licenses did not contemplate the possibility of convertibility being abandoned), Argentina's domestic market pesification and external market dollarization allowed consumers to continue to pay for gas and prevented a collapse in demand.<sup>108</sup> Given this legal and regulatory context, there could not be any violation of the U.S.-Argentina BIT, since the "guarantees invoked by CMS are not the property of the company protected under the Treaty and TGN continues to operate normally."<sup>109</sup> As an alternative ground, Argentina invoked the existence of a national emergency as a ground for exemption from liability under international law and the U.S.-Argentina BIT.

Using Argentine law, the U.S.-Argentina BIT, and principles of international law as the applicable law to the dispute, the Tribunal commenced its analysis by establishing CMS' rights: 1) the right to a tariff calculated in dollars and converted into pesos at the time of billing;<sup>110</sup> 2) the right to adjustment of tariffs in accordance with the U.S. PPI;<sup>111</sup> and 3) the right to stabilization mechanisms as provided under the terms of the License.<sup>112</sup> According to the Tribunal:

[T]he legal framework and the License, particularly in the context of the privatization, was to guarantee the stability of the tariff structure and the role the calculation in dollars and the US PPI adjustment played therein. Devaluation

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<sup>106</sup> See *id.* paras. 91-94 (enumerating the Argentine government's defenses to CSM's claims).

<sup>107</sup> See *id.* para. 92 ("The Respondent is of the view that any consequences arising from CMS's decision to rely on the report of private consultants for its investment strategies cannot be assigned to the Government.").

<sup>108</sup> See *id.* paras. 95-96 ("[T]he Respondent filled in by means of the pesification in the domestic market and dollarization in the external market, thereby allowing consumers to continue to pay for gas and avoiding the collapse of demand.").

<sup>109</sup> *Id.* para. 98.

<sup>110</sup> *Id.* paras. 127-38 .

<sup>111</sup> *Id.* paras. 139-44.

<sup>112</sup> *Id.* paras. 145-51.

could of course happen at some point, but then the tariff structure would remain intact within the framework of stability envisaged as it would adjust automatically to the new level of the exchange rate.<sup>113</sup>

The Tribunal initially considered the defense of state of necessity under the Argentine legal system, and concluded that “the state of necessity under domestic law does not offer an excuse if the result of the measures in question is to alter the substance or the essence of contractually acquired rights. This is particularly so if the application of such measures extends beyond a strictly temporary period.”<sup>114</sup> The Tribunal noted that any rebalancing of the contractual commitments due to Argentina’s economic circumstances “were available under [Argentine] law and the License. The necessary adjustments could be accommodated within the structure of the guarantees offered to the Claimant.”<sup>115</sup>

After the foregoing clarification, the Tribunal then separately discussed the alleged breaches of the U.S.-Argentina BIT. It held that there was no violation of Article IV(1) (indirect or creeping expropriation), because Argentina’s acts did not amount to a substantial deprivation of CMS’ investment in TGN.<sup>116</sup> Likewise, the Tribunal rejected CMS’ claim of Argentina’s breach of Article II(2)(b) (prohibition against arbitrariness or discrimination), on the finding that “there has been no impairment, for example, in respect of the management and operation of the investment,”<sup>117</sup> nor any discernible discrimination in the context of the gas transportation and distribution industry.<sup>118</sup> However, the Tribunal found that Argentina breached Article II(2)(a) (fair and equitable treatment standard), since “the measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made,” and that “the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision.”<sup>119</sup> In light of this violation, the Tribunal also declared

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<sup>113</sup> *Id.* para. 161.

<sup>114</sup> *Id.* para. 217.

<sup>115</sup> *Id.* para. 238.

<sup>116</sup> *Id.* para. 262–64.

<sup>117</sup> *Id.* para. 292.

<sup>118</sup> *Id.* para. 293.

<sup>119</sup> *Id.* para. 275.

Argentina's breach of the umbrella clause under Article II(2)(c) of the U.S.-Argentina BIT.

Finding that Argentina breached Articles II(2)(a) and II(2)(c) of the U.S.-Argentina BIT, the Tribunal then turned to Argentina's alternative defense of necessity. It first examined the defense under customary international law, as represented by Article 25 of the Articles of State Responsibility, and held that in the context of the Argentine crisis, some of its elements were "partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test."<sup>120</sup> Considering the strict and exceptional legal threshold of Article 25, this finding was uncontroversial.

The more contentious issue arose from the Tribunal's interpretation of Articles XI and IV(3) of the U.S.-Argentina BIT. The Tribunal began its reasoning by declaring what it held to be the "design" of the BIT "to protect investments at a time of economic difficulties or other circumstances leading to the adoption of adverse measures by the Government."<sup>121</sup> However, the Tribunal suddenly imported an element from Article 25 of the Articles of State Responsibility—"the act 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"—as intrinsic to furthering the apparent design of the U.S.-Argentina BIT, which, in the present case, the Tribunal concluded Argentina had not shown.<sup>122</sup> The Tribunal did not cite any legal authority or interpretive basis for using this element of Article 25 to interpret the structural design of the U.S.-Argentina BIT. The Tribunal then proceeded to conduct a broad interpretation of "essential security interests" under Article XI to embrace the concept of economic emergencies.<sup>123</sup> However, it was careful to note that Article XI is

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<sup>120</sup> *Id.* para. 331.

<sup>121</sup> *Id.* para. 354.

<sup>122</sup> *See id.* paras. 357-58.

For the purpose of this case, and looking at the Treaty just in the context of its States parties, the Tribunal concludes that it does not appear that an essential interest of the State to which the obligation exists has been impaired, nor have those of the international community as a whole. Accordingly, the plea of necessity would not be precluded on this count.

*Id.*

<sup>123</sup> *See id.* paras. 359-60.



not a “self-judging” clause.<sup>124</sup> Notwithstanding the applicability of Article XI to economic emergencies, the Tribunal still held that there was a duty to compensate, analogous to (if not predicated on) Article 27 of the Articles on State Responsibility.<sup>125</sup> In determining the standard of compensation, the Tribunal then held that “the cumulative nature of the breaches . . . is best dealt with by resorting to the standard of fair market value.”<sup>126</sup> Applying a discounted cash flow methodology, the Tribunal arrived at the amount of \$133.2 million (USD) as compensation for damages and the loss in value of CMS’s shares. Upon Argentina’s payment of an additional \$2,148,100 (USD), CMS would also transfer ownership of its shares in TGN to Argentina.<sup>127</sup>

Argentina sought annulment of the Award under Article 52(b) and (e) of the ICSID Convention, claiming that the Tribunal had

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While the text of the Article does not refer to economic crises or difficulties of that particular kind, as concluded above, there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI. It must also be kept in mind that the scope of a given bilateral treaty, such as this, should normally be understood and interpreted as attending to the concerns of both parties. If the concept of essential security interests were to be limited to immediate political and national security concerns, particularly of an international character, and were to exclude other interests, for example, major economic emergencies, it could well result in an unbalanced understanding of Article XI. Such an approach would not be entirely consistent with the rules governing the interpretation of treaties.

*Id.*

<sup>124</sup> See *id.* para. 373.

In light of this discussion, the Tribunal concludes first that the clause of Article XI of the Treaty is not a self-judging clause. Quite evidently, in the context of what a State believes to be an emergency, it will most certainly adopt the measures it considers appropriate without requesting the views of any court. However, if the legitimacy of such measures is challenged before an international tribunal, it is not for the State in question but for the international jurisdiction to determine whether the plea of necessity may exclude wrongfulness. It must also be noted that clauses dealing with investments and commerce do not generally affect security as much as military events do and, therefore, would normally fall outside the scope of such dramatic events.

*Id.*

<sup>125</sup> *Id.* paras. 383–94.

<sup>126</sup> *Id.* para. 410.

<sup>127</sup> See *id.* paras. 468–69 (providing the amount of compensation for damages and value of the shares).

manifestly exceeded its powers and failed to state the reasons on which the Award was based.<sup>128</sup> Argentina argued that the Tribunal had manifestly exceeded its powers by transforming the U.S.-Argentina BIT's "fair and equitable treatment" clause and "umbrella" clause into strict liability provisions, by failing to give effect to Article XI of the US-Argentina BIT, and by rejecting Argentina's defense of necessity under customary international law.<sup>129</sup>

The *Ad Hoc* Committee dismissed all of Argentina's claims, except for one. The *Ad Hoc* Committee annulled the first subparagraph of the Award, which provided that "The Respondent [Argentina] breached its obligations . . . to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) [umbrella clause] of the Treaty."<sup>130</sup> The Committee found that there were "major difficulties with [the Tribunal's] broad interpretation of Article II(2)(c)," since, as the Committee clarified, "[t]he obligation of the State covered by Article II(2)(c) will often be a bilateral obligation, or will be intrinsically linked to obligations of the investment company . . . if the Tribunal's interpretation is right, then the mechanism in Article 25(2)(b) of the ICSID Convention is unnecessary whenever there is an umbrella clause."<sup>131</sup> Apart from annulling this portion of the Award, the *Ad Hoc* Committee nonetheless held that the Tribunal's finding of breach of Article II(2)(a), the fair and equitable treatment standard of the U.S.-Argentina BIT, was "adequately founded on the applicable law and the relevant facts," and "the Tribunal evaluated the legality of the challenged measures in the light of all the circumstances of the case and did not transform Article II(2)(a) into a strict liability clause."<sup>132</sup> The *Ad Hoc* Committee then reiterated that Argentina had to accept the transfer of ownership of TGN shares as provided in the Tribunal's Award. During the pendency of Argentina's Application for Annulment, ICSID had provisionally stayed enforcement of the Award, particularly with respect to Argentina's

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<sup>128</sup> CMS Gas Transmission Co. v. Argentina, Decision of the *Ad Hoc* Committee on the Application for Annulment of Argentina, ICSID Case No. ARB/01/8, Sept. 25, 2007.

<sup>129</sup> *Id.* para. 48.

<sup>130</sup> *Id.* para. 100 (citing CMS Gas Transmission Co. v. Argentina, Award, ICSID Case No. ARB/01/8, at 139 para. 1).

<sup>131</sup> *Id.* para. 95.

<sup>132</sup> *Id.* para. 85.

option to purchase CMS' shares in TGN as provided in subparagraph 3 of the Award.<sup>133</sup>

The *Ad Hoc* Committee's Decision on the Application for Annulment was a significant departure from the interpretive trends in *Sempra*, *LG&E*, and the Tribunal's Award in *CMS*. All of these prior decisions had, in varying degrees, used the doctrine of necessity under customary international law (as codified under Article 25 of the Articles on State Responsibility) as a supplementary means of interpreting "essential security interests" in Article XI of the U.S.-Argentina BIT. In contrast, however, the *Ad Hoc* Committee's Decision attempted to set out specific distinctions between Article XI and Article 25 as to substantive content, operation, and effects:

The Committee observes first that there is some analogy in the language used in Article XI of the BIT and in Article 25 of the ILC's Articles on State Responsibility. The first text mentions "necessary" measures and the second relates to the "state of necessity". However Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25 is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. *Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply.* By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.<sup>134</sup>

Furthermore Article XI and Article 25 are substantively different. The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions. It requires for instance that the action taken "does not seriously impair an essential interest of the State or States towards which the obligation

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<sup>133</sup> *CMS Gas Transmission Co. v. Argentina*, Decision on Argentina's Request for a Continued Stay of Enforcement of the Award, ICSID Case No. ARB/01/8, Sept. 1, 2006.

<sup>134</sup> *CMS Gas Transmission Co.*, Decision on the *Ad Hoc* Committee on the Application for Annulment of Argentina, ICSID Case No. ARB/01/8, para. 129 (emphasis added).

exists, or of the international community as a whole," a condition which is foreign to Article XI. In other terms, the requirements under Article XI are not the same as those under customary international law as codified by Article 25, as the Parties in fact recognized during the hearing before the Committee. On that point, the Tribunal made a manifest error of law.

Those two texts having a different operation and content, it was necessary for the Tribunal to take a position on their relationship and to decide whether they were both applicable in the present case. The Tribunal did not enter into such an analysis, simply assuming that Article XI and Article 25 are on the same footing.

In doing so the Tribunal made another error of law. One could wonder whether state of necessity in customary international law goes to the issue of wrongfulness or that of responsibility. But in any case, the excuse based on customary international law could only be subsidiary to the exclusion based on Article XI.

If state of necessity means that there has not been even a *prima facie* breach of the BIT, it would be a primary rule of international law. But this is also the case with Article XI. In other terms, and to take the words of the International Court of Justice in a comparable case,<sup>135</sup> if the Tribunal was satisfied by the arguments based on Article XI, it should have held that there had been "no breach" of the BIT. Article XI and Article 25 thus construed would cover the same field and the Tribunal should have applied Article XI as the *lex specialis* governing the matter and not Article 25.

If, on the contrary, the state of necessity in customary international law goes to the issue of responsibility, it would be a secondary rule of international law – this was the position taken by the ILC. In this case, the Tribunal would have been under an obligation to consider first whether there had been any breach of the BIT and whether such a breach was excluded by Article XI. Only if it concluded that there was conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded in whole or in part under customary international law.

These two errors made by the Tribunal could have had a decisive impact on the operative part of the Award. As admitted by CMS, the Tribunal gave an erroneous interpretation to Article

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<sup>135</sup> Oil Platforms (Iran v. U.S.) (Merits), 2003 I.C.J. (Nov. 6), para. 34.

XI. In fact, it did not examine whether the conditions laid down by Article XI were fulfilled and whether, as a consequence, the measures taken by Argentina were capable of constituting, even *prima facie*, a breach of the BIT. If the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground.

The Committee recalls, once more, that it has only a limited jurisdiction under Article 52 of the ICSID Convention. Under the circumstances, the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal. Notwithstanding the identified errors and lacunas in the Award, in the end the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. Accordingly, there is no manifest excess of powers."<sup>136</sup>

The foregoing excerpt shows that the *Ad Hoc* Committee envisaged a clear line of demarcation between Article XI and Article 25 as to their respective *substantive requirements*, so much so that the CMS Tribunal made a "manifest error of law" in conflating the requirements under each norm to interpret "essential security interests" under Article XI.<sup>137</sup> According to the *Ad Hoc* Committee, the Tribunal's failure to "examine whether the conditions laid down by Article XI were fulfilled" generated the erroneous interpretation of Article XI.<sup>138</sup> The Tribunal's assumption that Article 25 and Article XI "were on the same footing" was thus "another error in law."<sup>139</sup>

However, the *Ad Hoc* Committee fell short of giving a definitive position on what interpretive relationship Article 25 could have with Article XI. Instead, it laid out two possible alternative scenarios for construing Article 25 in relation to Article XI. First, Article 25 could be seen as a "primary rule of international law," where a state of necessity would mean that there is no *prima facie*

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<sup>136</sup> CMS Gas Transmission Co. v. Argentina, Decision on the *Ad Hoc* Committee on the Application for Annulment of Argentina, ICSID Case No. ARB/01/8, paras. 129-26 (emphasis added).

<sup>137</sup> See *id.* paras. 130-31 ("On that point, the Tribunal made a manifest error of law. . . . The Tribunal did not enter into such an analysis [discerning the relationship between Article XI and Article 25 and their relative applicability to the case], simply assuming that Article XI and Article 25 are on the same footing.").

<sup>138</sup> *Id.* para. 135.

<sup>139</sup> *Id.* paras. 131-32.

breach of the U.S.-Argentina BIT.<sup>140</sup> Both Article 25 and Article XI would operate as *norms of exclusion*, or norms that would prevent a breach of international obligation from arising in the first instance. According to the *Ad Hoc* Committee, in this scenario, Article XI should be applied as *lex specialis*. The effect of applying Article XI, however, would be to construe the “necessity” measure as incapable of giving rise to any breach of obligation under the U.S.-Argentina BIT.

The second scenario treats Article 25 as a “secondary rule of international law” that pertains to responsibility.<sup>141</sup> Under this formulation, according to the *Ad Hoc* Committee, the Tribunal would have to follow this sequence: (1) determine the existence of any breach of the U.S.-Argentina BIT; (2) if there is a breach, determine if the breach is “excluded” by Article XI of the U.S.-Argentina BIT; and (3) if there is any remaining breach that cannot be excluded under the terms of Article XI, determine if the state’s responsibility for the breach can be precluded under Article 25.<sup>142</sup>

It should be emphasized that the *Ad Hoc* Committee avoided a choice between either scenario, justifying its reticence through the Committee’s limited mandate under Article 52 of the ICSID Convention. As will be shown later, however, this very same hesitation to settle the interpretive relationship between Article 25 and Article XI would foment further interpretive confusion in the 5 September 2008 Award in *Cont’l Cas. Co. v. Argentina*. Further confusion would be engendered by the *Ad Hoc* Committee’s interpretation (and without citing any authority) that “if [Article XI] applies, the substantive obligations under the [U.S.-Argentina BIT] do not apply.”<sup>143</sup> As will be shown in the next section, these gaps in the interpretive methodology used for Article XI of the U.S.-Argentina BIT would resurface in a doubly problematic manner in the *Continental* Award.

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<sup>140</sup> *Id.* para. 133.

<sup>141</sup> *Id.* para. 134.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 129.

#### 1.4. *Continental Casualty Company v. Argentine Republic: Synthesis and Critique*

As of this writing, the Tribunal's Award in *Cont'l Cas. Co. v. Argentina*<sup>144</sup> ("Continental") is the latest ICSID decision interpreting Article XI of the U.S.-Argentina BIT in relation to the doctrine of necessity under customary international law. *Continental* contains the most controversial interpretive methodology to date on Article XI of the U.S.-Argentina BIT.

##### 1.4.1. *Synthesis*

Continental Casualty Company is an American corporation, a subsidiary of another American corporation, CNA Financial Inc., and is the 99.9995% owner of CNA ART; an Argentine corporation that provides workers' compensation insurance services in Argentina. CNA ART maintained a portfolio of investment securities consisting mainly of cash deposits, treasury bills, and government bonds. Prior to March 2001, these assets were denominated in Argentine pesos which were then fully convertible 1:1 into U.S. dollars. After March 2001, CNA ART invested in low-risk U.S.-denominated assets for a total value of \$100,998,000 (USD). Argentinean regulations of CNA ART's insurance operations generally required investment of all capital within Argentina. Starting December 2001, however, Argentina enacted a series of measures collectively known as the Capital Control Regime<sup>145</sup> that, according to Continental, "destroyed the legal security of the assets" and frustrated CNA ART's ability to hedge

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<sup>144</sup> *Cont'l Cas. Co. v. Argentina*, Award, ICSID Case No. ARB/03/9, Sept. 5, 2008.

<sup>145</sup> *Id.* para. 137. According to the Tribunal, measures could be grouped among the following: (1) measures that blocked deposits (temporary bank freeze), severely curtailing the right to withdraw money (Decree 1570/*Corralito*); (2) measures that prohibited the transfer of funds abroad and their exchange in freely convertible and transferable currencies (Decree 1570/*Corralito*); (3) measures that terminated the peso convertibility and its pegging to the U.S. dollar at the fixed exchange rate 1:1 (Emergency Law 25,561 and Decree 260/02) - replaced by a dual exchange system based on 1.4 pesos to 1 U.S. dollar, later permitted devaluation to almost 4 pesos to 1 U.S. dollar; (4) measures that rescheduled term deposits and reduced interest rates (Resolution 6/*Corralon*); (5) pesification (forced conversion) of outstanding dollar-denominated contracts and private or governmental debt, at a rate of 1.40 pesos for each nominal US dollar as to the latter and financial deposits, while in all other cases conversion occurred at par (Decree 214, Decree 471, Decree 644); and (6) default on and unilateral rescheduling of governmental debt (Resolution 73).

against the risk of peso devaluation.<sup>146</sup> Continental claims that CNA ART suffered an absolute loss in value of its assets of \$46,412,000 (USD) due to the Capital Control Regime.<sup>147</sup> Thus, when Continental brought its claim against Argentina before ICSID, Continental asserted four violations of the U.S.-Argentina BIT: (1) the umbrella clause, or the requirement to observe obligations under Article II(2)(c); (2) the requirement to provide treatment in accordance with international law (fair and equitable treatment, full protection of security, most favoured nation clause) under Articles II(2)(b) and II(2)(a); (3) the requirement to permit all investment-related transfers without delay under Article V; and (4) the requirement to pay compensation upon acts of expropriation under Article IV.<sup>148</sup>

Argentina's theory of defenses in its Counter-Memorial refuted each of the foregoing asserted violations. First, Argentina insisted that there was no violation of the umbrella clause, since the latter does not apply to contracts entered into between CNA and Argentina. "The umbrella clause is intended to protect the commitments assumed by Argentina towards foreign investors protected by the BIT, not contractual obligations."<sup>149</sup> Second, Argentina argued that there was no violation of the fair and equitable treatment standard, since the standard must be applied "considering especially the circumstances under which [the Capital Control Regime] measures were adopted."<sup>150</sup> According to Argentina, "fair and equitable treatment is the minimum international treatment"—a standard meaning "reasonability, proportionality, and no discrimination."<sup>151</sup> It claimed the Capital Control Regime measures were proportional, reasonable, and not inconsistent as they re-established "a balance among all the economic agents" and "re-adapted the circumstances to the prevailing economic situation."<sup>152</sup> Third, Argentina claimed that there was no violation of the requirement to permit all investment-related transfers, because at all times Argentina allowed all such transfers. During a short interval within the Argentine financial

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<sup>146</sup> *Id.* para. 19.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* para. 20.

<sup>149</sup> *Id.* para. 295.

<sup>150</sup> *Id.* para. 56 (citation omitted).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*



crisis, authorization was required for transfers, “but neither Continental nor CNA ART ever asked for such authorization.”<sup>153</sup> Fourth, Argentina argued that there could not be any expropriation as contemplated in Article IV of the BIT because none of the Capital Control Regime measures affected Continental’s investment value in CNA ART. Under this reasoning, Continental cannot claim for alleged damages to CNA ART’s investments, but only for damages in relation to Continental’s shareholdings in CNA.<sup>154</sup>

Finally, in the event that the Tribunal would find a breach of any of the foregoing U.S.-Argentina BIT provisions, Argentina reasserted its alternative defenses based on Articles XI and IV(3) of the U.S.-Argentina BIT. To recall, the full text of these provisions state:

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 maintenance or restoration of international peace or security, or the Protection of its own essential security interests.

Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favourable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favourable treatment, as regards any measures it adopts in relation to such losses.<sup>155</sup>

After a copious discussion of the factual background on the Argentine economy and the development of the Argentine financial crisis, the Tribunal proceeded to resolve Continental’s claims on the merits by beginning with a discussion of Article XI in relation to the doctrine of state of necessity under customary international law as codified under Article 25 of the Articles on

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<sup>153</sup> *Id.* para. 54.

<sup>154</sup> *Id.* para. 55.

<sup>155</sup> U.S.-Argentina BIT, *supra* note 14, art. XI & IV(3).

State Responsibility. In paragraph 164 of the Award, the Tribunal reiterated the *Ad Hoc* Committee's position in the *CMS Gas* Decision on the Application for Annulment, which characterized Article XI as a norm of exclusion that operates to prevent substantive obligations under the U.S.-Argentina BIT from becoming applicable:

The ordinary meaning of the language used, together with the object and purpose of the provision (as here highlighted and interpreted under Article 31 of the Vienna Convention on the Law of Treaties) clearly indicates that either party would not be in breach of its BIT obligations if any measure has been properly taken because it was necessary, as far as relevant here, either "for the maintenance of the public order" or for "the protection of essential security interests" of the party adopting such measures. The consequence would be that, under Art. XI, such measures would lie outside the scope of the Treaty so that the party taking it would not be in breach of the relevant BIT provision. . . . Art. XI 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. [Footnote 236 indicates: "This Tribunal is thus minded to accept the position of the Ad Hoc Annulment Committee in the ICSID case *CMS v. Argentina*, where it states: 'Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.' On the one hand, if Art. XI is applicable because the measure at issue was necessary in order to safeguard essential security interest, then the treaty is inapplicable to such measure. On the other hand, if a State is forced by necessity to resort to a measure in breach of an international obligation but complying with the requirements listed in Art. 25 ILC, the State escapes from the responsibility that would otherwise derive from that breach." ] In fact, Art. XI has been defined as a safeguard clause; it has been said that it recognizes "reserved rights",

or that it contemplates “non-precluded” measures to which a contracting state party can resort.<sup>156</sup>

After taking this doctrinal position, the Tribunal stressed that there are conceptual “links” between Article XI and Article 25, in that “both intend to provide flexibility in the application of international obligations, recognizing that necessity to protect national interests of a paramount importance may justify setting aside or suspending an obligation, or preventing liability from its breach.”<sup>157</sup> The Tribunal noted that “the practical result of applying [Art. XI rather than Art. 25] may be the same: condoning conduct that would otherwise be unlawful and thus removing the responsibility of the State.”<sup>158</sup>

The Tribunal thus made its resolution on the merits by initially applying Article XI of the U.S.-Argentina BIT. The Tribunal then interpreted the text of Article XI as encompassing Argentina’s Capital Control Regime measures, as they involved the “maintenance of public order” and/or the protection of Argentina’s “essential security interests.”<sup>159</sup> The Tribunal construed “public order” as a “broad synonym for ‘public peace’” (*orden público* in the Spanish text of the U.S.-Argentina BIT, corresponding to the French *ordre public*).<sup>160</sup> Under this denotative rubric:

[A]ctions properly necessary by the central government to preserve or to restore civil peace and the normal life of society . . . to prevent and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten the legal order, even when due to significant economic and social difficulties, do fall within the application under Art. XI.<sup>161</sup>

On the other hand, the Tribunal’s interpretation of “essential security interests” under Article XI proved demonstrably convoluted. While the Tribunal recognized conceptual distinctions

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<sup>156</sup> Cont’l Cas. Co. v. Argentina, Award, ICSID Case No. ARB/03/9, Sept. 5, 2008, para. 164 (emphasis added).

<sup>157</sup> *Id.* para. 168.

<sup>158</sup> *Id.* para. 168.

<sup>159</sup> *Id.* paras. 174–75.

<sup>160</sup> *Id.* para 174.

<sup>161</sup> *Id.*

between Article 25 and Article XI,<sup>162</sup> the flow of reasoning in the award indicates that the Tribunal apparently still used the customary international law doctrine on state of necessity as an interpretive foil to broadly define the motivation and content of “essential security interests” under Article XI.<sup>163</sup> “Essential security interests,” according to the Tribunal, could be construed within the same acceptance of “wide variety of interests” under Article 25 of the Articles on State Responsibility. However, unlike the high threshold of “grave and imminent peril” under Article 25, the Tribunal imposed a lower threshold for measures that are covered by essential security interests under Article XI:

The protection of essential security interests recognized by Art. XI does not require that “total collapse” of the country or that a “catastrophic situation” has already occurred before responsible national authorities may have recourse to its protection. The invocation of the clause does not require that the situation has already degenerated into one that calls for the suspension of constitutional guarantees and fundamental liberties.<sup>164</sup>

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<sup>162</sup> *Id.* para. 164–65.

<sup>163</sup> *See id.* paras. 175, 190–91 (“[The ILC commentary to Art. 25] ought to be considered not only as a more precise explanation of the term ‘necessary’ with regard to invocation of the defense of necessity under customary international law, but also as a standard applicable in interpreting Art. XI of the BIT.”).

As to “essential security interests”, it is necessary to recall that international law is not blind to the requirement that States should be able to exercise their sovereignty in the interest of their population free from internal as well as external threats to their security and the maintenance of a peaceful domestic order. It is well known that the concept of international security of States in the Post World War II international order was intended to cover not only political and military security but also the economic security of States and of their population. The Preamble to the Charter of the United Nations and, even more relevant for the present case, that of the International Monetary Fund support this approach. *As noted by the International Law Commission, States have invoked necessity “to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population.”*

*Id.* para. 175 (citing Article 25 of the ILC Commentary to the Draft Articles on State Responsibility) (emphasis added).

<sup>164</sup> *Id.* para. 180 (citations omitted).

It is also of considerable interest that the Tribunal used a plethora of legal sources to interpret Article XI of the U.S.-Argentina BIT. While initially pointing out that Article XI derives from the U.S. Model BIT and the U.S. Friendship Commerce and Navigation (FCN) treaties,<sup>165</sup> the Tribunal suddenly drew on the U.S. FCN treaties' supposed derivation from Article XX of GATT 1947 to justify reference to GATT and WTO case law:

The Tribunal is thus faced with the task of determining the content of the concept of necessity in Art. XI, in order to decide whether the various Measures challenged by the Claimant were indeed necessary, as a matter of causation. With regard to the necessity test required for the application of the BIT, for the reasons stated above relating to the different role of Art. XI and of the defense of necessity in customary international law, the Tribunal does not share the opinion that "the treaty thus becomes inseparable from the customary law standard insofar as to the conditions for the operation of the state of necessity are concerned", as stated in the *Enron Case* and submitted also by the Claimant. *Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in the GATT, rather than to refer to the requirement of necessity under customary international law.*<sup>166</sup>

The Tribunal then cited GATT and WTO case law to justify its methodology for interpreting "necessary measures" under Article XI of the U.S.-Argentina BIT. It determined the standard of "necessary" under a context of "assess[ing] whether the [Capital Control Regime] Measures contributed materially to the realization of their legitimate aims under Art. XI of the BIT, namely the protection of the essential security interests of Argentina in the economic and social crisis it was facing."<sup>167</sup> In applying the

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<sup>165</sup> *Id.* para. 176.

<sup>166</sup> *Id.* para. 192 (emphasis added) (citations omitted).

<sup>167</sup> *Id.* para. 196.

standard, the Tribunal advanced an interest- and value-driven test for determining the necessity of a measure:

The necessity of a measure should be determined through “a process of weighing and balancing of factors” which usually includes the assessment of the following three factors: 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.<sup>168</sup>

Under this broader concept of necessity, the Tribunal then concluded that the Capital Control Regime measures were “in part inevitable, or unavoidable,” that they were “in part indispensable” and that they were “in any case material or decisive in order to react positively to the crisis, 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.”<sup>169</sup> While the Tribunal held that Article XI of the U.S.-Argentina BIT is not self-judging, the Tribunal’s review of the Capital Control Regime measures yielded the conclusion that Argentina could properly invoke Article XI to justify virtually all of the measures. The only measure held outside the ambit of Article XI was the Argentine government’s restructuring of the LETEs (treasury bills), which involved a swap offering at a later date, with a reduced percentage of the original value of the debt, and onerously conditioned on the waiver of any other rights of the security holder/investor.<sup>170</sup>

Having determined the applicability of Article XI to almost all of the Capital Control Regime measures, the Tribunal then proceeded to determine the existence of any breach of the BIT as alleged by Continental. Significantly, the Tribunal rejected each of the breaches alleged by Continental, largely upon factual grounds pertaining to Continental and CNA ART. The Tribunal held that Argentina did not breach Article V (freedom of transfer),<sup>171</sup> since

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<sup>168</sup> *Id.* para. 194 (quoting Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, para. 164, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000)).

<sup>169</sup> *Id.* para. 197.

<sup>170</sup> *Id.* para. 221.

<sup>171</sup> *Id.* para. 244.

the type of transfer which Continental claimed had been barred was, in reality, “merely a change of type, location and currency of part of an investor’s existing investment, namely a part of the freely disposable funds, held short term at its banks by CNA [ART] . . . .”<sup>172</sup>

With respect to Continental’s claim of breach of Article II(2)(a) (fair and equitable treatment), the Tribunal examined various operative facts to ascertain the existence of a breach: 1) specificity of the undertaking allegedly relied upon; 2) general legislative statements which engender reduced expectations, especially with competent major international investors in a context where the political risk is high; 3) unilateral modification of contractual undertakings by governments; 4) centrality to the protected investment and impact of the changes on the operation of the foreign-owned business in general including its profitability.<sup>173</sup> Focusing on these operative facts, the Tribunal held that Continental could not invoke legitimate expectations as to the change of the convertibility regime, and ought to have maintained reduced trust in the Intangibility Law under the circumstances in which it was passed by the Argentine Legislature.<sup>174</sup> (It should be noted that the Intangibility Law was a general legislative measure, not directed to any particular industry or sector, but made applicable to all citizens and businesses during the Argentine financial crisis as a means of forestalling bank runs and capital flight.) Nevertheless, “[a]s far as the de-dollarization and its specific modalities could be considered contrary to any fair and equitable treatment standard in light of [Argentina’s] previous assurances” and the Intangibility Law, the Tribunal held that Argentina could avail of a necessity defence under Article XI of the U.S.-Argentina BIT.<sup>175</sup> However, with respect to the LETEs worth \$2.8 million (USD), the Tribunal held that Argentina could not invoke the Article XI defense to exculpate itself from liability.

Similarly drawing on factual investigation of the nature of the measures relative to Continental and CNA ART’s circumstances, the Tribunal held that Argentina did not breach Article IV (prohibition of direct and indirect expropriation) of the U.S.-

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<sup>172</sup> *Id.* para. 241.

<sup>173</sup> *Id.* para. 261.

<sup>174</sup> *Id.* para. 262.

<sup>175</sup> *Id.*

Argentina BIT. The Tribunal characterized the Capital Control Regime measures as non-compensable, or measures that do not require indemnification, as they are

. . . limitations to the use of property in the public interest that fall within typical government regulations of property entailing mostly inevitable limitations imposed in order to ensure the right of others or of the general public . . . . These restrictions do not impede the basic, typical use of a given asset and do not impose an unreasonable burden on the owner . . . [and] are not therefore considered a form of expropriation and do not require indemnification.<sup>176</sup>

Finally, the Tribunal also rejected Continental's claim of breach of Article II(2)(c) (the umbrella clause), because the clause does not come into play when the breach complains of "concerns [mere] general obligations arising from the law of the host State."<sup>177</sup>

On this reasoning, the Tribunal ruled that Continental was only entitled to payment of compensation in the principal sum of \$2.8 million (USD), representing the principal value of the LETEs at 6 months LIBOR plus 2 percent compounded annually until payment. The Tribunal rejected Continental's all other claims amounting to approximately \$112 million (USD).

#### 1.4.2. Critique

The *Continental* award sets a rather precarious precedent for the development of international investment law. Much of the Tribunal's reasoning on the factual circumstances specific to *Continental* and *CNA ART* shows that a similar outcome could have been reached without the Tribunal's forced interpretation of Article XI of the U.S.-Argentina BIT. Unlike the *LG&E*, *CMS Gas*, and *Sempra* cases, which involved industry-specific guarantees and license-specific contractual terms and arrangements, *Continental* did not have any such assurances at the time that it made its investments in *CNA ART*. Even during the Argentine financial crisis, when *Continental* and *CNA ART* were making business decisions on whether to maintain their investments in Argentina or to transfer them elsewhere, *Continental* and *CNA ART* appear to have relied only on general political statements by Argentine

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<sup>176</sup> *Id.* para. 276.

<sup>177</sup> *Id.* para. 300 (citation omitted).



governmental leaders, and a general legislative measure (the Intangibility Law). These types of assurances were not at all determinative of the *initial* investment decision (as in the *LG&E*, *CMS Gas*, and *Sempre* cases), and as such, cannot be so easily deserving of protection under various provisions of the U.S.-Argentina BIT. As the Tribunal ultimately found in its extensive factual examination of the Capital Control Regime measures in relation to Continental's own actuations, the risk of loss in value of Continental's investment during the Argentine financial crisis was not entirely unforeseeable. Continental's failure to act prudently to preserve the value of its investment, especially given the widely-known economic climate in the three-year period before and during the Argentine financial crisis, cannot translate to Argentina's breach of the U.S.-Argentina BIT. On the factual analysis conducted by the Tribunal, Continental's claims could have been similarly rejected without even reaching a decision on the interpretation of Article XI of the U.S.-Argentina BIT.

Instead, the Tribunal's interpretation of Article XI created two sources of conceptual-methodological problems. First, the Tribunal problematically interpreted Article XI of the U.S.-Argentina BIT in a way that automatically takes out the "necessary measure" from the scope and coverage of the U.S.-Argentina BIT, including the duty to compensate. Under this interpretation, whenever Article XI is found applicable, there would be no duty to compensate since none of the substantive obligations of the U.S.-Argentina BIT would ever come into force with respect to the "necessary measure" in question. As will be shown below, textual reasons, structural design, and policy motivations animating the U.S.-Argentina BIT militate against adopting this "exclusionary" interpretation of Article XI.

Second, the Tribunal summarily imported "necessity" concepts in distinct legal regimes such as international trade law to purposely reach a lower threshold of necessity. The following subsection will also show that not only was it functionally and legally inappropriate to cull this standard from international trade law, but that the Tribunal also overlooked salient aspects of the WTO Appellate Body Report on the *Korea-Beef* case which the Tribunal had cited as its main authoritative basis in support of a lower threshold of necessity. Had the *Korea-Beef* decision been examined more closely in its entirety, however, the Tribunal could not have avoided concluding that even under GATT and WTO law, the concept of "necessity" is already circumscribed by various

contextual qualifications and textual limitations. In any case, given the vastly different respective natures, objects, and purposes of the U.S.-Argentina BIT and GATT 1947, the Tribunal ought to have been constrained by the unitary system of treaty interpretation under Article 31 of the VCLT from using Article XX of GATT 1947 as an interpretive tool to define the substantive content of “essential security interests” and “necessary measures” in Article XI of the U.S.-Argentina BIT.

Both these conceptual-methodological problems need not have been incurred in the first place. Their presence in the *Continental* award carries unsettling consequences for the proper interpretation of the treaty

1.4.2. *Does Article XI Prevent any Breach of the U.S.-Argentina BIT from Arising?*

To reiterate, Article XI of the U.S.-Argentina BIT states in its entirety:

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.<sup>178</sup>

The precise wording of Article XI is crucial. According to the Tribunal’s interpretation in the *Continental* award (and based on an earlier view stated by the *Ad Hoc* Committee in its Decision on the Application for Annulment in the *CMS Gas* case), measures embraced under Article XI “would lie outside the scope of the Treaty so that the party taking it would not be in breach of the relevant BIT provision.”<sup>179</sup> This effect, however, is nowhere seen in the actual wording of Article XI. Textually, all that Article XI refers to are measures which are not precluded from application by the Treaty (“This Treaty shall not preclude the application by either Party of measures. . .”). To “preclude” means to “close,” “rule out in advance,” or “make impossible by necessary consequence.”<sup>180</sup>

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<sup>178</sup> U.S.-Argentina BIT, *supra* note 14, art. XI.

<sup>179</sup> Cont’l Cas. Co., ICSID Case No. ARB/03/9 para. 164.

<sup>180</sup> Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/preclude> (emphasis added).

Denotatively, therefore, all that Article XI provides for is that the U.S.-Argentina BIT does not “close”, “rule out in advance”, or “make impossible by necessary consequence” a party’s application of measures that are necessary for: (1) “the maintenance of public order”; (2) “fulfilment of its obligations with respect to the maintenance or restoration of international peace or security”; or (3) “the protection of [the Party’s] own essential security interests.”<sup>181</sup> In no case does the text of Article XI even indicate what consequences arise when a Party applies such measures. As seen from the very same phraseology of Article XI itself, there is no textual support for the *Continental* Tribunal’s asserted effect of Article XI.

Furthermore, without citing any of the *travaux préparatoires* of the U.S.-Argentina BIT in support of its position, the *Continental* Tribunal simply infers that the effect of Article XI is to prevent the U.S.-Argentina BIT’s substantive obligations from ever attaching to a party whenever it applies the “necessary measures” contemplated under Article XI. A structural analysis of various provisions of the U.S.-Argentina BIT, however, reveals that the state parties to this treaty *expressly* provided for exceptional circumstances when the treaty protections would not apply.

Article I(2) states the parties’ specific intent to deny the protections and/or advantages of the U.S.-Argentina BIT in strictly limited circumstances:

Each party reserves the right to deny to any company of the other Party the advantages of this Treaty if (a) nationals of any third country, or nationals of such Party, control such company and the company has no substantial business activities in the territory of the other Party, or (b) the company is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.<sup>182</sup>

Article II(1) reserves the right of each party to expressly create exceptions to the U.S.-Argentina BIT’s standard of treatment, under an agreed and transparent procedure:

Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favourable than that

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<sup>181</sup> U.S.-Argentina BIT, *supra* note 14, art. XI.

<sup>182</sup> *Id.* art. I(2).

accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.<sup>183</sup>

Article II(9) explicitly indicates the denial of application of the U.S.-Argentina BIT's most favored nation ("MFN") provisions to certain benefits conferred under existing regional or institutional arrangements:

The most favored nation provisions of this Article shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of that Party's binding obligations that derive from full membership in a regional customs union or free trade area, whether such an arrangement is designated as a customs union, free trade area, common market or otherwise.<sup>184</sup>

Article IV(3) illustrates the state parties' intent to *avoid* a situation of *denying* substantive protection even for investment

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<sup>183</sup> *Id.* art. II(1).

<sup>184</sup> *Id.* art. II(9).

losses arising from “national emergencies,” by instead mandating states parties to provide for non-discriminatory treatment:<sup>185</sup>

Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.<sup>186</sup>

Article IX specifies the inapplicability of Articles VII and VIII of the U.S.-Argentina BIT for certain classes of disputes:

The provisions of Article VII and VIII shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.<sup>187</sup>

The foregoing provisions show that the parties to the U.S.-Argentina BIT contemplated departures from the substantive obligations provided for in the treaty as an *exceptional* circumstance, and one that requires specification in the language of the treaty itself. The failure to provide for a clause stipulating the *effect* of a party’s application of measures under Article XI raises a justifiable implication that neither of the parties to the U.S.-Argentina BIT envisaged a situation where the treaty would be completely inappropriate, so as to prevent any of its substantive protections from taking effect. Had the parties to the U.S.-Argentina BIT intended otherwise, the text of Article XI should have been explicitly worded to provide for the *effect* of treaty inapplicability. This is reasonably consonant with the posture

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<sup>185</sup> For conclusions reached under a similarly-worded provision in the United Kingdom-Argentina Bilateral Investment Treaty, see *BG Group PLC v. Argentina* (U.K. v. Arg.), Final Award, paras. 381-84 (Dec. 24, 2007) (discussing national treatment and most favored nation requirements under a provision of the U.K.-Argentina Bilateral Investment Treaty).

<sup>186</sup> U.S.-Argentina BIT, *supra* note 14, art. IV(3).

<sup>187</sup> *Id.* art. IX.

taken by both treaty parties, who had—in the afore-cited treaty provisions—so meticulously specified the limitations and parameters of exemption from the applicability of the U.S.-Argentina BIT's substantive obligations.

Significantly, the Protocol to the U.S.-Argentina BIT is likewise silent on the *effect* of a party's application of measures under Article XI. Paragraph 6 of the Protocol clarifies the substantive content of a clause in Article XI, but does not indicate the effect of the application of any such measure under Article XI: "The Parties understand that, with respect to rights reserved in Article XI of the Treaty, 'obligations with respect to the maintenance or restoration of international peace or security' means obligations under the Charter of the United Nations."<sup>188</sup>

The fact that the parties purposely chose not to indicate in the Protocol any effect of a party's application of a measure under Article XI can be contradistinguished from the first five clauses of the Protocol, which refer expressly to the parties' respective reservation of rights to create exceptions from substantive obligations under the U.S.-Argentina BIT.<sup>189</sup> The treaty parties' failure to provide for the *effect* of a host state's application of measures under Article XI should therefore be seen as the treaty parties' rejection of the absolute inapplicability of the treaty with

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<sup>188</sup> *Id.* protocol para. 6.

<sup>189</sup> See Protocol to the U.S.-Argentina BIT:

During dispute settlement proceedings pursuant to Article VII, a party may be required to produce evidence of ownership or control consistent with Article I(1)(a).

With reference to Article II, paragraph 1, *the United States reserves the right to make or maintain limited exceptions to national treatment in the following sectors . . .*

With reference to Article II, paragraph 1, *the United States reserves the right to make or maintain limited exceptions to national treatment with respect to certain programs involving government grants, loans, and insurance.*

With reference to Article II, paragraph 1, *the United States reserves the right to make or maintain limited exceptions to national and most favoured nation treatment in the following sectors, with respect to which the treatment will be based on reciprocity . . .*

With reference to Article II, paragraph 1, *Argentina reserves the right to make or maintain limited exceptions to national treatment in the following sectors . . .*

U.S.-Argentina BIT, *supra* note 14, protocol paras. 1-5 (emphasis added).

respect to measures embraced by Article XI. Doubt as to the intent of the treaty parties should be construed in favor of the interpretation which better upholds the “object and purpose” of the treaty, and does not thwart its substantive application.<sup>190</sup> It is reasonable to conclude that parties to a treaty intended its application, unless deliberately excluded as seen in the afore-cited provisions of the U.S.-Argentina BIT.

Finally, attention must also be directed to Article III of the U.S.-Argentina BIT:

This Treaty shall not preclude either Party from prescribing laws and regulations in connection with the admission of investments made in its territory by nationals or companies of the other Party or with the conduct of associated activities, provided, however, that such laws and regulations shall not impair the substance of any of the rights set forth in the Treaty.<sup>191</sup>

The foregoing provision is the only other provision in the U.S.-Argentina BIT that, like Article XI, indicates acts which are not precluded by the treaty. As the phraseology of Article III makes clear, non-preclusion does *not* mean that the U.S.-Argentina BIT does not apply to certain acts of a treaty party. Rather, non-preclusion merely connotes that a treaty party is not prevented from committing certain acts even within the operative duration of the treaty. Article III’s proviso (“*provided, however, that such laws and regulations shall not impair the substance of any of the rights set forth in the Treaty*”), however, expressly restricts the effects of a party’s acts against impairment of substantive rights under the treaty. While this proviso is not present in the wording of Article XI, all that the absence implies is that the measures contemplated under Article XI *could* conceivably impair substantive rights under the U.S.-Argentina BIT. However, it cannot extend to an implication (which the Tribunal in the *Continental Award* problematically made) that a treaty party’s application of measures

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<sup>190</sup> Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331; *see also* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 474-562 (2006); *see generally* Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT’L. L. 1 (1951) (discussing theories of treaty interpretation).

<sup>191</sup> U.S.-Argentina BIT, *supra* note 14, art. III (emphasis added).

under Article XI automatically removes the right to compensation under various provisions of the U.S.-Argentina BIT.

Clearly, textual and structural analysis of the U.S.-Argentina BIT does not support the *Continental* Tribunal's broad interpretation of Article XI to prevent a breach from ever arising when a host State implements "necessary measures," to the point that the host State would never have any duty to compensate for such measures when they impair substantive rights under the treaty. As will be further shown in Section 2 and Section 3, a rigorous application of the *lex specialis* under Article XI in relation to other substantive provisions of the U.S.-Argentina BIT should still militate in favour of maintaining the right to compensation as manifest from the treaty's text, structural design, and policy motivations.

1.4.3. *Are GATT and WTO Law and Jurisprudence Legally Relevant in Determining the Substantive Content of Article XI?*

The *Continental* Tribunal justified its reference to GATT and WTO case law on the claim that "the text of Article XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947."<sup>192</sup> The Tribunal then primarily relied on the WTO Appellate Body Report on the *Korea-Beef* case, to infer a lower threshold of necessity under Article XI to mean "whether the [Capital Control Regime] Measures contributed materially to the realization of their legitimate aims under Article XI of the BIT,"<sup>193</sup> and "whether Argentina had reasonably available alternatives, less in conflict or more compliant with its international obligations, while providing an equivalent contribution to the achievement of the objective pursued."<sup>194</sup>

The sudden resort to GATT and WTO case law is unprecedented, not having been referred to at all by previous ICSID tribunals in the *Sempra*, *LG & E*, and *CMS Gas* cases that also interpreted Article XI of the U.S.-Argentina BIT. As reflected from the *Continental* Tribunal's own proffered justification, Article XI

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<sup>192</sup> Cont'l Cas. Co. v. Argentina, Award, ICSID Case No. ARB/03/9, para. 192 (Sept. 5, 2008).

<sup>193</sup> *Id.* para. 196.

<sup>194</sup> *Id.* para. 198 (citation omitted).



only remotely derives from Article XX of GATT 1947 through the parallel model clause of the US FCN treaties. However, nowhere in the *Continental Award* did the Tribunal show that Article XX of GATT 1947 had formed part of the *travaux préparatoires* of the parties to the U.S.-Argentina BIT, and if so, the precise degree in which Article XX of GATT 1947 had been relied upon during the negotiation and drafting of Article XI of the U.S.-Argentina BIT.

More importantly, the textual nexus between Article XX of GATT 1947 and Article XI appears more imagined than real. The full text of Article XX of GATT 1947 states, in full:

#### Article XX: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- a) necessary to protect public morals;
- b) necessary to protect human, animal or plant life or health;
- c) relating to the importations or exportations of gold or silver;
- d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
- e) relating to the products of prison labour;
- f) imposed for the protection of national treasures of artistic, historic or archaeological value;

- g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the Contracting Parties and not disapproved by them or which is itself so submitted and not so disapproved;
- i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- j) essential to the acquisition or distribution of products in general or local short supply; *provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The Contracting Parties shall review the need for this sub-paragraph not later than 30 June 1960.<sup>195</sup>

Nowhere in the text of Article XX of GATT 1947 is there language that reproduces Article XI of the U.S.-Argentina BIT. Article XI's "This Treaty shall not preclude . . ." is in no way a denotative equivalent for Article XX's "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any

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<sup>195</sup> General Agreement on Tariff and Trade art. XX, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT 1947], available at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_02\\_e.htm#articleXX](http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX).

contracting party of measures . . . .” Mere “non-preclusion” in Article XI is not conceptually tantamount or analogous to “non-construction to prevent adoption or enforcement” under Article XX.

Obviously, the two-tiered structure of Article XX in its chapeau (“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade . . . .”) and the ten items enumerated from (a) to (j) is facially absent from the actual wording of Article XI of the U.S.-Argentina BIT.<sup>196</sup> Raj Bhala describes Article XX’s drafting history to have been motivated by the desire to meet particular conditions existing in specific countries in construing exceptions from multilateral trade obligations under the GATT.<sup>197</sup> The chapeau is intended to guard against the abusive interpretation of any of the itemized exceptions:

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<sup>196</sup> *Id.*

<sup>197</sup> RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENTS ON TARIFFS AND TRADE 531–33 (2005).

All GATT obligations are subject to a set of 10 general exceptions set forth in Article XX. This ‘laundry list,’ albeit incomplete, generates some of the most hotly and frequently debated problems in the multilateral trading system . . . . Conceptually, it is a folly to think a single theory underpins these seven exceptions, much less all 10 of them . . . . Indeed, in the 1946 London and 1947 Geneva Preparatory Conferences, no effort was made to develop a coherent theoretical basis unifying the items on Article XX . . . . Rather, self-interested expediency mattered to the drafters of GATT, as Professor Jackson observes: ‘Naturally, the tendency of the drafting sessions [of both Articles XX and XXI], as was the case for other articles, was to add to the list of general exceptions in order to meet the particular conditions existing in specific countries.’ . . . . Pessimism aside, the starting point for the international trade lawyer and scholar needing to come to terms with Article XX is the language of the text. Despite the lack of a unifying theory, there is one unifying aspect to that text, namely, its introductory clause, known as the *chapeau* . . . . [Which] concerns not the aim or design of a measure, but rather the way in which a measure is applied. Simply put, the purpose of the *chapeau* is to prevent the abusive invocation of an itemised exception. This concern helps make it a unifying force for the 10 itemised exceptions. The purpose of the *chapeau* is what makes it a device uniting all 10 exceptions in Article XX, other than the textual fact it is an introduction to them.

*Id.*

The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rule of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.<sup>198</sup>

The particular phraseology of the chapeau in Article XX:

[E]mbodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions under Article XX, specified in paragraphs (a) to (j), on the other hand, and the substantive rights of the other Members under the GATT 1994, on the other hand.<sup>199</sup>

The absence of a textual nexus between Article XX of GATT 1947 and Article XI of the U.S.-Argentina BIT is easily explained by the disparate design and policy motivation behind the respective legal regimes. GATT binds Member States to comply with multilaterally-negotiated rules in the international trade system, such as those pertaining to tariffs (including schedules, modalities, and bindings), non-tariff barriers (such as those on limits on and administration of quantitative restrictions), and customs (including rules on transit and origin, valuation and fees), among others. A Member State to the GATT can only invoke Article XX under narrow circumstances and conditions to justify a measure that is inconsistent with the State's affirmative obligations under GATT.<sup>200</sup>

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<sup>198</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶ 22, WT/DS2/AB/R, (Apr. 29, 1996), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/als1p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/als1p1_e.htm).

<sup>199</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶156, WT/DS58/AB/R, (Oct. 12, 1998).

<sup>200</sup> PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 599 (2005).

In general, Article XX is relevant and will be invoked by a Member only when a measure of that Member has been found to be inconsistent with another GATT provision. In such a case, Article XX will be invoked to

Whenever a Member State's measure is deemed to be GATT-inconsistent, the GATT's system of dispute settlement under Articles XXII and XXIII (and later, the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes or DSU) come into play:

Article XXII: Consultation

- 1) Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
- 2) The Contracting Parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII: Nullification or Impairment

- 1) If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the

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justify the GATT-inconsistent measure. As the Panel in *US-Section 337* noted, the central phrase in the first sentence of Article XX is that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . ." Measures satisfying the conditions set out in Article XX are thus permitted, even if they are inconsistent with other provisions of the GATT 1994. As noted by the Panel in *US-Section 337*, Article XX provides, however, for *limited and conditional exceptions* from obligations under other GATT provisions. The exceptions are "limited" as the list of exceptions in Article XX is exhaustive. The exceptions are "conditional" in that Article XX only provides for justification of an otherwise illegal measure when the conditions set out in Article XX . . . are fulfilled. While Article XX allows Members to adopt or maintain measures promoting or protecting other important societal values, it provides an exception to, or limitation of, affirmative commitments under GATT 1994. In this light, it is not surprising that Article XX has played a central role in many GATT and WTO disputes.

*Id.*

attainment of any objective of the Agreement is being impeded as the result of

- (a) The failure of another contracting party to carry out its obligations under this Agreement, or
  - (b) The application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
  - (c) The existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
- 2) If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the Contracting Parties. The Contracting Parties shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The Contracting Parties may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the Contracting Parties consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in

the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.<sup>201</sup>

As the foregoing provisions show, the remedy contemplated under the GATT/WTO dispute settlement system is the realignment of a Member State's questioned measure (whether found to constitute a "violation nullification or impairment," or, in rare instances, a "non-violation nullification or impairment")<sup>202</sup> back to consistency and compliance with GATT obligations. Unlike the U.S.-Argentina BIT, the GATT does not provide for compensation as a remedy for breach of substantive obligations. Conversely, the U.S.-Argentina BIT does not provide for the removal of a government measure in the manner followed in the GATT system.

On the other hand, the parties to the U.S.-Argentina BIT negotiated and concluded the treaty in order to "maintain a stable framework for investment and maximum effective use of economic resources."<sup>203</sup> In the event of direct or indirect expropriation or nationalization, the treaty regime specifically provided for a duty to pay "prompt, adequate and effective compensation."<sup>204</sup> Compensation was further characterized as that which is

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<sup>201</sup> GATT 1947, *supra* note 195, arts. xxii-xxiii.

<sup>202</sup> KOSKENNIEMI, *supra* note 190, at 1152-56. A "violation nullification or impairment" involves a trade measure that, on its face, nullifies or impairs benefits under the General Agreement. A "non-violation nullification or impairment," on the other hand, involves a Member State's implementation of a lawful measure in a manner that denies or disrupts trade benefits of the complaining Member as negotiated under the GATT. *Id.* See also C. O'Neal Taylor, *Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement*, 28 U. PA. J. INT'L ECON. L. 309 (2007); Joel P. Trachtman, *Regulatory Jurisdiction and the WTO*, 10 J. INT'L ECON. L. 631 (2007); Hal S. Shapiro, *The Rules that Swallowed the Exceptions: The WTO SPS Agreement and its Relationship to GATT Articles XX and XXI*, 24 ARIZ. J. INT'L & COMP. L. 199 (2007).

<sup>203</sup> U.S.-Argentina BIT, *supra* note 14, pmbl.

<sup>204</sup> *Id.* art. IV(1).

equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.<sup>205</sup>

The treaty structure, object and purpose, as well as the policy animating the GATT vastly differ from that of the U.S.-Argentina BIT. Textual differences accompany the patent structural disparity between the one-sentence Article XI of the U.S.-Argentina BIT, and the two-tiered structure of chapeau and listed exceptions in Article XX of GATT 1947. The word "necessary" in Article XX is qualified by specific objects and/or qualificatory clauses (e.g. "necessary to protect public morals"; "necessary to protect human, animal or plant life or health"; "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement") that are not found in the terminology of Article XI of the U.S.-Argentina BIT (e.g. "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."). The GATT provision which might have the closer linkage with the objects of "maintenance of public order" or "essential security interests" in Article XI of the U.S.-Argentina BIT is Article XXI of GATT 1947, entitled "Security Exceptions." Even then, however, the textual formulation and limited application of Article XXI remains vastly different from the wording of Article XI of the U.S.-Argentina BIT:

Article XXI: Security Exceptions

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers

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<sup>205</sup> *Id.*



- necessary for the protection of its essential security interests;
- i. relating to fissionable materials or the materials from which they are derived;
  - ii. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
  - iii. taken in time of war or other emergency in international relations;
- or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.<sup>206</sup>

As seen above, the nature of measures “necessary for protecting essential security interests” in Article XXI of GATT 1947 is qualified by subparagraphs (b)(i) through b(iii).<sup>207</sup> None of these qualifications are found in the brief language of Article XI.

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<sup>206</sup> GATT 1947, *supra* note 195, art. XXI (emphasis added).

<sup>207</sup> See Andrew Emmerson, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?*, 11 J. INT’L ECON. L. 135, 139–40 (2008).

For this first “occasion,” the security exceptions negotiated the politically charged “discursive space” between the WTO’s legal authority and the retention of sovereign power by members. In this sense, the security exceptions operate as a dual political excuse. The WTO, as an institution, is wary that WTO membership “erodes states’ control over cross-border flows’ and thus, state sovereignty. A state’s participation therefore became dependent on reserving their sovereign rights of power over national security. Members essentially seek confirmation that their security interests supersede trade obligations. This first manifestation is a *sovereign excuse* that appears to function “as a description of the [members’] norm.” That is, Realism’s view that security is a political issue solely for state determination.

Secondly, security exceptions operate as a facilitative, *institutional excuse*. They allow the WTO and its Agreements to ‘walk the fine line between

Finally, it was likewise erroneous and methodologically inappropriate for the *Continental* Tribunal to simply lift jurisprudential tests developed by the WTO Appellate Body in relation to Article XX of GATT 1947 in order to expand the substantive content of “essential security interests” or “necessary” measures under Article XI of the U.S.-Argentina BIT. In particular, the *Continental* Tribunal quoted a passage from the *Korea-Beef* case as an authoritative principle for the Tribunal to define “necessary measures” in Article XI as a process of assessing “whether the [Capital Control Regime] Measures contributed materially to the realization of their legitimate aims under Art. XI of the BIT, namely the protection of the essential security interests of Argentina in the economic and social crisis it was facing.”<sup>208</sup> Had the *Continental* Tribunal quoted the *entire* passage from the *Korea-Beef* decision, however, it could not have avoided the conclusion that the term “necessary” in Article XX is context-dependent and cannot simply be transplanted into Article XI of the U.S.-Argentina BIT.<sup>209</sup>

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these two competing concerns’ of sovereignty and authority. States are induced, and justify, entering the regime believing their “*essential security interests*”, which demand great domestic political responsibility, will be protected. Conceptually, therefore, security exceptions are the necessary “escape clause” used to expedite the conclusion of Agreements, while binding members to their WTO obligations. Pragmatism requires the appearance of the WTO circumscribing its decision-making authority, while the states’ political power seemingly exists “despite [the] institution’s rules or norms.” Therefore, by including security exceptions, states are encouraged to consent to WTO membership, underpinning the WTO’s negotiated legitimacy.

*Id.* (emphasis added).

<sup>208</sup> Cont’l Cas. Co. v. Argentina, Award, ICSID Case No. ARB/03/9, para. 196 (Sep. 5, 2008).

<sup>209</sup> In paragraph 193 of the *Continental* Award, the Tribunal cited an excerpt from paragraph 161 of the *Korea-Beef* decision. The entire paragraph is set forth below:

We believe that, as used in the context of Article XX(d), the reach of the word “necessary” is not limited to that which is “indispensable” or “of absolute necessity” or “inevitable.” Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term “necessary” refers, in our view, to a range of degrees of necessity. At one end of this continuum lies “necessary” understood as “indispensable”; at the other, is “necessary” taken to mean as “making a contribution to.” We consider that a “necessary” measure is, in this continuum, located significantly closer to the pole of “indispensable” than to the opposite pole of simply “making a contribution to.”

Given the textual, structural, and policy incompatibilities between Article XX of GATT 1947 and Article XI of the U.S.-Argentina BIT, there appears to have been no legal relevance for the *Continental* Tribunal to conflate “necessity” concepts as understood in relation to Article XX with “necessary measures” as discussed in Article XI of the U.S.-Argentina BIT. The Tribunal did not cite any *travaux préparatoires*, prior practice or subsequent agreement of the parties to the U.S.-Argentina BIT to make Article XX an authoritative interpretive source for Article XI. Accordingly, this particular methodology in *Continental* should not be seen as a useful adjudicative precedent for the development of international investment law. If followed by other investment arbitration tribunals, the two conceptual-methodological problems identified in the preceding Sections are likely to wreak interpretive havoc on future cases. With many bilateral and multilateral investment treaties carrying provisions worded similarly to Article XI of the U.S.-Argentina BIT, a tribunal’s inability to thoroughly justify the choice of interpretive methodology opens the international legal regime to criticisms of arbitrariness, lack of rule of law, instability and unpredictability of legal outcomes. Under the *Continental* Tribunal’s interpretive practice, the importance of text as a key source of meaning can be negated by extraneous considerations and policies set by third-party arbitrators. “Context” can be loosely used to fit every legal standard, from any legal regime whatsoever, so long as a tribunal deems it “relevant” to defining the substantive content of a treaty. This interpretive practice altogether undermines the duty to observe the unitary system of treaty interpretation under Article 31 of the VCLT.

Ultimately, the source of controversy in the *Continental* Award is its interpretive methodology. Based only on its extensive evaluation of the facts in relation to Argentina’s substantive treaty obligations, the *Continental* Tribunal could conceivably have arrived at the same result without complicating the interpretation of Article XI. The problematic interpretive methodology in *Continental* trenches both the concept and consequence of “necessity” under Article XI of the U.S.-Argentina BIT. It is also a problem of process—and the extent to which a tribunal or arbitrator can reach into the spectrum of international legal sources

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Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, para. 161, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000).

to set definitive interpretive tools. Section 2 explores these conceptual-methodological issues further, situating the controversy to the use of the customary norm of necessity as a "supplementary" means of interpreting the *lex specialis* of Article XI of the U.S.-Argentina BIT.

2. CONCEPTUAL AND METHODOLOGICAL PROBLEMS IN USING THE CUSTOMARY NORM OF NECESSITY AS A "SUPPLEMENTARY MEANS OF INTERPRETATION" OF ARTICLE XI AS THE *LEX SPECIALIS*

The foregoing analysis of the *Sempra*, *LG & E*, *CMS Gas*, and *Continental* cases has shown that the customary norm of necessity has permeated judicial interpretation of Article XI of the U.S.-Argentina BIT to varying degrees. Whether considered as part of the treaty's "context" or a "relevant rule of international law applicable in the relations between the parties" under Article 31 of the VCLT, or as a "supplementary means of interpretation" under Article 32 of the VCLT, it must first be ascertained whether a legal-conceptual relationship could even exist between Article XI of the U.S.-Argentina BIT and the doctrine of necessity in customary international law (as codified by Article 25 of the ILC Articles on State Responsibility). As the *lex specialis*, Article XI takes precedence as the operative rule in investment controversies brought under the U.S.-Argentina BIT.<sup>210</sup> Any normative weight

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<sup>210</sup> See Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT'L L. 27, 30, 39 (2005) (arguing that although *lex specialis* may be effective in resolving certain normative conflicts, it may be less appropriate for dealing with new conflicts created by the fragmentation of international law); NANCY KONTOU, *THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW* 19-20 (1994).

It is often necessary to decide which of several conflicting rules of international law deriving from the same or different sources and being in force at a particular time must apply to a given situation. In the literature three criteria are used to solve conflicts of this kind: the normative value of the conflicting rules, their relative degree of generality, and the chronological order of their generation.

According to these criteria, the rule which has a higher normative value (*lex superior*) will prevail. This will be the case when one of the rules has the character of *jus cogens*. If the conflicting rules are all expressions of equal authority, then the rule which is more recent (*lex posterior*) or more specific (*lex specialis*) will prevail. A rule can be regarded as *lex specialis*, because it is binding on a few States as opposed to a rule binding *erga omnes* (*lex specialis ratione personae*) or because it "furnishes, in comparison with the *lex generalis*, the deeper, more detailed, perhaps

attributable to Article 25 could therefore only be in a supplementary sense to Article XI. As this Section contends, however, fundamental conceptual and methodological incompatibilities between Article 25 and Article XI undercut the former norm's relevance in interpreting the latter norm. The following subsections juxtapose various aspects of the underlying incompatibilities between the norms.<sup>211</sup> Considering the distinct normative development of the doctrine of "necessity" under customary international law, the concluding subsection disputes the presumed existence of a legal-conceptual relationship between Article XI and Article 25, and argues that Article 25 cannot be accepted as an interpretive tool for Article XI within the framework of operative rules in Articles 31 and 32 of the VCLT.

### 2.1. Nature of Measures Contemplated

"Necessity" under Article 25 contemplates a State's commission of a measure or act that is admittedly "not in conformity with an international obligation." When a State pleads necessity, therefore, there is already a situation of extant wrongfulness arising from the State's act. Necessity functions as an affirmative defense against the State's responsibility for acting in breach of an international obligation. Hugo Grotius, credited with developing the doctrine of necessity, discussed the origin of this particular affirmative defense from "certain premises of human impulse and external circumstances [in which] man has been compelled to resort to certain rules."<sup>212</sup> In the *Gabčíkovo-*

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exceptional, regulation of the same subject-matter" (*lex specialis ratione materiae*).

*Id.*

<sup>211</sup> See also W. Michael Reisman, Professor, Yale Law School, Fifteenth Goff: Arbitration Lecture: National Emergencies and Necessities: Do They and Should They Relieve States of Their Investment Obligations (Oct. 7, 2008) (discussing problems of dealing with business disputes through public international law) (on file with author).

<sup>212</sup> BURLEIGH CUSHING RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW 7-10 (1928).

We have said that Grotius more than anyone else deserves to be considered the modern founder of the doctrine of necessity. . . . It should not, however, detract from the fact that Machiavelli, writing 115 years earlier, without aiming at a systematic presentation of the subject matter, and proceeding from entirely different premises, nevertheless had arrived at conclusions that bear a startling similarity to those of Grotius. . . .

*Nagymaros* case, the International Court of Justice adopted the International Law Commission's characterization of the customary doctrine of necessity as "deeply rooted in general legal thinking."<sup>213</sup>

The modern concept of necessity under Article 25, however, does not recognize the existence of "an omnibus category" of State acts or measures.<sup>214</sup> Judicial decisions cited by the International Law Commission (ILC)<sup>215</sup> in which the plea of necessity has been applied include State measures involving the use of force<sup>216</sup> and its incidents,<sup>217</sup> provisional prohibitions or restrictions on commercial activities,<sup>218</sup> and delayed repayment of monetary obligations.<sup>219</sup>

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In estimating the part played by Machiavelli in developing the doctrine of necessity it is sufficient to repeat that he antedated Grotius by more than one hundred years in pointing out that in order to excuse the use of necessity, there must be a real danger to the life and property of the state and that the amount of force to be employed should be no greater than is essential to defend the particular rights in danger.

<sup>213</sup> *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 40 (Sept. 25).

<sup>214</sup> See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 448 (6th ed. 2003) (explaining that while some defenses such as assumption of risk or contributory negligence are commonly accepted in international tribunals, necessity may only be pleaded in narrower contexts).

<sup>215</sup> *Report of the International Law Commission to the General Assembly, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, U.N. Doc. A/56/10 80-84 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/56/10 80-84 [hereinafter ILC, *Draft Articles on Responsibility of States*].

<sup>216</sup> See *id.* at 81 (Draft Art. 25, cmt. 5) (discussing the "Caroline" incident of 1837).

<sup>217</sup> See *id.* (Draft Art. 25, cmt. 4) (discussing an Anglo-Portuguese dispute of 1832 involving the appropriation of private property in order to provide subsistence for certain troop contingents quelling internal disturbances and the March 1967 bombing of the Liberian oil tanker *Torrey Canyon* by the British government to prevent further spillage of large amounts of oil threatening the English coastline).

<sup>218</sup> See *id.* (Draft Art. 25, cmt. 6) (addressing the Russian Fur Seals controversy of 1893, where the Russian government issued a decree prohibiting sealing in an area of the high seas) (citing *Fisheries Jurisdiction (Spain v. Can.)*, 1998 I.C.J. 432 (Dec. 4)).

<sup>219</sup> See *id.* (Draft Art. 25, cmt. 7) (discussing the Ottoman Empire's use of force majeure to justify its delay in payment of debt to Russia); Beate Rudolf and Nina Hüfken, *Argentinean State Bonds – Defense of Necessity in Relationship Between State and Private Debtors – Customary International Law and General Principles of Law*, 101 AM. J. INT'L L. 857, 857 (2007) (summarizing the German Federal Constitutional Court's May 8, 2007 ruling that "no discernible, general rule of public international law enables a state to invoke the doctrine of necessity as a

According to the ILC, state practice and judicial decisions support the use of the necessity justification for “acts contrary to a broad range of obligations, whether customary or conventional in origin,” and the doctrine “has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population.”<sup>220</sup>

In contrast to Article 25, the text of Article XI of the U.S.-Argentina BIT merely specifies the classes of measures contemplated (“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”),<sup>221</sup> without stating that any of these measures would automatically be in breach of the treaty, or call for a suspension of treaty obligations. Applying the *ejusdem generis* rule of treaty interpretation,<sup>222</sup> the parties to the U.S.-Argentina BIT can only commit such measures that fall within these limited classes—those which fall within the same genus as “public order,” “international peace or security,” or “essential security interests.” The treaty-defined genus appears more limited than the Article 25 formulation, since Article XI’s specified classes of measures presuppose immediacy, urgency, and

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justification for suspending the performance of obligations now due and arising under private law to pay private creditors”).

<sup>220</sup> ILC, *Draft Articles on Responsibility of States*, *supra* note 215, at 83 (Draft Art. 25, cmt. 14).

<sup>221</sup> U.S.-Argentina BIT, *supra* note 14, art. XI.

<sup>222</sup> See *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1952 I.C.J. 93, 110 (July 22) (discussing when facts forming the subject matter of a dispute may relate to a treaty); *Ambatielos Claim (U.K. v. Greece)*, 12 R. Int’l Arb. Awards. 83, 106 (Perm. Ct. Arb. 1956) (debating the interpretation of the most-favored nation clause); ULF LINDERFALK, *ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 303 (2007):

According to many authors in the literature, a treaty shall be interpreted through application of the principle of *ejusdem generis*. In my judgment, this is sufficient reason for us to conclude that the principle is a valid rule of international law. However, the question is still what the principle stands for—in the literature, authors seem to think this obvious. The only real explanation offered by the literature is the following: The *ejusdem generis* doctrine is to the effect that general words when following (or sometimes preceding) special words are limited to the genus, if any, indicated by the special words.

directness in the measures to be applied by a State. This militates against adopting an Article 25 interpretation that favors a "wide variety of interests" in construing "necessity." Had the parties to the U.S.-Argentina BIT desired an Article 25-type provision to cover the kinds of State acts or measures described under Article XI, there ought to have been more analogous textual formulation to that effect in the phraseology of Article XI. The absence of Article 25-type language in Article XI weighs against extending Article XI coverage to every conceivable State act or measure as a "necessary" measure.<sup>223</sup>

Ultimately, what is of signal importance for a measure to be deemed "necessary" under Article XI are the three qualifying classes defined under its common genus of immediacy, urgency, and directness to State interest in survival: (1) maintenance of public order; (2) fulfilment of international obligations with respect to the maintenance of international peace and security; and (3) essential security interests.<sup>224</sup> The parties to the U.S.-Argentina BIT further defined the second qualifying class in the Protocol to the treaty as:

"The Parties understand that, with respect to rights reserved in Article XI of the Treaty, 'obligations with respect to the maintenance or restoration of international peace or security' means obligations under the Charter of the United Nations."<sup>225</sup>

Two observations can be made from the parties' deliberate specification of meaning for this class of obligations. The first is that the parties intended that the genus of Article XI "necessary" measures should approximate states' interests of fundamental

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<sup>223</sup> See Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT'L L. & POL. 447-48 (2008).

However, in our reading, the status of necessity in customary international law cannot be broader than the narrowest formulations included in explicit treaty language, and these are clearly neither open-ended nor entirely self-judging. On the general proposition that drafters do not include meaningless language in treaties, permissive wording would be included in a treaty only if it were thought necessary to overcome a background presumption against a broad interpretation of the doctrine.

*Id.*

<sup>224</sup> U.S.-Argentina BIT, *supra* note 14, art. XI.

<sup>225</sup> Protocol to the Treaty Between The United States of America and The Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, para. 6, U.S.-Arg., Nov. 14, 1991, S. Treaty Doc. No. 103-2 (emphasis added).



importance such as obligations under the UN Charter. The second is that the parties' silence on the definition of the first and third qualifying classes should lean towards an interpretation that is not only comparable to the importance with which parties view UN Charter obligations, but also, that silence should be interpreted towards the option least restrictive of rights provided for under the treaty. Simply stated, the parties' omission in the Protocol to correspondingly clarify what "maintenance of public order" or "essential security interests" mean should not be construed against the parties' expressed will of giving effect to the substantive obligations in the treaty.<sup>226</sup> Both observations argue against applying an Article 25-type expansive reading of measures (involving a "wide variety of interests") to the carefully-phrased language of Article XI. As will be shown in Section 2.3., this conceptual divide will likewise affect the respective remedial consequences available under Article 25 and Article XI.

## 2.2. *Conditions for Application*

Article 25 sets distinct and conjugated conditions before a State's measure could be justified under "necessity" as a ground precluding wrongfulness. For a State to be able to properly invoke "necessity", Article 25(1) imposes two positive conditions both of which must be fulfilled: (1) the State's act or measure is "the only way for the State to safeguard an essential interest against a grave and imminent peril"; and (2) that such act or measure "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."<sup>227</sup>

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<sup>226</sup> See David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 970 (1994) (explaining that treaty interpretation should reflect the intent of the parties); 74 AM. JUR. 2d *Treaties* § 31 (2001) (requiring that in interpreting a treaty, words "be given their natural and ordinary significance" unless the words are ambiguous or obscure). For a proposal of a clear statement rule that avoids implying a remedy unless parties express an unmistakable intent to provide for such remedy in the treaty, see Ryan D. Newman, *Treaty Rights and Remedies: The Virtues of A Clear Statement Rule*, 11 TEX. REV. L. & POL. 419, 447 (2007); see also SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986 60 (1989) ("[T]he exact language of the treaty provision in question must always be carefully scrutinized and analysed before the conclusion is reached that the provision is truly mandatory and not merely exhortatory or optative.").

<sup>227</sup> ILC, *Draft Articles on Responsibility of States*, *supra* note 215, at 80 (Draft Art. 25).

As to the first condition, the International Law Commission (“ILC”) expounds that

The extent to which a given interest is “essential” depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave, the peril has to be imminent in the sense of proximate. . . .

The word “way”<sup>228</sup> in paragraph 1 (a) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, the conservation measures for a fishery taken through the competent regional fisheries agency). Moreover, the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.<sup>228</sup>

Broad categories of “essential interests” considered by the ILC in varying degrees include, among others, the existence of the state, political or economic survival, continued functioning of the state’s essential services, maintenance of internal peace, survival of a sector of the state’s population, and the preservation of the environment of the state’s territory or a part thereof.<sup>229</sup>

As to the second condition, the ILC emphasized that “the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.”<sup>230</sup> This condition underscores the higher relative weight of the interest being served by the State act

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<sup>228</sup> *Id.* at 83 (Draft Art. 25, cmt. 15).

<sup>229</sup> See Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VAND. J. TRANSNAT’L L. 485, 502–03 (2004) (discussing the difficulty the ILC had in trying to “spell out” and “lay down pre-established categories of interests”).

<sup>230</sup> ILC, *Draft Articles on Responsibility of States*, *supra* note 215, at 84 (Draft Art. 25, cmt. 17).

or measure in question, as opposed to *all* other interests existing at the point in time that the act or measure is devised and implemented.

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. (Indeed, in the *Gabcikovo-Nagymaros Project* decision, the International Court of Justice held that Hungary's claimed concern for potential ecological impacts arising from the project did not meet the high objective standard of a "grave and imminent peril" under Article 25.<sup>231</sup> Apart from these positive conditions, however, Article 25(2) further imposes two separate negative conditions. Neither of these conditions should prevail, otherwise, the State cannot avail of the necessity defense: (1) "the international obligation in question excludes the possibility of invoking necessity"; or (2) "the State has contributed to the situation of necessity."<sup>232</sup>

The cumulative result of the above positive and negative conditions to Article 25 is to make the necessity defence only *narrowly or exceptionally* available to States. This was purposely intended by the ILC when it codified the customary normative status of necessity in the Draft Articles of State Responsibility, precisely in order to delimit and prevent the norm from following the loose contours of the ancient maxim *necessitas non habet legem* ("Necessity knows no law"), on which States' opposition to the norm had been based.<sup>233</sup> The final "limit" that the ILC set to the use of necessity defence is found in Article 26 of the Draft Articles on State Responsibility, which stresses that "[n]othing in this chapter precludes the wrongfulness of any act of a State which is

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<sup>231</sup> *Gabcikovo-Nagymaros Project* (Hung. v. Slov.) 1997 I.C.J. 7, 42 (Sept. 25).

<sup>232</sup> ILC, *Draft Articles on Responsibility of States*, *supra* note 215, at 80 (Draft Art. 25).

<sup>233</sup> *Id.* at 80, 83 (Draft Art. 25(2)(a), cmt. 20). The maxim has been ascribed to a long-standing legal tradition in the English common law, dating back to the monk Gratian's *Decretals* of 1140. See also Sarah F. Hill, *The 'Necessity Defense' and the Emerging Arbitral Conflict in its Application to the US-Argentina Bilateral Investment Treaty*, 13 *LAW & BUS. REV. AM.* 547, 550-57 (2007) (examining the history and application of the necessity defense). The necessity norm's application to domestic legal orders (especially criminal law) has also been attributed to 17th century Western legal philosophers such as Pufendorf and Antonius Matthäus, see Khalid Ghanayim, *Excused Necessity in Western Legal Philosophy*, 19 *CAN. J.L. & JURISPRUDENCE* 31, 35-39 (2006).

not in conformity with an obligation arising under a peremptory norm of general international law.”<sup>234</sup>

In contrast, however, no such similar conditions can be found in the one-sentence terminology of Article XI of the U.S.-Argentina BIT. This implies that the conditions for a treaty party's application of Article XI are already substantively contained in the limited classes defined as “necessary” measures (e.g., “maintenance of public order”, “fulfilment of obligations with respect to the maintenance or restoration of international peace or security”, or the “protection of essential security interests”), and are thus apparently triggered *ipso facto* when the State invokes Article XI. Where a State's act or measure can be subsumed under any of these categories, all that Article XI indicates is that the State is “not precluded” by the U.S.-Argentina BIT.

Clearly, there is a gulf between a State's restricted ability to apply Article 25 to its measure, as opposed to the seemingly more open capacity of a State to apply Article XI. This difference will likewise bear upon the effects of, and remedies available, under each norm.

### 2.3. *Effects and Remedial Consequences*

As previously discussed in Section 1, Article 25 characterizes necessity as a “ground for precluding wrongfulness.” The ILC clarifies that State acts or measures justified under this ground belong to “those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, *for the time being*, not to perform some other international obligation of lesser weight or urgency.”<sup>235</sup> In this sense, Article 25 only has a *suspensive* effect, and one dependent on the relative weight of the underlying interest served by the State's act or measure, in relation to other international obligations which a State has the duty to perform. This view is consistent with Article 27 of the Draft Articles on State Responsibility, which explicitly states:

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<sup>234</sup> ILC, *Draft Articles on Responsibility of States*, *supra* note 215, at 84 (Draft Art. 26). For the theory that peremptory norms can also have an ‘excusing’ effect when the essential interest of the State involves the protection of peremptory norms, see Jorge E. Viñuales, *State of Necessity and Peremptory Norms in International Investment Law*, 14 L. & BUS. REV. AM. 79 (2008).

<sup>235</sup> ILC, *Draft Articles on Responsibility of States*, *supra* note 215, at 80 (Draft Art. 25, cmt. 1) (emphasis added).

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) The question of compensation for any material loss caused by the act in question.<sup>236</sup>

The ILC describes Article 27 as a “without prejudice” clause, where the circumstance precluding wrongfulness “do[es] not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect.”<sup>237</sup> It also provides for compensation for material loss, so long as “the effect of the facts which disclose a circumstance precluding wrongfulness [does not] also give rise to the termination of the [underlying] obligation.” Material loss has been described as a “narrower” concept than damage, one that “concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.”<sup>238</sup>

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<sup>236</sup> *Id.* at 85 (Draft Art. 27).

<sup>237</sup> *Id.* at 86 (Draft Art. 27, cmt 1). *But see* Chusei Yamada, *Revisiting the International Law Commission’s Draft Articles on State Responsibility*, in *INTERNATIONAL RESPONSIBILITY OF TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER* 117, 123 (Mauricio Ragazzi ed., 2005).

Draft Article 27 is a “without prejudice” clause and does not give any answer to the question of compensation. What is the circumstance that would preclude wrongfulness of a conduct but would not relieve a State from its responsibility to compensate for the material loss caused by its conduct? Self-defence would preclude responsibility. *Necessity might not.*

*Id.* (emphasis added).

<sup>238</sup> ILC, *Draft Articles on Responsibility of States*, *supra* note 215, at 86 (Draft Art. 27, cmt. 4). *See* IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY*, PART I 199 (1983).

Compensation [is] used to describe reparation in the narrow sense of the payment of money as a “valuation” of the wrong done. Confusion arises in the case where compensation is paid for a breach of duty which is actionable without proof of particular items of financial loss, for example the violation of diplomatic or consular immunities, trespass in the territorial sea, or illegal arrest of a vessel on the high seas. The award of compensation for such illegal acts is sometimes described as “moral” or “political” reparation, terms connected with concepts of “moral” and “political” injury . . . .

More importantly, the ILC has expressly declared that the plea of necessity under Article 25 is “not intended to cover conduct which is in principle regulated by the primary obligations,” specifically such rules on the use of force and military necessity. Where a State’s conduct is covered by primary obligations, considerations similar to those underlying Article 25 may be “taken into account in the context of the formulation and interpretation of the primary obligations.”<sup>239</sup> Thus, in both the body of its commentary to Article 27 as well as its citation of authorities (footnotes 406 to 409), the ILC explicitly limited the consideration of Article 25 to primary obligations on the use of force and military necessity.

The burden to prove the applicability of necessity as a ground precluding wrongfulness thus falls on the State making the invocation in order to justify an act or measure that patently breaches other international obligations.<sup>240</sup> In any case, the effect of applying Article 25 is simply to *suspend* the effectivity of other international obligations in relation to the questioned act or measure. When the facts giving rise to the circumstance of necessity have ceased to exist, the State has the duty to resume compliance with such other obligations. At any rate, the State is liable to compensate material losses suffered by any other State due to the former’s non-compliance.

On the other hand, the one-sentence phraseology of Article XI of the U.S.-Argentina BIT does not contain any definitive text on the effects of applying Article XI. Other than the clause “[t]his Treaty shall not preclude the application by either Party of measures necessary . . . ,” Article XI does not specify any consequential effect to “necessary measures” implemented by a treaty party under this provision. As discussed in Section 1, it was erroneous (and nowhere borne in the language of Article XI) for the *Continental* Tribunal to impute an overriding effect of non-applicability of any of the substantive obligations of the U.S.-Argentina BIT when Article XI operates in relation to a State’s act or measure. Had the treaty parties intended this effect, there would have been language reflecting such intent in the text of Article XI itself, or Item No. 6 of the Protocol to the U.S.-Argentina BIT which clarified the meaning

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*Id.*

<sup>239</sup> ILC, *Draft Articles on Responsibility of States*, *supra* note 215, at 84 (Draft Art. 25, cmt. 20).

<sup>240</sup> *See id.* at 86 (Draft Art. 27, cmt. 2).

to “obligations with respect to the maintenance or restoration of international peace or security” under Article XI.<sup>241</sup> None of the cases interpreting Article XI (*Sempra*, the *LG&E* cases, the *CMS Gas* cases, and *Continental*) cite any authority or *travaux préparatoires* to the U.S.-Argentina BIT supporting the position that Article XI meant non-applicability of any of the U.S.-Argentina BIT’s substantive obligations, or that “no breach” of a BIT obligation would ever arise when Article XI was invoked.

Moreover, Article X(b) and X(c) of the U.S.-Argentina BIT categorically declares that the “Treaty shall *not derogate from* . . . (b) international legal obligations; or (c) obligations assumed by either Party . . . ”<sup>242</sup> A harmonious interpretation of these provisions in relation to Article XI should militate against reading Article XI as a blanket ‘exception’ or ‘opt-out’ clause to international legal obligations contained in the U.S.-Argentina BIT. This is consistent with the presumed binding force of the U.S.-Argentina BIT on both treaty parties, and their respective duties to perform obligations contained therein under the general principle of *pacta sunt servanda*.<sup>243</sup> Derogations for which a party can exclude certain provisions of a treaty from application for a particular period are expressly specified in the language of the treaty itself, and are not to be easily inferred.<sup>244</sup>

Nor can Article XI be read as authority for suspension of the operation of the U.S.-Argentina BIT. Article 57 of the VCLT provides that operation of a treaty may be suspended with respect to a particular party in two circumstances: (1) “in conformity with the provisions of the treaty”; or (2) “at any time by consent of all the parties after consultation with the other contracting States.”<sup>245</sup> In either case, the party invoking suspension of the treaty’s operation has the express duty to “notify other parties of its claim”

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<sup>241</sup> U.S.-Argentina BIT, *supra* note 14, art. XI.

<sup>242</sup> U.S.-Argentina BIT, *supra* note 14, art. X.

<sup>243</sup> See Vienna Convention, *supra* note 2, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed in good faith.”).

<sup>244</sup> See, e.g., International Covenant on Civil and Political Rights art. 4(3), Dec. 19, 1966, 999 U.N.T.S. 171 (requiring States Parties to immediately report derogations); Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 (derogations limited to “to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”).

<sup>245</sup> Vienna Convention, *supra* note 2, art 57.

under the procedures set forth in Article 65 of the VCLT.<sup>246</sup> The language of Article XI belies any attempt to construe this provision as authority for suspension of the U.S.-Argentina BIT. It lacks any language indicating suspension of the operation of the U.S.-Argentina BIT, and does not provide for a duty to notify the other treaty party of such suspension.

Finally, Article XI cannot be read as a reservation to the substantive obligations of the U.S.-Argentina BIT. Article 2(1)(d) of the VCLT defines a reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”<sup>247</sup> As discussed in Section 1, both the United States and Argentina made their respective specific reservations to substantive obligations of the treaty in the Protocol, but did not make any comparable reservations with respect to “necessary” measures referred to under Article XI of the U.S.-Argentina BIT. More importantly, extrapolating Article XI as some form of treaty “reservation” would not meet the test of compatibility with the object and purpose of the treaty.<sup>248</sup> Permitting the wholesale and indefinite exclusion of the U.S.-Argentina BIT from applicability with respect to the classes of “necessary” measures in Article XI would certainly defeat the treaty’s stated purpose of “maintain[ing] a stable framework for investment and maximum effective use of economic resources.”<sup>249</sup>

Since the language of Article XI cannot be read as a suspension of, or derogation from, the applicability of the U.S.-Argentina BIT, nor as a reservation to the latter’s substantive obligations, the law of treaties does not support the *Continental* Tribunal’s interpretation that Article XI prevents the U.S.-Argentina BIT’s substantive obligations from ever applying to the classes of State measures indicated in Article XI. Extending the argument further,

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<sup>246</sup> *Id.* art. 65.

<sup>247</sup> *Id.* art. 2(1)(d).

<sup>248</sup> See AUST, *supra* note 6, at 136–38; Edward T. Swaine, *Reserving*, 31 YALE J. INT’L L. 307, 316–17 (2006) (discussing “permissibility” and “opposability” approaches to state reservations to treaties).

<sup>249</sup> U.S.-Argentina BIT, *supra* note 14, pmb1. On the trend towards more concrete intent expressed through bilateral treaties, see Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT’L L.J. 323 (2008) (analyzing preference for bilateral treaties as perceived method of protecting sovereignty).



it is thus also unwarranted under the law of treaties for the *Continental* Tribunal to conclude that where Article XI applies, no breach of a substantive obligation under the U.S.-Argentina BIT could ever arise, and consequently, no duty to compensate would be implicated in the first instance.

2.4. *Article 25's Disqualification from Article XI's Range of Interpretive Sources within Articles 31 and 32 of the VCLT*

If the treaty applier cannot read into Article XI any authority to indefinitely suspend, unilaterally modify, impliedly reserve, or derogate from substantive obligations under the U.S.-Argentina BIT, what is the legal effect of Article XI? In view of the interpretive rules under Articles 31 and 32 of the VCLT and the primary mandate to interpret treaties "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty,"<sup>250</sup> the interpretation of Article XI must be contextually-calibrated with other obligations under the U.S.-Argentina BIT to give the fullest possible effect to *all* of its provisions. It has not been shown in any of the ICSID cases interpreting Article XI that the United States and Argentina intended a "special meaning" to the clause, "[t]his Treaty shall not preclude . . ." as to render the latter the functional equivalent of non-applicability of the U.S.-Argentina BIT ("[t]his Treaty shall not apply when . . .") as the *Continental* Tribunal erroneously concluded. The ordinary meaning of Article XI, coupled with the mandate to give full force and effect to the entirety of the U.S.-Argentina BIT and interpret the same in good faith, requires the treaty applier to harmonize provisions, rather than loosely imputing or assigning textually-absent legal effects to Article XI such as suspension, modification, reservation, or derogation from substantive obligations under the U.S.-Argentina BIT.<sup>251</sup>

Considering the text of Article XI alongside the structural design of the U.S.-Argentina BIT, it is proposed that the States Parties to the U.S.-Argentina BIT could only invoke Article XI against each other for *state responsibility claims* deriving from a breach of the U.S.-Argentina BIT, not to reject the host State's *lex*

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<sup>250</sup> Vienna Convention, *supra* note 2, arts. 31-32.

<sup>251</sup> See *Report of the International Law Commission*, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] Y.B. Int'l L. Comm'n 220, U.N. Doc. A/CN.4/SER.A/1966 (discussing general principles of treaty interpretation).

*specialis* duties spelled out in the U.S.-Argentina BIT as specifically owed to foreign investors. This differentiated approach adheres to the classical dichotomy between the “law of the instrument” (norms and consequences set forth in the treaty terms, to which the VCLT applies) and the “law of obligation” (obligations created under the treaty terms as between the state parties, as distinguished from obligations created under the treaty terms as between the host state and the investor from the counterpart state party in the BIT, to which the Articles on State Responsibility and other applicable norms of general international law apply).<sup>252</sup> Thus, when a host State commits a “measure necessary for . . . the Protection of its own essential security interests” under Article XI of the U.S.-Argentina BIT, it remains liable to observe specific substantive duties to investors (e.g. the duty to pay compensation in the event of direct or indirect expropriations defined under Article IV). However, the host State can invoke Article XI as a defense against the counterpart State Party’s claim of state responsibility due to any “internationally wrongful acts” that separately arise *in the process of breaching BIT obligations*.<sup>253</sup>

Given the foregoing differentiation, a State party is not precluded by the U.S.-Argentina BIT from implementing “necessary measures” as defined under Article XI. However, for purposes of defending its international responsibility to the other State Party in the U.S.-Argentina BIT, the extent and duration by which the host State’s measures infringe substantive obligations would be balanced, on a case-to-case basis, in determining the qualitative content of compliance that could be reasonably expected from the host State applying the “necessary measures” in

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<sup>252</sup> See SHABTAI ROSENNE, BREACH OF TREATY 3-8 (1985) (developing “law of the instrument” and “law of obligation” framework).

<sup>253</sup> ILC, *Draft Articles on Responsibility of States*, *supra* note 215, at 55 (Draft Art. 12, cmt. 3-4).

It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned . . . Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act. Moreover, these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on.

*Id.*

opposition to such substantive obligations under the circumstances. In no case, however, would the measure's apparent infringement or breach of a substantive obligation eliminate *lex specialis* duties to investors protected by the BIT, such as the duty to pay compensation and to comply with BIT obligations. When a host State implements an NPM under Article XI, it effectively pleads an adjustment of expectations with respect to the international obligations *owed to the other State Party* in the U.S.-Argentina BIT. It cannot, however, cause exculpation from specific liability for compensation owed to the foreign investor. This interpretation appears more consonant with the precise wording of Article XI.

This primarily-textualist approach to interpreting the U.S.-Argentina BIT accords with the unitary system of interpretation under Article 31 of the VCLT. The formative history of the VCLT shows that VLCT drafters expressly rejected a proposal (advanced by U.S. Chief Delegate Myres McDougal) that would vest treaty interpreters with more discretion to weigh treaty text versus other extrinsic sources.<sup>254</sup> As the International Court of Justice previously declared, "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context of which they occur."<sup>255</sup> The International Law Commission's 1966 Draft Commentaries to the VCLT also supports the view that text is the fundamental referent of the treaty applier, before context and other phenomena that must be taken together with context.<sup>256</sup>

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<sup>254</sup> Conference on the Law of Treaties, Vienna, Austria, Mar. 26–May 24, 1968, *Official Records, First Session*, U.N. Doc. A/CONF.39/11 (1969) [hereinafter *Vienna Conference 1*]; Conference on the Law of Treaties, Vienna, Austria, Apr. 9–May 22, 1969, *Official Records, Second Session*, U.N. Doc. A/CONF.39/11/Add.1 (1970).

<sup>255</sup> Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3).

<sup>256</sup> ILC, *Draft Articles on the Law of Treaties*, *supra* note 7, at 220 (emphasis added).

Once it is established—and on this point the Commission was unanimous—that the starting point of interpretation is the meaning of the text, logic indicates that 'the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' should be the first element to be mentioned.

*Id.* (emphasis added).

To what extent, therefore, could the Article 25 “necessity” defense be relevant to the interpretation of Article XI? As stated in Section 1, Article 25 is already textually different from the specific formulation of Article XI. The preceding subsections in Section 2. have also shown that there are conceptual-methodological incongruities and incompatibilities between Article 25 and Article XI. Article 25 must therefore be ruled out from interpretive consideration given the unitary system of interpretation in Article 31 of the VCLT. The “necessity” defense under Article 25 cannot be admitted within the *text* of the U.S.-Argentina BIT. Nor can it form part of the *context* of the U.S.-Argentina BIT, since Article 25 of the Draft Articles on State Responsibility is not an “agreement relating to the treaty which was made by one or more of the parties in connection with the conclusion of the treaty.”<sup>257</sup> Nor is Article 25 an “instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”<sup>258</sup> For obvious reasons, the ILC’s Draft Articles on State Responsibility cannot be treated as a “subsequent agreement” by the United States and Argentina regarding the interpretation or application of the U.S.-Argentina BIT.<sup>259</sup>

At best, Article 25 can only be accepted as an interpretive tool under Article 31 of the VCLT as a “relevant rule of international law.” Given the previously-discussed incongruities between Article 25 and Article XI of the U.S.-Argentina BIT, however, the precise ‘relevance’ of Article 25 to interpreting Article XI is highly doubtful. Admitting Article 25 as a “relevant rule of international law” for interpreting Article XI, notwithstanding the conceptual-methodological incongruities between these norms, still would not bolster the *Continental* Tribunal’s interpretive conclusions on the legal consequences of Article XI. If anything, admitting Article 25 as a “relevant rule of international law” would have the opposite effect. Article 25 is textually and historically a more exacting and stringent normative standard than Article XI of the U.S.-Argentina BIT. And yet, Article 27 (in relation to Article 25) of the Draft Articles on State Responsibility still recognizes that the State

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<sup>257</sup> Vienna Convention, *supra* note 2, art. 31(a).

<sup>258</sup> *Id.* art. 31(2)(b).

<sup>259</sup> See Sean D. Murphy, *Contemporary Practice of the United State Relating to International Law*, 95 AM. J. INT’L L. 873, 887 (2001) (discussing U.S. position on subsequent agreements in international trade litigation).

invoking the circumstance precluding wrongfulness has the duty of compliance upon cessation of the facts giving rise to the circumstance, as well as the duty to pay compensation for material losses suffered by other States. If the stricter standard (Article 25) already imposes these duties upon the State invoking such standard, it is not unlikely that similar concomitant duties can likewise be imposed in relation to a less rigorously-formulated standard (Article XI). Under this syllogism, the *Continental Tribunal's* conclusion that there is no duty to compensate when Article XI applies should fail.

Before Article 25 can be taken as a "relevant rule of international law" to interpreting Article XI of the U.S.-Argentina BIT, however, Article 31(3) of the VCLT requires that this rule be "taken together with the context."<sup>260</sup> This implies that there should be a separate showing of a *linkage* or *nexus* between Article 25 of the Draft Articles on State Responsibility and the context of the treaty (composed of the text of the treaty, agreements made by the parties in connection with its conclusion, or instruments made by the parties in connection with the conclusion of the treaty) in determining the relevance of a rule of international law as part of the unitary system of interpretation under Article 31 of the VCLT.<sup>261</sup> As previously discussed, no such linkage or nexus can be seen from the text of Article XI, the Protocol to the U.S.-Argentina BIT, or the drafting history of the U.S.-Argentina BIT. Considering that the text of Article XI appears silent on any supposed intent of the parties to consider Article 25, and the earlier-demonstrated conceptual-methodological incompatibilities between Article 25 and Article XI, it is plausible to conclude that Article 25 does not constitute a "relevant rule of international law" under Article 31(3) of the VCLT, for purposes of interpreting Article XI of the U.S.-Argentina BIT.

Short of a clearly expressed intent of the parties to the U.S.-Argentina BIT to include Article 25 within the range of interpretive sources collectively regarded by the treaty applier in the unitary system of interpretation of Article 31 of the VCLT, can Article 25 nevertheless serve as a "supplementary means of interpretation" under Article 32 of the VCLT? To recall, despite the *Continental Tribunal's* insistence that it regarded Article XI disjunctively from

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<sup>260</sup> Vienna Convention, *supra* note 2, art. 31(3).

<sup>261</sup> IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 118, 130-38 (2d ed. 1984).

Article 25, the Tribunal's flow of reasoning in the *Continental Award* still evinced a pattern of treating Article 25 as a supplementary means of interpreting Article XI.<sup>262</sup>

The supplementary reference to Article 25 in interpreting Article XI, however, should still abide by the rules for supplementary means of interpretation under Article 32 of the VCLT. It was not shown in the *Continental Award* that the requisites of Article 32 of the VCLT had been met. In the first place, Article 25 cannot be used as a supplementary means of interpretation because it cannot "confirm the meaning resulting from the application of Article 31 [of the VCLT]." The conceptual-methodological incongruities between Article 25 and Article XI negate Article 25's capacity to *confirm* meaning resulting from the application of text, context, and other phenomena (such as subsequent practice or agreement, and relevant rules of international law) relating to Article XI.

Second, Article 25 cannot be used as a supplementary means of interpretation under Article 32 in the *determinative* sense, since it has not been shown that an interpretation of Article XI under the unitary system of Article 31 of the VCLT (text, context, other phenomena) "leaves the meaning ambiguous or obscure," or "leads to a result which is manifestly absurd or unreasonable."<sup>263</sup> In fact, the stark flaw in the *Continental Award* stems from the Tribunal's imputation of legal consequences (e.g. suspension or modification of, or derogation from, substantive obligations of the U.S.-Argentina BIT) that were not found in the text of Article XI or elsewhere in the U.S.-Argentina BIT. The *Continental* Tribunal did not show that the systematic consideration of Article XI's text, context, subsequent agreement or practice of the United States and Argentina, or relevant rules of international law, resulted in ambiguity, obscurity, or manifestly absurd or unreasonable results. As the treaty applier making use of Article 25 as a supplementary means of interpretation, the *Continental* Tribunal failed to meet the threshold requirements of Article 32 of the VCLT.

The "necessity" defense under Article 25 of the Draft Articles of State Responsibility does not furnish a useful interpretive tool for Article XI of the U.S.-Argentina BIT. Article 25 bears no textual linkage to Article XI, and there is no evidence that the parties to the

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<sup>262</sup> Cont'l Cas. Co. v. Argentina, ICSID Case No. ARB/03/9 paras. 175, 190-91 (Sept. 5, 2008).

<sup>263</sup> Vienna Convention, *supra* note 2, art. 32.

U.S.-Argentina BIT and its Protocol ever intended for the language of Article XI to reflect the customary international law necessity defense. In this sense, while it has been argued that Article 31(3) of the VCLT gives room for a narrow proposition that the evolution and development of law can be taken into account in interpreting a treaty, it must first be shown that the “very nature [of the terms of the treaty are] expressed in such general terms as to lend themselves to an evolutionary approach.”<sup>264</sup> There is no such showing in Article XI.

Nor has it been shown that the “necessity” defense under customary international law was operationalized in other contextual phenomena such as agreements or instruments relating to the U.S.-Argentina BIT. Finally, it has not been shown among the *travaux préparatoires* to the U.S.-Argentina BIT that the parties even contemplated the “necessity” defense under customary international law when they formulated the precise phraseology of Article XI. Clearly, the varying degrees of conflation of Article 25 and Article XI across the ICSID awards in *Sempra*, *LG & E*, *CMS Gas*, and most recently, *Continental*, are superfluous to the process of decision-making. Article 25 unduly complicates, and does not illuminate, the discursive formulation of Article XI.

### 3. ARTICLE XI (*LEX SPECIALIS*) AS THE EXCLUSIVE CHOICE OF LAW, UNLESS OTHERWISE PROVIDED IN THE TREATY TEXT

The *Sempra*, *LG&E*, *CMS Gas* and *Continental* cases illustrate a threshold problem for the treaty applier: in determining meaning under Article XI, to what extent is it acceptable to refer to sources external to the treaty text? And if referring to external sources, what internal criteria makes these particular sources controlling for the treaty applier? *Sempra* represents one end of the spectrum of choices, where the Tribunal as treaty applier completely relied on Article 25 as the controlling external source to interpret Article XI.<sup>265</sup> The *LG&E* Tribunal referred to Article 25 only to support its *a priori* analysis of Article XI’s meaning.<sup>266</sup> The Tribunal in the *CMS Gas* Tribunal did not accept all elements of Article 25, but instead, only imported one element of the concept of “necessity”

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<sup>264</sup> TASLIM O. ELIAS, *THE MODERN LAW OF TREATIES* 140 (1974).

<sup>265</sup> *Sempra Energy Int’l v. Argentina*, ICSID Case No. ARB/02/16, paras. 375–76 (Sept. 28, 2007).

<sup>266</sup> *LG&E Energy Corporation v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1, para. 245 (Oct. 3, 2006).

under Article 25 to characterize the supposed structural design of the U.S.-Argentina BIT, and ultimately to draw a broad interpretation of Article XI that includes the concept of economic emergencies.<sup>267</sup> The other end of the spectrum (where the treaty applier chose not to rely on Article 25 as a controlling external source to interpret Article XI) could be seen from the *Ad Hoc* Committee's Decision on Application for Annulment in *CMS Gas*. In *CMS Gas*, however, while the *Ad Hoc* Committee noted conceptual distinctions between Article 25 and Article XI as to substantive content, operation, and effects, the Committee was also the first to make the problematic interpretation—without citing any legal authorities—that the U.S.-Argentina BIT's substantive obligations could not apply alongside Article XI if the latter is properly invoked. Simply put, for the *Ad Hoc* Committee, the applicability of Article XI removes the questioned act or measure of a State from the scope of substantive obligations throughout the rest of the U.S.-Argentina BIT.<sup>268</sup>

Under its more controversial methodology, the *Continental* Award treads both ends of the spectrum of choices available to the treaty applier. While the *Continental* Tribunal acknowledged the conceptual distinctions between Article 25 and Article XI explained by the *Ad Hoc* Committee in *CMS Gas*, the Tribunal nevertheless latently referred to Article 25 in a “supplementary” sense to support its choice of a broad definition of “essential security interests” in Article XI.<sup>269</sup> The *Continental* Tribunal then adopted a *Sempra*-like approach by completely relying on external sources from different legal regimes, as when it introduced WTO and GATT law as ‘controlling’ legal authorities for infusing substantive meaning to Article XI of the U.S.-Argentina BIT.<sup>270</sup>

As Section 1's critical survey has shown, the tribunals as treaty appliers in the *Sempra*, *LG&E*, *CMS Gas*, and *Continental* cases faced the threshold question on the use of external sources without explaining how their respective methodologies could be justified under the system of unitary interpretation in Article 31 of the

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<sup>267</sup> *CMS Gas Transmission Co. v. Argentina*, Award, ICSID Case No. ARB/01/8, paras. 357–60 (May 11, 2005).

<sup>268</sup> *CMS Gas Transmission Co. v. Argentine Republic*, Decision on Annulment, ICSID Case No. ARB/01/8, paras. 129–136 (Sept. 25, 2007).

<sup>269</sup> *Cont'l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, paras. 164, 175, 180, 190–91 (Sept. 5, 2008).

<sup>270</sup> *Id.* para. 192.



VCLT, or the rules on supplementary means of interpretation under Article 32 of the VCLT. All of the Tribunals in these cases made choices on the extent to which they would rely on an external source (Article 25), based on another legal regime (customary law as codified by the Draft Articles on State Responsibility), without an adequate explanation for these choices in the reasoning of each respective Award. Instead, what appears implicit from the manner by which the Tribunals disposed of their methodological choices is that the “necessity” defense under Article 25 was already *assumed* to have some form of relationship or nexus to Article XI of the U.S.-Argentina BIT. All of the Awards interpreting Article XI to date have carried this assumption in varying degrees, without sufficiently explaining why.

Clearly, there is a need to return to fundamental dynamics under the law of treaties. To avoid the criticism that treaty appliers’ problematic choices of law (and their accompanying interpretive methodologies) thwart the stability of decisionmaking and the rule of law in the international legal order,<sup>271</sup> it is imperative that future tribunals interpreting Article XI (or other similarly-worded BIT clauses) make a clear preliminary statement of their choice of law that explains the tribunal’s internal criteria on how it employs external sources to derive treaty meanings. Unless there is clear textual support in the treaty language that incorporates the customary doctrine of “necessity” under Article 25, the choice of law should *exclusively* be the treaty provision stipulating non-precluded measures (e.g., Article XI in the U.S.-Argentina BIT) in relation to the elements of the unitary system of interpretation found in Article 31 of the VCLT. Regarding the specific case of Article XI of the U.S.-Argentina BIT, however, the inevitable choice of law should purely be Article XI. Based on Section 2’s discussion of conceptual-methodological incompatibilities between Article 25 and Article XI, Sections 1 and 2 have shown that Article XI’s textual formulation does not show that the parties to the U.S.-Argentina BIT intended to incorporate the customary doctrine of “necessity.” However, the text of other BIT clauses on similar non-precluded measures could foreseeably provide this nexus. For these cases, treaty appliers must therefore

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<sup>271</sup> A recent empirical survey of ICSID decisions observes that ICSID tribunals make interpretive arguments in a manner “that is quite far removed from the structures set out in Articles 31-32 of the VCLT.” Fauchald, *supra* note 12, at 358-59.

make methodological choices within the framework of Articles 31 and 32 of VCLT, and refer to the customary doctrine of “necessity” only when the treaty text indicates the parties’ intent to incorporate this customary norm.

The following two subsections of this Article show that the normative choices involving Article 25 and Article XI inherently constitute a basic conflict of norms for the treaty applier. As a corollary to this basic conflicts, the manner in which treaty appliers resolve this conflict will frame their view of the duties of a host State invoking Article XI both at the time of investment as well as subsequent to the implementation of the act or measure under Article XI, the quantum of evidence they will require from a host State to prove Article XI’s applicability to the host State’s act or measure, and to what degree the host State has a margin of appreciation in determining “essential security interests” under Article XI, and the extent to which the host State’s act or measure appears “reasonable” or “proportional” in relation to adjusting compensation claims brought under the U.S.-Argentina BIT. Section 3.1 looks to the treaty applier’s theoretical considerations in resolving the conflict of norms, while Section 3.2 applies the theoretical considerations to tentatively propose functional guideposts to interpreting Article XI (and other similarly-worded treaty clauses) in the future. By returning to the fundamental interpretive rules in Articles 31 and 32 of the VCLT, the author hopes that future decision-making on Article XI-type clauses will become more methodologically-transparent and outcome-predictive.

### 3.1. Article XI as *Lex Specialis vis-a-vis* Article 25

At first glance, the treaty applier’s interpretive choices on Article XI and Article 25 do not appear to represent a real normative conflict. The traditional formulation of a conflict is captured by Wilfred Jenks’ classical 1953 treatise: “A conflict in the strict sense of direct incompatibility arises only where a party to a treaty cannot simultaneously comply with its obligations under both treaties.”<sup>272</sup>

The foregoing definition implies that “the norms are mutually exclusive; they cannot coexist in a legal order. Compliance with

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<sup>272</sup> Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT’L L. 401, 426 (1953).

one norm entails non-compliance with the other.”<sup>273</sup> Under this formulation, there does not appear to be a direct conflict between Article XI and Article 25. A State’s *ipso facto* implementation of an act or measure encompassed by the classes of “necessary” measures under Article XI will not, on its face, breach Article 25. Rather, as discussed in Section 2, the conceptual-methodological incompatibilities between Article XI and Article 25 make the case for separating one norm from the other. The applicability of Article XI can thus be conceptually divided from the issue of compliance with Article 25. A further point that favors conceptual separation is the language of Article XI (“This Treaty shall not preclude the application by either Party of measures necessary . . .”), which appears permissive, rather than prohibitory, of certain types of State actions or measures. It does not appear that conduct permitted under Article XI is conversely prohibited under Article 25.<sup>274</sup>

However, as the *Sempra*, *LG&E*, *CMS Gas*, and *Continental* cases have shown there is an interpretive conflict between an exclusive consideration of Article XI within the confines of conventional law and a blended interpretation of Article XI involving the customary doctrine of “necessity” in Article 25. In its 2006 report, the International Law Commission’s Study Group on the Fragmentation of International Law defined a “relationship of interpretation” as the case “where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such a situation, both norms are applied in conjunction.”<sup>275</sup> Considering the conceptual-methodological incompatibilities between Article 25 and Article XI discussed in Section 2, it cannot be said that the customary doctrine of “necessity” codified under Article 25 could bear such a

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<sup>273</sup> SEYED ALI SADAT AKHAVI, *METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES* 5 (2003).

<sup>274</sup> See Erich Vranes, *The Definition of ‘Norm Conflict’ in International Law and Legal Theory*, 17 *EUR. J. INT’L L.* 395, 404–05 (2006) (questioning narrow definition of normative conflicts).

<sup>275</sup> *Report of the International Law Commission to the General Assembly, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/61/10, reprinted in [2006] 2 *Y.B. INT’L L. COMM’N*, U.N. Doc. A/61/10, available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1\\_9\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf) [hereinafter ILC, *Conclusions*].

“relationship of interpretation” to Article XI, more so where the text and drafting history of Article XI do not show that the parties to the U.S.-Argentina BIT intended such a relationship. As such, what subsists for the treaty applier in considering Article XI vis-à-vis Article 25 is a “relationship of conflict,” defined by the ILC as the case “where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them. The basic rules concerning the resolution of normative conflicts are to be found in the VCLT.”<sup>276</sup> The ILC stresses the importance of following the framework of treaty interpretation under Articles 31-33 of the VCLT, and states that harmonization is a “generally accepted principle” where, “when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”<sup>277</sup>

The interpretive issue for the treaty applier in regard to Article XI, therefore, is one of priority between the *lex specialis* standard (Article XI) and a customary norm (the defense of “necessity” codified under Article 25). Under the maxim *lex specialis derogat legi generali*, priority among norms dealing with the same subject matter should be given to the norm that is more specific, even where the norms involve treaty and non-treaty standards (such as custom, in this case).<sup>278</sup> According to the ILC, the rationale for this principle is that the special law, “being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.”<sup>279</sup>

The same may be said of Article XI. Treaty appliers of the U.S.-Argentina BIT are better advised to first examine the entire text and structural design of the U.S.-Argentina BIT and the obligations contained therein when they endeavor to derive the meaning and legal consequences to Article XI, instead of immediately reaching for external sources (such as the doctrine of “necessity” codified under Article 25, or, in the *Continental Award*, GATT and WTO jurisprudence relating to Article XX of GATT 1947) that do not appear to have been foremost (if ever) in the consideration of the

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<sup>276</sup> *Id.* § 1(2).

<sup>277</sup> *Id.* § 1(4).

<sup>278</sup> AKHAVI, *supra* note 273, at 101-03.

<sup>279</sup> ILC, *Conclusions*, *supra* note 275, § 2(7).

treaty drafters. Straining to infuse substantive content to Article XI, when the treaty drafting history or *travaux préparatoires* do not indicate consideration of the customary doctrine of “necessity” in the first place, is a precipitate exercise that creates the appearance of arbitrariness in international decision-making. Regrettably, the *Sempra*, *LG&E*, *CMS Gas*, or *Continental* awards did not pay thorough attention to the full text and structural design of the U.S.-Argentina BIT in interpreting Article XI. While it is certainly arguable that the majority of these decisions reached the correct result (more on factual grounds), treaty appliers’ interpretive methodologies should not be masked in obscurity.

It is also important to consider that the entirety of the U.S.-Argentina BIT constitutes a “special regime” that is itself *lex specialis*. The ILC defines a “special regime” as a “group of rules and principles concerned with a particular subject matter [that] often have their own institutions to administer the relevant rules”<sup>280</sup> and usually fall under one of three types: (1) one where “a violation of a particular group of (primary) rules is accompanied by a special set of (secondary) rules concerning breach and reactions to breach”; (2) one formed by “a set of special rules, including rights and obligations, relating to a special subject matter”; or (3) one where “all the rules and principles that regulate a certain problem area are collected together.”<sup>281</sup> The U.S.-Argentina BIT fits within the first two types of special regimes. It is specifically intended by the parties to promote greater economic cooperation and investment between them, based on fair and equitable treatment and under a stable legal framework that encourages reciprocal protection of investment.<sup>282</sup> It contains special rules governing rights and obligations of the host State and investors from the treaty parties in relation to their respective investments. More importantly, it provides various anticipatory and remedial mechanisms for breach of substantive obligations: (1) reservation of the right to deny advantages of the treaty in third-party control situations;<sup>283</sup> (2) the right to make exceptions to national treatment, subject to duties of notification;<sup>284</sup> (3) dispute resolution mechanisms, along with the duty to promptly consult

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<sup>280</sup> *Id.* § 2(11).

<sup>281</sup> *Id.* § 2(12).

<sup>282</sup> U.S.-Argentina BIT, *supra* note 14, pmb1.

<sup>283</sup> *Id.* art. I(2) (relating to art. II(9)).

<sup>284</sup> *Id.* art. II(1) (relating to the Protocol to the U.S.-Argentina BIT).

and discuss matters relating to interpretation or application of the treaty;<sup>285</sup> (4) in case of direct or indirect expropriation or nationalization, the duty to pay prompt, adequate, and effective compensation (specifically defined as the “fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier . . . includ[ing] interest at a commercially reasonable rate from the date of expropriation”;<sup>286</sup> (5) for nationals or companies of either party whose investment has been partly or wholly expropriated, the right to prompt review by appropriate judicial or administrative authorities;<sup>287</sup> and (6) the right to terminate the treaty after written notice to the other party.<sup>288</sup>

Thus, when the *Continental* Tribunal interpreted Article XI to mean that none of the substantive obligations of the U.S.-Argentina BIT would ever apply when a State act or measure is covered by Article XI, the Tribunal made an interpretive choice automatically rejecting the entire *lex specialis* that is the U.S.-Argentina BIT. As previously discussed in Section 1.4, the Tribunal did not cite authorities supporting this interpretation other than the *Ad Hoc* Committee Decision in *CMS Gas* (which, likewise, did not cite any legal authority for this position). To reiterate, the text of Article XI does not favor giving this drastic effect of suspension, modification, or termination of obligations under the U.S.-Argentina BIT. Nowhere in the Tribunal’s reasoning in the *Continental* Award were there legal reasons furnished for the sweeping rejection of *lex specialis* substantive obligations.

As discussed in Section 2.4, the more cogent approach to interpreting Article XI as the *lex specialis* lies mainly with the tenets of harmonization that the ILC has already explicated in its 2006 Report. Accordingly, treaty appliers should look to the ordinary meaning of the text of Article XI in relation to the other substantive provisions of the U.S.-Argentina BIT. (As discussed in Section 2.4, suspension of substantive obligations does not appear to have textual support from Article XI in relation to the rest of the provisions of the U.S.-Argentina BIT). They should likewise be mindful of the object and purpose of the U.S.-Argentina BIT, which

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<sup>285</sup> *Id.* arts. VI–VIII.

<sup>286</sup> *Id.* art. IV(1).

<sup>287</sup> *Id.* art. IV(2).

<sup>288</sup> *Id.* art. XIV(2).

is to provide a stable framework for investment that encourages reciprocal protection among parties and their respective investors. A textually-unsupported, blanket and indefinite exclusion of a State act or measure under Article XI from the substantive obligations of the U.S.-Argentina BIT does not advance, and instead defeats, this object and purpose. To reiterate, the interpretation that better harmonizes Article XI within the overriding framework and structural design of *lex specialis* obligations in the U.S.-Argentina BIT is to treat Article XI as a defense pleaded by a host State, when its BIT counterpart State Party raises separate claims of international responsibility arising from the continuum of operative acts that gave rise to breaches of BIT obligations.

That said, it is difficult to offer an immutable *a priori* interpretation of the one-sentence formulation of Article XI without considering actual factual circumstances giving rise to the legal standards contained in Article XI. Determining whether a State act or measure is “necessary” under Article XI for being one that involves the “maintenance of public order,” “the fulfilment of obligations with respect to the maintenance or restoration of international peace or security,” or the “*protection of essential interests*,” involves the treaty applier’s appreciation of the factual circumstances that approximate these legal standards. Factual phenomena must be carefully calibrated with legal norms.<sup>289</sup> In this process of normative conflict-resolution and interpretation, the treaty applier should openly justify his or her interpretive methodology within the governing dynamics of Articles 31 and 32 of the VCLT. This justification is clearly lacking from the decisions in *Sempra*, *LG&E*, *CMS Gas*, and *Continental*, and largely accounts for the conceptually-problematic transposition of meaning and legal effect from the customary doctrine of “necessity” under Article 25 to Article XI.

It is only by treating the entirety of the U.S.-Argentina BIT as the governing *lex specialis* that the treaty applier could reach the “more equitable result” to rationalize interpretation. This means that even with the applicability of Article XI, the U.S.-Argentina BIT remains in force, and the host State retains its duties both to

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<sup>289</sup> See generally JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1998) (providing a sociologically informed conceptualization of law and basic rights).

the investor and its counterpart State Party in the U.S.-Argentina BIT. If there are breaches of substantive obligations under the U.S.-Argentina BIT arising from the State's act or measure under Article XI, it is for the treaty applier to distinguish modalities of responsibility to the investor and the counterpart State Party. Article XI can only be used by the treaty applier to adjudicate state responsibility, and accordingly calibrate the reasonability of the State's (non)compliance with other substantive duties, such as the injured State's rights under general international law to compensation and to exact performance of treaty obligations. On the other hand, Article XI cannot be used to deny liability to an investor for compensation for direct or indirect expropriations under the U.S.-Argentina BIT, or even for damages in the case of "unlawful expropriations."<sup>290</sup>

As the *Sempra*, *LG&E*, *CMS Gas* and *Continental* cases show, a State's invocation of Article XI does not escape review under the same dispute resolution mechanisms provided for in the U.S.-Argentina BIT.<sup>291</sup> This balancing role of adjudication, under a setting of methodological openness, is precisely what makes treaty interpretation "to some extent an art, not an exact science."<sup>292</sup>

### 3.2. Possible Guideposts for Consideration in Article XI Interpretation

Without the facts of actual cases or controversies, it is difficult to definitively interpret Article XI (and similarly-worded treaty provisions on non-precluded measures). As discussed in the previous subsection, the treaty applier assumes the task of calibrating Article XI alongside the rest of the provisions of the U.S.-Argentina BIT in determining the qualitative level of compliance to be observed by the host State invoking Article XI, only as against its counterpart State Party.

The choice of the *lex specialis* (Article XI) as the exclusive operative norm (and devoid of the infusion of substantive content from the customary doctrine of "necessity" under Article 25),

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<sup>290</sup> Reisman, *supra* note 211, at 61. See *ADC Affiliate Ltd. v. Hungary*, Final Award, ICSID Case No. ARB/03/16, paras. 480-85 (Oct. 2, 2006) (laying out the applicable standard for assessing damages).

<sup>291</sup> The fact that ICSID Tribunals chose to accept jurisdiction and exercise their respective competencies over the disputes in these cases only underscores that the U.S.-Argentina BIT was not suspended, modified, or terminated by Argentina's invocation of Article XI.

<sup>292</sup> ILC, *Draft Articles on the Law of Treaties*, *supra* note 7, at 218.



however, raises several preliminary considerations for the treaty applier in future interpretive applications of Article XI. At the very least, the treaty applier's choice of the *lex specialis* should affect the complexion of other interrelated aspects of adjudication when a State undertakes an Article XI-type act or measure.

The first aspect involves the treaty applier's perspective on the duties of the host State, both at the time the investment was entered into, and at the time the State implements an act or measure under the rubric of the "necessity" defense. As seen in the *Sempra*, *LG&E*, *CMS Gas*, and *Continental* awards, Argentina invoked the customary defense of "necessity" in relation to Article XI in order to plead release from its BIT obligations to observe fair and equitable treatment, full protection or security of investment, and the most favored nation clause, as well as to pay compensation for acts of expropriation.

However, Article 55 of the Draft Articles on State Responsibility clearly states that the *lex specialis* alone controls "where 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."<sup>293</sup> Since the various provisions of the U.S.-Argentina BIT themselves contain the conditions for determining the existence of a breach, and subsequently, the content of the State's international responsibility, the treaty applier's determination of the duties of the host State should be relatively straightforward. Thus, at the time that the investment is entered into, the host State has positive duties, among others, to: (1) "permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies" (national treatment);<sup>294</sup> (2) "at all times accord [the investment] fair and equitable treatment," where the investment shall "enjoy full protection and security and shall in no case be accorded treatment less than that required by international law" (fair and equitable treatment);<sup>295</sup> (3) "observe any obligation it may have entered into with regard to investments" (umbrella clause);<sup>296</sup>

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<sup>293</sup> ILC, *Draft Articles on Responsibility of States*, *supra* note 215, at 140 (Draft art. 55).

<sup>294</sup> U.S.-Argentina BIT, *supra* note 14, art. II(1).

<sup>295</sup> *Id.* arts. II(2)(a), XII(1).

<sup>296</sup> *Id.* art. II(2)(c).

(4) permit nationals of either party to “enter and remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment” (entry into territory);<sup>297</sup> (5) permit companies making the investment “to engage top managerial personnel of their choice, regardless of nationality” (choice of management);<sup>298</sup> and (6) provide an open regulatory framework that does “not impair the substance of any of the rights set forth in this Treaty,” with access to effective means of remedial redress and enforcement of investor rights (assertion of claims and enforcement of rights).<sup>299</sup>

Subsequent to the entry of the investment, the U.S.-Argentina BIT stipulates negative duties, among others, for host States designed to ensure investor protection: (1) non-impairment of the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments through arbitrary or discriminatory measures (non-impairment through arbitrary or discriminatory measures);<sup>300</sup> (2) prohibition against direct or indirect expropriation or nationalization, except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II(2) (expropriation);<sup>301</sup> and (3) prohibition against delay or obstruction of transfers related to an investment (*transfers*).<sup>302</sup> Finally, the U.S.-Argentina BIT expressly provides for resort to consultation, negotiation, and failing these procedures, binding arbitration, in the event that an investment dispute arises. Considering the totality of all of positive and negative duties of the host State in the *lex specialis* regime of the U.S.-Argentina BIT, the treaty applier should be able to weigh the host State’s factual compliance with these duties alongside the “permissive” language of measures under Article XI. To a lesser extent, this was undertaken by the ICSID Tribunals in the *Sempra*, *LG&E*, and *CMS Gas* cases, where the Tribunals commonly accorded considerable weight to Argentina’s specific guarantees in the Licenses to the oil distribution/utilities sectors to characterize Argentina’s heavier

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<sup>297</sup> *Id.* art. II(3).

<sup>298</sup> *Id.* art. II(4).

<sup>299</sup> *Id.* arts. II(6), II(7), III.

<sup>300</sup> *Id.* art. II(2)(b).

<sup>301</sup> *Id.* art. IV(1).

<sup>302</sup> *Id.* art. V.

duties as a host State in relation to these sectors, as against Argentina's permissive authority under Article XI to implement general emergency measures during the Argentine financial crisis. This can be distinguished from the facts in *Continental*, which did not contain similar industry-specific guarantees at the time the investment was made.

Precisely because the body of *lex specialis* alone under the U.S.-Argentina BIT controls the treaty applier's perspective on the duties of the host State, the treaty applier can undertake an informed process of balancing qualitative compliance with such duties alongside the "permissive" conduct of non-precluded measures contemplated in Article XI. It is only when the treaty applier arbitrarily infuses the customary doctrine of "necessity" under Article 25 (which, as previously discussed, is conceptually and methodologically incompatible with Article XI) to provide substantive content that the topography of host State duties becomes inconsistent and incoherent. As shown in Part 2 the treaty applier's balancing task becomes complicated with this needless merger of different (and clearly incompatible) normative legal regimes.<sup>303</sup>

The second aspect involves the question of evidence. When the treaty applier focuses on *lex specialis* alone (e.g. the U.S.-Argentina BIT, since, as previously shown, the customary defense of "necessity" cannot be treated as an applicable rule of international law)<sup>304</sup>, what quantum of evidence will suffice to show that a host

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<sup>303</sup> See Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007); International Law Commission, *supra* note 215, at 140 (Draft Art. 55).

It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases, it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be "determined" by the special rule and the principle embodied in article 55 will apply. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. . . .

For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.

*Id.* (emphasis added).

<sup>304</sup> See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S.

State's act or measure is properly encompassed within any of the three classes of "necessary" measures under Article XI? To what extent, if at all, will the treaty applier defer to the host State's discretion in determining that a measure serves the "maintenance of public order," "fulfilment of obligations with respect to the maintenance of international peace or security," or "the protection of essential security interests"? Again, a deeper consideration of *lex specialis* as a whole should guide the treaty applier's evidentiary considerations.

It may be recalled that in *Sempra, LG & E, CMS Gas*, as well as *Continental*, the ICSID Tribunals were careful to assert that they were not substituting their own judgment for the economic policy and financial judgment of the Argentine government. However, it is clear that the burden of proof for proving the applicability of Article XI to its Capital Control Regime measures lay with Argentina, who had invoked this treaty provision. This initial assignment of probative burden is consistent with the broad general rule in international tribunals that "the burden of proof rests upon him who asserts the affirmative of a proposition that if not substantiated will result in a decision adverse to his contention."<sup>305</sup>

The quantum of evidence exacted by the ICSID Tribunals in *Sempra, LG&E, CMS Gas*, and *Continental* cases inevitably depended on the Tribunals' respective qualitative appreciation of the legal standards<sup>306</sup> "maintenance of public order," "fulfilment of obligations with respect to the maintenance of international peace or security," or "the protection of essential security interests," juxtaposed with the overall design and structure of the U.S.-

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159 ("The Tribunal shall decide a dispute *in accordance with such rules of law as may be agreed by the parties. . .*") (emphasis added).

<sup>305</sup> DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 127 (Univ. of Virginia Press, revised ed., 1975); See MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 369 (1996) (explaining that the party who makes allegations regarding a disputed fact or issue bears the burden of proving such fact or issue).

<sup>306</sup> Notably, the Tribunals made varying degrees of comparative legal analysis, particularly in explaining the content of "public order" in relation to the Spanish *orden publico* and the French *ordre publique*. This method of comparative law reference has been observed as a common methodological phenomenon in international arbitration. See Frédéric Gilles Sourgens, *Comparative Law as Rhetoric: An Analysis of the Use of Comparative Law in International Arbitration*, 8 PEPP. DISP. RESOL. L.J. 1 (2007) (noting the frequent use of comparative law in arbitral rhetoric).

Argentina BIT. In *Sempra*, the Tribunal restated the object and purpose of the U.S.-Argentina BIT before accepting economic emergencies as reasonably within the standard of “essential security interests.”<sup>307</sup> Similar reasoning was employed by the Tribunal in *LG&E*, although it held that Argentina was liable for compensation “once the state of necessity was over.”<sup>308</sup> The *CMS Gas* Tribunal followed the same broad interpretation of “essential security interests” and found the existence of a state of necessity, but held that Argentina had a duty to compensate that was analogous to the material loss liability provision in Article 27 of the Articles on State Responsibility.<sup>309</sup> Finally, as previously discussed, the *Continental* Tribunal determined the existence of “essential security interests” triggering Article XI under a different (and lower) threshold driven by GATT and WTO jurisprudence in relation to Article XX of GATT 1947.<sup>310</sup>

As has been argued throughout this Article, however, the qualitative appreciation of legal standards in Article XI cannot be divorced from a holistic consideration of the text, design, and structure of the U.S.-Argentina BIT. While the factual circumstances of the Argentine economic crisis considered by the ICSID Tribunals in *Sempra*, *LG&E*, *CMS Gas*, and *Continental* appear to be reasonably embraced within the concept of “essential security interests,” what remains in dispute is the legal effect attached by each of these Tribunals to “non-preclusion” under Article XI. In this case, Argentina ought to have been assigned the heavier burden of proof to show that the legal effect of non-preclusion was (as it indeed claimed) outright exculpation from liability under the rest of the substantive obligations of the U.S.-Argentina BIT. Considering that the text of Article XI nowhere provided for this asserted legal effect, the *Continental* Tribunal (and likewise, the *Ad Hoc* Committee in *CMS Gas*) should have required evidence from Argentina, who was stating the affirmative proposition on Article XI’s supposed legal effect. Otherwise, the

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<sup>307</sup> *Sempra Energy Int’l v. Argentina*, Award, ICSID Case No. ARB/02/16, para. 139 (Sept. 28, 2007).

<sup>308</sup> *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability para. 265 (Oct. 3, 2006).

<sup>309</sup> *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, paras. 383–94 (May 12, 2005).

<sup>310</sup> *Cont’l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, para. 192 (Sept. 5, 2008).

reasonable inference drawn from the text of Article XI, as well as the object and purpose of the parties in entering into the U.S.-Argentina BIT, would be to ensure that the substantive obligations of the treaty would remain binding and in force. Exceptions to substantive coverage ought not to be lightly assumed.<sup>311</sup>

To a considerable extent, the Tribunals in *Sempra*, *LG&E*, *CMS Gas*, and *Continental* observed this method of allocation of the burden of proof for a different, but related matter—ascertaining the nature of Article XI as “self-judging” or “non-self-judging.” Since Argentina and the respective claimant-investors advanced their own affirmative views on this subject, both parties were called upon to present evidence to show that the parties to the U.S.-Argentina BIT intended that the Article would be self-judging. Owing to their observance of the allocative method on the burden of proof in this matter, it is unsurprising that the Tribunals in *Sempra*, *LG&E*, *CMS Gas* and *Continental* separately reached the unanimous and well-considered conclusion that Article XI is not a “self-judging” clause.

The last aspect that should affect the treaty applier’s choice of the *lex specialis* is the issue of damages and/or compensation. Viewing the U.S.-Argentina BIT as the *lex specialis* should not be taken as inhibitive to using the general rules on state responsibility in a residual manner,<sup>312</sup> particularly on the issue of damages where the text of the U.S.-Argentina BIT is entirely silent. (The issue of compensation under Article IV(1) of the U.S.-Argentina BIT is directed towards the legality of an expropriation, and not as a means of reparation for breaches of the substantive obligations contained throughout the entire U.S.-Argentina BIT). This is utterly different from the situation where Article XI already contains a specific normative formulation, and a treaty applier

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<sup>311</sup> See Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT’L LAW. 47 (1994) (arguing that international tribunals are poorly equipped for the fact-finding task).

<sup>312</sup> See Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT’L L. 483, 500–01 (2006).

First, the rules of the special regime, ordinarily codified in a treaty instrument, must be interpreted according to Article 31 of the Vienna Convention on the Law of Treaties in order to establish whether the states parties intended the regime’s secondary rules to be exhaustive and complete. Second, resort must be had to general international law to verify whether the latter permits such derogation.

*Id.*

erroneously attempts to infuse substantive content to this formulation from a separate legal regime such as the customary doctrine of “necessity.” As previously discussed in Section 3.1 in relation to Section 2, given the abject incompatibilities between both norms, the customary doctrine of “necessity” bears a “relationship of conflict” with Article XI.

In the case of damages, however, the general rules of international law, specifically customary doctrines on reparation as codified in the Articles on State Responsibility, can be viewed as a “relevant rule of international law” within the interpretive framework of Article 31(3) of the Vienna Convention on the Law of Treaties. Awarding damages in case of treaty breaches is entirely consistent with the U.S.-Argentina BIT’s objects of “maintaining a stable framework for investment” and encouraging “reciprocal protection of investment.” Considering that the U.S.-Argentina BIT’s dispute resolution mechanisms in Articles VI and VII contemplates resort to binding arbitration before the International Centre for the Settlement of Investment Disputes (“ICSID”), it is reasonable to conclude that parties foresaw the application of Article 42(1) of the ICSID Convention (which entitles ICSID Tribunals to decide a dispute in accordance with “applicable rules of international law.”) The law on reparations, specifically as codified in Articles 31 and 34 of the Articles on State Responsibility, inimitably comprise part of the corpus of such applicable international legal rules in investment adjudication.<sup>313</sup>

In summary, interpreting Article XI against the context of the entire U.S.-Argentina BIT makes the exclusive choice of the *lex specialis* inevitable. The glaring conceptual-methodological incompatibilities between the customary defense of “necessity” under Article 25 and non-precluded measures under Article XI sufficiently disposes of any interpretive function of the former towards the latter. Where the text of the non-precluded measures

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<sup>313</sup> In the cases so far published, ICSID tribunals have framed the obligations imposed by their awards in pecuniary terms. This not due to a belief that they lack the power to proceed otherwise. Rather, the cases involve situations in which the investment relationship had broken down and the claimants had defined their demands in pecuniary terms. It is entirely possible that future cases will involve disputes arising from ongoing relationships in which awards providing for specific performance or injunctions become relevant. Tribunals imposing such non-pecuniary obligations should provide for a pecuniary alternative in case of non-performance such as liquidated damages, penalties, or another obligation to pay a certain sum of money. CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1124–26 (2001).

clause in a treaty specifically provides for resort to such other types of normative regimes under international law, however, such norms could be admitted to establish a “relationship of interpretation” between the treaty standard and the non-treaty standard. This is perfectly consistent with the framework of the unitary system of interpretation under Article 31 of the VCLT and supplementary means of interpretation under Article 32 of the VCLT.

#### 4. CONCLUSION

Financial downturns, economic recessions, and other economic emergencies have been “associated with the peaks of business cycles,”<sup>314</sup> the trends of which appear almost as historically inevitable as death and taxes.<sup>315</sup> Even as of this writing, the 2008 global financial crisis has yet to fully unravel, and governments throughout the world are besieged by calls for recovery and reform.<sup>316</sup> Under a persistent climate of high risk, market uncertainty, and capital volatility, it is not unlikely that more governments will find inspiration from Argentina’s triumphant use of the defense of necessity or economic emergency in the *Continental* Award to defeat investor claims. At the very least, the *Continental* Tribunal’s interpretation of non-precluded measures under Article XI could spur similar assertions with respect to other bilateral investment treaties throughout the world that contain clauses akin to Article XI. Independent of the interpretation of Article XI of the U.S.-Argentina BIT, the quandary about the interpretation of treaty clauses involving non-precluded measures is far from over.

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<sup>314</sup> CHARLES P. KINDLEBERGER, *MANIAS, PANICS AND CRASHES: A HISTORY OF FINANCIAL CRISES* 3 (4th ed. 2000).

<sup>315</sup> See JEAN TIROLE, *FINANCIAL CRISES, LIQUIDITY AND THE INTERNATIONAL MONETARY SYSTEM* (2002) (focusing on market failure, crisis prevention, and institutional design); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002) (discussing how globalization has influenced economic development); *THE ASIAN FINANCIAL CRISIS: LESSONS FOR A RESILIENT ASIA* (Wing Thye Woo, Jeffrey D. Sachs, & Klaus Schwab eds. 2000) (analyzing the Asian Financial Crisis of 1997-1999).

<sup>316</sup> ROBERT J. SHILLER, *THE SUBPRIME SOLUTION: HOW TODAY’S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT* (2008). See *Global Economy in ‘Major Downturn’ from Financial Crisis: IMF*, AGENCE FRANCE-PRESSE, Oct. 8, 2008, available at <http://afp.google.com/article/ALeqM5gaPha4zcGA1e5SzeYwZW6EWKBMDQ> (reporting that the global economy is in a major downturn while entering 2009 after a shock in financial markets).



There is an urgent need to address the lack of transparency and coherence in treaty appliers' interpretive methodologies. As this Article shows, the recurring problem of how to interpret Article XI of the U.S.-Argentina BIT exposes divergences in methodologies even among the various ICSID Tribunals in *Sempra*, *LG&E*, *CMS Gas*, and most recently, *Continental*. Deficiencies in *Continental*, the most recent of these Awards, do little to inspire confidence in the stability of the international legal investment regime. When treaty appliers appear to enjoy almost unfettered discretion in cherry-picking extrinsic sources from which to cull the supposed substantive content and legal effects of a bilateral treaty provision, without showing the justifications for its interpretive methodology within the canonical rules of interpretation in the law of treaties, there are obvious red flags to the practice and development of international investment law.

The logical response to stem this groundswell of instability lies with restoring fealty to interpretive rules under Articles 31 and 32 of the Vienna Convention on the Law of Treaties. This Article re-examined the infusion of the customary defense of "necessity" into the interpretation of Article XI against the components of the unitary system of interpretation in Article 31 of the VCLT, and showed that neither text, context, subsequent agreement or practice of the parties to the U.S.-Argentina BIT support the use of the customary norm as an interpretive tool. Conceptual and methodological incompatibilities between the customary defense of "necessity" (as codified under Article 25 of the Articles on State Responsibility) and Article XI also militate against the treaty applier's reference to Article 25 as a "relevant rule of international law" under Article 31(3) of the VCLT. Neither can the customary defense of "necessity" be used as a supplementary means of interpretation within the framework of Article 32 of the VCLT, since the fundamental requirements for using such supplementary means (whether in the *confirmatory* or *determinative* sense) to derive meaning are all wanting in the particular case of Article XI of the U.S.-Argentina BIT. Teleological scrutiny of the full compass of investment protections and treaty objectives in the U.S.-Argentina BIT also yields an additional argument against the use of the customary defense of "necessity" to interpret Article XI of the U.S.-Argentina BIT.

The consequences to forcing the customary defense of "necessity" into Article XI interpretation are not only legal. Policy and governance issues both pose countervailing considerations to

this form of interpretation. Uncertainty in ICSID Tribunals' interpretations of the same treaty provision undermines investor and host State confidence in the reliability of the dispute settlement procedures available in the international investment regime, and could likely deter recourse to binding arbitration when there is a higher perception of unpredictability of legal outcomes.<sup>317</sup> Investors undertaking cost-benefit analyses could be incentivized by this perception of poor recovery from litigation to precipitately pull out (capital or financial) investments altogether at the first signs of economic or financial crisis in the host State, instead of agreeing to alternative forms of restructuring (such as writing off distressed debt, corporate reorganizations, among others).<sup>318</sup> Increased volumes of capital flight, in turn, could plunge a host State into an even deeper and longer economic crisis than initially projected.<sup>319</sup>

At the same time, attaching an Article 25-type meaning (customary defense of "necessity") to Article XI-type non-precluded measures (and coupled with a *Continental*-like interpretation that non-preclusion would mean that no breach would ever arise from the bilateral investment treaty), itself creates a moral hazard for the conduct of host States in relation to investment treatment and protection. If permissively-worded BIT clauses on non-precluded measures (e.g. "This Treaty shall not preclude the application by either Party of measures necessary . . .") could suffice to cavalierly dispose of a host State's substantive obligations under the BIT, host States might conceivably relax the necessary diligence in corporate governance and investment protection at its own timeline, or for so long as the host State deems that its economy is in a "state of economic emergency" (or at the very least, presents macroeconomic indicators to reasonably support its economic judgment).

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<sup>317</sup> See Barnali Choudhury, *Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law*, 6 J. WORLD INVESTMENT & TRADE 297, 302-16 (2005).

<sup>318</sup> See Molly Zohn, *Filling the Void: International Legal Structures and Political Risk in Investment*, 31 FORDHAM INT'L L.J. 230, 282-83 (2007) (concluding that factors external to host countries greatly affect political risk within host countries, and thus investors have incentives to foster new methods of host country control).

<sup>319</sup> See CAPITAL FLIGHT AND CAPITAL CONTROLS IN DEVELOPING COUNTRIES (Gerald A. Epstein ed., 2005) (presenting case studies of capital flight in countries including South Africa, Turkey, and Brazil).

Can the customary defense of “necessity” ever transform the content of the conventional law on non-precluded measures? Additionally, given the contemporary legal regime governing international investment, is there still room for host States to plead “essential security interests”?

Answering both questions still requires adherence to the unitary system of interpretation under the VCLT. While the restrictive minority view on treaties states that the meanings of treaty norms could progressively incorporate subsequent “evolutionary” customary law development on the same subject matter,<sup>320</sup> it is difficult to draw this inference given the specific textual formulation of Article XI alongside the entire structural design of the U.S.-Argentina BIT. Thus, insofar as host State obligations to *investors* are concerned, the U.S.-Argentina BIT itself provided for delimitations that already contemplated and factored in political risk, and expressly segregated instances when substantive protections would not apply. This rationale powerfully dovetails with the sole arbitrator’s conclusions in the May 4, 1999 Final Award in *Himpurna California Energy Ltd. v. Republic of Indonesia*, where a host State’s liability for compensating a foreign investor was upheld notwithstanding the pleaded defense of deleterious consequences from the 1997 Asian financial crisis:

Parties entering into international contracts cannot claim unawareness of the risks of macro-economic adversities. Their effects may be extreme, but are nonetheless within the contemplation of the signatories. Moreover they are in the contemplation of financiers who evaluate the reliability of borrowers on the strength of contractual undertakings; and as they are in the contemplation of insurers who assess their willingness to provide cover to investors who also rely on such undertakings.<sup>321</sup>

The same rationale, however, may not be said to apply for the use of Article XI as between States Parties to the U.S.-Argentina BIT. With respect to legal obligations (whether arising from treaty,

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<sup>320</sup> NANCY KONTOU, *THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW* 17 (1995).

<sup>321</sup> *Himpurna California Energy Ltd. v. PT (Persero) Perusahaan Listrik Negara (Berm. v. Indon.)*, Award, 14 MEALEY’S INT’L ARB. REP. A-1, ¶¶ 411-13 (May 4, 1999).

customary international law, or general principles of international law) under the structure of state responsibility in general international law, States cannot be reasonably expected to hedge against political risks in the way investors and host States do. At best, States Parties to bilateral investment treaties could only expect adjustments in their relative claims and mutual expectations in relation to responsibilities to each other if they foresaw that either could, at a point in time, apply such “necessary measures.” This is all the “comfort” that Article XI could provide to States Parties to the U.S.-Argentina BIT, without doing violence to the VCLT’s unitary system of interpretation as was done in the *Continental* Award.

In this sense, “necessity” can be conceptually disaggregated—there is “necessity” which a government employs within its domestic legal order (as in legislative exercises which justify measures in relation to domestic constituents on the grounds of the *ordre publique* or *orden publico*); “necessity” which a government applies to condition and adjust citizens’ expectations in relation to how the state apparatus is deployed to affect individual or constitutional rights in emergency cases; and there is “necessity” which is *res inter alios acta* for investors enjoying contractual rights, but is permissibly raised among and between States in the international legal order. The treaty-applier’s task of making these distinctions is imperative to avoid the kind of confusion seen from the stream of Article XI cases from *Sempra* to *Continental*.

Certainly, future bilateral investment treaties could stipulate further detail on the legal effects of non-precluded measures, and countries are well within their rights if they decide to include a *Continental*-like interpretation of non-preclusion into the treaty text. However, unless it is clear from the treaty’s text, context, subsequent agreement or practice, or relevant rules of international law as specified in the treaty or intended by the parties to the treaty, the radical interpretation undertaken by the *Continental* Tribunal should not be read into existing bilateral investment treaty regimes. It is for parties to bilateral investment treaties to negotiate and provide for these specific legal consequences to non-precluded measures, and not for vacillating tribunals with opaque interpretive methodologies.