

# State of Necessity in Post Covid-19 Investor-State Arbitration: CMS and LG&E Revisited

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**Abstract:** Covid-19 has spread its wrath on every aspect of human affairs. Foreign investment is no exception to that. To combat the pandemic, different States have deployed various restrictive measures having a direct bearing on foreign investors. Such actions are likely to result in an influx of investor-State disputes. It can be reasonably assumed that the States will invoke the necessity plea, among other grounds, to negate their responsibilities in such situations. The cases of *The CMS Gas Transmission Company v. The Argentine Republic (2005)* and *LG&E Energy Corporation v. The Argentine Republic (2006)* previously sparked debate about the necessity defence's applicability in investment arbitrations. This article examines the suitability of the defence in investor-State arbitrations in the post-Covid-19 era in light of the CMS and LG&E cases. After careful scrutinization, this article proposes that the unique nature of the crisis borne from the Covid-19 pandemic should be taken into consideration while applying the defence in any pandemic-induced arbitration. It concludes that unless the catalysts associated with the pandemic are taken into account while applying the defence, it will be invariably futile in investor-State arbitrations.

**Key Words:** Covid-19, defence of necessity, investor-State arbitration, customary international law, ICSID.

## 1. Introduction

Since the first known outbreak of the novel coronavirus in November 2019, Covid-19's global impact has been devastating. World Health Organization (WHO) declared it a pandemic on 11 March 2020.<sup>1</sup> The virus led to widespread transmission, causing millions of deaths and an unprecedented health crisis. It also severely crippled global economies,<sup>2</sup> surpassing post-world war II damage. Given

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<sup>1</sup> World Health Organization, 'Celebrating the One Billion Vaccine Milestone' (WHO, 2022) <[https://www.who.int/india/emergencies/coronavirus-disease-\(covid-19\)#:~:text=On%2011%20March%202020%2C,to%20save%20people's%20lives](https://www.who.int/india/emergencies/coronavirus-disease-(covid-19)#:~:text=On%2011%20March%202020%2C,to%20save%20people's%20lives)> accessed 6 April 2022.

<sup>2</sup> The World Bank, 'The Global Economic Outlook During the COVID-19 Pandemic: A Changed World' (The World bank, 8 June 2020) <<https://www.worldbank.org/en/news/feature/2020/06/08/>>

the different restrictive measures taken by the States to combat the situation, it has posed some severe financial concerns, including the curtailment of certain rights and privileges of foreign investors and the non-performance of treaty obligations towards other countries. In the near future, this will inevitably give rise to many complex investor-State conflicts over the measures taken and might result in different investor-State arbitrations.

States can adopt crisis-driven economic policies, but these may lead to claims of treaty violations by foreign investors. However, international investment agreements often prioritize economic development over public health.<sup>3</sup> Transnational public policies also tend to favour economic development over the health of local communities.<sup>4</sup> This makes the current problem more complex. This conflicts with measures taken to combat the pandemic, potentially violating bilateral investment treaties (BITs) without exemptions for public health. The pro-investor Investor-State Dispute Settlement (ISDS) system exacerbates this challenge<sup>5</sup>

States must balance BIT obligations with public health concerns, notably in emergencies like Covid-19. This requires navigating between regulatory actions and commitments to foreign investors. However, in some situations of great national interest and public policy concern, a country may be left with the inevitable choice of avoiding its responsibilities towards foreign investors to safeguard an essential national interest. To avoid the consequences of such violation, States can rely on the treaty emergency clause (if any) or any general rule under international law to preclude the wrongfulness of their action or responsibilities for such wrongful act. ‘Defence of necessity’ under Customary International Law (CIL) is an exceptional ground which allows a State to claim exemption from responsibilities for an internationally wrongful act. It is axiomatic that Article 25 of the International Law Commission’s (ILC) Draft Articles on State Responsibility codifies the customary law in this regard.<sup>6</sup>

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[the-global-economic-outlook-during-the-covid-19-pandemic-a-changed-world](#)> accessed 30 January 2023.

<sup>3</sup> Julien Chaisse, ‘Both Possible and Improbable-Could COVID-19 Measures Give Rise to Investor-State Disputes?’ [2020] *Contemp. Asia Arb. J.* 99, 105.

<sup>4</sup> *ibid.*

<sup>5</sup> Rumana Islam, (2020) ‘Mapping the Investor-State Dispute Settlement (ISDS) Regime of Bangladesh: Past, Present, and Future’ in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2020) 2710-2754.

<sup>6</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts of International Law Commission (November 2001) Supplement No. 10 (A/56/10), ch.IV.E.1.

Many governments' regulatory measures to tackle the pandemic have already threatened a surge of foreign investment disputes.<sup>7</sup> Moreover, the disruption by the pandemic will leave deep scars on foreign direct investment (FDI), suggesting some potential delayed effects.<sup>8</sup> Such an enduring effect increases the possibility of an influx of Covid-19 induced investor-State disputes. The world has witnessed a wave of such investment disputes on multiple occasions, e.g., against Argentina due to economic crises in 2001-2002, against Egypt after the Arab spring of 2011, and against Spain due to its reformative legislative measures in the energy sector. Argentina took resort to the treaty emergency clause and the plea of necessity under CIL to defend its actions during economic crisis. The outcome of those disputes against Argentina and the investment tribunals' outlook towards the plea raised by Argentina on the ground of necessity are something interesting to see how such a plea might apply in the post Covid-19 investor-State disputes.

Argentina's 1998-2002 economic emergency arbitrations marked a milestone for invoking necessity to defend financial policies.<sup>9</sup> These Awards hold key insights for States defending Covid-19 measures. However, International Centre for Settlement of Investment Disputes (ICSID) tribunals' varied outcomes against Argentina create uncertainty on necessity's applicability in financial crises as a defence. Additionally, their interpretation of the Non-Precluded Measures (NPM) provision in the BITs differs significantly. In such a backdrop, this article takes an interest in examining the first two ICSID cases arising out of Argentina's financial crises, i.e., *CMS Gas Transmission Company vs. The Argentine Republic*<sup>10</sup> and *LG&E Energy Corporation vs. Argentine Republic*,<sup>11</sup> to understand the applicability of the necessity defence and the NPM clause in international investment law in a severe crisis like the Covid-19 pandemic.

## 2. Background of the Disputes Against Argentina

In the early 1990's Argentina took some major economic reform initiatives to bolster its economy. Among other reformative measures, Argentina concluded several BITs with major capital-exporting countries, like- the US, the UK, and Germany, initiated privatization of public enterprise, and adopted the convertibility law that connected Argentina's currency, the *Peso*, at a one-to-one exchange rate

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<sup>7</sup> Chaisse (n 3) 101.

<sup>8</sup> *ibid.*

<sup>9</sup> Robert D. Sloane, 'On the use and abuse of necessity in the law of state responsibility' [2012] *American Journal of International Law* 447, 460.

<sup>10</sup> *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Liability (12 May 2005) (hereinafter *CMS*).

<sup>11</sup> *LG&E Energy Corporation v. Argentine Republic*, ICSID Case No. ARB/02/01, Decision on Liability (3 October 2006) (hereinafter *LG&E*).

with the US dollar. It signed nearly fifty BITs in the 90s.<sup>12</sup> Most sectors of the economy were liberalized to attract foreign investment.<sup>13</sup> Though initially, these reforms resulted in economic prosperity,<sup>14</sup> Argentina eventually drowned in the greatest economic crisis of its history.<sup>15</sup> The *Economist* compared the emergency events to the 1930s' great depression.<sup>16</sup> In response to the situation, the Argentine government introduced the Public Emergency Laws 2002, which devalued the *Peso* and abandoned the convertibility regime.

Faced with a severe economic crisis, it repealed the Convertibility Law, which was the main incentive for most investors. When the emergency measures started to affect the foreign investors adversely, they initiated many arbitrations against Argentina. CMS Gas, an American company, instituted the first of this series of arbitrations against Argentina.<sup>17</sup> The second proceeding was initiated within a short interval by LG&E Energy Corporation, another US power company.<sup>18</sup> These two arbitrations against Argentina have ignited considerable debate because of the heterogeneity in the awards arising out of almost identical legal and factual basis. In the already decided arbitrations, including *CMS* and *LG&E*, Argentina's primary defence was the BIT emergency provision and state of necessity under CIL.<sup>19</sup> Argentina tried to justify its actions under the NPM clause of the concerned BIT and customary international law as codified under Article 25 of the ILC Draft Articles.<sup>20</sup>

### 3. Argentina's Breach of BIT Obligations in *CMS* and *LG&E*

The *CMSTribunal* concluded that Argentina had breached the fair and equitable treatment (FET) clause of the US-Argentina BIT<sup>21</sup> since it had "profoundly altered

<sup>12</sup> Luis F Castillo Argañarás, 'The state of necessity as international defence raised by a state undergoing a financial crisis. A case study' (2007) 4.4 Transnational Dispute Management (TDM) 1, 2.

<sup>13</sup> Amin George Forji, 'A Focus on BITs Drawing the Right Lesson from ICSID Jurisprudence on the Doctrine of Necessity' [2010] Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 44, 46.

<sup>14</sup> Stephan W. Schill, 'From Calvo to CMS: Burying an International Law Legacy? Argentina's Currency Reform in the Face of Investment Protection: The ICSID Case CMS v. Argentina' [2006] Transnational Dispute Management 1, 3.

<sup>15</sup> Argañarás (n 12).

<sup>16</sup> David Schneiderman, 'Judicial politics and international investment arbitration: seeking an explanation for conflicting outcomes' (2010) 30 Nw. J. Int'l L. & Bus. 383, 388.

<sup>17</sup> *CMS* (n 10).

<sup>18</sup> *LG&E* (n 11).

<sup>19</sup> Marie Christine Hoelck Thjoernelund, 'State of Necessity as an exemption from state responsibility for investments' [2009] Max Planck Yearbook of United Nations Law Online 421, 441.

<sup>20</sup> *ibid.*

<sup>21</sup> Art. II(2) (a) of United States-Argentina BIT (signed on 14 November 1991, entered into force on 20 October 1994) (1994) available at [http://www.unctad.org/sections/dite/iaa/docs/bits/argentina\\_us.pdf](http://www.unctad.org/sections/dite/iaa/docs/bits/argentina_us.pdf).

the stability and predictability of the investment environment, an *assurance* that was key to its decision to invest” (emphasis added).<sup>22</sup> The Tribunal very wrongly considered this ‘*assurance*’ as a strict liability even in a matter of severe economic crisis of a country. In arriving at the decision, the *CMS* Tribunal heavily relied on *CME*<sup>23</sup> and *Tecmed*<sup>24</sup> and equated the principle of FET with the international law minimum standard because both preserve “the required stability and predictability of the business environment.”<sup>25</sup> The *CMS* Tribunal interpreted the FET clause to impose two obligations on a host country: maintaining the bargain between the parties and guaranteeing a predictable investment environment.<sup>26</sup> However, the Tribunal also mentioned that the States need not freeze their legal systems to respect the FET clause.<sup>27</sup> Still, it prohibited the parties from abandoning the initial conditions which formed the basis of the investment in the first place.<sup>28</sup>

The observations of the Tribunal are self-contradictory. Though it states that the legal framework can be modified to adapt to new challenges,<sup>29</sup> it holds the host State liable for abandoning the initial framework when the initial framework itself no longer exists. In this case, the particular BIT’s preamble should be considered, which states that FET of investment is ‘desirable.’<sup>30</sup> In the context of judicial interpretation, FET is synonymous with the minimum standard.<sup>31</sup> The Tribunal recognizes this alignment. Also considering the US Model BIT, the focus should be on ‘desirable,’ not to be equated with ‘necessary’.<sup>32</sup> Promoting a stable and predictable investment environment might be desirable, but it cannot be said to be guaranteed by the principle of FET. Therefore, State practice tends to negate the *CMS* tribunal’s finding that predictability and stability are inseparable conditions of the FET clause.<sup>33</sup> The tribunal also confirmed the treaty violation

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<sup>22</sup> *CMS* (n 10) paras 266, 281.

<sup>23</sup> *CME v Czech Republic*, 9 ICSID Reports 264, Final Award (14 March 2003).

<sup>24</sup> *Técnicas Medioambientales Tecmed, S.A vs United Mexican States*, ICSID Case No. ARB(AF)/00/02, Award (29 May 2003).

<sup>25</sup> *CMS* (n 10) para 284.

<sup>26</sup> *ibid*, para 274.

<sup>27</sup> *ibid*, para 277.

<sup>28</sup> *ibid*, para 277.

<sup>29</sup> *ibid*.

<sup>30</sup> The Preamble to the United States-Argentina BIT 1994 states, “fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources.”

<sup>31</sup> *CMS* (n 10) para 284.

<sup>32</sup> Graham Mayeda, ‘Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties’ (2007) 42 (1) *Journal of World Trade* 273, 290.

<sup>33</sup> *CMS* (n 10) para 276.

due to stabilization clauses in the license, which forbade altering the tariff regime without TGN's approval.<sup>34</sup>

Like *CMS*, the Tribunal in *LG&G* accepted that abolition of the initial legal regime violates the FET standard and the umbrella clause of the BIT.<sup>35</sup> The *LG&E* Tribunal also concluded that the legal and fiscal conditions should be stable to ensure fair and equitable treatment<sup>36</sup> but qualified this broad proposition with the proviso that such stability should not threaten the very existence of the host State itself.<sup>37</sup> The Tribunal acknowledged the economic hardships of Argentina while saying, "It was fair that during this period of time, Argentina suspended the guarantees of the Gas Law and postponed the PPI tariff adjustments until such time as the Government could manage to resume its obligations."<sup>38</sup> According to this interpretation of the Tribunal, necessity indirectly influences the interpretation of FET obligation. However, the Tribunal based its conclusion of the breach of the FET clause on the fact that Argentina was wrong in altogether abolishing the legal environment, which attracted the investors.<sup>39</sup> If the emergency measures had been temporary, the Tribunal's finding would have been different.

While both *CMS* and *LG&E* Tribunals found that Argentina violated its international obligations towards the investors, these two decisions of the ICSID Tribunals led to open a debate as to the 'state of necessity' defence in international investment law and its relationship with the NPM clause of the concerned BIT. The *LG&E* Tribunal found that Argentina's economic crisis was severe enough to invoke the defence.<sup>40</sup> The *CMS* Tribunal reached the opposite conclusion just eighteen months earlier on almost similar facts. The Tribunals in both cases dealt with the same BIT and the same economic measures taken by Argentina. The fact that the two arbitrations reach contrasting decisions regarding when and to what extent a defence of necessity can be relied on is very concerning.<sup>41</sup> This unhealthy and inconsistent split of decisions will impact developing country's interest and make the investor-host State relation more complicated during a financial crisis. The first point on which the two Tribunals differed is determining the relationship between the BIT NPM clause and the plea of necessity under CIL.

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<sup>34</sup> *Ibid*, para 302.

<sup>35</sup> *LG&E* (n 11) para 164.

<sup>36</sup> *ibid*, para 124.

<sup>37</sup> *ibid*.

<sup>38</sup> *ibid*, para 30.

<sup>39</sup> *ibid*, para 139.

<sup>40</sup> *LG&E* (n 11).

<sup>41</sup> Forji (n 13) 50.

#### 4. Separation of NPM Clause and Necessity Plea Under Customary International Law

In the *CMS* case, Argentina sought to invoke necessity defence to justify its actions, an exception available under CIL and Article XI of the US-Argentina BIT.<sup>42</sup> The Tribunal's analysis of the defence of necessity was erroneous in several aspects. Firstly, in *CMS*, instead of separating the NPM clause from the CIL defence of necessity, the Tribunal applied the two provisions analogously.<sup>43</sup> Following the footsteps of *CMS*, the Tribunals in *Sempra*<sup>44</sup> and *Enron*<sup>45</sup> also applied the same approach. Instead of treating Article XI of the BIT as a *lex specialis*, they considered it a reflection of the CIL defence of necessity.

While integrating the two provisions, these Tribunals failed to appreciate the difference between the wordings and the consequent requirements under the two provisions. Phrasing it in the negative, the International Law Commission warrants stricter conditions to be satisfied for a successful defence under Article 25.<sup>46</sup> On the other hand, the presence of NPM clause in the BIT indicates the parties' desire to protect the interests of the host State during an emergency.<sup>47</sup> In line with this intention, Article XI of US-Argentina BIT 1991 contains the treaty's NPM provision, aimed at justifying:

“[T]he application by either party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of International Peace and Security, or the protection of its own essential security interests.”

Article XI intends to allow the host State the liberty to take actions “otherwise inconsistent with the treaty when for example, the actions are necessary for the protection of essential security interests, the maintenance of public order, or to respond to a public health emergency.”<sup>48</sup> The *CMS* Tribunal failed to appreciate that, instead of incorporating “safeguarding an essential interest against a grave and imminent peril” as the sole ground of precluding responsibilities, Article XI allows “maintenance of public order, maintenance or restoration of international

<sup>42</sup> Schneiderman (n 16) 388.

<sup>43</sup> *CMS* (n 10) paras 353-358.

<sup>44</sup> *Sempra Energy International v. Argentine Republic*, ICSID Case No.ARB/02/16, Award (28 September 2007).

<sup>45</sup> *Enron Corp and Ponderosa Assets v. Argentina*, ICSID Case No ARB/01/3, Award (22 May 2007).

<sup>46</sup> ILC Draft Articles (n 6) art. 25.

<sup>47</sup> Gabriel Bottini, ‘Protection of essential interests in the BIT era’ [2008] Investment Treaty Arbitration and International Law. New York. JurisNet 145, 148.

<sup>48</sup> Forji (n 13) 47.

peace and security, and protection of essential security interest” as grounds of precluding wrongfulness for an otherwise violation of treaty obligations. Non-realization of such fundamental distinction led the *CMS* Tribunal to the erroneous decision of equating the necessity plea of CIL and Article XI of the BIT. The Tribunal failed to give any logical explanation behind this exceptional interpretative approach.

In contrast, the *LG&E* Tribunal, separated the NPM clause from the CIL necessity plea. This approach allowed the arbitrators to evaluate the relevant facts more clearly. Like *CMS*, the *LG&E* Tribunal also found that Argentina has breached the FET standard. Still, it exempted Argentina from any responsibility for a period during which the preconditions for invoking a state of emergency, as mentioned in the BIT, had been satisfied.<sup>49</sup> It analysed the BIT NPM clause independently from the necessity plea under Article 25 of the ILC Articles to reach that conclusion. This approach of the *LG&E* Tribunal has been subsequently followed in the *Continental Casualty* arbitration.<sup>50</sup> The *LG&E* Tribunal clarified that the protection provided in Article XI of the BIT was sufficient enough to exonerate Argentina.<sup>51</sup> Though the Tribunal also concluded that the conditions of CIL were met to invoke a plea of necessity successfully,<sup>52</sup> it analyzed the CIL only to support the decision already reached through the treaty emergency provision. Hence, even if the Tribunal had found otherwise about the fulfillment of the CIL criteria, Argentina would have been exempted from liabilities under Article XI of the BIT.

In determining the relationship between the emergency clause of the treaty and plea of necessity under CIL, the standing of the *Sempra* Tribunal is also mentionable. While the Tribunal followed the *CMS* approach in equalizing Article 25 of the ILC Draft Articles and Article XI of the BIT, unlike the *CMS* tribunal, it explained such an approach. According to the Tribunal, in the absence of a definition of the term “essential security interest” in the BIT, the conditions of necessity plea mentioned in Article 25 of the ILC Draft Articles become relevant while interpreting the BIT.<sup>53</sup> The Tribunal also stated that if the treaty itself provided any specific requirements, reference to Article 25 would not have been essential.<sup>54</sup> Here, the *Sempra* Tribunal seems to ignore the linguistic differences between the NPM clause and Article 25 of the ILC Draft Articles. The linguistic

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<sup>49</sup> *LG&E* (n 11) para 229.

<sup>50</sup> *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9), Award (5 September 2008) paras 168, 233.

<sup>51</sup> *LG&E* (n 11) para 245.

<sup>52</sup> *ibid.*

<sup>53</sup> *Sempra* (n 44) para 110.

<sup>54</sup> *ibid.*



difference between the BIT NPM clause and Article 25 indicates that the former can be more restrictive or comprehensive than the latter in its operation.<sup>55</sup>

Following the confluence approach, the Tribunal made the ‘only way’ and ‘no contribution’ criteria of the CIL applicable to Article XI of the BIT, though there is no mention of these conditions in the BIT itself. The inapplicability of the ‘only way’ criteria in Article XI of the BIT has been affirmed by the *Continental Casualty* Tribunal.<sup>56</sup> While applying the NPM clause, the *Sempra* Tribunal should have interpreted the treaty in good faith according to the ordinary meaning of the treaty provision, keeping its object and context in mind.<sup>57</sup> The Tribunal ignored the fact that the US-Argentina BIT preceded the ILC Draft Articles by more than a decade. Therefore, it is unlikely that the treaty conceptualized necessity in the same way as Article 25.<sup>58</sup> Consequently, the Tribunal misplaced its reliance on Article 25 to interpret the BIT NPM clause.

The *CMS*, *LG&E*, and *Sempra* awards show that the Tribunals’ decisions will depend on whether they apply the BIT NPM clause as a primary source of law and necessity plea under CIL as an additional source or *vice versa*. Arbitrators in the *CMS* case used the necessity plea under international law as the primary source and absorbed the BIT NPM clause into Article 25. In contrast, the *LG&E* Tribunal applied the BIT’s NPM provision independently and considered the necessity defence under CIL as a secondary source of law.<sup>59</sup> This technical difference also affected the Tribunals’ opinion regarding the amount of compensation Argentina should pay to the investors.<sup>60</sup>

In this regard, the *LG&E* tribunal’s approach makes more sense as the appropriate practice is to employ the BIT provision before any other source of international law. This is because, in international law, treaty provision (BIT NPM clause) prevails over other sources (ILC Articles).<sup>61</sup> Without providing any justification for taking this exceptional route, the *CMS* award resolved the NPM clause into the CIL necessity plea. On the other hand, though the *Sempra* Tribunal explained the reasoning for following a confluence approach, it does not make much sense according to the rule of interpretation. Although the two concepts have relevance, their scope and objective differ.

<sup>55</sup> Sloane (n 9) 499.

<sup>56</sup> *Continental Casualty Company v. The Argentine Republic* (2008) (ICSID Case No. ARB/03/9) para 236.

<sup>57</sup> Art. 31 of Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331; 8 ILM 679 (1969).

<sup>58</sup> Sloane (n 9) 498.

<sup>59</sup> Stephen W. Schill, ‘International Investment Law and the Host State’s Power to Handle Economic Crises—Comment on the ICSID Decision in *LG&E v. Argentina*’ (2007) 24(3) *Journal of International Arbitration* 265, 278.

<sup>60</sup> *ibid.*

<sup>61</sup> Forji (n 13) 51.

Though the US-Argentina BIT itself offered the host State a wider opportunity to enact regulatory measures (permitted by Article XI) to combat extraordinary situations, the decision of the *CMS* and *Sempra* Tribunal denied Argentina the benefits of the NPM clause. Such interpretation has clearly ignored the intention of the parties to the BIT and burdened Argentina with unjustified obligations. It limits host States' flexibility in using BIT provisions, even in cases of vital public interests. On the other hand, the *LG&E* Tribunal used the appropriate path to use the treaty NPM clause as the primary source of determining Argentina's responsibility. It examined the fulfillment of the conditions of the plea of necessity under CIL only to support its finding under the treaty. The *LG&E* Tribunal correctly concluded that the requirements under the treaty emergency provision and necessity under CIL differ effectively.<sup>62</sup>

The CMS annulment proceeding has rightly criticized the CMS tribunal's decision to equalize the BIT emergency provision and necessity plea under CIL.<sup>63</sup> The *Enron* and *Sempra* Tribunals subsequently followed the same route. Annulment proceedings were also initiated against these awards, and the annulment Tribunals criticized the awards because of the Tribunals' failure to apply the necessity plea under CIL and BIT emergency clause correctly.<sup>64</sup> These decisions of the annulment proceedings support the *LG&E* Tribunal's standing to apply the BIT NPM provision separately.

Though the Tribunals differed in determining the relationship between the CIL necessity plea and the NPM clause of the concerned BIT, they discussed the applicability of the CIL in Argentina's economic crisis in detail. This discussion is crucial as necessity defense offers host States room to prioritize essential interests over treaty obligations. The role of the CIL becomes more crucial in the absence of a special provision (NPM clause) in the concerned BIT.

#### **4.1 Is NPM Clause a Salient Feature of all BITs?**

Since treaty norms mainly govern international investment arbitration, the necessity plea available under CIL is applied only in exceptional circumstances.<sup>65</sup> While the NPM clause of any BIT should be applied first to determine the availability of emergency provisions in any given case, the utility of the CIL defence of necessity cannot be negated in this regard. This is because, though

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<sup>62</sup> *LG&E* (n 11) para 245.

<sup>63</sup> *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Proceeding (25 September 2007) para 134.

<sup>64</sup> *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16), Annulment Proceeding (29 June 2010) paras. 212, 213; *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Annulment Proceeding (30 July 2010) paras 377, 378.

<sup>65</sup> Sloane (n 9) 450.

most BITs contain an NPM clause,<sup>66</sup> the scope of such provisions largely varies. While some are drafted in a narrow fashion,<sup>67</sup> some are broad in their scope.<sup>68</sup> Furthermore, total absence of NPM is also not a peculiar incident. This is because it depends on the negotiation capacities and dynamics of the States involved.<sup>69</sup> Since the developing countries sign BITs to attract foreign direct investment, they often compromise their regulatory power by not including NPM provisions.<sup>70</sup> For instance, all the south Asian countries, except India, have signed eighty BITs altogether, out of which only ten contain NPM provisions.<sup>71</sup>

Therefore, in the absence of an NPM provision, or in case of inadequate protection mechanisms of such measures, the host States will have to rely on the CIL for exonerating liability for an internationally wrongful act in exceptional situations. The defence of necessity, as enumerated in Article 25 of the ILC Draft Articles, is one of the protection mechanisms under CIL. The ICSID tribunal's divergent decisions on the necessity defence in almost similar cases gave rise to the inevitable question of whether the defence is inapplicable for economic emergencies. Hence, the stand of the *CMS* and *LG&E* Tribunals on Article 25 of the ILC Draft Articles requires special attention.

## 5. Defence of Necessity Under International Law

Necessity is a well-established defence in international law. In the words of Professor Roberto Ago, former Special Rapporteur of the International Law Commission on State Responsibility, "The concept of state of necessity is far too deeply rooted in the consciousness of the members of the international community and of individuals within States. If driven out of the door it would return through the window, if need be in other forms."<sup>72</sup>

<sup>66</sup> Jeswald Salacuse JW, *The law of investment treaties* (OUP 2015) 1.

<sup>67</sup> E.g. Some BITs restrict the application of a specific treaty provision to a particular circumstance. See Art. 6(3) of the Agreement Between the Government of the United Mexican States and the Government of the Republic of Korea for the Promotion and Reciprocal Protection of Investment 2000.

<sup>68</sup> Treaty Between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, 19 May 1992 (entered into force 12 January 1994), art. 1(2).

<sup>69</sup> Amit Kumar Sinha, 'Non-precluded measures provisions in bilateral investment treaties of South Asian countries' (2017) 7(2) *Asian Journal of International Law* 227, 235.

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid* 236.

<sup>72</sup> Roberto Ago, *Addendum to the 8th Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility: Circumstances Precluding Wrongfulness: State of Necessity* (Yearbook of the International Law Commission 1980) Volume II Part 1, A/CN.4/318/Add.5-7, para 80.

In both *CMS* and *LG&E* Tribunals, apart from Article XI of the US-Argentina BIT, Argentina sought to shelter its actions by invoking state of necessity available under customary international law. While both the Tribunals recognized the customary nature and restrictive application of the defence, they differed on its applicability in Argentina's economic crisis. Although the disputes were based on almost identical facts and involved violation of the same BIT, the Tribunals' decisions contradicted on the availability of the defence for Argentina.

### 5.1 Evolution of Necessity Under International Law

At its initial stage, defence of necessity was dependent on the right of self-preservation, an inevitable right for the very existence of the states. Unlike Article 25 of the ILC Draft Articles, the classical notion recognized only one 'essential interest': an imminent threat to the existence of the State, sufficient to rely on the defence successfully. For example, in the case of the *Naptune*, between Great Britain and the United States, necessity was interpreted following an 'absolute' criterion, requiring the very existence of the State to be endangered.<sup>73</sup> The same approach was maintained in the *Russian Indemnity* award, following a dispute between the Ottoman Empire and Russia wherein the Ottoman Empire failed to repay its debt in time.<sup>74</sup> It tried to defy responsibilities by virtue of its exacerbated financial straits. While acknowledging the utmost seriousness faced by the empire, the Tribunal concluded that even a severe financial emergency could not attract the necessity plea unless the State's existence was endangered.

The early authorities have persistently stressed that a security concern must exist for a successful plea of necessity. This is in contrast with the object and scope of Article 25.<sup>75</sup> As reflected in Article 25, the modern CIL has departed from this absolute criteria.<sup>76</sup> Necessity can now be availed in absence of a threat to the State's very existence. To make it clear, in the Addendum to the Eight Report, Professor Ago stated that 'self-preservation' and 'necessity' are neither identical nor invariably linked; instead, they are the justification of each other.<sup>77</sup> He further emphasized that necessity does not emanate from the right of self-preservation; rather, it is an excuse to breach an international obligation to protect an essential

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<sup>73</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius Publications Limited Cambridge 1957) 70.

<sup>74</sup> *Affaire d'Indemnité Russe* (Russ./Turk.), 11 R.I.A.A. 431 (Perm. Ct. Arb. 1912), translated in 7 AJIL 178 (1913).

<sup>75</sup> Sloane (n 9).

<sup>76</sup> The International Court of Justice confirmed that the ILC Articles reflect customary international law in *the Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, (Judgment) [1997] ICJ Reports 1997, p. 7.

<sup>77</sup> Ago (n 72) 8.

interest of a State.<sup>78</sup> Professor Ago's explanation demonstrates that modern CIL of defence of necessity is not confined to the right of self-preservation.

### **5.2 Necessity Under Customary International Law**

With time the classical notion of necessity has expanded, and currently, instead of the 'absolute' criterion- wherein the existence of the State must be in peril, a relatively relaxed approach has been introduced. This progressive development has resulted in the emergence of a customary international law. The CIL has been codified in Article 25 of the ILC Draft Articles, and the customary nature of the article has been assured in a number of cases. In order to invoke necessity under Article 25, the following conditions must be fulfilled:

1. A severe and imminent peril must endanger an 'essential interest' of the State.
2. There is no way to protect the essential interest except the act in question.
3. The alleged violation does not seriously affect an essential interest of the State towards which the international obligation exists or of the international community as a whole.

Furthermore, the article denies the protection of necessity plea if-

- a) The international obligation itself excludes the possibility of invoking necessity;
- b) The invoking State has contributed to the emergency situation.

In *Gabcikovo-Nagymaros* case, the International Court of Justice referred to the above conditions as reflective of customary international law.<sup>79</sup> The customary status of Article 25 has also been reaffirmed in a number of investor-State disputes.<sup>80</sup> While the *CMS* and *LG&E* Tribunals were at a consensus about the customary nature of Article 25,<sup>81</sup> they differed in applying the conditions to the same factual proposition. As a result, the Tribunals' decisions cast a doubt on the applicability of the CIL plea of necessity in a financial crisis.

### **5.3 Is the Defence of Necessity Inapplicable in an Economic Crisis?**

The ILC Commentary on Article 25 of the Draft Articles has no categorical

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<sup>78</sup> *ibid.*

<sup>79</sup> *Gabcikovo-Nagymaros* (n 76) paras 51, 52.

<sup>80</sup> Jürgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 INT'L&COMPL.Q.325,334; see, e.g., *Sempra Energy* (n 64) 344; *CMS* (n 10) 315.

<sup>81</sup> *CMS* (n 10) paras 91-96.

eligibility criteria to attract the defence. The incidents cited in the ILC Commentary correspond to three factual categories: State security, economic crises, and ecological harms.<sup>82</sup> However, the commentary also shows that in economic contexts, international adjudicators never upheld a necessity plea before the publication of the Draft Articles in 2001.<sup>83</sup> In fact, before the arbitrations arising out of Argentina's economic emergency of 1998-2002, necessity plea was never successfully invoked to justify a State's financial policies.<sup>84</sup> All the incidents reported before the Argentine cases contemplate necessity through the classical lens where the State's existence must be threatened.<sup>85</sup>

Time and again, international adjudicators rejected necessity in the absence of a threat to the State's very existence.<sup>86</sup> While this position was correct under the classical concept of defence of necessity, it does not make sense under the plea of necessity under CIL as enumerated in Article 25 of the ILC Draft Articles. Both *CMS* and *LG&E* Tribunals agreed on the availability of the defence in economic emergency situations, provided that all the conditions enumerated in Article 25 are fulfilled. However, the Tribunals differed in applying the conditions in a given fact- in this case, the financial crisis of Argentina. A detailed discussion of the points on which the two Tribunals differed will clarify their positions.

## 6. The *CMS* and *LG&E* Tribunals' Standing on the Necessity Plea: Points of Disagreement

In reaching their respective conclusions as to the applicability of the necessity plea under CIL, the Tribunals differed on the following aspects:

### 6.1 *Intensity of Argentina's Economic Crisis*

The first condition to be fulfilled under Article 25 of the ILC Draft Articles is that "an essential interest of the State must be at stake against a grave and imminent peril." The *CMS* and *LG&E* Tribunals applied this test to the financial crisis of Argentina and reached contradicting conclusions. They differed in their opinion as to whether an essential interest of Argentina was threatened due to the economic emergency situation. There are no absolute criteria for deciding what poses such a threat. ILC left it to be judged by the adjudicators on a case by case basis.<sup>87</sup> ILC further shows multiple instances of invoking necessity in

<sup>82</sup> Sloane (n 9) 454.

<sup>83</sup> *ibid* 459.

<sup>84</sup> *ibid*.

<sup>85</sup> *ibid* 460.

<sup>86</sup> *ibid*.

<sup>87</sup> International Law Commission (ILC), 'Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the Fifty-Third Session' (2001) UN Doc

diverse situations, including environmental hazards or when there is a threat to the civilian population.<sup>88</sup> Though the *CMS* Tribunal accepted that a severe economic crisis could give rise to circumstances exempting responsibilities under BIT,<sup>89</sup> it found Argentina's crisis not severe enough to attract such exemptions.

Considering the seriousness of the crisis, Argentina argued that its economic emergency was a severe one that could even result in the failure of the entire State mechanism.<sup>90</sup> While scrutinizing this argument, the *LG&E* Tribunal examined the socio-economic evidence presented by Argentina, including the unemployment rate, inflation, breakdown of the food supply and health system, and political unrest. It concluded that Argentina was going through a severe crisis affecting its economic, political, and social sectors to the extent that it threatened the State's collapse.<sup>91</sup> While mandating a high threshold for invoking necessity in a financial crisis, the *LG&E* Tribunal observed that:

“[t]o conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the government to lead. When a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion.”<sup>92</sup>

In contrast, the *CMS* Tribunal considered a “severe crisis” insufficient to invoke a necessity plea unless it is accompanied by a threat to the “total economic and social collapse.”<sup>93</sup> While evaluating the gravity of the economic emergency, the *CMS* Tribunal investigated whether an essential security interest of Argentina was threatened. This required evaluating the seriousness of Argentina's financial emergencies and their adverse impacts. The Tribunal concluded that only if the probable outcome is a ‘major breakdown’ invocation of necessity is allowed.<sup>94</sup> Here, the Tribunal observed that the US-Argentina BIT is designed to protect investors during economic difficulties where the government often takes adverse measures to protect its interest.<sup>95</sup> Accordingly, it concluded that treaty protection standards for investors would prevail on any plea of necessity unless the situation

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A/56/10, 2001/II(2), art 25, para 15.

<sup>88</sup> *ibid.*

<sup>89</sup> *CMS* (n 10) para 304.

<sup>90</sup> *LG&E* (n 11) para 219.

<sup>91</sup> *ibid.*, para 232.

<sup>92</sup> *ibid.*, para 212.

<sup>93</sup> *CMS* (n 10) para 355.

<sup>94</sup> *ibid.*, para 319.

<sup>95</sup> *ibid.*, para 354.

results in complete financial and social collapse.<sup>96</sup> Here, total economic and social melt-down, as perceived by the *CMS* Tribunal, will undoubtedly pose a threat to the State's very existence. From the ILC commentary on Article 25 and Professor Ago's work, it is clear that the CIL does not require such a high threshold for invoking Article 25.

The *CMS* Tribunal seems to be concerned with the proximity of the crisis as it suggests that for a successful plea of necessity, a State should wait until the crisis results in complete economic and social collapse. In this connection, the ICJ in the *Gabcikovo-Nagymaros* case mentioned that even though a peril has not attained its maturity, it can be considered 'imminent' if its realization is certain and inevitable.<sup>97</sup> The *CMS* Tribunal erred in this regard as it suggested a State in peril has to wait until the crisis fully matures to react to it. This is unrealistic as the government is accountable to its populace for every action taken to combat a severe economic crisis like that in Argentina.

If the *CMS* approach is followed, the destructive effects, however dire, of the Covid-19 pandemic on the health sector alone will never qualify as a threat to an 'essential interest.' Any State will need to wait until the situation deteriorates to a level where the total healthcare system melts down to invoke Article 25. It will inevitably result in the death of more people. For all practical purposes, it is illogical for any government to wait for such havoc to take proper actions, where intervention at an earlier stage can mitigate the adverse impacts.

## **6.2 The 'No Contribution' Principle**

Another condition for invoking the plea of necessity under the CIL on which the *CMS* and *LG&E* Tribunals differed largely is the 'no contribution' rule. It requires the State not to contribute to the situation of necessity. This requirement of CIL is challenging to apply in its literal sense in economic emergencies. However, ILC commentary mentions that the State must make a substantial contribution to exclude a plea under subparagraph (2)(b) of Article 25. A peripheral or incidental contribution will not be a disqualification in this regard.<sup>98</sup> Hence, every contribution of the State will not be regarded as a disqualification for availing the plea of necessity. The *CMS* and *LG&E* Tribunals took divergent approaches to apply this principle.

The *CMS* Tribunal decided that Argentina's economic policies substantially contributed to its fiscal emergency. Though it acknowledged that external factors

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<sup>96</sup> *ibid*, para 355.

<sup>97</sup> *Gabcikovo-Nagymaros* (n 76) para 54.

<sup>98</sup> ILC Commentary on Draft Article (n 87) art. 25, para 20.



also contributed to the crisis, it did not exonerate Argentina from liability.<sup>99</sup> Therefore according to the Tribunal, Argentina's contribution was sufficiently substantial to negate the invocation of Article 25. However, the Tribunal did not explain in detail how the Argentine Government's policies were responsible for the crisis. Instead, the Tribunal nonchalantly mentioned that the causes of economic emergencies usually include both domestic and international dimensions, and the case of Argentina is no exception to that. The *CMS* Tribunal acknowledged that an inevitable characteristic of the global economy is the interaction of national and international factors.<sup>100</sup>

Here, the Tribunal accepted that every economic crisis would involve some contribution on the government's part. Due to the unique nature of economic crises, this approach of the Tribunal seems to be unfit for cases involving any financial measure taken by a State. This interpretation would make the plea of necessity meaningless in economic emergencies as virtually all economic crises can, at least in part, be blamed on State's wrong economic recipes.<sup>101</sup> No State can foresee the precise consequences of its fiscal decisions;<sup>102</sup> this is especially true during an unprecedented crisis like the Covid-19 pandemic.

Though the Tribunal in *LG&E*, in contrast, shifted the burden upon the investor to prove that Argentina contributed to its financial crisis, it only briefly remarked that there is no evidence to indicate that Argentina's wrong economic policies brought about the emergency.<sup>103</sup> Here, the Tribunal relied on a dubious burden of proof rule<sup>104</sup> and held the foreign investors liable to prove the host State's contribution to the crisis. However, this unusual route taken by the *LG&E* Tribunal is considered to be an aberration and has encountered severe criticism. Thus, both awards fail to analyze the requirement of 'no contribution' in depth. Therefore, both Tribunals could not provide any concrete solution to the 'no contribution' criteria in the economic crisis. Instead, it leads to the notion that it is impossible to transpose the requirement of 'no significant contribution' in financial emergencies.

The rule of 'no contribution' needs a different dimension to make it viable in economic emergencies. Otherwise, crises that originate from financial policies

<sup>99</sup> *CMS* (n 10) para 329.

<sup>100</sup> *ibid*, para 328.

<sup>101</sup> Francesco Costamagna, 'Investor'Rights and State Regulatory Autonomy: the Role of the Legitimate Expectation Principle in the *CMS v. Argentina* case' [2006] *Transnational Dispute Management (TDM)* 1, 11.

<sup>102</sup> Anne Van Aaken, 'On the Necessity of Necessity Measures: A Response to Alan O. Sykes' [2015] *American Journal of International Law* 181, 182.

<sup>103</sup> *LG&E* (n 11) para 257.

<sup>104</sup> *ibid*, para 256.

would be altogether excluded from the protection of necessity plea. There will always be some government decisions that subsequently fail and give rise to the emergency situation.<sup>105</sup> The ILC Draft Articles introduce the ‘no contribution’ criteria as a condition of successfully invoking the defence of necessity. But a conditional requirement with a predetermined affirmative answer makes no sense.<sup>106</sup> Therefore, the criteria followed by the *CMS* Tribunal will, in effect, make the entire necessity plea ineffective in financial crisis.

On the other hand, the route taken by the *LG&E* Tribunal is also flawed as it makes the condition of ‘no contribution’ almost impossible to prove for the investors and gives the host State an undue advantage in this regard. Instead of either approach, criteria such as the foreseeability of certain consequences of economic choices could serve as a workable test.<sup>107</sup> It should be scrutinized whether the consequent emergency was reasonably foreseeable or not. If it were unforeseeable and the State took action in good faith, depriving the host State of the protection of necessity plea for its economic policies would be unfair.

If the *CMS* approach is followed, governments combating Covid-19 are in risk of not meeting the ‘no contribution’ criteria due to uncertainties. States must still strive to combat the pandemic. If a well-intentioned economic measure fails and leads to an emergency, the State should not be barred from invoking Article 25. The key factor should be whether the State could foresee the policy’s disastrous impact and still pursued it. If so, the State’s contribution is significant enough to prevent invoking the necessity plea.

### 6.3 The ‘only way’ criterion

The intention of Article 25 of the ILC Draft Articles is to excuse a State facing peril, threatening its essential interest, for not living up to its international obligations.<sup>108</sup> The article provides strict conditions to invoke the defence, mandating the unlawful act to be “the only means for the State to safeguard an essential interest against a grave and imminent peril.” Both *CMS* and *LG&E* affirmed this prerequisite.

In *CMS* case, the Tribunal held that necessity is “excluded if there are other (otherwise lawful means) available, even if they may be more costly or less convenient.”<sup>109</sup> *LG&E* took a similar view, opining that the act must be the only means

<sup>105</sup> Schill, ‘From Calvo to CMS’ (n 14).

<sup>106</sup> Van Aaken (n 102) 182.

<sup>107</sup> Schill, ‘International Investment Law’ (n 59) 281.

<sup>108</sup> Michael Waibel, ‘Two Words of Necessity in ICSID Arbitration: CMS and LG&E’ (2007) 20 *Leiden Journal of International Law* 637, 641.

<sup>109</sup> *CMS* (n 10) para 324.

available to the State in order to protect an interest.<sup>110</sup> However, the two Tribunals struggled to apply the ‘only way’ criterion in the financial context. Based on the opinion of several experts, the *CMS* Tribunal found that multiple policy alternatives were available for the Argentine government to combat the crisis; therefore, Argentina failed to fulfill the ‘only way’ criterion under CIL.<sup>111</sup> This approach of the *CMS* Tribunal saved it from the jurisdictional dilemma of assessing a sovereign State’s macroeconomic policies. Divergent views among economic experts established that alternative policy measures precluded the invocation of necessity for Argentina.

The Tribunal in *CMS* followed the route taken by the ICJ in its *Israeli Wall Advisory opinion*, where ICJ negated the defence on the ground that there were other available means to safeguard the interest of Israel but omitted to mention those means.<sup>112</sup> Likewise, the Tribunal mentioned that the crisis could have been dealt with otherwise, without mentioning the other available policies. Virtually for any economic crisis, there is never an ‘only way’ to address them, but rather a wide range of alternatives that requires hard choices on the part of the government in charge.<sup>113</sup> The availability of multiple options to combat a crisis is an inevitable characteristic of economic emergencies. Hence, the *CMS* test renders the fulfillment of ‘only way’ criteria in an economic crisis a redundancy with a predetermined negative answer. The *CMS* award implies that wherever there is one other policy alternative, the defence of necessity is unavailable.

In contrast, the *LG&E* Tribunal observed it from opposite directions and pushed the door open for necessity defence. In the Tribunal’s view, an economic recovery package was the only way of responding 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.<sup>114</sup> The decision in *LG&E* leaves greater freedom of action to a State facing a severe economic crisis and allows it to react flexibly and effectively by choosing a policy from several available policy alternatives.<sup>115</sup>

Essentially this results in recognizing that the host State has a certain range of non-reviewable policy choices at its disposal in this context. It thus attenuates one of the consequences that resulted from the restrictive interpretation of the *CMS* Tribunal: to avail the necessity plea, a State facing an economic crisis must

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<sup>110</sup> *LG&E* (n 11) para 250.

<sup>111</sup> *CMS* (n 10) para 33.

<sup>112</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Advisory opinion) [2004] ICJ Reports 2004, p. 136, para 40.

<sup>113</sup> *Costamagna* (n 101) 12.

<sup>114</sup> *LG&E* (n 11) para 257.

<sup>115</sup> *ibid*, para 240.

wait until the situation becomes so aggravated that there is only one way left to combat it. However, in doing so, the *LG&E* Tribunal mostly ignores the ‘only way’ criterion under CIL. While the *CMS* Tribunal interprets the ‘only way’ criteria in a manner that makes the application of the defence of necessity in economic crisis virtually impossible, the approach of *LG&E* Tribunal gives almost unrestricted power to the host State to choose a method to deal with a crisis. There should be a middle way that will allow the invocation of the plea in economic crises while keeping the ‘only way’ criteria effective.

Anne-Marie Slaughter’s ‘good faith’ standard, as argued in the *CMS* Case,<sup>116</sup> can be a suitable alternative in this regard. In economic crises, where the nature of the situation will inevitably offer multiple options to deal with it, respect should be shown to the sovereign power of the government to choose among the available options. Here, the good faith test will work as a shield to prevent the misuse of this power on the part of the government. While choosing an option, the interest of the investors should be taken into consideration in good faith. The State should prove that it made reasonable efforts to strike a balance between the obligations towards the investors and the responsibilities towards its population.

The restrictive interpretation of the ‘only way’ criteria, like the *CMS* tribunal, will inevitably result in the denial of the plea of necessity under CIL for any Covid-19 borne crisis. Different States are taking divergent approaches to combat the pandemic depending on their socio-economic ability and needs. The inconceivable nature of the pandemic makes it impossible to find out a single way to combat it. The States are still scrutinizing the effectiveness of different measures in this regard. Therefore, if any State invokes the plea of necessity to shield any action taken to combat the adverse impacts of the Covid-19 pandemic to scrutinize the fulfillment of the plea, the ‘only way’ criteria should be qualified by the ‘good faith’ test. Otherwise, the States will be denied the protection of the defence merely because the very nature of the crisis allows more than one option to combat the same.

## 7. Impact of *CMS* and *LG&E*

The approach followed in the *CMS* case has the potential to deprive States of the benefit of treaty emergency provision (if any). Moreover, while assessing the Argentine economic crisis through the lens of CIL, the Tribunal interpreted ‘essential interest’ in a way that unduly burdens the States. The most alarming consequence of the *CMS* case is the interpretation of the ‘no contribution’ and ‘only way’ criteria under Article 25 of the ILC Draft Articles. The Tribunal’s approach makes these two conditions inapplicable to financial crises of all kinds—a consequence that CIL by no means contemplates.

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<sup>116</sup> Van Aaken (n 102) 183.

Quoting *Gabcikovo-Nagymaros* case,<sup>117</sup> the Tribunal emphasized that all conditions of necessity must be fulfilled to satisfy the cumulative test.<sup>118</sup> According to the Tribunal, Argentina had fulfilled some conditions of the necessity plea, but when taken together, it failed to satisfy the cumulative test.<sup>119</sup> Because of the failure to satisfy this cumulative test, it came to the conclusion that Argentina was not exempted from liability under the plea of necessity. Here, the Tribunal is absolutely right in stressing on satisfying the cumulative test, but the qualifying threshold for some of the conditions, i.e., ‘no contribution’ and ‘only way,’ are set at a level that is impossible to fulfill in economic crises. Therefore, if the *CMS* test is followed, necessity will never be applicable in a financial crisis, irrespective of the severity of the situation. While CIL leans towards a limited use of necessity defense,<sup>120</sup> it doesn’t seek to entirely eliminate it in economic emergencies

On the other hand, in *LG&E*, while the Tribunal tried to show reverence to the State authority to choose from multiple policy alternatives, it went too far by giving the States almost limitless power in this regard. Moreover, while analyzing the ‘no contribution’ rule, the *LG&E* Tribunal applied a contentious burden of proof rule, which is unjustified for the investors. Without any justification, it departed from the ordinary rule where the burden remains with the party relying on an exception.<sup>121</sup> Nevertheless, being a rare incident of upholding the necessity plea in a financial emergency, the award will be examined closely by the States as an indicator of future legal strategies, and the award’s long-term significance in allowing the state of necessity defence is undoubted.<sup>122</sup>

Overall, the contradictory nature of the *CMS* and *LG&E* awards has a bearing on the future of investment arbitration. Though in international law, the principle of *stare decisis* is not binding, consistency among different decisions secures the credibility and stability of any legal system.<sup>123</sup> In contrast, divergent opinions on similar issues question a legal system’s legitimacy.<sup>124</sup>

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<sup>117</sup> *Gabcikovo-Nagymaros* (n 76).

<sup>118</sup> *CMS* (n 10) para 330.

<sup>119</sup> *ibid*, para 331.

<sup>120</sup> *Van Aaken* (n 102) 183.

<sup>121</sup> Schill, ‘From Calvo to CMS’ (n 14) 265.

<sup>122</sup> Greg Falkof, ‘State of Necessity Defence Accepted in *LG&E v. Argentina* ICSID Tribunal’ (2006) 3.5 *Transnational Dispute Management*.

<sup>123</sup> Aristidis Tsatsos, ‘ICSID Jurisprudence: Between Homogeneity and Heterogeneity-A Call for Appeal?’ (2009) 6.1 *Transnational Dispute Management* 1, 6.

<sup>124</sup> *ibid*.

## 8. Conclusion

The varying decisions of CMS and LG&E Tribunals on crucial matters, such as the treaty emergency provision and the defense of necessity, pose concerns for investment law. Though foreign investment law and arbitration have undoubtedly been the most visible areas to rely on the necessity plea in recent decades,<sup>125</sup> the success of the defence is a rare incident in investment disputes. Considering the history of investment disputes, it appears that the closest international investment arbitration has reached is within the framework of the treaty NPM clause rather than under Article 25 Draft Articles on State Responsibility.<sup>126</sup> Though the *LG&E* award is an exception, some scholars have already forecasted that it would be considered an aberration.<sup>127</sup>

The effects of the *CMS* and *LG&E* awards will undoubtedly influence any post Covid-19 investor-State dispute arising from regulatory approaches adopted by the States to combat the pandemic. The future tribunals should be cautious to mitigate the ramifications of these divergent awards. The pandemic has unfolded its wrath, exerting uncountable challenges for the States. In combating these challenges, States are sometimes forced to violate treaty provisions, exposing them to the threat of investment disputes. In deciding any such dispute, the concerned tribunal should not shut the door of the defence of necessity under CIL for the States altogether in the name of restrictive interpretation. Instead, the peculiar nature of emergencies posed by the pandemic should be taken into account while deciding whether the criteria under Article 25 of ILC Draft Articles are fulfilled or not.

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<sup>125</sup> Sloane (n 9) 497.

<sup>126</sup> Attila Tanzi, 'Necessity, state of' [2013] Max Planck Encyclopedia of Public International Law, para 11.

<sup>127</sup> David Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking and Explanation for Conflicting Outcomes' (2010) 30 *Northwestern Journal of International Law and Business*, 383, 386.