

Armed Conflict as Force Majeure in International Investment Law

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ABSTRACT: *This article examines how force majeure has been invoked in international investment law as a shield against claims of state responsibility for losses that foreign investors sustained in various types of turmoil. The historically rich diplomatic and jurisprudential practice has created a misplaced expectation about the potential of this international law principle as a defence in the modern investment law context. The article argues that the usefulness of the defence depends on the nature of the claim, whereby different categories of claims may be susceptible to different concepts of force majeure, distinguishing in particular between force majeure as a circumstance precluding wrongfulness, a circumstance informing the duty of due diligence, and an exception in investment contracts. The article examines how these concepts overlap and differ, and how the interaction between them affects their application as a defence in conflict-related investment arbitration cases. It argues that while the potential of force majeure as a circumstance precluding wrongfulness is limited, its manifestation as an aspect that modifies the obligation of due diligence or an exception included in investment contracts, has played an important role in investment cases concerning conflict-related losses.*

1. INTRODUCTION

Violent situations like riots, revolutions, civil wars and international armed conflicts can impair the state's ability to carry out its obligations towards foreign investors.¹ For example, due to the suddenness and impact of a violent event, state organs may be unable to protect investments (including the investor as a person, and the investment as facilities, assets, personnel, etc.) against physical attacks of rebels, terrorists or insurgents. On the other hand, state security forces may be compelled to inflict damage on investment property in the course of hostilities or in furthering their military cause. Furthermore, during protracted violent periods, government agencies may become unable to carry out obligations under investment contracts, and fulfilling financial obligations to investors may become temporarily impossible. In the absence of armed

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¹ For the purpose of this article, the concept of armed conflict transcends the narrow dichotomous definition created by the sources of international humanitarian law. Instead, the concept of armed conflict is used autonomously as emerged from armed conflict clauses in bilateral investment treaties (BITs) so as to encompass different types of violent situations of certain scale (including riots, revolutions etc.). See e.g., Article 5 of the Pakistan – Philippines BIT (1999) which states that the clause applies with respect to losses owing to 'war, revolution, state of emergency, revolt, insurrection, riot, or other armed conflicts in the territory of such Contracting Party'.

conflict, such conduct could result in state responsibility to pay damages to injured investors for the violation of investment treaties or customary protections. International law, however, provides certain rules that address disruptions to a state's ability to perform and provide for a fairer distribution of risk when such disruptions occur. One such rule that has been frequently invoked when a conflict situation caused disruption is the defence of *force majeure*.

The notion of legal excuse for not performing an obligation due to an overpowering, supervening event is widely believed to have origins in Roman law.² Centuries of international commerce and legal development contributed to the wide popularity of this principle, which has taken different names and different meanings across various municipal legal systems and various legal disciplines. The name *force majeure* originated from the French Civil Code of 1804, but has become widely used in other domestic, transnational and international legal systems as a concept denoting certain extraordinary events that can justify the non-performance of a legal obligation.³ Commonly, such events would have to be unforeseen, or foreseen but irresistible, uncontrollable and make it impossible to perform an obligation. The ubiquity of this exception across various municipal systems paved the way for its gradual acceptance in international law as a defence against state responsibility.

Historically, the notion entered the international legal discourse in the nineteenth and early twentieth centuries, a period fraught with riots, revolutions and civil wars.⁴ The claims of foreigners who suffered injuries in those situations were espoused by their home states that sought compensation for losses incurred via channels of diplomatic protection or different types of adjudicative bodies, like mixed claims commissions and arbitrations. Because host states commonly invoked *force majeure* as a defence against such claims, the concept became increasingly subjected to the analysis of international arbitrators, diplomats and scholars. It is thus no exaggeration to suggest that developments involving losses that foreign investors sustained during violent strife importantly contributed to the development of a defence of *force majeure* and its ultimate codification in the Articles on Responsibility of States for Internationally Wrongful Acts (ARS).⁵

² For example, Justinian's Digest expresses the idea that nobody is bound by the impossible: 'impossibilium nulla obligatio'. See Peter Mazzacano, 'Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG', *Nordic Journal of Commercial Law*, 2011, 2: 1-54, at 12.

³ *Ibid.*, at 39.

⁴ See Section 3. The governments of newly independent Latin American countries were unstable, there was a civil war in the US, growing nationalist movements in Europe, and a wave of colonisation in Africa.

⁵ International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries', UN GAOR, 56th Sess., Supp. 10, Ch. 4, (2001) UN Doc A/56/10 (ARS), Article 23.

While in the past, the treatment of foreign investors in time of armed conflict gave rise to discussions about *force majeure*, in modern investment law, characterised by international investment treaties, until recently, the defence has rarely been invoked, let alone successfully asserted, at least as a circumstance precluding wrongfulness. Scholars tend to agree this is due to a high threshold for meeting the requirements of the said defence in international law.⁶ The reasons may be more complex, however. This article sets out to examine the treatment of *force majeure* as a state's defence against claims of foreign investors for losses they sustained during armed conflicts. It aims to show that the appeal of *force majeure* as a defence in the international law of state responsibility is reduced not only because of strict conditions for its invocation, but more importantly, due to the availability of other defences that are more relevant and suitable for addressing such supervening situations.⁷ Critically for this article, these include the content of relevant primary obligations and a *force majeure* clause as an exception in international investment contracts.

Since in the past *force majeure* was often invoked to cover any situation of inability to perform due to armed conflict, this has created a misunderstanding about what the concept actually means and how it differs from other concepts that carry the same name and perform a similar role, but on a distinct plane. As will be demonstrated in the article, this conceptual confusion and the lack of clarity still pervades contemporary jurisprudence and scholarship. In view of the recent surge in investment claims following 'Arab Spring' events in 2011 and other ongoing armed conflicts in the region, which seem to portend the renaissance of the *force majeure* invocation in investment disputes,⁸ the examination of this question is timely and pertinent.

⁶ See e.g., Federica I. Paddeu, 'A Genealogy of Force Majeure in International Law', *British Yearbook of International Law*, 2012, 82(1): 381-494; Andrea K. Bjorklund, 'Emergency Exceptions: State of Necessity and Force Majeure', in Peter Muchlinski *et al.* (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008), 459-523, at 499; Sandra Szurek, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Force Majeure', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (OUP, 2010), 475-80, at 476; S. Malcolm Evans, *International Law* (5th ed., OUP, 2018), at 437.

⁷ On this occasion, the relationship between *force majeure* and other defences under the law of state responsibility (e.g., necessity) or exceptions in the law of treaties (e.g., supervening impossibility to perform) is not explored. See, however, Paddeu (2012), *supra* note 6, at 467; Christina Binder, 'Does the Difference Make a Difference? A Comparison between the Mechanisms of the Law of Treaties and of State Responsibility as Means to Derogate from Treaty Obligations in Cases of Subsequent Changes of Circumstances', in Marcel Szabó (ed.), *State Responsibility and the Law of Treaties* (The Hague: Eleven, 2010), 1-34, at 27-31.

⁸ See e.g., *Ampal-America Israel Corp v. Arab Republic of Egypt*, ICC Case 18215/GZ/MHM (Final award, December 2015) (*Ampal*, ICC); *Ampal-America Israel Corp v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11 (Decision on Liability, February 2017) (*Ampal*, ICSID); *Gujarat State Petroleum Corporation Limited v. the Republic of Yemen and the Yemen Ministry of Oil and Minerals*, ICC Arbitration No. 19299/MCP (Award, 10 July 2015). In recent Libya cases, not yet published, *force majeure* has been also reportedly invoked as a defence. See L Peterson, 'As Libya Begins to See Wave of Investment Treaty Arbitrations, at Least Seven Turkish BIT Claims are Pursued at ICC' (IAReporter,

The article distinguishes in particular between three concepts of *force majeure*: (i) *force majeure* as a circumstance precluding wrongfulness, (ii) *force majeure* as a factual circumstance informing the duty of due diligence, and (iii) *force majeure* as an exception in investment contracts. While all three concepts can be used as a state's shield against claims of foreign investors, they operate on different levels and overlapping legal contexts, and may exhibit similar characteristics with different meanings. Through surveying the relevant investment jurisprudence and doctrinal views, the article juxtaposes these concepts, discusses commonalities and differences, and attempts to untangle conceptual complexities. It argues that while the potential of *force majeure* as a circumstance precluding wrongfulness may be limited, its manifestation as an aspect that modifies the obligation of due diligence or an exception included in investment contracts, has played an important role as a defence against investment claims for conflict-related losses.

Force majeure has attracted very limited attention in international law scholarship⁹ and barely any in investment law.¹⁰ This contribution presents the first examination of the defence in the context of investment claims emerging from armed conflict, and more generally, the first comparative analysis of different *force majeure* conceptions. Significantly, the article introduces a novel concept of *force majeure* as a factual circumstance informing the duty of due diligence, which helps explain the relationship between *force majeure* as a legal defence and a state's obligation to protect foreign investors. Although the discussion is limited to the cases of investment losses in conflict situations, the findings are of a general nature and equally relevant for application of *force majeure* in a non-investment setting as well as situations when a supervening event is not armed conflict.

The article starts with a brief description of *force majeure* as a defence in the law of state responsibility. It differentiates between its invocation in situations when investment losses resulted from state action and situations when losses derived from state omission. With regard to the latter, the article examines whether *force majeure* can be invoked to justify the non-payment of financial obligations in time of armed conflict. Section Three looks into the application of *force majeure* in cases of alleged non-performance of the obligation of protection. The focus of this part is the relationship between the duty of due diligence and *force majeure*, something that has

31 March 2017), available at: www.iareporter.com/articles/as-libya-begins-to-see-wave-of-investment-treaty-arbitrations-at-least-seven-turkish-bit-claims-at-icc/ (accessed 7 December 2018).

⁹ For a general discussion on *force majeure* as a circumstance precluding wrongfulness, see Paddeu (2012), *supra* note 6; Szurek (2010), *supra* note 6.

¹⁰ See Bjorklund (2008), *supra* note 6; Anastasios Gourgourinis, 'Financial Crisis as *Force Majeure* under International Law and EU Law: Defending Emergency Measures, *à l'europpéenne*, in Investment Arbitration under Intra-EU BITs', in Christian Tams *et al.* (eds.), *International Investment law and Global Financial Architecture* (Elgar, 2017), 281-310.

generated a great deal of jurisprudential and doctrinal confusion. Lastly, Section Four examines the application of *force majeure* clauses in investment contracts, which have been commonly invoked in time of turmoil. It highlights the often overlooked differences between the private law exception and the defence in international law, while also identifies points of convergence, focusing in particular on two requirements: unforeseeability and impossibility.

2. FORCE MAJEURE AS A CIRCUMSTANCE PRECLUDING WRONGFULNESS

In the international law of state responsibility, *force majeure* presents one of the circumstances that precludes the wrongfulness of a state's conduct. In other words, it is one of the circumstances that exonerates a state from responsibility for not performing a particular international obligation. As such, *force majeure* constitutes a defence against a claim of state responsibility and could potentially be used as a host state's defence against claims of foreign investors for the alleged breach of investment treaty obligations.¹¹ *Force majeure* is codified in Article 23 of ARS, which provides:

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 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;
 - b. the State has assumed the risk of that situation occurring.

For the defence to be successfully invoked, three conditions, in particular, must be met. First, the event of *force majeure* must be due to either an irresistible force or an unforeseen event. With respect to 'irresistibility', the International Law Commission (ILC) explained in the Commentary to ARS 'that there must be a constraint which the state was unable to avoid or oppose by its own means'.¹² On the other hand, the alternative condition of 'unforeseeability' means that 'the event must have been neither foreseen nor of an easily foreseeable kind'.¹³ It suffices that either the event is

¹¹ General law of state responsibility can apply in a specialised regime, like investment treaty law, with respect to the matters that are not regulated in the specialised regime. See Article 55 of ARS.

¹² ILC Commentary to ARS, Article 23, para. 2.

¹³ *Ibid.*

unforeseeable or foreseeable but irresistible.¹⁴ Due to its ambiguous meaning, the requirement of ‘unforeseeability’ is analysed in greater detail in Section 4.1.

Second, the *force majeure* act must be beyond the control of the state. This does not mean that it must be absolutely external to the state invoking the defence. As stated in the comprehensive UN Secretariat Study, *force majeure* can be applied even in cases when the activities or omissions giving rise to it stem from the state itself, as long as they are not attributed to it as a result of its wilful behaviour.¹⁵ This requirement is related to the negative condition stipulated in ARS Article 23(2)(a) that the situation of *force majeure* must not be ‘due to’ the conduct of the state invoking the defence. The phrasing of the ‘non-attributability’ requirement was discussed in the final reading of the draft Article.¹⁶ According to Special Rapporteur Crawford, the threshold of the ‘contribution’ to the situation of impossibility, contained in the earlier draft Article 31, was too restrictive.¹⁷ If that threshold had been kept, a *force majeure* defence could have been excluded in circumstances during which the state has ‘unwittingly contributed to a *force majeure* situation by something which, in hindsight, might have been done differently but which did not itself constitute a breach of an international obligation or make the event any less unforeseen’.¹⁸ This would have certain implications, particularly when the event giving rise to *force majeure* was due to human action (e.g., riots), meaning that unpopular government measures could be construed as said government’s ‘contribution’.¹⁹ The threshold was thus changed to ‘due to’, which enables a *force majeure* defence even when the state has ‘unwittingly contributed to the occurrence’ of the situation, but precludes it when the state’s role in its occurrence was consequential.²⁰

¹⁴ Study by the Secretariat, “‘Force majeure’ and ‘Fortuitous event’ as Circumstances Precluding Wrongfulness: Survey of State Practice, International Judicial Decisions and Doctrine”, *Yearbook of the International Law Commission*, 1978, Vol. II, UN Doc A/CN.4/315 (Part 1) 61, at 70 (Secretariat Study).

¹⁵ *Ibid.*, at 69. See also *Libyan Arab Foreign Investment Company v. Republic of Burundi*, (1994) 96 ILR 279, at 318, para. 55, cited in ILC Commentary to ARS, Article 23, para. 9 (in which the tribunal rejected *force majeure* because the impossibility was a consequence of the decision of the Government of Burundi and not the result of ‘an external event beyond’ its control).

¹⁶ James Crawford, ‘Second Report on State Responsibility’, *Yearbook of the International Law Commission*, 1999, Vol. II(1), UN Doc A/CN.4/498/Add.1-4, 3, at 66 (Second Report).

¹⁷ Draft Article 31(2) read: ‘Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.’

¹⁸ Crawford (1999), Second Report, *supra* note 16.

¹⁹ For example, in *Autopista* case, *force majeure* was invoked due to massive protests following the unpopular measures taken in compliance with the investment contract by the Venezuelan Government. The tribunal noted that although the Venezuelan Government was not responsible for the protests, the latter were supported by the State Government. The tribunal emphasised that the successful plea of *force majeure* would not have been possible had it been proved that the support of the State Government was causal for the protests or their seriousness. *Autopista Concesionada v. Republic of Venezuela*, ICSID Case No. ARB/00/5 (Award, 23 September 2003), para. 128.

²⁰ ILC, *Yearbook of the International Law Commission*, 1999, Vol. I, UN Doc A/CN.4/SER.A/1999, at 282, para. 56.

Lastly, the unforeseeable, irresistible and uncontrollable event must make it materially impossible for a state to perform the obligation. The condition of ‘material impossibility’ signifies that merely the increased difficulty of performance is insufficient for a successful invocation of the plea. The Commentary to ARS emphasises that ‘[f]orce majeure does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis’.²¹ What exactly this means has been subject to disagreement. The arbitral tribunal in *Rainbow Warrior Affair* famously equated material impossibility with ‘absolute impossibility’.²² This view was later criticised by James Crawford²³ and implicitly rejected by the International Court of Justice (ICJ) in *Gabčíkovo – Nagymaros Case*,²⁴ both maintaining the distinction between ‘material impossibility’ under *force majeure* and the stricter standard of ‘absolute impossibility’ under the rule of supervening impossibility to perform, as codified in Article 61 of the Vienna Convention on the Law of the Treaties.²⁵ Given its unsettled status under international law, the applicability of the impossibility standard in the context of conflict situations is further discussed in the subsequent sections.²⁶

It has been long undisputed that the event giving rise to *force majeure* could be a natural disaster (e.g., an earthquake) as well as a man-made situation, such as war, revolution or mob violence. In fact, it was due to the latter type of events that *force majeure* entered prominently onto the international legal plane. Historically, the defence was frequently raised against claims of foreign investors for losses they suffered in conflict situations. Countries in the nineteenth and early twentieth centuries often declared international and civil wars, as well as other types of internal strife, as *force majeure* in an attempt to preclude all claims for reparations by aliens and their home states.²⁷ While it was widely accepted that *force majeure* was a universal rule of international law (e.g., it was referred to as a general principle of law in the Hague Conference for the Codification of International Law in 1930),²⁸ the disagreement existed as to what it actually meant.²⁹ The violent events of that era thus presented an

²¹ ILC Commentary to ARS, Article 23, para. 3.

²² See e.g., *Rainbow Warrior Affair (New Zealand v France)* (1990) 20 RIAA 217, 253. The tribunal found that ‘the test of applicability of [draft article 31] is of absolute and material impossibility’ and consequently rejected France’s defence by emphasising that ‘a circumstance rendering performance more difficult or burdensome does not constitute a case of force majeure.’

²³ Crawford (1999), Second Report, *supra* note 16, paras. 257-9.

²⁴ *Case Concerning the Gabčíkovo – Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 1, para. 102.

²⁵ Vienna Convention on the Law of Treaties (signed on 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

²⁶ See Section 2.2 and, in particular, Section 4.2.

²⁷ Secretariat Study, *supra* note 14, at 106-24. See also Section 3.

²⁸ *Ibid.*, at 68, 83.

²⁹ See e.g., the statement of Mexico on the United Nations Conference on the Law of the Treaties in 1968: ‘Force Majeure was a well-defined notion in law; the principle that “no person is required to do

opportunity for statesmen, adjudicators and scholars to assert and establish their views about the content and role of *force majeure* in international law.

States have invoked *force majeure* to justify their non-performance of an international obligation ‘to do’ something (positive obligation) as well as an obligation ‘not to do’ or refrain from doing something (negative obligation). The following sections consider how the defence has been applied with respect to both types of obligation in the context of conflict-related cases concerning foreign investors.

2.1. Non-Performance of an International Obligation Resulting from Action

The cases where *force majeure* was invoked for non-performance resulting from action (i.e., breach of an international obligation consisting in a duty of a state to refrain from acting) have been rare, which is not that surprising as *force majeure* presupposes an element of ‘involuntariness’. In other words, for the defence to be successfully invoked, the external circumstances would have to make it impossible to avoid committing an act in violation of international law. A commonly cited example is a pilot who loses control over their aircraft due to weather conditions and thus knowingly but involuntarily violates the airspace of another state.³⁰ In the context of investment law, property losses that investors sustained as a consequence of destruction by state organs in the midst of hostilities could potentially present a case for a *force majeure* defence. However, if a state action was deliberate and taken in pursuit of protecting national security interests or to prevent grave and imminent danger, as it often is, other legal justifications will be more appropriate, in particular security exceptions and ‘necessity of the situation’ exceptions in advanced armed conflict clauses, if included in investment treaties,³¹ or a necessity defence as codified in ARS Article 25.³²

the impossible” was both a universal rule of international law and a question of common sense’. On the other hand, representatives of other countries voiced concerns that ‘force majeure lacked precision’ (the US), and ‘had not been clearly defined and had no precise meaning in international law’ (the Soviet Union). Cited in Secretariat Study, at 88.

³⁰ Roberto Ago, ‘Eighth Report on State Responsibility’, ILC, *Yearbook of the International Law Commission*, 1979, Vol. II, UN Doc A/CN.4/SER.A/1979.1 (Part 1), 3 (Eighth Report) at 48 and 52, citing correspondence between the US and Yugoslav Government, following episodes of US aircraft entering the airspace of Yugoslavia in 1946. Such situations would have to be distinguished from those where ‘it [was] impossible for the author of the conduct attributable to the State to realize that its conduct is not in conformity with the international obligation’, which were described by Ago as fortuitous events (e.g., the pilot who enters the aerial space of another state without noticing it due to weather conditions). See 1569th Meeting, ILC, *Yearbook of the International Law Commission*, 1979, Vol. I, UN Doc. A/CN.4/SER.A/1979, at 185. The distinction between *force majeure* and fortuitous events was later abandoned by the ILC. See Crawford (1999), Second Report, *supra* note 16, para. 253.

³¹ For an example of a security exception, see Article IX of the US – Ukraine BIT (1994). For an example of an exception entailed in advanced armed conflict clauses, see Article 5(2) of the UK – Ukraine BIT (1993).

³² In its first paragraph, ARS Article 25 states:

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:

The confusion between these types of situations is illustrated in *AAPL v. Sri Lanka*, a case concerning the destruction of the investor's farm in the course of the military operation that government forces undertook against the Tamil Tigers.³³ The *AAPL* tribunal concluded that Sri Lankan authorities failed to take precautionary measures before launching an armed attack on the investor's premises. The dissenting arbitrator, Samuel Asante, held that the tribunal's assessment of governmental measures was inappropriate and that the obligation of protection was precluded because the government was 'confronted with essentially a force majeure situation'.³⁴ Asante's view appears inaccurate because the alleged breach arose out of a situation that included the state's volition (a carefully planned armed attack) and was thus within the state's control and a result of the state's voluntary conduct. The event could have given rise to another defence, however, namely that of necessity.

When the conflict situation passes the threshold of international or internal armed conflict required for application of international humanitarian law,³⁵ exceptions to state responsibility which exist in primary rules of a specialised regime governing the conduct of states in armed conflict remove the need for general defences under the law of state responsibility.³⁶ Thus historically, destruction of alien property in the course of armed conflict, battles or during bombardment has often been categorised as the 'legitimate act of war',³⁷ or measures 'compelled by the imperious necessity of war',³⁸ thus not giving rise to state responsibility. The damages resulting from the seizure or destruction prompted by imperious military necessity were considered to be 'war losses', i.e., damages incident to combat action, and as such, no compensation could be demanded.³⁹ In such situations, *force majeure* (or other general defences like

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- (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

³³ *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3 (Award, 27 June 1990).

³⁴ *Ibid.*, Dissenting Opinion, at 593.

³⁵ See e.g., the decision of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case which has been widely relied upon as authoritative with regard to the meaning of armed conflict in both international and non-international conflicts. According to the tribunal, an armed conflict exists whenever 'there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State ...' *Prosecutor v. Tadić*, ICTY-IT-94-1-T (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995), para. 70.

³⁶ ILC Commentary to ARS, Article 25, para. 21; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/08 (Award, 12 May 2005), para. 353.

³⁷ See *The Dunn Case (Chile/United Kingdom)* (1895), cited in Secretariat Study, at 158; *The Case of the Compagnie Francaise Des Chemins De Fer Venezueliens (France/Venezuela)* (1905), cited in Secretariat Study, at 166.

³⁸ See *The Bembelista Case (Netherlands/Venezuela)* (1903), cited in Secretariat Study, at 163.

³⁹ For more cases see John Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (Washington: Government Printing Office, 1898), at 3668, 3670, 3678,

necessity) does not need to be considered beyond the degree to which it may fit into the unavoidable military necessity exception provided for in international humanitarian law.⁴⁰

Cases involving genuine military operations and consequences of measures that a state takes during war should be distinguished from those due to the general situation of war itself. The distinction was highlighted in the *Agache Case* emerging from World War II, where the French/Italian Conciliation Commission explained in its decision that the fact that transported goods were ‘spoiled and reduced in value [as] a result of the general disruption caused by the war in rail transport between Italy and France’ and not a result of a measure that state took during the war.⁴¹ Furthermore, it was also held by post-conflict arbitral tribunals that the state was not responsible for the interruption of ordinary commercial and professional activities and the consequential loss of business and profit, or claims for damages because they were ‘an inevitable result of a state of war’.⁴² While such situations were referred to as *force majeure, de jure*, the non-responsibility of a state was due to lack of causality and consequently lack of attribution. The damage could not be attributed to the state, as it was caused by a general situation of war rather than a state’s direct action or omission.

The next section turns to discussing the invocation of *force majeure* as a circumstance precluding wrongfulness emerging from the state inaction.

2.2. Non-Performance of an International Obligation Resulting from Inaction

Non-performance due to a *force majeure* event has been more commonly invoked with respect to an obligation to do something. One could differentiate between at least three types of such an obligation: first, obligations originating in a contract that a state has entered into with an investor (e.g., failure or delay in delivering the goods or services); second, an obligation of prevention (e.g., failure to protect investors from physical violence); and third, a financial obligation to pay (e.g., failure to make certain payments to an investor). As will be argued below, in the first two categories, *force majeure* arguably takes a different legal form than a defence under the law of state responsibility, thus they will be addressed under separate headings. The third category of financial impossibility, however, is one where international courts and arbitral tribunals have

3703 and 3679; Jackson Ralston, *Venezuelan Arbitrations of 1903* (Government Printing Office, 1904), at 14-25, 35-6; Edwin Borchard, *Diplomatic Protection of Citizens Abroad* (Banks Law Publishing, 1915), at 256-7.

⁴⁰ See e.g., Article 23(g) of the Hague Convention IV Respecting the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910), 187 Consol T S 227. See also Georg Dahm, *Volkerrecht* (Stuttgart: W. Kohlhammer, 1961), vol. III, 213-4; cited in Secretariat Study, *supra* note 14, at 220.

⁴¹ *The Establishment Agache Case (France/Italy)* (1955), cited in Secretariat Study, *supra* note 14. at 187.

⁴² See e.g., *Henry Case (US v. Venezuela)* (1903) 9 RIAA 113, at 125.

most expressly addressed *force majeure* in the past, and also one that has been subjected to much controversy. It thus warrants a further analysis.

Countries are often faced with economic challenges to make payments during and in the aftermath of protracted armed conflicts when their budget is impoverished and their resources are needed for defence or the post-conflict rebuilding of the economy. While in theory such economic impossibility could give rise to *force majeure*, commentators have widely agreed this is unlikely, as it only constitutes an increased difficulty of performance.⁴³ The historical arbitrations seem to reflect a different view. Several tribunals in the past held that *force majeure* can exculpate the state from the responsibility to pay its financial obligation on the ground that its resources are depleted due to the intense conflict situation. For example, in the case of *French Company of Venezuelan Railroads*, the Venezuelan government argued that the revolution constituted *force majeure* and thus rendered it impossible to repay its debt to the French investor.⁴⁴ The umpire clarified that the *force majeure* defence under international law was applicable and that the situation of internal armed conflict necessitated the consumption of all the government's resources in the same fashion as it deprived the company of the proceeds of its ordinary business.⁴⁵ The umpire emphasised the importance of prioritising the country's existence in allocating the government's financial resources: '[Its] first duty was to itself. Its own preservation was paramount. Its revenues were properly devoted to that end. The appeal of the company for funds came to an empty treasury, or to one only adequate demands of the war budget.'⁴⁶

Similar reasoning, but with different outcome, was espoused by the arbitral tribunal constituted under the Permanent Court of Arbitration in the *Russian Indemnity* case,⁴⁷ and by the Permanent Court of International Justice (PCIJ) in the *Serbian and Brazilian Loans cases*⁴⁸ and the *Socobelge* case.⁴⁹ In the latter case, Greece argued that the severe political and economic crisis in the post-conflict period made it impossible to pay in full and immediately the amount owed to the foreign investor in accordance with the arbitral award.⁵⁰ The Court held that the financial circumstances of the state alone could not be the reason for not performing a *res judicata* award,

⁴³ Paddeu (2012), *supra* note 6, at 459; Szurek (2010), at 479-80; Bjorklund (2008), *supra* note 6, at 501; ILC Commentary to ARS, Article 23, para. 3.

⁴⁴ *1888 French Company of Venezuelan Railroads* (1904) 10 RIAA 285, at 335, 327.

⁴⁵ *Ibid.*, at 314.

⁴⁶ *Ibid.*, at 354.

⁴⁷ *Russian Claim for Interest on Indemnities (Russia v. Turkey)* (1912) 11 RIAA 421, 434.

⁴⁸ *Serbian Loans (France v. Serb-Croat-Slovene)* [1929] PCIJ Ser A No. 20, para. 82; *Brazilian Loans (France v. Brazil)* [1929] PCIJ Ser A No. 21, para. 66.

⁴⁹ *Societe Commerciale de Belgique (Socobelge)* [1939] PCIJ Rep Series A/B No. 78, at 161.

⁵⁰ Counter-Memorial of Greece PCIJ Rep Series C No. 91, at 100.

however, ‘the debtor’s capacity to pay’ could be taken into account when making arrangements in relation to the execution of the award.⁵¹

In contrast to early twentieth century defence strategies, modern examples of states pleading incapacity to fulfil financial obligations indicate the preference for a necessity defence as codified in Article 25 of ARS, or more specific investment treaty security exceptions. This is illustrated by a series of arbitration cases prompted by the Argentine financial crisis in the early 2000s.⁵² According to Paddeu, the shift from *force majeure* to necessity was only ostensible, as defences in early twentieth century cases had in fact used the necessity defence elements in ‘*force majeure*’ clothing.⁵³ The reason for this was the uncertainty as to whether necessity would be recognised as a defence in international law, which led lawyers to address the situations of necessity under the more accepted and familiar defence of *force majeure*.⁵⁴ This view would imply that with the codification of necessity in ARS, the situations of non-payment of financial obligations are better addressed under necessity than *force majeure*.

Some objections can be raised against this conclusion, though. First, in the above-mentioned historical cases, the ‘necessity’ element that states could not meet their financial obligation without putting at risk their preservation was used only as a subsidiary argument. The primary reason for raising *force majeure* was that state finances had been decimated by war, and consequently the servicing of debt was materially impossible.⁵⁵ Inability to perform rather than protection of state vital interests was at the core of the defence.

Second, in the Argentine cases, the financial inability to pay was due to a financial crisis, and the prospect of a conflict was only invoked by the state to describe a threat which could have materialised had the contested economic measures not been passed.⁵⁶ In contrast, in the early twentieth century cases, the conflict was something that had actually caused the financial inability of the state to service debts. This highlights an important difference between the *force majeure* and necessity defences, namely the

⁵¹ *Socobelge*, *supra* note 49, at 167. The Court did not have to decide on the arguments concerning *force majeure* because Belgium discontinued the claim concerning Greece’s responsibility for the failure to perform the award.

⁵² Argentina resorted to the necessity defence to justify its economic measures which were passed to avoid a ‘serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace’. See *LG&E Energy Corp v. The Argentine Republic*, ICSID Case No. ARB/02/1 (Decision on Liability, 3 October 2006), para. 257. See also *CMS*, Award, *supra* note 36; *Enron Corp v. The Argentine Republic*, ICSID Case No. ARB/01/03 (Award, 22 May 2007); *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (Award, 28 September 2007); *Continental Casualty Company v. The Argentine Republic*, ICSID Case No ARB/03/9A (Award, 5 September 2008).

⁵³ Paddeu (2012), *supra* note 6, at 443.

⁵⁴ *Ibid.*, at 445.

⁵⁵ See *French Company of Venezuelan Railroads*, *supra* note 44, at 327.

⁵⁶ See e.g., *LG&E*, *supra* note 52, para. 257; *Continental Casualty*, *supra* note 52, para. 180-1.

timing of the event that triggers the respective defence. While *force majeure* impossibility stems from an irresistible force or unforeseen event which is ongoing or occurred in the past, the plea of necessity, as defined in ARS Article 25, is based on the ‘peril’ to the state’s essential interest – a risk that has not yet materialised but is ‘existent’, ‘grave’ and ‘imminent’.⁵⁷ Therefore, there is a difference between cases where a situation of armed conflict has resulted in financial impossibility to fulfil an obligation and cases where the non-fulfilment of a financial obligation was justified with an aim to prevent a perilous event from occurring (e.g., an outbreak of violence which could lead to the destruction of the state). While the former situations can be addressed by invoking *force majeure*, the latter fall within the realm of the state of necessity.

This distinction is important as it rebuts the argument that the plea of *force majeure* cannot be invoked to justify the non-compliance with financial obligations. The essence of that argument is that the ability to carry out financial obligation is never absolute – it may only be impaired for a certain duration and amounts merely to an increased difficulty of performance, which is not enough for a successful invocation of *force majeure*.⁵⁸ While it is true that in practice, situations when a country’s finances are stretched to the extent that this would present material impossibility to perform financial obligations are very rare, the possibility nonetheless exists, especially during and in the aftermath of prolonged and intense conflicts. More convincing is thus the view offered by Special Rapporteur Ago that *force majeure* impossibility could prevent states from paying financial obligations, and that such impossibility was temporary.⁵⁹ The state is thus excused from the obligation to pay only for the duration of the situation giving rise to *force majeure*.⁶⁰ The continued failure to pay in the period after the *force majeure* circumstances had ceased would give rise to state responsibility.⁶¹

The Iran–US Claims Tribunal has confirmed the practice of allowing temporary suspension of financial responsibilities on the ground of *force majeure* in some conflict-related cases.⁶² For example, in *Sylvania Technical Systems, Inc.*, it was held that revolutionary events in Iran in 1978 and 1979 caused the disruptions of the banking

⁵⁷ Paddeu (2012), *supra* note 6, at 463; see *Gabčíkovo – Nagymaros*, *supra* note 24, para. 54.

⁵⁸ ILC Commentary to ARS, Article 23, para. 3.

⁵⁹ Ago, Eighth Report, at 59, *supra* note 30.

⁶⁰ The temporal scope of application of *force majeure* would need to be determined with a case-by-case analysis of factual circumstances, rather than by relying on the formal beginning and the end of armed conflict. See e.g., *Anaconda – Iran Inc v. Iran et al.* (1986) 13 Iran – US CTR 199, at 213.

⁶¹ ARS Article 27(a) states that the duty to perform treaty obligations is revived once the circumstances giving rise to the preclusion of wrongfulness no longer exist.

⁶² See e.g., *Anaconda – Iran*, *supra* note 60; *Gould Marketing, Inc v. Iran et al.* (1983) 3 Iran – US CTR 147, at 153; *General Dynamics Telephone Sys Ctr v. Iran* (1985) 9 Iran – US CTR 153, at 160; *General Electric Co. v. Iran et al* (1991) 26 Iran – US CTR 148, at 180; *Westinghouse Electric Corp. v. Iran et al* (1997) 33 Iran – US CTR 60, at 78.

operations and amounted to a *force majeure* situation. Consequently, the respondents' failure to pay debts due during that period was excused by *force majeure*.⁶³ Furthermore, recent practice related to situations of economic crisis suggests more favourable attitudes of states to plead financial incapacity under the *force majeure* head.⁶⁴

When armed conflict has ceased, however, *force majeure* defence will be of limited assistance to a state. This does not mean that a state's capacity to pay in the transitional period will be completely ignored in consideration of its liability. There is a compelling argument presented elsewhere, and supported by the post-conflict judicial, arbitral and diplomatic practice, that a state's inhibited ability to pay would be reflected in modification of the amount and the time of payment of compensation and damages on the basis of equity.⁶⁵

Force majeure was also commonly invoked when states were accused of violating another type of positive obligation, namely the obligation to protect foreign investors against violent action at the hands of non-state actors. As will be argued below, though, the rule applying to obligations of protection differs from the circumstance precluding wrongfulness and thus warrants introducing a new concept of *force majeure*, analysed in the next section.

3. FORCE MAJEURE AS A CIRCUMSTANCE INFORMING THE DUTY OF DUE DILIGENCE

The arbitral jurisprudence emerging from the conflict situations of the nineteenth and early twentieth centuries was instrumental to the development of rules on protection of aliens and alien property. Broadly speaking, two schools of thought emerged with regard to state liability for injuries to aliens sustained in conflict. According to one theory that never gained much support in practice, the state was always responsible for such losses.⁶⁶ The other school took the opposite view by asserting absolute non-responsibility for conflict-related injuries. Latin American scholars and diplomats most

⁶³ *Sylvania Technical Systems v. Iran* (1985) 8 Iran – US CTR 309-10.

⁶⁴ Iceland relied on *force majeure* defence to justify its non-compliance of international obligations due to economic crisis. See Case E-16/11, *EFTA Surveillance Authority v. Iceland (Icesave)* [2013] EFTA Ct Rep 4. For the analysis of the case and, more broadly, a discussion on the invocation of *force majeure* in financial crises, see Gourgourinis (2017), *supra* note 10.

⁶⁵ For a detailed discussion, see Jure Zrilič, 'International Investment Law in the Context of Jus Post Bellum: Are Investment Treaties Likely to Facilitate or Hinder the Transition to Peace?', *Journal of World Investment and Trade*, 2015, 16: 604-32.

⁶⁶ See e.g., P Fauchille, 'Droits et Devoirs en cas d'Insurrection', *Annuaire de l'Institut de Droit international*, 1900, 18: 234; E. Brusa, 'Responsabilité des Etats à Raison des Dommages Soufferts par des Étrangers en cas d'Émeute ou de Guerre Civile', *Annuaire de l'Institut de Droit international*, 1898, 17: 96-137, at 108-9; C. Wiesse, 'Reglas de Derecho Internacional Aplicables a las Guerras Civiles' (1893), cited in Clyde Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), at 140.

prominently advanced this view, unsurprisingly so, as it was Latin American countries that were usually at the receiving end of claims to compensate aliens for losses that they suffered in civil strife.⁶⁷

The theory of non-responsibility was important as it introduced *force majeure* to the discourse about state responsibility. As summarised by Argentine jurist Calvo, if aliens suffered injuries as a result of the host state's unlawful measures during conflict situations, the state could still escape responsibility by invoking the defence of *force majeure*.⁶⁸ Accordingly, a state was not liable for losses sustained by aliens at the hands of rebels and revolutionaries because the revolutions constituted a *force majeure* event.

This view was espoused by prominent Latin American statesmen and was manifested in their diplomatic correspondence, treaties and even their constitutions and municipal laws.⁶⁹ For example, in 1903, the Venezuelan Foreign Minister defended the government's stance that a state was not responsible for such conflict-related losses because they 'like those of natural origins, cannot be prevented or avoided ...'⁷⁰ This argument has been repeatedly voiced against claims for compensation that Western powers brought against Venezuela in the aftermath of various conflicts in the nineteenth century. For example, the Venezuelan government rejected the responsibility for acts of insurgents during guerrilla action in 1858 by arguing that injuries sustained by foreigners in such internal disturbances 'are disasters for which Governments cannot humanely be held responsible, just as they are not answerable for fires, plagues, earthquakes or other disorders arising from physical causes.'⁷¹ Similar views were advanced in the aftermath of revolutions and insurrection in Brazil in 1884 and 1993,⁷² and insurrection in Cuba in 1887.⁷³

3.1. The Emergence of the Due Diligence Standard

Despite strong diplomatic opposition coming from Latin America, in most cases where conflict-related claims were addressed before arbitrations or mixed-claims commissions, the view that *force majeure* presents an automatic exception for

⁶⁷ Harmodio Arias, 'The Non-Liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection or a Civil War', *American Journal of International Law*, 1913, 7(4): 724-66; Carlos Calvo, *Le Droit International Théorique et Pratique* (3rd ed., Pedone-Lauriel, 1880), vol. 3.

⁶⁸ Calvo (1880), *ibid.*, at 429. On these developments, see also Paddeu (2012), *supra* note 6, at 412.

⁶⁹ For example, the Guatemalan Constitution of 1875 provided in Article 46 that 'neither Guatemalans nor foreigners shall have indemnification for damages arising out of injuries done to their persons or property by revolutionists.' Generally, see Julius Goebel, 'The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars', *American Journal of International Law*, 1914, 8: 802-52, at 833.

⁷⁰ Secretariat Study, *supra* note 14, quoting M. T. Pulido Santana, *La Diplomática en Venezuela* (Caracas: Imprenta Universitaria, 1963), vol. 1, at 131.

⁷¹ *Ibid.*, at 110.

⁷² Goebel (1914), *supra* note 69, at 847-8.

⁷³ Secretariat Study, *supra* note 14, at 116.

responsibility for injuries incurred on aliens was adamantly rejected. The theory on absolute non-responsibility was considered unfairly prejudicial to aliens and their property, and thus a more nuanced view evolved – one which acknowledged that despite the general non-responsibility of a state for injuries to foreigners in times of conflict, in exceptional cases the state could still be held responsible. It became widely accepted that the state was only liable if it had failed to exercise due diligence in protecting aliens. In other words, the existence of the host state’s responsibility was to be determined by establishing whether the state had exercised proper care in the prevention of injuries to aliens.⁷⁴

Most arbitral tribunals and mixed commissions followed this rule.⁷⁵ For example in the case of *Spanish Zone of Morocco*,⁷⁶ the arbitrator Max Huber held that the state was not in itself responsible for the mere fact there was a conflict, whether a riot, rebellion, civil war or international war; nor was it responsible for the fact that those events gave rise to damage in its territory.⁷⁷ While Huber accepted that such events must be treated as ‘cases of force majeure’, he held that a state could nevertheless be responsible for what the authorities do or not do to avert, to the extent possible, the consequence’ of such events.⁷⁸ To establish responsibility, the conduct of the state’s authorities or armed forces during the conflict had to be analysed. Huber held that the state was not liable for damages incurred at the hands of the hostile tribes so long as the rebellion caused an inability to protect foreign property.⁷⁹ The situation, however, changed when this ‘abnormal situation’ arising from the conflict ended and the state was again ‘able to exercise its authority in more or less normal conditions’.⁸⁰ Huber understood due diligence as a standard that took into account the specific circumstances of the situation in which the harm was done and the resources available to the state.⁸¹

It has become widely accepted that the obligation to act with due diligence in pursuit of the protection of foreigners is one of the elements of the international

⁷⁴ See P. Fiore, *Nouveau droit international public* (2nd ed., Pedone-Lauriel, 1886), vol. I, at 582, cited in *Sambiaggio Case (Italy v. Venezuela)* (1903) 10 RIAA 499, at 511.

⁷⁵ See e.g., *Sambiaggio, ibid.*; *Kummerow, Otto Redler and Co, Fulda, Fischbach, and Friedericy Cases (Germany v. Venezuela)* (1903) 10 RIAA 369, at 394; *Home Missionary Society (US v. Great Britain)* (1920) 4 RIAA 42, at 44; *Youmans (US v. Mexico)* (1926) 4 RIAA 110; *Chapman (US v. Mexico)* (1930) 4 RIAA 632.

⁷⁶ *Spanish Zone of Morocco (Great Britain v. Spain)* (1924) 2 RIAA 615, at 639, 642. The case concerned more than fifty claims made by British nationals against Spain for the losses they suffered during the riots and civil uprising that took place in the wake of the insurrection of a Berber tribe in the early 1920s.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, at 653-4.

⁸⁰ *Ibid.*, at 421.

⁸¹ *Ibid.*, at 644.

minimum standard of treatment which constituted customary international law.⁸² In the context of conflict situations, the obligation required the state to exercise due diligence to protect foreign nationals from physical violence. In ascertaining the content of due diligence, commissions and tribunals typically highlighted the following factors: the type of conflict situation, the degree of the state's control over parts of its territory, the state's resources and the foreseeability of the harm.⁸³ In the same way, the principle of due diligence has been applied in contemporary investment treaty jurisprudence.⁸⁴

3.2. Force Majeure as a Legal Concept v. Force Majeure as a Factual Circumstance

While the case law emerging from violent situations at the end of the nineteenth and the beginning of the twentieth century was of great importance for clarifying the obligations that states owe to foreign investors in time of armed conflict, it also created a great deal of confusion about the role of *force majeure* in determining state responsibility. Because the notion of *force majeure* was commonly invoked in those cases, they were referred to and analysed in the ILC reports and commentaries during the process of codification of articles on state responsibility. The conflict-related jurisprudence was used to support and inform the codification of *force majeure* as a circumstance precluding wrongfulness. These historical developments led some scholars to introduce a distinction between two approaches to conceptualising *force majeure*.⁸⁵

According to an event-based approach, *force majeure* was largely understood as a concept describing a certain type of event, including armed conflicts, the occurrence of which was enough for the state to escape responsibility for any acts or omissions related to that event. In other words, the mere occurrence of a conflict sufficed to preclude the wrongfulness of the state's action and no subsequent scrutiny of a state's measure was needed.⁸⁶ Because this understanding of *force majeure* forewent the assessment of the impact that the critical event had had on the state's ability to perform

⁸² See e.g., Elihu Root, 'Basis of Protection to Citizens Residing Abroad', *American Journal of International Law*, 1910, 4: 517-28, at 521-2; Borchard (1915), *supra* note 39, at 28; Ian Brownlie, *System of the Law of Nations: State Responsibility Part I* (Clarendon Press, 1983), at 159-79.

⁸³ See e.g., Chapman, *supra* note 75, at 639; *Spanish Zone of Morocco*, *supra* note 76, at 644-5; *Sambiaggio*, *supra* note 74; *GL Solis (US v Mexico)* (1928) 4 RIAA 358, at 362; *Mena Case (Spain v. Venezuela)* (1903) 10 RIAA 748, at 749.

⁸⁴ See e.g., *AAPL*, *supra* note 33, para. 85B; *American Manufacturing & Trading, Inc v. Republic of Zaire*, ICSID Case No ARB/93/1 (Award, 21 February 1997), paras. 6.05-6.06, 6.11, 6.14; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award, 8 December 2000), para. 84; *Pantehniki SA Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21 (Award, 30 July 2009), para. 77; *Joseph Houben v. Burundi*, ICSID Case No. ARB/13/7 (Award, 12 January 2016), para. 161; *Peter Allard v. Barbados*, PCA Case No. 2012-06 (Award, 27 June 2016), paras 543-4.

⁸⁵ Paddeu (2012), *supra* note 6, at 438.

⁸⁶ *Ibid.*

its obligation under international law and that opened the door to abuse, a new, so-called situation-based approach was introduced.⁸⁷ According to this, each individual claim had to be analysed to determine whether the event was really beyond the state's control, and whether all the elements of *force majeure* were met. Drawing on the case law of mixed claims commissions and arbitrations mentioned above, scholars concluded that the situation-based approach prevailed.⁸⁸

There is no doubt that a mere outbreak of armed conflict (or the occurrence of any other physical or natural event) *per se* does not justify invocation of *force majeure* as circumstance precluding wrongfulness, and that certain conditions which make the performance of an obligation impossible must be present (unforeseeability, irresistibility, uncontrollability). Despite differences in the views of the role and meaning of these features, this has been relatively uncontested in international law.⁸⁹ The distinction between event- and situation-based concepts of *force majeure* thus seems superfluous in modern context. More problematically, it is based on the inaccurate analysis of the conflict-related jurisprudence of the late nineteenth and early twentieth centuries. Whether or not states were responsible for losses that aliens suffered was not decided through the evaluation of conditions of *force majeure* defence, but rather through the assessment of the obligation of due diligence. In other words, those cases were not decided on the ground of *force majeure*, as often suggested,⁹⁰ and therefore are not directly relevant for the content of a *force majeure* defence as a circumstance precluding wrongfulness.

A more relevant distinction would seem to be one between *force majeure* as a legal justification in the law of state responsibility (i.e., a circumstance precluding wrongfulness) and *force majeure* as an event, a factual circumstance or a situation in the context of which the host state adopts or fails to adopt certain conduct. While revolutions, insurrections and civil wars were often described as situations of *force majeure* in arbitral decisions,⁹¹ legally, those cases were not decided by analysing specific *force majeure* conditions, but rather by assessing whether governments exercised due diligence in protecting aliens. The fact that the due diligence obligation accommodates a broad array of circumstances, including a state's ability to protect, a

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ See Secretariat Study, *supra* note 14, at 70, citing P. Reuter, *Droit International Public* (4th ed., Paris: Presses Universitaires de France, coll. Themis, 1973), at 181: 'In order to exonerate a State from its responsibility, force majeure must possess the three characteristics states in all legal systems: it must be irresistible, it must be unforeseeable, and it must be external to the party invoking it'.

⁹⁰ See e.g., Paddeu (2012), *supra* note 6; Szurek (2010), *supra* note 6, at 477; James Crawford, *Brownlie's Principles of Public International Law* (7th ed., OUP, 2008), at 564; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed., OUP, 2012), at 183.

⁹¹ *Spanish Zone of Morocco*, *supra* note 76.

state's control over its territory, and unforeseeability of a conflict situation, further amplified terminological confusion with the *force majeure* as a legal concept.

This distinction gives rise to an important question as to what is the relationship between the due diligence obligation and *force majeure* as a legal defence in international law. Can a *force majeure* defence be effectively invoked in cases of non-performance of obligations that involve the duty of due diligence? There are important conceptual and methodological differences between these two concepts of international law. Due diligence is part of some primary rules of international law: in the context of investment law, it is a yardstick for measuring the fulfilment of an obligation to protect investors that exists in customary international law as a minimum treatment standard, and in most investment treaties as a 'full protection and security' provision.⁹² In contrast, *force majeure* is a secondary rule that exonerates state responsibility for the breach of a primary rule of international law. It can be only invoked when the state has committed a wrongful act, i.e., violated an international obligation. If there is no wrongfulness, there is no need to resort to the defences under the law of state responsibility.⁹³ The most important practical consequence of this difference lies in the obligation to pay compensation. Following the successful invocation of *force majeure* under ARS, the wrongfulness of the state's act is precluded, however, the state could still be obliged to pay compensation.⁹⁴ By contrast, establishing that the state carried out its due diligence duty within the relevant primary rule gives rise to no such obligation.

In theory, *force majeure* can be invoked with respect to any international obligation. However, this does not mean that the content of primary obligations cannot affect the applicability of the *force majeure* defence. The Secretariat Study on *force majeure* thus noted that the application of *force majeure* can be excluded by the content of the specific international obligation.⁹⁵ As argued in Section 2, some special regimes of international law provide for their own *force majeure* exception or similar limitations

⁹² For an example of a full protection and security clause see Article 4 of the Germany – Mali BIT (1977).

⁹³ On the distinction between primary and secondary rules, see ILC Commentary to ARS, Chapter V, paras. 2-4 and 7; *CMS*, Decision on Annulment, 25 September 2007, *supra* note 36, paras. 129 and 132-4.

⁹⁴ See ARS, Article 27(b); *Gabčíkovo – Nagymaros Case*, *supra* note 24, para. 48. The question is not settled in international law, however, and tribunals have espoused conflicting positions, see e.g., *CMS*, Award, *supra* note 36, paras. 383-94 (noting that the duty to compensate continues regardless of the invocation of the necessity); *LG&E*, *supra* note 52, para. 264 (noting that the risk of damages shifts to the investor). See also Martins Paparinskis, 'Circumstances Precluding Wrongfulness in International Investment Law', *ICSID Review*, 2016, 31(2): 484-503, at 500.

⁹⁵ Secretariat Study, *supra* note 14, at 220.

as part of the primary rules,⁹⁶ which effectively prevents the operation of *force majeure* as a circumstance precluding wrongfulness. It is submitted that the same applies for the obligations containing a duty of due diligence. It is difficult to imagine a situation where the wrongfulness of a state's failure to sufficiently protect an investor during armed conflict would be precluded by the *force majeure* defence pursuant to ARS Article 23. Namely, whether the state has violated this obligation will be measured against the duty of due diligence, taking into account different circumstances which may largely coincide with the conditions of a *force majeure* defence. As explained above, arbitral tribunals often held that the state was unable to protect aliens because the situation in question was sudden (and thus unforeseeable),⁹⁷ intensely violent (and thus irresistible),⁹⁸ or it occurred in the part of the territory which is outside of the state's control (and thus uncontrollable).⁹⁹ If no breach of the obligation to protect is found, there is also no need for invoking *force majeure* – the elements of latter are already implicitly incorporated in the due diligence standard.¹⁰⁰

While a *force majeure* defence is possible in principle, its invocation in such situations would be incompatible with the purpose of investment law obligations of prevention. Both, *force majeure* and the due diligence standard, are tools that international law uses for allocating risks concerning states' failure to comply with primary international obligations. These risks are defined by certain characteristics such as unforeseeability, impossibility and uncontrollability. Since the application of the due diligence standard in the context of armed conflict already reduces the risk for a state's responsibility, the application of *force majeure* as a secondary tool for allocating the same risk in the same circumstances and against the same parameters, is gratuitous. The reverse position (i.e., the use of *force majeure* before the breach of the obligation to protect has been ascertained through the due diligence analysis) would not only be legally inaccurate but could also result in a decision that a state has to pay compensation for the losses that investors sustained during armed conflict. Therefore, it is proposed that flexibility of the due diligence standard excludes the application of *force majeure* for certain primary obligations, in particular the obligation to protect.

⁹⁶ For example, the military necessity exception in the law of armed conflict, see Section 2.1. See also Article 18 of the United Nations Convention on the Law of the Sea, which provides for an exception concerning the right to stop and anchor during passage in foreign waters due to *force majeure*.

⁹⁷ See e.g., *US Diplomatic and Consular Staff in Teheran Case (US v. Iran)* (Judgment) [1980] ICJ Rep 3, at 33; *Ampal*, ICSID, *supra* note 8, paras. 285 and 289.

⁹⁸ See e.g., *Spanish Zone of Morocco*, *supra* note 76, at 644-5; *GL Solis*, *supra* note 83, at 362; *Pantechniki*, *supra* note 84, para. 82.

⁹⁹ See e.g., *Wipperman Case*, reported in Moore, (1898), *supra* note 39, at 3041; *Spanish Zone of Morocco*, *supra* note 76; *Ampal*, ICSID, *supra* note 8, paras. 285 and 289.

¹⁰⁰ For similar views, see Eagleton (1928), *supra* note 66, at 156. See also Secretariat Study, *supra* note 14, at 215, 217.

The relationship between due diligence and *force majeure* was most directly addressed by the Iran–US Claims Tribunal in *Gould Marketing* case, in which the tribunal stated:

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 operation at such forces are therefore not attributable to the state for the purposes of its responding for damages.¹⁰¹

The tribunal conceptualised the relationship between due diligence and *force majeure* as one of thresholds, whereby a higher threshold of ‘uncontrollability’ applied for *force majeure*. Accordingly, if an event is within the power of a state to control it, but a state fails to do so, the responsibility will be determined by using the due diligence standard. On the other hand, if the event is outside of the power of the state to control it (i.e., the event could not be controlled even by exercising due diligence), *force majeure* defence would come into play. This position is untenable, namely even in the latter case of the higher degree of ‘uncontrollability’, the due diligence rule already excludes the responsibility of a state for injury, hence no recourse to *force majeure* is needed.

More recently, the investment tribunal in *Ampal-American Israel Corp v. Egypt* implicitly acknowledged the overlap in conditions of the due diligence standard and the defence of *force majeure*.¹⁰² In that case, the American investor, whose primary activity was to export gas from Egypt to Israel, claimed, among others, that the government of Egypt failed to protect its facilities and the pipeline system from continuous terror attacks during the 2011 revolution. While the government argued that those attacks constituted *force majeure*, the investment tribunal rejected that ground of defence. The tribunal noted that the contractual dispute between the same parties involving the same facts was already decided in 2015 in an international commercial arbitration administered by the International Court of Arbitration within the International Chamber of Commerce (ICC).¹⁰³ While the investment tribunal decided to rely on the factual findings that the ICC tribunal made in its award with respect to the attack on the pipeline as *res judicata*, it did not treat similarly the ICC tribunal’s legal findings with respect to *force majeure* defence.¹⁰⁴

Having found that it was bound to apply the investment treaty standards rather than the standards under the investment contract, such as *force majeure* invoked by the

¹⁰¹ See *Gould Marketing*, *supra* note 62, at 153. Similarly, see *General Dynamics*, *supra* note 62, at 160; *Anaconda – Iran*, *supra* note 60, at 213.

¹⁰² *Ampal*, ICSID, *supra* note 8.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, para. 274.

state, the investment tribunal decided the case by relying on the duty of due diligence as entailed in the full protection and security provision of the US – Egypt BIT.¹⁰⁵ In other words, the tribunal treated the duty of due diligence as a standard that can replace *force majeure*, and it proceeded to focus its analysis on whether the state had fulfilled its international obligation rather than whether it should be excused for having breached that obligation. Ultimately, both ICC and ICSID tribunals found that Egypt failed to protect the investor, relying on the same factual analysis but arriving at the outcome by applying different legal standards. While *force majeure* in question was a contractual clause rather than a defence under international law, the tribunal’s reasoning clearly indicated how factual circumstances justifying *force majeure* as a legal concept overlap with the circumstances of the duty of due diligence, and that the latter can be applied to legal problems emerging from factually identical situations.

The *Ampal* case is also illustrative of states’ preference to rely on *force majeure* exceptions stipulated in investment contracts rather than the defence in international law for a certain category of claims. Despite carrying the same name, there are important differences between these two concepts, which are addressed in the next section.

4. FORCE MAJEURE AS AN EXCUSE TO NON-PERFORMANCE IN INVESTMENT CONTRACTS

Force majeure as a defence in international law of state responsibility and codified in Article 23 of ARS must be distinguished from *force majeure* clauses, often contained in investment contracts governed by domestic and international commercial law. In recent years, such *force majeure* clauses have been invoked more frequently than *force majeure* in international law to excuse the non-performance due to a conflict situation. Breaches of investment contracts can be brought to investor-state arbitration because they explicitly provide so, the contractual breach is elevated to the violation of the investment treaty by means of an umbrella clause or the contractual breaches are so fundamental that they constitute a violation of an investment treaty standard (in particular indirect expropriation or fair and equitable treatment). While some investment tribunals were reluctant to apply standards from investment contracts,¹⁰⁶ most considered them to the extent this was necessary for the determination of whether investment treaty provisions had been breached.¹⁰⁷

While tribunals typically treat *force majeure* clauses as self-contained provisions in the context of a contract in which the clause is contained, they sometimes aid

¹⁰⁵ *Ibid.*, para. 239.

¹⁰⁶ *Ibid.*

¹⁰⁷ See e.g., *Autopista*, *supra* note 19.

interpretation by relying on applicable law, which could be domestic law,¹⁰⁸ international commercial law¹⁰⁹ and sometimes even public international law.¹¹⁰ While both types of *force majeure* provide for a defence in situations when normal performance of an obligation is disrupted due to a supervening event, the conditions of the defence and its legal effects can differ. It is thus important to understand the differences between international and contractual *force majeure*, especially because the two defences often get conflated and misinterpreted in doctrine and jurisprudence.¹¹¹

Unlike international law *force majeure*, which precludes wrongfulness of a state's failure to carry out an international obligation (rooted either in custom or a treaty), contractual *force majeure* can be typically invoked by either of the parties for the performances of a contractual obligation. It does not provide a defence to state responsibility only, but rather serves as a device for allocating risk in contractual transactions between equal parties. Moreover, parties can customise the contract and tailor the *force majeure* exception to their own needs, which can affect the scope, the conditions and the legal effect of the defence.¹¹²

With regard to the scope, contractual *force majeure* clauses typically include a list of events that can trigger the application of a clause. By such detailed drafting parties customise the clause to the circumstances of their contract and business transaction, and maximise the protection against potential political and other risks. Although such lists are usually non-exhaustive, it is often perceived among investors that the defence will not be available if the risk is not specifically identified in the clause.¹¹³ Consequently, the *force majeure* events are often broadly defined, extending the scope of *force majeure* situations for which the defence is typically invoked in

¹⁰⁸ See e.g., *National Oil Corporation v. Sun Oil*, ICC Case No. 4462/1985 and 1987, *Yearbook Commercial Arbitration*, 1991, XVI: 54-78.

¹⁰⁹ See e.g., the United Nations Convention on Contracts for the International Sale of Goods (signed 11 April 1980, entry into force 1 January 1988) (CISG) Article 79; International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (2016) (UNIDROIT Principles) Article 7.1.7.

¹¹⁰ See *Autopista*, *supra* note 19. See also decisions of the Iran – US Claims Tribunal referred to by the *Autopista* tribunal, para. 123.

¹¹¹ *Ibid.*

¹¹² For example, while contractual clauses will typically exonerate the party from the payment of damages or sometimes even justify the termination of a contract, consequences of a successful invocation of *force majeure* in the law of state responsibility (i.e., whether the obligation to pay damages persists) are less clear. See note 94.

¹¹³ In *Kell Kim Corp v. Cert. Mkts., Inc.*, 519 N.E. 2d 295, 296 (N.Y. 1987) the Court noted that 'ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused'. See also Mark Augenblick and Alison B Rousseau, 'Force Majeure in Tumultuous Times: Impracticability as the New Impossibility', *Journal of World Investment and Trade*, 2012, 13 (noting that 'unless the type of event is specifically listed in the force majeure clause, virtually no external event will be deemed unforeseeable and constitute force majeure excusing contract performance').

public international law.¹¹⁴ According to the ICC model *force majeure* clause, which reflects the prevailing practice and emerging consensus on *force majeure* defence in international business transactions,¹¹⁵ the events of *force majeure* include armed conflict or a threat thereof, hostile attack, military embargo, blockade, all types of internal conflicts (from civil wars, insurrections and riots to mob violence), act of terrorism, and even general labour disturbance such as strikes and occupations of factories and premises.¹¹⁶

The wider scope of a contractual *force majeure* clause can be explained by different nature of a breached obligation and the identity of a party invoking the defence. Even small-scale violence can prevent investors from executing their obligation under a contract, while the same cannot be said for the failure to carry out an international obligation by a state. Justifications for non-performance of international obligations tend to be narrowly defined in order to foster stability in international relations. Moreover, states, unlike investors, possess certain resources that place them in a better position to manage risks arising out of exceptional circumstances. Thus the event, which is beyond the control of an investor, is not necessarily beyond the control of a state.

For example, an occupation of an investor's premises by its employees in the course of strikes or mob violence has been a common ground for investment treaty claims on the ground that the state failed to provide sufficient protection to investors.¹¹⁷ Such confined violent interference typically does not meet the conditions of *force majeure* in international law. On the other hand, the same type of event can be sufficiently beyond the control of investors, enabling them to invoke contractual *force majeure* for the non-performance of their obligation stipulated in investment contracts. This makes the scope of situations for which the *force majeure* presents a viable defence mechanism narrower in international law than in the context of investment contracts.

Furthermore, the fact that states exercise more control over political and social situations, which can escalate into a conflict, raises important questions about the content of the conditions of *force majeure*. The conflict-related arbitral decisions signal a lack of clarity as to what the meaning of these conditions is in international law and under contractual clauses, whether conditions are the same for either type of defence and whether they differ depending on the party invoking the defence. The following

¹¹⁴ For example, in *Nykomb Synergetics*, the contractual *force majeure* clause, invoked by the foreign investor, included 'amendments to legislative regulations' and 'government resolutions'. See *Nykomb Synergetics Technology Holding AB v. Latvia*, SCC (Award, 16 December 2003), para. 3.6.4.

¹¹⁵ ICC Force Majeure Clause 2003 – Hardship Clause 2003, ICC Publication 650 (2003).

¹¹⁶ *Ibid*, s 3.

¹¹⁷ See e.g., *Wena Hotels*, *supra* note 84; *Noble Ventures Inc v. Romania*, ICSID Case No ARB/01/11 (Award, 12 October 2005); *Tecnicas Medioambientales Tecmed SA v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2 (Award, 29 May 2003).

sections thus turn to unpacking the criteria that have proven most problematic and have yielded inconsistent interpretation in practice, namely unforeseeability and impossibility.

4.1. Unforeseeability

While it is generally accepted that an event must be unforeseeable in order to qualify as *force majeure*, the question arises as to how strict is this requirement. The ICSID tribunal in *Autopista v. Venezuela* set the bar high for ‘foreseeability’. In that case, the foreign investor initiated arbitration because of Venezuela’s failure to comply with the concession agreement in which Venezuela had committed to carry out works and maintenance of the highway system, including raising the tolls for the use of the highway. The government’s intention to implement toll increases resulted in violent protests and riots in Caracas in 1997 and 2002, which led the government to dispense with the tolls altogether.

In the arbitration, Venezuela defended its failure to perform its contractual obligation by invoking *force majeure* and arguing that in view of the violent reaction and civil unrest, it had been impossible for it to further increase the tolls. More specifically, it argued that the 1997 unrest was unforeseeable because ‘the parties could not and did not foresee a protest of such magnitude and threatened violence that it would undermine the entire financing mechanism for the construction project ...’¹¹⁸ While Venezuela acknowledged that the prospect of public opposition to its unpopular measure was indeed foreseeable, it contested the foreseeability of the magnitude and form of such resistance. Because the concession agreement did not contain the relevant *force majeure* clause, the tribunal resorted to the law governing the contract which was Venezuelan law, inasmuch as it does not conflict with international law.¹¹⁹ In its interpretation of *force majeure*, the tribunal held that the standard in Venezuelan administrative law does not differ from the one imposed in public international law.¹²⁰

The tribunal was not convinced by Venezuela’s defence. In the reasoning behind its decision, it emphasised that in 1989 Venezuela had experienced similar riots leading to hundreds of deaths in response to an increase in gasoline prices. According to the tribunal, the impact of that civil unrest on Venezuelan society, which had happened eight years earlier, proved that the 1997 riots could have been foreseen at the time of the negotiation of the concession agreement.¹²¹ On the ground that the protests had been foreseeable, the tribunal dismissed the plea of *force majeure*. According to the tribunal’s interpretation, for the event to be foreseeable, it does not have to be probable

¹¹⁸ *Autopista*, *supra* note 19, para. 111.

¹¹⁹ *Ibid.*, para. 105.

¹²⁰ *Ibid.*, para. 127.

¹²¹ *Ibid.*, paras. 117-8.

or likely to occur – it is enough that it could not be ruled out as a possibility. The fact that Venezuela anticipated some public disagreement over the toll increase showed the tribunal that the possibility of a ‘very violent protest’ could not have been excluded. Furthermore, the tribunal used the country’s previous record of conflict as the ultimate yardstick for the foreseeability considered in this case. Although it had been almost a decade since the last similar upheaval, that event led the tribunal to conclude there was a lack of unforeseeability in the matter at hand.

This conclusion is problematic for several reasons. First, it offers no tangible criteria to delimit foreseeability: practically speaking, everything is foreseeable. Second, it does not allow states to prioritise regarding their protective policies. If everything is foreseeable and states ought to be proactive regarding any possible harmful event, then they will never be able to concentrate on those risks that are indeed foreseeable. Third, it renders *force majeure* defence practically useless to every state that has previously experienced protests and riots.

In another ICSID case, *RSM Production Corporation v. Central African Republic*,¹²² the arbitral tribunal took the opposite approach to determining foreseeability. RSM and the Central African Republic entered into a contract according to which the foreign investor obtained a four-year licence for oil exploration. During the last year of exploration in 2001, due to civil and political turmoil and armed conflict in the Central African Republic, the investor invoked a *force majeure* clause to justify the non-performance of certain aspects of the contract. Although the *force majeure* in this case was based on the contract,¹²³ the elements that the tribunal inspected were the same as those under international law.¹²⁴ Even though the country was politically unstable and outbreaks of violence had not been uncommon, the tribunal held that the conflict situation in question was not foreseeable.

The tribunal espoused a more nuanced approach than the *Autopista* tribunal in its analysis, focusing on the general political and security atmosphere at the time, and the type and magnitude of the past unrest. It held that the occurrence of the latter could not have portended the occurrence of a security situation that would have made the performance of the contract impossible, and thus the plea of *force majeure* was successful.¹²⁵ In contrast to the *Autopista* tribunal, the *RSM* tribunal did not focus on the past record of violence on the country’s territory, but rather discussed the condition

¹²² *RSM Production Corp v. Central African Republic*, ICSID Case No. ARB/07/02 (Decision on Jurisdiction and Liability, 7 December 2010).

¹²³ The contract defined *force majeure* as ‘Unforeseen events, irresistible and beyond the control of the party invoking such as earthquake, strike, riot, insurrection, civil commotion, sabotage, acts of war or conditions attributable at war’. *RSM, ibid.*, para. 147.

¹²⁴ *Ibid.*, para. 178.

¹²⁵ *Ibid.*, paras. 180, 185 and 211.

of ‘foreseeability’ in relation to other conditions, in particular its impact on the performance of the obligation.

In a recent ICC case, *Gujarat v. Republic of Yemen*, the threshold of unforeseeability was further lowered.¹²⁶ In that case the investor terminated the production sharing agreements on the ground that the *force majeure* events in Yemen in 2011 (riots and insurrection) made it unsafe for its staff to carry out the data seismic studies and other activities required under the investment contract. The tribunal relied exclusively on the wording of the broadly drafted *force majeure* clause and found no need to aid interpretation by relying on Yemeni domestic law, which governed the contract.¹²⁷ Since the clause did not include the condition of ‘unforeseeability’, the tribunal concluded that riots and insurrection did not need to be unforeseeable for the *force majeure* clause to apply.¹²⁸

While this indicates the importance of clear and precise drafting of *force majeure* clauses, tribunal’s *obiter dictum* is more interesting for the present analysis. Namely, the tribunal went on and suggested that it would have reached the same conclusion even if the clause had expressly provided for an ‘unforeseeability’ requirement.¹²⁹ It rejected the view that the *force majeure* event is foreseeable if similar events existed before or at the time of entering into a contract. What was crucial, according to the tribunal, was not the existence of the *force majeure* risk at the time of contracting, but rather whether there was a ‘significant and sharp increase in risk beyond what was contemplated by the parties at the time of contracting.’¹³⁰ In other words, the ‘unforeseeability’ condition would be met even when the country experienced a security crisis before or at the time contracting, if the situation would suddenly and severely deteriorated.

This flexible interpretation of unforeseeability, while more understanding of commercial realities, is in stark contrast to the *Autopista* tribunal’s strict interpretation. The notable difference between the *Gujarat* and *RSM* decisions, on the one hand, and *Autopista*, on the other hand, is that in the former cases the investors invoked *force majeure* defence, while in the latter, it was the government. This invites the question whether the unforeseeability should be measured differently, depending on whether the party invoking *force majeure* defence is a state or an investor.

¹²⁶ *Gujarat*, *supra* note 8.

¹²⁷ The clause provided that that *force majeure* ‘shall be any order, regulation or direction of the [government of the Republic of Yemen]... whether promulgated in the form of law or otherwise, or any acts of GOD, *insurrection, riot, war, strike* (or other labor disturbances), fires, floods or any cause *not due to the fault or negligence of the Party invoking Force Majeure*, whether or not similar to the foregoing, *provided that any such cause is beyond the reasonable control* of the party invoking Force Majeure.’ *Ibid.*, para. 105.

¹²⁸ *Ibid.*, para 158.

¹²⁹ *Ibid.*, para 159.

¹³⁰ *Ibid.*

Whether the event is foreseeable is determined by the knowledge of the event or the anticipation thereof. Thus, it would appear to be more apposite to consider foreseeability as a subjective element – whether or not a particular event is unforeseeable depends on the circumstances of a subject invoking the *force majeure* defence. For example, a war that has been declared by a state or precipitated by its direct actions, is clearly more foreseeable for a state than for a foreign investor. On the other hand, some events arising from an investor’s sphere of control, like strikes, could be anticipated even by investors that exercise some control over their employees and a company’s financial conditions. The ability to foresee detrimental events depends on the availability of resources and access to relevant information. When it comes to security crises and conflict situations, it is reasonable to assume that a state has more control over pertinent information about such risks and the likelihood of them materialising in the near future than private actors. The threshold of foreseeability will thus likely be set higher for a state than for a foreign investor, regardless of whether *force majeure* is invoked as a circumstance precluding wrongfulness or a contractual defence.

This, however, does not mean that a threshold is so high as to make the defence impossible. For the successful invocation of *force majeure*, the foreseeability should not only concern occurrence of the prejudicial event, but also its determinative characteristics that affect the non-performance of the obligation, namely its scope, magnitude, intensity, form, frequency and timing. In other words, the standard of foreseeability is fragmented and thus the element of exactness is required. Foreseeing a possibility of a conflict in the future would not preclude the *force majeure* defence, if the conflict preventing the state from carrying out an obligation was of unforeseeable scope and magnitude. This was the approach confirmed by the *RSM* and *Gujarat* tribunals which, in contrast to the *Autopista* tribunal, did not base their assessment solely on the history of violence and the general political situation in a state at the time of contracting, but also on what has happened since, and how severely and at what pace has the security situation deteriorated.

4.2. Impossibility

While contractual *force majeure* clauses usually do not expressly address the standard of impossibility, the practice suggests that the threshold of impossibility created by the supervening event, which is required for the successful invocation of the *force majeure* defence, is lower than in international law. As explained above, the Commentary to ARS makes it clear that an increased difficulty of performance does not constitute *force majeure* under international law. The standard that has been codified is one of material impossibility, which, as sometimes argued, purports to ‘convey an objective rather than

a subjective criterion for determining the situation of impossibility'.¹³¹ In stark contrast, the ICC model *force majeure* clause, for example, states that *force majeure* is invoked when the performance of contractual obligations is *impeded*, rather than made impossible.¹³² As emphasised by the ICC, the 'test of commercial reasonableness' should be used when assessing the criterion,¹³³ which arguably lowers the bar from the standard of 'impossibility' to the level of commercial 'impracticability'.¹³⁴ The ICC standard *force majeure* clause purports to replace the application of the relevant domestic law provisions on *force majeure*, which differ across jurisdictions and may impose a stricter standard that may be deemed inappropriate for international commercial transactions.

The trend towards the more lenient standard of 'impracticability' is further reflected in codifications of international commercial rules and customs. For example, CISG codifies *force majeure* in Article 79 as 'impediment beyond [party's] control'.¹³⁵ Because the rationale of the CISG is to harmonise international commercial law and bridge the divide between civil and common law doctrines, the language of the provision is vague and sufficiently broad to accommodate not only situations of absolute impossibility but also cases of increased difficulty of performance. A similar approach is followed in the UNIDROIT Rules.¹³⁶ Some scholars argued that these developments are reflective of an autonomous standard that emerged from the practice of international merchants and forms part of the new *lex mercatoria*.¹³⁷

Conflict-related arbitral practice reflects this shift towards the lenient interpretation of impossibility for contractual *force majeure*, but also illustrates confusion and lack of clarity as to whether the same standard applies in international law. In the *Autopista* case, the tribunal made several errors in the treatment of the 'impossibility' requirement. First, while the tribunal made clear from the outset that the potential inconsistencies between the Venezuelan rules on *force majeure* and international law will be resolved with the latter prevailing over the former,¹³⁸ it did not follow through when interpreting the standard of impossibility. When considering whether the 1997 unrest met the requirement of impossibility, the tribunal concluded that the standard was the same under Venezuelan and international law: '[u]nder this

¹³¹ On differing views as to whether material impossibility denotes absolute impossibility, see *supra* notes 22-24. See also Paddeu (2012), *supra* note 6, at 454.

¹³² See e.g., ICC Force Majeure Clause, s 6.

¹³³ *Ibid.*, s 12.

¹³⁴ See Augenblick and Rousseau, *supra* note 113.

¹³⁵ CISG, Article 79.

¹³⁶ UNIDROIT Rules, Article 7.1.7.

¹³⁷ Mazzacano, *supra* note 2, at 54; David R. Rivkin, 'Lex Mercatoria and Force Mejeure' in Emmanuel Gaillard (ed.), *Transnational Rules in International Commercial Arbitration* (ICC Publications, 1993), at 208.

¹³⁸ *Autopista*, *supra* note 19, para. 104.

standard, it is not necessary that the force majeure event be irresistible; it suffices that by all reasonable judgment the event impedes the normal performance of the contract.¹³⁹ The tribunal rejected the claim that *force majeure* under international law imposes a standard of absolute impossibility and supported its argument by referencing Draft Articles on State Responsibility.¹⁴⁰ This is in particular puzzling because the Articles explicitly mention criteria of irresistibility and material impossibility.

Second, the tribunal held that the finding that the riots were not unforeseeable meant that investigation of other criteria was not necessary anymore and *force majeure* claim failed on that ground alone. According to international law, however, *force majeure* applies even in situations when the event was foreseeable but impossible to avoid due to its strength (i.e., was irresistible). Moreover, unforeseeability is only relevant inasmuch as it makes it materially impossible for the state to perform an international obligation. Thus, the condition of impossibility is a vital element of *force majeure* defence in international law and needs to be met cumulatively with other conditions. The tribunal's dismissal of further analysis is in particular problematic because it hinted that the impossibility requirement in that case was actually likely met.¹⁴¹ This means that had the tribunal applied the law accurately, the final decision would have been completely different as the state's defence would have succeeded.

The likely reason for the *Autopista* tribunal's reticence to discuss impossibility was that it wanted to avoid reaching the conclusion on whether the government could have done something to prevent or resist the riots while complying with its obligation (increasing the road tolls). The question can give rise to tension between the state's duty to use force to quash political protests and internal strife, on the one hand, and the appropriateness of such violent measures, on the other hand. Without giving a final answer, the tribunal voiced the predicament in the following terms:

Venezuela admits that the civil protest was not irresistible in the sense that it could not have been mastered by the use of force. This being so, the question then becomes: by all reasonable judgment how much force can a State be legally required to deploy to perform its contract obligations? The answer to this implies a delicate assessment that calls in part for political judgment.¹⁴²

In the *Gujarat* case, the tribunal held that the contractual *force majeure* did not entail the 'impossibility' requirement because it did not expressly provide for it. While the respondent (the Government of Yemen) argued that such requirement existed by means of application of Yemeni law that governed the contract, the tribunal treated the

¹³⁹ *Ibid.*, para. 121.

¹⁴⁰ *Ibid.*, para. 123

¹⁴¹ *Ibid.*, para. 124.

¹⁴² *Ibid.*, para. 124.

clause as a self-contained regime, reflecting the will of the parties and being sufficiently clear and precise to avoid any interpretative exercise.¹⁴³ As with the condition of unforeseeability discussed above, however, the tribunal went on and reaffirmed that its decision would not have been different had the impossibility condition been introduced to the clause, because “‘impossibility’ in the context of *force majeure* meant that it was not possible to perform an obligation in a practical way’.¹⁴⁴ In other words, impossibility in the context of investment contracts denoted commercial impracticability rather than absolute impossibility. Citing the decision in *National Oil Corporation v. Sun Oil Company*, the tribunal noted there was a trend to define *force majeure* in long-term international contracts less strictly than under domestic contracts.¹⁴⁵

In the cited *National Oil Corporation* case, however, the ICC tribunal actually adopted a more cautious approach when considering the impossibility requirement. The tribunal held that the ban on US citizens (respondent’s personnel tasked to carry out an oil exploration agreement in Libya) to travel to Libya did not sufficiently impede the performance of the contract as to justify the *force majeure* plea.¹⁴⁶ According to the tribunal, the respondent could have hired non-US staff to carry out the contract. While the tribunal rejected the *force majeure* defence, its assessment of the standard of impossibility hinged on the reasonable balancing of potential alternatives. The required standard of impossibility was short of absolute, but it also rose above mere commercial impracticability.

A requirement that the party asserting *force majeure* defence would have to demonstrate there was no reasonable alternative arrangement that would have allowed the performance under the contract, was highlighted in some other conflict-related cases.¹⁴⁷ For example, in *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*,¹⁴⁸ the respondent’s personnel were required to leave the country following the outbreak of armed conflict. After the end of the conflict, the respondent rejected the claimant’s request to continue performing its contractual duties, arguing that it was not possible to ensure the safe return of its employees to the country. The tribunal allowed *force majeure* defence only for the duration of the conflict (one month). It, however, held that the impossibility standard was not met for the period

¹⁴³ *Gujarat*, *supra* note 8, para. 153.

¹⁴⁴ *Ibid.*, para. 160.

¹⁴⁵ *Ibid.*, para. 152.

¹⁴⁶ *National Oil Corporation*, *supra* note 108. See also 733 F. Supp. 800 (D. Del. 1990).

¹⁴⁷ Augenblick and Rousseau (2012), *supra* note 113.

¹⁴⁸ ICC Np. 1703/1971, Pieter Sanders (ed.), *Yearbook Commercial Arbitration*, 1976, I: 130-2. See also *Parsons & Whittemore Overseas Co.*, 508 F.2d 969, cited in *ibid.*

after the conflict, as there were other staffing alternatives the respondent had not explored.

These cases show that the plea of *force majeure* has been considered on a spectrum of impossibilities, ranging from absolute impossibility in international law to increased difficulty in the context of international commercial contracts, with a varying degree of ‘reasonable’ impossibility in between. Could the latter test be of any assistance in interpreting *force majeure* in international law? While it has been made clear that material impossibility in international law *force majeure* does not denote increased difficulty, in practice it will also rarely amount to complete inability, in particular when the supervening event is armed conflict. To effectively deal with violence, a government will often have other options than violating obligations owed to foreign investors. The question then arises what are the costs of such alternatives, measured not necessarily in monetary but, more importantly, in security and humanitarian terms. For example, in *Autopista* case, the state could have met its obligation of increasing road tolls pursuant to the investment contract by deploying more military force to suppress the violent opposition. While the impossibility was not absolute, the alternative solution would arguably create unreasonable and excessive costs reflected in an exacerbated security situation and a likely increase in death toll. In that context, the impossibility criterion was indeed met, as indicated, but regrettably not confirmed, in the final award.

Such an interpretation of material impossibility under international law *force majeure* introduces a degree of flexibility by taking into account not only circumstances created by a conflict situation, but also the nature and importance of the international obligation in question (e.g., a commercial obligation from an investment contract would lend itself to a more lenient interpretation of impossibility), and by assessing whether there were any reasonable alternatives to a breach of the said obligation. This gives rise to a modified objective standard; one that is situated between absolute impossibility (an objective standard) and increased difficulty or impracticability (a subjective standard). While this understanding of *force majeure* has been often followed when investors invoked the defence, there seem to be no convincing reasons not to extend it to the invocation of international law *force majeure* in factually similar situations. Indeed, Special Rapporteur Ago described material impossibility as ‘relative impossibility’, the threshold of which was met when the performance would result in a ‘sacrifice that could not be reasonably required’.¹⁴⁹ While reasonableness is a vague term and its content

¹⁴⁹ Ago, Eighth Report, *supra* note 30, paras. 103 and 106. See also 1569th Meeting, ILC, *supra* note 29, at 185, para. 5 (noting that there is no real freedom of choice, if one of the alternatives could not be reasonably required to be followed). A similar interpretation of impossibility has been supported under the EU law, where the European Court of Justice has permitted the defence in situations when performance would be possible by making unreasonable and excessive sacrifice. See Case 11-70,

will have to be ascertained in each individual case, it arguably provides a state with desirable leeway to make legally difficult and often politically sensitive decisions in turbulent times.

5. CONCLUSION

Historically, *force majeure* has been commonly invoked in diplomatic correspondence, jurisprudence and doctrinal works dealing with state responsibility for losses that aliens sustained in various types of turmoil. This has created a misplaced expectation about the potential of this international law principle as a defence against claims of foreign investors for conflict-related losses. This article has argued that the usefulness of the defence is limited; however, not because of the high threshold of the criteria for its successful invocation, but rather because of other defences incorporated in international law, investment treaties or private law instruments.

It has been shown that the content, scope and origin of a primary obligation will play an important role in the application of *force majeure*. If the violation is due to actions of state organs, defences that purport to cover state voluntary measures will take precedence (e.g., exceptions in investment treaties, necessity). If a state has breached a positive obligation, the scope for the application of the defence will open up. Departing from most of the doctrine, the article has argued that *force majeure* could be used to temporarily justify the state's failure to make financial payments during armed conflict.

It has been further argued that with respect to the obligation of prevention (e.g., the obligation to protect as encompassed in customary law and full protection and security provisions of investment treaties), the *force majeure* defence loses its appeal. This article has dismissed the doctrinally popular distinction between *force majeure* as a situation- and event-based defence as outdated, and instead introduced a distinction between *force majeure* as a circumstance precluding wrongfulness and *force majeure* as a circumstance modifying the obligation of due diligence. It has been demonstrated that the latter has played an essential role in deciding most of historical conflict-related investment cases. Legally, however, those cases were decided on the ground of the duty of due diligence which already incorporates the elements of *force majeure*. This removes the need to invoke *force majeure* defence in cases where the performance of the allegedly violated obligation is assessed on the basis of due diligence.

Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, para. 23; *Case 25/70, Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster and Berodt & Co* [1970] ECR 1161, para. 38; *Case C-325/96, Fábrica de Queijo Eru Portuguesa Lda v. Subdirector-Geral das Alfândegas, and Ministério Público* [1997] ECR 7249, para. 24. For more on the application of *force majeure* in EU law see Michael Parker, 'Force Majeure in EU Law', in Ewan McKendrick (ed.), *Force Majeure and Frustration of Contract* (Routledge, 2014), at 341; Gourgourinis (2017), *supra* note 10, at 296-304.

Lastly, the article has considered the exception of *force majeure* as stipulated in investment contracts, thereby highlighting important differences with the defence in international law. Such *force majeure* clauses are often tailored to the needs of parties entering into long-term commercial transactions and are consequently drafted in broad terms, thereby widening the scope of situations in which they can be applied, and lowering the impossibility threshold to the level of commercial impracticability. This could create a problem when the content of *force majeure* concept in international commercial law is read into the *force majeure* principle in the international law of state responsibility. While being mindful of the differences between these two concepts, the article has been nonetheless critical of an overly strict interpretation of the *force majeure* requirements in international law, in particular unforeseeability and impossibility. It has been argued that whether these criteria are met must be assessed against the circumstances of a case, in particular the circumstances on the side of the obligor and the characteristics of armed conflict in question (unforeseeability), and the nature of the breached obligation and the availability of reasonable alternatives (impossibility).

