State of Necessity and Peremptory Norms in International Investment Law

Jorge E Vinuales
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INTRODUCTION

It is usually assumed that peremptory norms have only a “limiting effect” with respect to the State of Necessity defence (“Necessity”), as characterized by article 25 of the International Law Commission’s Articles on State Responsibility (“ILC’s Articles”). Indeed, Necessity cannot be invoked to justify a violation of a peremptory norm of international law. This

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3 On the development of the idea of peremptory norms see: VERDROSS, A., Jus dispositivum and jus cogens in International Law, in American Journal of International Law, 60/3, 1966, pp. 55 et seq.; GAJA, G., Jus cogens beyond the Vienna Convention, in Recueil des cours de l’Académie de droit international, t. 172-III,
article contends that this assumption reflects an incomplete understanding of the impact of peremptory norms on the development of public international law. Specifically, we argue that peremptory norms have not only a limiting effect, but also what we call an “excusing effect,” when the essential interests invoked by a State in support of Necessity are enshrined in peremptory norms. This excusing effect has three main consequences, which we explore in more detail in what follows. First, States’ ability to contractually set aside the public international law defence of Necessity in a bilateral investment treaty (“BIT”) is considerably restricted. Second, the conditions that a State must meet to avail itself of Necessity must be adjusted to take into account the nature of the interests at stake. Third, the preceding two consequences together suggest the existence of a specific form of Necessity.

The awards rendered in two recent ICSID cases against Argentina, namely CMS and LG&E,4 offer an interesting set of facts to explore these claims. A major reason why the CMS and LG&E awards have generated considerable commentary from practitioners and academics alike is that the two tribunals reached contrasting conclusions on the issue of Necessity, despite the fact that factual background was largely the same. Indeed, both cases concerned a number of restrictive measures taken by the Argentine government to cope with the economic crisis that unfolded in Argentina starting in late 1999. The government decided to suspend US PPI tariff adjustment and freeze gas distribution tariffs,5 which eventually led investors to initiate arbitration proceedings under the aegis of ICSID. However, while the CMS tribunal found that Necessity did not avail Argentina, the LG&E tribunal considered that Argentina had found itself, for a limited period of time, in a State of necessity justifying the measures taken upon the onset of the crisis. Commentary on these awards has mainly focused on whether economic necessity is admissible under customary international law (or under Article XI of the Argentina-US BIT) or whether Argentina could follow any other path in coping with the consequences of the 2001 economic crisis.6 After the recent Decision of the ad hoc annulment rendered in the CMS case in late September 2007, the attention has moved rather to the reasoning followed by the arbitral tribunal to determine the law governing Necessity.

The question of Necessity in public international law appears, however, to have deeper implications than those usually analyzed in the literature. At the very core of Necessity lies a balance between different interests and lurks the still unresolved question of whether there

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5 As the crisis worsen, more restrictive reforms were subsequently adopted by the Argentine government, in particular a Decree imposing controls on foreign exchange.

might be a hierarchy between international norms. When the required conditions are met, Necessity precludes the wrongfulness of a State’s action because the international legal order (as most domestic orders, under different names) considers that such action was intended to protect an “essential interest”, that is a higher value than the one protected by the norm breached. In this context, a feature of Necessity, which received little attention in the awards in CMS and LG&E as well as in the literature commenting on them, is the relation between Necessity and peremptory norms. When mentioned, peremptory norms are considered only as a limit, excluding the availability of Necessity. Insofar as the norm violated by the State invoking Necessity protects an “essential interest” of the home State and/or is a peremptory norm, Necessity will not be available. In other words, acts that result in violations of peremptory norms or of norms protecting a State’s essential interest (as we shall see, the two categories overlap to some extent, albeit not entirely), would normally not be justifiable by the Necessity defence. However, peremptory norms are not only the outer limit of Necessity as a defence but also part of the content of the necessity defence. In assessing the content of the expression “essential interests” of a State, as it applies to Necessity, one should start at the

Footnotes:

7 The existence of a hierarchy between different norms of international law has been widely debated. The two main loci from which the controversy developed are certain provisions of the 1969 Vienna Convention on the Law of Treaties (arts 53 and 64) and a famous obiter dictum of the International Court of Justice (“ICJ”) in the 1970 Barcelona Traction case, where the ICJ states: “When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes”, Barcelona Traction, Light and Power Company Ltd: second phase, February 5 1970 (Belgium / Spain), ICJ Reports, 1970, § 33. On the hierarchy of the sources of international law see: AKEHURST, M., The Hierarchy of the Sources in International Law, in British Yearbook of International Law, 1974-1975, pp. 273 et seq. ; WEILER, J.H., PAULUS, A.L., The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?, in European Journal of International Law, 8/4, 1997, pp. 545 et seq. ; KOSKENNIEMI, M., Hierarchy in International Law: A Sketch, in European Journal of International Law: 8/4, 1997, pp. 566 et seq. ; CARRILLO SALCEDO, J.A., Reflections on the Existence of a Hierarchy of Norms in International Law, in European Journal of International Law, 8/4, 1997, pp. 583 et seq. ; PAWELYN, J., Conflict of Norms in Public International Law, Cambridge University Press, Cambridge, 2003; SHELTON, D., Normative Hierarchy in International Law, in American Journal of International Law, 100/2, 2006, pp. 291 et seq.

8 On the nature of the defences included in the ILC Draft Articles (and current ILC Articles) see: LOWE, V., Precluding Wrongfulness or Responsibility: A Plea for Excuses, in European Journal of International Law, 10/2, 1999, pp. 405 et seq.

9 In the context of domestic private law, we can refer, for instance, to Force Majeure, Hardship or the theory of “imprevisión”. The Necessity defence is, at the domestic level, more often found as an excusing defence in criminal law.

10 The inherent vagueness of the expression “essential interest” has, understandably, been the object of much scholarly discussion. Commentators have endeavoured to distinguish what qualifies as an “essential interest” from what does not. Regarding, specifically, self-preservation and economic and financial necessity, see the discussion and the references provided by HEATHCOTE, S., State of Necessity and International Law ... , pp. 200-261.

11 See supra footnote 6.

12 In the present piece, we adopt the usual characterization of home State (State of which the investor is a national or where it is incorporated or, still, where the investor’s headquarters are located) and host State (State where the investment is made). In connection with a Necessity situation, we also use the terms breaching State (State invoking Necessity to preclude the wrongfulness of a breach to an international norm) and victim State (State with respect to which an international norm is breached). In the context of international investment, these categories overlap with those of host State and home State respectively.
beginning, that is with those interests that can by no means be subordinated to others. In other words, one should start by peremptory norms themselves as the core content (but not the whole content) of the expression “essential interests”.

From this perspective, the question of Necessity can be re-stated as follows: was the action taken by the State necessary to avoid a violation of a peremptory norm of international law? Or, should the State have rather violated (or aggravated a violation of) a peremptory norm in order to comply with its obligations under international (investment) law (treaty or customary)? Which one of these two options must a State follow when no satisfactory middle ground seems available? The answer to this question would, in our view, provide useful guidance to practitioners of international investment law in addressing the issue of Necessity in hard cases. It is also to be hoped that such answer will contribute to the understanding of how the concept of peremptory norms influences the development of public international law.

This piece attempts to provide an interpretation of Necessity from the perspective of the broader question as of the existence of a hierarchy among international norms, as it stems from the very concept of peremptory norms. The analysis is structured into three parts. The first deals with the legal concept of Necessity in light of the decisions in CMS v. Argentina and LG&E v. Argentina. These awards have received considerable attention in the legal literature so we focus only on a limited number of issues which we find noteworthy for the purpose of the ensuing analysis. The second part focuses on one aspect of the relation between Necessity and peremptory norms, namely the limiting effect of peremptory norms. We outline four possible scenarios according to the nature of the interests invoked by the home and the host State, respectively. This discussion foreshadows the object of the third and final part, which explores the idea of an excusing effect of peremptory norms, paying particular attention to its practical implications for the availability of Necessity as a defence.

I. NECESSITY IN THE CMS AND LG&E ARBITRAL AWARDS

At the root of the divergent conclusions in the CMS and LG&E awards lie contrasting assessments of the factual situation in Argentina at the time the measures were taken as well as, to some extent, a divergence as to the content of the applicable law. The purpose of the present section is to analyze three features of the CMS and LG&E awards, namely each tribunal’s understanding of the law governing Necessity, their legal assessment of the facts and the way the concept of peremptory norms informs the two awards. These three features all impinge on the way the two tribunals envisioned the Necessity defence, in particular as regards the concept of “essential interests.”

Let us deal first with the way each tribunal understands the law governing Necessity. The treatment of this point in the two cases differs in its form and, to some extent, in its substance. Regarding form, the CMS tribunal starts with a discussion of Necessity under customary international law (as reflected by art. 25 of the ILC Articles) and then pursues its
analysis of Necessity under Article XI of the US-Argentina BIT.\textsuperscript{15} Conversely, the LG&E tribunal focuses first on Article XI of the US-Argentina BIT before undertaking, only for the purpose of buttressing its argumentation, a discussion of art. 25 of the ILC Articles. While the CMS tribunal uses separate sections for each discussion, the LG&E uses the same section for both discussions. Despite the clearer structure of the CMS award on this point, the relation between the two legal bases (custom and treaty law) for assessing Necessity is more explicitly articulated in the LG&E award. Indeed, while the CMS award applies part of the test of the customary rule on Necessity to assess Necessity under Article XI of the BIT, without spelling out the reasons for doing so,\textsuperscript{16} the LG&E award clearly specifies in its paragraph 245 that the customary international law of Necessity only intervenes to confirm a conclusion already reached on the basis of Article XI of the BIT.\textsuperscript{17} The difference is significant, for the conditions for one and the other formulation of the Necessity defence, though comparable, are not the same. It is important to note that the LG&E tribunal formally decided the question of Necessity on the basis of Article XI of the BIT, whereas the CMS tribunal applied the full test of Article 25 of the ILC’s Articles, taking the stance that a number of conditions not expressly mentioned in Article XI of the BIT must be completed by those set forth in customary law.\textsuperscript{18} This was severely criticized in the decision of the ad hoc annulment committee. Indeed, the committee found that the reasoning of the CMS tribunal was deficient on this point, to the

\textsuperscript{15} Argentina-US BIT (1994), signed on November 14, 1991 and entered into force on October 20, 1994. Article IX states: “This Treaty shall not preclude the application by other Party of measures necessary for maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests”. The CMS tribunal also discusses the idea of Necessity under Argentine law, as it stems from the \textit{teoría de la imprevisión} provided for in article 1198 of the Argentine Civil Code.

\textsuperscript{16} See in particular paragraphs 357-358 of the award. In the section devoted to the Tribunal’s findings in respect of the Treaty’s clauses on emergency, the tribunal undertakes to analyze one of the customary conditions for Necessity, which was not required by Article XI of the BIT: “357. A second issue the Tribunal must determine is whether, as discussed in the context of Article 25 of the Articles on State Responsibility, the act in question does not seriously impair an essential interest of the State or States towards which the obligation exists … 358. For the purpose of this case, and looking at the Treaty just in the context of its States parties, the Tribunal concludes that it does not appear that an essential interest of the State to which the obligation exists has been impaired, nor have those of the international community as a whole. Accordingly, the plea of necessity would not be precluded on this count”, \textit{CMS Award}, §§ 357-358. Article XI of the BIT does not mention this condition. As we will see in section II of this article, only contrariety to peremptory norms would render this condition applicable to some extent.

\textsuperscript{17} “In the previous analysis, the Tribunal has determined that the conditions in Argentina from 1 December 2001 until 26 April 2003 were such that Argentina is excused from liability for the alleged violation of its Treaty obligations due to the responsive measures it enacted. The concept of excusing a State for the responsibility for violation of its international obligations during what is called a ‘state of necessity’ or ‘state of emergency’ also exists in international law. While the Tribunal considers that the protections afforded by Article XI have been triggered in this case, and are sufficient to excuse Argentina’s liability, the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in Article 25 of the ILC’s Draft Articles on State Responsibility) supports the Tribunal’s conclusion”, \textit{LG&E Award}, § 245 (italics added). Thus, the conditions set forth in Article 25 of the ILC’s Articles are only used to confirm and not to decide the claim (see also § 258 of the award). This is consistent with the way the Tribunal had set out to use the different legal sources involved: “The Tribunal reiterates that to carry out the two-fold analysis already mentioned, it shall first apply, the Treaty, second, the general international law to the extent that is necessary and third, the Argentine domestic law. The Tribunal underscores that the claims and defences mentioned derive from the Treaty and that, to the extent required for the interpretation and application of its provisions, the general international law should be applied”, \textit{LG&E Award}, § 206.

\textsuperscript{18} In this regard see §§ 383 ff of the \textit{CMS Award} relating to the applicability of the rule of Art. 27 of the ILC Articles to Art. XI of the US-Argentina BIT.
extent that the requirements set for the application of Article XI of the BIT must not be equated with those provided for in Article 25 of the ILC Articles.\(^\text{19}\)

Regarding our second point, the analysis of the Argentine crisis provided by the CMS award is less detailed than the one provided by the LG&E award, in particular in respect of the potential tension between competing interests. Paragraphs 319 to 321 of the CMS Award set out to analyze whether an essential interest, in the sense of customary international law, was involved in the matter. The tribunal’s actual appraisal of the situation is however unclear:

“The Tribunal is convinced that the crisis was indeed severe and the argument that nothing important happened is not tenable. However, neither could it be held that wrongfulness should be precluded as a matter of course under the circumstances. As is many times the case in international affairs and international law, situations of this kind are not given in black and white but in many shades of grey … It follows that the relative effect that can be reasonably attributed to the crisis does not allow for a finding on preclusion of wrongfulness.”\(^\text{20}\)

The remarks of the CMS tribunal with respect to Article XI of the BIT are more developed.\(^\text{21}\) It is stated that, even if the concept of “essential security interest” used in Article XI of the BIT covers above all situations of war, armed conflict or disturbance, this does not preclude the possibility that an economic crisis might, under some circumstances, affect a State so as to trigger the protection of this Article. This interpretation seems accurate to us, but could have been more fully developed. It is true that, as mentioned in paragraph 15 the ILC Commentary,\(^\text{22}\) the extent to which a given interest is “essential” cannot be pre-determined and will depend on the circumstances of the case. However, the tribunal was confronted with specific circumstances and should have made a determination on this issue. The LG&E award is, in this respect, more precise, whether one agrees or not with its decision on this point. As noted before, the tribunal specifically assessed the situation in light of Article XI of the BIT,\(^\text{23}\) referring to Article 25 of the ILC Articles for mere confirmation purposes.\(^\text{24}\) As in CMS, the LG&E tribunal stressed that severe economic crises may qualify for the level of protection granted by Article XI to essential security interests.\(^\text{25}\) But the tribunal went further in its assessment of the situation, mentioning different types of essential interests that were in danger under the circumstances. Among these interests, we find not only economic hardship and the like,\(^\text{26}\) but also more fundamental interests of the Argentine population, such as access to food and to basic medical supplies.\(^\text{27}\) This is particularly interesting for our purpose

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\(^{19}\) “131. Those two texts having different operation and content, it was necessary for the Tribunal to take a position on their relationship and to decide whether they were both applicable in the present case. The Tribunal did not enter into such an analysis, simply assuming that Article XI and Article 25 are on the same footing. 132. In doing so the Tribunal made another error of law. One could wonder whether state of necessity in international law goes to the issue of wrongfulness or that of responsibility. But in any case, the excuse based on customary international law could only be subsidiary to the exclusion based on Article XI”, CMS Annulment, §§ 131-132.

\(^{20}\) CMS Award, §§ 320 in fine, 321.

\(^{21}\) Id. §§ 359 – 365.

\(^{22}\) ILC Commentary, ad art. 25, § 15.

\(^{23}\) LG&E Award, §§ 230 et seq.

\(^{24}\) Id., §§ 251-252. See also footnote 17 supra.

\(^{25}\) LG&E Award, § 238.

\(^{26}\) Id., §§ 232, 233, 235 and 236.

\(^{27}\) “The entire healthcare system teetered on the brink of collapse. Prices of pharmaceuticals soared as the country plunged deeper into the deflationary period, becoming unavailable for low income people. Hospitals suffered a sever shortage of basic supplies. Investments in infrastructure and equipment for public hospitals declined as never before. These conditions prompted the Government to declare the nationwide health emergency to ensure the population’s access to basic health care goods and services. At the time, one quarter of the population could not afford the minimum amount of food required to ensure their subsistence. Given the
precisely because it implicitly suggests the existence of different levels even within the black-box of “essential security interests.”

This latter observation takes us closer to our third point, namely that, despite the type of interests identified in the LG&E award, neither the LG&E nor the CMS tribunal characterized the situation in which Argentina found itself after 2001 by reference to peremptory norms. Although the terms “essential interest” and “essential security interests” are repeatedly used in the awards, peremptory norms are not explicitly used to assess the situation in which the Argentine government acted. As regards the ILC Commentary, upon which the two awards rely heavily, it expressly states that essential interests cannot be defined abstractly, once and for all.28 In an earlier version of the Commentary, which remains relevant for this purpose, it was noted that the international legal order has evolved and that the introduction of the concept of peremptory norms is part of this evolution.29 Despite the fact that the sole express reference to peremptory norms in this version of the commentary relates to their limiting effect,30 some implicit support for the idea of an excusing effect of peremptory norms could be derived from the evolving character of international law. According to this rationale, the legal concept of essential interests should evolve with the development of international law, in a way analogous to that applicable to the concept of domaine réservé, although in the opposite direction. Indeed, while the domaine réservé of the State tends to shrink with the development of international law,31 for new norms such as human rights and the like set new limits to State action, the concept of essential interests is progressively filled in, as the recognition of paramount interests enshrined in peremptory norms develops.

The preceding considerations suggest that the question of the relation between peremptory norms and essential interests of States needs further elaboration. The ILC Articles provide a first element towards this endeavour in Article 25 § 1(b) in fine and Article 26. According to these provisions, no essential interest of a State can be upheld to preclude the wrongfulness of a violation of a peremptory norm (or of a norm protecting the interests of the international community as a whole). The rationale for this was explained in paragraph 37 of the Commentary to the Former ILC Draft Articles (1996), still relevant in this regard:

level of poverty and lack of access to healthcare and proper nutrition, disease followed”, Id., § 234. One may, of course, argue that this was not directly related to gas distribution. However, a powerful counterargument would be that the assessment of such a crisis cannot be segmented by specific companies or even sectors, for socio-economic crisis involve a large array of interconnected causes and consequences.

28 ILC Commentary, ad art. 25, § 15.
29 Commenting on the famous “Caroline” case, it is stated: “For the State organs and for the writers of the time, it made no difference, with regard to the possibility of invoking a state of necessity, whether the obligation with which the act of the State was not in conformity was or was not an obligation relating to respect for territorial sovereignty. But can the same be said today? Apart from doubt on the question whether all international obligations concerning respect for the territorial sovereignty of States have really become obligations of jus cogens, it must be borne in mind that Article 2, paragraph 4, of the Charter of the United Nations requires Member States to refrain from the use of force ‘against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations’”’, ILC Commentary (1996), ad art. 33, § 24.
30 See ILC Commentary (1996), ad art. 33, §§ 22, 28, 37 and 41.
31 Already in 1923, le Permanent Court of International Justice had noted: “la question de savoir si une certaine matière rentre ou ne rentre pas dans le domaine exclusif d’un Etat est une question essentiellement relative, elle dépend du développement des relations internationales”, Nationality Decrees in Tunisia and Morocco, PCIJ, Series B, n. 4, p. 24.
“This obviously means that peremptory rules are so essential for the life of the international community as to make it all the more inconceivable that a State should be entitled to decide unilaterally, however acute the state of necessity which overtakes it, that it may commit a breach of the obligations which these rules impose on it.”

This explanation was retained in the current Commentary with regard to Article 26:

“It is … desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law … The plea of necessity likewise cannot excuse the breach of a peremptory norm.”

Let us elaborate conceptually on this remark. The values enshrined in peremptory norms are, by definition, recognized as essential interests of all States. However, other values may be essential without qualifying as peremptory norms, and this either with respect to all States or only to a specific State. The values that amount to essential interests are therefore not exactly the same as those enshrined in peremptory norms. An interest of the State may be essential for such State and not for all other States. If an interest is essential to all States, that can either mean that an international norm protecting this interest is a peremptory norm or that such interest is merely essential in a general way. Interests enshrined in peremptory norms are therefore only part of the content of the expression essential interests. Hence, two discussions must be distinguished. First, the classic discussion which focuses on the outer limits of the concept of essential interests. Second, a new discussion, which would get into the “black-box” to explore the relationship between different values that are all encompassed by the concept of essential interests.

32 ILC Commentary (1996), ad art. 33, § 37.
33 ILC Commentary, ad art. 26, § 4.
34 For instance, internal peace is, admittedly, an essential interest for each and all States. Conversely, interests such as access to a particular resource (fishing resources, water, pharmaceuticals, certain types of energy, etc.) may represent an essential interest for some States and not for others, depending on the specific circumstances of each State. It may, of course, be argued that, in fact, these interests are only instrumental to the maintenance of a more general essential interest, namely the survival of the population of the State. However, such a reasoning would also make instrumental widely accepted essential interests such as the maintenance of internal peace, for internal peace may also be envisaged as a condition for the survival of the population of a State. Such theoretical issues are extremely difficult to handle. One way to do it, and perhaps the most pragmatic one, is to focus on norms (in which certain interests are enshrined) instead of on the interests as such.
35 The primary norms set forth in multilateral conventions on human rights or humanitarian law may at the least be considered as enshrining general essential interests and perhaps even amount to peremptory norms. The difference between general essential interest and peremptory norms seems to underlie the separate treatment of international obligations which exclude the possibility of invoking Necessity (art. 25 II lit. a ILC Articles) and peremptory norms (art. 26 of the ILC Articles). The ILC Commentary, ad art. 25, briefly refers in § 19 to humanitarian conventions expressly excluding military necessity. For a more developed treatment of this point, we may refer to the Commentary to the Former ILC Draft Articles (1996), which states: “The Commission does not believe that the existence of a situation of necessity of the kind indicated can permit a State to disobey one of the above-mentioned rules of humanitarian law. In the first place, some of these rules are, in the opinion of the Commission, rules which impose obligations of jus cogens, and as stated below, a state of necessity cannot be invoked to justify non-fulfilment of one of these obligations. In the second place, even in regard to obligations of humanitarian law which are not obligations of jus cogens, it must be borne in mind that to admit the possibility of not fulfilling the obligations imposing limitations on the method of conducting hostilities whenever a belligerent found it necessary to resort to such means in order to ensure the success of a military operation would be tantamount to accepting a principle which is in absolute contradiction with the purposes of the legal instruments drawn up. The rules of humanitarian law relating to the conduct of military operations were adopted in full awareness of the fact that “military necessity” was the very criterion of that conduct”, ILC Commentary (1996), ad art. 33, § 28. Thus, some rules of international humanitarian law may be generally essential without necessarily qualifying as peremptory norms. We will see in section III the differences between these two qualifications.
The relation between Necessity and peremptory norms is heavily dependent upon this second discussion. As we shall see next, this relationship has two aspects. First, peremptory norms operate as a limitation to the availability of the Necessity defence. Second, peremptory norms give content to the expression essential interests, in which case Necessity presents particular features.

II. THE LIMITING EFFECT OF PEREMPTORY NORMS

Article 25 §1(b) of the ILC Articles addresses one aspect of the relation between the interests of the breaching State and those of the victim State. A literal reading of this provision would suggest that if the interests of both States qualify as essential, then there can be no Necessity precluding the wrongfulness of the breach. On closer scrutiny, however, at least four different scenarios appear to be possible.

The first and simplest scenario concerns the situation in which both States invoke interests qualifying as essential, neither one amounting to an interest enshrined in a peremptory norm. For instance, both States are undergoing an economic crisis in which (we assume) essential interests of both States are deemed to be at stake. In this case, the Necessity defence would be excluded by virtue of the express limitation in 25 §1(b) of the ILC Articles. In the second scenario, the breaching State invokes an essential interest not enshrined in a peremptory norm whereas the victim State invokes one enshrined in a peremptory norm. This is the basic situation envisaged by Article 26 of the ILC’s Articles. Necessity is expressly excluded. A third scenario would arise when both the breaching State and the victim State invoke an interest enshrined in a peremptory norm. Article 26 of the ILC’s Articles would again exclude Necessity, although from the standpoint of principle this situation may create some uneasiness. This shows the idea that peremptory norms may operate as both the very core of essential interests and the absolute limits of Necessity, and that as a consequence they can in no way be legally jeopardised.

One may ask, however, whether the internal periphery

36 Article 25 of the ILC Articles, in relevant part, reads: “1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: … (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”

37 The number of different scenarios will depend upon the hierarchical levels we recognize within the overall concept of essential interests.

38 Article 26 of the ILC Articles reads: “Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law”.

39 The terms “legally jeopardised” must be noted for they represent the main reason why Necessity cannot be upheld as a defence in this case. The peremptory norm invoked by the breaching State is not legally but factually jeopardised in this case. What the international legal order seems no longer ready to accept is a situation in which a legal device is used to validly derogate a peremptory norm. Of course, the very existence of a dilemma means that, as Necessity is not available in this case, the breaching State will be compelled to breach, indirectly, the peremptory norm it invokes. We would like to make three comments on this question. First, in some cases the peremptory norm itself will envision an exception to itself based precisely on the paramount importance of the interest of the counterparty. For instance, the peremptory norm banning the use of force in international law has two exceptions (and perhaps more), i.e. self-defence and UN enforcement action. States acting on the basis of any one of these two exceptions would not need to invoke Necessity to assert the legality of their action. One could, to some extent, view self-defence as a specific case of Necessity. Second, situations in which there exists a real dilemma between two peremptory norms, and not covered by an exception of the sort we have just described, are extremely rare in practice. They represent those kind of exceptional situations that cannot even be approached on the basis of norms specifically created to deal with exceptions. Third, the theory
of the concept of essential interests, namely essential interests that are not enshrined in peremptory norms, may be subordinated to higher interests? This leads us to the fourth scenario. In the fourth scenario, the breaching State invokes an essential interest enshrined in a peremptory norm while the victim State invokes one that qualifies as a mere “essential interest”. A literal reading of Article 25 §1(b) would lead to the unavailability of Necessity. However, this would imply that the breaching State would have to comply with the norm protecting the other State’s essential interest, even to the detriment of a peremptory norm. There seems to be some room here for a differing interpretation, according to which Necessity would be available. If this were not the case, article 25 would legally comfort a situation where a value enshrined in a peremptory norm is subordinated to a value protected by a hierarchically inferior norm, an hypothesis contrary to the very concept of peremptory norms. Of course, considerations of equity may require that compensation for such breaches be adapted in a special way.\footnote{CMS Award, § 325.}

This latter scenario represents a useful conceptual device, for it takes to the extreme the implications of the concept of peremptory norms on the issue of Necessity. Specifically, it provides an analytical bridge to go from the limiting effect of peremptory norms to their excusing effect. Before turning to this other effect, let us note a number of issues arising out the CMS and LG&E awards that seem interesting for the present discussion. As already noted, peremptory norms are not expressly mentioned in the LG&E award and only briefly mentioned in the CMS award. Paragraph 325 of the CMS award notes:

“It does not appear … that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation governed by Article 26 of the Articles”.\footnote{CMS Award, § 325.}

This paragraph calls for at least three remarks. First, the CMS tribunal suggests that there may be a difference between the essential interests of the international community and interests protected by peremptory norms. We have already noted that interests considered essential to many States are not necessarily peremptory norms.\footnote{See supra footnote 35.} The first category of norms could include international humanitarian standards,\footnote{See supra footnote 35.} health and sanitary standards,\footnote{Such interests are expressly recognized in the WTO context, under Art. XX lit. b) of the GATT (1947). On the way Necessity operates in the WTO context see: HILF, M., PUTH, S., The Principle of Proportionality on its Way into WTO/GATT Law, in VON BOGDANDY, A., MAVROIDIS, P., MENY, Y. (eds.), European Integration and International Coordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann, Kluwer, The Hague, 2002, pp. 199 et seq. ; DESMEDT, A., Proportionality in WTO Law, in Journal of International Economic Law, 4, 2001, pp. 441 et seq.: OSIRO, D., GATT/WTO Necessity Analysis : Evolutionary Interpretation and its Impact on the Autonomy of Domestic Regulation, in Legal Issues of Economic Integration, 29/2, 2002, pp. 123 et seq.; NEUMANN, J., TURK, E., Necessity Revisited …, cited supra footnote 1.} and perhaps also labour\footnote{On the nature of basic labor standards see, for instance: DILLER, M.J., LEVY, D.A., Child Labor, Trade and Investment : Toward the Harmonization of International Law, in American Journal of International Law, 91/4, 1997, pp. 663 et seq.} and/or environmental standards.\footnote{Admittedly, a gravity threshold would seem to entail that no contradiction may exist between norms that qualify as peremptory. More precisely, such norms should be conceptualized in such a way as to be compatible with each other. On this idea (but dealing with political values) see DWORKIN, R., Moral Pluralism, in DWORKIN, R., Justice in Robes, Harvard University Press, Cambridge MA, 2006, pp. 105 et seq.} Admittedly, a gravity threshold would
be needed in order to prevent such standards from becoming an excuse to neutralize the necessity defence or from becoming an easy exit strategy from international obligations. The second category would include norms such as the prohibition of the use of force, the ban on crimes against humanity, genocide, grave breaches of the 1949 Geneva Conventions, or gross human rights violations.\textsuperscript{47} An intermediate category would include those obligations considered \textit{erga omnes}, namely those that must be respected by all States.\textsuperscript{48} As we have already suggested, different qualifications may entail different interactions within the essential interests “black-box”. The three categories seem however to have a limiting effect. This view is of course correct, but only insofar as a scenario-four-type situation is not taken into account.

The second remark concerns the CMS tribunal’s assertion that, in the present case, no essential interests or peremptory norms were at stake from the perspective of either the victim State or the international community. This is interesting because it suggests that investment arbitrations rarely touch upon essential interests of the victim State or upon interests of this State protected by peremptory norms. This is an intuitive conclusion insofar as the claimants in such proceedings are not States but private parties, and that the link between the interests of such private parties and the essential interests of their home State are usually tenuous. However, one could think of some situations in which an investment dispute may threaten an arguably essential interest of the victim State or the international community or a peremptory norm. For instance, the nationalization of a foreign company whose activities represent the only source of natural resources necessary to supply basic services (water, heating and the like) to the population of the home State. This situation is not necessarily an academic example, as suggested by the recent debates on the limitation of foreign investment in strategic industries of the home State. Such regulations may indeed entail a violation of the equal treatment clause included in many BITs in circumstances would not necessarily be covered by clauses reserving essential security interests or by the general necessity defence.\textsuperscript{49}

The third and final remark, and perhaps the most obvious one, is that the tribunal in CMS only contemplates the limiting effect of peremptory norms. Peremptory norms play no other role, either explicitly or implicitly, in the reasoning of the tribunal. This point is not devoid of relevance for the result reached by the tribunal. In fact, we will argue that it partly

\textsuperscript{46} For instance, the \textit{ILC Commentary (1996), ad art. 19, linked environmental standards to the concept of peremptory norms in its §§ 15-17. On the issue of ecological Necessity, as it was raised by Hungary before the ICJ, in the case concerning the Gabčíkovo-Nagymaros Project, see: DOBOS, D., \textit{The Necessity of Precaution …}, cited supra footnote 1.

\textsuperscript{47} See \textit{infra} footnote 51.

\textsuperscript{48} Although this category is often equated with peremptory norms (see \textit{supra} footnote 7), there are cases in which a clear distinction can be drawn. For instance, the international personality of the United Nations organization has been deemed opposable \textit{erga omnes} (Reparation for Injuries Suffered at the Service of the United Nations, Advisory Opinion of 11 April 1949, \textit{ICJ Reports, 1949, p. 174}), an element which seems important in view of the powers conferred on the organization. On the distinction between peremptory norms and obligations \textit{erga omnes} see: DE HOOGH, A., \textit{The Relationship between jus cogens, Obligations erga omnes and International Crimes: Peremptory Norms in Perspective}, in \textit{Austrian Journal of Public International Law, 42/2, 1991, pp. 183 et seq.}; BYERS, M., Conceptualizing the Relationship between Ius Cogens and Erga Omnes Rules, in \textit{Nordic Journal of International Law, 66/2-3, 1997, pp. 211 et seq.}

\textsuperscript{49} Article 3(1) of the 2004 US Model BIT states that: “Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion … of investments in its territory”. This debate has revolved around the potential acquisition, by State-controlled foreign investors, of companies active in industries in which the home State has a strategic interest. The United States Congress has recently enacted a \textit{Foreign Investment and National Security Act}, of July 26, 2007.
explains the contrasting way in which the CMS and LG&E tribunals analyzed the Argentine crisis. Indeed, as we will see next, despite the absence of any express mention of peremptory norms in the LG&E award, the LG&E tribunal did refer to this concept implicitly in its limiting and excusing dimensions.

III. THE “EXCUSING EFFECT” OF PEREMPTORY NORMS

a. Actual Conflicts vs. Supervening Conflicts

Peremptory norms aim to preserve, in all circumstances, certain values considered of paramount importance to the international community. In order to perform this function, they must be hierarchically superior to other norms of domestic and/or international law. This hierarchy is however not based on the specific source from which peremptory norms stem but on the values they protect.\(^{50}\) As a consequence, there is no settled methodology to identify the norms of international law that qualify as peremptory norms. Understandably, international lawyers tend to refer, in this matter, to the decisions of international tribunals, in particular those of the International Court of Justice (ICJ).\(^{51}\) There is, however, no guarantee that the ICJ’s sometimes ambiguous qualifications represent an accurate guide.

The way in which peremptory norms exert their overriding or invalidating effects depends, necessarily, upon the legal context in which they operate. In the context of the law of treaties, their effects are explicitly stated in articles 53 and 64 of the 1969 Vienna Convention. The invalidating effects of these two provisions, although apparently clear on their face, require further elaboration. Art. 53 of the Vienna Convention lays out a sort of “ordre public” at the international level. According to this provision:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”

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\(^{50}\) See supra footnote 7, as well as WEIL, P., Vers une normativité relative en droit international public ?, in Revue générale de droit international public, 1982, pp. 5 et seq.; DANILENKO, G.M., International jus cogens …, cited supra footnote 3.

\(^{51}\) The case-law of the ICJ offers considerable guidance on the contents of what norms qualify as *ius cogens*. See, for instance, the following decisions: *Barcelona Traction, Light and Power Company Ltd*: second phase, Judgment of 5 February 1970 (Belgium / Spain), § 34 (referring to norms banning acts of aggression, genocide, as well as to norms protecting fundamental rights, including the ban on slavery and racial discrimination); *United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1980 (United States of America v. Iran), § 88 (referring to the imperative nature of obligations stemming from diplomatic and consular law); *Military and Paramilitary Activities in and against Nicaragua*, Judgment of 27 June 1986 (Nicaragua v. United States of America), § 190 (referring to the ban on the unauthorized use of force as part of *ius cogens*); *East Timor*, Judgment of 30 June 1995 (Portugal v. Australia), § 29 (referring to the right of peoples to self-determination as *erga omnes*); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, § 79 (referring to “great many rules of humanitarian law applicable in armed conflict” as “intransgressible principles of international customary law”). It must be noted, however, that in some cases, it is rather unclear whether an obligation *erga omnes* qualifies as a peremptory norm. While this is, for instance, clear for the norm banning genocide, it is still to be confirmed as regards the right of peoples to self-determination.
In this regard, it is usually considered that the relevant peremptory norm must exist at the time of the conclusion of the treaty. It is however not clear what the term “conflicts” precisely means. For the purposes of our discussion, suffice it to say that the conflict must, in principle, be an actual conflict, i.e. it must stem from the text of the treaty or from an interpretation of this text in conformity with the interpretation rules laid out in articles 31 to 33 of the Vienna Convention. One obvious example illustrating this type of cases would the conclusion of an offensive military alliance between two or more countries against one or more other countries, or of a treaty regarding slave trade. Slave trade and the use of force being banned by peremptory norms, such treaties would be void and of no effect. Concretely, this means that a State would not engage its responsibility for breaching its obligations under such a treaty and that private parties could not derive any legal consequences whatsoever from the existence of this treaty.

In the field of foreign investment, the question would be whether the text of this or that BIT would on its face conflict with this or that peremptory norm. Aside from very special cases, one may reasonably take as a starting point that, as a rule, BITs in the form of the US or Canadian Model BITs are not prima facie in conflict with peremptory norms. However, this does not mean that the existence of peremptory norms has little relevance for analysis how BITs operate in practice. Indeed, even in those cases in which a treaty is prima facie in conformity with peremptory norms, conflicts between the two may potentially arise if a new peremptory norm (contrary to the text of the treaty) comes into being or when the actual implementation of a treaty conflicts with an existing peremptory norms. Such conflicts may be referred to as supervening conflicts.

b. Supervening Conflicts

Supervening conflicts between a treaty and one or more peremptory norms may arise in two main forms: first, a new peremptory norm may override the content of a treaty; second, the normal performance of the treaty obligations (ordinarily interpreted) may, under some circumstances, conflict with an existing peremptory norm. Let us analyse these two cases in order of complexity.

The first case is contemplated in article 64 of the Vienna Convention, which reads:

“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

This provision expressly acknowledges that international law is an evolving realm, and that conducts that are permitted at one point in time may become banned at a later time. The emergence and development of the ban on the use of force is but one obvious example. Thus, while a treaty laying out an offensive alliance was legally valid during the XIX century and arguably up to the enactment of the UN Charter, today such an alliance would be devoid of any legal effect. Other, perhaps more relevant, examples may involve treaties running against environmental and/or labour standards, whose status as peremptory norms is still ambiguous but may become well affirmed in the years to come. Indeed, albeit not settled, it seems arguable that the application of a treaty relating to the exploitation of endangered species or to the exchange of foreign workers under lower labour standards than those internationally

52 With two uncontroversial exceptions: enforcement action ordered or authorized by the U.N. Security Council, under Chapter VII of the U.N. Charters; and self-defence. Other possible exceptions, still extremely controversial in contemporary international law are: the use of force within the context of a people’s exercise of its right to self-determination; and humanitarian armed intervention.
recognized could be challenged, as the case may be, before national or international courts. These illustrations come much closer to how the protection provided by a BIT could be set aside by a court on the basis of peremptory norms. Of course, such environmental and/or labour restrictions are often taken into account in the text of BITs. However, it is far from clear whether the restrictions contemplated in the relevant provisions of such treaties cover all or even most international standards.

The second case is more complex. It concerns treaties concluded in perfect conformity with peremptory norms but whose implementation under specific circumstances seems to conflict with peremptory norms. These specific circumstances include, of course, Necessity. One illustration of this second case, particularly relevant from a practitioner’s standpoint, concerns the validity of a BIT clause excluding the invocation of Necessity. A priori there is no reason why ordinary rules of international customary law, such as those governing Necessity, could not be set aside by treaty. Such a clause would only be invalid if it can be established that the rules governing Necessity cannot be derogated from by treaty. However, except for those rules related to peremptory norms, there are no reasons to believe that the customary international law of State responsibility benefits from an imperative character. In this line of thought, Necessity could a priori be derogated from, but such derogation would have no effect when the Necessity defence operates to uphold the application of a peremptory norm. Concretely, if the breaching State can justify the breach referring to the need to abide by a peremptory norm, then a clause excluding the necessity defence in all cases, including those in which peremptory norms are at stake, would not be fully valid. It would only be valid to the extent that it excludes the invocation of Necessity in cases in which the breach is not justified by the need to uphold a peremptory norm. Such a conflict is both actual and supervening in some respects. However, insofar as the relevant clause seems prima facie valid, it seems more appropriate to analyze it as a supervening conflict.

53 See, for instance, articles 12 and 13 of the US Model BIT (2004), and art. 11 of the Canadian Model BIT (2004).

54 Even provisions in human rights treaties may be derogated in case of public emergency. See, for instance, article 4.1 of the International Covenant on Civil and Political Rights, of 16 December 1966, which runs as follows: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin”. However, even under such conditions, no derogation is admissible with respect to certain core human rights identified in article 4.2: “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.” The rights concerned by this provision include the right to life, the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, the prohibition of imprisonment for contractual debts, the “nullum crimen nulla pena sine lege” principle, the right to recognition as a person before the law and the right to freedom of thought, conscience and religion. Moreover, there are other obligations based on customary law that, according the Human Rights Committee, belong to the human rights core and are excluded from derogation, cf. Human Rights Committee, General Comment 29, paragraph 11. It should be noted that, in the current state of development of public international law, only massive violations of human rights seem to be banned by a peremptory norm. See supra footnote 51.

55 Of course, a major issue in all these illustrations is severability. The ILC Commentary, ad art. 26, starts its discussion with the issue of severability, quoting the Special Rapporteur on the Law of Treaties, Fitzmaurice: “A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of jus cogens will justify (and require) non observance of any treaty obligation involving such incompatibility … the same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty”, ILC Commentary, ad art. 26, § 2. The ILC Commentary pursues: “In theory one might envisage a conflict arising on a subsequent occasion between a treaty
Beyond the specific context of a treaty clause excluding Necessity, this analysis suggests that a State may find itself in a situation where it has the responsibility to protect its population from a specific threat or disaster, even if the actions that should be reasonably taken run counter other international obligations of the State. In such a situation, the State faces something close to a dilemma. Two or more competing (or even mutually exclusive) obligations require from the State courses of action incompatible with each other. Some of these obligations may be clearly stated in, say, the black letter of a BIT. The problem with Necessity is, however, that it does not clearly state what are the obligations that stand on the other end. This is a point that has often been neglected. Necessity is based on a hierarchy of values enshrined in international norms. If one is to identify which norms should stand on the other end, one cannot avoid starting with peremptory norms. Admittedly, peremptory norms may not be the whole story, but they are at least part of the story. Other norms may also intervene as contenders of BITs or of other obligations. But one can hardly proceed to a weighing of the interests at play in a Necessity situation if the norms which enshrine such interests are not clearly identified and characterized.

c. A Specific Form of Necessity

A government facing a situation of Necessity such as the one described in the preceding paragraph will face the following choice: either pursuing a policy which, although contrary to the obligations arising out of a BIT, maximizes the probability that the value enshrined in a peremptory norm will be preserved as fully as possible, or simply sticking to its BIT obligations, no matter the effects on the values preserved by peremptory norms. Such perspective is closely connected with the condition requiring that, for Necessity to be admissible, there must be no other choice for the State but to breach the BIT. One may wonder what is actually required from States by this condition. In practice, decision-makers will have a number of options available, none of which will provide total certainty that the goal pursued will be attained, but varying degrees of probability short of that. Suppose that a decision-maker is trying to find ways to preserve, as much as possible, the population’s access to gas or water. Suppose further that there are two major alternatives: one which is clearly in obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred. Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts, § 3 (italics added). The issue of severability has been considerably studied in the context of invalid reservations to treaties: BARATTA, R., Should Invalid Reservations to Human Rights Treaties be disregarded, in European Journal of International Law, 11/2, 2000, pp. 413 et seq.; GOODMAN, R., Human Rights Treaties, Invalid Reservations, and State Consent, in American Journal of International Law, 96/1, 2002, pp. 531 et seq.

The competing values (and the norms in which they are enshrined) would be related to each other in the form of a zero-sum game. 

Availability should not mean here theoretical availability. Decision-makers will normally have a limited number of possible courses of action in their minds, some of which they have perhaps already tested in the past (or have been tested somewhere else) while others will just come to their minds as mere theoretical options. We submit that the law of Necessity cannot require from decision-makers that they follow theoretical untested courses of action or even courses of action that the relevant officials are not trained or prepared to handle. Otherwise, the no-other-action condition would simply be impossible to meet or, even worse, it would require ungrounded experimentation on human societies.
breach of a BIT’s obligations but that has a 50% probability of attaining the public policy goal, and another which is a priori compatible with the BIT but that has only a 30% probability of attaining the public policy goal. What alternative should the decision-maker pursue?

It is submitted that, from a legal standpoint, the first alternative should be followed. More fundamentally, the first alternative must be considered as meeting the “no-other-choice” condition. This stems from the fact that, once a peremptory norm is at stake, every improvement in the probability required to preserve the value enshrined in a peremptory norm is not only desirable but legally required. To further illustrate this point, we could overstretch the example. If the first alternative, although in total breach of the BIT, had an 85% probability to preserve the value at stake, while the second, fully compatible with the BIT, was only 80% sure of preserving the same value, it would still be legally required to pursue the first alternative. Admittedly, three main questions arise here: first, how accurately can we predict the probability of success of each policy alternative?; second, should the principle proportionality have a bearing on the legal outcome of this dilemma? third, is this reasoning applicable when values enshrined in norms other than peremptory norms are at stake?

Concerning the first question, the answer is strictly technical. The outcomes of different public policies can be reasonably predicted. If this claim was totally wrong, a whole province of contemporary social science, including economics and econometrics, would be of little use. Of course, it is not a matter of whether policy outcomes can be predicted to some extent or not but rather of how accurately they can be so. Small margins of error such as 5% (our second illustration) would, admittedly, be hardly persuasive. However, margins of 20% or more, to say a number, could not be simply neglected and should, in our view, be carefully taken into account at least when it comes to preserving values enshrined in peremptory norms.

Of course, and this is our second point, the probabilities issue should also have a bearing with respect to proportionality and, more precisely, in determining compensation. Indeed, a course of action with a slightly higher probability of success but which entails, say, a far more damaging outcome for foreign investors (as compared with other possible courses of action), while still justified, may require fuller compensation for the damaged investors, in accordance with the principle of proportionality. Conversely, when one course of action clearly stands out as the best option with respect to the protection of values enshrined in peremptory norms, even if other courses of action would be less harmful to investors, compensation may be more limited.

Third, what if the value that the decision-maker is seeking to preserve is not enshrined in a peremptory norm? Does our reasoning apply in the exact same manner? To make things clearer, an example will help. What would be the case if the decision-maker was seeking to optimize another value, say economic prosperity or strategic interests, which is not enshrined in a peremptory norm? We think the legal solutions in this case should be different, and this to the point that Necessity would no longer be applicable.58 Viewed from the perspective of a hierarchy between the values (norms) at stake, insofar as, say, the economic prosperity of the host country does not legally override the obligations under the BIT, there is no question of Necessity being applied. In other words, the first question to be asked when facing an allegation of Necessity is: what are the values at stake? If the host State is not acting to

58 See also our brief discussion of foreign investment limitations in strategic industries, supra p. 9 and footnote 49.
preserve a value hierarchically superior to the one protected by the BIT, then Necessity is excluded.

This reasoning leaves open, however, the question of how to analyze a situation in which the host State is acting to preserve an “essential interest”, whose peremptory character is controversial. A possible example would be environmental norms. As a first step, the tribunal would have to rule whether the interest that the host State was seeking to preserve is essential or not. If it is not, Necessity would simply be excluded. If it is essential, then the tribunal will have to deal again with the probabilities issue. What is then the difference between this case and the one involving a peremptory norm?

It is submitted that there are at least four differences. First, when a peremptory norm is involved, the excusing effect of Necessity is larger, overriding also those cases in which an essential interest of the home State is involved. Second, when a peremptory norm is not at stake, the probabilities issue should be appraised more restrictively. This is because, as a rule, a peremptory norm admits no derogation and requires to be preserved as fully as possible. Thus, from a legal standpoint, a decision-maker should not be entitled to take any chance in seeking the full preservation of such a norm. Third, the fact that peremptory norms must be upheld by and are the concern of all States (while an essential interest may be the egoistic concern of one single State) should be reflected in the computation of damages. Compensation awards for breaches of a BIT stemming from acts that sought the preservation of a value enshrined in a peremptory norm should, in our view, be more benevolent. After all, if the same situation had arisen in the State where the investor is based, such State would have had to act in a similar fashion as the host State did, for peremptory norms serve to protect the interests of (and thus are imperative for) all States. Moreover, it stems from the very concept of peremptory norms that, in upholding a peremptory norm, the breaching State was legally acting in the interest of all States. Fourth, situations involving peremptory norms may render Necessity available in cases where essential interests which are not enshrined in peremptory norms preclude its availability. For instance, suppose that a plant producing conventional weapons (investor) is based in State A, which has concluded a BIT with State B (investor’s home State). Now, let us suppose that State A realizes that the weapons legally produced by the investor are the main supply (through the intermediary of State B) of a paramilitary group active in a State bordering A (State C), who has committed all sorts of atrocities in total violation of peremptory norms banning gross violations of human rights and humanitarian law. Suppose further that State A takes action to prevent such exports and, in so doing, breaches the obligations under its BIT with B. Can State A invoke Necessity? Technically, Necessity would not be ab initio excluded, for despite the fact the crisis is not State A but in State C, the preservation of values enshrined in peremptory norms is, by definition, essential to all States. This is not the case of mere essential interests. The critical issue to assess Necessity in this hypothesis would, admittedly, be whether other courses of action were

59 As already noted, environmental interests are often contemplated in the text of a BIT so our hypothesis supposes that either in the instant case the BIT does not include such clause or that there is a dispute as to the environmental interests covered by such clause. The peremptory character of environmental norms was suggested by art. 19 of the former Draft Articles on State Responsibility (1996), which considered violations of international environmental norms as international crimes. Art. 19 was much criticized and finally abandoned in the current version of the ILC Articles. However, in view of the current debate on environmental issues, it is not totally unlikely that at least some environmental norms gain enough importance in the coming years (decades) to become peremptory norms.

60 See supra section II.
available to State A, such as diplomatic pressure over State B or others. Here again, the probabilities issue would come into play. A tribunal assessing whether Necessity could justify the actions of State A will thus have to focus, as we have seen before, on whether State A’s decision-maker was entitled to believe that action taken was the best (even if not the only) course of action to preserve the peremptory norms at stake.61

d. LG&E and Specific Necessity

The decision of the arbitral tribunal in LG&E offers a good illustration of how the excusing effect, although not openly taken into account, lurks behind the hard choices made by the tribunal. We have already discussed both the CMS and the LG&E decisions and concluded that only the LG&E tribunal clearly identified the value trade-off inherent to Necessity. Here, we would like to add some comment on the implicit underpinning of part of the reasoning conducted by the LG&E tribunal with regard to Necessity.

The tribunal focuses its analysis of Necessity on Article XI of the prevailing BIT and concludes that, between 1 December 2001 and 26 April 2003, the “essential security interests” of Argentina were threatened.62 The concept of essential security interests, and that of essential interests, may cover interests so essential as to be protected by peremptory norms. In the specific context of the case, this would have been the case had Argentina been, for instance, under foreign military intervention and the like. In the matter at hand, it was however far more difficult to determine whether such a norm was at stake. This is indeed difficult because, aside from some widely acknowledged norms, it is unclear which norms qualify as peremptory norms. It was safer to use the more general concept of essential interests, which is broader in scope. However, among the different values that the tribunal considered at stake, it mentioned that the crisis threatened the satisfaction of basic human needs.63 The tribunal did not pursue this line of reasoning, and concluded that this constituted an indicator, among others, that the crisis was severe. One way to put it would be to say that the tribunal only glimpsed at the idea that the preservation of values such as minimal sanitary conditions for a large portion of the population should override the obligations of Argentina under the BIT. Of course, such an argument must be appraised restrictively, in light of the evidentiary record. But what is interesting for our purpose is not whether the tribunal concluded in this or that way but rather the road suggested by its reasoning.

Another element relevant as an illustration of our remarks is given by how the tribunal assessed the “no-other-choice” requirement. The LG&E tribunal has been criticized for placing on the claimants the burden of proof that the Argentine government could have followed another course of action.64 While, traditionally, it is the defendant who must prove all the conditions required for Necessity, a principle that could be applied by analogy to clauses of Necessity in BITs, the reasoning of the tribunal can still be explained satisfactorily taking into account our remarks on the probabilities issue. What the tribunal seeks to establish

61 It should be reminded that action undertaken by State A may be covered by Necessity only insofar as it does not itself breach a peremptory norm. To take an example, forceful intervention by State A would be precluded by the peremptory norm banning the use of force.
62 LG&E Award, § 231.
63 Id., § 234.
64 LG&E Award, § 242 in fine. See SCHILL, S.W., International Investment Law and the Host State’s Power to Handle Economic Crises … , cited supra footnote 6.
in paragraphs 240 et seq of the award seems to be that, given the circumstances, the measures taken by the Argentine government were the best solution to the crisis (although not with respect to investors) that the relevant officials were reasonably able to come up with. Again, the tribunal did not fully develop its line of thought. However, reading between the lines, there is some ground to conclude that the tribunal took a pragmatic (as opposed to theoretical) view of the courses of action available to the relevant officials and acknowledged that the Argentine government took the one with the better probability of success. One may object to this point both normatively and from the standpoint of what the evidentiary record allowed to conclude. It makes nevertheless sense to admit that the first and foremost imperative when handling a severe crisis is to ensure that the top priorities are met, even if this requires causing more harm to investors than what other courses of action would. But this conclusion seems to be admissible only if these “top priorities” are sufficiently legitimate, a condition clearly met when they involve preserving as fully as possible values enshrined in peremptory norms. Let us add that this latter point does not necessarily mean that a peremptory norm was at stake in this specific case, but only that, should this be the case, the requirements needed to invoke Necessity would have to be adjusted to take into account the nature of the interests at stake.

CONCLUDING REMARKS

The preceding considerations suggest that acknowledging theexcusing effect of peremptory norms as part of the Necessity defence may in fact considerably influence the way in which academics and practitioners understand and apply Necessity. As soon as we admit that the preservation of the values enshrined in peremptory norms represent an essential interest in the sense attributed to this concept by the ILC Articles and international customary law, a number of legal consequences follow, consequences that have not yet been fully explored. This article constitutes a preliminary attempt at conducting such exploration.

Indeed, if as this article argues, the concept of essential interests is a legal concept which evolves with the development of international law, then it would be difficult to reject the view that in contemporary international law such concept covers interests enshrined in peremptory norms. From the moment we admit that peremptory norms, as related to the Necessity defence, may have not only a limiting effect but also an excusing effect, the understanding of Necessity changes in subtle though important ways. We have identified several ways in which this change is noticeable. Let us summarize here the most important ones. First, our analysis suggests that Necessity should be approached as a contest between two or more mutually exclusive (and hierarchically unbalanced) values, a modus operandi often neglected. Second, once the excusing effect of peremptory norms is acknowledged, it becomes necessary to revisit the “no-other-choice” requirement of Necessity. This point has also implications on the allocation of the onus probandi. Third, when the essential interests claimed by States are also enshrined in peremptory norms, the Necessity may cover situations that would have been excluded under the traditional understanding of this defence. Finally, the excusing effect of peremptory norms may have implications as regards compensation issues.

Of course, as with every legal issue on which the concept of peremptory norms may have a bearing, one of the main questions is what norms qualify as peremptory and with what consequences. When the concept of peremptory norms was first introduced in text of the
Vienna Convention on the Law of Treaties, by analogy with domestic contract law, it was extremely difficult to foresee the impact that it would have on other areas of international law in the years to come.\textsuperscript{65} Today, however, peremptory norms benefit from wide, although not total,\textsuperscript{66} recognition. The case-law of the International Court of Justice has welcomed the concept both in advisory opinions and contentions cases. This wide and increasing acceptance represents, no doubt, a formidable legal development. But such accomplishment will be of little use if its implications remain obscure. In this context, we would like to see the preceding analysis as a preliminary contribution to the understanding these implications on one specific point of law.

\textsuperscript{65} See GAJA, G., \textit{Jus cogens beyond the Vienna Convention} \ldots, cited \textit{supra} footnote 3.

\textsuperscript{66} See for instance, paragraph 3 (a) of the Comment of the government of France to the \textit{Draft Articles on State Responsibility} (1996): “Article 19 of the draft articles, mentioned above, draws on the same idea as \textit{jus cogens}. If paragraph 2 of that article is read in the light of articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, it will be noted that the concept of “an international obligation so essential for the protection of fundamental interests of the international community” is very close to that of “a peremptory norm of general international law”. It is precisely because the 1969 Vienna Convention introduced a concept of the law of treaties which was previously unknown and, what is more, is dangerous for legal security, that France refused to sign that Convention. For the reasons of principle stated above, the express references to \textit{jus cogens} in article 18, paragraph 2, article 29, paragraph 2, and article 50, subparagraph (e), should be deleted.”