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May a State Justify Infringement of Investors' Rights by Financial Necessity?

Streszczenie

Pytanie o możliwość powołania się przez państwo na stan wyższej konieczności mającej usprawiedliwić podjęcie działań naruszających prawa inwestorów jest niezwykle istotne zarówno dla samych przedsiębiorców, jak i dla bezpieczeństwa gospodarczego. Szczególnego znaczenia kwestia ta nabiera w odniesieniu do kryzysu ekonomicznego, jaki miał miejsce w Argentynie na początku XXI wieku. Idea stanu wyższej konieczności wyłączającej bezprawność działania państwa stanowi obecnie normę międzynarodowego prawa zwyczajowego. Aby odpowiedzieć jednak na pytanie zadane w tytule, konieczne jest ustalenie zależności między prawem zwyczajowym a prawem konwencyjnym.

W przypadku spraw przeciwko Argentynie trybunały arbitrażowe nie mogły dojść do porozumienia, która norma prawna, mianowicie art. XI międzynarodowej umowy bilateralnej czy art. 25 *Artykułów o odpowiedzialności państw*, powinna być zastosowana najpierw. Tymczasem od tego rozstrzygnięcia zależał wynik sprawy. Przyjmując, że mimo obowiązującej normy konwencyjnej należy również wziąć pod uwagę prawo zwyczaj-

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owe, przynajmniej w charakterze pomocniczym, konieczne okazuje się przeanalizowanie poszczególnych przesłanek zawartych w art. 25 *Artykułów o odpowiedzialności państw*. Dodatkowo pojawia się problem możliwości powołania sie na stan wyższej konieczności w przypadku sporu między państwem a prywatną spółką, opartego jednakże na prawie krajowym. Wszystkie te rozważania zostały zawarte w niniejszym artykule.

Summary

A question about the possibility to invoke "necessity" in the state's defense in order to preclude wrongfulness of actions, which infringed investors' rights, is of paramount importance for entrepreneurs and an economic security; especially during an economic crisis such as the one which took place in Argentina at the beginning of 21st century. The notion of "necessity" precluding wrongfulness constitutes a customary law. In order to answer the question posed in the title of the paper, it is necessary to establish what the interactions between the customary law and the treaty law are. In cases against Argentina, arbitral tribunals could not come to a common conclusion, which norm of law should be applied at first: art. XI of the BIT or art. 25 of *Articles on State's Responsibility*; whereas the result of the case relied on the answer to that question. If we assume that, apart from a binding treaty norm, customary rule should be taken into account, at least as a supplementary source of law, then it is necessary to analyze particular premises included therein. In addition, it is questionable whether there is a possibility to invoke "state of necessity" in case of a dispute between a state and private company, but when based on national law rather than international. All of these considerations are included in the paper.

I. Introduction

The question posed in the title of this paper is of paramount importance for entrepreneurs trying to broaden their commercial activities and explore new markets. New investments are always connected with a certain risk, which has to be undertaken in order to achieve financial success. Investors' rights are usually protected by bilateral investments treaties [hereinafter: BITs]. Nevertheless, there are existing tools in public international law, which allow for a state's non-compliance with its treaty obligations in case of a grave and imminent peril. One of these tools is a possibility to invoke "state of necessity". The purpose of this paper is to analyze the notion of financial necessity and its influence on investors' rights, and also to answer the question whether the notion, as understood in

customary international law, may be applied to investor-state disputes. It should be borne in mind that due to the fact that the economic crisis is still affecting many countries, especially in Europe, all financially unstable states could revoke their international obligations because of unfavorable circumstances, which is unimaginable and would have an absolutely detrimental effect on investments. Therefore, a lot of attention will be given to limitations and premises, which a state has to take into consideration in order to invoke "state of necessity" in its defense.

II. Sources of law

In order to analyze the issue of financial necessity, several international documents and judgments will be taken into account. First of all, attention will be given to *Articles on the Responsibility of States for Internationally Wrongful Acts*[2] [hereinafter: ARSIWA]. Furthermore, in order to answer the question posed in the title, practice of the International Centre for Settlement of Investment Disputes [hereinafter: ICSID] will be particularly useful. Therefore, *Convention on the Settlement of Investment Disputes Between Sates and Nationals of Other States*[3], which establishes ICSID have to be taken into account. Due to the fact that the notion of financial necessity has been at stake mainly in arbitration against Argentina, a proper analysis will be limited to cases such as: *CMS Gas Transmission Company v. The Republic of Argentina*[4] [hereinafter: CMS], *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Republic of Argentina* [5] [hereinafter: LG&E], *Enron Corp. Ponderosa Assets L.P v The Republic of Argentina*[6] [hereinafter: Enron], *Sempra Energy International v. The Republic of Argentina* [7] [hereinafter: Sempra] and *Continental Casualty Company v. The Republic of Argentina* [8] [hereinafter: Continental Casualty]. In these cases, tribunals put utmost attention to the issue. Thus, despite the fact that there are also other cases dealing with the notion such as: *Impregilo S.p.A v. The Republic of Argentina*[9], *Metalpar S.A. and Buen Aire S.A. v. The Republic of Argentina*[10] or *National Grid P.L.C. v. The Republic of*

02 UN A/RES/56/83 (2001).
03 ICSID [1965] 575 UNTS 159.
04 [2005] Case No. ARB/01/8 (ICSID) [CMS].
05 [2006] Case No. ARB/02/1 (ICSID) [LG&E].
06 [2007] Case No. ARB/01/3 (ICSID) [Enron].
07 [2007] Case No. ARB/02/16 (ICSID) [Sempra].
08 [2008] Case No. ARB/03/9 (ICSID) [Continental Casualty].
09 [2011] Case No. ARB/07/17 (ICSID).
10 [2008] Case No. ARB/03/5 (ICSID).

Argentina[11], due to lack of a profound subject-matter analysis included therein, they will not be addressed.

In addition, findings of the annulment committees should be discussed. These include: *Decision of the Ad Hoc Committee on the Application for Annulment of The Republic of Argentina* in CMS case[12], *Decision of the Ad Hoc Committee on the Application for Annulment of The Republic of Argentina* in Enron case[13] and *Decision of the Ad Hoc Committee on the Application for Annulment of The Republic of Argentina* in Sempra case[14].

Most BITs do not contain express security exceptions. The United States of America's [hereinafter: the US] BITs, however, contain an example of provisions, which may be invoked in case of necessity[15]. Due to the fact that cases mentioned above are based on the BIT concluded between the US and The Republic of Argentina[16], certain provisions included in this document will be studied as well.

III. Argentinean crisis

Before going into a detailed case analysis, it is worth looking at factual circumstances which forced investors to seek protection against arbitral tribunals. Argentinean crisis lasted between 2001 and 2002. During the 1990s Argentina was perceived as a successful country with a developing economy. Foreign investors poured billions of dollars into the country, inflation rates were lower than those in the US at that time and Argentinean economy was one of the fastest growing economies in Latin America[17]. However, in 2001 it reached its breaking point. The government announced *inter alia* that its foreign debt could not be paid back[18]. The most important cause of the crisis is without doubt fixed exchange rate policy which was intended to be a stabilizing force for the economy after a period of hyperinflation (up to 200%). This policy, essentially, made the peso and dollar interchangeable[19]. As a result, measures taken by the government in order to safe

11 [2008] Case No. 1:09-cv-00248-RBW (UNCITRAL).
12 [2005] Case No. ARB/01/8, Annulment Proceedings (ICSID) [CMS Annulment].
13 [2007] Case No. ARB/01/3, Annulment Proceedings (ICSID) [Enron Annulment].
14 [2007] Case No. ARB/02/16, Annulment Proceedings (ICSID) [Sempra Annulment].
15 A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Austin 2009, p. 488.
16 *Treaty between the United States of America and Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment*, 1991, http://2001-2009.state.gov/documents/organization/43475.pdf, 24.04.2014.
17 *Economic crises*, http://ucatlas.ucsc.edu/sap/argentina_crisis.php, 15.05.2013.
18 *Ibidem*.
19 *Ibidem*.

Argentina from total collapse, infringed foreign investors' rights and resulted in arbitral proceedings mainly under the aegis of ICSID.

IV. The notion of necessity in the light of international law

Several international judicial cases indicate that the notion of necessity precluding wrongfulness is a concept that has been widespread in a legal doctrine for many years.

In the *Russian Indemnity* case from 1912, the government of the Ottoman Empire, to justify its delay in paying its debt, invoked among others the fact that it had been in an extremely difficult financial situation, which it described as *force majeure*[20]. The arbitral tribunal ruled that the obligation of a state to execute treaties may be weakened "if the very existence of the State is endangered and if fulfilling the international duty is self-destructive"[21]. However, the tribunal eventually concluded that

> it would be a manifest exaggeration to admit that the payment of the relatively small sum of 6 million francs owed to the Russian claimants would have imperiled the very existence of the Ottoman Empire or seriously endangered its internal or external situation[22].

In the *Case Concerning Various Serbian Loans Issued in France*[23] from 1929, the French government decided to commence proceedings on behalf of its nationals, who were creditors of the Kingdom of Serbs, Croats and Slovenes. The SCS government tried to justify non-payment of its obligation with *force majeure* labeled as "state of necessity" caused by World War I[24]. Despite a stirring speech of the government representative, Permanent Court of International Justice decided that it cannot be maintained that the war itself,

> despite its grave economic consequences, affected the legal obligations of the contracts between Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the indebted State from its duty[25].

20 *Report of the International Law Commission on the work of its fifty – third session, chapter IV State Responsibility*, Supplement No. A/56/10 GAOF, p. 81 [Report of the ILC].

21 *Russian Indemnity Case* [1912] UNRIAA Vol. XI (Sales No. 61.V.4), para. 394.

22 *Ibidem*.

23 [1929] PCIJ 20 series A, [Case Concerning Various Serbian Loans].

24 T. Yamada, *State of Necessity In International Law: A Study of International Judicial Cases*, 2005, http://www.law.kobegakuin.ac.jp/~jura/hogaku/34-4/34-4-04.pdf, 24.04.2014, p. 124.

25 Case Concerning Various Serbian Loans, paras. 39–40.

It can be argued that the Court did not discard the doctrine as such, although it rejected the suit in the light of the facts presented in this case[26].

Finally, in 1997 the International Court of Justice [hereinafter: ICJ] made a judgment in the *Gabcíkovo-Nagymaros Project* case between Hungary and Slovakia[27]. The former one was justifying its wrongfulness, which was a result of discontinuation of work on a barrage system, that is because of ecological necessity. The ICJ carefully considered an argument based on ARSIWA and profoundly analyzed all of its aspects[28]. It decided that "state of necessity is grounds recognized by customary international law for precluding the wrongfulness of an act inconsistent with an international obligation"[29]. It observed, moreover, that

> the aforementioned premise can only be accepted on an exceptional basis and that "state of necessity" can only be invoked under certain strictly defined conditions which must be thoroughly acceptable and the State concerned is not the sole judge of whether those conditions have been met[30].

As a consequence, it is agreed that art. 25 of ARSIWA, which refers to "state of necessity," is in harmony with customary international law. As indicated above, art. 25 sets up certain premises, which will be discussed in subsequent parts of this paper.

Apart from art. 25 of ARSIWA, agreements concluded between states may contain necessary provisions. One example is the US and Argentina BIT. Art. XI of the BIT that reads as follows:

> This Treaty shall not preclude taking measures necessary for the maintenance of public order by either Party, but also those to maintain or restore international peace or security, or to protect its own essential security interests.

At first glance, it is visible that art. XI allows the parties of the treaty to impose restrictions which are necessary to maintain public order etc. But it does not determine particular requirements which have to be met in order to invoke "state of necessity" in defense.

26 T. Yamada, *op.cit.*, p. 125.
27 (Hungary v. Slovakia), Judgment, 1997 ICJ Rep 7, [Gabcikovo-Nagymaros Project].
28 Report of the ILC, p. 82.
29 Gabcikovo-Nagymaros Project, para. 40.
30 *Ibidem*, paras. 51–52.

V. Problem with the determination which kind of law should be applied at first

One of main problems which arbitrators had to face was the question which kind of law, customary international law or provisions of the USA–Argentina BIT to be precise, should be taken into account at first and should be given utmost attention. One may claim that treaty should primarily be given priority, but in the case of an "internationalized contract", "it may be that defense will derived from precedents precluding wrongfulness in general international law"[31].

Different tribunals reached totally different conclusions on that matter. What is more, two awards were annulled because of the wrong answer to that question and one, despite not being annulled, was severely criticized.

1. Self-judging character of art. XI of the US-Argentine BIT?

One of the core Argentinean arguments in each case was that art. XI of the BIT has a self-judging character, thus burden lies solely on Argentina to decide whether the conditions preceding its application has been met. However, tribunals reached a common conclusion that the provision is not self-judging[32]. It is believed that "this may be derived, inter alia, from the absence of explicit language. (…) Argentina apparently provided no evidence that the self-judging issue was ever discussed during the BIT negotiations" [33].

2. Tribunals' findings

The tribunal in CMS firstly determined that "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"[34]. But, in fact, the tribunal did not go through it. Instead, it considered that art. XI has to be interpreted in the light of customary international law concerning "state of necessity" and concluded that if the conditions set up under international customary law are not met *per se*, Argentina's defense under art. XI has to be rejected[35].

31 R. D. Bishop, J. Crawford, *et al.*, *Foreign Investment Disputes: Cases, Materials and Commentary,* The Hague 2005, p. 1203.
32 CMS, paras. 366–373; LG&E, para. 212; Enron, paras. 322–342; Sempra, paras. 364–391.
33 A. Newcombe, L. Paradell, *op.cit.*, p. 492.
34 CMS, para. 359.
35 CMS Annulment, para. 124.

Such a stance was heavily criticized by the annulment committee, which underlined that the tribunal should have reverted to its previous assessment concerning the application of customary international law while examining Argentina's defense in respect to art. XI of the BIT[36]. It stressed as well that the tribunal should certainly have been more explicit in specifying that "the very same reasons which disqualified Argentina from relying on the customary law of necessity, meant that the measures it took could not be considered "necessary" for the purpose of art. XI either"[37]. The committee said that requirements under art. XI of the BIT are not the same as those under customary international law as codified in art. 25 of ARSIWA. It also decided that the tribunal made a glaring error of law[38] on that point and that assumption that both articles are on the same footing is incorrect[39]. What is the most important is the fact that the committee stated that defense under art. XI should be analyzed first because successful application of that rule would mean that the treaty had not been violated and that there is no need to examine whether Argentina can invoke necessity as it is described in international customary law. Moreover, "Art. 25 is an excuse which is only relevant once it has been decided that there would otherwise have been a breach of the substantive obligations"[40]. It was pointed out that art. XI of the BIT is *lex specialis* towards art. 25 of ARSIWA. Nevertheless, "despite the fact that these errors could have had a decisive impact on the operative part of the award, it could not have been annulled"[41]. What is interesting is that this argumentation was presented, *inter alia,* by Prof. James Crawford, who was a member of the annulment committee and is a "father" of ARSIWA and unquestionable authority in international law.

Furthermore, the tribunal in LG&E drew a conclusion from the decision of the annulment Committee in CMS. The tribunal ruled that it shall apply, firstly, the treaty; secondly, the general international law to the extent that was necessary; and thirdly, the Argentinean domestic law. The tribunal underscored that the claims and defenses mentioned derived primarily from the treaty[42]. In this regard, the tribunal determined that Argentina's "enactment of the *Emergency Law* was a necessary and legitimate measure"[43] and allowed invocation of "state of necessity" in its defense.

36 *Ibidem*.
37 *Ibidem*, para. 125.
38 *Ibidem*, para. 130.
39 *Ibidem*, para. 131.
40 *Ibidem*, para. 129.
41 *Ibidem*, para. 136.
42 LG&E, para. 206.
43 *Ibidem*, para. 240.

In Enron, the tribunal took slightly different approach. It was aware of the opinion of the annulment committee in CMS, but it stated that the problem is that the treaty itself does not deal with elements necessary for invocation of "state of necessity"[44]. Art. XI is indeed very general and without certain limits it is likely that it would be abused."The treaty thus becomes inseparable from the customary law standard insofar as the conditions for the operation of «state of necessity» are concerned"[45]. This reasoning seems to be quite convincing. The tribunal decided that art. XI of the BIT does not constitute *lex specialis* towards customary law because it is not precise at all and, in fact, it sets up a general rule, which must be complemented by an already existing one under specific requirements of customary law regarding invocation of "state of necessity"[46].

However, the annulment committee has concluded that, due to the tribunal's findings that the requirements of art. 25 of ARSIWA are not satisfied in this case and that art. XI of the BIT was inapplicable, an award must be annulled[47]. The committee has announced that both: the tribunal's decision that Argentina is precluded from relying on art. XI, and the tribunal's decision that Argentina is precluded from relying on the principle of necessity under customary international law, are tainted by annullable error[48]. In the author's view, the attitude of the annulment committee is ungrounded because the tribunal did apply art. 25 of ARSIWA and analyzed only art. XI of the BIT. The mere fact that the annulment committee has a different point of view on these matters should not serve as a basis for annulment.

The tribunal in Sempra shared the opinion of the tribunal in Enron and declared 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[49].

The tribunal highlighted that an analysis of the notion of necessity under art. XI of the BIT should reflect the one under customary international law as envisaged in art. 25 of ARSIWA[50]. The tribunal's conclusions were quite similar to those of the tribunal in Enron. It said that it is recognized that a treaty specifically dealing with a given matter will pre-

44 Enron, para. 334.
45 *Ibidem*.
46 *Ibidem*.
47 Enron Annulment, para. 405.
48 *Ibidem*.
49 Sempra, para. 376.
50 A. Martinez, *Invoking State Defenses in Investment Treaty Arbitration* [in:] *The Backlash against Investment Arbitration*, M. Waibel, A. Kaushal, *et al.* (ed.), Alphen aan den Rijn 2010, p. 324.

vail over more general rules of customary law. But it also paid attention to the fact that the treaty itself did not deal with the legal elements necessary for the legitimate invocation of "state of necessity" and decided that rules governing such situations will thus be found under customary law[51]. As a result, the tribunal referred to the analysis of art. 25 of ARSIWA and reached conclusion that conditions set up therein had not been met[52].

Nevertheless, some experts claimed that the US and Argentina "had decided to accord investors greater protection than they would receive under customary international law; but also greater protection to states to deal with threats to their national security"[53]. This position was, of course, once again criticized by the annulment committee, which basically reiterated findings of the previous annulment committees and reached a conclusion that the tribunal had failed to apply appropriate law, namely art. XI of the BIT; and by failing to do so, it committed a manifest abuse of power[54].

The tribunal in Continental Casualty agreed with both the annulment committee in CMS and the tribunal in LG&E and decided that "in the face of differences between the situation regulated under art. 25 of ARSIWA and that addressed by art. XI of the BIT, the conditions of application are not the same"[55]. Having found that Argentina was excused under art. XI of the BIT, the tribunal did not consider art. 25 of ARSIWA at all. It reflected instead on that country's reasoning and declared that it could not be based on a "state-of-necessity" defense as understood to be under customary international law. The tribunal then found it more appropriate to rely on the case law of General Agreement on Tariffs and Trade and World Trade Organization panels[56].

To sum up, different tribunals and committees reached three different conclusions. Some of them applied in fact only art. 25 of ARSIWA and based its analyses on premises included therein. The others decided that the treaty as *lex specialis* shall prevail. The main argument was that provisions contained in art. XI of the BIT and art. 25 of ARSIWA are not the same and in this regard art. XI being treaty provision should be applied at first. Only after reaching the conclusion that Argentina cannot rely on it, may art. 25 of ARSIWA be addressed. The third conclusion is that art. XI of the BIT cannot be treated as *lex specialis* to customary law due to its unclear and incomplete wording. Thus, it should be read together with provisions of customary international law determining the notion of necessity.

51 Sempra, para. 378.
52 *Ibidem*, para. 388.
53 Expert Statement of Professor William Burke-White, Hearing Transcript, Vol. 6, 2006, p. 1100.
54 Sempra Annulment, para. 165.
55 Continental Casualty, para. 167.
56 A. Martinez, *op.cit*., p. 322; Continental Casualty, para. 192.

3. Application of a *lex specialis* rule

Tribunals and annulment committees in some cases based its considerations on a *lex specialis* rule, although reaching different conclusions. One may say that treaties should prevail over custom and thus the answer to the question: Which kind of law should be applied at first? is easy. However, this is not always the case.

The *lex specialis derogat legi generali* rule is a widely recognized method of interpretation of treaties in international law. Indeed, in practice treaties often act as *lex specialis* in the case of customary law and general principles[57]. But, "the source of the norm whether a treaty, custom or general principle of law is not decisive for the determination of a more specific standard"[58]. Thus, it is equally possible that a customary rule may be more specific than a treaty and in such cases the customary rule prevails over the treaty[59].

Therefore, in the case in hand it could be argued that the notion of necessity is codified in a much more specific way in art. 25 of ARSIWA (reflecting customary law) than in art. XI of the BIT (a treaty norm).

But, it needs to be noticed that the aforementioned phrase applies only to the rules governing the same situations, and that some tribunals and committees emphasized that the provisions are not the same. Nevertheless, in the author's opinion, despite some differences in wording and application conditions, both provisions refer to the same notion, namely the notion of necessity, and a result of their successful application in both cases would be the same. However, it seems to be incorrect for the author of this paper that in the case in question customary law constitutes *lex specialis* to treaty law, and thus treaty provision should not be applied at all.

4. Other possibilities

Javier El-Hage in his paper defines four possible interactions between treaty norms and customary law. Firstly, he mentions a "full fallback" situation, which allows for an application of customary law when a treaty is silent on a subject. Secondly, he distinguishes a "harmonized fallback" situation when a treaty regulates a matter, but in a unclear way, which allows us to interpret it in a way consistent with a custom. Thirdly, he mentions

57 ILC, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Yearbook of the International Law Commission, vol. II, part 2, 2006, [ILC Conclusions]; *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v. United States of America), judgment, ICJ Rep. 1986, p. 14, p. 137, para. 274.

58 ILC Conclusions.

59 M. Akehursti, *The hierarchy of the sources of international law*, *British Yearbook of International Law* 47(1)/1975, p. 275.

a "contract–out" situation when a treaty provision is clear enough to exclude application of a custom and "non-interaction" situations when provisions refer to different matters[60].

Furthermore, he suggests that in the Argentinean cases, tribunals could opt for a second option and apply the treaty, but interpret it in compliance with a customary provision, and the justification being that art. XI of the BIT itself is not clear enough. El-Hage derives such a possibility not from a *lex specialis* rule, but from art. 31(3) (c) of the *Vienna Convention on the Law of the Treaties*[61] [hereinafter: VLCT], which states that while interpreting a treaty "any relevant rules of international law applicable in the relations between the parties" should be taken into account. This conclusion is the most convincing one for the author of this paper.

5. Partial conclusions

The aforementioned arguments indicate that the question: which kind of law should be applied at first? is of paramount importance, and very controversial at the same time. Tribunals and committees mainly decided to apply a *lex specialis* rule, but reached different conclusions. Some tribunals stated that customary international law is evidently more specific in regard to the issue of necessity and sets up certain requirements, while art. XI of the BIT is too general. Therefore, there is a need to read art. XI of the BIT in the light of art. 25 of ARSIWA. On the contrary, members of *ad hoc* committees highlighted that treaty law is *lex specialis* to customary law. Some tribunals and committees also stressed that the provisions of the BIT and ARSIWA referring to the notion of necessity are not the same, thus art. 25 of ARSIWA should be treated as a secondary rule of international law.

The problem is, though, that this could lead to the violation of investors' rights. Almost every measure infringing investors' rights could be regarded as necessary for the maintenance of public order. Thus, the most convincing approach for the author of this paper is that of art. XI of the BIT, and, due to its lack of clear and detailed wording, should be interpreted in a light of art. 25 of ARSIWA, according to the art. 31 (3) (c) of the VLCT rather than a *lex specialis* rule. At the same time the author acknowledges that the conclusion may be different if the provisions are not the same. Then, art. XI should be applied at first and art. 25 of ARSIWA should be applied only after the conclusion has been made that a state cannot rely on art. XI due to some other reasons.

[60] J. El-Hage, *How may tribunals apply the customary necessity rule to the Argentine cases? An analysis of ICSID decisions in respect to the interaction between art. XI of the U.S – Argentine BIT and the customary rule of necessity* [in:] *Yearbook on International Investment Law & Policy 2011–2012* K.P. Sauvant (ed.), p. 480.

[61] Vienna, [1969], 1155 UNTS 331.

Coming to that conclusion, it is justified to analyze further tribunals' findings in respect to the certain premises envisaged in art. 25 of ARSIWA.

VI. Premises included in art. 25 of ARSIWA

1. Essential interests of a state

In subsequent parts of this paper, the author will present attitudes of respective tribunals with regard to the particular premises, starting with the need for the essential interest of a state, that is willing to invoke "state of necessity" in its defense. The tribunal in CMS said that "it is convincing that the crisis was indeed severe and argument that nothing important happened is not tenable"[62]. Essential interests of Argentina were at stake, but, at the same time, the tribunal was not convinced that wrongfulness could be precluded[63].

The tribunal in LG&E, in turn, seemed to be convinced that

> the conditions from December 2001 constituted the highest degree of public disorder, threatened Argentina's essential security interests and might have resulted in total collapse of the government and the Argentinean State[64].

In Enron, the tribunal had as well no doubts that the crisis was severe, but, at the same time, it was not convinced that the situation threatened the very existence of Argentina and its independence involving an essential interest of a state[65].

2. Serious and imminent peril

The tribunal in CMS reiterated that it considered the situation as sufficiently difficult to justify the government's actions undertaken in order to prevent total economic disaster[66]. On the other hand, the tribunal stated that "even a severe economic crisis cannot necessarily be equated with a situation of total collapse, disintegration of society, or a total breakdown of the economy"[67]. Therefore, it can be concluded that the tribunal was not convinced whether an economic crisis can be perceived as a peril. The tribunal said as

62 CMS, para. 319.
63 *Ibidem*.
64 LG&E, para. 231.
65 Enron, para. 306.
66 CMS, para. 322.
67 *Ibidem*, para. 354.

well that "in comparison to other crises affecting different countries, it may be observed that they have not led to the derogation of international obligations"[68]. In Enron, the tribunal focused on an issue of control, and decided that there is no evidence that situation had become unmanageable[69]. Of course, the tribunal in LG&E ruled quite to the contrary.

3. The only way to safeguard an essential interest of a state

One of the most controversial requirements set up in art. 25 of ARSIWA is a condition that taking a measure which violates a state's obligation must be the only way to safeguard an essential interest of that state. The views of the parties and experts differed a lot on this matter, ranging from the support of measures imposed by the government to the discussion of a variety of alternatives[70]. After a profound analysis, the tribunal in CMS decided that measures in question were not the only possible ones. The situation was of course not simple and there was no certainty that other measures would be successful. But at least there were other possibilities satisfactory to the tribunal to conclude that the condition has not been met[71]. Not surprisingly, the tribunal in LG&E reached absolutely opposite conclusion, stating that an economic recovery package was the only means to respond to the crisis. The tribunal said that "although there may have been a number of ways to draft the economic recovery plan, the evidence presented before the tribunal demonstrated that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed"[72]. In Enron, the tribunal focused on a comparison of Argentina's situation with other economic crises, and concluded that there are always many other possibilities to address such economic disasters. It was not, however, demonstrated by the government representatives that any of them were available in the case in hand[73].

Unfortunately, the scarcity of evidence can be observed. Neither Argentina's nor Claimant's evidence is discussed[74]. The result is that "with probable exception for the parties in dispute, who knew the evidence provided, the decisions convey a sense of rigidity in applying this requirement of the law of necessity"[75].

68 *Ibidem*, para. 355.
69 Enron, para. 307.
70 CMS, para. 323.
71 CMS, para. 323.
72 LG&E, para. 257.
73 Enron, para. 308.
74 A. Newcombe, L. Paradell, *op.cit.*, p. 518.
75 *Ibidem*.

4. Measure does not seriously impair an essential interest of a state towards which an obligation exists or of the international community

The tribunal in CMS noted that it did not appear that the essential interest of the international community as such was affected in any relevant way, nor might a peremptory norm of international law have been compromised[76]. It was subsequently repeated by the tribunal in Enron[77] and in Sempra[78]. It seems that all tribunals made an assumption that Argentina allegedly infringed rights of investors rather than of the state towards which an obligation exists, namely the US, and thus this requirement has been met. In fact, it can be argued that the US indirectly suffered because, like every country, it is obliged to protect its nationals; and if their interest is endangered, it *per se* means an impairment of a state's interest. However, tribunals did not decide to deal with that matter more profoundly.

The reasoning in *Enron* and *Sempra,* in particular, suggests, without any excessive elaboration, that since investment obligations are owed to foreign investors, essential interests of the state are somehow to be substituted with interests of investors.

5. International obligation does not exclude possibility to invoke "state of necessity"

This premise was, in fact, almost fully neglected by respective tribunals because all of them concluded that in this case none of the international obligations of Argentina exclude invocation of "state of necessity". Quite to the contrary, art. XI of the BIT literally allows for an adoption of measures necessary in maintaining *inter alia* public order.

6. A state did not contribute to the situation

The above statement is the second most controversial condition. In CMS the tribunal observed that contribution must be "sufficiently substantial and not merely incidental or peripheral"[79]. In the case in hand, the tribunal concluded that "government's policies and their shortcomings significantly contributed to the crisis"[80]. Indeed, external factors appeared as well, although they do not exempt Argentina from responsibility[81]. In LG&E the tribunal encumbered Claimant with proving that Argentina had contributed

76 CMS, para. 325.
77 Enron, para. 310.
78 Sempra, para. 352.
79 CMS, para. 328.
80 *Ibidem*, para. 329.
81 *Ibidem*.

to the crisis and stated that Claimant failed to convince the tribunal about its assertions. Moreover, the tribunal stated that the attitude adopted by the Argentinean government "had shown a desire to slow down the severity of the crisis by all the means available"[82]. In Sempra, the tribunal decided that "the truth is somewhere in the middle, and factors which caused crisis were both internal and external"[83], which meant that Argentina, to some extent, had contributed to the crisis[84].

VII. Argentina Necessity Case

At the end, attention will be given to the very interesting case heard before the German Constitutional Court. On May 8, 2007, Bundesverfassungsgericht handed down a decision on the question whether Argentina could invoke necessity under general international law as an affirmative defense against claims brought in German courts by private individuals for the country›s default on sovereign bonds in early 2002[85]. The fact that "state of necessity" precludes the wrongfulness of a breach of international law has not been contested. However, the German Court wondered whether this rule is also applicable to relations between a state and individuals when a private contract, and not international law, is being violated. The Court held that "currently no rule of general international law can exists which gives a State, vis-à-vis private individuals, a right to suspend the performance of due financial obligations arising under private law, by invoking necessity based on insolvency"[86]. Similarly, the same court decided that ICSID practice is not sufficient because in investor – state disputes it is international law that is, allegedly, still infringed rather than private contracts governed by domestic law[87]. Due to the alleged lack of uniformity in the domestic legal orders, the Court considered itself incapable of finding out if necessity constituted a general principle of law, which would allow a state to suspend its payment obligations towards private individuals[88].

Nevertheless, decision was not unanimous. In her dissenting opinion, Judge Lübbe-Wolff disagreed with the findings of the majority. In her view, necessity does not only

82 LG&E, para. 256.
83 Sempra, para. 353.
84 *Ibidem*, para. 354.
85 S. W. Schill, *German Constitutional Court Rules on Necessity in Argentine Bondholder Case*, http://www.asil.org/insights070731.cfm, 15.05.2013.
86 *Argentina Necessity Case* [2007] Bundesverfassungsgericht, Judgment, 2 BvM 1/03, para. 29.
87 *Ibidem*, paras. 50–53.
88 *Ibidem*.

constitute an international custom, but also a general principle of law[89]. What is more, for her, separating international law from and domestic one made little sense as the indebted state, by invoking necessity in the domestic court proceedings, would merely "assert the international law entitlement vis-à-vis the State to give precedence in the case of an emergency to maintain and reestablish its function as a State"[90]. Furthermore, she invoked several cases, e.g. *Russian Indemnity Case*, when arbitrators emphasized that *force majeure* was valid in international law just as it was in private law[91]. Nevertheless, she pointed out that there are some significant limitations and courts should apply strict scrutiny in determining whether the facts of a case give rise to economic necessity[92]. In conclusion, when it regards proceeding between states and investors before national courts, there is lack of consensus on the possibility to apply "state of necessity", especially when the investor does not violate international law such as BIT.

VIII. Conclusions

While answering the question posed in the title, it should be noted that there is a possibility to justify infringement of the investors' rights by financial necessity. But, at the same time, customary international law, should it be applied, sets up certain conditions, which have to be taken into account. In order to use "state of necessity" in the defense there must be an essential interest of a state at stake, serious and imminent peril, measures taken must be the only way to safeguard an essential interest of a state, and they cannot seriously impair an essential interest of a state or of the international community towards which an obligation exists. Furthermore, international obligation cannot exclude possibility to invoke "state of necessity" and a state, which seeks to rely on "state of necessity," could not contribute to the situation.

Two out of six premises are particularly controversial. Firstly, it is rather hard to imagine a country which does not contribute whatsoever to its economic crisis. Moreover, questions whether measures taken by the government were the only possible means seem to be unresolved. But the most controversial issue is a question: which kind of law should be applied at first – treaty law or customary law? This dilemma arises when a provision of the BIT, which refers to "state of necessity", is very general and unclear. Some tribunals

89 *Ibidem*, paras. 80–93.
90 *Ibidem*, para. 90.
91 *Ibidem*, paras. 82–84.
92 *Ibidem*, para. 73.

decided that art. XI of the BIT between the US and Argentina would have to be analyzed in the light of customary international law which is much more specific and contains important limitations. On the other hand, annulment committees and other tribunals concluded that treaty law shall prevail over customary law and is a *lex specialis* to international custom. The assertion is enhanced by the conclusion that provisions included in art. XI of the BIT and art. 25 of ARSIWA are different.

The author of this paper agrees that if these provisions relate to different matters, the treaty should be applied at first, which would factually exclude application of art. 25 of ARSIWA. But she has also some doubts whether these provisions are indeed so much unlike, acknowledging at the same time some differences in their wording. Overall, they refer to the same notion of necessity and their successful application would lead to the same results. Of course, threshold included in art. 25 of ARSIWA is much higher, but this actually enables maintenance some certainty as to the protection of investors' rights.

The author believes that analysis cannot be limited only to the examination of art. XI of the BIT because it is indeed too general, and it would be too easy for a country to invoke "state of necessity" almost in every situation of economical unrest. Therefore, according to art. 31 (3) (c) of the VLCT, treaty provision should be applied, but, at the same time, it should be interpreted in compliance with customary law. The author agrees with Javier El-Hage that this approach should be based on the VLCT provisions rather than a *lex specialis* rule. Nevertheless, an answer to the question is not so clear-cut, which is indicated by completely different conclusions drawn by prominent lawyers serving as arbitrators in cases against Argentina.

At the very end, attention was paid on the Argentina Necessity Case when not international law but private contract was allegedly violated. The German Constitutional Court decided that there is no such rule which would allow for the application of "state of necessity" in country's defense when national courts deal with a private contract. However, the question seems to be unanswered so far because the above ruling has met many critics like Judge Lübbe-Wolff, who gave her dissenting opinion on the subject.

To sum up, in some situations a state may invoke necessity in order to justify infringements of investors' rights. Despite the fact that factual conditions were pretty the same in each case against Argentina, the country succeed in invoking necessity in its defense only twice in LG&E and Continental Casualty. Different conclusions depended on different s in respect to the application of law. Undoubtedly, each case should be examined separately and arguments can be found for both sides of the dispute.