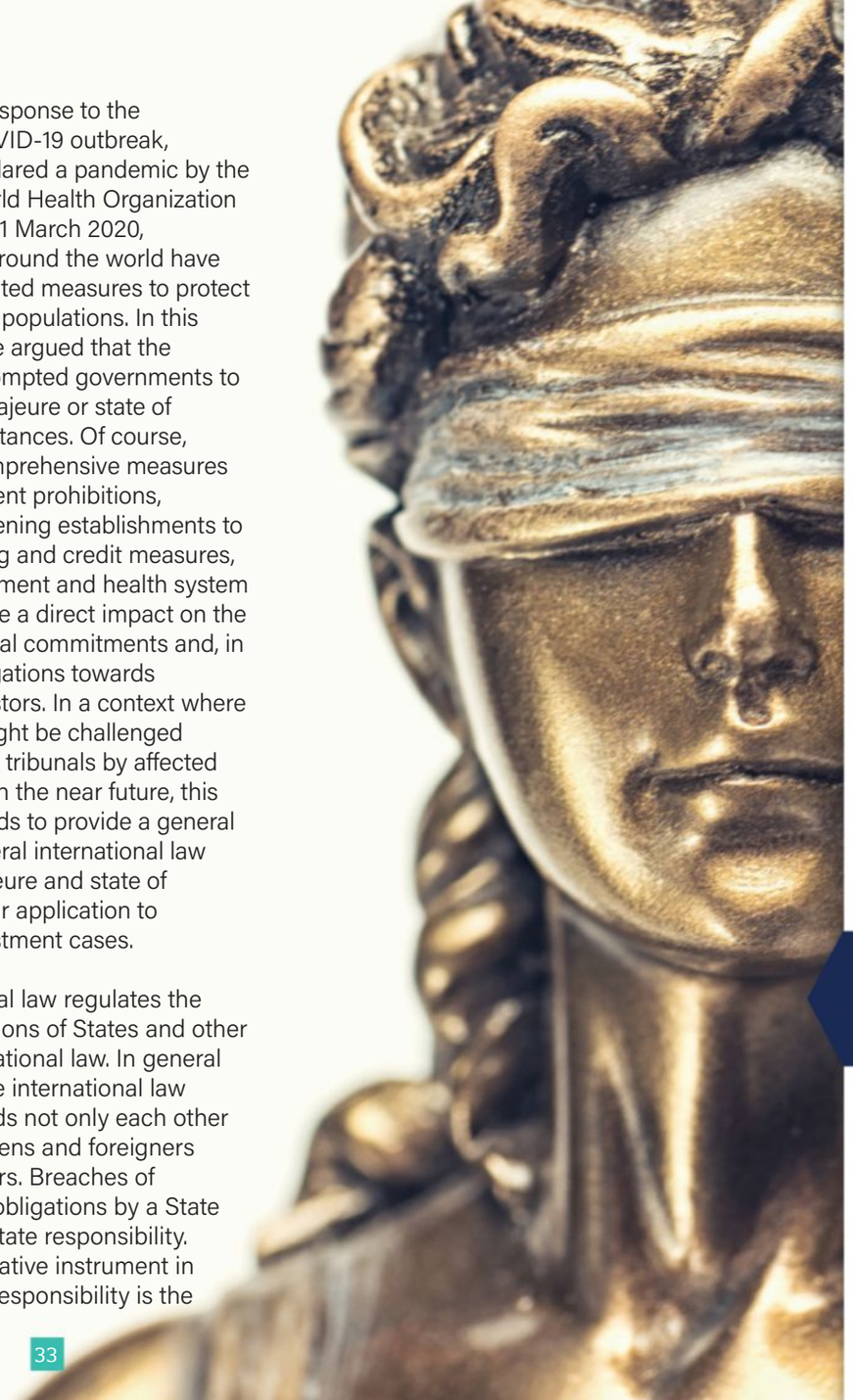
COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure

Sebastián Green Martínez
International Arbitration and Litigation

Mariana de la Rosa Riera
International Arbitration and Litigation

In response to the COVID-19 outbreak, declared a pandemic by the World Health Organization on 11 March 2020, governments all around the world have taken unprecedented measures to protect the health of their populations. In this context it could be argued that the COVID-19 has prompted governments to act under force majeure or state of necessity circumstances. Of course, thorough and comprehensive measures —such as movement prohibitions, restrictions on opening establishments to the public, banking and credit measures, as well as employment and health system actions— may have a direct impact on the States' international commitments and, in particular, its obligations towards international investors. In a context where said measures might be challenged before investment tribunals by affected foreign investors in the near future, this contribution intends to provide a general notion of the general international law rules of force majeure and state of necessity and their application to international investment cases.

Public international law regulates the rights and obligations of States and other subjects of international law. In general terms, States have international law obligations towards not only each other but also their citizens and foreigners within their borders. Breaches of international law obligations by a State may give rise to State responsibility. The most authoritative instrument in the field of State responsibility is the



International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (Articles or ARSIWA), which is considered to partially reflect customary international law.[1] The Articles apply to the obligations set out in bilateral and multilateral Investment treaties, i.e. the international treaties usually applied in investment arbitrations.

The Articles foresee the existence of exceptional circumstances that might preclude the wrongfulness of acts that would otherwise entail breaches of international law obligations.[2] In these troubled and challenging times, where states and private entities are increasingly adopting extraordinary measures to confront the COVID-19 pandemic, circumstances precluding wrongfulness are likely to be discussed in the context of investment arbitration. Although the Articles foresee a total of six circumstances that preclude wrongfulness, two are of particular relevance in the context of international investment arbitration, namely force majeure and state of necessity.[3] The aim of this article is to provide a general notion of these circumstances with a specific emphasis on international investment arbitration.

1 Rudolf Dolzer, Christoph Schreuer, *Principles of international Investment Law* (OUP 2012) 184.

2 The nature of circumstances precluding wrongfulness has entailed a lexical debate between state representatives. Judge James Crawford, former ILC special rapporteur for State responsibility, points out that the 'two groups might be called... "justifications and excuses."' See James Crawford, *State Responsibility - The General Part* (CUP 2013) 279.

3 The other circumstances, excluded from the scope of this article, are: consent, self-defence, countermeasures in respect of an internationally wrongful act and distress.

State of Necessity

State of necessity, état de nécessité or necessity is codified by Article 25 of the ILC's Articles which states that:

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.

The wording of Article 25 emphasizes the exceptional nature of necessity.[4] According to such Article, necessity will only preclude the wrongfulness of an otherwise internationally wrongful act when the following specific requirements are cumulatively met:[5]

(i) the State's conduct should be the only means of safeguarding an essential interest against a grave and imminent peril. The extent to which a given interest is 'essential' will depend on all the circumstances and cannot be prejudged. The peril has to be objectively established and not merely understood to be possible. In addition the peril must be not only grave, but also imminent in the sense of proximate;[6] and the course of action taken must be the 'only way' available to safeguard that interest.

(ii) the conduct in question should not impair an essential interest of the State or the States towards which the obligation exists, or of the international community as a whole. That means that 'the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.'[7]

(iii) the international obligation in question does not exclude the possibility of invoking necessity; and

(iv) the State invoking necessity has not contributed to the situation of

4 ILC, ARSIWA, commentary No 14 on Article 25; *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005) para 317: 'If strict and demanding conditions are not required or are loosely applied, any state could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and the predictability of the law.'

5 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary / Slovakia) (judgment) [1997] ICJ Rep 7, paras 51- 52.

6 ILC, ARSIWA, Comments on art 25, para 15.

7 Ibid, Comments on art 25, para 17.

Necessity does not involve conduct which is involuntary or coercive –such as force majeure–. Necessity arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other

necessity. This contribution must be 'sufficiently substantial and not merely incidental or peripheral.'[8]

Necessity does not involve conduct which is involuntary or coercive –such as force majeure (Article 23 of the ARSIWA)–. Necessity arises 'where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other.'[9]

Force Majeure

The preclusion of the wrongfulness of an act of a State that violates its international obligation owing to force majeure differs from necessity as the conduct (that would otherwise be internationally wrongful) must be involuntary or at least involve no element of free choice.[10] It refers to a situation that makes it totally impossible to perform the obligation agreed between the parties as opposed to simply 'more difficult,'[11] for example due to a political or economic crisis.[12]

Force majeure is codified in Article 23 of the ILC's Articles in the following terms:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) the State has assumed the risk of that situation occurring.

A situation of force majeure precluding the wrongfulness of an international obligation only arises when it is:[13]

(i) unforeseeable: the act in question must be brought about by an irresistible force or an unforeseen event;

(ii) uncontrollable: the act in question is beyond the control of the State concerned; and

(iii) impossible: it is materially impossible in the circumstances to perform the obligation.

States may not invoke force majeure if they have caused or induced the situation in question. Merely contributing to the situation of material impossibility does not suffice, but rather 'the situation of force majeure must be "due" to the conduct of the State invoking it.'[14] Furthermore, force majeure 'should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.'[15]

State of Necessity and Force Majeure in International Investment Arbitration

Both of the circumstances precluding wrongfulness discussed in this article have been extensively invoked and considered in international dispute settlement mechanisms. For instance, the state of necessity has been recognized as a rule of customary international law by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case.[16] Force majeure, on the other hand, has been accepted as a circumstance precluding wrongfulness by international tribunals, such as the tribunal of the *Russian Indemnity* arbitration between Russia and Turkey.[17]

The state of necessity exception has been extensively considered and applied in the investment arbitration cases that followed on from Argentina's economic crisis of 2001.[18] In the *CMS* case,[19] the claimant –which had invested in a privatized company involved in the transportation of gas–

8 Ibid, Comments on art 25, para 20.
9 Ibid, Comments on art 25, para 2.
10 Ibid, Comments on art 23, para 1.
11 Dolzer, Schreuer (n 1) 187.
12 *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007) para 246.
13 ILC, Articles, 2001, Comments on art 23, para 2.
14 Ibid, Comments on art 23, para 9.
15 Ibid, Comments on art 23, para 10.
16 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary / Slovakia) (judgment) [1997] ICJ Rep 7, paras 51- 52.
17 *The Russian Indemnity Case* (Russia v Turquie) (award) [1912] XI U.N.R.I.A.A. 431, 443.
18 Although there are other cases involving state of necessity considerations, we refer to two cases for illustrative purposes.
19 *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005).

alleged the breach of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic owing to the economic measures taken by the latter due to the economic crisis. Such measures involved the freezing of tariffs under the relevant concession agreement, the revocation of the pegging of the Argentine peso to the US dollar and the peso devaluation. CMS Gas initiated arbitral proceedings against the Argentine Republic asking for the suspension of such measures, alleging the breach of the 1991 bilateral investment treaty. The respondent pleaded the defence of necessity but the tribunal, even though it considered that an economic crisis may have justified a state of necessity plea, found that all the conditions for its application had not been met.[20] The tribunal found that the measures taken by Argentina were not the only way to cope with the situation and that Argentina itself had contributed to the situation.[21]

Shortly after, the tribunal in the *LG&E* case reached the opposite conclusion.[22] In that case, which involved another investor in the gas sector facing Argentina's economic crisis, the tribunal found that Argentina's abrogation of the guarantees breached certain standards in the applicable bilateral investment treaty. Contrary to the CMS case, however, the tribunal considered that the measures adopted by the Argentinian government where the 'only means' available and that Argentina had not substantially contributed to the state of emergency.[23] It considered the situation of necessity to have existed from 1 December 2001 to 26 April 2003 and therefore that the Argentine Republic should be absolved from international responsibility for losses that occurred during that period.

The rule on force majeure has also been recognized by investment arbitral tribunals as customary law. In *Sempra*,[24] a US investor that had invested in the gas transportation sector in Argentina challenged the measures adopted by Argentina during its economic crisis in 2001. In its award, the tribunal expressly referred to the Articles holding that '[force majeure] requires, under Article 23 of the Articles on State Responsibility, that the situation involve the occurrence of an irresistible force, beyond the control of the State, making it materially impossible under the circumstances to perform the obligation.'[25]

Recently, the tribunal in the *Greentech* case[26] analysed the force majeure rule. The case involved an investment in Italy's photovoltaic sector where the claimant had acquired a number of photovoltaic plants and, due to specific commitments entered into by Italy, expected tariffs to be kept for two decades. After the incentives gave place to an economic crisis in Italy, the tariffs were modified through a number of tax measures that were challenged by the claimants. The tribunal acknowledged the existence of the rule and that a general crisis could potentially develop into a circumstance of force majeure. After a debate between the members of the tribunal, however, the majority specified that not every economic hardship reaches the threshold of force majeure:

> The majority of the Tribunal does not deny that Italy faced 'a situation of economic difficulty' as Professor Sacerdoti writes in his dissenting opinion. However, none of the circumstances evidenced in this case reach the level of force majeure. The right of Respondent to change the tariffs does not arise under the present circumstances.[27]

The rules on circumstances precluding wrongfulness apply to truly extreme situations where urgent and radical measures are usually adopted by States. While the absolute priority is the protection of the health and wellbeing of everyone, the current COVID-19 pandemic poses legal and economic challenges to every actor in the international arena. Considering that these measures could potentially be a catalyst to future claims by foreign investors and/or States, the aim of this article has been to offer a general view of the relevant circumstances precluding wrongfulness that may be invoked in coming investment arbitration proceedings.

20 Ibid, paras 315-331.

21 The award was partially annulled. See *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007).

22 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Republic of Argentina*, ICSID Case No ARB/02/1, Award (3 October 2006).

23 Ibid, para 257.

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

25 Ibid, para 246.

26 *Greentech Energy Systems A/S (now Athena Investments A/S), NovEnergia II Energy & Environment (SCA) SICAR and NovEnergia II Italian Portfolio SA v Italian Republic*, SCC Case No V(2015/095), Final Award (23 December 2018).

27 Ibid, para 451.