TOWARDS UNITY? THE CONCEPTS OF NECESSITY AND PROPORTIONALITY IN EXCEPTION CLAUSES ACROSS INTERNATIONAL LAW

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ABSTRACT

Exception clauses in treaties and their analogues in subfields of customary international law (such as the law on state responsibility) allow states to unilaterally 'derogate' from otherwise binding rules of international law, typically under the condition that the derogating action is necessary and proportionate. While necessity and proportionality thus undoubtedly play a central role in exception clauses, they have been curiously understudied and remain startlingly unclear; international courts have struggled to interpret the necessity/proportionality. In addition, despite the wide-spread inclusion of necessity/proportionality in exception clauses across international law, comparative studies across contexts are exceedingly rare.

This thesis studies the concepts of necessity and proportionality enshrined in exception clauses across a variety of treaties and subfields of international law – specifically, the law on state responsibility, the law on self-defence, and the general exception clauses in WTO law –, and in particular how they are applied and reviewed by international courts. The thesis explores the concepts of necessity and proportionality in general, clarifies how they are applied in the context of the surveyed rules, and reveals the degree to which necessity/proportionality overlap across the different contexts, demonstrating the existence of a unified core. It argues further that this unified core can be utilised to facilitate cross-interpretation between different contexts, which offers an original strategy to overcome some hitherto unresolved difficulties with respect to the interpretation of necessity/proportionality in exception clauses.

The thesis is divided into two parts. Part I (chapters I-III) analyses and compares the concepts of necessity/proportionality as well as how compliance therewith is reviewed by international courts across the surveyed rules. Part II (chapter IV) explores cross-interpretation of necessity/proportionality across contexts with reference to its unified core content.

TABLE OF CONTENTS

ABBREVIATIONS

AB	Appellate Body
ALoP	Actual Level of Protection
BIT	Bilateral Investment Treaty
CUP	Cambridge University Press
DLoP	Desired Level of Protection
EC	European Communities
ECR	European Court Reports
ECtHR	European Court of Human Rights
ed(s)	editor(s)
edn	edition
eg	*exempli gratia*
EHRR	European Human Rights Reports
etc	*et cetera*
EU	European Union
f	and the following page
FCN	Friendship, Commerce and Navigation
ff	and the following pages
fn	external footnote
HCJ	High Court of Justice (Israel)
HRC	Human Rights Committee
HUP	Harvard University Press
ibid	*ibidem*
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
IDI	Institut de Droit International
ie	*id est*
IIC	International Investment Claims (OUP)
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
IMT	International Military Tribunal
Iran-USCTR	Iran – United States Claims Tribunal

ITLOS	International Tribunal for the Law of the Sea
LoH	Level of Harm
LoP	Level of Protection
LoT	Level of Threat
McNair Intl L Opinions	McNair AD, *International Law Opinions: Selected and Annotated* (University Press 1956)
MPEPIL	Max Planck Encyclopaedia of Public International Law
MUP	Manchester University Press
n	internal footnote
NPM	Non-precluded Measures
OED	Oxford English Dictionary
OUP	Oxford University Press
para(s)	paragraph(s)
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RHDI	Revue hellénique de droit international
RIAA	Reports of International Arbitral Awards
RLoP	Reference Level of Protection
Stat	United States Statutes at Large
tr	translator
UNCITRAL	United Nations Commission on International Trade Law
UNTS	United Nations Treaties Series
US	United States
UST	United States Treaties and Other International Agreements
WTO	World Trade Organization
YUP	Yale University Press

AUTHORITIES

a) Cases

Other

b) Treaties

c) Official Documents

INTRODUCTION

1. General introduction: uncertainties about necessity and proportionality

Exception clauses in treaties and their analogues in subfields of customary international law (such as the law on state responsibility) allow states to unilaterally 'derogate' from otherwise binding rules of international law. 'Exception clauses' can either be primary or secondary rules: a primary rule exception clause prevents a breach of international law from arising in the first place, whereas a secondary rule exception clause only precludes such a breach from being considered wrongful. Exception clauses fulfil an important function, releasing states from having to comply with these otherwise binding rules or exonerating them for a breach of obligation where compliance would lead to undesired consequences.[1] At the same time, exception clauses evoke the danger of undermining the binding nature of international law obligations.[2] The latter is especially true for broad, general exception clauses such as the 'circumstances precluding wrongfulness'[3] in the law of state responsibility, successful invocation of which can 'justify' or 'excuse'[4] derogation from almost any rule of international law.[5]

To ensure that they can fulfil their intended purpose while avoiding overreach, exception clauses circumscribe the conditions under which they can be invoked with various degrees of

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[1] Ago referred to the State of Necessity (Article 25 ASR ('ASR')) as a 'safety-valve' that can ensure that 'respect for the law does not ultimately lead to the kind of situation that is perfectly described by the adage *summum jus, summa injuria*' (Ago, *Addendum*, para 80). The tribunal in *Continental Casualty*, para 164, referred to an exception clause as a 'safeguard clause'.

[2] Allott, 'State Responsibility', 21, suggesting that general exceptions have the potential to 'destroy any possibility of an international rule of law'. See also *Vivendi*, para 258, cautioning that applying too lenient a general exception like the State of Necessity 'would threaten the very fabric of international law and indeed the stability of the system of international relations'.

[3] Chapter V ASR.

[4] This thesis takes no position on whether exception clauses should be understood as justifications or excuses. On this distinction and its implications, see only Lowe, 'A Plea for Excuses'.

[5] The circumstances precluding wrongfulness do not apply, for example, to breaches of *ius cogens* norms (Article 26 ASR).

strictness and precision. They typically overlap, however, with respect to at least one central aspect: derogation from otherwise binding rules is only possible where it is 'necessary' and/or 'proportionate'. [6] The concepts of necessity and proportionality form important parts of international law's conceptual toolbox more generally, but it is arguably in the context of exception clauses that they are most prominent.

Three examples serve to illustrate this point. First, under the customary law on self-defence and its equivalent in the UNC[7], a defensive use of force must comply with 'the criteria of necessity and proportionality as the essential components of the right of self-defence under international law'[8] in order to justify what would otherwise infringe the prohibition of the use of force.[9] Second, the customary plea of necessity, codified as the 'State of Necessity' in Article 25 ASR,[10] provides:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.

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[6] See Franck, 'Proportionality of Countermeasures', 752.

[7] Article 51 UNC.

[8] *Oil Platforms* (Owada), para 35.

[9] The ICJ in *Nicaragua* recognized that in customary law the exercise of self-defence is conditional on the defensive action taken being both necessary and proportionate (*Nicaragua*, paras 176, 194). The ICJ later extended both conditions to the Charter regime (*Nuclear Weapons*, para 41; some authors have argued that it is implied in the second part Article 51 UNC, eg Corten, *Law Against War*, 470). See generally IDI, *Self-Defence*, para 2; Wilmshurst, 'Chatham House Principles', 965; Schwebel, 'Self-Defense in Modern International Law', 483; Schachter, 'Self-Defense and the Rule of Law', 266; Tams and Devaney, 'Applying Necessity', 92; Trapp, 'Back to Basics', 156; Greenwood, 'Self-Defence', para 8; Gray, *Use of Force*, 148. Rejecting the two conditions: Kunz, 'Self-Defense', 878.

[10] The formulation in Article 25 ASR was recognized as reflecting custom: *Gabcikovo*, paras 51-52; for some remaining doubts on the customary status before see only *Rainbow Warrior*, para 78; Desierto, *Necessity*, 9-10; and generally Heathcote, 'État de Nécessité'; note also *EDF*, para 1167. For some doubts on State of Necessity even being a legal rule, see generally Heathcote, 'State of Necessity', who argued that 'state of necessity remains a prototype and not a rule in its own right' (ibid, 258).

The condition that under the plea measures must constitute the 'only way' to 'safeguard an essential interest against a grave and imminent peril' while not infringing an essential interest of another state or the international community as a whole ultimately embody the requirements of necessity and proportionality.[11] To avoid any terminological confusion, the exception clause laid down in Article 25 ASR is always referred to as 'State of Necessity';[12] the term 'necessity' denotes the concept of necessity as such. Finally, the general exception clauses enshrined in Articles XX(a), (b), (d) GATT and XIV(a), (b), (c) GATS, as well as the related provisions in Articles 2.2 TBT and 5.6 SPS, condition the legality of measures derogating from the GATT/GATS or restricting trade on them being 'necessary'[13]:

> Article XX GATT (in part)
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life or health;
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement ... ;
>
> Article XIV GATS (in part)
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
> (a) necessary to protect public morals or to maintain public order;[14]

[11] This may not be immediately obvious. Nevertheless, 'the requirement of necessity is inherent in the plea' (ILC, *2001 Commentary*, Article 25, para 15; see also Barboza, 'Necessity (Revisited)', 39). See further chapter I, section 6.2.1.

[12] A similar approach is taken by Cassella, *La nécessité en droit international*, 16-17.

[13] It is argued in chapter II that with the exception of Article 5.6 SPS, the other WTO rules here mentioned also contain a proportionality condition. See chapter II, section 3.3.

Under the SPS and TBT the necessity standard can sometimes be presumed to be complied with (see Articles 3.2 SPS and 2.5 TBT). The jurisprudence on the *chapeau* to Article XX GATT may also indicate the presence of an additional necessity test (see Marceau and Trachtman, 'Technical Barriers', 830; Neumann and Türk, 'Necessity Revisited', 228-31; generally Appleton, 'Chapeau').

[14] The footnote attached to Article XIV(a) GATS reads: 'The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society'.

(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement ...;

Article 2.2 TBT
Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such 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. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

Article 5.6 SPS
Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.[15]

While necessity and proportionality thus undoubtedly play a central role in exception clauses, they have been curiously understudied or remain startlingly unclear and poorly understood.[16] Especially necessity has apparently never been studied in its own merit.[17] What is more, despite the frequent inclusion of necessity and proportionality in exception clauses situated in different treaties or subfields of customary international law, comparative studies of what both

[15] The footnote attached to Article 5.6 SPS reads: 'For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.'

[16] References to ambiguities, poor understanding, and lack of scholarship abound. See, eg, *Enron Annulment*, paras 369-72; Gray, *Use of Force*, 150; Gardam, *Necessity*, 149; Green, 'Docking Caroline', 450; Lazar, 'Necessity', 4-5; Parish, 'On Necessity', 183; Elliott, 'Proportionality and Deference', 2-3; Cannizzaro, *Il Principio Della Proporzionalità*, 455; Newton and May, *Proportionality*, 12-13; Kretzmer, 'Proportionality in Jus ad Bellum', 237; Akande and Lieflaender, 'Clarifying Necessity', 566, 569; Rodin, *War and Self-Defense*, 114; McMahan, 'Proportionality', 143; Statman, 'Can Wars be Fought Justly?', 435; Reinold, 'State Weakness', 248.

[17] For example, the *Max Planck Encyclopaedia of Public International Law* ('MPEPIL') contains no entry on the necessity standard, only entries on the State of Necessity (Tanzi, 'State of Necessity') and military necessity (Dinstein, 'Military Necessity'). In contrast, there is a separate entry on proportionality (Crawford, 'Proportionality').

concepts entail and how they operate in different contexts are exceedingly rare.[18] There is, accordingly, little clarity about how the concepts enshrined in different rules relate to one another. In consequence, necessity and proportionality are 'mysterious concept[s]'[19], 'paradoxically ... well-known but still relatively unknown'[20], 'understood by all and no one at the same time'[21]. The continuing state of uncertainty was perhaps most eloquently (and most broadly) summarised by Schachter: 'centuries of discussion by philosophers and jurists about the meanings of necessity and proportionality in human affairs do not seem to have produced general definitions capable of answering concrete issues'.[22]

The uncertainties that continue to exist with respect to necessity in particular have recently been thrown into stark relief in the context of international investment law. In a line of disputes arising from the 2001 Argentine financial crisis primarily American investors alleged breaches of the US-Argentina Bilateral Investment Treaty ('BIT') by Argentina. Argentina attempted to justify these alleged breaches by pointing to the financial crisis and invoking the BIT's exception clause ('non-precluded measures' or 'NPM' clause). The clause centrally provides that in order to be exempted, a measure amounting to a breach of a substantive provision must be 'necessary'.[23] Interpreting and applying these NPM clauses caused severe difficulties, with a number of arbitral tribunals and annulment committees approaching the same legal problem from an astonishing number of 'wildly inconsistent'[24] angles, reaching a plethora of conclusions

[18] See Mazzeschi, 'Book Review', 1031. The notable exception as regards proportionality is Cannizzaro, *Il Principio Della Proporzionalità*. Franck, 'Proportionality of Countermeasures' and Mitchell and Henckels, 'Variations', also deserve some mention.

[19] Cannizzaro, *Il Principio Della Proporzionalità*, 455 (referring only to proportionality).

[20] Mazzeschi, 'Book Review', 1031 (referring only to proportionality).

[21] Carmola, 'Proportionality', 94.

[22] Schachter, 'Implementing Limitations', 39.

[23] Article XI US-Argentina BIT.

[24] Stone Sweet, 'Proportionality's New Frontier', 49.

and thereby 'creat[ing] insecurity about the proper state of the law and put[ting] the legitimacy of the system of investment arbitration into question.'[25] Arbitrators especially struggled to make sense of the necessity standard, claiming regularly that the treaty's failure to provide a precise test mandated 'cross-interpretation'[26] by importing content from elsewhere: most tribunals opted for the customary State of Necessity, another chose World Trade Organization ('WTO') jurisprudence on the general exceptions in Article XX GATT. In fact, the arbitral tribunals were not the first ones to struggle with the interpretation and application of the necessity standard: the International Court of Justice ('ICJ') faced the same problem in *Oil Platforms* (and to a lesser extent in *Nicaragua*) with respect to a Friendship, Commerce and Navigation ('FCN') treaty's NPM clause, reacting similarly by drawing on an external rule to fill the perceived gap and interpret the necessity standard, in this case the law of self-defence. Regrettably, neither the various arbitral tribunals nor the ICJ were able to justify coherently their recourse to the respective external rules under the rules of treaty interpretation.[27]

In conclusion, the wide-spread appearance of necessity and proportionality conditions in exception clauses is accompanied by a lack of clarity concerning their precise content or how their manifestations in different contexts relate to one another, as highlighted by the jurisprudence of the ICJ and various investment arbitration tribunals dealing with the fall-out of the Argentine financial crisis.

2. Research question and objectives: reducing uncertainty and exploring unification

Against this backdrop, this thesis studies the concepts of necessity and proportionality both in their abstract form as well as the concrete manifestations enshrined in exception clauses

[25] Schill, 'Economic Crises', 278. See also Mitchell and Henckels, 'Variations', 96.

[26] By cross-interpretation this thesis refers to interpretation of a treaty clause with reference to other rules of international law located outside this treaty.

[27] See chapter IV, section 3.2., for an analysis of the interpretative approaches chosen by the ICJ and the various investment tribunals.

included in a variety of treaties and their equivalents in subfields of customary international law. [28] A particular focus is on how necessity and proportionality as enshrined in exception clauses are applied and reviewed by international courts, as it is arguably in this context that their conceptual subtleties come most fully to the fore. In doing so, the thesis principally pursues four interconnected objectives[29]:

First, by studying necessity, proportionality, and how they are reviewed by international courts, both in the abstract and in their concrete manifestations in various rules, the thesis aims to unearth the inherent conceptual logic within necessity and proportionality. This objective includes clearly situating necessity and proportionality *vis-à-vis* each other and understanding the role played by procedural rules in their judicial review.

Second, the thesis aims to identify what the concepts of necessity and proportionality prescribe, how they operate, and how they are judicially reviewed, in a variety of concrete exception clauses taken from different contexts. The analysis thus seeks to overcome or reduce at least some of the much-invoked uncertainty that persists, including by exploring whether insights from the abstract conceptual analysis may serve as the basis for suggesting progressive solutions to hitherto unanswered questions. Finally, even where some uncertainty remains, the thesis still hopes to advance the discussion by more clearly identifying the crucial questions that need to be answered to achieve greater clarity.

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[28] Because it focuses on the concepts of necessity and proportionality only, the thesis may touch upon but does not systematically address other element of exception clauses apart from necessity/proportionality. In particular, this includes any additional and unrelated legality conditions as well as notably the particular legal consequences of the successful invocation of an exception clause.

[29] In pursuing these objectives, the thesis aspires to go considerably beyond the existing legal literature. First, it is the first work of international law scholarship to develop a single coherent theoretical framework for analysing necessity, proportionality, and their judicial review, outside a particular rule. Second, the comparative approach against this single theoretical framework facilitates new insights both into the operation of necessity and proportionality in each context, as well as into how the various concrete manifestations relate to one another and diverge or overlap. Third, this thesis is the first study that comparatively analyses the concept of necessity in its own right. Fourth, the thesis breaks new ground as regards the existence of unified standard of necessity/proportionality, and whether such a standard can be used to overcome the identified interpretative dilemmas.

Third, the comparison of necessity and proportionality, as well as how compliance with them is reviewed by international courts, explores the extent to which overlap exists between the various surveyed rules. In other words, the comparison discusses the degree to which the necessity and proportionality standards as enshrined in the selected exception clauses, as well as how they are reviewed, are *unified* across international law, unearthing a surprising degree of convergence.

Finally, the thesis ventures into largely uncharted territory by exploring whether cross-interpretation based on a unified necessity/proportionality standard can alleviate the interpretative difficulties that are so evident in *Oil Platforms* and the Argentina investment disputes. However, the thesis incidentally also assesses more generally whether and to which degree the notion of unified standards – and the method here developed to determine their existence – can usefully be employed to facilitate cross-interpretation between different treaties and subfields of international law.

In the final analysis, the thesis' overall objective is to improve the understanding, interpretation and application of necessity and proportionality as enshrined in exception clauses across international law. Reducing existing uncertainties regarding their content, the interrelationship between their manifestations in different context, and the possibilities and limits of cross-interpreting between the different manifestations all ultimately serve this purpose.

3. Methodology

3.1. Selection of the analysed exception clauses

The exception clauses selected for comparative analysis in this thesis are the three examples mentioned above, namely the State of Necessity[30] taken from the customary law of state responsibility, the rules on self-defence[31] taken from the customary and conventional law on

[30] Article 25 ASR.

[31] Article 51 UNC.

the use of force, and the general exception clauses in conventional WTO law[32]. Collectively, these three (sets of) rules are referred to as the 'surveyed rules'. They were chosen for three main reasons:

First, necessity and proportionality play rather prominent roles in all of them.[33] With respect to all surveyed rules there exists a body of doctrine and – more importantly for the purpose of understanding how the concepts are applied and reviewed by international courts – international case-law, which facilitates in-depth analysis and comparison. At the same time, the precise content of necessity/proportionality in each of these contexts is beset with uncertainties and controversies. Thus, reducing or eliminating at least some of these uncertainties makes a real contribution to clarifying the content of these important norms.

Second, the selected rules are particularly relevant for the interpretation of NPM clauses in BITs and FCN treaties. Similar to the surveyed rules, in particular the necessity standard plays a central role in the NPM clauses, signalling a functional congruence. In fact, the selected rules are precisely those that have been referred to by the ICJ and the various investment tribunals in interpreting the equivalent NPM clauses in the US-Nicaragua[34] and US-Iran[35] FCN treaties as well as the US-Argentina BIT [36] . Thus, demonstrating a unified core of the necessity/proportionality standard contained within the surveyed rules would reduce the difficulties in choosing from among them for the purpose of cross-interpreting the NPM clauses.

Third, the surveyed rules are uniquely suited to a comparative analysis seeking to determine whether there is a unified necessity/proportionality standard in exception clauses

[32] Articles XX(a),(b), (d) GATT, XIV (a),(b), (c) GATS, 2.2 TBT, 5.6 SPS. The latter two are not properly speaking exception clauses, but have to be included in the analysis for reasons further explained in section 3.3. The thesis also touches briefly upon Articles XXI GATT and XIV*bis* GATS (chapter III, section 4.3.1.), mainly to contrast the self-judging nature of the exceptions established therein with the other surveyed rules.

[33] See section 1. and generally chapters I and II.

[34] Article XXI(1)(d) US-Nicaragua FCN.

[35] Article XX(1)(d) US-Iran FCN.

[36] Article XI US-Argentina BIT.

across international law more generally. Centrally, the surveyed rules are diverse in their character, context and function. The surveyed WTO rules are primary rules, the State of Necessity is a secondary rule,[37] and self-defence is best described as a hybrid primary-secondary rule[38]. The rules differ in their institutional setting, in that the WTO rules are treaty-based rules enshrined in a highly integrated set of agreements, administered by a permanent international organisation and subject to compulsory judicial dispute settlement[39], whereas the State of Necessity and self-defence are (primarily) customary rules[40] not subject to compulsory judicial dispute settlement. Some rules are recognised as affirmative defences (the State of Necessity, self-defence, Articles XX GATT and XIV GATS) and some are autonomous obligations (Articles 2.2 TBT and 5.6 SPS). Finally, the State of Necessity and self-defence are arguably rooted in a 'private law' conception of international law, while WTO law tends to be more administrative in character, displaying elements rather characteristic of 'public' or 'administrative' law.[41] The point in highlighting this diversity within the surveyed rules is quite simple: if it is possible to distil a unified necessity/proportionality standard even from such diversity, there is a strong case for assuming that this unified standard indeed reaches across exception clauses in international law even beyond the surveyed rules.

Nevertheless, in principle examining the existence of a unified necessity/proportionality standard in exception clauses across international law should include exception clauses from all major sub-fields of international law. Thus, ideally other prominent sub-fields of international law containing exception clauses enshrining a necessity/proportionality standard – such as human

[37] ILC, *2001 Commentary*, Chapter V, paras 2-4, 7; see also *CMS Annulment*, para 134. Some, however, doubt that the defences set out in the ASR are properly secondary rather than primary rules (eg, Aust, 'Circumstances Precluding Wrongfulness', 177-178).

[38] See Paparinskis, 'Equivalent Primary Rules', 283, fn.153.

[39] See the DSU.

[40] The right of self-defence is also enshrined in Article 51 UNC.

[41] For instance, Krisch and Kingsbury, 'Introduction', 3: 'WTO dispute settlement can in many cases be regarded as another layer of judicial review of domestic administrative action.'

rights law[42], international humanitarian law[43], and European Union law[44] – should have been included in the study.[45] However, not only are there some considerations that cast doubt on whether these sub-fields could have suitably been included in the analysis,[46] but doing so would have also significantly exceeded the bounds of this thesis. In light of the above considerations, it appears justified to limit the analysis in this thesis to the selected three (sets of) exception clauses.

3.2. General methodology

The thesis is broadly divided into two parts: Part I (comprising chapters I-III) analyses and compares the necessity and proportionality standards, as well as how compliance therewith is reviewed by international court, across the surveyed rules. Part II (comprising chapter IV) explores the notion of cross-interpretation with reference to unified standards.

Part I poses a particular methodological challenge. Determining whether there is any overlap between the surveyed rules that would allow concluding on the existence of a unified necessity/proportionality standard requires meaningful comparison. Meaningful comparison is, however, rendered difficult by at least two problems: first, it cannot be assumed that identical terms designate the same thing in different contexts, and problems of labelling may feign or

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[42] Eg, Articles 4(1), 12(3) ICCPR; Articles 2(2), 8(2), 15(1) ECHR.

[43] Eg, Henckaerts and Doswald-Beck (eds), *Customary International Humanitarian Law*, Rule 14; Articles 51(5)(b) and 57(2)(a)(iii) AP I.

[44] Eg, Article 5(4) TEU; 'the principle of proportionality is [also] applicable ... as a general principle of Community law' (Hilf and Puth, 'The Principle of Proportionality', 205).

[45] Because the conclusion on the existence of a unified necessity/proportionality standard methodologically depends on the choice of rules included in the comparative analysis, it cannot be fully excluded that a different choice of surveyed rules could potentially yield different results.

[46] For example, EU law has famously been called a 'new legal order' (*Van Gend en Loos*, 12) and is often interpreted as *sui generis* in nature (see generally Weiler and Haltern, 'Autonomy'), casting doubt on its availability for cross-interpretation in general international law.

There further exists comparatively little international case-law on the necessity/proportionality standard in international humanitarian law outside the international criminal law context, and it is unclear whether the international criminal law jurisprudence would be a good guide to understanding the necessity condition as such in international humanitarian law.

obscure conceptual similarities and difference.[47] As ITLOS put it, 'identical or similar provisions of different treaties may not yield the same results'.[48] The fact that, for example, both the customary norm authorizing the use of force in self-defence and Article XX GATT contain a necessity condition, but that only self-defence explicitly includes a proportionality condition, says very little about how necessity and proportionality actually compare in the two contexts. The analysis must therefore go beyond mere terminological/textual comparison.

Second, as noted above, even within a particular rule there is frequently no clarity as regards the precise content of a particular concept. For example, disagreement about whether a particular use of defensive force was proportionate or not may not only stem from disagreement about the application of the proportionality standard to a given instance, but also from more fundamental disagreement about what proportionality requires in the first place.[49] This second problem aggravates the difficulties of cross-context comparison.

To succeed, the thesis must adopt a methodology that can overcome these problems. A turn to general comparative law is helpful in this regard, since in comparing different legal systems[50] general comparative law encounters some of the same terminological and conceptual problems. Gutteridge observed that legal terminology differs between legal systems (including those using the same language), and noted that '[i]t is almost impossible from the standpoint of comparative studies to exaggerate the perils which lie hidden in terminology'.[51] The similar problems faced render the methods developed by comparative law suitable for the present

[47] See Newton and May, *Proportionality*, 3; Sloan, 'Necessity', 507; Burke-White and von Staden, 'Extraordinary Times', 322; von Staden, 'Doctrinal Clarity', 225-226.

[48] *MOX Plant Order*, para 51.

[49] Kretzmer, 'Proportionality in Jus ad Bellum', 237.

[50] General comparative law is concerned with identifying similarities and differences between legal system. See Dannemann, 'Similarities or Differences?', 387, referring to Zweigert and Kötz, *Introduction*.

[51] Gutteridge, *Comparative Law*, 117-118.

purposes, facilitating meaningful comparison across different contexts despite terminological differences.

The method generally adopted[52] by comparatists to achieve meaningful comparison is the so-called 'functional approach'. Based on the assumption that almost every legal system faces essentially the same legal problems, this approach focuses on comparing those legal norms and concepts that 'fulfil the same function'.[53] Thus, with respect to any given notion the focus is on describing 'what it does'[54]. The comparatist must pose questions in functional terms 'without any reference to the concepts of one's own legal system'.[55] In other words, the solutions offered by a particular legal system must be 'freed from the context of [their] own system'.[56]

Once the solutions offered by various legal systems to the same problem are identified and stripped of the particular terminology, the comparatist must 'formulate a system of similarities and differences which can serve as a basis for further analysis' and 'only at this second stage does comparison come into play'.[57] As regards this actual comparison, Jansen explained that 'properly comparative propositions in their simplest form draw a triadic relation between two objects and a certain quality, the *tertium comparationis*'.[58] Indeed, without a neutral *tertium*, a comparative legal analysis could only be cast in the terms or concepts of one of the two legal

[52] For critical perspectives on the functional approach, see Michaels, 'Functional Method'.

[53] Zweigert and Kötz, *Introduction*, 34.

[54] Samuel, *Introduction*, 67.

[55] Zweigert and Kötz, *Introduction*, 34; see also Hailbronner, 'Ziele', 200.

[56] Zweigert and Kötz, *Introduction*, 44.

[57] Jansen, 'Comparative Law', 306.

[58] Ibid, 310.

systems under comparison.[59] Thus, the *tertium* must be a neutral analytical framework, allowing in-depth analysis of each surveyed object and meaningful comparison between them.

Broadly inspired by this focus on the identification of a context-independent *tertium comparationis*, the thesis' comparative chapters follow a two-step analytical process. First, the concepts of necessity, proportionality, and judicial review are analysed in the abstract, without direct reference to the surveyed rules themselves. This analysis yields a neutral, coherent terminology and insights into the concept's essential conceptual logic, allowing the identification of relevant elements, their interrelationships, and the delineation of neighbouring concepts. Second, these abstract versions of the concepts under consideration are respectively used as a functional 'scheme of intelligibility'[60] or blueprint (ie, the *tertium*), which allow the structured, neutral and uniform analysis of each concept as it appears in the context of each surveyed rules. This analysis, in turn, yields deeper insights into the content of each concept in each particular surveyed rule, as it is not inhibited by the received understanding of the concept in that particular rule, and facilitates meaningful comparison identifying similarities and difference, with the potential to reveal functional similarities despite terminological differences, and functional differences despite terminological similarities.[61]

3.3. Additional methodological remarks

While the foregoing section has outlined the main analytical approach in chapters I-III, to fully circumscribe the method applied some additional preliminary remarks are essential. These remarks incidentally also point out the limitations of this thesis, both in terms of methodology used and materials covered.

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[59] See Zweigert and Kötz, *Introduction*, 44: 'The next step in the process of comparison is to build a system. For this one needs to develop a special syntax and vocabulary, which are also in fact necessary for comparative researches on particular topics.'

[60] The term is borrowed from Samuel, *Introduction*, 81.

[61] The use of a neutral 'scheme of intelligibility' allows, for example, unveiling manifestations of necessity or proportionality that go under different labels in different rules, since only the substance/function of a concept in a given context is relevant, not its label.

First, this thesis only addresses exception clauses.[62] Exception clauses are permissive in character, rather than obligatory.[63] As analysed below,[64] this difference has direct relevance for the 'end-setting discretion'[65] that states enjoy under exception clauses, that is the ability to choose for themselves – within certain limits – which objectives to pursue. This discretionary element in turn impacts the way necessity and proportionality function. Accordingly, while some of the conclusions of this thesis are likely relevant for obligatory clauses as well, they should not automatically be assumed to be so in their entirety.

Second, the thesis is primarily concerned with how manifestations of necessity and proportionality in the surveyed exception clauses are applied by international courts in dispute settlement procedures. Thus, in analysing the surveyed rules there is a focus on international jurisprudence. This should not detract from the fact that the substantive findings in chapters I, II and IV are also relevant outside the context of judicial dispute settlement. Naturally, however, judicial review tackled in chapter III has little relevance outside the courtroom.

Third, while Part I is divided into three separate chapters, none of these chapters is ultimately self-standing. In particular, chapters I and II analyse necessity/proportionality almost exclusively in terms of identifying the relevant elements involved and the decision logic that links them together; thus, they focus largely on the substantive requirements of necessity and proportionality. In contrast, they do not directly deal with the deep 'epistemic' problems involved with making many of the required (factual) determinations, which are addressed more

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[62] While excluded from this thesis, it should still be noted that especially proportionality has received increasing attention in the context of the substantive protections available under international investment law (see, eg, Schill, 'Cross-Regime Harmonization'; Leonhardsen, 'Looking for Legitimacy', Krommerdijk and Morijn, 'Proportional by what Measure(s)?'; Kingsbury and Schill, 'Investor-State Arbitration as Governance').

[63] Article 117 UNCLOS is an example of an obligatory rule containing the necessity standard. It prescribes that '[a]ll States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.'

[64] See chapter I, sections 3.3. and 7.1.4.

[65] The term is borrowed from Alexy, *A Theory*, 395. It is similar to 'policy-choice discretion' (Rivers, 'Proportionality and Discretion', 114).

systematically in chapter III. Ultimately, however, it is the combination of knowing what the necessity/proportionality standards enshrined in each surveyed rule substantively require (chapters I and II) and how it can be decided under conditions of epistemic uncertainty whether these requirements are actually fulfilled (chapter III) that matters. While by itself the discussion in chapters I and II may appear somewhat detached from reality, there are good reasons for structuring the analysis in this way: if it is unclear what necessity and proportionality require even when epistemic problems are ignored, the very idea of reviewing compliance with uncertain requirements makes no sense. Questions about epistemic uncertainty and judicial review can only meaningfully be asked where uncertainty about substantive requirements has been removed.

Fourth, while the thesis concerns exception clauses, the analysis also includes Articles 2.2 TBT and 5.6 SPS, which are not exceptions but self-standing obligations. Their inclusion is, however, justified and indeed required, since Articles 2.2 TBT and 5.6 SPS function rather similarly to the general exceptions in Articles XX GATT and XIV GATS.[66] In fact, the similarity as regards necessity/proportionality is so great that the WTO panels and Appellate Body ('AB') have not hesitated to cross-interpret liberally between all four provisions,[67] with the result that 'the concept of necessity has converged across the WTO agreements'.[68] Because of this constant exchange between the four rules, leaving the TBT and SPS out would distort the analysis and provide an incomplete picture of necessity/proportionality even in Articles XX GATT and XIV GATS. The close linkages also explain why this thesis, in analysing necessity/proportionality under WTO law, does not systematically keep the four mentioned WTO Agreements apart.

[66] At least in the case of the Article 5.6 SPS this is not particularly surprising, seeing that according to its preamble the SPS is supposed 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)'. On the relationship between SPS and Article XX GATT see generally Shapiro, 'Swallowed Exceptions'.

[67] For a discussion of the WTO's approach to cross-interpretation between the WTO Agreements, see chapter IV, section 2.4.; see generally Kapterian, 'Critique', 90-91; Neumann and Türk, 'Necessity Revisited', 226-27.

[68] Delimatsis, 'Who's Afraid of Necessity?', 96.

Finally, still concerning WTO law, the thesis touches upon but does not systematically include analysis of the *chapeau* contained in Articles XX GATT and XIV GATS. While Alvarez and Brink argued that 'the chapeau of Article XX has subtly affected ... what dispute settlers consider to be "necessary"'[69], the jurisprudence does not bear out such an influence. Rather, Sacerdoti (once chairman of the WTO AB) explained that 'the definition of "necessity" in WTO case law is not affected by the presence of the chapeau'.[70] Thus, largely ignoring the *chapeau* does not undermine the conclusions concerning necessity/proportionality in the surveyed WTO rules.

4. Thesis Structure

As indicated, the thesis is broadly divided into two parts: Part I (comprising chapters I-III) analyses and compares the necessity and proportionality standards as well as how compliance therewith is reviewed by international court across the surveyed rules. Part II (comprising chapter IV) explores the notion of cross-interpretation with reference to unified standards.

Chapter I tackles the necessity standard. It sets out by constructing a 'scheme of intelligibility' of necessity based on linguistic philosophy and classifying the various types of necessity found in legal rules (section 2). Based on this identification of the central elements of necessity, the following sections discuss each of these elements in detail, first by setting out the relevant questions in theoretical terms before proceeding to empirically scrutinise how each element is filled with content in the surveyed rules (sections 3-7). At the end of each section, a conclusion is drawn on the existing overlap between the surveyed rules, and whether it is thus possible to speak of a unified necessity standard in this regard.

Chapter II address the proportionality standard. It starts by providing an overview of the different principal variants of proportionality in the abstract (which serves as the 'scheme of

[69] Alvarez and Brink, 'Revisting the Necessity Defense', 342; Alvarez and Khamsi, 'Argentine Crisis', 441. See also Alvarez, 'Beware: Boundary Crossings', 32-33; Alvarez-Jiménez, 'New Approaches', 17.

[70] Sacerdoti, 'BIT Protections and Economic Crises' 382, fn.120; see also Sacerdoti, 'Application of BITs', 20; Stone Sweet and della Cananea, 'Proportionality, General Principles of Law', 939; Mitchell and Henckels, 'Variations', 136-137.

intelligibility' for the empirical analysis), situating proportionality in relation to necessity, considering the normative implications of their relationship, and finally touching upon questions of normative indeterminacy raised by proportionality (section 2). Against this background, the chapter proceeds to analyse whether the surveyed rules include a proportionality standard, and if so, what exactly it requires within each rule (section 3). The chapter concludes by assessing whether there is a unified proportionality standard, and whether a combination with the findings of chapter I allows speaking of a unified joint necessity/proportionality standard.

Chapter III concerns international judicial review. At the outset, it briefly clarifies to which degree necessity and proportionality raise questions of fact or of law (section 2), followed by a theoretical exploration of the notions of justiciability, standard of review, and standard/burden of proof (section 3). The empirical study considers the issues of justiciability, burden of proof, and standard of proof/review with respect to each surveyed rule (section 4). Once more, the chapter concludes by assessing the degree of unity across the surveyed rules.

Chapter IV relates to treaty interpretation. It first outlines the difficulties faced by arbitration tribunals and the ICJ in interpreting necessity in NPM clauses, arguing that the solutions found so far are incoherent and insufficiently justified (section 2). With reference to the VCLT's rules of interpretation, it then discusses the novel idea of cross-interpreting treaty norms with reference to unified standards distilled from multiple external rules (section 3). Finally, the last section discusses the practicalities, advantages, and limitations of cross-interpretation on the basis of the unified necessity/proportionality standard (section 4).

The general conclusion summarises the results of the thesis and reflects on their broader significance for international law.

PART I

I. NECESSITY

1. Introduction: facilitating a comparative analysis of necessity in exception clauses with the help of linguistics

The thesis' general introduction highlighted some of the difficulties connected to comparative analyses, most prominently the fact that similar or equivalent concepts can go by different names in different legal contexts, and different concepts can misleadingly go under the same name.[71] To facilitate a meaningful comparison, the starting point is therefore the construction of a 'scheme of intelligibility'. A 'scheme of intelligibility' is an abstract conceptual blueprint which facilitates both the identification of equivalent concepts existing under different labels in different contexts and their comparison. To avoid bias, the scheme must be derived not from one of the subjects under analysis but from a 'neutral' source. This thesis relies on an exploration of the notion of necessity in linguistic philosophy, more precisely the study of 'modality'.[72] Modality deals with how language conceives of the contrasting notions of necessity and possibility, thereby providing a good background to understanding how law, which employs language to convey meaning, approaches the former.

The study of modality in linguistic philosophy can, however, only go so far. While it provides a basic 'scheme of intelligibility' that structures the analysis and provides a coherent terminology, modality does not address all the intricacies of the concept of necessity in a legal context. Accordingly, this modality-inspired scheme is extended by the help of logical extrapolation. As the study of modality itself relies to a large extent on formal logic,[73] it results

[71] See Introduction, section 3.2.

[72] See section 3.1.

[73] See generally Garson, 'Modal Logic'.

that the 'scheme of intelligibility' used in this thesis is primarily necessity's own inherent conceptual logic. Simply put, the analysis seeks to first identify each question that must logically be asked and answered before necessity can be coherently operationalized in a legal context, in the sense of providing a clear decision logic to decide whether a given measure qualifies as necessary or not.

The analysis in this chapter proceeds as follows: it first briefly explores the notion of necessity in linguistic philosophy, identifying four major structuring elements that are subsequently analysed in the following sections (section 2). The structuring elements are the crucial connection between a measure's necessity and its objective (sections 3 and 4), the insight that necessity operates within a given domain (section 5), the conception or decision logic of necessity (section 6), and finally the set of conditions under which the availability of an alternative measure can disprove the necessity of the challenged measure (section 7). The conclusion to each section compares the results, suggests explanations for commonalities and differences between the various rules, and – where appropriate – proposes answers to hitherto unanswered questions.

2. Necessity in linguistic philosophy

2.1. Introducing modal necessity

When linguistic philosophers talk about how necessity is expressed in language, they do so together with the contrasting notion of possibility in the framework of modality. As Kratzer put it, '[m]odality has to do with necessity and possibility.'[74] Modal constructions are a way of talking about what could be (possibility) or must be (necessity), rather than statements about what actually is the case.[75] In order to theorize necessity and possibility as notions going beyond the actual, linguistic philosophy frequently uses so called 'possible worlds semantics'. Possible

[74] Kratzer, 'Modality', 639.

[75] See Swanson, 'Modality', 1193. Note that in order to express necessity, the actual terms 'necessary' and 'necessity' are the most obvious indicators, but by no means the only ones (see Kratzer, 'Modality', 639).

worlds semantics posit that apart from the actual world in which we live, countless other worlds are possible. Menzel explained the notion thus:

> Most of us also believe that things, as a whole, needn't have been just as they are. Rather, things might have been different in countless ways, both trivial and profound. ... Intuitively, then, the actual world ... is only one among many *possible worlds*.[76]

The link between possible worlds semantics and the notion of necessity is that in modal logic, necessity and possibility are treated as quantifiers over possible worlds:[77] necessity attaches to propositions that are true in all possible worlds (ie, the proposition is necessarily true), and possibility attaches to propositions that are true in at least some possible worlds (ie, the proposition is possibly true).[78] Necessity is then a 'universal' and possibility an 'existential' quantifier.[79] This difference is also referred to as the particular force of the modal.[80]

Saying that necessity only attaches to propositions that are true in all possible worlds means that the existence of a single possible world in which the proposition is not true rules out its necessity. In this light, the definition of what counts as a possible world for the purpose of analysing necessity is of crucial importance. The possible worlds which have to be taken into account in analysing whether a proposition is necessarily or possibly true are not generally unrestricted: a modal statement typically relates to only a specific set of possible worlds. For every modal statement, the set of possible worlds is thus restricted by what can be termed the particular 'admissibility condition'[81]. The possible worlds that comply with this condition and

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[76] Menzel, 'Possible Worlds', Introduction (emphasis in the original). While Menzel here focused only on the fact that the actual world could have been different in the sense of historical contingency, possible worlds semantics can also be used to describe contingency in the present and the future. Present contingency relates mainly to limitations of knowledge about the presence, whereas future contingency relates to the possible ways in which the world might develop.

[77] See ibid, section 1.2.

[78] See Kment, 'Varieties', section 1.

[79] See Menzel, 'Possible Worlds', section 1.2.

[80] See Hacquard, 'Modality', 5.

[81] Linguistic philosophers typically use the similar term 'accessibility relation' (eg, Menzel, 'Possible Worlds', note 9).

thus have to be taken into account can be called 'admissible possible worlds'. The importance of the admissibility condition can hardly be overstated, particularly as regards necessity: changing the admissibility condition (and thus the set of possible worlds to be taken into account) can be determinative of whether or not a proposition is necessarily true.

The content of the admissibility condition can vary. However, one central element of the admissibility condition is automatically implied by the particular variety of modality in issue. The more common ones include epistemic, deontic, circumstantial/dynamic, logical and finally teleological modality.[82] Each variety has a different reference point, in that they concern what is necessary or possible given what is known and what information is available (epistemic), a body of rules (deontic), a set of facts or circumstances (circumstantial), the rules of logic (logical), or the desire to achieve an objective (teleological). Thus, a proposition is epistemically necessary if it holds true in every possible world that complies with the state of knowledge,[83] it is deontically necessary if it holds true in every possible world in which the rules are complied with, and so on. For teleological modality, this means that only those propositions are teleologically necessary that are true in every possible world in which the desired objective is achieved. Or put differently, under teleological modality the admissibility condition is only complied with by possible worlds in which the desired objective is achieved.[84] When assessing the necessity of a measure to achieve an objective, the measure is thus teleologically necessary where no possible world exists in which the objective is achieved and the measure is *not* taken. A single possible world in which an

[82] See von Fintel, 'Modality and Language', 2; Swanson, 'Modality', 1195. The varieties of modality are not necessarily mutually exclusive. For example, making a statement that no world exists in which both the objective is achieved and the measure not taken is actually a statement that, on the basis of the available knowledge about how the objective is to be causally achieved as well as the given facts and available resources, no such world exists. Thus, circumstantial and epistemic components are implied in teleological modal statements. See Kratzer, 'Modality', 646-647 (on ordering sources for circumstantial modal bases), who argued in different terms, but going in the same direction.

[83] Epistemic necessity is 'agent relative' (Kment, 'Varieties', 4), as it depends on the subjective state of knowledge. On the general role of epistemology in modality, see Vaidya, 'Epistemology of Modality'.

[84] See Kratzer, 'Modality', 642.

alternative measure is taken and the objective still achieved suffices to render the other measure not necessary.

The foregoing insight has certain important implications. First, in this conception necessity is notably a binary concept, in the sense that something either is or is not necessary, but cannot be more or less necessary.[85] Second, the analysis of whether a proposition or measure is necessary is unavoidably directed at and specific to that very proposition or measure, whose necessity can either be confirmed or disproved. The point of the analysis is not which of a variety of measures is necessary, but rather whether the necessity of the particular 'challenged' measure under analysis can be established or disproved.[86] Third, necessity can either be absolute or hypothetical.[87] Absolute necessity is premised on the unavailability of any choice, a situation where A occurs with no volitional element intervening.[88] Hypothetical necessity, in contrast, is present where A must exist for B to be – A is necessary for B. The necessity is only hypothetical because it is contingent on B: the necessity of A derives from the desire to realise B. Hypothetical necessity then involves both a choice and an absence of choice, since whether or not to realise B is contingent, but where B is to be realised, necessity implies that there is no choice but to realise A. It is important to realise that the choice thus involved in hypothetical necessity relates entirely to the objective that is ultimately pursued, and notably not the means to achieve the objective.

[85] Some differentiation as to the strictness of necessity is allowed in Kratzer's theory of modality, distinguishing the less demanding 'human necessity' and the stricter 'simple necessity' (see Kratzer, 'Notional Category', 47-51). See also Kment, 'Varieties', 29-30.

[86] An analysis of which of a variety of measures is necessary involves analysing for each particular measure whether it is necessary or not.

[87] On this distinction, see Reader, *Philosophy of Need*, 114-15.

[88] See the examples listed by Kratzer, 'Modality', 640.

2.2. Constructing a basic 'scheme of intelligibility' of necessity as a guide for the comparative analysis

It emerged that whether a measure is necessary comes down to analysing whether admissible possible worlds exist in which the measure is not taken, ie whether the worlds in which that measure is taken are the only ones that comply with all the elements of the applicable admissibility condition. The crucial step is then defining each element of the applicable admissibility condition.

As already mentioned, the first element of the admissibility condition relates to the particular variety of modality. The initial step is then to analyse the variety of modality enshrined in the surveyed rules (section 2.3.). It will emerge from this analysis that the surveyed rules all enshrine teleological necessity. This signifies that the first element to be analysed in identifying the applicable admissibility condition is a given measure's objective (sections 3 and 4). Second, it must be asked whether the admissibility condition excludes certain measures *a priori* (section 5). If this is the case, any possible world in which an excluded measure is taken is not admissible.[89] Third, the particular conception of necessity enshrined in the surveyed rules must be identified (section 6). The conception of necessity refers to the decision logic underlying the admissibility condition that applies when assessing a measure's necessity. Finally, once the basic conception has been identified, it must be investigated in greater detail what precise criteria the admissibility condition (especially as regards the character of alternative measures) prescribes (section 7).

[89] *A priori* exclusion can apply to both the measure under analysis and possible alternative measures.

2.3. The concept of necessity in legal rules and particularly the rules under scrutiny: teleological necessity

The logical starting point is the identification of the particular variety of modality in play in the surveyed exception clauses. The modal varieties of necessity that appear to be most present in legal rules generally are circumstantial, deontic, and teleological necessity.[90]

Circumstantial necessity is a form of absolute necessity, leaving no measure of choice. A good example of circumstantial necessity is enshrined in the provision on *force majeure* in the ILC's ASR.[91] The commentary confirms that it addresses situations that completely negate the possibility of choice.[92] In cases of *force majeure* the measure that infringes a state's obligation is thus not actually properly speaking 'taken' by that state, but rather forced upon it by the circumstances without any possibility for the state to decide to act differently.

Deontic necessity, on the other hand, is a form of hypothetical necessity, since the acting state has, at least in principle, the choice of whether or not to follow applicable rules. A good example is the part of Article XI of the 1991 US-Argentina BIT which provides that '[t]his Treaty shall not preclude the application ... of measures necessary for … the fulfilment of [a party's] obligations with respect to the maintenance or restoration of international peace or security'.[93] What is necessary is effectively determined by a different set of rules, namely the state's obligations under the UN Charter.[94]

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[90] The terms 'necessary' or 'necessity' are widely present in international treaties. Times that the terms 'necessary' or 'necessity' appear: UNCLOS - 118 (including annexes); UNC - 20; ICCPR - 11; GATT - 39; AP I - 41. While it is not possible here to survey every use of these or related terms in even some of the major treaties, it may be supposed that they enshrine multiple varieties of necessity.

[91] Article 23 ASR. On *force majeure* see generally Paddeu, 'Force Majeure'.

[92] ILC, *2001 Commentary*, Article 23, para 1; see also Ago, *Addendum*, para 1.

[93] See also the similar but differently worded Article XXI(c) GATT.

[94] US-Argentina BIT, Protocol, para 6. See also *Nicaragua*, para 223, concerning the similar Article XXI(1)(d) US-Nicaragua FCN.

The surveyed rules, finally, all rather obviously enshrine teleological necessity. This point will emerge more clearly from the considerations on objectives entailed in sections 3 and 4 of this chapter, but can already be glimpsed from the basic structure of the norms at issue. For instance, Articles XX(a), (b), and (d) GATT all provide that the GATT does not 'prevent the adoption or enforcement by any contracting party of measures'[95] that are 'necessary to protect' or 'necessary to secure', indicating that the necessity at play relates to the objective pursued and is thus teleological in character. Similarly, the codification of the State of Necessity in Article 25 ASR provides that a measure's wrongfulness cannot be precluded unless that measure is 'the only way to safeguard'[96], again pointing to the crucial connection between the measure and its objective. Because the rules under scrutiny thus enshrine teleological necessity, this thesis does not consider other forms of necessity in law in any detail.

3. First order objectives: the permissible objectives of state action in the context of exception clauses

The first element of teleological necessity's admissibility condition is then the objective pursued. A measure cannot simply be teleologically necessary without consideration of the measure's objective, it can only be teleologically necessary as regards a specified objective: 'the relevant objective is the benchmark'.[97] Indeed, teleological necessity can only be assessed against a specific objective pursued, not independently thereof.[98] The identification of a measure's

[95] Article XX GATT, *chapeau*.

[96] Article 25(1)(a) ASR. It is argued (section 6.2.1.) that the 'only way' requirement indeed enshrines a condition of necessity.

[97] *US-COOL (AB)*, para 387; see further ibid: 'the importance of ... identifying with sufficient clarity and consistency the objective or objectives pursued by [a state] through [a measure] cannot be overemphasized'.

[98] See Gardam, *Necessity*, xvii-xviii; Tams, 'Anti-Terrorist Self-Defence', 378.

objective is then a precondition for being able to assess the measure's necessity,[99] so that the first question in this assessment must always be: 'necessary for what?'[100]

This section first explores the consequences that arise out of this centrality of the objective, identifying crucial questions that each rule operationalizing teleological necessity must answer (section 3.1.), before examining how the surveyed rules respond to these questions (section 3.2.).

3.1. Theoretical considerations: the centrality of a measure's objective

The centrality of a measure's objective for assessing that measure's necessity has at least two relevant implications. First, it highlights that teleological necessity is hypothetical in nature, in that it involves a choice. This explains why, for example, the State of Necessity rule is characterized as one involving deliberate action. For instance, Special Rapporteur Ago considered with respect to the State of Necessity that '[t]he conduct engaged in will ... stem from a deliberate choice, fully conscious and voluntary in every respect.'[101] The apparent misunderstanding in this respect is that the choice relates to the measure; in reality, it relates to the objective.[102]

Second, while teleological necessity thus implies an absence of choice as regards the measure by which an objective is to be achieved, it is silent about the choice of which objective to pursue in the first place. If a legal rule incorporating teleological necessity aims at regulating not only the measures that may be taken in the pursuit of a given objective, but also the choice of the pursued objective itself, it needs to do so in addition to requiring necessity. The main

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[99] See *Thailand-Cigarettes II (AB)*, para 179, fn.272: 'That the defence by Thailand was largely unelaborated with respect to "necessity" is likely due to the fact that it is difficult to make detailed arguments to demonstrate the "necessity" of a measure under Article XX(d) in the absence of a clear identification of the laws or regulations with which that measure is purportedly necessary to secure compliance.' See also *US-Clove Cigarettes (Panel)*, para 7.335.

[100] *Kishenganga*, para 390.

[101] Ago, *Addendum*, para 2; see also Sykes, 'Economic Necessity', 298; Crawford, 'Revising', 444; Agius, 'Invocation', 18.

[102] Eg, Heathcote, 'State of Necessity', 75, 251-52, is apparently under this misunderstanding.

question that must thus be asked of the rules under scrutiny in this thesis is then whether and how they regulate the objective that a measure may pursue.

3.2. Empirical survey: permissible objectives in the surveyed rules

3.2.1. State of Necessity

The starting point for the analysis of the State of Necessity is Article 25 ASR, which has been recognised as codifying customary international law in this regard.[103] Article 25(1)(a) ASR provides that the wrongfulness of an act can only be precluded where that act 'is the only way for the State to safeguard an essential interest against a grave and imminent peril'. The only permissible objective is thus the safeguarding of an 'essential interest'. The ILC's commentary clarifies that it may be an essential interest either of the acting state or the international community as a whole.[104] Where a state's measure is found not to pursue an essential interest, it cannot be considered necessary.[105]

What exactly falls within this category is rather unclear, revealing a certain vagueness which has drawn criticism.[106] Nevertheless, Special Rapporteur Ago opined in 1980 that

> [h]ow 'essential' a give interest may be naturally depends on the totality of the conditions in which a State finds itself in a variety of specific situations; it should therefore be appraised in relation to a particular case in which such an interest is involved, and not predetermined in the abstract.[107]

This approach, favouring a vague general reference to 'essential interests' rather than providing more guidance on the permissible objectives, was accepted by the ILC and included in its

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[103] See n.10.

[104] ILC, *2001 Commentary*, Article 25, para 15. For perspectives on the inclusion of community interests see Johnstone, 'Necessity', 388; Heathcote, 'State of Necessity', 452.

[105] See Buza, 'Necessity', 213; Vinuales, 'Peremptory Norms', 99.

[106] ILC, *Yearbook 1980*, 1617th meeting, para 2 (Yankov); Sloan, 'Necessity', 505; Aust, 'Circumstances Precluding Wrongfulness', 197.

[107] Ago, *Addendum*, para 12.

authoritative commentary.[108] An indication of which objectives can be accepted as constituting 'essential interests' can thus only be gained from surveying relevant practice. While no exhaustive such survey is here attempted, it emerges that a multitude of different objectives have been accepted,[109] including safeguarding the very existence of the state and its people (self-preservation),[110] maintaining social order and the state's independence,[111] upholding the state's ability to deliver basic services to its people,[112] protecting the state's economy against severe crises,[113] and shielding the state's natural environment from significant harm.[114]

It might be possible to attempt to distil, from these interests accepted as 'essential', an abstract set of criteria distinguishing 'essential' and 'non-essential' interests. However, the more promising approach would appear to be reading the 'essential interest' requirement together with the need for the interest at stake to be threatened by a 'grave and imminent peril'.[115] Conceptually, the essentiality of an interest could be distinguished from the level of threat against it, as 'essentiality' could be seen as relating only to the inherent quality of the interest.[116] However, in reality, it makes more sense to think of 'essentiality' as expressing a threshold combination of the threatened interest's inherent quality and the gravity of the threat it faces. This is not to say that

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[108] See ILC, *1980 Commentary*, Article 33, para 32; ILC, *2001 Commentary*, Article 25, para 15.

[109] In his separate opinion in the *Micula* case, Abi-Saab went as far as suggesting that Romania could have invoked the State of Necessity in the fact of 'the imperious necessity for Romania to join the European Union, which was an overriding national interest' (*Micula* (Abi-Saab), para 10). In a 2006 article, Gathii argued that the 'long term health of a country's population' can qualify as an essential interest (Gathii, 'Compulsory Licensing', 960). These two examples demonstrate just how open the notion of 'essential interest' really is.

[110] *Orinoco*, 280; *Venezuelan Railroads* (Plumley), 353; *Nemours*, 250-251; *Chichester*, 231; *Anglo-Portuguese Dispute*, 232.

[111] *Dickson Car Wheel*, 678-682.

[112] *Vivendi*, para 260; *Impregilo*, para 346; *Gabcikovo* (Herczegh), para 183.

[113] *Russian Indemnities*, section II.6; *Societe Generale Hellenique*, 377-378; *US Nationals in Morocco (Pleadings)*, 182; see also *LG&E*, para 238.

[114] *Gabcikovo*, para 53; Ago, *Addendum*, para 33.

[115] See section 4.

[116] Similarly Song, 'Scylla and Charybdis', 250-51.

every interest can be 'essential' when faced with a sufficiently grave threat,[117] but rather that there is a class of interests that can be considered 'essential' if and only if faced with a sufficiently grave threat.[118]

This suggestion has some support in practice. In *CMS*, the arbitral tribunal indicated that whether an interest is essential may itself depend on the gravity of the threat, and consequently collapsed the analysis of whether an essential interest was threatened and whether the threat against this interest was grave:[119] 'the issue is then to establish how grave an economic crisis must be so as to qualify as an essential security interest'.[120] In *LG&E*, the tribunal similarly considered that 'an interest's greater or lesser essential [sic], must be determined as a function of the set of conditions in which the State finds itself under specific situations [sic].'[121] In any event, whether to conceive of essentiality as unrelated to the threat against the interest or as being connected thereto has had little relevance in practice, since no plea invoking a State of Necessity was ever dismissed purely because the interest as such was found not to be essential.[122]

While the contours of how the rules regulating the State of Necessity restrict the set of permissible objectives are left somewhat unclear, it is important to draw attention to one element that may be seen as implicitly contained in the very notion of an 'objective': the objective must be concerned with the future, rather than the past. Already in the early *Caroline* case[123], the British

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[117] A nation's sporting success in the Olympics may, for instance, be an interest that can never be considered 'essential', no matter how grave the threat against it.

[118] Notably, this works only for graded objectives. A graded objective is one that can be achieved to varying degrees (see *US-Tuna II (AB)*, para 315). A typical example for a graded objective is national security – it can be realised in greater or lesser degrees. A non-graded or binary objective would be, for example, to be the leading trading nation in the world – a country either is or it is not.

[119] *CMS*, paras 319-22. Similarly *Enron*, para 305. Apparently in support Bjorklund, 'Emergency Exceptions', 481.

[120] *CMS*, para 361.

[121] *LG&E*, para 252.

[122] See also Laursen, 'Use of Force', 503; Christakis, 'L'Etat avant le droit?', 15.

[123] The Caroline affair is often cited in the context of self-defence. However, in reality the case relates more proplery to the State of Necessity (see Crawford, *Second Report*, para 278). It cannot, of course, be denied that historically the

Law Officers laid great emphasis on the point that 'the grounds on which we consider the conduct of the British Authorities to be justified, is that it was absolutely necessary as a measure of precaution for the future and not a measure of retaliation for the past.'[124] With similar clarity the tribunal in *LG&E* held that '[t]he concept of state of necessity and the requirements for its admissibility lead to the idea of prevention: the State covers itself against the risk of suffering certain damages.'[125] The consequence is that measures pursuing a punitive or retaliatory purpose cannot, as a matter of principle, be considered as pursuing a permissible objective.

3.2.2. Self-defence

The question of which objectives a state may permissibly pursue when using force in self-defence has received increasing attention in recent years.[126] This scholarship draws attention to the fact that despite the importance of a clear understanding of what the permissible objectives of defensive action are, many controversies persist: 'there is no consensus on what that end [of self-defence] may be'.[127] Increased attention to this questions and efforts to achieve greater clarity are certainly needed. For one, a defensive action that pursues an impermissible objective is *ipso facto* not justifiable.[128] Second, the purpose of self-defence is a 'critical issue in evaluating the necessary and proportionate character of defensive military operations'.[129] Moreover, the discussion about objectives is of wider import, seeing that, as Kammerhofer suggested, different opinions

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two legal devices could hardly be properly distinguished (see Brownlie, 'Recent Appraisals', 720), and some scholars still consider the current distinction erroneous (see Dinstein, *War*, para 719).

[124] *Caroline*, 228 (emphasis added).

[125] *LG&E*, para 248.

[126] The leading article is undoubtedly Kretzmer, 'Proportionality in Jus ad Bellum'.

[127] Ibid, 239.

[128] See Franck, 'Proportionality of Countermeasures', 723; Tams, 'Anti-Terrorist Self-Defence', 379.

[129] Koutroulis, 'Prohibition of the Use of Force', 623.

regarding the permissible objectives may in fact underlie many of the more technical debates surrounding self-defence.[130]

Judicial pronouncements on the question are rare. For instance, in *Oil Platforms* the ICJ 'avoided the issue of the aim and purpose of the measures taken in self-defence', leaving many questions open.[131] The discussion thus largely takes place in doctrine. To start, it is uncontroversial that the objective of defensive action may permissibly be to halt or repel an armed attack that has already occurred (or, possibly, is about to occur) and to recover territory lost in the course of the attack.[132] Likewise, pure deterrence is rejected.[133] Beyond this agreed-upon core, however, controversies quickly arise, and the line between permissible and non-permissible objectives is often hard to draw.[134] Some scholars take a strict position, allowing only and exclusively repelling an armed attack.[135] Others go further and propose that seeking to establish a minimum level of security against future attacks by substantively weakening the attacker[136] and pursuing invading forces beyond the border to this effect[137] is permissible. At the extreme end of the spectrum, Dinstein considered that the victim of an armed attack may pursue 'total victory'[138] and continue 'until the enemy is utterly crushed and no longer poses an effective

[130] Kammerhofer, 'Uncertainties', 197, 201.

[131] Ochoa-Ruiz and Salamanca-Aguado, 'Exploring', 516. Summarizing these controversies: Corten, 'Controversies'.

[132] See Greenwood, 'Self-Defence', para 27; IDI, *Self-Defence*, para 3; Ago, *Addendum*, para 90; Gray, 'Force and Order', 599; Gardam, *Necessity*, 156; Gill, 'When Does Self-Defence End?', 739.

[133] See Kretzmer, 'Proportionality in Jus ad Bellum', 257.

[134] See Lowe, *International Law*, 278, noting that the emphasis of self-defence is on prevention, and that deterrence is not allowed, all the while acknowledging that '[t]he line between deterrence and prevention is difficult to draw'.

[135] Eg, Ago, *Addendum*, para 119. See also Kammerhofer, 'Uncertainties', 168, 201; and apparently Wilmshurst, 'Chatham House Principles', 967.

[136] See discussion in Gardam, *Necessity*, 157; Walzer, *Just and Unjust Wars*, 118.

[137] Eg, Randelzhofer, 'Article 51', 805.

[138] Dinstein, 'Implementing Limitations', 58.

military menace.[139] Finally, some reject any abstract sets of permissible goals and simply hold that 'a rational appraisal of particular purposes must depend upon a consideration of all relevant conditioning factors in particular detailed contexts'.[140]

While the debate about the permissible objectives of self-defence against a (possibly only threatened) 'classic' armed attack is already controversial, the question arguably takes on added significance in self-defence against non-state actors. Assuming, for the sake of the argument, that self-defence against non-state actors is in principle possible,[141] the question of what the defending state may even seek to achieve in targeting non-state actors in other states becomes crucial. It is in the context of alleged self-defence against terrorist that Tams noted the worrying trend that states have 'in recent years ... invoked self-defence to justify conduct which primarily served non-defensive purposes', thereby putting the essential character of self-defence as 'defensive' into doubt.[142]

It may yet be too early, however, to consider this trend in state practice to have effected a real change of the set of permissible objectives of self-defence. Despite all uncertainty and occasional claims of 'retaliatory self-defence'[143], the weight of opinion still comes down in favour of a defensive conception of self-defence, which in turn indicates that the permissible objectives of self-defence all relate to the future; they are forward-looking.[144] It must be realised that even when the defending state merely expels the invading force, its objective points to the future, the

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[139] Dinstein, *War*, para 696. Explicitly rejecting this view Akande, 'Nuclear Weapons', 191

[140] McDougal and Feliciano, *Law and Minimum World Public Order*, 222-223.

[141] No attempt is made to deal with the thorny question in detail. See *Armed Activities*, para 147, where the ICJ left the question open (notably 'rather than considering the matter to have been conclusively dealt with in the negative in its prior jurisprudence' (Kreß, 'Principle of Non-Use of Force', 586)). All reference to self-defence against non-state actors is thus *arguendo*.

[142] Tams, 'The Use of Force Against Terrorists', 391.

[143] See on these ibid, 391.

[144] Note, for instance, the strong emphasis put in 2004 by Taft – then Legal Adviser of the Department of State – on the preventative character of the US actions at issue in the *Oil Platforms* case (see Taft, 'Self-Defense', 296-297).

'continuing threat'[145], namely preventing the invasion from persisting or progressing.[146] As Bowett wrote, in self-defence "'the essentially preventive and non-retributive character of [defensive action]" cannot be overstressed'.[147] In contrast, backward-looking objectives, such as revenge or retaliation, fall outside the set of allowed objectives.[148]

3.2.3. WTO law

In contrast to the vague reference to 'essential interests' as regards the State of Necessity, and the important controversies which pervade the law on self-defence in this regard, WTO law provides greater guidance. For one, most of the surveyed trade rules define the sets of permissible objectives with some precision. Thus, Articles XX(a),(b), and (d) GATT, as well as the largely equivalent Articles XIV(a),(b), and (c) GATS, allow a contracting party to take measures necessary to 'protect public morals' (GATT)/'protect public morals and to maintain public order'[149] (GATS), to 'protect human, animal or plant life or health', and to 'secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement'. Like Articles XX(b) GATT and XIV(b) GATS, the SPS covers measures that are 'necessary to protect human, animal or plant life or health'.[150]

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[145] Moir, *Reappraising*, 68.

[146] See Ago, *Addendum*, para 90; Gazzini, *Changing Rules*, 129; Tams and Devaney, 'Applying Necessity', 101-102. The failure to appreciate this point appears to underlie contrary conclusions (eg, Corten, *Law Against War*, 485; Dinstein, *War*, para 517; Christodoulidou and Chainoglou, 'Proportionality in Self-Defence', 84).

[147] Bowett, *Self-Defence*, 13, quoting Cheng, *General Principles*, 94.

[148] See *Nuclear Weapons* (Koroma), 562; Waldock, 'General Course', 238; Lowe, *International Law*, 278; Randelzhofer, 'Article 51', 805; Sofaer, 'Necessity of Pre-emption', 225; O'Connell, 'Lawful Self-Defense to Terrorism', 893. Also in just war theory, the medieval 'punitive conception' has been gradually overtaken by a 'more explicitly defensive' conception (see Boyle, 'Waging Defensive War', 150).

[149] The footnote attached to Article XIV(a) GATS indicates that '[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society'. While this provision partly relates to the notion of threat, considered in section 4, the reference to 'fundamental interests of society' is reminiscent of the 'essential interests' reference in Article 25 ASR. It may be supposed that in this respect there is a similar connection between the abstract objective and the threat against that objective as was suggested with regard to the State of Necessity above.

[150] Articles 2.1, 2.2 SPS.

While the mentioned provisions in the GATT, GATS and SPS Agreement have thus chosen to provide precise – and exhaustive – enumerations of permissible objectives, the TBT opted for a different path. Article 2.2 TBT provides that measures must be 'necessary to fulfil a legitimate objective' and explains 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'. As indicated by the addition '*inter alia*', the list is not exhaustive and other objectives may qualify as legitimate.[151]

When assessing a measure's necessity under WTO law, the first step is thus to verify whether the particular objective pursued falls within the set of listed permissible objectives.[152] Where the measure is found to pursue a non-permissible objective, the measure cannot be covered by the rule and a proper necessity analysis is not required.[153] It is furthermore perfectly possible for a measure to pursue multiple different objectives.[154] However, in such cases necessity can logically only be assessed against the permissible objective(s).[155]

What exactly falls under a rule's listed objectives has to be determined by the normal application of the rules of law ascertainment, ie here by means of interpretation.[156] The WTO's AB and panels have undertaken this task on many occasions, and in consequence a high degree of clarity now exists as regards most permissible objectives. For instance,[157] with regard to the

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[151] *EC-Sardines (AB)*, para 286; *US-Tuna II (AB)*, para 313; *US-COOL (AB)*, para 370; Andenas and Zleptnig, 'Proportionality', 421; Andersen, 'Protection', 396.

[152] See *US-Tuna*, para 5.29; *EC-Seal Products (Panel)*, para 7.631; *Colombia-Textiles (Panel)*, para 7.297; see also Osiro, 'GATT/WTO Necessity', 131.

[153] See, eg, *Canada-Periodicals (Panel)*, para 5.10; *EC-Tariff Preferences (Panel)*, para 7.210.

[154] *EC-Seal Products (Panel)*, para 7.400.

[155] Similarly Marceau and Trachtman, 'Technical Barriers', 866.

[156] Eg, *US-Shrimp (AB)*, paras 130-31.

[157] Another good example would be the efforts to elaborate on the notion of 'legitimate objectives' in Article 2.2 TBT. See *US-Tuna II (AB)*, para 313; *EC-Seal Products (Panel)*, para 7.416.

notion of 'public morals',[158] the panel in *US-Gambling* noted that despite 'the inherent difficulties and sensitivities associated with interpretation of the terms "public morals" and "public order" in the context of Article XIV(a) [GATS], we must nonetheless give meaning to these terms in order to apply them to the facts of in this case.'[159] The panel proceeded to define 'public morals' as 'standards of right and wrong conduct maintained by or on behalf of a community or nation'[160], noting that such standards 'can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values'[161]. The definition provided for Article XIV(a) GATS was later accepted also for Article XX(a) GATT[162] and Article 2.2 TBT[163].

A final point to note is that, again, the permissible objectives relate to the future. The AB intimated as much when it clarified that 'the word "objective" describes a "thing aimed at or sought; a target, a goal, an aim".'[164] The forward-looking character may be somewhat obscured by the fact that many measures taken under the analysed provisions relate less obviously to preventing something undesired from occurring in the future, but rather to preventing an undesirable present from continuing in the future.[165] However, it is easy to realise that both types of action are actually not different in kind.

3.3. Conclusion

The foregoing findings allow at least three conclusions. First, all surveyed rules coincide in that all explicitly define a set of permissible objectives and that all permissible objectives are

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[158] See generally Diebold, 'Morals and order exceptions'; Howse *et al*, 'Pluralism'.

[159] *US-Gambling (Panel)*, para 6.462.

[160] Ibid, para 6.465.

[161] Ibid, para 6.461.

[162] *China-Trading Rights (Panel)*, para 7.759; *Colombia-Textiles (Panel)*, paras 7.294ff.

[163] *EC-Seal Products (Panel)*, paras 7.381, 7.418. The *EC-Seal Products* panel further explained the required test (ibid, para 7.383).

[164] *US-Tuna II (AB)*, para 313, quoting Stevenson (ed), *Shorter Oxford English Dictionary*, 1970.

[165] Consider, eg, the *EC-Asbestos (Panel)*, *Korea-Beef (Panel)*, *US-Gambling (Panel)*, or *Brazil-Tyres (Panel)* disputes.

forward-looking. The definitions abstractly discriminate between 'interests' that may and 'interests' that may not be permissibly furthered. This commonality indicates that at least roughly setting out a set of permissible objectives, and thereby restricting the objectives that can be legally pursued, is a typical structural element of exception clauses containing a teleological necessity condition.[166] Notably, necessity can then only be assessed against a permissible objective.[167]

Second, under all rules the central questions is whether the objective of the challenged measure falls within the set of permissible objectives, but the necessity or propriety of even pursuing a permissible objective in the first place is not questioned.[168] In including a particular objective within the set of permissible objectives, the rule removes the question of the necessity or propriety of pursuing such a goal from the examination, thus leaving (in permissive rules of the type here under examination) the decision of whether or not to pursue a permissible objective to the acting state.[169] The degree of the state's resulting 'end-setting discretion' depends on how wide or narrow the defined set of permissible objectives is, as well as on how precise or vaguely it is formulated. Vague regulation tends to grant the acting state more discretion in choosing which objectives it seeks to pursue, while narrow definitions and precise enumerations of permissible objectives limit that discretion.

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[166] Barak, 'Principled Balancing', 6; Klatt and Meister, *Constitutional Structure*, 25; Rivers, 'Proportionality and Discretion', 113; Barak, *Proportionality*, 254; Akande and Lieflaender, 'Clarifying Necessity', 569. Similarly, in morality the acceptability of a measure depends first on whether it pursues a proper goal (see Letsas, 'Rescuing Proportionality', 321) or just cause (just war theory).

The restriction to permissible objectives is expressive of a more general feature of law, namely that it simplifies by excluding certain reasons and interest from legal considerations that may well be relevant in other contexts (see Lowe, 'Function', 211; also Sunstein, 'Incommensurability and Valuation', 786).

[167] This is of particular relevance where a measure pursues, directly or indirectly, more than one objective, as the analysis of that measure's necessity must be limited to assessing it against the permissible objective, not all its objectives (see Barak, *Proportionality*, 324).

[168] See *US-Gasoline (Panel)*, para 6.22; *EC-Sardines (Panel)*, para 7.120. See also Newton and May, *Proportionality*, 142-143; Barak, *Proportionality*, 320; Kurtz, 'Adjudging the Exceptional', 368. In contrast, as Walzer showed (Walzer, *Just and Unjust Wars*, 240-41), in political morality the question of necessity arises at two levels: first, is the action necessary to reach the objective? Second, is achieving the objective necessary?

[169] See *US-Continued Suspension (AB)*, para 531: 'Whilst WTO Members have the right to take SPS measures, they are not required to do so'; *Brazil-Tyres (AB)*, para 140.

Third, the precise sets of permissible objectives provided by each rule, as well as their respective precision, naturally differ; each rule is idiosyncratic in this regard. This idiosyncrasy extends not only to the type of permissible objectives, but also to the way in which they operate. On the one hand, self-defence and the surveyed trade law rules rely on self-standing definitions of permissible objectives. The State of Necessity, on the other hand, has recourse to a combination of both the abstract quality of the interest and the particular threat against that interest. It may be speculated that this difference is due to the impossibility of providing even a rudimentary definition of 'essential interest' in the abstract, combined with the heightened danger of abuse of the State of Necessity.[170]

In general, it may thus be concluded that there is far-reaching structural unity between the surveyed rules, in that all provide a set of permissible objectives that are forward-looking in nature, that the questions of the necessity or propriety of actually pursuing a permissible objective is removed from the examination, and that all define permissible objectives with reference to 'interests' that may be furthered. In contrast, the actual set of permissible objectives is idiosyncratic.

4. Second order objectives: addressing a threat against a permissible (first order) objective

The foregoing section noted that objectives are forward-looking, ie by definition relate to the future. This insight has the important consequence that the notion of permissible objectives must be further refined in order to properly operationalize a requirement of teleological necessity in exception clauses.

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[170] Pointing to the danger of abuse is a commonplace in discussions of the State of Necessity. Thus, the Italian-US Conciliation Commission considered in 1953 that 'the right of necessity [is] very often ... only an expedient created in order to legalize the arbitrary' (*Armstrong Cork*, 163). William Pitt famously said that necessity 'is the argument of tyrants; it is the creed of slaves' (quoted in Hill, 'Necessity Defense', 566). See further only ILC, *Government Comments 2001*, 56 (UK); ILC, *Yearbook 1980*, 1616th meeting, para 10 (Schwebel); Allott, 'State Responsibility', 17, 21; Waldock, 'Regulation', 461-462; Weidenbaum, 'Necessity', 105; Sloan, 'Necessity'; Raby, 'Necessity', 261; Tomuschat, 'General Course', 287; Laursen, 'Use of Force', 499-500, and Okowa, 'Defences', 398 (both summarizing different views).

In a simple model, an objective may be defined as a desired future state-of-affairs with respect to the interests sought to be furthered. Achieving an objective obviously only requires action where the desired future state-of-affairs differs from the future state-of-affairs that will materialise if no action is taken. The problem as regards teleological necessity arises from the fact that the exact future state-of-affairs is often very difficult or even impossible to predict with any precision. Where the future is contingent in this sense, the model of teleological necessity outlined thus far no longer suffices: the teleological necessity of a measure implies the absence of any admissible possible worlds in which the measure is not taken but the objective still achieved, whereas uncertainty about the future indicates that the desired future state-of-affairs might materialise even without the measure. Thus, under conditions of uncertainty about the future, a measure could never be strictly speaking necessary. To come to terms with this problem, the notion of threat needs to be introduced.

This section first introduces the mentioned refinement, again identifying crucial questions that each rule operationalizing teleological necessity must answer (section 4.1.), before surveying how the rules under scrutiny do answer these questions (section 4.2.).

4.1. Theoretical considerations: the notion of threat against objective and knowledge-dependence of threat analysis

4.1.1. The notion of threat

A threat exists where there is a positive possibility that the present state-of-affairs leads, via a causal chain, to an undesired 'threatened' future state-of-affairs that diverges from the desired future state-of-affairs.[171] Where it is less than fully certain whether the threatened or the desired future state-of-affairs will materialise (as is typically the case), a differentiation must be undertaken between a measure's first order and second order objectives: the first order objective remains the desired future state-of-affairs, which corresponds to the objectives considered in

[171] See Walker, 'Myth', 200.

section 3. The second order objective, in contrast, is the reduction or elimination of the threat against the first order objective. In a condition of future contingency, teleological necessity can only be meaningfully assessed against the second order objective: a measure is teleologically necessary not only if no possible world exists in which the desired state-of-affairs materialises without the measure being taken, but also if no possible world exists in which the existing threat is reduced by the desired degree without the measure being taken.

Because of the close connection between the first order objective, the threat against it, and a measure's teleological necessity, to cope with future contingency it is not sufficient for an exception clause enshrining a requirement of teleological necessity to set out only the set of permissible first order objectives. Rather, it must complement this set with some provision on the set of permissible second order objectives. In practical terms, this means that the rule has to indicate which form of threat reduction constitutes a permissible goal. It can conceivably do so in two ways (which are not mutually exclusive): first, the rule could prescribe that a certain threat threshold must first be crossed before a reduction of that threat may be pursued. A minimum threat threshold essentially requires a state to tolerate certain levels of threats without being able to act in response. Second, the rule could exclude measures that do not bring about a sufficient threat reduction, in effect requiring a measure to cross a threshold of effectiveness. Since the issue of minimal effectiveness is addressed later,[172] the present section only examines whether the surveyed rules require a minimum threat threshold to be crossed before action can be taken.

To understand which challenges exception clauses requiring teleological necessity face in doing so, it is necessary further to define the notion of threat. Basically, a threat consists of two essential elements.[173] First, the notion of threat implies that it is, to a larger or smaller degree,

[172] See section 7.1.2 and chapter II, section 3.3.1.

[173] See Schropp, 'Commentary', 193; also Foster, 'Rotten', 325ff; Foster, 'Public Opinion', 439ff; Akande and Lieflaender, 'Clarifying Necessity', 564; McCormack, *Self-Defense in International Law*, 263; Gruszczynski, *Regulating Health*, 8 (his description of the 'technical paradigm').

uncertain that the threatened future state-of-affairs materialises.[174] The overarching concept of uncertainty in effect denotes a combination of two distinct notions. Going back to Knight's seminal work on the topic, a distinction can be drawn between risk, on the one hand, and true or 'Knightian' uncertainty on the other.[175] In Knight's own words:

> It will appear that a measurable uncertainty, or 'risk' proper, as we shall use the term, is so far different from an *unmeasurable* one that it is not in effect an uncertainty at all. We shall accordingly restrict the term 'uncertainty' to cases of the non-quantitive [sic] type. [This latter kind is] 'true' uncertainty [.][176]

Both risk and true uncertainty affect our ability to predict less than fully certain events, but in different ways. In a situation marked by risk, 'we cannot be sure what tomorrow will bring, but we can rest assured that unforeseen events will be drawn from known probability distributions'.[177] True uncertainty exists either where an objective measurement of probability is impossible (objective true uncertainty)[178], or where a subject has no knowledge of the measurable probability (subjective true uncertainty)[179]. A combination of risk and true uncertainty (in both variants) then constitutes what is referred to here as the 'threat certainty'.

In addition to threat certainty, the second constituent element of a threat is the severity of consequences if the threat materialises. Crucially, this refers to the degree to which the undesired threatened future state-of-affairs differs from the desired one. Some sense of magnitude is typically required, since it matters not only whether the two future state-of-affairs differ, but also how much they differ. The degree of divergence between the threatened future and the desired

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[174] The concept of uncertainty is central to most definitions of threat or risk. See only the ISO 31000 (2009) / ISO Guide 73:2002 definition of risk as the 'effect of uncertainty on objectives'.

[175] See Dobos, 'Necessity of Precaution', 381.

[176] Knight, *Risk, Uncertainty and Profit*, 20 (emphasis in the original).

[177] Nelson and Katzenstein, 'Financial Crisis', 362.

[178] See Keynes, 'General Theory', 214, for a well-known description of objective uncertainty.

[179] See Hansson, 'Risk', section 2, for a good example of subjective uncertainty.

future can be referred to as the 'threat magnitude'. The combination of threat certainty and threat magnitude can then be expressed as the overall 'Level of Threat' ('LoT').[180]

When a rule incorporates a requirement of teleological necessity and where the future is at least to some degree contingent, the rule must decide whether it requires a certain minimum LoT. If a minimum threshold is required, the rule must further indicate whether this threshold is defined by reference only to an overall LoT (with the factors of threat certainty and magnitude somehow combined to form an overall LoT), or whether it sets individual minimum levels for both certainty and magnitude. Before proceeding to examining the surveyed rules in this regard, however, it is necessary to briefly highlight one final element of the notion of threat, namely its knowledge-dependence.

4.1.2. Knowledge-dependence of threat analysis

In his ground-breaking work on the 'risk society'[181], the sociologist Beck exposed that threats (as understood in this thesis) are 'in a central sense at the same time real and unreal.'[182] They are unreal because they relate to a future that has not yet materialised, yet are also real because the projection of future catastrophes and dangers shapes experiences and actions in the present.[183] In this context, the unreality of the threatened future becomes real and tangible in the present only when and where counterfactual[184] prediction takes place.[185] In turn, the need for

[180] LoT is equivalent to Hansson's 'expectation value': 'The expectation value of a possible negative event is the product of its probability and some measure of its severity' (ibid, section 1).

[181] Beck, *Risikogesellschaft*.

[182] Ibid, 44 (translation by the present author).

[183] Ibid, 44, 69.

[184] A counterfactual, describing an 'unactualised possibility' (Menzier, 'Causation'), can take two forms - if x, then y (future); if x had been, then y would have been (past).

[185] Against the background of the necessary element of knowledge-dependent prediction of an as-of-yet unreal future, one might disagree with Ago, who explained that '[t]he concept of "state of necessity" gradually came to mean a factual situation forming the setting in which a certain State act was committed' (Ago, *Addendum*, para 72), and rather side with Nitzsche's adage that '[n]ecessity is not fact, it is interpretation' (cited after Heathcote, 'State of Necessity', 49) or Hume's declaration that 'necessity is something that exists in the mind, not in objects' (cited after

counterfactual prediction highlights the 'knowledge-dependence'[186] of the notion of threat, since the ability to make counterfactual predictions about an as-of-yet unreal future depends crucially on knowledge of facts and causalities.[187]

Notably, while this knowledge-dependence is clearest as regards the future, it also exists for counterfactual analyses of the past. For example, where it is analysed whether a measure that was actually taken was necessary to eliminate a threat which, in reality, did not materialise, a counterfactual and knowledge-dependent reconstruction of an alternative possible history in which the measure was not taken is needed to conclude on whether the threat would have materialised without that measure.[188]

The type of knowledge required depends on the type of threat at hand, with the consequence that the methodology to be used and the reliability of the results vary according to the threat.[189] One might broadly distinguish between threats with a social component, ie threats where human behaviour constitutes part of the relevant causal chain, and those without it. Examples for the former may be economic, military, or political threats. Knowledge (in particular concerning causal relations) about these types of threats mostly derives from 'soft' sciences, such as economics and political sciences, which have limited predictive and explanatory capabilities under 'real world' conditions.[190] Predictions about threats with a social component thus typically

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Vaidya, 'Epistemology of Modality'). Similarly, Pinto contemplated that 'it may well be that necessity was not a state or condition of things, but rather an interpretation or evaluation of a situation, and therefore a state of mind' (ILC, *Yearbook 1980*, 1618th meeting, para 3 (Pinto)). See finally also Agamben, *State of Exception*, 29-30.

[186] Beck, *Risikogesellschaft*, 36 (translation by the present author).

[187] Knowledge of causalities in play is notably also required to know which facts are relevant in the first place. On the interplay of counterfactuality and causal reasoning, see Speallman and Kincannon, 'Counterfactual'; Menzier, 'Causation'.

[188] See, eg, Rodin, 'The Problem', 147, speaking of the need for a 'counterfactual history'. Backward-looking counterfactual analysis is particularly typical of judicial dispute resolution over events that already occurred.

[189] See *US-Continued Suspension (AB)*, para 562.

[190] For example, Lazar pointed out that 'in the chaotic context of war' making any counterfactual predictions 'is extremely difficult, if not impossible' (Lazar, 'Non-combatant immunity', 61). Sacerdoti observed that '[c]ausation in economic matters does not lend itself however to a strict deterministic evaluation, otherwise than in exact sciences' (Sacerdoti, 'Application of BITs', 13).

involve a high degree of subjective judgment that cannot be fully justified with scientific methods. Unsurprisingly, in the realm of social sciences disagreement abounds.

Examples of threats without immediately obvious social components are environmental or health threats, knowledge about which typically stems from 'hard' natural sciences. The natural sciences are often assumed to be better able to provide objective knowledge[191] that allows better predictions about the future, not reliant on subjective judgments. Thus, natural sciences are seen as a 'neutral arbiter'[192], for example in the assessment of threats. However, precisely this perception of the natural sciences as being neutral and objective became subject to criticism over the last few decades and has to be nuanced.[193] For one, it is highly likely that most threats typically assessed with the help of natural sciences also include a social component, since it must be assumed that most threats result from a combination of human behaviour and non-social elements.[194] For example, in the *EC-Hormones* case the AB recognised that the threat posed by growth hormones stemmed, in part, from the possibility of maladministration.[195] The AB eloquently stressed that:

> risk that is to be evaluated in a risk assessment under Article 5.1 [SPS] is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.[196]

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[191] See Peel, *Science and Risk*, 65, summarising the idea of science as 'value-free and objective'; and see Burke-White and von Staden, 'Extraordinary Times', 361.

[192] Walker, 'Myth'.

[193] See *Pulp Mills* (Cancado-Trindade), para 80; see generally Peel, *Science and Risk*; Walker, 'Myth'; also Beck, *Risikogesellschaft*, 36ff, 79.

[194] See, eg, *Gabcikovo*, para 55, where the Court pointed out that 'any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation'. The Court considered that since the 'final rules of operation had not yet been determined', the dangers remained uncertain. In *Japan-Apples 21.5 (Panel)*, para 8.140, the Panel stressed the importance of taking 'non-laboratory conditions' into account.

[195] See further *US-Continued Suspension (AB)*, para 535.

[196] *EC-Hormones (AB)*, para 187. See also ibid, para 206.

In addition to the frequent inseparability of social and non-social threats, scholars have pointed out that also natural sciences often involve significant areas of non-scientific judgment.[197] For instance, many areas of natural sciences rely on so called 'science policies', which for example embody standards of the scientific community on how to interpret raw data to allow meaningful conclusions.[198] Such 'science policies' are social conventions, that are neither objectively right or wrong, thus introducing a non-scientific element also in the 'hard' natural sciences.[199] In the end, and unavoidably, also in the natural sciences disagreements among experts are plentiful.[200]

Despite the difficulties of prediction faced as regards both social and non-social threats, attempts to use the best knowledge available and minimise the uncertainties arising from a lack of knowledge mean that experts (ie, those individuals possessing the best knowledge of facts and causalities in a particular field) are typically resorted to where counterfactual analysis is needed, for example where the existence and level of a threat are in question.[201] The usefulness of having recourse to experts is, however, often marred by divergence of expert opinions.[202]

The limitations of knowledge, both inherent limitations stemming from the nature of certain types of knowledge and those arising from more mundane gaps in causal and factual information, draw attention to the fundamental difficulties that exist in objectively assessing the existence, certainty, and magnitude of a threat. In a large number of circumstances an actually objective assessment of threats seems impossible. Yet, deciding whether a given measure is or

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[197] See generally Walker, 'Myth'. See also, eg, *Australia-Salmon 21.5 (Panel)*, para 7.47, noting that scientific risk assessment 'inevitably includes subjective elements'; Foster, 'Social Science Experts', 446, summarizing the views expressed in a social science amicus brief submitted in the *EC-Biotech* case, noting that risk assessment and management can never be 'purely technical'.

[198] See Button, *Power to Protect*, 97ff.

[199] See Peel, *Science and Risk*, 211; Walker, 'Myth', 213ff.

[200] See Peel, *Science and Risk*, 93.

[201] For examples taken from international law, see only *Gabcikovo*, the Argentina investment arbitration cases, and many WTO disputes on necessity. See also *SoCoBelge* (Eysinga), 182; and generally *Pulp Mills* (Al-Khasawneh and Simma), paras 3, 17: Desierto, *Necessity*, 157; Pauwelyn, 'Economics', 17. On the use of experts in WTO dispute settlement procedures see Marceau and Hawkings, 'Experts'.

[202] Disagreement is typically the case in situations of true uncertainty; see Al-Najjar, 'A Bayesian Framework', 16.

was teleologically necessary to counter a given threat is likewise impossible without some form of threat assessment. In such circumstances, two separate questions must be asked: first, it must be clarified what constitutes a 'sufficient' threat under the particular rule; second, it must be clarified how such a 'sufficient' threat can be established to the satisfaction of a court under conditions of epistemic uncertainty. The latter question primarily relates to the burden and standard of proof as well as the applicable standard of review, addressed in chapter III. Accordingly, the present section is confined to analysing the definition of a 'sufficient' threat under the surveyed rules.

4.2. Empirical survey: the required threat threshold against permissible objective in the surveyed rules

4.2.1. State of Necessity

Article 25(1)(a) ASR specifies the threat that must exist before a state can rely on a State of Necessity by requiring the existence of a 'grave and imminent peril'.[203] The commentary notes that mere apprehension of a threat is insufficient;[204] there must, accordingly, be some threat with both a positive threat certainty and threat magnitude.

To start, the reference to an 'imminent peril' in Article 25(1)(a) ASR *prima facie* appears to denote a temporal requirement, apparently affirming the classic demand that the 'danger must be imminent in point of time'.[205] As the tribunal held in *LG&E*, the threat 'must be imminent in the sense that it will soon occur.'[206] However, on closer examination the imminence requirement is actually much more about certainty than temporal proximity. In *Gabcikovo*, the ICJ juxtaposed 'imminence' with 'possibility' and held that even a 'far off' peril can be imminent as long as it is

[203] Imminence was already required before codification by the ILC. See, eg, *Anglo-Portuguese Dispute*, 232; *Virginius*, 236-237; *ILO Greece Inquiry*, para 110.

[204] ILC, *2001 Commentary*, Article 25, para 15. See also *Neptune* (Gore), 415-417 (relying on Grotius), explaining that the danger must be 'not an imaginary but a certain danger'; Buza, 'Necessity', 214; Cheng, *General Principles*, 71.

[205] See Rodick, *Necessity*, 6, summarising the views of Grotius. The ILC commentary merely notes that imminence requires the peril to be 'proximate' (ILC, *2001 Commentary*, Article 25, para 15).

[206] *LG&E*, para 253. See also *Anglo-Portuguese Dispute*, 232.

not thereby 'any less certain and inevitable.'[207] Requiring only certainty instead of temporal imminence makes much conceptual sense.[208] The reasons are clear: where the realization of a sufficiently grave threat is certain, it is hard to understand why it should matter *per se* whether the threat will materialise in the near or distant future. As Buza wrote, '[t]he law does not require waiting for the last moment; this would be wanton.'[209] This is not to say that temporal proximity plays no role whatsoever; as discussed below, temporal factors have great evidentiary value and are relevant in the assessment of whether the scrutinised measure was without alternatives.[210]

As regards the degree of certainty, the insistence on the threat being 'certain and inevitable' appears to require full certainty or at least a very high level of certainty.[211] Such a standard is, however, exceedingly difficult to comply with when it comes to counterfactual predictions.[212] In complex cases, the knowledge of facts and causalities is bound to be imperfect and the future 'always contingent.'[213] Even ignoring, for the moment, the uncertainty that can arise from diverging threat assessments and expert opinions, it would appear that cases in which a threat can be assessed as highly certain are very rare indeed, if not inexistent.[214]

There are some indications that less than full certainty can suffice. Revisiting the ASR after *Gabcikovo*, Special Rapporteur Crawford considered that

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[207] *Gabcikovo*, para 54.

[208] See ILC, *Yearbook 1980*, 1617th meeting, para 29 (Barboza); Barboza, 'Necessity (Revisited)', 40-42.

[209] Buza, 'Necessity', 214.

[210] See sections 4.3. and 7.4.2.

[211] See Dobos, 'Necessity of Precaution', 381; Heathcote, 'State of Necessity', 99; Christakis, 'Pas de Loi?', 24. Critical of this high standard: *Gabcikovo* (Herczegh), para 185; Dobos, 'Necessity of Precaution', 397; and Fitzmaurice, 'Necessity', 190 (as regards environmental cases); Parish, 'On Necessity', 181.

[212] See Crawford, *Second Report*, para 289.

[213] Heathcote, 'State of Necessity', 105. See also Foster, 'Necessity and Precaution', 267; Dobos, 'Necessity of Precaution', 397.

[214] Notably, this problem could not be fully overcome by applying a lenient standard of review either. Even if a court accepted the acting state's threat assessment with full deference, it is hard to see how any threat assessment, given the limits of knowledge discussed above, could result in a finding that the materialisation of a threat is fully certain.

> By definition the peril will not yet have occurred, and it cannot be required that the invoking State prove that it would certainly have occurred otherwise. It is difficult and may be impossible to prove a counter-factual. ... [A] measure of scientific uncertainty about the future [should not] disqualify a State from invoking necessity, if the peril is established on the basis of the evidence reasonably available at the time (as based, for example, on a proper risk assessment procedure), and the other conditions laid down for necessity are met.[215]

This concession to uncertainty, however, appears to only relate to uncertainty as the inability to prove conclusively, which appears to be more about the required standard of proof than the required threshold of certainty. Crucially, the question of how certain the threat must be on the basis of the available evidence remains unanswered. The use of the term 'establish' would again point to a high level of certainty. With the small exception relating to the inability to prove conclusively, it can then be concluded that the State of Necessity requires very high levels of certainty, approaching full certainty.[216] While making sure that the State of Necessity cannot easily be invoked, this high standard also runs the risk of rendering the State of Necessity all but obsolete by making its invocation nearly impossible.[217]

Moving on to the question of threat magnitude, the reference in Article 25(1)(a) ASR to a 'grave ... peril' certainly implies that a minimum of magnitude is required.[218] Nevertheless, practice

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[215] Crawford, *Second Report*, para 289. See also Ago, *Addendum*, para 37; ILC, *2001 Commentary*, Article 25, para 16. It is not clear whether Crawford had only scientific uncertainty in mind. Crawford, *Second Report*, fn.563, appears to indicate that all forms of uncertainty are covered. Accepting two different standards would indeed be difficult (see Christakis, 'Pas de Loi?', 24-25).

[216] See *Gabcikovo*, paras 55-56.

[217] As Judge Herczegh noted (ibid, para 185), the high certainty requirement applied in *Gabcikovo* meant that Hungary would effectively have had to construct the dam and wait for the threat to actually materialise in order to prove that it was sufficiently certain.

In the few cases where the existence of an imminent peril were accepted, it appears that the threat was already in the course of materialising when responsive measures were taken, rendering counterfactual prediction of what would happen without the measure more feasible (see, eg, *Impregilo*, paras 347-350).

[218] See also Ago, *Addendum*, paras 11, 13. The gravity requirement was sometimes related to the status quo, rather than the threat against the first-order objective (see *Enron*, paras 306-307; *Sempra*, paras 348-349), an approach that is conceptually confused (see, eg, Gazzini, 'Common Understanding', 18; Song, 'Scylla and Charybdis', 252). See also *Kate A. Hoff*, 446-447; *Continental Casualty*, para 180.

has so far not elaborated on the 'mysterious concept' of a 'grave' peril.[219] This may be so because the gravity of a threat is not purely a question of threat magnitude, but one that involves a strong evaluative element. Indeed, the gravity of a threat seems best understood as the combination of the importance or 'normative weight'[220] of the threatened interest and the magnitude of the threat. In the case of the State of Necessity this makes particular sense, since it was already discussed above that the reference to an 'essential interest' actually incorporates the gravity of the threat.[221] While the precise contours of the 'grave peril' threshold are thus elusive, it is clear that the combination of threat magnitude and the threatened interest's normative weight must reach a relatively high level.

Having thus considered threat certainty and threat magnitude separately, it may be asked whether the two constitute separate and independent thresholds, or whether in reality the applicable threshold is a combination of both, such that a particularly high threat certainty can offset a low magnitude and *vice versa*.[222] Such a connection has been suggested in older cases. For example, in the *Chichester* case the British Law Officer opined that '[u]nder circumstances involving such serious consequences, I do not think that the Mexican Government were called upon to incur any risk'.[223] Despite these suggestions, however, newer practice[224] has rather treated certainty and magnitude as separate requirements, so that they should now be accepted as such.

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[219] Parish, 'On Necessity', 181. See also Dobos, 'Necessity of Precaution', 380; Boed, 'State of Necessity', 28.

[220] The notion of normative weight is discussed in more detail below; see in particular chapter II, section 2.3.

[221] See section 3.2.1.

[222] See, eg, Dobos, 'Necessity of Precaution', 398-399.

[223] *Chichester*, 231. For another example see *Russian Indemnities*, 442.

[224] Eg, *Gabcikovo*, para 56, noting that '[h]owever "grave" [the threat] might have been, it would accordingly have been difficult ... to see the alleged peril as sufficiently certain and therefore "immiment" in 1989', and thereby suggesting that the two elements do not interact. See also ibid, para 57.

4.2.2. Self-defence

As regards self-defence, it makes sense to initially separate responsive self-defence, 'anticipatory'[225] self-defence, and the particular case of self-defence against non-state actors. With respect to the first, the certainty element – or indeed the need for a threat – has received little attention. Where an armed attack has occurred, the existence or certainty of a threat is not in issue. It does not appear, however, that this is so because no or only a low threat certainty is required, or that no threat must be established at all. Indeed, as discussed above, the permissible objectives also of reactive self-defence are forward-looking, which implies that the presence of a qualified threat putting the desired future in question is required before defensive action can be taken.[226] Rather, the better reading is that as soon as an armed attack occurs it is treated as establishing that a continuing threat with sufficiently high threat certainty exists,[227] which in turn highlights how past events can have a role to play in predicting the future.[228] This reading is affirmed by the requirement that in order to trigger the attacked state's right of self-defence, an attack that already occurred must have been intentional,[229] as an accidental attack does precisely not indicate any actually ongoing threat against the attacked state. However, the fact that threat certainty is simply assumed as being sufficient after an intentional armed attack makes is difficult to determine the exact certainty threshold required.

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[225] As Deeks noted, different terms are used to denote self-defence in advance of an armed attack: anticipatory, pre-emptive, and preventive (Deeks, 'Taming', 662). This thesis uses the term anticipatory self-defence for any self-defence taking place in advance of an armed attack. In contrast to the definitions provided by Deeks (ibid, 663), it does not thereby imply a particular technical meaning of 'anticipatory' or a particular position on the legality conditions of such self-defence.

[226] See section 3.2.2.

[227] See British Law Officers (*Caroline*, 228); see also Tams and Devaney, 'Applying Necessity', 97; Green, *International Court*, 84, fn.122; Schmitt, 'Counter-terrorism', 24; Murphy, 'Preemptive Self-Defense', 735.

[228] See Lubell, *Extraterritorial Use of Force*, 53; Uniacke, 'Retaliation', 81.

[229] See Dinstein, *War*, para 611.

Certainty is much more prominent as regards anticipatory self-defence.[230] There is far-reaching agreement that anticipatory self-defence requires some level of certainty that an armed attack against the defending state can or will occur. While varying terminology is used to denote the level of certainty required, arguably the most frequent label under which the required level of certainty is discussed is that an armed attack against the defending state must be 'imminent'.[231] Of course, as Bethlehem has noted, there is ultimately 'little scholarly consensus on what is properly meant by "imminence" in the context of contemporary threats'[232], making it difficult to identify exactly what the imminence condition actually requires.[233] For one, it is again frequently suggested that imminence requires a temporal proximity, in the sense that the anticipated armed attack will soon occur.[234] However, as was argued to be the case with respect to the State of Necessity,[235] there are also good reasons for rejecting temporal proximity as an independent element of the law on self-defence, and instead focusing on threat certainty:[236]

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230 Indeed, it can more generally be maintained that necessity and proportionality generally speaking are of heightened importance when it comes to anticipatory self-defence (see Moir, *Reappraising*, 16 (quoting Jennings and Watts, *Oppenheim's International Law*); Ago, *Addendum*, para 120; Gardam, *Necessity*, 153-154).

231 Eg, the ICJ case-law has been interpreted by Kreß, 'Principle of Non-Use of Force', 581, to require imminence. See also *Nicaragua*, para 194, explaining that in this case 'the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised'.

232 Bethlehem, 'Self-Defense', 773.

233 See also Yoo, 'War in Iraq', 572; Green, 'Ratione Temporis', 105.

234 Lubell, 'Imminence', 699: imminence 'is traditionally used as a temporal description, pointing to a specific impending attack' (internal notes omitted). See also Green, *International Court*, 101; Green, 'Docking Caroline', 469.

235 See section 4.2.1.; and see Dinstein, *War*, para 544, discussing the applicability of the *Gabcikovo* approach to 'imminence' to self-defence. Lubell appeared to consider that the *Gabcikovo* standard is not applicable to self-defence (Lubell, 'Imminence', 703). In contrast, Wood, 'Nécessité', 285-286, endorsed the *Gabcikovo* notion of imminence.

236 See also Wilmshurst, 'Chatham House Principles', 967, noting that 'imminence cannot be construed by reference to a temporal criterion only'; Yoo, 'War in Iraq', 572; Zedalis, 'Pre-emptive Self-Defence', 214-215; Rodin, *War and Self-Defense*, 41 (but note that Rodin later repudiated his earlier views; see Rodin, 'The Problem', 161).

Zedalis nevertheless still saw an important role for a temporal element. He suggested that the degree of certainty demanded should be inversely proportionate to the temporal proximity of the threat materialisation, so a temporally still far-off threat would need to be more certain than a temporally proximate threat (see Zedalis, 'Pre-emptive Self-Defence', 221). The rationale behind his approach appears to be essentially the same as behind the proposal made below (see chapter III, section 5.2.) that depending on the temporal proximity of the threat materialisation, the standard of review/proof should be stricter or more lenient.

> For one thing, such an independent temporal limitation would mean that where a highly probable and severe threat exists, whose realization is temporally remote, no action could be taken even where no future opportunity will arise to eliminate the threat. The better argument is that where a threat is sufficiently [certain] and [of sufficient magnitude], the mere fact that it is still temporally remote should provide no independent injunction against action where that action is necessary and proportionate.[237]

As regards the required level of certainty, doctrine generally demands a high degree of certainty that an armed attack will occur.[238] The precise degree of certainty demanded, however, differs from author to author.[239] As a matter of fact, the debate over the required degree of certainty is so central to the entire debate over the legality of anticipatory self-defence that it appears that the latter can, for the most part, be reduced to the former.[240]

Finally, the condition of threat certainty may take on added importance in the context of self-defence against non-state actors located in another state. In a traditional setting of one state defending itself against another state, it can be maintained that by either attacking or preparing to attack, the attacking state 'has rendered itself liable to defensive force, which somewhat lowers the burden of justification for the defending state.'[241] It would appear that for a state hosting and possibly supporting non-state actors attacking or planning to attack another state, the question of liability to defensive force is more complex. For one, a state that is willing but unable to eliminate aggressive non-state actors would appear to have made itself much less liable to suffering defensive force than an aggressor state. On the other hand, a state that actively supports

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[237] Akande and Lieflaender, 'Clarifying Necessity', 565.

[238] Sofaer, 'Necessity of Pre-emption', 221; Bothe, 'Terrorism', 233; Franck, *Recourse to Force*, 108; Gardam, *Necessity*, 153-54; Gardam, 'A Role for Proportionality', 11.

[239] Compare only Waldock, 'Regulation', 498, 500; Brownlie, *Use of Force*, 259; Dinstein, *War*, paras 530ff; O'Connell, 'Lawful Self-Defense to Terrorism', 893-894; McCormack, *Self-Defense in International Law*, 267; Schmitt, 'Counter-terrorism', 23.

[240] Implicitly pointing in this direction: Alexandrov, *Self-Defense*, 165. See also Uniacke, 'Retaliation', 77-78, concerning ethics, who distinguished between unjustified responses to 'future threats' (developing, uncertain) and justified self-defence against 'actual threats of future harm' (certain to materialise).

[241] Akande and Lieflaender, 'Clarifying Necessity', 563. Liability connects to the notion of 'discounting', which is discussed later; see chapter II, section 3.2.3. Discounting and liability are virtually only relevant to self-defence, since under the State of Necessity and under WTO law the victim state has typically not rendered itself liable to suffering harm.

aggressive non-state actors (but short of the extent required to make their actions attributable to the state) would appear to be more liable to suffer defensive force, yet arguably still less than an outright aggressor state. In the end, the degree of liability appears to be situated on a sliding scale depending on factual circumstances, and appears to go hand-in-hand with a concordant variation of the justificatory burden of the defending state.[242] It can indeed be supposed that the quasi-presumption in favour of the defending state that operates after a classic inter-state armed attack may not operate with the same force in cases of armed attacks by non-state actors. The actual substantive standard, requiring a relative high threat certainty, would however not appear to be different.

In the light of these separate discussions of responsive and anticipatory self-defence, as well as self-defence against non-state actors, one cannot help asking whether there is actually any conceptual difference between them. In fact, it appears that there is none. At their basis, all three are directed at achieving one of the permissible forward-looking objectives of self-defence, eg repelling an armed attack: 'all self-defensive action is preventive'[243]. The main difference is that in the case of responsive self-defence, the fact that the armed attack has already occurred is treated as establishing a high level of threat certainty, whereas no similar 'shortcut' to establishing certainty is available in the case of anticipatory self-defence:

> Must defense against a future attack be measured by the same standard of imminency as defense against an initial one? The answer is 'yes,' but the mere fact that an entity has attacked once makes it easier to conclude that it will do so again. After all, the 'potential' attacker's state of mind has now been tangibly demonstrated.[244]

In self-defence against non-state actors, the reduced liability of the host state to suffer defensive force may impact the degree to which an armed attack that has already occurred is

[242] See ibid, 563; Statman, 'Can Wars be Fought Justly?', 442.

[243] Buchanan, 'Justifying Preventive War', 126 (paraphrasing McMahan).

[244] Schmitt, 'Counter-terrorism', 24. See also Deeks, 'Taming', 663-664.

sufficient to establish an ongoing threat.[245] While this explains why the question of threat certainty is more prominent as regards anticipatory self-defence and self-defence against non-state actors, it does not change the fact that all forms of self-defence are identical in their conceptual structure. More generally, it may then be supposed that whether or not an armed attack has already occurred, and who is the author of that attack, accordingly only impacts how compliance with the conditions of lawful self-defence is assessed; the substantive legality conditions appear, however, to be the same.

In consequence, if there is only a single set of legality conditions, the required certainty threshold must be the same for all cases of self-defence. Unfortunately, however, since the debate about certainty in the anticipatory self-defence context is not conclusive, and since the question is virtually never addressed as regards responsive self-defence and rarely explicitly as regards self-defence against non-state actors, it is difficult to draw a precise conclusion on what the required threat certainty threshold is. Drawing on the debate on anticipatory self-defence, it may however be said that the level of certainty must be high, with the exact degree being controversial.

Moving on from threat certainty to threat magnitude, with respect to self-defence the key appears to be in the armed attack requirement. Recall that the ICJ has held that less-grave forms of the use of force do not fulfil this condition,[246] which suggests that the threat embodied in the attack must be over a certain threshold of magnitude.[247] With respect to anticipatory self-defence and self-defence against non-state actors, it can be assumed that the threat must at least reach the gravity threshold that would qualify as an armed attack.[248]

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[245] In addition, as discussed below, the degree of liability of the host state may impact the necessity and proportionality calculi more generally; see chapter II, section 3.2.3.

[246] *Nicaragua*, para 191; see also *Eritrea/Ethiopia*, para 11. But see Wilmshurst, 'Chatham House Principles', 966, and Taft, 'Self-Defense', 300, denying any 'threshold of intensity'.

[247] See Cannizzaro, 'Contextualizing Proportionality', 782; van Steenberghe, 'Self-Defence', 184; Tams, 'The Use of Force Against Terrorists', 387; Szabó, *Anticipatory Action*, 293; Green, 'Ratione Temporis', 99.

[248] See Lubell, 'Imminence', 708-709. In *Nicaragua*, para 195, the ICJ held that 'in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation ... would have been classified as an armed attack rather than as a mere frontier incident had it been carried

Finally, again similar to the case of State of Necessity, it has sporadically been suggested that in self-defence threat certainty and threat magnitude should be read in conjunction, so that a particularly high threat certainty can offset a low magnitude and *vice versa.*[249] In particular when considering devastating threats with weapons of mass destruction, a lower degree of threat certainty is asserted to be acceptable.[250] Such a joint reading does not appear, however, to be widely accepted, so that it can be concluded that threat certainty and magnitude are in principle separate conditions. [251] Accepting a combination would also have undesirable normative consequences, since in case of particularly grave threats (eg, use of weapons of mass destruction) it could effectively erode the need for any substantive certainty, opening the door to too-wide an array of anticipatory action in self-defence.

4.2.3. WTO law

Under WTO law, the question of whether a minimum threat threshold – both in the sense of certainty and magnitude – applies was first addressed in the *EC-Hormones* case, concerning the SPS. In this case the panel's analysis could be read as suggesting 'that a certain magnitude or threshold level of risk [has to] be demonstrated in a risk assessment if an SPS measure based thereon is to be regarded as consistent with Article 5.1.'[252] The AB firmly rejected this imposition of a 'quantitative requirement' as having 'no basis in the SPS Agreement'.[253] It did, however, agree that purely theoretical threats, ie those resulting from the 'uncertainty that

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out by regular armed forces.' This Court was here concerned, however, with acts of non-state actors that were attributable to a state; the pronouncement is thus not final authority as regards non-attributable act of non-state actors.

[249] See Wilmshurst, 'Chatham House Principles', 967-68, and Yoo, 'War in Iraq', 572-576, regarding anticipatory self-defence.

[250] See Lubell, 'Imminence', 713; Greenwood, 'Pre-emptive Use of Force', 16.

[251] See Sofaer, 'Necessity of Pre-emption', 221, noting that even a great threat is not sufficient if it is unlikely to occur.

[252] *EC-Hormones (AB)*, para 186.

[253] Ibid, para 186.

theoretically always remains since science can never provide absolute certainty that a given substance will not ever have adverse health effects', were not sufficient.[254] In other words, apart from the requirement that some risk be positively established – or in the words of the AB, 'ascertainable'[255] –, no minimum requirement applies.[256]

While this position in *EC-Hormones* was developed with respect to the SPS, which explicitly requires a risk assessment in Article 5.1 SPS, it would appear that none of the other rules under scrutiny require a minimum threat either.[257] In the context of Article XX(a) GATT, the recent report of the AB in *EC-Seal Products* on first sight even suggests that no showing of any threat is required at all. The AB concluded that it did 'not consider that the term "to protect", when used in relation to "public morals" under Article XX(a), required the panel, as Canada had contended, to identify the existence of a risk to EU public moral concerns regarding seal welfare.'[258] This finding should not be overemphasised however, since it referred only to risk that 'may lend itself to scientific or other methods of inquiry'.[259] In fact, when assessed against the wider notion of threat underlying this thesis, the *EC-Seal Products* case implicitly confirms that some positive threat must exist. When upholding the panel's finding that the EU's measures

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[254] Ibid, para 186.

[255] See *Australia-Salmon (AB)*, para 125. The exact location of the threshold of 'ascertainable' is not obvious (see Peel, *Science and Risk*, 200; Gruszczynski, *Regulating Health*, 120).

An exception from this requirement is Article 5.7 SPS, responding to concerns similar to those underlying the precautionary principle. No similar 'safety valve' (Button, *Power to Protect*, 28), is available under GATT, GATS and TBT. The precautionary principle is not treated more prominently in this thesis because it embodies a paradigmatic shift that is different from simply requiring a low level of certainty (see ibid, 125). See *Japan-Apples (AB)*, para 184, holding that Article 5.7 SPS is not triggered by uncertainty, but by insufficiency of scientific evidence. See also *US-Continued Suspension (Panel)*, para 7.628.

[256] See also *Australia-Salmon (Panel)*, para 8.80. But see *Japan-Apples (Panel)*, para 8.181, which appears to endorse a minimum threat level requirement by dismissing a demonstrated threat as 'negligible' (see Button, *Power to Protect*, 47-49; Peel, *Science and Risk*, 227). The AB rejected Japan's challenge against this apparent minimum requirement of a non-negligible threat (*Japan-Apples (AB)*, para 240-241).

[257] But see Article XIV(a), fn.5 GATS, requiring a 'genuine and sufficiently serious threat'. This higher threshold, however, has had very limited impact in practice (see *US-Gambling (Panel)*, paras 6.467ff; *US-Gambling (AB)*, para 298).

[258] *EC-Seal Products (AB)*, para 5.198.

[259] See ibid, para 5.198.

made a contribution to protecting public morals, the AB implicitly also confirmed that a threat against public morals existed. As is discussed in more detail below,[260] a measure's contribution is exactly its impact on the threat facing the pursued objective. A measure cannot logically contribute to reducing an inexistent threat; in other words, a measure's contribution to an objective is dependent on the existence of a threat.

4.3. Conclusion

The comparative analysis again suggests partial convergence and partial divergence between the surveyed rules. First, all rules require that some positive threat exists. After all, where a challenged measure's objective will be reached in any event (ie, where there is no threat at all), that measure can hardly be considered teleological necessary.[261] Purely hypothetical or theoretical threats – such as those resulting from the impossibility of 'proving a negative'[262] (ie, the absence of a threat) – are not sufficient: '*vani timoris justa excusatio non est*'[263].

Second, the rules diverge on whether they do (State of Necessity, self-defence) or do not (WTO law) require a minimum threat threshold: under the former a 'simple threat'[264] does not suffice, whereas under WTO law any positive threat is sufficient. The reason why State of Necessity and self-defence are more demanding may well be the 'high stakes' involved,[265]

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[260] See section 7.1.

[261] Summing this up for NPM clauses, see *Oil Platforms* (Kooijmans), para 50: 'If the alleged threat to the "essential security interests" cannot be deemed reasonable, the measures taken are *eo ipso* not necessary.' See also *China-Auto Parts (Panel)*, para 7.361.

[262] The thesis speaks of the difficulties in 'proving a negative', though as Saunders argued, the difficulty of proving a fact is not connected to it being a 'positive' or a 'negative', but rather whether a factual claim asserts a 'universal' or 'existential' proposition (Saunders, 'Mythic Difficulty', 279ff). Of course, shifting the focus to 'universals' and 'existentials' would nicely connect with the use of necessity as a 'universal quantifier' in modal logic (see section 2.1.). Since, however, in most cases a 'negative' is a 'universal' and an 'existential' is a 'positive', it seems justifiable to retain the terminology lawyers are more accustomed to.

[263] Christakis, 'Pas de Loi?', 23.

[264] García Amador, *Third Report*, Article 14, para 14.

[265] As regards the State of Necessity the ILC (ILC, *2001 Commentary*, Article 25, para 1) and the Court (*Gabcikovo*, para 51) have stressed its 'exceptional' character. See also Ago, *Addendum*, para 11, pointing out that the threat would need to be 'extremely serious'.

considering their particularly sensitive context (justification for the use of force and the 'generality of operation of the customary [State of Necessity] exception'[266]) and the dangers of abuse (in the self-defence context particularly visible as regards the anticipatory variant). The normative consequence of a minimum threat threshold is that states are obliged to bear existing threats below this threshold without the possibility of acting to remove them, even where the threats go against essential interests.

Third, where minimum levels of threat certainty and threat magnitude are required, both elements appear to operate separately, in the sense that low certainty cannot be offset against high magnitude and *vice versa*. Conceptually, however, such a *iunctim* would be perfectly feasible, so that the law might well at some point develop in this direction.

Fourth, while both the State of Necessity and (anticipatory) self-defence feature a prominent imminence requirement,[267] this properly understood relates to threat certainty and notably does not denote an independent requirement of temporal proximity, in the sense of the threat having to materialise soon. That is not to say that the temporal proximity of the threat materialisation has no role to play: it has not – as Heathcote suggested with respect to the State of Necessity – become entirely 'redundant'.[268] But it does mean that the time factor only plays a conceptually residual, albeit practically important role. For one, temporal factors have great evidentiary value. Where the threat will soon materialise, it is reasonable to assume that it is generally, although not necessarily, easier to establish the causal chain with certainty. 'Shorter' causal chains are less complex, leaving less room for intervening variables and rendering counterfactual prediction more feasible.[269] In addition, the temporal aspect comes into play with

[266] Kurtz, 'Adjudging the Exceptional', 341.

[267] While imminence is hardly ever discussed in the WTO context, the panel in *India-Solar Cells (Panel)*, para 7.347, explicitly rejected the proposition that a threat would need to be imminent.

[268] Heathcote, 'State of Necessity', 96.

[269] See Lubell, 'Imminence', 711-712; and Bakircioglu, 'Contours', 161-162.

respect to possible alternative courses of action and the question of 'last resort' or 'last window of opportunity', which is addressed later.[270]

In conclusion, it follows that the existence of some positive threat (both as regards certainty and magnitude), and the absence of a temporal dimension are unified across the surveyed rules, whereas the additional minimal threat thresholds are context specific.

5. Necessity's domain: measures that are *a priori* impermissible regardless of their necessity

The previous two sections dealt with first and second order objectives. Whether a given measure pursues a permissible objective and responds to a sufficient threat are questions which must be answered before the requirement of teleological necessity can function, since necessity operates with reference thereto. However, they do not directly impact on the teleological necessity requirement itself; in this sense, they are external elements of the necessity standard. A further such external element is the domain in which teleological necessity operates.

After briefly introducing the idea of necessity's domain and *a priori* exclusions (section 5.1.), this section surveys necessity's domain in the rules under scrutiny (section 5.2.), before concluding on whether there is any overlap between the rules in this regard.

5.1. Theoretical considerations: how *a priori* exclusions function and why they matter

In exception clauses containing a teleological necessity standard, a given measure's legality is conditional upon that measure's necessity. Teleological necessity may not, however, be the only legality condition. Rather, the rule may exclude certain measures even where they might be teleologically necessary. Additional legality conditions may be implicitly or explicitly included in the rule. Necessity's domain then demarcates the set of measures for which an assessment against the necessity standard is required, and those measures that are excluded regardless of their

[270] See section 7.4.2.

compliance with that standard. The domain is an external element precisely because it does not depend on the measure's necessity – it is an absolute *a priori* exclusion.

Paying attention to *a priori* exclusions is important. There is, for one, the purely practical consideration that a state must know which measures it can potentially take under an exception clause if the measure is necessary, and which measures are excluded from the outset. In addition, and more interesting from a scholarly point of view, when applying rules containing a teleological necessity requirement, courts are not always perfectly clear whether they reject a certain measure because it is not teleologically necessary or because it is excluded *a priori*. This may be the case particularly with respect to implicit additional legality conditions, the application of which can be misread as applications of the necessity standard itself. If *a priori* exclusions are not carefully identified, findings that are really about *a priori* exclusions may be read as relevant pronouncements on necessity.[271]

The present section does not seek to exhaustively set out all legality conditions additional to teleological necessity enshrined in the surveyed rules. Rather, the purpose is to highlight the need for clearly distinguishing between proper applications of necessity and additional *a priori* exclusions. Since this need is particularly acute when it comes to implicit exclusions, the section concentrates mainly on these.

5.2. Empirical survey: *a priori* excluded measures in the surveyed rules

5.2.1. State of Necessity

Under the law on the State of Necessity, the first implicit *a priori* limitation that springs to mind is the requirement that measures must be taken in good faith. The requirement was asserted in various pleadings before the Permanent Court of International Justice ('PCIJ')[272]/ICJ[273] and

[271] A prominent case that exemplifies these dangers is *Oil Platforms*, discussed in chapter IV, section 3.2.2.

[272] *Serbian Loans (Pleadings)*, 259-60 (France).

[273] *Gabcikovo (Memorial Slovakia)*, 324.

has found support in doctrine.[274] It translates into requiring that the state asserting a State of Necessity 'must believe it exists' and 'have held that deep and genuine belief at the moment it decided to act contrary to its international obligations'.[275]

Two further *a priori* exclusions of certain measures function by reference to other rules of international law. Thus, pursuant to Article 26 ASR, the State of Necessity does not cover measures violating a norm of *ius cogens*. Despite the fact that at least one scholar[276] has doubted whether this exclusion is absolute, it cannot be doubted that Article 26 ASR acts as a firm bar to the invocation of the State of Necessity in case of *ius cogens* violations.[277]

Article 25(2)(a) ASR provides a systematically similar exclusion in setting out that the State of Necessity cannot be invoked where 'the international obligation in question excludes the possibility of invoking necessity'. Such exclusion can be explicit or implicit, in the latter cases often following from the object and purpose of the rule.[278] Practice has not defined the conditions under which reliance on the State of Necessity is excluded by a primary rule in any great detail.[279] The rule laid down in Article 25(2)(a) may not be absolute, in that it may not apply with full force where the interest as stake is either the state's bare existence[280] or one enshrined in a *ius cogens* norm[281].

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[274] Christakis, 'L'Etat avant le droit?', 44; Cheng, *General Principles*, 77.

[275] *Gabcikovo (Memorial Slovakia)*, 324. See also Fitzmaurice, 'Necessity', 186.

[276] See Spierman, 'Humanitarian Intervention', 536-41.

[277] See Christakis, 'Pas de Loi?', 22; see also Heathcote, 'State of Necessity', 82, arguing that the exclusion of *ius cogens* violations is in the end 'no more than a specific or concrete expression of the balancing of interests proportionality criterion' enshrined in Article 25 ASR. Similarly Spierman, 'Humanitarian Intervention', 541.

[278] ILC, *2001 Commentary*, Article 25, para 19.

[279] See *Wall Opinion*, para 140; *CMS*, paras 353-354; *BG Group*, para 409; *Vivendi*, para 262; *National Grid*, para 256.

[280] See Binder, 'Nichterfüllung', 138; Binder, 'Performance of Treaty Obligations', 19.

[281] See Vinuales, 'Peremptory Norms', 96.

5.2.2. Self-defence

As was the case with respect to the State of Necessity, the first exclusion enshrined in the law on self-defence is that defensive action must be taken in good faith.[282] Probably the best example can be found in the *Oil Platforms* case, where the Court's findings on the necessity of the American actions in reality rely on the application of the good-faith requirement, even if the Court did not say so explicitly and appeared to simply apply the necessity standard.[283] Indeed, rather than assess the actual necessity of the United States' acts, the Court only questioned the United States' own assessment:

> In the case both of the attack on the *Sea Isle City* and the mining of the USS *Samuel B. Roberts*, the Court is not satisfied that the attacks on the platforms were necessary to respond to these incidents. In this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, in the same way as it complained repeatedly of minelaying and attacks on neutral shipping, which does not suggest that the targeting of the platforms was seen as a necessary act. The Court would also observe that in the case of the attack of 19 October 1987, the United States forces attacked the R-4 platform as a "target of opportunity", not one previously identified as an appropriate military target ... .[284]

Again somewhat similar to the State of Necessity, the law on self-defence contains a number of exclusions by reference to other rules. One clear example is that no use of force can be justified as self-defence if it 'would be in violation of a Security Council resolution applicable in the case at hand'.[285] Much less clearly, the ICJ could be understood to have suggested, in *Nuclear Weapons* and in *Oil Platforms* that no defensive action can be justified when it breaches a rule of international humanitarian law.[286] As Judge Weeramantry explained, 'while the *jus ad bellum* only opens the door to the use of force ..., whoever enters that door must function subject to the

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[282] See Wood, 'Nécessité', 286; Bowett, *Self-Defence*, 143; Brownlie, *Use of Force*, 238; Wilmshurst, 'Chatham House Principles', 967; Kaye, 'Adjudicating', 160; but see Green, 'State of Mind', 183ff, disputing the existence of a good faith criterion.

[283] See Hayashi, 'Using Force', 19.

[284] *Oil Platforms*, para 76. See also ibid (Kooijmans), para 59.

[285] Corten, 'Necessity', 870.

[286] *Nuclear Weapons*, para 39; *Oil Platforms*, para 51.

jus in bello.'[287] This could relate both to the use of prohibited weapons[288] and rules related to the conduct of hostilities[289]. If this reading were correct, it would imply a problematic mixing of the *ius ad bellum* and the *ius in bello*.[290] For the purpose of this thesis the debate does not need to be resolved; it suffices to point out that if the outlined reading of the ICJ's jurisprudence was correct, it would establish an *a priori* exclusion.

Finally, it is often asserted that reactive defensive action must be not only necessary and proportionate, but that it must also be immediate, implying that defensive action must not be too temporally remote from the attack provoking it.[291] It is maintained that an immediacy requirement does not prevent an attacked state from taking some time after the attack has occurred to prepare its response, gather intelligence, etc;[292] but that a long and unjustified delay undermines the defensive action's legality.[293] Whatever the precise content of an immediacy condition may be,[294] however, it is questionable whether it actually provides a self-standing condition, or whether it merely describes one aspect of the larger teleological necessity condition and requirement to take action in good faith. Indeed, where a long time has passed between an

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[287] *Nuclear Weapons* (Weeramantry), para 519.

[288] Ibid, para 39; ibid (Shahabuddeen), 418-419.

[289] *Oil Platforms*, para 51.

[290] See Christodoulidou and Chainoglou, 'Proportionality in Self-Defence', 83. This mixing has been criticized by some (eg, Dinstein, *War*, para 464). Whatever the position in principle, defensive action directed against non-military targets will hardly count as necessary in the *ius ad bellum* sense (see Moir, *Reappraising*, 125; Green, 'Oil Platforms', 381). See also Gardam, 'Proportionality as a Restraint', 168.

[291] See Gardam, *Necessity*, 149-50; Green, 'Docking Caroline', 471-73; Dinstein, *War*, para 608; Lubell, *Extraterritorial Use of Force*, 44; Ruys, *Armed Attack*, 99; see against immediacy as a general requirement, Barboza, 'Necessity (Revisited)', 40. See also *Nicaragua*, para 237, which points to the time passed between the attack and the response. The Court's point here does not, however, appear to be the lack of immediacy as such, but rather that the attack had already been repulsed before the United States took action.

[292] A very strict immediacy requirement would of course sit uneasily with a possible obligation (see section 7.4.2.) to exhaust peaceful means before taking defensive military action (see Corten, *Law Against War*, 486).

[293] See Dinstein, *War*, para 615. The central element appears to be the justification for the delay advanced by the defending state. Thus, as Judge Schwebel pointed out in *Nicaragua*, the defending state should not 'be faulted for taking the time to pursue prior recourse to measures of peaceful settlement' (*Nicaragua* (Schwebel), para 209).

[294] Eg, in *Oil Platforms* the Court did not refer to any immediacy condition (see Ochoa-Ruiz and Salamanca-Aguado, 'Exploring', 519).

armed attack and the response thereto, with no further attacks/threats emerging, it may be asked how defensive action is necessary to remove a threat,[295] or whether such an action can still be seen as a good faith invocation of the right of self-defence.

5.2.3. WTO law

In WTO law, the best-known example of an *a priori* limitation is the *chapeau* in Article XX GATT and its analogues in the other agreements.[296] The *chapeau* subjects all measures 'to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. Notably, the *chapeau* includes the requirement that the measure must be taken in good faith.[297] Measures failing to comply with the *chapeau* cannot be justified under Article XX, regardless of whether they are teleologically necessary under Articles XX(a), (b), or (d). The fact that compliance with the *chapeau* is assessed after a preliminary conclusion on compliance with one of the sub-paragraphs is drawn does not detract from the fact that the chapeau functions as an *a priori* exclusion.

A second possible element of necessity's domain in the WTO context is the exclusion of measures that have a purely extraterritorial effect, the so-called 'jurisdictional limitation'.[298] For instance, the *US-Tuna* panel considered that 'measures taken so as to force other countries to change their policies, and that are effective only if such changes occurred, could not be considered "necessary" ... in the sense of Article XX(b).'[299] Considering the panel's reasoning[300]

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[295] It might be supposed that the longer the delay between an attack and the response, the more the defending state's justificatory burden (which is, as mentioned, rather minimal after an attack occurs) revives.

[296] The equivalent provisions are the *chapeau* in Article XIV GATS, Article 2.3 SPS. In the TBT, the equivalent requirement is mentioned in the preamble and otherwise read into Article 2.2 TBT.

[297] *US-Shrimp (AB)*, para 158; see also *US-Shrimp (Panel)*, paras 7.40-7.41; *China-Rare Earths (Panel)*, para 7.349; see also Desierto, *Necessity*, 225; Neumann and Türk, 'Necessity Revisited', 231.

[298] See generally Young, 'Trade Measures'.

[299] *US-Tuna*, para 5.39. See also *US-Shrimp (AB)*, para 164.

and the absence of any actual necessity assessment, the panel here appears to pronounce itself on an *a priori* exclusion contained in Article XX(b) GATT, not an element of the necessity standard. Whether such a jurisdictional limitation actually exists in the end is, however, unsettled.[301]

5.3. Conclusion

The foregoing comparison of necessity's domain in the surveyed rules allows two general conclusions: first, all the surveyed rules provide a series of *a priori* exclusions, indicating that such exclusions are indeed a frequent element of external limitation. Second, all the surveyed rules exclude measures not taken in good faith or violating *ius cogens*. While only the law on the State of Necessity states the second limitation explicitly, it is inherent in the very concept of *ius cogens* and asserting otherwise strains credibility.[302]

Beyond this, however, it third emerges that the particular set of *a priori* limitations is largely idiosyncratic to the particular rule. These conclusions then suggest that while *a priori* exclusions relating to good faith and *ius cogens* are unified across the surveyed rules, the set of exclusions is otherwise context-dependent.

6. The conception of necessity: the basic decision logic of necessity

Having dealt with first and second order objectives, as well as necessity's domain, the external elements with reference to which necessity operates are now sufficiently clarified. Moving on to the heart of the matter, the conception of necessity comes into focus. In this context, the conception of necessity refers to the decision logic that applies when assessing a measure's necessity. Put differently, by what criteria is it decided whether a measure, which seeks

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[300] See *US-Tuna*, para 5.38.

[301] See *US-Shrimp (AB)*, para 133, where the AB refused to 'pass upon the question'; similarly *EC-Seal Products (AB)*, para 5.173; in consequence, the law is 'unsettled on the extent to which it permits a Member state to take legislative action designed to have an impact exclusively beyond that Member's border' (Howse *et al*, 'Pluralism', 123; see also Levy and Regan, 'Seals', 372).

[302] See, eg, *Oil Platforms* (Simma), para 9. See also Nagel, 'War and Massacre', 126ff, for a moral argument concerning the need for some absolute restrictions not subject to any cost-benefit analysis.

to protect a permissible objective against a sufficient threat and which is not *a priori* excluded, counts as necessary?

This section explores the conception of necessity in the surveyed rules, before the next section examines how that conception is filled with more detailed content. To achieve its task, this section initially introduces three different possible conceptions of necessity (section 6.1.), followed by an analysis which of these conceptions the surveyed rules actually enshrine (section 6.2.).

6.1. Theoretical considerations: three competing conceptions of necessity

Returning to the notion of necessity in linguistic philosophy, it must be recalled that necessity attaches to propositions that are true in all admissible possible worlds.[303] A given measure can thus only be considered (teleologically) necessary where no admissible world exists in which the measure is not taken, which points to the crucial element: the absence of viable alternatives. The relevance of the existence or absence of alternatives indicates that in the abstract model of necessity derived from linguistic philosophy, necessity is a relational concept. This means that a measure's necessity cannot be assessed simply by considering the characteristics of that measure, but rather by relating a given measure's features to those of any set of alternative measures. The central question then becomes which characteristics an alternative measure must possess to refute the original measure's necessity.

One possible answer to the above question is that the precise characteristics of an alternative do not matter greatly, since necessity is premised on the absence of any alternative whatsoever. In this sense, in order to be considered necessary the challenged measure must be the 'one and only' available (hence, this approach might be is termed the 'exclusivity conception'). Apart from some very basic exclusion criteria (objective impossibility of taking the alternative measure; the alternative is objectively incapable of making any contribution whatsoever to

[303] See section 2.1.

achieving the challenged measure's objective), under this first possible conception the features of the alternative (such as the harm it causes as a side-effect of achieving its objective) are irrelevant.

A second possible conception of necessity is more nuanced, focusing on the absence of 'qualified' alternative measures. Under this approach (which is termed the 'comparative conception'), an alternative must possess certain characteristics, defined by reference to the characteristics of the original measure or some independent set of criteria, in order to refute the original measure's necessity. It is clear that a measure is more likely to be considered necessary under this conception, as the set of 'qualified' alternatives is smaller than that accepted under the 'exclusivity conception'.

The two mentioned conceptions are both relational in nature and thus differ only in degree, not in kind. They are both compatible with the construction of necessity derived from linguistic philosophy. There is, however, a third possible conception of a different kind, one not relying on relational logic at all. Putting the insights gained from linguistics to one side, it could be asserted that necessity is not concerned with the absence of alternatives, but only with an autonomous assessment of the characteristics of a given measure (hence, this approach is termed the 'autonomous conception'). Here, the characteristics of the measure under scrutiny would exclusively be evaluated against an independent set of criteria (such as minimum ability to achieve the objective pursued, or not causing more than a threshold of collateral harm), without any need to consider alternatives.

It is clear that the two relational conceptions on the one hand, and the autonomous conception, on the other hand, relate to each other in different ways. As regards the former, the relationship between the two variants is straightforward, in that a measure that is necessary under the exclusivity conception is always necessary under the comparative conception as well, but not the other way around. No similar statement can be made as regards the relationship of the relational conceptions and the autonomous conception: a given measure can conceivably be necessary under both, none, or one but not the other.

6.2. Empirical survey: the decision logic of necessity in the surveyed rules

6.2.1. State of Necessity

On first sight, the codification of the customary rule on the State of Necessity in Article 25 ASR does not require a measure to be necessary; rather, that article requires the measure to be the 'only way' to safeguard the essential interest under threat. There are essentially two interpretations of the 'only way' requirement, as summarised by the *Enron* annulment committee:

> One potential interpretation is that it has its literal meaning, such that in the present case, the principle of necessity could be relied on by Argentina if there were genuinely no other measures that Argentina could possibly have adopted in order to address the economic crisis. ... [A]nother possible interpretation would be that there must be no alternative measures that the State might have taken for safeguarding the essential interest in question that did not involve a similar or graver breach of international law.[304]

The two options outlined by the *Enron* annulment committee sharply contrast as regards the role of an alternative measure's relative effectiveness and harmfulness. The first option proposed, ie the literal reading, amounts to requiring that the acting state have 'one, and only one'[305] option of how to react to the threat, regardless of the alternative measures' respective effectiveness or harmfulness.[306] As soon as an alternative is available that is not entirely ineffective in reaching the objective, the original measure is no longer the 'only way' and thus not necessary. This reading of the 'only way' requirement corresponds to the exclusivity conception

[304] *Enron Annulment*, paras 369-370. See also *EDF Annulment*, para 335, where the committee suggested that the precision demanded in the Enron annulment was unnecessary to apply the 'only means' requirement, pointing to various judgments (*Gabcikovo*, *Wall Opinion*) in which no further clarification was undertaken.

[305] Waibel, 'Two Worlds', 646.

[306] See Schill, 'Economic Crises', 280.

outlined above. This conception has been accepted by some parts of doctrine[307] and arguably underlies some investment arbitration awards[308].

In contrast, the second option identified by the *Enron* committee requires that the alternative must have both the ability to actually also achieve the desired objective, and that it must cause less harm than the challenged measure in doing so.[309] This second option thus corresponds to the comparative conception of necessity identified above. Much actually speaks in favour of concluding that the rules on the State of Necessity are in reality based not on the exclusivity conception just discussed, but rather on the comparative conception. Special Rapporteur Ago wrote about the 'only way' condition that 'it must be impossible for the peril to be averted by any other means … which can be adopted without a breach of international obligations' and that '[a]ny action in excess of what is strictly necessary … is *ipso facto* a wrongful act, even if the excuse of necessity would otherwise be allowed to operate.'[310] Ago here lays out a two-tiered approach: the first tier is that no alternative must be available that is not contrary to the state's international obligations, whereas the second is that the challenged measure must not be 'excessive'.[311] Non-excessiveness was also emphasised by Webster's celebrated note to Fox in the context of the *Caroline* affair, which held that the invoking state must have done 'nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it'.[312] In particular focusing on the second tier of non-excessiveness, the foundations of which cannot seriously be doubted, reveals that the 'only way'

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[307] See Alvarez and Khamsi, 'Argentine Crisis', 440; Kurtz, 'Delineating', 236, 250; Kurtz, 'Adjudging the Exceptional', 338; Christakis, 'L'Etat avant le droit?', 33; Bücheler, *Proportionality*, 231. See also Bjorklund, 'Economic Security', 487; Stern, 'Nécessité Économique', 353.

[308] See *CMS*, paras 323-324; *Enron*, paras 308-309; *EDF*, para 1172. See also Reinisch, 'Investment Arbitration', 154; Burke White and Von Staden, 'Public Law Standards of Review', 696-697.

[309] The notions of harm and effectiveness are explored in greater detail in sections 7.1. and 7.2.

[310] Ago, *Addendum*, para 14.

[311] See also Barboza, 'Necessity (Revisited)', 32; Lowe, *International Law*, 276; Salmon, 'Nécessité', 246.

[312] *Caroline*, 222; for other early cases, see *Virginius*, 236; *Neptune* (Gore), 415-418 (relying on Grotius).

criterion cannot be understood as referring to the exclusivity conception. The prohibition of excessive action expresses the idea of limitation, of curbing the undesired effects of a measure taken in order to achieve a desired objective. Accordingly, the only sensible construction is that 'excessive' relates to the harm caused by the measure. Crucially, excessiveness is relational and implies a comparison of the relative harmfulness of different options; thus, the inclusion of a non-excessiveness requirement logically rules out the exclusivity conception. It means that between two options, the acting state must choose the less harmful one (as the other one causes excessive harm), which will then be considered as necessary. The existence of a more harmful alternative cannot rule out the necessity of the less harmful one that causes the minimum amount of harm necessary.

Taking the two limbs together then means that under the correct interpretation, a measure is necessary (ie, the 'only way') where no effective alternative is available that is either not in contravention of the acting state's international obligation at all or at least less harmful than the original measure.[313] Understanding the 'only way' requirement as referring to the comparative conception has found support in the literature as well.[314]

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[313] Proponents of the literal reading may object that a comparative conception cannot be squared with the actual wording of Article 25 ASR, requiring the measure to be the 'only way'. However, in light of the foregoing discussion, it is better to understand the reference to the 'only way' to explicitly relate only to the first leg, namely there being no effective alternative that does not contravene the acting state's international obligations (going in this direction Nolan and Sourgens, 'The Limits of Discretion', 401). The second leg, demanding that the acting state select the least harmful of all effective measures that are in contravention of the state's international obligations, would then be merely implicit in Article 25 ASR (ILC*, 2001 Commentary*, Article 25, para 15: 'the requirement of necessity is inherent in the plea'; see also Barboza, 'Necessity (Revisited)', 39).

[314] The same conclusion is reached, albeit often without much supporting analysis, by Gazzini, 'Necessity Investment Law', 463; Gazzini, 'Common Understanding', 22; Kent and Harrington, 'Necessity', 252; Cassella, *La nécessité en droit international*, 340; Gazzini *et al*, 'Necessity Across', 4-5 (notably citing *Oscar Chinn* (Anzilotti), 114, where Anzilotti required only the absence of legal means, not the absence of less harmful but equally illegal ones). Further confirmation may be drawn from ILC*, 2001 Commentary*, Article 27, para 2, as the idea of returning to partial compliance logically implies the reading of the 'only way' criterion here asserted.

See also the *Wall Opinion*, para 140, where the ICJ found that 'the construction of the wall along the route chosen was [not] the only means'. This unexplained conclusion (see Weisburd, 'Justiciability', 340) may have been inspired by the forgoing finding on art 12(3) ICCPR (*Wall Opinion*, paras 136-137), which notably incorporated the 'least-intrusive instrument' necessity standard (citing HRC, *General Comment 27*, para 14). See generally Foster, 'Wall Opinion', 91-92.

This conclusion is eminently sensible, as can be easily demonstrated by use of an example. In a hypothetical scenario, a state is imminently threatened with a widespread epidemic. The producer of the effective (patented) treatment does not have sufficient manufacturing capacity to respond to the crisis. The state has three options: (1) tackle the crisis with widely available, but mostly ineffective alternative medicine; (2) suspend the patent on the effective treatment to allow manufacturing on a much larger scale, but thereby breaching a (supposed) international patent-protection rule; or (3) cancel the patent altogether. It seems clear that option 2 is necessary: neither the availability of an ineffective alternative (1) nor of an equally effective, but more harmful alternative (3) should rule out the necessity of option (2). This is the result reached by the comparative conception. The exclusivity conception, on the other hand, would hold that the state is either required to choose option (1) since it is the only one that does not breach the state's international obligations; and even if option (1) is ruled out, the exclusivity conception would rule out both option (2) and (3) since neither is literally the 'only way'. There is no convincing normative argument that could support this construction, and it must be concluded that the comparative conception is the only acceptable interpretation of the 'only way' requirement in Article 25 ASR.

It is finally agreed that the law on the State of Necessity adopts a continuous notion of necessity.[315] For instance, when Ashburton wrote to Webster concerning the *Caroline* affair, he stated that a State of Necessity can only preclude wrongfulness for 'the shortest possible period, during the continuance of an admitted over-ruling necessity'.[316] A measure can only be justified until the point where it is 'no longer "necessary"'[317], implying that a measure's necessity must be continuous until the measure is terminated.

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[315] Article 27(a) ASR; *Gabcikovo*, para 101; *ILO Greece Inquiry*, para 110; *EDF Annulment*, para 330.

[316] *Caroline*, 223.

[317] ILC, *Yearbook 1980*, 1612th meeting, para 44 (Ago).

6.2.2. Self-defence

The conception of necessity enshrined in the law of self-defence is less controversial. Under the law of self-defence, the first uncontroversial element of necessity prescribes that use of force is only allowed where peaceful alternatives are not available.[318] In *Nicaragua*, Judge Schwebel brought it to the point when he wrote that 'the question of necessity essentially turns on whether there were available to the United States peaceful means of realizing the ends which it has sought to achieve by forceful measures.'[319] The strong doctrinal foundations of this requirement may, nevertheless, be contrasted with the fact that it does not always seem to play a major role in state practice: if a state suffers an armed attack by another state, it is not questioned that the former can resort to defensive force against the latter. However, similar to what was argued above[320] and as is detailed further below[321], this fact should not be seen as denying the existence of the requirement that no peaceful alternatives be available; rather, it only demonstrates that compliance with the requirement is easily accepted in cases of clear-cut inter-state self-defence.

The requirement that peaceful alternatives must not be available is sometimes assumed to be only real content of the necessity standard in self-defence.[322] However, necessity reaches further, in that it extends also to the degree of force used where no peaceful alternatives are available. This wider extension of necessity is often overshadowed by problems of labelling, since what under the conceptual approach employed in this thesis belongs to necessity is, in the self-defence context, often[323] subsumed under the label of proportionality (which explains why

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[318] The criterion is generally accepted. See only, eg, Ago, *Addendum*, para 120; Tams and Devaney, 'Applying Necessity', 96; Kaye, 'Adjudicating', 162; Ruys, *Armed Attack*, 95.

[319] *Nicaragua* (Schwebel), para 201.

[320] See section 4.2.2.

[321] See chapter III, section 4.2.3.

[322] See, eg, Reinold, 'State Weakness', 267 (implicitly); Rodin, *War and Self-Defense*, 111.

[323] Eg, *Nuclear Weapons* (Higgins), para 5; Barboza, 'Necessity (Revisited)', 34; Trapp, 'Back to Basics', 146; Corten, *Law Against War*, 488; Gardam, *Necessity*, 16; Gray, *Use of Force*, 150; Kretzmer, 'Proportionality in Jus ad Bellum',

necessity in the self-defence context is then said to be limited to the absence of peaceful alternatives[324]).[325] In this thesis, proportionality is understood, simply put, as relating to the balance of the 'good' and 'bad' effects of a measure, which is different from the question whether the measure was without alternatives. Proportionality is extensively discussed in chapter II, including whether proportionality thus conceived plays a role as regards self-defence (chapter II, section 3.2.)

Leaving the issue of labelling aside, in substance it is undisputed that under the rules on self-defence, where use of force is *per se* inevitable, it must then also not go beyond the degree that is required to reach the objective.[326] In *Oil Platforms* Judge Kooijmans put the matter thus: 'the relevant question is whether the United States was unable to achieve the desired result … by different conduct, involving either no use of armed force at all or merely its use on a lesser scale'.[327] Trapp makes the same point by noting that 'defensive force [must] be tailored, and not go beyond what is necessary to halt or repeal the armed attack to which it is responding.'[328] In substantive terms, the picture is thus clear: the law on self-defence demands the absence of peaceful or less-forcible alternatives. It thus implements the comparative conception of necessity identified above.

The foregoing conclusion holds true despite a suggestion in the court's case-law that could be read as implementing the autonomous conception. In *Nicaragua* the ICJ considered that a measure must 'not merely be such as *tend to protect* the [the objective], but must be "necessary"

239; van Steenberghe, 'Proportionality', 113; McDougal and Feliciano, *Law and Minimum World Public Order*, 241; Green, 'Ratione Temporis', 101.

[324] Explicitly Gardam, 'Necessity and Proportionality', 275, 277; Deeks, 'Unwilling or Unable', 494.

[325] See van Steenberghe, 'Self-Defence', 205; Ruys, *Armed Attack*, 112; and Wilmshurst, 'Chatham House Principles', 967, 969, also arguing that the conception of proportionality as 'no more than necessary' is an aspect of necessity.

[326] See Waldock, 'Regulation', 463, 467; Greenwood, 'Self-Defence and Armed Conflict', 280; Okimoto, 'Cumulative Requirements', 65.

[327] *Oil Platforms* (Kooijmans), para 62 (emphasis added). See also *Ago, Addendum*, para 121.

[328] Trapp, 'Back to Basics', 146.

for that purpose', a juxtaposition that could turn on the degree of contribution.[329] This reading should, however, not be accepted. For one, the Court here discussed the NPM clause in the US-Nicaragua FCN, and it is not clear whether it intended its pronouncement to apply to the necessity condition in self-defence as well. The passage can, furthermore, also be read as supporting the comparative conception,[330] since the emphasis on the measure having to be 'necessary' could indicate precisely that looking only at the intrinsic features of the measure is not enough. There are, finally, strong normative reasons against an autonomous conception: accepting it would curtail the limiting function of necessity (as discussed in more detail in section 7.2.), in that it could uphold a measure's necessity even where equally effective and less harmful alternatives are readily available.[331] The conclusion must thus be that self-defence endorses the comparative conception.

A final element of the conception of necessity under self-defence law is that necessity must again be continuously present.[332] This means that '[t]he requirement of necessity must be respected not only at the moment of the initial decision to resort to military measures but also throughout the operations'.[333] When necessity ceases, 'for example because the attacking state or entity no longer poses a threat or other alternatives have proven to provide an adequate solution', the defending state is no longer justified in using force in self-defence.[334]

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[329] *Nicaragua*, para 282 (emphasis added). See also *Oil Platforms*, para 43, and *Corten, Law Against War*, 483.

[330] See, eg, *Cassella, La nécessité en droit international*, 349.

[331] On the other end of the scale, imposing a minimal contribution also negates the freedom of the acting state to choose the level of protection it seeks to achieve, an important element discussed below in section 7.1.4.

[332] See *Nicaragua*, para 281.

[333] Gazzini, *Changing Rules*, 146-47; see also Ago, *Addendum*, para 122; Christodoulidou and Chainoglou, 'Proportionality in Self-Defence', 87; Gardam, *Necessity*, 155, 167; Gardam, 'Proportionality and Force', 404; Gardam, 'A Role for Proportionality', 5; Greenwood, 'Relationsship', 223; Green, *International Court*, 90; Ruys, *Armed Attack*, 123; contra Dinstein, *War*, paras 695-96.

[334] Gill, 'When Does Self-Defence End?', 745-746.

6.2.3. WTO law

In the trade law context, the panel adjudicating the first trade dispute relating to the necessity condition, *US-Section 337*, adopted the comparative conception with respect to Article XX(d) GATT (which provides that measures otherwise in breach of the GATT are allowed under that agreement when they are 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement'). Without explaining the basis of its finding, the panel held that

> a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.[335]

It continued that if no consistent measure is available, 'a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions'[336] and clarified that the alternative would in any event have to also achieve the objective.[337] Early case-law followed this approach,[338] and the explicit provisions in the SPS and TBT endorse the same conception.[339] For instance, the footnote attached to Article 5.6 SPS explains that 'a measure is not more trade-restrictive than required unless there is another measure, reasonably available ..., that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.' It would thus appear that WTO law firmly

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[335] *US-Section 337*, para 5.26.

[336] Ibid, para 5.26. One important implication of the second leg is that a measure must be necessary in its entirety (ibid, para 5.27; see also Trachtman, 'Trade and... ', 69; Ayres and Mitchell, 'Exceptions', 31). Each element that causes a relevant injury must be necessary (*US-Gasoline (Panel)*, para 6.22; *US-Gasoline (AB)*, 13-14).

[337] *US-Section 337*, para 5.26.

[338] *Thailand-Cigarettes*, paras 74-75; *US-Tuna*, paras 5.34-5.35; *US-Gasoline (Panel)*, para 6.24. Some scholars read some form of balancing or value judgment already into these early decisions (eg, Sykes, 'Least Restrictive Means', 404ff; Kapterian, 'Critique', 103).

[339] Article 5.6 SPS and fn.3 thereto; 2.2 TBT; Bown and Trachtman, 'Brazil - Tyres', 130. Kapterian concluded from the explicit endorsement of this conception in the TBT and SPS Agreements that the silence of the GATT must mean that a different test was intended to be applied thereunder (Kapterian, 'Critique', 117).

endorsed the comparative conception, upholding a measure's necessity where no equally effective alternative that is either not inconsistent or entails a lesser degree of inconsistency is available.

The law, however, did not remain as clear, as the 'leading case'[340] on the necessity standard, *Korea-Beef*, introduced much confusion.[341] In its report, the AB first explained that 'the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to."'[342] On the basis of this distinction, it went on to consider that the

> determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' … involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the … measure to [achieving the objective], the importance of [achieving the objective], and the accompanying impact of the [measure] on imports or exports.[343]

The AB in *Brazil-Tyres* further clarified the testing sequence:

> In order to determine whether a measure is 'necessary' within the meaning of Article XX(b) ... , a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.[344]

The *Korea-Beef* definition of necessity and the *Brazil-Tyres* clarification deserve detailed attention, as they have been extremely influential, despite being rather confusing and 'lend[ing]

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[340] Delimatsis, 'Determining', 372.

[341] See Doyle, 'Gimme Shelter', 167: 'The trend of "necessity" jurisprudence has been to add uncertainty to an already complex burden of justification under Article XX.'

[342] *Korea-Beef (AB)*, para 161.

[343] Ibid, para 164.

[344] *Brazil-Tyres (AB)*, para 156. See also *China-Trading Rights (AB)*, paras 241-242; and the somewhat opaque *EC-Asbestos (AB)*, para 172.

themselves to a wide spectrum of interpretations'.[345] Indeed, the 'weighing and balancing' was taken up for all the relevant provisions of Articles XX GATT and XIV GATS, as well as Article 2.2 TBT.[346] It has not, however, been adopted in the jurisprudence on the SPS, where the test remains confined to the elements listed in footnote 3 to Article 5.6 SPS.[347]

First, the AB's distinction between indispensable and not indispensable measures makes little sense. For one, the AB appeared to say that in respect of an indispensable measure, no comparison of the actual measure with possible alternatives is required. However, the AB has not provided a substantive test or 'procedural sequence for the finding of indispensability or otherwise'[348] and it is indeed hard to see how a finding of indispensability can be reached without examining the availability of alternatives.[349] It is illogical to condition the comparison with alternatives on a qualification that can only be the outcome of just this comparison. Furthermore, there is no reason why the 'weighing and balancing' process should apply only to not indispensable measures.[350] Indeed, the difference between indispensable and other measures does not directly turn on the factors taken into account in the 'weighing and balancing', so that it is not clear why they should matter in the one case but not the other. In light of these considerations, it seems only logical that the distinction between indispensable and other measures has never actually gained much traction after *Korea-Beef*. In practice the panels have never found a measure

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345 Venzke, 'Making General Exceptions', 208. See also van den Bossche, 'Looking for Proportionality', 284.

346 On the close parallelism between the 'weighing and balancing' under GATT/GATS and the TBT, see chapter II, section 3.3.

347 *Australia-Salmon (AB)*, para 194:

> As already noted, the three elements of this test under Article 5.6 are that there is an SPS measure which: (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the SPS measure contested.

348 Osiro, 'GATT/WTO Necessity', 134.

349 See McGovern, 'Balance Interests', 185, writing that '[t]o say that a measure is not indispensable to an objective is to say that there are other means by which that objective may be achieved', which implies that indispensability implies precisely the absence of alternatives.

350 See Regan, 'Meaning of "Necessary"', 354.

to be indispensable so as to render the 'weighing and balancing' as well as the comparison with alternatives obsolete. Both tests are routinely carried out.

Second, and more centrally, it is not clear what role the 'weighing and balancing' process actually plays.[351] To start, how can the result of the *Brazil-Tyres* test's first leg be 'confirmed' by the second leg?[352] Both test for different things: the first one is about elements intrinsic to the challenged measure ('weighing and balancing'), whereas the second one is about an extrinsic quality of the challenged measure (the absence of an alternative). A confirmation would require both legs to test for the same thing, merely using different approaches. Still in *Korea-Beef,* the AB gave some indication of how, in its view, the factors entering into the 'weighing and balancing' may impact necessity:

> The more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument.[353]
>
> The greater the contribution [of the measure to the realisation of the end pursued], the more easily a measure might be considered to be 'necessary'.[354]
>
> A measure with a relatively slight [restrictive effect] might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects.[355]

One reading that could make sense of these statements, as well as the already-quoted reference to the second leg of the test confirming the first leg in *Brazil-Tyres*, would be to see them as purely factual: where a measures makes a greater contribution or has a relatively slight restrictive effect, it is factually more likely that no alternatives exist that are both equally effective and less

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[351] See Doyle, 'Gimme Shelter', 159; Du, 'Autonomy', 1095-1096.

[352] More recently, in *US-COOL* the AB referred to the second leg as 'completing' rather than 'confirming' the necessity analysis, which could be read as a *sotto voce* admission that the two legs are actually separate tests (*US-COOL (AB)*, para 479).

[353] *Korea-Beef (AB)*, para 162.

[354] Ibid, para 163.

[355] Ibid, para 163.

restrictive.[356] The first leg of the test would then provide a first indication about the absence of alternatives, but final confirmation could only come after actually considering available alternatives. This reading could not, however, make sense of the AB's position regarding the relative importance of the objective, as all alternatives would by definition pursue the same objective. Thus, the better reading of the AB's statements is not factual, but normative, indicating the presence of a teleological proportionality test. This would, of course, again signal a problem of labelling, since here an element of necessity as defined by the AB would actually enshrine proportionality, as conceived in chapter II.[357] The precise role of the 'weighing and balancing' test, as well as whether Articles XX GATT, XIV GATS and 2.2 TBT indeed include an independent, operational proportionality test is analysed in chapter II, section 3.3. Here it suffices to foreshadow already that the 'weighing and balancing' test is either a proportionality test, a preparatory stage of the necessity test (without itself impacting the necessity test), or actually without any real relevance. As regards the necessity test proper, however, the conception is then essentially unchanged since *US-Section 337*, requiring the absence of consistent or less inconsistent alternatives that are also effective in achieving the objective (comparative conception).[358]

The final element is, again, that necessity must in principle be continuously assessed.[359] However, as remedies under WTO law are only prospective,[360] the panels and AB usually limit

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[356] See Fontanelli, 'State Discretion', 16, 20-22.

[357] In fact, the situation in WTO law would be the mirror-image of that in self-defence: in the former 'necessity' would include elements of 'proportionality', while in the latter what is referred to as 'proportionality' is actually 'necessity'.

[358] There have been small aberrations. In *US-Gambling (AB)*, para 292, the AB referred to the necessity requirement as relating to the 'degree of connection' between the measure and the objective, indicating an autonomous conception of necessity. This approach would appear to turn most centrally on some form of minimum contribution, a proposition that contradicts the freedom of states to choose their own level of protection (see sections 7.1.2.3. and 7.1.4.). In any event, the AB itself did not follow through with this approach, eventually returning to the comparative conception (ibid, paras 307-308).

[359] *EC-Biotech (Panel)*, para 7.3031; Foster, 'Precaution', 55; contra Alvarez-Jiménez, 'New Approaches', 11.

[360] See Matsushita *et al*, *The World Trade Organization*, 185.

their analysis to the measure's necessity at the moment of the proceedings and do not inquire into their historical necessity.

6.3. Conclusion

The foregoing analysis allows three significant conclusions. It first emerges that all surveyed rules converge around the same fundamental conception of necessity, namely the comparative one. While the exclusivity conception and the autonomous conception[361] have some limited support as regards one rule or another, the best reading of all rules is that the necessity standard focuses on the absence of alternatives that can also reach the objective while being either harmless or less harmful than the challenged measure.[362] Necessity is also continuous under all surveyed rules, in that a measure must in principle be necessary from the moment it is adopted until its termination.

Second, in principle, under the comparative conception necessity can function in a simple or a complex manner: the simple variation discriminates only between harmless and harmful measures; the complex variation, on the other hand, also takes degrees of harm into account. The fact that all rules under scrutiny rule out necessity not only were a harmless alternative (State of Necessity: measure not in contravention of a state's international obligations; self-defence: peaceful measure; WTO-law: measure not inconsistent with WTO and/or not trade-restrictive)

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[361] Apart from the self-defence context (discussed in section 6.2.2.), some scholars likewise focused on the alleged need for an 'extremely close causal connection' (Bjorklund, 'Economic Security', 487) between a measure and its objective in the BIT (Burke-White and von Staden, 'Extraordinary Times', 330-331; Burke-White and von Staden, 'Non-precluded Measures', 114; Kurtz, 'Delineating', 236; Montini, 'Necessity Principle', 139) and WTO (Kapterian, 'Critique', 95, 121ff) contexts. They cannot, however, point to any instance in which the autonomous conception has actually been applied, and the normative reasons expounded in the self-defence context against accepting this conception hold true in other contexts as well.

Incidentally, the same is true for the approach adopted in *LG&E*, paras 239, 242, which single-handedly replaced 'necessary' with 'legitimate', without being able to justify this substitution (see Kurtz, 'Adjudging the Exceptional', 356; Kurtz, 'Delineating', 252). Also focusing on the measure's legitimacy, see *Sea-Land Services*, 165.

[362] This result may not be surprising, given the normative implications of both the autonomous and the exclusivity conception. On the former see the discussion in section 6.2.2. The exclusivity conception, on the other hand, would rule out necessity even where an alternative either cannot similarly achieve the objective or is more harmful than the measure chosen, making it difficult to discern any normatively-justified function that necessity thus conceived could still discharge.

exists, but also where a less harmful alternative is available, demonstrates that all rules enshrine the complex variant of the comparative conception.

Third, despite the reference of the WTO's AB to 'degrees of necessity'[363], necessity is conceived as a binary concept in all the rules.[364] The comparative conception of necessity unavoidably implies that a measure either is or is not necessary, depending on the availability of a qualified alternative. Where the law speaks of degrees of necessity (such as references to 'extreme necessity'[365], 'strict'[366] or 'absolute'[367] necessity), this may relate to a particularly demanding proportionality test[368] or could be connected to how assertions of necessity are reviewed[369], but it is not actually about the content of necessity itself.

The convergence of all rules with respect to the basic conception of necessity justifies concluding that the necessity standard is unified across all surveyed rules in this regard. The next step in the analysis is now to analyse in more detail exactly which characteristics an alternative measure must possess under each surveyed rule to be able to refute the challenged measure's necessity.

7. Alternative measures: when the availability of an alternative measure refutes the challenged measure's necessity, and when not

Given that each rule under scrutiny enshrines a complex comparative conception of necessity, focusing on the absence of qualified alternatives, the set of characteristics that an alternative must possess to disqualify the challenged measure's necessity is crucial. The most

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[363] *Korea-Beef (AB)*, para 161.

[364] This was already noted to also be the case for the notion of necessity in linguistic philosophy. See section 2.1.

[365] Eg, *Teodoro Garcia*, 121.

[366] Article 15 ECHR.

[367] Article 53 GC IV; Article 2 ECHR.

[368] Rivers, 'Proportionality and Discretion', 126.

[369] See, eg, *Brannigan* (Martens), para 4; Ambrus, 'Evidentiary Approach', 240, referring to *Giuliani and Gaggio*.

obvious feature is, of course, that an alternative must actually be possible[370] and not 'merely theoretical in nature, for instance, where the responding Member is not capable of taking it'.[371] Beyond this, an alternative's relevant characteristics in principle fall within three categories: the alternative's contribution to the objective pursued; the harm it causes to other interests as a side-effect of pursuing the objective; and finally any inconvenience that the alternative might cause the acting state. What the various rules prescribe with respect to each of these categories is addressed in sections 7.1. to 7.3. In addition, section 7.4. deals with three particular problems that are related to the availability of alternatives, namely whether the acting state's contribution in creating a threat prevents it from relying on necessity (section 7.4.1.), whether there exists an obligation to exhaust all less harmful alternatives before a state can act under necessity (section 7.4.2.), and finally whether the necessity standard implies an obligation of the acting state to pay compensation (section 7.4.3).

Before embarking on the analysis, it is useful to again[372] stress that the point of comparing a challenged measure with alternatives is purely to prove or disprove the specific, challenged measure's necessity.[373] The analysis cannot determine *per se* which of a variety of measures is necessary.[374] Importantly, this means that even a finding that a qualified alternative is available would not mean that this alternative should be adopted as the 'necessary' measure.[375] Thus, in the

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[370] *EC-Asbestos (AB)*, para 169.

[371] *US-Gambling (AB)*, para 308. For example, in the Argentine financial crisis it was certainly not possible for Argentina to respond by aggressively devaluing the US dollar, simple because this was not within its power. In this sense, possibility is an agent-specific concept (see Zedalis, 'Pre-emptive Self-Defence', 224-225).

[372] This point was already made above in the abstract (see section 2.1.).

[373] See Cassella, *La nécessité en droit international*, 347.

[374] To arrive at this conclusion the necessity analysis would have be carried out for each contemplated measure.

[375] See *Japan-Apples 21.5 (Panel)*, para 8.199.

end a 'comparison with reasonably available alternative measures is [merely] a conceptual tool for the purpose of ascertaining whether a challenged measure is ... necessary.'[376]

7.1. Protection: the ability of a measure to achieve its objective

The previous section revealed that all rules under scrutiny require an alternative to be somewhat effective in achieving the objective. Naturally, where a permissible objective is faced with a sufficient threat, the necessity of a measure that is effective in safeguarding the objective cannot be undermined by an alternative measure that is not. In other words, teleological necessity only admits causally sufficient alternatives.

The causal sufficiency or effectiveness of a measure designates the measure's impact on the threat against the pursued objective. The AB has spoken in this context of 'a genuine relationship of ends and means between the objective pursued and the measure at issue'.[377] It is clear that an assessment of a measure's effectiveness in achieving its objective first requires an assessment of the existing level of threat, since without knowledge of the threat it cannot be assessed in how far a measure is effective in reducing this threat.[378]

A measure's ability to achieve the permissible objective pursued, its causal impact on the objective, can be termed the measure's protectiveness or 'Level of Protection' ('LoP'). The relevant question for the comparison of the challenged measure with possible alternatives is then which LoP a given alternative must possess to count. In other words, what is the 'Reference Level of Protection' ('RLoP') that the alternative must reach? The question is of some

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[376] *US-Tuna II (AB)*, para 320. See also *Australia-Apples (AB)*, para 363; *EC-Seal Products (Panel)*, para 7.467; *US-COOL 21.5 (AB)*, para 5.328.

[377] *Brazil-Tyres (AB)*, para 145.

[378] See *US-Poultry (Panel)*, para 7.335; also *US-Products from Argentina (Panel)*, para 7.383; *India-Solar Cells (Panel)*, para 7.347. In *Australia-Apples (AB)*, para 364, the AB clarified that while

> a complainant pursing a claim under Article 5.6 [SPS] is not required to undertake or furnish a risk assessment relating to the alternative measure proposed ... 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.

importance, since the likelihood that the original measure passes as necessary is higher or lower depending on how difficult it is for an alternative to reach the RLoP.

7.1.1. Theoretical considerations: identifying the threshold of protectiveness the alternative measure needs to reach to refute the challenge measure's necessity

At a basic level, the RLoP can be defined either in relation to the LoP of the challenged measure, in the sense that the alternative's LoP must be compared to the challenged measure's LoP, or by reference to some independent standard. Comparing the alternative's LoP to the RLoP (however defined) is relatively straightforward in cases where the protectiveness of a given measure can be determined with certainty, either *ex ante* (as regards hypothetical alternatives) or *ex post* (as regards the actually adopted challenged measure). However, in the real world this is frequently not possible: predicting a measure's effects or determining its effect by reference to what would have happened if the measure had not been adopted is, just like the concept of threat, again rendered difficult by counterfactuality and limited knowledge about facts and causalities.[379]

To be of use in the real world, the notion of causal sufficiency must then be further refined. Three elements are of importance in determining a measure's protectiveness: first, a measure can achieve its objective to a larger or lesser degree. Second, different measures can seek to protect the same objective in different ways, indicating that there may be a difference not only in the degree but also the kind of protection provided. In technical terms, both refer to the measure's ability to narrow the gap between the desired and the threatened future state-of-affairs. The measure's degree and kind of protectiveness can be referred to as the magnitude of protection. Third, the ability of a measure to achieve its objective may be uncertain, ie exposed to risk and true uncertainty.[380] A measure's overall LoP is accordingly constituted by a combination of protection magnitude and certainty.

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[379] See Huscroft, 'Relevance of Interpretation', 186, and Brems and Lavrysen, 'Less Restrictive Means', 143, mentioning the need for counterfactual analysis concerning hypothetical alternatives.

[380] See Barak, 'Principled Balancing', 9.

This refinement of the notion of protectiveness introduces at least two important questions. First, it is not automatically clear what causal sufficiency means under conditions of uncertainty. Comparing an alternative's LoP with the RLoP seems straightforward where the alternative measure's LoP is either higher or lower than the RLoP as regards both certainty and magnitude of protection. Comparison becomes much harder, though, when the measure has a higher protection certainty but lower protection magnitude than the RLoP and *vice versa*, or where the alternative provides a different kind of protection than the RLoP. In such cases, two approaches are in principle possible to decide which LoP is higher: first, it could be supposed that an alternative measure only counts as causally sufficient if it provides the same kind of protection and its LoP is equal to or higher than the RLoP with respect to both protection certainty and magnitude.[381] The second approach, on the other hand, would focus rather on a comparison of the total protectiveness: the difficulty then resides in determining the rate of substitution between certainty and magnitude, which is by nature a normative problem expressing a relative preference. The normative dimension involved in this second approach introduces the notion of 'normative weight',[382] in that deciding which of two measures that protect the same objective is normatively 'better' requires comparing their normative weights.[383] While the concept of teleological necessity cannot provide a coherent decision logic if no choice is made between these two possible approaches, the concept itself does not imply either one. At the same time, if a

[381] To this effect see Barak, *Proportionality*, 324.

[382] The concept of normative weight is explored at greater length in chapter II, section 2.3.

[383] In fact, the concept really at play here is that of 'concrete' rather than 'abstract' or 'overall' normative weight. But since these latter two are not yet needed and will only be introduced later, it is preferable to just speak of normative weight for now. The notion of concrete normative weight is similar to Alexy's 'degrees of interference or satisfaction' (see Alexy, *A Theory*, 401ff). Rivers referred to the problem of concrete weight as 'problems of relative evaluation within one value' (Rivers, 'Proportionality and Discretion', 115; see also Rivers, 'Second Law of Balancing', 177f). Isay noted the difference as being between the weighing of values and the weighing of concrete 'valueholders' (Isay, 'Method', 321).

given rule chooses the second option, it is also clear the concept of necessity itself cannot supply the required rate of substitution.[384]

A second problem emerges where the RLoP is defined by reference to the challenged measure. In situations of uncertainty the LoP actually achieved by the challenged measure may not coincide with the LoP that the acting state desired to achieve in choosing that measure. In other words, the measure's 'Actual Level of Protection' ('ALoP') may be higher or lower than the state's 'Desired Level of Protection' ('DLoP'). Where the desired and actual levels of protection diverge, the concept of necessity can only function if it is determined which of the two serves as the RLoP for the comparison with alternative measures. It is again clear that the concept of necessity requires an answer in order to provide a coherent decision logic, but does not supply the answer itself.

A final issue relates to the possibility that a measure may pursue more than one permissible objective at the same time. In such cases, the measure could have a protective effect as regards all permissible objectives, and it would need to be asked whether any alternative needs to be as protective as the original as regards all permissible objectives, or whether relative differences in protectiveness – the alternative may be more protective as regards one objective and less protective concerning another – can be offset against each other.

7.1.2. Empirical survey: the require threshold of protectiveness in the surveyed rules

7.1.2.1. State of Necessity

Article 25 ASR does not provide a clear indication of how protective an alternative has to be. It merely requires there to be no 'other way' to safeguard an essential interest. While this implies that an alternative that does not safeguard the essential interest in question at all is

[384] On questions of normative weight allocation and making value judgments, see again in particular chapter II, section 2.3.

disqualified, the precise RLoP remains unclear.[385] Practice and doctrine alike provide only scarce guidance. In the *Nachfolger* case, the French *Conseil d'État* insisted that no alternative was 'sufficient'.[386] Raby emphasised effectiveness in writing that under the State of Necessity there must be 'no other effective means of action'.[387] The essentially unsettled nature of the question was nicely highlighted by the *Enron* annulment committee, which faulted the *Enron* tribunal for not addressing

> whether the relative effectiveness of alternative measures is to be taken into account. ... For instance, suppose that there are two possible measures that a State might take in order to seek to safeguard an essential interest. One is 90 per cent probable to be 90 per cent effective to safeguard that essential interest, while the other is 50 per cent probable to be 60 per cent effective. Suppose that the former measure would (subject to the potential application of the principle of necessity) be inconsistent with obligations of the State under international law, while the latter measure would not. Would the State be precluded from invoking the principle of necessity if it adopted the former measure, on the basis that there was an alternative available? Or could the State claim that the measure taken was the 'only way' that stood a very high chance of being very effective? ... It was however necessary for the Tribunal, either expressly or *sub silentio*, to decide or assume the [answer] in order to apply the "only way" provision of Article 25(1)(a) to the facts of this case.[388]

The majority of rulings on the State of Necessity which found that the measure under scrutiny was not 'the only way' did not explain why an alternative was considered to be sufficiently protective.[389] In the rare instances that such an analysis was undertaken, it generally led to the result that an alternative measure with a lower LoP than the original measure was considered to be unavailable.[390] While it seems clear that the RLoP must somehow be set with

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[385] See also Ago, *Addendum*, para 14; *Wall Opinion* (Higgins), para 40.

[386] *Nachfolger*, 4.

[387] Raby, 'Necessity', 262.

[388] *Enron Annulment*, paras 371, 373.

[389] See, eg, *Enron*, para 308, and the criticism of this approach in *Enron Annulment*, paras 376-378. In Gabcikovo the ICJ did also not assess the relative effectiveness of alternatives (see Bücheler, *Proportionality*, 273). See generally as regards investment treaty arbitrations Gazzini, 'Common Understanding', 23; Alvarez and Khamsi, 'Argentine Crisis', 399; Kent and Harrington, 'Necessity', 253-254; Bjorklund, 'Emergency Exceptions', 484-845; Reinisch, 'Split of Opinions', 200-201; Martin, 'Investment Disputes', 66; Song, 'Scylla and Charybdis', 252-253; more generally on State of Necessity, Agius, 'Invocation', 26-27.

[390] See, eg, *Chichester*, 231.

reference to the challenged measure's LoP, the question concerning the precise reference point remains rather unsettled.

7.1.2.2. Self-defence

Under self-defence law it is fairly clear that a state acting in self-defence has no obligation to take peaceful or less-forcible measures that are unlikely to be effective.[391] A peaceful alternative does not have to be attempted where it 'would be to no avail'[392], 'clearly ... futile'[393], or not 'feasible'[394]. In addition, some pronouncements indicate that the RLoP is to be set by reference to the desire of the defending state. Thus, in *Nicaragua* Judge Schwebel opined that the relevant question was whether there were available to the United States 'peaceful means of realizing the ends which it has sought to achieve by forceful measures'.[395] Similarly, in *Oil Platforms* Judge Kooijmans explained the United States had to have been 'unable to achieve the desired result (the protection of its essential security interests) by different conduct'.[396]

However, similar to what is the case with regard to the State of Necessity, no full clarity has emerged as regards the exact RLoP. While it would again appear logical that the RLoP is set with reference to the challenged measure, it seems that so far neither (judicial) practice nor doctrine have provided a satisfactory answer to the question that the present author previously put thus:

> [L]et us assume a state plans defensive action by drawing up two campaigns. One may involve a fully-fledged invasion, with a high chance of obtaining the

[391] See Tams and Devaney, 'Applying Necessity', 96; Wilmshurst, 'Chatham House Principles', 966-967 (speaking only of non-forcible alternatives). See also Webster's formula in the *Caroline* case: 'It must be shown that [the alternative] was impracticable, or would have been unavailing; ... that it would not have been enough to [use less force]' (quoted after Jennings, 'Caroline', 89).

[392] Gardam, *Necessity*, 26.

[393] Ruys, *Armed Attack*, 95. See also Schachter, 'The Right of States', 1631.

[394] Schmitt, 'Counter-terrorism', 19.

[395] *Nicaragua* (Schwebel), para 201.

[396] *Oil Platforms* (Kooijmans), para 62.

> [permissible] objectives quickly, and another is based on a combination of targeted bombings and commando operations, with a lower [certainty] of achieving the [permissible] objectives and later in time. Assume for now that the invasion is considered more [harmful] than the second option ... . Under the [necessity] test, would the defending state be obliged to opt for the second campaign, even though it is less likely to succeed and will take longer?[397]

7.1.2.3. WTO law

The WTO jurisprudence stands in stark contrast to the rather unclear state-of-affairs concerning State of Necessity and self-defence. First, it has been recognized across the board – either via case-law or in the relevant agreement itself – that the acting state has the right to set the desired LoP and that this provides the yardstick for the comparison in the sense of constituting the RLoP, so that the alternative must reach at least the same LoP as the challenged measure.[398] Because the LoP always relates to a specific threat, it is clear that only measures reaching at least the same LoP with respect to the same threat can count.[399] The WTO's jurisprudence has likewise addressed the individual elements of the LoP, holding that either a lower impact[400] or lower certainty[401] would disqualify the alternative. A further factor, broadly related to impact, is that an alternative must not expose the acting state to new threats.[402]

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[397] Lieflaender, 'Ius ad bellum Proportionality'.

[398] See, eg, *US-Section 337*, para 5.26; *EC-Hormones (AB)*, paras 124, 172; *Korea-Beef (AB)*, para 176; *EC-Asbestos (AB)*, paras 168, 174; *US-Gambling (AB)*, para 308; *US-Tuna II (Panel)*, para 7.460; fn.3 to Article 5.6 SPS and Annex A(5), also preamble SPS and Article 3.3 SPS; preamble TBT. Panels often resort to rather cursory reasoning in assessing the alternative's LoP, which raises doubts as to how genuinely they uphold the right of member states to choose their desired LoP (see Kapterian, 'Critique', 101-103).

[399] See *US-Gambling (AB)*, para 326.

[400] See *EC-Asbestos (AB)*, para 174.

[401] See *US-Clove Cigarettes (Panel)*, para 7.424; *US-Gambling (AB)*, para 317. See also *Continental Casualty*, para 204.

[402] See *Brazil-Tyres (AB)*, para 174; *US-Gasoline (Panel)*, para 6.27. See also *Japan-Apples 21.5 (Panel)*, para 8.171.

The WTO panels and the AB also already had to deal with challenged measures whose ALoP and DLoP diverged.[403] The question first arose in the SPS-related *Australia-Salmon* dispute. The panel here considered that

> any sanitary measure applied to a given situation inherently reflects and achieves a certain level of protection with respect to that situation and that this level of protection – implied in the sanitary measure selected by a Member – can be presumed to be at least as high as the level of protection considered to be appropriate by that Member.[404]

Logically, the panel then went on to assess 'whether these alternatives meet the level of protection currently achieved by the measure at issue.'[405] In rather sharp contrast, the AB rejected this focus on the implied, actual LoP and held that when a state has explicitly expressed a DLoP, nothing 'entitles the Panel or the [AB], for the purposes of applying Article 5.6 in the present case, to substitute its own reasoning about the implied level of protection for that expressed consistently by [the state].'[406] On this basis, the AB considered the declared DLoP to be the relevant yardstick.[407]

The *Australia-Salmon* finding can be contrasted with the same body's approach in the GATT-related dispute *Korea-Beef*. Rather than concentrating on Korea's expressed DLoP, the AB focused on the challenged measure's ALoP in holding that the yardstick for the comparative analysis was whether alternatives can 'reasonably be expected to be employed to achieve the same result.'[408] The ALoP also served as the relevant reference point in subsequent proceedings.[409] The

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[403] The problem arises only when the acting state has made the DLoP public, as it is otherwise simply assumed to correspond to the ALoP (see *Australia-Salmon (Panel)*, paras 8.107, 8.173; *Australia-Salmon (AB)*, para 207; *US-Clove Cigarettes (Panel)*, para 7.375), which then serves as the yardstick.

[404] *Australia-Salmon (Panel)*, para 8.107.

[405] Ibid, para 8.173.

[406] *Australia-Salmon (AB)*, para 199.

[407] Ibid, para 204. The AB also considered that this focus on the DLoP meant that the SPS 'contains an implicit obligation to determine the appropriate level of protection' (ibid, para 206).

[408] *Korea-Beef (AB)*, para 178 (emphasis added).

[409] *Canada-Wheat (Panel)*, para 6.232; *Dominican Republic-Cigarettes (Panel)*, paras 7.228-7.230, affirmed in *Dominican Republic-Cigarettes (AB)*, para 72.

same approach has furthermore been followed under the TBT.[410] In *US-COOL 21.5* the AB recently emphasised the need for any alternative measure to also reach the LoP considered appropriate by the acting state (ie, the DLoP) in order to refute the challenged measure's necessity, but at the same time stressed that '[t]he level a Member "considers appropriate" is usually revealed by the degree of contribution that a [challenged] technical regulation *actually* makes to its objective'.[411]

In conclusion, it would thus appear that while under the SPS the DLoP is decisive if explicitly declared, the GATT, GATS and TBT focus primarily on the ALoP. This contrast may, however, be attenuated by the fact that in those SPS cases where DLoP and ALoP diverged, the state's declared DLoP appeared to be lower than the challenged measure's ALoP.[412] Indeed, the SPS jurisprudence has been interpreted as implying that 'the Member's statement of its [DLoP] binds WTO tribunals even if it is lower than the [ALoP]'.[413] It is not clear whether the AB would demand reference to the DLoP also when the challenged measure itself does not achieve the desired level, where the challenged measure's ALoP is thus lower than the DLoP.[414]

A panel and the AB also recently had to address the problem of different kinds of protection provided by the challenged measure and possible alternatives. In *US-COOL 21.5* the AB rejected the idea that an alternative's LoP must be 'identical' to that of the challenged measure, holding that 'a proposed alternative measure may achieve an equivalent degree of [protection] in ways different from the [challenged measure]'.[415] The AB also stressed that it is the

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[410] See *EC-Seal Products (Panel)*, paras 7.441, 7.479.

[411] *US-COOL 21.5 (AB)*, para 5.201 (emphasis in the original). The AB also noted, however, that '[t]he level at which a Member considers it appropriate to pursue a legitimate objective may also be discernible in other ways, such as through an express provision or statement in the instrument at issue' (ibid, para 5.201, fn.632).

[412] See *Australia-Salmon (AB)*, paras 197, 213, fn.166; *US-Products from Argentina (Panel)*, para 7.386.

[413] Mitchell and Henckels, 'Variations', 139.

[414] See further the discussion in section 7.1.4.

[415] *US-COOL 21.5 (AB)*, para 5.215.

equivalence of the '*overall* [protection]' that matters, not 'any individual isolated aspect or component of contribution'.[416] In the particular case at hand, which was concerned with the provision of product information to consumers, the panel and AB were faced with the question whether an alternative which made available less detailed information than the challenged measure, but for a larger group of consumers, provided an equivalent level of protection. Against the objections of the United States, the AB concluded:

> Where two or more distinct variables in a technical regulation collectively produce an overall degree of contribution to its objective, ... we see no reason why, in principle, adjustments that were made with respect to one of those variables could not compensate for adjustments made with respect to another such variable, so that the overall degrees of contribution of a measure and a proposed alternative measure would be equivalent.[417]

Finally, the *EC-Seal Products* case raised the issue of multiple objectives. In that case the EU arguably pursued two permissible objectives with its measure, namely protecting public morals in Europe by prohibiting the import of seal products while also seeking to protect Inuit lifestyle by exempting certain Inuit seal products from the ban. While the panel and AB themselves did not address the impact of multiple objectives on the necessity standard, Regan took the occasion of the case to argue that in such circumstances an alternative would have to also achieve all the objectives of the challenged measure.[418]

7.1.3. Conclusion

It emerges from the foregoing that all surveyed rules define the RLoP which an alternative measure's protectiveness needs to achieve by reference to the challenged measure, rather than by reference to an independent standard. In this respect there is unity across the surveyed rules. With the possible exception of Article 5.6 SPS, the reference point is the protectiveness of the challenged measure itself. One consequence thereof is that a challenged

[416] Ibid, para 5.216 (emphasis in the original).

[417] Ibid, para 5.269.

[418] Regan, 'Multiple Purposes'.

measure whose protectiveness is zero (ie, which does not contribute to achieving the objective at all) can never be necessary, as any other measure (including doing nothing) would reach at least the same LoP.[419]

The most striking point that emerges from this section's analysis is, however, the obvious mismatch of the development of the law on the State of Necessity and self-defence, on the one hand, and WTO law, on the other hand. While the former two have only clarified the most elementary elements about the alternative measures' required protectiveness, WTO law has reached a much higher level of sophistication. This appears to be due to the already high level of detail laid down in the WTO Agreements – particularly the TBT and SPS – as well as the compulsory jurisdiction of the WTO's panels and AB. This being said, despite its sophistication the WTO jurisprudence has not been able to provide fully coherent answers to all relevant questions. Thus, it is not clear why the SPS appears to favour the state's DLoP as the relevant yardstick (as long as it was explicitly stated), while the other agreements rather focus on the challenged measure's ALoP. Likewise it is not clear why the jurisprudence appears to have rejected weighing protection certainty and protection magnitude against each other, but has recently allowed such balancing where an alternative provides a different kind of protection.

Given this unsatisfying state of affairs, it may be asked whether it is not possible to develop a coherent theoretical model to at least suggest some answers to the open questions.

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[419] See *Mexico-Soft Drinks (AB)*, para 74; *Australia-Salmon 21.5 (Panel)*, para 7.137; *Colombia-Ports (Panel)*, para 7.618; *US-COOL (Panel)*, para 7.719; *China-Rare Earths (Panel)*, para 7.147; see also the findings of the ICJ regarding necessity in *Armed Activities*, para 147; ibid (Kooijmans), para 34; and ibid (Simma), para 14, which can all be interpreted as being based on a finding that the disputed measures made no contribution to the objective (see Corten, *Law Against War*, 482, 488; Zimmermann, 'Der Libanon-Krieg', 205). See further Lazar, 'Non-combatant immunity', 57; Kaye, 'Adjudicating', 162; McDougal and Feliciano, *Law and Minimum World Public Order*, 243; Gray, 'The Limits of Force', 114. See also *SAUR*, paras 460-463, noting inter alia that the measures allegedly necessary were taken years after the crisis had passed.

7.1.4. Suggested development: resolving lingering uncertainties about the required protectiveness threshold

Of the surveyed rules, WTO law most clearly identifies the relevant RLoP that an alternative measure must reach. The panels and AB consistently stress that states have the right to choose for themselves the precise LoP they wish to bring about. In order to ensure respect for this right, every alternative must therefore be at least as protective as the challenged measure (with either the ALoP or underlying DLoP being the precise reference point). To develop progressive answers to the various open questions, it is first important to understand that the existence of the right of WTO member states to set their own appropriate LoP does not appear to be merely the result of particular choices made by the parties in drafting the WTO agreements or the panels and AB in developing the standards, but (subject to a potentially attendant proportionality condition) rather appears to flow from the very logic of teleological necessity.[420]

The reasoning goes as follows: in defining a set of permissible objectives, a permissive exception clause regulates which objectives a state may pursue even when this unavoidably infringes otherwise legally protected interests. In doing so, the rule removes (subject to a potentially attendant proportionality condition) the question of whether pursuing these objectives in a given situation is appropriate or desirable from the ambit of the rule. In this sense and within the confines of the definition of permissible objectives, under permissive rules the states thus enjoy a degree of 'end-setting discretion', deciding for themselves whether and when to pursue one of the permissible objectives (again, it has to be stressed, subject to a potentially applicable proportionality condition).[421] If it falls within the discretion of a state to either pursue an

[420] See Rivers, 'Variable Intensity', 199.

[421] See generally Lazar, 'Necessity', 16; indeed, it might be the central difference between necessity and proportionality that the former does not question the LoP as such, whereas the latter is – at least in its teleological guise – precisely concerned with the 'appropriateness of the aim' (Cannizzaro, 'Proportionality', 897; Elliott, 'Proportionality and Deference', 3).

objective or not, it must logically likewise fall within the same state's discretion to decide to which degree to pursue that objective.

Leaving aside proportionality for now, the consequence of these considerations is that once a sufficient threat against a permissible objective is established, the state may decide not to act at all (effectively pursuing a LoP of zero) or to pursue a high level of threat-reduction, approaching or amounting to a complete elimination of the threat. Any LoP falling between the two extremes could be legitimately pursued – *a maiore ad minus*. For the purpose of necessity, this freedom of a state to set its own LoP in this way means that it has the right to achieve just this LoP and needs not accept anything less.[422] This does not mean, of course, that the state would be free to reject an alternative only because it achieves a higher LoP than it desires, only that it must not consider any less-protective alternatives. The essence of the teleological necessity standard embedded in permissive exception clauses is then that any alternative must be at least as protective as the challenged measure in order to be capable of disproving the challenged measure's necessity. This conclusion applies to all the surveyed rules with equal force.

It is helpful to express the same basic insight more technically: the legal protection that the rule accords to a particular interest underlying a permissible objective is beneficiary[423]-dependent.[424] Granting legal protection to an interest translates into the rule attaching normative weight to that interest.[425] That it is up to the beneficiary to decide whether or not to activate this legal protection ultimately means that the law only accords normative weight to a given interest,

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[422] Vinuales, 'Peremptory Norms', 97-100, reaches the same conclusion as regards protecting *ius cogens* interests (though his reasoning differs), but otherwise suggests a more flexible approach. See also *US-COOL 21.5 (AB)*, para 5.201.

[423] The term 'beneficiary' here does not denote the actor actually benefitting from the legal protection of interests, but the actor who disposes of this legal protection.

[424] This somewhat abstract point can be easily illustrated: it is perfectly clear that under a permissive exception clause, a state entitled to invoke that exception is never obliged to do so. See, eg, Dinstein, *War*, para 504. This is not true, of course, where the exception clause is not permissive in character but obligatory. For the distinction see Rivers, 'Second Law of Balancing', 168.

[425] See in more detail chapter II, section 2.3.1.

for example one underlying a permissible objective, where and to the extent that the beneficiary so desires.[426] Seeing, thus, that permissive rules leave the decision of whether and to what extent to active the legal protection provided by the rule to a given interest means by logical extension that the beneficiary has the right to achieve precisely the level of protection it desires (subject to a possible proportionality condition).

The essence of these considerations, namely each state's inherent end-setting discretion and the underlying beneficiary-dependency of normative weight allocation, can be extended to tentatively suggest answers to some of the more detailed questions left open above as well. First, they indicate that with respect to the question whether the challenged measure's ALoP or DLoP should be the relevant reference point, rather than adopting a principled preference for either one or the other it is much more convincing to take whichever of the two is lower as the decisive yardstick. Where the ALoP is lower than the DLoP, it makes no sense to require an alternative to reach the higher DLoP, effectively holding it to a standard that the original measure itself cannot fulfil.[427] Accepting the opposite would imply that a state could make almost any measure necessary by simply declaring an unachievably high DLoP.[428] Where, on the other hand, the measure's ALoP is higher than the state's expressed DLoP, the alternative measure's LoP should

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[426] Beneficiary-dependent normative weight allocation is, of course, ultimately present throughout a given legal systems. The most obvious illustration is that the beneficiary of any legal protection can virtually always waive that protection. See only Article 20 ASR.

[427] Regan, 'Meaning of "Necessary"', 359 (concerning WTO law). See also the arguments by the complainants in *EC-Seal Products (Panel)*, para 7.479.

A case in which the Panel apparently considered the challenged measure's DLoP to be higher than the ALoP is *Dominican Republic-Cigarettes*. The Panel considered that the challenged measure itself did not achieve the DLoP and that any alternative would only have to be as protective as the challenged measure itself (*Dominican Republic-Cigarettes (Panel)*, paras 7.228-7.229). The approach was explicitly confirmed by the AB (*Dominican Republic-Cigarettes (AB)*, para 72).

[428] See *US-Poultry (Panel)*, para 7.244, for similar reasoning, albeit related to Article 5.5 SPS rather than 5.6 (and see Regan, 'US - Poultry', 285; Gruszczynski, *Regulating Health*, 250). The situation becomes even more problematic where using the DLoP as the yardstick is combined with a presumption that the DLoP can only be reached by a more injurious alternative, which implies that any original measure that undershoots the DLoP is automatically necessary. While this reasoning is almost comically absurd, it was actually applied by the panel in *US-Clove Cigarettes (Panel)*, para 7.395.

only have to be at least as high as the original's DLoP,[429] as in those cases the contested measure's 'surplus protection' is undesired by the acting state and thus – based on the notion of beneficiary-dependent weight allocation – receives no legal protection. Because the 'surplus protection' receives no protection, the beneficiary state and thus the law are indifferent between measures achieving any LoP equal to or higher than the DLoP. The overall reasoning is rather simple: neither can the acting state require an alternative to be more protective than its chosen measure, nor can it demand an alternative to overshoot the self-proclaimed target only because its chosen measure happens to do so.[430] In both cases the state would be free to choose a measure that neither under- nor overshoots the DLoP. The relevant yardstick with which the alternative is to be compared must logically be whichever of the two is lower.[431] This conclusion again holds equal force for the State of Necessity, self-defence, and WTO law.

The theoretical considerations can further help to answer a second important question, namely how to compare two measures' LoP where they have different protection certainties and magnitudes. The most coherent answer would be that an alternative measure needs to be at least as protective as the challenged measure in every respect. For instance, an alternative that is 50% certain to be 90% effective would still not count as an alternative to a challenged measure that is 60% certain to be 60% effective. The key to understanding this counterintuitive conclusion again lies in the notion of beneficiary-dependent legal protection. Assuming that the challenged measure's ALoP is also the acting state's DLoP, the alternative's surplus in effectiveness would be undesired by the acting state, depriving it of any legal protection. At the same time, the

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[429] As noted in section 7.1.2.3., this was apparently the scenario underlying the SPS cases in which reference to the DLoP rather than the ALoP was stressed. See also *Australia-Apples (Panel)*, paras 7.1143-7.1144.

[430] An original measure that overshoots the DLoP is not automatically unnecessary, as such a finding would still depend on identifying an alternative that is both less harmful and reaches the DLoP (see Regan, 'US - Poultry', 285, 289). Nevertheless, in *Australia-Salmon (AB)*, para 213, fn.166, the AB may have suggested as much. This statement should, however, not be read as an automatic consequence, but rather as concerning the likelihood that the measure might fail the necessity test (as indeed any alternative would only have to achieve the lower DLoP).

[431] The same conclusion is reached by Regan, 'US - Poultry', 289(concerning WTO law). Similarly also Gruszczynski, *Regulating Health*, 249-250.

alternative's reduction in protection certainty would be legally relevant, as it would curtail the acting state's right to achieve its DLoP in this respect. One consequence of this finding is, of course, that the rates of substitution hinted at above[432] are not actually needed, since an alternative that is less protective in any one respect by implication has a lower normative weight than the challenged measure. Once more, this conclusion – which would also apply similarly to alternatives providing different kinds of protection[433] – would be equally applicable to all the surveyed rules.

7.2. Harm: the harm a measure causes by pursuing its objective

It was concluded above that the conception of necessity in all the surveyed rules focuses on the availability of effective yet either harmless or less harmful alternatives to the challenged measure. Having considered protectiveness, the next step is then to focus on the harm. To understand the role that harm plays, the section first briefly explains the function of necessity, which is at the same time empowering and limiting the acting state, and explains the implications thereof, before examining how the surveyed rules address harm.

7.2.1. Theoretical considerations: necessity as limitation of harm that can be caused in pursuit of a permissible objective

In the surveyed rules, necessity in its complex comparative conception serves a dual function.[434] On the one hand, it is a fundamental legality condition for action, in the sense that the state's ability to take a measure to pursue certain objectives is conditional on the measure's necessity. Where necessity is present, the state is thus empowered to take a measure where otherwise that same measure would be illegal.

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[432] See section 7.1.1.

[433] This conclusion is, of course, contrary to what the AB suggested in *US-COOL 21.5* (see section 7.1.2.3.).

[434] See Newton and May, *Proportionality*, 33, who speak of proportionality as being both 'power limiting' and 'power enhancing' (their arguments are just as applicable to necessity); Christakis, 'Pas de Loi?', 16-17: 'tantôt elle [necessity] accorde une autorisation; tantôt elle impose une limitation'.

At the same time, this empowering function is only needed because the measure subject to justification has some implications that make it, in principle, normatively undesirable; otherwise it would not need to be justified by the empowering function. This undesirable implication or harmfulness of the measure does not disappear because the measure is necessary, but it is accepted as unavoidable in bringing about the measure's desired effects. There is no reason, however, to accept any avoidable harm, which points to the limiting function of necessity: the harm must be limited to the minimum necessary to achieve the objective.[435] Necessity, in this sense, is often said to expresses the idea of Pareto optimality.[436] Two competing interests are in a state of Pareto optimality where neither can be furthered without harming the other.[437] Necessity reflects this: where an alternative exists that can decrease the harm done in pursuit of the objective while maintaining the achievement of the objective, the challenged measure is not necessary.[438]

The limiting function thus implies that only harmless or less harmful alternatives are relevant. Applying this non-excessiveness requirement causes no greater problems where it is clear what counts as a measure's relevant 'harm'. However, a measure can have more than one negative implication: an action by a state may have implications such as expenditure of resources, administrative effort, inconvenience, economic effects, or breach of a legal obligation. Assessing the teleological necessity of a multidimensional measure requires knowing which implication the non-excessiveness aspect of necessity attaches to.

Once the relevant harm is identified, comparing the harm caused by two measures poses similar difficulties as comparing two measures' LoP. In the by now familiar fashion, the harm

[435] See Kolb, 'L'utilisation du moyen le moins fort', 601.

[436] See Alexy, *Theorie der Grundrechte*, 149, fn.222; Alexy, *A Theory*, 398; Veel, 'Incommensurability', 179; Klatt and Meister, *Constitutional Structure*, 10.

[437] See OED, 'Pareto, n.'.

[438] Upon closer inspection necessity enshrines only a partial Pareto optimality condition. Necessity does not require asking whether an alternative measure exists that can achieve a higher LoP than the challenged measure without causing any additional harm. True Pareto optimality would require not only downward but also upward optimisation.

caused by a measure can again be broken down into various elements. The question of a measure's magnitude of harm relates to the degree or amount of harm caused to the relevant interests, whereas the certainty of harm (including risk and true uncertainty) expresses the degree to which the materialisation of the harm is contingent.[439] The combination of harm magnitude and harm certainty provides the measure's 'Level of Harm' ('LoH'). Comparing two measures' LoH can again be approached from two angles: first it could be maintained that only measures that are less harmful in every respect are taken into account;[440] the second option is again that the total harmfulness matters, which again raises aforementioned normative problems (rates of substitution, difference in kind of magnitude), which requires assigning normative weights to the two measures' LoH.

Assigning normative weight to two measures' harmfulness is, however, slightly more complex than doing the same with regard to protectiveness. Whereas only concrete normative weights are at issue when it comes to protectiveness, comparing harmfulness requires introducing the idea of abstract normative weight. Concrete weight relates to the normative weight of the concrete harm inflicted by a measure on a legally protected interest, whereas abstract weight concerns the normative weight of that harmed interest as such.[441] When comparing the LoP of two measures, the abstract weight of the protected interest is irrelevant, as the two measures under comparison by definition both protect the same interest.[442] The same is not necessarily true,

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[439] It could be speculated, however, that the materialisation of harm is often more easily predictable than the achievement of positive effects, in particular where the relevant harm consists in breaching a legal obligation (see Rivers, 'Proportionality and Discretion', 120; Rivers, 'Second Law of Balancing', 181).

[440] See Barak, *Proportionality*, 325ff, arguing alternatives violating different interests (or in his terms different rights) are automatically excluded from the analysis and that only measures that are less harmful in every respect qualify.

[441] Alexy, 'Balancing and Subsumption', 440: 'The abstract weight of [a principle] is the weight which [that principle] has relative to other principles independently of the circumstances of any cases.' As discussed in chapter II, section 2.1., the dimension of abstract weight is more prominent in proportionality than in necessity. The conclusion, however, that abstract weights are irrelevant for necessity (see Rivers, 'Proportionality and Discretion', 115; Rivers, 'Second Law of Balancing', 171), is incorrect for the reasons here assessed.

[442] See Alexy, *A Theory*, 406, and Alexy, 'Balancing and Subsumption', 440, on the possibility to ignore abstract weights that are equal.

however, as regards the comparison of two measures' LoH, as the two measures may well harm different protected interests in pursuing the same goal.[443] Where the interests harmed differ, a comparison that accounts for the fact that not all interests are equally important from a normative standpoint even in the abstract (ie, have different abstract weight) thus requires assigning both concrete and abstract weights, resulting in the overall normative weight of a measure's LoH.[444] To give a concrete example (returned to below[445]), assume a State can exercise its right to self-defence in one of two equally effective ways: strategy (1) kills 10 000 enemy combatants, while strategy (2) kills only 2 000 enemy combatants, but also 50 civilians. Knowing which of the two strategies is more harmful it is necessary to know both the concrete weights (here, the number of dead enemy combatants and civilians) and the abstract weights (the normative importance of an enemy combatant's and a civilian's life).

The two relevant questions in going forward are then first the identification of what counts as the relevant harm, and second whether the surveyed rules focus on the overall harm or rather require an alternative to be less harmful in every respect.

7.2.2. Empirical survey: the role of a measure's harmfulness in the surveyed rules

7.2.2.1. State of Necessity

To know which implication of a measure constitutes the relevant harm, a convenient starting point is asking which aspects of a measure are in need of justification. Under the State of Necessity, the fact that a measure is the 'only way to safeguard an essential interest'[446], when all other conditions are also fulfilled, precludes the wrongfulness of an act that is in violation of an

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[443] See Alexy, *Theorie der Grundrechte*, 101, fn.86, and in more detail Alexy, *A Theory*, 400, where he described necessity analysis involving two different potentially harmed interests (principles, in his parlance). Alexy also explained that the choice between the two potentially harmed interests requires weighing them against each other.

[444] See Rivers, 'Proportionality and Discretion', 118.

[445] See section 7.2.2.2.

[446] Article 25(1)(a) ASR.

international obligation of the state. Thus, what logically need to be justified are those aspects of a measure that contravene an international obligation.[447] A state's action that harms another state's interests but is not prohibited under international law must obviously enough not be legally justified.

The foregoing already gives a clear answer that under the State of Necessity, an alternative measures counts as harmless if it is not inconsistent with any of the acting state's international obligations.[448] The assessment is more complicated, however, where all the alternatives are also inconsistent with one of the acting state's international obligations. Recall that under the comparative conception of necessity, the challenged measure's necessity is not ruled out simply because another illegal and harmful alternative exists. The question is how to compare the harmfulness of two illegal measures with a view to determining which one is less harmful.

One might suppose that an alternative is taken into account where it is 'less inconsistent' or 'less illegal' than the challenged measure. This, however, does not lead very far, since legality is a binary concept: a measure either breaches an obligation or it does not, with there being no 'shades' of illegality. It makes much more sense to think that the comparison must be made with reference to the harm to the interests[449] protected (and to the extent protected) by the infringed obligation.[450] Derogation from an otherwise binding rule implies that the interests protected by that rule are exposed to harm; it is natural that the non-excessiveness implied by necessity in exception clauses then seeks to limit harm to precisely these interests. Logically, this also means that what precisely counts as harm depends on which obligation is being infringed. Since the State of Necessity can in principle be invoked to preclude the wrongfulness of an infringement of

[447] See *CMS Jurisdiction*, para 27: '[w]hat is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments'.

[448] See already section 6.2.1.

[449] See Pound, *Ideal Element*, 110; and Young, 'Proportionality is Dead', 59f, on the element of interests underlying rights and duties. See also chapter II, section 2.3.

[450] Similarly Cassella, *La nécessité en droit international*, 353 (with respect to WTO law). See also Gazzini *et al*, 'Necessity Across', 5.

any rule that does not explicitly exclude it, the precise reference point for the assessment of harm differs from case to case.

While the foregoing answers the question concerning the reference point, it says nothing about whether only alternatives that are less harmful in every respect are taken into account or whether the overall LoH matters. Indeed, neither doctrine nor practice appear to have dealt with this question.

7.2.2.2. Self-defence

In the case of self-defence, the same approach as under the State of Necessity can be used. Self-defence's primary function is undoubtedly to justify action that would otherwise constitute a violation of the prohibition of the use of force.[451] At the same time, self-defence 'may justify non-performance of certain obligations other than that under [Article 2(4) UNC], provided that such non-performance is related to the breach of that provision'.[452] Taking again as the reference point the interests protected under the rules departure from which is being justified, it makes perfect sense that necessity requires the absence of 'peaceful alternatives' or the possibility of using force on a lesser scale.[453] Beyond this first insight, it is however by no means obvious exactly what is taken into account in evaluating the harmfulness of a given use of force. It is clear that 'the *ius ad bellum* calculus is wider than the one involved in *ius in bello* [rules], in that also damage to enemy combatants and military objects is counted as relevant harm, and that one must look at the whole campaign rather than individual operations'.[454] This implies that also the

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[451] See, eg, *Oil Platforms* (Rigaux), para 16; Ago, *Addendum*, para 120; ILC, *2001 Commentary*, Article 21, para 1.

[452] ILC, *2001 Commentary*, Article 21, para 2.

[453] See section 6.2.2.

[454] Lieflaender, 'Ius ad bellum Proportionality'. See also Gardam, *Necessity*, 16-17, and Gardam, 'Proportionality as a Restraint', 166, summarizing that 'the major considerations in the application of proportionality in modem *ius ad bellum* ... are as follows: first, overall combatant and civilian casualties; second, the level of destruction of enemy property; and third, the impact of the use of force on third states' (speaking of proportionality but really meaning necessity); Greenwood, 'Self-Defence and Armed Conflict', 279.

choice of weapons and their respective impact is relevant.[455] But exactly how inclusive the definition of harm is remains somewhat elusive.[456]

The case of self-defence furthermore highlights the normative difficulties involved in comparing the harmfulness of two alternatives. In the *Nicaragua* case the ICJ distinguished between 'armed attacks' and less grave forms of the use of force.[457] Leaving extreme cases aside,[458] deciding which use of force is graver than another is difficult. By way of example, is a campaign in self-defence that kills 10 000 enemy combatants more or less harmful than an alternative campaign that kills only 2 000 enemy combatants, but also 50 civilians?[459] Because of the wide range of interests ultimately underlying the prohibition of the use of force, it is hard to see how a comparison of harm can be reduced to mechanical considerations (eg, number of bombs dropped). At the same time, it appears likely that no two military operations will be harmful in exactly the same way, so that the different kinds of harm render a comparison of only harm certainty and magnitude futile. It thus seems that as regards self-defence, a comparison of the overall harm, with reference to the overall normative weight of each alternative's LoH, is the only viable option, regardless of the difficulties connected therewith.

7.2.2.3. WTO law

The analysis of WTO law must start with a distinction between Articles XX GATT and XIV GATS on the one hand, and Articles 2.2 TBT and 5.6 SPS on the other hand. The first two

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[455] See Gardam, *Necessity*, 168; Gardam, 'Proportionality as a Restraint', 168.

[456] See Lieflaender, 'Ius ad bellum Proportionality'. The best discussion yet in a legal context is found in Gardam, *Necessity*, 168ff. For an excellent discussion from a just war perspective, see Hurka, 'Proportionality and Necessity', 131ff.

[457] *Nicaragua*, para 191.

[458] It is obviously easy to say that a full-fledged invasion is graver than a minor border incident involving only a handful of soldiers.

[459] See also the example given in Lieflaender, 'Ius ad bellum Proportionality'.

are recognised as exception clauses, whereas the latter two enshrine self-standing obligations of the member states.

Starting with Articles XX GATT and XIV GATS, what needs to be justified are the 'aspects of a measure ... that give rise to the finding of inconsistency'[460] with other GATT or GATS provisions.[461] Those parts of a measure that are not inconsistent are not investigated.[462] Accordingly, in the early *US-Section 337* case the panel required an alternative to be either GATT consistent or to involve a lower degree of inconsistency.[463] More recently the focus appears to have shifted away from looking for a 'less inconsistent' alternative and towards identifying a 'less trade restrictive' option.[464] It is submitted, however, that this is not a true substantive change, but only makes explicit what already lay beneath the panel's pronouncement in *US-Section 337*. Indeed, as the AB held in *China-Trading Rights*, 'while in principle a panel must assess the restrictive effect of a measure on international commerce, this test must be applied in the light of the specific obligation of the covered agreements that the respective measure infringes.'[465] Ultimately, the substantive provisions of the GATT and GATS protect free trade, so that a measure infringing them is by definition – and regardless of any actual trade effects it may produce[466] – in one way or another trade restrictive.[467] Requiring an alternative measure to be 'less trade restrictive' then only

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460 *EC-Seal Products (AB)*, para 5.185.

461 See *Thailand-Cigarettes II (AB)*, para 177; *Thailand-Cigarettes*, para 74; *US-Section 337*, paras 5.22, 5.24, 5.27; *Argentina-Goods and Services (Panel)*, para 7.588. Critically Kapterian, 'Critique', 104-05; see also Neumann and Türk, 'Necessity Revisited', 207.

462 See *US-Gasoline (Panel)*, para 6.22; *US-Gasoline (AB)*, 13-14.

463 *US-Section 337*, para 5.26.

464 Eg, *Brazil-Tyres (AB)*, para 156; see generally Voon, 'Trade-Restrictiveness', 465ff.

465 *China-Trading Rights (AB)*, para 306.

466 See *US-COOL (AB)*, para 359 (summarizing panel).

467 See Voon, 'Trade-Restrictiveness', 462ff; McGovern, 'Balance Interests', 190; Weiler, 'Brazil - Tyres', 139, noting that 'least inconsistent' needs some form of 'least trade restrictive' to make it work in practice.

translates the earlier formulation of the alternative having to be 'less inconsistent', based on the interests ultimately behind the GATT and GATS substantive obligations.

The situation is different under the SPS and TBT. As the provisions enshrining the necessity standard (Articles 2.2 TBT and 5.6 SPS) do not operate as defences, there is no inherent reference point; the rule itself must designate an infringement of which interest counts as harm. Under Articles 2.2 TBT and 5.6 SPS the implication of a technical regulation or sanitary/phytosanitary measure that must be justified as necessary is a measure's trade-restrictiveness.[468] A measure that is not trade restrictive requires no such justification.[469] Since trade-restrictiveness is then the decisive reference point under all the surveyed WTO rules, the exception clauses and the self-standing obligations ultimately overlap in this respect. Accordingly, the analysis of necessity under Articles XX GATT and XIV GATS also frequently overlaps with the same analysis under Articles 2.2 TBT and 5.6 SPS.[470]

There is one notable particularity about Article 5.6 SPS: while under all other surveyed provisions an alternative only has to be at least marginally less harmful, footnote 3 to Article 5.6 SPS provides that in order to be taken into account an alternative must be 'significantly less

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[468] See *US-Tuna II (Panel)*, paras 7.456, 7.460. On the notion of trade-restrictiveness, see generally Voon, 'Trade-Restrictiveness'.

[469] *US-Tuna II (AB)*, para 322, fn.647. The assessment of a measures trade-restrictiveness may include a counterfactual. Thus, the *Colombia-Ports* panel considered that 'the relevant question is not whether Panamanian imports increased in absolute terms, but whether or not importation was suppressed, in other words, whether the imports would have increased to an even greater extent had the measure not been in place' (*Colombia-Ports (Panel)*, para 7.597; similarly *China-Trading Rights (AB)*, para 300).

[470] See *US-Clove Cigarettes (Panel)*, para 7.363, fn.662:

> We agree with the United States that Article XX(b) is drafted in terms of whether the trade-restrictive measure is necessary to fulfil its objective, whereas Article 2.2 is drafted in terms of whether the degree of trade-restrictiveness of that measure is necessary to fulfil its objective. However, the United States has not explained why or how an analysis framed in terms of the necessity of the 'trade-restrictiveness' of a trade-restrictive measure would be significantly different from an analysis framed in terms of the necessity of that trade-restrictive measure.

This highlights that ultimately it is always the harm that needs to be justified as necessary, not the measure in a broader sense. See also Osiro, 'GATT/WTO Necessity', 127; more cautiously Desmedt, 'Proportionality', 468.

trade-restrictive' than the challenged measure.[471] The precise impact of this difference is, however, not clear, not least because no panel has ever found an alternative to be less harmful but not 'significantly' less so.

Until now the WTO panels and AB have not dealt with the second question posed at the outset, whether the overall LoH matters or whether the alternative needs to be less harmful in every respect. Neither has doctrine addressed this point.

7.2.3. Conclusion

Two conclusions follow from the empirical analysis. First, it seems clear that under exception clauses, the reference point for assessing a measure's harmfulness are the interests protected under the obligation an infringement of which is sought to be justified by recourse to necessity.[472] In contrast, self-standing obligations do not refer back to the interests underlying other rules, but rather designate themselves the interest a violation of which counts as harm. It seems justifiable to conclude that there is structural unity between all the rules in this regard.

For exception clauses, this notably renders the test dependent on the particular obligation that is breached. In addition, it has a somewhat less obvious further consequence: the necessity standard as enshrined in an exception clause is impossible to apply before it has been assessed whether the challenged measure actually infringes another obligation. Before an infringement has been identified, it cannot be said what the LoH of the measure is, and if indeed it causes any harm at all, making it impossible to assess whether any alternative causes less harm. Thus, it is not only counterintuitive to assess whether a measure complies with an exception clause

[471] The panel's report in *US-Clove Cigarettes* put some doubt on this fact. The United States had argued that the test under Article 5.6 SPS differed from that in Article XX(b) GATT on the basis that the footnote to the former provided that any alternative had to be 'significantly less trade-restrictive' (*US-Clove Cigarettes (Panel)*, para 7.365). The panel responded that it was 'unaware of any GATT or WTO panel or Appellate Body ruling which suggests that a different standard applies under Article XX(b)' (ibid, para 7.366). However, there is in reality no ruling that suggests that an alternative must be significantly less restrictive under Article XX GATT. The panel in *US-Tuna II (Panel)*, para 7.464, was careful not to simply read this requirement into art 2.2 TBT; see also *US-COOL 21.5 (Panel)*, para 7.445.

[472] One general consequence is that necessity imposes no restriction on state as regards their choice between measures that do not infringe an obligation (see generally Brems and Lavrysen, 'Less Restrictive Means', 142).

containing the necessity standard before assessing whether the measure actually infringes another obligation, but where the measure has a LoP higher than zero it is actually logically impossible.[473]

The second conclusion that can be drawn is that the rules under scrutiny provide very limited guidance concerning the question of whether the overall LoH matters or whether an alternative needs to be less harmful than the challenged measure in every respect. The lack of guidance makes it worthwhile to ask whether the approach followed above with respect to the LoP, namely drawing certain conclusions from the acting state's end-setting discretion and beneficiary-dependence of weight allocation,[474] can be extended to the LoH as well.

It is immediately clear that no argument in favour of allowing only alternatives that are less harmful than the challenged measure in every respect can be derived from the idea of beneficiary-dependent weight allocation. The acting state is not the beneficiary of the protection the law extends to the interests exposed to harm, so the acting state's preferences cannot be decisive. It may, however, be asked whether the harmed state's preferences play a role.

On the one hand, the idea of beneficiary-dependent normative weight allocation in principle applies not only to the interests furthered by a measure, but also those harmed by the same measure. For instance, a state towards which an obligation exists that is being infringed may waive its corresponding right, in which case the action that would otherwise be in breach of obligation is no longer unlawful.[475] More specific to the necessity context, it would appear to make sense that if one purpose of the necessity standard is to limit harm, the state actually suffering the harm could play a role in deciding which of two harmful but equally protective measures it would prefer. On the other hand, introducing the harmed state's preferences into the equation means that necessity loses most of its ability to guide action by providing an objective

[473] This conclusion has some relevance for the analysis of the ICJ's sequence of analysis in *Oil Platforms*, which is undertaken in detail in chapter IV, section 3.2.

[474] See section 7.1.4.

[475] Article 20 ASR. The idea has deep roots in moral theory; see only Brandt, *Morality, Utilitarianism, and Rights*, 74.

standard against which a state wishing to act in furtherance of a permissible objective can evaluate its options. Second, a measure may affect the interests of more than one other state, in which case the (potentially conflicting) preferences of all affected states would somehow become relevant, posing further questions of how to weigh multiple states' preferences against one another. Finally, in the particular case of inter-state self-defence the 'victim' state has actually made itself liable to suffering defensive force; giving weight to that state's preferences seems normatively deeply flawed.

In conclusion, the reasons speaking against relying on beneficiary-dependent weight allocation also as regards the harm side of the equation outweigh those speaking in favour. Likewise the acting state's preferences cannot be ultimately decisive for knowing which of two measures is less harmful. For the concrete question posed, this means that the only option that makes sense is to compare the overall normative weight of the two measures' LoH. This, notably, introduces a deep normative dimension into the concept of teleological necessity in legal rules, raising difficult but unavoidable questions of valuation.[476]

7.3. Inconvenience: the role of measure's additional undesired effects that do not count towards the measure's harmfulness

Having now clarified the characteristics that an alternative must possess with respect to protectiveness and harm, it must finally be asked whether an alternative measure's additional inconvenience[477] plays any role. The category of inconvenience covers all the additional negative consequences of an alternative for the acting state that do not relate to the LoP. In other words, can an alternative that is equally protective and less harmful be ignored simply because taking it, rather than the challenged measure, would be more inconvenient for the acting state?[478] Can, for

[476] See again chapter II, section 2.3.

[477] The term 'inconvenience' is inspired by the language used by the ILC in its *2001 Commentary*, where it states that an alternative is not ruled out even if 'less convenient' (ILC, *2001 Commentary*, Article 25, para 15).

[478] See Elliott, 'Proportionality and Deference', 12f.

example, an equally effective and less harmful alternative measure that costs significantly more money than the challenged measure negate the latter's necessity?

7.3.1. Theoretical considerations: possible approaches to addressing inconvenience

A measure's 'Level of Inconvenience' is again made up of the familiar elements of certainty and magnitude. A given rule may not allocate any role to inconvenience, in that it is perfectly possible for a rule enshrining a teleological necessity standard not to give any weight to considerations of convenience. If the rule allocates some role to inconvenience, however, two approaches would appear possible. First, the rule could set an absolute threshold of inconvenience, for example by requiring that only 'very significant' additional expenditure would disqualify an alternative measure. The second possible approach is a balancing- or proportionality-based rationale: a rule could require that the inconvenience occasioned by an alternative measure must not 'outweigh' the reduction of harm that this alternative brings about in comparison with the challenged measure.

7.3.2. Empirical survey: the role of a measure's inconvenience in the surveyed rules

7.3.2.1. State of Necessity

With respect to the State of Necessity, it is generally recognized that an alternative measure can refute the challenged measure's necessity even where it is 'much more onerous'[479], 'more difficult or more burdensome'[480], or 'more costly or less convenient'[481]. So far, no court has ever found an alternative to be too onerous, leaving it unclear how much inconvenience the acting state has to accept.[482]

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[479] Ago, *Addendum*, para 14. See also ILC, *Yearbook 1980*, 1613th meeting, para 7 (Ago).

[480] *Brazilian Loans (Counter-Memorial France)*, 255.

[481] ILC, *2001 Commentary*, Article 25, para 15. See also *Gabcikovo*, para 55.

[482] See in this respect *Gabcikovo*, para 55. Judge Herczegh apparently disagreed because he considered the alternatives' costs to be too high (ibid (Herczegh), para 185).

The tribunal in *Total* reproached Argentina for failing to prove that 'no reasonable alternatives' were available, which implies that the Tribunal thought the criterion to be some form of reasonableness.[483] Boed wrote that the required degree of inconvenience would definitely be reached where 'the additional cost of the alternative is … of such magnitude as to render resort to it a threat to an essential interest of the State in itself.'[484] This makes sense, as anything else would mean that the requirement for the absence of less harmful alternatives would be so far-reaching as to make the rule self-defeating in these cases. Thus, it would appear that a state would, for example, not have to endanger the functioning of its central public services, national defence, health care, and education by diverting funds in order to fund a less harmful but much more expensive alternative.[485]

While it can be concluded that under the State of Necessity inconvenience has a place, the exact threshold of when the additional inconvenience occasioned by an alternative is so significant as to render the alternative unavailable for the purpose of the law is not quite clear.

7.3.2.2. Self-defence

Under the law of self-defence, convenience has received little attention. One question that has, however, arisen in this context is whether a state is allowed to use 'greater mechanised force' in order to reduce the risk to its own soldiers, even if this will cause more (civilian) casualties and destruction on the other side.[486] Even though this issue may primarily relate to international humanitarian law[487] and possibly proportionality,[488] it is still relevant in the present

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[483] *Total*, para 223. See also Parish, 'On Necessity', 184.

[484] Boed, 'State of Necessity', 18.

[485] See the position of the South African government taken in 1930, quoted in Sykes, 'Economic Necessity', 309; see also Waibel, *Sovereign Defaults*, 98.

[486] See Wilmshurst, 'Chatham House Principles', 967, fn.17; Sloan, 'Puzzles', 322; and generally McMahan, 'Humanitarian Intervention'; Shue, 'Civilian Protection'.

[487] See Wilmshurst, 'Chatham House Principles', 967, fn.17. Discussion in the humanitarian law context is lively; see only Neuman, 'Applying the Rule of Proportionality'; Geiss, 'The Principle of Proportionality'; Ziegler and Otazari, 'Do Soliders' Lives Matter?'.

context. While the law is rather unclear in this difficult area,[489] the level of inconvenience (in terms of own risk or expenditure) that the acting state has to accept would appear to be connected to the reduction in harm that can thereby be achieved. Intuition would suggest that the state has to accept additional inconvenience where the reduction of harm outweighs the added inconvenience.

7.3.2.3. WTO Law

International trade law, finally, has dealt with convenience in more depth. From the earliest case onward it was held that the alternative must be 'reasonably available'[490], raising the question: 'what is reasonable?'[491] The answer given by panels and the AB has so far been pragmatic, rather than based on some overarching principle. First, it has been determined that 'administrative difficulties' do not render an alternative measure unavailable.[492] Second, the AB in *US-Gambling* considered that the alternative measure must not impose 'substantial technical difficulties'.[493] Third, with respect to the cost of an alternative, extra cost as such may not disqualify an alternative, but additional costs that are 'too high'[494] or 'prohibitive'[495] would.[496] Finally, the AB has recognised in *EC-Seal Products* that 'an alternative measure may be deemed not reasonably available due to significant costs or difficulties faced *by the affected industry*, in particular

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488 See Linnan, 'Self-Defense', 92; Carmola, 'Proportionality', 102ff.

489 See Gardam, 'Proportionality and Force', 173.

490 *US-Section 337*, para 5.26.

491 Marceau and Trachtman, 'Technical Barriers', 826; Trachtman, 'Trade and... ', 70.

492 *US-Gasoline (Panel)*, paras 6.26, 6.28, as interpreted in *EC-Asbestos (AB)*, para 169. See also *India-Agricultural (Panel)*, para 7.543.

493 *US-Gambling (AB)*, para 308. See also Article 5.6 SPS, fn.3.

494 *Korea-Beef (AB)*, para 179.

495 *US-Gambling (AB)*, para 308.

496 In *Korea-Beef (AB)*, para 181, the AB seemed to take some consideration of fairness into account, noting that Korea in effect shifted the costs it saved by imposing a GATT-incompatible measure on to the imported goods and retailers.

where [they] could affect the ability or willingness of the industry to comply with the requirements of that measure.'[497] The best summary of all these factors is simply that the alternative must not 'impose an undue burden'.[498] What exactly this means in a concrete case is, however, elusive.[499]

7.3.3. Conclusion

Every surveyed rule accords a certain role to considerations of inconvenience.[500] Beyond this general conclusion, however, can any general guidelines be deduced from this seemingly diverse and often unclear landscape? It is not surprising that none of the rules have set clear thresholds, since it seems virtually impossible to construct meaningful thresholds in the abstract.[501] Even though none of the cases or rules spell this out explicitly, it may be speculated that the real criterion is a form of proportionality.[502] It would then be decisive whether the inconvenience caused by the alternative measure outweighs the degree to which it is less harmful than the original measure.[503] Thus, the alternative would be too inconvenient where it imposes significant additional inconvenience for a marginal reduction of harm. How exactly the two sides of the equation would be measured is again a question of valuation.

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[497] *EC-Seal Products (AB)*, para 5.277.

[498] *US-Gambling (AB)*, para 308; *China-Trading Rights (AB)*, para 327. The AB intimated that in this assessment the 'particular circumstances of the responding Member ... may be relevant' (*US-COOL 21.5 (AB)*, para 5.337).

[499] See Mitchell and Henckels, 'Variations', 133.

[500] See *Continental Casualty*, para 227, recognising a role for inconvenience also as regards the NPM clause.

[501] But see Barak, *Proportionality*, 324f, who effectively argued that any additional inconvenience can disqualify an alternative. Adopting this approach would elevate the avoidance of inconvenience to the same level as the objectives against which necessity must be measures (ie, it would form part of the LoP; see also Elliott, 'Proportionality and Deference', 14). Both Barak and Elliott do not discuss questions of convenience if only a necessity test applies, rather than necessity and proportionality. This is significant since, in their analysis, giving a greater role to convenience in the necessity stage is counter-balanced by giving it very little weight in the proportionality stage.

[502] See Kurtz, 'Adjudging the Exceptional', 369, suggesting as much for his construction of a 'reasonable LRM test'.

[503] Explicitly for trade law, see Regan, 'Meaning of "Necessary"', 349; Regan, 'Non-trade Interests and Values', 20-21; Mitchell and Henckels, 'Variations', 154; more cautiously Bown and Trachtman, 'Brazil - Tyres', 101. See generally also Kurtz, 'Adjudging the Exceptional', 369; Hoelck Thjoernelund, 'Necessity', 477.

7.4. Special questions: contribution, prior exhaustion of alternatives, and compensation

Before concluding this chapter, three further issues – contribution, exhaustion of alternatives, and compensation – must be addressed. They do not fit easily into any of the previous sections, as each displays a particularity. First, the question of contribution differs from the analysis of alternatives so far considered in that it does not ask whether an alternative existed when the challenged measure was adopted, but whether an alternative existed before that point in time. Second, an obligation to exhaust less harmful alternatives before resorting to the challenged measure could exist even where the alternatives to-be-exhausted would not be taken into account in a standard necessity analysis. Finally, it is asked whether necessity might imply an obligation to pay compensation even where necessity is otherwise established.

7.4.1. Contribution: is reliance on necessity precluded when the acting state has contributed to the emergence of the threat against the permissible objective?

The issue of contribution relates to whether the acting state has contributed to creating the threat it now seeks to reduce or eliminate. Contribution implies that the acting state could have achieved the objective by less harmful means if it had acted or omitted to act earlier in time.[504] Contribution is regulated explicitly in Article 25(2)(b) ASR, providing that the State of Necessity cannot be invoked where 'the State has contributed to the situation of necessity'.[505] In addition, the *Continental Casualty* tribunal read a requirement of non-contribution into the international trade law standard on necessity, even though the WTO jurisprudence cited by the tribunal does not recognize such a retrospective alternative means analysis.[506] It has –

[504] Sykes suggests that exception clauses raise moral hazards, since actors may be induced to take excessive risks knowing that they can shift the costs to others under the exception clause (Sykes, 'Economic Necessity', 299). Thus, a requirement of non-contribution could be needed to counterbalance this moral hazard.

[505] For the various possible interpretations thereof, see *Enron Annulment*, paras 386-389; *Impregilo*, para 356. See further *Gabcikovo*, para 57; and also *Gould Marketing*, 152, which requires not merely contribution but that the relevant conditions be attributable 'to the fault of the Respondent party'.

[506] See *Continental Casualty*, para 198; Alvarez-Jiménez, 'New Approaches', 10.

unsurprisingly – played no role in the law of self-defence. After all, a possible consequence would be that an attacked state would not be allowed to defend itself simply because something it did may have causally contributed to the attacking state's decision to strike first.

Conceptually speaking, there are two ways of analysing a requirement of non-contribution in the context of necessity. First, it can be seen as an independent and additional legality condition that simply bars a state from responding to a threat to the creation of which it contributed. Under this option there is no direct connection with necessity. Article 25 ASR appears to support this first approach, avoiding conflation with necessity proper.[507] The second way of looking at contribution is by including alternatives that could have been taken earlier in time in the general alternative measures analysis. This approach finds some support in jurisprudence. For instance, in *Continental Casualty* the tribunal considered that

> if a Contracting Party to the BIT has contributed to endangering its essential security interest, for the protection of which it has then adopted the challenged measures, those measures may fail to qualify as 'necessary' under Art. XI, since that Party could have pursued some other policy that would have rendered them unnecessary.[508]

Similarly, the tribunal in *El Paso* opined that 'the requirement under Article XI that the measures must be "necessary" presupposes that the State has not contributed, by acts or omissions, to creating the situation which it relies on when claiming the lawfulness of its measures'.[509] The difference between the two awards lies in the fact that while *Continental Casualty* explicitly rejected reliance on Article 25 ASR to arrive at its conclusion, *El Paso* recalled that 'concepts used in Article 25 [ASR] "assist in the interpretation of Article XI itself"'[510] and in fact relied *inter alia* on

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[507] Alvarez-Jimenez suggests that a 'no contribution requirement' is a general principle of international law, which suggests that it is separate from the necessity standard itself (see Alvarez-Jiménez, 'Advancing Doctrine', 177; and Alvarez-Jiménez, 'Political Economy of Crises', 489).

[508] *Continental Casualty*, para 234.

[509] *El Paso*, para 613. During the annulment proceedings, Argentina protested against interpretation, arguing that 'necessity' and 'non-contribution' are 'clearly distinguishable requirements' (*El Paso Annulment*, para 247). The annulment committee left the tribunal's findings undisturbed (ibid, para 248).

[510] *El Paso*, para 613, citing *Continental Casualty*, para 168. Notably, the *Continental Casualty* award here used less definite language, leaving it open whether Article 25 ASR actually assists in the interpretation of the treaty's Article

Article 25 ASR with respect to contribution.[511] In turn, this may suggest that the *El Paso* tribunal simply applied the Article 25 non-contribution requirement, rather than one somehow inherently contained within the teleological necessity standard.

So should the requirement of non-contribution be seen as a standalone condition, which a rule would need to set out explicitly, or as being implied in the necessity standard itself? In fact, treating contribution as a separate requirement makes more logical sense. An otherwise illegal measure is only justified if necessary for the entire duration of its application (or until it ceases to be unlawful-unless-justified). This implies that the measure's necessity must be established at the time the measure is adopted and continuously from there onward. The necessity analysis is thus logically restricted to the timeframe during which the specific measure is maintained. Asking whether an earlier measure (including omitting action that gave rise to a threat) would have achieved the objective does not answer this question, but rather substitutes it with a different one: it is no longer about whether the measure is necessary, but rather whether it could have been avoided that the measure became necessary in the first place. This is an entirely different standard, which can hardly be seen as inherently contained within the necessity standard itself.[512]

The approach treating the non-contribution requirement as a separate and additional limitation is affirmed by jurisprudence, where contribution was only ever considered with respect to Article 25 ASR, which explicitly provides for it.[513] Apart from *Continental Casualty* and the ambiguous *El Paso* award mentioned above, the question of contribution has not been treated as

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XI: 'The Tribunal will therefore focus on the analysis of Art. XI and the conditions of its application, referring to the customary rule on State of Necessity ... only insofar as the concept there used assist in the interpretation of Art. XI itself.'

[511] *El Paso*, para 617.

[512] The second reason is a possible paradox that arises from treating non-contribution as part of the alternative measures analysis, namely that the necessity of a later measures could be undermined by the availability of less harmful measures earlier in time, even where those earlier measures would themselves not have been justifiable as necessary at that time because there was then no sufficient threat yet. See on this point *Continental Casualty*, para 229; Alvarez-Jiménez, 'Early Warning Models', 538.

[513] Note also Arbitrator Stern's critical view on the matter of contribution (*El Paso*, paras 666ff; *Impregilo*, para 360).

one of alternative means.[514] This clearly speaks against considering it an inherent element of the necessity standard, but rather as a special additional limitation that needs to be separately embodied in the respective rule.[515] As Cassella put it, 'il n'existe pas de raison *a priori* pour exclure la situation de nécessité à laquelle l'Etat a contribué, sauf si la norme le prévoit clairement.'[516]

7.4.2. Prior exhaustion of alternatives: does necessity imply a requirement for the acting state to first attempt all less harmful alternatives?

An obligation to exhaust alternatives before resorting to the challenged measure is only of interest where it would oblige the acting state to adopt measures that would not normally count as alternatives, since otherwise the obligation would already be fully contained in the necessity standard as described. As it makes no sense to think of an obligation to exhaust alternatives that are more harmful or are not capable of achieving the objective to the same degree, the obligation would then relate only to less harmful measures that have a lower LoP in terms of certainty.

The existence of an obligation to exhaust alternatives has sporadically been suggested with respect to self-defence.[517] For instance, Judge Schwebel contemplated in the *Nicaragua* case that the United States 'should have exhausted [the available] multilateral remedies', even if it

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[514] See, eg, *CMS*, paras 328-329. Notably, contribution was also not considered a relevant factor in the interpretation of Article 15 ECHR (which is even argued by one scholar to have 'crystallized the already-existing custom of necessity as a defense' (Bellish, 'In Priniciple but Not in Practice', 134)), despite claims in this direction (Buffard, 'Verhältnis', 116-17). See also Binder, 'Performance of Treaty Obligations', 10, noting that non-contribution is generally not a requirement under human rights law; and Binder and Reinisch, 'Economic Emergency Powers', 539, noting that 'none of the national emergency systems' surveyed in their comparative study 'contains a "contribution element" that would exclude adopting emergency measures in situations where the state has contributed to the emergency'.

[515] Similarly Kurtz, 'Adjudging the Exceptional', 343; Heathcote, 'State of Necessity', 261; Binder, 'Nichterfüllung', 145; Titi, *Right to Regulate*, 242; Cristani, 'Sempra Annulment', 247.

No attempt is made here to evaluate the claim advanced by the *Enron* tribunal that the requirement of non-contribution expresses 'a general principle of law devised to prevent a party taking legal advantage of its own fault' (*Enron*, para 311; see also Alvarez-Jiménez, 'The Interpretation of Necessity Clauses', 441). In any event, such a general principle would not attach to the necessity standard as such, but rather to an exception clause as a whole.

[516] Cassella, *La nécessité en droit international*, 165.

[517] See, eg, Lubell, *Extraterritorial Use of Force*, 45, suggesting such an obligation under certain circumstances. For a discussion in the just war context, see Aloyo, 'Last Resort'.

considered them to be ineffective.[518] The existence of the obligation has, however, most prominently been raised in the context of the State of Necessity.[519] For example, Arbitrator Pinkney in the early *Neptune* case relied on Grotius in holding that necessity 'does not give a right of [acting harmfully] until all other means of relief consistent with the necessity have been tried and found inadequate.'[520] More recently, in *Gabcikovo* the ICJ considered that Hungary's measures were not justified partly because 'negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being any need to abandon it.'[521] Similar claims have not generally[522] been advanced under the international trade regime.[523]

Despite these prominent suggestions, whether an obligation to exhaust alternatives actually exists is rather questionable.[524] First, in the majority of cases, it was not raised. Second, and more importantly, it seems to conflict with the acting state's freedom, within the limits set by the permissible objectives and possibly proportionality, to determine the LoP it wants to achieve, including the element of certainty of success.[525] However, this conflict is only partial, as the challenged measure may still be available after less harmful and less certain alternatives were

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[518] *Nicaragua* (Schwebel), para 204. See also Sofaer, 'Necessity of Pre-emption', 223, who treats exhaustion of other remedies more as an evidentiary matter. In just war theory the condition plays a more prominent role (see only Newton and May, *Proportionality*, 65, 145).

[519] Apart from the instances cited hereafter, see also *LG&E*, para 250; implicitly Keiver, 'The Pacific Salmon War', 413-414.

[520] *Neptune* (Pinkney), 398-99. See also ibid (Gore), 415; ibid (Turnbull), 433.

[521] *Gabcikovo*, para 57. See generally also Ago's treatment of *Torrey Canyon*; ILC, *Yearbook 1980*, 1614th meeting, para 34 (Ushakov); Cheng, *General Principles*, 71, 74.

[522] But see Trachtman, 'Regulatory Jurisdiction', 650; van Calster, 'Regulatory Autonomy', 132.

[523] In *US-Gambling (Panel)*, para 6.528, the Panel suggested that the United States should have 'explored and exhausted' WTO-consistent alternatives. The AB, however, rejected this finding, holding that the proposed alternative was uncertain (*US-Gambling (AB)*, para 317).

[524] State of Necessity: see Agius, 'Invocation', 60. Self-defence: see Corten, *Law Against War*, 482; Corten, 'Necessity', 872; Green, 'Docking Caroline', 452-55; Green, *International Court*, 84.

[525] See section 7.1.4.

attempted. Thus, it appears that in the final analysis the impact that exhausting less certain measures would have on the challenged measure's LoP is decisive. Combining the logic of the state's right to set the desired LoP and the rationale underlying an obligation to exhaust less-harmful alternatives suggests the following: if a less certain alternative can be taken without thereby reducing the LoP that the challenged measure provides when implemented if and after the alternative measure has failed, then and only then an obligation first to attempt the alternative measure makes sense.[526] Under such circumstances, taking the alternative measure does not infringe the right of the state to eventually achieve its desired LoP. Where, however, first attempting the less certain alternative measure would either exclude the original measure (where there is an either-or choice) or reduce its LoP, no exhaustion obligation would appear to exist.[527]

In the light of the foregoing consideration, it also becomes clear that a temporal dimension still has a role to play. Where the threat materialisation is still temporally distant, even if already sufficiently certain and grave, there would appear to be more room to explore and attempt alternatives before resorting to the challenged measure.[528] Where the threat is temporally already proximate and leaves no time for trial and error, a measure with a lower protection certainty would not have to be attempted, as doing so would undermine the acting state's ability to ultimately achieve the desired LoP.[529]

A final point in this context concerns evolving threats. It might be thought that where the required minimal thresholds of magnitude and certainty have already been reached and where the

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[526] This approach is notably compatible or even equivalent with the 'last window of opportunity' test sometimes advanced (see Lubell, 'Imminence', 710-711).

[527] Going in the same direction: Lowe, *International Law*, 278; Lowe, 'Clear and Present', 192; Wilmshurst, 'Chatham House Principles', 967; Dinstein, *War*, para 612. In such cases attempts to exhaust less-injurious alternatives may still fulfil an important evidentiary function, as they could serve to prove that the alternative does not achieve the relevant LoP (see Green, 'Docking Caroline', 455; Green, *International Court*, 84; Green, 'Ratione Temporis', 101; Sofaer, 'Necessity of Pre-emption', 223).

[528] See Christakis, 'Pas de Loi?', 27; Lubell, *Extraterritorial Use of Force*, 62; Gill, 'When Does Self-Defence End?', 744; Hayashi, 'Using Force', 21; Cassella, *La nécessité en droit international*, 341.

[529] See also Raby, 'Necessity', 265; Buza, 'Necessity', 214.

LoT continues to grow in time until the threat materializes, the state taking the protective measure may not have to exhaust less harmful alternatives before acting, as it does not have to allow the threat to grow any further. But in reality it is not the development of the threat itself that matters, but rather whether letting the threat grow reduces the state's ability to respond effectively.[530] The essential question is whether the increased LoT automatically brings with it a lower achievable LoP, increased inconvenience, or neither. Depending on the answer, the fact that a threat is growing may still not relieve the state of an obligation to exhaust alternatives.

7.4.3. Compensation: does necessity imply an obligation to pay compensation for the harm caused?

There is no debate that where a measure is found not to be necessary, that measure is *ipso facto* wrongful under the rules surveyed in this thesis, either because the measure breaches a self-standing obligation (TBT and SPS), or because the defence against an already established breach of obligation fails (State of Necessity, self-defence, Articles XX GATT and XIV GATS). This wrongfulness will carry the usual consequences, which may involve an obligation to pay compensation.[531] There is some debate, however, whether in certain circumstances an obligation to pay compensation may arise even where the measure has been found to be necessary (and all the other conditions the rule may impose are also fulfilled). While nobody seriously suggests this for self-defence and WTO law, it has been widely debated for the State of Necessity and NPM clauses in BITs.[532] Article 27 ASR explicitly leaves the question open.

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[530] See Akande and Lieflaender, 'Clarifying Necessity', 566.

[531] See Article 36 ASR.

[532] In the main case concerning the State of Necessity (*Gabcikovo*), the state invoking the State of Necessity agreed that 'a state of necessity would not exempt it from its duty to compensate its partner' (*Gabcikovo*, para 48). In the early *Anton Quella* case, the arbitral tribunal rejected a right to compensation, holding that '[a]ny holder of rights must be subject to emergency measures of general interest without being entitled to compensation' (*Anton Quella*, 176-179, quoted after Coussirat-Coustère and Eisemann (eds), *Repertory*, 267; see also *Dickson Car Wheel*, 678-682). Many investment arbitration tribunals have upheld an obligation to pay compensation in any event (see *CMS*, paras 388ff; *BG Group*, para 409; *EDF*, paras 1177-1178), while at least one has apparently rejected it (see the not-altogether-clear *LG&E*, paras 261, 266). See also Sykes, 'Economic Necessity', 321-323.

Not dissimilar to a requirement of non-contribution, an obligation to pay compensation can exists as an independent rule relating to the consequences of a successful invocation of an exception clause containing the necessity standard. Alternatively, taking a measure and paying compensation could be seen as being less harmful than taking the same measure without paying compensation.[533] If the latter were true, necessity would imply an obligation to pay compensation.

There are good reasons to think that only the first reading makes sense. Above all, the second reading would suggest that the payment *vel non* of compensation impacts on a measure's harmfulness. However, as discussed above, harmfulness is measured with respect to the interests protected under the infringed rule, which are by no means always economic in nature. To propose then that paying compensation can render a measure less harmful is to misunderstand the nature of harm in this respect. Second, in some contexts (such as self-defence or sanitary and phytosanitary measures), imposing an obligation to pay compensation is manifestly absurd. After all, should a defending state have to pay compensation to the state that attacked it in the first place, or should a state banning the importation of harmful substances to protect the health of its citizens compensate the state exporting these harmful substances?

In conclusion, in some cases the obligation to pay compensation despite an established necessity may make sense. It cannot, however, be understood as being generally implied in the necessity standard and cannot automatically be applied across the board.[534]

7.5. Conclusion on alternative measures

The foregoing comparison allows for the conclusion that the surveyed rules converge to a rather large degree with respect to the fundamental characteristics that an alternative must possess in order to refute the challenged measure's necessity. First, under all the rules an

[533] See Alvarez and Khamsi, 'Argentine Crisis', 456, can be read is going in this direction when they suggest that compensation can in any event only be denied when 'the failure to pay compensation [itself] remains "necessary."'

[534] See *CMS Annulment*, para 146, holding that a successful invocation of the NPM clause excludes the payment of compensation, thus implying that no such obligation is included in the necessity standard in the NPM clause. See also *Continental Casualty Annulment*, para 126; *El Paso*, para 612; and Bücheler, *Proportionality*, 242ff.

alternative's protectiveness is assessed against the challenged measure itself, rather than an independent threshold. The general rule is that the alternative must be at least as protective as the challenged measure. There is less clarity as to whether the overall protectiveness of two measures must be compared, or whether the alternative must be at least as protective as the challenged measure in every respect (kind, certainty, and magnitude). Likewise, there is some uncertainty, including within WTO law, as to whether the relevant reference point is the challenged measure's actual or desired LoP. Nevertheless, it was suggested that based on a coherent theory of beneficiary-dependent weight allocation, all the surveyed rules should develop in the same direction: the alternative should only count if it is as protective as the RLoP in every respect and that the relevant reference point should always be the lower of either the challenged measure's ALoP or DLoP.

Second, as regards the dimension of harm, there is unity in that under all surveyed rules an alternative needs to be less harmful, and that for exception clauses harm is measured with reference to the interests protected by the rules an infringement of which is sought to be justified by invoking necessity. Furthermore, it was argued that under all surveyed rules – and in contrast to the dimension of protectiveness – it is the overall normative weight of the harm caused that must count for the comparison between an alternative and the challenged measure.

Third, while inconvenience plays a role under each surveyed rule, none has spelled out the exact yardstick for deciding when the additional inconvenience caused by an alternative disqualifies it. It can nevertheless be tentatively suggested that the real criterion appears to be one of proportionality, in that the additional inconvenience caused by an alternative must not outweigh the reduction in harm brought about by just that alternative. Again, the surveyed rules converge in this respect.

Finally, there are good reasons for accepting that neither a non-contribution requirement nor an obligation to pay compensation are genuine elements of the necessity standard; they are not implied by necessity. Rather, they constitute standalone requirements that a particular rule

may or may not impose. Concerning a possible obligation to exhaust alternatives, it makes much sense to think that such an obligation is indeed implied by necessity where attempting a less harmful but also less certain alternative would not undermine the ultimate ability of the acting state to achieve its desired level of protection. Once more, this applies to all the surveyed rules.

8. Conclusion on necessity

Taking a global perspective on the findings under each section of this chapter reveals three significant insights. First, the necessity standard as enshrined in each of the surveyed rules embodies precisely the same essential conceptual structure and fundamental decision logic: each rule (a) defines a set of forward-looking permissible objectives and entails a measure of 'end-setting discretion' for the acting state; (b) requires the presence of some positive threat; (c) adopts a binary, complex comparative, and continuous conception of necessity; and (d) requires the absence of at least equally protective and less harmful alternatives. It furthermore emerged that with respect to the reference point of comparing two measures' protectiveness and harmfulness, the surveyed rules have not yet provided comprehensive answers in each case, but the common challenges facing all rules and common underlying logic of teleological necessity would appear to pull the development under all rules in the same direction. With regards to these essential structural elements and fundamental decision logic, the necessity standard is thus unified across the diverse surveyed rules. This unity strongly suggests that it is the very concept of teleological necessity as used in exception clauses that imposes this essential conceptual structure and fundamental decision logic.

Second, there exists additional overlap between the surveyed rules with respect to some elements that are not equally essential for the basic functioning of the necessity standard in the context of exception clauses, but which nevertheless frequently recur. Thus, the surveyed rules (a) do not enshrine a proper temporal proximity condition; (b) exclude any measures not taken in good faith or that violate *ius cogens*; (c) give a certain role to the additional inconvenience caused

by an alternative measure, with it being tentatively suggested that an alternative's additional inconvenience must not outweigh the reduction of harm implied by the alternative; (d) do not include non-contribution or payment of compensation as elements of the necessity standard, but rather as add-on conditions; and (e) may include an obligation to exhaust less harmful but less certain alternatives only when this does not infringe the acting state's ability to achieve its desired LoP. The overlap between the surveyed rules in these respects, despite the vast difference in character and context of the rules, signals unity, again leading to the conclusion that these overlapping elements form part of the necessity standard's core unified content across exception clauses in international law.

Third, there are some areas of divergence. Thus, (a) the precise set of permissible objectives is naturally idiosyncratic to each rule, and some rules set out the permissible objectives in the abstract while others rely on a dynamic model combining the abstract quality of an interests permissibly furthered and the concrete threat facing that interest; (b) some rules require a minimum threat threshold to be crossed, while others allow action when any positive threat exists; (c) beyond excluding measures not taken in good faith and in violation of *ius cogens*, each rule provides an idiosyncratic set of *a priori* exclusions; and (d), some rules include the add-on conditions (such as non-contribution) and some do not, which suggest that they are not in practice seen as always concurrent with teleological necessity. With respect to each non-unified element, it appears feasible to explain the divergence by reference to the particular character and context of each rule, demonstrating the degree to which necessity adapts to the particular normative requirements of each rule. These non-unified elements cannot be counted towards the context-independent unified core content of teleological necessity in exception clauses.

Against the background of a thus largely unified, determinate structure and decision logic of teleological necessity in exception clauses across international law, it cannot be overlooked that applying the necessity standard in a concrete case still depends on a number of case-specific

assessments of fact and allocations of normative weight.[535] In addition, it is frequently submitted that the necessity standard always implies a proportionality test as well.[536] A study of how teleological necessity operates in exception clauses is thus only complete once the connection between proportionality and necessity, as well as how courts review the case-specific determinations required for the application of the necessity standard, have been examined as well. The thesis proceeds to do so in the following two chapters.

[535] Klatt and Meister stressed that necessity (and proportionality) are ultimately formulas that relate certain premises, but do not determine the value of each premise in a concrete case (Klatt and Meister, *Constitutional Structure*, 54, 56). See also Shany, 'Toward', 915, explaining that the application of standard-type norms (such as necessity) is always circumstance-dependent; see finally also Desierto, *Necessity*, 173, pointing out that 'emergencies (or states of necessity) in general are fact-dependent situations'.

[536] See chapter II, section 2.2.

II. PROPORTIONALITY

1. Introduction: finding and comparatively analysing proportionality in the surveyed rules

The concept of proportionality can be found in a plethora of highly diverse contexts and guises.[537] There are few topics in legal scholarship that have received more attention in recent years than proportionality as a limitation on state action.[538] Proportionality is arguably most prominent in the context of constitutional and human rights law as well as in national administrative law. As regards constitutional rights in particular, Beatty famously wrote that '[p]roportionality is a universal criterion of constitutionality' and that it is 'an essential, unavoidable part of every constitutional text'.[539] Having its origin in German (or more precisely Prussian[540]) administrative law in the 19th century,[541] proportionality has since become the 'single most successful legal transplant of the past sixty years', having been received by legal systems around the world.[542] Despite being widely accepted by legal systems as a limiting principle on state action, proportionality is also highly contested.[543]

Turning to the rules surveyed in this thesis, the first impression is one of ambiguity: the status and form of proportionality in the surveyed rules are not immediately obvious. First, with regard to the State of Necessity, the codification text of the customary rule contained in Article 25 ASR does not mention proportionality *eo nomine*. Article 25(1)(b) ASR excludes reliance on the

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[537] See generally Cannizzaro, *Il Principio Della Proporzionalità*.

[538] See only the recently published Huscroft *et al* (eds), *Proportionality and the Rule of Law*.

[539] Beatty, *Rule of Law*, 162.

[540] See Hilf and Puth, 'The Principle of Proportionality', 200-201.

[541] See Dyzenhaus, 'Culture of Justification', 236; Kretzmer, 'Proportionality in Jus ad Bellum', 276. But see also Poole, 'Proportionality in Perspective', who traces proportionality's origins back to Greek and Roman thinkers.

[542] See Stone Sweet and Mathews, 'Proportionality Balancing', 74; Stone Sweet and della Cananea, 'Proportionality, General Principles of Law', 916-917; and generally Kennedy, 'Genealogy'.

[543] See Klatt and Meister, *Constitutional Structure*, 1.

State of Necessity where the acting state, by breaching one of its obligations in order to safeguard an essential interest, would 'seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole'. Whether this formula in fact enshrines proportionality requires more detailed analysis (section 3.1.).

In the context of self-defence, it is uncontroversial that the use of defensive armed force must be proportionate, both under the customary rule and its twin in the UNC.[544] At the same time, it was noted in chapter I that what is often referred to as proportionality in the self-defence context is actually only one aspect of necessity, and thus not proportionality proper.[545] It is thus an open question whether, in addition to necessity (including under the label of proportionality), self-defence requires any proper proportionality of defensive force (section 3.2.)

Turning finally to WTO law, Articles XX GATT and XIV GATS as well as the TBT and SPS all explicitly refer to necessity, but they make no reference to proportionality. Yet, following the *Korea-Beef* case and the AB's introduction of a 'weighing and balancing' test,[546] the WTO's own secretariat concluded that 'there has been some evolution in the interpretation of the necessity requirement of Article XX (b) and (d)' and that necessity proper has become 'supplemented with a proportionality test ("a process of weighing and balancing a series of factors").'[547] Similarly, the then Director-General of the WTO opined in 2006 that the necessity test has 'features of a "proportionality" requirement' since the AB introduced 'a new and additional balancing test'. [548] Whether the AB in *Korea-Beef* really established a proper proportionality test can again only be answered after detailed analysis (section 3.3).

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[544] See n.9.

[545] See chapter I, section 6.2.2.

[546] See chapter I, section 6.2.3.

[547] WTO, *Secretariat Note*, para 42.

[548] Lamy, 'The Place of the WTO', 979.

Against this general backdrop, the present chapter pursues three overarching purposes: first, it aims to better understand how the controversial concept of proportionality works in principle, distinguishing its different variants, throwing light on their respective normative implications, and delineating proportionality from necessity (section 2). Second, the chapter surveys whether the various rules under scrutiny contain a variant of proportionality, and if so, how it operates in the context of that rule (section 3). Finally, the chapter concludes on the degree of unity between the various rules in this respect and puts the findings into theoretical perspective (section 4).

2. Theoretical considerations: identifying the main variants of proportionality as a guide for the comparative analysis

The general introduction to this thesis as well as the introduction to chapter I highlighted some of the problems for comparative analyses that stem from inconsistent terminologies and confusing labelling. These problems must likewise be tackled when it comes to analysing proportionality across different rules. It is perfectly possible for a rule to terminologically reference a proportionality condition without actually entailing one and *vice versa*. Accordingly, just as was the case for necessity,[549] the first step for comparatively analysing proportionality is to draw up a 'scheme of intelligibility' that allows identifying proportionality where it occurs, as well as distinguishing its numerous variants. Accordingly, this section outlines the main variants of proportionality in their abstract form (section 2.1.), with the help of which the rules under scrutiny can then be analysed in section 3. In addition, it delineates proportionality and necessity (section 2.2.), and explores the mechanisms behind normative weight allocation (section 2.3.).

2.1. Typology of proportionality

Proportionality as a limiting principle is conceived of by a large number of legal systems as consisting of three or four separate sub-tests: (1) 'suitability' or 'appropriateness', (2) 'necessity',

[549] See chapter I, section 2.

and (3) 'narrow proportionality' or 'proportionality *stricto sensu*'.[550] Some formulations include 'legitimacy'[551] or 'proper purpose'[552] as a fourth criterion. In these systems, in order to be proportionate in this 'wide' sense, a measure must comply with all these conditions. There cannot, however, be any serious debate that these three or four conditions can in reality be reduced to two: necessity and narrow proportionality. Proper purpose and suitability are in fact subsumed by both necessity and narrow proportionality, since a measure pursuing an inappropriate objective or which is unsuitable for achieving its objective would already fail the necessity test,[553] and as will emerge below, most narrow proportionality tests.[554] Accordingly, in this thesis mention of proportionality always refers to narrow proportionality/proportionality *stricto sensu*, not the wider formulation of proportionality enshrining various subtests.

A standard dictionary explains proportionality as the 'the quality, character, or fact of being proportional'.[555] In turn, proportion is defined as an '[a]ppropriate, fitting, or pleasing relation (of size, etc) between things or parts of a thing; due relation of one part to another'.[556] The central elements of proportionality can be distilled form this starting point: proportionality is a relational concept that situates at least two 'things or parts of a thing' to one another in a particular way. Thus, to understand what a proportionality standard requires, two questions must be asked: first, what are the two 'things' that proportionality refers to? Second, once these 'things' have been identified, how must one relate to the other so that their relationship is appropriately

[550] See only Alexy, *Theorie der Grundrechte*, 100; Alexy, 'Balancing and Rationality', 135; Verdirame, 'Resucing Human Rights', 5; Crawford, 'Proportionality', para 2.

[551] Klatt and Meister, *Constitutional Structure*, 8.

[552] Barak, *Proportionality*, 3.

[553] See chapter I, sections 3 and 7.1.

[554] See Rivers, 'Proportionality and Discretion', 114; Rivers, 'Second Law of Balancing', 171; Mitchell, *Legal Principles in WTO Disputes*, 188-189.

[555] OED, 'Proportionality, n.'.

[556] OED, 'Proportion, n.'.

characterised as 'proportionate'? The second question concerns the decision logic of proportionality. The decision logic is typically one of 'balancing', 'weighing' or 'cost-benefit analysis'.[557] However, which exact decision logic the proportionality standard relies on in a given rule depends on the variant of proportionality enshrined in that rule.

The following sub-sections address both main questions with respect to the three main variations[558] of proportionality as expressed in permissive legal rules: 'global (teleological) proportionality', which requires the challenged measure's total or 'global' positive consequences to outweigh the 'global' negative consequences; 'marginal (teleological) proportionality', which requires the challenged measure's net balance (or margin) of positive and negative consequences to be better than that of any alternative; and 'commensurate proportionality', which requires the challenged measure's negative consequence not to go beyond the negative consequences of some antecedent measure.

2.1.1. Global (teleological) proportionality

To start, the most basic – and probably the most common – form of narrow proportionality is 'global (teleological) proportionality', which is broadly speaking concerned with comparing a particular measure's positive and negative consequences.[559] This form of proportionality is teleological in nature, since a measure's positive consequences are precisely the measure's objectives. A primary example of an international law norm enshrining global proportionality is the rule of international humanitarian law prohibiting 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a

[557] See Rivers, 'Proportionality and Discretion', 112; Crawford, 'Proportionality', para 23: the principle of proportionality 'varies according to the areas in which it is applied, but remains, essentially, a test for the balancing of interests and rights.'

[558] Further variations are in principle conceivable; the thesis, however, concentrates only on those variants that are commonly observed in practice.

[559] See Barak, 'Principled Balancing', 7; Cannizzaro, *Il Principio Della Proporzionalità*, 474.

combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.[560]

Comparing a measure's positive and negative consequences is not straightforward. As was discussed with respect to comparative law methodology, a meaningful comparison (or 'weighing') of two things, especially two things that are different in kind, can only be carried out with the help of a *tertium comparationis*: the two things must first be translated into a 'common language', must be situated on a common metric. It was already hinted at in chapter I, when discussing the possibility of deciding which of two measures is more protective or more harmful, that in law the relevant common metric is the respective 'normative weight'[561] of the two *comparanda*.[562] Thus, for the purpose of global proportionality, what matters are the respective normative weights of both the measure's positive and negative consequences. In contrast to necessity, however, the dimension of weight has a more prominent role when it comes to proportionality. While at least abstract weight can often be ignored in necessity reasoning,[563] the fact that proportionality relates the positive and negative consequences to one another, and that typically different interests are in play on the two sides of the scale, abstract weight in particular and normative weight in general are central to proportionality.[564] Because of the difficulties involved in assigning weight,[565] which are addressed further below,[566] the centrality of normative weight is the most controversial aspect of proportionality. For the moment, the more directly relevant question is, however, just how the

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560 Henckaerts and Doswald-Beck (eds), *Customary International Humanitarian Law*, Rule 14; Articles 51(5)(b) and 57(2)(a)(iii) AP I.

561 The notion of 'normative weight' was already touched upon in chapter I, section 4.2.1, 7.1.1 and 7.2.1. It is discussed in more detail below in section 2.3.

562 See chapter I, sections 7.1.1. and 7.2.1.

563 See chapter I, section 7.2.1.

564 See Schauer, 'Question of Weight', 180; Craig, 'Proportionality, Rationality and Review', 268.

565 See *Air Services*, para 83; ICTY, *NATO Bombing Report*, paras 48ff.

566 See section 2.3.

concept of global proportionality requires the normative weights of the positive and negative consequences of a measure to relate to one another in order for the measure to be considered 'proportionate'.

What is here termed global (teleological) proportionality takes as a starting point the total or global weight of the positive consequences and relates it to the total or global weight of the negative consequences (hence, the term 'global' proportionality). The decisive element of global proportionality is typically that it requires the weight of a measure's positive consequences to be equal or greater than the weight of that measure's negative consequences.[567] In other terms, the measure must have a positive 'net weight' ('net weight' equals the 'weight of positive consequences' minus the 'weight of negative consequences').

This decision logic of global proportionality has at least three tremendously important implications. First, a measure's global proportionality can be assessed without having to compare that measure with any alternative measures, as all the relevant elements are those of the analysed measure alone. Second, what matters for global proportionality is not the presence of some precise balance or equivalence between the two sides of the scale, but rather a misbalance in weight on the side of the positive consequences. In fact, the global proportionality standard does not in the strict sense require any proportionality at all, but rather demands the absence of negative disproportionality (absence of a negative net weight).[568] In consequence, global proportionality does not necessitate determining the precise point where the weights of positive and negative consequences are equivalent, which would require the respective weight to be cardinally ranked, but can operate on the basis of ordinal ranking.[569] The assignment of weight to

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[567] See Barak, *Proportionality*, 351. Variations can require particular relations, such as 'not clearly disproportionate' etc.

[568] Rivers, 'Proportionality and Discretion', 109; Rivers, 'Variable Intensity', 193.

[569] Klatt and Meister, *Constitutional Structure*, 63. 'Cardinal ranking' requires assigning a precise value of weight to each side of the scale, while 'ordinal ranking' only requires determining which of the two sides has a higher weight, with the precise weight being irrelevant.

the positive and negative consequences then only has to be precise enough to allow such ordinal ranking.[570]

Third, global proportionality does not require complete optimisation.[571] Optimisation would require not only that the net weight of a measure is positive, but that it is as positive as it possibly can be, and in consequence would only qualify the one optimal measure as proportionate. Under global proportionality, however, a number of different measures can all be simultaneously proportionate. This factor grants the acting state a significant measure of structural discretion, in that choosing any one of a set of measures with a positive net weight satisfies a global proportionality requirement.[572]

2.1.2. Marginal (teleological) proportionality

Global proportionality can be contrasted with 'marginal proportionality'.[573] The main difference between the two variants is that marginal proportionality crucially relies on comparing the net weight of the challenged measure with that of alternative measures:[574] the challenged measure is considered disproportionate if an alternative measure has a higher net weight, which means that choosing such an alternative measure could marginally improve the balance between positive and negative consequences achieved in pursuing a particular goal. An example of marginal proportionality can be found in the Israeli Supreme Court's *Beit Sourik* ruling. Here the court had to assess whether the protection afforded to Israel by the construction of the 'Security Fence' was proportionate to the harm caused by that 'Fence' to the rights of Palestinians.[575] The

[570] As discussed in section 2.3.2., this reduces the problem of incommensurability.

[571] See, however, Alexy, 'Balancing and Rationality', 135; Klatt and Meister, *Constitutional Structure*, 10.

[572] See Rivers, 'Proportionality and Discretion', 114.

[573] Despite the fact that marginal proportionality may be implied in some of the exception clauses here investigated (see section 3), this form of proportionality is rarely ever discussed in the literature.

[574] The Israeli Supreme Court refers to this conception as a 'relative' application of the narrow proportionality test (see *Beit Sourik*, para 41).

[575] Ibid, para 44.

Supreme Court approached this task by comparing different routes of the 'Fence': the one actually chosen by the government and a less harmful but also less protective alternative one proposed by the petitioner in the case. The court judged those sections of the 'Fence' on the actual route to be disproportionate where it considered the reduction of harm to the Palestinians' rights that would have been brought about by the alternative route to outweigh the concordant relative loss of protection.[576] This translates into saying that the actual 'Fence' was disproportionate where implementing the alternative route, even if achieving a lower LoP, would have resulted in a higher net weight.

As is the case with necessity, under marginal proportionality the challenged measure must in theory be compared with all possible alternatives, and the existence of a single alternative with a higher net weight means that the challenged measure fails the proportionality test.[577] In contrast to necessity, however, not only alternatives which are at least as protective as the challenged measure are relevant, but also those that are less protective.[578] Such alternatives may still have a higher net weight than the challenged measure if the reduction of the positive consequences is overcompensated by a more significant reduction of the negative consequences.[579] It is furthermore clear that no globally disproportionate measure can be marginally proportionate if a globally proportionate alternative exists, since the net weight of a globally disproportionate measure would always be lower than that of any globally proportionate alternative.[580]

The decision logic of marginal proportionality again has three important implications. First, marginal proportionality differs from global proportionality in that it depends on a

[576] See, eg, ibid, paras 61, 71. See also *Mara'abe*, para 115.

[577] In practice, a comparison with all thinkable alternatives is of course hardly possible. However, as with necessity, this is a practical rather than conceptual problem.

[578] Marginal proportionality represents a version of the 'Kaldor-Hicks criterion' (see thereon Sunstein, *Laws of Fear*, 168).

[579] As is explained in more detail in section 2.2., the central difference between necessity and marginal proportionality is that the latter allows a variation of the LoP, whereas necessity requires keeping the LoP static.

[580] See Lazar, 'Necessity', 17ff.

comparison between the challenged measure and alternatives, rather than on a stand-alone analysis of the challenged measure. Second, where more than one globally proportionate measure exists, marginal proportionality goes much beyond the global proportionality test set out above. Rather than simply ensuring that a measure's net weight is at least neutral, a measure can in principle only pass the marginal proportionality test if it has the highest net weight of all possible measures. Accordingly, once the state has selected a permissible objective it wishes to pursue, marginal proportionality leaves the state no structural discretion in selecting a measure, as only the optimal measure can be considered proportionate.[581]

Third, marginal proportionality relies, in principle and like global proportionality, on ordinal ranking. Rather than ordinally ranking the weight of a measure's positive and negative consequences, however, it ordinally ranks the net weights of all possible measures. In comparison, marginal proportionality then requires a rather precise determination of the net weight in order to be able to compare various measures in this regard and find the optimal measure. It is clear that this task is normatively very demanding and, in fact, approximates cardinal ordering.

2.1.3. Commensurate proportionality

A third form of proportionality that can serve to limit state action under a permissive rule is 'commensurate [582] proportionality'. Commensurate proportionality limits the negative consequences of a measure by relating their weight not to that of the positive consequences, but rather to the weight of the negative consequences of some antecedent. Commensurate proportionality is thus reactive or backward-looking and not teleological or forward-looking in

[581] Similar to necessity, any structural discretion that marginal proportionality allows is thus related to the choice of the objective, not the choice of the measure.

[582] *Gabcikovo*, para 85. Cannizzaro, 'Proportionality', 905, uses the term 'retributive proportionality' for the same idea.

nature.[583] A primary example in international law is the proportionality condition attaching to countermeasures, which must be 'commensurate with the injury suffered'.[584]

As was true for global (teleological) proportionality, commensurate proportionality in reality does not require a measure's negative consequences to have the exact same weight as the antecedent's negative consequences to which it is compared. Rather, the limiting nature of the condition signals that commensurate proportionality only requires that the weight of the measure's negative consequences be lower or at most equal to the weight of the antecedent's negative consequences. Just like global proportionality, commensurate proportionality requires only ordinal ranking of the weight of the measure's negative consequences in relation to that of the antecedent and leaves structural discretion to the acting state. Rather like necessity or marginal proportionality, however, the commensurate proportionality of a measure cannot be assessed by reference to the features of that measure alone, as it requires a comparison between the measure taken and the antecedent to which it responds. The actual comparison is, in turn, very similar to that required in the context of necessity analysis when assessing which of two measures has the lower LoH.

2.2. Clarifying the relationship between necessity and the three variants of proportionality: conceptual delineation and normative implications

The typology of proportionality drawn up above facilitates not only the empirical survey that follows in section 3, it also now allows a conceptual delineation of necessity and proportionality. Apart from creating conceptual clarity, clearly delineating the two concepts is desirable not least because the proper relationship between necessity and proportionality frequently leads – due to the lack of a coherent typology of necessity and proportionality across

583 See ILC, *2001 Commentary*, Article 51, para 7.

584 Article 51 ASR. See also *Gabcikovo*, para 85; *Naulilaa*, 1028; and generally O'Keefe, 'Proportionality'. Cannizzaro, 'Proportionality', 891ff, discusses reconceiving proportionality in countermeasures not as commensurate, but as teleological.

international law – to confusion, both in the literature and in case law. For example, with respect to the law of self-defence, 'necessity and proportionality have often been equated in the literature'[585], and this '[f]ailure to distinguish between necessity and proportionality would seem to be one of the key factors contributing to the uncertainty surrounding both concepts'.[586]

Equating necessity and proportionality has led to doubts regarding 'how far the two concepts can operate separately.'[587] In the *Oil Platforms* case, Higgins went as far as stating that 'in general international law, "necessary" is understood also as incorporating a need for "proportionality"'[588] and in *Kishenganga* Pakistan submitted that 'an element of proportionality is inherent in the term "necessary" as developed in international law jurisprudence'.[589] The intuition that there is an unavoidable connection between necessity and proportionality may be underpinned by the fact that in some of the systems most notoriously relying on proportionality, there is no clear textual basis for this.[590] For example, proportionality was read into a text requiring only necessity both as regards the ECHR[591] and the EU Treaties[592], which may suggest that necessity always carries proportionality in its wake.[593] Thus, the ECtHR stated explicitly that

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585 Greenwood, 'Self-Defence', para 26. Greenwood himself collapsed the two again later on (see ibid, paras 27-28). See also Uniacke, 'Retaliation', 82, fn.26.

586 Tams, 'Anti-Terrorist Self-Defence', 377. See also chapter I, section 6.2.2.

587 Gray, *Use of Force*, 150; similarly Corten, *Law Against War*, 471.

588 *Oil Platforms* (Higgins), para 48.

589 *Kishenganga*, para 222. See also *Oil Platforms* (Rigaux), para 16, holding without explanation that in order to be 'necessary' under the NPM clause a given measure must also comply with the (non-specified) proportionality principle; Alexy, *Theorie der Grundrechte*, 103, arguing that necessity must always be supplemented by proportionality.

590 See Verdirame, 'Resucing Human Rights', 8; Barak, *Proportionality*, 212; Hickman, 'Comparative Law Lessons', 31.

591 The ECtHR introduced the principle in *Belgian Linguistics*, para 10; see also *Handyside*, para 49; on reading proportionality into necessity, see also Rivers, 'Variable Intensity', 177; Rivers, 'Presumption', 412; Legg, *Margin of Appreciation*, 178; Villiger, 'Proportionality', 208.

592 See Rivers, 'Proportionality and Discretion', 112. In practice the European Courts do not differentiate neatly between necessity and (narrow) proportionality (Herwig and Serdarevic, 'Standard of Review', 213).

593 See Rivers, 'Proportionality and Discretion', 112, noting that reading 'balancing into necessity is endemic'; and Ranjan, 'Public Law Concept', 876.

'the notion of necessity implies that the interference ... is proportionate to the legitimate aim pursued.'[594]

Analytically, claims regarding a firm connection between necessity and proportionality may be understood as being either conceptual (in the sense that the concept of necessity implies that of proportionality or *vice versa*) or phenomenological (in that necessity and proportionality in practice always appear together, regardless of whether there is a conceptual connection) in nature. The present section delineates necessity and the three analysed variants of proportionality (global, marginal, and commensurate) conceptually and illustrates the distinctions by pointing out the normative implications inherent in the two concepts. The phenomenological question is tackled following the empirical survey.

2.2.1. Conceptual delineation

A *prima facie* appealing approach to delineating necessity and proportionality can be ruled out from the beginning: necessity and proportionality cannot be delineated along the factual/normative divide.[595] As was observed above, necessity may well include normative questions, in addition to factual ones.[596] At the same time, problems of proportionality cannot be reduced to normative questions. Indeed, factual elements (for instance knowing what the positive and negative consequences of a measure are) are as relevant for proportionality as they are for necessity. A more informative approach is asking whether the two notions are conceptually independent, ie whether a measure's necessity does imply its proportionality and *vice versa*. Conceptual independence does not have to be mutual: where every measure that is proportionate is automatically also necessary, but not every measure that is necessary is automatically

[594] *Olsson*, para 67.

[595] See only Fontanelli, 'State Discretion', 5, who appears to make this distinction. At most, it could be argued that necessity is predominantly factual, while proportionality more prominently normative.

[596] See chapter I, section 7.

proportionate, necessity is comprised by (ie, not independent of) proportionality, but proportionality is independent of necessity.

Starting with necessity and global proportionality, it is clear that both are independent concepts.[597] Necessity centrally requires that against an invariable LoP, the LoH must be minimised. Assuming for the moment that the LoP and LoH correspond to the positive and negative consequences targeted by proportionality,[598] necessity would then require that the measure's net weight must be as positive as possible, given a static LoP. Notably, a measure that has an overall negative net weight (ie, which is globally disproportionate) can fulfil this condition, as long as the negative net weight is as small as possible given the static LoP. On the other hand, global proportionality contains no complete optimisation requirement, which means that a measure failing the necessity test may well be globally proportionate. As long as the measure has a positive net weight, it is irrelevant for global proportionality whether it is as positive as possible, given the static LoP. It is, in conclusion, perfectly possible for a measure to fail one test but pass the other, or pass/fail both tests.[599]

Marginal proportionality, on the other hand, comprises necessity, while being itself independent. Marginal proportionality requires a measure to have the optimal net weight in order to be considered proportionate. Necessity does the same, but under the crucial condition of keeping the LoP static. The key difference between marginal proportionality and necessity is then that the former does not require the LoP to be static, but rather requires reaching the optimal net weight by allowing a (downward) variation of both LoH and LoP. The result is that a measure failing the necessity test automatically also fails the marginal proportionality test, whereas a measure passing the necessity test may still not be marginally proportionate. Accordingly, where a

[597] But see Beatty, *Rule of Law*, 163, arguing, without further substantiation, that necessity is just a 'clear and easy' application of narrow proportionality.

[598] This proposition is discussed in section 4.

[599] See Hurka, 'Proportionality and Necessity', 129; Greenwood, 'Self-Defence', para 26; see also Lowe, *International Law*, 279.

condition of marginal proportionality applies, a separate necessity test only operates as a filter, sorting out measures that would in any event fail at the proportionality stage.

Finally, commensurate proportionality and necessity also are mutually independent. A challenged measure's LoH may well be both the lowest possible given a static LoP (ie, the measure is necessary), while at the time being higher than the LoH of the relevant antecedent (thus failing a commensurate proportionality test), and *vice versa*.

In this light, claims that necessity and proportionality are conceptually inseparable or that one is derivative of the other depend on the type of proportionality in question. Necessity and global as well as commensurate proportionality are mutually independent, whereas marginal proportionality comprises necessity, but not the other way around. Against this backdrop, many claims of conceptual inseparability – such as those advanced by Lazar[600] and Hurka[601] in the context of just war theory – can be unravelled as presupposing the applicability of a particular type of proportionality, namely marginal proportionality.

2.2.2. Normative implications

The delineation between necessity and proportionality, as well as between the different types of proportionality, highlights their different respective decision logic. Importantly, each distinct decision logic goes hand in hand with particular normative implications. 'Normative implications' here refers to the relative preference between the protected interests (of which the acting state is the beneficiary, as embodied in the measure's LoP) and the harmed interests (of which other actors – other states, individuals, the international community – are the beneficiaries, as embodied in the measure's LoH), which in turn impacts on the acting state's degree of discretion.[602]

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[600] Lazar, 'Necessity', 17ff; Lazar, 'Non-combatant immunity', 57.

[601] Hurka, 'Proportionality and Necessity', 129.

[602] See Shany, 'Toward', 924f, offering some thoughts on the normative implications of wider or narrower discretion.

To start, under both necessity and proportionality enshrined in permissive rules states have so-called 'end-setting discretion'[603]. Beyond this general commonality, however, the concepts' normative implications differ. By enshrining any set of the discussed standards, a legal rule expresses a normative choice, demarcating the space of discretionary action of the state. Necessity has the least 'severe' normative implication: the necessity test does not inhibit a state's ability to pursue a permissible objective to the degree desired.[604] The state has the freedom to determine the desired LoP and only alternative measures that are at least as protective as the challenged measure are taken into account,[605] which means that for every permissible objective there is a set of necessary measures (at least one for each distinct LoP) that the acting State can choose from.[606] Necessity thus merely restricts the state's ability to impose avoidable harm, and in consequence (to the extent that harm is unavoidable) the harmed interests are unlimitedly subjected to the protected interests of the acting state.[607] Where inconvenience is relevant, the harmed interests receive even less protection, since additional inconvenience for the acting state can offset a reduction of harm to the interests benefitting other actors.

Global proportionality, on the other hand, expresses no *a priori* preference for either the protected interests or the harmed interests, but rather subjects whichever interest weighs more 'lightly' to the 'heavier' one. This means that the acting state's ability to pursue the permissible objectives is curbed: the acting state may not be permitted to protect legally recognized interests from which it benefits to the degree desired because doing so would harm the equally protected interests benefitting another actor.[608] Notably, this implies a 'greater impact on decision-makers'

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[603] Alexy, *A Theory*, 395. As regards necessity see chapter I, section 3.

[604] See Rivers, 'Proportionality and Discretion', 114; Rivers, 'Second Law of Balancing', 171.

[605] See chapter I, section 7.1.

[606] Rivers, 'Variable Intensity', 199.

[607] See Cannizzaro, *Il Principio Della Proporzionalità*, 468.

[608] See Elliott, 'Proportionality and Deference', 3.

discretion'[609], since the state can no longer obtain its desired LoP under all circumstances.[610] By requiring a positive net weight, global proportionality in effect ultimately subjects both the interests benefitting the acting state and those benefitting the other actors to the aggregated total interests of the relevant legal community, as expressed in the net weight.[611] Global proportionality does, however, still leave the acting state an important measure of leeway, since that state can freely choose between all globally proportionate measures.

Marginal proportionality entails the most severe subjection of the interests of the acting state and other actors to the total interests of the relevant legal community: not only does the acting state's action have to lead to a positive net weight, but marginal proportionality requires the State to identify the measure that is optimal from the perspective of the relevant legal community's totality of interests. The acting state's freedom to act is thus maximally restricted to a binary choice: inaction or optimal action.

Commensurate proportionality, finally, has an altogether different normative implication. Since it is backward-looking and implements a retributive logic, the objective pursued by the challenged measure is ultimately irrelevant. The acting state can pursue any permissible objective to any degree desired, as long as the harm caused in doing so does not cross an absolute threshold set by the harmfulness of the relevant antecedent. There is thus no clearly structured preference between the various interests involved. If anything, it might be said that commensurate proportionality subjects the ability of the acting state to pursue a permissible objective to the general interest of the relevant legal community in avoiding an escalation of harm.

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[609] See ibid, 4.

[610] See Cannizzaro, *Il Principio Della Proporzionalità*, 468.

[611] See generally on weight allocation section 2.3.

2.3. Understanding the logic and limits of proportionality: the allocation of normative weight and problems of indeterminacy

The foregoing sections have stressed the degree to which proportionality – and to an extent also necessity – rely on 'weighing' and 'balancing' processes. They have not, however, explained how this weighing is effected or where the crucial normative weights derive from. Indeed, the main criticism that is frequently levied against 'weighing' processes is their alleged irrationality, in the sense that it is not possible to rationally 'weigh' the two sides of the scale.[612] This alleged irrationality stems from the supposed incommensurability of the factors that are being compared.[613] How is it rationally possible – so the argument goes – to decide whether a measure's positive consequences (eg, the protection of human health) 'outweigh' its negative consequences (eg, a restriction of free trade)? The incommensurability is then said to lead to indeterminacy in the law,[614] which subjects the application of rules requiring a weighing of incommensurables to arbitrariness, in the end 'fully expos[ing] judges as lawmakers'.[615]

It is neither possible or necessary to comprehensively deal with the problem of (in)commensurability and resulting indeterminacy in the remit of this thesis. However, to understand better how proportionality and necessity function, it is useful to explore in more depth both how such 'weighing' takes place by allocation and comparison of normative weight, and which degree of indeterminacy legal rules requiring a 'weighing' really entail.

2.3.1. Normative weight scales

It was already observed that a meaningful comparison (or 'weighing') of two distinct things can only be carried out with the help of a *tertium comparationis*: the two things must first be

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[612] See only Endicott, 'Proportionality and Incommensurability', 315ff.

[613] See Craig, 'Reasonableness Review', 150, recounting various influential definitions of incommensurability; see also definitions of incommensurability discussed in Veel, 'Incommensurability', 181ff.

[614] See Endicott, 'Proportionality and Incommensurability', 323; Luterán, 'Lost Meaning', 40.

[615] Stone Sweet, 'Proportionality's New Frontier', 50.

translated into a 'common language', situated on a common metric. It was likewise already mentioned that in law the relevant aspect is the respective normative weight.[616] There must, accordingly, be a 'weight scale' which both assigns weight to the objects under comparison (by means of what can be termed the 'weight function') and provides the yardstick against which to compare them. Where are this weight scale and this weight function to be derived from?[617]

It appears clear that in law – other than, for example, morality – the particular normative weight is assigned by the particular legal system or regime in which the legal rule requiring the 'weighing' operates.[618] Where a legal instrument recognises a particular interest as being worthy of legal protection, this interest is assigned normative weight (a legally non-protected value typically carries no normative weight).[619] Each system's or regime's weight function is, in turn, informed by the weight scale underlying that system or regime. Behind the legal system or regime, and thus behind the allocation of normative weight, is ultimately the legislator that has created that legal system or regime. In international law, (still) a system of self-regulation by states, the relevant legislator is the particular community of states that has created the particular legal instrument. For a treaty the community is the collective of the states parties, in customary international law it is all

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[616] See section 2.1, and chapter I, sections 7.1.-7.3.

[617] The following considerations follow a tradition of jurisprudential thought focusing on the interests underlying legal rules and the need to balance them against one another. The main theorist that have shaped this tradition are Jhering (see Duxbury, 'Jhering's Philosophy of Authority'), Ehrlich (see Littlefield, 'Ehrlich's Fundamental Principles'), Pound (see Pound, *Ideal Element*; McLean, *Law and Civilization*), and Heck (see Heck, 'Outline'). It is not possible to discuss their and competing jurisprudential theories in detail in the confines of this thesis. For a concise summary see Freeman, *Introduction*, 835ff.

[618] See generally Pound, *Social Control Through Law*, 68; Bücheler, *Proportionality*, 86. Thus, eg, in constitutional law balancing the weight function is supplied by the constitution (Alexy, 'Balancing and Subsumption', 442; also Alexy, *Theorie der Grundrechte*, 95, fn.64, 110; Klatt and Meister, *Constitutional Structure*, 27); Kennedy, 'Genealogy', 190; *Beit Sourik*, para 59. As regards international law, Judge Higgins held in *Nuclear Weapons* that '[t]he judicial lodestar, whether in difficult questions of interpretation of humanitarian law, or in resolving claimed tensions between competing norms, must be those values that international law seeks to promote and to protect' (*Nuclear Weapons* (Higgins), para 41).

[619] See Heck, 'Outline', 35; Pound, *Ideal Element*, 113; Pound, *Social Control Through Law*, 64. See also *South West Africa*, para 51. Naturally, this theory about weight-allocation must be read to include the notion of beneficiary-dependent weight allocation outlined in chapter I, section 7.1.4.

states bound thereby, and so on. The ultimate source of normative weight is thus the relevant legal community, and the relative normative weight expresses that community's preferences.[620]

It can be argued, that every legal system at least implicitly enshrines a more or less determinate weight scale. Without being immediately obvious, balancing considerations relying on a weight scale are widespread; in fact, they effectively underlie much of what is law.[621] In the words of Pound, '[t]here is no escape in the science of law from the problem of value' since '[e]very adjustment of relations and ordering of conduct has behind it some canon of valuing conflicting and overlapping interests.'[622] Thus, '[b]alancing ... is ubiquitous in law'[623], it is its 'major task'[624]. To understand the degree to which balancing is actually present in legal rules, a few considerations may suffice. It is easy to accept that every legal rule arbitrates between competing interests by establishing a hierarchy between them.[625] As Heck wrote, 'each command of the law determines a conflict of interests.'[626] The preference relation thus established is reflective of the relative normative weights allocated to the competing interests, in the sense that the weightier interest prevails. Law thus decides both which interests are legally relevant/legally protected and posits a particular hierarchy between them, both of which are ultimately reflective

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620 See Heck, 'Outline', 47, emphasising that legal commands embody value judgments of the legal community; see also Littlefield, 'Ehrlich's Fundamental Principles', 18, summarising Ehrlich: 'Society gives weight to the interests which are to be balanced'; Beatty, *Rule of Law*, 167-168. Pound speaks of the 'will of society' (Pound, 'Sociological Jurisprudence', 597; see also Pound, 'Sociological Jurisprudence (Part II)', 143). See also Sloan, 'Necessity', 477.

621 For a powerful discussion of balancing incommensurables in law, see Craig, 'Reasonableness Review', 150ff; concerning the ECHR, see Rivers, 'Variable Intensity', 187. See further Cassella, *La nécessité en droit international*, 13-14.

622 Pound, *Ideal Element*, 117. See also Pound, *Social Control Through Law*, 103.

623 Alexy, 'Balancing and Subsumption', 436. See also Alexy, *Theorie der Grundrechte*, 111, 151, on balancing underlying even determinate rules and being central to legal argumentation; Rivers, 'Variable Intensity', 184. See also Kennedy, 'Genealogy', 189.

624 McLean, *Law and Civilization*, 226.

625 See Spierman, 'Humanitarian Intervention', 527. At the most basic level, the mere existence of a legal rule subjects the general interest in freedom of action to the interest protected in the rule (see Beatty, *Rule of Law*, 170). The coordination of competing interests can also be in the form of a compromise, rather than a strict preference (see Dworkin, *Taking Rights Seriously*, 77, speaking of rules representing a compromise between competing principles).

626 Heck, 'Outline', 35.

of the legislator's pre-legal (ie, political, moral, etc) preferences and ideals, which thereby become binding and legally enforceable in the society/community concerned.

Many of the legal processes that take place after a rule has been set can also easily be cast in terms of arbitrating between interests. Legal (rather than purely factual) controversies are disagreements about the precise preference relation established by a legal system, and the authoritative resolution of a controversy fixates a previously uncertain preference relation between two or more competing interests.[627] Interpretation of legal rules with a view to clarifying its content and applying it to a set of facts is nothing else than the identification of the preference relation enshrined in that rule as it applies to particular facts.[628] Legal techniques such as reasoning by analogy or relying on precedent are ways of using known preference relations, ie a known relative allocation of normative weight, to resolve a similar but not identical conflict of interests presenting itself.[629] The more and more elaborate a legal system becomes, the more elaborate – and thus determinate – a system of preference relations between legally relevant interests emerges.[630]

All of this quite simply means that law constantly establishes preference relations between interests that are, strictly speaking, incommensurable. By creating a legal rule or resolving a legal controversy, the law fixates a particular preference relation, expressing a choice between the incommensurable interests at stake. As Sunstein wrote, '[c]ommensurability is not required for

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[627] See Kennedy, 'Genealogy', 190: 'In balancing, we understand ourselves to be choosing a norm'; Littlefield, 'Ehrlich's Fundamental Principles', 26: 'the judge determines the legal norms to be applied by finding what society considers of value'; Heck, 'Outline', 40-41. Pound goes as far as holding that the judge's function is 'finding practical adjustments and reconcilings and, if nothing more was possible, practical compromises, of conflicting and overlapping interests' (Pound, *Social Control Through Law*, 111).

[628] See Alexy, *Theorie der Grundrechte*, 145; Luterán, 'Lost Meaning', 25, quoting Greer, *The European Convention*, 211; Barak, *Proportionality*, 75 (on interpretative balancing); Rivers, 'Variable Intensity', 184.

[629] See Heck, 'Outline', 41. One might also understand in this way MacCormick when he writes that gaps in law are filled in 'by extrapolation from what is already there' (MacCormick, *Legal Reasoning and Legal Theory*, 246, quoted in Freeman, *Introduction*, 389). See also Dworkin, *Taking Rights Seriously*, 113, concerning precedent in particular.

[630] See Luterán, 'Lost Meaning', 24, noting that balancing is necessary when a right emerges, and less-and-less so once a refined definition has emerged.

choice'[631]. The totality of preference relations expressed by the choices between incommensurables enshrined in the law constitutes the applicable weight scale.

Conversely, the foregoing does not mean that a particular legal system provides either a determinate or readily identifiable preference relation for every conceivable conflict of legally relevant interests.[632] While indeterminacy may be more or less limited, as discussed in the following section, it is also clear that in weighing problems some degree of indeterminacy almost always remains.[633] In addressing weighing problems in practice, the law applier must eventually identify allocated normative weights;[634] where the weight allocation identifiably prescribed by the legal system is less than fully determinate, this act necessarily involves a degree of choice on the part of the law applier.[635]

2.3.2. Reigning in indeterminacy

Based on the previous section, it can be reasoned that determinacy relates to the precision with which the weight scale underlying a legal system or regime determines the outcome of a concrete weighing of interests, taking into account beneficiary-dependent weight allocation. The weight scale underlying the legal system or regime is, as is the case with all general law, necessarily rather abstract, and the degree to which it dictates the outcome of a particular weighing exercise

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631 Sunstein, 'Incommensurability and Valuation', 810.

632 See Alexy, *Theorie der Grundrechte*, 142.

633 See Barak, *Proportionality*, 478.

634 Alexy, 'Balancing and Subsumption', 446, points out that courts often allocate weights implicitly, but that the allocation can nevertheless be inferred.

635 See Endicott, 'Proportionality and Incommensurability', 328; Legg, *Margin of Appreciation*, 185-6; Peters, 'Verhältnismäßigkeit', 18. That choice is, in turn, determined by how the law applier sees the weight scale underlying the legal system, which may be founded on the law applier's political philosophy, development of moral conviction in the society, etc. This can explain Klatt and Meister's insistence that 'balancing cannot do without moral reasoning' (Klatt and Meister, *Constitutional Structure* 52). See also Kumm, 'Political Liberalism', 148f. Ultimately, it is 'generally admitted' that subjective 'value judgments' are an inevitable part of law (see Freeman, *Introduction*, 44-45), but it is likewise clear that 'a "rational" theory of evaluation is an impossibility' (Isay, 'Method', 317). Accordingly, a judge 'must rely upon the substance of his own judgment at some point, in order to make any judgment at all' (Dworkin, *Taking Rights Seriously*, 124; see also generally Dworkin, *Law's Empire*). In this sense, 'judicial lawmaking is inevitable' (Ginsburg, 'Bounded Discretion', 640; see also Lauterpacht, *Development*, 146).

can be more or less determinate. While an assessment of how determinate the outcome of a concrete weighing exercise is necessarily depends on the particular system or regime[636] and weighing problem at hand, at least three general observations can be made.

First, the degree of determinacy depends on the type of weighing required. The more precise the assignment of weight needs to be, the more exact the weight function must be to provide a determinate answer. Thus, the legal instrument is typically more likely to provide a determinate answer to questions of global proportionality than to questions of marginal proportionality. In other words, it is generally easier to determine whether a measure has a positive net weight than to state whether the measure has the optimal net weight.[637]

Second, the degree of determinacy depends on the interests being compared. For determining which of two measures has a lower LoH or a higher LoP, for example, it will often be true that both measures infringe or protect the same legally protected interest, so that the question to be decided is the degree to which they do so. Thus, the question of abstract weight of the interest at stake can safely be ignored, and only the concrete weight must be assessed. There is then typically a higher degree of normative determinacy as regards necessity than proportionality, since the latter unavoidably involves comparing different interests, while the former often does not.

Third, and arguably most importantly, the degree of determinacy depends on the extent to which the legal system has already tackled similar weighing problems.[638] Thus, reasoning by analogy or from precedent may be used to draw out the extent to which the legal system has

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[636] Legg, *Margin of Appreciation*, 202-203, notes for example that the ECHR textually indicates that it attaches greater weight to the right to life than to other rights, which may render balancing questions involving the right to life more determinate than if such an indication was absent.

[637] See Klatt and Meister, *Constitutional Structure*, 124: 'Our ability to achieve normative differentiation and, therefore, the knowability of slight normative differences decrease with an increasing refinement of the scales.'

[638] Alexy, *Theorie der Grundrechte*, 143, seems to have the same thing in mind when he refers to 'networks of concrete preference decisions' creating a soft ordering; see also Young, 'Proportionality is Dead', 58, on the use of precedent in allocating weight; and Shany, 'Toward', 923, on the limits of using precedent where the application of circumstance-dependent standards is concerned.

already endorsed, or at least tended towards, a particular preference relation between the interests at stake in the weighing problem under analysis. As with other legal questions, this means that also with regard to weighing problems a legal system becomes more determinate the more fine-tuned the underlying set of preference relations or weight scale become over time.

2.4. Conclusion

The foregoing considerations have demonstrated that there is not a single concept of proportionality, and has outlined the principal varieties that can be identified and conceptually distinguished. All of these varieties of proportionality relate certain elements to one another; variety arises out of the fact that the elements are either not the same (compare global and marginal to commensurate proportionality) or relate to one another in a different way (compare global to marginal proportionality). The consequence is that applying different variants of proportionality to a single set of facts may render different results, so that the characterization of a measure as proportionate or disproportionate depends, in the first step, on the choice of the variant of proportionality that is to be applied.

Determining the applicable variant is, however not enough. Similar to necessity, all variants of proportionality provide only a conceptual structure, in that they identify the relevant elements and prescribe how they must relate to one another. Each rule must fill this structure with further content, such as indicating what exactly counts as positive or negative consequences. Applying proportionality in an actual case then again requires filling this structure by determining both factual and normative elements, such as normative weight.[639]

[639] Klatt and Meister, *Constitutional Structure*, 54ff; Cannizzaro, *Il Principio Della Proporzionalità*, 481.

3. Empirical survey: proportionality in the surveyed rules

3.1. State of Necessity

As noted, the codification of the customary rule on the State of Necessity in Article 25 ASR does not make any overt reference to proportionality, but merely mentions that a state cannot rely on the State of Necessity to preclude the wrongfulness of an act where that act 'seriously impair[s] an essential interest of the State or States towards which the obligation exists, or of the international community as a whole'.[640] The literal interpretation would suggest that what matters is simply whether the harm caused by the challenged measure is judged to 'seriously impair an essential interest' of another state or the international community, an assessment which on its face would not require resorting to proportionality reasoning. Indeed, it would suggest that as soon as the negative consequences of that challenged measure cross the prescribed threshold, the matter is resolved and reliance on the State of Necessity is precluded.

The literal interpretation must, however, be rejected in favour of a proportionality-based one. As Special Rapporteur Ago explained in his 1980 Report, '[i]t is a matter of relation of proportion, rather than of absolute value.'[641] Accordingly, the ILC Drafting Committee stressed that the reference to 'an essential interest' in both subparagraphs (1)(a) and (1)(b) of Article 25 ASR 'implied a comparison between the two interests involved.'[642] This rejection of a literal interpretation seems logical in light of the ILC's emphasis that what counts as an essential interest cannot be determined in the abstract, but can only be 'appraised in relation to a particular case'.[643]

Accordingly, what the condition enshrined in Article 25(1)(b) really requires is that 'the interest sacrificed on the altar of "necessity" must obviously be less important than the interest it

[640] Article 25(1)(b) ASR.

[641] Ago, *Addendum*, para 15.

[642] ILC, *Drafting Committee*, Article 33, para 46.

[643] Ago, *Addendum*, para 12.

is thereby sought to save'.[644] The required comparison focuses on the 'importance'[645], 'weight or urgency'[646], so that 'the interest relied on must outweigh all other considerations'[647]. The 2001 Commentary furthermore stresses that the essential interest sought to be safeguarded must have a greater weight 'not merely from the point of view of the acting State but on a reasonable assessment of the competing interests'.[648] The logic here expressed is rather obviously the 'choice-of-evils' rationale that is frequently said to underlie and indeed found the law on the State of Necessity.[649] The 'choice-of-evils' is, of course, nothing other than global proportionality.[650]

The particular type of proportionality here enshrined may not, however, be global proportionality *simpliciter*. Special Rapporteur Ago frequently stressed the need for the sacrificed interests to be 'obviously ... inferior'[651] and 'clearly less important'[652], that they must not be 'of equal or greater importance'.[653] One might suppose that by using terms such as 'obviously' and 'clearly', Ago implied that it is not sufficient that the safeguarded interest be 'just about' more important than the sacrificed one, but that it needs to be so by some margin. Whatever normative merit such an interpretation may have,[654] the ILC as a whole has not taken up his emphasis, so

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644 ILC, *1980 Commentary*, Article 33, para 35.

645 ILC, *Yearbook 1980*, 1613th meeting, para 7 (Ago).

646 ILC, *2001 Commentary*, Article 25, para 17.

647 Ibid, Article 25, para 17.

648 Ibid, Article 25, para 17. This may be taken to confirm the assertion (see section 2.3.1.) that as regards the allocation of normative weight it is always the relevant legal community as a whole that serves as the reference point, rather than an individual member of that community.

649 See Heathcote, 'State of Necessity', 18; Cheng, *General Principles*, 74.

650 See also Ago, *Addendum*, para 36: '[a]ny measures taken must ... be proportionate to the actual or threatened damage'.

651 Ibid, para 15.

652 ILC, *Yearbook 1980*, 1612th meeting, para 44 (Ago).

653 Ibid, 1613th meeting, para 7 (Ago). In this context, Ago also justified his emphasis on proportionality by the fact that the sacrificed interest 'had been legally protected and the [safeguarded interest] had not.'

654 It could, eg, reduce the danger of abuse, since the State of Necessity could not be relied on in borderline cases.

that Article 25 ASR does not now enshrine a particularly demanding form of global proportionality – the safeguarded interest must simply outweigh the sacrificed one.

The presence of a proportionality test in the law on the State of Necessity was not always obvious, and has been criticised in some quarters.[655] Indeed, references to proportionality are rather sporadic in early cases concerning the State of Necessity.[656] One example[657] including such a reference is the *Teodoro Garcia* case heard by the US-Mexico General Claims Commission in 1926, where the Commission held that

> human life may not be taken either for prevention or for repression, unless in· cases of extreme necessity. … In order to consider shooting on the border by armed officials of either Government ... justified, a combination of four requirements would seem to be necessary: ... (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons their neighbourhood[.][658]

The somewhat ambiguous status of proportionality under the State of Necessity can possibly be explained by the fact that until rather late in the day it was unclear whether other interests than the safeguarding of the very existence of the invoking state were suitable for protection.[659] It was arguably only with Ago's 1980 report that he debate was laid to rest.[660] The interest of a state in its own existence was long treated as 'paramount'[661], so that weighing it against competing interests may have hardly seemed appropriate. Thus, it was precisely the

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[655] Eg, ILC, *Government Comments 1981*, 76 (Mongolia): 'It is virtually impossible to establish whose interests are essential when the interests of two States clash'. Ibid, 77 (Sweden): '[E]ach case will have to be judged individually on the basis of moral rather than legal considerations.' See also Dupuy, 'L'Invocation', 234.

[656] For instance, the celebrated *Caroline* case does not refer to proportionality.

[657] Another relatively early case referring to proportionality is *ILO Greece Inquiry*, para 110.

[658] *Teodoro Garcia*, 121.

[659] For instance, Rodick concluded his 1928 monograph by summarising that the State of Necessity could only be invoked where the measure taken 'is essential to the preservation and continuity of the state and its ability to continue in the full and free exercise of its rights and duties' (Rodick, *Necessity*, 119). Cheng, writing in 1953, still considered that 'necessity must be "absolute" in that the very existence of the State is in peril' (Cheng, *General Principles*, 71).

[660] Ago, *Addendum*, para 13.

[661] *Venezuelan Railroads* (Plumley), 353.

recognition of other interests as being capable of being safeguarded under the State of Necessity that reinforced the need to include a proportionality condition in the law. As Special Rapporteur Ago wrote in 1980, including proportionality

> is particularly important ... because ... the idea that the only interest for the protection of which the excuse of necessity might be invoked is the very existence of the State has now been completely discarded. Consequently, the interest in question cannot be one which is comparable and equally essential to the foreign State concerned.[662]

Moving on to which factors enter on both sides of the proportionality equation, it is clear that the safeguarded interest must be weighed against the sacrificed interest. There is an obvious connection here with the challenged measure's LoP and LoH, as those express protectiveness and harmfulness precisely in terms of the safeguarded and sacrificed interests. It appears, then, that the proportionality condition compares the respective normative weights of the LoP and LoH. In consequence, the reference points for necessity and proportionality are the same.

3.2. Self-defence

Despite ritual 'incantation'[663] that proportionality is one of the central conditions of self-defence, '[t]here is a profound lack of clarity and consensus as to the test to be applied with regard to the proportionality requirement in the *jus ad bellum*'[664], and this despite the fact that proportionality is 'usually the cardinal bone of contention in the exercise of self-defense'[665]. It was already indicated above that what is in the self-defence context often referred to as proportionality is in reality just one aspect of necessity.[666] This, of course, then leaves the questions open whether self-defence actually includes any form of proper narrow proportionality.

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662 Ago, *Addendum*, para 15 (internal footnotes omitted). The same sentiment is expressed in ILC, *1980 Commentary*, Article 33, para 35.

663 Gardam, 'A Role for Proportionality', 4.

664 Akande and Lieflaender, 'Clarifying Necessity', 566. See also Christodoulidou and Chainoglou, 'Proportionality in Self-Defence', 90; Tams, 'Anti-Terrorist Self-Defence', 374.

665 Dinstein, 'Implementing Limitations', 57.

666 See chapter I, section 6.2.2.

As Kretzmer rightly observed, '[i]ssues of "narrow proportionality" in *jus ad bellum* have not been subjected to much academic analysis'[667] and many commentators actually 'push the narrow proportionality question aside when addressing the issue of jus ad bellum'[668].

Discussing proportionality in the self-defence context must, against the backdrop of such far-reaching uncertainty, revolve around three questions: first, does the law on self-defence enshrine a narrow proportionality test, and if so, which one? Second, what are the factors taken into account? Finally, what difference does it make for proportionality that the attacking state has made itself liable (to a greater or lesser extent) to suffering defensive force?

3.2.1. The type of proportionality: which variant, if any, of proportionality does the law on self-defence enshrine?

Starting with the first question, one cannot but notice that as regards the jurisprudence of the ICJ, 'the Court's position on [the] proportionality criterion is far from clear'.[669] In fact, the Court appears to read two different proportionality conditions, namely commensurate and global proportionality, into the law on self-defence.

First, there appears to be some support in the case-law of the ICJ for the proposition that self-defence enshrines a requirement of commensurate proportionality, in the sense that the gravity of defensive action may not go beyond that of the attack to which it responds.[670] The ICJ explained in *Nicaragua* that 'self-defence would warrant only measures which are proportional to the armed attack'[671], before concluding on the facts of the case that '[w]hatever uncertainty may

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667 Kretzmer, 'Proportionality in Jus ad Bellum', 278.

668 Kretzmer, 'Response'. Kretzmer here referred specifically to commentators discussing proportionality in the 2006 Lebanon war.

669 Green, *International Court*, 96.

670 See Christodoulidou and Chainoglou, 'Proportionality in Self-Defence', 80, 83; Ruys, *Armed Attack*, 115; Franck, 'Proportionality of Countermeasures', 730; Kreß, 'Principle of Non-Use of Force', 589-590; Tams, 'Anti-Terrorist Self-Defence', 387.

671 *Nicaragua*, para 176.

exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities could not have been proportionate to that aid.'[672] In *Oil Platforms*, the Court similarly intimated that

> [a]s a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither 'Operation Praying Mantis' as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.[673]

In *Armed Activities* the Court held that the allegedly defensive actions 'would not seem proportionate to the series of transborder attacks [Uganda] claimed had given rise to the right of self-defence'.[674] Finally, a passage from the *Nuclear Weapons* advisory opinion could be read to support a condition of commensurate proportionality. Noting that certain states had asserted that nuclear weapons could be lawfully used in the context of reprisals, the Court refused to rule on this assertion but observed that 'in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality.'[675] As already noted, countermeasures, of which reprisals are a subtype, rely on a notion of commensurate proportionality.[676] The Court's language can be taken to imply that the same type of proportionality applies to reprisals and self-defence, which would suggest that the latter is also based on commensurate proportionality. Finally, some scholars have likewise concluded that self-defence requires commensurate proportionality.[677]

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[672] Ibid, para 237. See also ibid (Schwebel), paras 9, 211, who disagrees on the fact but appears to also apply a notion of commensurate proportionality, stressing that 'the United States symmetrically supports rebels who conduct a rebellion in Nicaragua' (para 9).

[673] *Oil Platforms*, para 77.

[674] *Armed Activities*, para 147.

[675] *Nuclear Weapons*, para 46.

[676] See section 2.1.3.

[677] See Bowett, *Self-Defence*, 13; Dinstein, *War*, para 657; Schachter, 'The Right of States', 1637; Peters, 'Verhältnismäßigkeit', 7; van Steenberghe, 'Self-Defence', 205, though he appears to argue that proportionality can be overruled by necessity (ibid, 206).

Despite these indications, it appears very doubtful that self-defence really requires compliance with the commensurate proportionality standard.[678] First, this form of proportionality sits very uneasily with the otherwise forward-looking nature of self-defence, which is decidedly not about punishment or retaliation but rather about averting imminent and on-going threats.[679] Second, commensurate proportionality would be impossible to apply in cases of anticipatory self-defence, where an antecedent action against which the response could be measured has per definition not (yet) occurred. For anticipatory self-defence the law would thus have to either resort to another type of proportionality or jettison narrow proportionality altogether, neither of which appears to currently have a basis in the law.[680] Rather, as was already concluded in chapter I, there appears to be a single set of legality conditions for all forms of self-defence.[681] Third, in cases of self-defence against non-state actors a requirement of commensurate proportionality would not allow taking the particular degree of responsibility of the host state into account. It is sometimes (correctly) asserted that whether the host state actively aided and abetted the non-state actors, tolerated them, or was merely unable to stop them, matters for the proportionality assessment.[682] It would appear, however, that commensurate proportionality is 'oblivious of the circumstances of the ... attack that provokes defensive action' and that '[o]nly the quantum of force used ... [counts], rather than the identity of the aggressor involved'.[683] Abandoning or replacing commensurate proportionality only for self-defence against non-state actors would, however, again appear to have no basis in the current law and conflict with the proposition of a

[678] See Moir, *Reappraising*, 68-69; Corten, *Law Against War*, 489; Cannizzaro, 'Contextualizing Proportionality', 784; Akande, 'Nuclear Weapons', 191; Gardam, 'A Role for Proportionality', 13.

[679] See Wilmshurst, 'Chatham House Principles', 969; and chapter I, section 3.2.2.

[680] Jettisoning narrow proportionality altogether would make particularly little sense, as it would reduce the conditions under which anticipatory self-defence is available in comparison with reactive self-defence.

[681] See chapter I, section 4.2.2.

[682] See section 3.2.3.

[683] Akande and Lieflaender, 'Clarifying Necessity', 568.

single set of legality conditions for any type of self-defence. Fourth, a requirement of commensurate proportionality would have the paradox consequence of giving the attacking state full control over the degree to which the attacked state may respond in self-defence, since the attack itself would be the yardstick. Taken together, these points indicate that claims asserting that self-defence requires commensurate proportionality should be rejected.

There may be two ways to reconcile this conclusion with the ICJ's apparent endorsement of commensurate proportionality in *Nicaragua*, *Oil Platforms*, and *Armed Activities*. For one, the uses of force concerning which the ICJ made its cited pronouncements might not fall in the category of full-blown self-defence, but rather constitute a form of armed countermeasure. Judge Simma argued in favour of recognising that states may respond to a use of force falling short of an armed attack with "'proportionate countermeasures" also of a military nature'.[684] These actions could be seen as subject more to the logic of countermeasures, which includes a condition of commensurate proportionality, than to the logic of self-defence.[685] It cannot be overlooked, however, that armed countermeasures are generally regarded as prohibited,[686] rendering this approach highly controversial and ultimately hardly promising.

The second possible approach would be to suppose that while the Court uses language that most naturally suggests a commensurate proportionality condition, the pronouncements could also be understood as being really about teleological proportionality. If the Court assumed that the armed attack triggering self-defence could serve as a proxy for the ongoing threat, the elimination of which is exactly the objective of defensive action, then its cited pronouncements would really indicate that the harm caused must not be more 'weighty' than the objective pursued.

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[684] *Oil Platforms* (Simma), para 14. See van Steenberghe, 'Self-Defence', 203-204, for further reference to proposals in this direction.

[685] Going in this direction Higgins, *Problems and Processes*, 231-232; Rodin, *War and Self-Defense*, 115; Kirgis, 'Some Proportionality Issues'; Moir, *Reappraising*, 69, also indicates that commensurate proportionality would be appropriate for 'armed reprisals' (which she, however, classifies as illegal).

[686] See only Article 50(1)(a) ASR (providing further references); *Nicaragua*, para 249.

In any event, the ICJ case-law furthermore also contains independent support for finding that self-defence enshrines a global teleological proportionality requirement. The *Nuclear Weapons* advisory opinion is particularly instructive. First, some states submitted to the Court that 'the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation', allegedly negating the possibility of the use of nuclear weapons ever being proportionate.[687] In response, the Court noted that 'the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality.'[688] This statement is, in principle, compatible with various types of proportionality, as it mainly stresses that the risks associated with nuclear weapons have to be taken into account when considering the negative consequences of their use. The statement nevertheless sits uneasily with commensurate proportionality, since it is difficult to imagine how a nuclear strike can be commensurately proportionate to anything but a prior nuclear attack from the other side. If that is so, it is not clear what role the risk of further escalation would play, and the more natural reading of the above-passage would point towards teleological proportionality.

This impression is reinforced by the Court's second relevant passage. The Court concluded its considerations by finding that 'it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.'[689] It may seem that the Court was, in this passage, mainly concerned with humanitarian law, but the statement can also be read as relating

[687] *Nuclear Weapons*, para 43.

[688] Ibid, para 43.

[689] Ibid, para 97.

to the right of self-defence.[690] Read in this way, it would appear that the Court requires a particularly large threat to be present, a particularly important good to be at stake, in order to outweigh the negative consequences of nuclear weapons, including the risk of escalation. This again points to a requirement of teleological proportionality.[691]

Scholars who have considered the presence of narrow proportionality in the law of self-defence have reached various conclusions.[692] For instance, Kretzmer defended that narrow proportionality 'is inherent in the very notion of proportionality' and that accordingly 'some "cost-benefit" analysis must indeed be part of the jus ad bellum test too.'[693] It appears that he had a form of marginal proportionality in mind, similar to that applied by the Israeli Supreme Court summarised above.[694] At the same time, he noted that '[m]any experts assume that [narrow proportionality] is only relevant in *jus in bello*'.[695] Indeed, for example Dinstein wrote that '[t]here is no support in the practice of States for the notion that proportionality remains relevant – and has to be constantly assessed – throughout the hostilities in the course of war', but rather that '[o]nce war is raging' the objectives can be pursued 'regardless of the condition of proportionality.'[696] Between the extremes of marginal proportionality and no proportionality at all,

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690 Lieflaender, 'Ius ad bellum Proportionality'; Kretzmer, 'Response'; see also *Nuclear Weapons* (Fleischhauer), para 305.

691 See also *Nuclear Weapons* (Schwebel), para 321, quoting the UK's Attorney-General's pleading; Akande, 'Nuclear Weapons', 205.

692 In ethics the conditions of just war undoubtedly include a global proportionality condition, comparing the good and bad effect of war. See only Mellow, 'Counterfactuals', 439; Rodin, 'War and Self-defense', 64; Hurka, 'Morality of War', 35; Hurka, 'Proportionality and Necessity', 127-128; Gardam, *Necessity*, 9; Gardam, 'Proportionality as a Restraint', 163.

693 Kretzmer, 'Response'.

694 Ibid, referring to the Israeli Supreme Court's jurisprudence.

695 Kretzmer, 'Proportionality in Jus ad Bellum', 240.

696 Dinstein, *War*, 697. See also Gardam, *Necessity*, 9; Gardam, 'Proportionality as a Restraint', 169; implicitly Ago, *Addendum*, para 121, requiring only that the defending state must not be able to act using 'no use of armed force at all or merely its use on a lesser scale'; implicitly also Gazzini, *Changing Rules*, 148-149, 197, 218, though his position is not entirely clear.

there is now sizeable support[697] for an acceptance of global proportionality as the relevant standard, which can be summed up thus: '[p]roportionality involves weighing the cost of resort to military force in terms of lives lost and property destroyed relative to the value of the legitimate military end.'[698]

Despite some remaining uncertainty, there are strong reasons for accepting the inclusion of a global teleological proportionality condition in the law on self-defence, and it is at the same time understandable that this condition has not yet emerged more clearly. To start with the case for accepting global proportionality as a condition for the lawful use of force in self-defence, the foregoing analysis demonstrated growing support for this condition in both case-law and doctrine. Significantly, the case-law signals the ICJ's acceptance that proportionality in self-defence goes beyond requiring that the defending state use no more force than necessary (which is, as discussed in chapter I, really an element of necessity often figuring under the label of proportionality in the self-defence context). At the same time, for the reasons discussed above, there are strong doubts about commensurate proportionality in the self-defense context, leaving global proportionality as the most sensible candidate.

Apart from its support in doctrine and case-law, accepting the inclusion of global proportionality also makes sense from a normative standpoint. Its first real strength and purpose is that it can impose additional limits on the use of force even where all other legality conditions are fulfilled, notably where a given use of force qualifies as necessary.[699] As Shue noted, requiring only necessity but not proportionality can be a 'licence to ruthlessness'.[700] It provides a legal basis

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[697] Tams and Devaney, 'Applying Necessity', 102f; Lowe, 'Clear and Present', 193; Moir, *Reappraising*, 69; Corten, *Law Against War*, 489; Tams, 'Anti-Terrorist Self-Defence', 377; Cannizzaro, 'Contextualizing Proportionality', 792; O'Connell, 'Lawful Self-Defense to Terrorism', 902; Christodoulidou and Chainoglou, '*Jus Ad Bellum* Proportionality', 1199, 1207; Reinold, 'State Weakness', 267; *Oil Platforms* (Rigaux), para 16, apparently considering proportionality as an additional limit. See also Wedgwood, 'Implementing Limitations', 59.

[698] O'Connell, 'Weighing the Cost of War'.

[699] Ibid; Tams, 'Anti-Terrorist Self-Defence', 386.

[700] Shue, 'Proportionality', at minute 28:45.

for the normative position that sometimes even force that is necessary to eliminate a sufficient threat can be excessive, simply because the harm done in defence is out of relation with the actual threat sought to be averted:

> To give an extreme (and admittedly extremely theoretical) example for the purpose of illustration, where only a [necessity] test is in place, a state could use extreme force (such as a nuclear weapon) to repel a relatively 'minor' attack (eg, the occupation of a remote and uninhabited island), provided that it factually has no other means of achieving this result.[701]

While it may seem rather unlikely that such a situation could actually arise,[702] 'given the wide range of attacks that may meet the definition of an armed attack, such a situation is indeed conceivable.'[703] If one accepts that in such a scenario the use of nuclear weapons should not be allowed, even if necessary, a global proportionality condition additional to the necessity limitation is the logical consequence. Admittedly, the same result could also be achieved by an across-the-board ban of nuclear weapons. Arguably, however, such a ban would also exclude the use of nuclear weapons in situations where their use would be both necessary and proportionate (if that can ever be the case). The UK's Attorney-General argued against an outright ban exactly on this basis in the *Nuclear Weapons* case:

> To assume that any defensive use of nuclear weapons must be disproportionate, no matter how serious the threat to the safety and the very survival of the State resorting to such use, is wholly unfounded. ... It cannot be right to say that if an aggressor hits hard enough, his victim loses the right to take the only measure by which it can defend himself and reverse the aggression. That would not be the rule of law. It would be an aggressor's charter.[704]

Thus, global proportionality's second strength is its flexibility, in that it can rule out certain (arguably) excessive action without ruling out whole types of action, including for scenarios in which they might be justified.

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[701] Lieflaender, 'Ius ad bellum Proportionality'.

[702] See Tams, 'Anti-Terrorist Self-Defence', 386.

[703] Kretzmer, 'Response'.

[704] *Nuclear Weapons* (Schwebel), para 321, quoting the UK's Attorney-General's pleading.

While the foregoing argued that there are strong (including normative) reasons for accepting global proportionality as a condition of lawful self-defence, it is clear that doing so has some less obvious normative implications. Indeed, it might seem to be at odds with the inherent nature of a state's right of self-defence to accept that even necessary defensive force may sometimes be prohibited. It was discussed above[705] that global proportionality subjects the interests of the defending state meant to be protected by the right of self-defence to a net weight calculation, against a weight scale set by the legal community.[706] It may be perceived as particularly disturbing that the interests of the attacking state exposed to harm by the defensive action could outweigh the right of the attacked state to defend itself.[707] While this unattractive result is nuanced by the fact that in the law of self-defence the interests of the attacking state must be heavily discounted,[708] in principle the point remains true.

The central normative question may thus well be whether the 'international community [has] reached a stage of integration in which it can credibly be maintained that the ultimate interest of the community as a whole [as expressed in the net weight] can sometimes override each state's right to defend itself'.[709] Seeing that over the last decades international law has incrementally attributed a more and more prominent role to community interests,[710] and noting in general the now wide-spread support for a global proportionality condition in self-defence, it would appear that international law has indeed reached this stage.

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[705] See section 2.2.2.

[706] It is, in this sense, an 'instrument for social control of unilateral resort to force' (Cannizzaro, 'Contextualizing Proportionality', 785).

[707] See Statman, 'Can Wars be Fought Justly?', 438.

[708] See section 3.2.3.

[709] Lieflaender, 'Ius ad bellum Proportionality'

[710] See only Simma, 'From bilateralism to community interest'; Gaja, 'General Interests'.

In conclusion, it can thus be asserted that the law of self-defence requires defensive action to be globally proportionate.[711]

3.2.2. Factors taken into account in assessing proportionality under the law on self-defence

The question that logically follows is which factors count as the relevant positive and negative consequences of defensive action to be weighed against each other. Case-law and state practice provide virtually no guidance, which is unsurprising given the lack of in-depth discussion of proportionality.[712] Doctrine dealing with the question generally coalesces around formulations focusing on the defensive purpose as the positive consequence, on the one hand, and the level of force and concomitant destruction brought about as the negative consequence, on the other hand. For example, it is clear that foreign civilian casualties count as relevant negative consequences.[713] Perhaps the most encompassing yet concise definition is provided by Barboza, who wrote that '[t]he interests in conflict in case of self-defence are ... on one side the territorial integrity of State A, on the other the territorial integrity of State B, and in any case the integrity of the persons and property of both States.'[714]

What emerges is once again the congruence between the interests relevant for necessity (as underlying a measure's LoP and LoH), and the interests relevant for the proportionality calculus. In other words, under the law on self-defence the positive consequences are exactly the protection achieved by the defensive action against a sufficient threat (its defensive purpose), and

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[711] It is true that case-law and state practice provide virtually no examples of defensive action being considered globally disproportionate. This could mean that there is no global proportionality condition in the first place. At the same time, because of the role of discounting harm, even massive defensive force is unlikely to be globally disproportionate, so that the absence of findings of global disproportionality is not surprising even if the global proportionality requirement applies.

[712] The question is discussed somewhat more extensively in the literature on the conditions of just war. See only Mellow, 'Counterfactuals', 442ff; McMahan, 'Proportionality', 144ff; Hurka, 'Morality of War', 38ff.

[713] See Wedgwood, 'Implementing Limitations', 61; Gardam, 'Proportionality and Force', 405; Cannizzaro, 'Contextualizing Proportionality', 792, considered the 'humanitarian cost' of defensive action relevant.

[714] Barboza, 'Necessity (Revisited)', 34.

the negative consequences are the harm done to other legally protected interests as a corollary. Ultimately, necessity and proportionality then function with respect to the same factors: protection and harm.

3.2.3. Discounting harm: the role of the attacking state's (greater or lesser) liability to suffer defensive force

A final issue related to the proportionality of defensive action – and to a degree also the necessity of such action – concerns the assertion that the actions of the state subject to defensive force make a difference in assessing proportionality and necessity.[715] For instance, with regard to defensive force against a state hosting non-state actors responsible for an armed attack, Bethlehem suggested that 'the extent of the responsibility of that state for aiding or assisting the nonstate actor in its armed activities may be relevant to considerations of the necessity to act in self-defense and the proportionality of such action'.[716] It thus seems to make a difference for proportionality and necessity whether the state subject to defensive force launched an armed attack itself, or was 'unable' or 'unwilling'[717] to prevent non-state actors from launching it.

It is not difficult to see how the actions of the state subject to defensive force matter for necessity, since the actions and attitudes of that state change the factual matrix in which necessity must be assessed.[718] Thus, the degree of force necessary may well differ where a host state has colluded with non-state actors and assisted them in launching an armed attack, and where the host state was merely unable to prevent the non-state actor's actions.[719]

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[715] See, eg, Reinold, 'State Weakness', 285.

[716] Bethlehem, 'Self-Defense', 776.

[717] On the 'unwilling or unable' doctrine, see generally Deeks, 'Unwilling or Unable'.

[718] See Trapp, 'Back to Basics', 147; Greenwood, 'Self-Defence', para 18; van Steenberghe, 'Self-Defence', 200, 202; Deeks, 'Unwilling or Unable', 495; Reinold, 'State Weakness', 272.

[719] Akande and Lieflaender, 'Clarifying Necessity', 568, fn.21.

The case is less clear-cut for proportionality, which relies relatively less on factual and relatively more on normative considerations than necessity. On one side of the scale, the normative weight of the positive consequences does not appear to depend on the actions of the state subject to defensive force. In the same vein, it might be thought that the weight of the harm does not differ either, since two identical defensive campaigns should be seen as equally harmful regardless of the fact that one might respond to an armed attack by a state and the other to an armed attack by non-state actors. Yet it is precisely this last point that must be rejected to make sense of the sensitivity of proportionality to the actions of the state subject to defensive force.

The clue can be found in the notion of 'normative discounting'.[720] Where a state launches an armed attack, it renders itself liable to suffering defensive force. At the same time, by being either unable or unwilling to stop non-state actors from launching an attack, the host state incurs a degree of responsibility for their action, thus arguably again rendering itself liable to suffering some degree of defensive force. The particular degree of liability, which is heaviest in case of a direct armed attack by the state and lightest where the state is willing but unable to stop a non-state actor, appears to inform the allocation of normative weight to the harm caused in self-defence. In other words, the normative weight is discounted against the liability of the state subject to defensive force. Normative discounting can then explain why the exact same defensive campaign could be proportionate where a host state has colluded with non-state actors, but disproportionate where the host state was merely unable to stop them.[721]

3.3. WTO-law

Chapter I already discussed that the AB in the *Korea-Beef* case introduced a 'weighing and balancing' process, which prominently includes an assessment of 'the contribution made by

[720] This is very common in ethics, where it extends even to taking into account the personal liability of soldiers etc (see, eg, the discussions of liability in McMahan, *Killing in War*, chapters 4-5; Frowe, *Defensive Killing*). Some form of individual discounting is discussed for legal purposes also by Cannizzaro, 'Contextualizing Proportionality', 790.

[721] See Akande and Lieflaender, 'Clarifying Necessity', 568.

the … measure to [achieving the objective], the importance of [achieving the objective], and the accompanying impact of the [measure] on imports or exports.'[722] The discussion in chapter I concluded that it is not quite clear what the role of this 'weighing and balancing' process is in the context of the wider necessity analysis, but that it might point towards the presence of a proportionality test.[723] That the relevant WTO provisions[724] only require a measure to be necessary and thus provide no explicit textual hook for a proportionality test is not *a priori* a bar to this interpretation. As already mentioned above, reading proportionality into treaty provisions that textually only refer to necessity is wide-spread; it notably takes place in the context of the ECHR and EU law.[725] Where proportionality is read into a clause textually referring only to necessity, the reference in effect enshrines a 'wide' notion of necessity, including both necessity in the sense used in this thesis and narrow proportionality.[726] In this light, it is important to keep in mind that when the AB speaks of necessity, it could have either a wide or narrow notion of necessity in mind. In line with the general approach taken in this thesis of focusing on the substantive tests used in any one context rather than the labels attached, to determine whether the surveyed WTO rules enshrine a proportionality test the case-law must thus be analysed with a view to identifying the test(s) actually used.

The 'weighing and balancing' was after *Korea-Beef* adopted for all the relevant provisions under Articles XX GATT and XIV GATS, though notably not the SPS. The TBT itself directly prescribes that 'technical regulations shall not be more trade-restrictive than necessary to fulfil a

[722] *Korea-Beef (AB)*, para 164.

[723] See section 6.2.3.

[724] The relevant provisions are cited in full in the Introduction, section 1.

[725] See section 2.2. and the references there provided.

[726] This 'wide necessity' is the mirror image of 'wide proportionality', often interpreted as including both necessity and narrow proportionality (see section 2.1.).

legitimate objective, *taking account of the risks non-fulfilment would create*.'[727] Article 2.2 TBT has been interpreted to involve a similar sequential 'weighing and balancing' analysis as its relatives in Articles XX GATT and XIV GATS, with the main difference being that the importance of the objective is replaced by the 'risks non-fulfilment would create'.[728] To see the close analogy, it is instructive to see that the AB considered the 'risks non-fulfilment would create' as

> a further element of weighing and balancing in the determination of whether the trade-restrictiveness of a technical regulation is 'necessary' or, alternatively, whether a possible alternative measure, which is less trade restrictive, would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and would be reasonably available.[729]

In support of this passage, the AB cites its report in the GATS-related *US-Gambling* case, where it used almost identical language, with the relevant difference being the focus on the importance of the objective rather than the risks of non-fulfilment.[730] Even though the AB later stressed that 'we do not view the phrase "taking account of the risks non-fulfilment would create" as providing a direct textual basis for taking into account the relative importance of the objective pursued'[731], the two concepts still appear to function as close analogues, and a real difference in operation has so far not been identified.[732] Articles XX GATT and XIV GATS on the one hand, and Article 2.2 TBT, on the other, thus overlap to a very large extent, which justifies taking jurisprudence concerning the one as authoritative also as regards the other.

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[727] Article 2.2 TBT (emphasis added). The AB held that assessing the 'risks non-fulfilment would create' required analysing two elements, namely 'the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective' (*US-Tuna II (AB)*, para 321). Desmedt suggested that this phrase itself indicated the presence of a proportionality test (Desmedt, 'Proportionality', 459-460).

[728] *US-Tuna II (AB)*, para 318.

[729] Ibid, para 321.

[730] *US-Gambling (AB)*, para 307.

[731] *US-COOL 21.5 (AB)*, para 5.277. The Panel in the same case (*US-COOL 21.5 (Panel)*, para 7.379) had still shied away from defining 'the precise relationship between the nature of risks and gravity of the consequences of the non-fulfilment of a legitimate objective under the TBT, on the one hand, and the relative importance of the interests or values protected under Article XX of the GATT 1994, on the other.'

[732] See also Marceau and Trachtman, 'Technical Barriers', 831; Condon, 'Climate Change', 923; Voon, 'Trade-Restrictiveness', 459; Mitchell and Henckels, 'Variations', 144.

Immediately after *Korea-Beef*, the 'weighing and balancing' process thus became a hallmark of WTO jurisprudence on necessity. Panels and the AB routinely went through the list of factors mentioned by the AB, reaching a conclusion on each of them. However, neither the panels nor the AB attached any explicit consequences to their findings,[733] leaving it entirely unclear what the actual impact of this test would be. Interpretations in doctrine saw the 'weighing and balancing' as establishing a proportionality test,[734] constituting a (preliminary) stage of the actual necessity test,[735] laying down 'a kind of *de minimis* rule',[736] or as simply having no actual impact at all.[737] The following sub-sections examine these possible interpretations.

3.3.1. The Appellate Body's 'weighing and balancing' as a proportionality test

To start, the true character of the 'weighing and balancing' test as one of proper global teleological proportionality appears to emerge more clearly in a line of cases starting with *Brazil-Tyres*. First, the AB suggested that a very trade-restrictive measure could only be necessary where it made a 'material contribution' to achieving its objective:

> [W]hen a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective. Thus, we disagree with Brazil's suggestion that, because it aims to reduce risk exposure to

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[733] See, eg, *EC-Asbestos (AB)*, para 172; *Canada-Wheat (Panel)*, paras 6.224f; *US-Gambling (AB)*, para 306. See generally Regan, 'Meaning of "Necessary"', 348-350.

[734] Marceau and Trachtman, 'Technical Barriers', 828; Osiro, 'GATT/WTO Necessity', 134; Bown and Trachtman, 'Brazil - Tyres', 119; Herwig and Serdarevic, 'Standard of Review', 218; Engan, 'In Search of Necessity', 509-510; Mitchell, *Legal Principles in WTO Disputes*, 199; Bücheler, *Proportionality*, 68ff, speaking of test 'very similar' to proportionality; Villanueva, 'Les sanctions commerciales', 608.

[735] Fontanelli, 'State Discretion', 16, 20-22; van den Bossche, 'Looking for Proportionality', 289.

[736] Neumann and Türk, 'Necessity Revisited', 211.

[737] Regan, 'Meaning of "Necessary"', 347-348, 360; Regan, 'Non-trade Interests and Values', 18; Lang, *World Trade Law after Neoliberalism*, 323; implicitly Zleptnig, *Non-economic Objectives*, 244ff; Kleinlein, 'Judicial Lawmaking', 266.

Some scholars have furthermore interpreted the 'importance' leg as operating as 'a margin of appreciation' (Mitchell and Henckels, 'Variations', 130), which is however 'a strained reading – especially since the Appellate Body never mentions the margin of appreciation' (Regan, 'Meaning of "Necessary"', 357). To be sure, the relative normative weights appear to have a role to play in setting the standard of review (see chapter III, section 5.1.), but this does not appear to be exactly what the AB had in mind when it formulated the 'weighing and balancing' test.

> the maximum extent possible, an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary.[738]

The direction of the AB's remark is not entirely unambiguous.[739] It could be read as establishing a general minimum contribution threshold,[740] and was indeed interpreted in this way by the *EC-Seal Products* panel. The panel explained that under Article XX GATT the contribution made by the measure 'to the identified objective must be shown to be at least material given the extent of its trade-restrictiveness',[741] and noted that no similar 'threshold degree of contribution'[742] was required under Article 2.2 TBT. However, the AB in the same case decidedly rejected this interpretation, arguing that its own findings in *Brazil-Tyres* were not meant to 'sets out a generally applicable standard requiring the use of a pre-determined threshold of contribution in analysing the necessity of a measure under Article XX of the GATT 1994.'[743]

With an interpretation finding a general *de minimis* rule or minimum threshold of contribution being ruled out, the AB's remarks in *Brazil-Tyres* can also be understood as pointing to the need for the contribution to 'outweigh' the trade restriction, which in case of a particularly restrictive measure only a material contribution can do. This second reading, which is more natural given the terms used by the AB, is also supported by its already-quoted explanation that a particularly important objective, a large contribution to achieving this objective, and a slight effect on trade would mean that a measure can be more easily considered as necessary.[744] Further

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[738] *Brazil-Tyres (AB)*, para 150.

[739] See van Calster, 'Regulatory Autonomy', 136 ('where exactly the AB wants this "material contribution" test to go is unclear').

[740] See Zleptnig, *Non-economic Objectives*, 242. See also *China-Raw Materials (Panel)*, para 7.515; and *Mexico-Soft Drinks (Panel)*, para 8.188, which could be read as suggesting a minimum protection certainty requirement. However, the passage relates not the necessity condition, but whether the measure was designed 'to secure compliance'. In any event, the AB rejected the panel's focus on certainty (*Mexico-Soft Drinks (AB)*, para 74).

[741] *EC-Seal Products (Panel)*, para 7.636.

[742] Ibid, para 7.635, fn.977.

[743] *EC-Seal Products (AB)*, para 5.213. A similar conclusion had already been reached in *US-COOL (AB)*, paras 461, 468.

[744] *Brazil-Tyres (AB)*, paras 162-163. See in this respect also *Colombia-Textiles (Panel)*, para 7.494.

evidence that that AB indeed had a proportionality analysis in mind came when it interpreted the panel report under appeal as finding that 'in the light of the importance of the interests protected by the objective of the [contested measures], the contribution of the [the contested measure] to the achievement of its objective *outweighs* its trade restrictiveness.'[745] This line was continued in further cases such as *China-Trading Rights*, where the AB likewise mentioned that the restrictive effect of a measure would have to be 'outweighed' by the other elements in the 'weighing and balancing' process.[746]

Taken together, there is a strong case that the AB really did establish a proportionality test under Articles XX GATT and XIV GATS. The mentioned line of cases appears to affirm that under the heading of necessity, two separate tests now exist: first, proportionality; second, necessity (a finding of disproportionality renders the testing of necessity proper obsolete).[747] The variant of proportionality embodied in these pronouncements is straightforward global teleological proportionality, as it essentially compares the normative weight of the measure's positive consequences (informed by the importance of the objective and the contribution to achieving it that the measure makes) with the normative weight of the negative consequences (here the degree of trade restrictiveness).

If it is accepted that the AB has thus introduced a global proportionality test alongside necessity, then it would again appear that the elements taken into account in the two tests overlap. Indeed, the contribution of the measure to its objective is of course nothing other than the

[745] *Brazil-Tyres (AB)*, para 179 (emphasis added). See also ibid, paras 182, 210.

[746] *China-Trading Rights (AB)*, para 310. Further cases following this line include *China-Auto Parts (Panel)*, para 7.360; *China-Raw Materials (Panel)*, para 7.487; *Colombia-Textiles (Panel)*, para 7.322; *EC-Seal Products (Panel)*, para 7.635.

[747] See *China-Trading Rights (Panel)*, paras 7.828, 7.836, 7.863, 7.868, 7.869, 7.898, 7.908; *China-Trading Rights (AB)*, paras 245ff; *China-Raw Materials (Panel)*, para 7.565. See also *Argentina-Goods and Services (Panel)*, para 7.737, where the panel considered it necessary to proceed with the 'weighing and balancing' after it already concluded that there were no alternatives available.

measure's LoP, and the restriction of trade nothing other than the measure's LoH.[748] The emphasis on appreciating the contribution in light of the importance of the objective pursued points to the dimension of normative weight, and what is in the end compared are the normative weights of a measure's LoP and LoH.

3.3.2. 'Weighing and balancing': alternative interpretations of the case-law

Despite the conclusions of the foregoing section, the analysis cannot end there. In fact, there are various reasons that appear to occasion doubt on the presence of a proper proportionality test. To start, the panels and AB have yet to actually rule out a measure as being disproportionate; wherever the 'weighing and balancing' was so far carried out, the decisive point for determining whether a measure was justified was ultimately its compliance with the necessity test set out in chapter I. This can be interpreted in one of two ways: either that none of the measures so far examined by the panels and AB was actually disproportionate, or that in fact no independent proportionality test applies and the 'weighing and balancing' is at most a preparatory stage for the necessity test.

Second, the AB has more recently emphasised that an assessment of possible alternatives is virtually always required, thereby again casting doubt on the existence of an independent – and independently operational – proportionality test. In *EC-Seal Products* and *US-COOL 21.5*, parties argued that in line with the AB's suggestion in *Brazil-Tyres* that the 'weighing and balancing' is one of two separate tests, panels are actually obliged to first draw a 'preliminary conclusion' based on the 'weighing and balancing' process (the so-called "'relational" analysis'[749]), before proceeding to the comparison with alternatives (the so-called "'comparative" analysis'[750]).[751] In this context,

[748] The distinction between DLoP and ALoP, introduced above with respect to necessity, is also of relevance for global proportionality. It again appears that the reference point for the balancing exercise must be whichever of the two is lower.

[749] See *US-COOL 21.5 (AB)*, paras 5.223.

[750] See ibid, paras 5.225.

Mexico referred in *US-COOL 21.5* to the *US-Tuna II* case,[752] where the AB had explained that '[i]n most cases, a comparison of the challenged measure and possible alternative measures should be undertaken'[753], before clarifying in a footnote that such a comparison could be dispensed with in 'at least two instances': where a measure is not trade restrictive and where it makes '*no* contribution to the achievement of the legitimate objective'.[754] It is clear that a measure that makes no contribution can be neither necessary nor proportionate, and a measure that causes no harm is not in any need of justification in the first place. More interestingly, the AB's reference to 'at least two instances' left open whether there are other scenarios, and the panel in *US-COOL 21.5* indeed interpreted Mexico's submission as arguing that the measure in question in that case 'represents a third scenario under which it should be found inconsistent without looking at alternatives.'[755] A finding that a measure was disproportionate could conceivably constitute such a third scenario.

In the end, the AB rejected the arguments in both *EC-Seal Products* and *US-COOL 21.5*, albeit not entirely conclusively. While it did not say explicitly that panels must always carry out the comparative analysis unless one of the two scenarios mentioned in *Tuna II* is present, and thus did not exclude that a panel could end the analysis after a preliminary conclusion, the AB held that panels are not obliged to first draw a preliminary conclusion based on the first leg of the *Brazil-Tyres* test:

> While there may be circumstances in which a weighing and balancing exercise would not require that a panel proceed to evaluate alternative measures [reference to *US-Tuna II*], we also do not consider that such an exercise mandates a

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751 Canada in *EC-Seal Products* (see *EC-Seal Products (AB)*, para 5.215, fn.1299) as well as Mexico and Canada in *US-COOL 21.5* (see *US-COOL 21.5 (AB)*, paras 5.223ff.).

752 See *US-COOL 21.5 (Panel)*, para 7.297.

753 *US-Tuna II (AB)*, para 322.

754 Ibid, para 322, fn.647 (emphasis in the original). See also *China-Rare Earths (Panel)*, para 7.147.

755 *US-COOL 21.5 (Panel)*, para 7.298.

> preliminary determination of the necessity of the challenged measure before proceeding to assess those alternatives.[756]

At the same time as making this statement, the AB however also confirmed that a panel cannot avoid assessing any of the factors that are relevant under the 'weighing and balancing' exercise, even if it was not obliged to draw a preliminary conclusion before proceeding to consider alternative measures.[757] This may be taken to suggest that the 'weighing and balancing' is indeed mostly, possibly exclusively, a preparatory step for the necessity analysis.

There are further elements pointing in this direction. For one, already in *Korea-Beef* the AB pointed out that:

> [i]n our view, the weighing and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available'.[758]

Going in the same direction, the AB has since *Brazil-Tyres* stressed that the analytical process comprised of 'first, the examination of the contribution of the [measure] to the achievement of its objective against its trade restrictiveness in the light of the interests at stake, and, second, the comparison of the possible alternatives' is a 'holistic operation' which requires 'putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement.'[759] The AB made that statement in response to criticism by the EU that the *Brazil-Tyres* panel 'did not "actually" weigh and balance the relevant factors'.[760] Once more, while the emphasis on the 'holistic weighing and

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[756] *EC-Seal Products (AB)*, para 5.215, fn.1299. See also *US-COOL 21.5 (AB)*, para 5.235.

[757] *US-COOL 21.5 (AB)*, para 5.218.

[758] *Korea-Beef (AB)*, para 166. Ortino similarly argued that in the context of Article 2.2 TBT, the 'risk non-fulfilment would create' is but one element taken into account when deciding if an alternative existed (see Ortino, *Basic Legal Instruments*, 468).

[759] *Brazil-Tyres (AB)*, para 182. See also *EC-Seal Products (AB)*, paras 5.214-5.215; *US-COOL 21.5 (AB)*, para 5.198.

[760] *Brazil-Tyres (AB)*, para 182.

balancing'[761] does not exclude that a panel could rule out a measure simply for being disproportionate,[762] it can be taken as support for seeing 'weighing and balancing' as merely preparatory for necessity.

Yet, this interpretation is ultimately not convincing, in particular because it fails to make sense of one of the central elements involved in the 'weighing and balancing' process. Of the three factors mentioned – the importance of the objective, the contribution of the measure to achieving the objective, and the measure's trade restrictiveness –, two also figure prominently in the proper necessity test.[763] The third factor, however, has no proper role in the necessity analysis: the challenged measure and its alternatives by definition pursue the same objective; otherwise the alternatives would not enter into the analysis in the first place. Where two measures pursue the same objective, the abstract weight (ie, its importance) of the objective can be ignored in the comparison. In this light, it is not surprising that the panels and AB have so far failed to provide any guidance on how the importance of the objective makes any difference whatsoever in the 'comparative analysis'. Panels and the AB have not acknowledged this fact, but have also not countered it convincingly. Rather, they appear to avoid the issue. For example, in the TBT-related *US-COOL 21.5* case the panel saw itself unable to conclude on the 'risks non-fulfilment would create' (which, as explained, appears to fulfil largely the same function as 'importance of the objective' in the GATT/GATS context) connected to the challenged measure.[764] On this basis, the panel went on to hold that 'we cannot determine the specific implications of risks of non-fulfilment for ... the first alternative's degree of contribution'.[765] Likewise, the AB remained

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[761] *US-COOL 21.5 (AB)*, para 5.198.

[762] Note in particular the recent *India-Solar Cells* case, where the Panel repeated the separation of the necessity test into two legs and suggested that the 'holistic weighing and balancing' only relates to the first step, not the comparison with alternatives (*India-Solar Cells (Panel)*, para 7.349).

[763] Deciding whether an alternative is equally protective and less trade-restrictive of course requires findings about the protectiveness and harmfulness of the measure itself.

[764] *US-COOL 21.5 (Panel)*, paras 7.423-7.424.

[765] Ibid, para 7.488.

explicitly silent on how "'the risks non-fulfilment would create" actually shed any light on whether the ... alternative measures make a contribution to the [challenged measure's] objective that is equivalent in degree to that of the [challenged] measure itself.'[766] What role the 'importance of the objective' should thus play in analysing alternative measures remains entirely obscure.

Still in *US-COOL 21.5* the AB suggested yet another role for the 'importance of the objective' element, noting that the 'risks non-fulfilment would create' can inform the margin of discretion that a panel has in assessing whether an alternative makes a contribution to the objective that is equivalent to that of the challenged measure.[767] The AB had accepted that an alternative does not need to make an identical contribution, but that it can make an equivalent contribution despite achieving the objective in other ways than the challenged measure.[768]

There are two problems with this suggestion: first, as mentioned above, the AB's distinction between identical and equivalent contribution appears to be in conflict with the acting state's right to set the desired level of protection.[769] Second, the AB's approach seems to make that right dependent on the importance of the objective, and in fact mixes two logically distinct categories, namely the importance of the objective and the contribution thereto, by suggesting that the first can inform the comparative analysis of the latter. As the United States argued in the case, this approach does not seem 'compatible with the fundamental premise that it is up to the [acting state] to decide at what level it wants to [achieve the objective], regardless of whether the "risks non-fulfilment would create" are high or low, great or small.'[770] Third, the AB's approach would only make sense of the 'importance of the objective' where the equivalence of two measures' protectiveness is in question, which is by no means always the case. Giving meaning to

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[766] *US-COOL 21.5 (AB)*, para 5.308.

[767] Ibid, para 5.215.

[768] Ibid, para 5.215.

[769] See chapter I, section 7.1.4, n.433.

[770] *US-COOL 21.5 (AB)*, para 5.257, quoting United States' appellant's submission, para 262.

the 'importance of the objective' only in some cases but not others would appear to be incompatible with the AB's pronouncement that a 'weighing and balancing' including of the 'importance of the objective' is required 'in every case'.[771] In the final analysis, the AB's remarks thus fail to give a proper role to the 'risks non-fulfilment would create' (and by implication the 'importance of the objective').

Finally, it should be mentioned that still in *US-COOL 21.5*, Canada and Mexico suggested an even more far-reaching interpretation. They requested the AB to find that

> even if these proposed alternative measures are found to achieve a lesser degree of contribution than the [challenged] measure, this is offset by their lower level of trade-restrictiveness and by the low gravity of 'the risks non-fulfilment would create', such that the [challenged] measure is 'more trade-restrictive than necessary'.[772]

The AB did not rule on this suggestion. The Canadian/Mexican interpretation would indeed succeed to make sense of the 'risks non-fulfilment would create', but it would do so precisely by introducing proportionality, in fact marginal proportionality (comparing the normative weight of the reduction in harm against the normative weight of the reduction in protection). It can thus not make sense of the importance of the objective outside a proportionality logic.

3.3.3. Concluding discussion

In the final analysis, the panels and AB have thus consistently stressed that the importance of the objective and the 'risks that non-fulfilment would create' have to be taken into account, but have failed to provide explicit guidance on how this should be done. Siding with the sceptics, one might think that there is actually no substance at all to *Korea-Beef*'s 'weighing and balancing' process, in which case assessing the importance of the objective is simply a pointless exercise.[773] Of course, this interpretation would have to attribute the same effect to the 'risks

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[771] *Korea-Beef (AB)*, para 164.

[772] *US-COOL 21.5 (AB)*, para 5.311.

[773] See Fontanelli, 'State Discretion', 20: 'the assessment of the state policy ... bears an almost anecdotal character'.

non-fulfilment would create'. This result would be rather disturbing, however, since taking these risks into account is mandated directly by the text of the TBT itself. Reading it out of existence simply does not seem acceptable.

The only viable interpretation of the AB's case-law is then to accept that the TBT and the AB in *Korea-Beef* actually created a proper global proportionality test, which has so far simply never led to a finding that a challenged measure was disproportionate. Much academic criticism has been levelled against the prospect of a global proportionality test in WTO law from a normative point of view, with much of it focusing on the fact that neither the texts nor the logic of the relevant GATT/GATS/TBT rules provide an obvious basis for subjecting the non-trade concerns protected in Articles XX GATT, XIV GATS and the TBT to the promotion of free trade.[774] In the same vein it is often pointed out that a proportionality test would contradict the freedom of states to set their desired level of protection.[775] Such normative consideration cannot, however, change the fact that only a proportionality reading succeeds in making sense of the AB's case-law. What is more, precisely the points underlying these criticisms could explain just how the proportionality requirement has so far played out. It can indeed be maintained that the relevant provisions express a principled hierarchy of interests, protecting the listed non-trade interests even at the expense of trade-restrictions where necessary to the degree desired by the acting states. This does not mean, however, that the preference must always be absolute; rather, it can mean that in the great majority of cases the non-trade interest will prevail, but that the WTO judiciary maintains the possibility of striking down even a necessary measure where the weight of the non-trade interest protected is out of all proportion with the gravity of harm done to free

[774] See, eg, *Thailand-Cigarettes*, para 73, where the panel noted that Article XX(b) 'clearly allowed contracting parties to give priority to human health over trade liberalization'. For critique from various angles see Kapterian, 'Critique', 119ff; Fontanelli, 'State Discretion', 13; McGrady, 'Necessity Exceptions', 162; Marceau and Trachtman, 'Technical Barriers', 852; Foster, 'Rotten', 318; Neumann and Türk, 'Necessity Revisited', 220, 232; Button, *Power to Protect*, 35; Du, 'Autonomy', 1101; Reid, 'Squaring the Circle', 319; Mitchell, *Legal Principles in WTO Disputes*, 199. In support of a proportionality test (in environmental cases at least), see Montini, 'Necessity Principle', 155.

[775] See McGovern, 'Balance Interests' 182; Venzke, 'Making General Exceptions' 206; van den Bossche, 'Looking for Proportionality' 290; Weiler, 'Brazil - Tyres', 140; Du, 'Autonomy', 1096-1097; Ortino, 'Korea-Beef and Balancing', 47.

trade. It would be neither surprising for the WTO to maintain this possibility, nor that it is used only in extreme circumstances (which so far have apparently not surfaced).[776]

In conclusion, it must be admitted that the WTO practice is not entirely clear on whether the relevant GATT/GATS/TBT provisions enshrine a proportionality condition. However, the best interpretation of the jurisprudence is that they do in fact require global proportionality. The applicability of this test has not been suggested as regards the SPS, and nothing in the jurisprudence points in this direction.[777]

4. Conclusion on proportionality

The foregoing empirical survey allows three important conclusions. First, and most obviously, it emerged that all the surveyed rules – with the notable exception being Article 5.6 SPS – include not only a proportionality requirement, but the same type: global teleological proportionality.[778] What is more, there is no indication that any rule requires the positive consequences of the challenged measure to outweigh the negative consequences by any particular margin.

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[776] Ayres and Mitchell observed in 2011 that 'in no case to date has a Panel or the Appellate Body found that a measure pursues values of only moderate or negligible importance' (Ayres and Mitchell, 'Exceptions', 18). It cannot be excluded that a panel will make such a finding at some point, and might then strike out a measure as disproportionate. See also Bown and Trachtman, 'Brazil - Tyres', 89: 'As to the value of the regulatory goal, human health and safety has not been required to be compromised, but it may be that other values, such as avoidance of fraud, would be, and it may be that in future cases the human health-and-safety benefit could be so small as to demand compromise'; Kleinlein, 'Judicial Lawmaking', 266-267.

[777] See Regan, 'US - Poultry', 301. There may be an analogue under the SPS, though only one case has so far touched upon it. In *Japan-Apples*, the Panel found that since the risk assessment at issue in that case had revealed only a negligible risk, the measure taken in response was 'clearly disproportionate to the risk identified on the basis of the scientific evidence available' (*Japan-Apples (Panel)*, para 8.198). The AB did not disturb this finding, but emphasised that it did not relate to Article 5.6, but rather Article 2.2 (*Japan-Apples (AB)*, para 163). See on this case and the question of proportionality Button, *Power to Protect*, 49-50.

On first sight Article 5.4 SPS might also be seen to enshrine a global proportionality test. However, it was established already in *EC-Hormones (Panel)*, para 8.166, that this provision is only 'hortatory' (Ortino, *Basic Legal Instruments*, 467) in nature.

[778] This result also means by direct implication that inconvenience plays no part in the proportionality calculus under any of the rules, since inconvenience comes into play with regard to proportionality only where a comparison with alternative measures is required, and that is only the case for marginal proportionality.

Second, it also emerged that in all the surveyed rules which include a global proportionality condition, proportionality operates with reference to the same two factors, namely the normative weight of the challenged measure's LoP and LoH.[779] This makes theoretical sense. First, as regards the positive consequences, permissive rules allow only action pursuing permissible objectives, the pursuit of the permissible objective being the legally relevant justification for taking the action. It is with respect to the objective that proportionality 'empowers',[780] and hence only logical that the challenged measure's protectiveness (ie, its ability to achieve the objective) counts as its positive consequences.[781] As regards, second, the negative consequences, it makes sense to look at the flip side of proportionality's empowering function, its limiting effect. Since the limiting function logically relates to the harm done to legally protected interests, it makes sense to count exactly this harm as the relevant negative consequences.

The foregoing leads to four important follow-up conclusions. First, it signals a far-reaching concordance between proportionality and necessity in the surveyed rules as regards the factors to be taken into account. The difference between them is that while both focus on the same elements, they relate them to each other using a different decision logic. Second, just like necessity, a teleological proportionality assessment depends on which obligation the challenged measure infringes. For example, under Article 25 ASR the breach of a large variety of obligations could be justified, and assessing proportionality requires knowledge of which interests are legally protected under a particular rule.[782] For self-defence, while the prohibition of the use of force is the obvious candidate, it was already pointed out that self-defence can also serve to justify

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[779] See Barak, *Proportionality*, 348.

[780] Similar to necessity, proportionality has a dual empowering/limiting function. See chapter I, section 7.2.1.

[781] See Klatt and Meister, *Constitutional Structure*, 71.

[782] It is, properly understood, in this regard that some of the Argentina ICSID cases discussed whether the individual interests of investors are taken into account in the proportionality calculus. See, eg, *Enron*, paras 341-342; *Enron Annulment*, para 383; *Sempra*, para 391; *Vivendi*, para 261; *Impregilo*, para 354. See also Bottini, 'Essential Interests', 157; Aguirre Luzi, 'BITs & Economic crises', 173ff; Binder and Reinisch, 'Economic Emergency Powers', 518; Reinisch and Binder, 'Debts and State of Necessity', 121.

breaches of other obligations.[783] The proportionality assessment is thus always case-specific. Third, again just like necessity, the proportionality of a measure is impossible to gauge before assessing whether the measure breaches an obligation, since whether and to what degree a measure harms legally protected interests is a crucial element in the proportionality calculus. Finally, proportionality centrally depends on clarity about what counts as a permissible objective. In proportionality, how far the definition of the permissible objectives reaches is directly relevant for the weight of the defensive action's LoP, which in turn is decisive for the proportionality calculus. It may thus be said that it is precisely in the area of proportionality where any on-going lack of clarity about the permissible objectives, such as in the case of self-defence, is most damaging.

Third, the empirical findings mean that necessity and proportionality operate independently from each other, though with reference to the same factors. As demonstrated, only marginal proportionality enshrines a one-directional conceptual dependence, while global proportionality and necessity are conceptually independent.[784] At the same time, the findings do suggest that in practice necessity and global proportionality frequently appear as inseparable twin-conditions. This phenomenological observation thus lends credence to the claims that necessity and proportionality are inseparable in international law, at least as regards exception clauses. Especially the emergence of proportionality in the surveyed WTO rules (with the SPS constituting the exception), which contain no clear textual marker[785] for proportionality,[786]

[783] See chapter I, section 7.2.2.2.

[784] See section 2.2.1.

[785] As discussed, Article 2.2 TBT refers to the 'risks non-fulfilment would create', which has been interpreted as such a marker. See n.727.

[786] In 1980, Riphagen still pointed out that 'GATT provisions did not imply that the interest in protecting, for example, public morals should be measured against the interest in promoting freedom of trade' (ILC, *Yearbook 1980*, 1614th meeting, para 17 (Riphagen)).

appears to signal a clear pull in the direction of regularly complementing necessity with global proportionality.[787]

Normatively speaking, this makes sense. As mentioned, under necessity the sacrificed interest is unlimitedly subjected to the protected interest.[788] In other words, necessity controls only the means (absence of alternatives), not the ends.[789] Proportionality relates precisely to the ends and thus keeps under control what is outside necessity's reach.[790] Arguably, in an international law that has moved increasingly from 'bilateralism to community interest'[791], it is only logical that the law reserves the power to safeguard the aggregate interests of the relevant legal community and make sure that in a choice-of-evils situation the bigger evil cannot prevail.

Against the background of these findings, which conclusion can be drawn as regards the unified contents of necessity and proportionality? First, there is a strong case for arguing that wherever a permissive rule requires necessity, a proportionality test also applies and *vice versa*, whether or not there is a corresponding textual marker. It thus makes sense to speak of a single, unified necessity/proportionality standard. Second, the proportionality condition is one of global teleological proportionality that relates the normative weight of the same factors that are relevant for necessity, namely the challenged measure's LoP and LoH. Third, the measure's positive

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[787] See, however, *Kishenganga*, para 399: 'Viewed in its ordinary meaning, however, "necessary" lacks this additional connotation' of proportionality. Still, the award is contradictory. It considers both that 'certain actions may be necessary to accomplish even very modest purposes' (ibid, 399) and that there may be situations where 'the benefits of [a measure] would be so marginal that [the measure] could not fairly be termed "necessary"' (ibid, 398). Since the former statement seems to reject a minimum contribution requirement, the latter statement can be read as endorsing an implicit proportionality condition.

The *CMS* annulment committee also opined that the proportionality condition enshrined in the State of Necessity is 'foreign to [the NPM clause]' (*CMS Annulment*, para 130). The Committee's conclusion was, however, based on a purely textual analysis, and did not assess the actual substance of the necessity standard in the NPM clause, or whether it might implicitly include a proportionality condition.

[788] See section 2.2.2.

[789] Necessity is often said to embodying purely 'instrumental rationality' (Verdirame, 'Resucing Human Rights', 7; Letsas, 'Rescuing Proportionality', 320).

[790] Proportionality is, in contrast to 'instrumental rationality', more concerned with 'moral judgment' (Verdirame, 'Resucing Human Rights', 7-8).

[791] Simma, 'From bilateralism to community interest'.

consequences must only just outweigh its negative consequences, but not necessarily so by a particular margin. In these three respects, there exists unity across the surveyed rules, which justifies counting all three elements towards the common core of the unified necessity/proportionality standard.

There is, of course, the outlier in the SPS. It might be speculated that since the SPS is only concerned with measures 'to protect human, animal or plant life or health'[792], undoubtedly interests of the highest importance,[793] the structural preference for those interests compared to the less elementary value of free trade is so strong that a situation of disproportionality is hard to imagine.[794] At the same time, it should be kept in mind that the proportionality test under the GATT, GATS, and TBT only emerged over time, and it is not excluded that a similar development will still take place under the SPS.[795] Under these circumstances, the particular case of the SPS would not appear to detract from the foregoing finding of unity.

[792] Preamble SPS.

[793] See *EC-Asbestos (AB)*, para 172; *Thailand-Cigarettes*, para 73.

[794] See Gruszczynski, *Regulating Health*, 245, explaining the absence of 'weighing and balancing' by reference to the inherently high value of the interests protected thereunder.

[795] It might be speculated that the inclusion of a proportionality test under Article XX(b) GATT, which protects the same values as the SPS, is owed primarily to the desire to maintain a single definition of necessity for all relevant sub-clauses of Article XX GATT.

III. JUDICIAL REVIEW OF NECESSITY AND PROPORTIONALITY

1. Introduction: the application of necessity and proportionality in practice can only be understood by including judicial review in the analysis

Chapters I and II have described necessity and proportionality's conceptual structure, decision logic, and the factors entering into the two equations. In doing so, they may have raised the impression that necessity and proportionality can be applied with almost mathematical precision: all that is needed is to make the required factual and normative assessments (such as how protective a measure is and how much normative weight this protectiveness is to be allocated) before inserting all elements into the two equations and drawing a simple conclusion. In pure theory, this is indeed the case.[796] In the real world, however, the required assessments, whether factual or normative in character, are typically very difficult and likely 'cannot be made by reduction to a formula or with mathematical precision.'[797] Especially the combination of counterfactual assessments, imperfect knowledge of facts/causalities, and the burden of relative normative indeterminacy renders the relevant determinations highly complex. Accordingly, the real factors entering the equation are not directly the actual normative weights of LoP, LoH and so on, but rather *judgments* about the factors that the two equations prescribe as relevant.[798]

This has particular consequences for judicial dispute settlement, on which this chapter focuses. Where a court is faced with adjudicating on questions of necessity and proportionality, and where the generally applicable prohibition of issuing a *non liquet*[799] bars the court from simply not reaching a decision, rules that may generally be termed 'procedural' take on added

[796] See for self-defence Green, 'State of Mind', 187, 206, noting that while 'interpretations may differ', the criteria of necessity/proportionality are objective.

[797] Green, 'Implementing Limitations', 66. See also Hurka, 'Proportionality and Necessity', 142; Sloan, 'Puzzles', 322.

[798] This paraphrases Alexy, 'Balancing and Subsumption', 448: 'The real premises of the Weight Formula are not numbers but judgments about degrees of interference, the importance of abstract weights and degrees of reliability.'

[799] See generally Bodansky, 'Non Liquet'.

importance.[800] Ultimately, in a judicial context the outcome of a court case is the product of a combination of substantive and procedural elements.[801] Not only does it matter what a rule requires in the abstract, but also who has to prove which facts and to what standard, and how the court will review matters of fact and law.[802] Indeed, it can be argued that in judicial dispute-settlement the substance of a legal rule only properly takes shape when placed in a procedural context, since only the application of the substance in its procedural context determines the outcome of the case.[803] It has thus, for example, been argued that in many cases revolving around necessity 'the crucial question … is how much deference [an international court ought to] pay to the respondent state's initial determination'[804] or that 'the allocation of judicial authority to decide whether the necessity test is fulfilled or violated is of greater importance than the exact scope and requirements of such a test'[805].

This chapter surveys how compliance with the necessity/proportionality standard enshrined in the rules under scrutiny is reviewed in judicial dispute settlement. It does so by analysing, on the one hand, the applicable burden of proof, and on the other hand, the applicable standards of proof and review. The chapter proceeds by briefly discussing the distinction between questions of fact and law as regards necessity and proportionality (section 2). Both burden of proof and standards of proof/review have different relevance for questions of fact and

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[800] Going in this direction Åhman, *Trade, Health*, 20; Foster, 'Burden of Proof', 29.

[801] On the relationship of substantive and procedural law see Main, 'Procedural Foundation' (as regards law generally) and Nollkaemper, 'Global Public Goods' (as regards international law more specifically); see also Rosenne, *Law and Practice*, 1027; Riddell and Plant, *Evidence*, 87f; Foster, *Science*, 6; Shelton, 'Judicial Review', 379; Vadi, 'Proportionality', 225.

[802] Questions of proof and standard of review are considered as 'procedural', since the remit of their application is confined to the court room (see Salmond, *Jurisprudence*, 577f, cited in Nollkaemper, 'Global Public Goods', 772). In general it must be noted that '[i]nternational law does not recognize a sharp distinction between the substantive and the adjective law' (Rosenne, *Law and Practice*, 1021).

[803] See Main, 'Procedural Foundation', 818ff.

[804] Burke-White and von Staden, 'Extraordinary Times', 368, 370. For a general emphasis on the standard of review, see Jansen Calamita, 'Proportionality', 171ff.

[805] Krajewski, 'Quis custodiet necessitatem?', 400.

law, so that clarifying which type of question necessity and proportionality involve is an important preparatory step. Thereafter the chapter progresses in the by now familiar fashion, first outlining the concepts of standard of review and burden/standard of proof in the abstract (section 3), before conducting the empirical survey (section 4).

2. Necessity and proportionality: facilitating an analysis of judicial review by distinguishing questions of fact and law

In reaching a judgment, a court's general task is typically to apply abstract and general rules to a concrete set of facts. In this process, both the facts and the content of the abstract rule can be contentious. How the court reaches the required decisions is to some extent dependent on the applicable procedural rules, which regularly differ with regard to questions of fact and law. Typically, the determination of questions of law ultimately lies in the responsibility of the court, and the existence and content of a rule are not subject to proof by the parties (the Court knows the law: '*iura novit curia*').[806] Furnishing evidence on the existence of facts, on the other hand, is the primary responsibility of the parties (though courts may themselves engage in a measure of fact-finding).[807] Likewise, the standard of review is different for legal and factual questions.[808] Whether a question is one of law or of fact is thus of some importance. Despite some uncertainty about whether a clear distinction between questions of law or of fact can meaningfully be drawn,[809] judicial practice is based on the broad assumption that this is possible.[810] Indeed, a workable distinction can be made on the basis of whether a question requires a normative

[806] See Wolfrum, 'Evidence', para 15; Lachs, 'Evidence', 274; Oesch, *Standards of Review*, 50; Riddell, 'Evidence, Fact-Finding', 853. The principle has long been recognized by international courts; see only *River Oder*, 19; *Brazilian Loans*, 124; *Fisheries (Iceland)*, para 17; *Nicaragua*, para 29. There are certain exceptions from this principle though, such as the need for a party invoking a regional custom (see *Asylum Case*, 276) or 'special meaning' of a treaty term (Article 31(4) VCLT; see Gardiner, *Treaty Interpretation*, 295) to prove its existence.

[807] See Shelton, 'Judicial Review', 387, concerning the ICJ. See generally, eg, Åhman, *Trade, Health*, 13

[808] See section 3.1.

[809] Allen and Pardo, 'Myth'; see also Lovric, *Deference*, 73.

[810] *EC-Aircraft (AB)*, para 872: 'In most cases ... an issue will *either* be one of application of law to the facts *or* an issue of the objective assessment of facts, and not both' (emphasis in the original).

response, or whether it can be answered on the basis of knowledge about the 'physical facts'[811] of the world.

In order to allocate the respective responsibilities in applying a legal rule, it must initially be determined which facts have to be known in order to allow the application of the rule. The facts thus required can be termed 'legal facts'.[812] A 'legal fact' is, however, not as such a 'physical fact'; rather, it is the legal qualification of a set of 'physical' or 'raw facts'.[813] The distinction is important: the existence/absence of a 'raw' fact is a purely factual question, whereas the qualification as a 'legal fact' involves a normative component and is really a question of law.[814]

In this light, it is fairly clear that necessity and proportionality both qualify as 'legal facts', and whether a challenged measure is necessary or proportionate is thus ultimately a legal question.[815] In principle, assessing necessity and proportionality follows the same scheme as that applicable to other 'legal facts': first, a set of 'raw facts' is analysed, relating principally to the LoT as well as the LoP, LoH, and inconvenience of the challenged measure and possible alternatives. Second, these sets of 'raw facts' are assessed in relation with one another in the particular way legally prescribed by the applicable necessity and proportionality standards. It is only by assessing the 'raw facts' against the legally prescribed content of the necessity and proportionality standards that the 'raw facts' become legally meaningful. At this stage, also the distinctive normative elements of necessity and proportionality, as embodied in the dimension of weight, enter the

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[811] 'Physical' facts can also include social facts, such as attitudes, beliefs, etc.

[812] The notion is borrowed from Ahman, *Trade, Health*, 11, though he uses it slightly differently. Eg, in the law of self-defence the legality of defensive action is conditional on the prior occurrence or sufficient threat of an 'armed attack'; the occurrence or threat of an 'armed attack' is a 'legal fact'.

[813] Note that 'raw' facts here relate to both 'raw evidence' and 'factual conclusions' drawn therefrom (on the latter two notions, see Oesch, *Standards of Review*, 18; Becroft, *Standards of Review*, 8). Eg, a tank crossing a border is a 'raw fact'; considering this fact as amounting to an 'armed attack' is a legal qualification of that 'raw' fact. See also Shany, 'Toward', 937, holding that the definition of what constitutes an 'armed attack' is 'law-intensive'.

[814] For an example from practice turning on the difference between raw and legal fact, see *Enron Annulment*, para 393. In contrast, see *Total Annulment*, para 239, where the committee confounded facts and legal standards, suggesting that Argentina had to prove a 'standard', rather than a fact.

[815] See Herwig and Serdarevic, 'Standard of Review', 225; Foster, *Science*, 145, 164-165. See also *Beit Sourik*, para 48.

analysis. By deciding on whether a measure is necessary and proportionate, the court thus subsumes the set of 'raw facts' and the normative weight allocated thereto under the normative requirements of the applicable test, and that is inherently a legal question.[816]

Having delineated the distinctly factual and legal elements involved in assessing whether a challenged measure is necessary and proportionate, the following sections discuss who has the burden to prove what to which standard and against what standard the required elements are reviewed by courts.

3. Theoretical considerations concerning judicial review: introducing 'standard of review', 'standard of proof', and 'burden of proof', as well as their normative implications

3.1. Standard of review: the notions of justiciability, discretion and deference

The concept of 'standard of review' and the related notions of discretion and deference have recently received unprecedented attention in international law scholarship.[817] One reason may be seen in the ever-increasing interest in domestic public law, in which questions of standard of review are more common than in private law, as inspiration for pubic international law.[818] Another reason may be that recent investment arbitration awards have been seen as too intrusive as regards states' power to regulate,[819] and that more deferential standards of review could serve to remedy the perceived problems.[820]

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[816] Rivers, 'Presumption', 415, argues that 'the final balancing stage is essentially one of normative evaluation and judgement, fundamentally a question of law'. Similarly Barak, *Proportionality*, 478.

[817] Until recently the substantive literature on the topic was limited to specific fields, such as human rights law (see, eg, Legg, *Margin of Appreciation*; Arai-Takahashi, *Margin of Appreciation*; and Greer, *Margin of Appreciation*) or WTO law (see, eg, Oesch, *Standards of Review*; Lovric, *Deference*; and Becroft, *Standards of Review*). The edited volume by Gruszczynski and Werner (eds), *Deference in International Courts*, marks the preliminary peak in scholarly interest in the topic across fields.

[818] See, eg, Kingsbury and Schill, 'Public Law Concepts'; Burke White and Von Staden, 'Public Law Standards of Review'; and Foster, 'A New Stratosphere?'.

[819] See generally Waibel *et al* (eds), *Backlash*.

[820] See, eg, Roberts, 'Battleground'; Henckels, 'Standard of Review', 113; Schill, 'Deference', 580ff.

The purpose of this section is not, however, to evaluate such claims; rather, its aim is more modest in that it seeks to understand how standards of review operate, or in which way they guide the determinative process of judges tasked with deciding a case, as well as preparing the survey of how intensively courts have reviewed questions of necessity and proportionality in practice. Doing so requires consideration of the key concepts frequently invoked in connection with the notion of standards of review, namely justiciability, deference and discretion, and how they relate to both questions of law and fact.

3.1.1. Justiciability

Before deciding which standard of review to apply to a dispute before it, a court must initially determine whether or not the dispute is justiciable in the first place. The justiciability of a dispute relates to whether it is appropriate to address that dispute by law-application, or whether the dispute is even capable of being thus resolved.[821] Where a matter is non-justiciable, the court seized of it must decline to give an opinion. A typical example of a non-justiciable dispute is one revolving around purely political questions, where settling the dispute one way or another is not a question of applying law to facts but of taking a political decision.[822] Thus, in the *Haya de la Torre* case, the ICJ declined to respond to the question before it because such a response 'could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice.'[823]

3.1.2. The nature of standard of review, deference, and discretion

If a dispute is justiciable, the question as to the applicable standard of review arises. It is generally agreed that the standard of review can range from *de novo* review, where the court determines all relevant questions for itself, to complete deference, where the court accepts all

[821] See Weisburd, 'Justiciability', 330.

[822] See Amoroso, 'Non-justiciability', 934.

[823] *Haya de la Torre*, 12.

determinations put forward by the acting state.[824] Where the applicable standard of review is located along this continuum is said to describe the 'intrusiveness'[825] with which the court reviews the acting state's measure, that it 'determines the extent of discretionary powers enjoyed by national authorities in making certain decisions, and affects the allocation of power between national and international levels'.[826] The standard of review is frequently said to be relevant for both questions of fact and law.[827] It is clear that the standard of review is different from the content of the norm as such and relates not to the substantive requirements of the norm, but rather to reviewing whether the acting state complied with that standard.

Deference and discretion are harder to grasp. There are no fixed definitions of these terms, and in the context of the standard of review both are often used interchangeably.[828] It is clear from the outset that both deference and discretion have something to do with the freedom of the acting state to act as it sees fit, with the court not overruling the state's determinations and choices. What is not immediately clear, however, is where this freedom or judicial restraint derives from: the applicable rule compliance with which is being reviewed or the applicable standard of review? To arrive at an analytically useful distinction of deference and discretion, it is instructive to consider the relationship between the two and the substantive content of the rule under review.

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[824] See Oesch, *Standards of Review*, 15; Åhman, *Trade, Health*, 39.

[825] Becroft, *Standards of Review*, 5; Bohanes and Lockhart, 'Standard of Review', 379.

[826] Gruszczynski and Werner, 'Introduction', 2. See also Oesch, *Standards of Review*, 13-14; Henckels, 'Balancing Investment Protection', 198ff.

[827] Oesch, *Standards of Review*, 14; Gruszczynski and Werner, 'Introduction', 3; Ragni, 'Standard of Review', 319; Henckels, 'Standard of Review', 115, distinguishes between 'normative' and 'empirical deference'. Much of the literature does not distinguish neatly between questions of fact and law as regards standards of review (to single out one example for illustration, see Young, 'Due Deference').

[828] See Schill and Briese, '"If the State Considers"', 74.

The content of the rule and the standard of review may be seen as two different tiers of analysis. With reference to Raz' concept of first and second order reasons,[829] it can be argued that the content of the rule determines the first order reasons a judge must consider in deciding a case one way or the other.[830] Notably, what exactly the relevant first order reasons are in a given case then depends on the interpretation of the content of the rule. The standard of review, in contrast, provides separate second order reasons that have an impact on how much weight the judge should accord to a state's own assessment of the various relevant first order reasons in making her/his own assessment of just these first order reasons.[831] By thus impacting the assessment of the first order reasons by the judge,[832] the second order reasons may effectively change the outcome of the case.[833]

For the purpose of this thesis, discretion and deference may then be understood as operating on different levels of the analysis: discretion relates to the freedom that the content of the rule itself grants to the acting state (eg, an exception clause leaving it to the state whether and which permissibly objectives to pursue),[834] whereas deference relates to freedom/judicial restraint resulting from the impact of second order reasons.[835] In this light, discretion is then not related to

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829 Raz, *Practical Reason and Norms*, 34ff, cited in Perry, 'Second-order Reasons', 913.

830 The account here presented mainly follows Legg, *Margin of Appreciation*, 18ff, and Perry, 'Second-order Reasons', both relying on Raz.

831 See Kavanagh, 'Defending Deference', 223, 231; Legg, *Margin of Appreciation*, 17ff. Among the factors often listed as second order reasons are issues of competence, such as the greater factual expertise of the original decision taker.

832 To give a fictitious example, a judge might have to decide whether a state has, by denying its citizens' access to a costly medical treatment, breached an obligation to grant citizens 'all effective medical treatments, subject to the availability of sufficient state resources'. The first order reasons prescribed by the rule are that the treatment must be effective and that the state must have sufficient resources. The judge could decide the case on the basis of his knowledge both about the effectiveness of the treatment and the state of the government's resources. A second order reason, namely the better competence of the state to decide both matters, may however induce the judge to disregard his own impression and defer to the government's better-informed view instead.

833 See Perry, 'Second-order Reasons', 932, speaking of 'reweighting'.

834 Discretion may thus be understood to circumscribe the 'zone of legality' (Shany, 'Toward', 910) in which states can operate.

835 There is some similarity with Alexy's distinction of structural and epistemic discretion, introduced in the postscript to Alexy, *A Theory*, 395ff (see also Rivers, 'Proportionality and Discretion', 114), as well as Dworkin's distinction between discretion in a 'strong' and a 'weak' sense (Dworkin, *Taking Rights Seriously*, 32).

the standard of review, as discretion concerns the content of the norm as such, from which the standard of review is conceptually separate. The importance of this distinction becomes clear by considering how discretion and deference relate to questions of fact and law.

3.1.3. Discretion, deference and questions of fact

Following the distinction introduced above between 'legal' and 'raw facts',[836] it is clear that only the existence of 'raw facts' is properly speaking a question of pure fact. Judicial review as regards questions of fact then relates to the question of when a 'raw' fact is considered to have been proved by a party to the satisfaction of the reviewing judge. In this context and under the terminology here used, deference has a role to play, while discretion does not.

With respect, first, to discretion, it must be recalled that discretion relates to the normative space that the rule grants to the acting state. Discretion is then by definition not concerned with questions of raw fact. Deference, on the other hand, has a role to play. In assessing the existence of a 'raw fact' asserted by the acting state, the reviewing court can consider both first and second order reasons. First order reasons relate to whether the court, on the basis of all the materials and knowledge available to it, can conclude that a 'raw fact' exists or not.[837] Second order reasons can change the weight of those first order reasons: the court may put more weight on evidentiary material presented by the acting state, give more credence to factual assessments of the acting state, etc. The second order reasons may be of particular importance where an assessment of the relevant first order reasons alone does not allow a clear conclusion, for instance where a large amount of uncertainty is involved.[838] The assessment of first order reasons as weighed in the light of second order reasons then determines whether the

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[836] See section 2.

[837] Such first order reasons may include an assessment of material put at the disposal of the court by any party, expert advice obtained, etc.

[838] See Alexy's discussion of 'empirical epistemic discretion' (Alexy, *A Theory*, 414-415); and also Brems and Lavrysen, 'Less Restrictive Means', 148, noting that the counterfactuality underlying many factual questions connected to necessity render judicial deference more important.

court considers a 'raw fact' to be established or not. The degree of the court's deference towards the state's factual assertions can range from unconditional acceptance (full deference) to a completely new assessment (and possibly investigation) of the 'raw facts' by the court itself (*de novo* review).[839] Different standards located between these two poles could be 'substantial evidence, reasonableness, abuse of discretion and clearly wrong', offering 'various degrees of judicial intrusiveness'.[840]

Fully comprehending how courts assess the existence of 'raw' facts is not possible, however, by means of an isolated analysis of the standard of review. Of at least equal – if not greater – importance is the standard/burden of proof, treated in the following section. On a purely conceptual level, the standard of review can be separated from questions of proof.[841] In practice, however, proof and review appear to be very closely related: the standard of review impacts to which standard the facts need to be proven in order to be accepted as established by the judge.[842] It is thus the combination of the required burden of proof and the standards of review and proof that determine the difficulty or ease with which a fact can be proved to the satisfaction of the court. Indeed, in judicial practice, in particular the standard of proof and standard of review rarely seem to be analysed separately, but are rather somehow jointly at play when a court determines whether a fact has been established or not.

3.1.4 Discretion, deference and questions of law

While the foregoing concluded that in the terminology here used deference plays a role with respect to questions of fact while discretion does not, the precise opposite is true for

[839] See Oesch, *Standards of Review*, 59. Oesch explained that the standard of review regarding questions of fact is theoretically separate from the role the court plays in the process of fact finding, though in practice the two may be more closely related.

[840] Tully, 'Objective Reasonableness', 547.

[841] See generally Ambrus, 'Evidentiary Approach'; also Oesch, *Standards of Review*, 166.

[842] See Tully, 'Objective Reasonableness', 547.

questions of law.[843] It was already discussed above that necessity and proportionality leave the acting state a certain amount of discretion in choosing a measure, with the amount of discretion depending on various factors (eg, which type of proportionality is present or whether there is any threshold LoT).[844] In addition to such abstract factors, the amount of discretion in a given case is also decisively defined by allocation of weight, a normative question. As regards global proportionality, this is easy to see: where the reviewing court attaches a low abstract weight to a measure's LoH or a particular high abstract weight to its LoP, it is easier for a measure's positive consequences to outweigh the negative consequences. By determining the relevant abstract weights, the court partly defines the manoeuvring space for the acting state. As regards necessity the impact of weight allocation is less obvious, but nevertheless present: the question of which of two measures' LoH is less weighty comes down to the allocation of concrete and possibly abstract weight. Where the reviewing court allocates a low concrete or abstract weight to the actual measure's LoH, the chances that an alternative measure's LoH has an even lower weight decrease, which in turn increases the acting state's discretion.

Can additional freedom for the acting state be derived from a deferential standard of review as regards questions of law?[845] It would appear not.[846] As Rivers wrote, 'the occasion for deference is the court's acceptance that its judgement is more likely to be correct if it relies on some other authority's assessment of some relevant matter.'[847] When it comes to questions of law,

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[843] Going in the same direction Shany, 'Toward', 913, stressing that a margin of appreciating can be granted as regards fact-intensive law-application, whereas norm-intensive law-interpretation should remain 'the exclusive province of the international judiciary.' See also Herwig and Serdarevic, 'Standard of Review', 219-220; Bohanes and Lockhart, 'Standard of Review', 386; Ehlermann and Lockhart, 'Standard of Review', 498.

[844] See chapter II, section 2.2.2.

[845] Oesch, *Standards of Review*, 46, provides only a partial answer in arguing that deference is inappropriate as regards the interpretation of WTO obligations by States. See also Shany, 'Toward', 913; Lovric, *Deference*, 73.

[846] The arguments here presented draw loosely on Allan, 'Judicial Deference'. Allan rejected the idea that review by judges can be separated into assessment of first and second order reasons; in contrast, the present thesis accepts this analytical division.

[847] Rivers, 'Variable Intensity', 203; see also Young, 'Due Deference', 570.

the maxim of *iura novit curia* implies that the court cannot assume that relying on somebody else's assessment can enable it to reach a better decision. Exercising deference would imply the court ceding, to at least some extent, its authority and responsibility to determine normative questions for itself.[848] To give an example, consider a court having to decide whether a given measure is globally proportionate. Assuming that the 'raw facts' are not in dispute, the court's task boils down to allocating the relevant normative weights, which is inherently a normative question and thus one of law. It would seem incongruous to assume that in discharging this quintessentially judicial task (determining what the law mandates), the court could defer to the opinion of the acting state as to what the normative weights should be.

The foregoing is not to say that in deciding on questions of law judges cannot attach any importance to, for example, the positions taken by states. It only indicates that judges should do so not as a matter of deference (ie, by taking second order reasons into account), but because and only if the relevant first order reasons require them to do so. Consider Article 31(3)(b) VCLT: where in interpreting a treaty a judge gives weight to the 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation', the judges are not exercising 'deference'. Rather, they simply discharge their responsibility of determinig the normative content of the rule in question, which here includes taking the subsequent practice of the treaty parties into account.

Accordingly, as regards questions of law, what is seemingly a question of deference mostly boils down to how wide the judge determines the discretion to be that the rule allocates to the acting state.[849] Seemingly 'deferential' judges are then simply those that interpret the rule to grant wide discretion, whereas 'intrusive' judges are those that interpret the rule as granting more

[848] To quote Rivers (Rivers, 'Variable Intensity', 191), deference in questions of law would to a degree grant states 'the power to determine the law intended to bind them'.

[849] See, eg, Legg, *Margin of Appreciation*, 114, where he appears to interpret as 'deference' discretion left to states by a norm not requiring uniformity. See also the opinion of Judge de Meyer in his partial dissent in *Z v Finland*, quoted in Bücheler, *Proportionality*, 233.

narrow discretion.[850] The 'tool' for judges to be either 'deferential' or 'intrusive' in questions of law is not the standard of review, but rather the relative normative indeterminacy contained within a rule granting judges space for interpretation. Where questions of weight are involved, the rule may be fairly indeterminate, but this does not change the fact that where a *non liquet* is prohibited the court must allocate weights and decide the case. This has nothing to do with the court substituting its own judgement for that of the state, since the court is not tasked with determining what it would have done in the place of the acting state; rather, it must consider whether the state's choice fell within the discretion granted to the state by the applicable rule as interpreted by the court, not more and not less.[851]

3.2. Burden and standard of proof

Traditionally, proof is only required of facts, not of law.[852] This means that in the taxonomy developed above, proof is only required of 'raw facts'. Two different questions must be tackled as regards proof: the determination of the applicable standard and burden of proof.

3.2.1. Standard of proof

To start, the standard of proof relates to 'what a party must do in order to discharge the burden of proof when that burden rests upon it',[853] that is the extent to which the existence of a 'raw fact' must be proved in order for that fact to be judicially regarded as established.[854] Standards of proof that can arguably be distilled from international judicial practice are a 'balance

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[850] Gruszczynski and Werner, 'Introduction', 4, argue that standard of review grants judges the tool to practice judicial self-restraint or activism. The same idea is expressed by Rivers when he speaks of pragmatic or idealistic judges (Rivers, 'Variable Intensity', 201; Rivers, 'Proportionality and Discretion', 117f; Rivers, 'Second Law of Balancing', 170ff). See finally also Oesch, *Standards of Review*, 182.

[851] See Kavanagh, 'Defending Deference', 228.

[852] See Foster, 'Burden of Proof', 33; Oesch, *Standards of Review*, 50.

[853] *Pulp Mills* (Greenwood), para 25.

[854] See Del Mar, 'Standards of Proof', 98; Oesch, *Standards of Review*, 168.

of probabilities', 'conclusive proof', 'preponderance of evidence', or 'beyond reasonable doubt', but other standards are thinkable as well.[855]

For the purpose of illustrating how these standards differ, it is useful to use a probabilistic model.[856] The extent to which a 'raw fact' must be proved can thus be located on a scale from 0% probability (full certainty of non-existence) to 100% probability (full certainty of existence). A 'balance of probabilities' or 'preponderance of evidence' standard may thus require that the probability of the existence of a fact must be at least 51%, whereas a 'beyond reasonable doubt' standard would require a much higher probability (eg, 90%), with the evidence 'demonstrating a high degree of cogency'[857]. Depending on which standard is applied, it is more or less difficult to prove to the satisfaction of the court the existence of the 'raw fact'.

The standard of proof actually applied is, however, not the only element that determines the difficulty in proving a fact. The second such element is the starting assumption of the court: without having been presented any evidence from the parties, a court may assume that the probability of the existence of a fact is 50% (it is equally likely that the fact does or does not exist). In that case, for a party to satisfy a 'balance of probabilities' standard would only require presenting proof that would raise the probability of a fact's existence from 50% to at least 51%. If, however, the court considers that the existence of a fact is only 25% probable before receiving evidence, satisfying the required standard of at least 51% is more demanding. The starting assumption of a court may depend on a variety of factors, such as the nature of the fact to be proved or applicable presumptions.

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[855] See Foster, 'Burden of Proof', 60; see also Del Mar, 'Standards of Proof', 99.

[856] This presentation borrows from Ahman, *Trade, Health*, 18ff, and is used strictly as a 'a pedagogical tool' (ibid, 19).

[857] Wolfrum, 'Evidence', para 76.

3.2.2. Burden of Proof

On first sight, the burden of proof regulates which party has to prove the existence of a 'raw fact'. The burden is formally allocated to one of the disputing parties, with the classic maxim *onus probandi incumbit actori* providing that 'it is the duty of the party which asserts certain facts to establish the existence of such facts.'[858] However, in reality both parties always have a type of burden of proof, only that the burden is not the same.

Where the 'burden' of proving a fact falls on party A, a 'balance of probabilities' standard would require party A to prove to the court that the probability of the existence of that fact is at least 51%. The burden on party B would, reversely, be to prove that that probability is at most 50%. On which party the applicable standard of proof actually imposes a burden depends on the state of the court's conviction at any one time. Where the starting assumption of the court is that the probabilities of the fact's existence or non-existence are both 50%, this means that the fact is considered not to have been established if party A does not present any proof.[859] In this case party B does not have to do anything. If, however, party A presents evidence that raises the probability of the existence of the fact to above 51% (where it has, in other words, established a *prima facie* case[860]), the fact is considered as established unless party B presents contradicting evidence that brings the probability back down to at most 50%.[861] Party B's burden to present rebuttal evidence is thus conditional on and triggered by party A having established a *prima facie*

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[858] *Pulp Mills*, para 162, also providing further references to relevant ICJ case-law. The WTO (see only *US-Woven Wool Shirts (AB)*, 14; and generally Unterhalter, 'Burden of Proof') and investment arbitration tribunals (see only *Continental Casualty Annulment*, paras 134ff) generally follow the same principle.

[859] The importance of the starting assumption explains, for example, the importance of presumptions for the allocation of the burden of proof, which are 'often linked' (Riddell and Plant, *Evidence*, 109ff).

[860] Foster, 'Burden of Proof', 51, quoting *Lillie Kling*, 585: '[A] *prima facie* case has been described as evidence "which unexplained or uncontradicted is sufficient to maintain the proposition affirmed"'; *EC-Hormones (AB)*, para 104; Hariharan, 'Standard', 809.

[861] See *US-Woven Wool Shirts (AB)*, 14. On the back-and-forth between the parties, see Watts, 'Burden of Proof', 294; Wolfrum, 'Evidence', para 78.

case.[862] If, however, the court's initial assumption of probabilities leans towards the fact that party A asserts does exist, it may be that in order to establish the non-existence of this fact party B has to produce evidence even in the absence of any proof provided by party A, and this despite the burden of proof being formally attributed to party A.

In the final analysis, the burden of proof then simply determines which party has to prove which facts to which extent. The consequences, including the normative ones, of this allocation only become apparent once the required standard of proof and the initial probability assumptions of the court are identified.

3.3. Normative implications

Setting both the standards of proof/review and allocating the burden of proof have important normative implications. Where the existence of a fact is less than fully certain, it is possible for a court to find that a fact was established where in reality it did not exist and *vice versa*. In other words, the existence of uncertainty raises the possibility of type I (false positive: the court wrongly finds that a fact existed) and type II (false negative: the court wrongly finds that a fact did not exist) errors. In setting the standard of proof/review and allocating the burden of proof, a preference is expressed for either one of these types of errors.[863] Setting a demanding standard of proof/review reduces the risk of type I errors and increases the risk of type II errors, whereas setting a lenient standard of proof/review does the opposite. Similarly, allocating the burden of proof to the party that asserts the existence of a fact *a priori* increases the risk of type II error, while allocating that burden to the party asserting the non-existence decreases that risk.

While considering the risk of type I and II errors may appear rather abstract, it has direct normative implications. The judicial recognition of a 'raw fact' as established or not may be determinative of whether the court finds that a 'legal fact' existed. Whether a legal fact is accepted

[862] Establishing a *prima facie* case 'shifts the burden of proof' (see Wolfrum, 'Evidence', para 78; Ahman, *Trade, Health*, 38, speaks of a shift of the 'tactical burden').

[863] See Ahman, *Trade, Health*, 24ff; Foster, 'Burden of Proof', 35.

to exist may, in turn, be determinative of whether the requirements of the rule under analysis are complied with. Seen in this light, the risk of type I and II errors as regards the existence of 'raw facts' feeds through to type I and II errors as regards compliance with the rule at stake. The consequence is then that the setting of the standard of proof/review and the allocation of the burden of proof have direct implications for the risk of legally misqualifying the case: the preference for type I or II errors concerning 'raw facts' translates into preferring the risk of mistakenly finding that there was a breach or not.[864]

3.4. Conclusion

The foregoing theoretical considerations have revealed three important insights: first, determining whether a measure is necessary and/or proportionate is ultimately a legal question, though the determination relies on multiple 'raw facts'. Second, questions of proof and review relate exclusively to those 'raw facts' underlying necessity and proportionality, not to their normative dimension. Accordingly, the following empirical section deals only with review and proof of 'raw facts' (and any reference to 'questions of fact' therein is strictly speaking to questions of 'raw facts'). Third, setting the standards of proof/review and allocating the burden of proof expresses certain normative preferences. The following empirical section surveys the standards applied and the allocation of the burden of proof effected across the rules under scrutiny, as well as interprets the normative implications of the resulting findings.

4. Empirical considerations: the judicial review of necessity and proportionality in the surveyed rules

As early as 1932 the PCIJ opined in *Free Zones of Upper Savoy* that 'the decision of an international dispute ... should not mainly depend on a point of procedure'[865], intimating a certain

[864] Rivers argues, for instance, that there are instance where a presumption in favour of necessity/proportionality apply (Rivers, 'Presumption', 411ff), justifying a particular allocation of the burden of proof, which would in the present terminology amount to a preference in favour of type I errors.

[865] *Free Zones of Upper Savoy*, 155.

aversion to procedural questions. In 1957 Judge Lauterpacht expressed himself on questions of proof in *Norwegian Loans*, noting that '[t]here is, in general, a degree of unhelpfulness in the argument concerning the burden of proof.'[866] However, Judge Lauterpacht admitted that 'some *prima facie* distribution of the burden of proof there must be' and considered that the 'degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting'.[867]

The PCIJ's and Judge Lauterpacht's comments exemplify two tendencies: first, there is obvious hesitation on the part of international courts to deal with procedural issues; second, when pressed to do so, they remain rather vague, such as stating only that the standard of proof cannot be 'so stringent as to render the proof unduly exacting'. Indeed, 'there are no detailed rules on either the burden or standard of proof, and the Court is free to take whatever position it likes in a particular case'[868], a freedom it has carefully guarded.[869] In the practice of international courts, in particular the applicable standard of proof/review[870] and the starting assumption are typically not spelled out.[871] While it is clear that in adjudicating on questions of fact, a court necessarily relies on one standard or another,[872] the applicable standard can at most – and even this connected with considerable difficulty – be distilled from the actual practice of the courts.[873] Bearing in mind these difficulties, the following empirical survey only aspires to approximate the

[866] *Norwegian Loans* (Lauterpacht), 39. See also Watts, 'Burden of Proof', 289, echoing a similar sentiment in writing that 'there is no place for narrow proceduralism before the International Court'.

[867] *Norwegian Loans* (Lauterpacht), 39.

[868] Riddell and Plant, *Evidence*, 80. See also Highet, 'Evidence', 8.

[869] See *Oil Platforms* (Higgins), para 31, citing Kazazi, *Burden of Proof*, 323, and Sandifer, 'Evidence', 45.

[870] See Tully, 'Objective Reasonableness', 558, noting that the ICJ used the expression 'standard of review' for the first time explicitly only in the 2014 *Whaling* judgment.

[871] See *Velasquez Rodriguez*, para 127; Foster, 'Burden of Proof', 59; Wolfrum, 'Evidence', paras 2, 73.

[872] See Roberts, 'Battleground', 177, holding that having 'some conception of the standard they are employing ... is part of the judicial function'.

[873] Regarding the difficulty of inductively ascertaining the standard of proof applied by the ICJ, see Del Mar, 'Standards of Proof', 100.

standards of review/proof and burden of proof actually applied. In addition, due to the already-noted close connection between and practical inseparability of the standards of review and proof, the two issues are treated together.

4.1. State of Necessity

Discussions about the State of Necessity in both case-law and doctrine have revolved more around the substantive requirements than the procedural rules applicable to reviewing compliance therewith in a judicial dispute settlement context. In modern times the State of Necessity has most frequently been adjudicated upon by the ICJ and investment arbitration tribunals. As just noted, the former has a proclivity not to spell out precise procedural rules, but rather to guard its freedom in this respect. As regards investment tribunals, the *Continental Casualty* annulment committee observed that 'the ICSID Convention and Arbitration Rules contain no provisions with respect to the burden of proof or standard of proof' and that a 'tribunal is not obliged expressly to articulate any specific burden of proof or standard of proof and to analyse the evidence in those terms'.[874] Similarly, 'investment treaties tend to say nothing about the standards of review' and '[d]ifferent arbitral panels have identified and relied on a dizzying set of standards of review in different cases'.[875] Accordingly, identifying the actual allocation of the burden as well as the standards of proof and review applied to asserted facts underlying invocations of the State of Necessity is not straightforward and must rely on induction.

4.1.1. Justiciability

Doubts about the reviewability of invocations of the State of Necessity have sometimes been expressed.[876] For instance, in the *Caroline* case Lord Aberdeen reasoned that the invoking

[874] *Continental Casualty Annulment*, para 135.

[875] Arato, 'Margin of Appreciation', 554, 556.

[876] See, eg, *LG&E*, para 248, where the tribunal considered that whether or not a sufficient threat exists is in principle 'left to the State's subjective appreciation'. The tribunal did not indicate whether the initial assessment was nevertheless subject to some further review.

state must be 'the sole Judge'[877] of whether the required conditions were present. Even as late as 1980, Pinto remarked in the context of the ILC's discussions on Ago's draft that 'the concept of necessity, by its very nature, imported a subjective element so pervasive as to make a rule based upon it incapable of proper application by a tribunal.'[878]

However, the weight of authority has virtually always been on the side of holding invocations of the State of Necessity to be perfectly justiciable.[879] As an ILO Commission of Inquiry argued in 1971, '[a]ll the main legal systems accept in some form the principle that pleas of justification on grounds such as [a plea of emergency] are subject to legal review'.[880] Reversing Lord Aberdeen's remark quoted above, the ILC in its 1980 Commentary on the ASR explained that 'the State invoking the state of necessity is not and should not be the sole judge of the existence of the necessary conditions in the particular case concerned.'[881] In *Gabcikovo*, the ICJ famously recycled this formula and only shortened it slightly, holding that 'the State concerned is not the sole judge of whether those conditions [of Article 25 ASR] have been met.'[882] There can thus be no doubt that invocations of the State of Necessity are justiciable;[883] they are 'a proper subject of judicial inquiry'.[884]

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[877] *Caroline*, 222.

[878] ILC, *Yearbook 1980*, 1618th meeting, para 3 (Pinto).

[879] It appears that no court has ever found the State of Necessity not to be justiciable.

[880] *ILO Greece Inquiry*, para 111.

[881] ILC, *1980 Commentary*, Article 33, para 36.

[882] *Gabcikovo*, para 51.

[883] See Osuna, 'L'Apport', 363; Stern, 'Nécessité Économique', 351; Reinisch, 'Staatsnotstand', 29ff. See also ILC, *Government Comments 2001*, 56 (UK): '[i]t should also be emphasized that it is a matter for international law, and not for each State, to determine whether any given circumstances justify the invocation of the defence of necessity.'

[884] Cheng, *General Principles*, 71.

4.1.2. Burden of Proof

As was explained above, a principle of procedural law that is widely followed holds that it is the duty of the party invoking a fact to establish it.[885] Accordingly, following this principle it would be the state invoking the State of Necessity that needs to prove the required facts.[886] As early as in the *Caroline* case, Webster stressed that '[i]t will be for the [invoking state] to a show a necessity of self-defence'.[887] Even more clearly, Judge Anzilotti explained in his individual opinion in *Oscar Chinn* that '[t]he question whether the [respondent] was acting … under the law of necessity is an issue of fact, which would have to be … proved by the [respondent].'[888] If no sufficient evidence is brought forward, the defence fails.[889] The application of this general rule has not been successfully challenged.[890]

The burden of proof in principle extends to all constituent factual elements of the State of Necessity. Centrally, the invoking state thus has to prove both the existence of a sufficient threat and the absence of any harmless or less harmful but equally effective alternatives.[891] The same approach has been applied to the additional requirement that the invoking State must not have contributed to the creation of the threat.[892] However, in at least two cases – *LG&E*[893] and

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[885] See section 3.2.2.

[886] See, eg, *Total*, para 221; *Impregilo*, para 345; *EDF Annulment*, para 331; ILC, *2001 Commentary*, Chapter V, para 8; Schill, 'Economic Crises', 280; Bjorklund, 'Economic Security', 483; Agius, 'Invocation', 15-16; Osuna, 'L'Apport', 363; Barboza, 'Necessity (Revisited)', 31.

[887] *Caroline*, 222.

[888] *Oscar Chinn* (Anzilotti), 113.

[889] See, eg, *Saiga No 2*, para 135; *LAFICO*, 287. See also *SoCoBelge* (Hudson), 186.

[890] But see the Greek pleading in *SoCoBelge*, which may be read as arguing for at least an initial reversal of the burden (*SoCoBelge (Pleadings)*, 231 (Greece)). The majority of the PCIJ did not adjudicate on this point, but Judge Hudson's reaction indicates that at least he rejected this proposition (*SoCoBelge* (Hudson), 186).

[891] See, eg, *Total*, para 223; *EDF*, para 1171; *El Paso*, para 626. See also Stern, 'Nécessité Économique', 353; Osuna, 'L'Apport', 363.

[892] Eg, *National Grid*, para 260.

[893] *LG&E*, para 256.

El Paso[894] – the tribunals imposed the burden of proving the invoking state's contribution on the claimant.[895] Nevertheless, it appears that these two cases are insufficient to establish the proposed shift, which has been exposed to some criticism in the doctrine,[896] as a matter of law.[897]

Placing the burden of proof on the state invoking the State of Necessity raises no conceptual difficulties as regards the 'positive' factual elements required, such as the presence of a sufficient threat or a positive contribution of the measure to achieving the permissible objective. With regard to the positive factual elements it is clear what needs to be proved. The same is, however, not the case with respect to the absence of alternatives, as here placing the burden of proof on the invoking state amounts to obliging that state to prove a negative fact, which is often impossible. The courts that have required proof of the absence of alternatives have not so far spelled out exactly what they thought the invoking state should have demonstrated. Should the invoking state itself identify possible alternatives and then refute them, or only rebut those put forward either by the opposing party or the court? In practical terms, the courts often do not clarify whether alternative measures discussed were identified by one of the parties or even the court itself.[898] In the *Wall* advisory opinion the ICJ even held that it was not convinced about the necessity of the wall on its precise course without ever looking at alternatives at all.[899]

Under these circumstances, it remains rather unclear what exactly the state invoking the State of Necessity has to do. It seems clear that when the opposing party identifies alternatives

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[894] *El Paso*, para 626. The *El Paso* tribunal rather sensibly justified this reasoning by explaining that it was actually the claimant that asserted contribution as a defence against the respondent's reliance on necessity.

[895] In *Impregilo*, even though the Tribunal had found that the burden of proving absence of contribution was plainly on the respondent (*Impregilo*, para 345), it nevertheless observed that it had been 'persuaded by substantial evidence proffered by Impregilo that Argentina's own economic policies over several years prior to the crisis rendered the economy of the country vulnerable' (ibid, para 358).

[896] See only Waibel, 'Two Worlds', 642; Reinisch, 'Split of Opinions', 203.

[897] It can here be left open whether this shift is justified, since it was considered above that contribution is not a inherent element of necessity and must thus not be further considered here.

[898] See, eg, *Gabcikovo*, para 55.

[899] *Wall Opinion*, para 140.

that the invoking state should – in the opposing party's opinion – have taken, the plea of State of Necessity will fail unless the invoking state can rebut those alternatives. It would furthermore appear that even where the opposing party has not identified alternatives, the invoking state would have to substantiate its claim concerning the absence of alternatives, rather than simply concentrating on the 'positive' factual elements, though how exactly it should do so is not clear.

4.1.3. Standard of proof and review

Once it is accepted that the State of Necessity is justiciable, it is clear from the outset that the standard of review cannot be full deference, and the standard of proof cannot be so low as not to require anything in substance from the invoking state. As Calle y Calle remarked in 1980, it is a basic tenant that 'the existence of a state of necessity must be proved'.[900] In the same vein, the ILC confirmed with respect to the element of threat that '[t]he peril has to be objectively established'.[901] In *Gabcikovo*, the ICJ noted that at the time of Hungary's decision to abandon the project, there existed serious uncertainties concerning its ecological impact. Nevertheless, the Court also held that these uncertainties 'could not, alone, establish the objective existence of a "peril" in the sense of a component element of a state of necessity'.[902] Rather, the Court required that this peril had to be 'duly established at the relevant point in time: the mere apprehension of a possible "peril" could not suffice in that respect.'[903]

[900] ILC, *Yearbook 1980*, 1616th meeting, para 18 (Calle y Calle). In the *SoCoBelge* case the PCIJ held that it could not simply accept Greece's submission as to a lack of capacity to pay, but that it could only decide on Greece's plea 'after having itself verified that the alleged financial situation really exists and after having ascertained the effect which the execution of the award in full would have on that situation' (*SoCoBelge*, 178; see also ibid (Eysinga), 182).

[901] ILC, *2001 Commentary*, para 15.

[902] *Gabcikovo*, para 54.

[903] Ibid, para 54.

While it is thus clear that some form of proof is required, the exact applicable standards of proof and review are not immediately obvious. Once again, the *Enron* annulment committee usefully summarised some of the open questions[904]:

> [W]ho makes the decision whether there is a relevant alternative, and in accordance with what test? Does the Tribunal determine this at the date of its award, when the Tribunal may have the benefit of knowledge and hindsight that was not available to the State at the time that it adopted the measure in question? Or does the Tribunal determine whether, on the basis of information reasonably available at the time that the measure was adopted, a reasonable and appropriately qualified decision maker would have concluded that there was a relevant alternative open to the State? Or does customary international law recognise that reasonable minds might differ in relation to such a question, and give a 'margin of appreciation' to the State in question? In that event, the relevant question for the Tribunal might be 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.[905]

Some authorities point to a rather lenient standard.[906] A number of earlier cases suggest a greater emphasis of the subjective appreciation of the acting state or that the crucial question is whether the factual assessment of the acting state was reasonable.[907] Similarly, in the discussions that took place in the ILC on Ago's proposal to include the State of Necessity in the ASR, numerous ILC members stressed the ineradicable subjective element.[908] Thus, Ushakov remarked that '[i]n the case of dire necessity, however, it was not always possible to assess the situation objectively'[909] and Vallat noted that 'there was inevitably a substantial element of subjectivity in assessing a state of necessity, something which rendered the application of article [25] more

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[904] The Committee explicitly addresses only the issue of absence of alternatives. The questions posed are, however, equally applicable to the State of Necessity's other elements.

[905] *Enron Annulment*, para 372.

[906] Scholars advocating for a certain margin of appreciation include Schill, 'Economic Crises', 281; Kent and Harrington, 'Necessity', 255; Van Aaken, 'Necessity Measures', 182 (as concerns economic necessity).

[907] Eg, *Neptune* (Pinkney), 398; *Orinoco*, 280; *Kate A. Hoff*, 447-448; *Nemours*, 250-251; *Sea-Land Services*, 165.

[908] Apart from the members individually quoted in this paragraph, see also ILC, *Yearbook 1980*, 1616th meeting, para 10 (Schwebel); ibid, 1617th meeting, para 7 (Yankov); ILC, *Yearbook 1999*, 2592nd meeting, para 32 (Kamto). In contrast, Barboza did not think that too much emphasis should be put on this subjective element, since by entailing some degree of subjectivity State of Necessity was merely like 'any other concept in international law' (ILC, *Yearbook 1980*, 1617th meeting, para 22 (Barboza)). See further Heathcote, 'Circumstances', 491.

[909] ILC, *Yearbook 1980*, 1614th meeting, para 36 (Ushakov).

difficult'.[910] In order to get to terms with the perceived inherent subjectivity of the State of Necessity, Pinto proposed to introduce 'a standard of "reasonableness" which would ensure that States exercised at least a minimum of objectivity.'[911] Finally, in the *Gabcikovo* case Judge Herczegh stressed that Hungary 'did not act in an arbitrary manner'[912], which may indicate that for him non-arbitrariness (which seems close to reasonableness) would be the relevant standard.

The only modern-day cases that appear to endorse a rather lenient standard of review are *LG&E* and *Continental Casualty*. The *LG&E* tribunal in substance applied a reasonableness test, holding for example that '[t]he severe devaluation of the peso against the dollar renders the Government's decision to abandon the calculation of tariffs in dollars reasonable.'[913] As regards the US-Argentina BIT's NPM clause, the *Continental Casualty* tribunal endorsed an objective standard, but clarified that 'this objective assessment must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage [sic] of hindsight.'[914] While this statement initially appears limited to the BIT's NPM clause, the tribunal went further and held that '[a] certain deference to such a discretion when the application of general standards in a specific factual situation is at issue, such as reasonable, necessary, ... may well be by now a general feature of international law also in respect of the protection of foreign investors under BITs'.[915] The tribunal's broader focus may thus suggest an application of the same standard for

[910] Ibid, 1615th meeting, para 26 (Vallat).

[911] Ibid, 1618th meeting, para 4 (Pinto).

[912] *Gabcikovo* (Herczegh), para 188.

[913] *LG&E*, para 242. It is explained in chapter IV, section 3.2.1., that while the *LG&E* tribunal on its face applied the NPM clause, it ultimately still equated it with the State of Necessity.

[914] *Continental Casualty*, para 181; see also ibid, 187.

[915] Ibid, para 181, referring to Shany, 'Toward' in support. See also Bjorge, 'Been There', 190, concluding that there is no generalised margin of appreciation in international law.

the State of Necessity as well. The standard that the tribunal eventually appeared to apply was one of reasonableness.[916]

Despite these pointers in the direction of a lenient standard, the weight of authorities is on the side of stricter review of the asserted facts. In his 1980 report, Ago considered that for a State of Necessity to arise, the 'situation in question would have to be extremely serious, and irrefutably so.'[917] The mention of 'irrefutably' would appear to indicate that a very high standard would need to be met, though it is not precisely spelled out.[918] In *Gabcikovo* the Court's analysis was not limited to verifying whether Hungary had reasonable grounds to assuming that a threat existed or that it has no other means to eliminate that threat, but rather assessed all factual elements objectively without granting any notable deference.[919] As already mentioned, the Court found that Hungary could not be 'the sole judge'[920] and that the elements of the State of Necessity had to be 'duly established'[921], which suggests a proper and objective review.

Coming to the investment tribunal jurisprudence, in *CMS* the tribunal considered that the State of Necessity is subject to judicial review, and that such review is not limited to assessing good faith.[922] Rather, the tribunal saw itself obliged to carry out 'a substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law'.[923] The tribunal in *EDF* held that '[n]ecessity must be construed

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916 *Continental Casualty*, paras 217, 219, 227, 232.

917 Ago, *Addendum*, para 11.

918 Elsewhere Ago spoke of the 'objective character that a situation must present' before it can be invoked as State of Necessity (ILC, *Yearbook 1980*, 1618th meeting, para 29 (Ago)).

919 *Gabcikovo*, paras 54-57.

920 Ibid, para 51.

921 Ibid, para 54. Note in this respect the emphasis that Ago put on the term 'established' (ILC, *Yearbook 1980*, 1618th meeting, para 29 (Ago)).

922 *CMS*, paras 373-374.

923 Ibid, para 374. The same conclusion was reached in *Enron*, para 339. Except for the mentioned *Continental Casualty* and *LG&E*, none of the investment tribunals displayed any perceptible deference to the invoking state.

strictly and objectively' and provided as justification that necessity must 'not [be] an easy escape hatch for host states wishing to avoid treaty obligations which prove difficult.'[924]

Based on the foregoing, it must be considered that while there are some divergent opinions, in the context of judicial dispute settlement the better-supported reading is that the factual elements underlying invocations of the State of Necessity are subject to strict review and concordantly high evidentiary requirements.[925] Such strict review may pose significant problems for the invoking state, in particular where far-reaching uncertainties exists about facts and causalities. As discussed in chapter I, assessing many factual elements underlying both necessity and proportionality – such as the existence of a threat or the protectiveness and harmfulness of a measure – requires counterfactual analysis, which in turn relies on knowledge of facts and causalities.[926] Depending on the type of threat and measure at issue, different bodies of knowledge are resorted to (natural sciences, political or economic sciences, etc). Significant problems can arise where strict review and high evidentiary standards are confronted with bodies of knowledge that inherently involve uncertainties and controversies.

For example, various tribunals have acknowledged the limitations of economic sciences to provide clear cause-and-effect answers even when it comes to analysing events of the past. As the *Continental Casualty* tribunal explained, '[i]n economic matters, the analysis of causation ... does not lend itself to the same scientific analysis as in the domain of the so-called exact sciences and

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[924] *EDF*, para 1171.

[925] See Henckels, 'Standard of Review', 131-132. But see Cassella, *La nécessité en droit international*, 211, concluding her analysis by finding more generally that 'les États disposent d'une certaine marge d'appréciation dans l'évaluation des situations de nécessité qui menacent leurs intérêts, mais cela n'exclut pas le contrôle d'un tiers, même si celui-ci est limité.'

A review of the authorities also indicates that there are generally no presumptions in favour of the invoking state that could ease the burden of proving all elements to the requisite standard. One interesting exception is the position defended by Arbitrator Stern in *Impregilo* and *El Paso* concerning contribution, where she considered that as a matter of principle 'the State's contribution to a situation of economic crisis should not be lightly assumed' (*Impregilo*, para 360; *El Paso*, para 667; see also Van Aaken, 'Necessity Measures', 182). She does not appear to advocate a reversal of the burden of proof; rather, the assumption that contribution cannot be easily assumed would appear to set a certain starting assumption (see section 3.2.1.) about the probability of contribution.

[926] See chapter I, sections 4.1, 7.1.1., 7.2.1.

of natural phenomena.'[927] In *El Paso*, Arbitrator Stern pointed to the divergence of expert opinions by holding that '[e]conomics is a complicated science or, better, a complicated art; the mere reading of the analyses of the experts of both Parties show that there is little certainty.'[928] If even understanding past causalities is ridden with uncertainty, predictions based on counterfactual analysis would appear to become almost impossible to prove objectively so as to satisfy a strict standard. The *Metalpar* tribunal clearly perceived this impasse:

> Leaders of different countries must make decisions of a very different nature on a daily basis. Except in very obvious situations, it is extremely difficult to determine at the time such decisions are made, and even some time afterwards, whether said decisions were the best they could have been. In this case, to try to abstractly determine whether the actions carried out by Argentina during the crisis were optimal is a difficult or impossible task[.][929]

In this light, it must therefore be asked how the judicial bodies which have adjudicated invocations of the State of Necessity have so far dealt with expert disagreement. In *Gabcikovo* the ICJ noted the existence of contradicting scientific evidence presented by the two parties, but eventually held that in the particular case at hand it was 'not necessary … to determine which of those points of view is scientifically better founded.'[930] Implicitly, the Court thus claimed for itself the competence and ability to determine the 'better' science, and that in order to meet the required standard a state would have to establish a scientific fact according to that 'better' science.[931] Unsurprisingly, the Court did not say how it would go about identifying the 'better' science.

Investment tribunals have likewise been faced with competing expert assessments. While not generally explicitly discussing how to deal with diverging expert assessments, the underlying

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[927] *Continental Casualty*, para 236, fn.356. See also Sacerdoti, 'BIT Protections and Economic Crises', 374.

[928] *El Paso*, para 668.

[929] *Metalpar*, para 198. In *Metalpar* the tribunal did not have to decide whether the conditions of the State of Necessity were fulfilled (ibid, para 211).

[930] *Gabcikovo*, para 54.

[931] See chapter I, section 4.1.2., concerning the limits to objectivity of science.

assumption appeared to be that the mere existence of competing expert assessments was sufficient to hold that the state bearing the burden of proof had failed to prove the existence of a disputed fact.[932] The *Enron* tribunal can be taken as an example. Faced with competing expert assessments regarding the question of contribution, the tribunal appeared to accept that the existence of doubt about contribution was enough to hold against the invoking state.[933]

The ICJ's and investment tribunals' approaches to expert disagreement are deeply problematic. While they reflect the commonly held belief that there is always one correct scientific answer to a question of fact, in reality the available information will often not allow a conclusion as to which assessment of the causalities in play is correct or more correct.[934] Indeed, as Fukunaga observed, in disputes marked by a conflict of different 'scientific truths' 'a [court's] search for the "correct truth" merely ends up producing "its own version of truth", thereby failing to provide a convincing and acceptable solution to a dispute'.[935] The consequence is then that against this standard, it will be extraordinarily difficult for any state to prove a counterfactual to the satisfaction of a court.

4.1.4. Conclusion

To conclude briefly, invocations of the State of Necessity are justiciable, and thus compliance with the necessity/proportionality standard is as well. The burden of proof with regard to the 'raw facts' underlying both necessity and proportionality is firmly on the state invoking the State of Necessity, though it is not quite clear to what the burden of proving the absence of alternatives really amounts. With respect to the standards of review and proof concerning 'raw facts', it appears that courts (and notably the ICJ) have predominantly applied a

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[932] Eg, *CMS*, paras 320-321; *Enron*, paras 305-306.

[933] *Enron*, para 311. See also *Enron Annulment*, para 393, where the annulment committee is critical of the tribunals approach.

[934] See generally Dupuy, 'L'Invocation', 231-232.

[935] Fukunaga, 'Standard of Review', 567.

strict standard of review and high evidentiary requirements. In this context, the dependence of both necessity and proportionality on counterfactual elements raises important questions, in particular with regard to expert disagreement. So far the courts adjudicating on the State of Necessity have failed to find a convincing way to both uphold strict review (in substance rather than rhetoric) while not precluding reliance on State of Necessity *a priori* where expert disagreement is endemic.

4.2. Self-defence

Identifying procedural rules at play in the adjudication of the use of force in alleged self-defence is rendered difficult by the simple fact that court cases dealing with self-defence are rare. It has also already been remarked that the ICJ, the principal forum in which self-defence has so far been subjected to judicial scrutiny,[936] does not typically spend much time clarifying the procedural rules it applies. In addition to the scarcity of judicial guidance, doctrine has likewise rarely discussed procedural/evidentiary aspects of the law on self-defence.[937] Against this general backdrop, the following discussion again can only hopes to approximate the applicable standards.

4.2.1. Justiciability

It has at times been asserted that the lawfulness of the use of force in self-defence, especially where the connected armed conflict is on-going, is non-justiciable.[938] Two examples from judicial practice are instructive. First, in the *Nazi Conspiracy* case before the International Military Tribunal ('IMT'), the defendants argued that the German invasion of Norway had been carried out in anticipatory self-defence, and 'that Germany alone could decide ... whether preventive action was a necessity, and that in making her decision her judgment was

[936] Non-ICJ cases include *Eritrea/Ethiopia*. Mention should also be made of *Nazi Conspiracy* and ICTY, *NATO Bombing Report*, though both were primarily concerned with criminal responsibility of individuals.

[937] See, eg, Green, 'Evidentiary Standards', 164, remarking that the 'standard of evidence' is '[o]ne of the most pressing and fundamentally overlooked questions relating to the international legal regulation of self-defence'.

[938] See Tams, 'Light Treatment', 964, for an overview.

conclusive.'[939] Second, in *Nicaragua* the United States denied justiciability, arguing that 'if a country's security is in jeopardy, the necessity of using force is ... a purely political or military matter, thus not a matter such as the Court could possibly decide.'[940] The United States' position was met with some sympathy on the bench. For instance, Judge Oda opined that 'a dispute in which use of force is resorted to is in essence and *in limine* one most suitable for settlement by a political organ ..., but is not necessarily a justiciable dispute such as falls within the proper functions of the judicial organ.'[941]

However, attempts to exclude self-defence from judicial dispute settlement as a matter of principle have not gained much traction. The prevalent sentiment can be nicely summarised with the help of a quote from Judge Azevedo's individual opinion in *Corfu Channel*: 'It would be absolutely contrary to the [UN Charter] and to several of its articles for a country to become judge in its own case.'[942] In response to the claim by the defendants in the *Nazi Conspiracy* case, the IMT in Nuremberg famously held that 'whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.'[943] Against these precedents, it is also hardly surprising that the ICJ proceeded to rule on the substance of self-defence in cases such as *Nicaragua*, *Oil Platforms*, and *Armed Activities*, apparently without seeing a need to explicitly discuss justiciability. In this light, it cannot be doubted that invocations of self-defence, and with it claims concerning

[939] *Nazi Conspiracy*, 38.

[940] United States position as summarised by Judge Lachs (*Nicaragua* (Lachs), para 166).

[941] Ibid (Oda), para 58. A similar sentiment is offered by Judge Schwebel (ibid (Schwebel), paras 69-73).

[942] *Corfu Channel* (Azevedo), para 38.

[943] *Nazi Conspiracy*, 38.

necessity and proportionality, are perfectly justiciable.[944] To speak with McDougal and Feliciano, any other conclusion would 'in effect repudiat[e] fundamental community policy'.[945]

4.2.2. Burden of Proof

Turning to the burden of proof, applying the general principle *onus probandi incumbit actori* suggests that it is again the party invoking self-defence that carries the burden of proving all the facts necessary to establish compliance with the various legality conditions, including the necessity/proportionality standard. This burden in principle extends to all underlying factual elements, thus the existence of a threat, the absence of peaceful or less harmful alternatives, etc.

The self-defence cases so-far adjudicated did not centrally turn on necessity or proportionality. In *Nicaragua*, *Oil Platforms,* and *Armed Activities* compliance with the necessity/proportionality standard was only discussed after it had already been decided that self-defence could not be invoked.[946] This may explain the Court's cursory discussions of necessity and proportionality, and the lack of any explicit pronouncements concerning the burden of proof applicable to the factual elements underlying necessity/proportionality. In fact, the Court addressed the burden of proof explicitly only in *Oil Platforms*, where it held that the 'burden of proof of the facts showing the existence of such an [armed] attack rests on the United States'.[947] Notably, in the context of that particular case this also included establishing that the use of force, if indeed it amounted in terms of scale to an armed attack, was attributable to the state subjected by the invoking state to defensive force (which, in a judicial context, would tend to be the opposing party).[948]

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[944] See also Schachter, 'Self-Defense and the Rule of Law', 264, pointing out that since there is some form of third-party judgment on every use of force (though not necessary by a court), 'no state is actually the *sole* judge of its own cause when it claims to have used force in self-defense' (emphasis in the original).

[945] McDougal and Feliciano, *Law and Minimum World Public Order*, 219.

[946] *Nicaragua*, para 237; *Oil Platforms*, paras 51, 61, 71; *Armed Activities*, para 147.

[947] *Oil Platforms*, paras 57, 61, 71.

[948] Ibid, paras 57, 59.

In the light of this sparse judicial guidance, the full imposition of the burden of proof on the invoking party should be taken with a grain of salt. For instance, as was the case with respect to the State of Necessity,[949] it is not clear exactly what the burden of proof would entail as regards the absence of peaceful or less forcible but equally protective alternatives.

4.2.3. Standard of proof and review

The most useful case to discuss standards of proof and review applicable to the facts underlying necessity/proportionality in judicial practice is again *Oil Platforms*. Here the ICJ set the stage for discussion by holding that 'the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion".'[950] With respect to the only evidentiary question it considered in greater depth (whether an armed attack could be attributed to Iran), the Court concluded that the evidence presented by the United States was 'insufficient'[951] or 'highly suggestive, but not conclusive'[952], but did not further clarify on the basis of which standards it reached these conclusions.

Precisely this lack of clarity was severely criticised by some judges.[953] Judge Higgins held that 'in a case where so very much turns on evidence, it was to be expected that the Court would clearly have stated the standard of evidence that was necessary for a party to have discharged its burden of proof.'[954] Similarly, Judge Buergenthal remarked that the Court 'never spells out what

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[949] See section 4.1.2.

[950] *Oil Platforms*, para 73. The conclusion is strongly supported by Judge Simma (ibid (Simma), para 11). Note that the Court uses the term 'discretion', though in the terminology used in this thesis it rather appears to have meant deference.

[951] Ibid, para 57.

[952] Ibid, para 71.

[953] See also ibid (Owada), para 52. For a critical voice in doctrine see only Green, 'Evidentiary Standards', 170.

[954] *Oil Platforms* (Higgins), para 30.

the here relevant standard of proof is'.[955] As Judge Higgins indicated, the only reference point the Court articulated was that it did not 'have to decide "on the basis of a balance of evidence"', which was ultimately not enough to know on the basis of precisely which standard the Court reached its finding that the United States had presented 'insufficient' proof.[956]

Absent any explicit clarification of the applicable standards by the Court, any conclusions can only be drawn by means of inference from the Court's actual factual findings. Undertaking just this analysis of the factual findings made by the Court in both *Oil Platforms* and *Nicaragua*, Green concluded that '[t]he inference that may be drawn from both judgments is that the standard employed was one of "clear and convincing evidence"'.[957] Combined with the Court's insistence on 'strict and objective' standards, this inference indeed points to a high standard of proof/review as regards the relevant facts.[958]

This relatively strict position brings with it difficulties not dissimilar to those discussed with respect to the State of Necessity.[959] However, since counterfactual predictions in the context of self-defence rely more than elsewhere on political and military assessments, the difficulties are exacerbated.[960] In discussing the necessity of the United States' actions, Judge Schwebel in *Nicaragua* stressed that

> a judgment of necessity requires the Court to pass upon whether or not the United States acts reasonably in refusing a belated profession of the Nicaraguan Government's willingness to refrain from undermining the governments of its neighbours ... . Such a judgment, involving as it does an appraisal of the motives

[955] Ibid (Buergenthal), para 41.

[956] Ibid (Higgins), paras 34, 36.

[957] Green, 'Evidentiary Standards', 172. See further O'Connell, 'Evidence of Terror'.

[958] See also *Oil Platforms* (Kooijmans), para 54, holding that 'the use of force must be subjected to a strict legality test, probabilities or even near certainties do not suffice as justification'.

[959] See section 4.1.3.

[960] See Lazar, 'Non-combatant immunity', 61; Franck, 'Proportionality in International Law', 233.

> and good faith of Nicaragua and the United States, is exceedingly difficult for this Court to make.[961]

Judge Schwebel's concerns are valid, namely that in self-defence the existence of a threat or the availability of peaceful or less forceful alternatives rather importantly depends on the attitude of the attacker, and predicting or reconstructing counterfactually a government's actions or reactions appears complex in the extreme. The complexity is further increased by the fact that in a judicial dispute settlement context concerning self-defence, the attacking state is typically one of the parties and has every reason to shape its own account in its favour. The approach that Judge Schwebel himself appeared to employ in forming an opinion (though without discussing it explicitly) was reverting to a standard of reasonableness.[962] There is support for a reasonableness standard of one sort or another also in the literature.[963] As seen, however, the Court did not follow this path.

What does all this mean for reviewing the factual elements underlying the necessity and proportionality of defensive force? It may be that some importance needs to be attached to the particular cases that the Court has so far ruled on. The cases did not turn centrally on necessity and proportionality, and were in fact (in the conclusion of the Court) unjustified instances of inter-state self-defence regardless of whether necessity and proportionality were complied with. For example, in *Oil Platforms* the central question was whether the use of force prompting the United States' defensive action was attributable to Iran. There is general agreement that under the ICJ case-law, the standard of proof must be higher the graver the charge.[964] Thus, it is clear that

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[961] *Nicaragua* (Schwebel), para 69. See also ibid, para 70.

[962] See ibid (Schwebel), paras 76, 203.

[963] See Kaye, 'Adjudicating', 166ff; McDougal and Feliciano, *Law and Minimum World Public Order*, 218. See also Corten, *Law Against War*, 488, rejecting both an 'absolute margin of appreciation' as well as too stringent an application of necessity/proportionality.

[964] *Corfu Channel*, 17; *Genocide*, para 210. See also *Oil Platforms* (Higgins), para 33; *Pulp Mills* (Greenwood), para 25; Del Mar, 'Standards of Proof', 106ff.

proof of facts establishing the attribution of an armed attack, which is a very grave charge indeed, must live up to a high standard.

In contrast, it appears less clear whether the Court would apply the same high standard to the factual elements underlying necessity/proportionality in cases of one state defending itself against an aggressor state that has beyond any doubt committed an armed attack.[965] While any statement about how the Court would treat such cases in terms of procedure is speculative, it seems fairly counterintuitive to think that the Court would impose a very exacting burden of proving the factual elements underlying necessity/proportionality on the defending state.[966] Rather, it would seem that 'if a state is really the victim of an armed attack it benefits from a certain leeway in how to react'.[967] The clearly-attributable armed attack may be thought to create a type of presumption in favour of the defending state and it would thus be more appropriate to suppose that the Court would put the main burden of proving facts demonstrating that defensive actions were unnecessary and/or disproportionate on the aggressor.[968]

The Court has also not yet properly dealt with anticipatory self-defence or self-defence against non-state actors.[969] Intuitively, it would make sense to apply a strict standard to factual assertions underlying anticipatory self-defence, as a state should only be allowed to 'strike first' when it can make a very good factual case both for the existence of a sufficient threat and the necessity/proportionality of its response. No factual presumption in favour of the defending state can operate where the basis of this presumption, namely that an armed attack has already occurred, is not present. Requiring strong evidentiary foundations of the facts invoked would

[965] Imagine that Kuwait had taken Iraq to court over the 1991 invasion, and Iraq had launched a counterclaim arguing that the actions in collective self-defence by Kuwait and the United States failed to comply with the necessity/proportionality standards.

[966] See also sections 3.3. and 5.1. The preference for type I or type II errors might change depending on the scenario.

[967] Corten, 'Necessity', 872-873.

[968] See also Zimmermann, 'Der Libanon-Krieg', 205.

[969] It only touched upon both issues inconclusively (self-defence against non-state actors: *Wall Opinion*, para 139; *Armed Activities*, para 147; anticipatory self-defence: *Nicaragua*, para 194; *Armed Activities*, para 143).

furthermore incentivise defending states not to act on a whim, but only where they have solid intelligence about threats, consequences of action, and possible alternatives.

As regards self-defence against non-state actors, it was also already suggested in chapter I that this type of self-defence appears to require stricter evidentiary standards than inter-state self-defence, as the host state that is unwilling or unable to contain non-state actors has not made itself liable to suffering defensive force in quite the same way as an aggressor state.[970] Nevertheless, the host state has, by either failing to contain or possibly even by actively supporting aggressive non-state actors, incurred a certain degree of liability. While this thought is again speculative, it would make sense to make the intensity of review of factual assertions inversely proportional to the degree of liability the host state incurred, with the effect that the justificatory burden on the defending state decreases as the liability of the host state increases. Such a dynamic model would ultimately be capable of explaining both the strict review of factual assertions seen in ICJ cases so-far, as well as the intuition presented about scenarios that have so far not reached the Court.

4.2.4. Conclusion

To summarise the above findings, invocations of the inherent right to self-defence as justification for the use of force are justiciable, and so is by logical implication compliance with the necessity/proportionality standard. The burden of proof concerning the factual elements underlying necessity and proportionality is in principle on the defending state. As was the case for the State of Necessity, it is however not quite clear how far this burden reaches concerning the availability of peaceful or less forcible alternatives. Turning to the standards of review and proof applicable to factual assertions underlying invocations of the right to self-defence, the Court has so far been rather strict, without however explaining in detail the standard applied. The strict approach raises particular difficulties when applied to counterfactual analyses of threats and

[970] See chapter I, section 4.2.2, and chapter II, section 3.2.3.

strategic options. It is quite possible that the Court's approach was so far specific to the scenarios it was asked to adjudicate upon, and that it would tailor its approach differently in other scenarios. On this basis, it can be speculated that the Court would vary the intensity of factual review proportionally to the degree of liability incurred by the state subject to defensive force.

4.3. WTO law

In contrast to the State of Necessity and self-defence, due to their compulsory jurisdiction the WTO panels and AB have developed an ample body of jurisprudence concerning procedural and evidentiary questions, including as concerns the review of factual elements underlying necessity and proportionality. This case-law allows rather more nuanced conclusions, though some questions still remain open.

4.3.1. Justiciability

It is not in question that disputes about the application of Articles XX GATT, XIV GATS, 5.6 SPS and 2.2 TBT are fully justiciable. Debates revolve more around the applicable burden of proof as well as the standards of proof and review. Justiciability is, however, discussed in the context of Articles XXI GATT and XIV*bis* GATS, which contain a self-judging element.[971] In *Nicaragua* the ICJ referred to Article XXI GATT, contrasting it with Article XXI of the US-Nicaragua FCN Treaty. The Court noted that the former spoke of measures 'considered necessary' by one of the parties, whereas the latter (just like Articles XX GATT and XIV GATS) 'speaks simply of "necessary" measures, not of those considered by a party to be such.'[972] Since the statement was made in the context of the Court's finding that it had jurisdiction, it might be supposed that the Court would see clauses drafted in the image of Article XXI GATT to be non-

[971] On self-judging exception clauses see generally Nolan and Sourgens, 'The Limits of Discretion'; Schill and Briese, '"If the State Considers"'.

[972] *Nicaragua*, para 222.

justiciable.[973] It is indeed sometimes asserted that the self-judging nature of these articles removes them completely from the scope of judicial review.[974] However, while at least one commentator maintains that a 'comparison between arguments favoring and disfavoring WTO jurisdiction over the national security exception demonstrates that one view does not clearly dominate over the other',[975] it is safe to say that the clear majority of scholars assert that Articles XXI GATT and XIV*bis* GATS are justiciable, but subject only to a lenient good faith or reasonableness assessment.[976] There is no WTO jurisprudence[977] on these articles that could fully settle the question,[978] but seeing that the GATT and GATS do not formally exclude Articles XXI and XIV*bis*, respectively, from the compulsory dispute settlement system it would seem difficult to find them not to be justiciable.[979]

4.3.2. Burden of proof

Already the first case properly dealing with the necessity element in Article XX GATT set the scene by holding that 'it is up to the contracting party seeking to justify measures under Article XX(d) to demonstrate that those measures are "necessary" within the meaning of that

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[973] The Court later emphasised the point by stressing that 'whether a measure is necessary to protect the essential security interests of a party is not ... purely a question for the subjective judgement of the party' (ibid, para 282; see also *Oil Platforms*, para 43), thereby stressing again that the question is justiciable. The Court's statement may be read to imply the opposite for clauses such as Article XXI GATT. See on the interpretation of the ICJ's pronouncement Akande and Williams, 'National Security Issues', 388; Schill and Briese, '"If the State Considers"', 98.

[974] See Howse *et al*, 'Pluralism', 103. Summarising various positions: Schloemann and Ohlhoff, '"Constitutionalization"', 442; Cann, 'Creating Standards', 430; Nolan and Sourgens, 'The Limits of Discretion', 388; Schill and Briese, '"If the State Considers"', 99-100; Neuwirth and Svetlicinii, 'Economic Sanctions', 905-906.

[975] Lindsay, 'Ambiguity', 1295.

[976] See Binder, 'Performance of Treaty Obligations', 14; Hahn, 'Vital Interests', 583; Schloemann and Ohlhoff, '"Constitutionalization"', 443ff: Akande and Williams, 'National Security Issues', 389-390. See also Ragni, 'Standard of Review', 336 (by analogy); Christakis, 'L'Etat avant le droit?', 40-41, 45; Sornarajah, *Foreign Investment*, 460; Schill and Briese, '"If the State Considers"', 107, 110 (noting that while there is agreement on good faith review, there is debate on what that standard entails). On good faith review generally see Burke White and Von Staden, 'Public Law Standards of Review', 705ff.

[977] One unadopted GATT panel report (*US-Nicaragua*, paras 5.1-5.3) appears to point to non-justiciability (see Van Aaken, 'Necessity Measures', 183).

[978] See Muchlinski, 'Trends', 69.

[979] See *LG&E*, para 214; *Sempra*, para 384; Hahn, 'Vital Interests', 592.

provision'.[980] Thus, from the start the approach followed was the same as that adopted by the ICJ, namely that 'each party has to prove its own allegations'.[981] As an affirmative defence invoked by the respondent, this means that for Articles XX GATT and XIV GATS the burden is on the respondent.[982] Accordingly, early cases consistently required the respondent to prove the facts underlying its invocation of an affirmative defence.[983] This burden extended to demonstrating that alternative measures were not 'reasonably available'.[984]

The burden of proof was from the beginning situated differently under the SPS and TBT.[985] Under Articles 5.6 SPS and 2.2 TBT, both enshrining self-standing obligations rather than affirmative defences, the complainant carries the (initial) burden of proof.[986] In order to succeed, the complainant has to establish a *prima facie* case that all elements of Articles 5.6 SPS and 2.2 TBT are fulfilled.[987] This includes establishing a *prima facie* case that a less trade-restrictive but equally protective alternative is reasonably available,[988] which the respondent must then rebut.[989] In this, simply 'listing … alternative measures without more' is insufficient.[990] In turn,

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[980] *US-Section 337*, para 5.27.

[981] *US-Continued Suspension (Panel)*, para 7.385.

[982] See *US-Gambling (AB)*, para 309. In the compliance dispute in *EC-Continued Suspension*, the panel suggested that the EC 'enjoyed a presumption of good faith compliance' and could establish a *prima facie* case on this basis alone (*US-Continued Suspension (Panel)*, para 7.385). The AB, however, rejected this suggestion (*US-Continued Suspension (AB)*, para 581).

[983] See *US-Gasoline (Panel)*, para 6.20; *US-Shrimp (Panel)*, para 7.30.

[984] See *US-Gasoline (Panel)*, paras 6.26, 6.28; *Dominican Republic-Cigarettes (Panel)*, para 7.228; *Canada-Wheat (Panel)*, para 6.229. Regarding inconvenience see also *China-Trading Rights (AB)*, para 327.

[985] As the panel in *EC-Biotech (Panel)*, para 7.2969, explained, characterizing a provision 'as a right rather than as an exception has implications for the allocation of the burden of proof.'

[986] See *Australia-Salmon (Panel)*, para 8.167.

[987] See *Japan-Agricultural Products (AB)*, para 126; *US-COOL 21.5 (Panel)*, para 7.437. See also *Australia-Apples (AB)*, para 355.

[988] *US-Tuna II (Panel)*, para 7.468; *US-Tuna II (AB)*, para 323; *US-COOL 21.5 (Panel)*, para 7.437.

[989] See, eg, *Australia-Salmon (Panel)*, paras 8.181-8.182; *US-COOL (AB)*, para 379.

[990] *US-Clove Cigarettes (Panel)*, para 7.423.

placing the obligation of establishing a *prima facie* case on the complainant means that a panel is not allowed to consider any alternative that was not explicitly proposed by the complainant, as the contrary would amount to the panel 'mak[ing] the case for the complaining party.'[991]

On the basis of the foregoing, it would then appear that there is a neat distinction between the affirmative defences in Articles XX GATT and XIV GATS on the one hand, and the self-standing obligations in Articles 5.6 SPS and 2.2 TBT on the other hand.[992] As already discussed, where the burden of proof is on the invoking party, this can prove very difficult with respect to the absence of alternatives, as it amounts to having to prove a negative fact. Unlike the courts that have so far adjudicated on the State of Necessity and self-defence, the AB understood this difficulty and in *US-Gambling* revised its approach with respect to affirmative defences. It explained that in making its case, 'a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective', finding that the 'WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden.'[993] In consequence, when presenting its defence the respondent 'may ... point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is "necessary".'[994] Rather, 'it rests upon the claiming Member to identify possible alternatives to the measure at issue that the responding Member could have taken.'[995] The AB established the following sequential approach:

> If … the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains

[991] *Japan-Agricultural Products (AB)*, paras 126-129.

[992] See Delimatsis, 'Determining', 371.

[993] *US-Gambling (AB)*, para 309.

[994] Ibid, para 310.

[995] *Brazil-Tyres (AB)*, para 156.

> 'necessary' in the light of that alternative … . If a responding party demonstrates that the alternative is not 'reasonably available', … it follows that the challenged measure must be 'necessary' within the terms of Article XIV(a) of the GATS.[996]

In effect, the AB changed the burden of proof regarding the existence or absence of alternatives rather drastically, based on the insight that putting the burden on the respondent would force that state to counterfactually prove a negative.[997] In other words, the original rule 'amounted to a sort of *probatio diabolica*, a requirement that no state could possibly satisfy'.[998]

While the AB's new approach under Articles XX GATT and XIV GATS was followed consistently after *US-Gambling*, what it initially left open was whether the complainant has a genuine burden to make at least a *prima facie* case, or whether it is sufficient to just identify an alternative.[999] While the AB's original language from *US-Gambling* appeared to point to the latter interpretation,[1000] the panel in the subsequent *US-Tuna II* case (concerning Article 2.2 TBT) implied that the first reading is correct. The panel here considered that '[a]s is the case *under Article XX of the GATT 1994 and under Article 5.6 of the SPS Agreement,* it is, in our view, for the complainant to make a prima facie case that the alternative meets the requirements of the provision at issue.'[1001] Significantly, despite the difference in character between Article XX GATT and Articles 5.6 SPS/2.2 TBT, the panel completely equated the burden as regards the existence of alternatives, thereby indicating that the AB's pronouncement in *US-Gambling* really did mark a proper reversal of the burden of proof in this respect.

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[996] *US-Gambling (AB)*, para 311. See also *Brazil-Tyres (AB)*, para 156; *China-Rare Earths (Panel)*, para 7.147. Pauwelyn, *Conflict of Norms*, 250, argued in favour of treating Article XX GATT as an autonomous right, which would shift the burden of proof completely.

[997] Critically Foster, *Science*, 222-23. See also Regan, 'Meaning of "Necessary"', 364; Alvarez-Jiménez Alvarez-Jiménez, 'New Approaches', 16.

[998] Montini, 'Necessity Principle', 153.

[999] The AB clarified, however, that the panel was not obliged to analyse alternatives not raised by the complainant (*US-Gambling (AB)*, para 320).

[1000] See also *EC-Seal Products (AB)*, para 5.169, also speaking of the complainant's duty to 'identify' alternatives.

[1001] *US-Tuna II (Panel)*, para 7.468 (emphasis added).

More recently, however, the AB clarified in *US-COOL 21.5* that a certain difference remains. While the AB considered 'relevant jurisprudence relating to Article XX [GATT] and Article XIV [GATS] in assessing the appropriate burden of proof concerning the "reasonable availability" [of alternatives] under Article 2.2 TBT', it also recalled that 'Article XX [GATT] and Article XIV [GATS] are exceptions, while Article 2.2 [TBT] sets out positive obligations', which 'may have implications for the allocation of the burden of proof.'[1002] Considering in particular the element of inconvenience (though it can safely be assumed that the clarification applies to all elements of alternative measures), the AB contrasted Article XX GATT, where 'the complainant has to identify alternatives' and the respondent 'has to adduce evidence substantiating why costs are prohibitive or technical difficulties are substantial'[1003], and Article 2.2 TBT, where 'a complainant must make a *prima facie* case that its proposed measure is indeed reasonably available.'[1004] Accordingly, the burden of proof is not allocated in exactly the same way, in that as regards affirmative defences the complainant must only identify alternatives, whereas as regards obligations the complainant has to make a *prima facie* case. How much difference this really makes depends, in the end, on the standards of proof/review applied to facts when a panel determines whether a *prima facie* case has been made out. While this question is considered in more detail in the following section, it can already be said that the standard is rather lenient, so that the difference in substance appears to be slim. There is, accordingly, a rather substantive convergence.

This far-reaching convergence is more generally remarkable because it loosened or even broke the tie between the burden of proof allocation generally applicable to the particular provision and that applicable to the availability of alternatives. As regards the availability of alternatives the shift was occasioned by the difficulties involved with proving a negative fact, which do not depend on whether the necessity/proportionality standard is enshrined in an

[1002] *US-COOL 21.5 (AB)*, para 5.329.

[1003] Ibid, para 5.337.

[1004] Ibid, para 5.338.

affirmative defence or a self-standing obligation. In other words, it was in part an inherent characteristic of the necessity/proportionality standard that influenced the burden of proof allocation, and not the normative context in which the standard was embedded.[1005]

4.3.3. Standard of proof and review

The general standard of review applicable to the GATT, GATS, SPS and TBT is set out in Article 11 DSU, requiring a panel to make an 'objective assessment of the matter before it'. The AB has considered that this provision 'articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels'[1006] and that the 'applicable standard is neither *de novo* review nor "total deference", but rather the "objective assessment of the facts".'[1007] While the formula is indeed very succinct,[1008] the AB has also clarified[1009] that it does not refer to a "'deferential reasonableness standard"' or a standard equivalent to that embodied in Article 17.6(i) of the Anti-Dumping Agreement.

More particularly with respect to the requirement that measures must be 'necessary', the AB translated this general standard into requiring that 'a panel must, on the basis of the evidence in the record, independently and objectively assess the "necessity" of the measure before it.'[1010] While the invoking state's 'characterization ... will be relevant in determining whether the measure is, objectively, "necessary"', panels are 'not bound by these characterizations'.[1011] This approach relates, in principle, to all factual elements of the necessity/proportionality standard, eg the

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[1005] Before *US-Gambling*, the AB had still denied a direct connection between the necessity standard and the burden of proof (*EC-Hormones (AB)*, para 102).

[1006] Ibid, para 115.

[1007] Ibid, para 117. See also *Japan-Apples (AB)*, para 165.

[1008] It has been doubted whether the AB actually introduced any clarity. See only Oesch, *Standards of Review*, 86; Button, *Power to Protect*, 171, 191; Andenas and Zleptnig, 'Proportionality', 396; Desmedt, 'Hormones', 697; Du, 'Standard of Review', 443; Ehlermann and Lockhart, 'Standard of Review', 495.

[1009] *EC-Hormones (AB)*, para 119. See also *US-Continued Suspension (AB)*, para 587.

[1010] *US-Gambling (AB)*, para 304. See also *Argentina-Goods and Services (Panel)*, para 7.658.

[1011] *US-Gambling (AB)*, para 304.

identification of a measure's objective[1012] or the DLoP[1013]. The AB has consistently recognised that neither the threat nor the protectiveness of a measure must necessarily be assessed in quantitative terms, but that a qualitative analysis can suffice.[1014]

On first sight, it may appear that review is more deferential concerning the question of whether a measure's objective counts as permissible, and less so as regards the remaining elements. For instance, the panel in *EC-Sardines* considered that 'the TBT, like the GATT 1994, ... accords a degree of deference with respect to the domestic policy objectives which Members wish to pursue' and that 'at the same time ... shows less deference to the means which Members choose to employ to achieve their domestic policy goals.'[1015] The statement concerning the measure's objective, however, does not in fact relate to the standard of review or proof at all (even though it uses the language of deference), but to the legal question concerning the 'end-setting discretion' provided to states by the definition of permissible objectives.[1016] As mentioned above, standards of review and proof have no relevance for legal questions.[1017]

Against this general backdrop, the panels and AB have tackled the problems of counterfactual analysis and (scientific) uncertainty in some detail. Four particular lines of case-law are of interest in this regard. First, in *Brazil-Tyres*, the AB reflected on the possibility of accurately assessing the protective effect of a measure,[1018] noting that for certain measures '[in] the short-

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[1012] *US-COOL (AB)*, para 371; *US-Tuna II (AB)*, para 314; *Colombia-Textiles (Panel)*, para 7.296; *EC-Seal Products (Panel)*, para 7.378.

[1013] See *India-Agricultural (AB)*, paras 5.220-5.221.

[1014] *EC-Asbestos (AB)*, para 167; *Brazil-Tyres (AB)*, para 146.

[1015] *EC-Sardines (Panel)*, para 7.120. See also *US-Gambling (Panel)*, para 6.461; *US-COOL (AB)*, para 440; *China-Raw Materials (Panel)*, para 7.479; *EC-Seal Products (Panel)*, para 7.381, explaining that states 'are afforded a certain degree of discretion in defining the scope of "public morals" with respect to various values prevailing in their societies at a given time'; Sykes, 'Economic Necessity', 303-304.

[1016] Factual question: what is a measure's objective? Legal question: does this objective fall within the set of permissible objectives?

[1017] See section 3.1.4.

[1018] The AB explained generally that '[t]he selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought [and] ultimately also depends on

term, it may prove difficult to isolate the contribution ... of one specific measure from those attributable to the other measures that are part of the same comprehensive policy' and that 'the results obtained from certain actions ... can only be evaluated with the benefit of time'.[1019] Accordingly, where a measure's protective impact cannot be readily observed, it is the 'aptness' or 'suitability' of the measure to produce that effect which becomes crucial.[1020] One of the consequences of focusing on aptness is naturally that the comparison of the challenged measure with possible alternatives must then focus on whether an alternative is 'at least as apt to contribute to the objective' as the challenged measure.[1021] The AB outlined that demonstrating aptness 'could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence' – in other words, demonstrating aptness relies on counterfactual prediction.[1022] In the final analysis, the focus on aptness rather than concrete effect in at least some circumstances can be seen as a concession by the AB to the limitations of counterfactual analysis.

Second, the need for counterfactual analysis is even more prominent as regards possible alternatives, which are by their very nature 'hypothetical'[1023] because 'they do not yet exist in the Member in question, or at least not in the particular form proposed by the complainant'[1024]. In *US-COOL 21.5*, the AB again took the limits of counterfactual reasoning into account and

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the nature, quantity, and quality of evidence existing at the time the analysis is made' (*Brazil-Tyres (AB)*, para 145). In *Colombia-Ports (Panel)*, para 7.580, the Panel implied that providing an adequate methodology forms part of the respondent's burden of proof.

[1019] *Brazil-Tyres (AB)*, para 151. For similar considerations about observability of effect, see already *US-Gasoline (AB)*, 21.

[1020] The AB used the terms 'apt' (*Brazil-Tyres (AB)*, paras 150-152, 154) and 'likely' (ibid, paras 149, 155), apparently interchangeably.

[1021] *US-Tuna II (Panel)*, para 7.577. See also *Brazil-Tyres (AB)*, para 174.

[1022] *Brazil-Tyres (AB)*, para 151. Such qualitative reasoning may, to give one example, be causal reasoning by analogy (see *Korea-Beef (AB)*, para 170).

[1023] *Australia-Apples (AB)*, para 363.

[1024] *US-COOL 21.5 (AB)*, para 5.328.

considered that the hypothetical nature of alternatives should 'inform the nature and degree of evidence required to establish the "reasonable availability" of proposed alternative measures in making a *prima facie* case under Article 2.2 of the TBT.'[1025] While the panel had held that 'adequately explaining how an alternative measure would be implemented is an essential part of the complainants' burden',[1026] the AB translated its concerns over the hypothetical nature of alternatives into practical guidance by holding that under Article 2.2 TBT 'complainants can[not] be expected to provide complete and exhaustive descriptions of the alternative measures they propose'[1027] and must not 'provide detailed information on how a proposed alternative would be implemented by the respondent in practice'[1028]. The AB thus rather substantially eased the burden imposed on the complainant, which in effect comes close to equating the mere identification of alternatives (required with respect to affirmative defences) and making out a *prima facie* case (required with respect to self-standing obligations).

Third, still in *US-COOL 21.5*, the AB considered that in assessing whether the challenged measure and a proposed alternative provide equivalent degrees of protection, '[s]ome imprecision ... may be inevitable in certain circumstances', but held that such imprecision cannot relieve the panel of making the required assessments.[1029] While this clarification relates, on its face, to the responsibilities of a panel,[1030] it may also have some relevance for the standards of proof and review. After all, the persistence of imprecisions could quite simply be taken as the failure of the party bearing the burden of proof to establish the facts underpinning its case to the required

[1025] Ibid, para 5.328.

[1026] *US-COOL 21.5 (Panel)*, para 7.586.

[1027] *US-COOL 21.5 (AB)*, para 5.334.

[1028] Ibid, para 5.338.

[1029] Ibid, paras 5.216, 5.218

[1030] In the actual case the panel had concluded that it could not properly assess a certain factor and decided to leave its analysis incomplete. See *US-COOL 21.5 (Panel)*, para 7.424.

standard. In this light, the AB's insistence that the panel assess all factors despite imprecision could be seen as lowering the applicable standards where full precision cannot be achieved.

Finally, there is the issue of (scientific) uncertainty in the face of expert disagreement. Rather than echoing the ICJ's apparent insistence on the 'better science',[1031] the panels and AB have opted for a more nuanced approach.[1032] In its seminal *EC-Hormones* report, the AB first considered that 'responsible, representative governments commonly act from perspectives of prudence and precaution' [1033] and must not necessarily, in identifying a threat, rely on '"mainstream" scientific opinion', but 'may act in good faith on the basis of what ... may be a divergent opinion coming from qualified and respected sources.'[1034] In *US-Continued Suspension* the AB elaborated that when relying on a minority opinion, this opinion 'must be considered to be legitimate science according to the standards of the relevant scientific community.'[1035] In essence, the AB thus accepted that a threat is established where a threat assessment is supported by any legitimate science, relieving it of the need to decide which of two legitimate scientific opinions is 'better'.[1036] While the AB's approach does not solve all the problems (in particular determining the boundaries of legitimate science),[1037] it significantly eases the strain on the state asserting the

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[1031] See section 4.1.3. In *Australia-Salmon (Panel)*, para 8.41, the panel stressed that it would not 'impose any scientific opinion on Australia'. In *US-Products from Argentina (Panel)*, para 7.321, the panel held that it was not its task 'to substitute our own judgement for that of the United States or determine whether the science relied upon was actually "correct".'

[1032] The AB's explanation mostly relate to Article 5.1 SPS, enshrining the obligation to carry out a risk assessment. They are nevertheless of relevance for the present analysis, as under the SPS the existence of a threat is indeed demonstrated by means of a risk assessment in keeping with Article 5.1 SPS (see, to this effect, *US-Poultry (Panel)*, para 7.335). In any event, the approach was extended to Article XX GATT (*EC-Asbestos (AB)*, para 178), where no obligation equivalent to Article 5.1 SPS exists.

[1033] *EC-Hormones (AB)*, para 124.

[1034] Ibid, para 194. See also *EC-Asbestos (AB)*, para 178; *US-Continued Suspension (Panel)*, para 7.633. There are, however, some doubts as to how serious the AB took its own pronouncement (see Button, *Power to Protect*, 68).

[1035] *US-Continued Suspension (AB)*, para 591; see also ibid, para 590.

[1036] *Australia-Apples (AB)*, para 220; *India-Agricultural (AB)*, para 5.28. On the requirements of 'legitimate science', see *Australia-Salmon 21.5 (Panel)*, paras 7.47-7.51. See generally on the advantages of scientific process over substance, Schropp, 'Commentary', 212-214.

[1037] See only Button, *Power to Protect*, 158; Howse, 'Democracy', 2343; and generally Foster, *Science*, 10.

existence of a threat and provides reasonable guidance as regards situations of scientific disagreement and imperfect causal knowledge. This approach, even though on its face it only addresses the element of threat, would appear applicable to all factual elements the proof of which requires recourse to scientific knowledge.

4.3.4. Conclusion

In summary, there is no doubt that invocations of Articles XX GATT, XIV GATS, 5.6 SPS, and 2.2 TBT (as well as Articles XXI GATT and XIV*bis* GATS) are justiciable, which also renders the necessity and proportionality of challenged measures subject to review. The burden of proof concerning the required facts is generally on the respondent where affirmative defences are concerned and on the complainant where compliance with autonomous obligations is at issue. With respect to the availability of alternatives, however, the initial burden to identify an alternative (affirmative defences) or prove its availability on a *prima facie* basis (obligations) is always on the complainant. In terms of standards of review and proof applicable to factual assertions, the case-law has rejected both *de novo* assessments and full deference, but rather opted for an objective assessment, which is neither particularly strict nor lenient. Furthermore, the case-law is cognisant of difficulties connected to counterfactual prediction and (scientific) uncertainty, and has introduced various provisions for easing the burden under appropriate circumstances.

5. Conclusion on judicial review of necessity and proportionality

5.1. Results

The empirical survey has once again revealed partial convergence and partial divergence in the surveyed rules. First, under all the rules analysed in this thesis, both necessity and proportionality are justiciable. As Gazzini, Werner, and Dekker noted, '[i]f one issue concerning the measures adopted on grounds of necessity [in different regimes] is undisputed, this is the

judicial review that a tribunal or other competent body may exercise over them.'[1038] Incidentally, the survey also noted that even rules enshrining a self-judging element are not altogether excluded from judicial review, but rather subject to a lenient good-faith standard.

Second, the allocation of the burden of proof generally follows the principle of *onus probandi incumbit actori*. It was noted that this causes certain problems as regards the absence of alternatives, as having to prove this would amount to requiring the acting state to prove a negative fact. So far only the WTO judiciary has acted on this insight and partially reversed the burden of proof as regards the availability of alternatives, imposing a duty to identify such alternatives on the complaining party.

Third, the standards or review and proof so far applied to facts in cases involving the State of Necessity and self-defence were strict, requiring high levels of proof while rejecting deference to the acting state. It was again noted that in the context of counterfactual prediction, which forms an inherent part of necessity and proportionality analyses, such strict evidentiary standards can effectively render the State of Necessity and self-defence unavailable. However, at least as regards self-defence it was suggested that the strict standard applied in the cases that heretofore reached the ICJ may be due to the particular scenarios confronting the Court, and that more lenience might be expected in other circumstances. The WTO panels and AB, finally, have applied an 'objective' standard of factual review, that rejected openly deferential review but is also not as strict as that seen with respect to, eg, the State of Necessity. In addition, the WTO judiciary has made provisions for dealing with the difficulties arising out of counterfactual prediction and (scientific) uncertainty.

The variance between the various rules, in particular with respect to the standards of review and proof, reflects a different preference for type I or type II errors.[1039] Thus, as regards

[1038] Gazzini *et al*, 'Necessity Across', 8.

[1039] See section 3.3.

the State of Necessity and self-defence, the courts have so far displayed a clear preference for type II errors (false negatives), whereas the WTO judiciary appears to lean slightly more towards type I errors (false positives). The explanation may well be that in the WTO context, the weight allocated to the protectiveness of a measure appears generally higher than the weight allocated to the harmfulness.[1040] In contrast, the interests exposed to harm in self-defence and the dangers of abuse connected to the State of Necessity may justify preference for type II errors.[1041] Finally, as suggested above, the strictness of factual review of self-defence may well depend on the degree to which the state subject to defensive force has made itself liable to suffering such force.[1042] This would fit the same logic, as the degree of liability determines to which degree the harm is discounted, reducing its normative weight.[1043]

The preference for type I or type II errors also has significance for a question broadly related to review, namely whether a reviewing court should take only information into account that was available when the state adopted the challenged measure or should take advantage of hindsight. The question has particular relevance when it turns out *ex post* that on the basis of the evidence available *ex ante*, the acting state's assessment was mistaken.

The question is of no importance in WTO law, where the limitation to prospective remedies (see n.360) means that 'only the evidence submitted at the time of the panel proceedings matters' (Pauwelyn, 'SPS Measures', 649). It has however been debated in the State of Necessity and self-defence contexts, where some scholars plead in favour of limiting review to evidence available at the time of the challenged measure's adoption (eg, Kent and Harrington, 'Necessity', 255; Kaye, 'Adjudicating', 176; Moir, *Reappraising*, 58; Christodoulidou and Chainoglou, '*Jus Ad Bellum* Proportionality', 1198), while others advocate an objective assessment that does not condone 'mistaken self-defence' (Linnan, 'Iran Air', 334ff; see also Kammerhofer, 'Uncertainties', 173; Corten, *Law Against War*, 493). The former position implies a preference for type I errors, while the latter implies the opposite.

Practice provides little guidance on which position is correct *de lege lata*; it has been noted, however, that for example the Court in *Oil Platforms* 'evidently examined the evidence as it saw it in 2003, not as U.S. decisionmakers may have seen it in 1987 and 1988' (Kaye, 'Adjudicating', 139). At least in *Oil Platforms* the Court's treatment of the evidence coincides with its generally strict, objective factual review, which suggests that the Court followed a comprehensive preference in favour of type II errors. A tentative generalisation of this position would suggest that determining which evidence to taken into account depends on the general preference for type I or type II errors adopted by the reviewing court as regards the particular case.

[1040] See chapter II, section 3.3.3., where this was suggested as an explanation why no measure has so far been found to be disproportionate in the WTO context.

[1041] See Kaye, 'Adjudicating', 168: 'As a matter of policy, one could take the position that, when a state uses force, it takes the risk of being wrong – of misperceiving facts or misinterpreting law. In order to limit the recourse to force, the burden of proof for the self-defense claimant must be high to discourage its use.' See also *Oil Platforms* (Kooijmans), paras 46, 54.

[1042] See section 4.2.3.

[1043] See chapter II, section 3.2.3.

Putting it in the abstract, the underlying logic would appear to be that factual review tends to be more lenient where the harm to be justified has a low normative weight, whereas review of facts is stricter where the harm is weighty (ie, where it relates to a particularly important interest).[1044] The mirror image is that where the objective sought is particularly important, review may well be more lenient, compared to review of measures that seek to protect a somewhat less important objective.[1045] In this sense, while the surveyed rules differ in the standards they apply, they appear to be following the same underlying logic.

It can thus be concluded that as regards justiciability, the general principle of *onus probandi incumbit actori*, and the underlying logic determining the intensity of review and standard of proof, unity exists across the surveyed rules.

5.2. Further development

Beyond the above conclusion, it can further be asked whether lessons learned in one context can be extended to another, and whether other factors should be taken into account in determining the intensity of review. The following suggestions have not yet manifested themselves in the jurisprudence and are thus here discussed only *de lege ferenda*.

Concerning the first point, possibly the most visible difference between procedural rules applicable to the State of Necessity and self-defence on the one hand, and WTO rules on the other hand, is the imposition of at least a partial burden of proof on the complainant in the case of Articles XX GATT and XIV GATS. In principle, the reasoning that led the AB in *US-Gambling* to occasion this shift is applicable to the other contexts as well.[1046] While a similar shift

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[1044] See only Alexy's 'epistemic Law of Balancing' (Alexy, *A Theory*, 418ff); Rivers, 'Second Law of Balancing', 170; Rivers, 'Variable Intensity', 177. See also Ragni, 'Standard of Review', 325.

[1045] See Peel, 'Apples and Oranges', 452: 'It is striking that the cases where the Appellate Body has adopted a more deferential stance have been those involving human health risks (cancer potentially caused by residues of growth hormones in beef), whereas the standard of review has uniformly been more stringently applied in phytosanitary quarantine cases.' The same logic can be found underlying the ICJ's approach to granting preliminary measures (see Del Mar, 'Standards of Proof', 118).

[1046] See Rivers, 'Presumption', 425, stating the point generally. For a different opinion as regards investment law see Schill, 'Economic Crises', 280-281.

has not taken place under the other surveyed rules,[1047] it would be the logical next step for this approach to gain prominence in other contexts as well.[1048] It would relieve the invoking state of having to prove a negative fact, without at the same time unduly burdening the complainant (as identification rather than *prima facie* proof of the availability of alternatives is enough).[1049]

Second, the provisions made by the WTO judiciary for dealing with the intricacies of counterfactuality and (scientific) uncertainty can be a useful guide in other contexts as well. For instance, the ICJ's misguided approach to science in the *Gabcikovo* case should be revised taking inspiration from the AB's *EC-Hormones* report, shifting the focus away from seeking to identify the 'better' science and towards demanding the establishment of the required facts on the basis of 'legitimate science'.

Moving on to further possible developments, the circumstances under which a measure has been adopted could be taken into account in determining the appropriate intensity of factual review. After all, when faced with a situation that leaves 'no moment for deliberation'[1050], it may be asked whether it can sensibly be expected of a state to carefully consider all options and investigate an unlimited number of possible alternatives. Thus, it might be supposed that measures taken in the face of a temporally proximate emergency could benefit from more lenient factual review, whereas a more demanding review could be carried out where the acting state had time to investigate all facts more carefully.[1051] Similarly, after an emergency or defensive measure

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[1047] There are, however, very careful tendencies in this direction in *Total*, para 223; *Enron Annulment*, para 367. In both cases the tribunal and committee, respectively, stressed that they assessed the alternatives proposed by the claimants.

[1048] Parish, 'On Necessity', 183-84, proposed just that with respect to the State of Necessity. Muchlinski, 'Trends', 71, goes in this direction as regards NPM clauses. See further also Forji, 'Drawing Lessons', 55. Arguments going in the same direction have also been voiced as regards human right law (see Brems and Lavrysen, 'Less Restrictive Means', 151). Critically Foster, *Science*, 223.

[1049] In the context of self-defence, where the aggressor's own attitude and plans are a prominent factor, more than the mere identification of an alternative might be required.

[1050] *Caroline*, 222.

[1051] Going in this direction see *Finogenov*, para 213, discussed in Skinner, 'Lethal Force Cases'. See also again *Continental Casualty*, para 181: 'a time of grave crisis is not the time for nice judgments, particularly when examined by

has been adopted, the longer the measure stays in place, the stricter the factual review could become, as the acting state would have had time to either gather and generate supporting evidence, or modify the measure if it emerges that a less harmful yet equally effective alternative is available.[1052]

In addition, the procedure followed by the acting state in choosing the challenged measure may make a difference.[1053] While necessity and proportionality generally do not impose certain procedures the acting state must follow,[1054] it should be clear that where a state has followed a procedure involving expert threat analysis and (factual) evaluation of various possible measures, it should be easier for the state to prove its factual assertions.[1055] Following a strict decision-making procedure already provides a certain safeguard against abuse. In contrast, where no such procedure has been followed, more could be required of the state to prove that its measure was not arbitrarily chosen.

6. Concluding remark on Part I: towards a unified necessity/proportionality standard in exception clauses across international law

Summing up the conclusions of chapters I-III,[1056] it results that the necessity/ proportionality standards enshrined in the surveyed rules indeed converge to a large extent, allowing the conclusion that the necessity/proportionality standard in exception clauses possesses

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others with the disadvantage [sic] of hindsight'; Kent and Harrington, 'Necessity', 253; Hayashi, 'Using Force', 21; Sornarajah, *Foreign Investment*, 463.

[1052] Going in this direction see Sykes, 'Economic Necessity', 320; and arguably Alvarez-Jiménez, 'Political Economy of Crises', 502. In the self-defence context Tams argued that 'the duration of a response plays an indicative role – the longer a state invokes its right of self-defence, the more credible must be its claim that further action against attacks or threats is indeed required' (Tams, 'Anti-Terrorist Self-Defence', 392).

[1053] Bohanes and Lockhart, 'Standard of Review', 384.

[1054] The prominent exception is the SPS, which requires a scientific risk assessment (Article 5.1 SPS). Another exception may be the obligation to exhaust other means, discussed in chapter I, section 7.4.2.

[1055] See Rivers, 'Presumption', 425: 'The more alternatives one has considered and rejected, the more confident one can be that a measure is necessary'; Brems and Lavrysen, 'Less Restrictive Means', 150.

[1056] See chapter I, section 8., chapter II, section 4., chapter III, section 5.

a rather determinate unified common core across international law. Centrally, the surveyed rules all enshrine a binary, complex comparative conception of necessity that operates with reference to the same essential elements, and enshrines the same fundamental decision logic. In addition, and with the exception of the SPS, all surveyed rules hold the challenged measure to the same global (teleological) proportionality standard, which functions with reference to the same fundamental considerations across the board. The invariable joint appearance of necessity and proportionality as twin conditions – regardless of whether there is a textual marker for both standards in each rule – justifies finding that one phenomenologically (as opposed to conceptually) implies the other. Finally, the necessity/proportionality standard is justiciable under each rule and there appears to be a common logic underlying all rules determining the standard of review/proof.

Beyond the structural overlap, the comparative analysis further revealed additional areas of overlap, for instance as regard the role played by inconvenience or the absence of requirements of temporal proximity, non-contribution, and payment of compensation as part of the necessity/proportionality standard. In addition, as regards areas currently still marked by divergence (such as the allocation of the burden of proof concerning the availability of alternatives), the common challenges facing each rule and the common logic of necessity/proportionality exert a strong pull for all the rules to develop in the same direction.

These important conclusions may be controversial. Indeed, most scholars who touched upon the issue of necessity/proportionality from a comparative perspective stressed the differences in the various contexts.[1057] However, none of the doctrinal analyses so far provided invalidate the present findings. Apart from the general observation that no study so far approached the topic with the same comprehensive methodology as the present thesis – a fact

[1057] The notable exception being Montini, 'Necessity Principle', 138.

that generally casts doubt on the comparability of results –, this is so for the following specific reasons.

First, some analyses fail to appreciate the distinction between the State of Necessity and the necessity standard.[1058] Thus, when Desierto rejected a 'baseline definition of necessity in international law',[1059] she seemed to base this position on observations such as that 'the "necessity" *criterion* for self-defence … is in no way the conceptual equivalent of the *doctrine of necessity*',[1060] evidently comparing the necessity standard of self-defence with the State of Necessity as a self-standing rule.[1061]

Second, while the present thesis was only concerned with exception clauses, some other studies go much further, with the consequence that their results are not comparable. Thus, when Andenas and Zleptnig maintained that 'it is difficult to identify a coherent substantive content of proportionality across the whole range of public international law',[1062] this conclusion reaches beyond exception clauses and consequently cannot undermine the finding that exception clauses enshrine substantively the same proportionality standard across international law.

Third, scholars such as Burke-White and von Staden concluded that there are 'at least four distinct interpretations' that 'could well be considered an "ordinary meaning" of the term "necessary for"'.[1063] Close scrutiny, however, reveals that their findings rest on an endorsement of the literal reading of the 'only way' requirement that was rejected above,[1064] or treat the matter of

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[1058] On the distinction see Introduction, section 1.

[1059] Desierto, *Necessity*, 9.

[1060] Ibid, 25-26 (emphasis added).

[1061] Similar considerations apply to findings by Gazzini *et al*, 'Necessity Across', 9; Tomuschat, 'Conclusions Générales', 378.

[1062] Andenas and Zleptnig, 'Proportionality', 398. See also Newton and May, *Proportionality*, 3; and in contrast Mazzeschi, 'Book Review', 1035.

[1063] Burke-White and von Staden, 'Extraordinary Times', 343. See also von Staden, 'Doctrinal Clarity', 224.

[1064] See chapter I, section 6.2.1.

convergence in an all-or-nothing manner.[1065] Thus, for example, in reaching their conclusion they focus on differences in the respective standards of review.[1066] This thesis acknowledges such differences and excludes diverging elements from the core content of the unified necessity/ proportionality standard.

[1065] The former point applies also to Kurtz, 'Adjudging the Exceptional', 338, and Kurtz, 'Delineating', 236, who read the 'only way' test too literally. He further supported this conclusion with a misguided reading of *Nicaragua* (compare ibid, 243, and *Nicaragua*, para 176).

[1066] Burke-White and von Staden, 'Extraordinary Times', 344ff.

PART II

IV. CROSS-INTERPRETING NECESSITY/PROPORTIONALITY

1. Introduction: using the standard's unified core to interpret necessity/proportionality

This thesis set out with various purposes in mind.[1067] Among them, it sought to explore commonalities and differences between the necessity and proportionality standards as enshrined in the surveyed rules, as well as in how compliance therewith is reviewed by international courts, with a view to revealing whether and to what extent it is possibly to speak of a unified core necessity/proportionality standard. This task was pursued in chapters I-III, which concluded that there is indeed far-reaching unity across the surveyed rules. A further purpose was to understand whether and to which degree such a unified core could be used for the purpose of solving interpretative dilemmas related to the necessity/proportionality standard by means of cross-interpretation. More particularly, it was asked whether a unified core could help to overcome difficulties which both the ICJ and multiple investment arbitration tribunals encountered in interpreting necessity/proportionality in NPM clauses in FCN treaties and BITs.

It is to these questions that the thesis turns in this chapter. It sets out by first discussing whether the (customary) rules of treaty interpretation encoded in the VCLT allow the cross-interpretation of necessity/proportionality appearing in a given exception clause by reference to the unified core of necessity/proportionality (section 2). Second, the chapter uses the example[1068] of NPM clauses to explore the utility of such cross-interpretation to overcome the interpretative challenges posed by the presence of unspecified necessity/proportionality conditions in exception clauses (section 3).

[1067] See Introduction, section 2.

[1068] The approach would also, in principle, be applicable to other exception clauses, such as those mentioned in n.42-44. It may further be useful outside the exception clause context as well (see section 4).

2. Interpreting necessity/proportionality: the potential of the unified necessity/proportionality standard under the rules of interpretation

Chapters I-III of this thesis revealed that the substantive content of necessity and proportionality, as well as the applicable procedural rules, are unified to a large extent across the surveyed rules. This revelation of a unified core of the necessity/proportionality standard raises an intriguing question: where a treaty clause relies on a given concept, can this concept be interpreted with reference to the unified core of the same concept across other parts of international law? Against this background, it can be asked whether reference to the unified core of necessity/proportionality can provide a basis for the cross-interpretation of an unspecified necessity/proportionality standard in a given exception clause.

The present section commences this inquiry by exploring whether reference to a unified standard is justifiable under the (customary) rules of treaty interpretation as enshrined in the VCLT. The two possible rules of interpretation pursuant to which this might be possible, and which must accordingly be analysed, are those referring to the ordinary meaning (section 2.1.) and the principle of systemic integration (section 2.2.).

2.1. The unified standard and ordinary (legal) meaning

The first – and most straightforward – strategy to fill a given term appearing in a treaty clause with content is to look for its 'ordinary meaning' (Article 31(1) VCLT). As regards necessity/proportionality, the problem arises that in the context of legal rules both embody rather complex concepts, and the 'ordinary' content of such complex concepts can often not readily be discerned simply by looking up the terms in a dictionary.[1069] The problems faced by the

[1069] Perspectives in the literature differ. Some scholars maintained that '"[n]ecessity" 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' (Mitchell and Henckels, 'Variations', 98; see also Kurtz, 'Adjudging the Exceptional', 337; Kurtz, 'Delineating', 236), while others argued that the term at least suggests a 'natural' meaning (see Regan, 'Meaning of "Necessary"', 348; Bown and Trachtman, 'Brazil - Tyres', 130; Regan, 'Exceptions to the Rules', 212).

ICJ and various investment arbitration tribunals in filling the term 'necessary' in NPM clauses with content, analysed in detail in section 3 below, is illustrative in this regard.

How then could the ordinary content of the necessity/proportionality standard be determined? The key is a small shift of focus: rather than first looking for the ordinary (dictionary) meaning of the terms necessary/proportionate and second operationalizing it in a legal context, it makes much more sense to look for the 'ordinary legal meaning'[1070] straight away.[1071] To identify how the terms necessary/proportionate are ordinarily used specifically in a legal context, the intuitive approach is to look at their meaning across other rules. Indeed, external rules may be referred to in the interpretation of a term where they are 'evidence of the common understanding of the parties as to the meaning of the term used'[1072] or 'reflect the "ordinary meaning" of a … treaty term'.[1073] In this sense, the interpreter would use the external rule as a 'rather elaborate law dictionary.'[1074] Lauterpacht eloquently explained the rationale behind treating external rules in this way:

> the doctrine of 'plain meaning' properly understood may be of pronounced helpfulness in the matter of interpretation of technical terms. Treaties are legal documents which as a rule are drawn up by legal experts or by persons availing themselves of legal advice. In view of this it must be assumed that whenever parties have recourse to terms which in legal terminology have an accepted connotation, they intend to use them in their technical, that is to say, in their ordinary legal meaning. This is a presumption which can be rebutted by cogent considerations ... However, in the absence of such proof to the contrary, technical terms must be deemed to have been resorted to as such.[1075]

[1070] This expression is borrowed from Lauterpacht, *Development*, 59-60.

[1071] See also Linderfalk's discussion of a term's 'technical meaning' as informing its 'ordinary meaning' (Linderfalk, *Interpretation of Treaties*, 65ff, 182). Simma and Kill noted that a given term in a treaty may be a 'known quantity' within public international law (Simma and Kill, 'Harmonizing', 683).

[1072] MacLachlan, 'Systemic Integration', 315.

[1073] Pauwelyn, *Conflict of Norms*, 260. See also *EC-Biotech (Panel)*, para 7.92; ILC, *Fragmentation Report*, paras 445-450; Van Aaken, 'Control Mechanisms', 421; Paparinskis, 'Treaty Interpretation', 78. For some critical remarks, see Flett, 'Importing', 296f.

[1074] MacLachlan, 'Systemic Integration', 315. See again also *EC-Biotech (Panel)*, para 7.92.

[1075] Lauterpacht, *Development*, 59-60. Similarly, MacLachlan, 'Systemic Integration', 283-284, spoke of a legal 'lexicon' that each state brings with it to the negotiation table.

Interpreting treaty terms with reference to other rules can thus serve to illuminate their ordinary legal meaning in a given legal system. When multiple external rules are in principle capable of informing the ordinary legal meaning of a term, this raises the problem of which external rule to refer to.[1076] In addition, it may be asked whether it even makes sense to speak of an ordinary legal meaning when various external rules differ with respect to the meaning of a particular term in at least some respect. It is against the backdrop of these questions that the distinct advantage of cross-interpretation with reference to the unified core of a concept like necessity/proportionality across other parts of international law becomes visible. The common unified core of necessity/proportionality was identified by comparative analysis of how this concept operates in multiple rules taken from various contexts. Thus, since the unified core is common to all the rules from which it is inductively derived, cross-interpretation with reference to the unified core requires no choice of which external rule to refer to. At the same time, precisely because the unified core converges across international law, it makes intuitive sense to speak of its ordinary legal meaning in this regard. The non-unified elements, on the other hand, are not reflective of the ordinary meaning, and could thus only be cross-interpreted from any particular external rule on the back of additional justification.

Referring to external rules with a view to deriving a treaty term's ordinary legal meaning may raise the question whether such cross-interpretation should not more properly be undertaken under Article 31(3)(c) VCLT, which in contrast to Article 31(1) VCLT explicitly mandates reference to external rules. It cannot be supposed, however, that the existence of Article 31(3)(c) VCLT should bar reference to external rules under Article 31(1) VCLT. Despite a close connection,[1077] the two rules have different ambits: Article 31(3)(c) mandates reference to external rules only where they are 'applicable in the relations between the parties' and relies on a

[1076] See in this respect also section 3.2. below.

[1077] The close connection between Articles 31(1) and 31(3)(c) VCLT is highlighted by the fact that the latter was originally included in the former (ILC, *1966 Commentary*, Article 27, para 16). See also Samson, 'High Hopes', 711-712; and Orellana Zabalza, *Systemic Integration*, 245.

number of formal criteria, while the 'ordinary meaning' approach makes reference to external rules because they may be expressive of how a treaty term is ordinarily understood in law. Young explained the difference well by pointing out that '"ordinary meaning" is not a matter of consent, but rather of intersubjectivity' and that '[m]eaning in language is not dependent on the consent of participants'.[1078]

The different ambits also mean that referring to external rules as evidence of ordinary meaning rather than as a formal application of Article 31(3)(c) VCLT[1079] has the distinct advantage that the formal requirements of that article can largely be ignored.[1080] For instance, an external rule may still be evidence of the ordinary legal meaning of a term even when that rule is not formally applicable between the parties of the treaty under interpretation. In the same vein, it is also clear that the external reference point does not require a formal normative status of any kind.[1081] An illustrative example of interpreting a term's ordinary meaning by reference to external rules can be found in the AB's *US-Shrimp* report. As Pauwelyn pointed out, in interpreting the phrase 'exhaustible natural resources' in Article XX(g) GATT, the AB 'referred to outside instruments that were *not* legally binding ... or not binding on *all* WTO members ... or even on all disputing parties in the WTO case before it ...'.[1082]

The foregoing is not meant to say that cross-interpretation of a term/concept in a given treaty rule with reference to the unified core meaning of that term/concept across other parts of international law is only possible under the ordinary meaning approach, but not under Article

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[1078] Young, 'The Biotech Case', 919.

[1079] See Van Damme, 'Some Observations', 29, 36.

[1080] The reliance on the 'ordinary meaning' has been criticised precisely because of this circumventing effect (see Matz-Lück, 'Norm Interpretation', 229; Dörr, 'Article 31', 567). Carstens argued that reference to Article 31(3)(c) is a 'more consistent basis' for cross-interpretation than the 'ordinary meaning' approach, which should be used with caution (Carstens, 'Transplanted Treaty Rules', 240).

[1081] See Pauwelyn, *Conflict of Norms*, 260.

[1082] Pauwelyn, 'Interplay', 9 (emphasis in the original, internal footnotes omitted), referring to *US-Shrimp (AB)*, paras 130, 132.

31(3)(c) VCLT. In fact, as the following section demonstrates, Article 31(3)(c) VCLT constitutes a second possible avenue – albeit a less straightforward and likely more controversial one – to bring cross-interpretation with reference to unified core concepts within the scope of the VCLT's rules of interpretation.

2.2. The unified standard and the systemic integration

The 'rarely invoked'[1083] Article 31(3)(c) VCLT incorporates the principle of 'systemic integration'[1084]. It provides that '[t]here shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties'.[1085] It is of particular interest here that Article 31(3)(c) VCLT can serve as a tool to fill gaps in a treaty or give meaning to unclear terms.[1086]

Article 31(3)(c) only allows recourse to 'relevant rules of international law applicable ... between the parties'. To know whether this rule allows reference to the unified necessity/proportionality standard to interpret necessity/proportionality in particular provisions (like the NPM clauses discussed below), it must then be examined whether that unified standard is 'a rule of international law', whether it is 'relevant', and whether it is 'applicable ... between the parties'.[1087]

[1083] Sands, 'Cross-Fertilization', 87.

[1084] MacLachlan, 'Systemic Integration', 280.

[1085] According to Klabbers Article 31(3)(c) VCLT 'aims to keep the system [of the law of treaties] hanging together by making sure that everything relates to everything else' (Klabbers, 'Reluctant Grundnorm', 157). Article 31(3)(c) may express a broader underlying principle, expressed thus by the ICJ in the *Namibia* opinion: 'An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation' (*Namibia*, para 53).

[1086] *Amoco*, para 112. See further Gardiner, *Treaty Interpretation*, 281-87; Matz-Lück, 'Harmonization', 50. In fact, the ICJ in *Oil Platforms* explicitly invoked Article 31(3)(c) VCLT to underpin its interpretative reference to self-defence law in order to fill the perceived gap with respect to the meaning of 'necessary' in the NPM clause (*Oil Platforms*, para 41). For more details on the ICJ's interpretative approach see below, section 3.2.1.

[1087] On the different elements of Article 31(3)(c) VCLT see MacLachlan, 'Systemic Integration', 290-291; McGrady, 'Fragmentation', 591.

2.2.1. Rules of international law

Article 31(3)(c) VCLT allows reference to custom, conventional rules and general principles, thus covering the traditional sources[1088] of international law.[1089] From the outset it cannot be doubted that the customary rules on self-defence and the State of Necessity on the one hand, and the treaty rules under the GATT, GATS, TBT, and SPS on the other hand, are rules of international law. More difficult is the question whether the unified standard identified in chapters I-III must have a normative status of its own in order to be available as a reference point under Article 31(3)(c) VCLT.

It can well be argued that the unified standard does not strictly need a normative status of its own. Reference to the unified core can be formally based on reference to the individual rules underlying it. It is inherent in the very notion of the unified standard that it is enshrined in each one of the individual rules from which it was derived by means of comparative induction, and thus originally derives its normative force from those individual rules. If, however, the requisite normative force is that of the underlying individual rules, two follow-up questions must be posed: first, considering that non-unified elements are not counted towards the unified core standard, what would be the justification for only 'importing' the unified elements if reference to the unified core standard is in the end just a short-hand for reference to the underlying rules? If limiting oneself to the unified elements is not justifiable, the question of which external rule to refer to reappears, since with respect to the non-unified elements the rules here analysed differ *per definitionem*. Second, if not all the origin rules are 'applicable ... between the parties',[1090] would this mean that all the elements shared by those rules that are applicable can be transposed, taking into account that the overlap would tend to increase with a decrease of the number of rules taken into account?

[1088] See Article 38(1) ICJ Statute.

[1089] See *EC-Biotech (Panel)*, para 7.67; Linderfalk, *Interpretation of Treaties*, 178; Bücheler, *Proportionality*, 99.

[1090] On applicability see section 2.2.3.

Ultimately, however, these follow-up questions do not pose significant problems, since it can be maintained that even if the formal reference goes to the underlying rules (or, depending on the circumstances, only some of them) rather than the unified core standard itself, transposing only the unified elements is still possible. The analysis carried out in chapters I-III sought to separate the unified core standard from more context- and rule-dependent elements, attempting in each case to explain variation as regard to the non-unified elements across the surveyed rules. The consequence of this approach is that while transposition of the unified core standard is in principle always possible,[1091] transposing the non-unified elements requires context-specific justification. The flip-side is that an interpreter must be free to accept the unified elements, but reject some or all of the non-unified elements enshrined in a given rule because they do not 'fit' the target rule.[1092] Thus, even with a single applicable external rule that has an established normative status, it is possible to interpret the target rule with reference to the unified core, without there being a need to transpose all non-unified elements as well or justify the choice of one origin rule over another.

In light of this conclusion (that the unified core does not need a normative status of its own in order to be available for cross-interpretation) it is not necessary to engage with the wider discussion of whether the unified core of necessity/proportionality has a normative status of its own, for example as a general principles of law.[1093]

[1091] On limits to transposability, see section 2.4.

[1092] On considerations of 'fit', see sections 2.4. and 3.4.1.

[1093] Numerous scholars assert that some form of necessity/proportionality amounts to a general principle of (international) law: Gardam, 'Necessity and Proportionality', 275; Franck, 'Proportionality of Countermeasures', 716; Delbrück, 'Proportionality', 1144; Montini, 'Necessity Principle', 136ff; Montini, 'Nature and Function', 129; Subramanian, 'Too Similar', 73; Kingsbury and Schill, 'Investor-State Arbitration as Governance', 24; Mitchell, 'Proportionality and Remedies in WTO Disputes', 1008; Mitchell, *Legal Principles in WTO Disputes*, 190. See also Heathcote, 'State of Necessity', 373; Buza, 'Necessity', 214. More doubtful: Higgins, *Problems and Processes*, 236; Corten, 'Necessity', 862: Alvarez, 'Beware: Boundary Crossings', 28.

2.2.2. Relevance

As regards relevance,[1094] it has been submitted that the external rule's 'subject matter' must be 'related' to that of the rule under interpretation.[1095] This reading could undermine Article 31(3)(c) VCLT's utility in cross-interpreting the necessity/proportionality standard, since it is not at all obvious that, for example, the rules on the State of Necessity or self-defence are 'related' to a NPM clause in a BIT or FCN treaty in the sense of having the same subject matter.[1096] The arguably better interpretation of the relevance requirement, however, focuses not on the external rule's subject matter, but on whether the external rule has any 'bearing'[1097] on the *term* to be interpreted, whether it can provide 'operational guidance'[1098] in this regard.[1099] The point is then simply that the external rule must be actually helpful in making sense of the unclear term, in the sense that it can 'shed light on the meaning of the ... term'.[1100]

A direct consequence of the foregoing is that in effecting the relevant interpretation, reference can only be had to that part of the external rule that actually bears on the meaning of the term under interpretation. For the purpose of necessity/proportionality, Article 31(3)(c) VCLT then does not mandate *wholesale* importation of external rules,[1101] but only reference to the

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[1094] On relevance see generally Gardiner, *Treaty Interpretation*, 260; French, 'Treaty Interpretation', 304; Paparinskis, 'Treaty Interpretation', 71.

[1095] See Sands, 'Cross-Fertilization', 102; Orellana Zabalza, *Systemic Integration*, 271.

[1096] See Desierto, 'Supplementary Means', 910-11, 917; Alvarez, 'Beware: Boundary Crossings', 28.

[1097] *Mutual Assistance in Criminal Matters*, para 114.

[1098] Simma and Kill, 'Harmonizing', 696.

[1099] See, eg, McGrady, 'Fragmentation', 591; Pauwelyn, *Conflict of Norms*, 263-264; Villiger, *Commentary*, 433; Dörr, 'Article 31', 565.

[1100] Pauwelyn, *Conflict of Norms*, 264. In *Peru-Agricultural* the AB required the external rule to 'concern the same subject matter as the *treaty terms* being interpreted', which boils down to asking whether the external rules 'bear[] specifically upon the interpretation of a treaty' (*Peru-Agricultural (AB)*, para 5.101 (emphasis added)).

[1101] See also section 3.2.2. below, which critiques the reliance of international courts on just such *wholesale* importation of the entire set of legality conditions from an external rule.

necessity standard enshrined in those rules.[1102] It is hard to see how the other elements of the external rule could be relevant for the interpretation of the term 'necessary' in the target rule.

If multiple external rules are in principle relevant, which one should the interpreter resort to?[1103] Article 31(3)(c) VCLT provides no clear guidance where more than one rule is relevant,[1104] and neither the ILC 'nor scholarly work on systemic integration, have addressed the issue of precedence when reliance on customary international law and on another treaty rule are equally possible'.[1105] However, the question of choice only really poses a problem where two conditions are fulfilled: first, the various relevant rules entail different/conflicting standards that offer themselves for importation; and only importation of all elements of a necessity/proportionality standard (ie, unified and non-unified elements) in an all-or-nothing fashion is possible. Precisely this latter point was, however, rejected above, where it was argued that importation of only the unified elements, which are by definition shared between all the origin rules, is possible.[1106]

As regards the relevance of the unified core standard for interpreting the term 'necessary' in provisions like the NPM clauses discussed below, the initial question must again be whether the reference goes to the origin rules from which the unified core standard has been abstracted, or directly to the unified standard itself. In the first case, the origin rules need to be 'relevant'. It seems the State of Necessity, self-defence and the selected WTO rules can all be regarded as relevant, because they all contain a necessity/proportionality standard and are thus capable of giving content to terms such as 'necessary' or 'proportionate'. In the second case, the unified core must itself be 'relevant', and also here there appears to be little reason for doubt. Since the

[1102] Similarly Kurtz, 'Adjudging the Exceptional', 354.

[1103] See, eg, *Sempra Annulment*, para 201, where the annulment committee considered that it was not 'obvious' that the external rule to be referred to was the State of Necessity.

[1104] See French, 'Treaty Interpretation', 282. A treaty may, however, specify which external rule to refer to (MacLachlan, 'Investment Treaties', 399).

[1105] El-Hage, 'Argentine Cases', 477. This lack of regulation may well be seen as underlying the ICJ and arbitral tribunals' difficulty to justify their choice.

[1106] See section 2.2.1.

unified core derives from the content of the necessity/proportionality standards in the origin rules, for the purpose of cross-interpretation it is just as relevant as the origin rules themselves.

2.2.3. Applicable between the parties

The final question with respect to Article 31(3)(c) VCLT goes to the requirement that the external rule must be 'applicable'[1107] between the parties. This requirement causes no problems when the external rule is a customary one. Where an external conventional rule is at issue, though, some difficulties may emerge.[1108] While it is essentially agreed that the external rule must at least be in force between the two parties to the dispute, it is controversial whether it must also be in force for all other parties to the treaty under interpretation.[1109]

However, once again, for present purposes the party requirement does not pose significant difficulties. It was argued that to allow the reference to the unified core under Article 31(3)(c) VCLT, a single applicable origin rule is enough to make the unified core standard available for cross-interpretation. As both the State of Necessity and the rules on self-defence are customary in nature, at least those two rules are always applicable, which in turn means that the unified core standard is always available as a means of cross-interpretation.

2.3. Interim conclusion: the rules of interpretation allow cross-interpretation with reference to a unified necessity/proportionality standard

The interpretation rules enshrined in Articles 31(1) and 31(3)(c) VCLT allow cross-interpretation of treaties with reference to external rules. Under both provisions, recourse to the

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[1107] There is some controversy about the meaning of 'applicable', with some scholars maintaining it means that the parties must be 'legally bound' (eg, Dörr, 'Article 31', 567) and others arguing that the external rule must only have been 'implicitly accepted or tolerated' (Simma and Kill, 'Harmonizing', 698, cautioning however that the topic requires further research; see also Bücheler, *Proportionality*, 115)

[1108] As regards the interpretation of NPM clauses discussed below, the problem could thus, for instance, arise that reference to WTO rules is precluded because one party to the treaty containing the NPM clause is not a WTO member.

[1109] See discussions in *EC-Biotech (Panel)*, para 7.68; ILC, *Fragmentation Report*, paras 470ff; McGrady, 'Fragmentation', 595ff; Linderfalk, 'Parties'; Linderfalk, *Interpretation of Treaties*, 178; Samson, 'High Hopes'; Pauwelyn, *Conflict of Norms*, 259; Orellana Zabalza, *Systemic Integration*, 288ff; Young, 'The Biotech Case', 914ff; Howse, 'Use and Abuse', 34ff; Baetens, 'Muddling the Waters', 207ff; Bücheler, *Proportionality*, 112.

unified core standard of necessity/proportionality identified in chapters I-III is permissible in the interpretation of other treaty clauses containing the necessity/proportionality standard, with the 'ordinary (legal) meaning' approach under Article 31(1) being the more obvious choice.

This conclusion, however, leaves open within which exact perimeters cross-interpretation can take place. It is the precise 'mechanics' of cross-interpretation with reference to the unified necessity/proportionality standard to which the next section turns.

2.4. The mechanics of cross-interpretation with reference to a unified core standard: the parameters of transposition

The starting point for asking whether the unified core can be transposed into provisions containing a necessity/proportionality condition (like the NPM clauses discussed below) by means of interpretation is to ask whether, in creating the clause, the treaty drafters intended it to enshrine the 'ordinary legal meaning'. The central point is here to identify whether the parties intended the necessity/proportionality standard in the treaty to carry a particular meaning, either as a 'special meaning' in the sense of Article 31(4) VCLT or otherwise.[1110] Where such an intention can be established, the intended particular meaning must prevail and there is no room for resorting to the unified core standard.[1111] Where no special meaning is established, '[t]oute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente'.[1112] Thus, there are strong grounds for the presumption that unless a special meaning is established, the use of an unspecified necessity/proportionality standard in an exception clause indicates an integration of the necessity/proportionality standard's ordinary legal meaning. Accordingly, the unified elements of necessity/proportionality – ie, those forming part of the

[1110] A 'special meaning' would have to be proved by the state invoking it (see Gardiner, *Treaty Interpretation*, 295).

[1111] See MacLachlan, 'Investment Treaties', 399.

[1112] *Georges Pinson*, 422.

standard's ordinary legal meaning – can be imported by means of interpretation into treaty clauses otherwise silent on the content of necessity/proportionality.

The only caveat is that where it is clear that the contextual elements in the target treaty rule render importation of any element of the unified core inappropriate or nonsensical, the contextual element should prevail over the ordinary legal meaning and thus bar importation. For example, it was argued that a global proportionality test forms part of the unified necessity/proportionality standard.[1113] It is perfectly possible, however, that a particular treaty implies the complete exclusion of any form of proportionality. In such a case, the global proportionality test included in the unified necessity standard could not be transposed.

It is furthermore clear that non-unified elements cannot be automatically transposed. These elements depend on context and vary between the surveyed rules. Such elements could, nevertheless, be imported into the target rule if they 'fit', in the sense that the determinative contextual elements in the origin rule match those of the target rule. This importation would, however, not take place as part of the determination of the ordinary legal meaning of necessity/proportionality, but rather under Article 31(3)(c) VCLT. Taking together these considerations about transposition of both non-unified and unified elements, it is clear that the advocated approach is context-sensitive, in the former case as enabling transposition, in the latter as stopping it where appropriate.

This general approach to transposition is inspired by WTO jurisprudence, where essentially the same strategy has been applied to intra-regime cross-interpretation between Articles XX GATT, XIV GATS, 2.2 TBT, and 5.6 SPS. Panels and the AB have generally not hesitated to use findings with respect to the necessity standard in one provision in the interpretation of that standard in other provisions.[1114] For instance, the AB in *US-Gambling*

[1113] See chapter II, section 4.

[1114] See, eg, *US-COOL (Panel)*, para 7.667 (concerning a case under Article 2.2 TBT): 'we will also refer to the legal tests established under relevant provisions of other covered Agreements, including both Article XX of the GATT 1994 and Article 5.6 of the SPS Agreement, to the extent appropriate'; *India-Agricultural (AB)*, paras 7.605-7.613,

determined that its own jurisprudence on necessity in the context of Article XX GATT is relevant to the interpretation of necessity under Article XIV GATS, stressing that the provisions are structurally similar and use the same wording, 'notably the term "necessary"'.[1115] Also in the WTO context cross-interpretation and transposition are, however, not automatic, but rather context-sensitive. As the panel in *US-Clove Cigarettes* put it,

> a treaty interpreter should not automatically transpose jurisprudence developed in the context of one provision to another [but] must carefully consider any differences in the wording, context and purpose of different provisions, and assess the significance of any such differences.[1116]

After citing a few authorities that point towards overlap, the *US-Clove Cigarettes* panel allowed transposition because 'no aspect of the Article XX(b) [GATT] jurisprudence relating to the interpretation of the term "necessary" [was identified] that would be inapplicable to Article 2.2 [TBT].'[1117] Significantly, the panel did not consider differences in the rules' overall functions and burden of proof issues to be of any relevance, focusing only on the substantive content of the necessity standard itself.[1118] In *US-COOL*, the panel likewise recalled arguments advanced by the United States concerning differences in terminology and relating to the burden of proof, but ultimately held that 'the United States highlights the differences between these provisions without explaining why such differences render the legal test under Article XX [GATT] irrelevant for an analysis under Article 2.2 [TBT]'.[1119] Accordingly, in the final analysis the panels and the AB

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particularly para 7.612: 'the Panel is particularly mindful of the resonance of these common elements of "necessity" in Article XX of the GATT 1994, Article XIV of the GATS, and Article 2.2 of the TBT, with the elements that must be demonstrated under Article 5.6 of the SPS Agreement.'

[1115] *US-Gambling (AB)*, para 291. Similarly *US-COOL (Panel)*, para 7.670, in particular fn.887. Other cases referring to the necessity standard in different WTO covered agreements include *China-Trading Rights (AB)*, para 242; *EC-Asbestos (Panel)*, para 8.55; *US-Tuna II (Panel)*, paras 7.464, 7.468; *EC-Seal Products (Panel)*, paras 7.613, 7.634; *India-Agricultural (Panel)*, paras 7.611ff; *US-COOL 21.5 (Panel)*, para 7.555, fn.1232; *US-COOL 21.5 (AB)*, paras 5.203, 5.329, 5.337; *Colombia-Textiles (Panel)*, para 7.304.

[1116] *US-Clove Cigarettes (Panel)*, para 7.356.

[1117] Ibid, para 7.362. See also ibid, paras 7.368f.

[1118] Ibid, paras 7.363f.

[1119] *US-COOL (Panel)*, para 7.669.

resort to cross-interpretation where no contextual element either in the origin or the target rule can be identified that speaks again it.

3. Cross-interpretation and the interpretative dilemma in NPM clauses: *Nicaragua*, *Oil Platforms*, and the Argentina cases

The foregoing section explored, and ultimately established, that the rules on treaty interpretation allow cross-interpretation of an otherwise unspecified necessity/proportionality standard within exception clauses with reference to the unified core distilled in chapters I-III. It also developed a context-sensitive model concerning how the transposition of the unified standard into the rule under interpretation can work. The section did not, however, undertake a more comprehensive analysis of the potential of an interpretative strategy based on the unified standard to solve interpretative challenges related to necessity/proportionality seen in practice, and did not comprehensively evaluate the advantages of this strategy over competing approaches. The current section does exactly this; it first outlines the difficulties that the ICJ and various international investment arbitration tribunals have faced in interpreting the term 'necessary' in NPM clauses, and discusses whether cross-interpretation with reference to the unified standard is a better response to these difficulties than the strategies these courts have so far adopted.

3.1. Introduction: NPM clauses in BITs and FCN treaties

NPM clauses, widely present in BITs as well as FCN treaties, provide that under certain circumstances parties to the treaty may take measures that are otherwise contrary to the substantive obligations enshrined in the treaty. In doing so, NPM clauses frequently condition the permissibility of otherwise infringing measures on them being 'necessary'. This was notably the case as regards the NPM provisions in the US-Nicaragua FCN/US-Iran FCN treaties that were considered in the *Nicaragua*/*Oil Platforms* cases, respectively, and the corresponding clause in the US-Argentina BIT, central to the numerous Argentina arbitrations. These provisions are virtually identical, all providing that the respective treaties 'do not preclude' the application of

'measures' that are 'necessary' in order to achieve certain objectives.[1120] In applying these provisions to the disputes before them, both the ICJ in *Nicaragua*/*Oil Platforms* and the investment arbitration tribunals struggled to give content to the necessity standard and to define the applicable rules guiding judicial review.

The interpretative challenge concerning the NPM clauses contained in the two FCN treaties at issue in *Nicaragua* and *Oil Platforms* as well as the US-Argentina BIT has two dimensions: giving content to the necessity standard enshrined in the NPM clauses (section 3.2.); and identifying the proper standard of review (section 3.3.). These challenges, while here only discussed with reference to the three identified treaties, would likewise arise with respect to other NPM clauses and exception clauses similar to them as well, so that the following discussion is likely reflective of a wider problem.

3.2. The substantive content of necessity/proportionality in NPM clauses

3.2.1. The interpretative problem and the various solutions proposed

In interpreting the NPM clauses in the two FCN treaties at issue in *Nicaragua* and *Oil Platforms* as well as the US-Argentina BIT, the ICJ and the arbitral tribunals in the Argentina cases struggled to make sense of the necessity standard enshrined in the treaties respective NPM clauses. All courts faced the same fundamental problem, namely a treaty that provided no guidance on what legal test the necessity standard actually incorporated. In the *Oil Platforms* case, Judge Kooijmans explained with respect to the US-Iran FCN treaty that

> neither Article XX, paragraph 1 (d), itself nor any other provision of the Treaty contains elements which enable the Court to apply the legality test with regard to the question whether measures, taken to protect the essential security interests, are necessary indeed.[1121]

[1120] Article XXI(1)(d) US-Nicaragua FCN; Article XX(1)(d) US-Iran FCN; Article XI US-Argentina BIT.

[1121] *Oil Platforms* (Kooijmans), para 48.

Being thus faced with the 'undefined or poorly defined'[1122] concept of necessity, Judge Kooijmans concluded that to give content to the necessity standard the Court had 'no choice but to rely for this purpose on the body of general international law'.[1123] In the BIT context, the *Enron* tribunal similarly explained that the treaty 'did not deal with' the precise 'conditions for [the] application' of the NPM clause and that these must therefore 'be searched for elsewhere'.[1124]

Unable to derive the content of the necessity standard from within the four corners of the respective treaties, the courts imported more precise definitions from external rules. In both *Nicaragua* and *Oil Platforms,* the ICJ decided to interpret the NPM clause by means of recourse to the customary law of self-defence. Holding that 'it is difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests'[1125] in the sense of the NPM clause, the ICJ in *Nicaragua* implicitly suggested that the necessity standards under both the NPM clause and the rules on self-defence are such that when the self-defence standard is fulfilled, the treaty one would be complied with as well. While this pronouncement in principle still leaves open the possibility that necessity under the FCN treaty is wider than under self-defence, the fact that the Court ultimately only really assessed whether the measures were necessary as acts of self-defence suggests a complete overlap in the eyes of the court as regards forcible measures.[1126]

In *Oil Platforms*, the ICJ became more explicit and confirmed this reading of *Nicaragua*, considering that '[i]n the present case, the question whether the measures taken were "necessary"

[1122] Ibid (Rigaux), para 16.

[1123] Ibid (Kooijmans), para 48.

[1124] *Enron*, paras 333-34. See also *Sempra*, paras 376, 378; Gazzini, 'Necessity Investment Law', 464; Alvarez and Khamsi, 'Argentine Crisis', 427ff; Bjorklund, 'Economic Security', 495; Muchlinski, 'Trends', 65; Parish, 'On Necessity', 176.

[1125] *Nicaragua*, para 224.

[1126] See *Oil Platforms* (Kooijmans), para 51 (discussing *Nicaragua*): 'Evidently, in applying the legality test to the measures taken by the United States in order to protect its essential security interests, the Court used the same standard as it had applied when dealing with these acts from the viewpoint of the lawfulness of the use of force'.

overlaps with the question of their validity as acts of self-defence.'[1127] By continuing to then assess whether the American actions 'met the conditions of Article XX, paragraph 1 *(d)*, as interpreted by reference to the relevant rules of international law',[1128] the Court effectively equated the two necessity standards, which allowed it to import the precise content from self-defence law.[1129] The Court did not stop there, however, as in the final analysis it proceeded on the basis that assessing whether the United States' action complied with the rules of self-defence more generally also simultaneously determined whether they fulfilled the conditions of the NPM clause. This had the consequence that the Court eventually imported not only the content of the necessity standard from the law on self-defence, but the *entire* set of legality conditions of self-defence[1130] as well as the result of the application of those conditions to the facts of the case into the treaty clause.[1131]

In the Argentina cases, the arbitral tribunals adopted a variety of approaches, with no truly dominant strategy emerging to this day. A first line of cases responded to the lack of definition in Article XI of the US-Argentina BIT by conflating the treaty standard with the State of Necessity rules codified in Article 25 ASR. The earliest case in this line of jurisprudence was *CMS*, where the tribunal first considered the validity of Argentina's plea under the customary State of Necessity doctrine before assessing the treaty defence.[1132] The tribunal's approach to the

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[1127] *Oil Platforms*, para 43. See also ibid, para 73, and ibid (Al-Khasawneh), para 9.

[1128] Ibid, para 45.

[1129] See also ILC, *Fragmentation Report*, para 102.

[1130] See *Oil Platforms* (Simma), para 10: 'only measures which fulfil all of the conditions required for the exercise of the right of self-defence can qualify as action that is permissible under [the NPM clause]'. This explains, eg, why the court focused on the armed attack requirement, and not only on the necessity standard (see, eg, ibid, paras 61, 71).

[1131] See ibid (Higgins), para 46.

Possibly explaining the Court's insistence that measures not justified as self-defence cannot be 'necessary' under the NPM clause is the apparently underlying assumption (eg, ibid (Rigaux), para 17) carried over from *Nicaragua* that reaching the opposite conclusion would somehow afford 'a defence to the claim [of unlawful use of force] under customary international law' (*Nicaragua*, para 271). Already in *Nicaragua* Judge Oda noted that this assumption was baseless (ibid (Oda), paras 85, 89), and it remained so in *Oil Platforms* (see Kammerhofer, 'Oil's Well', 794).

[1132] *CMS*, paras 304ff.

application of the latter ultimately evinced, in the eyes of the *CMS* annulment committee, the conviction 'that Article XI was to be interpreted in the light of the customary international law concerning the state of necessity and that, if the conditions fixed under that law were not met, Argentina's defense under Article XI was likewise to be rejected.'[1133] While interpretation 'in the light of' custom still appears to signal some caution, the second part of this statement indicates that the tribunal conflated the two standards completely. As the ICJ did with respect to self-defence, the *CMS* tribunal took the reference to 'necessary' in Article XI of the US-Argentina BIT as an opening that allowed it to import the complete set of legality conditions applicable under Article 25 ASR into the treaty clause. The tribunals in *Enron*[1134] and *Sempra*[1135] followed this approach.[1136]

The conflation approach was heavily criticised by the *CMS* annulment committee.[1137] While the committee noted 'some analogy in the language used in Article XI of the BIT and in Article 25 [ASR]', notably that '[t]he first text mentions "necessary" measures and the second relates to the "state of necessity"',[1138] it nevertheless rejected the conflation on the basis that 'Article XI and Article 25 are substantively different'.[1139] The annulment committee then exemplified these differences, pointing for instance to the absence of an explicit proportionality

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[1133] *CMS Annulment*, para 124.

[1134] *Enron*, para 334.

[1135] *Sempra*, paras 376, 378.

[1136] The *El Paso* tribunal *prima facie* followed the *CMS Annulment* approach, treating the NPM clause as *lex specialis* (*El Paso*, para 552). In the end, however, as regards the only element it analysed in detail (non-contribution; see conclusion in ibid, para 665), the tribunal still interpreted the NPM clause with reference to the State of Necessity (see ibid, paras 552, 613, 617), thus again conflating the two rules (see Sacerdoti, 'Application of BITs', 18).

[1137] The *Sempra* annulment committee adopted essentially the same approach (see *Sempra Annulment*, paras 197-200; the committee in *Enron Annulment*, para 403, expressed no opinion on the relationship of the State of Necessity and the NPM clause).

[1138] *CMS Annulment*, para 129.

[1139] Ibid, para 130.

condition in the NPM clause.[1140] The annulment committee was certainly correct in noting the textual differences existing between Article 25 ASR and the NPM clause as well as the tribunal's effective replacement of the terms of the NPM clause with the legality conditions of the State of Necessity.[1141] Likewise, the committee's subsequent findings that the tribunal should have applied the treaty standard first, treating the customary standard either as *lex generalis* or as a secondary rule,[1142] is convincing from a systematic point of view and broadly supported by a majority of scholars.[1143] However, in all this the annulment committee still failed to provide any actual guidance on how the tribunal should have filled the treaty's own necessity standard with content.

The *LG&E* tribunal adopted what appears to be a slightly different approach. It first considered that 'the claims and defenses mentioned derive from the Treaty' and found that only 'to the extent required for the interpretation and application of [the treaty's] provisions, the general international law shall be applied'.[1144] While the tribunal had no explicit recourse to any outside standard in its interpretation of the treaty's necessity standard, it considered that 'satisfaction of the state of necessity standard as it exists in international law … supports the Tribunal's conclusion' under the NPM clause.[1145] The tribunal never properly explained the basis of its findings under the treaty standard, or where its interpretation derived from.[1146] The 'support' the tribunal draws from the customary rule at the very least implies a substantive overlap between the treaty standard and the State of Necessity and would actually appear, in the light of the

[1140] Ibid, para 130. In addition to different legality conditions, the committee also referred to differences in function (see ibid, para 129).

[1141] Ibid, para 135.

[1142] See ibid, paras 133-134.

[1143] See only Burke-White and von Staden, 'Extraordinary Times', 323; Binder, 'Changed Circumstances', 629; Binder, 'Nichterfüllung', 150; Kurtz, 'Adjudging the Exceptional', 344; Kurtz, 'Delineating', 251; Muchlinski, 'Trends', 67; Song, 'Scylla and Charybdis', 246; Desierto, 'Supplementary Means', 832-33). But see Bjorklund, 'Economic Security', 503; Hoelck Thjoernelund, 'Necessity', 477; and Alvarez and Khamsi, 'Argentine Crisis', 427ff.

[1144] *LG&E*, para 206.

[1145] Ibid, para 245. See also ibid, para 258.

[1146] See ibid, especially paras 239-242.

tribunal's silence on how it arrived at its interpretation of the treaty standard, signal that the tribunal's treaty interpretation was really inspired by its reading of the customary norm.[1147] In substance, the *LG&E* line then comes very close to the conflation approach pioneered by the *CMS* tribunal.

The tribunal in *Continental Casualty*, finally, attempted yet a different path. In line with the *CMS* and *Sempra* annulments, it highlighted the differences between Article 25 ASR and Article XI, likewise concentrating on differences in function and effect.[1148] Still, it noted some 'link' between Article 25 ASR and Article XI of the BIT, and considered that '[t]hese connections may be relevant as to the interpretation of the bilateral provision in Art XI, in that the customary concept of necessity may be relevant in this respect' and that it would accordingly refer 'to the customary rule on State of Necessity ... only insofar as the concept there used assist[s] in the interpretation of Art. XI itself.'[1149] In the end, however, the tribunal did not refer to the State of Necessity,[1150] but resorted to WTO jurisprudence[1151] on the necessity standard to fill the treaty's necessity condition with content:

> Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law.[1152]

[1147] See Foster, 'LG&E v Argentina', 154; El-Hage, 'Argentine Cases', 472.

[1148] *Continental Casualty*, paras 164-167. Notably, the Tribunal did not explicitly focus on purely textual differences.

[1149] Ibid, para 168.

[1150] It should be noted that in analysing the threat, the tribunal undertook an autonomous interpretation of the BIT, noting that the BIT was not as demanding as the State of Necessity. See ibid, paras 170-181, in particular fn.264.

[1151] In doctrine, the tribunal's reference to WTO law has both supporters (eg, Engan, 'In Search of Necessity', 496-497; Stone Sweet and della Cananea, 'Proportionality, General Principles of Law'; Alvarez-Jiménez, 'The Interpretation of Necessity Clauses', 438-439; Weiss, 'Trade and Investment Law', 83) and critics (eg, Alvarez and Brink, 'Revisting the Necessity Defense', 325ff; Alvarez, 'Beware: Boundary Crossings', 26; Claussen, 'Casualty', 1546ff).

[1152] *Continental Casualty*, para 192 (internal references omitted).

3.2.2. Critique

The absence of precise definitions in both the FCN treaties underlying the *Oil Platforms* and *Nicaragua* cases as well as the US-Argentina BIT and the resulting 'quintessential [interpretative] dilemma'[1153] certainly make a good case for reference to external rules as an interpretative aid.[1154] Such cross-interpretation with reference to particular external rules can in principle be based on Article 31(3)(c) VCLT.[1155] The problem with the existing jurisprudence is thus not the recourse to external rules as such.[1156] Rather, the discussed approaches suffer from a more particular threefold failure to justify the particular interpretative moves: first, the failure to justify the choice of the external rule; second, the failure to justify the wholesale importation of the *entire* set of legality conditions applicable under the respective external rules; and third, the failure to justify that importing the content of the necessity condition should also allow importing the result of applying the necessity condition in the context of the external rule.

With regard to the first point, Judge Kooijmans reasoned in *Oil Platforms* that the self-defence standard must be used because the measure under evaluation was an instance of the use of force.[1157] This justification is superficially compelling but ultimately not sufficient. As the Court itself recognised, the NPM clause is generally wider than the rules on self-defence.[1158] It seems odd to import a necessity standard that is specific to the use of force, where the NPM clause – and with it the necessity standard enshrined therein – is capable of applying to a wider

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[1153] Subramanian, 'Too Similar', 76.

[1154] Bjorklund noted that virtually all interpretations of the necessity condition in NPM clauses proposed by scholars rely on importing content from elsewhere (see Bjorklund, 'Economic Security', 495).

[1155] Article 31(3)(c) VCLT was discussed in detail in section 2.2. Indeed, the case of NPM clauses seems to be the type of 'hard case[]' MacLachlan had in mind justifying reliance on Article 31(3)(c) VCLT (see MacLachlan, 'Systemic Integration', 281, 287).

[1156] As the *Sempra* annulment committee held, 'it may be appropriate to look to customary law as a guide to the interpretation of terms used in the BIT' (*Sempra Annulment*, para 197).

[1157] *Oil Platforms* (Kooijmans), paras 23, 49.

[1158] See *Nicaragua*, para 224.

range of measures. Absent any indication of an intention to the contrary, it is difficult to see why the content of the necessity standard in the NPM clause should not, in principle, be the same for all covered measures. The Court does not attempt to justify why the necessity standard of self-defence should be appropriate to the full array of possibly 'necessary' measures.

The failure to fully justify the choice of the self-defence standard is accentuated by the investment arbitration jurisprudence, which has interpreted a virtually identical provision by reference to two different (sets of) rules, namely the State of Necessity and WTO rules containing a necessity standard. None of the tribunals establish conclusively why either State of Necessity or WTO law should be imported.[1159] Arguments for or against a particular standard tend to rely on rather vague considerations of 'fit'.[1160] Apart from the *Continental Casualty* tribunal, no other tribunal even considered resorting to another external rule than the one it ultimately chose, highlighting the lack of justification. The *Continental Casualty* tribunal's reference to the BIT's drafting history is laudable, but in the end insufficient.[1161] In the final analysis, three virtually identical provisions have then been interpreted with reference to three different external rules, without any objectively convincing justification for resorting to one or the other.

The second failure is the absence of convincing reasoning by the ICJ or the arbitral tribunals as to why they were justified in importing the *entire* set of legality conditions of the self-defence or State of Necessity rules, rather than just the narrower necessity (and possibly

[1159] In *Continental Casualty*, Professor Sacerdoti acted as the President of the tribunal while simultaneously serving as Member of the WTO AB. This double function may be one reason why the tribunal broke new ground by referring to WTO law. On the influence of individual judges/arbitrators as regards the spread of proportionality, see generally Stone Sweet and Mathews, 'Proportionality Balancing', 161; Stone Sweet and della Cananea, 'Proportionality, General Principles of Law', 924.

[1160] Eg, Bjorklund, 'Economic Security', 495; Muchlinski, 'Trends', 67; Sacerdoti, 'Application of BITs', 20, discussed the 'appropriateness' of referring to one external rule rather than another. To be sure, the dimension of 'fit' has a role to play, but with respect to individual non-unified elements of necessity/proportionality, rather than external rules as a whole. See sections 2.4. and 3.4.1.

[1161] See Moon, 'Essential Security Interests', 498, also providing further references; Desierto, 'Supplementary Means', 882ff; Alvarez and Brink, 'Revisting the Necessity Defense', 331ff.

proportionality) standard.[1162] In *Oil Platforms*, this move prompted Judge Higgins to heavily criticize the majority reasoning and conclude that rather than interpreting the treaty norm, the Court 'invoked the concept of treaty interpretation to displace the applicable law', which is 'not in fact interpreted at all'.[1163] In the BIT context, the *CMS* annulment committee's critique of the tribunal's reference to the State of Necessity can be read as targeting exactly the wholesale importation of that rule, seeing that the committee focused its critique on elements of the State of Necessity that appear not to be included in the NPM clause.[1164] Effectively, though it found the State of Necessity and the NPM clause to be 'substantively different', the committee identified no difference between the actual necessity standard as embodied in the State of Necessity (mainly the requirement that a measure must be the 'only way') and in the NPM clause, but rather pointed to other elements of the State of Necessity rule.[1165] In the final analysis, following Judge Higgins, it does appear that rather than interpreting the NPM clause the ICJ and various tribunals simply applied the external rule, losing sight of their originally much narrower endeavour of giving meaning to the treaty term 'necessary'.

The third failure of especially the ICJ is to overlook that importing the content of the necessity standard from an external rule cannot automatically be equated with importing the result of the application of that standard in the context of the external rule. As recalled in the previous section, in *Oil Platforms* the Court considered that the necessity condition under the

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[1162] The *Continental Casualty* tribunal limited its importation of WTO law to the actual necessity standard, though it included therein certain elements that are actually alien to the standard as applied by the WTO judiciary (see chapter I, section 7.4.1.). A similarly limited cross-interpretation is considered by Kurtz, 'Adjudging the Exceptional', 354.

[1163] *Oil Platforms* (Higgins), para 49. See also ibid (Buergenthal), para 32 ('Court's failure to apply the language of Article XX, paragraph 1 (d)'); ibid (Owada), para 34 ('[I]t is quite conceivable that certain measures can be legally undertaken under [the NPM clause] in relation to such activities as may not amount to an "armed attack", as being "necessary to protect [the] essential security interests" of the United States'); Kammerhofer, 'Oil's Well', 703; Gardiner, *Treaty Interpretation*, 286; Green, 'Oil Platforms', 376; Berman, 'Interpretation', 320.

[1164] See again *CMS Annulment*, paras 129ff; see also Binder, 'Changed Circumstances', 629: 'The CMS, Enron, and Sempra tribunals' "interpretation approach" de facto results in a replacement of the treaty-based emergency exception (Article XI of the Argentina-US BIT) by the narrower customary law standard (Article 25 of the ILC Articles)'; Binder, 'Performance of Treaty Obligations', 29.

[1165] *CMS Annulment*, para 130. Similarly *Sempra Annulment*, para 200; *Continental Casualty*, paras 166-67; Sacerdoti, 'BIT Protections and Economic Crises', 378.

NPM clause and the law on self-defence overlapped, and that in consequence assessing compliance with the rules of self-defence was tantamount to assessing compliance with the NPM clause. However, it was established in chapter I that what counts as a measure's LoP and LoH depends on the normative context, such as the rule derogation from which is sought to be justified.[1166] In consequence, the harm[1167] a measure causes by breaching the rule prohibiting the use of force is not the same as the harm the same measure causes by breaching a rule protecting, as was the case under the FCN treaty at issue in *Oil Platforms*, the freedom of commerce. Assessing whether the harm caused by the measure to the interests underlying the prohibition of the use of force was minimal given the measure's objective then says very little, if anything, about the different question of whether the harm caused by the same measure to the interests underlying the protection of the freedom of commerce was also minimal. This means that even where the content of the necessity standard in two rules is identical, one and the same measure may still be necessary under one rule but not under the other (and *vice versa*).[1168]

This point is further highlighted by the fact that in *Oil Platforms* it was only because the ICJ effectively imported not only the content of the necessity standard, but also the result of applying it in the context of self-defence law, that it could assess compliance with the NPM clause before assessing whether the measure actually breached the substantive FCN provisions.[1169] Only after concluding that the measure was not necessary did the Court find that

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[1166] See chapter I, sections 3, 7.1. and 7.2., in particular 7.2.3. See also *Oil Platforms* (Higgins), para 51, pointing out that by focusing only on self-defence, the Court 'narrows the range of factual issues to be examined', suggesting that the Court did not pay enough attention to the different legal contexts of the NPM clause and self-defence.

[1167] Since the NPM clauses here studied allow the protection of essential security interests, it can be argued that the permissible objectives under the NPM clause and the rules on self-defence overlap to an important extent. See in this sense *Nicaragua*, 224.

[1168] See *Oil Platforms* (Kooijmans), para 23, pointing out that referring to self-defence to aid interpretation of the NPM clause is 'something completely different from putting these measures directly to the test of the general rules of law on the use of force.' See also ibid (Owada), paras 31-32.

[1169] Similarly, in *El Paso* the tribunal held that 'it would have been appropriate for the Tribunal to analyse the existence of a situation of necessity under Article XI even before evaluating the different measures adopted' (*El Paso*, paras 553-554).

the measure in question did not breach the substantive obligations in the first place.[1170] Yet, if there is no breach, there is no relevant legal harm, and where there is no relevant legal harm it makes no sense to even ask whether the level of harm imposed was necessary.

For the sake of completeness, it must be mentioned that the Court's approach in *Oil Platforms* can also be read differently, namely as not being about interpreting the necessity standard at all (despite what the Court says), but about necessity's domain.[1171] For instance, the Court considered that it was 'hardly consistent with Article I to interpret Article XX, paragraph 1*(d)*, to the effect that the "measures" there contemplated could include even an unlawful use of force by one party against the other.'[1172] This statements may indicate the Court's conviction that a use of force not in line with the requirements of self-defence was not 'contemplated by that provision of the Treaty',[1173] which is the same as saying that it is outside the set of potentially covered measures, regardless of their necessity.[1174] While accepting this reading of the Court's pronouncement would circumvent some of the criticism here presented, it is hard to square with the Court's explanation that its task was to assess whether the United States' actions 'met the conditions of Article XX, paragraph 1 *(d)*, as interpreted by reference to the relevant rules of international law',[1175] since the reading focusing on necessity's domain would render the particular conditions of Article XX(1)(d) irrelevant. In addition, interpreting the NPM clause as excluding *a priori* all measures that do not comply with rules on the use of force, without any textual or

[1170] See only *Oil Platforms*, para 125 (*dispositif*), (1).

[1171] The possibility of reading *Oil Platforms* as being either about interpreting necessity or about necessity's domain reaffirms the importance of clearly distinguishing between these two questions (see chapter I, section 5.1.).

[1172] *Oil Platforms*, para 41 (emphasis in original). See also ibid (Higgins), para 41; ibid (Rigaux), para 17; ibid (Simma), paras 9-10; and *Nicaragua* (Jennings), 541.

[1173] *Oil Platforms* (Koroma), 224.

[1174] The Court's finding is controversial. Apparently in support, eg, Ochoa-Ruiz and Salamanca-Aguado, 'Exploring', 508; more convincingly against, eg, *Oil Platforms* (Higgins), para 41; Kammerhofer, 'Oil's Well', 704.

[1175] *Oil Platforms*, para 45.

contextual element pointing in this direction, is a stretch. Accordingly, this second possible reading of *Oil Platforms* is rather implausible.

In the end, one cannot avoid the conclusion that so far '[n]one of the tribunals offer a coherent analysis of the "necessary for" nexus'[1176] and that it therefore 'remains to be seen whether, and how, tribunals will fill the lacunae in the [NPM] provisions'[1177]. The 'great dilemma'[1178] persists that while the treaty standard provides almost no guidance with respect to the 'charged question of when a given measure will be "necessary"',[1179] none of the attempts to import content are convincing. How to make sense of the treaties' necessity standard then remains largely an open question.

3.3. Necessity and proportionality in NPM clauses: issues of standard of review

The previous section outlined that both the ICJ in *Nicaragua* and *Oil Platforms*, as well as the various investment tribunals in the Argentina cases, considered that the respective FCN treaties and BITs did not provide guidance on the substantive content of the necessity standard. The courts apparently felt themselves more able to give content to the NPM clauses in the respective treaties as regards the applicable procedural rules, more particularly the question of justiciability and the standard of proof/review. However, they did not achieve consistency, in particular with respect to the applicable standards of review/proof, and disagreement persists, again rendering the state of the law unclear.

[1176] Burke-White and von Staden, 'Extraordinary Times', 337.

[1177] Bjorklund, 'Emergency Exceptions', 498. The difficulty in deriving autonomous content is illustrated in Desierto, 'Supplementary Means', 897-98, where she insisted on autonomous interpretation of the treaty standard but struggled to fill it with content, eventually stating without explanation that necessity 'presuppose immediacy, urgency and directness'. See also Stone Sweet, 'Proportionality's New Frontier', 70, arguing without further explanation that '[p]roportionality analysis appears to be tailored made for application to Article XI of the U.S.-Argentina BIT'; see also Stone Sweet and della Cananea, 'Proportionality, General Principles of Law', 928.

[1178] Jung and Han, 'Dilemma', 397.

[1179] Kurtz, 'Adjudging the Exceptional', 340.

3.3.1. Justiciability

In *Nicaragua* the ICJ found Article XXI of the US-Nicaragua FCN Treaty be justiciable, contrasting it with clauses containing a self-judging element (such as Article XXI GATT),[1180] and ultimately finding that 'whether a measure is necessary to protect the essential security interests of a party is not ... purely a question for the subjective judgement of the party'.[1181] The investment tribunals seized of the Argentina cases likewise regularly considered the NPM clauses in the US-Argentina BIT not to be self-judging and thus justiciable, often relying on the ICJ's *Nicaragua* reasoning.[1182]

In the *LG&E* case, the tribunal also decided that the NPM clause was not self-judging.[1183] At the same time, it held that even if it were self-judging, 'Argentina's determination would be subject to a good faith review anyway, which does not significantly differ from the substantive analysis presented here'.[1184] The tribunal here raises two points: first, it confirms that even a self-judging standard is or can be ultimately subject to some form of review.[1185] Second, it raises the question that if justiciable, according to which standard should review take place? The fact that in *Nicaragua* the ICJ found that a measure's necessity is not 'purely' a matter for the subjective determination of the acting state does not mean that the acting state's views do not matter at

[1180] *Nicaragua*, para 222.

[1181] Ibid, para 282; see also *Oil Platforms*, para 43.

[1182] Eg, *CMS*, paras 373-374; *Enron*, paras 332-339; *Sempra*, paras 379ff; *Continental Casualty*, para 187; *El Paso*, paras 589-90, 610. In support, Alvarez and Khamsi, 'Argentine Crisis', 417ff; Reinisch, 'Split of Opinions', 211-212; Kurtz, 'Adjudging the Exceptional', 339; Kurtz, 'Delineating', 238; Desierto, *Necessity*, 216; critically, Burke-White and von Staden, 'Extraordinary Times', 381-382. See also *Kishenganga*, para 398.

[1183] *LG&E*, para 212.

[1184] Ibid, para 214.

[1185] See also discussion about Articles XXI GATT and XIV*bis* GATS in chapter III, section 4.3.1.

all;[1186] the degree of scrutiny to which the state's assertions are exposed is, however, not further specified.[1187]

3.3.2. Standard of review and proof

Under both ICJ and investment tribunal jurisprudence, it is not settled whether the standard or review/proof applicable to factual assertions underlying necessity under an NPM clause should be strict or require only reasonableness, as there is some support for both options. In *Nicaragua*, the Court considered that it had to assess whether the 'risk run by these "essential security interests" is reasonable',[1188] which may be taken to indicate a reasonableness standard.[1189] The issue of standard of review/proof came to the fore again in *Oil Platforms*, where the United States had argued that '[a] measure of discretion should be afforded to a party's good faith application of measures to protect its essential security interests.'[1190] The Court did not decide on this point in its majority opinion.[1191] The judges on the bench were divided. For one, Judges Higgins[1192] and Simma[1193] rejected a lenient standard, holding that no 'measure of discretion' had to be afforded. Several other judges, however, expressed themselves in favour of some sort of reasonableness standard.[1194] Judge Kooijmans noted the mention of reasonableness as regards the risk run in *Nicaragua*, but also remarked that reasonableness was not mentioned as regards the

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[1186] See in this respect Buergenthal, n.1196; Shany, 'Toward', 934.

[1187] See Ragni, 'Standard of Review', 324.

[1188] *Nicaragua*, para 224.

[1189] In *South West Africa* Judge Jessup already suggested reasonableness as the relevant standard for exception clauses (*South West Africa* (Jessup), 438).

[1190] *Oil Platforms*, para 73.

[1191] See ibid, para 73. A decision was ultimately not needed because the Court applied the law on self-defence with the attendant standard of review/proof.

[1192] Ibid (Higgins), para 48.

[1193] Ibid (Simma), para 11.

[1194] See also ibid (Owada), para 35.

qualification of the measure taken as necessary, which thus required stricter review.[1195] In Judge Buergenthal's opinion, the NPM clause implicitly enshrines 'the right of each party to make that assessment [whether a measure is necessary to protect an essential security interest] by reference to a standard of reasonableness'.[1196] Given this rather even split of opinion on the bench, the issue was effectively left open for another day.

The only investment tribunals that actually appeared to apply the NPM clause rather than the State of Necessity were *LG&E* and *Continental Casualty*. It was already discussed[1197] that both tribunals appeared to endorse a reasonableness standard for both the NPM clause and the State of Necessity.[1198] For example and to recall, the *Continental Casualty* tribunal held that the required objective factual assessment 'must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage [sic] of hindsight.'[1199] Both tribunals' pronouncements should, however, be taken *cum grano salis*. Since both tribunals appeared to apply the same lenient standard to the State of Necessity as well, which was considered not to be in line with the better authorities,[1200] it is unclear whether they are reliable also as regards the NPM clause.

[1195] Ibid (Kooijmans), para 44. Judge Kooijmans further held that since the US opted for use of force, and since the prohibition on the use of force is *ius cogens*, it had to be subject to strict legal norms, and that wider discretion would have been available for, eg, economic measures (ibid (Kooijmans), para 46).

[1196] Ibid (Buergenthal), para 37. In reaching this finding, Judge Buergenthal emphasised that in Nicaragua, the Court had held that the relevant assessments were not 'purely' questions for the assessment of the parties, which meant that the assessment of the party still played some role and that the Court could not 'substitute its judgment completely for that of the Government' (ibid (Buergenthal), para 37).

[1197] See chapter III, section 4.1.3.

[1198] Scholars advocating a certain lenience in review as regards NPM clauses include Burke-White and von Staden, 'Extraordinary Times', 371ff; Burke White and Von Staden, 'Public Law Standards of Review', 694ff; Van Aaken, 'Necessity Measures', 182; Muchlinski, 'Trends', 72ff; Bottini, 'Essential Interests', 160ff; strongly against, Alvarez and Khamsi, 'Argentine Crisis', 443ff.

[1199] *Continental Casualty*, para 181; see also ibid, para 187.

[1200] See chapter III, section 4.1.3.

3.4. Evaluation of cross-interpretation with reference to the unified necessity/proportionality standard

3.4.1. Possibilities

The preceding sections of this chapter established that cross-interpretation on the basis of the unified standard is a possible interpretative strategy, and that the alternative interpretative strategies so far employed by courts charged with applying NPM clauses containing a necessity standard fail to convince. This, however, still leaves the crucial question, namely whether the proposed approach relying on the unified standard is actually better than the failed strategies employed so far, open. To answer this question, the logical starting point is to evaluate cross-interpretation on the basis of the unified standard against the shortcomings of the existing case-law identified above.[1201]

First, courts have in the past tended towards wholesale importation of the *entire* set of legality conditions under the external rule, thereby including elements that are alien to the necessity/proportionality standard properly considered. Cross-interpretation on the basis of the unified standard would obviously avoid this problem, given that only elements actually forming part of the necessity/proportionality standard are included in the unified core.

Second, especially the ICJ in *Oil Platforms* did not limit itself to importing the necessity standard from the law of self-defence, but actually imported the result of the application of self-defence's necessity standard as well. Once more, cross-interpretation on the basis of the unified standard would avoid this issue, since the unified standard is derived by abstraction from the particular origin rules, so that importing the result of the application of the necessity/proportionality standard under any one of the origin rules would be illogical.

While cross-interpretation on the basis of the unified standard would thus rather naturally avoid two of the identified shortcomings, it may be objected that the same result could have been

[1201] See sections 3.2. and 3.3.

achieved if the courts had been more careful, since avoiding wholesale importation of *all* legality conditions of a given origin rule and avoiding the importation of results is perfectly possible even where cross-interpretation takes place with respect to a single origin rule. Thus, it is with respect to the third shortcoming of the strategies used so far, namely the failure to supply an adequate justification for the choice of the particular external rule relied on, that cross-interpretation on the basis of the unified standard proves genuinely superior. Precisely because the unified standard draws on all the surveyed external rules,[1202] it requires no choice between them; the only justification required for resorting to the unified standard is that the rule to be interpreted neither itself provides sufficient content to the necessity/proportionality standard enshrined therein, nor provides reasons rendering importation of (some elements of) the unified standard inappropriate.

It might be objected that since the unified standard is, by definition, common to all the surveyed origin rules, it ultimately does not matter which one is chosen, as each one will provide the identical standard all the same. In other words, if the individual rules do not differ, then choosing one over the other is without consequence and thus requires no further justification. This argument would, however, overlook a crucial point: each of the origin rules contains not only the unified standard, but also idiosyncratic, non-unified elements; only transposition of the unified elements requires no further justification. It is possible to selectively transpose only some elements from one rule to another,[1203] and insofar as only the unified elements are concerned it indeed does not matter which external rule is referred to. However, the catch is that the identification of the unified elements can precisely not be carried out on the basis of looking at only one external rule, but rather requires comparison between all the surveyed origin rules. Thus, importing only the unified elements from a single origin rule is, in effect, cross-interpretation on the basis of the unified standard.

[1202] Recall that the three rules that the ICJ and investment tribunals have resorted to as interpretative aids when dealing with NPM clauses are exactly the 'surveyed rules' in this thesis.

[1203] See section 2.2.1.

It might furthermore be objected that while this thesis has criticised vague considerations of 'fit' as insufficient in justifying reliance on one external rule or another,[1204] it eventually came full circle to embraced 'fit' as the relevant criterion for deciding whether and which non-unified elements to transpose. Ultimately, so it could be argued, if the unified elements can be transposed without further justification, and if the relevant criterion for transposing the non-unified elements is 'fit', in the end transposing a full set of both unified and non-unified elements turns out to be the same thing as just choosing a given particular external rule on the basis of 'fit'. However, despite a certain logic, the argument would miss two interrelated points: first, the consideration of 'fit' criticised above related to either the rule or at least the necessity/proportionality standard taken from a specific rule as a whole, whereas the dimension of 'fit' advocated with respect to the non-unified elements is element-specific. Chapters I-III not only identified which elements are unified and which ones are specific, they also attempted to explain variance and thereby provided guidance as to which factors enter into an analysis of element-specific considerations of 'fit'. Admittedly, it is possible that choosing a particular external rule for cross-interpretation on the basis of fit, and transposing the unified standard as well as individual non-unified elements based on element-specific 'fit', may lead to the same outcome in practice. Still, the latter would, if nothing, else appear to be better (because more specifically) justified. Second, because the considerations of 'fit' here advocated are element-specific, it would in principle also be possible to transpose non-unified elements from different external rules into one and the same target rule under interpretation. Thus, for example, in interpreting the necessity/proportionality standard in a NPM clause, a court could draw inspiration from the non-unified elements in a variety of external rules. In comparison to simply relying all-or-nothing on one particular external rule, this adds flexibility and extends the utility of cross-interpretation.

[1204] See section 3.2.2.

In conclusion, cross-interpretation on the basis of the unified standard avoids the difficulties identified with respect to the interpretative strategies resorted to so far. It presents a genuinely promising option to overcome the difficulties in interpretation associated with the substantive content of the necessity/proportionality standard in exception clauses like the NPM provisions. The same is true as regards the issue of standard of review/proof, where the courts have so far failed to develop a consistent line.

3.4.2. Potential limitations

Despite the foregoing conclusion, it cannot be overlooked that cross-interpretation on the basis of the unified standard is subject to some potential limitations. While these potential limitations do not detract from the proposed approach's utility and potential just outlined, they must be kept in mind. Most obviously, the unified standard identified in chapters I-III was distilled from three particular (sets of) rules: the State of Necessity, self-defence, and various WTO rules encoded in the GATT, GATS, TBT, and SPS.[1205] This derivative nature of the unified standard has two implications.

First, as already mentioned in the introduction to the thesis,[1206] the conclusions methodologically depend on this choice of rules, and it cannot be fully excluded that a different choice of rules to be surveyed could have yielded different results. In theory, in order to draw fully comprehensive conclusions, it would be desirable to include rules entailing a necessity/proportionality standard from all major sub-fields of international law. Nevertheless, for the reasons already discussed,[1207] there are solid reasons for presuming that the conclusions drawn on the basis of the surveyed rules are uniquely useful for concluding on unification across exception clauses in international law and for cross-interpreting provisions like the NPM clauses.

[1205] For the justification of this choice see Introduction, section 3.1.

[1206] See ibid.

[1207] See Introduction, section 3.1.

The second implication is that as a derivative concept, the unified standard is exposed to normative changes that may occur in any one of the underlying rules: the area of convergence may shift with time, previously non-unified elements can become unified and *vice versa*.[1208] The unified core standard is, in this sense, dynamic. This dynamism can be a chance, in that it facilitates a continuous updating of the content of the 'ordinary legal meaning' of the necessity standard, allowing it to move with time and incorporate new insights. In particular, developments in one rule addressing issues common to all the surveyed rules (such as the problem of counterfactual analysis) can migrate across those surveyed rules, in the sense that each rule may take inspiration from its neighbours. Only a dynamic model can ensure that any further gravitation towards increasing overlap can be reflected in the unified core.

At the same time, the dynamic nature can also lead to difficulties. With a view to the debates about evolutionary and original treaty interpretation,[1209] it could first be argued that if a given treaty intended to enshrine the 'ordinary legal meaning' of necessity/proportionality in exception clauses as it stood at the time the treaty was drafted, the comparative analysis leading to the identification of the unified standard would have to be carried out with respect to that particular point in time.[1210] It would be more intuitive, however, to accept that – as is the case with other 'generic terms'[1211] – an evolutionary interpretation is generally intended.[1212] An intention of treaty drafters to not continuously update the meaning of 'necessary' as enshrined in

[1208] A good candidate in this respect might be the burden of proof regarding the availability of an alternative, since there are strong reasons for expanding the WTO approach also to the State of Necessity and self-defence contexts. See chapter III, section 5.2.

[1209] See only Bjorge, *Evolutionary Interpretation*; Fitzmaurice, 'Part I'; Fitzmaurice, 'Part II'.

[1210] For instance, the presence of a proportionality test in WTO law only started to emerge with *Korea-Beef* (see chapter I, section 6.2.3, and chapter II, section 3.3.). Thus, prior to *Korea-Beef* it would not have been possible to conclude that a global proportionality test forms part of the unified necessity/proportionality standard.

[1211] *Aegean Sea*, paras 75-77; *Navigational Rights*, para 66; Dörr, 'Article 31', 534.

[1212] See also *US-Shrimp (AB)*, para 129, interpreted by Pauwelyn as adopting an evolutionary interpretative approach (Pauwelyn, 'Interplay', 9). See further Simma and Kill, 'Harmonizing', 696.

an exception clause as the treaty ages would need to be established as a 'special meaning' (Article 31(4) VCLT).

The second difficulty is more a practical one: since the unified standard identified in chapters I-III is nowhere encoded, anybody wishing to interpret a necessity/proportionality condition in a treaty with reference to the unified standard must carry out the comprehensive comparative analysis at the time of the interpretation of the treaty. This interpretative strategy thus requires, on the part of the interpreter, a high level of awareness of developments in a range of fields of international law, including those other than the one in which the treaty to be interpreted is located.

4. General conclusion: the potential of cross-interpreting necessity/proportionality

The international judicial institutions so far tasked with interpreting NPM clauses containing an unspecified necessity standard regularly resorted to external rules with a view to giving content to the rule under interpretation; however, none of the interpretative strategies so far employed is convincing. This chapter undertook to explore a hitherto entirely uncharted interpretative path, namely cross-interpretation on the basis of the unified necessity/proportionality standard identified in chapters I-III. It concludes that this interpretative path is not only viable under the rules of treaty interpretation, but constitutes a better justified and more fine-tuned approach to filling an unspecified necessity standard in provisions like the NPM clauses with content than rival approach so far employed by courts.

This finding is significant beyond the context of the interpretative challenges that emerged in *Nicaragua*, *Oil Platforms*, and the investment arbitration cases under the US-Argentina BIT. First, there is no principled reason why the unified necessity/proportionality standard could not be taken into account also for the interpretation of rules containing an unspecified necessity/proportionality standard other than the NPM clauses considered here, even where these rules are not strictly speaking exception clauses. For instance, the *Kishenganga* arbitration

revolved around a provision of the Indus Water Treaty requiring that 'where a Plant is located on a Tributary of The Jhelum on which Pakistan has any Agricultural use or hydro-electric use, the water released below the Plant may be delivered, *if necessary*, into another Tributary'.[1213] The crucial issue in the case was whether the diversion of water by India for the purpose of hydroelectric power generation was 'necessary'. Pakistan advocated a rudimentary version of cross-interpretation with reference to a unified standard, since in making its case concerning the interpretation of 'necessary' it

> turns to a variety of sources to elaborate the scope of necessity. It first refers to the meaning of 'necessary" in the context of treaties of "Friendship, Commerce, and Navigation.' The necessity-based exceptions of several of these treaties were discussed in the *Nicaragua* and *Oil Platforms* cases by the International Court of Justice ... [Pakistan looks] also to the interpretation of necessity in arbitrations under bilateral investment treaties and in the context of the World Trade Organisation ... . Pakistan further posits that an element of proportionality is inherent in the term 'necessary,' as developed in international law jurisprudence.[1214]

The Court of Arbitration did not follow this line, holding instead that it 'considers inapposite the concepts of necessity developed in international trade law, investment law and other special areas [and] ... finds it inappropriate to import the understanding of necessity as a circumstance precluding wrongfulness under the law of State responsibility.'[1215] Nevertheless, this rejection of Pakistan's arguments cannot be taken as a rejection of cross-interpretation on the basis of the unified standard *per se*. First of all, the Court of Arbitration provides no reason whatsoever for its decision, simply declaring reference to external rules 'inapposite' and 'inappropriate'. Second, in the *Kishenganga* case the Court of Arbitration saw itself capable of giving content to the necessity standard without reference to any outside rules. Without evaluating the interpretation adopted in that case, it is clear that were autonomous interpretation is possible there is less need for reference to outside rules. It is submitted that if the Court of

[1213] Para 15(iii) of Annexure D, Indus Water Treaty (emphasis added).

[1214] *Kishenganga*, paras 221-222 (internal footnotes omitted). India opposed this interpretation (ibid, para 225).

[1215] Ibid, para 397.

Arbitration had, in contrast, found itself in the same position as the ICJ in *Nicaragua*/*Oil Platforms* and the investment tribunals in the Argentina cases, cross-interpretation on the basis of the unified standard should have been its preferred choice.

CONCLUDING REMARKS

1. Summary of results and evaluation against the thesis' objectives

Taking into account unresolved questions about necessity and proportionality in the context of exception clauses as well as the lack of any serious comparative study of these concepts across international law, the thesis set out with four principal objectives:[1216] (a) uncovering the inherent conceptual logic behind the necessity and proportionality standards as enshrined in exception clauses; (b) clarifying how the necessity and proportionality standards work and how compliance therewith is reviewed in the context of each surveyed rule; (c) identifying the degree of overlap between the surveyed rules and concluding on whether and to what extent it is possible to speak of a unified necessity/proportionality standard across international law; and (d) exploring whether this unified standard, if found to exist, could be used for the purposes of cross-interpreting undefined necessity/proportionality standards in treaty exception clauses and thus help to alleviate interpretative problems encountered by international courts in the past.

As regards the first objective, the combination of theoretical and empirical inquiry undertaken in chapters I-III has granted deep insights into the nature of the necessity and proportionality standards as enshrined in exception clauses, as well as into the particular challenges that their very nature poses for judicial review. It emerged that on a conceptual level, both (teleological) necessity and proportionality primarily provide an analytical framework and fundamental decision logic, in that each identifies a set of relevant factual and normative elements and defines how these elements need to relate to one another. The thesis disentangled the different variants of necessity and proportionality, delineated them from one another, and revealed their respective normative implications. Ultimately, the thesis thereby exposed the

[1216] See Introduction, section 2.

normative choices that each exception clause must make when determining which particular variant of necessity and/or proportionality to include.

Concerning the second objective, the thesis revealed two things: on the one hand, it laid bare the particular choices made by each surveyed rule in giving content to the necessity and proportionality standards contained. Thus, the thesis for instance identified for each rule which conception of necessity and which variant of proportionality they enshrined, thereby exposing the exact set of relevant normative and factual considerations as well as their interplay. The thesis also examined how the relevant considerations and conclusions are reviewed by courts, clarifying under what circumstances a state's determinations hold up under judicial scrutiny.

The clarifications thus achieved go a long way in addressing hitherto open questions about the content of necessity and proportionality in the context of each surveyed rule. Beyond the fundamental questions (eg, does a rule require a measure to be proportional at all, and if so, according to which of the different possible variants of proportionality?), the thesis also succeeded in answering a series of more precise questions, such as whether temporal proximity of threat materialisation has a role to play under the rules on the State of Necessity and self-defence, or whether there exists a general requirement of non-contribution. In some other cases, precise answers to open questions (eg, whether the ALoP or the DLoP of the challenged measure should be the relevant reference point for assessing whether an alternative is sufficiently protective) were suggested on the basis of theoretical considerations.

Moving on to the third objective, the comparative analysis structured by common 'schemes of intelligibility' facilitated detailed conclusions about areas of overlap and divergence between the surveyed rules.[1217] The results demonstrated that the necessity and proportionality standards enshrined in the surveyed rules indeed converge to a large extent, allowing the conclusion that both standards possess a rather determinate unified common core across

[1217] See chapter I, section 8., chapter II, section 4., chapter III, section 5.

international law. Most significantly, the surveyed rules all enshrine a binary, complex comparative conception of necessity that operates with respect to the same essential elements (primarily threat, protectiveness, and harmfulness) and enshrines a single fundamental decision logic (absence of equally protective but less harmful alternatives in a situation where a positive threat exists). All surveyed rules, with the exception of the SPS, furthermore enshrine the same proportionality standard (global teleological proportionality) that operates with respect to the same considerations (normative weight of the challenged measure's protectiveness and harmfulness). Accordingly, exactly the same versions of necessity and proportionality appear as twin conditions – notably regardless of whether there is a textual marker for both standards in each rule – across the analysed exception clauses, justifying the conclusion that one phenomenologically (as opposed to conceptually) implies the other. Finally, the necessity/proportionality standard is justiciable under each rule and there appears to be a common logic underlying all rules determining the appropriate standard of review/proof.

Beyond the structural overlap, the comparative analysis further revealed additional areas of overlap, for example as regard the role played by inconvenience or the absence of requirements of temporal proximity, non-contribution, and payment of compensation as part of the necessity/proportionality standard. Where these requirements are present they constitute additional conditions independent of the necessity/proportionality standard. In addition, there are reasons to believe that in areas currently still marked by divergence (such as the allocation of the burden of proof concerning the availability of alternatives), the common challenges facing each rule and the common logic of necessity/proportionality as enshrined in these rules exert a strong pull to develop in the same direction.

Coming, finally, to the fourth and last objective, the thesis demonstrated first that cross-interpretation with reference to unified core standards is possible under the (customary) rules of treaty interpretation, specifically those enshrined in Articles 31(1) and 31(3)(c) VCLT. Second, it argued that with respect to the concrete problem of interpreting an undefined necessity condition

in NPM clauses (and other provisions of the same type), cross-interpretation with reference to the unified necessity/proportionality standard is superior to any of the interpretative strategies so far employed by international courts. The interpretative avenue here proposed thus constitutes a genuine opportunity to overcome this hitherto unsolved issue.

2. Final observations: reflecting on the nature of necessity/proportionality and the significance of their convergence in exception clauses across international law

The thesis set out from the empirical observation that exception clauses typically condition the permission they give to states to derogate from otherwise binding rules of international law on the necessity and/or proportionality of the derogating measure. The conclusions reached in this thesis demonstrate the existence of a largely determinate, unified necessity/proportionality standard in exception clauses across international law, which lends credence to the *Sempra* tribunal's proclamation that '[i]nternational law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle.'[1218]

The far-reaching unity across the surveyed rules of international law is likely driven by the function that both exception clauses generally and the standard of necessity/proportionality within exception clauses more specifically serve. In the final analysis, both necessity and proportionality are conceptual tools or 'normative technique[s]'[1219] to provide abstract law with sufficient flexibility to deliver the desired normative outcome when applied to a wide range of concrete facts.[1220] In this sense, Cannizzaro rightly described proportionality as 'an element for the self-integration of the international order, [which] contributes thus to fill *lacunae* arising either

[1218] *Sempra*, para 378. But see also *Sempra Annulment*, para 202, criticising this statement.

[1219] Cannizzaro, *Il Principio Della Proporzionalità*, 481.

[1220] See Shany, 'Toward', 915, concerning standard-type norms in general.

from the incompleteness of a legal system or from the absence of a conflict-resolution rule',[1221] and the same applies to necessity. It is particularly within exception clauses, where the demands for strict fidelity to the law and derogation for the protection of particularly weighty interests clash most openly, that this function is regularly performed.

As a matter of fact, it appears that proportionality and necessity are more than simply useful tools that law resorts to when convenient. Rather, they appear to be expressive of the deeper logic of law itself, laying bare for everyone to see the fundamentals of how law works:[1222] if two interests that the relevant legal community considers valuable are in conflict, prefer the more important one, but do not sacrifice the inferior interest more than necessary.[1223] To speak once more with Pound, law ultimately serves to 'give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole.'[1224] In this sense, necessity may well be described as 'the ultimate ground and very source of the law'.[1225] But necessity and proportionality do not only lay these fundamentals bare; they make them directly operational.[1226] Thus, ultimately necessity and proportionality perform their particular task of facilitating the 'self-integration of the international order' by referring the law-applier directly to the deep foundational principle and very driving-force of the law. Against this background, from a theoretical standpoint the far-reaching unity of necessity and proportionality across exception clauses in international law hardly surprises. One of the values of the present thesis is then that it has revealed this unity empirically, using a theoretically-informed inductive-comparative method.

[1221] Cannizzaro, *Il Principio Della Proporzionalità*, 481.

[1222] See generally chapter II, section 2.3.1.

[1223] See Rivers, 'Presumption', 413, concerning the logical approach to conflicts of duties.

[1224] Pound, 'A survey of Social Interests', 39. Pound stressed this point repeatedly; see Pound, *Ideal Element*, 79, 122; Pound, 'Philosophical Theory and International Law', 89; Pound, *Social Control Through Law*, 65).

[1225] Agamben, *State of Exception*, 26.

[1226] Similarly Cassella, *La nécessité en droit international*, 13-14.

Moving beyond the particular issue of the necessity/proportionality standard in exception clauses and their review, it would furthermore appear that the methodological approach here developed – both as regards identification and transposition – could be employed for other complex standard-type concepts across international law as well. While concepts such as 'reasonableness',[1227] 'equity', 'good faith', 'arbitrariness' or 'due diligence' come to mind immediately, there may well be others. The point is simply that for concepts comparable in kind to necessity and proportionality, it may well be possible to likewise distil a unified core content by inductive-comparative analysis, and that such a unified core can become the indicator of the 'ordinary legal meaning' of these complex concepts, revealing unity across international law and readily available to solve interpretative dilemmas comparable to the ones discussed in chapter IV of this thesis. In this sense, the present thesis could be taken as a first, modest attempt to lay the foundations for a new type of analysis. It may be tentatively speculated that in light of the on-going expansion and segmentation (to avoid the overburdened term 'fragmentation') of public international law, such a cross-cutting methodological approach has much to contribute, not least because of its potential to highlight the – in the eyes of the present author – far-reaching but all-too-often overlooked[1228] conceptual unity across international law.

[1227] See already Corten, *L'utilisation du "raisonnable"*, and Corten, 'Motif légitime', which show some methodological similarity.

[1228] As Sands noted, it has become commonplace to assume that international law 'is made up of a collection of fragmentary parts, the implication being that the different parts only seldom, if ever, connect' (Sands, 'Cross-Fertilization', 88).

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