

INTRODUCTION TO SYMPOSIUM ON
ALAN O. SYKES, “ECONOMIC ‘NECESSITY’ IN INTERNATIONAL LAW”

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This symposium of two essays responds to Alan Sykes’ editorial comment in the *American Journal of International Law*, entitled “*Economic ‘Necessity’ in International Law*.”¹ In that comment, Sykes applies a rational choice approach from contract theory to assess the application of the “necessity” test by international courts. Sykes focuses on international investment law, where the issue has become quite salient because different arbitral tribunals have issued radically different holdings based on the same set of underlying facts.

Sykes starts by drawing lessons from theory and jurisprudence regarding necessity defenses in other legal fields, such as tort, contract, and international trade law. He then reviews, from an economic perspective, the customary international law defense of necessity and the jurisprudence on the necessity defense in international investment law, in particular that involving Argentina. He contends that, in order to limit opportunism and moral hazard, compensation should normally be due by a State that justifiably invokes a situation of necessity as a defense to a violation of its investment treaty obligations, but that such compensation should not be due until after the period of necessity terminates. The actual amount of compensation, he further contends, could be reduced so as not to require the payment of interest. He also leaves open the possibility that the justified invocation of necessity could be a complete defense so that no compensation would be due if the prospect of paying compensation would effectively preclude the State from adopting a necessary measure, an event he suggests would rarely occur. He thus proposes to “marry deference to a state’s claim for a need to apply emergency measures with [an appropriate] compensation requirement.”²

Professors Alberto Alvarez-Jimenez (University of Waikato, New Zealand) and Anne van Aaken (University of Saint Gallen, Switzerland) respond to Sykes in this symposium. Alvarez-Jimenez broadly agrees with Sykes’ insights and overall goal of attaining a balanced allocation of risks between States and investors in situations of economic emergencies, but finds that it would be inappropriate for an arbitral tribunal to apply Sykes’ logic without further treaty guidance.³ Nonetheless, he finds that tribunals can find, and already have found, ways to apply Sykes’ proposal (deferred compensation, possibly without interest) within the framework of existing jurisprudence. He first points out that by the time an arbitral tribunal issues an award, years have passed (especially where the process includes an annulment proceeding and request to stay enforcement), so that a *de facto* suspension of compensation has occurred. He then notes that tribunals can decide both that no compensation is due during an economic emergency for emergency measures taken, and that the

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¹ Alan O. Sykes, *Economic “Necessity” in International Law*, 109 AJIL 296 (2015).

² *Id.* at 323.

³ Alberto Alvarez-Jimenez, *Advancing Doctrine through Devil’s Advocacy: A Response to Alan O. Sykes*, 109 AJIL UNBOUND 175 (2015).

period of the emergency was short. In this way, a tribunal can tailor the amount of compensation to give a “balanced” economic result that is roughly similar to what Sykes proposes.

Van Aaken also agrees with many of Sykes’ arguments but calls for contextualization in their application, especially in light of the incentives of investors, who are the third party beneficiaries of the investment treaty/contract.⁴ She highlights the lack of expertise of arbitrators who are not well-positioned to make complex economic determinations. She thus argues for a middle ground between full deference—where arbitrators defer to States’ self-judgment of a situation of economic necessity—and strict scrutiny. For van Aaken, a tribunal should apply a good faith standard or outsource the decision on economic measures to an expert body. Most importantly, she notes that there is reason to doubt the optimality of an across-the-board rule, as opposed to a contextualized approach. She calls for differentiation based on the behavior of the investor in order to avoid risks of moral hazard, concluding that “[i]f the amount of the damage could have been avoided by the investor (e.g. by taking out insurance), if the investment took place at a time where the respective country was already a high risk (question of legitimate expectations), and if the investment was in a sector which is highly volatile due to economic cycles (e.g. energy or natural resources), the damage claim should be reduced to a larger extent.”

⁴ Anne van Aaken, *On the Necessity of Necessity Measures: A Response to Alan O. Sykes*, 109 AJIL UNBOUND 181 (2015)