THE REPUBLIC OF TURKIYE
GALATASARAY UNIVERSITY
INSTITUTE OF SOCIAL SCIENCES
DEPARTMENT OF PRIVATE LAW

STATES OF EMERGENCY: THE ROLE OF NECESSITY AND *FORCE MAJEURE* IN INVESTOR-STATE DISPUTE SETTLEMENT

MASTER'S THESIS

Elif KAPISIZ

Thesis Advisor: Assoc. Prof. Berk DEMIRKOL

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FOREWORD

This thesis could not have been completed without the support, encouragement, and contributions of many people, to whom I am deeply grateful.

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ABBREVIATIONS

Art.	Article
Austria-Libya BIT	Agreement between the Republic of Austria and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments
BIT	Bilateral investment treaty
CIL	Customary international law
CISG	United Nations Convention on Contracts for the International Sale of Goods
COVID-19	Coronavirus Disease 2019
e.g.	*exempli gratia*, for example
Ebola	Ebola Virus Disease
ed.	Editor
eds.	Editors
EMG	East Mediterranean Gas Company
EU	European Union
FET	Fair and equitable treatment
ff	Following pages
fn.	Footnote
FPS	Full protection and security
GATT	General Agreement on Tariffs and Trade
H1N1	Influenza A (H1N1) Virus

i.e.	*id est*, that is, in other words
IACtHR	The Inter-American Court of Human Rights
Ibid.	*Ibidem*, in the same place
ICC	International Chamber of Commerce
ICJ or the Court	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IHL	International humanitarian law
ILC	International Law Commission
ILC Articles or ILC Articles on State Responsibility	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
IMF	International Monetary Fund
ISDS	Investor-state dispute settlement
ITLOS	The International Tribunal for the Law of the Sea
MERS	Middle East Respiratory Syndrome
MFN	Most-favored-nation
NATO	North Atlantic Treaty Organization
no.	Number
NPM	Non-precluded measures
p.	Page
para.	Paragraph
paras.	Paragraphs

PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PhD	Doctor of Philosophy
PIL	Public international law
pp.	Pages
PPP	Public-private partnerships
SARS	Severe Acute Respiratory Syndrome
SOE	State-owned enterprise
U.S.	United States of America
U.S. – Argentina BIT	Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment
UFG	Union Fenosa Gas
UN	United Nations
UNGA	United Nations General Assembly
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
v.	Versus
VCLT	Vienna Convention on the Law of Treaties
vol.	Volume
WHO	World Health Organization
WTO	World Trade Organization

RÉSUMÉ

Dans le monde actuel, marqué par la multiplication des crises complexes telles que les effondrements économiques, les pandémies, les catastrophes environnementales, l'instabilité politique et les conflits armés, il est devenu inévitable que les États interviennent dans les droits des investisseurs afin de protéger l'intérêt public. La question de savoir dans quelle mesure de telles interventions peuvent être considérées comme licites en droit international nécessite une analyse approfondie des limites de deux moyens de défense fondamentaux : l'état de nécessité et la *force majeure*. Cette thèse de master de recherche examine de manière approfondie le rôle de ces deux défenses juridiques fondamentales que les États peuvent invoquer dans des circonstances exceptionnelles en droit international de l'investissement, notamment dans le contexte du règlement des différends entre investisseurs et États. L'étude explore dans quelle mesure les réponses étatiques à des crises soudaines peuvent légitimement interférer avec les droits des investisseurs dans un système économique mondialisé, et comment ces interférences peuvent être juridiquement encadrées par le droit international.

L'objectif principal de cette thèse est d'évaluer la nature juridique et la fonction des moyens de défense fondés sur l'état de nécessité et la *force majeure*, en particulier dans le cadre du droit international de l'investissement. Elle identifie les sources juridiques de ces défenses, y compris le droit international coutumier et les principes généraux du droit, et examine les conditions strictes dans lesquelles elles peuvent être invoquées. Elle analyse en outre la manière dont ces défenses sont interprétées par les tribunaux arbitraux, leur interaction avec les clauses d'exception contenues dans les traités, ainsi que les incertitudes et difficultés qu'elles soulèvent en pratique. La thèse va au-delà de l'analyse doctrinale pour explorer les implications concrètes de ces défenses pour les États hôtes et les investisseurs étrangers confrontés à des situations d'urgence.

La première partie de la thèse présente le cadre juridique, en commençant par les principes généraux du droit international et les articles de la Commission du droit international (CDI) sur la responsabilité de l'État. Elle clarifie la distinction entre l'état de nécessité et la *force majeure* et examine le rôle des clauses d'exception ou d'urgence dans les traités d'investissement. Elle aborde également la manière dont la *force majeure* et la clause de hardship sont traitées dans les contrats d'investissement, et comment les dimensions de droit public et de droit privé s'entrecroisent dans ce contexte.

La deuxième partie offre une analyse complète de la défense fondée sur l'état de nécessité dans le règlement des différends entre investisseurs et États, en se concentrant sur l'article 25 des articles de la CDI. Elle détaille les exigences juridiques, y compris le critère du « *seul moyen* », la notion d'« *intérêt essentiel* » et la condition d'absence de

contribution, et discute leur application dans la jurisprudence pertinente. Une attention particulière est portée aux affaires liées à la crise financière en Argentine, aux conflits en Libye, et aux différends gaziers en Égypte. La thèse évalue de manière critique l'application stricte de ces seuils juridiques et les débats concernant la proportionnalité, la contribution de l'État, et le chevauchement avec les exceptions prévues dans les traités.

La troisième partie est consacrée à la défense fondée sur la *force majeure*, en commençant par sa définition juridique et les exigences établies par le droit international coutumier, notamment l'article 23 des articles de la CDI. Elle explore comment cette défense a été appliquée dans les réclamations fondées sur les traités, les différends contractuels et les cas mixtes, ainsi que la manière dont les tribunaux arbitraux ont traité son invocation. La thèse souligne que la *force majeure* est rarement acceptée dans le contexte ISDS et expose les obstacles juridiques et pratiques qui en limitent l'efficacité.

La quatrième partie présente une analyse comparative avec l'arbitrage commercial, en examinant la manière dont les clauses de *force majeure* et de hardship sont comprises et appliquées dans des contextes purement contractuels. Elle met en lumière les différences entre l'approche plus flexible adoptée en arbitrage commercial et les standards rigides en ISDS, en identifiant les convergences et divergences qui peuvent éclairer les futures réformes.

La cinquième partie propose une analyse thématique de l'application de ces moyens de défense dans différents types de crises. Elle aborde les urgences sanitaires telles que la pandémie de COVID-19, les crises économiques et financières, les catastrophes climatiques et environnementales, la guerre, les sanctions, ainsi que les inégalités structurelles entre le Nord et le Sud global. Cette section s'appuie sur des exemples pratiques pour évaluer comment les tribunaux arbitraux ont appréhendé l'état de nécessité et la *force majeure* dans des contextes variés, et elle examine les implications de la jurisprudence émergente.

La sixième et dernière partie analytique présente des réflexions et propositions de réforme, portant sur des sujets tels que l'amélioration de la rédaction des traités, la cohérence des raisonnements des tribunaux arbitraux, la protection de l'espace réglementaire des États, et la réduction des inégalités structurelles en droit de l'investissement. Elle propose également des mesures pour garantir un système de protection des investissements étrangers plus équilibré, prévisible et équitable en période de crise.

ABSTRACT

In today’s world, with the rise of complex crises such as economic collapses, pandemics, environmental disasters, political instability, and armed conflicts, it has become inevitable for states to intervene in investor rights in order to protect public interests. The question of to what extent such state interventions can be considered lawful under international law necessitates a closer examination of the boundaries of two key defences: necessity and *force majeure*. This master's thesis comprehensively examines the role of these two core legal defences that states may invoke in exceptional circumstances under international investment law, particularly in the context of investor-state dispute settlement. The study explores to what extent state responses to sudden crises may justifiably interfere with investor rights in a globalized economic system, and how these interferences can be legally framed under international law.

The primary aim of the thesis is to assess the legal nature and function of the necessity and *force majeure* defences, particularly within the scope of international investment law. It identifies the legal sources of these defences, including CIL and general principles, and examines the strict conditions under which they may be invoked. It further addresses how these defences are interpreted by arbitral tribunals, their interaction with treaty exception clauses, and the challenges and ambiguities they pose in practice. The thesis goes beyond doctrinal analysis to explore the real-world implications of these defences for both host states and foreign investors navigating emergencies.

The first part of the thesis provides the legal framework, starting with the general principles of international law and the ILC Articles on State Responsibility. It clarifies the distinction between necessity and *force majeure* and examines the role of emergency or exception clauses in investment treaties. It also addresses how *force majeure* and hardship are treated in investment contracts and how public and private law dimensions intersect in such contexts.

The second part of the thesis offers a comprehensive analysis of the necessity defence in investor-state dispute settlement, focusing on Article 25 of the ILC Articles. It details each legal requirement, including the “*only way*” test, the definition of “*essential interest*,” and the non-contribution criterion, and discusses their application in relevant caselaw. Particular emphasis is placed on the Argentina financial crisis cases, Libya conflict cases, and Egypt gas disputes. The thesis critically evaluates the strict application of legal thresholds and debates surrounding proportionality, contribution, and the overlap with treaty-based exceptions.

The third part focuses on the *force majeure* defence, beginning with its legal definition and requirements under CIL, specifically Article 23 of the ILC Articles. It explores how *force majeure* has been applied in treaty claims, contractual disputes, and mixed cases, as well as how tribunals have treated its invocation. The thesis underscores its rare acceptance in investor-state dispute settlement and outlines the legal and practical challenges limiting its success.

The fourth part presents a comparative analysis with commercial arbitration, examining how *force majeure* and hardship clauses are understood and applied in purely contractual contexts. It contrasts the more flexible and remedial approach in commercial arbitration with the rigid standards in investor-state dispute settlement, identifying key points of divergence and convergence that may inform future reforms.

The fifth part provides a thematic analysis of the application of these defences across different types of crises. It discusses public health emergencies like COVID-19, economic and financial collapses, environmental and climate disasters, war, sanctions, and structural inequalities between Global North and South. This section draws on practical examples to assess how tribunals have approached necessity and *force majeure* in diverse contexts and considers the implications of emerging jurisprudence.

The sixth and final analytical part presents reflections and reform proposals, addressing issues such as better treaty drafting, consistency in tribunal reasoning, safeguarding regulatory space for states, and mitigating structural inequities in investment law. It also proposes steps to ensure a more balanced, predictable, and equitable foreign investment protection system in times of crisis.

In conclusion, the thesis evaluates the capacity of international investment law to cope with exceptional situations while maintaining a fair balance between state sovereignty and investor protection. Although necessity and *force majeure* are narrowly defined in law, their inconsistent application and divergent tribunal interpretations limit their effectiveness. As such, the study calls for clearer drafting of treaties, structural investor-state dispute settlement reform, and a more context-sensitive and equitable legal understanding of state conduct in emergencies.

ÖZET

Günümüzde ekonomik çöküşler, pandemiler, çevresel felaketler, siyasi istikrarsızlıklar ve silahlı çatışmalar gibi karmaşık krizlerin artmasıyla birlikte, devletlerin kamu menfaatlerini koruma amacıyla yatırımcı haklarına müdahale etmesi kaçınılmaz hale gelmiştir. Bu tür devlet müdahalelerinin uluslararası hukuk nezdinde ne ölçüde hukuka uygun sayılabileceği sorusu, "*zorunluluk*" ve "*mücbir sebep*" olmak üzere iki temel savunmanın sınırlarının daha yakından incelenmesini gerektirmektedir. Bu yüksek lisans tezi, devletlerin uluslararası yatırım hukuku çerçevesinde olağanüstü hallerde başvurabileceği bu iki temel hukuki savunmanın, özellikle yatırımcı-devlet uyuşmazlıklarının çözümünde nasıl bir rol oynadığını kapsamlı biçimde incelemektedir. Bu bağlamda çalışma, devletlerin ani krizlere verdikleri tepkilerin küreselleşmiş ekonomik düzende yatırımcı haklarına ne ölçüde meşru biçimde müdahale edebileceğini ve bu müdahalelerin uluslararası hukuk çerçevesinde nasıl gerekçelendirilebileceğini araştırmaktadır.

Tezin temel amacı, özellikle uluslararası yatırım hukuku bağlamında zorunluluk ve mücbir sebep savunmalarının hukuki niteliğini ve işlevini değerlendirmektir. Bu savunmaların dayandığı hukuki kaynakları, özellikle uluslararası teamül hukuku ve genel hukuk ilkeleri, tespit etmekte ve hangi sıkı koşullar altında ileri sürülebileceğini irdelemektedir. Ayrıca, bu savunmaların hakem heyetlerince nasıl yorumlandığı, yatırım anlaşmalarındaki istisna hükümleriyle nasıl etkileşime girdiği ve uygulamada ne tür zorluklar ve belirsizlikler doğurduğu tartışılmaktadır. Tez, yalnızca kuramsal bir değerlendirme sunmakla kalmayıp, bu savunmaların olağanüstü durumlarla karşı karşıya kalan ev sahibi devletler ve yabancı yatırımcılar için pratik etkilerini de analiz etmektedir.

Tezin ilk bölümü, zorunluluk ve mücbir sebep savunmalarının genel uluslararası hukuk içerisindeki yerini ortaya koyan hukuki çerçeveyi sunmaktadır. Uluslararası Hukuk Komisyonu'nun (ILC) Devletlerin Uluslararası Hukuka Aykırı Fiillerinden Doğan Sorumluluğu Hakkındaki Maddeleri temel alınarak, bu savunmaların nasıl tanımlandığı ve hangi şartlar altında hukuka aykırılığı ortadan kaldırabileceği incelenmektedir. Bu bölümde ayrıca, yatırım anlaşmalarında yer alan istisna ve olağanüstü hal hükümlerinin rolü ile yatırım sözleşmelerindeki mücbir sebep ve aşırı ifa güçlüğü (*hardship*) hükümleri ele alınmakta, kamu ve özel hukuk sınırlarının nasıl kesiştiği açıklanmaktadır.

Tezin ikinci bölümü, zorunluluk savunmasını yatırımcı-devlet uyuşmazlıklarında detaylı biçimde analiz etmektedir. Bu kapsamda, ILC'nin 25. Maddesi çerçevesinde savunmanın hukuki gereklilikleri, "*tek çıkar yol*" testi, "*esas menfaat*" kavramı, "*katkı yasağı*" gibi unsurlar, ayrıntılı biçimde ele alınmaktadır. Arjantin'in ekonomik krizi, Libya'daki iç çatışmalar ve Mısır'daki altyapı problemleri gibi somut uyuşmazlıklar bu

bağlamda incelenmekte; hakem heyetlerinin bu vakalara nasıl yaklaştığı değerlendirilmekte ve özellikle orantılılık, katkı derecesi ve anlaşmalardaki istisnalarla etkileşim konularındaki güncel tartışmalar analiz edilmektedir.

Üçüncü bölüm, mücbir sebep savunmasına odaklanmakta ve bu savunmanın uluslararası teamül hukukundaki tanımı ile ILC'nin 23. Maddesi çerçevesindeki gereklerini ortaya koymaktadır. Mücbir sebebin antlaşma temelli iddialarda, sözleşmeye dayalı uyuşmazlıklarda ve karma davalarda nasıl uygulandığı ve hakem heyetlerince nasıl değerlendirildiği açıklanmaktadır. Tez, mücbir sebep savunmasının yatırım tahkimi kararlarında oldukça nadiren kabul edildiğini vurgulamakta ve bu sınırlı başarıyı açıklayan hukuki ve pratik engelleri ortaya koymaktadır.

Dördüncü bölüm, ticari tahkimle karşılaştırmalı bir analiz sunmakta; ticari sözleşmelerde mücbir sebep ve aşırı ifa güçlüğü hükümlerinin nasıl yorumlandığını ve uygulandığını incelemektedir. Yatırım tahkimindeki katı yorumlar ile ticari tahkimdeki daha esnek ve çözüm odaklı yaklaşımlar arasındaki farklar ortaya konmakta ve gelecekteki reformlara ışık tutabilecek ortak noktalar ve ayrımlar analiz edilmektedir.

Beşinci bölüm, savunmaların farklı türde krizlerdeki uygulamasına dair tematik bir analiz sunmaktadır. COVID-19 pandemisi, ekonomik ve finansal krizler, çevresel ve iklimsel felaketler, savaş ve yaptırımlar ile Küresel Kuzey-Güney eşitsizlikleri gibi başlıklar altında somut örnekler üzerinden hakem heyetlerinin yaklaşımı değerlendirilmektedir. Bu bölüm, gelişen içtihatların sonuçlarını tartışmakta ve farklı bağlamlarda savunmaların nasıl işlediğini göstermektedir.

Altıncı ve son analiz bölümü, reform önerileri ve değerlendirmeler sunmakta; yatırım anlaşmalarının daha açık biçimde kaleme alınması, hakem heyetlerinin kararlarında tutarlılık sağlanması, devletlerin düzenleyici alanlarının korunması ve yatırım hukukundaki yapısal eşitsizliklerin giderilmesi gibi meseleleri ele almaktadır. Ayrıca, kriz dönemlerinde daha dengeli, öngörülebilir ve adil bir yatırım koruma sisteminin nasıl inşa edilebileceğine dair öneriler sunmaktadır.

INTRODUCTION

The increasingly complex crisis landscape of the 21st century has compelled states to intervene more frequently and assertively in economic and regulatory spheres in order to safeguard public welfare. From global financial collapses and armed conflicts to pandemics and climate-induced disasters, states are often required to take urgent and extraordinary measures. However, these measures can come into tension with the rights granted to foreign investors under international investment law, raising critical questions about the limits of state sovereignty and the protection of investor interests.

At the heart of this tension lies a fundamental dilemma: how can a legal framework designed to promote stability, predictability, and investor confidence accommodate the unpredictability and volatility of real-world emergencies? Investor-state dispute settlement mechanisms often become the forum for resolving this conflict, as foreign investors challenge state measures that, while taken in the public interest, may appear to breach treaty obligations or undermine investment protections.

Two legal defences that states frequently invoke in such disputes are necessity and *force majeure*. Both defences are rooted in CIL and reflected in the Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission. While they are well-established in international law, their application within the investment arbitration context remains inconsistent and contested. The threshold for invoking these defences is high, and arbitral tribunals have diverged significantly in their interpretation of key elements such as causation, contribution, foreseeability, and the existence of alternative measures.

Moreover, the complexity is heightened by the interplay between CIL and treaty-specific exceptions, which may include clauses on public order, national security, or emergencies. The overlap, and sometimes conflict, between these defences and treaty-based exception clauses poses further challenges for both tribunals and parties to a dispute. Questions also arise regarding the relationship between these public law defences and contractual mechanisms, such as *force majeure* or hardship clauses, especially in hybrid disputes involving both treaty and contract claims.

This thesis aims to provide a comprehensive analysis of the role and limits of necessity and *force majeure* in investor-state arbitration. It begins by exploring the legal foundations of both defences in international law, examining their codification and the theoretical rationale behind them. The study then turns to a detailed assessment of their use in investment arbitration, focusing on key case law, most notably the extensive jurisprudence arising from Argentina's 2001–2002 financial crisis. By comparing conflicting arbitral decisions, the thesis highlights inconsistencies in interpretation and application, particularly regarding the strictness of the "*only way*" test and the standard of contribution.

In addition, the thesis examines the interaction between these customary defences and treaty exception clauses, analyzing how tribunals have approached the interpretation of clauses that are self-judging or subject to review. It also considers the role of contractual clauses and how *force majeure* operates differently in private versus public law contexts. Finally, the thesis applies the theoretical framework to contemporary global crises, including the COVID-19 pandemic, armed conflicts, and climate emergencies, to assess how the law can and should evolve to better accommodate legitimate state action in times of extreme necessity.

The thesis is divided into six main chapters. Chapter One sets out the legal framework by examining the general principles of international law, the ILC Articles on State Responsibility, and the key distinctions between necessity and *force majeure*. It also explores emergency or exception clauses in investment treaties and the role of contractual *force majeure* and hardship clauses in investor-state relations. Chapter Two provides a comprehensive analysis of the necessity defence in ISDS. It discusses the legal thresholds, including core elements such as the "*only way*" test, the definition of essential interests, and the non-contribution requirement. This chapter includes a detailed examination of relevant jurisprudence, such as the Argentina financial crisis cases, Libya conflict cases, and post-Arab Spring disputes, and explores current doctrinal debates over proportionality and the interaction with treaty exception clauses. Chapter Three turns to the *force majeure* defence, assessing its legal foundations under CIL. It examines how *force majeure* has been used in both treaty-based and contractual investment claims and evaluates its rare invocation and acceptance by arbitral tribunals. Chapter Four provides a comparative perspective by analyzing how *force majeure* and hardship are treated in commercial arbitration. It highlights differences in approach, flexibility in interpretation, and the commonalities and contrasts between commercial and investment arbitration frameworks. Chapter Five offers a thematic analysis of how necessity and *force majeure* are used across different types of crises. It addresses public health emergencies (particularly COVID-19), financial and economic crises, environmental and climate emergencies, armed conflict and sanctions, and structural inequalities within the North-South divide. This chapter draws lessons from case law and evaluates evolving tribunal practices. Chapter Six presents reflections and policy proposals. It discusses how treaty drafting could better incorporate emergency clauses, how tribunals might achieve greater consistency, how states can protect their regulatory autonomy, and how systemic issues in ISDS can be addressed in light of recurring global emergencies.

I. LEGAL FRAMEWORK

Understanding how the doctrines of necessity and *force majeure* operate within the international legal framework requires beginning with their foundations in general principles of international law. These principles, as recognized in Article 38(1)(c) of the Statute of the International Court of Justice ("**ICJ**" or "**Court**"),[1] draw upon the shared legal traditions of national systems and serve as autonomous sources of international law alongside treaty and custom. While both necessity and *force majeure* have been codified in the International Law Commission's ("**ILC**") Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**" or "**ILC Articles on State Responsibility**"),[2] they also reflect long-standing general principles found in many domestic legal orders. In the context of investor-state dispute settlement ("**ISDS**"), tribunals often rely on these principles, especially in the absence of treaty or contractual exceptions, to assess whether a state's failure to perform its obligations during crises is legally excused. However, the dual grounding of these defences in both custom and general principles has also led to doctrinal uncertainty, with tribunals and parties frequently invoking them interchangeably.

This section explores the legal status and interpretive function of general principles in ISDS, the dual codification of necessity and *force majeure* in the ILC framework and domestic legal systems, and the tensions and inconsistencies that arise in their application, particularly when public interest and investor rights collide in times of emergency.

A. General Principles of International Law

Localizing the necessity and *force majeure* in international law requires starting with an analysis of general principles of international law. Both necessity and *force majeure* rest on two distinct pillars with one being CIL ("**CIL**")[3] and the other one being general

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[1] Statute of the International Court of Justice, annexed to the Charter of the United Nations, 26 June 1945, 33 UNTS 993.
[2] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001, UNGA Res 56/83 (12 December 2001), UN Doc A/RES/56/83.
[3] As codified under Articles 23 and 25 of the ILC Articles.

principles of international law. In practice, these pillars are often invoked and applied interchangeably by parties and tribunals.[4]

General principles of law, as recognized in Article 38(1)(c) of the ICJ Statute, encompass principles "*recognized by civilized nations*".[5] Their role is to fill the gaps in international law by drawing reference from the common themes of the major different legal systems.[6] Although this gap-filling role may lead to a wrong impression that they are subsidiary rules, they form an autonomous source of international law, distinct from treaty law and custom.[7] In ISDS, they serve to interpret and supplement the applicable rules, especially to evaluate the state responsibility in exceptional circumstances.

In addition to being codified in the ILC Articles on State Responsibility (Articles 23 and 25),[8] both necessity and *force majeure* also reflect common themes found across different domestic legal systems[9] – albeit with nuanced differences. Civil law jurisdictions recognize *état de necessité* and *force majeure*, while common law systems opt for notions such as necessity, impossibility and frustration of purpose.[10] Despite differences in

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[4] See *e.g.*, *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Reports of International Arbitral Awards, United Nations, Volume XX, 30 April 1990, pp. 215-284, pp. 251 *ff*.
[5] Statute of the ICJ, Art. 38(1)(c). Available at: https://www.icj-cij.org/statute (last accessed: 12 July 2025).
[6] HAFEZ Karim, "The General Principles of Law Applicable to International Disputes", Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, vol. 64, no. 5, 1998, pp. 1-15, pp. 11-12.
For a more detailed analysis *see* WANG Yilin, "The Origins and Operation of the General Principles of Law as Gap fillers", Journal of International Dispute Settlement, ed. Thomas Schultz, vol. 13, no. 4, 2022, pp. 560-582.
[7] PELLET Alain / MÜLLER Daniel, "Article 38", The Statute of the International Court of Justice: A Commentary, ed. Andreas Zimmermann, and others, Oxford Commentaries on International Law, Oxford Law Pro, 2019, para. 246, https://doi.org/10.1093/law/9780198814894.003.0050.
[8] Articles 23 and 25 of the ILC Articles on State Responsibility,.
[9] WANG Lu / SHAN Wenhua, "Force Majeure and Investment Arbitration", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, vol. 37, no. 1/2, 2022, pp. 138-159, pp. 140-141; SICARD-MIRABAL Josefa / DERAINS Yves, "Chapter 7: General Defenses on the Merits", Introduction to Investor-State Arbitration, Kluwer Law International, 2018, pp. 161-170, p. 163; MARTINEZ Alexis, "Part III Chapter 13: Invoking State Defenses in Investment Treaty Arbitration", The Backlash against Investment Arbitration, eds. Michael Waibel, Asha Kaushal, 2010, pp. 315-337, p. 316.
[10] Wang / Shan, "**Force Majeure and Investment Arbitration**", pp. 138-139; GUO Yuanyuan / SHAIK MD NOOR ALAM Hazlina / DAHLAN Nur Khalidah, "Comparative Research on Force Majeure System in Contract Law", International Journal of Criminal Justice Science, vol. 19, no. 1, 2024, pp. 101-102.

terminology and requirements, the underlying rationale is common: when a party is compelled to breach a contractual obligation due to external circumstances beyond its control, it would violate fundamental principles of justice, equity, and proportionality to hold that party fully responsible.[11]

In ISDS, necessity and *force majeure* are often applied as forming part of general principles of international law, especially when the applicable treaty is silent on exceptions for emergency situations.[12] The same is true for contractual gaps.[13] A particularly sensitive instance of application would be when there is public interest at stake, forcing the state to disregard its obligations to safeguard public health, financial stability or national security. In such cases, the tribunals strike a balance between the protection of foreign investors and state's legitimate right to regulate in times of emergency.[14] States usually raise these defences in the context of war, economic collapse, natural disasters, or public health emergencies, such as the Coronavirus Disease 2019 ("**COVID-19**") pandemic.[15]

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[11] Guo / Shaik Md Noor Alam / Dahlan, "**Comparative Research on Force Majeure System in Contract Law**", p. 101.

[12] Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 138; GOLDSMAN Roy Uriel / FORASTIER Miguel López, "Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis", Arbitration in Argentina, ed. Fabricio Fortese, Kluwer Law International, 2020, pp. 645-668, pp. 650-652; TOMKA Peter, "Chapter 34: Defenses Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties", Building International Investment Law: The First 50 Years of ICSID, eds. Meg Kinnear, Geraldine R. Fischer, Kluwer Law International, 2015, pp. 477-494, p. 478.

[13] "*It also is admitted generally that force majeure, as a cause of full or partial suspension or termination of a contract, is a general principle of law which applies even when the contract is silent. Therefore, although Article 27 does not so provide, that absence is no obstacle to a finding that the Agreement was terminated by force majeure if the circumstances warrant such a finding (…)*": *Mobil Oil Iran, Inc, et al*, Partial Award No. 311–74/76/81/150–3, 14 July 1987, 16 Iran–US Claims Tribunal Reports 39, para. 117.

[14] ACCAOUI LORFING Pascale, "Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure", Balancing the Protection of Foreign Investors and States Responses in the Post-Pandemic World, eds. Yulia Levashova, Pascale Accaoui Lorfing, Kluwer Law International, 2022, pp. 31-60, pp. 59-60.

[15] Sicard-Mirabal / Derains, "**Chapter 7: General Defenses on the Merits**", p. 163; AZEREDO DA SILVEIRA Mercedeh, "Chapter 7: Economic Sanctions, Force Majeure and Hardship", ICC Dossier No. 17: Hardship and *Force majeure* in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World, Dossiers of the ICC Institute of World Business Law, eds. Fabio Bortolotti, Dorothy Udeme Ufot, vol. 17, 2018, pp. 161-211, pp. 184 *ff*; Accaoui Lorfing, "**Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure**", pp. 57-59.

Yet, reliance on general principles of international law while raising the necessity and *force majeure* defences is a double-edged sword: while it offers the advantage of flexibility, it also creates the risk of inconsistent application.[16] As these principles are designed for exceptional circumstances and impose strict legal thresholds, the protection they offer to states may be uncertain, especially considering that ISDS is a system where legal certainty and protection of foreign investors' rights are often emphasized.[17]

As will be explored in later sections, this tension has led to divergent outcomes in arbitral practice, raising questions about the coherence and legitimacy of ISDS jurisprudence in emergency contexts.[18]

B. The ILC Articles on State Responsibility

The ILC Articles on State Responsibility, despite being a soft law instrument, are widely regarded as reflective of CIL.[19] They codify the general rules on the attribution of conduct to states and the legal consequences of internationally wrongful acts. While non-binding, they are often used by international courts and tribunals[20] both as an indication of CIL and as an interpretative aid under Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("**VCLT**").[21]

The necessity defence is codified in Article 25 of the ILC Articles.[22] Although the provision does not offer a precise definition, it outlines the strict conditions under which

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[16] Sicard-Mirabal / Derains, "**Chapter 7: General Defenses on the Merits**", p. 171.
[17] **Ibid**., p. 169.
[18] **Ibid**., p. 165.
For a criticism on the inconsistent caselaw on the essential security interest clauses *see* KABRA Ridhi, "Return of the Inconsistent Application of the 'Essential Security Interest' Clause in Investment Treaty Arbitration: CC/Devas v India and Deutsche Telekom v India", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, vol. 34, no. 3, 2019, pp. 723-753.
[19] PAPARINSKIS Martins, "Circumstances Precluding Wrongfulness in International Investment Law", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, vol. 31, no. 2, 2016, pp. 484-503, p. 487.
[20] **Ibid**.; Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 150.
[21] Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331.
[22] The full text is as follows:
"*Article 25 Necessity*

necessity may preclude the wrongfulness of a state's conduct. From these conditions, it can be deduced that necessity may be invoked only when the act in question is the only means to safeguard an essential interest of the state against a grave and imminent peril. Furthermore, the act in question must not seriously impair an essential interest of the state(s) toward which the obligation exists. Also, the situation compelling this act must not be contributed to by the state invoking the defence. The vague legal concepts used in the article, such as "*grave and imminent peril*" or "*essential interest*", have given rise to a number of interpretive challenges, particularly on how to balance the competing interests.[23]

Force majeure, on the other hand, is codified under Article 23.[24] Unlike necessity, *force majeure* is explicitly defined as "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".[25] As with necessity, *force majeure* cannot be relied upon if the compelling circumstance was caused by the invoking state or if the latter assumed the risk of such an event. Despite this similarity, there is a key distinction between

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) and is the only way for the State to safeguard an essential interest against a grave and imminent peril;
(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."

[23] PADDEU Federica / WAIBEL Michael, "Necessity 20 Years On: The Limits of Article 25", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, vol. 37, no. 1/2, 2022, pp. 160-191, p. 165-173.

[24] The full text is as follows:
"*Article 23 Force Majeure*
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."

[25] Art. 23 of the ILC Articles on State Responsibility.

the two defences: *force majeure* requires an objective impossibility, whereas necessity prompts a subjective evaluation of conflicting interests.[26]

In the context of ISDS, the ILC Articles are frequently used to assess state responsibility, especially when the relevant treaty and/or contract is silent on exceptions for emergency situations.[27] However, the vague and open-ended wording of both articles has led to divergent interpretations on the conditions and threshold. These issues, along with the resulting inconsistencies in the practice, will be addressed in further detail below.

C. The Distinction between Necessity and *Force Majeure*

Necessity and *force majeure* are both circumstances that may preclude wrongfulness of a state's conduct under international law. They are codified in the ILC Articles on State Responsibility and also general principles of law common to many domestic legal systems. These defences are often invoked together in ISDS proceedings, especially in situations involving economic, health, or armed conflict emergencies. While they share certain structural features, their underlying legal logic, conditions, and effects differ significantly. Understanding these distinctions is crucial, particularly when states invoke both defences concurrently.

Both necessity and *force majeure* originate from CIL and can apply in the absence of treaty and/or contract-based exceptions.[28] However, they work with different conceptual frameworks. Necessity applies when a state *chooses* to breach an international obligation to protect an essential interest under a grave and imminent peril. Thus, there is a subjective balancing and evaluation.[29] The breach must be the only means to protect the

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[26] Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 146.
[27] CRAWFORD James, "Investment Arbitration and the ILC Articles on State Responsibility", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, vol. 25, no. 1, 2010, pp. 127-199, p. 129; SHIRLOW Esmé, DUGGAL Kabir, "The ILC Articles on State Responsibility in Investment Treaty Arbitration", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, vol. 37, no. 1/2, 2022, pp. 378-542, pp. 468, 471.
[28] *Mobil Oil Iran, Inc, et al,* Partial Award No 311–74/76/81/150–3, para. 117; Accaoui Lorfing, "**Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure**", p. 49.
[29] Wang / Shan, "**Force Majeure and Investment Arbitration**", pp. 144-145.

interest at stake, must not seriously impair the essential interests of other states, and must not result from the invoking state's own conduct.

Force majeure, by contrast, does not involve any such balancing. It occurs when there is an irresistible force or unforeseen event, beyond the control of the state, which makes it materially impossible to perform the obligation. Unlike necessity, *force majeure* does not depend on the nature of any interest being protected, but rather depends on an objective assessment of impossibility.

This difference echoes in their respective application. *Force majeure* requires a mechanical analysis on whether the performance was objectively and materially impossible, without any regard to the interests at stake. Necessity, on the other hand, is rather evaluative and permits the state not to perform an obligation where performance is still possible but would endanger a higher essential interest.[30] For the latter defence, the tribunal evaluates whether the breach was the only viable option and is justified in light of the competing interests.[31]

Caselaw rarely addresses the distinction explicitly, it still provides important insight.

In *Gabčíkovo-Nagymaros*, the ICJ examined Hungary's invocation of necessity for suspending its obligations under a bilateral treaty with Slovakia due to environmental concerns.[32] The Court acknowledged that environmental protection could constitute an essential interest but rejected the defence, finding that the peril was neither grave nor imminent and that Hungary had not exhausted alternative means.[33] In *LG&E v. Argentina*, the tribunal upheld Argentina's necessity defence under Article 25 of the ILC Articles,

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[30] CARPENTIERI Leonardo, "The Invocation of State Defenses in Times of Conflict: Force Majeure, Necessity and the Libyan Example", International Journal of Arab Arbitration, vol. 11, no. 2, 2019, pp. 7-29, p. 25.
[31] *E.g.*, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ, Judgment, 25 September 1997, paras. 49 *ff*; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 315 *ff*; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 226 *ff*.
[32] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, paras. 21 *ff*.
[33] **Ibid**., paras. 53-54, 57.

citing an imminent threat to public order and social stability during its financial crisis.[34] By contrast, in *CMS v. Argentina*, the tribunal rejected the same defence, reasoning that Argentina had contributed to the crisis and that the threshold of grave and imminent peril had not been met.[35]

The scope of *force majeure* has been construed more narrowly due to its strict conditions. In the *Rainbow Warrior* arbitration, the tribunal rejected France's invocation of *force majeure* in relation to its failure to comply with its international obligations, holding that the breach was not caused by an irresistible or unforeseen event, and that France retained control over the relevant actors.[36] Similarly, in the *Serbian Loans* case, the Permanent Court of International Justice ("**PCIJ**") dismissed the *force majeure* defence raised by the debtor state, finding that wartime conditions had not rendered performance objectively impossible, especially as partial payments had continued.[37]

These examples illustrate the core difference in legal reasoning. In necessity, tribunals assess whether a serious peril justified a deliberate balancing of obligations. In *force majeure*, tribunals focus only on whether the external event rendered performance impossible, without entering into any normative justification. The distinction is thus not

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[34] *LG&E v. Argentine Republic*, Decision on Liability, paras. 231 *ff*.

[35] *CMS v. The Argentine Republic*, Award, paras. 317 *ff*.

[36] "*In conclusion, New Zealand is right in asserting that the excuse of force majeure is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case offorce majeure. Consequently, this excuse is of no relevance in the present case.*": *Rainbow Warrior*, Decision, para. 77.

[37] "*It is contended that under the operation of the forced currency regime of France, pursuant to the law of August 5th, 1914, payment in gold francs, that is, in specie, became impossible. But if the loan contracts be deemed to refer to the gold franc as a standard of value, payments of the equivalent amount of francs, calculated on that basis, could still be made. Thus, when the Treaty of Versailles became effective, it might be said that* "*gold francs*"*, as stipulated in Article 262, of the weight and fineness as denned by law on January 1st, 1914, were no longer obtainable, and have not since been obtainable as gold coins in specie. But it could hardly be said that for this reason the obligation of the Treaty was discharged in this respect on the ground of impossibility of performance. That is the case of a treaty between States, and this is a case of loan contracts between a State and private persons or lenders. But, viewing the question, not as one of the source or basis of the original obligation, but as one of impossibility of performance, it appears to be quite as impossible to obtain* "*gold francs*" *of the sort stipulated in Article 262 of the Treaty of Versailles as it is to obtain gold francs of the sort deemed to be required by the Serbian loan contracts.*": *Serbian Loans Case (France v. Serbia)*, PCIJ, Judgment, 12 July 1929, PCIJ Series A, No. 20, para. 83.

merely formal, but essential to understanding how states may justify breaches of their international obligations under exceptional circumstances.

D. Emergency or Exception Clauses in Investment Treaties

The previous section addressed how the tribunals apply the necessity and *force majeure* defences both under the gap-filling function of general principles of law and within the framework of CIL. However, an additional and increasingly relevant scenario arises where investment treaties or contracts contain express emergency or exception clauses. In such cases, a distinct interpretive analysis is required.

When faced with a treaty or contractual clause addressing emergencies, such as provisions for the protection of public order or essential security interests, tribunals must determine whether the clause incorporates or deviates from the customary standard.[38] This analysis typically begins by identifying the relevant clause and interpreting it in accordance with Articles 31 and 32 of the VCLT. The tribunal then compares the clause to the applicable customary rule to assess whether the treaty standard is more stringent, more lenient, or equivalent to the customary threshold.

Moreover, the tribunal must determine whether the clause is self-judging, meaning that the state has discretion to decide unilaterally whether an emergency exists. If so, the question becomes whether such a determination is beyond judicial review, or whether tribunals may still scrutinize the invocation based on good faith or abuse of rights.

Where the treaty standard diverges from CIL, it is often treated as a lex specialis, overriding the default customary framework.

This approach was adopted in *CMS v Argentina*, where the tribunal held that Article XI of the Treaty Between the United States of America ("**U.S.**") and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment ("**U.S.**

[38] Tomka, "**Chapter 34: Defenses Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties**", pp. 485-487.

– **Argentina BIT**”)[39], permitting measures necessary for public order or essential security interests, was not identical to the customary necessity defence under Article 25 of the ILC Articles.[40] The tribunal concluded that the treaty clause was less stringent than the customary rule, but nevertheless found that neither threshold was met, and rejected both defences.[41]

In *LG&E v Argentina*, the tribunal also analyzed both the treaty provision and the customary standard, and concluded that Argentina's economic crisis met the conditions for necessity under both frameworks.[42] Similarly, in *Enron v Argentina*, the tribunal acknowledged the link between Article XI and CIL but held that treaty-based exceptions must be interpreted restrictively due to their exceptional nature.[43] In *AWG v Argentina*, the tribunal applied a narrower reading of Article XI, emphasizing the risk of abuse and the importance of maintaining the integrity of treaty obligations.[44]

These cases reveal that tribunals adopt differing approaches: some interpret emergency clauses as establishing autonomous standards, while others closely align them with the ILC Articles.[45] The language of the relevant provision is key. Terms such as "*public order*" or "*essential interests*" may not refer to the same threshold of gravity or justification.[46] Moreover, the term "*necessary*" is often subjected to a proportionality analysis to assess whether less intrusive means were available.

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[39] Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed 14 November 1991, entered into force 20 October 1994, 31 I.L.M. 124 (1992).
[40] *CMS Gas Transmission Company v. The Argentine Republic*, Award, paras. 332 *ff*.
[41] **Ibid**., paras. 360 *ff*.
[42] *LG&E v. Argentine Republic*, Decision on Liability, paras. 245 *ff*.
[43] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 207 *ff*.
[44] *AWG Group Ltd. v. The Argentine Republic*, Decision on Liability, 30 July 2010, paras. 232-237.
[45] Goldsman / López Forastier, "**Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis**", pp. 652-658.
[46] For an overview of different types of escape clauses *see* PRODROMOU Zena, "Chapter 4: The Public Order Exception in International Investment Arbitration", The Public Order Exception in International Trade, Investment, Human Rights and Commercial Disputes, International Arbitration Law Library, Kluwer Law International, 2020, vol. 56, pp. 49-82, pp. 52-55.

A further complication arises when such clauses are formulated as self-judging. These provisions ostensibly allow the state to determine unilaterally whether the situation justifies derogation. However, tribunals have generally declined to accept that such clauses preclude all forms of review.[47] Instead, most tribunals insist that even self-judging clauses are subject to at least a good faith standard.[48]

For example, in *CMS*, the tribunal held that Article XI was not self-judging and that its invocation remained subject to judicial scrutiny.[49] Similarly, the World Trade Organization ("**WTO**") Panel in *Russia – Traffic in Transit* interpreted Article XXI(b) of the General Agreement on Tariffs and Trade ("**GATT**"), a classic self-judging clause, to permit limited review for abuse of rights.[50] The Panel confirmed that while the invocation of security interests involves a degree of discretion, this discretion is not unfettered, and the tribunal could assess whether the measure was plausibly taken in response to a genuine emergency.[51]

In practice, therefore, tribunals typically conclude that exception clauses do not exclude judicial review altogether. Even where discretion is afforded to the state, tribunals retain the power to conduct an objective analysis, often grounded in principles of good faith, necessity, and proportionality. This approach preserves the balance between state sovereignty and the rule of law within the investment treaty regime.

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[47] Sicard-Mirabal / Derains, "**Chapter 7: General Defenses on the Merits**", p. 173.
[48] Accaoui Lorfing, "**Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure**", p. 46.
[49] "*In light of this discussion, the Tribunal concludes first that the clause of Article XI of the Treaty is not a self-judging clause. Quite evidently, in the context of what a State believes to be an emergency, it will most certainly adopt the measures it considers appropriate without requesting the views of any court. However, if the legitimacy of such measures is challenged before an international tribunal, it is not for the State in question but for the international jurisdiction to determine whether the plea of necessity may exclude wrongfulness. It must also be noted that clauses dealing with investments and commerce do not generally affect security as much as military events do and, therefore, would normally fall outside the scope of such dramatic events*." *CMS v. The Argentine Republic*, Award, para. 373.
[50] CRIVELLI Pramila / PAULSEN Mona, "Separating the Political from the Economic: The Russia-Traffic in Transit Panel Report", **EUI WTO Dispute Settlement and Case Law Project, Forthcoming World Trade Review 2021**, 2021, pp. 582-605, pp. 586-587, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3760680 (last accessed: 14 July 2025).
[51] **Ibid**.

E. Contractual *Force Majeure* and Hardship Clauses

A foreign investment contract is within the broader category of international commercial contracts.[52] However, it is distinct as it involves sovereign entities and also the underlying transaction is a long term capital intensive nature.[53] The involvement of the sovereign entity gives rise to a notion called "*sovereign risks*" which include state interference, regulatory changes, repudiation of contracts and invocation of sovereign immunity, which does not exist with international commercial contracts between two private parties.[54] The risks are also compounded by the long duration, big complexity and great scale of the underlying projects, transactions. Indeed, the typical examples of investment contracts, such as public-private partnerships ("**PPP**"s), infrastructure projects, energy concessions often span decades and involve great amounts of capital, requiring close interaction with public laws and regulatory frameworks.[55]

Foreign investment contracts are of a hybrid nature: they are often governed by private law principles, however, the involvement of the sovereign party creates a public-private interface.[56]

Due to the risks mentioned above, these contracts usually involve clauses addressing private law remedies such as *force majeure* and hardship,[57] but the state party can also rely on public international law defences like necessity in parallel.

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[52] SORNARAJAH Muthucumaraswamy, "Chapter 2 - Nature of the Foreign Investment Contract", The Settlement of Foreign Investment Disputes, Kluwer Law International, 2000, pp. 25-60, pp. 25-26.
[53] **Ibid**.
[54] *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 369.
[55] Sornarajah, "**Chapter 2 - Nature of the Foreign Investment Contract**", pp. 29-30.
[56] **Ibid**., s. 36.
[57] W. Michael Reisman, James Crawford (eds.), "Chapter 3: Investment Contracts and Key Clauses", Foreign Investment Disputes: Cases, Materials and Commentary, Kluwer Law International, 2014, pp. 213-280, pp. 270-271.

There are different types of clauses that can be relevant for emergency situations. These can be grouped under three headlines: (**i**) *force majeure* clauses, (**ii**) material adverse change clauses and (**iii**) hardship, impossibility and frustration clauses.

Force majeure clauses refer to events beyond the parties' control, rendering the performance impossible.[58] Parties often model them after standard clauses in international commerce.[59] They are usually triggered by natural disasters, civil unrest, armed conflict

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[58] For a more detailed examination of contractual *force majeure* clauses *see* BRUNNER Christoph, "Chapter 4: Force Majeure Excuse, Section 10: Interpretation and Effects of *Force majeure* Clauses", Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, International Arbitration Law Library, Kluwer Law International, 2008, vol. 18, pp. 383-390.

[59] **Ibid**., p. 384.

A notable example would be the ICC Force Majeure Clause of March 2020, which regulates as follows (short form):

"*1. Force majeure*" *means the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that that party proves: [a] that such impediment is beyond its reasonable control; and [b] that it could not reasonably have been foreseen at the time of the conclusion of the contract; and [c] that the effects of the impediment could not reasonably have been avoided or overcome by the affected party.*

2. In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause: (i) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation; (ii) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy; (iii) currency and trade restriction, embargo, sanction; (iv) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation; (v) plague, epidemic, natural disaster or extreme natural event; (vi) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy; (vii) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises.

3. A party successfully invoking this Clause is relieved from its duty to perform its obligations under the contract and from any liability in damages or from any other contractual remedy for breach of contract, from the time at which the impediment causes inability to perform, provided that the notice thereof is given without delay. If notice thereof is not given without delay, the relief is effective from the time at which notice thereof reaches the other party. Where the effect of the impediment or event invoked is temporary, the above consequences shall apply only as long as the impediment invoked impedes performance by the affected party. Where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party. Unless otherwise agreed, the parties expressly agree that the contract may be terminated by either party if the duration of the impediment exceeds 120 days."

or epidemics.[60] And once they are triggered, they allow suspension, extension of time or termination.[61]

Material adverse change clauses on the other hand allows the parties to renegotiate or withdraw from the contract if unforeseeable economic or legal events occur, such as devaluation, regulatory change, economic crises.[62] They are often used in PPPs or long-term infrastructure contracts. Even though they are controversial and rather invoked successfully, as they go against the solid principle of *pacta sunt servanda*, they can be useful for financial crisis or pandemics as seen in practice.

The last type of clauses has different names under different jurisdictions. While under civil law, they are often referred to as hardship clauses, under common law they are applied under the doctrine of frustration.[63] They differ in the sense that they rather aim at renegotiation or adaptation to the new circumstances.[64]

There are also mixed disputes where contractual claims are brought under an umbrella clause or in parallel with treaty claims, where the tribunals will then have to disentangle and decide whether the defence is invoked as a contractual claim or under international law. In the former situations, the claims will be examined under the applicable law to the contract, with the applicable rules of international law.[65]

II. THE NECESSITY DEFENCE IN ISDS

The necessity defence occupies a central yet controversial position in the jurisprudence of ISDS. Codified in Article 25 of the ILC Articles on State Responsibility,

[60] BERGER Klaus Peter, "Chapter 6: *Force majeure* Clauses and their Relationship with the Applicable Law", ICC Dossier No. 17: Hardship and *Force majeure* in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World, Dossiers of the ICC Institute of World Business Law, Kluwer Law International, 2018, vol. 17, pp. 140-160, p. 140.
[61] Brunner, "**Chapter 4: Force Majeure Excuse, Section 10: Interpretation and Effects of Force Majeure Clauses**", p. 346.
[62] Sornarajah, "**Chapter 2 - Nature of the Foreign Investment Contract**", pp. 55-56.
[63] Wang / Shan, "**Force Majeure and Investment Arbitration**", pp. 140-141.
[64] Sornarajah, "**Chapter 2 - Nature of the Foreign Investment Contract**", p. 54.
[65] Wang / Shan, "**Force Majeure and Investment Arbitration**", pp. 152-155.

necessity permits a state to preclude the wrongfulness of conduct that would otherwise breach international obligations, provided that stringent legal criteria are met. While the doctrine is well established in CIL, its application in practice, especially during crises involving economic collapse, armed conflict, or public emergencies, has generated significant debate.

This chapter provides a comprehensive examination of the necessity defence in ISDS.

It begins with an analysis of the legal requirements and threshold conditions under international law, including the origin and interpretation of key terms such as "essential interest," "grave and imminent peril," and the "*only way*" test. It also considers additional constraints such as the obligation not to seriously impair the interests of other states, the exclusion clauses within international obligations, and the controversial "no contribution" requirement.

The second part turns to case law, tracing the development and divergence of arbitral practice, from foundational ICJ jurisprudence to key ISDS cases arising from Argentina's economic crisis, Libya's armed conflict, and terrorism-related infrastructure disruptions in Egypt.

Finally, the third part explores unresolved debates in the application of necessity in ISDS: whether the legal threshold is too rigid, how tribunals approach the issue of state contribution, the role of proportionality in interpreting necessity, and how necessity interacts with treaty-based exception clauses.

Through this analysis, the chapter aims to assess both the potential and the limitations of necessity as a defence for states navigating extraordinary crises while remaining bound by their international obligations.

A. Legal Requirements and Threshold

This section outlines the legal foundations and constituent elements of the necessity defence under international law, as codified in Article 25 of the ILC Articles on State Responsibility. It proceeds by analyzing each of the positive and negative conditions required for a successful invocation of necessity. These include: the nature and scope of the *"essential interest"* being protected; the existence of a *"grave and imminent peril"*; the strict "*only way*" test; the requirement that the measure must not seriously impair other states' essential interests; and the exclusion of necessity when the obligation itself precludes it or when the state has contributed to the situation. Each element will be examined in turn to clarify its content, interpretive challenges, and relevance in the ISDS context.

1. Legal Basis of Necessity in International Law: Article 25 of the ILC Articles on State Responsibility

Necessity refers to a circumstance in which a state, faced with a grave and imminent peril, breaches an international obligation as the only means to safeguard an essential interest.[66] While such a breach would ordinarily give rise to international responsibility, the necessity defence may preclude wrongfulness under certain strict conditions.[67]

This defence is codified in Article 25 of the ILC Articles on State Responsibility, which has been widely recognized by international tribunals[68] and courts[69] as reflecting

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[66] DOLEA Sorin, "Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]", Revista Română de Arbitraj, ed. Cristina Emilia Alexe, vol. 14, no. 4, 2020, pp. 44-62, pp. 48-49.

[67] Tomka, "**Chapter 34: Defenses Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties**", pp. 477-478.

[68] *E.g.*, "*The Tribunal, like the parties themselves, considers that Article 25 of the Articles on State Responsibility adequately reflect the state of customary international law on the question of necessity (…)*": *CMS v. The Argentine Republic*, Award, para. 315.

[69] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, para. 52; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, Advisory Opinion, I.C.J. Reports 2004, p. 136, p. 195, para. 140.

CIL.[70] Under this provision, a state may invoke necessity if it can demonstrate, first, the existence of a grave and imminent peril; second, that the peril threatened an essential interest of the state; third, that breaching the obligation was the only means of protecting that interest; and fourth, that the act did not seriously impair an essential interest of the state or states toward which the obligation was owed, or of the international community as a whole.[71]

In addition to these positive requirements, Article 25 sets out two negative conditions that limit its applicability. The defence is excluded if the international obligation in question explicitly rules out reliance on necessity, or if the state invoking the defence has contributed to the situation of necessity.

Before examining its legal requirements, it is important to note that Article 25 appears in Part One, Chapter V of the ILC Articles, titled "*Circumstances Precluding Wrongfulness*." This placement emphasises a crucial distinction: the provision does not deny the occurrence of a breach but instead serves to preclude the legal consequences of that breach by recognizing a justifying circumstance that exempts the state from international responsibility.

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[70] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 46; KATSIKIS Dimitrios, "'Necessity' due to COVID-19 as a Defence to International Investment Claims", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, vol. 36, no. 1, 2021, pp. 46-69, p. 47; Roy Uriel Goldsman, Miguel López Forastier, "**Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis**", p. 645; ALVAREZ-JIMÉNEZ Alberto, "Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law", Journal of International Arbitration, vol. 27, no. 2, 2010, pp. 141-177, p. 144; Tomka, ""**Chapter 34: Defenses Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties**", p. 477; CRISTANI Federica, "Chapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International Investment Arbitration Cases", Balancing the Protection of Foreign Investors and States Responses in the Post-Pandemic World, eds. Yulia Levashova, Pascale Accaoui Lorfing, Kluwer Law International, 2022, pp. 61-74, p. 64.

[71] These conditions must be met cumulatively: *CMS v. The Argentine Republic*, Award, para. 330; *LG&E v. Argentine Republic*, Decision on Liability, para. 249; *National Grid PLC v. The Argentine Republic*, Award, 3 November 2008, para. 262; *Enron v. Argentine Republic*, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 313; Alvarez-Jiménez, "**Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law**", p. 142.

2. Clarifying the Meaning of "*Essential Interest*"

Necessity, unlike *force majeure*, requires a balancing of conflicting interests: on one side, the interest of the state invoking the defence, which has breached an obligation in order to protect that interest; and on the other, the interest of the state to which the obligation is owed. This inherent balancing exercise explains why the interest pursued by the breaching state must be "*essential*", it must carry sufficient weight to justify setting aside the rights or interests of another state or the international community and to preclude the wrongfulness of what would otherwise be an internationally wrongful act.

Importantly, what qualifies as an essential interest cannot be determined in absolute or abstract terms. Instead, it must be assessed contextually, on a case-by-case basis, taking into account the specific circumstances and severity of the peril faced.[72] The notion of essential interest encompasses not only the internal interests of the state and its population but can also extend to values of importance to the broader international community.[73]

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[72] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, ILC, 2001, p. 83, para. 15; PADDEU Federica, "Necessity 20 Years On: The Limits of Article 25", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, vol. 37, no. 1/2, 2022, pp. 160-191, p. 170.
[73] **Ibid**.
53. "*The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabtikovo-Nagymaros Project related to an* "*essential interest*" *of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission. The Commission, in its Commentary, indicated that one should not, in that context, reduce an* "*essential interest*" *to a matter only of the* "*existence*" *of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see Yearbook of the International Law Commission, 1980, Vol. I I , Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity,* "*a grave danger to . . . the ecological preservation of al1 or some of [the] territory [of a State]*" *(ibid, p. 35, para. 3); and specified, with reference to State practice, that* "*It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of al1 States.*" *(Ibid., p. 39, para. 14.) The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:* "*the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.*" (*Legality of the Threat or Use of Nuclear Weapons, ICJ, Advisory Opinion, ICJ Reports 1996, pp. 241-242, para. 29.*)": *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, para. 53.

Although Article 25 employs the term "*essential*," scholars have debated its scope. Some argue that there must be a direct link between the protected interest and the very survival or "*life*" of the state, suggesting a narrow reading tied to existential threats.[74] Others reject this rigid approach, pointing out that the ILC's commentary does not support such a restrictive interpretation.[75] Rather, they propose that the focus should be on the gravity of the danger, not on whether the interest can be labelled as existential in abstract terms.[76] For instance, while a financial interest might be considered non-essential in theory, a sufficiently grave economic peril could, in practice, pose a serious threat to the viability or stability of the state.[77]

This broader and more flexible approach finds support in international jurisprudence. In the *Gabčíkovo-Nagymaros Project* case, the ICJ rejected a narrow understanding of "*essential interest*" confined to a state's existence.[78] The Court's

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[74] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 170, fn. 77.
The tribunal in *Sempra v. Argentina* adopted a similar approach, refusing to recognize necessity as a defense, finding that although the economic crisis was severe, it did not threaten Argentina's survival as a state: *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 347.

[75] **Ibid**.
Other tribunals dealing with the Argentine economic crisis opted for this approach, contrasting the *Sempra* tribunal.
In *LG&E v. Argentina*, the tribunal held that the situation was so dire, evidenced by a collapsing GDP and stock market, soaring unemployment and poverty, widespread protests, and the resignations of multiple successive presidents, that Argentina's essential interests were indeed at stake: *LG&E v. Argentine Republic*, Decision on Liability, para. 251.
However, it is important to note that in this case, the tribunal conducted its analysis under a treaty clause rather than CIL. Nonetheless, it relied on CIL principles to interpret the treaty clause and ultimately upheld the defense. The tribunal also reinforced its conclusion by determining that the requirements under CIL were met as well.
Similarly, in *Impregilo v. Argentina (I)*, the tribunal adopted this approach, recognizing that safeguarding the state's social, economic, and environmental stability, as well as ensuring the fundamental needs of its people, constituted an essential interest under Article 25: *Impregilo S.p.A. v. Argentine Republic (I)*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 346.

[76] **Ibid**.

[77] **Ibid**.

[78] "*(...) The Commission, in its Commentary, indicated that* ***one should not, in that context, reduce an*** "***essential interest***" ***to a matter only of the*** "***existence***" ***of the State****, and that the whole question was, ultimately, to be judged in the light of the particular case (...); at the same time, it included among the situations that could occasion a state of necessity,* "*a grave danger to . . . the ecological preservation of al1 or some of [the] territory [of a State]*" *(ibid, p. 35, para. 3); and specified, with reference to State practice, that* "*It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States.*"*(...)*" (emphasis added): *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, para. 53.

reasoning confirms that an interest need not be existential in the strict sense in order to qualify under Article 25.[79]

Overall, interests recognized as "*essential interests*" under Article 25 include, but are not limited to, the existence and independence of the state, the maintenance of public order, and the well-being of the population, such as access to public services and the proper functioning of public institutions.[80]

3. Grave and Imminent Peril

Turning to the second requirement, the peril to the essential interest must be both grave and imminent. The term "*peril*" implies the existence of a serious risk, rather than actual material harm.[81] In this sense, the standard resembles the threshold applied for the granting of provisional measures, where potential, not actual, harm must be established. The risk may relate both to the event capable of triggering harm and to the

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[79] Despite this leniency it must be noted that there is still a certain threshold to be met for the relevant interest to be held as "*essential*".
For example, In *Border Timbers v. Zimbabwe*, the respondent invoked necessity as a defense, arguing that the state's economic and political survival was at risk. However, the tribunal found that while Zimbabwe was indeed experiencing a difficult period, the real interest at stake was the survival of its government. The tribunal further held that the existence of a political party does not equate to the survival of the state itself and, therefore, does not constitute an essential interest warranting absolute protection: *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award, 28 July 2015, paras. 609 *ff*.

[80] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 170-171.

[81] " *(…) The word "peril" certainly evokes the idea of "risk" ; that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time; the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the "peril" constituting the state of necessity has at the same time to be "grave" and "imminent". "Imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility". As the International Law Commission emphasized in its commentary, the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time" (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable. (…)*": *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, para. 54.
See Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 50; Alvarez-Jiménez, "**Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law**", p. 144.

harm itself.[82] The source of the risk may stem from a natural hazard or a human act, and it may originate either within the state's own territory or beyond its borders.[83]

The use of the term "*imminent*" indicates that the peril has not yet materialized.[84] However, it does not require that the risk be immediate in a purely temporal sense. Rather, imminence should be understood to mean that the risk is sufficiently close and concrete to justify preventive measures.[85] This interpretation aligns with the underlying purpose of the necessity defence, which is to permit states to act before the harm occurs, provided the threat is serious and real.[86]

Nonetheless, this does not mean that states are free to adopt any precautionary measure under the guise of necessity. If there is a significant temporal gap between the adopted measure and the anticipated harm, the state may find it difficult to persuade a tribunal that the defence of necessity applies.[87] This is especially true when considering the additional requirement that the measure taken be the "*only way*" of safeguarding the essential interest.[88] A distant or speculative threat weakens the credibility of that claim.

The requirement of *gravity* further demands that the risk be serious in nature, whether in a quantitative sense (*e.g.*, large-scale harm to the population or economy) or

[82] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 165-166.
[83] **Ibid**., p. 166.
[84] The International Court of Justice provided that "*[i]mminence is synonymous with* "*immediacy*" *or* "*proximity*" *and goes far beyond the concept of* "*possibility*": *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, para. 54.
Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**, p. 50; Katsikis, **Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 56.
[85] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 50; Katsikis, "**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 56; Alvarez-Jiménez, "**Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law**", p. 144; Cristani, "**Chapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International Investment Arbitration Cases**", p. 65.
[86] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 166.
[87] **Ibid**., p. 167.
[88] **Ibid**.

a qualitative sense (*e.g.*, irreversible environmental damage or disruption of core state functions).[89]

Finally, the existence of peril must be supported by a sufficient degree of certainty; mere apprehension or hypothetical fears about potential harm are not enough to satisfy this threshold.[90]

4. "*Only Way*" Test

The third requirement under Article 25 stipulates that the conduct in question must be the only means available to safeguard the essential interest from a grave and imminent peril. The term "*only*" is interpreted literally,[91] imposing a strict standard: the state must demonstrate that no lawful, feasible, and effective alternative existed at the time the measure was adopted.

This stringent condition is often the primary reason why tribunals reject the necessity defence.[92] The defence fails if any other means could have addressed the situation, even if that alternative was significantly more costly, administratively burdensome, or politically inconvenient.[93] Necessity does not excuse wrongful conduct merely because it was the most expedient or least disruptive option.[94]

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[89] **Ibid**., p. 166.
[90] Katsikis, "**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 57.
[91] MANTON Ryan, **Necessity in International Law**, (PhD Thesis), Oxford University, 2016, p. 167.
[92] Katsikis, "**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 59; Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 174; PARISH Matthew, "On Necessity", The Journal of World Investment & Trade, vol. 2, 2010, pp. 169-195, p. 183.
[93] Katsikis, "**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 59; Goldsman / López Forastier, "**Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis**", pp. 645-668, p. 660; Alvarez-Jiménez, "**Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law**", p. 144.
[94] Dolea, "**Covid-19 Și Starea de Necesitate în Arbitrajul Investițional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 54; Goldsman / López Forastier, "**Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis**", p. 660; Cristani, "**Chapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International Investment Arbitration Cases**", pp. 64-65.

Three key issues emerge when assessing compliance with the "*only way*" requirement.[95]

First, there is the question of what exactly is being assessed. Should tribunals evaluate an individual measure in isolation, or should they assess that measure within the broader package of state responses to the crisis? Arbitral practice varies. Some tribunals narrowly focus on the specific challenged measure,[96] while others[97] consider the wider context of the state's crisis-management strategy.[98] The latter approach is arguably more realistic: states often respond to emergencies with multi-layered, complementary measures, none of which may appear to be the "*only way*" in isolation, but which together form a necessary whole.

Second, tribunals must confront the problem of hindsight.[99] A measure that ultimately fails or appears unnecessary in retrospect may still have been the only rational option at the time it was adopted. Yet, several tribunals, particularly in the Argentine financial crisis cases, have adopted problematic reasoning in this respect. Some rejected the necessity defence because the challenged measure did not resolve the crisis, reasoning that it was not the "*only means*."[100] Others rejected it on the ground that no crisis eventually materialized, concluding that the measure was unnecessary altogether.[101] Both approaches are flawed. The first imposes an unreasonable ex post facto test of effectiveness, which is not supported by Article 25. The second approach conflates the "*grave and imminent peril*" requirement with the "*only way*" test, disregarding the preventive logic behind the necessity defence. The more appropriate approach is to assess

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[95] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 174-178.
[96] *E.g.*, *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015; *Suez Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, Decision on Liability, 30 July 2010; *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010.
[97] *E.g.*, *LG&E v. Argentine Republic*, Award.
[98] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 175-176.
[99] **Ibid**., p. 176.
[100] *Total SA v Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, para. 345; *Bernhard von Pezold and others v. Republic of Zimbabwe*, Award, para. 637.
[101] *Enron v. Argentine Republic*, Award, para. 306.

the necessity of the measure from the perspective of the state at the time of decision, based on the information and conditions it faced, not with the benefit of hindsight.

Third, the core question is how to determine whether a viable alternative existed.[102] Tribunals often side with investors who, benefiting from hindsight, propose hypothetical alternatives that appear feasible on paper.[103] If any conceivable option can defeat the defence, then no state would ever meet the standard.[104] To strike a fair balance between the high threshold of necessity and its practical applicability, legal doctrine and arbitral reasoning increasingly recognize that an alternative must satisfy three cumulative criteria: it must be lawful, available, and effective.[105]

Lawfulness means the alternative must comply with international and domestic law.[106] However, some tribunals have controversially suggested that, even where all available options were unlawful, the state must choose the one least harmful to third parties.[107] While this approach seeks to minimize injury, it imposes an additional layer of obligation that is not reflected in the language or intent of Article 25.[108]

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[102] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 176-178.
[103] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", pp. 60-61.
[104] Parish, "**On Necessity**", p. 183.
[105] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 178.
[106] Alvarez-Jiménez, "**Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law**", p. 144; Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 177.
[107] "*For instance, another 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. Under this interpretation**, if there are three possible alternative measures that a State might adopt, all of which would involve violations of the State's obligations under international law, the State will not be prevented from invoking the principle of necessity if it adopts the measure involving the least grave violation of international law**. Under this interpretation, the principle of necessity will only be precluded if there is an alternative that would not involve a breach of international law or **which would involve a less grave breach of international law**.*" (emphasis added): *Enron v. Argentine Republic*, Annulment, para. 370.
[108] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 177.

Availability requires that the alternative be realistically feasible at the time.[109] This includes considerations of timing, capacity, and urgency. A theoretical or long-term solution that could not have addressed the crisis in real time does not qualify.[110]

Effectiveness entails that the alternative must be capable of adequately protecting the essential interest. On this point, tribunals diverge. Some take a rigid view: if any other effective alternative existed, the defence fails.[111] Others adopt a comparative approach, recognizing that if the adopted measure was demonstrably more effective, the defence may still be valid.[112] This latter approach is more consistent with the balancing rationale underlying the necessity defence and avoids penalizing states for rejecting minimal or inadequate alternatives in favor of more robust responses.

5. No Serious Impairment of Other States' Essential Interests

The final requirement under the necessity defence is that the relevant conduct must not seriously impair another essential interest, whether of a state or of the international community as a whole.

This requirement serves to ensure that a state invoking necessity does not protect one essential interest at the unacceptable expense of another, particularly where the other interest is of comparable gravity. In this context, the notion of "*essential interest*" is assessed symmetrically: the same criteria used to determine whether the invoking state's interest is "*essential*" apply to the interest potentially impaired.

This requirement, however, becomes complicated when applied outside the inter-state context, especially in ISDS proceedings. The original rule was designed for disputes between states, and it is unclear whose interests must be protected from serious impairment in an ISDS context. Is it the home state's essential interests that must not be

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[109] **Ibid**.
[110] Manton, **Necessity in International Law**, p. 170.
[111] **Ibid**., pp. 170-171.
[112] *Enron v. Argentine Republic*, Annulment, para. 371.

impaired, or those of the investor? Despite this issue being repeatedly raised in investment arbitration, no tribunal has yet provided a definitive or consistent answer.

Substantively, the requirement introduces a balancing of competing essential interests: the interest protected by the state's measure and the interest allegedly harmed by that same measure.[113] This balancing exercise does not require perfect equivalence between the two interests, but the measure must not disproportionately undermine another essential interest.[114]

Importantly, this assessment should be made from the perspective of the invoking state at the time of the measure.[115] If the consequences turn out to be more damaging than anticipated, that alone does not invalidate the defence, what matters is whether the state could reasonably foresee that no serious harm would result to other essential interests.[116]

The requirement has attracted scholarly criticism.[117] Since international law generally does not establish a hierarchy among rules or interests (except for *jus cogens*), it is unclear how tribunals are to weigh and rank competing essential interests.[118] This raises legitimacy concerns: if a tribunal makes the final determination, it risks assuming the authority to decide whose interest is "*more important*".[119] On the other hand, deferring too much to the invoking state could allow it to unilaterally assert that its interest outweighs that of another, thus undermining the principle of sovereign equality.[120]

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[113] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 56; Manton, **Necessity in International Law**, p. 178.
[114] Alvarez-Jiménez, "**Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law**", p. 144.
[115] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 172.
[116] **Ibid**.
[117] Manton, **Necessity in International Law**, p. 181; SLOANE Robert D., "On the Use and Abuse of Necessity in the Law of State Responsibility", American Journal of International Law, vol. 11-16, 2012, pp. 447-508, p. 458.
[118] Sloane, "**On the Use and Abuse of Necessity in the Law of State Responsibility**", p. 478.
[119] SHIRLOW Esme, "Part I - Conceptual Framework and Methodological Approach", Judging at the Interface Deference to State Decision-Making Authority in International Adjudication, Cambridge University Press, 2021, pp. 13-90, pp. 19-21.
[120] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 173.

Despite this theoretical tension in public international law, ISDS tribunals have generally not treated this requirement as a significant obstacle.[121] It seems unlikely that the impairment to the investor's interest would impair the home state's essential interests.[122] However, the tribunals suggested that the balancing must be made between the host state's essential interest and the *investor's* essential interest as the beneficiary of investment treaty obligations.[123]

Yet, tribunals have typically refrained from offering a clear analytical framework for conducting this balancing exercise.[124] Instead, ISDS tribunals appear to defer to the host state's judgment, effectively allowing it to determine the comparative importance of the interests at stake.

6. The International Obligation Should not Exclude Necessity

The first exception to the necessity defence arises when the international agreement underlying the breached obligation explicitly or implicitly excludes its invocation. In such cases, the treaty itself overrides the CIL defence of necessity.

A classic example from general international law is found in the context of international humanitarian law ("**IHL**").[125] IHL treaties are specifically designed to apply during armed conflict**,** precisely the kind of context in which a state might face a grave and imminent peril to its essential interests. However, since IHL prescribes binding obligations that must be respected especially in times of emergency**,** the defence of

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[121] INAN Onur, "Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?", Revista Română de Arbitraj, ed. Cristina Emilia Alexe, vol. 14, no. 3, 2020, pp. 131-156, p. 150.
[122] Manton, **Necessity in International Law**, pp. 186-187; Cristani, "**Chapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International Investment Arbitration Cases**", p. 65.
E.g., *CMS v. the Argentine Republic*, Award, para. 325; *LG&E v. Argentine Republic*, Decision on Liability, para. 257; *Enron v. Argentine Republic*, Award, para. 310; *Sempra v. Argentine Republic*, Award, para. 352.
[123] Manton, **Necessity in International Law**, p. 187.
[124] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 173; Inan, "**Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?**", p. 150.
[125] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 57.

necessity is effectively excluded, as the treaty regime is structured to govern conduct under conditions of crisis, including war or armed conflict.

In the investment law context, some commentators argue that the object and purpose of investment treaties, to safeguard investor rights against state interference, including during economic crises, suggests an implicit exclusion of the necessity defence.[126] According to this view, allowing a state to invoke necessity to justify emergency measures would defeat the very protections the treaty was designed to ensure.[127]

However, this position may overextend treaty interpretation principles. The necessity defence is a rule of CIL, and its exclusion should not be lightly presumed. Absent clear and unambiguous treaty language to that effect, it would be inappropriate to infer an implicit waiver of a state's right to invoke this defence.[128] Therefore, to exclude the operation of necessity in the investment treaty context, the treaty must contain explicit language demonstrating the parties' intent to do so.[129]

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[126] REINISCH August, "Necessity in International Investment Arbitration— An Unnecessary Split of Opinions in Recent ICSID Cases?", The Journal of World Investment & Trade, vol. 8, no. 2, 2007, pp. 191-214, p. 205.

[127] **Ibid**.

[128] A similar situation arose in the ELSI case where the ICJ had to assess whether the Treaty of Friendship, Commerce, and Navigation constituted a derogation from the local remedies rule, an important principle of CIL and sought an explicit waiver: "(…) *The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty ; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so. This part of the United States response to the Italian objection must therefore be rejected*. (…)": *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, International Court of Justice, Judgment of 20 July 1989, I.C.J. Rep. 15, para. 50.

[129] This issue has also been debated in investment arbitration case law.

In the case of *BG Group Plc v. Argentina*, the tribunal expressed doubt as to whether the necessity defence is compatible with the object and purpose of investment treaties, suggesting that reliance on such a defence could undermine the treaty's protective framework: "*Furthermore, the Commentary to the ILC Draft Articles indicates that a defense based on necessity is precluded* "*where the international obligation in question explicitly or implicitly excludes reliance on necessity.*"*It can be argued that the Argentina-U.K. BIT implies such an exclusion. Thus, Argentina would not be entitled to invoke necessity to unilaterally revoke vested rights (e.g., a dollar denominated tariff and economic equilibrium) designed precisely to operate in situations where a run on the currency would lead to a situation of necessity. There is no question that Argentina is entitled to adopt such measures as it deems appropriate to emerge from the state of emergency. However, it remains obligated to pay compensation. This is one view as to how bilateral investment treaties*

7. No Contribution Requirement

The second exception applies when the invoking state has contributed to the situation of necessity. The rationale behind this exception is clear: it serves to encourage prudent conduct by states, prevent moral hazard, and maintain the legitimacy of the necessity defence.[130] However, compared to other requirements under CIL, this element lacks a clear basis in state practice and was already a point of contention during the drafting of the ILC Articles.

It is widely accepted that the contribution must be substantial; a merely peripheral or incidental contribution is not sufficient to exclude reliance on the defence. Yet the threshold between a substantial and a peripheral contribution remains undefined. Tribunals frequently highlight factual circumstances that suggest contribution, but they rarely provide a principled framework for assessing whether that contribution meets the required threshold.

Two main approaches have been adopted in practice.

The first is a causal approach, where the mere existence of a causal link between the state's prior conduct and the situation of necessity is considered sufficient to bar the defence.[131] This strict interpretation can result in the exclusion of necessity even where the state acted with good intentions but implemented ill-conceived policies.[132] Although

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operate to induce foreign investment. Assuming that necessity were to justify some fair and non-discriminatory measure by Argentina, an obligation to compensate would still obtain by virtue of the BIT.": *BG Group Plc v. The Republic of Argentina*, Final Award, 24 December 2007, para. 409.
By contrast, the tribunal in *National Grid v. Argentina* reached the opposite conclusion, holding that a state does not, by entering into a bilateral investment treaty, waive its sovereign right to invoke defences available under CIL, including necessity: "*The Tribunal considers that, by concluding the Treaty with the United Kingdom, the Respondent did not limit its powers that as a sovereign it would have under international law except to the extent provided in the Treaty* (…)": *National Grid v. The Argentine Republic*, Award, para. 255.

[130] SYKES Alan, "Economic 'Necessity' in International Law", American Journal of International Law, vol. 109, no. 2, 2017, pp. 296-323, p. 299.

[131] *E.g.*, *Impregilo The Argentine Republic*, Award, para. 356; *CMS v. The Argentine Republic*, Award, paras. 328-329; *Enron v. Argentine Republic*, Award, paras. 311-312; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 618.

[132] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 58.

the ILC's commentary and some arbitral awards have followed this line of reasoning, it has been criticized for effectively depriving the necessity defence of any practical application. It also stretches the rationale of the contribution exception too far. The purpose of the exception is to prevent states from benefitting from their own wrongful conduct, which arguably requires some degree of fault. Without such a requirement, the rule would penalize proactive but flawed attempts to prevent or manage a crisis, while favoring states that took no action at all.

In contrast, a fault-based approach requires that the state's contribution be the result of negligent or reckless conduct.[133] This interpretation is regarded as more balanced and has found support among scholars and in some case law.[134] It aligns more closely with the underlying rationale of accountability, without making the invocation of necessity unreasonably difficult.[135] It also moderates the harsh consequences of the causal approach, which might disqualify the defence even in the absence of any wrongful intent or behaviour.

Beyond the threshold issue, the contribution requirement also raises temporal and causal complexities. One must ask how far back tribunals should go in identifying contributory conduct. In some cases, the contribution may arise not from proximate causes but from historical, structural, or systemic decisions.[136] However, if tribunals adopt too expansive a view, nearly every instance of necessity could be traced back to some earlier policy decision, making the defence virtually impossible to invoke. Tribunals must therefore exercise caution to ensure that the requirement does not defeat the purpose of the necessity defence itself.[137]

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[133] *E.g.*, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 711.
[134] GAZZINI Tarcisio, "Foreign Investment and Measures Adopted on Grounds of Necessity: Towards a Common Understanding", Transnational Dispute Management, vol. 7, no. 1, 2010, pp. 1-27, pp. 19-22.
[135] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 180.
[136] *E.g.*, "*To an extent, a situation of necessity can always be traced back, as a matter of history, to political and economic mistakes made by a State years, if not decades, earlier (…)*": *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 8.60.
[137] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 179-180.

In conclusion, the contribution requirement remains one of the most ambiguous elements of the necessity defence under CIL. A strict causal interpretation risks undermining the defence entirely, even in situations where the state acted responsibly in the face of grave public peril. A more balanced approach, grounded in some form of fault or ill-judgment, better serves the goals of both accountability and fairness. It preserves the legitimacy of the necessity defence while ensuring that states do not escape responsibility for conduct that demonstrably contributed to the crisis.

B. Caselaw Analysis

This section analyzes how the necessity defence has been interpreted and applied in practice through a range of judicial and arbitral decisions. It begins with early reflections in international jurisprudence, focusing on the role of the ICJ in shaping the doctrinal contours of necessity. It then turns to ISDS case law, examining its application across different factual and geopolitical contexts. These include the Argentine economic crisis cases, where tribunals grappled with financial collapse as a justification for emergency measures; the Libya conflict cases, involving armed conflict and institutional breakdown; and the Egypt gas cases, which addressed terrorism and post-revolution infrastructure disruptions. Together, these cases illustrate the evolving, and often inconsistent, approach to necessity in investment arbitration.

1. Judicial Reflections: ICJ Caselaw and Historic International Law

Before turning to the application of the necessity defence in investment treaty jurisprudence, it is important to examine its historical treatment. Although investment tribunals are not formally bound by ICJ decisions, they frequently draw upon the Court's reasoning, including with respect to the necessity defence and other principles of international law.

The landmark case is *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*. The decision helps illuminate the contours of necessity under CIL and continue to influence arbitral reasoning.

In *Gabcíkovo-Nagymaros*, the dispute arose from the Treaty concerning the construction and operation of the Gabčíkovo–Nagymaros System of Locks[138] between Hungary and Czechoslovakia, which envisaged the joint construction and operation of the Gabčíkovo-Nagymaros Barrage System along the Danube River.[139] In response to mounting public criticism, Hungary decided to suspend, and eventually abandon, its obligations under the treaty, invoking a state of ecological necessity.[140]

The ICJ recognized that necessity formed part of CIL, but emphasized that it could only be accepted as an exceptional ground for precluding wrongfulness.[141] Drawing upon the ILC draft articles, the Court identified five cumulative conditions: the existence of an essential interest of the invoking state; the threat to that interest by a grave and imminent peril; the relevant act being the only means of safeguarding that interest; the act not seriously impairing an essential interest of the state towards which the obligation exists; and the invoking state not having contributed to the situation of necessity.[142]

The Court clarified that "*peril*" referred to a risk, not to harm already materialized, and that such a risk must be clearly established.[143] While it accepted that some of Hungary's environmental concerns could indeed constitute a grave peril for the region, the Court found that the peril was not imminent at the time Hungary suspended the works.[144]

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[138] Treaty between the Hungarian People's Republic and the Czechoslovak Socialist Republic concerning the construction and operation of the Gabčíkovo–Nagymaros System of Locks, signed 16 September 1977, Budapest. Published in UN Treaty Series Vol. 1109, p. 236 (UNTS No. I-17101).
[139] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, paras. 15-20.
[140] **Ibid**., paras. 22 *ff*.
[141] **Ibid**., para. 51.
[142] **Ibid**., para. 52.
[143] **Ibid**., para. 54.
[144] **Ibid**., para. 55.

Importantly, the Court's conclusion on the lack of imminence did not concern temporal remoteness, but rather the failure to sufficiently demonstrate the threat's existence.[145] In this sense, the Court focused less on the timing of the threat and more on the evidentiary standard for establishing peril.[146]

Furthermore, the ICJ concluded that even when the peril later materialized, Hungary had alternative means at its disposal to address the threat.[147] This finding on the existence of alternative measures was central to the Court's rejection of the necessity defence.[148] Although the Court did not elaborate extensively on this point, it implied that Hungary could have pursued other responses short of breaching its treaty obligations, for instance, by monitoring water quality and taking steps to purify it as needed.[149]

The *Gabcíkovo-Nagymaros* case is significant for several reasons.

First, it demonstrates that ecological interests can qualify as an "*essential interest*" within the meaning of the necessity defence. This confirms that the concept is not confined to threats to the state's survival but may encompass a broader range of vital national concerns.[150]

Second, it underscores the high threshold required to satisfy the "*imminence*" and "*only way*" criteria, emphasizing the need for a clearly established and grave threat, as well as the absence of alternative measures.[151]

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[145] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 166.
[146] **Ibid**., p. 167.
[147] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, para. 55.
[148] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", pp. 49-50.
[149] **Ibid**., p. 55.
[150] *E.g.*, *Bernhard von Pezold and others v. Republic of Zimbabwe*, Award, para. 628 (maintenance of public order); *Sempra v. Argentine Republic*, Award, para. 326 (functioning of public institutions).
[151] *(1) Mr Idris Yamantürk (2) Mr Tevfik Yamantürk (3) Mr Müsfik Hamdi Yamantürk (4) Güriş Inşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v. Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2020, para. 320; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 117; *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, para. 105.

Third, the Court's focus on whether Hungary could have addressed the threat through less disruptive means, without breaching its treaty obligations, has influenced subsequent investment tribunals to examine whether a state could have protected its essential interest without harming the foreign investor.[152]

Finally, the Court's criticism of Hungary's decision to unilaterally suspend and ultimately terminate the treaty has echoed through ISDS jurisprudence, where tribunals have similarly expressed caution toward drastic state actions such as expropriation or contract termination, particularly when those measures are not shown to be unavoidable or proportionate.[153]

Another important case is the ad hoc arbitration known as the *Russian Indemnity*[154] case.

The dispute[155] arose from Russia's claim for interest on delayed payments by the Ottoman Empire under the Treaty of Peace between the Russian Empire and the Ottoman Empire signed at Constantinople on 8 February 1879.[156] Ottoman Empire had agreed to compensate Russian nationals for losses suffered during the Russo-Turkish War of 1877–1878 but failed to make the payments for over 20 years.[157] In the arbitration before the Permanent Court of Arbitration ("**PCA**"), Ottoman Empire invoked necessity, arguing that domestic financial crises, wars, and civil unrest made it impossible to meet its obligations.[158]

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[152] *E.g.*, *Continental Casualty Company v. The Argentine Republic*, Award, para. 231; *BG Group Plc. v. Argentine Republic*, Final Award, para. 394.
[153] *E.g.*, *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No. V 2014/163, Final Award, 28 September 2017, para. 376.
[154] *Russian Claim for Interest on Indemnities (Damages Claimed By Russia for Delay in Payment of Compensation Owed to Russians Injured During The War Of 1877-1878)*.
[155] *Russian Indemnity Case*, Award of the Tribunal, 11 November 1912, p. 3.
[156] Treaty of Peace between the Russian Empire and the Ottoman Empire, signed 8 February 1879 (27 January/8 February 1879 Old Style/New Style), Constantinople, Final Peace Treaty superseding San Stefano.
[157] *Russian Indemnity Case*, Award of the Tribunal, p. 3.
[158] **Ibid**., pp. 12-13.
It must be noted that despite the Government of the Ottoman Empire describing the financial difficulties as "*force majeure*", they are better suited for a "*necessity*" defence and thus the case stays important for the

This case is significant because it is one of the earliest examples of a state invoking the defence of necessity to justify non-performance of an economic obligation under international law. The tribunal accepted that necessity could in principle preclude state responsibility, but it rejected Turkey's claim on the facts. It found that the sum owed was relatively minor and that its payment would not have endangered the existence of the Ottoman Empire. Therefore, the situation did not meet the high threshold required to invoke necessity.[159]

The *Russian Indemnity* case has since become a landmark for the strict interpretation of the necessity defence in international law.[160] Its emphasis that economic hardship alone is insufficient to justify necessity has been influential and frequently cited by subsequent tribunals.[161]

2. Argentina Economic Crisis Cases

The Argentina economic crisis of 2001–2002 stemmed from economic reforms implemented in the 1990s.[162] During this period, Argentina pegged the peso to the U.S. dollar and privatized state-owned utilities, introducing dollar-based tariffs to attract foreign investment.[163] Initially, these policies succeeded: inflation dropped, and the economy grew.[164] However, unemployment rose sharply, and public debt ballooned.[165]

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necessity defence: ILC, **Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries**, p. 81, Article 25, para. 7.

[159] *Russian Indemnity Case*, Award of the Tribunal, pp. 12-13.

[160] Prodromou, "**Chapter 4: The Public Order Exception in International Investment Arbitration**", p. 60.

[161] *E.g.*, *Guris Insaat v. Syria*, Final Award, para. 320: "*It is therefore a purely economic obligation in the nature of an indemnity which must be shown to be* "*materially impossible in the circumstances to perform*" *or to be precluded by conduct that is* "*the only way for the State to safeguard an essential interest against a grave and imminent peril*"*. A demonstration of* "*material impossibility*" *or action necessary to* "*safeguard an essential interest against a grave and imminent peril*" *is fact-specific, requiring cogent evidence. Here, the Respondent has not explained, let alone demonstrated, how payment of money to the Claimants would satisfy either of these legal tests. The Tribunal observes in that regard that war or armed conflict, in themselves and without more, do not excuse non-compliance with monetary obligations*."

[162] Goldsman / López Forastier, "**Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis**", p. 646.

[163] **Ibid**., pp. 646-647.

[164] **Ibid**., p. 647.

[165] **Ibid**.

By 2001, the Argentine economy collapsed.[166] In response, the government took drastic measures: bank withdrawals were restricted, social unrest erupted, debt payments were suspended, the peso was devalued, and the dollar peg was abandoned.[167] The government also forcibly converted contracts denominated in U.S. dollars into pesos.[168] These actions triggered a surge of investment arbitration claims under various bilateral investment treaties ("**BIT**"s), particularly the U.S.-Argentina BIT.

The Argentina cases remain relevant today as they constitute the first modern test of the necessity defense in the investor-state dispute settlement context. Various key legal themes emerged from these cases, revealing both consistent patterns and conflicting approaches among different tribunals.

The first major issue concerned how tribunals defined the concept of necessity and, more specifically, the threshold of "*grave peril*." Under CIL, as reflected in Article 25 of the ILC Articles on State Responsibility, this threshold is quite high: the peril to the state's essential interests must be both serious and sufficiently imminent. "*Imminence*" here refers less to timing and more to the certainty justifying preventive measures.[169]

Tribunals dealing with Argentina's crisis reached different conclusions on whether the economic collapse constituted such a grave and imminent peril that could justify the government's actions.

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[166] **Ibid**.
[167] **Ibid**., pp. 647-648.
[168] **Ibid**., p. 648.
[169] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 50; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 56; Alvarez-Jiménez, "**Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law**", p. 144; Cristani, "**Chapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International Investment Arbitration Cases**", p. 65.

CMS v. Argentina was the first of the major cases to reach a final award. The tribunal applied a combination of international law (the BIT and CIL) and Argentina's domestic law, including constitutional and gas regulatory law.[170]

The tribunal first confirmed that CMS held rights to have tariffs calculated in U.S. dollars and adjusted semi-annually.[171] While it acknowledged the drastic economic changes in Argentina, it emphasized that these rights were protected under the Argentine Constitution and contract law.[172] Argentina's disregard of these obligations constituted a breach of the BIT.

Regarding the Fair and Equitable Treatment ("**FET**") standard, the tribunal noted its vague definition but found maintaining a stable legal environment essential.[173] Although states have some right to regulate, this right is limited by prior commitments.[174] The tribunal found Argentina breached FET by radically altering the legal framework underpinning CMS's investment.[175] This conclusion was supported by findings of discriminatory and arbitrary treatment, reinforcing but not replacing the FET breach.[176]

On the umbrella clause, the tribunal agreed with Argentina that breaches of contractual obligations alone do not automatically constitute treaty breaches.[177] Instead, governmental authority interference was required, which was present here, so the umbrella clause was also breached.[178]

[170] *CMS v. The Argentine Republic*, Award, paras. 115-123.
[171] **Ibid**., paras. 138, 144.
[172] **Ibid**., paras. 183 *ff*.
[173] **Ibid**., paras. 273-274.
[174] **Ibid**., para. 277.
[175] **Ibid**., para. 281.
[176] **Ibid**., paras. 285-295.
[177] **Ibid**., para. 299.
[178] **Ibid**.

The tribunal then assessed whether Argentina's breaches could be excused under the necessity defense, analyzing both the BIT and CIL. Applying Article 25 of the ILC Articles, the tribunal emphasized the defense's exceptional and restrictive nature.[179]

However, its analysis of whether Argentina's essential interests faced a grave and imminent peril was unclear. It acknowledged the crisis's severity and the government's need to respond but concluded, without explicit statement, that the "*relative effect*" of the crisis did not justify the necessity defense. [180]

The *Enron* and *Sempra* tribunals, under similar circumstances, reached the same conclusion via slightly different reasoning. Enron rejected necessity under both domestic and international law, finding that although the crisis was severe, it did not threaten the "*very existence of the state and its independence*."[181] This interpretation restricts "*essential interest*" narrowly to state survival.

The *Sempra* tribunal adopted a similar view, acknowledging the crisis's severity but concluding it did not threaten Argentina's survival.[182] It noted the government's duty to prevent worsening but found no evidence that events were out of control or unmanageable.[183]

The restrictive approach adopted by *CMS*, *Enron*, and *Sempra* tribunals has been widely criticized.[184] Limiting "*essential interest*" to the state's very existence ignores the broader reality that threats to public health, social order, or financial stability can gravely impact a state's essential functions.[185] A state might continue to exist but be functionally incapacitated if it cannot maintain economic stability or public order.[186]

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[179] **Ibid**., para. 317.
[180] **Ibid**., paras. 318-321.
[181] *Enron v. Argentine Republic*, Award, para. 306.
[182] *Sempra v. Argentine Republic*, Award, para. 332.
[183] **Ibid**., para. 349.
[184] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 168, 170.
[185] **Ibid**., p. 170.
[186] **Ibid**.

Moreover, the *Sempra* tribunal's reasoning effectively requires a state to wait until a crisis spirals out of control before taking necessary measures, a position incompatible with contemporary governance where proactive measures are essential to mitigate harm. The risk of abuse can be adequately controlled through proportionality and means tests, rather than by imposing an overly narrow definition of necessity.

The *LG&E* tribunal, while still applying a high threshold, adopted a broader approach.[187] It accepted that the crisis threatened not only the state's survival but also "*its political or economic survival, to the possibility of maintaining its essential services in operation, to the preservation of its internal peace, or to the survival of part of its territory.*"[188] This approach better reflects the real purpose of the necessity defense, protecting a state's ability to function, maintain order, and provide essential services.

Despite similar facts, the *LG&E* tribunal's more nuanced analysis resulted in a different outcome compared to *CMS*, *Enron*, and *Sempra.*

Two additional tribunals, *Continental Casualty* and *Mobil*, analyzed Argentina's crisis under treaty provisions, specifically Article XI of the U.S.-Argentina BIT, rather than CIL.

The *Continental Casualty* tribunal rejected the high "*total collapse*" threshold, noting that Article XI did not require a catastrophe for necessity to apply.[189] This approach aligns with criticisms of earlier tribunals: waiting for total collapse is neither logical nor realistic. States must be allowed to intervene earlier to preserve their economies and public welfare.

[187] *LG&E v. Argentine Republic*, Decision on Liability, paras. 238 *ff*.
It must be noted that although *LG&E* tribunal also did its analysis under the BIT, it supported its conclusions by noting that the CIL requirements were also met.
[188] **Ibid**., para. 246.
[189] *Continental Casualty Company v. Argentine Republic*, Award, para. 180.

The *Mobil v. Argentina* tribunal adopted similar reasoning, accepting that Argentina's crisis met the requirements of Article XI.[190]

Overall, the tribunals addressing the Argentina crisis applied different standards and reached divergent conclusions. The first four tribunals (*CMS*, *Enron*, *Sempra*, *LG&E*) applied the stricter CIL standard, while *Continental Casualty* and *Mobil* applied a more flexible treaty-based standard.

Even among the four applying CIL, there was no consensus on the threshold of necessity. Limiting essential interest to the state's survival is outdated; a functioning state requires more than mere existence.[191] Additionally, requiring states to wait until crises are "*out of control*" before acting undermines their ability to protect public order and welfare.

The second key theme addressed in the Argentina cases relates to the contribution exception under Article 25(2)(b) of the ILC Articles on State Responsibility. As noted above, if the invoking state contributed to the circumstances giving rise to necessity, it is precluded from relying on this defence. However, there is debate over what constitutes "*contribution*": should a causal approach apply, where any policy choice, even well-intentioned ones, that led to the emergency bars the state from invoking necessity? Or should a fault-based approach prevail, barring the state only to the extent it acted with fault or malintent?

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[190] "*The Tribunal considers that the state of emergency referred to in Article XI can be of an economic nature, as stated by several other ICSID tribunals.423 No responsibility should be found for damage suffered during the period of emergency, as the BIT does not apply in such a period, except if the State has substantially contributed to create it as it will be examined below. (...) This Tribunal finds it plain that Argentina's crisis faced in late 2001 and which continued into 2002 may fall within the scope of Article XI.*": *Mobil Exploration v. Argentine Republic*, Decision on Jurisdiction and Liability, paras. 1057, 1059.

[191] "*The alleged situation of extreme peril does not take the form of a threat to the life of individuals whose conduct is attributed to the State, but represents a grave danger to the existence of the State itself, its political or economic survival,* ***the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof****, etc.*" (emphasis added): Addendum - Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur - the internationally wrongful act of the State, source of international responsibility (part 1), United Nations, Report A/CN.4/318/ADD.5, Extract from the Yearbook of the International Law Commission, 1980 vol. II(1), p. 3.

In the Argentina cases, there is relatively more consensus that Argentina did contribute to the 2001-2002 economic crisis.

The *CMS* tribunal first recognized that the crisis, like any economic crisis, was caused by both endogenous and exogenous factors.[192] It held that Argentina's policies, implemented by public authorities, made a significant contribution to the crisis, while external factors aggravated the situation.[193] Accordingly, the *CMS* tribunal concluded that Argentina could not rely on the necessity defence.[194] Several other tribunals followed this reasoning, noting that Argentina's policies contributed to rendering the economy especially fragile to external shocks.[195]

However, other tribunals reached different conclusions.

The *Continental Casualty* tribunal observed that Argentina's economic policies were supported by the international community and highlighted conflicting qualified views about whether the policies were sound.[196] Ultimately, it held that Argentina's conduct, considering these factors, did not bar the application of Article XI.[197]

Similarly, the *LG&E* tribunal emphasized that a faulty contribution was required to bar the defence.[198] It found that claimants failed to prove Argentina had contributed to the crisis and thus held that Argentina was not precluded from liability under Article XI of the BIT.[199]

Two important points emerge from this comparison.

First, *CMS* and tribunals following it adopted a rather broad causal approach, deeming it sufficient that the state's policies, regardless of intent or soundness, led to the

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[192] *CMS v. The Argentine Republic*, Award, para. 328.
[193] **Ibid**., para. 329.
[194] **Ibid**., para. 331.
[195] *E.g.*, *National Grid v. Argentina*, Award, para. 225.
[196] *Continental Casualty Company v. Argentine Republic*, Award, paras. 115 *ff*.
[197] **Ibid**., para. 236.
[198] *LG&E v. Argentine Republic*, Decision on Liability, para. 256.
[199] **Ibid**.

circumstances creating necessity, thus barring the defence. In contrast, *Continental Casualty* and *LG&E* applied a more balanced approach by examining whether the policies were sound or reasonable on their face, requiring a substantive, not merely causal, contribution to bar the defence.

The latter approach better aligns with the rationale of the exception. The contribution exception mirrors the general legal principle that no one can benefit from their own wrongdoing and aims to bar states from invoking necessity based on circumstances they themselves created. However, it would be unreasonable to hold states liable for all failed policies. Argentina's 1990s policies initially worked, and while their soundness can be debated, states must be free to adopt one policy approach over another. Therefore, a threshold requiring some element of abuse or bad faith better fits the rule's purpose.[200] Moreover, balancing interests and applying a means test are sufficient safeguards against abuse. There is no need to penalize well-intentioned policies that simply did not succeed.[201]

The second aspect concerns the burden of proof. Most tribunals placed the burden on the respondent state to prove it did *not* contribute to the state of necessity. However, a few tribunals, including *LG&E*, *Mobil*, and *El Paso*, reversed this, placing the burden on the claimants to show that Argentina contributed and was therefore barred from invoking the defence.[202] They reasoned that since claimants rely on the contribution exception to preclude the defence, it is appropriate for them to prove its existence.[203]

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200 Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 180.

201 "*As regards the use of the words "contributed" or "caused by", it should be left to the Drafting Committee to choose the most appropriate wording. The verb "contribute" had the advantage of having been used in other draft articles, even if to use it in article 33 might make the provision somewhat strict. It was a moot point whether a State was in a "state of necessity" if it found itself in a situation which was not really "caused by" it but to which it had contributed, for instance by pursuing too lax a financial policy. If that situation was nevertheless fraught with extreme danger for it, was it fair to not allow it any excuse?*": Summary records of the meetings of the thirty-second session 5 May -25 July 1980, ILC, 1618th Meeting, para. 26.

202 FORJI Amin George, "Drawing the Right Lessons from ICSID Jurisprudence on the Doctrine of Necessity", Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, ed. Derek Roebuck, Sweet & Maxwell, 2010, pp. 44-57, p. 55.

203 **Ibid**., p. 56.

Despite some scholarly criticism, placing the burden of proof on claimants appears more appropriate. While the respondent must generally prove the conditions of necessity, contribution is an exception to the defence. It does not make sense for the respondent to prove the *absence* of an exception; rather, claimants should prove that the exception applies despite the main conditions being met.[204]

The third key aspect to emerge from the Argentina cases concerns the interaction between the necessity defence under CIL, codified in Article 25 of the ILC Articles on State Responsibility, and the treaty-based necessity clause found in Article XI[205] of the U.S.-Argentina BIT. This issue became one of the most contentious points in the arbitration proceedings stemming from Argentina's 2001–2002 economic crisis, with tribunals adopting divergent approaches.

The *CMS* tribunal was the first to examine this interplay. It began by analyzing Argentina's defence under CIL (Article 25 of the ILC Articles),[206] and after rejecting it, turned to Article XI of the BIT.[207] However, the tribunal provided neither a rationale for this sequence nor a clear explanation of the relationship between the two legal regimes. Ultimately, it rejected Argentina's defence under Article XI as well, relying heavily on its earlier findings under Article 25.[208]

Subsequent tribunals in *Sempra* and *Enron* followed a similar structure but provided more reasoning. The *Enron* tribunal, for instance, observed that Article XI lacked definitions for key concepts such as "*essential security interests*," and thus turned to Article 25 to interpret these terms.[209] It concluded that Article XI did not constitute *lex specialis* that would override CIL.[210] Instead, it treated Article 25 as a source of

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[204] **Ibid**.
[205] Article XI of the Argentina - United States of America BIT (1991) is as follows: "*This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests*."
[206] *CMS v. The Argentine Republic*, Award, paras. 315-331.
[207] **Ibid**., paras. 353-378.
[208] **Ibid**.
[209] *Enron v. Argentine Republic*, Award, para. 333.
[210] **Ibid**., para. 334.

interpretive guidance.[211] However, in doing so, the tribunal effectively merged the two standards: rejection of necessity under Article 25 also led to rejection under Article XI.[212]

The *CMS* Annulment Committee strongly criticized this conflation. Although it could not annul the award based on errors of law (which are not a ground for annulment under the ICSID Convention), it offered significant legal clarification.

First, it highlighted the structural and functional distinction between the two regimes.[213] Article XI of the BIT operates as a primary rule and serves as a threshold clause.[214] If it applies, the substantive obligations of the BIT do not arise in the first place.[215] In contrast, Article 25 of the ILC Articles functions as a secondary rule, operating only after a breach is established, to determine whether that breach can be excused.[216]

Accordingly, a tribunal cannot affirm both grounds simultaneously. If Article XI applies, there is no breach, and hence no need for a preclusion of responsibility under Article 25. If Article XI does not apply and a breach is found, only then may Article 25 be assessed.[217]

Second, the Committee criticized the overlapping of conditions**.** Article XI refers broadly to measures necessary for maintaining public order or protecting essential security interests, without stipulating how the measure must be applied or its consequences.[218] Article 25, by contrast, contains stricter conditions: the measure must be the "*only way*" and must not "*seriously impair an essential interest*" of another state.[219] Therefore, transposing Article 25's stricter conditions into Article XI was legally inappropriate.[220]

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[211] **Ibid**., para. 333.
[212] **Ibid**., para. 339.
[213] *CMS v. The Argentine Republic*, Decision of the *Ad hoc* Committee on Argentina's Application for Annulment, 25 September 2007, paras. 119-136.
[214] **Ibid**., para. 129.
[215] **Ibid**.
[216] **Ibid**., para. 134.
[217] **Ibid**.
[218] **Ibid**., para. 130.
[219] **Ibid**.
[220] **Ibid**., para. 131.

Although the *CMS* award was not annulled, its shortcomings influenced later tribunals and *ad hoc* committees.[221]

The *Continental Casualty* tribunal built on the annulment committee's reasoning and went further.[222] It accepted that Article XI constituted a *lex specialis* and, if applicable, would render any analysis under Article 25 unnecessary.[223] However, the tribunal also introduced two important elements: first, the identification of a conceptual link between Article XI and Article 25;[224] and second, the use of jurisprudence developed under GATT Article XX[225] as interpretative guidance.[226]

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[221] *E.g.*, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Decision on Annulment, 16 November 2021, para. 113; *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, para. 190; *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, para. 256; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, para. 297.
[222] *Continental Casualty Company v. Argentine Republic*, Award, para. 167.
[223] **Ibid**., para. 168.
[224] **Ibid**.
[225] The article is as follows: "*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; (c) relating to the importations or exportations of gold or silver; (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; (e) relating to the products of prison labour; (f) imposed for the protection of national treasures of artistic, historic or archaeological value; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;* (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination; (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960*."
[226] *Continental Casualty Company v. Argentine Republic*, Award, paras. 192 *ff.*

On the first point, the tribunal acknowledged that while the two defences were distinct and mutually exclusive in their application, their overlap in language and underlying logic could justify using Article 25 to help interpret Article XI.[227] This approach, while not without risks, was more restrained than that of the *CMS* tribunal, which had conflated the two legal regimes without a proper framework. *Continental Casualty* maintained the distinction between the provisions while drawing interpretive value from their shared elements.

On the second point, the tribunal turned to WTO case law concerning GATT Article XX.[228] Since Article XI was modeled on GATT Article XX and shared similar wording, the tribunal considered WTO jurisprudence to be a helpful source in interpreting the BIT clause.[229]

This comparative approach was innovative and potentially fruitful, but the need for caution, given the differing contexts of international trade and investment law must be noted. While GATT Article XX applies in inter-state trade disputes, Article XI serves as a safeguard for host states in the investment context, and the objectives and interpretive standards of these fields may diverge.

A different approach was adopted by the *LG&E* tribunal. It began its analysis with Article XI and, having found it applicable, concluded that Argentina was not in breach of the treaty.[230] The tribunal then turned to Article 25 and found that it confirmed the conclusions already reached under Article XI.[231] Rather than treating the two provisions as entirely separate, the *LG&E* tribunal relied primarily on Article XI and used Article 25 as supportive reasoning, reinforcing its decision by ensuring consistency across both legal frameworks.[232]

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[227] **Ibid**., para. 168.
[228] **Ibid**., paras. 192 *ff*.
[229] **Ibid**.
[230] *LG&E v. Argentine Republic*, Decision on Liability, paras. 226-261.
[231] **Ibid**., paras. 245-258.
[232] **Ibid**.

Among these approaches, subsequent tribunals tended to follow the reasoning of the *CMS* annulment committee.[233] They acknowledged the necessity of maintaining a clear distinction between the treaty-based defence under Article XI and the customary defence under Article 25, while also recognizing, as in *Continental Casualty*, that the two may share interpretive linkages.[234] The prevailing view among later tribunals has been that Article XI deserves autonomous interpretation, and although CIL or other legal regimes such as trade law may offer useful insights, they should not override the distinct legal framework provided by the treaty.

This approach preserves the functional autonomy of treaty exceptions, ensures consistency in the application of international legal standards, and respects the hierarchical and temporal differences between primary treaty rules and secondary rules of state responsibility.

The final aspect to analyze is the "*only way*" requirement.

Here, the debate and divergent approaches largely revolved around the standard of review. The central question was whether tribunals should adopt a strict standard, where

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[233] *E.g.*, *Magyar Farming v. Hungary*, Decision on Annulment, para. 113; *Deutsche Telekom AG v. The Republic of India*, Interim Award, para. 190; *CC/Devas (Mauritius) v. Republic of India*, Award on Jurisdiction and Merits, para. 256; *EDF International v. Argentine Republic*, Decision on Annulment, para. 297.

[234] *E.g.*, "*Contrary to DT's position, India submits that Article 12 of the BIT does not require urgency for the application of the essential security interests defense. The Claimant erroneously conflates Article 12 of the BIT with the customary international law plea of necessity. In particular, the C/WS and Sempra ad hoc committees rejected this view. They considered that the essential security interests clause in the Argentina-U.S. BIT excludes the application of the substantive obligations of the treaty as a result of which there can be no breach of the treaty if the clause applies. By contrast, the state of necessity contemplated by Article 25 of the International Law Commission Articles on State Responsibility (*"*ILC Articles*"*) is a circumstance precluding wrongfulness, which only comes into play when there is a breach of a primary treaty obligation:* "*Article XI [the'essential security interests' provision of the U.S.-Argentina BIT] is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 [of the ILC Articles on State Responsibility] is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations*""*: Deutsche Telekom AG v. The Republic of India, PCA Case No. 2014-10, Interim Award, 13 December 2017, para. 190;* "*The Tribunal therefore concludes that the conditions attached to the state of necessity defence under customary international law are not applicable in the present situation. The Tribunal observes that this approach is consistent with that taken by the tribunal in Continental Casualty v. Argentina and the annulment committee in CMS v. Argentina.*": *CC/Devas (Mauritius) v. Republic of India*, Award on Jurisdiction and Merits, para. 256.

the mere existence of an alternative measure is enough to conclude that the contested action was not the "*only way*", or whether a more flexible, reasonableness-based approach should guide the analysis.

Starting with the *CMS* tribunal, it found that it was debatable whether Argentina could have adopted other measures to protect its essential interests during the crisis.[235] The tribunal did not evaluate whether those alternatives would have been better or worse than the ones Argentina chose. Instead, it treated the issue as a threshold question and concluded that, since other options existed, the "*only way*" requirement was not satisfied.[236]

This approach has been widely criticized.[237] Simply identifying the existence of alternative measures should not be sufficient to reject the necessity defence. In situations of financial crisis, it is almost always possible to imagine multiple policy responses.[238] However, the mere presence of alternatives does not mean that they are viable or less harmful. The purpose of the "*only way*" requirement in the ILC Articles is to ensure that the state chooses the least harmful option, not to demand an impossible standard of singularity. Accepting that any alternative is enough to defeat the defence risks enabling investors to construct theoretical or hindsight-based options that appear more attractive only in retrospect.[239]

The *LG&E* tribunal also applied the "*only way*" test, but concluded, without substantive reasoning, that Argentina's economic recovery package was the only available measure.[240] This conclusion too attracted criticism in academic literature for being overly broad and insufficiently examined.[241] Scholars argue that the key question should not be whether any alternative existed, but whether there was a feasible alternative that would

[235] *CMS v. The Argentine Republic*, Award, para. 323.
[236] **Ibid**., paras. 323-324.
[237] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 176-178.
[238] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 60.
[239] It must be noted that this approach does not actually render the high threshold of "*only way*" more lenient but rather provides for the application of the criterion as it was meant to be applied: **Ibid**., p. 62.
[240] *LG&E v. Argentine Republic*, Decision on Liability, para. 257.
[241] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 62.

have inflicted less harm on investors, even if it might have been more costly or politically difficult for the state.[242]

The *Enron* tribunal's decision came after both *CMS* and *LG&E*. It undertook a comparative analysis of how other states had responded to economic crises and concluded that Argentina had other available options.[243] The tribunal adopted a strict interpretation of the "*only way*" requirement and summarily rejected Argentina's necessity defence on the basis that alternatives existed. This rigid approach was criticized by subsequent tribunals.[244]

However, the *Enron ad hoc* annulment committee strongly criticized this reasoning, ultimately leading to the annulment of the award. The committee noted that the only means requirement could admit more than one plausible interpretation and that the tribunal had adopted the most severe one without proper justification.[245] First, it failed to assess whether the proposed alternatives were genuinely effective.[246] Second, it did not weigh the relative effectiveness and consequences of these alternatives.[247] Third, it did not clarify who should judge the viability of these alternatives or what criteria should guide such an assessment.[248] These failures led the committee to conclude that the tribunal had manifestly exceeded its powers and failed to apply the law correctly.[249]

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[242] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 177-178.
[243] *Enron v. Argentine Republic*, Award, paras. 308-309.
[244] "*In the past, some investment tribunals have held that the necessity requirement was not fulfilled as soon as they had identified a possible alternative measure. The necessity test, however also demands that alternative measure to be available and equally effective. Without any empirical evidence proving that these conditions are satisfied, engaging in such a scrutiny would exceed the Tribunal's institutional capacity. It would blur the line between adjudication and policy-making, the latter being reserved to the State's legislative and regulatory organs. Thereby, it would fail to grant the deference owed to States on how to implement their policies. In any event, water preservation was not the only public purpose pursued by the Constitutional Amendment. Accordingly, a potential alternative in terms of control over water extraction would not be dispositive of necessity in relation to the other public purposes involved.*": *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, PCA Case No. 2017-08/AA629, Award, 7 October 2020, para. 571.
[245] *Enron v. Argentine Republic*, Annulment, para. 369.
[246] **Ibid**., para. 371.
[247] **Ibid**.
[248] **Ibid**., para. 372.
[249] **Ibid**., para. 377.

In contrast to this rigid standard, two tribunals adopted a more balanced and reasonableness-based approach. The *Continental Casualty* tribunal, drawing on WTO case law, held that the appropriate test was whether Argentina had a reasonable alternative available.[250]

Similarly, the *Urbaser* tribunal acknowledged that the "*only way*" requirement contains an element of reasonableness and must involve a proportionality assessment to determine whether any viable alternative existed.[251] The *Urbaser* tribunal echoed key aspects of the *Enron* annulment committee's reasoning, critically assessing the claimant's proposed alternatives and finding several of them either unconvincing or entirely unfeasible.[252]

Thus, while the majority of tribunals applied a strict interpretation of the "*only way*" requirement, this approach has its limitations. If taken too far, it risks rendering the necessity defence effectively useless. The purpose of the "*only way*" criterion is to ensure that the state seriously considers the interests of the other party and engages in a genuine balancing of interests. It is not meant to be a trap set by claimants to invalidate the defence by proposing idealized or impractical alternatives. A more appropriate standard, as articulated by the *Enron* annulment committee, is to evaluate whether the proposed alternatives would have been reasonably effective in the circumstances. This more nuanced and contextual interpretation preserves the function of the necessity defence while ensuring that it is not abused.

To sum up, the cases involving Argentina following the 2001–2002 economic crisis offer valuable guidance in ISDS, particularly in relation to the application of the necessity defence. These cases reveal not only inconsistencies in the application of CIL, but also diverging interpretations of treaty clauses and the appropriate legal standards to apply.

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[250] *Continental Casualty Company v. Argentine Republic*, Award, paras. 198 *ff*.
[251] *Urbaser S.A. v. Argentine Republic*, Award, para. 716.
[252] **Ibid**., paras. 724-732.

Three main aspects have been analyzed in this context.

First, the interpretation of the conditions for necessity, particularly "*grave and imminent peril*", varied significantly among tribunals. Early decisions adopted a strict reading, holding that the essential interest under threat must relate to the very existence of the state, and that the peril must endanger this existence directly.[253] In contrast, later tribunals adopted a more pragmatic and policy-sensitive approach, recognizing the legitimacy of preemptive measures aimed at protecting financial stability and public welfare.[254]

Second, the "*contribution*" exception gave rise to conflicting decisions. Two primary approaches emerged. Some tribunals relied on a purely causal analysis, finding the exception applicable whenever a state's policy contributed to the crisis in any way. Others, more appropriately, required a substantial contribution involving a fault-based analysis. This latter approach is more convincing, as it takes into account the complexities of policymaking, especially in volatile conditions marked by external pressures and evolving circumstances. On this point, there were also divergent views regarding the burden of proof: while many tribunals placed it on the respondent state, a more balanced approach would place the burden on the claimant to prove that the exception applies.[255]

Third, there was considerable debate about the relationship between treaty-based necessity clauses and the CIL defence of necessity. Early tribunals blurred the distinction between the two, treating them interchangeably.[256] Later tribunals[257], and especially annulment committees[258], clarified the important differences between their aims, effects, and legal conditions. While some comparative analysis between the two can be beneficial,

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[253] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", pp. 50-51.
[254] HILL Sarah F., "The Necessity Defense and the Emerging Arbitral Conflict in Its Application to the U.S.-Argentina Bilateral Investment Treaty", Law and Business Review of the Americas, vol. 13, no. 3, 2007, pp. 547-567, p. 561.
[255] For a criticism of the latter *see* WAIBEL Michael, "Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*", Leiden Journal of International Law, vol. 20, 2007, pp. 637-648.
[256] *E.g.*, *CMS v. Argentina*; *Enron v. Argentina*; *Sempra v. Argentina*.
[257] *E.g.*, *LG&E v. Argentina*.
[258] *E.g.*, *CMS* v. Argentina, Annulment.

conflating them undermines their distinct legal foundations and risks doctrinal confusion.[259]

Overall, the Argentina cases represent the first major modern test of the necessity defence, compelling tribunals to engage with complex legal and factual questions.[260] In today's world, where crises are increasingly frequent, economic, environmental, or otherwise, it is crucial to build on the lessons of these cases. A more coherent, flexible, and context-sensitive approach is needed. While necessity remains a strict and exceptional defence, it should not be rendered inoperable through overly rigid interpretations. Likewise, preserving the distinction between treaty clauses and CIL is essential to maintaining a solid and principled legal framework for future adjudication.

3. Libya Conflict Cases: Armed Conflict and Breakdown of State Functions

The 2010s witnessed a surge in ISDS cases involving Arab parties, largely driven by the effects of the Arab Spring, a series of anti-government protests, uprisings, and armed rebellions that spread across the Islamic world in the early 2010s.[261] The Arab Spring reached Libya in 2011, and since then, the country's economic and political situation has steadily deteriorated.[262]

Existing investors faced ongoing disruptions and sought ways to exit, either by halting projects or initiating arbitration proceedings to obtain compensation or protection

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[259] DESIERTO Diane A., "Necessity and 'Supplementary Means of Interpretation' for Non-Precluded Measures in Bilateral Investment Treaties", University of Pennsylvania Journal of International Law, vol. 31, no. 3, 2010, pp. 827-934, pp. 894-907.
[260] BURKE-WHITE William W., "The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System", Asian Journal of WTO & International Health Law and Policy, vol. 3, no. 1, 2008, pp. 199-234, p. 207.
[261] Carpentieri, "**The Invocation of State Defenses in Times of Conflict: *Force majeure*, Necessity and the Libyan Example**", p. 7.
[262] **Ibid**., p. 8; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 55.

amid continuous conflict and insecurity.[263] These ISDS cases have profoundly shaped the arbitration landscape involving Arab parties since the early 2010s.[264]

The Arab Spring and its aftermath have given rise to a significant body of investment arbitration case law concerning the effects of armed conflict. Just as the Argentine cases contributed to the development of legal principles surrounding economic crises and their impact on investment obligations, these proceedings have led arbitral tribunals to engage in detailed analyses of how armed conflict interacts with investment protections under both domestic law and international treaties.

The Libyan cases, in particular, offer valuable insights.

Under Libyan domestic law, foreign investors are afforded substantive protections.[265] Notably, Libyan administrative law provides that in the event of an armed conflict amounting to exceptional circumstances, an investor has the right to rebalance or terminate the investment contract.[266] However, the application of these provisions by Libyan courts is strict, and the burden lies with the investor to prove that the armed conflict constituted an exceptional circumstance that led to serious or exorbitant losses.[267]

In addition to domestic legal protections, Libya is party to various investment treaties that contain standard investor protections such as fair and equitable treatment, full protection and security, and provisions against unlawful or uncompensated expropriation. Some of these treaties also include war clauses.[268] While these clauses do not create new

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[263] Carpentieri, "**The Invocation of State Defenses in Times of Conflict: *Force majeure*, Necessity and the Libyan Example**", p. 8.
[264] FOTY Cherine, "Impact of the Arab Spring on the International Arbitration Landscape", Kluwer Arbitration Blog, 26.07.2019, https://legalblogs.wolterskluwer.com/arbitration-blog/impact-of-the-arab-spring-on-the-international-arbitration-landscape (last accessed: 23 June 2025); BLAKE Gordon, "Investment arbitration in the Arab Spring: first lessons", Thomson Reuters Practical Law Arbitration Blog, 04.01.2018, https://arbitrationblog.practicallaw.com/investment-arbitration-in-the-arab-spring-first-lessons/ (last accessed: 23 June 2025).
[265] Carpentieri, "**The Invocation of State Defenses in Times of Conflict: *Force majeure*, Necessity and the Libyan Example**", pp. 13-14.
[266] **Ibid**., p. 13.
[267]**Ibid**., p. 14.
[268] For example, Article 5 of the Turkey-Libya BIT (2009) provides that "*Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war,*

substantive rights for the investor, they ensure that, in the event of damage resulting from war or conflict, the investor will receive the same level of compensation as domestic or other foreign investors.

Although these legal protections may appear adequate, they often fall short in practice.[269] Many such clauses only apply to damage caused directly by the host state's armed forces and not by rebel groups or non-state actors.[270] Moreover, compensation is frequently excluded where the damage can be justified by the doctrine of necessity.[271] Consequently, investors often struggle to prove that the harm they suffered was both attributable to the state and not excused under international law.

In the ISDS cases brought by investors in the wake of Libya's civil conflicts, arbitral tribunals have been frequently called upon to address the applicability of the defences of *force majeure* and necessity. While the focus of this section is on necessity, a brief discussion of *force majeure* is warranted due to its conceptual proximity.

Force majeure is commonly invoked in both investor-state and commercial arbitration during situations of armed conflict or civil unrest, particularly when a state loses control over its territory or military apparatus, as often occurs during revolutions or

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insurrection, civil disturbance or other similar events shall be accorded by such other Contracting Party treatment no less favourable than that accorded to its own investors or to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses."

[269] Carpentieri, "**The Invocation of State Defenses in Times of Conflict: *Force majeure*, Necessity and the Libyan Example**", p. 19.

[270] **Ibid**.

[271] It must be reminded that whether compensation is due where the necessity defence is upheld is debated: Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", pp. 60-61.

The *LG&E* tribunal held that "*(...) this Tribunal has decided that the damages suffered during the state of necessity should be borne by the investor.*": *LG&E v. Argentine Republic*, Decision on Liability, para. 264.

In contrast, the *BG Group Plc* tribunal held that "*(...) There is no question that Argentina is entitled to adopt such measures as it deems appropriate to emerge from the state of emergency. However, it remains obligated to pay compensation. This is one view as to how bilateral investment treaties operate to induce foreign investment. Assuming that necessity were to justify some fair and non-discriminatory measure by Argentina, an obligation to compensate would still obtain by virtue of the BIT.*": *BG Group Plc v. The Republic of Argentina*, Final Award, para. 409.

civil wars.[272] The doctrine requires that the event in question be unforeseeable, irresistible, and not attributable to the party invoking it. In the context of armed conflict, prior incidents such as protests or political instability may lead tribunals to conclude that subsequent violence was foreseeable, undermining the claim of *force majeure*.[273] That said, when it is the investor rather than the state that invokes *force majeure*, tribunals tend to adopt a more flexible approach, recognizing that a private party cannot be held responsible for the political or security situation in the host state.[274]

The Libyan context illustrates the difficulties of invoking *force majeure*.

The 2011 civil war, which emerged from the Arab Spring protests and ensuing governmental repression, gave rise to questions about whether the conflict was at least partially attributable to state actions, an issue that would preclude the successful invocation of *force majeure* by the state.[275] Additionally, given that similar uprisings had already occurred in other parts of the region, there has been debate over whether Libya should have foreseen the risk of widespread unrest and taken preventive measures.[276] The outbreak of a second civil war in 2014 further complicated matters, with some arguing that the renewed conflict was foreseeable in light of the earlier events of 2011.[277]

Turning now to the use of the necessity defence in this context, it is notable that during the 2010s, necessity was primarily invoked in cases arising from economic crises,

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[272] AL-RASHID Meriam / GOLENDUKHIN Levon / BARDYN Ulyana, "Investment Claims Amid Civil Unrest: Questions of Attribution and Responsibility", BCDR International Arbitration Review, ed. Nassib G. Ziadé, 2016, pp. 181-218, p. 212.
[273] **Ibid**., pp. 214-215.
[274] *E.g.*, *RSM v. Central African Republic*, ICSID Case No. ARB/07/2, Excerpts of the Decision on Annulment of February 20, 2013 made pursuant to Rules 48(4) and 53 of the ICSID Arbitration Rules of 2006, paras. 29-30.
[275] Carpentieri, "**The Invocation of State Defenses in Times of Conflict: *Force majeure*, Necessity and the Libyan Example**", p. 23.
For a similar analysis regarding cases involving Venezuela see Al-Rashid / Golendukhin / Bardyn, "**Investment Claims Amid Civil Unrest: Questions of Attribution and Responsibility**", p. 215.
[276] Carpentieri, "**The Invocation of State Defenses in Times of Conflict: *Force majeure*, Necessity and the Libyan Example**", p. 24.
[277] DAZA-CLARK Ana Maria / BEHN Daniel, "Between War and Peace: Intermittent Armed Conflict and Investment Arbitration", European Yearbook of International Economic Law (Special Issue), 2018, pp. 43-66, p. 62.

most prominently in the Argentina-related proceedings. Although commentators have rightly observed that invoking necessity may be more appropriate in situations of armed conflict than during financial crises, States remain generally reluctant to rely on this defence in cases involving war, armed conflict, or civil unrest.[278]

Despite this reluctance, the necessity defence appears to be a potentially viable option in cases concerning damage arising from armed conflict. Given the criteria required to successfully invoke necessity, it seems plausible that a host State could argue that protecting civilians during armed conflict outweighs the obligation to safeguard foreign investors' assets. This would satisfy the balancing requirement, as well as the "*essential interest*" and "*grave and imminent peril*" elements of the defence.[279]

However, difficulties may arise with the "*no contribution*" requirement. In Libya's case, some commentators argue that its repeated violations of human rights and repression of its population, particularly in connection with the civil wars of 2011 and 2014, may hinder its ability to claim that it did not contribute to the situation of necessity.[280] This could ultimately prevent Libya from successfully relying on the necessity defence.

The *Strabag v. Libya*[281] case provides useful insights on this topic.

Strabag, through its German subsidiary, entered into construction contracts with Libyan state-owned entities in the mid-2000s.[282] Subsequently, Libya imposed a requirement that foreign firms partner with local companies, which led Strabag to form a joint venture with a Libyan firm called Al Hani, in which Strabag held a 60% share.[283] Al

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[278] JONES Doug, "Investor-State Arbitration in Times of Crisis", National Law School of India Review, vol. 25, no. 1, 2013, pp. 27-61, p. 36.
[279] Carpentieri, "**The Invocation of State Defenses in Times of Conflict: *Force majeure*, Necessity and the Libyan Example**", p. 28.
[280] Daza-Clark / Behn, "**Between War and Peace: Intermittent Armed Conflict and Investment Arbitration**", p. 18; Carpentieri, "**The Invocation of State Defenses in Times of Conflict: *Force majeure*, Necessity and the Libyan Example**", p. 28.
[281] *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1.
[282] **Ibid**., Award, 29 June 2020, paras. 57 *ff*.
[283] **Ibid**., paras. 7, 59.

Hani secured additional contracts for urban development and road construction projects.[284]

The Libyan revolution began in 2011.[285] At that time, one of the road construction projects, the Benghazi project, was completed but had not yet received final acceptance, while other contracts were still ongoing.[286] During the revolution, Al Hani suffered material damages and experienced significant disruptions to its work.[287] Although some payments were made after the revolution, not all projects resumed fully, prompting Strabag to initiate arbitration.[288]

The key issue in this case was not the CIL necessity defense *per se*, but rather the application of a war losses clause included in the relevant BIT.[289] Despite this, the tribunal's examination remains relevant due to the war losses clause's close connection to the necessity defense and because the tribunal's reasoning offers insights into how arbitral tribunals might approach necessity claims.

The BIT's war losses clause was broad, providing for compensation related to wartime requisitions and destruction that was not justified by the "*necessity of the situation*."[290] Libya argued that the claimant bore the burden of proving that the damage

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[284] **Ibid**., para. 60.
[285] **Ibid**.
[286] **Ibid**.
[287] **Ibid**., paras. 75-84.
[288] **Ibid**., paras. 85-96.
[289] The relevant clause is Article 5 of the Austria-Libya BIT (2002) and provides as follows: "*(1) An investor of a Contracting Party who has suffered a loss relating to its investment in the territory of the other Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event, or acts of God or force majeure, in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third state, whichever is most favourable to the investor. (2) An investor of a Contracting Party who in any of the events referred to in paragraph (1) suffers loss resulting from: (a) requisitioning of its investment or part thereof by the forces or authorities of the other Contracting Party, or (b) destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation, shall in any case be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Article 4(2) and (3).*"
[290] *Strabag SE v. Libya*, Award, para. 213.

was not due to necessity and further contended that the war losses clause functioned as a *lex specialis*, precluding reliance on other treaty provisions.[291]

The tribunal rejected Libya's arguments.

The tribunal started by determining that the war losses clause was not *lex specialis*.[292] It emphasized that the principle of *lex specialis derogat legi generali* serves only as a supplementary interpretive tool under Article 32 of the Vienna Convention on the Law of Treaties, applicable only when treaty language is ambiguous or leads to absurd results.[293] Here, the ordinary treaty language did not support such a restrictive interpretation.[294] Thus, the tribunal concluded that the war losses clause did not prevent the claimant from invoking other treaty protections.[295]

Turning to the merits under the war losses clause, the tribunal noted that compensation for destruction caused by the respondent state's forces or authorities was only warranted if such destruction was not required by the necessity of the situation.[296] The claimant's spreadsheets detailing damages were of limited help since they did not specify the causes of destruction.[297] Instead, the tribunal relied on a report prepared for the project's insurers, which it deemed an objective outsider's assessment.[298] This report identified three main causes of loss: North Atlantic Treaty Organization ("**NATO**") forces, looting by civilians, and destruction by military personnel.[299] Based on this, the tribunal awarded compensation equal to one-third of the damages claimed for the claimant's site facilities and materials.[300]

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[291] **Ibid**., paras. 216, 221-222.
[292] **Ibid**., paras. 224-228.
[293] **Ibid**., para. 225.
[294] **Ibid**., para. 224.
[295] **Ibid**., para. 228.
[296] **Ibid**., paras. 270 *ff*.
[297] **Ibid**., paras. 257-263, 274.
[298] **Ibid**., paras. 275 *ff*.
[299] **Ibid**., para. 298.
[300] **Ibid**.

Also, the tribunal held that placing the burden of disproving necessity on the claimant would be excessively onerous.[301]

Although the *Strabag* case did not provide a detailed analysis of the necessity defense, it remains important for several key conclusions.

First, the tribunal concluded that the war losses clause in the BIT was not *lex specialis*. This means that even when such clauses exist, investors can still invoke other treaty protections.

Second, the case offers valuable evidentiary insights: the tribunal relied on a report prepared by the project insurer, considering it an objective and impartial source to determine the causes of damage. Based on this report, which identified three sources of loss, the tribunal awarded compensation for only one-third of the total damages claimed, since military personnel were responsible for only part of the harm.

However, these conclusions are not without conflicting decisions in other Libya-related cases.

Regarding the *lex specialis* nature of the clause, the majority of the tribunal in *Oztas Construction v. Libya*[302] reached the opposite conclusion.

In that case, Oztas alleged that Libya breached its FET and Full Protection and Security (“**FPS”**) obligations by failing to respond adequately to civil unrest that escalated into a civil war.[303] The tribunal rejected this claim, reasoning that it would be unprecedented to hold a state liable for failing to prevent a revolution or civil war.[304] It

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[301] **Ibid**., para. 315.
[302] *Öztaş Construction, Construction Materials Trading Inc. v. State of Libya*, ICC Case No. 21603/ZF/AYZ.
[303] **Ibid**., Final Award, 14 June 2018, paras. 134-138, 153-156.
[304] “*There is, so far as we are aware, no case in which an arbitral tribunal constituted pursuant to an investment treaty has found that an investment treaty was breached by a failure to avoid a revolution or civil war. As a matter of international law, the condition of civil war or uprising, if existent, constitutes an extraordinary situation that negates any negligence or lack of due diligence against the State of Libya, and Claimant has not shown, let alone compellingly demonstrated, that the State of Libya has taken measures that directly aggravated or triggered the civil war and resulted in Claimant's alleged losses. (…)*” (emphasis added): **Ibid**., para. 162.

further stated that civil war and revolutions negate any negligence or lack of due diligence on the part of the state, and that the claimant should have demonstrated that the state took measures that directly aggravated the conflict, causing the claimant's losses.[305]

Importantly, the tribunal also noted the temporal aspect of the events.[306] Moreover, the BIT already contained a war losses clause, which neither party had invoked.[307] The tribunal concluded that this war losses clause appeared to be the proper and exclusive remedy for the claimant, and that the discrimination provision was not the appropriate basis for the claim.[308]

Thus, the *Oztas* tribunal's reasoning contrasts with the *Strabag* tribunal. While the *Oztas* tribunal held that the war losses clause was the sole proper remedy,[309] the latter rejected the idea that such a clause negated the claimant's ability to seek relief under other treaty provisions. The latter approach seems more frequently adopted in arbitral practice, at least in Libya-related proceedings.[310]

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[305] **Ibid**.

[306] "*(…) Moreover, Respondents pointed out that the uprising during the Libyan revolution took place between 15 February 2011 and 23 October 2011,* ***which was two years before the Termination Agreement was signed*** *on 18 March 2013, and the majority of the Arbitral Tribunal agrees that therefore* ***it could not have possibly impaired its ability to recover the amount that is owed to it under the Termination Agreement****, which (as explained at paragraph 108 above) Claimant claims is the relevant* "*investment*"." (emphasis added): **Ibid**.

[307] **Ibid**., paras. 164-172.

[308] **Ibid**.

[309] For the tribunals that have adopted the same approach see *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, 12 November 2008, paras. 173-181; *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Dissenting Opinion of Samuel K.B. Asante, 27 June 1990, para. 49.

[310] *E.g.*, *Way2B ACE v. State of Libya*, ICC Case No. 20971/MCP/DDA, Award, 24 May 2018 (examined in "Way2B V. Libya Tribunal Finds that BIT's War-Losses Clause Does Not Exclude Operation of Other Bit Protections (Including Full Protection & Security), but Foreign Investor Fails to Meet Evidentiary Burdens", IAReporter, 8 January 2019, available at https://www.iareporter.com/articles/tribunal-finds-that-bits-war-losses-clause-does-not-exclude-operation-of-other-bit-protections-including-full-protection-security-but-foreign-investor-fails-to-meet-evidentiary-burdens/) (last accessed: 23 July 2025); *Cengiz Inşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018, paras. 354-358; *Guris Insaat v. Libya*, ICC Case No. 22137/ZF/AYZ, Partial Award on Jurisdiction and Liability, 4 February 2020 (examined in ANALYSIS: Tribunal in *Guris v. Libya* Award Draws Contrast with Cengiz Award on FPS Interpretation and Sides With Majority of Prior Libya Awards With Respect To War Losses Clause, IAReporter, 5 March 2020, available at https://www.iareporter.com/articles/analysis-tribunal-in-guris-v-libya-award-draws-contrast-with-cengiz-award-on-fps-interpretation-and-sides-with-majority-of-prior-libya-awards-with-respect-to-war-losses-clause/) (last accessed: 23 July 2025).

Another notable difference of the *Strabag* tribunal is that it actually awarded compensation under the war losses clause, whereas other tribunals dealing with post-revolution Libya have declined to grant compensation under similar clauses. This is largely due to differences in the wording of the war losses clauses. For example, in *Cengiz v. Libya*[311] and *Way2B v. Libya*[312], the war losses clauses merely prohibited discrimination. Since the claimants failed to demonstrate discrimination, neither tribunal awarded compensation. By contrast, *Strabag* case involved a broader war losses clause, which enabled compensation.

In sum, Libya-related cases illustrate that although armed conflict might appear to be a straightforward basis for invoking necessity to evade liability for state measures during difficult times, the reality is far more complex.

First, the necessity defense requires strict conditions. While the elements of protecting essential interests and facing imminent grave peril may be relatively easy to satisfy, the non-contribution requirement is more challenging for states.[313] This is because, prior to a civil war, there are often less severe disturbances such as riots and protests, during which states still have opportunities to act.[314] States like Libya face particular

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[311] Article 5 of the Libya-Turkey BIT (2009) provides: "*Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting State owing to war, insurrection, civil disturbance or other similar events shall be accorded by such Contracting Party treatment no less favourable than that accorded to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses*."

[312] Article 7 of the Libya-Portugal BIT (2003) provides: "*Investors of one Party who suffer losses in investments made in the territory of the other Party as a result of war or other armed conflict, revolution, state of national emergency, disobedience or disturbances or any other event considered equivalent shall receive from that Party treatment restoring the conditions of such investments as they existed before the damage occurred, or compensation or any other measure no less favourable than that granted by that Party to the investments of its own investors or of investors of third States, whichever is the more favourable. Any payment made under this Article shall be freely transferable, without delay and in convertible currency*." (free translation from the Portuguese original).

[313] Daza-Clark / Behn, "**Between War and Peace: Intermittent Armed Conflict and Investment Arbitration**", p. 17.

[314] **Ibid**., pp. 17-18.

difficulties meeting this condition given ongoing human rights violations and repression, which complicate their ability to prove no contribution to the crisis.[315]

Second, war losses clauses raise difficult questions. Are these clauses *lex specialis*, meaning they exclude reliance on other treaty provisions? It appears that if the clause is broad enough to cover damages due to armed conflict, there may be no need, and arguably no right, to invoke other treaty clauses to avoid "*double recovery*."[316] Nonetheless, tribunals are generally cautious to prevent double compensation. Moreover, many armed conflict-related damages result not from state military personnel but from civil unrest, riots, or terrorist attacks, raising questions about the extent to which a state can prevent such harm while balancing its broader duty to protect public welfare and maintain order.[317]

Finally, if the war losses clause is narrowly worded, simply prohibiting discrimination, it may be difficult for investors to prove a breach. It is often not feasible for a foreign investor to show that another investor in a similar situation received better treatment during armed conflict. This difficulty explains the rejection of discrimination claims in *Cengiz v. Libya* and similar cases.

4. Egypt Gas Cases: Terrorism and Infrastructure Disruption Post- Spring

Egypt, much like Libya, was deeply affected by the Arab Spring. In the years following the uprisings, the state and public experienced multiple periods of unrest, instability, and security challenges, which triggered nationwide protests.[318] Given Egypt's dense population and this volatile background, the military became heavily involved in

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[315] Carpentieri, "**The Invocation of State Defenses in Times of Conflict: *Force majeure*, Necessity and the Libyan Example**", p. 28.
[316] *E.g.*, *Oztas v. State of Libya*, Final Award, para. 167.
[317] Carpentieri, "**The Invocation of State Defenses in Times of Conflict: *Force majeure*, Necessity and the Libyan Example**", p. 19.
[318] ALI Hager, "Egypt after the Arab Spring: A Legacy of No Advancement", GIGA Focus, vol. 7, German Institute for Global and Area Studies, https://www.giga-hamburg.de/en/publications/giga-focus/egypt-after-the-arab-spring-a-legacy-of-no-advancement (last accessed: 1 August 2025).

politics, creating an environment that was neither safe for the public nor for foreign investors, making this context highly relevant for our analysis.[319]

The post-Arab Spring ISDS cases involving Egypt are mostly connected to increasing terrorist attacks targeting gas infrastructure and foreign investors in the energy sector. These cases have raised several important and debatable questions.

The first question concerns the extent of the FPS obligation. It is generally accepted that under this obligation, a host state must protect investors against physical harm caused by third parties[320], terrorists, in the Egypt gas cases. The question, however, is not whether this obligation exists, but rather its extent: to what degree can the state be expected to protect investors amid nationwide unrest and an overall unstable context?[321]

In *Ampal-American Israel Corp. v. Egypt*, the tribunal emphasized that the FPS obligation must be assessed in light of the state's available resources and the scale of

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319 **Ibid**.

320 *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania (I)*, ICSID Case No. ARB/15/31, Award, 8 March 2024, para. 874 ("*Traditionally, the phrase "full protection and security" referred to the protection of investors from physical interference with their investments caused by third parties (...)*"); *Public Joint Stock Company Mobile TeleSystems v. Turkmenistan (II)*, ICSID Case No. ARB(AF)/18/4, Award, 14 June 2023, para. 395 ("*The Tribunal observes that the FPS standard is traditionally concerned with the physical safety of investments (...)*"); *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, para. 944 ("*The Tribunal concurs with the view (...) that the (...) standard (...) requires the host State to use due diligence and take reasonable steps to protect investors against harmful acts by third parties. The Tribunal further finds that at its core, at least, this guarantee is concerned with the investor's physical security (...)*"); *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 May 2021, paras. 384-386; *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar (II)*, ICSID Case No. ARB/17/18, Award, 17 April 2020, para. 299; *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Final Award, 29 March 2019, para. 267; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 632-634; *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award, 12 January 2016, para. 157; *Border Timbers v. Republic of Zimbabwe*, Award, para. 596; *AWG Group Ltd. v. The Argentine Republic*, Decision on Liability, paras. 174-177.

321 It is generally accepted that the FPS standard does not create a strict liability but rather imposes a due diligence obligation, especially where the damage is due to actions not attributable to the host state: *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, 31 March 2025, paras. 298-299, 302; *Border Timbers v. Republic of Zimbabwe*, Award, para. 596 ("*The Parties agree that the FPS standard is not a strict liability test, but is an "all reasonable measures" (i.e., a due diligence) standard* (…)"); *AAPL v. Republic of Sri Lanka*, Award, para. 50; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 177.
The same approach can be observed in the ICJ's caselaw as well: *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, para. 108.

unrest.[322] The tribunal acknowledged Egypt's difficult circumstances and accepted that the state could not have prevented the early attacks.[323] However, the tribunal found that, given the pattern of attacks, where attacks followed failed or absent state responses, including ignoring reports of explosives on pipelines, the state's failure or unwillingness to act despite prior warnings constituted a breach of FPS.[324]

Thus, the case highlights that while the FPS obligation is not absolute or unconditional, it requires the state to take reasonable, proactive steps based on its capabilities and the prevailing challenges.[325]

In cases arising from the post-Arab spring effect, Egypt invoked both necessity and *force majeure*, arguing that civil unrest and terrorist acts were exceptional events excusing non-performance. Tribunals have generally taken a strict approach to these defenses, consistent with broader ISDS practice.

The *Union Fenosa Gas v. Egypt* case provides valuable insight here. Union Fenosa Gas ("**UFG**"), a Spanish investor, operated a natural gas liquefaction plant in Egypt.[326] From the plant's inception, UFG never received the full contractual gas supply, leading to its shutdown.[327] The shortfall was due both to insufficient gas production and to Egypt

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[322] *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, paras. 244-247.
[323] **Ibid**., para. 285.
[324] **Ibid**., paras. 286-291.
[325] For a similar conclusion *see Smurfit Holdings B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/18/49, Award, 28 August 2024, paras. 548-549; *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award, 14 December 2023, para. 869; *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award, 24 November 2021, para. 821; *Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Republic of Colombia*, ICSID Case No. UNCT/18/1, Award, 12 March 2021, paras. 570-574 ; *Consutel Group S.P.A. in liquidazione v. People's Democratic Republic of Algeria,* PCA Case No. 2017-33, Final Award, 3 February 2020, paras. 414-415; *Sergei Paushok, CJSC Golden East Company and CJSCVostokneftegaz Company v. The Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, para. 325.
[326] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, Award, paras. 5.3 *ff*.
[327] **Ibid**., paras. 5.143 *ff*.

prioritizing domestic consumption over export contracts, effectively discriminating against UFG.[328]

Egypt invoked the necessity defense, arguing that its conduct was caused by the 2011 revolution and subsequent unrest.[329]

However, the tribunal rejected this defense.[330] Notably, the tribunal erred in the order of analysis: necessity is a secondary rule under ILC Articles on State Responsibility, meaning it can only apply if a breach is first established. Thus, the tribunal should have first assessed whether a breach occurred before considering necessity. Instead, it began by analyzing necessity, leading to confusing reasoning.[331]

Regarding the grave and imminent peril requirement, Egypt claimed that the civil unrest caused a sudden gas supply drop and widespread blackouts, a serious peril.[332] The tribunal accepted that a revolution or civil unrest can constitute necessity grounds but noted that the gas shortages at UFG started five years before the Arab Spring.[333] Therefore, the tribunal found no causal link between the revolution and the gas supply peril.[334]

Instead, the tribunal identified the cause as Egypt's long-standing energy policies, its management of gas deposits, electricity generation, and prioritization of domestic users.[335] This should have led to the conclusion that Egypt contributed to the circumstances creating necessity, which would invalidate the defense. Nonetheless, the

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328 **Ibid**.
329 **Ibid**., paras. 8.5 *ff*.
330 **Ibid**., paras. 8.37 *ff*.
331 **Ibid**.
332 **Ibid**., paras. 8.10-8.12.
333 **Ibid**., paras. 8.41 *ff*.
334 **Ibid**.
335 "*That shortage originated in the Respondent's long-standing policies of subsidising domestic users of gas and electricity, together with a statement of policy (but not actual practice) to encourage the finding of gas deposits in Egypt*.": **Ibid**., para. 8.50.

tribunal continued its analysis and only addressed the non-contribution requirement at the end.[336]

On the essential interest criterion, Egypt referred to Argentine cases, claiming that maintaining public services, specifically energy supply, was an essential interest threatened by the crisis.[337] However, Egypt did not clearly identify public order as the essential interest. The tribunal concluded that the essential interest was the supply of natural gas itself.[338]

For the only means requirement, Egypt argued, relying on the *Enron* annulment committee decision, that prioritizing domestic supply was the only way to prevent blackouts.[339] The tribunal rejected this, emphasizing Egypt's discriminatory treatment between UFG and other users.[340]

This rejection, however, is questionable. The only means test asks whether any alternative to the measure existed, even if more costly or burdensome. The tribunal's focus on differential treatment between users conflates this test with an adequacy or discrimination test. The tribunal should have examined whether the measure was necessary and proportionate, rather than focusing on unequal treatment.

Finally, on the no contribution requirement, the tribunal stated there must be a substantive contribution by Egypt to the crisis.[341] It quickly concluded this was not the case, reasoning Egypt neither intended nor foresaw the revolution and its consequences.[342]

This analysis is problematic for several reasons.

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[336] **Ibid**., paras. 8.59-8.61.
[337] **Ibid**., para. 8.8.
[338] **Ibid**., para. 8.49.
[339] **Ibid**., para. 8.13-8.15.
[340] **Ibid**., para. 8.46.
[341] **Ibid**., paras. 8.59-8.61.
[342] **Ibid**.

First, since the tribunal had already found no grave and imminent peril and that the measure was not the only means, it should have rejected necessity outright without delving further.[343]

Second, the tribunal earlier recognized Egypt's contribution to the gas shortage under the peril assessment but then seemingly treated contribution to the revolution itself separately, creating a confusing and flawed distinction.[344]

In sum, the *Union Fenosa* tribunal should have simply rejected the necessity defense outright because the gas shortage, and thus the core issue, predated the revolution, as the tribunal itself acknowledged. There was no need for the tribunal to engage in a detailed, flawed, and confusing analysis of the defense's individual elements. Instead, recognizing that the hardship existed well before the civil unrest would have been sufficient to dismiss the defense without further convoluted reasoning.

C. Debates: Threshold, Proportionality

In this section, several key interpretive and doctrinal challenges surrounding the necessity defence will be explored.

Particular attention is given to the thresholds imposed by Article 25 of the ILC Articles, which have been viewed by many as overly rigid. The "*only way*" requirement is examined in light of its practical implications for crisis response, while the contribution requirement is assessed for its ambiguity and potential to undermine the defence altogether.

The role of proportionality, although not expressly included in the ILC framework, is also discussed as a possible interpretive tool to introduce greater flexibility.

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[343] CASSELLA Sarah, "Union Fenosa Gas v Egypt: The Necessity Defense: Much Ado about Nothing?", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, vol. 37, no. 1/2, 2022, pp. 552-557, p. 557.
[344] **Ibid**.

Finally, the interaction between customary necessity and treaty-based exception clauses is addressed, with a focus on whether treaty language should be understood to displace or complement the customary standard. Through this analysis, the limitations and possible reform paths for the necessity doctrine in ISDS are brought into focus.

1. Is the "*Only Way*" Requirement Unrealistic?

The "*only way*" requirement, as mentioned above, is one of the most frequent reasons why states fail to successfully invoke the necessity defence.[345] Among the various contested elements of this defence, the "*only way*" criterion arguably stands out as the most debated and controversial. Indeed, tribunals have taken diverging approaches to its application. Some require only the theoretical existence of an alternative, without assessing its feasibility or effectiveness, and reject the defence if even a paper alternative is identified.[346] Others, by contrast, seek an effective and available alternative, adopting a more balanced and context-sensitive interpretation.[347]

This divergence has sparked extensive debate. The stricter interpretation, whereby the mere existence of a hypothetical alternative suffices to deny the defence, has drawn criticism for making the "*only way*" test too rigid and nearly impossible to satisfy, thereby rendering the necessity defence practically inoperable.

This controversy traces back to the *Gabčíkovo-Nagymaros* case, where the International Court of Justice applied the "*only way*" requirement stringently. The Court found that suspending and later abandoning the project was not the only way to protect the water quality of the Danube River, affecting the joint undertaking. It pointed out that there were other less disruptive alternatives, such as monitoring water quality and intervening when necessary, that could have addressed the issue.

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[345] 1.A.4.

[346] *E.g.*, *CMS v. The Argentine Republic*, Award, paras. 322-323; *Enron v. The Argentine Republic*, Award, paras. 308-309; *Sempra v. The Argentine Republic*, Award, paras. 350-351.

[347] *E.g.*, *Enron v. The Argentine Republic*, Annulment, paras. 366-367; *LG&E v. The Argentine Republic*, Award, paras. 250 *ff*.

While this approach has been criticized as "*strict*,"[348] it was arguably in line with the underlying rationale of the "*only way*" test: to ensure that necessity remains an exceptional defence, preventing its abuse and preserving legal certainty. In that case, the alternative measures were both feasible and effective, even if more costly.

However, investment tribunals seem to have taken the strict approach even further. Their frequent dismissal of the necessity defence based solely on the existence of alternative measures has led many commentators to argue that the "*only way*" condition is being applied in an excessively rigid manner, particularly in the context of economic crises. [349]

The Argentina cases illustrate this problem vividly. In *CMS*, the tribunal rejected the necessity defence in part on the grounds that the measures adopted were not the "*only way*" available. It acknowledged the significant debate over the effectiveness and appropriateness of Argentina's economic policies but stated that it was not its role to determine which policy was superior. Limiting its assessment to whether an alternative existed, the tribunal found, by relying on the ILC Articles' commentary, that other lawful, albeit costlier or less convenient, options had been available. As such, it concluded that the measures taken did not satisfy the "*only way*" requirement under Article 25.

The *Enron* and *Sempra* tribunals followed a similar path, noting the existence of various ways to address an economic crisis and concluding that Argentina's measures could not be considered the sole available option. This led to rejection of the defence.

These tribunals began on the right track by emphasizing that they should not second-guess governmental policy choices. However, their reasoning quickly veered off course: by simply acknowledging the presence of other options, without analyzing their

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[348] Manton, **Necessity in International Law**, p. 167.
[349] Waibel, "**Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E**", p. 647; Reinisch, "**Necessity in International Investment Arbitration— An Unnecessary Split of Opinions in Recent ICSID Cases?**", pp. 200-201.

effectiveness, lawfulness, or availability, they dismissed the defence too easily.[350] This approach misconstrues the "*only way*" test. The existence of other theoretical alternatives should not automatically preclude the application of necessity. There is almost always more than one way to respond to a crisis. Demanding that there be no conceivable alternative is excessively strict and risks rendering the defence unusable in practice.[351]

Instead, the test should incorporate a proportionality element. Tribunals should assess whether the proposed alternatives were: (**i**) effective in addressing the crisis; (**ii**) lawful under international and domestic law; and (**iii**) available to the state at the relevant time, not just in hindsight.[352]

This last factor is particularly important, as it prevents tribunals and claimants from unfairly benefitting from *ex* post assessments.[353]

Scholars have thus argued that if the "*only way*" requirement is interpreted as it was in *CMS*, *Enron*, and *Sempra*, it risks producing unjust outcomes, particularly in complex crises.

In economic emergencies, a state may not reasonably be expected to adopt drastically more expensive or uncertain alternatives.[354]

Similarly, in multi-dimensional crises such as terrorism or pandemics, where a government must act swiftly and on multiple fronts, there will inevitably be multiple possible responses. If the mere presence of any alternative, regardless of its feasibility or

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[350] Manton, **Necessity in International Law**, p. 169; Martinez, "**Part III Chapter 13: Invoking State Defenses in Investment Treaty Arbitration**", pp. 335-337.
[351] Martinez, "**Part III Chapter 13: Invoking State Defenses in Investment Treaty Arbitration**", p. 337; Manton, **Necessity in International Law**, p. 169; Reinisch, "**Necessity in International Investment Arbitration— An Unnecessary Split of Opinions in Recent ICSID Cases?**", pp. 200-201; GIBSON Catherine H., "Beyond Self-Judgment: Exceptions Clauses in US BITs", Fordham International Law Journal, vol. 38, no. 1, 2015, pp. 2-56, p. 12.
[352] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 177-178.
[353] **Ibid**., p. 178.
[354] Waibel, "**Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E**", p. 648.

proportionality, leads to an automatic rejection of the defence, the necessity doctrine will be stripped of its utility in precisely the kinds of situations it was designed for.

2. "*Contribution*" by the State – How Much is Too Much?

Article 25(2)(b) of the ILC Articles provides that a State cannot invoke the necessity defense if it "*contributed*" to the situation of necessity. The rationale is straightforward: a State should not be allowed to escape liability by relying on necessity when it itself created or contributed to the crisis. This reflects a broader general principle of law that no one can benefit from their own wrongdoing, here, the emphasis is on wrongdoing, which becomes crucial when deciding the extent and nature of contribution that bars reliance on necessity.

The ILC Commentary, however, is not very instructive on this point. While it notes that the contribution should be "*substantial*" and not merely peripheral,[355] it effectively shifts the question from "*what constitutes contribution*" to "*what constitutes substantial contribution*," without clarifying either concept. Moreover, it does not address whether fault, negligence, or intent on the part of the State is required to trigger the bar.[356]

International practice and case law have also been mostly silent on this issue, and the contribution requirement did not attract much attention until the Argentina cases.[357] Prior to these cases, there was little detailed discussion, either in arbitral awards or during the negotiations of Article 25.[358]

The problem is partly due to this lack of engagement. For example, *Gabcikovo*, one of the leading necessity cases, offers scant guidance. The tribunal briefly noted Hungary's awareness of the need to protect the river, as reflected in the treaty, yet Hungary nonetheless delayed, suspended, and ultimately abandoned the project for environmental

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[355] "*For a plea of necessity to be precluded under paragraph 2 (b), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral.*": ILC Articles on State Responsibility with Commentaries, p. 84.
[356] Manton, **Necessity in International Law**, pp. 191-192.
[357] **Ibid**, p. 190.
[358] **Ibid**.

reasons.[359] The tribunal concluded that even if Hungary met other conditions for necessity, it could not rely on the defense because it had "*helped, by act or omission, to bring it about*."[360] Yet, the term "*helped*" is vague and offers no clear standard to determine the outer limits of the contribution bar, leaving the door open for interpretive uncertainty.[361]

Before the Argentina cases, the "*non-contribution*" requirement was typically mentioned only as part of the factual background rather than as a strict legal bar binding the invoking State.[362] Consequently, ambiguity remained regarding what "*substantial contribution*" means. Tribunals often sidestepped the issue, relying on claimants' assertions rather than offering clear analyses of how to delineate the contribution exception.

In addition to uncertainty over the extent of contribution that bars necessity, there is further ambiguity over the role of State fault. The debate centers on whether tribunals should look for subjective fault (intent or negligence) or rely on an objective causal link between the State's actions and the circumstance giving rise to necessity.[363] Put simply, the question is whether to require fault or merely causation.

The Argentina cases brought this issue into focus after a long period of silence, resulting in divergent tribunal approaches and fragmented case law, even in similar factual and legal contexts under the same instruments.

The *CMS*, *Enron*, and *Sempra* tribunals adopted a relatively lenient approach.[364] They held that Argentina contributed substantially to the economic crisis through its governmental policies and shortcomings, despite external factors.[365] However, these

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[359] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, p. 46.
[360] **Ibid**.
[361] Manton, **Necessity in International Law**, p. 191.
[362] **Ibid**., p. 190.
[363] Goldsman / López Forastier, "**Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis**", pp. 664-666; Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 179.
[364] *CMS v. The Argentine Republic*, Award, paras. 328 *ff*; *Sempra v. Argentine Republic*, Award, paras. 353 *ff*; *Enron v. Argentine Republic,* Award, paras. 311 *ff*.
[365] **Ibid**.

tribunals failed to explain their reasoning or clarify how they assessed "*substantial contribution*." They merely concluded Argentina's policies were a substantial factor without detailed analysis.

The *Enron*[366] and *Sempra*[367] tribunals also invoked the principle that no State can take advantage of its own wrongdoing but did not elaborate on what this principle entails or how it relates to fault or the degree of contribution. They noted the crisis was caused by both endogenous and exogenous factors and jumped to the conclusion that Argentina had substantially contributed.[368]

This reasoning is flawed in many ways.

First, while acknowledging the principle against benefiting from one's own wrongdoing, the tribunals gave it little practical weight by failing to analyze its application or meaning.

Second, economic crises often have multiple causes, both internal and external. Simply noting that Argentina contributed to some extent does not mean its internal contribution was "*substantial*" without a thorough case-by-case analysis.[369]

Third, even if Argentina contributed, it is critical to examine whether this was due to negligence, intent, or merely unsuccessful but good-faith policies, not simply assume liability.[370]

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[366] "*A further condition that Article envisages is that the State cannot invoke necessity if it has contributed to the situation of necessity.* ***This is of course the expression of a general principle of law devised to prevent a party taking legal advantage of its own fault****. (…)*" (emphasis added): *Enron v. Argentine Republic*, Award, para. 311.
[367] "*A further condition that Article 25 imposes is that the State cannot invoke necessity if it has contributed to the situation giving rise to a state of necessity.* ***This is of course the expression of a general principle of law devised to prevent a party from taking legal advantage of its own fault****. (…)*" (emphasis added): *Sempra v. Argentine Republic*, Award, para. 353.
[368] *Enron v. Argentine Republic*, Award, para. 311; *Sempra v. Argentine Republic*, Award, para. 353.
[369] Manton, **Necessity in International Law**, p. 193.
[370] **Ibid**., pp. 203-204; Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 180.

This flawed approach led to the annulment of the *Enron* award. The ad hoc committee found the tribunal had failed to apply the law properly, relying on economic expert reports addressing only the factual aspects of contribution, not the legal standard under Article 25(2)(b).[371] Due to lack of reasoning, the committee concluded there was a manifest excess of powers under Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**")[372] Article 52(1)(b), annulling the award.[373]

In subsequent cases such as *Suez*, *National Grid*, and *El Paso*, tribunals considered expert evidence more concretely but still took strict approaches to the contribution bar without adequately addressing the fault element. For example, the Suez tribunal emphasized the choice of the word "*contribute*" rather than "*cause*" or "*create*," indicating that multiple factors may contribute simultaneously and one contributor does not exclude another.[374] The tribunal identified Argentina's excessive spending, inefficient tax collection, and delays in policymaking as contributions but paradoxically dismissed external factors as insufficient causes since other states were not similarly affected.[375] However, the tribunal did not analyze whether Argentina intended to contribute or was negligent.

[371] *Enron v. Argentine Republic*, Annulment, paras. 385-395.
[372] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed 18 March 1965, entered into force 14 October 1966, 575 UNTS 159.
[373] *Enron v. Argentine Republic*, Annulment, para. 393.
[374] "*The fourth condition for the defense of necessity: Non-contribution to the situation of necessity. To invoke the defense of necessity, a State must not have contributed to its situation of necessity. The operative word of this condition is* "*contribute*", *not* "*cause*" *or* "*create.*" *Thus, the fact that other actors, besides the State in question, may have contributed to that State's situation of necessity does not automatically mean that such State has not contributed to it. (…)*": *Suez v. Argentine Republic*, Decision on Liability, para. 241.
[375] "*The Tribunal finds that a combination of endogenous and exogenous factors contributed to the Argentine crisis at the beginning of this century. Among Argentina's contributing factors to the crisis were excessive public spending, inefficient tax collection, delays in responding to the early signs of the crisis, insufficient efforts at developing an export market, and internal political dissension and problems inhibiting effective policy making. (…)*": **Ibid**., para. 242.

This reveals a recurring pattern: tribunals often fail to provide reasoned analysis of the substantial contribution criterion and neglect the fault aspect, resulting in opaque and inconsistent decisions that sometimes unduly bar States from invoking necessity.

Some tribunals have at least touched on fault, albeit not thoroughly. Notably, the *LG&E* tribunal shifted the burden to the investor to prove that the State contributed to the circumstances, consistent with the exceptional nature of Article 25(2)(b).[376] The tribunal acknowledged Argentina's efforts to mitigate the crisis[377] but left open the question whether mitigation could offset a substantial contribution, considering the strict condition of non-contribution, this seems unlikely.[378]

The *Continental Casualty* case is also significant. It relied on Article XI of the U.S.-Argentina BIT rather than the CIL-based necessity and thus provided a fresh perspective on treaty interpretation.[379] The tribunal rightly distinguished Article 25 of ILC Articles' customary law rule from the treaty clause, noting the latter determines the scope of the treaty protection (primary rule), while the former is a secondary rule of justification.[380]

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[376] *LG&E v. Argentine Republic*, Decision on Liability, para. 256.

[377] "*The State must not have contributed to the production of the state of necessity. It seems logical that if the State has contributed to cause the emergency, it should be prevented from invoking the state of necessity. If there is fault by the State, the exception disappears, since in such case the causal relationship between the State's act and the damage caused is produced. The Tribunal considers that, in the first place, Claimants have not proved that Argentina has contributed to cause the severe crisis faced by the country; secondly,* ***the attitude adopted by the Argentine Government has shown a desire to slow down by all the means available the severity of the crisis***." (emphasis added): **Ibid**.

[378] Manton, **Necessity in International Law**, p. 196.

[379] *Continental Casualty Company v. Argentine Republic*, Award, paras. 160 *ff.*

[380] "*The Tribunal will deal with the arguments based on Art. XI first, both because Argentina raises it as its first defense, and also because the application of Art. XI in the present case (if warranted) may be such as to render superfluous a detailed examination of the defense of necessity under general international law applied to the particular facts of the present dispute. (…)*
Moreover, the content of the two defenses is different. Under Art. XI the obligations that either Party have undertaken under the Treaty as to the treatment of investments and investors of the other Party "*shall not preclude*" *the application of* "*measures necessary*" *for the pursuit of three types of national interest listed therein, namely for: a. the maintenance of public order; b. the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security; c. the protection of its own essential security interests.*
The ordinary meaning of the language used, together with the object and purpose of the provision (as here highlighted and interpreted under Article 31 of the Vienna Convention on the Law of Treaties) clearly indicates that either party would not be in breach of its BIT obligations if any measure has been properly taken because it was necessary, as far as relevant here, either "*for the maintenance of the public order*" *or for* "*the protection of essential security interests*" *of the party adopting such measures. The consequence*

Considering this distinction, the tribunal examined whether Argentina's conduct barred reliance on Article XI and concluded Argentina acted reasonably, based on International Monetary Fund ("**IMF**") and other international reports.[381] This more flexible and proportional approach contrasts with other tribunals' stricter interpretations but is justified by the treaty-specific context.

The *Impregilo* tribunal was one of the few to explicitly address the fault issue, concluding that intent to contribute is not required and that contribution may result from "*well-intended but ill-conceived policies*."[382] It adopted an objective causation approach, deeming it sufficient that the crisis resulted from some State action.

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would be that, under Art. XI, such measures would lie outside the scope of the Treaty so that the party taking it would not be in breach of the relevant BIT provision. A private investor of the other party could therefore not succeed in its claim for responsibility and damages in such an instance, because the respondent party would not have acted against its BIT obligations since these would not be applicable, provided of course that the conditions for the application of Art. XI are met. In other words, Art. XI restricts or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met. In fact, Art. XI has been defined as a safeguard clause; it has been said that it recognizes "*reserved rights,*" *or that it contemplates* "*non-precluded*" *measures to which a contracting state party can resort.*
Art. 25 of the ILC Articles on State Responsibility, assuming it to be reflective of customary international law, envisages and regulates a different situation (…)
Necessity is there taken into account as a "*ground for precluding the wrongfulness of an act not in conformity with an international obligation,*" *under certain strict conditions.* "*The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin. It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population.*
Thus an act otherwise in breach of an international obligation ("*not in conformity*" *with it) is not considered wrongful, and does not therefore entail the secondary obligations attached to an illicit act, thank to the* "*exceptional*" *presence of one of the conditions that under international law preclude wrongfulness, here necessity.*": **Ibid**., paras. 162-166.

[381] **Ibid**., paras. 170-181.

[382] "*Finally, it remains for the Arbitral Tribunal to decide, in accordance with para. 2 (b), whether Argentina is precluded from invoking the necessity plea because it has* "*contributed to the situation of necessity*"*. Certain questions arise regarding how* "*contributed*" *should be defined, including whether the conduct be deliberate (i.e. intended to bring about the state of necessity) or reckless or negligent, or even caused by a lesser degree of fault.93 In the opinion of the Arbitral Tribunal, a State's contribution to its necessity situation need not be specifically intended or planned - it can be the consequence, inter alia, of well-intended but ill-conceived policies. This result comports with common sense, because a contrary interpretation always would have to ascribe underhanded motives to the government or, more frequently, to the several governments that control the State successively prior to a situation of necessity*.": *Impregilo v. Argentine Republic (I)*, Award, para. 356.

This approach risks rendering the necessity defense almost impossible to invoke.[383] Every State reacts to brewing crises with policies deemed necessary at the time. Holding States liable for well-intended policies adopted under internal or external pressure creates an undue burden and hinders their ability to manage crises.[384] It also unfairly penalizes good-faith attempts to address problems versus States that neglect action until crisis becomes undeniable.

A narrower interpretation is preferable, requiring some degree of intent or negligence.[385] Without this, a State misjudging policies or experimenting in good faith could be unduly barred from necessity. Adopting a subjective fault criterion better aligns with the good-faith and abuse-prevention aims of Article 25(2)(b), barring reliance on necessity only where the State knowingly or negligently caused the crisis.

In summary, case law on the no contribution requirement remains inconsistent and poorly reasoned. Tribunals often issue opaque conclusions without clear analysis, leading to unpredictable and sometimes unfair results. A more nuanced approach, requiring substantial contribution accompanied by some degree of fault, would promote fairness, proportionality, and legal certainty in future decisions.

3. Proportionality

At first glance, proportionality may appear to be an implied component in the assessment of the necessity defence. This is because the necessity defence only applies to the extent that the measure adopted is the only means available to protect an essential interest. Some scholars even suggested that proportionality should be incorporated into the necessity analysis, particularly in cases involving economic emergencies.[386]

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[383] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 179.
[384] Manton, **Necessity in International Law**, p. 200.
[385] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 180; Manton, **Necessity in International Law**, p. 202.
[386] Reinisch, "**Necessity in International Investment Arbitration— An Unnecessary Split of Opinions in Recent ICSID Cases?**", p. 154; LIU Yang, "Proportionality Balancing under General International Law: the Case of Article 25(1)(b) of ARSIWA", Chinese Journal of International Law, vol. 21, no. 4, 2022, pp. 647-700, p. 654.

However, the wording of Article 25 of the ILC Articles indicates otherwise. It adopts a stricter standard, namely the "*only way*" requirement, which serves as a threshold condition.[387] If an alternative measure exists, however debated the definition of "*alternative*" may be, the necessity defence fails.

Proportionality, by contrast, is concerned with whether the adopted measure is not excessive in scope or intensity relative to the interest being protected.[388] It allows for a degree of balancing between means and ends. Yet, these two tests are not interchangeable. A tribunal cannot simply assess whether a measure was proportionate and, on that basis alone, bypass the question of whether alternatives existed. Conversely, if the tribunal determines that the measure was indeed the only available option, and all other conditions are met, the defence succeeds, regardless of whether the measure was proportionate**.**

The choice of the "*only way*" language in Article 25 is rooted in the *travaux préparatoires*. The provision was drafted primarily in the context of use-of-force scenarios, where a strict and narrow threshold was deemed necessary.[389] In such contexts, proportionality alone is insufficient, force must be the absolute last resort. As a result, watering down the "*only way*" test by replacing it with proportionality would contradict both the purpose and the ratio legis of Article 25.[390]

Interestingly, this strict approach contrasts with how tribunals interpret non-precluded measures ("**NPM**") clauses, such as those invoked in the Argentine economic crisis cases. These treaty-based clauses often require a proportionality assessment, as they aim to balance the interests of the investor with those of the state.[391] Unlike CIL-based

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[387] GÜLÇÜR Abdulkadir, "The Necessity, Public Interest, and Proportionality in International Investment Law: A Comparative Analysis", University of Baltimore Journal of International Law University of Baltimore Journal of International Law, vol. 6, no. 2, 2019, pp. 215-265, p. 262.
[388] **Ibid**., p. 249.
[389] KURTZ Jürgen, "Adjudging the Exceptional at International Investment Law: Security, Public Order, and Financial Crisis", International & Comparative Law Quarterly, vol. 59, no. 2, 2010, pp. 325-371, p. 359.
[390] However, it must be noted that there is no need to adopt the exact same threshold used in the use of force context for financial crisis circumstances: **Ibid**.
[391] PATHIRANA Dilini / MCLAUGHLIN Mark, "Non-precluded Measures Clauses: Regime, Trends, and Practice", Handbook of International Investment Law and Policy, 2020, pp. 483-506, pp. 497, https://doi.org/10.1007/978-981-13-5744-2_6-1 (last accessed: 1 July 2025); BURKE-WHITE William W.

necessity, which emerged in the context of armed conflict, NPM clauses serve a different function and operate under a different normative framework.

In sum, while necessity under CIL, as codified in Article 25, does not include a proportionality assessment and instead imposes the strict "*only way*" threshold, treaty-based NPM clauses typically involve proportionality balancing. This divergence reflects their different origins: Article 25 developed in the context of limiting the use of force, whereas NPM clauses empower tribunals to weigh competing interests in economic and regulatory contexts.

4. Interaction with Treaty Exception Clauses

There are various types of treaty exception clauses that may be invoked by states to justify regulatory measures impacting foreign investments.[392] These clauses can take the form of NPM clauses**,** essential interests clauses**,** general exceptions, and more specific exceptions such as public health or disease-related clauses.[393] Despite differences in terminology and formulation, most of these clauses share a common feature: they permit states to adopt measures necessary to protect essential interests, often during times of emergency or crisis.[394]

In earlier generations of investment treaties, exception clauses were typically limited to security-related exceptions. However, more recent treaties include broader and more

/ VON STADEN Andreas von, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", Virginia Journal of International Law, vol. 48, 2008, pp. 309-410, p. 345.

[392] Pathirana / McLaughlin, "**Non-precluded Measures Clauses: Regime, Trends, and Practice**", pp. 486-489.

[393] **Ibid**., pp. 490-492; ALSCHNER Wolfgang / HUI Kun, "Missing in Action: General Public Policy Exceptions in Investment Treaties", Yearbook on International Investment Law and Policy, eds. Lisa Sachs, Lise Johnson, Jesse Coleman, Ottawa Faculty of Law Working Paper No. 2018-22, 2018, pp. 1-28, pp. 2-3.

[394] Pathirana / McLaughlin, "**Non-precluded Measures Clauses: Regime, Trends, and Practice**", pp. 492-496; Alschner / Hui, "**Missing in Action: General Public Policy Exceptions in Investment Treaties**", pp. 2-3.

detailed exceptions, often covering public health, the environment, and disease prevention.[395]

General exception clauses,[396] often modeled after Article XX of the GATT, allow states to take measures "*necessary to protect human, animal or plant life or health*."[397] Although the language of such clauses appears broad, arbitral tribunals have generally interpreted them strictly.[398] The test commonly involves a necessity or proportionality analysis.[399] While these clauses offer a degree of flexibility, it is accepted the actual deference afforded to the state may not exceed that available under the customary necessity defence.[400]

Essential security clauses, by contrast, frequently include self-judging language, allowing states to unilaterally determine what constitutes an essential security interest.[401]

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[395] Alschner / Hui, "**Missing in Action: General Public Policy Exceptions in Investment Treaties**", pp. 4-8.

[396] *E.g.*, Article 10.7(6) of the Free Trade Agreement between the Republic of Korea and the Republic of Chile.

[397] SABANOĞULLARI Levent, "The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice", Investment Treaty News, 21.05.2015, https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/ (last accessed: 18 July 2025); TANG Yi, "General Public Policy Exceptions in International Investment Agreements (IIAs): Opportunities and Challenges in Times of Global Health Crisis", Asian Journal of WTO & International Health Law and Policy, vol. 20, University of Hong Kong Faculty of Law Research Paper No. 2024/14, no. 1, 2024, pp. 127-176, pp. 132-137.

[398] Burke-White / von Staden, "**Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties**", p. 372; Sabanoğulları, "**The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice**"; MASUMY Naimeh / SHANG Carrie Shu, "Analyzing the Anatomy of Innovative Investment Treaty Drafting: The Quest to Safeguard the Right to Regulate", Journal of Dispute Resolution, vol. 2023, no. 1, pp. 1-38, p. 17; GRIGERA Aurelia, "Necessity in Investment Arbitration: Boosting the ICSID System's Legitimacy", The American Review of International Arbitration, 25.03.2024; BREW Brew, "Exception clauses in international investment agreements as a tool for appropriately balancing the right to regulate with investment protection", Canterbury Law Review, vol. 25, 2019, p. 214.

[399] Pathirana / McLaughlin, "**Non-precluded Measures Clauses: Regime, Trends, and Practice**", pp. 495-499; Brew, "**Exception clauses in international investment agreements as a tool for appropriately balancing the right to regulate with investment protection**", pp. 215-216; GALVEZ Cynthia C., "Necessity, Investor Rights, and State Sovereignty for NAFTA Investment Arbitration", Cornell International Law Journal, vol. 46, no. 1, 2013, pp. 143-163, p. 153.

[400] PANTELAKI Myrto, "Defenses Against Investment Treaty Claims in Pandemic Times Fitting New Trends Into Old Standards", ITA in Review, vol. 4, no. 2, 2022, pp. 30-72, p. 64; Brew, "**Exception clauses in international investment agreements as a tool for appropriately balancing the right to regulate with investment protection**", p. 239.

[401] BAHMAEI Mohammad-Ali / SABZEVARI Habib, "Self-Judging Security Exception Clause as a Kind of Carte Blanche in Investment Treaties: Nature, Effect and Proper Standard of Review", Asian Journal of

Nevertheless, these provisions do not grant unlimited discretion.[402] Tribunals have held that even where self-judging language is present, there must be some level of review, particularly concerning the good faith and reasonableness of the state's actions.[403] Despite this, essential security clauses typically afford greater discretion to the state than either general exceptions or the customary necessity defence.[404]

Public health exception clauses tend to be more lenient than the general or security-based clauses.[405] When states act to protect public health based on sound scientific evidence, tribunals are more likely to defer to those measures.[406] Once a legitimate public health purpose is established, the burden may shift to the investor to demonstrate that the measure was unjustified.[407] This relative leniency, combined with the possibility of relying

International Law, C. 13, 2023, pp. 97-123, pp. 100-106, doi:10.1017/S2044251322000273; NOLAN Michael D. / SOURGENS Frederic G., "The Limits of Discretion? Self-Judging Emergency Clauses in International Investment Agreements", Yearbook of International Investment Law and Policy, 2011, pp. 362-418, pp. 363-364.

[402] "*In respect of the existence of essential security interests, the Tribunal accepts that a degree of deference is owed to a state's assessment.* ***However, such deference cannot be unlimited****. In support of its argument, India cites to an ECtHR decision in which the Court, in India's words,* "*refused to accept the State's contention that drug trafficking was a matter of national security, even though the latter term does have a broad scope*"*. In reality, the ECtHR held that the notion of national security cannot be stretched* "*beyond its natural meaning*"*:* "*the notion of national security' [...] may, indeed, be a very wide one, with a large margin of appreciation left to the executive to determine what is in the interests of that security. However, that does not mean that its limits may be stretched beyond its natural meaning [...]. It can hardly be said, on any reasonable definition of the term, that the acts alleged against the first applicant - as grave as they may be, regard being had to the devastating effects drugs have on people's lives - were capable of impinging on the national security of Bulgaria or could serve as a sound factual basis for the conclusion that, if not expelled, he would present a national security risk in the future*"." (emphasis added): *Deutsche Telekom AG v. The Republic of India*, Interim Award, para. 235.

See also ACKERMANN Tobias, "9 - Security Exceptions", The Effects of Armed Conflict on Investment Treaties, Cambridge University Press, 2022, pp. 217-249, p. 222.

[403] **Ibid**., pp. 233-237; Bahmaei / Sabzevari, "**Self-Judging Security Exception Clause as a Kind of Carte Blanche in Investment Treaties: Nature, Effect and Proper Standard of Review**", p. 116.

[404] Ackermann, "**9 - Security Exceptions**", p. 228.

[405] YU Guangyi / SHEN Wei, "**Public Health and Investment Protection in the Context of the COVID-19 Pandemic—From the Sustainable Perspective of Exception Clauses**", Sustainability, vol. 14, no. 11, 2022, doi:https://doi.org/10.3390/su14116523, pp. 4-7.

[406] BAETENS Freya, "Protecting Foreign Investment and Public Health Through Arbitral Balancing and Treaty Design", International & Comparative Law Quarterly, vol. 71, no. 1, 2022, pp. 139-182, p. 153.

[407] **Ibid**., p. 148.

"*Thus, the burden then falls onto the Claimants to show that Poland's regulatory actions were inconsistent with a legitimate exercise of Poland's police powers. If the Claimants produce sufficient evidence for such a showing, the burden shifts to Poland to rebut it.*": *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, Award, 14 February 2012, para. 584.

on scientific justification, often makes public health exceptions more accessible than general exception clauses or the necessity defence under CIL.[408]

It is important to emphasize that treaty exception clauses are grounded solely in treaty law. They are not codifications or restatements of the CIL doctrine of necessity, as reflected in Article 25 of the ILC Articles on State Responsibility.[409] Consequently, treaty exceptions and the CIL necessity defence represent distinct legal bases with different legal functions and thresholds.[410] However, case law has not always clearly maintained this distinction with some tribunals conflating the two, effectively treating treaty exceptions as equivalent to the customary necessity defence.[411] This has led to inconsistencies and uncertainty as to their respective roles.[412]

One of the clearest distinctions between the two lies in their legal effect.[413] Treaty exception clauses operate at the level of primary obligations. If a measure falls within the scope of an exception clause, it does not constitute a breach of the treaty. In contrast, the customary necessity defence functions as a secondary rule, invoked only after a breach has been established, and serves to preclude the wrongfulness of the breach. This distinction suggests a clear analytical sequence: tribunals must first assess whether a treaty exception clause applies.[414] Only if the measure in question is not excluded from the scope

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[408] Baetens Freya, "**Protecting Foreign Investment and Public Health Through Arbitral Balancing and Treaty Design**", p. 170.
[409] Desierto, "**Necessity and 'Supplementary Means of Interpretation' for Non-Precluded Measures in Bilateral Investment Treaties**", pp. 832-835.
[410] HENCKELS Caroline, "Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses", Exceptions in International Law, eds. Federica Paddeu, Lorand Bartels, 2020, pp. 363-374, p. 366.
[411] **Ibid**., pp. 368-370; Brew, "**Exception clauses in international investment agreements as a tool for appropriately balancing the right to regulate with investment protection**", p. 214; Desierto, "**Necessity and 'Supplementary Means of Interpretation' for Non-Precluded Measures in Bilateral Investment Treaties**", p. 844.
[412] Grigera, "**Necessity in Investment Arbitration: Boosting the ICSID System's Legitimacy**".
[413] Desierto, "**Necessity and 'Supplementary Means of Interpretation' for Non-Precluded Measures in Bilateral Investment Treaties**", p. 861.
[414] THJOERNELUND Marie Christine Hoelck, "State of Necessity as an Exemption from State Responsibility for Investments", Max Planck Yearbook of United Nations Law, eds. A. von Bogdandy, R. Wolfrum, vol. 13, 2009, pp. 423-479, p. 456; HENCKELS Caroline, "Investment Treaty Security Exceptions, Necessity and Self-Defence in the Context of Armed Conflict", International Investment Law and the Law of Armed Conflict, eds. Catherine Titi, Katia Fach Gómez, Anastasios Gourgourinis, 2019, pp. 320-341, pp. 330-333.

of the treaty, and a breach is found, should the necessity defence under CIL be considered to determine whether the wrongfulness of the breach may be precluded.

In addition to substantive differences, important procedural differences also arise between the two. Under the CIL necessity defence, tribunals generally adopt a strict and narrow approach due to the exceptional nature of the defence, often requiring a high threshold of proof and a rigorous application of the "*only way*" test.[415] If tribunals identify any plausible alternative measure available to the state, they typically reject the defence without proceeding to a balancing exercise.[416] The state also bears the full burden of proof and must demonstrate that all elements of the defence are met, including that it did not contribute to the situation of necessity.[417]

By contrast, treaty exception clauses often allow for a more flexible standard of review. Proportionality is either implied or expressly required in many treaties, allowing tribunals to conduct a balancing exercise between the state's legitimate interests and the investor's protected rights.[418] The burden of proof may also be less onerous. Some tribunals have shifted the burden to the investor once the state establishes a prima facie case that the exception applies. Furthermore, tribunals often exhibit greater deference to the state, particularly in identifying the peril and defining the essential interest at stake, especially where self-judging language is used.[419]

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[415] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 59; Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 176; Parish, "**On Necessity**", p. 183.
[416] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", pp. 60-61.
[417] Henckels, "**Investment Treaty Security Exceptions, Necessity and Self-Defence in the Context of Armed Conflict**", pp. 336-337.
[418] For a detailed analysis on how the tribunals conduct this analysis *see* HENCKELS Caroline, "4 - Methods of review employed by investment tribunals in regulatory disputes", Proportionality and Deference in Investor-State Arbitration Balancing Investment Protection and Regulatory Autonomy, Cambridge University Press, 2015, pp. 69-125, pp. 82-122.
[419] Bahmaei / Sabzevari, "**Self-Judging Security Exception Clause as a Kind of Carte Blanche in Investment Treaties: Nature, Effect and Proper Standard of Review**", pp. 100-106; Nolan / Sourgens, "**The Limits of Discretion? Self-Judging Emergency Clauses in International Investment Agreements**", pp. 363-364.

III. FORCE MAJEURE IN ISDS

This section examines the role and treatment of the *force majeure* defence in ISDS. The analysis begins with the legal foundations of the doctrine, focusing on its definition, sources, and codification in Article 23 of the ILC Articles on State Responsibility. The key legal elements, such as irresistibility, unforeseeability, and objective impossibility, are then outlined. The discussion proceeds to the application of *force majeure* in treaty-based, contractual, and mixed claims, highlighting the distinctions in legal standards and interpretive approaches. Finally, the way tribunals have engaged with the doctrine is assessed, emphasizing its infrequent invocation and even rarer acceptance, along with the practical and conceptual challenges that limit its effectiveness in the ISDS context.

A. Legal Requirements and Threshold

This part sets out the legal basis and key components of the *force majeure* defence in international law. The discussion begins with a general introduction to the concept and its relevance in the ISDS context. It then outlines the primary sources of the doctrine, with a particular focus on its codification in Article 23 of the ILC Articles on State Responsibility, which reflects its status in CIL. Finally, the core legal elements required for a successful invocation, such as irresistibility, unforeseeability, and material impossibility, are examined in detail.

1. Introduction

Force majeure is a general excuse for the non-performance of obligations when events beyond a party's control prevent it from fulfilling its contractual duties.[420] Typical examples include natural disasters, armed conflict, acts of terrorism, epidemics and regulatory changes.[421]

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[420] Wang / Shan, "**Force Majeure and Investment Arbitration**", pp. 138-139; CHENG Tai-Heng / LIM Jennifer, "Chapter 10: Force Majeure and Hardship", Managing 'Belt and Road' Business Disputes: A Case Study of Legal Problems and Solutions, ed. Michael J. Moser, Chiann Bao, Kluwer Law International, 2021, pp. 195-208, p. 196.

[421] Cheng / Lim, "**Chapter 10: *Force majeure* and Hardship**", p. 196.

Despite the foundational principle of *pacta sunt servanda*, *force majeure* is accepted in most civil law systems, grounded in the Roman maxim *nemo tenetur ad impossibile*, no one is bound to do the impossible.[422]

In common law systems, by contrast, *force majeure* is not recognized as a standalone doctrine in the absence of a contractual clause.[423] However, parties are free to incorporate *force majeure* provisions into their agreements, and courts will generally enforce them according to their terms.[424]

While *force majeure* is rooted in contract law, its relevance in ISDS extends far beyond the private sphere. Due to the involvement of states, questions of public international law often arise, especially when a state invokes *force majeure* to justify non-compliance with treaty or contractual obligations. This intersection introduces complexity in terms of applicable law, standards of interpretation, and the legal consequences of non-performance.

However, the engagement of public international law should not be mistaken for a softening of the legal standard. Whether invoked under a treaty or a contract, *force majeure* remains a rigorously constrained doctrine, with a high evidentiary threshold that tribunals are generally reluctant to accept without compelling, well-documented proof of absolute impossibility and lack of fault.

2. Sources of *Force majeure*

Force majeure may arise under different legal sources, leading to divergent standards and interpretative frameworks.

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[422] Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 140.
[423] Cheng / Lim, "**Chapter 10: *Force majeure* and Hardship**", pp. 197-202.
[424] Wang / Shan, "**Force Majeure and Investment Arbitration**", pp. 140.

Broadly, it can be invoked in two main ways: (**i**) as a defence under public international law, particularly CIL, in investment treaty claims; or (**ii**) as a contractual defence in investor–state disputes governed by private law.

In the context of treaty-based claims, states occasionally invoke *force majeure* as a circumstance precluding wrongfulness under Article 23 of the ILC Articles on State Responsibility.[425] This provision, considered reflective of CIL, sets a high threshold: the event must be unforeseeable, external to the State, and render performance materially impossible.

In practice, this defence is rarely invoked and even more rarely accepted. The strict requirements under Article 23, combined with the potential overlap or conflict with treaty-specific exceptions (such as necessity or national security clauses), have led to interpretative complexity and doctrinal debate. One way to resolve this tension is through treaty primacy: if a treaty permits non-performance due to specific circumstances, then there is arguably no breach, and thus no need to resort to the ILC Articles, which are only triggered to excuse a wrongful act *after* a breach has occurred.[426]

However, even if *force majeure* is accepted as a defence under CIL, questions often remain regarding liability and compensation. The key issue is not always whether the State is excused from responsibility entirely, but rather whether full or partial reparation is warranted.

Alternatively, *force majeure* may arise in a contractual context, where it is treated as a private law concept. Here, its application depends primarily on the governing law of the contract, which may be a national legal system or international law, and the specific wording of the *force majeure* clause, if present.

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[425] Paparinskis, "**Circumstances Precluding Wrongfulness in International Investment Law**", p. 487.
[426] BJORKLUND Andrea K., "12 Emergency Exceptions: State of Necessity and Force Majeure", The Oxford Handbook of International Investment Law, ed. Peter Muchlinski, 2012, 459-523, p. 489, https://doi.org/10.1093/oxfordhb/9780199231386.013.0012 (last accessed: 4 June 2025).

Unlike the rigid test under CIL, the contractual standard is typically more flexible.[427] It is shaped by principles of contract law and tribunals often draw a clear distinction, applying different standards accordingly.

Importantly, contractual *force majeure* clauses also benefit from party autonomy: the parties can tailor the clause to fit their needs, and the clause is generally symmetrical, allowing either party, State or investor, to invoke it. By contrast, *force majeure* under CIL is inherently asymmetrical, available only to the State as a defence against responsibility.

In sum, while *force majeure* under contract law serves as a risk allocation mechanism between equal parties, under public international law it functions as a sovereign defence to excuse State responsibility. These distinctions affect their respective purposes, thresholds, and legal consequences.

To preview the analysis that follows: *force majeure* under treaty law remains rarely successful due to the high bar imposed by Article 23 of the ILC Articles, while contractual *force majeure* offers greater flexibility, grounded in the applicable law and specific contract terms. Ultimately, it falls to the tribunal to assess whether the defence arises in a public or private law framework, which may significantly affect the outcome. This is also why future treaty drafting is important to clarify the priority and interaction between CIL and contractual standards.

3. *Force majeure* under CIL: Article 23 of the ILC Articles on State Responsibility

Force majeure is codified in Article 23 of the ILC Articles on State Responsibility, as follows:

"*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*

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[427] Wang / Shan, "**Force Majeure and Investment Arbitration**", pp. 154-155.

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."

It is widely accepted that Article 23 reflects CIL and is regularly invoked by states in arbitral practice.[428] However, successful invocation remains extremely rare.

Before analyzing its legal requirements, it is important to emphasize that Article 23 is located within Part One, Chapter V of the ILC Articles, under the title "*Circumstances Precluding Wrongfulness*." This placement highlights a key distinction: the provision does not negate the existence of a breach, but rather excuses a breach from giving rise to international responsibility due to the existence of a justifying circumstance.[429]

Accordingly, when invoked under CIL, *force majeure* is raised by respondent states in response to treaty-based claims to assert that, although their conduct may breach an obligation, they should not be held internationally responsible due to the extraordinary circumstances surrounding the breach.

For the defence to succeed, three cumulative elements must be met: (**i**) there must be an exceptional and unforeseen event or force that was external to the state; (**ii**) the event must have been beyond the state's control, with no contributory fault, including failure to prevent, mitigate, or respond appropriately; and (**iii**) the event must have rendered performance objectively impossible. This last requirement is particularly strict, as mere impracticability, increased cost, or political difficulty is insufficient. Tribunals have

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[428] Paparinskis, "**Circumstances Precluding Wrongfulness in International Investment Law**", p. 487.
[429] SABAHI Borzu / RUBINS Noah / WALLACE JR. Don, "XVI. State Responsibility, Attribution, and Circumstances Precluding Wrongfulness", Investor-State Arbitration, Oxford University Press, 2019, pp. 511-537, pp. 526-527.

repeatedly emphasized that only a complete and objective impossibility of performance can satisfy the standard under Article 23.

Force majeure under Article 23 must also be distinguished from neighboring doctrines. It might appear similar to necessity under Article 25, especially in situations where states face crises such as war, financial collapse, or pandemics, leading them to invoke both. However, while *force majeure* requires objective impossibility, Article 25 rather involves a balancing of conflicting interests, allowing non-performance to protect an essential interest of the state.

On that note, *force majeure* under CIL is distinct from its counterpart under contract law. Under CIL, *force majeure* is a public international law defence available only to states, while in contract law it is available to both the private party and the state as contracting parties acting on equal footing.

Treaty carve-outs must also be addressed. At first glance, they might appear redundant in light of the *force majeure* defence. However, general exceptions clauses or essential security interests clauses in treaties serve a different function.[430] While these operate as built-in permissions, meaning there is no breach when they are successfully invoked, *force majeure* is a circumstance that precludes wrongfulness, thus only relevant after a breach is established.[431] This creates a difference in the order of analysis: if the treaty exception applies, there is no need to consider *force majeure* under CIL, as no breach exists to trigger it.

This distinction, however, is not always clearly maintained by tribunals. In practice, tribunals sometimes conflate treaty exceptions with *force majeure* or necessity, and may conduct an Article 23 analysis even when treaty-based exceptions are at issue.[432] While

[430] Henckels, "**Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses**", p. 366.
[431] Sloane, "**On the Use and Abuse of Necessity in the Law of State Responsibility**", p. 449.
[432] Sabahi / Rubins / Wallace Jr., "**XVI. State Responsibility, Attribution, and Circumstances Precluding Wrongfulness**", p. 535.

some overlap may be understandable, overusing such cross-analysis risks blurring legal distinctions and undermining predictability.[433]

This distinction is even more important when considering that treaty exceptions allow for more flexibility in threshold-setting, since they are negotiated between sovereign parties and can reflect more tailored and conscious drafting choices. In a post-COVID world, treaty parties may be more inclined to include specific clauses for public health emergencies, for instance.[434]

While analysing *force majeure* under CIL is relatively straightforward in theory, successfully invoking it in practice is a different matter. Perhaps due in part to its rare invocation, *force majeure* under CIL has had virtually no success in ISDS practice.[435] This is also linked to the high evidentiary threshold required, as well as tribunals' hesitation to apply such a rigid test in usually politically sensitive circumstances.

4. Key Legal Elements

Force majeure can be invoked under different legal frameworks, yet tribunals are still called upon to assess a set of common legal elements. These core conditions, consistent across various legal bases, can be summarised as: (**i**) an unforeseeable and irresistible event, (**ii**) beyond the control of the party, and (**iii**) rendering performance materially impossible.

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433 Grigera, "**Necessity in Investment Arbitration: Boosting the ICSID System's Legitimacy**".
434 Qu / Shen, "**Public Health and Investment Protection in the Context of the COVID-19 Pandemic—From the Sustainable Perspective of Exception Clauses**", p. 4; Pantelaki, "**Defenses Against Investment Treaty Claims in Pandemic Times Fitting New Trends Into Old Standards**", pp. 61-62; GAUKRODGER David, "The future of investment treaties - possible directions", OECD Working Papers on International Investment 2021/03, 2021, p. 8, https://dx.doi.org/10.1787/946c3970-en (last accessed: 7 August 2025).
435 Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 139; VADI Valentina, "Crisis, Continuity, and Change in International Investment Law and Arbitration", Michigan Journal of International Law, vol. 42, no. 2, 2021, pp. 321-367, p. 356, https://doi.org/10.36642/mjil.42.2.crisis (last accessed: 9 July 2025); Pantelaki, "**Defenses Against Investment Treaty Claims in Pandemic Times Fitting New Trends Into Old Standards**", p. 49; ZRILIC Jure, "Armed Conflict as Force Majeure in International Investment Law", Manchester Journal of International Economic Law, vol. 16, no. 1, 2019, pp. 28-56, p. 30.

The first condition requires that the relevant event is both unforeseen and irresistible.[436] This must be evaluated in light of the circumstances at the time the obligation was undertaken.[437] The applicable legal standard will depend on the source relied upon: if invoked under CIL, Article 23 of the ILC Articles serves as the key guidance;[438] in treaty-based claims, the wording of the treaty exception clause will be central; and in contractual contexts, either the governing domestic law or the contract's own language will guide the analysis.

The second condition concerns the element of control. The event must be genuinely beyond the control of the party invoking *force majeure*, meaning they must not have caused or contributed to its occurrence.[439]

Unlike unforeseeability, this condition requires a distinction between a state and an investor.[440] A state should not be able to rely on an act of its own government as a *force majeure* event, as this could allow the state to manipulate its legislative framework or government actions to avoid its obligations.[441] Such reliance would undermine the

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[436] *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*, ICSID Case No. ARB/10/18, Award, 24 September 2021, para. 72; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 237; *CMS v. The Argentine Republic*, Award, para. 227; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003, para. 118.

[437] "*An event relieves the* "*promissor*" *of his obligation only if it occurred after the obligation has been contracted. This is, indeed, a general feature of force majeureand similar defences, which normally apply only if the event is unforeseen and unavoidable*": *Niko Resources v. Bangladesh*, Decision on the Payment Claim, para. 197; Accaoui Lorfing, "**Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure**", p. 50.

[438] Under the ILC Articles analysis, it is accepted that the event must be either "*unforeseeable*" or "*foreseeable but inevitable and irresistible*", reflecting the language of the article and marking an important difference compared to the notion of *force majeure* under contract law: Secretariat, "'*Force majeure*' and 'Fortuitous event' as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine - study prepared by the Secretariat", International Law Commission, 1978, p. 69.

[439] *Huntington Ingalls Inc. v. Ministry of Defense of the Bolivarian Republic of Venezuela (II)*, Final Award, 19 February 2018, para. 236; *Platinum Blackstone PTY LTD (formerly known as Nexbis Pty Ltd) v. Republic of Maldives*, SIAC Case No. ARB003 of 2014, Award, 24 November 2016, para. 170; *RSM Production Corporation v. Central African Republic*, Decision on Jurisdiction and Liability, para. 184; *Aucoven v. Venezuela*, Award, paras. 108, 126.

[440] For example, in *Huntington Ingalls v. Venezuela (II)*, the investor succesfully relied on import/export license delays as *force majeure*: *Huntington Ingalls Inc. v. Venezuela (II)*, Final Award, para. 844.

[441] In *Nykomb v. Latvia*, the respondent state argued that a change in legislation constituted a *force majeure* event, asserting that the tariff multiplier under the contract no longer applied. However, the tribunal rejected

principle that a *force majeure* event must not arise from the actions of the party invoking it.

This also raises the question of whether a state entity can invoke the actions of its parent state as a *force majeure* event. This issue has not been directly addressed in practice, but case law suggests that state entities and the state itself are distinct legal personalities.[442] Tribunals have emphasized that applying the *Air France* criteria to establish an organic link between a state entity and the state would imply that all state entities are equivalent to the state itself.[443] Additionally, case law has accepted situations where the breaching act, attributed to the actions of the parent government, was beyond the state entity's control.[444]

The third condition is the most defining feature of *force majeure* and also the strictest. Performance must be objectively impossible, not merely more difficult, less profitable, or more burdensome.[445] This high threshold distinguishes *force majeure* from neighboring defences such as necessity or hardship, and contributes to its limited success in practice. In practice, tribunals have applied different thresholds when assessing this criterion. Some have required absolute impossibility, meaning that no alternative measure could have allowed performance.[446] Others have taken a more flexible approach, adopting

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this argument, reasoning that a separate clause specifically addressed changes in base tariffs. It concluded that price adjustments fell under that provision rather than the general *force majeure* clause: *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC Case No. 118/2001, Arbitral Award, 16 December 2003, para. 107.
Although the tribunal did not explicitly rule on whether a state can invoke changes in its own legislation as a *force majeure* event and dismissed Latvia's defense based on contractual interpretation, its strict reading of the *force majeure* clause is notable.

[442] *Phillips Petroleum Company Venezuela Limited, Conocophillips Petrozuata B.V. v. Petroleos De Venezuela, S.A., Corpoguanipa, S.A., PDVSA Petroleo, S.A.*, ICC Case No. 20549/ASM/JPA (C-20550/ASM), Final Award, 24 April 2018, paras. 471-473; *Southern Pacific Properties Limited v. Arab Republic of Egypt and Egyptian General Company for Tourism and Hotels*, ICC Case No. YD/AS No. 3493, Award, 11 March 1983, para. 61.

[443] *Phillips Petroleum Company v. Petroleos De Venezuela, S.A., Corpoguanipa, S.A., PDVSA Petroleo, S.A.,* Final Award, paras. 471-473.

[444] *SPP v. Egypt*, Award, para. 61.

[445] *Bureau Veritas, Inspection, Valuation, Assesment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, para. 153; *Aucoven v. Venezuela*, Award, para. 108.

[446] *RSM Production Corporation v. Central African Republic*, Decision on Jurisdiction and Liability, paras. 181-183; *Sempra v. Argentine Republic*, Award, para. 246; *Enron v. Argentine Republic*, Award, para. 217.

the national law standard, deeming it enough that the event impeded the performance of the contractual obligation.[447]

Although these are labelled as "*core elements*," their application varies depending on the legal framework. Under CIL, the conditions are interpreted narrowly and applied with considerable rigor. In contrast, contractual *force majeure* clauses offer the parties flexibility to tailor the conditions according to their commercial needs, often softening the standard of impossibility. Treaty carve-outs may also override the CIL analysis entirely if they contain specific exceptions, although it must be noted that treaty clauses, unlike contractual ones, are negotiated between state parties and not necessarily by the disputing parties themselves.

The question of how these conditions are applied in practice, and the extent to which tribunals scrutinize such defences, will be explored in the next section.

B. Application in Treaty and Contractual Claims

This section examines how the *force majeure* defence is applied across different types of legal claims in ISDS. It begins by analyzing its invocation in treaty-based disputes, where public international law governs the assessment. The discussion then turns to contractual claims, where *force majeure* is typically evaluated under the applicable domestic or transnational contract law. Finally, the challenges arising in mixed claims, where both treaty and contractual elements are present, are explored, highlighting the complexities tribunals face in disentangling overlapping legal frameworks.

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[447] In *Aucoven v. Venezuela*, the tribunal analyzed the conditions for establishing *force majeure*. After determining that the unforeseeability requirement was not met, it nonetheless proceeded to examine the remaining two conditions. Regarding impossibility, the tribunal applied the standard under Venezuela's domestic administrative law, finding no reason to depart from it. On the facts, Venezuela acknowledged that the protests in question could have been controlled through the use of force. However, given the politically sensitive nature of such measures, the tribunal refrained from making a definitive ruling. Instead, it indicated that it was inclined to find the impossibility requirement satisfied. This suggests that the tribunal was willing to afford the state some degree of leniency, as it did not categorically state that the protests could have been prevented through coercive measures: *Aucoven v. Venezuela*, Award, paras. 120-124.

1. *Force majeure* in Treaty Claims

When *force majeure* is invoked as a defence against treaty claims, the primary reference[448] is Article 23 of the ILC Articles on State Responsibility, which lists *force majeure* as one of the six circumstances precluding wrongfulness.

Force majeure is rarely raised in ISDS, and even less frequently accepted.[449] This limited use is partly due to the high threshold required under CIL, as reflected in the ILC Articles. Moreover, alternative defences, such as necessity or specific treaty clauses addressing situations of conflict or emergency, often provide softer thresholds and greater flexibility for both states and tribunals.[450] Additionally, there is often confusion in arbitral reasoning between treaty-based war clauses and the customary law concept of *force majeure*, which further blurs the analysis.

Güriş Construction and Others v. Syrian Arab Republic stands out as a rare case where the *force majeure* defence was not only seriously argued but also substantively examined. The arbitration involved claims by Turkish investors against Syria, concerning their investments in cement facilities located in regions severely affected by the Syrian civil war.[451] Syria invoked both *force majeure* and necessity as defences, arguing that the armed conflict rendered performance of its treaty obligations materially impossible.[452]

A central element in the dispute was Article IV(3) of the Turkey–Syria BIT, a war losses clause that limited state liability for losses caused by war, insurrection, or civil disturbance, while still requiring treatment no less favourable than that accorded to the

[448] *E.g.*, *Sempra v. Argentine Republic*, Award, para. 246; *Enron v. Argentine Republic*, Award, para. 217; *Aucoven v. Venezuela*, Award, para. 123.
[449] Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 139; Vadi, "**Crisis, Continuity, and Change in International Investment Law and Arbitration**", p. 356; Pantelaki, "**Defenses Against Investment Treaty Claims in Pandemic Times Fitting New Trends Into Old Standards**", p. 55; Zrilic, "**Armed Conflict as Force Majeure in International Investment Law**", p. 30.
[450] Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 145.
[451] *Guris Insaat v. Syria*, Final Award, paras. 105 *ff*.
[452] **Ibid**., paras. 315 *ff*.

host state's own investors or those of third countries.[453] The tribunal held that this clause did not exclude other treaty protections, particularly the most-favored-nation ("**MFN**") clause in Article III(2).[454] Based on the MFN clause, the tribunal allowed the importation of a more favourable provision from the Syria–Italy BIT, which provided an explicit obligation to offer adequate compensation for losses arising from war or similar events.[455]

Regarding the *force majeure* defence, the tribunal applied the high threshold of Article 23 of the ILC Articles, which requires that the act in question be rendered materially impossible due to an irresistible force or unforeseen event beyond the state's control.[456] The tribunal found that Syria did not meet this standard and therefore rejected the defence, emphasizing the strict conditions that must be satisfied for *force majeure* to apply.

Ultimately, Syria was held responsible for compensation. The tribunal adopted a balanced approach, weighing CIL defences against treaty-based obligations. Notably, the tribunal's reliance on the MFN clause to secure compensation for war-related losses may serve as both a warning and a guide for future treaty drafters. It also illustrates a broader trend: tribunals tend to avoid granting states a complete exemption from liability under investment treaties, preferring instead to mitigate liability through specific treaty provisions while preserving core protections for investors.

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[453] "*Investors of either Party whose investments suffer losses in the territory of the other Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Party treatment no less favourable than that accorded to its own investors or to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses*."
[454] *Guris Insaat v. Syria*, Final Award, paras. 229-238.
[455] **Ibid**., paras. 246 *ff*.
[456] "*It is therefore a purely economic obligation in the nature of an indemnity which must be shown to be* "*materially impossible in the circumstances to perform*" *or to be precluded by conduct that is* "*the only way for the State to safeguard an essential interest against a grave and imminent peril*". *A demonstration of* "*material impossibility*" *or action necessary to* "*safeguard an essential interest against a grave and imminent peril*" *is fact-specific, requiring cogent evidence. Here, the Respondent has not explained, let alone demonstrated, how payment of money to the Claimants would satisfy either of these legal tests. The Tribunal observes in that regard that war or armed conflict, in themselves and without more, do not excuse non-compliance with monetary obligations*": **Ibid**., para. 320.

It is important to emphasize that *force majeure* under the ILC Articles is a *secondary rule*. These rules do not define the content of primary obligations (such as those in investment treaties) but rather determine whether a breach of a primary obligation entails state responsibility. Where a treaty provision constitutes *lex specialis*, such as a clause explicitly allowing derogation in cases of conflict, it will take precedence. If there is no breach of the treaty in the first place (due to such a clause), the ILC Articles do not apply.

Only once a breach has been established do the ILC Articles become relevant. Even then, debate continues over whether the conclusion of investment treaties constitutes a derogation from the ILC Articles.[457]

However, such a view is unconvincing: the ILC Articles, as codifications of CIL, operate independently from primary treaty obligations. Unless a treaty clearly and explicitly excludes their application, they must remain applicable as a secondary legal framework.

Finally, if the *force majeure* defence is accepted, it does not necessarily mean that the state escapes all responsibility.[458] The ILC Articles indicate that compensation may still be appropriate, even if the act is not wrongful, though they do not specify in what

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[457] "*The Tribunal acknowledges the fact that the ILC Articles are the product of over five decades of ILC work. They represent in part the* "*progressive development*" *of international law -pursuant to its UN mandate- and represent to a large extent a restatement of customary international law regarding secondary principles of state responsibility. But the provisions of the ILC Articles may be derogated from by treaty, as expressly recognized in Article 55 in relation to lex specialis: Lex specialis.- These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the internal responsibility of a State are governed by special rules of international law. Accordingly, customary international law does not affect the conditions for the existence of a breach of the investment protection obligations under the NAFTA, as this is a matter which is specifically governed by Chapter Eleven.*"*: Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, para. 116.
[458] "*The Respondent's view appears to be based on the understanding that Article 27 would only require compensation for the damage that arises after the emergency is over and not for that taking place during the emergency period. Although that Article does not specify the circumstances in which compensation should be payable because of the range of possible situations, it has also been considered that this is a matter to be agreed with the affected party, thereby not excluding the possibility of an eventual compensation for past events. In the absence of a negotiated settlement between the parties, this determination is to be made by the Tribunal to which the dispute has been submitted*": *Enron v. Argentine Republic*, Award, para. 345.

circumstances or to what extent.[459] This compensation is distinct from the full reparation regime under Article 34;[460] rather, it relates to losses directly caused by the *force majeure* event itself. In this sense, compensation would be limited to actual material losses, falling short of full reparation.[461]

This creates a balanced outcome, one that recognizes the exceptional circumstances faced by states while ensuring that investors are not left bearing the full burden alone. In practice, some tribunals have relied on Article 27 of the ILC Articles to guide this limited compensation analysis.

2. *Force majeure* in Contractual Claims

Force majeure is a well-recognized excuse for non-performance of contractual obligations, and in this sense, it is distinct from the concept under the ILC Articles on State Responsibility, where it is treated as a ground for excluding international responsibility rather than a contractual defence.

When invoked in the context of a contractual claim, the relevant legal framework is primarily determined by the applicable law of the contract, and often more crucially, by the contractual provisions themselves. This reflects the nature of most domestic contract law systems, where *force majeure* operates as a secondary rule, filling in the gaps left by the parties and allowing them to customize their legal relationship.

Given that the application of *force majeure* is generally more flexible in contractual contexts, investment arbitration jurisprudence offers more frequent and detailed discussions of the concept.

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[459] Article 27 of the ILC Articles on State Responsibility envisages: "*The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question*."
[460] Article 34 of the ILC Articles on State Responsibility envisages: "*Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter*."
[461] Bjorklund, "**12 Emergency Exceptions: State of Necessity and Force Majeure**", p. 516.

One of the earliest applications in the ISDS context was the *Aucoven v. Venezuela* case.

In that case, the claimant, a Venezuelan company owned by a U.S. corporation, had entered into a concession agreement with the respondent state for the renovation and operation of the Caracas–La Guaira Highway, including the construction of a viaduct and toll collection.[462] The central issue arose when Venezuela failed to raise tolls as agreed, citing violent public protests as justification.[463] This failure made it financially impossible for the claimant to proceed with construction, leading to termination of the contract.[464]

Venezuela defended itself by invoking *force majeure*, arguing that public unrest had rendered performance impossible.[465] The Tribunal examined this defence through both Venezuelan administrative law and international law, referring to the ILC Articles for the latter.[466] Although the concession agreement contained a *force majeure* clause, it only addressed non-performance by the concessionaire, not the state.[467] As a result, the Tribunal turned to applicable law to assess Venezuela's defence.[468]

The tribunal listed the three conditions for *force majeure*: (**i**) the event must render performance impossible, (**ii**) the event must be unforeseeable, and (**iii**) the event must not be attributable to the party invoking it.[469] This framework was drawn from both Venezuelan administrative law and international law.[470]

The Tribunal's analysis of impossibility was limited. [471] It noted that under Article 23 of the ILC Articles, impossibility must be material, i.e., performance must be physically or legally impossible. It briefly compared this to Venezuelan administrative

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462 *Aucoven v. Venezuela* Award, paras. 6 *ff*.
463 **Ibid**., paras. 32 *ff*.
464 **Ibid**., paras. 40 *ff*.
465 **Ibid**., paras. 106 *ff*.
466 **Ibid**., paras. 107 *ff*.
467 **Ibid**., para. 107.
468 **Ibid**.
469 **Ibid**., para. 108.
470 **Ibid**.
471 **Ibid**., paras. 120 *ff*.

law, where the threshold is lower: it suffices that the event reasonably impedes normal performance, even if it is not entirely irresistible. Despite this significant difference, the Tribunal did not attempt to reconcile these diverging standards or provide a harmonized interpretation.[472] Instead, it sidestepped the issue, focusing on the unforeseeability requirement.

Ultimately, the Tribunal rejected Venezuela's *force majeure* defence because it found that the public protests were not unforeseeable.[473] It concluded that Venezuela had not provided convincing evidence to show that such unrest following toll increases was unexpected.[474] Although the Tribunal implicitly accepted that the protests were not attributable to the state (thus satisfying the externality requirement), the failure to meet the unforeseeability condition was sufficient to dismiss the defence.[475]

Importantly, the Tribunal emphasized that the standard of impossibility under domestic and international law should not diverge significantly.[476] However, it failed to develop a coherent approach to reconcile the more lenient Venezuelan standard with the stricter ILC Articles standard. By focusing on unforeseeability, the Tribunal avoided engaging in a deeper legal analysis of this divergence.

Nevertheless, the case remains important. The Tribunal's suggestion that domestic and international standards of *force majeure* should converge is significant for ISDS consistency. If *force majeure* standards vary drastically between treaty-based and

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[472] "*On the second question set forth above, the Arbitral Tribunal is not satisfied that international law imposes a different standard which would be called to displace the application of national law. The Tribunal reaches this conclusion on the basis of a review of the decisions issued under international law to which the parties have referred (see in particular General Dynamics Telephone Sys. Ctr. v. The Islamic Republic of Iran, Award No. 192-285-2 (4 Oct. 1985), 9 Iran-U.S. Cl. Trib. Rep. 153, 160, Resp. Auth. 18. See also Gould Marketing, Inc. v. Ministry of Defense of Iran, Award No. ITL 24-49-2 (27 July 1983), 3 Iran-US Cl. Trib. Rep. 147, Cl. Auth. 23, and Sylvania Tech. Sys., Inc. v. Iran, Award No. 180-64-1 (27 June 1985), 8 Iran-U.S. Cl. Trib. Rep. 298, Cl. Auth. 32.), as well as on the basis of the Draft Articles on State Responsibility of the International Law Commission, and the legal arguments of the parties*.": **Ibid**., para. 123.
[473] **Ibid**., para. 119.
[474] **Ibid**., paras. 111 *ff*.
[475] **Ibid**., para. 119.
[476] **Ibid**., para. 123.

contract-based claims, this could lead to uneven investor protections and arbitrary limitations on states' ability to act in the public interest during extreme circumstances.

Unlike *Aucoven v. Venezuela*, where the Tribunal blurred the lines between international and domestic standards, tribunals in several cases involving Argentina more clearly distinguished between the standards for *force majeure* under the ILC Articles and domestic law.

In particular, the *Enron v. Argentina* tribunal explicitly observed that *force majeure* under international law (as codified in the ILC Articles) is not identical to the doctrine of *imprevisión* under Argentine law.[477] The Tribunal emphasized that the ILC standard involves more express and stringent conditions, such as material impossibility, unforeseeability, and externality.[478] This distinction was later acknowledged by the *ad hoc* annulment committee, even though the award was ultimately annulled on other grounds.[479] The *Sempra v. Argentina* tribunal made a similar observation, reinforcing the view that international and domestic standards of *force majeure* do not overlap entirely and should not be conflated.[480]

In *Niko Resources v. Bangladesh*, the International Centre for Settlement of Investment Disputes ("**ICSID**") tribunal also addressed the interplay between contractual, domestic, and international standards of *force majeure*. The respondent had invoked *force majeure* as a defence for non-payment of invoices under a gas purchase and sale agreement.[481] However, the tribunal rejected the defence, noting that the alleged *force majeure* event was already known to the respondent at the time of contract conclusion.[482] Since both Bangladeshi law and the contractual *force majeure* clause required unforeseeability, the defence was unsuccessful.[483] Moreover, the Tribunal scrutinized

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[477] *Enron v. Argentine Republic,* Award, para. 217; Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 152.
[478] **Ibid**.
[479] **Ibid**., Annulment, para. 287.
[480] *Sempra v. Argentine Republic*, Award, para. 246.
[481] *Niko Resources v. Bangladesh*, Decision on the Payment Claim, 11 September 2014, paras. 177 *ff*.
[482] **Ibid**., para. 205.
[483] **Ibid**., para. 204.

whether the respondent had taken reasonable steps to mitigate the effects of the event, making it clear that *force majeure* is not a *carte blanche* that allows the non-performing party to do nothing.[484]

A different scenario arose in *RSM v. Central African Republic*, where it was the investor, rather than the state, who invoked *force majeure*, citing the deteriorating political and security situation in the host state.[485] The Tribunal noted, without much elaboration, that the *force majeure* clauses in both the contract and international law shared similar requirements.[486] It accepted that the situation was unforeseeable, but clarified that *force majeure* does not suspend all obligations.[487] For instance, the investor could still have sought a renewal of its license, even amid the unrest, and its failure to do so undermined the defence.[488]

These cases illustrate the critical role of the contract language in *force majeure* analysis, not only in defining the threshold conditions (*e.g.*, unforeseeability, impossibility), but also in determining risk allocation. This was particularly evident in *Rutas de Lima v. Lima*,[489] where the Tribunal rejected the *force majeure* defence because the parties had explicitly excluded social unrest related to toll increases from the scope of the *force majeure* clause. This is a clear contrast with CIL, where there is no specific exclusion for such events, but where the standard for impossibility is stricter, requiring absolute and material impossibility.

The decisive role of contractual language has also shaped how *force majeure* standards are drafted. Increasingly, contract drafters are moving away from rigid requirements of impossibility and embracing a lower standard based on commercial

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[484] **Ibid**., paras. 215 *ff*.
[485] *RSM Production Corporation v. Central African Republic*, Excerpts of the Decision on Annulment of February 20, 2013 made pursuant to Rules 48(4) and 53 of the ICSID Arbitration Rules of 2006.
[486] **Ibid**.
[487] **Ibid**.
[488] **Ibid**.
[489] Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 153.

impracticability or reasonableness.[490] This trend is reflected in modern instruments such as the UNIDROIT Principles of International Commercial Contracts ("**UNIDROIT Principles**")[491] and the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**"),[492] which do not require absolute impossibility.[493]

A strong example of the value of lenient contractual drafting is found in *Gujarat v. Yemen*.[494] There, the tribunal placed central importance on the broad and self-contained language of the *force majeure* clause, which it found exhaustive.[495] As such, it declined to rely on domestic law for interpretation or supplementation.[496] The tribunal held that even if an unforeseeability requirement had applied, it would still have been satisfied, interpreting it as a "*sharp increase in risk beyond what was contemplated by the parties at the time of conclusion*."[497] In doing so, the Tribunal interpreted impossibility in commercial terms, effectively aligning it with commercial impracticability and softening the standard.[498]

Gujarat v. Yemen is therefore a key case demonstrating that parties have considerable autonomy to define the parameters of *force majeure* in their contracts. Tribunals have generally respected this autonomy, and when the contractual clause is clearly drafted, tribunals are more likely to uphold it without reference to domestic or international law. This approach reduces legal uncertainty, avoids complex questions

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490 AUGENBLICK Mark / ROUSSEAU Alison B., "Force Majeure in Tumultuous Times: Impracticability as the New Impossibility", The Journal of World Investment & Trade, vol. 13, p. 1, 2012, pp. 59-75, p. 60.
491 UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2016*, International Institute for the Unification of Private Law (UNIDROIT), Rome, 2016.
492 *United Nations Convention on Contracts for the International Sale of Goods*, adopted 11 April 1980, entered into force 1 January 1988, 1489 UNTS 3.
493 Zrilic, "**Armed Conflict as Force Majeure in International Investment Law**", pp. 28-56.
494 *Gujarat State Petroleum Corporation Limited, Alkor Petroo Limited, and Western Drilling Constructors Private Limited v. the Republic of Yemen and the Yemen Ministry of Oil and Minerals*, ICC Case No. 19299/MCP.
495 " *In the Tribunal's view, the language of the clause makes clear that the Parties agreed to their own custom-made definition of Force majeure for the PSAs. The clause is self-contained and clear.(…)*": **Ibid**., Award, 10 July 2015, para. 144.
496 **Ibid**.
497 **Ibid**., para. 159.
498 Zrilic, "**Armed Conflict as *Force majeure* in International Investment Law**", p. 29.

about the interplay between contractual, domestic, and international standards, and promotes predictability and party autonomy in international contracting.

In addition to having different standards and scopes, the consequences of successfully invoking a *force majeure* defense differ significantly between the contractual and treaty contexts.

In the treaty context, *force majeure* operates as a defense after a breach of the treaty has been established. It excuses the state from international responsibility for the breach, although compensation might still be owed under certain circumstances. It is thus a secondary defense, invoked to justify or excuse non-compliance after the fact.

In contrast, in the contractual context, *force majeure* typically results in a temporary suspension of the affected obligations, lasting for as long as the *force majeure* event persists. Termination of the contract is only justified if the effects of the event are permanent, if the suspension defeats the object and purpose of the contract, or if it imposes an undue burden on the non-affected party.

Moreover, in contract-based claims, the affected party is usually under a duty to notify the other party, either under the contract or the applicable domestic law, as well as an obligation to mitigate damages.[499] These requirements are generally absent in the international law framework, where the focus is on the existence of an ex post justification for breach, rather than procedural diligence.

Importantly, *force majeure* is not a blanket defense in the contractual setting: only the obligations rendered impossible or impracticable are suspended. All other obligations under the contract remain in force.[500]

To sum up, in the contractual context, tribunals tend to assess the specific language of the *force majeure* clause, the applicable domestic law, and general international contract

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[499] Wang / Shan, “**Force Majeure and Investment Arbitration**”, p. 155.
[500] **Ibid**., p. 153.

principles. *Force majeure* in this context is more flexible and party-driven than under the ILC Articles, with greater emphasis on risk allocation and commercial practicality rather than strict objective impossibility.[501]

Given these distinctions, clear drafting by the parties and diligent conduct by the party invoking *force majeure*, such as timely notification and mitigation, remain essential to a successful defense.[502]

3. ***Force majeure* in Mixed Claims**

The tension between contract and treaty claims has been widely discussed in both case law and academic literature.[503] This is largely because, in ISDS, the boundaries between these claims are often blurred.[504] Rather than appearing as clearly distinct categories, contractual and treaty claims frequently overlap, creating legal uncertainty. This becomes particularly complex when umbrella clauses are involved, raising questions

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[501] International Institute for the Unification of Private Law, "Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis", UNIDROIT 2020 – UPICC and COVID-19, 2020, s. 4; Augenblick / Rousseau, "**Force Majeure in Tumultuous Times: Impracticability as the New Impossibility**", p. 60.

[502] On how to draft a *force majeure* clause *see* FINKEL Robert M. Finkel / TRENOR John A. / SOIFFER Ariel, "COVID-19: Drafting *Force majeure* Clauses in Light of the COVID-19 Pandemic", WilmerHale, 14.04.2020, https://www.wilmerhale.com/en/insights/client-alerts/20200413-drafting-force-majeure-clauses-in-light-of-the-covid-19-pandemic (last accessed: 14 July 2025); HEEP Jeremy, "Best Practice With Notices for *Force majeure* Events", Troutman Pepper Locke, 11.06.2020, https://www.troutman.com/insights/best-practice-with-notices-for-force-majeure-events.html (last accessed: 14 July 2025).

[503] ARATO Julian / BROWN Chester W. / ORTINO Federico, "Parsing and Managing Inconsistency in Investor-State Dispute Settlement", Brooklyn Law School Legal Studies Research Papers Accepted Paper Series, King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2020-43, 2020, pp. 1-30, p. 17, https://ssrn.com/abstract=3522483 (last accessed: 15 July 2025); WONG Jarrod, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes", George Mason Law Review, vol. 14, 2008, pp. 137-179; CRAWFORD James, "Treaty and Contract in Investment Arbitration", Arbitration International, vol. 24, no. 3, 2008, pp. 351-374.
The issue was first noted by the Annulment Committee in the *Vivendi v. Argentina* case: "*In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions.*": *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 96.

[504] Arato / Brown / Ortino, "**Parsing and Managing Inconsistency in Investor-State Dispute Settlement**", p. 17.

about whether they transform contractual breaches into treaty violations or whether a more limited interpretation should be adopted.[505]

Strabag v. Libya exemplifies such complexity.[506] The Austrian claimant and the respondent state were embroiled in a dispute concerning large-scale construction contracts, assigned to a joint venture involving both the claimant and a Libyan state-owned enterprise ("**SOE**").[507] The contracts included advance payments secured by bank guarantees.[508] Following the 2011 Libyan revolution, the joint venture suffered substantial damage caused by both Libyan forces and third parties, prompting the claimant to initiate arbitration.[509]

Before turning to the issue of *force majeure*, it is important to note that the tribunal found the umbrella clause in the Agreement between the Republic of Austria and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments ("**Austria-Libya BIT**")[510] to have the effect of elevating contractual breaches to treaty breaches.[511] However, the tribunal's analysis remained largely grounded in the contractual framework. It focused on the *force majeure* provisions contained in the contracts themselves, which allocated risk between the parties.[512] While some contracts merely allowed for termination in *force majeure* situations, others permitted compensation.[513] In the latter cases, the tribunal awarded compensation accordingly.[514]

In *Ampal-American v. Egypt*, the complexity did not arise from concurrent treaty and contract claims within the same proceeding, but from parallel proceedings. The

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505 **Ibid**., s. 18.
506 *Strabag SE v. Libya*.
507 **Ibid**., Award, paras. 56 *ff*.
508 **Ibid**.
509 **Ibid**.
510 Agreement between the Republic of Austria and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments, signed 18 June 2002 in Vienna, entered into force 1 January 2004.
511 *Strabag SE v. Libya*, Award, paras. 155 *ff*.
512 **Ibid**., paras. 791 *ff*.
513 **Ibid**.
514 **Ibid**.

dispute stemmed from the American claimants' investment in the East Mediterranean Gas Company ("**EMG**"), which had entered into a gas supply contract with EGPC and EGAS, two Egyptian state-owned companies.[515] The claimants alleged that the Egyptian state persistently and increasingly interfered with the contract: EMG's license was revoked, gas deliveries were withheld to force renegotiation, contractual obligations were not fulfilled, and the gas pipeline was inadequately protected against terrorist attacks.[516]

The matter was first addressed in an arbitration before the International Chamber of Commerce ("**ICC**") between EMG and EGPC/EGAS, where the tribunal ruled in favor of EMG and awarded compensation.[517] Subsequently, the American investors initiated ICSID proceedings under the applicable BIT.

The ICSID tribunal faced the question of *res judicata*, specifically, the extent to which it was bound by the findings of the ICC tribunal.[518] It emphasized that its jurisdiction derived from the BIT and that it was required to apply international legal standards in determining whether Egypt had breached its treaty obligations.[519] Egypt had invoked *force majeure* as a defense under the investment contract, prompting the ICSID tribunal to consider the findings of the ICC tribunal, which had rejected the *force majeure* argument.[520]

The ICSID tribunal held that this finding had *res judicata* effect, and therefore declined to conduct a separate analysis of the *force majeure* defense.[521] In doing so, the tribunal relied on prior investment arbitration jurisprudence establishing that foreign shareholders may be considered in privity of interest with their local corporate subsidiaries.[522] Accordingly, findings in cases involving the subsidiaries are binding on

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[515] *Ampal-American v. Egypt*, Decision on Liability and Heads of Loss, paras. 25-42.
[516] **Ibid**., paras. 43-67.
[517] **Ibid**., para. 248.
[518] **Ibid**., paras. 252 *ff*.
[519] **Ibid**., para. 239.
[520] **Ibid**., para. 330.
[521] **Ibid**., para. 270.
[522] "*In other legal contexts, the doctrine of res judicata applies not simply to the parties themselves, but also to those who are in privity of interest with them. (…) This approach has now been adopted in two important investment awards considering the res judicata effect of prior awards rendered in claims brought by*

the shareholders.[523] The tribunal noted that the claimants' claims were entirely derivative of EMG's rights under the contract, and thus they were bound by the ICC tribunal's conclusions.[524] While acknowledging the binding nature of the prior decision, the ICSID tribunal nevertheless reviewed the ICC's factual findings and confirmed that its rejection of Egypt's *force majeure* defense was well-founded.[525]

These cases highlight important distinctions between contractual *force majeure* and *force majeure* under international law. Such divergence is natural. In commercial settings, even sovereign states are treated as commercial actors, engaging in transactions on equal footing with private entities, and thus are subject to standards of commercial reasonableness. In contrast, under international law, states are regarded as sovereigns, and *force majeure* is interpreted more narrowly, with a higher threshold, particularly when raised against a foreign investor presumed to be the weaker party.

While distinguishing between contractual and international *force majeure* may seem straightforward in theory, the lines blur in ISDS, where public and private law, domestic and international law, and private and sovereign actors intersect. This complexity is further amplified by umbrella clauses, which may transform contractual obligations into treaty obligations. The central question then arises: should the tribunal apply the contractual standard of *force majeure*, or adopt the stricter international law standard applicable to treaty breaches?

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investment companies wholly owned by the claimants in the second arbitration. (…) The Tribunal observes that the ICSID tribunals in these cases make two points that are applicable to the position of the parties in the present case vis-à-vis the ICC Award between the investment vehicle (EMG) on the one hand and the Egyptian State instrumentalities with which it contracted on the other hand (EGPC & EGAS). They apply the doctrine of res judicata to the parties to the prior award and to those persons who are in privity of interest with them. They do so on the basis that since, in the context of investment arbitration, a shareholder is entitled to pursue a claim for investments that are indirectly held through a corporation, it must also be subject to defences that would be available against the corporation, including the defences of estoppel based on a prior judgment.": **Ibid**., paras. 261-266.

[523] **Ibid**.

[524] **Ibid**., para. 268.

[525] **Ibid**., paras. 271-282.

Even though the elevation theory, that umbrella clauses convert contract claims into treaty claims, can seem unconvincing at times, one might argue that the substantive nature of the claims and the applicable law should not necessarily change simply because the forum changes.[526] Otherwise, a state could find itself unable to invoke *force majeure* in circumstances where, as a commercial party to the contract, it otherwise could. While this approach may offer stronger protection to investors, it risks undermining the parties' contractual autonomy and unfairly altering their agreed risk allocation simply due to the change in legal forum.

Looking forward, tribunals' reluctance to engage in a robust international law analysis of *force majeure* deserves further examination. Often, references to international legal standards are cursory and lack detailed reasoning, especially when contractual and treaty claims coexist. Tribunals should aim for clearer delineation of applicable law and legal standards, particularly when assessing *force majeure*.[527] They must also account for the dual role of the state, as a sovereign in treaty claims and as a commercial actor in contract claims.[528] A more thorough engagement with the ILC Articles on State

[526] Crawford, "**Treaty and Contract in Investment Arbitration**", p. 370.
For tribunals adopting this approach *see SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, para. 127 ("*To summarize, for present purposes Article X(2) includes commitments or obligations arising under contracts entered into by the host State. The basic obligation on the State in this case is the obligation to pay what is due under the contract, which is an obligation assumed with regard to the specific investment (the performance of services under the CISS Agreement). But this obligation does not mean that the determination of how much money the Philippines is obliged to pay becomes a treaty matter. The extent of the obligation is still governed by the contract, and it can only be determined by reference to the terms of the contract.*"); *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, para. 200 ("*A fourth view held that umbrella clauses may form the basis for treaty claims, without transforming contractual claims into treaty claims. Such view is described by Professor James Crawford who states Finally, there is the view that an umbrella clause is operative and may form the basis for a substantive treaty claim, but that it does not convert a contractual claim into a treaty claim. On the one hand it provides, or at least may provide, a basis for a treaty claim even if the BIT in question contains not generic claims clause; on the other hand, the umbrella clause does not change the proper law of the contract or its legal incidents, including provisions for dispute settlement.*").
[527] Wang / Shan, "**Force Majeure and Investment Arbitration**", pp. 158-159; Zrilic, "**Armed Conflict as Force Majeure in International Investment Law**", p. 22.
[528] For tribunals duly adopting this distinction *see Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 20 ("*It cannot be denied that for much of its existence, CSOB acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to*

Responsibility, and a comparative analysis between contractual and international law doctrines, could help bridge the analytical gap. While the conditions may differ, both states and investors would benefit from greater doctrinal clarity and consistency.

C. Application by Tribunals

This section considers how arbitral tribunals have applied the *force majeure* defence in practice. It begins by noting the relative rarity of its invocation and even rarer acceptance in ISDS cases. Key decisions are then reviewed to identify the main judicial approaches and reasoning. Finally, the practical and doctrinal challenges that limit the effectiveness of the defence, such as strict legal thresholds and evidentiary burdens, are discussed.

1. Rare Invocation, Rarer Acceptance

Despite being a foundational concept in contract law and recognized as CIL under the ILC Articles on State Responsibility, *force majeure* has been invoked in ISDS far less frequently than one might expect.[529] Yet, this rarity becomes understandable when one

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support and that the State's control of CSOB required it to do the State's bidding in that regard. But in determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose. While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature."); *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, para. 43 ("(…) *In the Tribunal's view, the assertion that "the Chinese State is the ultimate decision maker" for BUCG is too remote from the facts of the Sana'a International Airport project to be relevant. BUCG was clearly not exercising a Chinese governmental function on the airport site in Yemen. The alleged military aggression was not by Yemen against the People's Republic of China (or the consequences might have been more severe) but in relation to BUCG as an airport contractor that, CAMA alleges, fell down on the job.*"); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 171-172 (" *Second, Respondent has not adduced any elements showing in a convincing manner that the State of Abu Dhabi was exercising both a general control over Claimant and a control on its investment decisions. On the basis of Respondent's concession recognising the absence of governmental powers of Claimant and its failure to adduce evidence supporting its control argument, Respondent's submission that this is a dispute between two States must fail.*").

[529] "Force majeure under the ILC Draft Articles on State Responsibility: Assessing Its Viability Against COVID-19 Claims | ASIL", (25.07.2025), https://www.asil.org/insights/volume/24/issue/24/force-majeure-under-ilc-draft-articles-state-responsibility-assessing (last accessed: 1 August 2025); Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 139; Carpentieri, "**The Invocation of State Defenses in Times of Conflict: Force Majeure, Necessity and the Libyan Example**", p. 22.

considers the high threshold and strict requirements for successfully relying on this defense.

In contractual settings, even when interpreted through the more lenient lens of commercial impracticability, *force majeure* still demands that the event be unforeseeable and irresistible.[530] In addition, the affected party must mitigate the consequences and promptly notify the counterparty, introducing further procedural hurdles.[531] Importantly, *force majeure* generally has only a suspensive effect: it excuses performance temporarily but requires the party to resume its obligations once the impediment is removed.[532] In the meantime, obligations under other contracts, especially with third parties, may continue to accumulate, compounding the hardship without offering full relief.

Under international law, the standard is even more exacting. *Force majeure* requires a showing of objective impossibility, not merely difficulty or increased burden. This makes its application to treaty breaches particularly puzzling.[533] For example, how can a state convincingly argue that it was objectively impossible to provide FET to an investor? Treaty obligations are often broad and flexible, with multiple avenues available to comply. As such, claiming impossibility in this context is inherently difficult, also considering that treaty obligations are about the treatment of the investor. *Force majeure* seems more naturally suited to specific, clearly defined obligations, such as performance or payment terms in contracts.

Tribunals have accordingly applied *force majeure* with caution and have done so only rarely in the context of investment disputes. This cautious approach reflects both the doctrine's demanding legal requirements and the inherent flexibility of treaty-based

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[530] Augenblick / Rousseau, "**Force Majeure in Tumultuous Times: Impracticability as the New Impossibility**", pp. 59-60.
[531] Brunner, "**Chapter 4: Force Majeure Excuse, Section 10: Interpretation and Effects of *Force majeure* Clauses**", p. 357.
[532] Augenblick / Rousseau, "**Force Majeure in Tumultuous Times: Impracticability as the New Impossibility**", p. 68.
[533] Pantelaki, "**Defenses Against Investment Treaty Claims in Pandemic Times Fitting New Trends Into Old Standards**", pp. 52-54; "Force Majeure under the ILC Draft Articles on State Responsibility".

obligations.[534] It is particularly challenging for a state to establish that compliance was truly impossible, especially when the underlying trigger is an economic or financial crisis.[535] Under the ILC Articles, financial distress alone is not enough; indeed, for monetary obligations, international law presumes that impossibility does not arise.[536]

In contrast, contractual *force majeure* claims tend to be more successful.[537] Parties to contracts can tailor *force majeure* clauses to allocate risk based on commercial realities,[538] and tribunals applying domestic law often treat such events as grounds for temporary suspension rather than outright termination of obligations. This reflects the pragmatic notion that while a party should not be forced to do the impossible, it may still be expected to resume performance once conditions stabilize.[539]

Recent events, including the COVID-19 pandemic, widespread economic sanctions, and armed conflicts, have shown that states, too, can be impacted by *force majeure* in ways similar to private actors. Given this evolving reality, and with umbrella clauses increasingly elevating contractual obligations into treaty claims, it is likely that *force majeure* will become more visible and more relevant in future ISDS cases. This makes it essential to examine not only the key cases where *force majeure* has been raised, but also the challenges and limitations that continue to constrain its application as a defense.

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[534] PADDEU Federica, "7 - *Force majeure*", Justification and Excuse in International Law Concept and Theory of General Defences, Cambridge University Press, 2018, pp. 285-333, p. 301; "Force Majeure under the ILC Draft Articles on State Responsibility".
[535] Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 145; Carpentieri, "**The Invocation of State Defenses in Times of Conflict: Force Majeure, Necessity and the Libyan Example**", p. 22; Accaoui Lorfing, "**Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure**", pp. 52-53; Sicard-Mirabal / Derains, "**Chapter 7: General Defenses on the Merits**", p. 165.
[536] **Ibid**.
[537] Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 139.
[538] 1.A.2.
[539] Lim, "**Chapter 10: Force Majeure and Hardship**", p. 196; SCHOUPS Marco, "**Construction Contract Claims**", p. 41.

2. Key Points in Caselaw

Despite the rare application of *force majeure*, this complicated notion has sparked significant debate in arbitral case law.

First, terms like "*unforeseeability*" and "*irresistibility*" require careful interpretation. While the threshold should remain high due to the exceptional nature of the defense, setting it too high risks rendering *force majeure* practically unusable.

Unforeseeability was central in the *Aucoven v. Venezuela* case, where the state's failure to increase tolls in accordance with its contractual obligations triggered the dispute.[540] The state attempted to rely on nationwide public resistance and riots as grounds for *force majeure*.[541] However, the tribunal rejected this, reasoning that such reactions were foreseeable, as there had been similar unrest in Venezuela in the past.[542]

This contrasts with the tribunal's reasoning in *Gujarat v. Yemen*, which primarily involved a contractual clause. There, the tribunal adopted a more flexible approach to unforeseeability. While the investor terminated the contract citing concerns for personal safety due to the events of 2011, the tribunal found that an unexpected deterioration in an already volatile situation could satisfy the requirement of unforeseeability.[543] The event did not need to arise entirely out of nowhere; it was sufficient that the conditions worsened unexpectedly beyond what could reasonably have been anticipated.[544]

These cases illustrate the lack of consistent interpretation regarding unforeseeability. Even though both concerned contractual *force majeure*, *Aucoven* applied a strict

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[540] *Aucoven v. Venezuela*, Award, paras. 32 *ff.*
[541] **Ibid**., paras. 106 *ff.*
[542] "*Given the well known tragic precedent of the Caracazo and the similar impact on the population of the contractual toll increase, Venezuela did not convince the Tribunal that the possibility of civil unrest could not be foreseen at the time of the negotiation of the Concession Agreement. In conclusion, the Tribunal finds that the alleged impossibility of raising the toll was not unforeseeable*.": **Ibid**., paras. 111-119.
[543] *Gujarat v. Yemen*, Award, para. 159.
[544] **Ibid**.

threshold, while *Gujarat* lowered the bar, recognizing that deteriorating conditions can qualify if they exceed what the parties could reasonably have contemplated.

Second, the requirement of objective impossibility, as opposed to mere economic hardship, remains a key element, particularly under international law.

While the *Enron* tribunal ultimately focused its analysis under the necessity doctrine, it briefly addressed *force majeure* and emphasized that this defense demands a material impossibility.[545] The tribunal noted that political and economic crises, even if severe, do not automatically suffice unless they make performance genuinely impossible.[546] This approach reflects the distinction between hardship and impossibility, *force majeure* being the more stringent standard.

Third, the interplay between contract and treaty claims, especially in the presence of umbrella clauses, complicates the application of *force majeure*. This was evident in *Strabag v. Libya* and *Ampal-American v. Egypt*.

In *Strabag*, both contract and treaty claims were pursued, and the tribunal applied the umbrella clause to elevate contractual obligations into treaty protections.[547] However, in its analysis, the tribunal relied exclusively on contractual principles and *force majeure* clauses, without engaging the international law dimension, even though Article 5 of the BIT referenced *force majeure*.[548] The tribunal focused on the allocation of risk as defined in the contracts, which were central to its compensation analysis. Multiple contracts were involved, each containing *force majeure* clauses. Three of these[549] allowed for termination

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[545] "*This question aside, however, it must be kept in mind that, at least as the theory of* "*imprevisión*" *is expressed in the concept of force majeure, this other concept requires, under Article 23 of the Articles on State Responsibility, that the situation should in addition be the occurrence of an irresistible force, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation. In the commentary to this article it is stated that* " *Force majeure does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis*"": *Enron v. Argentine Republic*, Award, para. 217.
[546] **Ibid**.
[547] *Strabag SE v. Libya*, Award, paras. 155 *ff.*
[548] **Ibid**., paras. 791 *ff.*
[549] "*Given the Tribunal's conclusion that events in Libya since 2011 constitute force majeure for purposes of Article 36 and the Government Contracting Regulations, Al Hani has no right to compensation for its*

in cases of *force majeure* but did not provide for any compensation.[550] The tribunal held that these clauses allocated the risk of *force majeure* to Al Hani, who had terminated the contracts, and therefore no compensation was owed.[551] In contrast, two other contracts[552] expressly provided for compensation in such events, leading the tribunal to estimate and award damages accordingly.[553]

In *Ampal-American*, the tribunal accepted a prior commercial arbitral award's findings on *force majeure* as *res judicata*.[554] Since the commercial tribunal had already rejected the application of *force majeure* under the contract, the investment tribunal did not revisit the matter or apply international law.[555] This outcome shows that while umbrella clauses may elevate contractual breaches into treaty claims, they do not transform the applicable legal standard for *force majeure*. Furthermore, *Ampal-American* demonstrates how findings in parallel proceedings can constrain tribunals, particularly when prior decisions are treated as binding.

Fourth, contractual *force majeure* clauses vary significantly and must be interpreted closely, as outcomes depend heavily on their wording. *Gujarat v. Yemen* provides a detailed example. The dispute concerned three production-sharing agreements for oil exploration in Yemen.[556] Due to the deteriorating conditions between 2011 and 2013, the claimants were unable to perform and relied on *force majeure* clauses to excuse their non-

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force majeure related losses under the Benghazi and Misurata contracts. It has the right to terminate the contracts, a right it has not exercised. Further, Al Hani "*may be exempted from executing its obligations if force majeure occurs rendering execution of the contract impossible.*" *But the contractually-agreed allocation of loss under Article 36 places the burden of Al Hani's losses from the Revolution and subsequent events on Al Hani, not on Respondent*." **Ibid**., para. 822.

550 **Ibid**., paras. 821-830.

551 **Ibid**.

552 "*These clauses entitle the contractor to receive compensation in circumstances where it is not available under Article 36. They give the contractor different rights depending on the gravity of the situation.*" **Ibid**., para. 836.

553 **Ibid**., paras. 831-874.

554 *Ampal-American v. Egypt*, Decision on Liability and Heads of Loss, paras. 248 ff.

555 **Ibid**.

556 *Gujarat v. Yemen*, Award, paras. 12-26.

performance, seeking a declaration that their termination was valid and reimbursement of bonuses paid.[557]

The applicable law was Yemeni law, and the tribunal upheld the claimants' reliance on the contractual *force majeure* provisions.[558] Notably, the tribunal did not examine in detail which specific incidents constituted *force majeure* or how each affected performance. This omission was due to the respondent's failure to produce crucial documents, which led the tribunal to draw an adverse inference in favor of the claimants.[559]

More significantly, the tribunal found the *force majeure* clause to be self-contained and exhaustive, rejecting the addition of any unwritten requirements, such as unforeseeability, into its interpretation.[560] Nevertheless, to be cautious, the tribunal still held that the unforeseeability requirement was satisfied.[561] The tribunal also distinguished between a general background risk and a sharp, significant increase in risk, concluding that the latter can constitute *force majeure* if it exceeds what the parties contemplated at the time of contracting.[562]

These conclusions are important for future practice. First, by treating the clause as exhaustive, the tribunal underscored the parties' freedom to structure their risk allocation and the limits on tribunals to read additional requirements into such clauses. Second, the finding that an increase in risk may satisfy the unforeseeability requirement, even where some baseline risk existed, avoids a rigid approach that could unfairly penalize investors operating in less stable jurisdictions. That said, maintaining a high threshold remains

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[557] **Ibid**.
[558] **Ibid**., paras. 211-224.
[559] "*According to the Tribunal, it is for the Parties to present evidence that they deem sufficient to prove their claims. Each Party bears the burden of proving the facts relied on in support of its claim or defence. That relevant witnesses that may have had knowledge of the matters under discussion have not been presented is a factor that the Tribunal has kept in mind in its overall evaluation of the evidence on record*.": **Ibid**., para. 104.
[560] **Ibid**., para. 144.
[561] **Ibid**., para. 216.
[562] **Ibid**., para. 159.

crucial to preserving the integrity of *pacta sunt servanda*, the foundation of contractual law.

The tribunal also rejected the argument that the *force majeure* events were merely episodic and that the claimants could have adopted alternative methods of performance.[563] The tribunal found that although events may have occurred intermittently, their cumulative effects rendered performance impractical for the entire 2011–2013 period.[564] The conclusion that it would not have been prudent or practical to send personnel further indicates a more flexible approach to impossibility, aligned with commercial reasonableness rather than strict legalistic impossibility. [565]

Fifth, the presence of other neighboring defenses often discourages reliance on *force majeure*.[566] For states, necessity is often more accessible and better tailored to treaty obligations, whereas *force majeure*, with its emphasis on absolute impossibility, is more suited to specific contractual obligations.

Interestingly, this dynamic was reversed in early 20th-century cases: *force majeure* was often used inappropriately to cover situations better addressed by necessity, largely because necessity had not yet been codified or widely recognized.[567] In that era, states often used *force majeure* as a "*catch-all*" due to the absence of a clearly articulated necessity defense.[568]

For example, in the *Russian Indemnity* case, the Ottoman Empire invoked *force majeure* to justify delays in repaying debt to Russia.[569] The tribunal rejected this argument,

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[563] **Ibid**., para. 179.
[564] **Ibid**.
[565] **Ibid**., para. 213.
[566] Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 145.
[567] Sloane, "**On the Use and Abuse of Necessity in the Law of State Responsibility**", p. 454; PADDEU Federica, "A Genealogy of Force Majeure in International Law", British Yearbook of International Law, vol. 82, no. 1, 2012, pp. 381-494, p. 443.
[568] **Ibid**.
[569] *Russian Indemnities Case*, Award of the Tribunal, pp. 12-13.

noting that financial hardship was more appropriately considered under necessity, though that defense was not widely accepted at the time.[570]

A similar situation arose in the *Serbian Loans* case, where Serbia argued that the war in Europe had compelled it to issue bonds and made it impossible to repay them in gold francs due to French legislation.[571] However, the PCIJ held that, despite the gravity of the war, it did not alter the contractual relationship between Serbia and France.[572] The PCIJ emphasized not the origin of the obligation (i.e., the war being the reason the bonds were issued), but whether the war made performance, specifically, payment in gold francs, impossible.[573] It found that while French legislation had made acquiring gold francs difficult, payment *in specie* was still possible.[574] Therefore, the *force majeure* defense was rejected.

A similar reasoning was applied in the *Brazilian Loans* case.[575] There, Brazil invoked French legislation to argue that payment in gold francs was impossible.[576] The PCIJ concluded that the economic effects of the war did not release Brazil from its obligations.[577] It held that the obligation was to pay the value of gold francs, and since this could still be obtained, Brazil remained bound to perform.[578]

Another illustrative example is the *French Company of Venezuelan Railroads* case.[579] A French company had entered into a contract with the Venezuelan government to construct and operate railway lines.[580] The work was repeatedly disrupted by floods, earthquakes, and revolutionary conflict.[581] In particular, during the revolution,

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570 **Ibid**.
571 *Serbian Loans*, Judgment, pp. 37-38.
572 **Ibid**., p. 39.
573 **Ibid**., pp. 40-41.
574 **Ibid**.
575 *Brazilian Loans*, PCIJ Series A. No 21.
576 **Ibid**., Judgment, 12 July 1929, p. 120.
577 **Ibid**.
578 **Ibid**.
579 *French Company of Venezuelan Railroads (France v. Venezuela)*.
580 **Ibid**., Award, 31 July 1905, pp. 335-336.
581 **Ibid**., pp. 341-342.

both sides reportedly used the company's railways and resources without compensation, prompting the company to suspend operations and seek damages.[582] Both the company and the Venezuelan government invoked *force majeure* before the mixed claims commission.[583] The company argued that the revolution justified suspension of its obligations, while the government claimed it bore no responsibility for the damage caused, since the events constituted *force majeure*.[584] The umpire sided with the government, upholding its *force majeure* defense and ruling that it was not liable for the suspension of the company's operations.[585]

Following the codification of necessity under the ILC Articles on State Responsibility, states and tribunals increasingly began using it in treaty disputes.[586] Moreover, the inclusion of specific treaty clauses on necessity or essential state interests has provided states with clearer, more tailored defences, further reducing reliance on the broader *force majeure* argument. As a result, *force majeure* has largely retreated into the domain of contractual relations.

3. Limits and Challenges on Application

The above explanations show that despite being derived from one of the oldest legal principles and recognized as a well-established exception, *force majeure* has had limited success and faces numerous challenges in its application in ISDS.[587]

This is due to several reasons.

First and foremost, there is a high evidentiary threshold imposed on the party invoking *force majeure*. This is true for both contractual and CIL-based *force majeure*

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582 **Ibid**., p. 342.
583 **Ibid**., p. 343.
584 **Ibid**.
585 **Ibid**., p. 353.
586 *E.g.*, *Sempra v. Argentina*, Award, para. 246; *Enron v. Argentina*, Award, para. 217; *Aucoven v. Venezuela*, para. 123.
587 "**Force majeure under the ILC Draft Articles on State Responsibility**"; Wang / Shan, "**Force Majeure and Investment Arbitration**", pp. 138-59; Carpentieri, "**The Invocation of State Defenses in Times of Conflict: Force Majeure, Necessity and the Libyan Example**", p. 22.

defenses. The latter requires the invoking party to demonstrate an absolute and material impossibility, making it even more difficult to meet.[588] While contractual *force majeure* provisions are somewhat more lenient, they are still interpreted narrowly, as exceptions are traditionally construed in a restrictive manner.[589] Notably, tribunals[590] have consistently rejected economic crises, which are frequently invoked by states as justification for breaching treaty obligations, as constituting "*impossibility*" under *force majeure*.[591] To this evidentiary burden must be added the risk of adverse inference, which arises in cases where the respondent state fails to cooperate in producing requested documents.[592] These procedural aspects can significantly influence the tribunal's findings and shape the outcome of the dispute.

Second, there is a persistent confusion with other doctrines, particularly the necessity defense. States often invoke both *force majeure* and necessity together, and tribunals tend to analyze them jointly.[593] This joint analysis sometimes leads to fragmented or inconsistent reasoning. One might expect this to be resolved following the codification of the ILC Articles, which draw clear distinctions between the two doctrines. However, because both *force majeure* and necessity arise in similar factual contexts, share

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588 Pantelaki, "**Defenses Against Investment Treaty Claims in Pandemic Times Fitting New Trends Into Old Standards**", p. 52; "**Force majeure under the ILC Draft Articles on State Responsibility**".
589 Augenblick / Rousseau, "**Force Majeure in Tumultuous Times: Impracticability as the New Impossibility**", pp. 59-60.
590 *E.g.*, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic*, SCC Case No. V 2015/095, Award, 23 December 2018, 451; *Duke Energy v. Republic of Ecuador*, Award, para. 237.
591 Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 145; Carpentieri, "**The Invocation of State Defenses in Times of Conflict: *Force majeure*, Necessity and the Libyan Example**", p. 22; Accaoui Lorfing, "**Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure**", pp. 52-53; Sicard-Mirabal / Derains, "**Chapter 7: General Defenses on the Merits**", p. 165.
592 *E.g.*, *Gujarat v. Yemen*, Award, para. 104.
593 Indeed, in *Guris Insaat v. Syria*, the respondent state invoked both *force majeure* and necessity in connection with the internal conflict, arguing that these defenses excluded its responsibility under a war losses clause, incorporated via an MFN clause from the Syria–Italy BIT. The tribunal considered the two defenses jointly but noted that Syria failed to explain how either force majeure or necessity, or their combined effect, could negate the obligations arising under the war losses clause. Since the respondent did not present the defenses separately or in a sufficiently articulated manner, the tribunal rejected the argument and proceeded to apply the war losses clause, which provided for compensation to investors: *Guris Insaat v. Syria*, Final Award, paras. 315-322.

comparable legal rationales, and produce similar results (i.e., precluding wrongfulness), the conceptual and practical overlap remains.

A further complication arises from self-judging clauses and the risk of abuse inherent in their use. These clauses allow states to unilaterally determine whether a situation justifying *force majeure* or the protection of essential security interests has arisen. This leads to the critical question of whether such determinations are final or subject to review by an arbitral tribunal.[594] In practice, tribunals tend to assert a degree of scrutiny, reviewing whether the self-judging clause was invoked in good faith and not abused to escape liability, thereby ensuring a balance between investor protection and state sovereignty.[595]

Another important limitation is related to the governing law. There is a significant divergence between the concept of *force majeure* under international law and domestic legal systems. The applicable law determines the conditions, consequences, and flexibility available to the parties. For instance, it has been observed that contract law often adopts a pragmatic approach centered on commercial practicability, whereas public international law imposes a stricter standard of absolute impossibility.[596] Accordingly, the direction of the tribunal's analysis will largely depend on whether the claim is contractual or treaty-based.[597] One particularly complex area is where umbrella clauses are used to elevate contractual breaches into treaty claims. Nevertheless, any confusion in this regard can be mitigated by the approach that, despite the elevation, the applicable law for contractual claims remains that of the contract, meaning the substantive analysis still follows contract law principles, whether rooted in domestic law or international law.

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[594] Bahmaei / Sabzevari, "**Self-Judging Security Exception Clause as a Kind of Carte Blanche in Investment Treaties: Nature, Effect and Proper Standard of Review**", p. 116.
[595] Accaoui Lorfing, "**Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure**", p. 46.
[596] Augenblick / Rousseau, "**Force Majeure in Tumultuous Times: Impracticability as the New Impossibility**", p. 60.
[597] I.B.

There are also jurisdictional limits to consider. Some investment treaty tribunals may not be able to examine contractual *force majeure* defenses, as their jurisdiction is confined to treaty violations. This can result in fragmented proceedings, where the same dispute must be argued in separate forums, one for treaty claims and another for contractual defenses, raising the risk of inconsistent outcomes. However, in *Ampal-American v. Egypt*, the investment tribunal accepted the findings of a commercial tribunal on the contractual defense as *res judicata*, thereby mitigating the risk of conflicting decisions.[598]

Given that many *force majeure* events invoked by states relate to political or economic crises, there is also the risk that the defence may be used opportunistically. While states are unlikely engineer such crises solely to invoke *force majeure*, they may nonetheless invoke these events *post hoc* to justify failures in performance, even when the causal link between the crisis and the breach is weak. This raises concerns about the potential dilution of legal standards, and the difficulty tribunals may face in distinguishing genuine claims from strategic defenses.

Lastly, one should consider the limits of mitigation and the requirement of good faith. The party invoking *force majeure* must typically demonstrate that it attempted to mitigate the effects of the impediment.[599] Tribunals may examine whether viable alternative means of performance existed. A failure to explore such alternatives can lead to the rejection of the *force majeure* defense. However, the extent of this obligation varies significantly among tribunals. Some adopt a strict approach, holding that the presence of an alternative excludes the impossibility required for *force majeure*, an approach more common in international law contexts.[600] Others treated *force majeure* more flexibly,

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[598] *Ampal-American v. Egypt*, Decision on Liability and Heads of Loss, para. 248.
[599] Wang / Shan, "**Force Majeure and Investment Arbitration**", pp. 147-148.
[600] *RSM v. Central African Republic*, Decision on Jurisdiction and Liability, paras. 181-183; *Sempra v. Argentina*, Award, para. 246; *Enron v. Argentina*, Award, para. 217; *CMS v. Argentina*, Award, para. 356; *Serbian Loans*, Judgment, pp. 39-40.

consistent with commercial contract law, which often prioritizes feasibility and reasonableness over absolute standards.[601]

IV. COMPARATIVE ANALYSIS WITH COMMERCIAL ARBITRATION

This section provides a comparative perspective by examining how *force majeure* and hardship are treated in commercial arbitration. It first outlines the definition, legal basis, and threshold requirements of these doctrines in commercial contract law. The analysis then turns to the approach of commercial arbitration tribunals, highlighting their relatively flexible interpretation and broader range of available remedies. Finally, key differences and commonalities between commercial arbitration and ISDS are identified, offering insight into how sovereign and private parties are treated under similar legal concepts.

A. *Force Majeure* and Hardship in Commercial Contracts

This subsection explores how *force majeure* and hardship are conceptualized and applied in the context of commercial contracts. It begins by defining the purpose and function of these doctrines in mitigating the impact of unforeseen events on contractual performance. The analysis then turns to their legal foundations in both civil and common law systems, followed by an overview of the typical thresholds that must be met for successful invocation. This framework sets the stage for comparison with their use in the ISDS context.

1. Definition and Purpose

Force majeure refers to a legal doctrine that excuses or modifies a party's contractual obligations when extraordinary events beyond that party's control make performance impossible or impracticable.[602] Common examples include natural disasters,

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[601] *Aucoven v. Venezuela*, Award, paras. 121-124.

[602] FIROOZMAND Mahmoud Reza, ZAMANI Javad, "Force majeure in international contracts: current trends and how international arbitration practice is responding", Arbitration International, ed. William W. Park, 2017, pp. 395-413, p. 395; Lim, "**Chapter 10: Force Majeure and Hardship**", p. 196; Brunner,

armed conflict, pandemics, and sudden changes in law or regulation.[603] In practice, *force majeure* rarely results in a permanent release from contractual duties; instead, it typically suspends performance for the duration of the exceptional event, aiming to preserve the contract while the disruptive conditions persist.[604]

Hardship, by contrast, addresses situations where unforeseen events fundamentally alter the equilibrium of the contract, making performance excessively burdensome but not impossible.[605] The purpose of hardship clauses or doctrines is not to excuse performance entirely, but to allow for the renegotiation or adaptation of the contract to reflect the new circumstances.[606] Where hardship is recognized, either through the applicable law or an express contractual clause, it generally imposes a duty on the parties to attempt to renegotiate the terms.[607] If negotiations fail, the consequences depend on the governing law or the contract: the parties may have the right to terminate the agreement, or one party may refer the matter to a competent court or tribunal to request judicial adaptation or termination, with termination typically considered a last resort.[608]

"**Chapter 4: Force Majeure Excuse, Section 10: Interpretation and Effects of Force Majeure Clauses**", p. 76.

[603] Brunner, "**Chapter 4: Force Majeure Excuse, Section 10: Interpretation and Effects of Force Majeure Clauses**", pp. 206-207; Lim, "**Chapter 10: Force Majeure and Hardship**", p. 196.

[604] Lim, "**Chapter 10: Force Majeure and Hardship**", p. 196.

[605] BRUNNER Christoph, "Chapter 5: Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract, Section 11: Hardship as a General Principle of Law", Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, Kluwer Law International, 2008, vol. 18, pp. 391-420, p. 393; AZEREDO DA SILVEIRA Mercedeh, "Part IV, Chapter 11: Adaptation of the Contract on Grounds of Hardship", Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation, Kluwer Law International, 2024, pp. 321-348, pp. 321-323.

[606] Brunner, "**Chapter 5: Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract, Section 11: Hardship as a General Principle of Law**", p. 400; Azeredo Da Silveira, "**Part IV, Chapter 11: Adaptation of the Contract on Grounds of Hardship**", pp. 321-322.

[607] Brunner, "**Chapter 5: Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract, Section 11: Hardship as a General Principle of Law**", p. 400.

[608] **Ibid**.; Azeredo Da Silveira, "**Part IV, Chapter 11: Adaptation of the Contract on Grounds of Hardship**", p. 327.

2. Legal Basis

In civil law jurisdictions, *force majeure* is typically codified within domestic legislation and applies even in the absence of an explicit contractual clause.[609]

By contrast, in common law systems, *force majeure* is not a doctrine recognized by general law.[610] Instead, its application depends entirely on the presence of a contractual clause.[611] As a result, in common law jurisdictions, the scope, conditions, and legal consequences of a *force majeure* event are determined solely by the wording of the contract, reflecting the principle of freedom of contract.[612]

The doctrine of hardship, like *force majeure*, is generally codified in civil law jurisdictions.[613] In common law systems, while there is no direct equivalent, functionally similar doctrines exist.[614] In the United States, for example, the Uniform Commercial Code provides for the concept of commercial impracticability,[615] and the common law

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[609]Lim, "**Chapter 10: Force Majeure and Hardship**", p. 196; Accaoui Lorfing, "**Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure**", p. 49.

[610] Lim, "**Chapter 10: Force Majeure and Hardship**", p. 196.

[611] **Ibid**.

[612] Schwarz Franz T., John A. Trenor (eds.), "United States", Contractual Performance and COVID-19: An In-Depth Comparative Law Analysis, 2021, pp. 505-588, p. 511.

[613] Brunner, "**Chapter 5: Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract, Section 11: Hardship as a General Principle of Law**", p. 402; Azeredo Da Silveira, "**Part IV, Chapter 11: Adaptation of the Contract on Grounds of Hardship**", pp. 321-322.
E.g., Article 1195 of the French Civil Code regulates "*Where a change of circumstances that was unforeseeable at the time of the contract's conclusion renders performance exceedingly onerous for a party that had not accepted to assume such risk, the party may ask the other party to renegotiate the contract. It shall continue to perform its obligations during renegotiation. In the event of refusal or failure of the renegotiation, the parties may agree to terminate the contract, on a date and on terms determined by them, or jointly apply to a judge to proceed with its adaptation. Failing agreement within a reasonable period of time, the judge may, upon a party's request, revise the contract or terminate it, on the date and terms he decides*." (free translation from French original); 313(1) BGB regulates hardship under German law as follows: "*If circumstances underlying the contract change fundamentally and placing performance at an excessive burden, making adherence unreasonable, the disadvantaged party may demand renegotiation. If renegotiation is unsuccessful, they can withdraw from the contract. If adjustment is impossible, non–performance is forgiven*." (free translation from German original).

[614] Brunner, "**Chapter 5: Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract, Section 11: Hardship as a General Principle of Law**", pp. 407-408; Azeredo Da Silveira, "**Part IV, Chapter 11: Adaptation of the Contract on Grounds of Hardship**", p. 322.

[615] "*Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance: (a) Delay in delivery or non-delivery in whole or in part by a seller who complies*

recognizes the doctrine of frustration of purpose.[616] Under English law, there is no doctrine of impracticability, but the doctrine of frustration applies in limited circumstances to discharge a contract when a supervening event renders performance radically different from what was initially agreed.[617]

Although *force majeure* and hardship are recognized and codified in many civil law systems, parties still often include specific *force majeure* or hardship clauses in their contracts to enhance clarity and ensure legal certainty.[618] These clauses usually outline the triggering events, the scope of excusable non-performance, the consequences of such events, and any procedural requirements such as notice obligations.[619] Accordingly, in both legal traditions, *force majeure* and hardship are typically governed by contractual rules tailored by the parties. When a contract is silent or incomplete on the matter, domestic law or soft law instruments can supplement the gap.

Among the most widely cited soft law instruments are the UNIDROIT Principles. These principles offer a harmonized legal framework for international transactions and are frequently relied upon in commercial arbitration.[620]

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with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. (…)": § 2-615 of the Uniform Commercial Code.
For a detailed analysis *see* Schwarz / Trenor, "**United States**", pp. 526-545.

[616] **Ibid**., pp. 545-554.

[617] Brunner, "**Chapter 5: Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract, Section 11: Hardship as a General Principle of Law**", pp. 408-411; Azeredo Da Silveira, "**Part IV, Chapter 11: Adaptation of the Contract on Grounds of Hardship**", pp. 322-323; Franz T. Schwarz, John A. Trenor (ed.), "England and Wales", Contractual Performance and COVID-19: An In-Depth Comparative Law Analysis, 2021, pp. 219-252, pp. 225-226.

[618] Accaoui Lorfing, "**Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure**", p. 54; Brunner, "**Chapter 4: Force Majeure Excuse, Section 10: Interpretation and Effects of Force Majeure Clauses**", p. 383.

[619] Brunner, "**Chapter 4: Force Majeure Excuse, Section 10: Interpretation and Effects of Force Majeure Clauses**", pp. 385-386.

[620] BRODERMANN Eckart, "Introduction to the UNIDROIT Principles of International Commercial Contracts ('PICC')", UNIDROIT Principles of International Commercial Contracts. An Article-by-Article Commentary, Second Edition 2023, 2023, pp. 1-24.

Article 7.1.7 of UNIDROIT Principles regulates *force majeure* as follows:

"*(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due."

Hardship is addressed under Article 6.2.2 of the UNIDROIT Principles, which defines it as follows:

"*There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and*

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party."

The legal consequences of hardship are regulated under Article 6.2.3 as follows:

" *(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.*

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium."

3. Thresholds to be Met

The conditions for successfully invoking *force majeure* depend on the applicable law and, more often than not, the specific contractual clauses. However, there are common elements that are generally accepted as core to the notion of *force majeure*.

First, the obligor must not have assumed the risk of the impediment's occurrence and must not have been reasonably expected to take the impediment into account at the time of contracting.[621] Risk assumption may be either explicit or implicit.[622] The latter element refers to the requirement of unforeseeability. A three-step test is typically applied:

[621] BRUNNER Christoph, "Chapter 4: Force Majeure Excuse, Section 8: Individual Requirements of the *Force majeure* Excuse under General Contract Principles, II. Contractual Assumption or Limitation of the Risk of the Occurrence of Certain Impediments", Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, International Arbitration Law Library, Kluwer Law International, 2008, vol. 18, pp. 116-167, p. 117.
[622] **Ibid**., p. 118.

(**i**) whether the extent or timing of the impediment was foreseeable, both generally and in the specific circumstances; (**ii**) whether the foreseeability was significant enough to imply risk assumption; and (**iii**) even if the first two are met, whether the contract nonetheless allocated the risk differently.[623]

Second, the impediment must be beyond the obligor's sphere of control. Only external impediments may excuse non-performance.[624] Obstacles arising from the ordinary preparation, organization, or implementation of the performance are deemed within the obligor's control and thus cannot excuse failure to perform.[625]

Third, there must be a causal link between the impediment and the non-performance.[626] The impediment must be the sole and direct cause; that is, but for the impediment, performance would have occurred.[627]

Fourth, the impediment or its consequences could not have been reasonably avoided or overcome.[628] This condition requires the obligor to take reasonable and necessary steps to prevent or overcome the effects of the impediment.[629] Even if such steps involve

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[623] **Ibid**., pp. 158-160.
[624] BRUNNER Christoph, "Chapter 4: Force Majeure Excuse, Section 8: Individual Requirements of the *Force majeure* Excuse under General Contract Principles, III. Impediments Beyond The Typical Sphere of Risk and Control of the Obligor", Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, International Arbitration Law Library, Kluwer Law International, 2008, vol. 18, pp. 167-206, p. 167.
[625] **Ibid**., pp. 167-168.
[626] BRUNNER Christoph, "Chapter 4: Force Majeure Excuse, Section 8: Individual Requirements of the Force Majeure Excuse under General Contract Principles, VII. Requirement of a Causal Link Between the Impediment and the Non-performance", Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, International Arbitration Law Library, Kluwer Law International, 2008, vol. 18, pp. 340-342, p. 340.
[627] **Ibid**.
[628] BRUNNER Christoph, "Chapter 4: Force Majeure Excuse, Section 8: Individual Requirements of the Force Majeure Excuse under General Contract Principles, VI. Unforeseeable, Unavoidable and Unsurmountable Impediments", Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, International Arbitration Law Library, Kluwer Law International, 2008, vol. 18, pp. 320-340, pp. 320-321.
[629] **Ibid**., p. 321.

significant cost or loss, the obligor is generally expected to act, provided there is a realistic chance of overcoming the obstacle.[630]

Hardship also involves an impediment beyond the obligor's control; however, unlike *force majeure*, which renders performance objectively impossible, hardship concerns situations where performance remains possible but the contractual equilibrium is so severely disturbed that holding the obligor to the original terms would be contrary to principles of good faith and justice.[631] The central question is whether the change in circumstances is fundamental enough to justify renegotiation or judicial adaptation of the contract, a question that is difficult to resolve.[632] While some propose using a percentage-based threshold as a benchmark, others favor a case-by-case analysis, emphasizing factors such as the risk of financial ruin for the obligor.[633]

B. Application by Commercial Arbitration Tribunals

This subsection examines how commercial arbitration tribunals apply the doctrines of *force majeure* and hardship in practice. It begins by outlining the general interpretive approach adopted in commercial settings, which tends to emphasize contractual intent and practical realities. The discussion then highlights the flexibility often afforded to parties and the range of remedies available, such as suspension, renegotiation, or contract adaptation, contrasting with the stricter application seen in ISDS.

1. General Approach

Commercial arbitration tribunals typically begin by assessing any *force majeure* or hardship clause contained in the contract, reflecting the central role of party autonomy in contract law. Where such a clause is absent, ambiguous, or leaves a gap, the tribunal turns

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[630] **Ibid**., p. 322.
[631] BRUNNER Christoph, "Chapter 5: Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract, Section 12: Individual Requirements of the Hardship Defence", Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, International Arbitration Law Library, Kluwer Law International, 2008, vol. 18, pp. 420-479, p. 421.
[632] **Ibid**., p. 426.
[633] **Ibid**.

to the governing domestic law or relevant soft law instruments to determine the applicable standard. The key question is whether the express or implied conditions set by the contract or applicable legal framework have been met.

To answer this, tribunals often engage in a thorough, fact-intensive analysis. Several key factors guide this evaluation. First, the nature of the event must meet a high threshold: it must be unforeseeable and beyond the control of the obligor. Second, timing is essential, only events that arise after the formation of the contract can potentially justify non-performance. Third, tribunals examine the causal link: the event must have directly caused the non-performance (in the case of *force majeure*) or rendered the performance excessively burdensome (in the case of hardship). Additionally, many legal frameworks impose a duty to mitigate: the affected party must take reasonable steps to limit the effects of the event and avoid or reduce the impact of non-performance.

The application of these doctrines is often shaped by the context and standards of the specific industry involved. Tribunals regularly apply industry-specific benchmarks and commercial norms when assessing the parties' conduct and expectations.

For example, in construction arbitration, the main obligation impacted by extreme external circumstances is typically the timely execution of the works.[634] When performance becomes impossible, *force majeure* suspends this obligation for the duration of the event. In such cases, a time extension equal to the period of suspension is often granted under the contract and/or applicable law, with termination allowed if the suspension exceeds a defined threshold.[635] Construction contracts frequently contain detailed *force majeure* clauses that define qualifying events and regulate their consequences, which arbitral tribunals generally apply.[636] However, if the circumstances merely render performance more difficult or burdensome, rather than impossible, tribunals

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[634] Schoups, "**Construction Contract Claims**", p. 41.
[635] **Ibid**.
[636] LÓPEZ ORTIZ Alejandro, "Key Features of International Construction Contracts", Construction and Arbitration: The Essential Building Blocks Reports from the CEPANI Colloquium held on 15 November 2024, eds. Patrick Baeten, Olivier Caprasse, 2024, pp. 5-36, p. 34.

and parties often rely on other remedies, such as claims for extensions of time or invoking hardship provisions.[637]

On the other hand, in energy arbitration, tribunals tend to adopt a strict interpretation of *force majeure* and emphasize the traditional criteria of unforeseeability, irresistibility, and externality.[638] Economic hardships, particularly price fluctuations and currency issues, are often at the center of these disputes. However, such circumstances are frequently rejected as valid grounds for *force majeure*, as tribunals generally view changes in oil prices or currency values as foreseeable.[639] Legislative changes are also commonly invoked, but tribunals typically do not accept them as *force majeure* events unless the new legislation renders contractual performance objectively impossible.[640]

As a final example, in the shipping industry, much like in the energy sector, price fluctuations are often at the heart of disputes.[641] However, unless the parties have expressly agreed otherwise, changes in market prices are not, by themselves, sufficient to constitute a *force majeure* event.[642] Moreover, given the inherent volatility of the commodity trade, such fluctuations are typically considered foreseeable and thus fail to meet one of the key conditions required to invoke *force majeure*.[643]

Thus, commercial tribunals tend to adopt a context-sensitive and fact-driven approach, tailoring their analysis to both the circumstances of the case and the demands

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[637] Schoups, "**Construction Contract Claims**", p. 42.
[638] BARYSHEVA Nataliya, "Force Majeure in Energy Arbitration: Predicting the Unpredictable", International Commercial Arbitration Review [Вестник Международного Коммерческого Арбитража], 2018, pp. 67-85, p. 71.
[639] PLUMP Andrew / ZIADÉ Roland, "Changed Circumstances and Oil and Gas Contracts", BCDR International Arbitration Review, ed. Nassib G. Ziadé, 2020, pp. 193-224, pp. 211-212; Barysheva, "**Force Majeure in Energy Arbitration: Predicting the Unpredictable**", p. 71.
[640] Plump / Ziadé, "**Changed Circumstances and Oil and Gas Contracts**", pp. 212-213; Barysheva, "**Force Majeure in Energy Arbitration: Predicting the Unpredictable**", pp. 72-73.
[641] TRABALDO-DE MESTRAL Elena, "Chapter 12: Arbitrating Commodity Trading, Shipping and Related Disputes", Arbitration in Switzerland: The Practitioner's Guide (Second Edition), ed. Manuel Arroyo, Kluwer Law International, pp. 1323-1344, p. 1329.
[642] **Ibid**.
[643] **Ibid**.

of the relevant industry. In doing so, they seek to balance legal certainty with commercial practicality.

2. Flexibility and Remedies

Under both *force majeure* and hardship in the commercial context, tribunals tend to adopt a more flexible approach and provide a broader range of remedies compared to their ISDS counterparts.

In cases of *force majeure*, affected obligations are typically suspended for the duration of the impediment. For instance, under Article 7.1.7 of the UNIDROIT Principles, if the impediment is temporary, the excuse for non-performance lasts as long as the impediment continues.

Hardship, on the other hand, allows the affected party to request renegotiation of the contract. If the parties fail to reach an agreement, the applicable rules, whether based on a contractual clause or governing law, often permit the matter to be referred to a court or tribunal, which may adapt the contract to restore its equilibrium.

Termination is generally considered a last resort under hardship. If renegotiation fails and adaptation is not feasible, either party, or the tribunal, may terminate the contract. For example, Article 6.2.3(4)(a) of the UNIDROIT Principles authorizes the court to terminate the contract and to fix the date and terms of termination.

This demonstrates that commercial arbitration frameworks dealing with hardship and *force majeure* offer greater flexibility in shaping appropriate remedies. In contrast, ISDS tribunals focus primarily on assessing the responsibility of the state, not on adjusting the underlying obligations or rebalancing the relationship between the parties. In the ISDS context, these defenses merely serve to preclude liability, without allowing for adaptation or substantive recalibration of the contract.

C. Differences and Common Themes with ISDS

As discussed above, *force majeure* and necessity exist both in private law and in international law, though under different labels and frameworks. In commercial contexts, terms such as *hardship*, *frustration*, or *commercial impracticability* are used, while in ISDS, the doctrines of *force majeure* and *necessity* derive from CIL, specifically Articles 23 and 25 of the ILC Articles on State Responsibility.

Both sets of doctrines aim to address exceptional, external, and unforeseeable events beyond the obligor's control, in the absence of fault or negligence. They are rooted in principles of fairness, recognizing that it would be unjust to hold a party liable for circumstances it could neither foresee nor prevent, especially when such events render performance impossible or excessively burdensome. As such, they strike a balance between legal certainty and equitable outcomes in extraordinary circumstances.

Despite these common foundations, important differences emerge in how these doctrines operate in ISDS and commercial arbitration.

First, necessity and *force majeure* under international law are defences available only to states; private actors, such as investors, cannot invoke them. In contrast, in commercial arbitration, both parties, whether state or private, can invoke *force majeure* or hardship, as these are grounded in contract law or the applicable domestic law.[644]

Second, the legal basis diverges significantly. In ISDS, *force majeure* and necessity are grounded in CIL, as codified under the ILC Articles. In the commercial realm, these doctrines arise from contractual clauses, national law, or transnational soft law instruments.

Third, the threshold for invoking these doctrines is markedly stricter in ISDS. ISDS tribunals apply the necessity and *force majeure* defences narrowly, emphasizing their

[644] Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 154.

exceptional nature.[645] Necessity, for example, requires that the measure taken was the *only means*[646] to safeguard an *essential interest*, and imposes a high bar regarding state contribution to the crisis. *Force majeure*, on the other hand, requires objective impossibility, not merely hardship.[647] By contrast, commercial doctrines are more flexible: hardship does not excuse non-performance but may trigger renegotiation, adaptation, or eventual termination. The threshold is lower, performance need only be excessively onerous, not impossible. As a result, commercial tribunals are often more receptive to these defences, especially when clear clauses or widely accepted legal standards apply.

Fourth, the consequences of invoking these doctrines differ. In ISDS, necessity and *force majeure* preclude the *wrongfulness* of a state's failure to perform, but they do not nullify the obligation itself, states are still in breach, but not held liable. In commercial arbitration, a successful invocation can suspend or terminate obligations. *Force majeure* typically leads to suspension during the period of impossibility, and in some cases, termination. Hardship encourages adaptation of the contract to restore equilibrium, with termination as a last resort. Thus, commercial doctrines emphasize rebalancing the contract, not simply excusing liability.

Fifth, domestic law plays a more central role in commercial arbitration. It often governs the relationship in the absence of contractual clauses, and supplies the legal

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[645] *E.g.*, *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, para. 613 ("*Commentary number 2 adds that the plea of necessity is exceptional and that it 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. Therefore, the necessity defense of the State will only rarely be available to excuse non-performance of an obligation*."); *Impregilo S.p.A. v. Argentine Republic (I)*, Award, para. 344; *RSM Production Corporation v. Central African Republic*, Decision on Jurisdiction and Liability, paras. 181-183; *Enron v. Argentine Republic*, Annulment, para. 304; *Suez v. The Argentine Republic*, Decision on Liability, para. 236.
[646] *E.g.*, *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar (II)*, Award, para. 348; *Suez v. The Argentine Republic*, Decision on Liability, para. 238; *AWG Group Ltd. v. The Argentine Republic*, Decision on Liability, para. 260.
[647] " *(…) New Zealand is right in asserting that the excuse of force majeure is not of relevance in this case because the test of its applicability is* ***of absolute and material impossibility****, and because* ***a circumstance rendering performance more difficult or burdensome does not constitute a case of force majeure****. Consequently, this excuse is of no relevance in the present case*." (emphasis added): *Rainbow Warrior*, Decision, para. 77.
Many tribunals adopted this strict approach: *e.g.*, *Sempra v. Argentina*, Award, para. 246; *Enron v. Argentina*, Award, para. 217; *CMS v. Argentina*, Award, para. 356.

framework for interpreting *force* majeure or hardship. In ISDS, domestic law may inform the tribunal's understanding of a state contract or serve in treaty interpretation, but the primary legal framework is international law.

These differences arise from a deeper distinction in the nature of the two systems. In ISDS, *force majeure* and necessity operate within the framework of state responsibility: they assess whether a state should be held liable for breaching its international obligations, rather than resolving the fate of the obligation itself. Moreover, ISDS often involves balancing public interest and investment protection. In contrast, commercial arbitration focuses on preserving contractual equilibrium between private parties (or a private party and a state in its commercial capacity), striving for fairness and the continuation of the contract where possible, through suspension or adaptation, rather than simply excusing performance.

While the doctrines may share conceptual roots, their application in ISDS and commercial arbitration reflects fundamentally distinct legal frameworks, objectives, and consequences. Recognizing these differences is crucial, particularly in light of debates on whether ISDS tribunals should adopt more flexible approaches inspired by commercial arbitration, especially in the context of state contracts with private investors.

V. THEMATIC ANALYSIS

This section offers a thematic analysis of how necessity and *force majeure* have been invoked and interpreted in response to various categories of crisis. It begins by examining public health emergencies, with a focus on COVID-19 and its implications for ISDS. It then turns to economic and financial crises, drawing lessons from the Argentine experience and exploring the future applicability of emergency defences in similar contexts. The analysis continues with environmental and climate-related emergencies, highlighting how treaty evolution may better accommodate such concerns. Armed conflict and sanctions are then considered, particularly their impact on state capacity and investment obligations. The section concludes by addressing the persistent North–South divide in the investment law regime, emphasizing structural inequalities, the uneven application of necessity, and growing reform efforts.

A. Public Health (COVID-19)

The COVID-19 pandemic presented an unprecedented global public health crisis, prompting states to adopt emergency measures that often impacted foreign investors. This section examines how such actions have been evaluated under international investment law, focusing on the applicability of *force majeure* and necessity defences. It considers the relevance and context of the pandemic, the legal and practical hurdles faced by states invoking these defences, and how treaty exception clauses have interacted with CIL doctrines. Finally, emerging trends in arbitral practice are analyzed to assess how tribunals have responded to the unique challenges posed by COVID-19.

1. Context and Relevance

COVID-19 first emerged in December 2019, with the initial cases recorded and confirmed in Wuhan, China.[648] Within months, the disease had rapidly spread across borders, instilling fear and uncertainty worldwide.[649] In response to its escalating transmission and global impact, the World Health Organization ("**WHO**") declared COVID-19 a *Public Health Emergency of International Concern*, its highest level of alert, thereby recognizing it as a pandemic.[650]

The pandemic affected both individuals and states profoundly.[651] In response, governments enacted sweeping and, in many cases, unprecedented measures aimed at

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[648] World Health Organization, "Coronavirus disease (COVID-19) pandemic", (15.07.2025), https://www.who.int/europe/emergencies/situations/covid-19 (last accessed: 25 July 2025).
[649] **Ibid**.
[650] **Ibid**..
[651] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 45; ASTERITI Alessandra, "Chapter 2: State Measures in Response to the COVID-19 Pandemic: A Review", Balancing the Protection of Foreign Investors and States Responses in the Post-Pandemic World, eds. Yulia Levashova, Pascale Accaoui Lorfing, Kluwer Law International, 2022, p. 7-30, p. 7.

curbing the spread of the virus.[652] These included, but were not limited to, state-imposed lockdowns, mandatory mask usage, social distancing regulations, and restrictions on domestic and international travel.[653] While necessary from a public health perspective, these interventions had severe economic consequences, resulting in widespread disruptions to supply chains, delays or cancellations of projects, and the suspension or termination of contracts.[654]

Although COVID-19 is no longer treated with the urgency it once commanded, now often regarded akin to the common cold, its legacy persists. The disruptions it caused triggered structural shifts in global trade and dispute resolution.[655] Remote hearings, flexible work arrangements, and virtual arbitration processes, which emerged as emergency solutions, are now becoming permanent features of the international legal landscape.[656]

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[652] BRATU Ioana, "O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]", Revista Română de Arbitraj, ed. Cristina Emilia Alexe, 2020, pp. 15-43, p. 17; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 46; ABDEL WAHAB Mohamed S., "Chapter 1: Dispute Prevention, Management and Resolution in Times of Crisis Between Tradition and Innovation: The COVID-19 Catalytic Crisis", International Arbitration and the COVID-19 Revolution, eds. Maxi Scherer, Niuscha Bassiri, 2020, pp. 1-26, p. 2; OGER-GROSS Elizabeth / HAKIM Hadia, "Chapter 16: The United States Policy Response to COVID-19 and Its Potential Impact on ISDS Claims", Balancing the Protection of Foreign Investors and States Responses in the Post-Pandemic World, eds. Yulia Levashova, Pascale Accaoui Lorfing, 2022, pp. 371-394, pp. 371-372; LAVRANOS Nikos / MAZLOM Ahmed, "The Investment Treaty Implications of COVID-19 Responses by States", European Investment Law and Arbitration Review, eds. Nikos Lavranos, Loukas A. Mistelis, 2021, pp. 3-57, p. 4.

[653] Bratu, "**O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]**", pp. 18-24; Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 45; Abdel Wahab, "**Chapter 1: Dispute Prevention, Management and Resolution in Times of Crisis Between Tradition and Innovation: The COVID-19 Catalytic Crisis**", p. 2.

[654] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 45; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", pp. 46-47; Abdel Wahab, "**Chapter 1: Dispute Prevention, Management and Resolution in Times of Crisis Between Tradition and Innovation: The COVID-19 Catalytic Crisis**", p. 2.

[655] Abdel Wahab, "**Chapter 1: Dispute Prevention, Management and Resolution in Times of Crisis Between Tradition and Innovation: The COVID-19 Catalytic Crisis**", p. 2; Oger-Goss / Hakim, "**Chapter 16: The United States Policy Response to COVID-19 and Its Potential Impact on ISDS Claims**", pp. 371-372.

[656] Arbitral tribunals and institutions have taken diverse and adaptive measures in response to the new reality brought on by the COVID-19 pandemic.

More importantly, for the purposes of this thesis, the pandemic gave rise to a significant wave of investment disputes. Foreign investors, adversely impacted by emergency state measures and regulatory restrictions, initiated numerous claims against host states, many of which remain pending or at pre-arbitration stage. In this context, the legal doctrines of necessity and *force majeure* have regained prominence as central defenses invoked by states in investment arbitration.[657]

2. *Force Majeure* as a Defence against Foreign Investors' Claims

The *force majeure* and necessity defenses are among the most frequently cited by scholars when considering the possible arguments a state may raise in response to investor claims stemming from COVID-19-related measures.[658] Additionally, treaty carve-outs,

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Many institutions have enhanced their digital infrastructure, with some adopting electronic filing as the default procedure: International Centre for Settlement of Investment Disputes, "ICSID Makes Electronic Filing its Default Procedure", 13.03.2020, https://icsid.worldbank.org/news-and-events/news-releases/icsid-makes-electronic-filing-its-default-procedure?CID=359 (last accessed: 14 July 2025); The London Court of International Arbitration, "LCIA Services Update: COVID-19", 18.03.2020, https://www.lcia.org/lcia-services-update-covid-19.aspx (last accessed: 14 July 2025).

Additionally, an increasing number of institutions have issued detailed guidelines aimed at mitigating the impact of the pandemic on arbitral proceedings and ensuring procedural continuity: International Chamber of Commerce, "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic", 09.04.2020, https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic-portuguese-version/ (last accessed: 14 July 2025); International Centre for Settlement of Investment Disputes, "A Brief Guide to Online Hearings at ICSID", 24.03.2020, https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid (last accessed: 14 July 2025); The London Court of International Arbitration, "Message from the Institutions: Arbitration and COVID-19", 16.04.2020, https://www.lcia.org/News/message-from-the-institutions-arbitration-and-covid-19.aspx (last accessed: 14 July 2025).

[657] Bratu, "**O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]**", pp. 39-41; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", pp. 47-49; Inan, "**Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?**", pp. 134, 141.

[658] Bratu, "**O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]**", pp. 39-41; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", pp. 47-49; Inan, "**Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?**", pp. 134, 1441; COLLINS David, "Chapter 10 Responses to the COVID-19 Pandemic and Customary Law Defences: Force Majeure and the State of Necessity", International Investment Law and the Pandemic, Nijhoff International Investment Law Series, Brill | Nijhoff, 2024, vol. 26, pp. 175-192, p. 177.

especially those addressing public health, may also come into play. These defenses will be examined in this order.

Force majeure may be invoked by states as a defense when investor claims arise from the damage and disruption caused by pandemic-related actions.

In this context, a two-fold analysis is required: one concerning *force majeure* under CIL, and the other concerning contractual *force majeure*, which depends on the existence of a relevant clause in the investment contract or the applicable domestic law.

Regarding *force majeure* under CIL, the state must demonstrate that the breach of its treaty obligations was caused by an irresistible force or an unforeseen event that was beyond its control and rendered the performance of its obligations materially impossible.[659] Additionally, the state must not have contributed to the situation or assumed the risk of its occurrence.[660]

However, it appears that it would be difficult for states to argue that the pandemic made it impossible for them to perform their treaty obligations. This difficulty arises from several considerations.

First, the defining element of *force majeure* is that performance must be absolutely and materially impossible, not merely significantly more burdensome.[661] Even if fulfilling the obligation becomes extremely difficult or costly, the defense does not apply unless impossibility is established. This is a high and rarely met threshold the application of which will depend on the nature of the obligation in question.[662] The nature of treaty

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[659] 1.A.
[660] 1.A.4.
[661] Bratu, "**O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]**", pp. 39-40; Inan, "**Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?**", p. 138; Accaoui Lorfing, "**Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure**", p. 52.
[662] Inan, "**Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?**", p. 139.

obligations also complicates matters, as many of them are regulatory in nature. For instance, how could it be materially impossible for a state to provide fair and equitable treatment to a foreign investor? Such obligations do not typically require physical performance and therefore do not easily give rise to a claim of impossibility.

Moreover, *force majeure* presupposes an involuntary breach triggered by an external, uncontrollable event.[663] While states clearly acted in response to the COVID-19 pandemic, they did so through deliberate policy decisions, implementing lockdowns, restricting travel, and enacting emergency regulations. These actions were taken knowingly and purposefully in pursuit of public health objectives. Accordingly, the breach of treaty obligations was not the result of an irresistible force in the strict sense, but a conscious choice made under challenging circumstances.[664] This aspect makes *force majeure* under CIL a difficult fit, whereas the necessity defense, which is based on balancing conflicting essential interests, may provide a more appropriate legal justification.

Another major hurdle is the requirement that the state not have contributed to the *force majeure* situation. This element is vague and open to interpretation. Questions arise as to whether a poorly funded healthcare system or a delayed governmental response to the outbreak could amount to contribution, thereby precluding reliance on the defense.[665] Similarly, measures that were well-intentioned but ineffective in practice may also call into question whether the state genuinely lacked control over the situation. These ambiguities significantly raise the bar for invoking *force majeure* successfully.

In addition, there is the question of unforeseeability. While pandemics are traditionally categorized alongside war and natural disasters as unforeseen events, not all commentators agree. Although the COVID-19 pandemic was unprecedented in terms of

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[663] Bratu, "**O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]**", p. 39.
[664] Inan, "**Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?**", pp. 139-140.
[665] **Ibid.**, pp. 140-141.

its global scale and severity, recent decades have seen numerous outbreaks, including Severe Acute Respiratory Syndrome ("**SARS**"), Middle East Respiratory Syndrome ("**MERS**"), Influenza A (H1N1) Virus ("**H1N1**"), and Ebola Virus Disease ("**Ebola**"), that arguably made another pandemic foreseeable.[666] This perspective challenges the assumption that COVID-19 was entirely beyond anticipation and complicates the application of the *force majeure* defense. Nevertheless, while pandemics themselves are not unprecedented, it would be overly rigid to assert that states could have foreseen the specific magnitude, impact, and systemic disruption caused by COVID-19.[667]

A relevant procedural illustration of this issue appears in *Julio Miguel Orlandini-Agreda and others v. Bolivia*, the first known COVID-related investment arbitration case.[668] In that proceeding, the respondent state requested a suspension of the time limit for filing its statement of defense, invoking COVID-19 as a *force majeure* event.[669] Although this did not concern the merits of the case but rather a procedural issue, the tribunal's treatment of the request still provides insight. The claimants objected to the extension, arguing that COVID-19 was no longer unforeseeable by the date of the request, 23 March 2020, and contended that the government had been aware of the emerging threat at least since January 2020.[670]

While the tribunal did not expressly rule on whether COVID-19 constituted a *force majeure* event, it dismissed the request, finding that the proceedings could continue without impediment due to the availability of remote communication technologies.[671] Although the tribunal avoided taking a definitive stance on the legal characterization of

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[666] Collins, "**Chapter 10 Responses to the COVID-19 Pandemic and Customary Law Defences: Force Majeure and the State of Necessity**", p. 179.
[667] Accaoui Lorfing, "**Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure**", p. 50.
[668] Pantelaki, "**Defenses Against Investment Treaty Claims in Pandemic Times Fitting New Trends Into Old Standards**", pp. 51-52; CARVOSSO Rhys, "The Role of Disasters in Investment Arbitration", Yearbook of International Disaster Law Online, vol. 3, no. 1, 2022, pp. 374-404, p. 379.
[669] *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. The Plurinational State of Bolivia*, PCA Case No. 2018-39, Procedural Order No. 7 (Respondent's Request for Suspension of the Time-limit for the Submission of its Statement of Defense), 10 April 2020, paras. 4, 9-22.
[670] **Ibid**., paras. 23-33.
[671] **Ibid**., paras. 34-42.

COVID-19 as *force majeure*, the decision implicitly suggests that unless there is a clear and demonstrable impossibility, tribunals may be reluctant to accept *force majeure*, even in procedural contexts. Nevertheless, because the decision concerned a procedural matter rather than the substantive application of *force majeure* under CIL, it offers limited guidance on how future tribunals might approach the defense in the context of COVID-related investment disputes.

Finally, there is the requirement of irresistibility.[672] It could be argued that no state could have prevented the virus from entering its territory, but some may question whether governments could have slowed its spread or managed it more effectively.[673] The asymptomatic transmission characteristic of COVID-19 makes it distinct from earlier pandemics like the 2002 SARS outbreak, where symptoms were more visible and containment arguably more feasible. For this reason, the condition of irresistibility may be somewhat easier to satisfy than the others, though it still imposes a significant evidentiary burden.[674]

In conclusion, although pandemics are often cited as classic examples of *force majeure* events under contract law, the application of the *force majeure* defense under CIL appears particularly difficult in the context of COVID-19.[675] The high threshold for material impossibility, the voluntary nature of state responses, the vague standard for non-contribution, the contested nature of unforeseeability, and the demanding requirement of irresistibility all combine to make *force majeure* an unlikely basis for exonerating states from treaty breaches during the pandemic. The necessity defense, which focuses on a

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[672] Collins, "**Chapter 10 Responses to the COVID-19 Pandemic and Customary Law Defences: *Force majeure* and the State of Necessity**", p. 179.
[673] Accaoui Lorfing, "**Chapter 3: Tools of International Investment Agreements and Investment Contract: National Security Interest and Force Majeure**", pp. 51-52.
[674] **Ibid**., p. 51.
[675] ABDEL WAHAB Mohamed S., "Chapter 5: The Protection Equilibrium in ISDS: Strategic Considerations and Realistic Expectations in Times of Crisis and Beyond", International Arbitration and the COVID-19 Revolution, eds. Maxi Scherer, Niuscha Bassiri, 2020, pp. 75-108, p. 99; CHAISSE Julien, "Both Possible and Improbable—Could COVID-19 Measures Give Rise to Investor-State Disputes?", Contemporary Asia Arbitration Journal, vol. 13, City University of Hong Kong Centre for Chinese and Comparative Law Research Paper Series Paper No. 2020/019, no. 1, 2020, pp. 99-184, p. 158.

proportional response to an essential threat, may ultimately prove to be the more viable avenue for states seeking to justify their actions under international investment law.

Regarding *force majeure* in the contractual context, states may have a comparatively stronger basis for invoking the defense under contract law. This is primarily because contractual *force majeure* relies heavily on the terms of the specific clause negotiated and agreed upon by both parties, thereby reflecting their mutual allocation of risks.[676] Where such a clause exists, its interpretation will generally be governed by the applicable domestic law of the contract. Even in the absence of a specific clause, most legal systems provide gap-filling mechanisms that allow for the application of domestic doctrines such as impracticability or frustration of purpose.

The critical distinction here is between the function of *force majeure* under contract law and under CIL. In contract law, *force majeure* often serves as a balancing tool between two equal parties, aimed at distributing the burdens of unforeseen external events in a fair and equitable manner.[677] By contrast, under CIL, *force majeure* operates as a strict exemption from international responsibility and imposes a much higher threshold, often requiring objective impossibility rather than mere commercial impracticability.[678]

The practical effect of this softer standard under contract law, however, depends on whether arbitral tribunals clearly distinguish between the contractual and international legal frameworks. As commentators have noted, the standards applicable to contractual *force majeure* should be treated separately from those under international law, not only in terms of the substantive conditions, but also in how risks are allocated and the scope of the defense is framed.[679]

While some tribunals have maintained this distinction in non-COVID contexts, applying the appropriate standard based on the governing law of the contract, others have

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[676] Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 154.
[677] **Ibid**.
[678] **Ibid**., pp. 142-149.
[679] Zrilic, "**Armed Conflict as *Force majeure* in International Investment Law**", p. 46; Wang / Shan, "**Force Majeure and Investment Arbitration**", p. 154.

blurred these lines. A particularly problematic example is *Autopista Concesionada de Venezuela v. Venezuela*. In that case, which arose from a concession agreement containing a *force majeure* clause, the tribunal acknowledged that the clause was to be interpreted according to Venezuelan law.[680] Nevertheless, it held that international law would prevail in the event of a conflict with domestic legal standards.[681] More concerning was the tribunal's treatment of the impossibility requirement: it concluded that there should be no difference between the standards of impossibility under Venezuelan law and international law, without offering a compelling justification for merging the two.[682]

This approach is inappropriate. Where a contract includes a *force majeure* clause governed by a clearly applicable domestic legal framework, there is no need to apply the stricter international law standard. Indeed, in this case, Venezuelan administrative law provided a more flexible standard, requiring only that the event impede normal performance of the contract under a standard of reasonable judgment, without requiring irresistibility.[683] By applying the international law threshold, the tribunal effectively raised the bar beyond what was contemplated by the applicable domestic law, undermining the equal footing of the contracting parties. This fusion of standards not only disregards the parties' contractual autonomy but also introduces an unjustified asymmetry between the state and the private investor, even though they are parties to the contract on equal terms.

Other tribunals (as discussed above) have more carefully preserved the distinction between *force majeure* under domestic contract law and under international law.[684] They have recognized that the defense must be assessed according to the legal framework

[680] "*In conclusion, the Arbitral Tribunal holds that this dispute must be resolved by application of the Decree Law 138 and Executive Decree Nr. 502 (pursuant to the first sentence of Article 42(1)) and, for matters not covered by such decrees, by any other pertinent rule of Venezuelan law (pursuant to the second sentence of Article 42(1)). Moreover, it holds that international law prevails over conflicting national rules*.": *Aucoven v. Venezuela*, Award, para. 105.
[681] **Ibid**.
[682] **Ibid**., para. 123.
[683] **Ibid**., para. 121.
[684] e.g, *Enron v. Argentine Republic*, Award, para. 217; *Sempra v. Argentine Republic*, Award, para. 246.

chosen by the parties, and not artificially elevated to the stricter standard of international law when the context does not demand it.

3. Necessity as a Defence against Foreign Investors' Claims

As noted above,[685] due to the high threshold required to successfully invoke the defence of *force majeure*, particularly under CIL, and more importantly, because *force majeure* demands an objective *absolute impossibility*, the defence of necessity appears to be a better fit in the context of COVID-19. Indeed, the measures adopted by states during the pandemic were not involuntary acts, but rather the result of deliberate and difficult choices made under extraordinary circumstances.[686] The emphasis on the word *choice* is critical here, as it fails to meet the involuntariness requirement inherent in the *force majeure* defence.

For the defence of necessity to be successfully invoked under Article 25 of the ILC Articles on State Responsibility, several conditions must be met. First, the measure in question must have been adopted to safeguard an essential interest against a grave and imminent peril. Second, the measure must be the only means of protecting that interest. Additionally, the measure must not seriously impair essential interests of other states or of the international community as a whole. There are also limitations to the applicability of the necessity defence: the state invoking it must not have contributed to the situation that created the necessity, and the obligation in question must not preclude the invocation of necessity.

Regarding the requirement of an essential interest, the protection of public health and the continued provision of health services clearly qualify. It is widely accepted that

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[685] 1.A.2.
[686] Bratu, "**O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]**", p. 39; Inan, "**Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?**", pp. 139-140.

safeguarding human health and minimizing loss of life constitute essential interests within the meaning of Article 25.[687]

The first requirement, identifying the essential interest, is relatively straightforward in the context of COVID-19. However, it must also be shown that this interest was threatened by a ”*grave and imminent peril*”. Given the global scale and serious health implications of the COVID-19 pandemic, including its mortality rate, it is evident that the virus constituted a grave peril.[688]

While there may be debate about the “*imminence*” of the peril, it is important to recall that imminence does not require that the threat be literally imminent or immediate. Rather, the peril must be real, clear, and approaching to a degree that warrants urgent action. Moreover, it would be unreasonable to expect states to wait until the peril became unmanageable before acting.[689] In fact, a failure to act in time could have exposed states to liability.

Considering that the WHO declared COVID-19 a public health emergency in January 2020 and that many states, particularly in Europe, began adopting emergency measures by March 2020, the imminence requirement appears to have been satisfied.[690] Therefore, the COVID-19 pandemic constituted a grave and imminent peril, thus falling within the scope of Article 25 of the ILC Articles.

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[687] Dolea, “**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**”, pp. 53-54; Cristani, “C**hapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International Investment Arbitration Cases**”, p. 71; Katsikis, “‘**Necessity’ due to COVID-19 as a Defence to International Investment Claims**”, p. 54; Inan, “**Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?**”, pp. 144-145.

[688] Dolea, “**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**”, pp. 53-54; Cristani, “**Chapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International Investment Arbitration Cases**”, p. 71; Katsikis, “‘**Necessity’ due to COVID-19 as a Defence to International Investment Claims**”, p. 59; Inan, “**Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?**”, p. 147.

[689] Katsikis, “‘**Necessity’ due to COVID-19 as a Defence to International Investment Claims**”, p. 59.

[690] **Ibid**.

The primary challenge in invoking the necessity defence in the context of COVID-19 lies in meeting the "*only way*" requirement.[691] This criterion has historically been the key reason why the defence was rejected in various other contexts, most notably in the Argentine economic crisis cases.[692] The interpretation of the "*only way*" requirement has varied significantly across tribunals, and this divergence has had a substantial impact on the success or failure of the defence. Some tribunals have adopted an overly rigid approach, setting the threshold so high that it renders the defence virtually inapplicable in practice.

In the context of COVID-19, states did not implement isolated measures; rather, the actions that affected foreign investors were typically part of broader policy packages aimed at protecting public health and general welfare.[693] Therefore, investment tribunals addressing COVID-related disputes under ISDS mechanisms must take this broader context into account and avoid assessing measures in isolation.[694] A narrow focus on individual acts risks mischaracterizing the rationale and necessity behind state conduct during an unprecedented public health crisis.

Moreover, if tribunals adopt the overly strict standard seen in some past decisions, where the mere existence of a theoretical alternative, even one that is clearly unfeasible in practice, is deemed sufficient to defeat the necessity defence, then no state would be able to successfully invoke this defence. This is particularly problematic in the context of public health, where policy responses are necessarily comprehensive and where, at least on paper, one may always identify theoretical alternatives.

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[691] Bratu, "**O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]**", p. 41.
[692] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 55.
[693] Inan, "**Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?**", p. 149.
[694] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 175-176.

Instead, tribunals should adopt a more pragmatic and reasonable approach.[695] While the necessity defence does impose a high threshold, requiring that the measure be the only means of protecting an essential interest, the proper application of this criterion must reflect the intent and practical realities underpinning it.[696] Specifically, tribunals should assess whether any purported alternative was actually feasible and available at the time the state adopted the challenged measure.[697] Only if a viable alternative existed under those specific circumstances should the state be precluded from relying on the necessity defence.

Lastly, it is important to emphasize that this approach does not require tribunals to second-guess or substitute their judgment for that of the state in terms of public health policy choices.[698] Rather, the inquiry is a limited one: to determine whether a genuine and feasible alternative existed that could have been adopted without resulting in a breach of the international obligation in question.[699]

Another requirement for the successful invocation of the necessity defence is that the measure in question must not seriously impair the essential interests of a third state or the international community as a whole. However, this condition does not appear to pose a significant obstacle for states seeking to justify COVID-related measures under the necessity defence. It is unlikely that the measures adopted during the pandemic impaired the essential interests of third states, on the contrary, most states implemented similar restrictions in response to the global health crisis.

Moreover, the measures in question cannot reasonably be seen as harming the essential interests of the international community. Rather, their primary objective was to

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[695] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 60; Inan, "**Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?**", p. 149.
[696] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 62.
[697] **Ibid**., p. 60.
[698] **Ibid**., p. 63.
[699] **Ibid**.

limit the spread of the virus, both domestically and across borders, thereby supporting, rather than undermining, the collective interest in global public health.

In the context of ISDS, the relevant question becomes whether the harm caused to a foreign investor's interests could amount to an impairment of a third party's essential interest. However, it is highly questionable to characterize the private economic interests of a foreign investor as equivalent to a state's essential interest.[700] While investor rights are protected under international investment agreements, they do not typically rise to the level of *essential interests* within the meaning of Article 25 of the ILC Articles.

In any case, the balancing exercise[701] inherent in the necessity defence would likely weigh in favor of the host state. The protection of public health, especially during a global pandemic, would generally outweigh the economic interests of foreign investors, particularly where the measures taken were proportionate, temporary, and aimed at mitigating an urgent public health threat.

Under Article 25(2) of the ILC Articles, two additional conditions must be satisfied for the necessity defence to apply. One of these is the non-contribution requirement, which raises concerns similar to the corresponding requirement under the defence of *force majeure*. While there is general consensus that only a *substantial contribution* by the state to the situation of necessity will bar the invocation of the defence, there is no uniform agreement on what precisely constitutes such a substantial contribution.[702]

In the context of COVID-19, the key question is whether states acted promptly and with due diligence.[703] For example, some may question whether a delay of several weeks,

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[700] Manton, **Necessity in International Law**, pp. 186-187; Cristani, "**Chapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International Investment Arbitration Cases**", p. 65.

[701] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 56; Manton, **Necessity in International Law**, p. 178.

[702] Cristani, "**Chapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International Investment Arbitration Cases**", p. 72.

[703] Bratu, "**O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]**", p. 41; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 67.

between the WHO's pandemic declaration and the adoption of measures, amounts to a substantial contribution.[704] However, tribunals must be cautious not to impose unrealistically high expectations on states, especially given the unprecedented nature of the crisis.[705] It is crucial that tribunals avoid the risk of hindsight bias and evaluate state conduct based on the information that was available at the time the measures were adopted.[706]

Importantly, a uniform standard should not be applied to all states. Tribunals must engage in a case-by-case analysis to determine whether a particular state acted with sufficient diligence, taking into account the specific circumstances it faced.[707] For example, a state might reasonably explain a delayed response by referring to geographic or climatic factors that initially reduced the urgency of adopting restrictive measures.[708]

Scholars also emphasize that this assessment is inherently technical, often involving scientific data and epidemiological projections.[709] Therefore, tribunals may need to rely on expert testimony and scientific evidence to evaluate whether a state's actions were timely and appropriate. Nevertheless, it must be reiterated that such evaluations must be conducted from the perspective of the circumstances as they existed at the time, not with the benefit of hindsight.[710]

The final criterion, more accurately, an exception, under Article 25(2)(b) of the ILC Articles is that the obligation in question must not explicitly exclude the invocation of the necessity defence. In this respect, the COVID-19 context does not introduce any fundamentally new considerations. The key question remains whether investment

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704 Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", pp. 67-68.
705 **Ibid**., p. 68.
706 Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 176.
707 Cristani, "**Chapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International Investment Arbitration Cases**", p. 72.
708 Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", s. 68.
709 **Ibid**.
710 Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 176.

protection obligations undertaken by states under international investment treaties exclude the applicability of the necessity defence.

While some scholars argue that such obligations are incompatible with invoking necessity,[711] this position appears unconvincing. Excluding recourse to a defence as fundamental and well-established as necessity would require clear and express wording in the treaty text.[712] In the absence of such language, it is not reasonable to interpret investment treaties or the ISDS framework as implicitly precluding reliance on necessity.

Accordingly, unless a specific treaty provision expressly rules out the application of the necessity defence, it should be considered available in principle. Therefore, if all other conditions for invoking necessity are satisfied, tribunals should not hesitate to uphold the defence.

4. Treaty Exception Clauses and their Interaction with *Force majeure* and Necessity Defences under CIL

In the context of the COVID-19 pandemic, states may invoke treaty-based exceptions to justify measures challenged by foreign investors under investment treaties. In doing so, they may rely on broadly worded public interest carve-outs[713] or, more specifically, on clauses related to the protection of public health.[714] In such cases, it is crucial to clearly distinguish the operation of these treaty exceptions from the CIL defences of necessity and *force majeure*.

As discussed above, investment tribunals have not always drawn a clear line between treaty-based exceptions and CIL defences.[715] In several cases, tribunals have

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[711] Reinisch, "**Necessity in International Investment Arbitration— An Unnecessary Split of Opinions in Recent ICSID Cases?**", p. 205.
[712] 1.A.6.
[713] *E.g.*, Article XX of the General Agreement on Tariffs and Trade (GATT 1947).
[714] *E.g.*, Article 9.11 of the Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China: "(…) *4. Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section*. (…)"
[715] 1.C.4.

blurred the distinction, applying the conditions and logic of CIL defences to the interpretation of treaty clauses, thereby conflating distinct legal frameworks.

However, it is important to recognize the conceptual and functional differences between the two. Treaty exceptions, by their very wording and legal effect, function as carve-outs from the treaty's substantive obligations. If such a clause is found to be applicable, it means that the treaty obligation does not apply in the first place, there is no breach to assess. In such cases, the tribunal's role is limited to determining whether the clause covers the measure in question; if it does, there is no need to proceed to a breach analysis.

By contrast, if the treaty exception is found not to apply, and the tribunal concludes that a breach of an investment obligation has occurred, then the CIL defences, such as necessity or *force majeure*, become relevant. These operate as secondary rules, assessing whether the wrongful act is nonetheless excused due to extraordinary circumstances, thereby precluding the wrongfulness of the breach.

5. Tribunal Treatment and Emerging Practice

Although COVID-19 first emerged in early 2020, as of the date of this thesis, there remains a limited number of ISDS cases directly related to pandemic-related state measures. At present, the majority of disputes in which COVID-19 has been raised arise in the context of commercial arbitration, rather than treaty-based investor-state arbitration. Nonetheless, it is reasonable to expect an increase in ISDS claims in the coming years, particularly as more foreign investors initiate proceedings or serve notices of intent and requests for arbitration, many of which remain at the pre-arbitration stage.[716]

[716] A recent example is the notice of dispute filed by a Singaporean company against Panama under the Singapore-Panama Free Trade Agreement (FTA) concerning the cancellation of a planned power plant. The investor claims it obtained a license in 2018, but the host state delayed, obstructed, and politically interfered with the project. The Covid-19 pandemic further stalled progress, and although an extension was granted, a portion of the project's capacity was reassigned to other companies. The investor's license was ultimately revoked, prompting it to initiate investor-state dispute settlement (ISDS) proceedings, alleging expropriation and unfair treatment. The dispute is expected to proceed following the six-month cooling-off period.

Thus far, the pandemic has triggered significantly more commercial disputes than ISDS cases. However, COVID-19 presents an important test case for future investment tribunals. Much like the wave of claims that followed the Argentine economic crisis, COVID-19 is likely to generate multiple arbitrations concerning similar state measures, adopted at roughly the same time and in comparable contexts. This raises several important legal questions that tribunals will be called upon to address. Tribunals will likely be asked to evaluate public health justifications advanced by states, whether under CIL defences (such as necessity and *force majeure*) or under treaty-based non-precluded measures clauses.[717]

There is also a procedural dimension: tribunals have already begun adapting to post-pandemic realities through remote hearings, electronic submissions, and other innovations that reflect the evolving dispute resolution environment.[718]

More fundamentally, COVID-19 may signal a shift in how investment tribunals approach public interest justifications, particularly in cases involving emergency measures.[719] It will serve as a key test of whether tribunals are capable of clearly distinguishing between treaty exceptions and CIL defences, both in form and legal consequence. Given the global scale and unforeseen nature of the pandemic, tribunals may

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For the analysis *see* Andrew Larkin, "Singaporean investor submits notice of dispute to Panama", **IAReporter**, 10.02.2025, https://www.iareporter.com/articles/singaporean-investor-submits-notice-of-dispute-to-panama/.

717 Bratu, "**O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]**", p. 42; Lavranos / Mazlom, "**The Investment Treaty Implications of COVID-19 Responses by States**", pp. 25-30.

718 Bratu, "**O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]**", pp. 41-42; BESERMAN BALCO María Solana, "COVID-19 and new ways of doing arbitration: are they here to stay?", Revista Brasileira de Arbitragem, eds. João Bosco Lee, Flavia Foz Mange, 2020, pp. 129-144; BALTAG Crina, "Chapter 17: Concluding Remarks: COVID-19 and Investments – Eyes on the Future", Balancing the Protection of Foreign Investors and States Responses in the Post-Pandemic World, eds. Yulia Levashova, Pascale Accaoui Lorfing, Kluwer Law International, 2022, pp. 395-398, p. 396.

719 Bratu, "**O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]**", p. 43; Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", pp. 61-62.

also be prompted to adopt a more flexible approach toward the margin of appreciation afforded to states when responding to public health crises.[720]

Looking ahead, it will be important to observe whether tribunals take these distinctions into account and apply the CIL defences of necessity and *force majeure* in a more realistic and balanced manner. Given the scientific uncertainty surrounding the pandemic, and tribunals' own limited expertise in such matters, it is possible that we will see greater deference to state discretion in assessing the necessity and proportionality of public health measures.

In the longer term, COVID-19 may also influence treaty drafting practices, potentially leading to the inclusion of more explicit public health exceptions and a broader recognition of regulatory autonomy.[721] Such changes are more likely if tribunals fail to afford states adequate deference and continue to apply impractically high standards to the invocation of *force majeure* and necessity under CIL.

B. Economic and Financial Crises

Economic and financial crises have historically tested the boundaries of state defences under international investment law, particularly with respect to necessity and *force majeure*. This section begins by reviewing the landmark Argentine crisis of 2001–2002, which produced a series of influential and often contradictory ISDS awards. It then

[720] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", pp. 61-62; Asteriti, "**Chapter 2: State Measures in Response to the COVID-19 Pandemic: A Review**", p. 29; NAIR Mahima / LAWRENCE Threcy, "Unravelling the Paradox of 'Necessity' under Investment Arbitration", Cambridge International Law Journal, 18.11.2020, https://cilj.co.uk/2020/11/18/unravelling-the-paradox-of-necessity-under-investment-arbitration/ (last accessed: 27 July 2025); STEPHENS-CHU Giséle, "Chapter 8: Discrimination Claims by Foreign Investors in the Aftermath of the COVID-19 Pandemic", Balancing the Protection of Foreign Investors and States Responses in the Post-Pandemic World, eds. Yulia Levashova, Pascale Accaoui Lorfing, Kluwer Law International, 2022, pp. 171-190, p. 189; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 69.

[721] Stephens-Chu, "**Chapter 8: Discrimination Claims by Foreign Investors in the Aftermath of the COVID-19 Pandemic**", p. 189; BEYER Vincent / EL-KADY Hamed, "Chapter 9: Accelerating Substantive IIA Reform: Policy Perspectives in Times of a Global Pandemic", Balancing the Protection of Foreign Investors and States Responses in the Post-Pandemic World, eds. Yulia Levashova, Pascale Accaoui Lorfing, 2022, pp. 191-202, pp. 191-193; Baltag, "**Chapter 17: Concluding Remarks: COVID-19 and Investments – Eyes on the Future**", p. 397.

explores the legal uncertainties and inconsistencies in arbitral reasoning that emerged from those cases. Drawing on those experiences, the section identifies key lessons for both states and tribunals, and considers how these insights might guide the application of emergency defences in future financial upheavals.

1. Precedents: Argentina in years 2001-2002

The economic and financial crisis that struck Argentina in 2001 has become one of the most frequently cited precedents in ISDS jurisprudence concerning state emergencies. Following the collapse of Argentina's economy, a series of investment claims were filed by foreign investors, primarily under the Argentina–U.S. BIT, challenging the state's emergency measures. In response, Argentina invoked the necessity defence under CIL, seeking to justify its actions.

However, tribunals were generally reluctant to accept the defence, applying a strict and arguably unrealistic threshold. The reasons for rejecting the defence varied. Some tribunals did not accept economic survival as an "*essential interest*", while others rejected the claim on the basis that Argentina had contributed to the crisis and was therefore barred from invoking necessity under Article 25(2)(b) of the ILC Articles. Moreover, several tribunals relied heavily on the "*only way*" requirement, interpreting it narrowly and demanding that no alternative measures be available, even if such alternatives were merely theoretical and not practically feasible.

2. Legal Issues and Inconsistent Caselaw

The ISDS cases following Argentina's crisis revealed deep inconsistencies in how tribunals approached the same legal standards, despite relying on identical legal instruments, particularly the Argentina–U.S. BIT.[722]

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[722] Goldsman / López Forastier, "**Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis**", pp. 666-668; MARTIN Antoine, "Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-precluded Measures and the Doctrine of Necessity under Customary International Law", Journal of International Arbitration, vol. 29, no. 1, 2012, pp. 49-70, p. 50.

Tribunals diverged significantly in how they interpreted the non-contribution requirement.[723] Some tribunals adopted a broad view, concluding that Argentina's mix of internal and external factors contributed to the crisis, and therefore rejected the defence without further inquiry. In contrast, a few tribunals adopted a more reasonable and nuanced fault-based approach, looking for a clear and negligent act by Argentina that substantially caused the crisis before denying the defence.

There was also disagreement regarding what qualifies as a grave and imminent peril.[724] Some tribunals accepted that Argentina faced a severe economic crisis but held that the situation had not yet reached a level threatening state collapse, thus failing to meet the threshold. This interpretation was criticized as unrealistic and inappropriate, particularly given the social unrest and collapse of basic state services at the time.

The "*only way*" element proved particularly problematic.[725] Certain tribunals concluded that, because theoretical alternatives existed, even if less effective, Argentina's measures did not meet the "*only way*" requirement. This overly rigid interpretation effectively rendered the necessity defence impossible to invoke, ignoring the practical constraints and urgent decision-making required during a national crisis.

Another contested issue was whether economic emergency constitutes an "*essential interest*" under Article 25.[726] Some tribunals took an outdated view, equating "*essential*

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[723] Alvarez-Jiménez, "**Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law**", pp. 160-174; Goldsman / López Forastier, "**Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis**", pp. 664-666; Tomka, "**Chapter 34: Defenses Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties**", pp. 490-491; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", pp. 65-67; Cristani, "**Chapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International Investment Arbitration Cases**", p. 68.
[724] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", pp. 55-57.
[725] Goldsman / López Forastier, "**Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis**", pp. 660-662; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", pp. 59-60.
[726] Tomka, "**Chapter 34: Defenses Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties**", pp. 487-488; Cristani, "**Chapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International**

interest" exclusively with state survival, thereby excluding economic stability as a legitimate interest. This interpretation has been criticized for being out of touch with contemporary understandings of state interests, particularly given the socio-economic consequences of financial collapse.

In addition to substantive inconsistencies, several tribunals also blurred the lines between treaty-based exceptions (such as non-precluded measures clauses) and CIL defences like necessity.[727] In some cases, tribunals merged the two frameworks, applying the same legal standards to both or rejecting them together on the basis that they are subject to identical conditions.

By contrast, annulment committees and academic commentators have emphasized that treaty exceptions and CIL defences are distinct in nature and function. Treaty exceptions operate as carve-outs, precluding the application of treaty obligations altogether if invoked successfully. In contrast, CIL defences apply after a breach has been established, potentially precluding the wrongfulness of that breach under international law.

However, not all tribunals made this distinction clear, contributing to doctrinal confusion and inconsistent reasoning.

These shortcomings in the Argentina cases serve as a cautionary tale for how tribunals may approach similar defences in the COVID-19 context, underscoring the need for clarity, consistency, and contextual sensitivity.

Investment Arbitration Cases", p. 69; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", pp. 50-54.

[727] Goldsman / López Forastier, "**Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis**", pp. 652-658; Martin, "**Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-precluded Measures and the Doctrine of Necessity under Customary International Law**", pp. 52-54.

3. Lessons Learned

The divergent conclusions reached by tribunals dealing with the same legal instruments and similar factual circumstances, as seen in the aftermath of the Argentine crisis, highlight a core issue within the ISDS system: the problem of inconsistent case law.[728] This inconsistency is, to some extent, inherent in the system, which lacks a binding precedent mechanism.[729] No arbitral tribunal is formally bound by the reasoning of others, and there is no appellate or supervisory body capable of ensuring uniformity or coherence in legal interpretations.[730]

In light of this structural limitation, it is imperative for future tribunals to strive for greater consistency, particularly in the application of CIL defences such as necessity. As a fundamental legal defence intended to be available in truly exceptional circumstances, necessity must be treated with both caution and reason. This does not mean that tribunals should adopt an overly lenient standard simply because a crisis exists.[731] However, it equally does not justify applying an excessively rigid threshold that renders the defence unusable in practice, reducing it to a theoretical construct without real-world effect.[732]

In this context, it is important for tribunals to adopt a modern understanding of what qualifies as an essential interest. The narrow view adopted by some tribunals, limiting essential interests to threats to the very survival of the state, is outdated and ill-suited to contemporary global challenges.[733] Economic survival, the maintenance of public order,

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[728] THANVI Ameyavikrama, "Chapter 1: Bringing Consistency to Investment Arbitration: Challenges and Reform Proposals", The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?, eds. Alan M. Anderson, Ben Beaumont, Kluwer Law International, 2020, pp. 9-32, p. 13; Forji, "**Drawing the Right Lessons from ICSID Jurisprudence on the Doctrine of Necessity**", p. 57.
[729] KAUFMANN-KOHLER Gabrielle, "Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture", Arbitration International, vol. 23, no. 3, 2007, pp. 357-378, pp. 368-373.
[730] For proposals on how to address inconsistency in ISDS *see* Thanvi, "**Chapter 1: Bringing Consistency to Investment Arbitration: Challenges and Reform Proposals**", pp. 23-31.
[731] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 62.
[732] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 179.
[733] Sloane, "**On the Use and Abuse of Necessity in the Law of State Responsibility**", pp. 486-487.

the protection of public health, and the functioning of core public services should all be recognized as essential interests for the purpose of the necessity defence.[734]

With respect to the "*only way*" requirement, tribunals should assess the entire package of measures adopted by a state, rather than isolating and scrutinizing only the measure challenged by the investor.[735] Furthermore, the mere existence of a theoretical alternative on paper should not automatically defeat the defence. Tribunals must examine whether the suggested alternatives were feasible, lawful, and available at the time the measures were adopted.[736] This is particularly relevant in economic crises, where multiple policy responses may exist, and denying the defence based on hypothetical alternatives risks undermining the state's discretion in managing emergencies.

The contribution requirement should likewise be applied with nuance. Most crises, including economic and public health emergencies, involve both internal and external contributing factors.[737] The mere fact that a state played some role in creating the conditions giving rise to necessity should not automatically bar the application of the defence.[738] A more appropriate approach is a fault-based standard, whereby the defence is precluded only if the state knowingly or negligently contributed to the situation.[739] This interpretation better aligns with the purpose of the non-contribution requirement, which is to prevent abuse of the defence, not to deny it in every case involving internal factors.

Finally, tribunals must clearly distinguish between non-precluded measures clauses in treaties and CIL defences. The two serve different legal functions. Treaty exceptions,

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734 Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 170.
735 For tribunals focusing solely on the measure challenged *see e.g.*, *Suez v. Argentine Republic*, Decision on Liability, para. 238.
For tribunals considering the whole package of measures adopted to face a crisis *see e.g.*, *Urbaser SA v. Republic of Argentina*, Award, para. 716.
736 VIÑUALES Jorge E., "Defence Arguments in Investment Arbitration", ICSID Reports, vol. 18, 2020, pp. 9-108, p. 84.
737 *Unión Fenosa Gas v. Egypt*, Award, para. 8.60.
738 SALMON Jean, "Faut-il codifier l'état de nécessité en droit international?", Essays in international law in honour of Judge Manfred Lachs, 1984, pp. 235-270, p. 264.
739 Some authors propose a third approach where the determination should be made according to the primary rule: Sloane, "**On the Use and Abuse of Necessity in the Law of State Responsibility**", p. 475.

such as NPM clauses, operate as carve-outs: if the clause is applicable, the relevant substantive obligations under the treaty do not apply, and there is therefore no breach. In contrast, CIL defences such as necessity operate as secondary rules: they come into play only after the tribunal finds that a breach has occurred, in order to determine whether the wrongfulness of that breach is precluded.[740]

There is a logical sequence to the application of these defences.[741] The tribunal must first determine whether the claim falls within the scope of the treaty and whether a substantive obligation exists and has been breached. If a treaty-based exception applies, the analysis ends there. However, if no such clause applies and a breach is found, only then should the tribunal assess whether customary defences such as necessity or *force majeure* are available to preclude the wrongfulness of the state's conduct.

4. Application to Future Crises

It appears that the intersection of economic crises and the necessity defence will remain highly relevant in the coming years. This is due to the anticipated rise in ISDS disputes arising from both the Eurozone debt crisis and the post-COVID recovery phase.

The Eurozone debt crisis, which began in 2008, marked a period of severe financial instability in several European countries, characterized by the collapse of financial institutions, soaring government debt, and a sharp rise in bond yield spreads. The crisis peaked between 2010 and 2012 and was eventually mitigated through coordinated financial guarantees by European states and support from the IMF, driven by concerns over the potential collapse of the euro and broader financial contagion.

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[740] "*For the purposes of this proceeding, as explained below, it is not necessary to clarify this matter due to the fact that, as will be shown further ahead, Claimants did not prove that their investments in the Argentine Republic were adversely affected by the actions taken by the Argentine Government, which would make it pointless to decide whether the measures taken by Argentina and challenged by Claimants, were executed due to there being a*"*state of necessity,*" *which would extinguish the liability that could be attributed to Respondent*": *Metalpar v. Argentine Republic*, ICSID Case No. ARB/03/5, Award, 6 June 2008, para. 211.
[741] Sloane, "**On the Use and Abuse of Necessity in the Law of State Responsibility**", p. 481.

This crisis has already led to ISDS cases involving European states, adding to the body of jurisprudence initiated during the Argentine economic crisis.[742] These cases have brought renewed attention to the complex interaction between investment protection standards and sovereign debt governance. Given the harsh economic measures implemented by many states during the crisis, such as austerity programs, privatizations, and structural reforms, there remains a risk of further claims by foreign investors, once again creating tension between economic necessity and investor protection.[743]

Similarly, the post-COVID recovery phase may generate a new wave of ISDS claims. In the wake of the pandemic, many states introduced state aid schemes, subsidies, and stimulus packages to support economic recovery. When such measures are perceived to favor domestic companies, foreign investors may challenge them under investment treaties, particularly invoking non-discrimination or FET provisions. This raises a critical legal question: Can necessity be invoked to justify such post-crisis measures, even after the immediate peril has passed?

In this context, the applicability of the necessity defence becomes more complex. A central issue will be whether the grave and imminent peril requirement is still met during the recovery phase. The standard requires the peril to be "*clearly established*" and sufficiently imminent. Tribunals will need to assess whether a lingering economic vulnerability or risk of relapse qualifies as a continuing peril, and whether that justifies exceptional state measures that impact foreign investors. Even if a peril is established, another challenge arises: can a state justify unequal treatment between foreign and domestic investors based on such post-crisis necessity?

In addition to post-crisis measures, preventive and early state action raises further questions about the non-contribution requirement under Article 25(2)(b) of the ILC Articles. Some tribunals have adopted a strict approach, finding that early or proactive

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[742] OLMOS GIUPPONI M. Belén, "ICSID Tribunals and Sovereign Debt Restructuring-Related Litigation: Mapping the Further Implications of the Alemanni Decision", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, 2015, pp. 556-588, p. 556.
[743] **Ibid**., p. 558.

state measures contributed to the crisis and therefore disqualified the state from relying on the necessity defence.[744] This creates a problematic precedent, one that penalizes states for taking timely and responsible action, while potentially rewarding inaction.[745]

Such reasoning risks discouraging states from adopting preventive policies, particularly in areas where scientific and economic forecasting is central, such as climate change. Tribunals must avoid this problematic logic. A more appropriate approach is a fault-based standard: only where the state knowingly or negligently contributed to the situation giving rise to the necessity should the defence be barred.[746] Preventive action that is well-intentioned, scientifically supported, and carefully implemented should not be disqualified, as it reflects responsible governance rather than misconduct.

C. Climate and Environmental Concerns

As climate change and environmental degradation intensify, states are increasingly adopting urgent measures to protect ecosystems, public health, and long-term sustainability. These actions, while necessary, may affect foreign investments and trigger legal disputes under international investment agreements. This section examines the growing relevance of environmental emergencies in ISDS, exploring how states might invoke the necessity and *force majeure* defences in this context. It also considers whether current treaties sufficiently accommodate environmental imperatives and reviews recent trends toward more flexible and environmentally responsive treaty drafting.

1. The Growing Relevance of Environmental Emergencies

Climate change is no longer a distant or theoretical risk, it is now recognized as a global crisis that occupies a central place on the international agenda. Its significance is

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[744] *E.g.*, *CMS v. Argentina*, Award, para. 329.
[745] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", s. 167; Sloane, "**On the Use and Abuse of Necessity in the Law of State Responsibility**", pp. 489-490.
[746] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 180; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 64.

underscored by the findings of the Intergovernmental Panel on Climate Change[747] and reflected in major international agreements such as the Paris Agreement,[748] which demonstrate a growing global consensus on the urgency and scale of the threat.

Unlike other crises such as pandemics or financial collapses, climate change is primarily a slow-onset phenomenon. However, this does not mean its effects are only long-term or abstract.[749] On the contrary, we are increasingly witnessing acute environmental events, including wildfires, floods, and droughts, that cause immediate harm and demand swift policy responses.[750] These sudden manifestations of a long-term problem blur the line between gradual and imminent peril.

Climate change poses a cross-border threat to essential global interests such as biodiversity, public health, food and water security, and economic stability.[751] Its far-reaching impact compels governments to adopt bold and coordinated environmental measures, many of which affect foreign investments, particularly in carbon-intensive industries such as fossil fuels, mining, and heavy manufacturing.[752] As states increasingly

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[747] *See e.g.*, Intergovernmental Panel on Climate Change, "Climate Change 2023 Synthesis Report", A Report of the Intergovernmental Panel on Climate Change, thk. Hoesung Lee, The Core Writing Team, José Romero, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Geneva, Switzerland: Intergovernmental Panel on Climate Change, 2023.

[748] United Nations. *Paris Agreement*. Paris: United Nations Framework Convention on Climate Change, 2015. https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement.

[749] "Introduction", Investment Arbitration and International Climate Change Law: Revaluing Legitimate Expectations, ed. Thomas Lehmann, Kluwer Law International, 2025, pp. 1-30, pp. 1-2; BURSTEIN Brian D., "Green investment disputes: the interaction between investment arbitration and the climate change agenda", Revista Brasileira de Arbitragem, eds. João Bosco Lee, Flavia Foz Mange, 2020, pp. 95-125, p. 98.

[750] MAGNUSSON Annette, "New Arbitration Frontiers: Climate Change", ICCA Congress Series No. 20 (Sydney 2018): Evolution and Adaptation: The Future of International Arbitration, eds. Jean Engelmayer Kalicki, Mohamed Abdel Raouf, vol. 20, 2019, pp. 1010-1035, pp. 1011-1012.

[751] CASTINEIRA Eliseo / LEHMANN Thomas, "After Vattenfall: A Science-Based Proposal to Account for Climate Change and Biodiversity in Energy Arbitrations", ASA Bulletin, ed. Matthias Scherer, 2021, pp. 286-305, p. 286.

[752] "**Introduction**", pp. 2-3; Burstein, "**Green investment disputes: the interaction between investment arbitration** and the climate change agenda", p. 96; KELLER Moritz / KAPOOR Sunny / MOMAH Jacqueline, "Climate Change Litigation: The Types of Disputes, the Legal Challenges and the Role of Arbitration", SchiedsVZ | German Arbitration Journal, eds. Jörg Risse, Guenter Pickrahn, 2022, pp. 13-20, p. 13.

implement ambitious climate policies, including emissions caps, fossil fuel phase-outs, and carbon taxes, there is a growing risk of investor-state disputes.[753]

These measures, while vital for the global public interest, may be challenged under investment treaties, especially by investors affected by regulatory shifts.[754] As a result, climate change will become a critical testing ground for balancing environmental protection with investment protection norms under international law.[755]

The central question this thesis seeks to explore is whether such measures can be justified under the CIL defences of necessity or *force majeure*.[756] Specifically, can states legitimately rely on these defences to preclude international responsibility and avoid liability in ISDS proceedings? Or do these regulatory actions expose states to the risk of investment treaty claims, particularly for indirect expropriation or violations of FET obligations?

2. Necessity Defence in Environmental Context

Necessity is one of the key CIL defences that states may invoke to preclude liability in cases where a tribunal finds a breach of investment treaty obligations.[757] The existing

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[753] MOUAWAD Caline / WALTERS Gretta, "Chapter 4: Climate Science: A Role to Play at Every Stage of Investment Arbitration?", Investment Arbitration and Climate Change, eds. Annette Magnusson, Anja Ipp, Kluwer Law International, 2023, pp. 85-104, p. 85.

[754] "**Introduction**", p. 3; SPEARS Suzanne, "Chapter 9: Reconciling Human Rights and Investor Rights: The Case of Climate Change", Investment Arbitration and Climate Change, eds. Annette Magnusson, Anja Ipp, Kluwer Law International, 2023, pp. 207-242, p. 207.

[755] Castineira / Lehmann, "**After Vattenfall: A Science-Based Proposal to Account for Climate Change and Biodiversity in Energy Arbitrations**", p. 305; Keller / Kapoor / Momah, "**Climate Change Litigation: The Types of Disputes, the Legal Challenges and the Role of Arbitration**", p. 19; JEVREMOVIC PETROVIC Tatjana / KAZEEM Ilias, "Chapter 11: Climate Change-Related Investment Disputes: A Catalyst for Public Participation in International Investment Law?", The Future of Investor-State Dispute Settlement: Reforming Law, Practice and Perspectives for a Fast-Changing World, eds. Ben Beaumont, Fahira Brodlija, 2024, pp. 261-286, p. 266; Spears, "**Chapter 9: Reconciling Human Rights and Investor Rights: The Case of Climate Change**", pp. 208-209.

[756] To date, the relationship, and often tension, between states' right to regulate and the rights of foreign investors has primarily been examined by tribunals through the lens of public interest justifications and the police powers doctrine, rather than through the application of the necessity defence under customary international law: Mouawad / Walters, "**Chapter 4: Climate Science: A Role to Play at Every Stage of Investment Arbitration?**", p. 96.

[757] HIOUREAS Christina G. / HO Diem Huong / ZALEZNIK Daniel, "Thawing the 'Regulatory Chill' Effects of ISDS Claims", BCDR International Arbitration Review, ed. Nassib G. Ziadé, 2022, pp. 361-384,

jurisprudence on necessity, particularly in the context of economic crises, offers important lessons for future cases, including those involving environmental and climate-related measures.[758] While many of the general issues raised by the necessity defence (*e.g.*, whether the impairment of investor interests bars its use, or whether investment treaties implicitly or explicitly exclude the defence) apply across different contexts, climate-related disputes raise several unique and pressing questions, particularly with regard to specific elements of Article 25 of the ILC Articles on State Responsibility.

To begin with, it is unlikely that states will face significant difficulty in establishing that environmental protection constitutes an "*essential interest*" under Article 25(1)(a).[759] The notion of "*essential interest*" has already been interpreted broadly in past decisions, including the Argentine crisis cases, where economic stability was deemed sufficient, suggesting that state survival is not the only qualifying threshold.[760] Both ICJ jurisprudence and the ILC Commentary also support the inclusion of environmental protection, such as biodiversity, clean water, and atmospheric stability, as essential interests.[761]

The more challenging issue lies in satisfying the "*grave and imminent peril*" requirement. Due to its slow-onset nature, climate change may not always meet this threshold as traditionally interpreted. However, there is growing recognition that even long-term environmental threats may qualify as grave and imminent perils, provided that states support their actions with robust scientific evidence.[762] Moreover, tribunals should

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p. 370; REYNOLDS Jesse L., "Solar Geoengineering Could Be Consistent with International Law", Debating Climate Law, eds. Benoit Mayer, Alexander Zahar, Cambridge University Press, 2021, pp. 257-273, p. 272.

[758] Hioureas / Ho / Zaleznik, "**Thawing the 'Regulatory Chill' Effects of ISDS Claims**", p. 376.

[759] **Ibid**., s. 371; MARISI Flavia, "Chapter 3: Environmental Law Principles", Environmental Interests in Investment Arbitration, International Arbitration Law Library, Kluwer Law International, 2020, vol. 51, pp. 29-102, p. 76; DELLINGER Myanna, "Rethinking Force Majeure in Public International Law", Pace Law Review, vol. 37, no. 2, 2017, pp. 455-506, p. 494.

[760] Hioureas / Ho / Zaleznik, "**Thawing the 'Regulatory Chill' Effects of ISDS Claims**", pp. 376-377; Sloane, "**On the Use and Abuse of Necessity in the Law of State Responsibility**", p. 486.

[761] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, para. 53; ILC Articles Commentary, pp. 81-83.

[762] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 168-169; Hioureas / Ho / Zaleznik, "**Thawing the 'Regulatory Chill' Effects of ISDS Claims**", p. 372; Center for International Environmental

allow states to rely on current, peer-reviewed data to demonstrate that a concrete and quantifiable risk exists, even if its effects are expected to materialize over time.[763] A rigid approach that requires literal immediacy would be ill-suited to the realities of climate governance.

A further requirement under Article 25 is that the measure must be the "*only way*" to safeguard the essential interest. This presents a familiar difficulty, as seen in the context of economic crises. Environmental protection typically involves multiple policy tools, such as emissions trading, carbon taxes, renewable energy subsidies, or direct bans. Thus, tribunals must adopt a pragmatic and flexible approach, assessing whether the measure in question was the only feasible and effective option available under the circumstances, rather than demanding absolute exclusivity.[764] Rejecting the defence simply because a theoretical alternative existed on paper would unduly restrict the state's regulatory autonomy in managing complex environmental risks.

The non-contribution requirement under Article 25(2)(b) presents another challenge in the climate context. Given the cumulative and global nature of climate change, determining whether a specific state "*contributed*" to the peril is inherently complex.[765]

Law, "Overcoming International Investment Agreements as a Barrier to Climate Action: A Toolkit to Safeguard Fossil Fuel Measures from Investment Treaty Claims", 01.2024, p. 24, https://www.ciel.org/wp-content/uploads/2024/02/Overcoming-International-Investment-Agreements-as-a-Barrier-to-Climate-Action.pdf (last accessed: 29 July 2025).
"*That does not exclude, in the view of the Court, that a* "*peril*" *appearing in the long term might be held to be* "*imminent*" *as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable*.": *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, p. 42.

[763] In this regard, an approach distinct from that of the ICJ would be preferable. In the *Gabčíkovo-Nagymaros Project* case, despite the parties' extensive reliance on scientific and technical evidence, the Court refrained from engaging deeply with these scientific arguments, instead grounding its decision primarily in the legal obligations arising from the treaty and customary international law: D'ASPREMONT Jean / MBENGUE Makane Moise, "Strategies of Engagement with Scientific Fact-finding in International Adjudication", Journal of International Dispute Settlement, ed. Thomas Schultz, 2014, pp. 240-272, p. 254.

[764] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 176-178; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 60; Inan, "**Can States Successfully Resort to the Customary International Defences Against the Possible Claims Arising Out of COVID-19 Measures?**", p. 149.

[765] Burstein, "**Green investment disputes: the interaction between investment arbitration and the climate change agenda**", p. 111; Dellinger, "**Rethinking Force Majeure in Public International Law**", p. 492.

Major carbon-emitting countries have certainly played a role in accelerating the crisis. However, tribunals should assess this requirement with reference to the evidence available at the time the measures were adopted, not based on retrospective scientific knowledge.[766] Applying hindsight would unfairly penalize proactive governance.[767] Moreover, tribunals must avoid falling into a paradox: if high-emitting countries, which are under the greatest pressure to act, are barred from invoking necessity because of their historical emissions, this could lead to perverse outcomes, discouraging the very actors most urgently needed to implement effective climate policy.[768] Such an approach would undermine not only the equity principle in international law, but also the objectives of the international climate regime.

3. Potential Use of *Force majeure* in Environmental Context

Given the slow-onset nature of climate change, the *force majeure* defence is likely to play a limited role in ISDS proceedings.[769] However, *force majeure* may still be relevant in exceptional circumstances, particularly when sudden and unforeseen natural disasters, such as extreme floods, wildfires, or hurricanes, which are increasingly linked to climate change, disrupt state operations to the extent that compliance with international obligations becomes objectively impossible.[770] Even then, the application of *force majeure* in the ISDS context remains narrow, as states must demonstrate that the event directly prevented them from fulfilling a specific treaty obligation, rather than simply making it more burdensome.[771]

In contrast, the *force majeure* defence may have greater relevance in commercial arbitration, where contractual obligations are often more susceptible to disruption by

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[766] Hioureas / Ho / Zaleznik, "**Thawing the 'Regulatory Chill' Effects of ISDS Claims**", p. 372.
[767] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 176; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", pp. 60-61.
[768] Hioureas / Ho / Zaleznik, "**Thawing the 'Regulatory Chill' Effects of ISDS Claims**", p. 377.
[769] SAUL Roxanne, The implications of climate change upon the concept of force majeure and its use in marine environmental policies, (Thesis submitted for the Degree of MSc Biological Sciences in the University of Hull Tezi), The University of Hull, 2017, p. 22.
[770] Dellinger, "**Rethinking Force Majeure in Public International Law**", p. 482.
[771] Barysheva, "**Force Majeure in Energy Arbitration: Predicting the Unpredictable**", p. 74; Dellinger, "**Rethinking Force Majeure in Public International Law**", p. 484.

physical or logistical barriers caused by environmental catastrophes.[772] In commercial contexts, arbitrators may be more willing to consider severe hardship or temporary impossibility when evaluating claims, even if such circumstances fall short of the absolute impossibility required under CIL.

4. Treaty Evolution and Future Trends

In recent years, the growing global concern over environmental degradation and climate change has led to significant legal and policy developments, particularly in the field of international investment law.[773] There is a clear shift toward recognizing that states not only have the right, but also the duty, to adopt proactive environmental measures.[774] At the same time, a more balanced approach is emerging, one that seeks to reconcile the protection of foreign investors' rights with states' regulatory authority to safeguard the environment.[775]

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[772] Keller / Kapoor / Momah, "**Climate Change Litigation: The Types of Disputes, the Legal Challenges and the Role of Arbitration**", p. 17.

[773] "**Introduction**", p. 2; Burstein, "**Green investment disputes: the interaction between investment arbitration and the climate change agenda**", p. 96.

[774] GESSEL-KALINOWSKA VEL KALISZ Beata / FRONTCZAK Maja / PAPROTA Piotr, "Chapter 1: Types of State Action Leading to Climate-Related Investor Claims", Investment Arbitration and Climate Change, eds. Annette Magnusson, Anja Ipp, Kluwer Law International, 2023, pp. 7-42, p. 8; HENIN Paula F., "Innovating International Investment Agreements: A Proposed Green Investment Protocol for Climate Change Mitigation and Adaptation", Journal of International Arbitration, ed. Maxi Scherer, 2019, pp. 37-70, pp. 39-40; AGGARWAL Manish / KABRA Ridhi, "Chapter 7: Regulating for Climate Change Without Breaching Investment Treaties", Investment Arbitration and Climate Change, eds. Annette Magnusson, Anja Ipp, Kluwer Law International, 2023, pp. 165-178, p. 168.

[775] Burstein, "**Green investment disputes: the interaction between investment arbitration and the climate change agenda**", pp. 105-106; Jevremovic Petrovic / Kazeem, "**Chapter 11: Climate Change-Related Investment Disputes: A Catalyst for Public Participation in International Investment Law?**", pp. 265-269; BODEN Deger, "Chapter 42: Harmonious Interpretation of Investment Treaties and International Human Rights Instruments Considering the Climate Change", ICCA Congress Series No. 21 (Edinburgh 2022): Arbitration's Age of Enlightenment?, vol. 21, 2023, pp. 719-736, p. 736; Aggarwal / Kabra, "**Chapter 7: Regulating for Climate Change Without Breaching Investment Treaties**", p. 166.

One notable development is the increasing[776] inclusion of climate- and environment-specific clauses in modern investment treaties.[777] These provisions often explicitly exclude environmental regulation from the scope of treaty protections.[778] Where such clauses are found to be applicable, the measures in question are considered outside the scope of the treaty, and tribunals need not proceed to assess the merits of expropriation,

[776] BALTAG Crina / JOSHI Riddhi / DUGGAL Kabir, "Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, 2023, pp. 381-421, pp. 398-408; GREENWOOD Lucy, "The Canary Is Dead: Arbitration and Climate Change", Journal of International Arbitration, ed. Maxi Scherer, 2021, pp. 309-326, pp. 317-318; REES-EVANS Laura, "The Protection of the Environment in International Investment Agreements – Recent Developments and Prospects for Reform", European Investment Law and Arbitration Review, eds. Nikos Lavranos, Loukas A. Mistelis, 2020, pp. 357-391, pp. 372-373; KESAR Divya, "In Pursuit of Sustainable Development: Safeguarding the Right to Regulate", Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, ed. Stavros Brekoulakis, 2024, pp. 360-385, p. 378; "Chapter 8: Towards a More Balanced Approach", The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment, ed. Yulia Levashova, International Arbitration Law Library, Kluwer Law International, 2019, vol. 50, pp. 237-276, p. 240; MAVROMATI Chrysoula / SCHUBERT Alexander, "The EU Model Clauses for Bilateral Investment Treaties of EU Member States With Third Countries", European Investment Law and Arbitration Review, eds. Nikos Lavranos, Loukas A. Mistelis, 2024, pp. 193-216, p. 203.

[777] *E.g.*, Article 24.3 of the Comprehensive Economic and Trade Agreement between EU and Canada regulates "*The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. Each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection*."; EU Model Clauses for BITs 2023 states "*The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity*."; Article 3 of the Canada Model BIT 2021 is as follows "*The Parties reaffirm the right of each Party to regulate within its territory to achieve legitimate policy objectives, such as with respect to the protection of the environment and addressing climate change; social or consumer protection; or the promotion and protection of health, safety, rights of Indigenous peoples, gender equality, and cultural diversity*."; Article 5 of the Burkina Faso-Turkey BIT of 2019 similarly states "*Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or applying non-discriminatory legal measures: (a) designed and applied for the protection of human, animal or plant life or health, or the environment; (b) related to the conservation of living or non-living exhaustible natural resources*."

For more examples *see also* Article 13 of the Morocco – Nigeria BIT; Annex 2 of the ASEAN – Hong Kong, China SAR Investment Agreement; Annex 1 of the Singapore – Rwanda BIT; Article 5.5 of the India - Kyrgyzstan BIT; Article 3 of the Hungary – Oman BIT.

[778] Rees-Evans, "**The Protection of the Environment in International Investment Agreements – Recent Developments and Prospects for Reform**", p. 388; Kesar, "**In Pursuit of Sustainable Development: Safeguarding the Right to Regulate**", pp. 378-380.

FET, or other substantive claims.[779] This approach streamlines proceedings and reduces the procedural and evidentiary burden on both states and tribunals.[780]

From a practical standpoint, these treaty-based exceptions may be more accessible for states than CIL defences such as necessity or *force majeure*. First, states negotiate the treaty language and can shape these clauses in a manner that reflects a mutually acceptable balance of interests.[781] Second, such clauses often involve more flexible legal standards, such as proportionality or reasonableness, rather than the strict and narrowly interpreted criteria of CIL defences.[782] In effect, if a state can demonstrate that its measure falls within the scope of an environmental exception clause, it may avoid lengthy legal debates over treaty breaches and benefit from early dismissal of the claim.[783]

Moreover, both in the application of treaty exceptions and even in reliance on CIL defences, there is a growing recognition, among scholars and in arbitral jurisprudence, that public health, environmental protection, and cultural heritage constitute essential interests deserving of heightened weight in the balancing exercise between investor protection and state sovereignty.[784] This trend is reinforced by the emergence of soft law

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[779] PAINE Joshua / SHEARGOLD Elizabeth, "A Climate Change Carve-Out for Investment Treaties", Journal of International Economic Law, vol. 26, no. 2, 2023, p. 294; HAILES Oliver, "Environmental Clauses in Investment Arbitration: Deep Roots, Green Shoots, and Dead Wood", LSE Legal Studies Working Paper No. 17/2024, 2024, p. 26.

[780] Paine / Sheargold, "**A Climate Change Carve-Out for Investment Treaties**", pp. 285-304, pp. 294-295; Center for International Environmental Law, "**Overcoming International Investment Agreements as a Barrier to Climate Action: A Toolkit to Safeguard Fossil Fuel Measures from Investment Treaty Claims**", p. 12.

[781] Center for International Environmental Law, "**Overcoming International Investment Agreements as a Barrier to Climate Action: A Toolkit to Safeguard Fossil Fuel Measures from Investment Treaty Claims**", p. 12.

[782] MARISI Flavia, "Chapter 4: Treaty Mechanisms Addressing Environmental Concerns", Environmental Interests in Investment Arbitration, International Arbitration Law Library, Kluwer Law International, 2020, vol. 51, pp. 103-142, pp. 119-120; Pantelaki, "**Defenses Against Investment Treaty Claims in Pandemic Times Fitting New Trends Into Old Standards**", p. 65.

[783] Paine / Sheargold, "**A Climate Change Carve-Out for Investment Treaties**", pp. 294-295; Center for International Environmental Law, "**Overcoming International Investment Agreements as a Barrier to Climate Action: A Toolkit to Safeguard Fossil Fuel Measures from Investment Treaty Claims**", p. 12.

[784] KULICK Andreas, "5 - How to balance the conflicting interests", Global Public Interest in International Investment Law, Cambridge University Press, 2012, pp. 168-222, pp. 193-195; ARANGO Margarita Rosa, "Addressing Fears and Pet Peeves of Investment Treaty Arbitration", ITA in Review, vol. 6, no. 3, 2022, pp. 30-72; VADI Valentina, "Conclusions", Cultural Heritage in International Investment Law and Arbitration, Cambridge University Press, 2014, pp. 291-296, p. 295.

instruments, such as the United Nations (“**UN**”) Sustainable Development Goals[785] and the Paris Agreement, which encourage states to adopt robust environmental policies. While these instruments are not legally binding, they can play an important interpretive role, supporting the legitimacy of state measures and guiding tribunals in understanding the public interest dimension of regulatory action.[786]

As a result, these evolving norms may lead tribunals to grant greater deference to states in environmental matters, especially where regulations are grounded in widely accepted scientific consensus or multilateral commitments.[787]

Recent advisory opinions by international courts are particularly noteworthy in the context of this discussion.

A significant example is the advisory opinion issued by the ICJ following two questions submitted by the United Nations General Assembly (“**UNGA**”).[788] The first question asked the Court to clarify “*the obligations of States under international law to*

[785] *See at* https://sdgs.un.org/goals (last accessed: 20 July 2025).
[786] JOHNSON Lise / SACHS Lisa / LOBEL Nathan, “Aligning International Investment Agreements with the Sustainable Development Goals”, Columbia Center on Sustainable Investment, 27.11.2019, pp. 58-120, pp. 84-85,https://ccsi.columbia.edu/sites/ccsi.columbia.edu/files/content/docs/publications/fJohnsonetal58-1.pdf (last accessed: 20 July 2025); MARTINI Camille, “From Fact to Applicable Law: What Role for the International Climate Change Regime in Investor-State Arbitration?”, Canadian Yearbook of International Law/Annuaire canadien de droit international, vol. 61, 2024, pp. 1-36, p. 17, doi:10.1017/cyl.2024.2; ARCURI Alessandra / MONTANARO Francesco, “Justice for All? Protecting the Public Interest in Investment Treaties”, Boston College Law Review, vol. 59, no. 8, 2018, pp. 2791-2824, p. 2816; Jevremovic Petrovic / Kazeem, “**Chapter 11: Climate Change-Related Investment Disputes: A Catalyst for Public Participation in International Investment Law?**”, p. 559.
For a general analysis on the interplay between soft law instruments and foreign investment protection *see* KORZUN Vera, “Enforcing Soft Law in International Investment Arbitration”, Akron Law Faculty Publications, vol. 56, no. 1, 2023, pp. 1-65.
[787] ZHU Ying, “Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development”, Natural Resources Journal, vol. 58, no. 2, 2018, pp. 319-363, pp. 356-359; SULYOK Katalin, “7 - Science in the Practice of Investment Arbitral Tribunals”, Science and Judicial Reasoning The Legitimacy of International Environmental Adjudication, Cambridge University Press, 2020, pp. 212-240, pp. 232-234; JEZ Areta, “Environmental Policy-Making and Tribunal Decision-Making: Assessing the Scope of Regulatory Power in International Investment Arbitration”, University of Pennsylvania Journal of International Law, vol. 40, no. 4, 2019, pp. 989-1016, p. 1016; MILO Caterina, “Environmental and Human Rights Justifications in Investment Arbitration: Probing the Limits of ISDS for the Adjudication of Climate-Related Disputes”, Journal of World Investment & Trade, vol. 26, 2025, pp. 512-556, p. 548.
[788] *Obligations of States in respect of Climate Change*, ICJ, Advisory Opinion of 23 July 2025.

ensure the protection of the climate system and other parts of the environment."[789] The second question concerned "*the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment.*"[790]

In addressing the first question, the ICJ confirmed that key climate treaties, including the UN Framework Convention on Climate Change,[791] the Kyoto Protocol,[792] and the Paris Agreement, impose binding obligations on states to protect the environment from human-induced greenhouse gas emissions.[793] Importantly for this thesis, the Court emphasized that these obligations include a duty of due diligence, requiring states to regulate the conduct of private actors.[794]

On the second question, the ICJ clarified that the climate treaty framework does not displace the general rules of state responsibility.[795] Accordingly, the breach of such climate obligations can constitute an internationally wrongful act, giving rise to the duties of cessation and non-repetition.[796] While the Court acknowledged the potential complexities in attribution and causation, it affirmed that responsible states may be required to provide full reparation, provided that a sufficiently direct and certain causal link can be established between the wrongful act and the resulting harm.[797] Notably, the Court stated that each injured state may individually invoke the responsibility of any state whose breach contributed to environmental damage, and that multiple states may share responsibility for the same harm.[798]

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[789] **Ibid**., p. 8.
[790] **Ibid**., p. 9.
[791] United Nations. *United Nations Framework Convention on Climate Change*. New York: United Nations, 1992. https://unfccc.int/resource/docs/convkp/conveng.pdf.
[792] United Nations. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*. Kyoto: United Nations, 1998. https://unfccc.int/kyoto_protocol.
[793] Obligations of States in respect of Climate Change, ICJ, Advisory Opinion of 23 July 2025, paras. 213, 220, 223.
[794] **Ibid**., para. 280.
[795] **Ibid**., paras. 411-420.
[796] **Ibid**., paras. 445-448.
[797] **Ibid**., paras. 449-455.
[798] **Ibid**., para. 431.

The advisory opinion was rendered unanimously, though several judges issued separate declarations and opinions. Of particular relevance to international investment law is the declaration by Judge Cleveland, who expressly referenced ISDS.[799] She opined that the interpretation of investment treaties must take into account states' obligations under international climate law, particularly the rigorous due diligence standards these obligations entail.[800] Her statement can be seen as a reminder to future ISDS tribunals to factor environmental obligations into treaty interpretation, possibly leading to greater deference to public interest regulation and better balancing between investor protection and environmental preservation.

This ICJ opinion followed two other major advisory opinions.

The International Tribunal for the Law of the Sea ("**ITLOS**") rendered an advisory opinion in May 2024 regarding the obligations of states under international law in relation to climate change and marine environmental protection.[801] ITLOS identified several obligations to prevent and mitigate marine pollution, concluding that these were obligations of conduct rather than result.[802] In other words, states are not required to guarantee prevention but must take all necessary measures to that end, reaffirming a due diligence standard. The ICJ's reasoning appears consistent with this interpretation.

In May 2025, the Inter-American Court of Human Rights ("**IACtHR**") also issued an advisory opinion, in response to a request from Colombia and Chile.[803] The questions related to the scope of state obligations to respect, protect, and ensure the exercise of human rights in the context of climate change.[804] The IACtHR emphasized that climate emergency is a determinative factor in interpreting state obligations.[805] It recognized that

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[799] *Obligations of States in respect of Climate Change*, ICJ, Advisory Opinion of 23 July 2025, Declaration of Judge Cleveland.
[800] **Ibid**., paras. 21-22.
[801] International Tribunal for the Law of the Sea. *Advisory Opinion on the obligations of States regarding climate-related duties under the law of the sea*. Opinion No. 1/2024, May 2024.
[802] **Ibid**., paras. 153-367, 395-396.
[803] Inter-American Court of Human Rights. Advisory Opinion on the Scope of State Obligations to Guarantee Rights in Situations of Climate Emergency. OC-1/2025, May 2025.
[804] **Ibid**., paras. 26-28.
[805] **Ibid**., para. 184.

states must both refrain from harming the environment and actively ensure that private actors do not undermine the enjoyment of human rights, again invoking a due diligence duty.[806] The IACtHR, in a narrow majority, went further to recognize Nature and its components as subjects of rights, and stated that the prohibition of conduct causing environmental harm is a *jus cogens* norm.[807] It also confirmed that the right to a healthy climate is encompassed within the right to a healthy environment.[808]

Taken together, these advisory opinions underscore a growing international consensus: states are under binding obligations to act with due diligence to protect the environment, and these obligations are relevant in multiple legal regimes, including human rights law, the law of the sea, and potentially international investment law. As a result, ISDS tribunals may increasingly be expected to consider these obligations when interpreting investment treaties, especially when balancing investor protections against legitimate public interest measures aimed at combating climate change.

D. War and Sanctions

Armed conflicts and the imposition of economic sanctions present some of the most complex and disruptive scenarios for both states and investors. In such contexts, states may be compelled to take emergency measures that interfere with investment protections, raising critical questions about the applicability of necessity and *force majeure* defences. This section explores how tribunals have approached claims arising from situations of armed conflict and state disintegration, as well as the legal implications of sanctions and geopolitical disruption. Attention is given to the doctrinal challenges, evolving jurisprudence, and the balance between sovereign imperatives and investor rights in times of international crisis.

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[806] **Ibid**., paras. 218 *ff*.
[807] **Ibid**., paras. 287-297, 316.
[808] **Ibid**., paras. 298-304.

1. Armed Conflict and Breakdown of State Functions

The unfortunate reality of the current global landscape is the resurgence of armed conflicts involving multiple regions and states. These conflicts impact a wide range of domains, including daily life, national economies, political stability, defense spending, and the performance of international obligations. Unsurprisingly, they also affect foreign investors operating in conflict-affected states. Such investors may turn to ISDS mechanisms to seek protection and compensation for losses incurred in volatile zones. Notable examples have emerged in the wake of the Libyan civil war, the Syrian conflict, and more recently, the Russia–Ukraine conflict, both in the post-2014 Crimea crisis and the full-scale invasion beginning in 2022.[809]

Armed conflicts give rise to complex legal questions concerning the scope and limits of foreign investment protection. For the purposes of this thesis, the most relevant issues concern whether states can rely on the international law defences of *force majeure* and necessity. First, one must ask whether the destruction caused by armed conflict or the interruption of state functions renders compliance with treaty obligations objectively impossible, thus potentially engaging the *force majeure* defence.[810] Second, it

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[809] WELLHAUSEN Rachel L. / PEINHARDT Clint, "Adjudicating while Fighting: Political Implications of the Ukraine-Russia Bilateral Investment Treaty", Perspectives on Politics, 2025, pp. 1-13, p. 2; CHANG Eric, "Lawfare in Ukraine: Weaponizing International Investment Law and the Law of Armed Conflict Against Russia's Invasion", Strategic Perspectives, ed. Denise Natali, vol. 39, 2022, p. 21; UNCTAD, "Investor–State Arbitrations in 2021: Key Facts with a Special Focus on Tax-Related ISDS Cases", IIA Issues Note, no. 1, 2022, p. 2; ACKERMANN Tobias / WUSCHKA Sebastian, "The Applicability of Investment Treaties in the Context of Russia's Aggression against Ukraine", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, 2023, pp. 453-471.

[810] In earlier cases, armed conflict has been considered as *force majeure*.
For example, in the *Spanish Zone of Morocco Claims (Great Britain v. Spain)* case, the sole arbitrator held "*That the State is not responsible for the fact that there is a rising, a revolt, or a civil or international war, nor for the fact that these events involve losses on its territory. It may be that it would be more or less possible to prove that mistakes have been committed by the Government, but in the absence of specific provisions in a treaty or agreement the investigation necessary to this end is not permissible. Such occurrences must be considered as cases of force majeure*.": "*Spanish Zone of Morocco Claims. Great Britain v. Spain*.", Annual Digest of Public International Law Cases, vol. 1933, no. 2, 2021, p. 159, doi:doi:10.1017/CBO9781316151297.109.
The Iran-US Claims tribunal also reached similar conclusions: "*It remains the Tribunal's task to determine from the facts what was the legal situation between the parties at the time performance ceased. By December 1978, strikes, riots and other civil strife in the course of the Islamic Revolution had created classic force majeure conditions at least in Iran's major cities. By* "*force majeure*" *we mean social and economic forces beyond the power of the state to control through the exercise of due diligence. Injuries caused by the*

is necessary to consider whether a state may invoke the necessity defence, claiming that its actions were the only means available to safeguard essential public interests such as national security, public order, and civilian protection, interests that may justifiably override economic considerations during wartime.

These defences will be assessed to determine whether a state can avoid liability for breach of investment treaty obligations not due to wrongful intent, but because it was either materially impossible or objectively necessary to act in the way it did.

In the context of *force majeure*, a critical issue is how to interpret the requirement of impossibility. As previously discussed, under CIL, this standard is strict, requiring a demonstration of absolute and material impossibility, not merely increased cost, difficulty, or danger.[811] Moreover, the impossibility must be directly linked to the specific obligation breached. Notably, the ILC Commentary explicitly acknowledges that a partial or total loss of territorial control, as may occur during armed conflict, can constitute a valid basis for invoking *force majeure*, as it may render performance genuinely impossible.[812]

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operation at such forces are therefore not attributable to the state for purposes of its responding for damages. Similarly, as between private parties, one party cannot claim against the other for injuries suffered as a result of delays in or cessation of performance during the time force majeure conditions prevail, unless the existence of these conditions is attributable to the fault of the respondent party.": *Gould Marketing, Inc., As Successor to Hoffman Export Corporation v. Ministry of Defence of the Islamic Republic of Iran*, IUSCT Case No. 49, Interlocutory Award (Award No. ITL 24-49-2), 27 July 1983, para. 19.

[811] Catherine Titi. (ed.), "War and Peace in International Investment Law", International Investment Law and the Law of Armed Conflict, 2019, pp. 1-22, p. 19.

[812] "*Material impossibility of performance giving rise to force majeure may be due to a natural or physical event (e.g. stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g. loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two.*": International Law Commission, "Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentary", Yearbook of the International Law Commission, 2001, vol. II, p. 254.

The requirement of unforeseeability also presents challenges.[813] For example,[814] in the Libyan context, some have debated whether the second civil war was rendered foreseeable by the first, thereby undermining the state's ability to invoke *force majeure*.[815] The externality requirement may also prove contentious.[816] Investors might argue that the state contributed to the outbreak or escalation of conflict, thus disqualifying it from invoking *force majeure*.[817] How tribunals interpret the contribution element will be crucial: if a strict standard is applied, states may frequently be found to have contributed, directly or indirectly, to the conflict, thereby losing access to the defence.[818]

When assessing the necessity defence, the elements of "*essential interest*" and "*grave and imminent peril*" should not, in principle, pose significant difficulty for a state to invoke and substantiate, particularly in the context of armed conflict.[819] In wartime, the protection of public order, the life and health of civilians, and the maintenance or resumption of vital public services clearly constitute essential interests. If even the most stringent tribunals have accepted the preservation of a state's economic stability as qualifying under this standard, then the protection of civilian life and national securitymust, a fortiori, be considered essential.

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[813] BINDER Christina / JANIG Philipp, "The Effect of Armed Hostilities on Investment Treaty Obligations: A Case of Force Majeure?", The Role of International Investment Law in Armed Conflicts, Disputed Territories, and 'Frozen' Conflicts, eds. Tobias Ackermann, Sebastian Wuschka, Nijhoff International Investment Law Series, 2020, vol. 15, pp. 112-136, p. 121.

[814] Similarly, although in contractual context, in *Aucoven v. Venezuela*, the *force majeure* defence was rejected because the tribunal deemed the public protests foreseeable due to similar events happening before once again after an increse in transportation prices: 1.B.2.

[815] Daza-Clark / Behn, "**Between War and Peace: Intermittent Armed Conflict and Investment Arbitration**", p. 20.

[816] Binder / Janig, "**The Effect of Armed Hostilities on Investment Treaty Obligations: A Case of Force Majeure?**", pp. 121-122.

[817] This seems to be a bigger issue for internal armed conflict where often it is the host state's actions which created the public unrest leading to the civil war: Daza-Clark / Behn, "**Between War and Peace: Intermittent Armed Conflict and Investment Arbitration**", p. 64.

[818] Binder / Janig, "**The Effect of Armed Hostilities on Investment Treaty Obligations: A Case of Force Majeure?**", pp. 124-125..

[819] Daza-Clark / Behn, "**Between War and Peace: Intermittent Armed Conflict and Investment Arbitration**", p. 62.

The ”*grave and imminent peril*” criterion may be more demanding, but it too should be realistically met in armed conflict scenarios.[820] The severe and immediate consequences of war, destruction of infrastructure, mass displacement, and threats to life, demonstrate that these essential interests are under clear and present threat.

The core challenges, however, are likely to arise in relation to the ”*only way*” requirement and the state contribution element.[821] The “*only way*” criterion is particularly problematic when tribunals adopt an unduly rigid interpretation, disqualifying the defence if any conceivable alternative measure exists, even if it is unrealistic or unfeasible under the circumstances.[822] In practice, it is relatively easy for investors to suggest hypothetical alternatives on paper, especially in complex emergencies where multiple policy responses may appear viable in hindsight.

Similarly, the contribution requirement poses difficulties, particularly given the political sensitivities surrounding armed conflicts. There is a real risk that tribunals may find that a state “*contributed*” to the situation of necessity through its prior political actions, even when the state did not intend or foresee the escalation to war.[823] Such an interpretation may be excessive. In most crises, whether economic, environmental, or political, some degree of domestic causation is almost inevitable.[824] If any internal involvement is deemed sufficient to defeat the necessity defence, then the doctrine risks becoming inoperable in all but the most drastic scenarios. A more nuanced and reasonable approach is therefore essential to preserve the utility of necessity as a legal defence in international law.

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[820] Carpentieri, “**The Invocation of State Defenses in Times of Conflict: Force Majeure, Necessity and the Libyan Example**”, p. 28.
[821] Daza-Clark / Behn, “**Between War and Peace: Intermittent Armed Conflict and Investment Arbitration**”, p. 62.
[822] ZRILIC Jure, “Are We in for a New Wave of Investment Arbitrations? Russia’s Measures Against Foreign Investors and Investment Treaty Implications”, **VerfBlog**, 21.03.2022, https://verfassungsblog.de/are-we-in-for-a-new-wave-of-investment-arbitrations/ (last accessed: 4 August 2025).
[823] Daza-Clark / Behn, “**Between War and Peace: Intermittent Armed Conflict and Investment Arbitration**”, p. 62; Carpentieri, “**The Invocation of State Defenses in Times of Conflict: *Force majeure*, Necessity and the Libyan Example**”, p. 28.
[824] *Unión Fenosa Gas v. Egypt*, Award, para. 8.60.

2. Sanctions and Geopolitical Disruption

Armed conflict has devastating consequences for the countries directly involved, but its effects often extend beyond borders, impacting third states as well. These repercussions include disruptions in international trade, diplomatic relations, travel and visa regimes, and financial flows. One significant consequence arises when sanctions are imposed by third-party states or international organizations.[825]

In recent years, we have witnessed a range of broad-based and targeted sanctions, most notably by the United States and the European Union, as well as by the United Nations Security Council.[826] These measures have been imposed against states such as Russia, Iran, Venezuela, and North Korea, with Russia currently facing some of the most extensive sanctions regimes in modern history.[827] The sanctions often include trade

[825] For a detailed analysis regarding the impact of sanctions on international trade and relations *see* COVER Avidan, "Sanctions and Consequences: Third-State Impacts and the Development of International Law in the Shadow of Unilateral Sanctions on Russia", Case Western Reserve University Case Western Reserve University School of Law Scholarly Commons, Faculty Publications, 2023, https://scholarlycommons.law.case.edu/faculty_publications/2189; CARRIL-CACCIA Federico, "The impact of economic sanctions on bilateral mergers and acquisitions", European Journal of Political Economy, vol. 86, 2025, p. 102650; EDMOND Chick, "The Role of Economic Sanctions in Shaping International Trade Relationships Case Study: Russia", Old Dominion University Digital Commons, Political Science & Geography Faculty Publications, 2025, pp. 1-20; NESTEROVA Kristina, "Impact of different types of international sanctions on migration flows", Applied Economics Letters, 2025, doi:https://doi.org/10.1080/13504851.2025.2462696; BOVE Vincenzo Bove / DI SALVATORE Jessica / NISTICO Roberto, "Economic Sanctions and Trade Flows in the Neighborhood", The Journal of Law and Economics, vol. 66, no. 4, 2023, pp. 639-873.

[826] CONTINI Kerry B., "US Russia Sanctions Under Trump: Current State of Play", Global Sanctions and Export Controls Blog by Baker Mckenzie, 18.03.2025, https://sanctionsnews.bakermckenzie.com/us-russia-sanctions-under-trump-current-state-of-play/ (last accessed: 4 August 2025); SAVIC Bob, "Divergent U.S. and EU sanctions reflect growing Western geopolitical rift", GIS Reports Online, 06.06.2025, https://www.gisreportsonline.com/r/us-eu-sanctions (last accessed: 4 August 2025); IMMENKAMP Beatrix, "EU sanctions: A key foreign and security policy instrument", European Parliamentary Research Service, 04.2024; HILDEBRANDT Julia, "Collateral Damage Through Sanctions : The Role of ISDS for Third Party Investors Impacted by EU Sanctions Against Russia", European Investment Law and Arbitration Review, eds. Nikos Lavranos, Loukas A. Mistelis, 2024, p. 123; AZEREDO DA SILVEIRA Mercedeh, "Part I, Chapter 1: International Trade Sanctions", Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation, Kluwer Law International, 2014, p. 10; UTTERBACK Meg, "Chapter 15: US Sanctions", Managing 'Belt and Road' Business Disputes: A Case Study of Legal Problems and Solutions, eds. Michael J. Moser, Chiann Bao, pp. 315-328; SZABADOS Tamás, "EU Economic Sanctions in Arbitration", Journal of International Arbitration, ed. Maxi Scherer, 2018, pp. 439-462.

[827] SZYSZCZAK Erika, "Sanctions effectiveness: what lessons three years into the war on Ukraine?", Economics Observatory, 19.02.2025, https://www.economicsobservatory.com/sanctions-effectiveness-what-lessons-three-years-into-the-war-on-ukraine (last accessed: 4 August 2025); Lorne Cook, "The EU

embargoes, financial and banking restrictions, confiscation, and reputational limitations.[828]

The interplay between sanctions and foreign investment protection takes several forms. Sanctions may prompt host states (*i.e.*, the sanctioned countries) to adopt retaliatory measures or amend domestic legislation to mitigate economic pressure, which can negatively affect foreign investors.[829] These measures, such as asset restrictions, payment controls, or regulatory overhauls, often lead to ISDS claims alleging indirect expropriation, violation of FET, breach of FPS, undue restrictions on transfers, or breach of umbrella clauses.[830]

In other cases, the negative impact on foreign investors stems from the actions of a third-party enforcing sanctions (*e.g.*, the U.S. or European Union ("**EU**")), where investors suffer collateral harm. However, ISDS claims in such scenarios are less likely to succeed unless the host state itself adopts or enforces specific measures that harm the

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and UK hit Russia with new sanctions. Moscow's energy revenue and spies are targeted.", **AP News**, 18.07.2025, https://apnews.com/article/europe-eu-russia-sanctions-oil-fleet-ce7b2fa3ebb4e07cc3251b456a5e99af (last accessed: 4 August 2025); Council of the European Union, "EU sanctions against Russia", (24.07.2025), https://www.consilium.europa.eu/en/policies/sanctions-against-russia/ (last accessed: 4 August 2025); Hildebrandt, "**Collateral Damage Through Sanctions : The Role of ISDS for Third Party Investors Impacted by EU Sanctions Against Russia**", p. 123; NGO Steve / WALKER Steven, "Impact and Effects of International Economic Sanctions on International Arbitration", Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, 2022, p. 390; AZEREDO DA SILVEIRA Mercedeh / LEVASHOVA Yulia, "Economic Sanctions, Countermeasures and Investment Claims against the Russian Federation: A Battle on Multiple Fronts", ICSID Review - Foreign Investment Law Journal, eds. Meg Kinnear, Campbell McLachlan, 2023, pp. 693-707.

[828] Hildebrandt, "**Collateral Damage Through Sanctions : The Role of ISDS for Third Party Investors Impacted by EU Sanctions Against Russia**", pp. 124-125; Azeredo Da Silveira, "**Part I, Chapter 1: International Trade Sanctions**", pp. 14-21.

[829] Azeredo Da Silveira / Levashova, "**Economic Sanctions, Countermeasures and Investment Claims against the Russian Federation: A Battle on Multiple Fronts**", pp. 693-707; AZEREDO DA SILVEIRA Mercedeh, "Brussels' Sanctions Against Russia and Moscow's Retaliatory Measures Through the Eyes of the Arbitrator", Kluwer Arbitration Blog, 26.09.2014, https://legalblogs.wolterskluwer.com/arbitration-blog/brussels-sanctions-against-russia-and-moscows-retaliatory-measures-through-the-eyes-of-the-arbitrator/ (last accessed: 2 August 2025); MAK Charles Ho Wang / LAI Roslyn, "Russian Foreign Investments at Risk: Why Bring Investment Disputes Relating to Russia to the Hong Kong International Arbitration Centre?", Asian Dispute Review, eds. Romesh Weeramantry, John Choong, 2023, pp. 28-29.

[830] Azeredo Da Silveira / Levashova, "**Economic Sanctions, Countermeasures and Investment Claims against the Russian Federation: A Battle on Multiple Fronts**", pp. 693-707; LEVASHOVA Yulia / AZEREDO DA SILVEIRA Mercedeh, "Investment Claims Against Russia in the Economic Sanctions Era", **Kluwer Arbitration Blog**, 31.05.2025, https://legalblogs.wolterskluwer.com/arbitration-blog/investment-claims-against-russia-in-the-economic-sanctions-era/ (last accessed: 13 July 2025).

investment.[831] This raises attribution questions: can the host state be held responsible under international law for investor harm resulting from another state's extraterritorial sanctions?[832]

For the purpose of this thesis, the focus is on whether and how states that are direct targets of sanctions can invoke *force majeure* or necessity under international law to defend against claims arising from their inability to perform investment-related obligations.

Sanctions raise complex questions regarding the applicability of *force majeure* and necessity defences. A central issue is whether a host state can invoke *force majeure*, either in a contractual context or under international law, when sanctions prevent it from fulfilling its obligations.[833] In contractual settings, *force majeure* clauses often allow for a more flexible and commercial approach. The standard typically does not require absolute

[831] BOGDANOVA Iryna / CALLO-MULLER Maria Vasquez, "Unilateral Cyber Sanctions: Between Questioned Legality and Normative Value", Vanderbilt Journal of Transnational Law, vol. 54, no. 4, 2023, pp. 911-954, p. 952; Hildebrandt, "**Collateral Damage Through Sanctions : The Role of ISDS for Third Party Investors Impacted by EU Sanctions Against Russia**", p. 125.

[832] This raises important questions, particularly in the EU context. The EU typically centralizes the imposition of sanctions, especially in the financial sector, leaving little discretion to individual member states. As a result, investors may struggle to identify a specific state measure that would support an ISDS claim against a member state. This challenge is even more pronounced when the relevant sanction takes the form of an EU regulation, which is directly applicable in domestic legal systems without the need for national implementing measures. In such cases, it becomes difficult to establish the existence of a wrongful act attributable to the state that could give rise to international responsibility: DE FAZIO Cristian, "Sanctions-Related ISDS Disputes - Issues of Jurisdiction and Merits", British Institute of International and Comparative Law, 30.10.2024, https://www.biicl.org/blog/90/sanctions-related-isds-disputes-issues-of-jurisdiction-and-merits (last accessed: 13 July 2025).

[833] In *General Dynamics v. Libya*, the respondent state invoked *force majeure* in relation to sanctions. However, the tribunal did not address this argument in detail, as it had already accepted the *force majeure* defence based on the prevailing military situation, rendering further discussion of sanctions unnecessary.: "*In light of the Tribunal's conclusion that Respondent was impeded by the force majeure events of the military situation in Libya from performing its obligations under the LTCIS Contract, the Tribunal does not consider it necessary to decide whether Respondent was also impeded by international sanctions including the asset freeze and arms embargo. The Tribunal also does not consider it necessary to decide whether there is further relevance of the sanctions and/or arms embargo for Claimant or for the application of Article 107 of the Swiss Code of Obligations*.": *General Dynamics United Kingdom Ltd. v. The State of Libya*, ICC Case No. 19222/EMT, Award, 5 January 2016, para. 267 *see also* paras. 192, 197-200.

impossibility but rather focuses on commercial impracticability or severe hardship,[834] particularly where the clause is broadly or leniently worded.[835]

By contrast, invoking *force majeure* under CIL, as codified in Article 23 of the ILC Articles on State Responsibility, requires meeting a far stricter threshold. The state must demonstrate that it was objectively and absolutely impossible to perform the obligation in question.[836] This stringent standard, particularly in the treaty context where obligations are often broad and ongoing, helps explain why *force majeure* under CIL is rarely invoked successfully in ISDS proceedings.

Another important consideration is the requirement of foreseeability: for the *force majeure* defence to succeed, the event in question must have been unforeseeable at the time the obligation was undertaken.[837] This raises the critical question of whether prior political or diplomatic developments had already signaled the possibility of future sanctions, potentially rendering them foreseeable and, therefore, outside the scope of a valid *force majeure* claim.[838]

Even if a state can demonstrate absolute impossibility and unforeseeability, it still faces another significant hurdle, the requirement of externality, which applies to both contractual and CIL-based *force majeure*. The state must show that the *force majeure* event was beyond its control and not attributable to its own conduct. In the case of sanctions,

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[834] Azeredo Da Silveira, "**Chapter 7: Economic Sanctions, Force Majeure and Hardship**", p. 173.

[835] Even so, the case law remains inconsistent, with some tribunals finding that sanctions or embargoes do not prevent performance, while others have upheld the *force majeure* defence on the basis that such measures do constitute a valid impediment: MAZUERA Andres, "Should Arbitral Tribunals Apply Sanctions Against Russia as Overriding Mandatory Rules?", Kluwer Arbitration Blog, 09.04.2022, https://legalblogs.wolterskluwer.com/arbitration-blog/should-arbitral-tribunals-apply-sanctions-against-russia-as-overriding-mandatory-rules/ (last accessed: 21 July 2025).

[836] ALI Arif Hyder / ATTANASIO David L., "Chapter 6: Merits: The Content of Investment Protection", International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice, Kluwer Law International, 2021, pp. 191-260, p. 257.

[837] *Niko Resources v.* Award, para. 72; *Duke Energy v. Republic of Ecuador*, Award, para. 237; *CMS v. The Argentine Republic*, Award, para. 227; *Aucoven v. Venezuela*, Award, para. 118.

[838] LIU Jiong, "Evaluating *Force majeure* Sanctions Under Chinese Law", **Mondaq**, 23.07.2025, https://www.mondaq.com/china/export-controls-trade-investment-sanctions/1655194/evaluating-force-majeure-sanctions-under-chinese-law (last accessed: 13 July 2025); Azeredo Da Silveira, "Chapter 7: Economic Sanctions, Force Majeure and Hardship", p. 177.

this can be particularly problematic. Sanctions are typically imposed in response to a state's political, military, or security-related actions. As a result, the targeted state may struggle to prove that it did not contribute to the situation giving rise to the sanctions.[839]

That said, expecting a complete absence of internal contribution to a crisis may set the bar too high.[840] Most geopolitical or economic crises inevitably have some internal dimension. A fault-based approach, where only deliberate or negligent conduct would disqualify a state from invoking *force majeure*, might appear more balanced.[841] However, applying such a standard in practice raises serious questions: Can an ISDS tribunal credibly assess whether a state acted without fault when engaging in international conflict? Can it determine whether a state's decision to use force was justified or reckless? These questions risk pulling tribunals into evaluating core questions of international politics and sovereign decision-making, which is well beyond their mandate.[842]

A potential middle ground might involve focusing not on the armed conflict itself, but on the sanctions as the *force majeure* event. While sanctions often stem from a state's prior conduct, tribunals might reasonably conclude that no state intends to be sanctioned and that the sanctions themselves,[843] rather than the triggering events, constitute the *force*

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[839] Zrilič, "**Are We in for a New Wave of Investment Arbitrations? Russia's Measures Against Foreign Investors and Investment Treaty Implications**".

[840] It must be noted that the "*contribution*" element is treated more strictly under the necessity defence than under *force majeure*. *Force majeure* excludes the defence only when the event is due to the conduct of the state itself. In contrast, necessity is unavailable if the state has contributed to the situation, even partially. Therefore, mere contribution, particularly when not deliberate or negligent, should not be sufficient to bar a state from invoking *force majeure*. This distinction reflects the different thresholds and rationales underlying the two defences: Pantelaki, "**Defenses Against Investment Treaty Claims in Pandemic Times Fitting New Trends Into Old Standards**", pp. 54-55.

[841] CRAWFORD James, "9 - Circumstances precluding wrongfulness", State Responsibility: The General Part, Cambridge Studies in International and Comparative Law, Cambridge University Press, 2013, pp. 274-322, p. 301; KOLB Robert, "Chapter 4: Circumstances precluding wrongfulness", The International Law of State Responsibility, 2017, pp. 109-147, p. 124.

[842] GAUKRODGER David, "The balance between investor protection and the right to regulate in investment treaties: A scoping paper", OECD Working Papers on International Investment 2017/02, p. 31, (24.07.2025), doi:https://dx.doi.org/10.1787/82786801-en.

[843] "*Unilateral economic sanctions have been traditionally characterised as factual impediments that could trigger force majeure*": Mazuera, "**Should Arbitral Tribunals Apply Sanctions Against Russia as Overriding Mandatory Rules?**"

majeure. This approach would avoid requiring tribunals to pass judgment on sensitive political or military decisions while still allowing space for legitimate defences.

In summary, sanctioned states face serious challenges in successfully invoking *force majeure*. These challenges arise from both the strict evidentiary threshold of absolute impossibility under CIL and the externality requirement, which questions whether the state contributed to the crisis. Although contractual *force majeure* may offer a more forgiving standard, similar issues around causation and attribution often remain. A nuanced approach that distinguishes the sanctions themselves from their geopolitical origins may provide a more workable and fair framework.

In addition to *force majeure*, sanctioned states may also attempt to invoke the necessity defence under CIL.[844] Unlike *force majeure*, which hinges on objective impossibility, necessity is concerned with whether the measures taken, whether to counter the adverse effects of sanctions, to prompt the lifting of sanctions, or to retaliate, were justified in light of a grave threat to an essential interest.

It is worth noting that retaliatory or regulatory measures taken in response to sanctions are often voluntary rather than compelled. This distinction is important: *force majeure* under Article 23 of the ILC Articles requires the act to be involuntary or beyond the control of the state.[845] Therefore, such retaliatory measures are unlikely to meet the requirements for *force majeure*, making necessity a more appropriate defence in this context.

To successfully invoke necessity under Article 25 of the ILC Articles, a state must first demonstrate that an essential interest, such as maintaining public order or preserving the national economy under strain from sanctions, was at stake.[846]

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[844] Hildebrandt, “**Collateral Damage Through Sanctions : The Role of ISDS for Third Party Investors Impacted by EU Sanctions Against Russia**”, p. 135.
[845] Bratu, “**O Echilibrare a Valorilor - Sănătatea Publică şI Capitalul în Contextul Pandemiei Covid-19 [A Balancing Of Values - Public Health And Capital In The Context Of The Covid-19 Pandemic]**”, p. 39.
[846] Paddeu, “**Necessity 20 Years On: The Limits of Article 25**”, p. 170.

The state must also establish the existence of a grave and imminent peril, meaning a real and immediate threat to the essential interest. This element, depending on the facts, may be satisfied in cases where sanctions severely undermine the functioning of the state or its economy.[847]

However, the greatest obstacles will likely arise with respect to the "*only way*" and non-contribution criteria.

Under the "*only way*" requirement, the state must prove that the measures it adopted, potentially including those that adversely affected foreign investors, were the sole means available to safeguard the essential interest. This is a high bar, and tribunals have historically interpreted it narrowly.[848] In the context of sanctions, it may be particularly difficult to persuade a tribunal that retaliatory or investor-affecting measures were the only viable option, especially given the international legal system's emphasis on peaceful dispute resolution.[849] Although each case will depend on its facts, existing jurisprudence suggests a restrictive application of this criterion.[850]

The non-contribution requirement presents similar challenges to the externality condition under *force majeure*. Because sanctions are typically imposed in response to a state's conduct, tribunals may be inclined to find that the invoking state contributed to the crisis.[851]

This may raise normative concerns. Some scholars do not deem ISDS tribunals equipped to evaluate the legitimacy of state conduct in geopolitical affairs or to determine whether a state acted with fault or negligence in, for example, pursuing certain foreign

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[847] **Ibid**.
[848] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 59; Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 174; Parish, "**On Necessity**", p. 183.
[849] Hildebrandt, "**Collateral Damage Through Sanctions : The Role of ISDS for Third Party Investors Impacted by EU Sanctions Against Russia**", p. 135; Zrilič, "**Are We in for a New Wave of Investment Arbitrations? Russia's Measures Against Foreign Investors and Investment Treaty Implications**".
[850] Manton, **Necessity in International Law**, pp. 170-171.
[851] Zrilič, "**Are We in for a New Wave of Investment Arbitrations? Russia's Measures Against Foreign Investors and Investment Treaty Implications**".

policy decisions.[852] A more appropriate analytical approach might involve viewing the sanctions themselves as the relevant circumstance creating the situation of necessity, rather than the antecedent political conduct. This would allow tribunals to sidestep complex geopolitical evaluations while still applying the doctrine of necessity meaningfully.[853]

That said, international courts and tribunals frequently address politically sensitive matters and are often required to make preliminary determinations to resolve the issues before them. It therefore seems possible for such bodies to engage with sanctions-related disputes as well, at least in cases where the lawfulness or unlawfulness of the sanctioned state's actions can be assessed relatively straightforwardly (for instance, the use of force, which is narrowly regulated under international law).

Ultimately, while necessity seems conceptually suitable to address sanction-induced crises, its application remains constrained by the rigorous thresholds imposed under CIL. In contrast to *force majeure*, which may not apply where states voluntarily adopt responsive measures, necessity offers a potentially more flexible, yet still demanding, legal pathway. For tribunals to apply it effectively, they may need to adopt a balanced and context-sensitive approach, particularly when assessing the feasibility of alternative measures at the time the state acted.

E. North-South Divide

The application of necessity and *force majeure* defences in investor–state dispute settlement often reflects deeper structural inequalities within the international investment regime. Developing states, typically situated in the Global South, face systemic

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[852] Gaukrodger, "**The balance between investor protection and the right to regulate in investment treaties: A scoping paper**", p. 31.

[853] International courts often employ various "*avoidance techniques*" to refrain from making determinations on politically sensitive issues. These include adopting restrictive interpretations of jurisdiction and standing, declaring that a dispute is not legal in nature or does not exist, or deferring to states through doctrines such as the margin of appreciation: ODERMATT Jed, "Patterns of avoidance: political questions before international courts", International Journal of Law in Context, vol. 14, 2018, pp. 227-233, doi:doi:10.1017/S1744552318000046.

disadvantages when invoking these doctrines, particularly during crises that highlight disparities in economic resilience, legal resources, and institutional capacity. This section examines how these asymmetries manifest in arbitral outcomes, focusing on the unequal application of necessity, the push for reform by Global South actors, and broader theoretical critiques of the investment system. It also reflects on the implications for legitimacy and equity in global economic governance.

1. Structural Inequalities in Investment Law

In addition to the broader structural inequalities embedded within international investment law, the operation of *force majeure* and necessity defences may also reflect a disparity in how developed (Global North) and developing (Global South) states are treated.[854] These defences are designed to apply in exceptional circumstances of crisis, and it is precisely developing states that are more frequently and severely affected by such crises. Economic instability, for example, is more prevalent in developing states; and even when global crises occur, such as the COVID-19 pandemic, the burden tends to fall disproportionately on less developed economies.[855] Armed conflicts, global supply chain disruptions, or health emergencies often inflict greater damage on developing states, in part due to their more fragile infrastructures and unequal positioning in international

[854] The potential for bias based on the development status of the respondent state has long been a subject of debate in ISDS, raising serious concerns about the legitimacy of the system: FRANCK Susan D., "Development and Outcomes of Investment Treaty Arbitration", Harvard International Law Journal, C. 50, 2009, pp. 435-489; ZHANG Jianing, "International Investment Arbitration: Development, Controversies, and Future Outlook", 01.11.2017, pp. 7-8, https://ssrn.com/abstract=3068727; RAO Weijia, "Development status and decision-making in investment treaty arbitration", International Review of Law and Economics, vol. 59, 2019, pp. 1-12.

[855] STROHECKER Karin, "Smaller economies' medium term default risk could have risen", Reuters, 30.01.2025, https://www.reuters.com/markets/smaller-economies-medium-term-default-risk-could-have-risen-2025-01-30 (last accessed: 13 July 2025); WISEMAN Paul, "World Bank warns that 39 fragile states are falling further behind as conflicts grow, get deadlier", AP News, 27.06.2025, https://apnews.com/article/world-bank-development-conflict-gdp-57c1f24ea6ca753e64870a7f882038d5 (last accessed: 13 July 2025); "COVID-19 Brief: Impact on the Economies of Low-Income Countries", U.S. Global Leadership Coalition, 08.2021, https://www.usglc.org/coronavirus/economies-of-developing-countries/ (last accessed: 13 July 2025); "Extreme Poverty is Rising Fast in Economies Hit by Conflict, Instability", World Bank Group, 27.06.2025, https://www.worldbank.org/en/news/press-release/2025/06/27/fragile-and-conflict-affected-situations-intertwined-crises-multiple-vulnerabilities (last accessed: 13 July 2025).

relations.[856] As a result, developing countries may be more likely to adopt drastic emergency measures, and, by extension, more likely to invoke *force majeure* or necessity as defences in investment disputes.

However, these same states face greater difficulty in successfully invoking these defences. A key obstacle is the high evidentiary burden and the rigid interpretation of requirements, particularly the "*only way*" criterion. Tribunals have frequently interpreted this condition strictly, rejecting the defence if any plausible alternative is presented, even if that alternative would have been prohibitively expensive or unrealistic under the circumstances.[857] This disproportionately affects developing states, whose lack of resources may make taking such measures significantly onerous.[858] In contrast, a developed state with greater financial or administrative capacity might feasibly adopt those alternative measures and, therefore, meet the high standard more easily.

From a procedural perspective, the burden of proof for these defences requires extensive evidence and legal argumentation. Developing states, already constrained by limited financial and technical resources, may struggle to meet these procedural demands. The lack of technical capacity, legal expertise, or access to top-tier counsel, an issue frequently highlighted in ISDS literature, further compounds the disadvantage faced by these states in mounting a credible emergency defence.[859]

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[856] "World's Most Vulnerable Countries Lack the Capacity to Respond to a Global Pandemic Credit: MFD/Elyas Alwazir", United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, (25.07.2025), https://www.un.org/ohrlls/news/world's-most-vulnerable-countries-lack-capacity-respond-global-pandemic-credit-mfdelyas-alwazir (last accessed: 13 July 2025); GUNIA Amy, "How Coronavirus Is Exposing the World's Fragile Food Supply Chain – and Could Leave Millions Hungry", Time, 08.05.2020, https://time.com/5820381/coronavirus-food-shortages-hunger (last accessed: 13 July 2025).
[857] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 59; Goldsman / López Forastier, "**Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis**", p. 660; Alvarez-Jiménez, "**Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law**", p. 144.
[858] VAN AAKEN Anne, "Part V Chapter 23: The International Investment Protection Regime through the Lens of Economic Theory", The Backlash against Investment Arbitration, eds. Michael Waibel, Asha Kaushal, 2010, pp. 537-554, p. 546.
[859] BRODLIJA Fahira, "The Multilateral Investment Court: Necessary ISDS Reform or Self-Fulfilling Prophecy?", PennState Dickinson Law Arbitration Law Review, vol. 15, pp. 1-18, p. 16; FYOCK Claiton,

This disparity is also reflected in the asymmetry of contract and treaty drafting. In contractual arrangements, developing states may negotiate from a weaker bargaining position, leading to agreements that favor the private investor and impose rigid obligations.[860] At the treaty level, much of the BIT architecture established in the 1990s prioritized investment protection, often without adequately considering the regulatory needs or crisis-management capacity of the host state.[861] Many of these treaties, drafted with developed states' preferences in mind, omitted public emergency exceptions altogether or included vague, ambiguously worded clauses that are open to restrictive interpretation.[862] Consequently, developing states are frequently forced to rely on CIL defences, such as *force majeure* or necessity, which impose far stricter conditions than

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"Getting 'real' about ISDS reform: a critical realist view of international investment law's status quo", Journal of International Dispute Settlement, vol. 16, 2025, pp. 1-22, p. 17, doi:https://doi.org/10.1093/jnlids/idae027; STEPHAN Ryan, "Is Investment Arbitration Beneficial for Developing Countries? An Empirical Analysis", Daily Jus, 27.06.2024, https://dailyjus.com/world/2024/06/is-investment-arbitration-beneficial-for-developing-countries-an-empirical-analysis (last accessed: 13 July 2025); KRYVOI Yarik, "Three Dimensions of Inequality in International Investment Law", British Institute of International and Comparative Law, 2020, pp. 10-11.

860 QUAK Evert-jan, "The Impact of State-Investor Contracts on Development", pp. 1-22, p. 15; BINTANG Sanusi, "Unfavorable Clauses in International Investment Contracts of Aceh Province, Indonesia", **IOSR Journal** Of Humanities And Social Science, vol. 21, no. 9, 2016, pp. 20-27, p. 21, doi:DOI: 10.9790/0837-2109032027; HALABI Sam F., "Efficient Contracting between Foreign Investors and Host States: Evidence from Stabilization Clauses", 2017, p. 270.

Stabilization clauses are often cited in this context, as they are criticized for tying the hands of the host state and limiting its regulatory discretion: HOWSE Robert, "Freezing government policy: Stabilization clauses in investment contracts", Investment Treaty News, vol. 3, no. 1, 2011, p. 3; Bintang, "Unfavorable Clauses in International Investment Contracts of Aceh Province, Indonesia", p. 24; SINGH Jagriti, "Stabilization Clauses in Investment Contracts in Developing Countries", SSRN Electronic Journal, 2015, pp. 4-7, doi:10.2139/ssrn.2658185; Halabi, "Efficient Contracting between Foreign Investors and Host States: Evidence from Stabilization Clauses", pp. 290-292.

861 Kryvoi, "**Three Dimensions of Inequality in International Investment Law**", p. 10; ALLEE Todd / PEINHARDT Clint, "Evaluating Three Explanations for the Design of Bilateral Investment Treaties", World Politics, vol. 66, no. 1, 2014, pp. 47-87, p. 62; HUIKURI Tuuli-Anna, "Constraints and Incentives in the Investment Regime: How Bargaining Power Shapes BIT Reform", The Review of International Organizations, vol. 18, no. 2, 2023, pp. 361-391, p. 367, doi:10.1007/s11558-022-09473-1; ROSE-ACKERMAN Susan / TOBIN Jennifer, "Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties", SSRN Electronic Journal, 2005, p. 9, doi:10.2139/ssrn.557121.

862 Gibson, "**Beyond Self-Judgment: Exceptions Clauses in US BITs**", p. 43; Masumy / Shang, "**Analyzing the Anatomy of Innovative Investment Treaty Drafting: The Quest to Safeguard the Right to Regulate**", p. 35; "Reforming Investment Treaties: Does Treaty Design Matter? – Investment Treaty News", (25.07.2025), https://www.iisd.org/itn/2018/10/17/reforming-investment-treaties-does-treaty-design-matter-tarald-laudal-berge-wolfgang-alschner (last accessed: 13 July 2025); Tang, "**General Public Policy Exceptions in International Investment Agreements (IIAs): Opportunities and Challenges in Times of Global Health Crisis**", p. 141.

modern treaty-based exception clauses. In some cases, tribunals may even conflate the two, applying the stringent standards of CIL to vague treaty language, leaving the state unable to benefit from either.[863]

In sum, both structurally and procedurally, developing states are more exposed to crises, more likely to adopt emergency measures, and yet less equipped to successfully invoke the very defences international law provides for such situations. This imbalance merits critical attention in both arbitral reasoning and future treaty reform.

2. Unequal Application of Necessity

As demonstrated in cases involving Global South states, such as Argentina during its economic crisis, Libya during its civil war, and various disputes concerning Egypt, tribunals have often rejected necessity defences even where the host state was clearly facing a grave and exceptional crisis.[864] The application of the "*only way*" [865] and "*no contribution*" [866] tests has frequently been rigid, with little regard for the broader context in which these states operated. Factors such as systemic vulnerabilities, limited institutional capacity, or a lack of economic and technical resources have generally not been given sufficient weight in the analysis.[867]

However, recent developments may begin to shift this dynamic. With global crises such as the COVID-19 pandemic and wide-ranging sanctions regimes affecting not only developing but also developed states (albeit to differing degrees), investment tribunals are

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[863] Sabahi / Rubins / Wallace Jr., "**XVI. State Responsibility, Attribution, and Circumstances Precluding Wrongfulness**", p. 535.
[864] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 59; Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 170-171; Parish, "**On Necessity**", p. 183.
[865] Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 59; Goldsman / López Forastier, "**Chapter 29: The Plea of Necessity in Investment Law: The Legacy of the 2001 Argentine Crisis**", p. 660; Alvarez-Jiménez, "**Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law**", p. 144.
[866] Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 58.
[867] Grigera, "**Necessity in Investment Arbitration: Boosting the ICSID System's Legitimacy**"; Burke-White, "**The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System**", p. 204; Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 177.

likely to face a growing number of cases involving Global North respondents. In such cases, similar emergency measures, constraints, and policy considerations may be invoked across jurisdictions, raising a critical question: will tribunals assess these claims with equal deference, regardless of the state's level of development?

In other words, will tribunals be more lenient toward developed states, those with strong legal representation, significant geopolitical influence, and greater reputational capital, while holding developing states to more stringent standards?[868] Will tribunals afford more credibility to emergency measures taken by well-perceived, diplomatically powerful states while expressing skepticism toward similar actions taken by developing states? And how will tribunals treat countries with a history of frequent ISDS claims and adverse awards, will their past record influence the perceived legitimacy of their current defences?

The risk of unequal treatment is particularly troubling when combined with the already strict substantive conditions imposed under necessity and *force majeure*. This combination could leave developing states disproportionately disadvantaged in asserting these defences, even though they may, in practice, be the ones most frequently facing the types of emergencies these doctrines were designed to address. If tribunals continue to adopt a rigid, formalistic approach with no margin of appreciation for the unique challenges confronting developing states, they risk deepening the existing asymmetries within the investment law regime.

While a strict application of the defences may also negatively affect developed states, the consequences are likely to be more severe for developing ones. A more balanced, context-sensitive approach that takes into account the varying capacities of host states is necessary to ensure that defences such as necessity and *force majeure* remain functional and equitable in the face of global crises.

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[868] BEHN Daniel / BERGE Tarald Laudal / LANGFORD Malcolm, "Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration", International Law, 2018, p. 335; NUNNENKAMP Peter, "Investor-State Dispute Settlement: Are Arbitrators Biased in Favor of Claimants?", 2017.

3. Push for Reform

To make emergency defences such as *force majeure* and necessity genuinely accessible, and to mitigate their disproportionate impact on developing states, tribunals must reconsider the overly rigid approaches seen in past decisions. The prevailing standards, such as the requirement of absolute impossibility under *force majeure* or the strict causality and "*no contribution*" tests under necessity, may not align with the realities of contemporary global crises. While these doctrines are framed with high thresholds, they are not meant to exist merely as theoretical safeguards, they must remain operable in practice.[869]

Rigid application of these standards risks creating a perverse outcome: developed states, with greater legal and institutional capacity, may more easily invoke emergency defences, while developing states, often more severely affected by crises, may find these avenues effectively closed to them. Given the significant interests at stake, ranging from public health and economic stability to the preservation of civilian life, tribunals should adopt a more proportionate, context-sensitive, and circumstances-based application of these defences.

Ideally, this shift should not rely solely on the discretion of tribunals. Treaty reform plays a critical role in rebalancing the framework. Recent investment treaties, particularly those negotiated by Global South countries, have begun to include more detailed general exceptions, national emergency clauses, and public interest provisions.[870] These reforms represent a conscious effort to recalibrate the balance between investor protections and

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[869] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 179; Katsikis, "'**Necessity' due to COVID-19 as a Defence to International Investment Claims**", p. 62.

[870] UNCTAD, "International investment agreements trends: the increasing dichotomy between new and old treaties", IIA Issues Note, vol. 2, 2024, https://unctad.org/system/files/official-document/diaepcbinf2024d4_en.pdf (last accessed: 11 July 2025); OECD-UNCTAD-UNCITRAL, "Modernising investment treaties to support the Sustainable Development Goals: New approaches and avenues for reform", Investment Treaty Conference 2025, 2025, pp. 4-5, https://www.oecd.org/content/dam/oecd/en/events/2025/03/investment-treaty-conference/Investment%20Treaty%20Conference%20-%20background%20note.pdf (last accessed: 11 July 2025); Alschner / Hui, "**Missing in Action: General Public Policy Exceptions in Investment Treaties**", pp. 1-28.

the regulatory autonomy of host states, particularly in times of crisis. They can also be seen as a response to both rigid treaty interpretation and the narrow reasoning historically applied by tribunals.

Academic commentary has increasingly echoed these concerns. There is a growing recognition that ISDS tribunals have often been overly formalistic and inconsistent, particularly in their treatment of developing countries.[871] Although the legal standards for necessity and *force majeure* appear neutral on paper, their application has frequently resulted in de facto inequality, disproportionately burdening Global South states. Ensuring a fairer and more functional approach to emergency defences requires doctrinal evolution, procedural sensitivity, and, perhaps most importantly, an acknowledgment of the structural asymmetries embedded in the investment arbitration system.

4. Broader Theoretical Implications

The availability of *force majeure* and necessity defences to developing states, and the potential for differential treatment by tribunals between developed and developing countries, reflects a broader structural challenge within the international investment law system. While not the only concern, this issue is particularly pressing in the current global landscape, where states are grappling with increasingly frequent and complex crises. In this context, it is essential that tribunals adopt a context-sensitive and circumstances-based analysis, rather than allowing disparities in state resources to result in unequal access to emergency defences.

[871] ARATO Julian / BROWN Chester W. / ORTINO Federico, "Parsing and Managing Inconsistency in Investor-State Dispute Settlement", pp. 10-16; FYOCK Claiton, "Getting 'real' about ISDS reform: a critical realist view of international investment law's status quo", pp. 3-5; ALCAREZ José E., "ISDS Reform: The Long View", ICSID Review - Foreign Investment Law Journal, vol. 36, no. 2, 2022, pp. 253-277, p. 268, doi:10.1093/icsidreview/siab036; JILLANI Muhammad Abid Hussain / GHOURI Ahmad Ali / WU Ximei, "Institutional Design for an Appellate Mechanism in Investor-State Dispute Settlement", Asian Journal of International Law, 2025, pp. 1-31, pp. 2-3, doi:10.1017/s2044251325000098; FRANCK Susan, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", SSRN Scholarly Paper, Rochester, NY, 11.10.2005, https://papers.ssrn.com/abstract=812964 (last accessed: 11 July 2025).

If emergency defences become practically available only to developed states, due to their superior legal and financial resources or greater deference from tribunals, the legitimacy of the ISDS system could be seriously undermined. A perception of bias may arise, further eroding trust among developing states. This, in turn, could prompt states to withdraw from investment treaties, terminate existing agreements, refuse to participate in arbitration, or even disregard tribunal decisions.[872] Ironically, such a reaction would harm not only the investment law regime but also the foreign investors whom the system is designed to protect, particularly those operating in high-risk or emerging markets.

In addition, there is a broader issue of legal certainty and predictability. The existing jurisprudence around *force majeure* and necessity defences is already inconsistent, and the risk of tribunals applying different standards in similar cases only exacerbates that problem. While variation is inherent in a decentralized adjudicative system like ISDS, it can and should be mitigated by greater coherence in reasoning and the adoption of principled, equitable standards.

In this sense, it is time to revisit and recalibrate the doctrines of *force majeure* and necessity to reflect modern realities. These concepts were traditionally applied to straightforward scenarios, such as a vessel being forced into foreign waters by a storm, where the defence clearly applied. But contemporary crises are more complex and systemic. States today face global pandemics, climate-related disasters, armed conflicts, and sweeping sanctions regimes. The rigid criteria developed decades ago may no longer be appropriate for assessing such situations.

Tribunals must therefore be willing to engage with the practical realities of states invoking emergency defences. Greater deference should be afforded to policy choices

[872] Huikuri, "**Terminating to Renegotiate? Strategic Exit from International Investment Treaties**", p. 16; KILIC Neriman, "Legitimacy Concerns in Investor- State Dispute Settlement", p. 12; LANGFROD Malcolm, "Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction", The Journal of World Investment & Trade, vol. 21, no. 2-3, 2020, pp. 167-187, p. 171, doi:10.1163/22119000-12340171; "Does the EU's Exit From the Energy Charter Treaty Foreshadow the Demise of ISDS?", Report, 2024, https://www.bakerinstitute.org/research/does-eus-exit-energy-charter-treaty-foreshadow-demise-isds (last accessed: 11 July 2025).

made in good faith during crises, particularly when the state faces resource constraints or systemic vulnerabilities. Doing so would help protect not only the regulatory autonomy of states but also the legitimacy and long-term viability of the investment law system as a whole.

VI. REFLECTIONS AND PROPOSALS

Having explored the legal foundations, case law, and thematic contexts of necessity and *force majeure* in investor–state dispute settlement, this final section turns to practical and forward-looking considerations. It offers a series of reflections and reform proposals aimed at enhancing the coherence, fairness, and legitimacy of emergency-related defences in international investment law. The discussion is structured around four key areas: improving treaty drafting through clear and effective emergency clauses; fostering greater consistency in arbitral decision-making; reinforcing the regulatory autonomy of states; and identifying procedural and institutional mechanisms to mitigate future conflicts between investor rights and sovereign crisis responses.

A. Emergency Clauses / Treaty Drafting

Although *force majeure* and necessity are long-standing principles of CIL, their vague definitions, blurred doctrinal boundaries, and strict thresholds have created considerable uncertainty in practice. These defences, while foundational, often prove difficult to apply effectively, especially in the context of complex modern crises like armed conflict, sanctions, pandemics, or economic collapse.

To address these shortcomings, it is preferable for states to include explicit emergency exception clauses in their investment treaties.[873] Clear, treaty-based provisions allow states to tailor exceptions to their specific needs and provide tribunals with concrete interpretive guidance when assessing emergency measures. While some debate exists as

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[873] Burke-White / von Staden, "**Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties**", p. 405; SINHA Amit Kumar, "Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries", Asian Journal of International Law, vol. 7, no. 2, 2017, pp. 227-263, p. 262.

to whether such treaty clauses supplement or replace the CIL framework, the former view is deemed more accurate.[874]

Recent treaty practice reflects this trend, with many states, especially those in the Global South, increasingly incorporating general exception clauses (public interest, public order, essential security) and more specific provisions (*e.g.*, public health in response to the COVID-19 pandemic).[875] To enhance clarity and predictability, it would be useful to develop model clauses that clearly define the conditions, scope, and procedural framework for such exceptions.[876]

These clauses could include a proportionality requirement, allowing tribunals to assess whether the measure was suitable, necessary, and balanced in its impact, thus providing more flexibility than the rigid CIL defences. Notably, proportionality is absent from *force majeure*, which requires absolute impossibility, and from necessity, which requires that the contested measure be the "*only way*."[877] Including proportionality would enable tribunals to better balance foreign investor rights with the legitimate public policy objectives of the host state.[878]

Clauses could also incorporate review mechanisms, specifying how the measures will be assessed, by whom, and under what standard.[879] This would help avoid disputes

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[874] Burke-White / von Staden, "**Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties**", p. 324; Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", p. 161.

[875] UNCTAD, "**International investment agreements trends: the increasing dichotomy between new and old treaties**"; OECD-UNCTAD-UNCITRAL, "**Modernising investment treaties to support the Sustainable Development Goals: New approaches and avenues for reform**", pp. 4-5; Alschner / Hui, "**Missing in Action: General Public Policy Exceptions in Investment Treaties**", pp. 1-28.

[876] *E.g.*, Article 8 of the SADC Model BIT; Article 8(3)(c) of the 2012 U.S. Model BIT; EU Model Clauses for BITs 2023; Article 3 of the Canada Model BIT 2021.

[877] Gülçür, "**The Necessity, Public Interest, and Proportionality in International Investment Law: A Comparative Analysis**", p. 264.

[878] "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality", International Investment Law and Comparative Public Law, eds. Benedict Kingsbury, Stephan W. Schill Oxford University Press, 2010, pp. 98-101, doi:10.1093/acprof:oso/9780199589104.003.0003.

[879] Masumy / Shang, "**Analyzing the Anatomy of Innovative Investment Treaty Drafting: The Quest to Safeguard the Right to Regulate**", p. 33.

over whether emergency clauses are "*self-judging*," a question that has divided tribunals[880] in past cases.[881] Sector-specific carve-outs, such as for healthcare, energy, or national security, could also be included where especially vital interests are implicated.

Well-drafted emergency clauses thus serve a dual, and seemingly paradoxical, function: they both limit arbitral discretion by offering clear boundaries, but also enhance flexibility by enabling tribunals to apply more context-sensitive standards than those found in CIL. To achieve this, treaty language should be crafted with an understanding of the practical challenges states face, particularly resource constraints. Clauses might expressly instruct tribunals to consider the host state's circumstances at the time of the measure, thus avoiding hindsight bias and enabling a more realistic review.

Finally, although the CIL doctrines of *force majeure* and necessity are doctrinally distinct,[882] treaty drafters should clearly differentiate between them in emergency clauses. This might involve separate provisions: one addressing *force majeure* (which applies to involuntary impossibility or, if a softer approach is desired, commercial impracticability), and another addressing necessity (which applies when voluntary but exceptional measures are taken to safeguard essential interests). This distinction would clarify the scope and application of each defence, making them more effective tools in both treaty drafting and dispute resolution.

B. How to Ensure Consistent Tribunal Practice

As explored above, the application of *force majeure* and necessity defences in investment arbitration has been plagued by serious inconsistencies in the case law. Some degree of divergence in outcomes is, of course, expected in a system like ISDS, which

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[880] *E.g.*, *Sempra v. Argentina*, Award, para. 388; *Enron v. Argentina*, Award, para. 339; *LG&E v. Argentina*, Decision on Liability, para. 212; *CMS v. Argentina*, Award, para. 373.
[881] WAGNER Kilian, "Regulation by Exception – The Emergence of (General) Exception Clauses in International Investment Law?", Austrian Review of International and European Law, C. 26, S. 1, 2023, pp. 77-117, p. 98, doi:http://dx.doi.org/10.1163/15736512-02601004.
[882] Sloane, "**On the Use and Abuse of Necessity in the Law of State Responsibility**", p. 489.

lacks binding precedent and a hierarchical appellate structure.[883] However, the variations seen, particularly in the Argentina cases, suggest deeper structural and methodological issues rather than merely incidental divergence.[884]

Argentina faced numerous claims under the same BIT, concerning the same emergency measures adopted in response to a single economic crisis. Yet, the tribunals reached markedly different conclusions on liability and on the applicability of the necessity defence. While some variation is understandable, for instance, in how tribunals assess the gravity of the crisis, the Argentina decisions revealed profound disagreements not just in evaluation but in which legal rules to apply and how to apply them.

Tribunals diverged sharply on key issues like the interpretation of the "*only way*" and "*no contribution*" requirements.[885] Regarding the no-contribution element, some tribunals adopted a strict causality-based approach, effectively barring the defence if any internal factors contributed to the crisis.[886] Others favored a fault-based approach, requiring proof of wrongful conduct rather than mere involvement.[887] Similarly, for the "*only way*" criterion, some tribunals demanded an extremely high threshold, while others barely reasoned through the alternatives, sometimes side-stepping the analysis altogether.[888] Perhaps more alarmingly, some decisions have conflated CIL-based defences with treaty-based exception clauses, despite their distinct legal bases, purposes, and effects. While erroneous decisions are an inevitable part of adjudication, hence the existence of annulment mechanisms, it is essential that tribunals exercise greater care in

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[883] Kaufmann-Kohler, "**Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture**", pp. 368-373.
[884] Thanvi, "**Chapter 1: Bringing Consistency to Investment Arbitration: Challenges and Reform Proposals**", p. 13; Forji, "**Drawing the Right Lessons from ICSID Jurisprudence on the Doctrine of Necessity**", p. 57.
[885] 1.B.2.
[886] *E.g.*, *Impregilo S.p.A. v. The Argentine Republic*, Award, para. 356; *CMS v. The Argentine Republic*, Award, paras. 328-329; *Enron v. Argentine Republic*, Award, paras. 311-312; *El Paso v. Argentine Republic*, Award, para. 618.
[887] *E.g.*, *Urbaser S.A. v. The Argentine Republic,* Award, para. 711.
See Dolea, "**Covid-19 Şi Starea de Necesitate în Arbitrajul Investiţional [Covid-19 and State Of Necessity in Investment Arbitration]**", p. 58.
[888] Paddeu, "**Necessity 20 Years On: The Limits of Article 25**", pp. 176-178.

distinguishing between these two categories to preserve clarity and ensure meaningful application.

Despite the absence of binding precedent, there is increasing emphasis on peer learning and cross-citation practices. Tribunals could be encouraged to engage more systematically with prior case law, not as binding precedent, but as a means to foster a more principled and transparent jurisprudence.[889] A tribunal that rigorously engages with the reasoning of past awards, even if it departs from them, enhances the credibility of its decision.[890]

Perhaps most importantly, ISDS tribunals must not shy away from engaging with public international law.[891] The *force majeure* and necessity defences derive from public international law ("**PIL**"), particularly as codified in the ILC Articles on State Responsibility. A deeper and more consistent application of PIL principles, not isolated from but in conversation with the investment law context, can help align ISDS practice with broader international legal standards and expectations.

C. Protecting the Regulatory Discretion of the States

While the protection of foreign investment has long been the core rationale of the ISDS system, and in many ways still is, recent years have seen a growing demand for greater regulatory discretion for host states, particularly in areas involving public welfare,

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[889] "Coherence, Consistency, and the Reform of Investment Treaty Arbitration", The Changing Character of International Dispute Settlement, ed. Eric De Brabandere, Cambridge University Press, 2023, p. 263, doi:10.1017/9781009076296.016; CHEN Richard C., "Precedent and Dialogue in Investment Treaty Arbitration", Harvard International Law Journal, vol. 60, pp. 70-71.

[890] EFILA Blog, "A Metamorphosis of Mindset: How International Investment Arbitration Has Evolved Without Major Institutional Reform - EFILA Blog", 22.01.2024, https://efilablog.org/2024/01/22/a-metamorphosis-of-mindset-how-international-investment-arbitration-has-evolved-without-major-institutional-reform/ (last accessed: 11 July 2025).

[891] Eric De Brabandere (ed.), "The public international law foundation of investment treaty arbitration", Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications, Cambridge Studies in International and Comparative Law, Cambridge: Cambridge University Press, 2014, pp. 17-54, doi:10.1017/CBO9781107589216.003; KULICK Andreas / WAIBEL Michael, "General International Law in International Investment Law Introductory Chapter", SSRN Electronic Journal, 2023, doi:10.2139/ssrn.4468225.

such as health, safety, and environmental protection.[892] States remain the primary actors responsible for governing their territories and responding to emergencies. As a result, tensions have increasingly emerged between investor rights and sovereign crisis responses, particularly when tribunals appear to prioritize investment protection over legitimate public policy objectives during emergencies.[893] This has raised concerns about whether the current ISDS framework adequately preserves the regulatory space necessary for states to act effectively in times of crisis.[894]

As discussed earlier, tribunals should also be more receptive to the asymmetries between developing and developed states, particularly in how crises affect them differently and in the resources available to respond. A uniform standard that does not account for these disparities risks disproportionately burdening developing countries, even when they act in good faith.

Moreover, in applying the non-contribution requirement, tribunals should consider adopting a more fault-based or negligence-based standard, rather than a rigid causality test. This would ensure that good-faith crisis management policies are not penalized simply because the state had some role in the crisis, especially when the measures taken

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[892] Baltag / Joshi / Duggal, "**Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?**", pp. 382-383; THOMPSON Alexander/ BROUDE Tomer / HAFTEL Yoram Z., "Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design", International Organization, vol. 73, no. 4, 2019, pp. 859-80, doi:10.1017/s0020818319000195; WESTON Phoebe / GREENFIELD Patrick, "Why Fear of Billion-Dollar Lawsuits Stops Countries Phasing out Fossil Fuels", The Guardian, (06.03.2025), blm. Environment, https://www.theguardian.com/environment/2025/mar/06/isds-fear-of-billion-dollar-lawsuits-stops-countries-phasing-out-fossil-fuels-aoe (last accessed: 11 July 2025); SEPÚLVEDA HARMS Sophia, "Toward a Green New Treaty Deal: Reforms to ISDS amid Environmental Crisis", Houston Law Review, vol. 58, no. 2, 2020, https://houstonlawreview.org/article/18021, https://houstonlawreview.org/article/18021-toward-a-green-new-treaty-deal-reforms-to-isds-amid-environmental-crisis (last accessed: 11 July 2025);KORZUN Vera, "The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs", vol. 50; SHEARGOLD Elizabeth, "International Investment Law and Public Health: The Need for Forward-Looking Reforms", Journal of International Dispute Settlement, vol. 16, no. 2, 2025, doi:10.1093/jnlids/idaf011.

[893] "ICSID Tribunals Fail to Address the Imbalance between Sustainable Development Principles and Investment Protections – Investment Treaty News", (25.07.2025), https://www.iisd.org/itn/2021/12/20/icsid-tribunals-fail-to-address-the-imbalance-between-sustainable-development-principles-and-investment-protections/ (last accessed: 11 July 2025).

[894] YACOUB Amin R., "Bridging the Gap between International Investment Law and Human Rights", **Hofstra** Law Review, vol. 52, 2023; "**Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality**", pp. 102-104.

are well-reasoned, based on expert advice or science, and clearly aimed at mitigating harm. Arbitral review should not result in second-guessing legitimate, well-intentioned policies, particularly in the midst of an emergency.

Ultimately, by adopting a more flexible, context-sensitive approach, grounded in proportionality, reasonableness, and deference where appropriate, tribunals can help safeguard states' regulatory discretion, ensure the legitimacy of ISDS, and prevent the perverse outcome of punishing states for taking necessary actions to protect their populations in times of crisis.

D. How to Prevent Future Issues

While the challenges surrounding the application of *force majeure* and necessity defences may initially appear insurmountable, they are by no means unresolvable. Many of the issues identified can be meaningfully addressed, or at least mitigated, through a combination of treaty reform, tribunal practice, and institutional capacity-building.

A key starting point lies in modernizing investment treaties. States should revisit outdated BITs and prioritize concluding new agreements with clear, detailed, and balanced emergency exception clauses.[895] These clauses not only guide tribunals more effectively but also enhance legal certainty and predictability for both investors and host states. Naturally, this presumes that tribunals will act diligently in distinguishing between treaty-based exceptions and CIL defences, avoiding analytical conflation and inconsistency.

Tribunals, for their part, should move away from overly rigid interpretations of old doctrinal criteria and instead adopt approaches that reflect the realities of today's world, including global crises and the resource constraints faced by many developing states.[896] This flexibility should extend not only to treaty interpretation, but also to contractual

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[895] "**International Investment Agreements Reform Accelerator**", p. 26; Nasirli, "**Balancing Investor Protection and Sovereignty- The Evolution of BITs and ISDS in International Public Investment Law**", p. 9; UNCTAD, "**International investment agreements trends: the increasing dichotomy between new and old treaties**".
[896] Grigera, "**Necessity in Investment Arbitration: Boosting the ICSID System's Legitimacy**".

contexts. Just as treaties need revision, contracts between foreign investors and host states should include well-drafted *force majeure* clauses, clearly defining the scope and consequences of crisis situations. Such clauses provide a more tailored legal framework for tribunals to assess contractual obligations, grounded in the specific expectations of the parties.

Beyond legal drafting, procedural mechanisms should be considered as a way to reduce friction between investors and states.[897]These could include notification and consultation processes that allow states to alert investors when emergency measures are being planned, providing space for dialogue and potentially averting full-blown disputes.[898] Such procedures promote amicable resolution, improve mutual understanding, and enhance investor confidence, without undermining the state's ability to act in the public interest.

While greater tribunal sensitivity to the asymmetries between developed and developing countries is important, this alone cannot be a permanent solution. A more sustainable path forward involves investing in capacity-building for developing states, including legal training and strengthening institutional expertise in international investment law.[899] This would enable these states to more effectively invoke emergency defences and protect the public interest in ISDS proceedings. Enhanced legal knowledge would also improve the design and implementation of emergency measures, minimizing

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unnecessary infringements on investor rights and reducing the likelihood of future disputes.

VII. Conclusion

This thesis set out to explore the complex legal and practical challenges surrounding the invocation of the necessity and *force majeure* defences by states in ISDS. In a world increasingly shaped by global crises, ranging from economic and financial collapses to pandemics, climate emergencies, armed conflicts, and geopolitical sanctions, states are often compelled to take extraordinary measures that may conflict with their obligations under international investment agreements. Against this backdrop, the study has examined whether and how international law, particularly through the doctrines of necessity and *force majeure*, allows states to justify such emergency responses without incurring international responsibility.

The research began by establishing the legal foundations of both defences under CIL, as codified by the ILC Articles. Through this analysis, the thesis clarified the conditions under which the wrongfulness of a state's conduct may be precluded: grave and imminent peril, lack of contribution, objective impossibility, and the "*only way*" test. While these criteria are designed to prevent abuse, they also risk being applied in an overly rigid or inconsistent manner by arbitral tribunals.

The case studies and jurisprudence reviewed, particularly in the context of Argentina's financial crisis, Libya's internal conflict, and other crisis-driven disputes, demonstrated that tribunal practice has been fragmented and often contradictory. Some tribunals have adopted narrow interpretations of key concepts like "*essential interest*" or "*only way*," while others have taken a more pragmatic and context-sensitive approach.

The thesis also addressed the interaction between customary defences and treaty-based exception clauses, such as those relating to public order, national security, or emergency situations. It showed that while some treaties incorporate flexible clauses, either self-judging or subject to tribunal review, others are silent, pushing states to rely on

CIL. The lack of clarity in treaty drafting and the divergent approaches taken by tribunals further contribute to legal uncertainty and reduce the effectiveness of these defences in practice.

Moreover, the research highlighted how contractual mechanisms, such as *force majeure* and hardship clauses, can overlap or conflict with public law defences, particularly in mixed claims where states are both commercial actors and sovereign regulators. In this regard, the thesis argued that clearer distinctions and integrated legal reasoning are required to reconcile public and private law obligations in ISDS.

Through its comparative analysis with commercial arbitration, the thesis revealed that while commercial tribunals tend to be more flexible in interpreting *force majeure* and hardship clauses, investment tribunals are often constrained by formalistic readings of state defences. This contrast underscores the need for greater adaptability and a more balanced risk-sharing framework in ISDS.

In its thematic analysis, the thesis assessed the applicability of necessity and *force majeure* across various crisis contexts. In the case of COVID-19, for example, many emergency measures taken by states triggered investor claims, despite being implemented for public health reasons. Similarly, in the face of climate change and environmental degradation, states may find themselves needing to enact drastic regulatory changes that affect foreign investors. Yet, without adequate legal space and flexible tribunal reasoning, such actions risk being penalized under the current investment regime.

Ultimately, the thesis concludes that international investment law, in its current form, offers only limited scope for states to invoke necessity and *force majeure* defences successfully. The strict legal thresholds, fragmented jurisprudence, and tension between investor rights and state sovereignty expose significant weaknesses in the ISDS system when it is faced with emergencies.

To address these gaps, the thesis argues for a series of coordinated reforms. First, there is a pressing need for clearer and more precise drafting of investment treaties, particularly with respect to exception clauses and their legal consequences, including the proper scope of self-judging provisions and the incorporation of procedural safeguards. Second, tribunal decision-making must become more consistent and transparent. Third, it is essential to recognize the evolving nature of global emergencies, such as environmental catastrophes and public health crises, and to reflect these realities in the future development of international investment standards. Finally, the legal system must better safeguard the regulatory autonomy of states, allowing them to take decisive and proportionate action in the public interest without exposing themselves to disproportionate liability under investment agreements.

By integrating these reforms, the international investment system could evolve toward a more equitable, predictable, and resilient regime, better equipped to balance investor protection with the legitimate exercise of state sovereignty during times of crisis.

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Curriculum Vitae

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