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Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law

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Abstract

The concept of "necessity" is used in many legal systems to delimit permissible from prohibited measures where such measures negatively affect the regime's primary values, such as human rights, liberalized trade, and protection of foreign investment. International investment tribunals have adopted a variety of approaches to the question of whether a measure is "necessary" to achieve its objective in relation to a number of provisions of investment treaties, including non-precluded measures clauses and fair and equitable treatment. Yet their approaches to this form of analysis are inconsistent and generally not analytically robust. By comparison, WTO tribunals have developed relatively sophisticated methods for analyzing a measure's necessity to achieve its objective in the context of general exceptions, sanitary and phytosanitary measures and technical regulations. The WTO approach generally takes into account a number of factors, including the importance of a measure's objective, a measure's effectiveness at achieving that objective, and the availability of alternative measures. Importantly, WTO tribunals generally undertake this analysis with a degree of deference, in recognition of the right of governments to set their own policy priorities. Investment tribunals could usefully employ aspects of the WTO approach to necessity in the context of non-precluded

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measures, fair and equitable treatment, non-discrimination, and non-expropriation. Such an approach would go some way toward the development of a consistent, coherent body of cases in relation to the concept of necessity in international investment law, providing greater certainty for both host states and investors.

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I. INTRODUCTION

The concept of "necessity" plays an important role in many legal systems to delimit permissible measures from those that are incompatible with rights or interests protected by that legal system.[1] This Article compares the approaches to the analysis of necessity by ad hoc tribunals constituted under investment treaties with the approach taken by World Trade Organization panels and the Appellate Body (WTO tribunals). In particular, the Article compares the use of this form of analysis to delimit permissible state measures from measures in violation of treaty obligations in international investment law and WTO law. It examines, in this regard, non-precluded measures clauses and the doctrines of fair and equitable treatment, non-discrimination, and non-expropriation in international investment law in comparison with WTO general exceptions provisions[2] and rules on sanitary and phytosanitary measures and technical regulations.

While international trade and investment are regarded as increasingly inseparable, they remain separately regulated in international law.[3] Yet both regimes frequently rule on the lawfulness of legislation and other measures adopted by governments in the public interest in terms of their compliance with the government's obligations affecting commercial entities, and in this respect, perform common functions. Disputes may be brought in both arenas relating to the same subject matter: international investment law and WTO law both provide aggrieved producers and service suppliers with the opportunity to seek redress (although a government must bring a claim on behalf of such interests before the WTO). The recent challenges to Australia's legislation mandating plain packaging of tobacco, as well as the series of disputes between Mexico and the United States in relation to high fructose corn syrup, exemplify this phenomenon.[4]

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1 See Tarcisio Gazzini, Wouter G. Werner, and Ige F. Dekker, *Necessity across International Law: An Introduction*, 41 Netherlands YB Intl L 3, 3 (2010).

2 General Agreement on Tariffs and Trade, Article XX, 61 Stat A-11, TIAS 1700, 55 UN Treaty Ser 194 (1947) (GATT).

3 See, for example, Nicholas DiMascio and Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Different Sides of the Same Coin?*, 102 Am J Intl L 48, 48–50 (2008); Gus Van Harten, *Investment Treaty Arbitration and Public Law* 78–79 (Oxford 2007).

4 See *Philip Morris Ltd v The Commonwealth of Australia* (UNCITRAL Arbitration), online at http://www.italaw.com/sites/default/files/case-documents/italaw1309.pdf (visited Apr 10, 2013); World Trade Organization, Request for the Establishment of a Panel by Ukraine, *Australia–Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc No WT/DS434/11 (Aug 17, 2012); World Trade Organization, Request for the Establishment of a Panel by Honduras, *Australia–Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to*

The potential for conflicting outcomes between the two regimes is of both theoretical and practical concern for states and investors alike, an issue that is compounded by the divergent approaches to finding state liability within international investment law itself. Given that a tribunal's determination of whether or not a measure is "necessary" to achieve its objective may be crucial to the outcome of a given case (as a measure that is not necessary will violate the state's obligations), this inconsistency in analytical approaches negatively impacts the certainty and predictability of international investment law. Investment tribunals have also faced opprobrium for interpreting investment treaties in a way that does not provide sufficient space for host states to enact new legislation and take other actions in the public interest. In this regard, a principled approach to testing the legality of a measure, in terms of its necessity to achieve a bona fide regulatory objective, is important in achieving an interpretation of international investment law that reflects an appropriate balance between the interests of both investors and host states. A more consistent and disciplined approach to necessity may deal with these criticisms and accommodate host states' regulatory autonomy to a greater extent. This Article aims to determine whether WTO law might be of assistance to investment tribunals in this respect.

Section II of the Article discusses the technique of necessity analysis in treaty-based regimes, highlighting the analytical stages and various methodologies an adjudicator may employ. Section III analyzes how international investment tribunals have determined the issue of necessity in relation to non-precluded measures, fair and equitable treatment, indirect expropriation and national treatment. Section IV assesses how WTO tribunals dealt with the issue of necessity in the context of general and security exceptions, sanitary and phytosanitary measures, and technical regulations. Section V reflects on the emergence of an approach to necessity influenced by WTO case law in the context of international investment law, and discusses the relevance of the WTO approach to international investment law. Section VI concludes that there are several aspects of WTO tribunals' approaches to necessity analysis from

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Tobacco Products and Packaging, WTO Doc No WT/DS435/16 (Oct 17, 2012); World Trade Organization, Request for the Establishment of a Panel by the Dominican Republic, *Australia–Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc No WT/DS441/15 (Nov 14, 2012); *Archer Daniels Midland Company v The United Mexican States*, ICSID Case No ARB (AF)/04/05, (Award of Nov 21, 2007), online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC782_En&caseId=C43 (visited Apr 10, 2013) *(Archer Daniels v Mexico)*; *Corn Products International, Inc v The United Mexican States*, ICSID Case No ARB (AF)/04/01, Decision on Responsibility (Jan 15, 2008), online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1012_En&caseId=C29 (visited Apr 10, 2013); World Trade Organization, Report of the Appellate Body, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WTO Doc No WT/DS308/AB/R (Mar 6, 2006) (*Mexico–Soft Drinks*).

which international investment tribunals could usefully draw guidance when determining the permissibility of measures affecting foreign investors. These are: assessing the importance of a measure's objective, testing a measure's effectiveness and permitting measures to pass this stage of review when they have the potential to achieve their objective in the future, undertaking least-restrictive means analysis in a manner that is sensitive to host states' technical, institutional and budgetary capacities, and taking a consistent approach to the burden of proof.

II. Necessity Analysis in Context

A. Overview

In international law, the concept of necessity has two separate meanings and functions. Under customary international law, a measure taken in relation to a state of necessity is a measure that is unlawful in normal circumstances, but may nonetheless be adopted by a state in exceptional circumstances, where the measure is the only means available to protect the state's essential interests against a grave and imminent danger.[5] The customary plea of necessity may only be argued where a breach of an international obligation is established according to the primary rules of the particular regime (be they *jus ad bellum*, environmental law, or other areas of international law); the defense operates as a secondary rule to determine whether this wrongfulness is precluded.[6] In this respect, the plea of necessity provides "a shield against an otherwise well-founded claim for the breach of an international obligation."[7] Among several strict prerequisites, the plea requires that the measure adopted be "the only means available" to deal with the situation.[8] As such, invocation of the state of necessity imposes an extremely high threshold.

However, the concept of necessity has a different meaning and function in a number of treaty-based regimes. It functions as a means of determining whether authorities may permissibly promulgate a measure that restricts or limits a right or interest protected by the legal regime (such as free trade, unimpeded

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5 United Nations, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/10 at Art 25 (2001).

6 See, for example, August Reinisch, *Necessity in Investment Arbitration*, 41 Netherlands YB Intl L 137, 148–49, 156 (2010).

7 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its fifty-third session (2001), Official Records of the General Assembly, fifty-sixth session, Supplement No. 10 (A/56/10), 71. See *Draft Articles*, Art 25 (cited in note 5).

8 *Draft Articles*, Art 25 (cited in note 5).

use of an investment, or human rights). In this context, the test of necessity operates to delimit the permissibility of state conduct that negatively affects a right or interest protected by the regime's primary rules, rather than as a justification or excuse for non-performance of the state's obligations.[9] It is this latter concept of necessity that this Article will explore further.

B. Necessity Testing in Treaty-Based Regimes

"Necessity" may be described as a term that has no inherent or ordinary meaning in relation to whether a measure is necessary to achieve a particular objective. Accordingly, courts and tribunals developed criteria by which to determine whether a measure is necessary.[10] Generally speaking, the test has been interpreted as a requirement of "the least restrictive means," requiring a state to choose, from all potential measures that would advance its desired objective, the measure that would least limit the protected right or interest.[11] This form of necessity testing is employed in a wide variety of legal systems, including in the case law of the Court of Justice of the European Union (CJEU), European Court of Human Rights (ECtHR), and in a number of domestic legal systems.

Undertaking least-restrictive means analysis is predicated on a court or tribunal's initial finding that a measure pursues a legitimate policy objective.[12] Where the treaty provision is open-ended or does not specify the policy objective that would justify limiting a right or interest, a court or tribunal must identify and evaluate the legitimacy and importance of the regulatory objective in terms of the public interest it is intended to serve. For example, the European Convention on Human Rights (ECHR) provides that contracting states may promulgate measures restricting the right to property "in the public interest."[13] In addition, the mandatory requirements doctrine, created by the CJEU, provides that member states may adduce grounds of justification for measures limiting free movement that do not have a basis in the treaty text, which requires the CJEU to assess the legitimacy of the objective of a challenged measure.[14]

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9 *Draft Articles*, Art 25 (cited in note 5).

10 Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 Intl & Comp L Q 325, 337 (2010).

11 See Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* 317 (Cambridge 2012).

12 See, for example, id at 321.

13 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), 213 UN Treaty Ser 221, Protocol 1, Art 1 (1953) (ECHR).

14 See *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case 120/78, 1979 ECR 649 ¶ 8 (1979); Gráinne de Búrca, *The Principle of Proportionality and its Application in EC Law*, 13 YB Eur L 105, 126 (1993); Takis Tridimas, *The General Principles of EU Law* 212 (Oxford 2d ed 2006).

Also, certain provisions in WTO agreements are open-ended as to the types of policy objectives that may be invoked in relation to the measures restricting trade.[15] An adjudicator's role in this respect is to filter out exercises of power in pursuit of ostensible public interests that cannot ever justify limiting protected rights and interests, such as protectionist or discriminatory conduct, rather than engaging in substitutionary review of the importance of the measure's objective.[16] By contrast, some treaty provisions set out a list of regulatory purposes that have already been determined to be legitimate by virtue of their inclusion in the treaty provision. Here, the adjudicator's role is limited to ascertaining whether the stated objective comes within one of the permissible areas. For example, GATT Article XX and GATS Article XIV specify lists of permissible objectives,[17] as does Article 36 of the EU Treaty.[18]

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15 Agreement on Technical Barriers to Trade, Annex 1 A to the Marrakesh Agreement Establishing the World Trade Organization, Art 2.2, 1867 UN Treaty Ser 3 (1995) (TBT Agreement). GATT, Art XX(d) (cited in note 2).

16 T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis,* 19 Emory Intl L Rev 465, 490 (2005); Mark Elliott, *Proportionality and Deference: The Importance of a Structured Approach,* in Christopher Forsyth, et al, eds, *Effective Judicial Review: A Cornerstone of Good Governance* 264, 281 (Oxford 2010).

17 GATT, Art XX (cited in note 2) provides that Members may take measures affecting international trade where necessary for the protection of public morals (XX(a)) and human, animal, or plant life or health (XX(b)); measures necessary to secure compliance with laws or regulations not otherwise inconsistent with the agreements (XX(d)) (although this provision is itself open-ended); and measures "involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan" (XX(i)). The other enumerated exceptions contain different nexus requirements: "relating to" the importations or exportations of gold or silver (XX(c)), the products of prison labor (XX(f)), and the conservation of exhaustible natural resources (XX(g)); "imposed for" the protection of national treasures of artistic, historic, or archaeological value (XX(f)); "undertaken in pursuance of" obligations under any intergovernmental commodity agreement (XX(h)) and "essential to" the acquisition or distribution of products in general or local short supply (XX(j)). See also the references to necessity in General Agreement on Trade in Services, Art XIV(a), (b), and (c), Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round vol 1, 1867 UN Treaty Ser 183 (1995) (GATS); Agreement on the Application of Sanitary and Phytosanitary Measures, Art 2.2, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round vol 1, Annex 2 A, 1867 UN Treaty Ser 493 (1995) (SPS Agreement), which controls measures "necessary to protect human, animal or plant life or health."

18 Treaty on European Union, Art 36, 2002 OJ (C 325) 5 (Feb 7, 1992) (EU Treaty) lists the permitted reasons for derogations from free movement of goods as "[p]ublic morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property." Similar derogation provisions exist in relation to the other freedoms (Articles 45(3), 52, 62, and 65).

Analysis of the necessity of a measure is also logically predicated on a finding that the measure is rationally connected to or suitable to achieve its objective. A court or tribunal must determine whether the measure has the capacity to achieve its aim or, in other words, whether there is a causal relationship between the measure and its objective.[19] Further, in many legal systems, a finding that a measure is necessary to achieve its objective will then lead the court or tribunal to perform a balancing test by weighing the importance of the underlying regulatory objective with the right or interest at stake (for example, cost to trade, investment or human rights) and hence to decide whether the deleterious impact on the relevant right or interest is proportionate to the measure's avowed public benefit.[20] This is an approach adopted by, for example, the CJEU and ECtHR, and is beginning to emerge in investment treaty arbitration.[21]

It should also be noted that least-restrictive means analysis is only relevant where the achievement of the objective is possible through the use of more than one alternative measure, and that an alternative measure would impair the right or interest to a lesser degree.[22] Any alternative measure must also achieve the objective as effectively.[23] Strictly speaking, if an alternative measure exists that would be less harmful to the protected right or interest and would equally advance the measure's purpose, the impugned measure is not "necessary" to achieve its objective.[24] The question of whether any alternatives exist is by no means always straightforward, particularly in complex policy areas involving the allocation of resources and other issues involving the consideration and balancing of a number of divergent interests.[25]

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19 See, for example, Barak, *Proportionality* at 303–05 (cited in note 11).

20 See, for example, id at 342–44.

21 See, for example, *Technicas Medioambientales Tecmed SA v Mexico*, ICSID Case No ARB(AF)/00/2, (Award of May 29, 2003), online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186 (visited Apr 12, 2013) (*Tecmed v Mexico*); *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award (Perm Ct Arb 2006) (*Saluka v Czech Republic*); *Total SA v Argentine Republic*, ICSID Case No ARB/04/1, (Decision on Liability of Dec 27, 2010), online at http://italaw.com/documents/TotalvArgentina_DecisionOnLiabilty.pdf (visited Apr 11, 2013) (*Total v Argentina*) (employing or proposing various manifestations of proportionality analysis in the context of international investment law, but not adverting to necessity analysis in terms of least-restrictive means testing).

22 Julian Rivers, *Proportionality, Discretion and the Second Law of Balancing*, in George Pavlakos, ed, *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* 167, 171, 177 (Oxford 2007); Barak, *Proportionality* at 317–18, 321, 323 (cited in note 11).

23 Rivers, *Proportionality, Discretion and the Second Law of Balancing* at 171, 177 (cited in note 22); Barak, *Proportionality* at 317–18, 321, 323 (cited in note 11).

24 Barak, *Proportionality* at 317 (cited in note 11).

25 Rivers, *Proportionality, Discretion and the Second Law of Balancing* at 185 (cited in note 22).

Analyzing the necessity of a measure requires a court or tribunal to have a detailed appreciation of the measure's context, its objective and the probability of this objective being achieved through alternative means. It requires adjudicators to evaluate hypothetical alternatives and predict their impact on the protected right or interest, as well as their efficacy at achieving the relevant objective.[26] Adjudicators must also select the evaluative criteria by which to measure the cost to the state of an alternative measure compared with the state's chosen measure.

C. The Nexus Requirement

The degree of scrutiny undertaken by courts and tribunals when performing necessity analysis varies from strict scrutiny to a high degree of deference, depending upon factors including the court or tribunal's constitutional role or position within a legal system and any textual articulation of the necessity test. At one end of the spectrum, Article 144 of the EU Treaty uses the term "strictly necessary" in relation to measures taken in relation to a balance of payments crisis,[27] and Article 15 of the ECHR permits member states to derogate from their obligations during wartime or other public emergency only "to the extent strictly required by the exigencies of the situation."[28] At the other end, some treaty provisions permit states a high degree of discretion in the determination of a measure's necessity. For example, GATT Article XX(b) provides that "nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests"; and Article 1(2) of the First Protocol to the ECHR provides that "[t]he preceding provisions shall not . . . impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest."

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26 Jan H. Jans, *Proportionality Revisited,* 27 Legal Issues Econ Integr 239, 241 (2000); Rivers, *Proportionality, Discretion and the Second Law of Balancing* at 185 (cited in note 22); Elliott, *Proportionality and Deference* at 264 (cited in note 16); Barak, *Proportionality* at 321 (cited in note 11).

27 EU Treaty, Art 144 (cited in note 18) provides:

> Where a sudden crisis in the balance of payments occurs . . . a Member State with a derogation may, as a precaution, take the necessary protective measures. Such measures must cause the least possible disturbance in the functioning of the internal market and must not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

28 ECHR, Art 15 (cited in note 13) provides:

> (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Absent an express stipulation of the standard of review in relation to the term "necessary" in the treaty text, adjudicators frequently afford the state some latitude in its assessment of whether there are less restrictive measures reasonably available. Authorities are required only to demonstrate a reasonable basis for the conclusion that the chosen measure was necessary or to meet an otherwise lowered standard of proof, rather than to show that the absolutely least restrictive alternative was selected.[29] Various courts and tribunals take the approach (particularly in cases where legislative action is taken to deal with a complex issue) that a measure will not be unlawful simply because the court or tribunal can conceive of a less restrictive alternative, as there may be a range of ways to solve the problem and factual uncertainty as to which will be the most effective.[30] This technique is described as an assessment of whether a measure is "reasonably necessary" rather than "strictly necessary."[31]

The "reasonably necessary" test is also relevant where an adjudicator needs to address the inability of the necessity test to permit consideration of broader public policy issues. A strict approach to necessity only assesses the measure's primary objective and not other interests (for example, environmental concerns, undue administrative complexities or financial implications) that may be affected adversely by selecting another option that impairs the protected right or interest to a lesser degree.[32] Adjudicators may therefore permit authorities to adduce evidence to demonstrate that a particular measure should not be adopted due to the fact that it unacceptably generates negative externalities. The reasonably necessary approach permits the decisionmaker to choose a measure that would avoid harm to broader interests, including undue administrative or fiscal burdens on the state[33] or (in the case of EU and ECHR law) harm to other rights and interests recognized by the legal regime that would result from adoption of the

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29 De Búrca, 13 YB Eur L at 111 (cited in note 14); Mads Andenas and Stefan Zleptnig, *Proportionality: WTO Law: in Comparative Perspective*, 42 Tex Intl L J 371, 392–93 (2006); Elliott, *Proportionality and Deference* at 269 (cited in note 16).

30 See Aileen Kavanagh, *Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication*, in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* 184, 191 (Cambridge 2008); Barak, *Proportionality* at 409, 411 (cited in note 11).

31 Elliott, *Proportionality and Deference* at 278 (cited in note 16). See also Jud Matthews and Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 Emory L J 797, 803 (2010–11).

32 Kurtz, 59 Intl & Comp L Q at 369 (cited in note 10); Elliott, *Proportionality and Deference* at 277–78 (cited in note 16).

33 See, for example, World Trade Organization, Report of the Appellate Body, *United States–Measures Affecting the Cross Border Supply of Gambling and Betting Services* ¶ 308, WTO Doc No WT/DS285/AB/R (Apr 7, 2005) (*US–Gambling*).

least restrictive means.[34] In other words, authorities may be granted latitude to triangulate the right or interest, the regulatory objective and wider considerations which might otherwise be prejudiced if the least restrictive means were selected.[35]

While the focus of this Article concerns the nexus requirement of necessity, it should be noted that this is not the only nexus requirement appearing in treaty provisions that provide space for states to pursue legitimate policy objectives, or that have been used by courts and tribunals to delimit permissible measures. For example, certain provisions of the WTO agreements' general exceptions provisions (discussed in greater detail in Section IV) provide that states may promulgate measures affecting international trade "relating to" the importation or exportation of gold or silver, the products of prison labor, and the conservation of exhaustible natural resources, or "imposed for" the protection of national treasures of artistic, historic or archaeological value.[36] Non-precluded measures clauses in investment treaties also differ with respect to the required nexus between a measure and its objective, as discussed in the following section. Other provisions of investment treaties provide a variety of nexus requirements: for example, investment treaties based on the US Model Bilateral Investment Treaty (BIT) state that regulations that are "designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[37]

III. THE USE OF NECESSITY ANALYSIS IN INTERNATIONAL INVESTMENT LAW

A. Overview

The series of claims brought by US investors against Argentina in relation to emergency measures adopted in the context of its economic crisis gave rise to

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34 Tridimas, *The General Principles of EU Law* at 214 (cited in note 14); Elliott, *Proportionality and Deference* at 278–80 (cited in note 16).

35 This approach is not without criticism, on the basis that necessity analysis is designed to assess the relationship between the measure and its underlying objective rather than the legitimacy of the objective itself, taking into account broader factors. This critique holds that the legitimacy of the primary objective and of any wider policy consideration, such as fiscal implications or harm to other rights or interests, should logically be established prior to the consideration of the necessity of the measure. The concept of reasonable necessity therefore conflates the question of necessity with the question of whether the public policy objective is legitimate. Elliott, *Proportionality and Deference* at 278–80 (cited in note 16).

36 See GATT, Arts XX (c), (e), (f) and (g) (cited in note 2).

37 Diplomacy in Action, *2012 US Model Bilateral Investment Treaty*, Annex B ¶ 4(b) (US Department of State 2012), online at http://www.state.gov/documents/organization/188371.pdf (visited Apr 12, 2013).

a number of tribunal decisions dealing with the concept of "necessity" in international investment law. Tribunals were required to determine whether the measures complied with the terms of a non-precluded measures clause in the US–Argentina BIT. But this is not the only area of investment law in which tribunals have employed necessity analysis. A number of tribunals have used necessity analysis in their assessment of whether host state conduct breaches the obligations of fair and equitable treatment, national treatment and, arguably, non-expropriation. Necessity analysis is used in these latter contexts as a means of determining whether the primary norm has been breached where that norm permits a degree of regulatory freedom for host states—for example, in relation to regulating emerging threats to human health or the environment—rather than as a means of determining whether a measure that is *prima facie* in breach of the host state's obligations is nevertheless permissible in the circumstances. Necessity analysis, in this respect, functions as a means for tribunals to determine whether measures taken in pursuit of particular public policy objectives impact investment no more than is required to achieve the particular objective. While these two areas differ in terms of the role of necessity analysis—determining the contours of the primary norm vis-à-vis justifying an otherwise prohibited measure—both contexts use the same analytical technique.[38]

With the exception of non-precluded measures clauses, investment treaties do not typically address the relationship between substantive standards of investor protection and host states' continuing ability to regulate and take other actions in the public interest—either in general or by stipulating the required nexus between a measure and its objective. The decided cases in international investment law demonstrate a high degree of variance with respect to this nexus requirement. Unlike WTO jurisprudence, which has evolved over a number of years and is disciplined by the oversight of the Appellate Body, any principles emerging from the body of decided cases remain fragmented and embryonic. It is difficult to say with certainty (a) whether a tribunal will adopt a necessity-based approach, at least outside the context of non-precluded measures clauses that specifically prescribe such a nexus requirement, and (b) how a tribunal will address the nexus requirement using the concept of necessity. With these caveats in mind, the cases will be explored.

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[38] See Federico Ortino, *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* 388 (Oxford 2004).

B. Non-Precluded Measures: From Strict to Flexible Necessity Analysis

1. Overview.

Non-precluded measures clauses (NPM clauses) set out the circumstances in which a state may promulgate a measure or otherwise act in a manner inconsistent with its substantive obligations toward investors.[39] Such clauses aim to preserve host states' regulatory autonomy and in so doing, reverse the general allocation of risk of state action impacting investment from states to investors.[40] Rather than directing tribunals to take into account investor protection and the public interest pursued by the host state in determining whether the substantive standard of investment protection has been violated (such as tribunals may do in relation to, for example, fair and equitable treatment), these treaty provisions direct tribunals to take into account these competing imperatives in analyzing whether a prima facie breach is nevertheless excused.[41]

Several features of NPM clauses, including limited permissible policy objectives and nexus requirements, set the boundaries of their applicability. These features determine whether the host state or the investor will ultimately be responsible for the costs to the investor arising from the measure.[42] First, the broader the range of permissible objectives, the greater the degree of flexibility retained by host states to regulate or take other actions in the public interest.[43] Permissible policy areas allowed by these provisions can cover a range of circumstances, but typically relate to areas of public policy touching on the core governmental functions of the state, and contain amorphous or open-textured terms.[44] The most frequently seen exceptions are security or international peace

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39 Such provisions regularly appear in investment treaties concluded by Germany, India, the Belgian-Luxembourg Union, Canada, and the US, but remain in the minority of investment treaties. However, they are becoming more prevalent, which may evidence negotiating states' intentions to maintain a degree of regulatory autonomy in relation to sensitive areas, including social and environmental issues. See *United Nations Conference on Trade and Development*, in *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* 142 (United Nations 2007); Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J Intl Econ L 1037, 1043–44 (2010).

40 William W. Burke-White and Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties,* 48 Va J Intl L 307, 401–02 (2008).

41 Spears, 13 J Intl Econ L at 1059–60 (cited in note 39).

42 Burke-White and von Staden, 48 Va J Intl L at 329 (cited in note 40).

43 Anne Van Aaken, *International Investment Law between Commitment and Flexibility: A Contract Theory Analysis*, 12 J Intl Econ L 507, 523–24 (2009).

44 Burke-White and von Staden, 48 Va J Intl L at 349–66, 403 (cited in note 40).

and security,[45] public order,[46] public health[47] and public morality.[48] Less frequently observed exceptions include "extreme emergency,"[49] conservation of natural resources[50] and prudential measures aimed at the security and predictability of the financial system.[51] The provisions also differ in their scope: some apply to all substantive investor protections, whereas others apply only to non-discrimination requirements.[52]

Second, NPM clauses differ in the requirement as to the nexus between a measure and its objective: some require that a measure be "necessary to" achieve the objective, whereas others require only that the measure be "proportional to,"[53] "appropriate to,"[54] "related to,"[55] "directed to,"[56] "for,"[57] or "designed and

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45 See, for example, Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (1991), US–Arg, 31 ILM 124 at Art XI.

46 See, for example, Agreement on the Reciprocal Promotion and Protection of Investments, Uganda-Belgium-Luxembourg (2005), Art 3.2.

47 See, for example, Agreement Between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments (2003), Ger–China, 2362 UN Treaty Ser 253 ¶ 4 (2003).

48 See, for example, Agreement for the Promotion and Protection of Investments (1996), Czech Rep–India, Art 12.

49 See, for example, Agreement for the Promotion of Investments (1996), Czech Rep–India, Art 12.

50 See, for example, Agreement Between the Government of Canada and the Government of the Eastern Republic of Uruguay for the Promotion and Protection of Investments (1997), Can–Uruguay, Annex I § III 2(c).

51 Id at § III 3(c).

52 Compare Ger–China, Art 4(a) (cited in note 47) ("Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed 'treatment less favourable' within the meaning of Article 3") with US–Arg, Art XI (cited in note 45) ("Nothing in this Treaty shall be construed . . . to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interest.").

53 See, for example, *Bilateral Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and _____ Colombian Model August 2007*, Art 8 (International Institute for Sustainable Development 2007), online at http://www.iisd.org/pdf/2007/inv_model_bit_colombia.pdf (visited Apr 13, 2013).

54 See, for example, Common Market for Eastern and Southern Africa, Investment Agreement for the Comesa Common Investment Area, Art 22:2, online at http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf (visited Apr 13, 2013).

55 Compare *Canadian Model Foreign Investment Protection and Promotion Agreement*, Art 10(4) (International Treaty Arbitration 2004), online at http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf (visited Apr 13, 2013), with GATT, Art XX(g) ("relating to the conservation of exhaustible natural resources") (cited in note 2).

56 New Zealand and China, Agreement on the Promotion of Investment (1988), 1787 UN Treaty Ser 186 at Art 11 (1994).

applied"[58] to further one of the permissible objectives. The nexus requirement will determine both the required relationship between the measure and its objective and, consequentially, the level of scrutiny that a tribunal would be expected to direct at the relationship between the policy objective and the measure selected to achieve it. A requirement of necessity invites a least restrictive means analysis, whereas a requirement of "related to" contemplates a less stringent nexus requirement.[59] While this Article focuses on the NPM clause in the Argentina–US BIT with the nexus requirement of "necessary," this form of analysis will not be appropriate in cases where the text of the relevant provision provides alternative interpretive guidance to tribunals.

Further, some NPM clauses are explicitly self-judging.[60] A self-judging treaty provision permits a state to unilaterally determine the existence of preconditions to derogating from their primary treaty obligations, and requires a court or tribunal to limit review to whether the host state has invoked the clause in good faith.[61] In this respect, investment tribunals would be precluded from engaging in substantive review of whether a measure is necessary to achieve its objective. However, no self-judging clause has to date been the subject of adjudication in the international investment law context.

2. Background to the Argentine claims.

In investor-state arbitration, NPM clauses have been adjudicated upon exclusively in relation to a series of claims against Argentina arising from its 2001 economic crisis. The first tranche of claims concerned a detailed and complex regulatory framework, specifically devised by Argentina following the

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57 Agreement on the Promotion and Reciprocal Protection of Investments (2001), India–Croatia, Art 12:2, online at http://unctad.org/sections/dite/iia/docs/bits/croatia_india.pdf (visited Apr 13, 2013).

58 Common Market for Eastern and Southern Africa, Art 22:1 (cited in note 54).

59 See United Nations Conference on Trade and Development, UNCTAD Series on International Investment Policies for Development, *The Protection of National Security in IIAs*, UNCTAD/DIAE/IA/2008/5 94-95 (2009).

60 For example, North American Free Trade Agreement (1992), 32 ILM 289 at Art 2102(1) (1993) (NAFTA); Australia–United States Free Trade Agreement, Art 22(2) (Australian Department of Foreign Affairs and Trade 2005), online at http://www.dfat.gov.au/fta/ausfta/final-text/ (visited Apr 13, 2012). See, generally, Stephan Schill and Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, 13 Max Planck YB UN L 61 (2009).

61 See *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, 2008 ICJ 171, 229 (June 4, 2008):

> [W]hile it is correct . . . that the terms of [the self-judging clause] provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 *Vienna Convention on the Law of Treaties*.

privatization of public utilities to promote the stability of the tariff regime in order to attract foreign investors in the electricity and gas utilities sectors. Argentina reformed monetary policy by pegging the peso to the US dollar, passing legislation allowing utility providers to charge tariffs in US dollars and providing that these tariffs could be adjusted in line with US inflation.[62] A former state monopoly on gas transportation and distribution was divided into several companies in which a number of US and UK investors acquired shares.[63] As is well-known, Argentina's economy subsequently floundered, developing into a state of crisis in late 2001. In response to the crisis, the parliament passed the far-reaching Emergency Law that, inter alia, froze tariffs for utilities, de-pegged the peso from the US dollar, which removed utility providers' ability to calculate tariffs in US dollars and adjust them in line with inflation, and pesified contracts formerly in US dollars. These measures resulted in a sharp decline in the value of the peso, causing financial losses to foreign investors. The law also required renegotiation of licenses, froze bank deposits and the transfer of funds abroad, rescheduled term deposits and reduced interest rates.[64]

Tribunals hearing the electricity and gas sector claims largely found that Argentina's actions breached the fair and equitable treatment standard, as the investors' expectations had been frustrated through a lack of stability in the legal environment upon which the investors based their decisions to invest.[65] Other

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62 See Kurtz, 59 Intl & Comp L Q at 330–31 (cited in note 10).

63 *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, (Award of July 17, 2013) at ¶ 58, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC503_En&caseId=C4 (visited Apr 13, 2013) (*CMS v Argentina (Award)*); *LG&E Energy Corp. v Argentina*, ICSID Case No ARB/02/1, (Decision on Liability of Oct 3, 2006) at ¶ 52, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC627_En&caseId=C208 (visited Apr 13, 2013) (*LG&E v Argentina*); *Enron Corporation Ponderosa Assets L.P. v Argentine Republic*, ICSID Case No ARB/01/3, (Decision on Jurisdiction of Aug 2, 2004) at ¶¶ 47–54, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC502_En&caseId=C3 (visited Apr 13, 2013) (*Enron v Argentina*); *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, (Award of Sept 28, 2007) at ¶ 83, 88–92, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8 (visited Apr 13, 2013) (*Sempra v Argentina*); *BG Group Plc v The Republic of Argentina*, Final Award, ¶¶ 24–26 (UNCITRAL 2007) (*BG v Argentina*).

64 See, for example, Diane A. Desierto, *Necessity and "Supplementary Means of Interpretation" for NPM in Bilateral Investment Treaties*, 31 U Pa J Intl L 827, 831 (2010).

65 *CMS v Argentina (Award)*, ICSID Case No ARB/01/8 at ¶¶ 273–81 (cited in note 63); *LG&E v Argentina*, ICSID Case No ARB/02/1 at ¶¶ 132–39 (cited in note 63); *Enron v Argentina*, ICSID Case No ARB/01/3 at ¶¶ 264–68 (cited in note 63); *Sempra v Argentina*, ICSID Case No ARB/02/16 ¶¶ 303–04 (cited in note 63); *BG v Argentina*, Final Award at ¶¶ 303–10 (cited in note 63); *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, (Award of Oct 31, 2011) at ¶¶ 510–17, online at https://icsid.worldbank.org/ICSID/FrontServlet?

tribunals hearing claims by investors in other sectors (such as water and sewerage and in relation to holders of government bonds) also found Argentina to be in breach of fair and equitable treatment and/or expropriation in relation to the emergency measures and other conduct related to the crisis.[66] Argentina argued that the measures that it took were necessary to deal with the economic crisis and that the crisis situation could justify the abrogation of its obligations to investors, by relying on Article XI of the Argentina–US BIT in relation to disputes taken by US investors and on the customary plea of necessity. In all cases where Argentina argued the customary plea, it was unsuccessful.

In determining whether Argentina could rely on the customary plea, tribunals relied upon the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (the Articles) to determine the contours of the defense.[67] Article 25 provides that necessity may only be invoked to preclude the wrongfulness of an act that does not comply with a state's international obligations where, inter alia, that act is "the only way for the State

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requestType=CasesRH&actionVal=showDoc&docId=DC511_En&caseId=C17 (visited Apr 13, 2013) (*El Paso v Argentina*); *National Grid PLV v The Argentine Republic*, Award, ¶¶ 175, 178–80 (UNCITRAL 2008); *Total v Argentina*, ICSID Case No ARB/04/01 at ¶¶ 166–75, 180, 325–38 (cited in note 21); *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23, (Award of June 11, 2012) at ¶¶ 970, 994, online at http://italaw.com/sites/default/files/case-documents/ita1069.pdf (visited Apr 13, 2013).

66 *Continental Casualty v Argentine Republic*, ICSID Case No ARB/03/9, (Award of Sept 5, 2008) at ¶¶ 215, 217, online at http://italaw.com/sites/default/files/case-documents/ita0228.pdf (visited Apr 13, 2013) (*Continental Casualty v Argentina*); *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, (Decision on Liability of July 30, 2010) at ¶¶ 215, 217, online at http://italaw.com/documents/SuezInterAguaDecisiononLiability.pdf (visited Apr 13, 2013) (*InterAgua v Argentina*); *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, (Decision on the Proposal for the Disqualification of Oct 22, 2007) at ¶¶ 235, 237, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC693_En&caseId=C19 (visited Apr 13, 2013) (*AWG v Argentina*); *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, (Award of June 21, 2011) at ¶¶ 325, 331, online at http://italaw.com/sites/default/files/case-documents/ita0418.pdf (visited Apr 13, 2013) (*Impregilo v Argentina*); *SAUR International SA v Republic of Argentina*, ICSID Case No ARB/04/4, (Decision on Jurisdiction and Liability of June 6, 2012) at ¶¶ 401–05; 504–05, online at http://italaw.com/sites/default/files/case-documents/ita1015.pdf (visited Apr 13, 2013).

67 The ILC Articles set out the circumstances in which the wrongfulness of conduct under international law may be precluded, including *force majeure,* distress, and necessity. The International Court of Justice confirmed that the ILC Articles reflect customary international law in *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia),* 1997 ICJ 41, ¶ 52 (Sept 25, 1997) and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ 133, 195, ¶ 140 (July 9, 2004).

to safeguard an essential interest against a grave and imminent peril."[68] The Commentaries to the Articles clarify the "only way" requirement, stating that "any conduct going beyond what is strictly necessary for the purpose will not be covered" and that the defense will be precluded where there are any other options available to the state to safeguard the essential interest, even where they are "more costly or less convenient."[69]

3. Early cases on Article XI.

In contrast to the stringent prerequisites of the customary plea, Article XI of the Argentina–US BIT permits measures "necessary for" achieving the permissible objectives. Article XI of the Argentina–US Treaty provides:

> This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Article XI is silent as to the nature of the required relationship between the measure and its objective, as opposed to the customary plea's detailed prerequisites, indicating the parties' intention that the scope of Article XI would be broader (and thus the standard of review less strict) than the customary plea.[70] However, the first three tribunals to consider Article XI—*CMS, Enron* and *Sempra*—adopted similar approaches, holding that Article XI reflected the customary plea with respect to the definition of necessity and the preconditions for its operation, including the "only way" requirement.[71]

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68 The other prerequisites are: that the act does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole; that the international obligation in question does not exclude the possibility of invoking necessity; and that the state has not contributed to the situation of necessity.

69 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts* at 83, 85 ¶ 15 (cited in note 7).

70 See Kurtz, 59 Intl & Comp L Q at 347 (cited in note 10).

71 The *CMS* Tribunal found that Argentina could not rely on the customary plea, and held that Article XI confirmed its interpretation of customary international law, implicitly finding that the criterion under Article XI was not met either. *CMS v Argentina (Award)*, ICSID Case No ARB/01/8 at ¶ 320 (cited in note 63), 323, 324, 329, 355, 356, 374. The *Enron* and *Sempra* tribunals both held that Article XI was "inseparable" from the customary international law standard. *Sempra v Argentina*, ICSID Case No ARB/02/16 at ¶ 376 (cited in note 63); *Enron v Argentina*, ICSID Case No ARB/01/3 at ¶ 334 (cited in note 63). These tribunals conflated the treaty exception with the international law defense. As Kurtz notes, this approach is inconsistent with the principle of effectiveness in treaty interpretation, in the sense that it would render Article XI redundant as the customary defense would be available in any event. Kurtz, 59 Intl & Comp L Q at 342, 344, 355 (cited in note 10). See also Burke-White and von Staden, 48 Va J Intl L at 321, 323, 493 (cited in note 40).

All three awards were subject to applications for annulment.[72] The *Enron* annulment committee[73] remarked that host states should be permitted to adopt measures more likely to be effective to achieve their objective (even where those measures had a negative impact on investors) over measures that impacted less on investors but were less likely to be effective.[74] It also pointed to the problem of determining the necessity of a measure with the benefit of knowledge and hindsight that was unavailable to the state at the time of the measure's adoption. The committee questioned whether a tribunal should "determine whether, on the basis of information reasonably available at the time that the measure was adopted, a reasonable and appropriately qualified decisionmaker would have concluded that there was a relevant alternative open to the State."[75] The committee's discussion is an acknowledgement that states acting in response to emergencies are operating under significant pressure, time constraints and informational limitations.

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72 *ICSID Convention, Regulations and Rules*, Art 52(1) (ICSID Apr 2006), online at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (visited Apr 10, 2013) provides:

> [E]ither party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.

The *Sempra* decision was annulled due to the tribunal's failure to consider the applicability of Article XI. *Sempra Energy International v Argentine Republic v Argentina*, ICSID Case No ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (June 29, 2010) at ¶¶ 208–09, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8 (visited Apr 13, 2013).

73 The *Enron* Tribunal decision was annulled for failure to state the legal test for the customary plea, instead stating it preferred the evidence of Enron's economic expert over Argentina's in relation to the question of necessity, which meant that it had also failed to state the legal test for the application of Article XI. *Enron Corporation Ponderosa Assets LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (July 30, 2010) at ¶¶ 373, 376–77, online at http://italaw.com/documents/EnronAnnulmentDecision.pdf (visited Apr 13, 2013) (*Enron v Argentina (Annulment)*).

74 Id at ¶ 371.

75 Id at ¶ 372 (also asking whether customary international law recognized "that reasonable minds might differ in relation to such a question, and give a 'margin of appreciation' to the State in question," meaning that the relevant question for a tribunal was "whether it was reasonably open to the State, in the circumstances as they pertained at the relevant time, to form the opinion that no relevant alternative was open").

The *CMS* annulment committee, while declining to annul the award, found serious errors of law in the decision.[76] The committee emphasized that Article XI and the customary plea should be addressed separately: compliance with the provisions of a treaty, including meeting the requirements of a NPM clause, means that there is no treaty violation, whereas invocation of the customary plea is predicated on a finding of unlawfulness in terms of the primary rules applicable to the legal regime.[77] The committee's decision clearly influenced the methodology of subsequent tribunals with respect to both Article XI and the customary plea.[78]

4. A more deferential approach to necessity: *LG&E* and *Continental.*

The *LG&E v Argentina* Tribunal was the first to examine Article XI as an independent obligation. This decision, and the decision of the *Continental Casualty v Argentina* Tribunal, demonstrate an approach to necessity analysis that comes closer to that taken by WTO tribunals and other supranational and international courts and tribunals.

The *LG&E* Tribunal stated that when a situation engaging the state's essential security interests arose, it would be "necessary" for the state to intervene.[79] It held that while a state might have several options available to deal with the crisis, the measures adopted were nevertheless "necessary" and "legitimate" in terms of the NPM clause.[80] The Tribunal took into account the urgency of the measures, their expedited drafting process, and the fact that there was evidence that Argentina had considered the interests of foreign investors in the policymaking process.[81] This latter consideration appeared to function as a procedural justification: if the state could demonstrate that it took the interests of foreign investors into account, this might suffice in terms of the criterion of necessity. In holding that a measure may be adjudged as necessary even if there are other options available to the state, the *LG&E* Tribunal's approach gave Argentina a degree of latitude in formulating its policy response. Argentina's defense was accepted with a temporal limitation, the Tribunal finding that after

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76 *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (Sept 25, 2007) at ¶¶ 129–36, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4 (visited Apr 13, 2013).

77 Id at ¶ 129. See Reinisch, 41 Netherlands YB Intl L at 148–49 (cited in note 6).

78 Reinisch, 41 Netherlands YB Intl L at 156 (cited in note 6). However, where a NPM clause is invoked, tribunals may proceed to assess whether the preconditions for its applicability are met "since such finding may make a closer analysis of BIT violations superfluous."

79 *LG&E v Argentina*, ICSID Case No ARB/02/1 at ¶ 226 (cited in note 63).

80 Id at ¶¶ 239–40, 242.

81 Id at ¶ 240.

the immediate crisis had passed, its measures were disproportionate to the threat to national security existing at that time.[82] Having found that Argentina could rely on Article XI, the Tribunal also opined that the customary international law defense supported its conclusion.[83] In relation to the "only way" criterion of the customary plea, it stated that "an economic recovery package was the only means to respond to the crisis," and that while "there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed."[84]

The *LG&E* decision has been met with mixed opinions. On the one hand, the impossibility of meeting the "only means" threshold, particularly in the context of economic measures, means that a more deferential approach to Article XI is apposite.[85] Yet the Tribunal's approach is also criticized for being cursory and unprincipled. The Tribunal's approach to the interpretation of the "only way" requirement of the customary plea was highly unorthodox, it referred to the "legitimacy" of the measure without further explication, and it applied a convoluted standard of review, appearing to meld least-restrictive means testing with review for good faith.[86] It is arguable that this approach would permit measures to pass muster even if they were wholly ineffective.[87]

The Tribunal in *Continental* also interpreted Article XI in a vastly different manner from previous awards. Like the *LG&E* Tribunal, its approach permitted greater discretion to Argentina to craft its legislative response to the crisis. The Tribunal, presided over by the former chairperson of the WTO Appellate Body,

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82 Id at ¶ 195.

83 *LG&E v Argentina*, ICSID Case No ARB/02/1 at ¶¶ 245, 258 (cited in note 63).

84 Id at ¶ 257.

85 Stephan Schill, *International Investment Law and the Host State's Power to Handle Economic Crises–Comment on the ICSID Decision in LG&E v Argentina,* 24 J Intl Arb 265, 280–81 (2007); William W. Burke-White, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System,* 3 Asian J WTO & Intl Health L & Poly 199, 218 (2008). See also Reinisch, 41 Netherlands YB Intl L at 154 (cited in note 6) (proposing that tribunals "incorporate considerations of adequacy and proportionality when assessing the appropriateness of the measures taken by host States to counter a state of necessity").

86 Kurtz, 59 Intl & Comp L Q at 355–56 (cited in note 10); August Reinisch, *Necessity in International Investment Arbitration–An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on* CMS v Argentina *and* LG&E v Argentina, 3 Transnatl Disp Mgmt 11 (2006) (arguing that this approach would permit a measure to pass muster even if it was "wholly inadequate to respond to the crisis"); William W. Burke-White and Andreas Von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale J Intl L 283, 324–25 (2010).

87 Christina Binder and August Reinisch, *Economic Emergency Powers: A Comparative Law Perspective*, in Stephan Schill, ed, *International Investment Law and Comparative Public Law* 75, 101, 511 (Oxford 2010); Kurtz, 59 Intl & Comp L Q at 356 (cited in note 10); Reinisch, 41 Netherlands YB Intl L at 154 (cited in note 6).

was strongly influenced by the WTO's approach to Article XX of the GATT, holding that WTO law was a more appropriate comparator than the customary plea as a source of interpretation of the concept and requirements of necessity in the context of economic measures.[88] The decision was the first decision in relation to a NPM clause to engage in this form of cross-fertilization, demonstrating the increasing willingness of investment tribunals to acknowledge the interconnectedness of international economic law's different strands.[89]

As a basis for its comparative approach, the *Continental* Tribunal referred to the Appellate Body's decision in *Korea–Beef*,[90] which set out its approach to the meaning of "necessary" in GATT Article XX (which is followed in GATS Article XIV). The Appellate Body stated that while "necessary" could have a number of different meanings on a continuum from "indispensable" to "making a contribution to," its meaning in the context of Article XX was closer to (but did not embody) "indispensable."[91] As summarized by the *Continental* Tribunal, the Appellate Body has also stated that the determination of necessity requires "'a process of weighing and balancing of factors' which usually includes assessment of . . . the importance of the interests or values furthered by the challenged measures, the contribution of the measure to the realization of the ends pursued by it, and the restrictive impact of the measure on international commerce."[92] A measure will not be necessary if another WTO-consistent or

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88 The Tribunal held that the textual basis of Article XI was derived from similar clauses of US friendship, commerce and navigation treaties, which in turn reflected the formulation of Art. XX of the GATT. *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 192 (cited in note 66). Giorgio Sacerdoti also chaired the subsequent *Total v Argentina* Tribunal, which did not follow this approach. See José E Alvarez and Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v Argentina*, in Karl P. Sauvant, ed, *Yearbook on International Investment Law & Policy* 319, 338–45 (Oxford 2011).

89 See Benedict Kingsbury and Stephan Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest–The Concept of Proportionality*, in Stephan Schill, ed, *International Investment Law and Comparative Public Law* 75, 101 (Oxford 2010); Reinisch, 41 Netherlands YB Intl L at 156 (cited in note 6). Investment tribunals have, however, extensively referred to WTO jurisprudence in relation to national treatment. See Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 Eur J Intl L 749 (2009) and Jürgen Kurtz, *The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO*, in Stephen Schill, ed, *International Investment Law and Comparative Public Law* 243 (Oxford 2010).

90 World Trade Organization, Report of the Appellate Body, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc Nos WT/DS161/AB/R, WT/DS169/AB/R (Dec 11, 2000) (*Korea–Beef*).

91 Id at ¶ 161.

92 *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 194 (cited in note 66), citing Reports of the Appellate Body, *Korea–Beef* at ¶ 164 (cited in note 90); World Trade Organization, Report of the Appellate Body, *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products* ¶ 172, WTO Doc No WT/DS135/AB/R (Mar 12, 2001) (*EC–Asbestos*);

less inconsistent alternative measure, which the state could reasonably be expected to employ, is available. A measure will not be reasonably available where it is merely theoretical, where the responding state is not capable of taking it, where the measure imposes an undue burden such as prohibitive costs or substantial technical difficulties, or where the measure did not achieve the state's chosen level of protection against the harm pursued by its regulatory objective.[93] Measures that are highly restrictive of trade may be found to be necessary where no other less trade restrictive alternative is reasonably available.[94]

Having set out its approach to necessity, the Tribunal emphasized that it was "not called upon to make any political or economic judgment on Argentina's policies and of the measures adopted to pursue them," and that the "evaluation of necessity does not require nor allow the Tribunal to go into the merits in detail and to substitute its own judgment to that of the national authorities."[95] Further, it remarked that "a margin of discretion and appreciation" should be afforded to authorities to determine the necessity of a measure.[96] Rather, its role was "to evaluate only if . . . Argentina had no other reasonable choices available ... than to adopt these Measures."[97]

Reports of the Appellate Body, *US–Gambling* at ¶ 306 (cited in note 33); World Trade Organization, Report of the Appellate Body, *Dominican Republic–Measures Affecting the Importation and Internal Sale of Cigarettes* ¶ 70, WTO Doc No WT/DS302/AB/R (Apr 25, 2005) (*DR–Cigarettes*).

93 *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 195, citing Report of the Appellate Body, *US-Gambling* at ¶ 308 (cited in note 92).

94 *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 195, citing World Trade Organization, Report of the Panel, Brazil–*Measures Affecting Imports of Retreaded Tyres* ¶ 7.211, WTO Doc No WT/DS332/R (June 12, 2007) (*Brazil–Tyres I*) (subsequently affirmed, after the *Continental Casualty* decision, in World Trade Organization, Report of the Appellate Body, Brazil–*Measures Affecting Imports of Retreaded Tyres* ¶ 154, WTO Doc No WT/DS332/AB/R (Dec 3, 2007) (*Brazil–Tyres II*)).

95 *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶¶ 198–99, 233, n 351. It later stated at ¶ 234: "Arguably, under Art. XI a Contracting Party may invoke necessity even if the need to protect its essential security interest has materialized as a consequence of a deliberate but still legitimate policy of that very State."

96 *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 233 (cited in note 66). The margin of appreciation is a doctrine of deference developed by the ECtHR in order to accommodate uniform application of the ECHR and national views concerning reasonable limitations on human rights, on the basis that the ECHR is an international treaty and that the ECtHR's power to review decisions of national authorities should be more limited than those of a national constitutional or other court reviewing such decisions. The margin has also been used—either explicitly or by the adoption of methodology consistent with doctrine—by other courts and tribunals including the ICJ, the CJEU, WTO panels and the Appellate Body and investment tribunals.

97 Id at ¶ 199.

Following WTO case law, the Tribunal stated that any alternative measures would, in order to be reasonably available, have to "have yielded equivalent results/relief" and that it was required to determine whether the measures "contributed materially to the realization of their legitimate aims"—in particular, whether the measures "were apt to and did make such a material or a decisive contribution" to the objective of protecting Argentina's essential security interests in the context of the crisis.[98] Applying this methodology, the Tribunal found that all but one of the measures[99] were "in part indispensable and in any case material or decisive in order to . . . prevent the complete break-down of the financial system, the implosion of the economy and the growing threat to the fabric of Argentinean society and generally to assist in overcoming the crisis."[100] With regard to the devaluation of the peso, the Tribunal held that the alternative measures proposed by the investor were "ineffective" (implicitly finding that alternative measures must achieve the same level of benefit as the impugned measure) and "impractical" and could not "have been reasonably pursued by Argentina with any probable chances of success."[101] In relation to the pesification of the US dollar-denominated contracts and deposits, it held that the measures were "inevitable,"[102] and the suspension of payments and the default and rescheduling of government financial instruments were "reasonably necessary" and "appropriate and reasonable."[103] The Tribunal was explicitly deferential with respect to necessity, in stating that it would not substitute its judgment for Argentina's, but rather would determine whether Argentina had other reasonable alternatives in the circumstances.[104]

However, the *Continental* Tribunal did not properly articulate the reasons for its comparative approach, nor did it comprehensively represent how the necessity test operates in the context of GATT Article XX and GATS Article XIV. While referring to weighing and balancing and the WTO's approach, the

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98 Id at ¶¶ 196, 198.

99 It found that the restructuring of treasury bills did not meet the test of necessity without consideration of reasonable alternatives: at the time the measures were put in place, the crisis had waned (and the measures appeared to be unreasonable in that they required the investor to waive other rights, including the protection of the investment treaty). This finding as to the absence of circumstances engaging the need to protect the state's essential security interests logically precludes necessity analysis.

100 Id at ¶ 196. In the Tribunal's view, there was undoubtedly "a genuine relationship of end and means in this respect." Id at ¶ 197.

101 *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶¶ 208–10 (cited in note 66).

102 Id at ¶ 214.

103 Id at ¶¶ 205, 210, 213, 219. Unlike the *LG&E* Tribunal, it did not stipulate a temporal limit on the lawfulness of these measures.

104 *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 233, n 351.

Tribunal did not undertake any balancing by explicit consideration of whether the measures' effectiveness outweighed their impact on the investment. Nor did it explicitly refer to the importance of the measures' objective.[105]

At the time of writing, no subsequent tribunal has directly considered the question of necessity under Article XI, and to date only one tribunal has considered Article XI subsequently.[106] However, a large number of cases are pending against Argentina in relation to these measures, and it remains to be seen whether this approach will find favor with other tribunals.[107]

C. Fair and Equitable Treatment: An Inconsistent Approach to Necessity

Fair and equitable treatment requires that foreign investors are afforded a minimum level of treatment, regardless of what their domestic counterparts enjoy. The obligation imposes procedural and substantive obligations on governments in relation to decisionmaking affecting investments. While the textual manifestation of the obligation of fair and equitable treatment varies across investment treaties, there is nevertheless considerable uniformity among treaty provisions, and investment tribunal decisions on fair and equitable treatment have increasingly converged around a number of sub-elements or principles.[108] These principles include the maintenance of a stable and

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105 Although elsewhere in the decision it referred to Article XI's purpose: "to protect national interests of a paramount importance" *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 168 (cited in note 66).

106 *El Paso v Argentina*, ICSID Case No ARB/03/15 at ¶¶ 649–70 (holding that Argentina's contribution to the economic crisis precluded its successful invocation of Article XI) (cited in note 65).

107 See the list of pending cases at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (visited May 3, 2013).

108 For example, some treaties expressly link fair and equitable treatment to customary international law or to principles of international law, whereas some refer only to fair and equitable treatment or contain text that expands upon the minimum standard. See, for example, NAFTA, Art 1105 (Minimum Standard of Treatment) (cited in note 60) ("1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment"), compare with Agreement on the Promotion and Reciprocal Protection of Investments, Sweden–Czech Republic, Art 2(1) (Oct 22, 1992), online at http://unctad.org/sections/dite/iia/docs/bits/sweden_czechoslovakia.pdf (visited Apr 13, 2013) (stating that "[e]ach Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party"). See, for example, Roland Kläger, *Fair and Equitable Treatment in International Investment Law* 85–87, 117–18 (Cambridge 2011); UNCTAD, *International Investment Agreements: Key Issues Volume 1* *19 (United Nations 2004), online at http://unctad.org/en/Docs/iteiit200410_en.pdf (visited Apr 14, 2013). See, in relation to the principles of fair and equitable treatment, Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J World Inv & Trade 357, 373–85 (2005); Todd Grierson-Weiler and Ian A. Laird, *Standards of Treatment*, in Peter Muchlinski, Federico Ortino, and Christoph Schreuer, eds,

predictable regulatory environment in terms of the enactment of new laws affecting investors, an obligation which is frequently characterized in terms of the investor's legitimate expectations.[109] They also include legitimate expectations arising from inconsistent administrative conduct, such as where a state revokes a permit or reneges from previous commitments.[110] The principle of fair and equitable treatment also includes: procedural due process by administrators[111] and in judicial proceedings;[112] acting in good faith;[113] protection from arbitrary and discriminatory conduct[114] and freedom from harassment and coercion.[115]

Tribunals have employed necessity analysis in fair and equitable cases where investors have alleged that changes to laws and regulations have infringed their legitimate expectations or are otherwise alleged to be unreasonable. In this respect, necessity analysis is used to delimit lawful from unlawful measures within the context of the primary obligation itself, rather than controlling an exception to the rule. Tribunals do not appear to have used necessity analysis in

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The Oxford Handbook of International Investment Law 258, 272–90 (Oxford 2008); Benedict Kingsbury and Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, in Albert Jan Van Den Berg, ed, *50 Years of the New York Convention* 5, 16 (Aspen 2009); Stephan Schill, *The Multilateralization of International Investment Law* 79–80 (Cambridge 2009).

109 See, for example, *CMS v. Argentina (Award)*, ICSID Case No ARB/01/8 at ¶¶ 277–81; *LG&E v. Argentina*, ICSID Case No ARB/02/1 at ¶¶ 132–39; *Enron v Argentina*, ICSID Case No ARB/01/3 at ¶¶ 260–68; *Sempra v Argentina*, ICSID Case No ARB/02/16 at ¶¶ 300–04; *BG v Argentina*, Final Award at ¶ 256 (each cited in note 63).

110 See, for example, *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2 at ¶ 145 (cited in note 21).

111 *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, (Award of Apr 30, 2004) ¶ 98, online at http://naftaclaims.com/Disputes/Mexico/Waste/WasteFinalAward Merits.pdf (visited Apr 14, 2013) (*Waste Management v Mexico*); *SD Myers, Inc v Government of Canada*, Partial Award, ¶ 134 (UNCITRAL 2004); *International Thunderbird Gaming Corporation v Mexico*, Award, ¶ 200 (UNCITRAL 2006).

112 For example *Compañia de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, (Award of Nov 21, 2000) ¶ 80, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC548_En&caseId=C159 (visited Apr 14, 2013); *The Loewen Group and Raymond L. Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, (Award of June 26, 2003) ¶ 132, online at http://www.state.gov/documents/organization/22094.pdf (visited Apr 14, 2013).

113 For example, *Waste Management v Mexico*, ICSID Case No ARB(AF)/00/3 at ¶ 138 (cited in note 111).

114 For example, *Eureko BV v Republic of Poland*, ad hoc arbitration, (Partial Award of Aug 19, 2005) ¶ 232, online at http://italaw.com/sites/default/files/case-documents/ita0308_0.pdf (visited Apr 14, 2013); *Eureko BV v Republic of Poland*, ad hoc arbitration, Dissenting Opinion (Aug 19, 2005), online at http://italaw.com/sites/default/files/case-documents/ita0307_0.pdf (visited Apr 14, 2013).

115 For example, *Pope & Talbot, Inc v the Government of Canada*, Award on Merit, ¶ 181 (UNCITRAL 2000) (*Pope & Talbot v Canada*); *Tecmed v Mexico*, ICSID Case No ARB(AF)00/2 at ¶ 163.

relation to other elements of fair and equitable treatment, such as the requirement of procedural due process, non-discrimination and freedom from harassment and coercion. This is most likely because conduct violating these requirements is not usually taken with a legitimate objective, which is a prerequisite for necessity analysis.[116] Yet to date, tribunals have also declined to employ necessity analysis in areas that might be amenable to such an approach, such as consistency in administrative conduct. There is no reason why necessity analysis is not an appropriate way to determine whether it is permissible for a state to, for example, resile from previous representations or decisions with respect to administrative decisionmaking. It should also be noted that tribunals have employed or discussed other methods of analysis in assessing the stability of laws and consistency of government conduct, such as assessing a measure's reasonableness,[117] balancing the interests of the investor and the host state,[118] or using the existence of a legitimate regulatory objective to determine the measure's legality.[119]

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116 But see, *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, (Award of Apr 12, 2002) ¶ 143, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC595_En&caseId=C182 (visited Apr 14, 2013), described by Kingsbury and Schill, *Public Law Concepts* at 97–98 (cited in note 89) as implicitly employing a form of proportionality analysis (including necessity) with respect to procedural due process.

117 See, for example, *Merrill & Ring v Canada*, Award, ¶ 213 (UNCITRAL 2010).; *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, (Award of July 31, 2007) ¶ 278, online at http://italaw.com/sites/default/files/case-documents/ita0500.pdf (visited Apr 14, 2013); *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, (Award of Sept 11, 2007) ¶ 332, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC682_En&caseId=C252 (visited Apr 14, 2013); *El Paso* v *Argentina*, ICSID Case No ARB/03/15 at ¶ 402 (cited in note 65); *Saluka v Czech Republic*, Partial Award at ¶ 307 (cited in note 21); *Impreglio v Argentina*, ICSID Case No ARB/07/17 at ¶ 291 (cited in note 66).

118 See, for example, *Saluka v Czech Republic*, Partial Award at ¶¶ 304–07; *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, (Award of Oct 8, 2009) ¶¶ 45–64, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1215_En&caseId=C57 (visited Apr 14, 2013) (*EDF v Romania*); *Glamis Gold Ltd v United States of America*, Award ¶ 762, 779, 803–05 (UNCITRAL 2009) (*Glamis Gold v US*); *Total v Argentina*, ICSID Case No ARB/04/1 at ¶¶ 123, 162–65, 309 (cited in note 21).

119 See, for example, *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, (Award of Aug 30, 2000) ¶¶ 90–99, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC542_En&caseId=C155 (visited Apr 14, 2013) (*Metalclad v Mexico*); *Tecmed v Mexico*, ICSID Case No ARB(AF)00/2 at ¶¶ 157, 173 (cited in note 21); *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v Estonia*, ICISD Case No ARB/99/2, (Award of June 25, 2001) ¶¶ 364–65, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC592_En&caseId=C178 (visited Apr 14, 2013) (*Genin v Estonia*).

The *Pope and Talbot v Canada* Tribunal employed a deferential approach to the question of necessity, indicating that host states should have the scope to select a measure within certain boundaries. The matter concerned a number of regulatory measures taken to implement the Canada–US Softwood Lumber Agreement, including (1) a super fee (a fee applied to certain exports of softwood lumber to the US) imposed on some producers, including the investor, for a benefit accorded to all producers in a particular province and (2) a transitional adjustment quota which had the effect of disadvantaging a group of producers, including the investor.[120] In relation to these measures the Tribunal held, respectively, that Canada's approach was a "reasonable response"; and that while Canada might have selected an alternative measure, the Tribunal would not substitute its judgment for that of authorities, suggesting that it would not interfere with a choice of measure unless that choice reached a certain level of severity compared with other potential measures.[121] The Tribunal appeared cognizant of its limitations in determining the likely efficacy and impact on investors of alternative measures. However, the Tribunal did not use this form of analysis in relation to the other claims, including where the Tribunal found a breach of fair and equitable treatment.[122] This may have been due to the Tribunal's reluctance to generate and evaluate alternative measures where there is uncertainty as to their likely efficacy.

Other decisions display a stricter approach to necessity. The cases of *Suez and InterAgua v Argentina* (*InterAgua*)[123] and *Suez, Vivendi and AWG v Argentina* (*AWG*)[124] both concerned suppliers of drinking water and sewerage services pursuant to concession agreements with municipal authorities. The suppliers alleged that Argentine provincial authorities breached fair and equitable treatment by a number of actions, including the enactment of decrees directing authorities not to adjust tariffs for drinking water and sewerage services in the context of the economic crisis, even after Argentina's economic crisis had abated.[125] Both tribunals, in almost identically worded decisions, undertook necessity analysis to find that the province had alternative measures available that would have had less impact on the claimants' interests, such as "tariff increases for other consumers while applying a social tariff or a subsidy to the

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120 *Pope & Talbot v Canada*, Award on Merits at ¶¶ 153–56; 122–23 (cited in note 115).

121 Id at ¶¶ 123, 128, 155.

122 In relation to an audit of an investor's records after it had filed the notice of arbitration, the Tribunal held that Canada failed to justify the reason for its actions. Id at ¶¶ 172–73.

123 *InterAgua v Argentina*, ICSID Case No ARB/03/17 (cited in note 66).

124 *AWG v Argentina*, ICSID Case No ARB/03/19 (cited in note 66).

125 Id at ¶¶ 238, 243, 247–48; *InterAgua v Argentina*, ICSID Case No ARB/03/17 at ¶¶ 218, 223, 227–28.

poor."[126] While the regulatory framework permitted the setting of tariff levels to take account of social objectives (and required that the investor be compensated), these decisions are open to the criticism that the tribunals did not give due consideration to whether, in the circumstances of the crisis, authorities possessed the capacity to devise and implement a differential tariff or subsidy scheme. Although appearing to accept the legitimacy of the authorities' objective (ensuring access of the population to the water supply), both tribunals ultimately held that the provincial measures amounted to an "abuse of regulatory discretion" and fell outside the scope of Argentina's legitimate right to regulate.[127]

In his separate opinions rendered in the cases, Arbitrator Pedro Nikken opined that a tribunal should not undertake necessity analysis strictly; rather, the role of a tribunal was to determine whether a measure was "within the range of decisions that any reasonable government could have adopted under the same circumstances."[128] This statement suggests that a more restrained approach to necessity is apposite, at least in the context of an economic crisis.[129] Nikken's statements also evidence concern with tribunals' competence to evaluate alternative measures, particularly in the context of economic policy and crisis situations, where tribunals are particularly weak in their ability to obtain all relevant information and predict the consequences of interventions.

Finally, the *Glamis Gold v US* Tribunal undertook a procedural approach to necessity analysis in finding that measures were not in breach of fair and equitable treatment. The claim concerned a challenge under NAFTA's investment chapter to new state laws designed to address environmental and cultural concerns associated with mining, as well as challenges to delays by federal authorities in issuing a permit to operate a mining site. The new legislation required operators to backfill open pit metal mines in certain circumstances, and placed greater regulatory controls on mining sites where indigenous artifacts were uncovered. Reviewing the legislation, the Tribunal took

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126 *InterAgua v Argentina*, ICSID Case No ARB/03/17 at ¶ 215; *AWG v Argentina*, ICSID Case No ARB/03/19 at ¶ 235.

127 *InterAgua v Argentina*, ICSID Case No ARB/03/17 at ¶ 217; *AWG v Argentina*, ICSID Case No ARB/03/19 at ¶ 237.

128 *InterAgua v Argentina*, ICSID Case No ARB/03/17, Separate Opinion of Professor Nikken (July 30, 2010) ¶¶ 37, 42, online at http://www.italaw.com/sites/default/files/case-documents/ita0814.pdf (Apr 14, 2013); *AWG v Argentina*, ICSID Case No ARB/03/19, Separate Opinion of Professor Nikken (July 30, 2010) ¶¶ 37, 42, online at http://www.italaw.com/sites/default/files/case-documents/ita0827.pdf (visited Apr 14, 2013).

129 *InterAgua v Argentina*, ICSID Case No ARB/04/17, Separate Opinion of Professor Nikken at ¶¶ 37, 42–43; *AWG v Argentina*, ICSID Case No ARB/03/19, Separate Opinion of Professor Nikken at ¶¶ 37, 42–43.

a deferential approach to the questions of legitimate objective, suitability and necessity. The Tribunal did not undertake strict scrutiny of the importance of the measures' objective, stating that the relevant test was "whether or not there was a manifest lack of reasons for the legislation."[130] With respect to the measures' suitability, the Tribunal referred to the authorities' "sufficient good faith belief that there was a reasonable connection between the harm and the proposed remedy," and found the legislation "reasonably drafted to address its objectives" and "rationally related to its stated purpose."[131] While the Tribunal did not explicitly undertake least restrictive means testing, it referred in its decision to similar processes undertaken by the authorities. Authorities promulgating the new regulations had considered alternative measures, and the Tribunal noted their finding that the option selected was "necessary for the immediate preservation of the public general welfare."[132] The Tribunal appeared to suggest that where a state could demonstrate that it actively considered alternative measures, the Tribunal might give more leeway with respect to this stage of analysis. This approach limits substantive review of the actual alternatives, but places a greater burden on authorities with respect to their decisionmaking processes.[133]

D. Indirect Expropriation: No Clear Trend of Necessity Analysis

Customary international law (as reflected in most investment treaties) provides that an expropriation will be lawful provided that it is effectuated for a public purpose, is not arbitrary or discriminatory in its effect, follows principles

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130 *Glamis v US*, Award at ¶¶ 803, 805 (cited in note 118).

131 Id at ¶¶ 803, 805.

132 Id at ¶ 180. Relevant regulatory schemes also required that, when determining whether to authorize an entity to take action that had the potential to affect the environment, authorities consider feasible alternatives and select a preferred alternative in terms of environmental impact and other factors, including economic, social and technical matters. Id at ¶¶ 63–64, 70, 101. The tribunal also went on to consider the whether the legislation represented a fair balance between the competing interests, holding that generally, it would respect the legislature's attempt to achieve an appropriate balance of interests where it was apparent that those interests had been taken into account. Id at ¶¶ 625–26, 726, 803–04. See also *Methanex v United States*, Award, Part III, Chapter A ¶¶ 13, 15 (UNCITRAL 2005), where the Tribunal referred to cost-benefit analysis performed in relation to the banned substance and alternative fuel oxygenates, as well as expert evidence with respect to a phase-out of the substance rather than a ban; and *Chemtura Corporation v. Government of Canada*, UNCITRAL (NAFTA), Award, August 2, 2010 ¶¶ 181-82, 192, where the Tribunal referred to an alternative measure proposed by the investor (a phase-out rather than a ban of a toxic pesticide), but found that that this option had been offered to the investor and the investor had refused.

133 See Andenas and Zleptnig, 42 Tex Intl L J at 415 (cited in note 29).

of due process, and is properly compensated.[134] While the scope of direct expropriation is relatively uncontroversial, there is uncertainty regarding the distinction between indirect expropriation and non-compensable regulations or other measures, and the role of the impugned measure in this assessment. The police powers doctrine recognizes host states' right to regulate or take other measures significantly affecting foreign investors' property interests without a finding of expropriation where such measures fall within the ambit of the state's general regulatory or administrative powers, pursue a legitimate purpose, are aimed at the general welfare, and are non-discriminatory.[135] Several recent decisions have adopted an approach to determining indirect expropriation claims which takes both the purpose and effect of host state measures into consideration, though the extent to which the state's regulatory purpose may be taken into account in determining whether there has been an expropriation is largely unsettled. Like fair and equitable treatment, tribunals considering indirect expropriation claims have used, or adverted to, other forms of analysis such as reasonableness[136] and balancing the interests of the investor and the host state.[137]

Necessity considerations may also play a role in defining when a measure will amount to an expropriation. Although there do not appear to be any decided cases in which a tribunal decided the question of expropriation based on least restrictive means analysis, tribunals have referred to necessity as a relevant legal test (or component thereof). The *SD Myers* Tribunal (referred to below) stated that both the purpose and the effect of the measure should be taken into account in determining whether an expropriation occurred, and remarked elsewhere in its decision that authorities were required to select a measure that had the least restrictive effect on foreign investment.[138] It may be inferred that the Tribunal would have applied these considerations to its determination of expropriation had the effect on the investment been sufficiently intense to

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134 See, for example, Malcolm N. Shaw, *International Law* 829–37 (Cambridge 6th ed 2008); Schill, *Multilateralization* at 81 (cited in note 108); Kingsbury and Schill, *Investor-State Arbitration as Governance*, in Van Den Berg, ed, *50 Years* at 31 (cited in note 108).

135 See, for example, United Nations Conference on Trade and Development, *Expropriation: A Sequel, UNCTAD Series on Issues in International Investment Agreements II*, 78–79 (United Nations 2012), online at http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (visited Apr 14, 2013).

136 *Marvin Roy Feldman v United Mexican States*, ICSID Case No ARB(AF)/99/1, (Award of Dec 16, 2002) ¶¶ 103–05, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC587_En&caseId=C175 (visited Apr 14, 2013) (*Feldman v Mexico*).

137 For example, *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2 at ¶¶ 117–19, 121–22 (cited in note 21) (without undertaking necessity testing). See Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 J Intl Econ L 223 (2012).

138 *SD Myers v Canada*, Partial Award at ¶¶ 215, 221, 255, 281–82.

require consideration of the measure's purpose. Only the *Archer Daniels* Tribunal has specifically mentioned the concept of necessity in the context of indirect expropriation, referring in passing to a requirement that a measure be "proportionate or *necessary* for a legitimate purpose."[139] Other tribunals have referred to the concept of proportionality in this assessment, which may mean that they would analyze a measure's necessity as part of this approach. However, these tribunals found that the level of interference with the investment was not sufficient to ground an expropriation claim, and did not go on to consider the proportionality of the challenged measure.[140]

E. National Treatment

The national treatment obligation requires that host states treat foreign investors no less favorably than domestic investors in like circumstances. The majority of decided cases suggest that host states may defend treatment that would otherwise be in breach of national treatment where the action is taken in pursuit of a legitimate public policy objective. Tribunals have, in most cases, used the existence of a legitimate objective rationally connected to the measure as the basis for finding that the foreign investor and its domestic counterpart were not in like circumstances, or that the differential treatment of investors in like circumstances may nevertheless be justified.[141] Most investment tribunals have not adopted a necessity test for this purpose. However, the Tribunal in *SD Myers* required that measures differentiating between foreign and domestic investors to satisfy a least restrictive means test.[142]

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139 *Archer Daniels v Mexico*, ICSID Case No ARB(AF)/04/5 at ¶ 250 (emphasis added) (cited in note 4).

140 *Azurix Corporation v the Argentine Republic*, ICSID Case No ARB/01/12, Award (July 14, 2006) ¶¶ 310–12, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC507_En&caseId=C5 (visited Apr 14, 2013); *Firemen's Fund Insurance Company v United Mexican States*, ARB (AF)/02/1, (Award of July 17, 2003) ¶ 176(j), online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC624_En&caseId=C207 (visited Apr 14, 2013); *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 276 (cited in note 66); *InterAgua v Argentina*, ICSID Case No ARB/03/17 at ¶¶ 147–48 (cited in note 66); *Total v Argentina*, ICSID Case No ARB/04/1 at ¶ 197 (cited in note 21); *El Paso v Argentina*, ICSID Case No ARB/03/15 at ¶ 241 (cited in note 65).

141 For example, *Feldman v Mexico*, ICSID Case No ARB(AF)/99/1 at ¶¶ 170, 184 (cited in note 136); *Pope & Talbot v Canada*, Award on Merits at ¶¶ 78, 81 (cited in note 115); *GAMI Investments, Inc v Mexico*, Final Award, ¶¶ 114 (UNCITRAL 2004). See DiMascio and Pauwelyn, 102 Am J Intl L at 76, 87–88 (cited in note 3); Federico Ortino, *Non-Discriminatory Treatment in Investment Disputes*, in Pierre-Marie Dupuy, Francisco Francioni, and Ernst-Ulrich Petersmann, eds *Human Rights in International Investment Law and Arbitration* 344, 361–63 (Oxford 2009).

142 *SD Myers v Canada*, Partial Award at ¶¶ 250, 255. See also the inter-state NAFTA case, *United States–In the Matter of Cross Border Trucking Services*, (Award of Feb 6, 2001) ¶ 258, online at

In *SD Myers v Canada,* the government enacted legislation banning the export of a toxic substance (PCB) from its territory, requiring disposal to take place within Canada with the effect that the investor, a US-based disposal provider, was no longer able to export PCB for disposal within the US.[143] Canada argued that its actions were necessary for environmental reasons, but the Tribunal found that the law's true objective was to assist domestic industries.[144] Accepting for the sake of argument that the measure had an "indirect environmental objective," the Tribunal found that the measure was not necessary to achieve this objective, as it could have been achieved by other equally effective means, such as by giving the domestic industry preferential treatment through subsidies or with respect to government procurement—both of which are specifically permitted in NAFTA's investment chapter.[145] The Tribunal also offered some general remarks that a government enacting measures directed at environmental protection was required to select a measure that was the least restrictive of investment. It held that "where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade. This corollary also is consistent with the language and the case law arising out of the WTO family of agreements."[146] In this respect, the Tribunal referred to the requirement in WTO case law that alternative measures must achieve the same level of protection desired by the state.[147] Yet, while the Tribunal suggested that these alternative measures would be as effective as the ban, it did not appear to explore the feasibility and less-restrictive nature of these options.[148] This might be explained by the fact that the

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http://www.naftaclaims.com/Disputes/USA/USTrucking/USTruckingChapter20.pdf (visited Mar 11, 2013).

143 *SD Myers v Canada*, Partial Award at ¶¶ 123–26.

144 Id at ¶¶ 162–95.

145 Id at ¶¶ 195, 255; NAFTA, Art 1108(7). While this analysis was in relation to national treatment, the Tribunal relied on it in finding that Canada had breached the fair and equitable treatment requirement.

146 *SD Myers v Canada*, Partial Award at ¶¶ 215, 221.

147 The Tribunal justified its approach to using WTO jurisprudence in stating that, like the WTO agreements, NAFTA's chapters formed a "single undertaking" meaning that, in its view, there was no reason not to apply the provisions of Chapter 3 (trade in goods) to the investment chapter, in particular Article 315, which states that parties may adopt or maintain export restrictions consistent with GATT Article XX(g), (i) or (j) in certain circumstances. *SD Myers v Canada*, Partial Award at ¶ 292.

148 See Kläger, *Fair and Equitable Treatment* at 241 (cited in note 108). In relation to similar criticism leveled at pre-WTO GATT panels, see, for example, John O. McGinnis and Mark L. Movsesian, *The World Trade Constitution*, 114 Harv L Rev 511, 579–80 (2000); Michael Ming Du, *Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?*, 13 J Intl Econ L 1077, 1091 (2010).

Tribunal's decision predates *Korea–Beef* and subsequent WTO jurisprudence with respect to necessity testing.

It is also arguable that in *UPS v Canada*, the Tribunal undertook a procedural approach to necessity testing, referring to Canada's arguments that authorities had considered alternatives and accepting that the measure was "the most efficient means" of achieving the objective, although the reasoning was not further developed in relation to this issue.[149]

IV. THE USE OF NECESSITY ANALYSIS IN WTO CASE LAW

A. The General Exceptions in GATT Article XX and GATS Article XIV

1. Overview.

The concept of necessity appears numerous times throughout the WTO Agreements.[150] However, the necessity provisions that have received the most attention from WTO tribunals are the general exceptions in Article XX of GATT and Article XIV of GATS. The Appellate Body has developed a detailed test to determine whether a measure is "necessary" within the meaning of these provisions. In essence, the test has three stages. First, the measure must have an objective that is recognized by one of the exceptions. Second, the tribunal must weigh the degree to which the measure achieves its objective against the degree

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149 *United Parcel Service of America Inc v Government of Canada*, Award on the Merits, ¶ 165 (UNCITRAL 2007). However, in this case, Arbitrator Ronald Cass rejected a least-restrictive means approach to national treatment:

> The position urged by UPS on this point would have the Tribunal read Article 1102 to provide narrowly limited scope for government to follow policy objectives that have the effect of disadvantaging foreign investors or investments. That construction would severely constrain NAFTA Parties in pursuit of their own objectives and would greatly expand the power of NAFTA tribunals to evaluate the legitimacy of government objectives and efficacy of governmentally chosen means.

Separate Statement of Arbitrator Cass ¶¶ 113, 117.

150 See, for example GATT, Arts III:3, VII:3, XI:2(b) and (c), XII:2(a), XVIII:9, XIX, XX(a), (b), (d) and (i), and XXI(b) (cited in note 15); SPS Agreement, Arts 2.1, 2.2 and 5.6 (cited in note 17); TBT Agreement, Art 2.2, 12.3 and 12.7 (cited in note 15); Agreement on Safeguards, Art 5.1, Final Act Embodying the Results of Uruguay Round of Multilateral Trade Negotiations, Legal Instruments–Results of Uruguay Round vol 1, 33 ILM 1125 (1945); Agreement on Government Procurement, Art XXIII, Final Act Embodying the Results of Uruguay Round of Multilateral Trade Negotiations, Legal Instruments–Results of Uruguay Round vol 1, Annex 4(b) 33 ILM 1125; GATS, Arts XII:2(d), XIV(a), (b) and (c), and XIV bis:1(b) (cited in note 17); and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Arts 8.1, 27.2, 39.3 and 73(b), Final Act Embodying the Results of Uruguay Round of Multilateral Trade Negotiations, Legal Instruments–Results of Uruguay Round vol 1, Annex 1C (1994), 1869 UN Treaty Ser 299 (1995).

to which it restricts international trade, and must do so in light of the importance of the objective. Third, if the second step leads to a preliminary conclusion that the measure is "necessary," the tribunal must consider whether a less trade-restrictive measure is reasonably available to achieve the same objective. These three inquiries can be described as the "objective," "suitability" and "least restrictive means" stages of the test.[151] The "objective" inquiry is usually a relatively straightforward question of fact.[152] The tribunal determines the objective of the measure and whether it falls within one of the exceptions by examining its text, design and regulatory context,[153] as well as statements of lawmakers and officials.[154] The "suitability" and "least restrictive means" inquiries raise a more complex set of issues.

2. Suitability.

The Appellate Body first promulgated a suitability test, or "weighing and balancing" test, as part of its necessity analysis in *Korea–Beef*. In that case, Korea claimed that a requirement that domestic and imported beef be sold in separate stores was necessary to prevent retailers from fraudulently labeling imported beef as domestic.[155] Korea relied on GATT Article XX(d), which applies to measures "necessary to secure compliance with laws or regulations which are not inconsistent with" GATT, including measures relating to "the prevention of deceptive practices."[156]

The Appellate Body noted that a wide range of measures could be "laws and regulations" within the meaning of Article XX(d) and that such measures could pursue many different objectives. In light of this, it held that WTO tribunals could "in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation" is intended to protect because "[t]he more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an

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151 We adopt this terminology so that the stages of the investment law and WTO law necessity tests are described consistently in this article. These terms are not necessarily used by WTO tribunals themselves.

152 However, difficult interpretive questions may arise about the scope of the exceptions themselves. The scope of "public morals" is one example. See Reports of the Appellate Body, *US–Gambling* at ¶ 6.461 (cited in note 33).

153 World Trade Organization, Report of the Appellate Body, *Japan–Taxes on Alcoholic Beverages* 26, WTO Doc Nos WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct 4, 1996); World Trade Organization, Report of the Appellate Body, *Australia–Measures Affecting the Importation of Apples from New Zealand*, WTO Doc No WT/DS367/AB/R (Nov 29, 2010) ¶ 173 (*Australia–Apples*).

154 See, for example Report of the Panel, *US–Gambling* at ¶¶ 6.481–6.487.

155 Report of the Appellate Body, *Korea–Beef* at ¶¶ 25–26 (cited in note 90).

156 GATT Art. XX(d) (cited in note 2).

enforcement instrument."[157] Further, the Appellate Body held that it would be easier to accept that a measure was "necessary" the more it contributed to its objective and the less it restricted international trade.[158]

According to the framework set out by the Appellate Body, the role of a tribunal is to determine where the measure falls on sliding scales of importance, contribution, and trade-restrictiveness; then, "weighing and balancing" the results of those inquiries to determine whether a measure is "necessary."[159] However, instead of applying these steps, the Appellate Body cryptically stated that this framework was "encapsulate[d]" by the least-restrictive measure test that had previously been applied by panels under the GATT 1947.[160] It therefore applied a least restrictive measure test without actually determining or weighing the importance, contribution and trade-restrictiveness of Korea's measure.[161]

Perhaps the most controversial aspect of *Korea–Beef* was the Appellate Body's finding that WTO tribunals can assess the importance of the objective pursued by the respondent's measure. On one view, this arrogates too much discretionary power to a tribunal and undermines the right of the responding state to determine its own level of protection against the problem to which the measure is directed.[162] Moreover, there is no obvious reason to find that one objective falling within Article XX is more or less important than another, particularly as the objective of preventing "deceptive practices" (at issue in *Korea–Beef*) is actually mentioned in Article XX(d) and has therefore been recognized as important by WTO Members themselves.[163]

When *Korea–Beef* was decided in 2000, three considerations appeared to attenuate these concerns. First, the Appellate Body implied that this inquiry was restricted to Article XX(d), because among the general exceptions only that provision is open-ended in terms of the policy objectives it covers.[164] Second, the Appellate Body did not explicitly assess the importance of Korea's objective,

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157 Report of the Appellate Body, *Korea–Beef* at ¶ 162 (cited in note 90).

158 Id at ¶ 163.

159 Id at ¶ 164.

160 Id at ¶¶ 165–66.

161 Donald H. Regan, *The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost–Benefit Balancing*, 6 World Trade Rev 347, 359–60 (2007).

162 See, for example, id at 366; Jan Neumann and Elisabeth Türk, *Necessity Revisited: Proportionality in World Trade Organization Law After Korea–Beef, EC–Asbestos and EC–Sardines*, 37 J World Trade 199, 232–33 (2003); Giselle Kapterian, *A Critique of the WTO Jurisprudence on "Necessity,"* 59 Intl & Comp L Q 89, 119 (2010); Du, 13 J Intl Econ L at 1101 (cited in note 148).

163 See World Trade Organization, Report of the Appellate Body, *United States–Import Prohibition of Certain Shrimp and Shrimp Products* ¶ 121, WTO Doc No WT/DS58/AB/R (Oct 12, 1998).

164 Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 J Intl Econ L 153, 160–61 (2008).

although it did reject Korea's stated level of protection of that objective.[165] Korea claimed that its measure sought to achieve the total elimination of fraud. However, while recognizing that "it is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations," the Appellate Body stated that it thought it "unlikely" that Korea really intended to eliminate fraud and that in fact its measure was designed only to considerably reduce it.[166] And third, one reading of the "importance of the objective" factor is that tribunals apply a margin of appreciation to this analysis, under which the other factors of contribution and trade restrictiveness are considered.[167] On this reading, the more important the tribunal assesses the objective of the measure to be, the less the measure will need to contribute to the objective and the more trade restrictive it may be and still be found "necessary." Moreover, where the Member's objective is of high importance, the tribunal may also exercise more deference to the Member's choice of measure under the least restrictive means analysis ("reasonable necessity").

In subsequent cases, however, the Appellate Body stated that the inquiry into the importance of the objective should be undertaken with respect to each of the necessity exceptions. For example, in *EC–Asbestos*, it held that the protection of human life and health from carcinogenic asbestos products was "vital and important in the highest degree,"[168] while in *US–Gambling* and *China–Audiovisuals* the panels held that measures for the protection of public morals should also be regarded as very important.[169] Thus, the inquiry into the importance of the objective is carried out even for objectives that are explicitly mentioned in Article XX, although the case law strongly suggests that when an objective fits within an explicit exception it will be held to be of high importance.

On the other hand, the Appellate Body has also refined the suitability test so that it is now clear that the importance of the measure is not directly weighed

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165 See notes 160–61 and accompanying text.

166 Report of the Appellate Body, *Korea–Beef* at ¶¶ 176–78 (cited in note 90).

167 Regan, World Trade Rev at 352–53 (cited in note 161).

168 Report of the Appellate Body, *EC–Asbestos* at ¶ 172 (cited in note 92).

169 Report of the Panel, *US–Gambling* at ¶ 6.492 (cited in note 33); World Trade Organization, Report of the Panel, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* ¶ 7.817, WTO Doc No WT/DS363/R (Aug 12, 2009) (*China–Audiovisuals*). The Panel and Appellate Body also held in *DR–Cigarettes* that the protection of tax revenues is a "most important interest" falling within Article XX(d). World Trade Organization, Report of the Panel, *Dominican Republic–Measures Affecting the Importation and Internal Sale of Cigarettes* ¶ 7.215, WTO Doc No WT/DS302/R (Nov 26, 2004); Report of the Appellate Body, *DR–Cigarettes* at ¶ 71 (cited in note 92).

against its trade restrictiveness. In *Brazil–Tyres* and *China–Audiovisuals*, the Appellate Body clarified that it is the effectiveness and trade restrictiveness of a measure that should be weighed and balanced, but that this should be done "in the light" of the importance of its objective.[170] Thus, importance appears to operate, as some commentators had predicted it might,[171] as a margin of appreciation under which the weighing of contribution and trade restrictiveness takes place. Deference is afforded according to the importance of the regulatory objective as a background to Appellate Body's weighing and balancing. Not only is this likely to lead to greater deference, but it also serves to emphasize that the suitability test is not a strict cost-benefit analysis (in the sense of quantifying the costs and benefits of the measure), nor does it involve a balancing test by which the tribunal attempts to balance the social benefits and detriments of the measure. Instead, it is a process of weighing disparate values that cannot be reduced to a common denominator. For example, the protection of "life or health" or "public morals" cannot be quantified in absolute economic terms and so cannot be directly compared with trade restrictiveness. Instead, the policy value and the trade restriction are compared in broad terms and the importance inquiry functions to tip the scales towards a finding that the measure is "necessary." The test is open to criticism for being vague, but the analytical process described by the Appellate Body also provides a relatively sophisticated framework that seeks to incorporate all relevant factors into the analysis.

Another factor that assists in proving necessity (in terms of the suitability criterion) is that the Appellate Body has held that the effectiveness of a measure does not necessarily need to be shown by proving its actual contribution to the objective. In cases where the measure is novel, or where it is part of a package of interrelated measures aimed at achieving a particular policy goal, effectiveness may also be demonstrated by showing with quantitative projections or qualitative reasoning that the measure is "apt to produce a material contribution to the achievement of its objective."[172] In *Brazil–Tyres*, the Appellate Body held that an import ban aimed at protecting human life and health was "necessary" under Article XX(b), even though the degree to which it achieved its objective could not be demonstrated other than by showing that it was "apt" to achieve the objective in the future, and even though an import ban is "by design as trade-restrictive as can be."[173] The Appellate Body has also remarked that the

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170 Report of the Appellate Body, *Brazil–Tyres* at ¶ 156 (cited in note 94); World Trade Organization, Report of the Appellate Body, *China–Audiovisuals* ¶¶ 240–42, WTO Doc No WT/DS363/AB/R (Dec 21, 2009).

171 Regan, World Trade Rev at 352–53 (cited in note 161).

172 Report of the Appellate Body, *Brazil–Tyres* at ¶ 151 (cited in note 94).

173 Id at ¶ 150, quoting Report of the Panel, *Brazil–Tyres* at ¶ 7.211 (cited in note 94).

effectiveness of a given measure may only be discernible with the passage of time, and has given the benefit of the doubt to states with respect to predicting measures' effectiveness at achieving their objectives.[174] Thus, WTO tribunals will give respondents significant deference where their measure is one of a suite of "mutually supportive elements of a comprehensive policy."[175] This approach may also apply more broadly: in the earlier case of *Mexico–Soft Drinks*, the Appellate Body stated that the suitability requirement would be satisfied where a measure is "capable" of achieving its objective or where "the measure cannot be guaranteed to achieve its result with absolute certainty."[176] This deference acknowledges the uncertainty inherent in promulgating regulations in terms of whether a measure will actually realize its purpose.

Some commentators have criticized this approach for allowing measures that are merely likely to make a contribution to their objective as "necessary," undermining the Appellate Body's earlier statement in *Korea–Beef* that "necessary" means something closer to "indispensable."[177] However, this critique overlooks that the standard of "aptness" introduced by the Appellate Body is only a threshold for the necessity test. If the measure is found to be "apt," it must still pass the more rigorous suitability and least restrictive measure analyses.[178]

The inquiry into the degree of "trade-restrictiveness" of a measure is perhaps the least well understood of the three elements of the weighing and balancing test. Under the GATT 1947, Panels equated trade-restrictiveness with the degree to which the measure was inconsistent with the positive obligations of the Agreement.[179] However, this raises difficult questions of how inconsistency is to be measured and appears to overlook the underlying aims of the GATT, by potentially requiring Members to adopt measures that are less inconsistent in a legal sense but which may have a heavier impact on trade.[180] Although the Appellate Body approved the GATT Panels' approach in *Korea–*

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174 World Trade Organization, Report of the Appellate Body, *United States–Standards for Reformulated and Conventional Gasoline* 21–22, WTO Doc No WT/DS2/AB/R (Apr 29, 1996) (*US–Gasoline*); Report of the Appellate Body, *Brazil–Tyres* at ¶ 151 (cited in note 94); Daniel Lovric, *Deference to the Legislature in WTO: Challenges to Legislation* 148 (Aspen 2010).

175 Report of the Appellate Body, *Brazil–Tyres* at ¶ 211 (cited in note 94).

176 Report of the Appellate Body, *Mexico–Soft Drinks* at ¶ 74 (cited in note 4).

177 Chad P. Bown and Joel P. Trachtman, *Brazil–Measures Affecting Imports of Retreaded Tyres: A Balancing Act,* 8 World Trade Rev 85, 126 (2009).

178 Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol and Diet* 148–49 (Cambridge 2010).

179 GATT Panel Report, *United States Section 337 of the Tariff Act of 1930* ¶ 5.26, GATT BISD 36S/345 (Jan 16, 1989).

180 Neumann and Türk, 37 J World Trade at 207–08 (cited in note 162).

Beef,[181] it equated trade-restrictiveness with the measure's factual impact on imports.[182] This finding, in the context of a violation of Article III:4 (national treatment), related specifically to restrictive effects on imported goods.[183] However, in *China–Audiovisuals* the Appellate Body clarified that the trade-restrictiveness inquiry is not limited to the impact on imports but should be carried out "in the light of the specific obligation of the covered agreements that the . . . measure infringes."[184] In that case, the infringed obligations related not only to "*what* can be traded, but more directly with the question of *who* is entitled to engage in trading"; thus, the restriction on the right to trade was the most relevant.[185]

These cases show that the Appellate Body has moved away from defining trade-restrictiveness as the "degree of inconsistency" and towards a consideration of the factual impact of the measure on the underlying values that the infringed obligation is designed to protect. This is a more fluid approach that avoids both a simplistic focus on the quantity of imports and exports and the impossibility of quantifying the "degree" of a legal violation. It may also allow the Appellate Body to determine the trade-restrictiveness of a measure according to amorphous values with little basis in the text of the Agreement (though there is little evidence of this in the existing case law). In *China–Audiovisuals*, for example, the Appellate Body derived the values in question from a careful examination of China's Accession Protocol, which was at issue.

3. Least restrictive alternative measure.

If the weighing and balancing exercise leads to a preliminary conclusion that the measure is "necessary," the next step undertaken by WTO tribunals is to determine whether less trade-restrictive measures exist that would achieve the Member's objective. Such measures are generally proposed by the complainant and must be "reasonably available" to the respondent.[186] This means that the respondent must be capable of taking them, they must not impose an "undue

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181 Report of the Appellate Body, *Korea–Beef* at ¶ 166 (cited in note 90); see also Report of the Appellate Body, *EC–Asbestos* at ¶ 171 (cited in note 92).

182 Report of the Appellate Body, *Korea–Beef* at ¶ 163 (cited in note 90).

183 The Appellate Body also noted that one of the stated objectives of the GATT is "the elimination of discriminatory treatment in international commerce." Report of the Appellate Body, *Korea–Beef* (cited in note 90).

184 Report of the Appellate Body, *China–Audiovisuals* at ¶ 306 (cited in note 170).

185 Id at ¶ 307.

186 Id at ¶ 319; Report of the Appellate Body, *Brazil–Tyres* ¶ at 156 (cited in note 94); Report of the Appellate Body, *US–Gambling* at ¶ 5.26 (cited in note 33).

burden" in the form of prohibitive costs or technical difficulties, and they must meet the respondent's desired level of protection.[187]

Because the clauses of Article XX and Article XIV are exceptions to the primary obligations of the GATT and the GATS, the respondent bears the burden of demonstrating that its measure meets their requirements, including the necessity test.[188] However, in *US–Gambling* the Appellate Body clarified that this does not mean that the respondent must positively exclude all potential alternative measures; instead, it need only show that measures proposed by the complainant are not "reasonably available."[189] In part, this is because if the respondent demonstrates to the Tribunal that its measure should be considered "necessary" under the weighing and balancing test, the Tribunal will already have come to a *prima facie* conclusion that the measure meets the requirements of the exception.[190] However, this should not be taken to mean that the burden of proof then switches to the complainant to show that a reasonable alternative exists. Instead, the complainant need only propose a measure that "in its view, the responding party should have taken";[191] it is then for the respondent to show that the measure is not reasonable. In *China–Audiovisuals*, the US proposed that China's system for reviewing the content of imported media would be less trade-restrictive if it were centralized in a single body. China asserted that this would be unduly burdensome and costly, but did not provide evidence of the nature or magnitude of the costs. Thus, the Appellate Body held that China had not met its burden of proving that the alternative was not reasonable and its measure was accordingly not "necessary to protect public morals."[192]

The Appellate Body has not fully explained what is meant by an "undue burden" imposed by a proposed alternative measure. On one hand, it is clear that an alternative will not be held to be unreasonable merely because it imposes

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187 Report of the Appellate Body, *US–Gambling* at ¶¶ 307–08 (cited in note 33). In subsequent cases, however, the Appellate Body has sometimes, but not always, stated that an alternative measure must make an "equivalent contribution" to achieving the respondent's desired level of protection, as opposed to actually achieving it. See Report of the Appellate Body, *Brazil–Tyres* at ¶ 156 (cited in note 94). However, the most recent authority states that a "reasonably available" alternative measure must preserve the responding party's right to achieve its desired level of protection with respect to the objective pursued under Article XX. Report of the Appellate Body, *China–Audiovisuals* at ¶ 318 (cited in note 170).

188 Report of the Appellate Body, *Korea–Beef* at ¶ 157 (cited in note 90).

189 Report of the Appellate Body, *US–Gambling* at ¶ 308 (cited in note 33).

190 Id at ¶ 310.

191 Report of the Appellate Body, *China–Audiovisuals* at ¶ 319 (cited in note 170).

192 Compare id at ¶ 328, with Report of the Appellate Body, *US–Gambling* at ¶ 321 (cited in note 33).

some extra costs on the respondent.[193] In *Korea–Beef*, for example, the measure at issue had effectively shifted the enforcement costs of protecting against fraud onto beef importers; the Appellate Body held that it was not unreasonable for Korea itself to assume those costs by paying for ordinary law enforcement.[194]

At some point, however, an alternative measure may become so costly or technically challenging that it imposes not only a burden, but an "undue burden." It has been suggested that this involves a cost-benefit analysis under which the trade costs of the Member's measure are balanced against the extra costs the Member would incur if it adopted the proposed alternative.[195] Regan argues that this form of balancing provides "a kind of safety-valve on the less-restrictive alternative test" that ensures that Members are not prevented from achieving their chosen level of protection with respect to a legitimate objective.[196] However, if applied too strictly it could also have negative effects. A direct comparison of trade costs with the costs of the proposed alternative might obscure other considerations. These include the potentially limited resources of the responding Member—for example, if the Member was a developing country—and also whether more expenditure on an alternative measure would force resources to be withdrawn from other areas. To date, no WTO case has squarely raised the issue of how the extra costs of alternative measures are to be assessed. An approach is required that considers the trade-restrictiveness of the challenged measure in a manner that is sensitive to the respondent's particular circumstances.[197]

Perhaps the most critical aspect of the alternative measure analysis is that the measure proposed by the complainant must meet the respondent's level of protection.[198] This is because WTO tribunals do not question the appropriateness of the respondent's objective, only whether it falls within one of the exceptions and whether there is a sufficient connection between the measure and the objective to demonstrate that the exception applies.[199] Thus, the Appellate Body has stated that "it is undisputed that WTO Members have the

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193 Report of the Appellate Body, *US–Gambling* at ¶ 308 (cited in note 33); Report of the Appellate Body, *China–Audiovisuals* at ¶ 327 (cited in note 170).

194 Report of the Appellate Body, *Korea–Beef* at ¶ 180–81 (cited in note 90); see also Report of the Appellate Body, *China–Audiovisuals* at n 603 (cited in note 170).

195 Regan, World Trade Rev at 349 (cited in note 161).

196 Id at 358.

197 Report of the Appellate Body, *US–Gambling* at ¶ 308 (cited in note 33).

198 Report of the Appellate Body, *Korea–Beef* at ¶ 176 (cited in note 90); Report of the Appellate Body, *EC–Asbestos* at ¶ 168 (cited in note 92); Report of the Appellate Body, *China–Audiovisuals* at ¶ 318 (cited in note 170).

199 Lovric, *Deference to the Legislature in WTO* at 143 (cited in note 174).

right to determine the level of protection [of the objectives set out in Article XX] that they consider appropriate."[200]

It has been argued that the weighing and balancing exercise has the potential to undermine this right because the tribunal makes its own determination of the importance of the respondent's objective. The tribunal could therefore conclude that a measure was not "necessary" even though there is no alternative that would achieve the respondent's level of protection.[201] Such an approach places significantly more power in the hands of WTO tribunals and reduces the autonomy of members. However, this criticism may misunderstand the nature of the analysis of the importance of the objective and its relationship to the respondent's chosen level of protection. The Appellate Body has emphasized that the level of protection chosen by a Member should be thought of as the "*objective*" the Member seeks to achieve by implementing its measure.[202] Although the Member's process of determining a level of protection necessarily involves an assessment of how important the Member believes the objective to be, the level of protection itself is not necessarily undermined by a WTO tribunal undertaking its own inquiry into the importance of the objective. This is because once the Member has determined the desired level of protection, the tribunal must respect it. Thus the importance inquiry can only affect the degree to which the tribunal will be willing to accept that a proposed alternative measure would achieve the Member's level of protection, not whether the level of protection itself is appropriate. Moreover, even if importance and level of protection are regarded as linked in a way that could affect Members' rights to achieve legitimate objectives, in practice the importance inquiry has not undermined those rights because WTO tribunals have always, to date, found the respondent's objective to be of high importance. It is of more concern that the Appellate Body has occasionally rejected the level of protection *stated* by a Member as not reflecting the true level of protection the Member sought to achieve, as it did in *Korea–Beef*.[203] However, in principle this simply reflects the fact that the objective pursued by the measure must be determined objectively by the tribunal. Thus, what the Member declares its level of protection to be will not necessarily be determinative, but once the level of protection has been established, any proposed alternative must meet it.

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200 Report of the Appellate Body, *EC–Asbestos* at ¶ 168 (cited in note 92).

201 See Neumann and Türk, 37 J World Trade at 232–33 (cited in note 162); Ortino, *Basic Legal Instruments for the Liberalisation of Trade* at 472 (cited in note 38); Regan, World Trade Rev at 348 (cited in note 161); Peter Van den Bossche, *Looking for Proportionality in WTO Law*, 35 Legal Issues of Econ Integration 283, 284 (2008).

202 World Trade Organization, Report of the Appellate Body, *Australia–Measures Affecting Importation of Salmon* ¶ 200, WTO Doc No WT/DS18/AB/R (Oct 20, 1998) (*Australia–Salmon*).

203 See also Report of the Appellate Body, *DR–Cigarettes* at ¶ 72 (cited in note 92).

4. The relevance of the chapeau to necessity analysis.

Even if the respondent demonstrates that its measure is "necessary" under one of the sub-clauses of Article XX or XIV, the exception is not made out unless the respondent can also show that the measure is not applied in a manner constituting "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade"[204] under the chapeau to the provision. The purpose of the chapeau is to prevent abuse of the exceptions by requiring that Members apply measures consistently if they are to be fully justified.[205] In essence, discrimination will be "arbitrary or unjustifiable" if it is not rationally connected to the objective according to which the measure has been provisionally justified under one of the sub-clauses.[206]

In one sense, the chapeau imposes a second suitability test by requiring that the measure at issue is applied consistently—or at least that any inconsistencies are justified according to the policy objective of the measure.[207] It may be that this has in turn influenced the Appellate Body's approach to necessity because the chapeau effectively acts as a second check to determine whether the measure is really being applied in good faith in circumstances where it is necessary to achieve a legitimate objective. This being the case, it is not necessary for the necessity test to be excessively strict, for example by requiring that a measure not have discriminatory effects to be "necessary."

The jurisprudence has not elaborated on the connection between the tests of necessity and discrimination, but it is arguably apparent from the Appellate Body's reasoning. In *US–Gasoline*, the Appellate Body held that it is not the underlying violation that should be examined for "necessity," but the measure as a whole.[208] Given that the underlying violation is often some form of discrimination, it is the task of the chapeau to determine whether that discrimination is "arbitrary or unjustifiable." It is not the task of the sub-clause to take discrimination into account when determining whether the measure is "necessary." This forms the basis of much of the Appellate Body's jurisprudence on the general exceptions. Surprisingly, however, the Appellate Body recently held in *Thailand–Cigarettes from the Philippines* that "what must be shown to be

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204 "Disguised restriction" includes both arbitrary or unjustifiable discrimination and, more broadly, measures which, although not discriminatory, "conceal the pursuit of trade-restrictive objectives." Report of the Appellate Body, *US–Gasoline* at 25 (cited in note 174).

205 Id at 22.

206 Report of the Appellate Body, *Brazil–Tyres II* at ¶ 227 (cited in note 94).

207 Bown and Trachtman, 8 World Trade Rev at 87 (cited in note 177).

208 Report of the Appellate Body, *US–Gasoline* at 16 (cited in note 174).

necessary is the treatment giving rise to the finding of less favorable treatment,"[209] appearing to reverse its previous position.

In any case, although some commentators have remarked upon the possible impact of the chapeau on the necessity test,[210] it is difficult to find direct evidence of this in the case law. Moreover, as discussed below, the Appellate Body has used the general exceptions' necessity test to guide its approach to other provisions of the WTO Agreements that have a necessity requirement, but not a chapeau. Thus, it appears that although the chapeau may have influenced the development of the necessity test under Articles XX and XIV, that test is wholly capable of standing on its own. Therefore, although sensitivity to context is required, the presence of the chapeau does not preclude the WTO necessity test informing the approach taken by investment tribunals.

B. The Security Exceptions in the GATT and GATS

In addition to the general exceptions, Article XXI of the GATT and Article XIV *bis* of GATS contain exceptions that Members may invoke to justify their "essential security interests." Both Articles provide that a Member will not be "prevented from taking any action which *it considers necessary* for the protection" of those interests.[211] However, such actions must relate to fissionable materials, arms or the military establishment, or alternatively must be taken "in time of war or other emergency in international relations."[212]

The critical difference between the general and security exceptions is that the latter allow Members to determine whether an action is "necessary" for their security. The evident purpose of this much lower, and perhaps non-justiciable, test is to preserve the autonomy of WTO Members in security matters. However, it has also led to concern that the scope of the security exceptions is self-judging.[213] Despite this, the security exceptions were rarely used under the GATT 1947 and have never been adjudicated in WTO tribunals.[214] There is accordingly very little relevant jurisprudence.

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209 See Section IV.C.

210 Alvarez and Brink, *Revisiting the Necessity Defense* at 347 (cited in note 88).

211 GATT Agreement, Article XXI(b) (cited in note 2); GATS, Article XIV *bis* (1)(b) (cited in note 17) (emphasis added).

212 GATT Agreement, Article XXI(b)(i)–(iii) (cited in note 15); GATS, Article XIV *bis* (1)(b)(i)–(iii).

213 GATT Panel Report, *United States–Trade Measures Affecting Nicaragua* ¶ 5.17, GATT Doc L/6053 (Oct 13, 1986, unadopted); Wesley A. Cann Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 Yale J Intl L 413 (2001).

214 But see John A. Spanogle Jr., *Can Helms–Burton Be Challenged under WTO?*, 27 Stetson L Rev 1313 (1998).

C. Necessity in Other WTO Agreements

The concept of necessity is also used in key provisions of the SPS Agreement[215] and the TBT Agreement.[216] Article 2.2 of the SPS Agreement requires Members to "ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health,"[217] while Article 5.6 contains a more specific obligation that "Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection."[218] Similarly, Article 2.2 of the TBT Agreement provides that "technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create" and that "[s]uch legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment."[219] Both Agreements are also explicitly intended to expand and supplement the disciplines contained in the GATT 1994. One of the stated purposes of the TBT Agreement is to "further the objectives of GATT 1994,"[220] while the SPS Agreement is designed to "elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)."[221]

1. The SPS Agreement.

Articles 2.2 and 5.6 of the SPS Agreement contain similar concepts to those that are relevant under the general exceptions. Article 2.2 provides a general standard of necessity, while Article 5.6 elaborates on that standard,[222] codifying both the "least restrictive means" test and the concept of an "appropriate level of protection." Further, "technical and economic feasibility" must be taken into account in the consideration of alternative measures and such alternatives must (i) achieve the respondent's level of protection and (ii) be

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215 SPS Agreement (cited in note 17).

216 TBT Agreement (cited in note 15).

217 SPS Agreement, Art 2.2 (cited in note 17).

218 Id at Art 5.6.

219 TBT Agreement, Art 2.2 (cited in note 15).

220 Id at Preamble.

221 SPS Agreement, Preamble (cited in note 17); GATT, Art XX(b) (applying to measures "necessary to protect human, animal or plant life or health") (cited in note 2).

222 Report of the Appellate Body, *Australia–Apples* at ¶ 339 (cited in note 153).

"significantly" less restrictive to trade.[223] "Appropriate level of protection" is defined as "[t]he level of protection deemed appropriate by the Member."[224]

These provisions reflect many of the concepts developed by the Appellate Body in its jurisprudence on the general exceptions. However, they provide Members with greater autonomy because they require that alternative measures must be "*significantly*" less trade restrictive and the level of protection is "*deemed*" by the Member, indicating that tribunals cannot question a Member's assertion of its own level of protection.[225] In *Australia–Salmon*, the Appellate Body affirmed that "[t]he determination of the appropriate level of protection is a *prerogative* of the Member concerned and not of the Panel or of the Appellate Body."[226] However, the Appellate Body also found that the SPS Agreement contains an "implicit obligation" to determine an appropriate level of protection before adopting a sanitary or phytosanitary measure,[227] and that where a Member has not done so with sufficient precision the WTO tribunals may determine its level of protection on the basis of the measure itself.[228] Thus, although the SPS Agreement preserves Members' rights to declare their own policy objective, there is still scope for a tribunal to make its own assessment if the Member has not done so.

In *Australia–Salmon*, which concerned import restrictions imposed on imported salmon, ostensibly to protect the local salmon population from disease, these principles led to an outcome the reverse of that which occurred in *Korea–Beef*. Australia expressly stated that its level of protection was "very conservative," but the Panel instead assessed it as "zero-risk" on the basis that the measure itself was a total ban.[229] However, the Appellate Body rejected this reasoning as a subversion of Australia's prerogative to "deem" its own level of protection, and accordingly it determined that the level was "very conservative" rather than "zero-risk."[230] Thus, while in *Korea–Beef* the Appellate Body rejected the level of protection asserted by the responding Member and instead inferred it from the measure at issue, in *Australia–Salmon* it was held that the Member's statement of its level of protection binds WTO tribunals even if it is lower than the level reflected in its measure. Although they seem inconsistent, these results

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223 SPS Agreement, n 3 (cited in note 17).

224 Id at Annex A(5) (emphasis added).

225 Report of the Appellate Body, *Australia–Salmon* at ¶¶ 199–200 (cited in note 202). See also Kapterian, 59 Intl & Comp L Q at 113 (cited in note 162).

226 Report of the Appellate Body, *Australia–Salmon* at ¶ 199 (cited in note 202).

227 Id at ¶ 206.

228 Id at ¶ 207.

229 Id at ¶ 125.

230 Report of the Appellate Body, *Australia–Salmon* at ¶¶ 197–99 (cited in note 198).

may be reconcilable on the basis that in both cases the Appellate Body was assessing what it believed to be the actual level of protection. Nevertheless, the Appellate Body's statements in *Australia–Salmon* appear to enable Members to conclusively assert their chosen level of protection, which Korea was not able to do in *Korea–Beef*.

Another way in which the necessity test in Article 5.6 may differ from the general exceptions is that it appears to preclude the balancing of factors such as importance, trade restrictiveness, and contribution to a legitimate objective. This is because the footnote to Article 5.6 states that "a measure is not more trade-restrictive than required *unless* there is" an alternative measure that meets all of its requirements.[231] Although this has not been addressed in the jurisprudence, this may mean that a tribunal cannot strike down a measure simply because, for example, it does not adequately contribute to its objective and is highly trade restrictive. In the absence of a reasonably available alternative, a measure will be consistent with the provision. The more general necessity test contained in Article 2.2 may also involve balancing, but again, this has yet to be ruled upon.

As Articles 2.2 and 5.6 contain positive obligations rather than exceptions, the Appellate Body has held that the complainant must raise a *prima facie* case that the measure infringes them before the burden switches to the respondent to provide a rebuttal.[232] This differs significantly from the approach under the general exceptions, where the complainant only needs to propose a measure to activate the respondent's burden of proving that it is not reasonably available.

Because of the subject matter of the SPS Agreement, which typically applies to measures designed to protect against diseases and other threats to health,[233] the complainant's burden will often require it to prove detailed

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231 SPS Agreement, n 3 (cited in note 17) (emphasis added).

232 World Trade Organization, Report of the Appellate Body, *European Communities–Measures Concerning Meat and Meat Products (Hormones)* ¶¶ 97–109, WTO Doc Nos WT/DS26/AB/R, WT/DS48/AB/R (Jan 16, 1998) (*EC–Hormones*); World Trade Organization, Report of the Appellate Body, *Japan–Measures Affecting the Importation of Apples* ¶¶ 152–53, WTO Doc No WT/DS245/AB/R (Nov 26, 2003).

233 Annex A(1) of the SPS Agreement contains the test for its applicability, providing:

> Sanitary or phytosanitary measure — Any measure applied:
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> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

technical matters demonstrating that its proposed alternative would achieve the respondent's level of protection. This raises the question of the standard of review to be exercised by WTO tribunals in SPS disputes when determining technical or scientific issues in which they are unlikely to have expertise: as the Appellate Body said in *Australia–Apples*, "we cannot conceive of how a complainant could satisfy its burden of demonstrating that its proposed alternative measure would meet the appropriate level of protection under Article 5.6 without relying on evidence that is scientific in nature."[234] In *EC–Hormones*, the Appellate Body held on the basis of the WTO Dispute Settlement Understanding[235] that "the applicable standard is neither *de novo* review as such, nor 'total deference,' but rather the 'objective assessment of the facts.'"[236] This vague standard could give WTO Panels significant scope to determine scientific or technical controversies according to their own views of competing evidence, limited only by the requirement that their assessment be "objective." However, as the Appellate Body stressed, Members have a right to adopt measures based on "divergent or minority" scientific views without panels rejecting their conclusions based on other scientific evidence.[237]

2. The TBT agreement.

Article 2.2 of the TBT Agreement provides that TBT measures must not be "more trade-restrictive than necessary to fulfill a legitimate objective."[238] As under the SPS Agreement, the complainant bears the burden of raising a *prima facie* case of inconsistency with this requirement, which the respondent must

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> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
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> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.

SPS Agreement, Annex A(1) (cited in note 17).

234 Report of the Appellate Body, *Australia–Apples* at ¶ 364 (cited in note 153).

235 World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article 11, online at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_05_e.htm#article11 (visited Apr 14, 2013).

236 Report of the Appellate Body, *EC–Asbestos* at ¶ 117 (cited in note 92).

237 World Trade Organization, Report of the Appellate Body, *United States–Continued Suspension of Obligations in the EC–Hormones Dispute* ¶ 591, WTO Doc No WT/DS320/AB/R (Oct 16, 2008) ("a panel should review whether the particular conclusions drawn by the Member assessing the risk find sufficient support in the scientific evidence relied upon").

238 TBT Agreement, Art 2.2 (cited in note 15).

rebut.[239] Legitimate objectives include, but are not limited to, national security, the prevention of deceptive practices, and the protection of human health or safety, animal or plant life health, or the environment.[240] In *US–Clove Cigarettes*, the Panel held that Article XX/XIV jurisprudence was relevant to the interpretation of Article 2.2 and proceeded to follow the test described in *Korea–Beef*.[241] The Panel acknowledged differences between the provisions, such as that Article 2.2 is not an exception to an underlying obligation, but held that these were not sufficient to demonstrate that a different standard should apply.[242] Moreover, in *US–COOL* the Panel did not appear to believe that the lack of a chapeau to Article 2.2 is a relevant point of distinction, noting that some of the wording of the Preamble to the TBT Agreement is similar to the chapeaux to Articles XX and XIV.[243]

In *US–Tuna II*, the Appellate Body confirmed that the list of "legitimate objectives" in Article 2.2 is open rather than exhaustive.[244] Further, it held that the list of express objectives should be used as a "reference point" for determining what other "legitimate objectives" the provision might cover, as well as finding that objectives found throughout the WTO Agreements "may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective."[245] Thus, where a provision is broadly expressed to cover a range of objectives, the text and purposes of the entire treaty may be examined to determine whether a particular objective falls within its scope.

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239 World Trade Organization, Report of the Appellate Body, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* ¶ 323, WTO Doc No WT/DS381/AB/R (May 16, 2012) (*US–Tuna II*).

240 TBT Agreement, Art 2.2 (cited in note 15).

241 World Trade Organization, Report of the Panel, *United States–Measures Affecting the Production and Sale of Clove Cigarettes* ¶¶ 7.368–7.369, ¶ 7.379, WTO Doc No WT/DS406/R (Sept 2, 2011) (*US–Clove Cigarettes*); see also World Trade Organization, Report of the Panel, *United States–Certain Country of Origin Labeling (COOL) Requirements* ¶¶ 7.669–7.670, WTO Doc Nos WT/DS384/R, WT/DS386/R (Nov 18, 2011) (*US–COOL*).

242 Report of the Panel, *US–Clove Cigarettes* at ¶¶ 7.362–7.366 (cited in note 241). This finding was not appealed to the Appellate Body, but the Appellate Body remarked that the balance set out in the TBT Agreement between states obligations not to create unnecessary obstacles to international trade and states' right to regulate was "not, in principle, different from the balance set out in the GATT 1994." World Trade Organization, Report of the Appellate Body, *US–Clove Cigarettes*, WTO Doc No WT/DS406/AB/R (Apr 4, 2012).

243 Report of the Panel, *US–COOL* at ¶ 7.670 (cited in note 241). See also World Trade Organization, Report of the Appellate Body, *US–COOL* at ¶¶ 374–76, WTO Doc Nos WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012).

244 Report of the Appellate Body, *US–Tuna II* at ¶ 313 (cited in note 239).

245 Id.

On the other hand, the Appellate Body also held that "[a] panel is not bound by a Member's characterization of the objectives it pursues through the measure, but must independently and objectively assess them."[246] This appears at odds with the approach taken under the SPS Agreement, where it is a Member's prerogative to declare its level of protection. However, the Appellate Body was distinguishing between the *purpose* of a measure in the broad sense—such as whether it is generally directed to protecting health—and the *level of protection* in the sense of the precise objective the Member seeks to achieve by adopting the measure. The Appellate Body recognized that the concept of "fulfill[ment]" of an objective in Article 2.2 refers to "provid[ing] fully what is wished for,"[247] thus preserving the right of Members to achieve their objectives. In this respect, the Appellate Body also drew on the Preamble to the TBT Agreement, which states that "no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate."[248] In the Appellate Body's view, this indicates that "a WTO Member, by preparing, adopting, and applying a measure in order to pursue a legitimate objective, articulates either implicitly or explicitly the level at which it seeks to pursue that particular legitimate objective."[249] Thus, the right of Members to achieve their level of protection is preserved, but their right to *assert* that level of protection is not absolute, as it appears to be under the SPS Agreement. Instead, WTO tribunals determine the level of protection from the measure itself, although no doubt the statements of the Member are taken into account.

Balancing of the kind undertaken under Article XX of the GATT is also a part of the analysis under Article 2.2 of the TBT Agreement. In *US–Tuna II*, the Appellate Body articulated a very similar test to the suitability test under the general exceptions provisions:

> The Appellate Body has previously noted that the word "necessary" refers to a range of degrees of necessity, depending on the connection in which it is used. In the context of Article 2.2, the assessment of "necessity" involves a relational analysis of the trade-restrictiveness of the technical regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks non-fulfillment would create.[250]

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246 Id at ¶ 314.

247 Id at ¶ 315.

248 TBT Agreement, Preamble (cited in note 15).

249 Report of the Appellate Body, *US–Tuna II* at ¶ 316 (cited in note 239)

250 Id at ¶ 318 (footnote omitted).

The Appellate Body confirmed that a TBT measure can meet the requirement of suitability where it "partially achieves" its objective[251] and need not completely attain its objective in order to be considered necessary to achieve it.[252]

The Appellate Body also held that a least-restrictive means analysis was part of the necessity test and hinted at an explanation of the relationship between the suitability and least restrictive means parts of the WTO necessity test:

> In most cases, [the analysis under Article 2.2] would involve a comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with that of possible alternative measures that may be reasonably available and less trade restrictive than the challenged measure, taking account of the risks non-fulfillment would create. The Appellate Body has clarified that a comparison with reasonably available alternative measures is a conceptual tool for the purpose of ascertaining whether a challenged measure is more trade restrictive than necessary.[253]

This folds the two tests into one another, suggesting that the factors in the suitability test can be seen as criteria that must be met by a proposed alternative measure if it is to be "reasonably available." Further, the requirement that "the risks of non-fulfillment" must be taken into account appears to mirror the importance element in the suitability test under Articles XX and XIV: the higher the risks, the more circumspect the tribunal should be in determining that a proposed alternative is "reasonably available." Nevertheless, the two tests may not have been wholly conflated. The Appellate Body stated that "[i]n order to make a *prima facie* case, the complainant must present evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary." It added that "[i]n making its *prima facie* case, a complainant *may also seek to identify* a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[254] This confirms that a complainant does not *necessarily* need to propose an alternative measure to show that the measure at issue is not "unnecessary." Thus, an argument purely based on trade-restrictiveness and contribution to the relevant objective, taking into account the risks of non-fulfillment of that objective, might suffice to show that the measure is not necessary. However, the Appellate Body also elaborated:

> We can identify at least two instances where a comparison of the challenged measure and possible alternative measures may not be required. For

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251 Id at ¶ 129.

252 Report of the Appellate Body, *US–COOL* at ¶ 468 (cited in note 243).

253 Report of the Appellate Body, *US–Tuna II* at ¶ 320 (cited in note 239) (footnote omitted).

254 Id at ¶ 323.

> example, it would seem to us that if a measure is not trade restrictive, then it may not be inconsistent with Article 2.2. Conversely, if a measure is trade restrictive and makes no contribution to the achievement of the legitimate objective, then it may be inconsistent with Article 2.2.[255]

This suggests, but does not fully confirm, that where a measure makes a contribution to its objective, the existence of a reasonably available less restrictive alternative must always be proven to demonstrate that the measure is not "necessary." It also provides a stricter test than either the GATT Article XX or SPS Article 5.6 tests, because the alternative must only be as effective as the respondent's actual measure. Under Articles XX and 5.6, the alternative must achieve the respondent's *objective*, in the sense of its chosen level of protection, rather than simply the actual contribution to that objective made by its existing measure.

V. The Utility of the WTO Approach to International Investment Law

This Part discusses several areas in which international investment tribunals might, in light of their common function with WTO tribunals, find useful guidance from WTO necessity analysis. We also identify the limitations of using WTO case law in this way, including addressing the concerns raised by the *Continental* Tribunal's approach to the use of WTO case law.

A. Importance of Objective

The importance of the objective that a measure is designed to achieve has been recognized as a relevant consideration in WTO necessity analysis from the earliest Appellate Body decisions on Article XX of the GATT. It is also relevant under the SPS Agreement and the TBT Agreement, although it sometimes takes different forms. However, investment tribunals have not consistently referred to the importance of a measure's objective as a consideration in determining whether a measure is "necessary." The tribunals in *AWG* and *InterAgua* both stated that in their view "[t]he provision of water and sewage services . . . was vital to the health and well-being [of a large population] and was therefore an essential interest of the Argentine State,"[256] while other tribunals have referred to the importance of the host state's objective more obliquely. In *Glamis Gold v US*, the Tribunal held that legislation enacted with the objective of preserving indigenous cultural sites was "necessary for the immediate preservation of the

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255 Id at n 647.

256 *InterAgua v Argentina*, ICSID Case No ARB/03/17 at ¶ 238 (cited in note 66); *AWG v Argentina*, ICSID Case No ARB/03/19 at ¶ 268 (cited in note 66).

public general welfare," but did not specifically affirm the importance of the objective in this context.[257] In the context of Article XI of the Argentina-US BIT, the *Continental* Tribunal only referred to the importance of the objective by reference to WTO jurisprudence, but did not actually evaluate the importance of the emergency measures' objective[258] (although elsewhere in its decision it referred to Article XI's purpose of protecting "national interests of a paramount importance").[259] While the *LG&E* Tribunal referred to the legitimacy of the actual measures adopted by Argentina, it only referred in passing to the importance of "protecting [Argentina's] social and economic system."[260]

The role of the necessity test is not for the tribunal to conduct a *de novo* review of whether it would have pursued the same policy goal in the circumstances, but to assess whether the means chosen to achieve the policy goal were "necessary." As the *US–Gasoline* Panel put it in the first decided WTO dispute, "it [is] not the necessity of the policy goal that [is] to be examined, but whether or not [the particular measure is] necessary . . . it [i]s therefore not the task of the Panel to examine the necessity" of the Member's objectives.[261] This approach has a sound basis in policy as well as a justification based on legal rigor. Firstly, it preserves the right to set legitimate policy goals to governments, thus avoiding excessive interference with regulatory autonomy. Secondly, it avoids the inevitably subjective decisionmaking that an assessment of the legitimacy of an objective entails. What one tribunal would deem to be a legitimate objective in a given situation another might see as unnecessary. Indeed, in the context of NPM clauses, investment tribunals have stated their assessments in terms of vague agreements that the situation prevailing in a country made action necessary. In *Continental v Argentina*, for example, the Tribunal stated that "[i]n general terms, within the economic and financial situation of Argentina towards the end of 2001, the Measures at issue . . . were in part inevitable, or unavoidable, in part indispensable and in any case material or decisive."[262] The *LG&E* Tribunal similarly stated that "Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests."[263] This is precisely the kind of reasoning that the WTO approach is designed to avoid because it slips

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257 *Glamis Gold v US*, Award at ¶ 180 (cited in note 118).

258 *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 194 (cited in note 66).

259 Id at ¶ 168.

260 *LG&E v Argentina*, ICSID Case No ARB/02/1 at ¶ 239 (cited in note 63).

261 World Trade Organization, Report of the Panel, *United States–Standards for Reformulated and Conventional Gasoline*, ¶ 6.22, WTO Doc No WT/DS2/R (Jan 29, 1996).

262 *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 197.

263 *LG&E v Argentina*, ICSID Case No ARB/02/1 at ¶ 226.

dangerously close to an assessment of whether the objective behind the measures, rather than the measures themselves, were necessary. The concept of a chosen or appropriate level of protection is a useful analytical tool to prevent this kind of reasoning and to preserve an appropriate level of national policy autonomy. Other tribunals have, however, referred to or afforded deference in their evaluation of host states' regulatory objectives: particularly NAFTA tribunals, which appear more attuned to these issues.[264] The *SD Myers v Canada* Tribunal referred to the "high measure of deference" applicable to the determination of its regulatory objectives.[265] Likewise, the *Glamis v US* Tribunal indicated that it would not undertake strict scrutiny, stating that the relevant test was "whether or not there was a manifest lack of reasons for the legislation."[266] The Tribunal also stated that "a tribunal's determination that an agency acted in a way with which the Tribunal disagrees" is not enough to find that a measure breached fair and equitable treatment.[267]

Other tribunals have affirmed the importance of host state regulatory objectives, but without performing necessity analysis. For example, the *Total v Argentina* Tribunal noted briefly that the pesification and related measures adopted by Argentina in response to its financial crisis had a legitimate objective, and undertook a balancing test to find that the measures did not breach fair and equitable treatment.[268] In *Genin v Estonia*, the Tribunal found that authorities' revocation of the investor's banking license was a legitimate regulatory decision on the basis of concerns about the bank's management and financial soundness, which was crucial to its finding that Estonia did not breach fair and equitable treatment.[269] In *EDF v Romania*, the Tribunal held that a measure revoking the licenses of operators of duty-free stores pursued a "legitimate aim in the public interest," namely addressing the potential for corruption in the sector, and that the importance of achieving this objective outweighed the impact on the investor.[270]

In several respects, the assessment of importance in necessity analysis is a double-edged sword. On the one hand, the concept of "necessity" inevitably

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264 See Caroline Henckels, *Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration* 4 J Int'l Dispute Settlement 197 (2013).

265 *SD Myers v Canada*, Partial Award at ¶¶ 195, 250, 297–98 (cited in note 111); Separate Opinion of Arbitrator Schwartz at ¶ 233.

266 *Glamis Gold v US*, Award at ¶¶ 803, 805 (cited in note 118).

267 Id at ¶ 625.

268 *Total v Argentina*, ICSID Case No ARB/04/1 at ¶ 164 (cited in note 21).

269 *Genin v Estonia*, ICISD Case No ARB/99/2 at ¶ 370 (cited in note 119).

270 *EDF v Romania*, ICSID Case No ARB/05/13 at ¶¶ 293–94 (cited in note 118).

raises the question of how important the objective in question is considered to be and who is competent to decide the question (a government or a tribunal). Because policy choices involve balancing multiple priorities and allocating limited resources, the importance ascribed to a particular objective will affect a government's decision on whether to adopt a measure in an attempt to achieve that objective. It seems apposite, then, that tribunals should assess the importance of a measure's objective as part of their assessment of whether the measure is necessary. To refrain from doing so risks an attenuated analysis that does not fully incorporate all of the relevant factors involved and risks the approbation of measures even where they pursue discriminatory or otherwise impermissible objectives.

However, there are two major drawbacks to the assessment of the importance of a measure's objective. The first is that it may intrude upon the right of states to set their own legitimate policy priorities. At the very least, it provides a smokescreen behind which an adjudicator can undermine the state's chosen level of protection or extent of preferred achievement of the objective while claiming to respect the state's regulatory autonomy. In the context of the WTO Agreement, this may undermine the right of Members to select their own level of protection of the policy values embodied in the Agreement as legitimate objectives. Thus, as Kapterian argues, while the Appellate Body's jurisprudence in cases such as *EC–Asbestos* has "reinforce[d] the fact that the weighing and balancing test [does] not involve balancing the level of protection against the trade restriction," it also "highlight[ed] the extent to which the importance of the value being sought . . . dictate[s] the survival of the measure."[271] The point is that allowing a tribunal to assess the importance of an objective carries with it the risk that this assessment will undermine the government's own assessment of the importance of a particular policy goal, as reflected both in its level of protection or achievement of that objective, and ultimately, in its measure.

These concerns have been borne out in international investment decisions, where tribunals have held that the host state acted with impermissible objectives though it is arguable that authorities acted in good faith. The *Metalclad v Mexico* and *Tecmed v Mexico* decisions both concerned situations where authorities resiled from previous representations that they would grant permits in relation to the construction or operation of hazardous waste facilities.[272] Both tribunals held that the authorities had acted for reasons related to their constituencies' opposition to the facilities, and that these were impermissible reasons for

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271 Kapterian, 59 Intl & Comp L Q at 110 (cited in note 162).

272 *Metalclad v Mexico*, ICSID Case No ARB(AF)/97/1 at ¶¶ 85–89, 107 (cited in note 119); *Tecmed v Mexico*, ICSID Case No ARB(AF)00/2 at ¶¶ 43, 45, 110 (cited in note 21).

denying the permits.[273] These decisions are amenable to the criticism that the tribunals did not afford due deference to the host state in its response to the concerns of its population.[274] Other tribunals have briefly remarked, in the context of fair and equitable treatment, that a host state would violate its commitments to a foreign investor if it regulated in the absence of "justification of an economic, social or other nature,"[275] regulated in bad faith[276] or departed from representations without a legitimate objective[277] (although their decisions have not turned on the determination of these issues).

In the WTO context, although the Appellate Body did not explicitly assess the importance of Korea's objective of preventing fraud in *Korea–Beef*, by rejecting Korea's assertion of its own level of protection and replacing it with an assessment based on all of the facts before it, the Appellate Body implicitly determined that Korea's objective was not of high importance and therefore its level of protection must be lower than it claimed.[278] According to Du, the result was that the Appellate Body *did* in fact balance Korea's level of protection against the impact of its measure on trade:

> [T]he rationale behind the ruling in *Korea–Beef* is that the harm caused by passing off different kinds of beef is modest. Compared with the adverse trade effects imposed on imported beef, Korea's regulatory purpose in this case must give way to trade liberalization, even if this means that Korean consumers will be less well protected and Korea's preferred ALOP ["appropriate level of protection"] is likely to be compromised.[279]

On this reading of the case, the Appellate Body's reasoning belies its assertion that "[i]t is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations."[280]

The second potential drawback is that despite over a decade of case law, the role of the assessment of the importance of the measure's objective in WTO

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273 *Metalclad v Mexico*, ICSID Case No ARB(AF)/97/1 at ¶¶ 90–98 (cited in note 119) ; *Tecmed v Mexico*, ICSID Case No ARB(AF)00/2 at ¶¶ 133, 135, 137, 139, 145–47, 154, 157–58, 164, 166, 172–73 (cited in note 21).

274 See Henckels, 15 J Intl Econ L at 232–33 (cited in note 137).

275 *El Paso v Argentina*, ICSID Case No ARB/03/15 at ¶ 372 (cited in note 65).

276 *CME Czech Republic BV v Czech Republic*, Partial Award ¶¶ 526, 611 (UNCITRAL 2001), online at. http://italaw.com/sites/default/files/case-documents/ita0178.pdf (visited Apr 14, 2013).

277 *Ronald Lauder v Czech Republic*, Award ¶¶ 263–64, 297 (UNCITRAL 2001), online at http://italaw.com/sites/default/files/case-documents/ita0451.pdf (visited Apr 14, 2013).

278 See Ortino, *Basic Legal Instruments for the Liberalisation of Trade* at 207–08 (cited in note 38); Bown and Trachtman, 8 World Trade Rev at 123 (cited in note 177); Du, 13 J Intl Econ L at 1100–01 (cited in note 148).

279 Du, J Intl Econ L at 1101 (cited in note 148).

280 Report of the Appellate Body, *Korea–Beef* at ¶ 176 (cited in note 90).

necessity analysis is still not entirely clear. Initially, it was expressed as a factor to be weighed against other factors, including contribution to the objective and trade restrictiveness. In later cases, it has been expressed as a separate consideration "in the light" of which the other factors are to be weighed.[281] Further, the Appellate Body has directed panels to conduct the least restrictive means test with the importance of the objective in mind, although precisely how it should affect the tribunal's analysis is unclear. The best reading of the WTO case law is that tribunals should be more cautious of finding that a measure is not "necessary" the more important its objective. The function of the assessment of the importance of the objective is therefore to set the tribunal's standard of review for the least restrictive means test that follows. However, it is difficult to see precisely how this is operationalized in the case law, beyond a general observation that measures with what the Appellate Body considers to be more important objectives tend to be upheld, or substantially upheld, more often.[282]

Nevertheless, these concerns may be overstated in the WTO context. When used to set the standard of review, the assessment of an objective's importance is a positive attribute of necessity analysis that shows appropriate sensitivity to the way governments make decisions. There will inevitably be some concern about tribunals coming to their own conclusions about the importance of a measure's objective. However, the actual assessment is formulated in WTO case law as an assessment of the "common interests or values" protected by the measure.[283] Thus, while the test inevitably involves a determination of values by a tribunal, this assessment is limited to values that are "common" amongst WTO members.

Further, although assessment of the importance of a measure's objective can be used as a shield to undermine the right to set an appropriate level of protection, there is no *necessary* connection between the two: indeed they are conceptually separate. The assessment of the importance of a measure's objective involves assessing whether the objective pursues "common values" engaged by the measure, while the level of protection is the objective the

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281 See Report of the Appellate Body, *Brazil–Tyres II* at ¶ 156 (cited in note 94); Report of the Appellate Body, *China–Audiovisuals* at ¶¶ 240–42 (cited in note 170).

282 Compare Reports of the Appellate Body, *EC–Asbestos* (cited in note 92) and *Brazil–Tyres II* (cited in note 94), with the outcomes in Reports of the Appellate Body, *Korea–Beef* (cited in note 90), *US–Gambling* (cited in note 33) and *China–Audiovisuals* (cited in note 170).

283 Report of the Appellate Body, *Korea–Beef* at ¶ 164 (cited in note 90); Report of the Panel, *US–COOL* at ¶¶ 7.645–7.651 (cited in note 241); Report of the Appellate Body, *US–COOL* at ¶ 452 (cited in note 243) (referring to the common practice of providing consumer information: although this approach was called into question by the Appellate Body, the Appellate Body did not overturn its conclusion as to legitimate objective).

respondent seeks to achieve. Assessment of the former by the tribunal does not necessarily undermine the latter, and indeed to do so would be a legal error according to the Appellate Body's own pronouncements. But some uncertainties remain with respect to the determination of an objective's legitimacy where it is not specified in the treaty text. It remains to be seen how the "common values" approach applies in the context of an objective that is not pursued by other WTO members.

Analyzing the importance of a measure's objective as a factor in necessity analysis might well improve the decision making process of investment tribunals. However, the WTO experience demonstrates that the exact role of this stage of analysis needs to be clearly explained and transparently applied to avoid undermining the right of parties to determine their own legitimate policy goals. While, as noted above, WTO tribunals have referred to certain policy objectives being shared by WTO members, this approach is potentially problematic in the context of international investment law.[284] Given that the operative provisions of international investment agreements do not generally specify legitimate objectives,[285] investment tribunals should generally display a high degree of deference toward host states' regulatory objectives in their assessment of the importance of a measure's objective. While the assessment of an objective's importance can intrude on regulatory autonomy in cases where a tribunal disagrees with a state's assessment, the reasoning and decisionmaking of investment tribunals would be improved by adopting an inviolable rule, as WTO tribunals have frequently reiterated, that states may determine their own legitimate policy objectives, which will not be undermined by the tribunal in any subsequent necessity analysis. The purpose of the assessment of the importance of the legitimacy of a measure's objective, therefore, should be to identify cases where the measure pursues a discriminatory, protectionist or otherwise impermissible objective, including where its ostensible objective is a pretext for an impermissible objective. It should not function as a means for tribunals to second guess the objective's importance or impugn the state's desired level of protection or achievement of that objective.[286]

B. Contribution to Objective

The WTO suitability test as applied in *Brazil–Tyres* affords substantial deference to measures that form part of a complex set of mutually supportive

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284 McGrady, *Trade and Public Health* at 147 (cited in note 178). See Report of the Appellate Body, *Korea–Beef* at ¶ 162 (cited in note 90).

285 However, the preambles of international investment treaties frequently refer to the objective of development.

286 See Section II.B.

measures directed at achieving a particular policy goal. Thus, a measure may be considered necessary even if its individual contribution to a policy goal cannot be demonstrated, as long as it can be shown, on the basis of evidence and reasoning, that the measure is "apt to produce a material contribution to the achievement of its objective."[287] However, as explained above, the aptness of a measure to achieve its objective is only a threshold question in the analysis of necessity. If a respondent can show that its measure forms part of a suite of measures designed to achieve a particular goal, a WTO tribunal will then assess its importance and trade restrictiveness before determining whether there is a less restrictive measure that is equally suitable.

Investment tribunals have not generally referred to the criterion of suitability in their review of measures. Whether "aptness" can satisfy the test of necessity in the absence of demonstrated contribution to the objective has only been discussed obliquely in investment decisions. In *LG&E*, the Tribunal determined that a package of "across-the-board solutions" satisfied the necessity test in Article XI.[288] The Tribunal did not consider the individual contribution of each element of the package, but, like the Appellate Body in *Brazil–Tyres*, it accepted that the components were mutually reinforcing and thus necessary aspects of the overall response.[289]

In *Continental*, the Tribunal directly appropriated the "aptness" standard from *Brazil–Tyres*, but applied it without a full application of the weighing and balancing test for suitability that would follow under WTO law. The Tribunal misstated the question as "whether the Measures were apt to and did make such a material or a decisive contribution" to their objective.[290] The test stated by the Appellate Body and applied by the Tribunal is more accurately stated as "whether the Measures were apt to *or* did make such a material or a decisive contribution"—the innovation of the test being that measures that may not have demonstrably made an *actual* contribution to their objective may still be necessary. However, the *Continental* Tribunal then applied the "aptness" standard without any assessment of actual contribution, stating:

> In general terms, within the economic and financial situation of Argentina towards the end of 2001, the Measures at issue (the Corralito, the Corralon, the pesification, the default and the subsequent restructuring of those debt instruments involved here) were in part inevitable, or unavoidable, in part indispensable and in any case material or decisive in order to react positively to the crisis, to prevent the complete break-down of the financial system,

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287 Report of the Appellate Body, *Brazil–Tyres II* at ¶ 151 (cited in note 94).

288 *LG&E v Argentina*, ICSID Case No ARB/02/1 at ¶ 241 (cited in note 63).

289 Id at ¶¶ 239–42.

290 *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 196 (cited in note 66).

> the implosion of the economy and the growing threat to the fabric of Argentinean society and generally to assist in overcoming the crisis.[291]

Thus, the Tribunal's determination was based on an assessment that the measures were a "positive reaction" adopted for the purpose of arresting Argentina's financial crisis, not on a finding that they achieved that objective. On this basis, the Tribunal held, quoting *Brazil–Tyres*, that the measures met the suitability test because there was "a genuine relationship of end and means."[292] However, as the Appellate Body made clear in its report, this was *not* a determination that the measures at issue satisfied the suitability test, but simply a finding on one element of that test: that "a *contribution* exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue."[293] This does not address the importance or trade (or, in this case, investment) restrictiveness elements, nor does it constitute balancing. Nevertheless, the *Continental* Tribunal overlooked these components of the Appellate Body's decision, moving directly from contribution to considering the availability of alternative measures without fully applying the WTO's suitability test.[294]

The "aptness" standard in WTO law is still embryonic and is yet to be fully clarified. For example, it is not clear whether the Appellate Body's reasoning applies to novel measures, for which evidence of actual contribution may be unavailable because they have never been applied before, or whether it applies only to measures that are part of a broader strategic initiative. Nevertheless, whether a measure is "apt" to contribute to its objective was never meant to be a conclusive test of suitability. The selective application of elements of this test means that the *Continental* Tribunal neglected other relevant factors, including the importance of the objective and the impact of the measure on the investor's interests, before turning to least restrictive means analysis. It is a positive development that investment tribunals have begun to apply the "apt" approach. Without it, certain kinds of measures could be arbitrarily struck down simply because, by their nature, their actual contribution could not be demonstrated. However, it is important that the full suitability test be applied, not just one component of it, to ensure that all relevant factors are considered in analyzing the necessity of the measure at issue.

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291 Id at ¶ 197.

292 Id at ¶ 197 (quoting Report of the Appellate Body, *Brazil–Tyres II* at ¶ 145 (cited in note 94)).

293 Report of the Appellate Body, *Brazil–Tyres II* at ¶ 145 (cited in note 94).

294 See *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 197, et seq (cited in note 66).

C. Whether an Alternative Measure is Reasonably Available

The WTO approach to determining whether a less restrictive alternative measure is reasonably available involves two essential questions: (i) whether the alternative measure achieves the respondent's chosen level of protection; and (ii) whether the alternative measure would impose an "undue burden" in the form of prohibitive costs or technical difficulties. These concepts contain a number of considerations that may be relevant for investment tribunals to consider in assessing whether measures are necessary.[295]

First, the WTO approach, with the possible exception of the TBT necessity test, requires not that alternatives achieve the same outcome as the challenged measure, but that they achieve the outcome that the respondent country desires to achieve—its level of protection. In some cases, the level of protection reflected in the measure will be higher than the country's actual level of protection, as in *Australia–Salmon*.[296] In others, the level of protection may be determined by examining the measure, as in *Korea–Beef*.[297] And, conceivably, in still others the state's level of protection might be higher than that reflected in its measure (although this has not been tested in a WTO dispute). In all cases, the principle inherent in the concept of respecting a chosen level of protection is clear: the WTO Agreement may set out those objectives that have been determined by the Members to be important and legitimate, but each Member has a right to set its own specific policy goals within those objectives. Such measures may restrict international trade, but only if they do so to the least degree possible.

Secondly, the WTO approach requires a case-by-case assessment of the resources and technical capacity of the respondent to determine whether measures are "reasonably available." In part, this stems from the concept of a level of protection, because unless the alternative is actually achievable, the respondent may be prevented from achieving its policy goal if the tribunal strikes down its measure. However, this assessment may also involve consideration not only of whether the alternative is *possible* for the respondent but whether the burden it imposes would be "undue." As discussed above, the exact content of this requirement has not been fully explained in WTO jurisprudence. Nevertheless, it is arguable that it involves a comparison of the trade costs that would be saved by the alternative measure and the costs to the respondent of adopting it.[298]

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295 Compare Kurtz, 59 Intl & Comp L Q at 369 (cited in note 10).

296 See notes 226–30 and accompanying text.

297 See notes 162–67 and accompanying text.

298 Regan, 6 World Trade Rev at 348–49 (cited in note 161).

Investment tribunals have generally taken a fairly strict approach to necessity testing. Some tribunals (*CMS, Enron, Sempra, AWG,* and *InterAgua*) determined that an alternative measure was available with little or no consideration of whether it is actually feasible.[299] In relation to *CMS, Enron,* and *Sempra*, this was undoubtedly because they applied, the "only way" requirement in the customary plea, which precludes invocation of necessity even where other means are "more costly or less convenient."[300] While this might preclude the "undue burden" stage of the WTO analysis, necessity analysis still requires detailed consideration of whether the respondent could actually adopt the proposed alternative, taking into account its resources and technical capacities. Even in that limited sense, investment tribunals could draw on the WTO "undue burden" analysis, as the Tribunal did in *Continental.*[301] It should, however, be noted that investment tribunals have on some occasions employed a "reasonable necessity" approach to assess whether authorities had alternative measures available to achieve the host state's objective, or have questioned tribunals' institutional capacity to undertake strict necessity analysis.[302] In this respect, investment tribunals have demonstrated an understanding that the host state is often better placed to devise and evaluate the feasibility and efficacy of alternative measures in the circumstances.

D. The Opacity of the Weighing and Balancing Test

As discussed above, a significant general difficulty with the WTO weighing and balancing test is its opacity. The test has been expressed in a number of different ways and indeed seems to change each time it is articulated, despite the Appellate Body's assertions that it has maintained "the same approach" even though "the language used is not identical."[303] The exact interaction of the individual elements of the weighing and balancing test is unclear, as is the role the test plays in the necessity analysis as a whole. As Regan argued in 2007, the Appellate Body may not have actually set up a balancing test in *Korea–Beef* and *US–Gambling,* but created this perception through the language of their

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299 See, for example *SD Myers v Canada*; *InterAgua v Argentina*, ICSID Case No ARB/03/17 (cited in note 111); *AWG v Argentina*, ICSID Case No ARB/03/19 (cited in note 66). See also Kläger, *Fair and Equitable Treatment* at 241 (cited in note 108).

300 See International Law Commission at 83 ¶ 15 (cited in note 7).

301 *Continental Casualty v Argentina*, ICSID Case No ARB/03/09 at ¶ 195 (cited in note 66).

302 *Pope & Talbot v Canada*, Award on Merits at ¶¶ 123, 125, 128, 155 (cited in note 154); *InterAgua v Argentina*, ICSID Case No ARB/03/17 at ¶ 37, 42 (separate opinion of Nikken) (cited in note 66); *AWG v Argentina*, ICSID Case No ARB/03/19 at ¶¶ 37, 42 (cited in note 66).

303 Report of the Appellate Body, *China–Audiovisuals* at ¶ 240 (cited in note 170).

decisions.[304] Whether this test involves the explicit balancing of the importance of achieving the measure's objective against the importance of liberalized trade in a manner akin to proportionality analysis remains to be seen. As noted in Part III, investment tribunals have more readily engaged in this form of balancing. Despite the potentially intrusive impact of this approach on regulatory autonomy, the majority of tribunals employing such a balancing test has followed a deferential approach and has weighed in favor of the host state rather than the foreign investor.[305]

For the purposes of investment tribunals, perhaps the most important lesson to take from necessity analysis in WTO law is to avoid replicating the persistent uncertainty surrounding the suitability stage. If the least restrictive means test is the main method of determining the necessity of a measure, this should be stated clearly. Further, if suitability analysis is undertaken, its exact interaction with the least restrictive means test should be described. These issues have been a persistent problem in WTO law for some time, and also need to be dealt with in international investment law.

E. Burden of Proof

As noted above, WTO case law establishes that in the context of the general exceptions, the respondent has the burden of proving that the measure meets requirements of the least restrictive means test,[306] but it is up to the complainant to propose alternative measures and for the respondent to show that the measure is not reasonably available.[307] SPS and TBT measures, as positive obligations, entail a different approach whereby the complainant must make a prima facie case that alternative approaches are reasonably available and that the measure is therefore not necessary before the burden shifts to the respondent to demonstrate that the proposed measures are not reasonably available.

Investment tribunals have not adopted a consistent approach to the burden of proof in necessity analysis. Of the international investment law cases examined in this article, the majority of cases do not refer to the burden of proof. Nor have tribunals generally outlined the process for evaluating alternative measures: for example, which party bears the burden of identifying alternative measures, and the host state's role in demonstrating that such

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304 Regan, 6 World Trade Rev at 348 (cited in note 161).

305 *Glamis v US*, Award at ¶¶ 803–05 (cited in note 118); *EDF v Romania*, ICSID Case No ARB/05/13 at ¶ 293 (cited in note 118); *Total v Argentina*, ICSID Case No ARB/04/1 at ¶¶ 163–65, 309, 317–18 (cited in note 21).

306 Report of the Appellate Body, *Korea–Beef* at ¶ 157 (cited in note 90).

307 Report of the Appellate Body, *US–Gambling* at ¶ 308 (cited in note 33).

measures are not available. While in several of the Argentine cases tribunals referred to measures put forward by investors' expert witnesses in the context of both the NPM clause and the fair and equitable treatment standard, they did not discuss the relevant treaty provision in terms of whether it constituted a positive obligation or an exception.[308]

In two cases, the burden of proof was discussed more explicitly. In relation to Article XI, the *Continental* annulment committee briefly addressed the issue when affirming the *Continental* Tribunal's approach to least restrictive means analysis, stating that the Tribunal had "considered certain specific alternative measures that Continental claimed could have been adopted . . . alternatives having been specifically raised by Continental . . . were unsurprisingly expressly considered by the Tribunal. The committee does not see any basis for suggesting that by doing so, the Tribunal thereby placed the burden of proof on Continental."[309] Thus, the committee suggested that once the investor proposes alternative measures, the burden shifts to the host state to demonstrate their unavailability. The *Total* Tribunal (in the context of the customary plea) affirmed that Argentina had the burden of persuading the Tribunal that there were no reasonable alternative measures available to it, which required submitting evidence to support its position that the impugned measures were prima facie necessary and rebutting the investor's argument that there were alternative measures available.[310]

WTO tribunals offer an approach to the burden of proof that might usefully guide international investment law tribunals. Their approach to the general exceptions has support in the context of international investment law (to the extent that the decided cases to date reveal consideration of burden of proof issues). Under NPM provisions, which provide exceptions from treaty-based obligations, investors only need to point to potential alternative measures, which is not an onerous obligation. With respect to treaty provisions that impose positive obligations, the investor needs to raise a prima facie case of inconsistency by proposing a plausible alternative measure—rather than simply pointing to a possible alternative. While it might be argued that investors, as

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308 *Sempra v Argentina*, ICSID Case No ARB/02/16 at ¶¶ 339, 350 (cited in note 63); *Enron v Argentina*, ICSID Case No ARB/01/3 at ¶¶ 300, 308 (cited in note 63); *InterAgua v Argentina*, ICSID Case No ARB/03/17 at ¶ 215 (cited in note 66); *AWG v Argentina*, ICSID Case No ARB/03/19 at ¶ 235 (cited in note 66).

309 *Continental Casualty v Argentina*, ICSID Case No ARB/03/09, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic (Sept 16, 2011) ¶ 139, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2291_En&caseId=C13 (visited Apr 14, 2013).

310 *Total v Argentina*, ICSID Case No ARB/04/1 at ¶ 223 (cited in note 21).

opposed to states, are at a disadvantage in making a prima facie case due to their lack of experience in regulatory policymaking, there is no reason why the majority of investors should not be able to marshal expert evidence to discharge this burden. Indeed, a number of the Argentine economic crisis decisions refer extensively to the evidence of economic experts retained by investors. However, in the case of smaller investors or individuals, it can be argued that this requirement would place them at a disadvantage in dispute settlement.[311] Whether this plays out in practice remains to be seen.

F. Limitations to Using WTO Law as a Comparator

Any comparison between WTO law and international investment law must be sensitive to the differences between the two regimes. Alvarez and Brink criticize the *Continental* Tribunal's recourse to WTO case law in determining whether Argentina's emergency measures complied with the NPM clause in the Argentina–US BIT. They argue that the Tribunal overlooked the Vienna Convention on the Law of Treaties (VCLT) rules of treaty interpretation and underestimated the differences between the WTO Agreement and international investment treaties.[312] In particular, they argue that the Tribunal should have attempted to justify its recourse to WTO law through Article 31(3)(c) of the VCLT, which provides that "any relevant rules of international law applicable in the relations between the parties shall also be taken into account," as well as other general rules of treaty interpretation.[313] To be sure, the *Continental* Tribunal could have bolstered its analysis by reference to rules of treaty interpretation.[314] However, other international and supranational fora also interpret the concept of necessity in the context of derogations, exceptions, and justifications for conduct that is inconsistent with the primary norm in a similar way. The authors do not take into account the prevalence of this approach by these other bodies in rejecting the relevance of WTO tribunals' approach to necessity. A broader perspective should consider how other international and supranational courts and tribunals deal with similar issues.

Alvarez and Brink also criticize the *Continental* Tribunal for overlooking key contextual differences between Article XI of the Argentina-US BIT and Article XX of the GATT 1994. In particular, they point out that Article XI has no list

311 See Kurtz, *The Use and Abuse of WTO Law* at 758 (cited in note 89).

312 Alvarez and Brink, *Revisiting the Necessity Defense* (cited in note 88).

313 Id at 335–38.

314 See Burke-White and von Staden, *Private Litigation* at 299 (cited in note 85).

of objectives similar to Article XX and also contains no chapeau.[315] In relation to the chapeau, they argue that its requirements may have

> subtly affected the degree of deference WTO dispute settlement accords to WTO Members under that clause and what WTO panels and the Appellate Body consider to be "necessary." There is arguably more leeway within the necessity analysis in the GATT because States' measures under Article XX (a)–(j) are, in the end, assessed against the chapeau of Article XX, which prevents the application of regulatory interventions which are discriminatory or protectionist . . . .[316]

However, while it is arguable that the presence of the chapeau may lower the standard of review with respect to the initial assessment of necessity under one of the general exceptions' enumerated paragraphs, the difference between the wording of the treaty provisions does not necessarily preclude investment tribunals from adopting aspects of WTO necessity analysis. In the first place, the influence of the chapeau on the necessity test under Article XX is no more than a hypothesis, albeit an interesting one. But more importantly, the Appellate Body has made clear that similar considerations, and a similarly structured test, apply under the positive obligations of the SPS and TBT Agreements.[317] Although those Agreements do contain separate injunctions against arbitrary or unjustifiable discrimination, they are not part of the necessity clauses. Moreover, the Appellate Body has made clear that the legitimate objectives in Article 2.2 of the TBT Agreement are an indicative list only,[318] demonstrating that the same test can apply to measures that do not necessarily fall within a textual exception. While Alvarez and Brink are right to caution that context must be taken into account, they overstate their case by focusing too narrowly on Article XX rather than on necessity in the WTO Agreements more generally.

VI. CONCLUSION

Investment tribunals have employed necessity analysis in a number of areas of international investment law as reflected in provisions of investment treaties. The first tranche of awards rendered against Argentina in respect of its emergency measures adopted a strict approach to necessity that did not involve consideration of issues such as the feasibility and likely effectiveness of alternative measures.[319] However, the *Continental* and *LG&E*[320] decisions

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315 Alvarez and Brink, *Revisiting the Necessity Defense* at 340 (cited in note 88). See also Desierto, 31 U Pa J Intl L at 875–76, 882–95 (cited in note 64); Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* 225–26 (Leiden 2012).

316 Alvarez and Brink, *Revisiting the Necessity Defense* at 346 (cited in note 88).

317 Report of the Appellate Body, *US–Tuna II* at ¶ 313 (cited in note 239).

318 Id.

319 See notes 299–300 and accompanying text.

permitted far greater scope to Argentina to craft its legislative response to the crisis within the framework of Article XI by adopting a more relaxed least-restrictive means test. The *LG&E* decision accepted that states should—at least in the context of an economic crisis—be afforded discretion in the determination of whether a measure is necessary, provided such measures are legitimate and reasonable in the circumstances. The *Continental* Tribunal evidenced a more structured and deferential approach to least-restrictive means analysis, echoing the approaches taken by other international and supranational courts and tribunals, including WTO tribunals.[321] Yet the *Continental* decision glossed over certain essential elements of WTO tribunals' approaches to the question of necessity in its analysis.

Investment tribunals have also employed necessity analysis in their determination of whether legislative changes breach fair and equitable treatment.[322] In this context, some tribunals have employed necessity analysis without appearing to consider whether the alternative measures they proposed were equally effective and reasonably available to the host state. However, other tribunals (and tribunal members in separate opinions) have employed a "reasonable necessity" approach to legislative changes affecting investors, indicating that host states should have the scope to select a measure within certain boundaries. There do not appear to be any instances of cases in which the tribunal set out an approach to indirect expropriation based solely on least restrictive means analysis, although cases have referred to the concept as relevant to determining whether a measure falls within the state's police powers and therefore does not amount to expropriation. Finally, two tribunals used necessity testing in the context of national treatment,[323] but most tribunals have favored a less stringent nexus requirement. Overall, most investment tribunals have not separately considered the importance of the host state's regulatory objective or the suitability (effectiveness) of the measure in their assessment of necessity.

By contrast to the relatively fragmented state of international investment law, WTO tribunals have developed a relatively sophisticated jurisprudence with respect to the concept of necessity.[324] The WTO approach to necessity in the context of the general exceptions entails review of the importance of a measure's objective, a test of suitability (including considerations of a measure's effectiveness and restrictive impact on trade), and an assessment of the

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320 See notes 79–84 and accompanying text.

321 See notes 290–94 and accompanying text.

322 See notes 108–33 and accompanying text.

323 See notes 141–57 and accompanying text.

324 See Sections IV.A.1–4.

availability of alternative measures.[325] The suitability, or weighing and balancing test, entails the assessment of the measure's degree of contribution to its objective and the extent to which the measure restricts international trade. This assessment is made against the backdrop of the assessment of the importance of the regulatory objective, which has always been performed deferentially by WTO tribunals. To be considered necessary, a measure need not have actually achieved its objective and it may be enough that a measure is apt to do so in future, particularly when the measure is one element of a suite of initiatives designed to address a particular objective.[326]

Should a measure pass the legitimate objective and suitability stages of review, a WTO tribunal will determine whether less trade-restrictive measures exist that would achieve the Member's objective.[327] Such measures must be "reasonably available" to the respondent, in the sense of being feasible, not imposing an "undue burden" on the Member, and meeting the Member's desired level of protection (or level of achievement) of the objective in question. Measures surviving this analysis are then reassessed for compliance with the chapeau, which requires that measures are not applied in a manner constituting "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade."[328]

Necessity tests also appear in the SPS and TBT Agreements.[329] Relevant provisions of these agreements contain similar concepts to those relevant under the general exceptions, including least restrictive means tests. The SPS Agreement, however, provides Members with slightly greater autonomy. For example, alternative measures must be "significantly" less trade restrictive, and Members are permitted to determine and declare their appropriate level of protection.[330] Further, the SPS Agreement precludes the balancing of factors such as importance, trade restrictiveness, and contribution to a legitimate objective, thereby granting greater policy space to Members.[331]

Similarly to the SPS provisions, the TBT Agreement codifies a least restrictive means test, providing that TBT measures must not be "more trade-restrictive than necessary to fulfill a legitimate objective."[332] Legitimate objectives include, but are not limited to, national security, the prevention of deceptive

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325 See Section IV.A.2.

326 See notes 172–178 and accompanying text.

327 See Section IV.A.3.

328 See Section IV.A.4.

329 See Sections IV.C.1–2.

330 See notes 224–28 and accompanying text.

331 See note 231 and accompanying text.

332 TBT Agreement, Art 2.2 (cited in note 15).

practices, and the protection of human health or safety, animal or plant life health, or the environment.[333] The Appellate Body has held that case law on the general exceptions is relevant to the interpretation of the TBT Agreement, despite the differences between the provisions.[334] While Members have the right to achieve their level of protection under the TBT Agreement, their right to assert that level of protection is not absolute, as it appears to be under the SPS Agreement.[335] The TBT Agreement also appears to provide a stricter least-restrictive means test because the alternative only needs to be as effective as the respondent's actual measure, rather than the chosen level of protection.[336] Because the relevant provisions of the SPS and TBT Agreements contain positive obligations rather than exceptions, the complainant must raise a *prima facie* case that the measure infringes them before the burden switches to the respondent to provide a rebuttal.[337]

There are four features of necessity testing in the WTO regime that investment tribunals could be guided by, assuming that the relevant treaty provision does not preclude such an approach. First, the assessment of the importance of the objective that a measure is designed to achieve is an important consideration. It is appropriate that investment tribunals make an assessment of the importance of a measure's objective. Indeed, to refrain from doing so risks approval of measures as "necessary" that are discriminatory or otherwise impermissible. Yet the assessment of the importance of a measure's objective carries with it the risk that a tribunal will substitute its own views as to the importance of the objective for that of the host state, which may intrude into the right of states to set their own legitimate policy priorities and level of protection (or achievement) thereof. It is for this reason that tribunals should approach this question with a measure of deference, as WTO tribunals have done. Investment tribunals should also clearly explain and transparently undertake this analysis to avoid undermining the right of states to determine their own legitimate policy goals.

Another area in which investment tribunals could usefully take guidance from WTO tribunals is in determining the extent to which a measure must achieve its objective. WTO tribunals afford substantial deference to measures in performing suitability analysis, in particular where measures form part of a complex set of mutually supportive measures directed at achieving a particular objective. A measure may be determined to be effective as long as it can be

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333 Id.

334 See notes 250–52 and accompanying text.

335 See notes 246–49 and accompanying text.

336 See notes 253–55 and accompanying text.

337 See notes 232, 239 and accompanying text.

shown that the measure is "apt" to make a material contribution to the achievement of its objective. Some investment tribunals have indirectly taken this approach, but most have not addressed the question of the efficacy of a measure in achieving its objective nor considered the degree of efficacy or potential efficacy of measures.

Investment tribunals have in some cases adopted a relatively strict approach to least-restrictive means testing, with tribunals holding that the availability of measures made the impugned measure unnecessary without proper consideration of alternative measures' feasibility in the circumstances. By comparison, WTO tribunals inquire (in the context of the general exceptions) as to whether alternative measures proposed by the complaining Member achieve the respondent's chosen level of protection and whether the measure would impose an "undue burden" in the form of prohibitive costs or technical difficulties. Investment tribunals would do well to consider whether a host state could actually adopt the proposed alternative, taking into account the state's resources, technical and institutional capabilities and other circumstances.

Finally, WTO case law establishes that the burden of proof of the necessity of a measure varies depending upon whether the obligation is an exception (Article XX of the GATT and XIV of the GATS) or is a positive obligation.[338] Investment tribunals have not adopted a consistent approach to the burden of proof with respect to necessity. Following WTO case law, under NPM clauses investors would only need to propose potential alternative measures, which is not an onerous obligation. With respect to treaty provisions that impose positive obligations, the investor would need to raise a prima facie case of inconsistency by proposing (rather than merely pointing to) a plausible alternative measure.

Some have criticized the *Continental* Tribunal's recourse to WTO case law to guide their interpretation of the NPM clause in the Argentina–US BIT, on the basis of the dissimilarities between the two instruments and their institutional context.[339] While the *Continental* decision is problematic insofar as it does not entirely accurately represent WTO case law, these criticisms are overstated. WTO law provides a rich source of jurisprudence for guiding investment tribunals in their analysis of the concept of necessity for both exceptions and positive obligations. WTO tribunals have, over the years, amassed a body of case law that displays institutional sensitivity and is appropriately deferential to national autonomy.

The appropriate level of regulatory autonomy in international investment law may also be addressed through drafting of treaty provisions and through

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338 See Section V.E.

339 See notes 312–16 and accompanying text.

consideration of the public interest in damages awards. However, this article proposes a means of accommodating these concerns through international investment law with respect to state liability as it currently stands, building on approaches taken by tribunals in the decided cases to date. Investment tribunals should continue to seek guidance from WTO jurisprudence on necessity in a way that accurately represents the relevant legal tests. Such an approach would go some way toward the development of an appropriate means of delimiting lawful state conduct from conduct in breach of investment treaty obligations and the provision of greater certainty for host states and investors.