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States' Defenses against Foreign Investors in Times of Political and Economic Crisis

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Abstract. During periods of economic and political crises, investors become more vulnerable because States usually adopt quick measures like protective policies and measures of public interest, which frequently come into conflict with international investment law: Foreign investors may resort to arbitration under investment treaties and file complaints usually arguing that changes and measures taken by the State violate the protections offered in these treaties. Legal defenses of States in times of crises are on the other hand very limited and constrained by strict conditions. Host States can invoke their right to modify rules to preserve public order under the customary principle of police powers. States may also rely on certain treaty provisions called non-precluded measures provisions if they exist and / or the exception of necessity under customary international law codified in article 25 of the International Law Commission (ILC) Articles on State Responsibility for Internationally Wrongful Acts to exclude from wrongfulness measures and acts adopted in a crisis situation. Arbitral jurisprudence provided clarifications on how to interpret non-precluded measures clauses in investment treaties in relation to the necessity plea under customary law. It has often addressed the question of whether the necessity defense is self-judging and also has taken different approaches to the determination of damages in cases involving the successful or unsuccessful use of necessity and non-precluded measures clauses.

Keywords: state defense, necessity, non-precluded measures clauses, emergency clauses, right to regulate, general interest, police powers, investment treaties, state responsibility, investment arbitration, crisis, damages, foreign investors.

Research area: Social Structure, Social Institutions and Processes, International Investment Law, Investment Arbitration.

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Защита государств от иностранных инвесторов во время политических и экономических кризисов

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Аннотация. В периоды экономических и политических кризисов инвесторы становятся более уязвимыми, поскольку государства обычно принимают оперативные меры, такие как защитная политика и меры в интересах общества, которые часто вступают в противоречие с международным инвестиционным правом. Иностранные инвесторы могут обращаться в арбитраж в соответствии с инвестиционными договорами и подавать жалобы, обычно утверждая, что изменения и меры, принятые государством, нарушают защиту, предусмотренную этими договорами. С другой стороны, правовая защита государств во время кризисов ограничена жесткими условиями. Принимающие государства могут ссылаться на свое право изменять правила для сохранения общественного порядка в соответствии с обычным принципом полицейских полномочий. Государства также могут ссылаться на определенные договорные положения, называемые положениями о незапрещенных мерах, если они существуют, и/или на состояние необходимости в соответствии с обычным международным правом, кодифицированным в статье 25 Статей Комиссии международного права об ответственности государств за международно-противоправные деяния, чтобы исключить противоправность мер и действий, принятых в кризисной ситуации. Арбитражная практика дала разъяснения относительно того, как толковать положения о неисключенных мерах в инвестиционных договорах в связи с признанием состояния необходимости в соответствии с обычным правом. В ней часто рассматривался вопрос о том, является ли защита в условиях необходимости самооценкой, а также применялись различные подходы к определению убытков в делах, связанных с успешным или неуспешным использованием клаузул о состоянии необходимости и неисключенных мерах.

Ключевые слова: защита государства, состояние необходимости, оговорки о неисключенных мерах, чрезвычайные оговорки, право на регулирование, общие интересы, полицейские полномочия, инвестиционные договоры, ответственность государства, инвестиционный арбитраж, кризис, убытки, иностранные инвесторы.

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Introduction

Over the past two centuries, several political and economic crises have taken place. During these times, investors become more vulnerable because governments may be under political pressure from citizens, political parties, and pressure groups to meet the demands of the public, which could result in political regime

change and turmoil in society. Depending on various economic, social, and political situations, States respond to these pressures and crises in a variety of ways. Market intervention and nationalization are common responses in times of crisis. Countries adopt on a national level quick measures and protective policies of public interest related to trade or finance. For example, banks may be temporarily shut down, the amount that can be withdrawn in cash might be restricted, or capital transfers might be blocked.

While such an intervention may be necessary during economic hardship, it frequently amounts to protecting national interests at the expense of domestic and international investors – whether deliberately or not. By enacting regulations to safeguard the public interest, States may materially affect investors' rights. Measures undertaken via domestic legislation are protected by state immunity in cases of lawsuits before domestic courts since they are classified as *acta iure imperii*. These domestic measures have frequently come into conflict with international law particularly international investment law because foreign investors may resort to investment arbitration under investment treaties. Investor-State arbitration offers a new means to contest government actions. These conflicts have become increasingly common in the area of investment law during the past few years. Some crises, like the Argentine crisis, have led to a considerable case law. Investment arbitration has become a common international mechanism for resolving disputes with host nations since the mid-1990's as a result of the growth in BITs and investment chapters in trade agreements. Investment treaties protect investors from legislative changes by providing protection standards such as fair and equitable treatment, and expropriation prohibitions. During economic crisis, dispute resolution practitioners often face increased workload due to trade measures, potentially leading to increased international disputes. Investment arbitration can be seen as a legitimate tool during economic crises, limiting policy reactions and preventing discriminatory bias, or an illegitimate tool, hindering governments from addressing domestic concerns.

Statement of the problem

The regular rendering of binding decisions by independent investment tribunals on the question of whether States have violated the investment protection standards guaranteed under various bilateral and multilateral investment treaties has made international investment law one of the most active areas of public international law. A foreign investor can file a complaint arguing that changes to legal frameworks and measures taken by the State violated one or more of the protections offered in investment treaties. Therefore, claims are usually based on allegations of breaches to provide full protection and security, fair and equitable treatment, to allow free transfer of capitals and profits. Other claims concern denial of justice, expropriation, and discrimination (including most-favored-nation or national treatment obligations). The other party would usually maintain that because of the crisis, it is unable to fulfill commitments made before the crisis or that it was compelled to take specific actions to limit the consequences of the crisis. What legal defenses do States usually use against foreign investors in times of political and economic crisis? The discussion is divided into six parts. Host States can invoke their right to modify rules to preserve public order in response to changing conditions (I). States may also use other defenses by relying on certain treaty provisions called non-precluded measures provisions (II) and/or the exception of necessity under customary international law (III). The relation between emergency clauses in treaties and international customary law of necessity has not been always clear in arbitral case law (IV). Whether the necessity defense is self-judging (V) and whether a successful reliance on necessity or the emergency clause has any influence on the subject of damages (VI) are questions often raised in such arbitrations.

Method

The methods used for the analysis are based on several approaches: descriptive, comparative, analytical, and historical. Legal research materials include primary sources such as international investment treaties, arbitration cases, and the Draft Articles on Responsibili-

ty of States for Internationally Wrongful Acts with Commentaries (ARSIWA). Secondary legal sources include law reviews and journals, book chapters on the subject in English and French, as well as articles written by lawyers and practitioners affiliated with international law firms, and papers or studies prepared or edited by international organizations.

Discussion

I. States' right to regulate for the general interest in international law: the doctrine of police powers

Investment arbitration often addresses the conflict between a State's regulatory powers and foreign investors' rights, which can be heightened during economic crises. International law acknowledges States' power to legislate in the public interest, which can be explicitly mentioned in investment treaties. States can also use the theory of police powers to defend actions that may breach investor protections, despite the absence of an exception clause. The OECD states that compensation is not required for economic injury resulting from non-discriminatory regulation within a state's police powers and that it is an accepted principle of customary international law. In *Saluka* case, the tribunal stated that "the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary international law today" (Saluka Investments B. V. v. The Czech Republic, UNCITRAL, Partial award, 17 March 2006, § 262).

Courts have used the argument of police powers in emergency situations. For instance, in the AWG case, the tribunal stated: "In analyzing the measures taken by Argentina to cope with the crisis, the Tribunal finds that, given the nature of the severe crisis facing the country, those general measures were within the general police powers of the Argentine State, and they did not constitute a permanent and substantial deprivation of the Claimants' investments" (AWG Group Ltd v. Argentina, UNCITRAL, Decision on Liability, 30 July 2010, § 140).

Not all measures taken for general interest can fall under the category of police powers. Moreover, the scope of police powers remains uncertain because its extent is left to the discretion of the tribunal settling the case. Many tribunals have held that actions under police powers must be taken in good faith, non-discriminatory, and proportionate. In the Saluka case, states are not liable to pay compensation to foreign investors when they adopt non-discriminatory regulations aimed at the general welfare (Saluka Investments B. V. v. The Czech Republic, see above, § 255). In the Philip Morris case, a state's action must be taken *bona fide* for the purpose of protecting public welfare, non-discriminatory, and proportionate (Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016, § 305). In the Marfin case, in order for a State action not to constitute an indirect expropriation, it must be taken in good faith for the purpose of protecting the public welfare, non-discriminatory and proportionate (Marfin Investment Group Holdings S. A., Alexandros Bakatselos and others v. Republic of Cyprus, ICSID Case No. ARB/13/27, Award, 26 July 2018, § 829).

Regardless of the possibility that a police powers argument would be successful, States can invoke, in addition, the defenses related to necessity available under investment treaties or customary international law to defend themselves. International public law presents rules and remedies to address unexpected circumstances that have an influence on States' responsibilities. Will be focused on specific clauses in bilateral investment treaties and specific mechanisms found in international customary law.

II. Non-precluded measures in treaties

Some treaties contain provisions known as non-precluded measures clause or emergency exceptions clause or "security clause" or "necessity clause" which have the effect of excluding from wrongfulness measures and acts adopted by a State in crisis situations. These kinds of provisions have been invoked in crisis situations on grounds of "public order" or "essential security". The non-precluded measures provision in a bilateral investment treaty may

be used as a foundation by the host State to defend some crisis-related actions or measures. Those provisions constitute an excuse for the State for breaching the relevant treaty without seeing its international responsibility engaged.

Economic crises are consistently mentioned in case law as the kind of event that may justify or excuse a breach of a treaty. A rising number of bilateral treaties have such clauses like article 18.2 of the US 2012 BIT model. In the context of the 2001 crisis in Argentina, several cases involved claims under Article XI of the Argentina-US BIT, providing such provision. For example, in CMS, Argentina claimed that investors cannot be compensated for negative consequences resulting from broad economic and currency policies that were implemented during a state-wide economic crisis or contested before arbitral tribunals because they '[were] not directed towards investors but affect[ed] the country and its population as a whole' (CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, § 30).

III. The necessity defense under international customary law

Under customary law, States are responsible for wrongful acts or omissions that will hence trigger a breach of their international obligations. However, customary international law also includes circumstances that preclude the wrongfulness of States' conduct that would otherwise not be in conformity with their international obligations. Customary international law defenses have been codified in the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts. Chapter V of this text provides six circumstances precluding wrongfulness: consent (article 20), self-defense (article 21), countermeasures in respect of an internationally wrongful act (article 22), *force majeure* (article 23), distress (article 24), and necessity (article 25). When an international wrongful act has been committed under any of these six circumstances, international customary law eliminates State liability, in other words, these circumstances constitute a justification or an excuse for the State to fail to perform an obligation as long as the circumstance in question remains. However, the said obligation is not annulled nor terminated.

The threshold is very high to prove these defenses and the scope of their application is limited. These defenses have been used in the jurisprudence of the International Court of Justice and by arbitration tribunals. Will be analyzed the exception of necessity because it seems the most relevant as a means of defense for States in times of economic and political crisis against possible pleas from investors.

International customary law allows a State to invoke necessity as an excuse for precluding the wrongfulness of an act not in conformity with an international obligation. This rule is codified in article 25 of the International Law Commission (ILC) Articles on State Responsibility. The necessity defense is exceptional and must fulfill several cumulative requirements to prevent its frequent application, rendering many international agreements ineffective.

To invoke necessity, there must be a grave and imminent peril that threatens an essential interest of the State, whose action must be the "only way" to protect it against this peril. The evaluation of necessity depends on the circumstances and has been invoked to protect various interests, including safeguarding the environment, preserving the existence of the State and its people during public emergencies, or ensuring the safety of a civilian population.

In cases such as the Russian Indemnity case, the arbitral tribunal held that compliance with an international obligation must be "self-destructive" in order for the wrongfulness of the non-compliant conduct to be precluded. In this case, the Government of the Ottoman Empire invoked, among other reasons, an extremely difficult financial situation to justify its delay in paying its debt to the Russian government. The financial difficulty was categorized as force majeure, but it was actually more of a situation of necessity. The arbitral tribunal accepted the plea in principle but added that: "It would be a manifest exaggeration to admit that the payment of the relatively small sum of 6 million francs due to the Russian claimants would have imperiled the existence of the Otto-

man Empire or seriously endangered its internal or external situation" (UNRIAA, Vol. XI (Sales No. 61.V.4), p. 421, at p. 443 (1912)).

The principle of necessity in international law states that a State's action should be the only means available to safeguard an essential interest. If there is another way, such as more expensive or inconvenient, the necessity defense cannot be used. In cases where the State's course of action was not the sole one, the necessity defense was rejected. The International Court of Justice (ICJ) suggests that alternative ways to protect an essential interest may include cooperative action with other States or international organizations. Additionally, a State cannot invoke necessity if it contributed to the creation of the situation. The principle of economic and financial necessity has been accepted in cases like Société commerciale de Belgique and the French Company of Venezuelan Railroads.

Finally, as stated in article 26 of the ILC Articles, necessity cannot be used to exclude "the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law," so recourse to it is not permitted in the event of aggression or the use of force".

IV. Relation between non-precluded measures clauses in treaties and international customary law of necessity

To justify resorting to the state of necessity, some tribunals invoked the emergency exception of the applicable BIT (like article XI of Argentina-US BIT), while others applied the necessity rules of customary international law. Some used both. The reasoning behind the assessments results in somehow different outcomes giving rise to inconsistent jurisprudence.

In CMS, the tribunal essentially combined the emergency clause of the Argentina-US BIT with the customary norm on necessity codified in article 25 ARSIWA, without explicitly addressing the relationship between these norms (CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005, at § 353–358, § 374). The conditions necessary for the implementation of article XI of the BIT have been assimilated to those concerning the existence of a state of necessity under customary international law, assuming that article XI and article 25 are "on the same footing" (CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment, 25 September 2007, § 128, § 131). In its analysis of the facts, the tribunal stressed that the need to prevent a major breakdown, with all its social and political implications, might have entailed an essential interest of the State in which case the operation of the state of necessity might have been triggered. As the conditions for invoking a plea of necessity need to be cumulatively satisfied, the tribunal concluded that the plea of necessity under customary international law did not justify Argentina's measures. The tribunal in *Sempra* had also failed to distinguish between article 25 ARSIWA and article XI Argentina-US BIT, explicitly arguing that the latter "provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined" (Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007, at § 376).

The *ad hoc* committee in the Sempra annulment proceedings proclaimed that the tribunal had manifestly exceeded its power by equating article 25 ARSIWA with the emergency clause and essentially applying it as 'primary law' instead of the article XI of the BIT (Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, at § 207–209). Also, the *ad hoc* committee in CMS pointed out that "the excuse based on customary international law could only be subsidiary to the exclusion based on Article XI", and that "Article XI and Article 25 thus construed would cover the same field and the Tribunal should have applied Article XI as the *lex specialis* governing the matter and not Article 25" (CMS Gas Transmission Company v. Argentina, Decision of the *ad hoc* Committee, see above, at § 132–133). The committee consid-

ered that the tribunal should have considered "first whether there had been any breach of the BIT and whether such a breach was excluded by Article XI. Only if it concluded that there was conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded in whole or in part under customary international law" (CMS Gas Transmission Company v. Argentina, see above, at § 134). The tribunal did not examine whether the conditions set out in article XI had been met and, whether the measures taken by Argentina were likely to constitute, even *prima facie*, a violation of the BIT.

These decisions provide recommendations on how to interpret a non-precluded measures clause in a BIT: First, such provision should be considered separately from the necessity exception in customary international law, and second, as a *lex specialis*, it should prevail over the necessity exception in customary international law. As a result of the *ad hoc* committees' findings, subsequent cases like El Paso and Continental Casualty, took into account the interaction between the two norms and made a distinction between them.

V. Who should decide what constitutes a state of necessity – is it the State or the arbitral tribunal?

The International Court of Justice clearly indicated how clauses pertaining to a State's fundamental interests or national security should be assessed: "The state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met" (*Gabčíkovo-Nagymaros Project* (Hungary/ Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997, 7, at § 51).

In CMS, the arbitral tribunal maintained that: "[q]uite evidently, in the context of what a State believes to be an emergency, it will most certainly adopt the measures it considers appropriate without requesting the views of any court. However, if the legitimacy of such measures is challenged before an international tribunal, it is not for the State in question but for the international jurisdiction to determine whether the plea of necessity may exclude wrongfulness" (CMS Gas Transmission Company v. The Republic of Argentina, Award, 12 May 2005, at § 373).

On the other hand, in LG&E, the arbitral tribunal affirmed that it is important to follow the intentions of the States agreed upon at the time of signing the treaties, which indicates, in the BITs in question, that the States wished that the provisions on the essential security measures be self-judging. Nevertheless, the tribunal added that "Argentina's determination would be subject to a good faith review anyway" (LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, at § 214).This implies that the tribunal would effectively have control over the States' measures and interpretations.

One may invoke a violation of the parties' will and the *pacta sunt servanda* principle. A check on the States' good faith in how they interpret essential security measures, yet, would prevent the arbitrary application of clauses that would foster economic protectionism under the pretext of national security. On the other hand, the task can be challenging since tribunals must ensure that the BITs' self-judging effect is respected because failing to do so would empty the BIT of part of its substance.

Certain treaties provide that the State may invoke its essential security interests like article XI of the US-Argentina BIT previously mentioned. Therefore, when the treaty does not explicitly confer on the State a power to assess the conditions which constitute the state of necessity, the competent judge or arbitrator will make that determination. It is initially the State's responsibility to present an argument on necessity and to demonstrate the realities of its financial difficulties. And after the crisis's existence has been demonstrated, it is up to the judge or arbitrator to decide whether it actually exists, how serious it is, and whether it might have an effect on the State's ability to fulfill its international obligations.

VI. Damages and necessity

The question of whether a successful reliance on necessity or the emergency clause had any influence on the subject of damag-

es was raised by several tribunals. Regarding a successful invocation of the emergency clause, it was acknowledged that the result would be the inapplicability of some BIT standards and that no damages could be awarded during the state of emergency (see El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011, § 612). A State would be released from liability. However, if the contested measures were still in effect after the emergency period ended, the obligation to pay damages would resurface. According to the annulment committee in CMS, the necessity clause of a BIT, when successfully invoked, results in the non-application of the BIT's provisions and releases the State from any obligation or responsibility to compensate.

Necessity serves as a temporary defense under customary international law as well, which means that after the emergency period has passed, the State is still required to fulfill the international obligation. Additionally, CMS asserts by reference to article 27 ARSIWA that "the plea of state of necessity may preclude the wrongfulness of an act, but it does not exclude the duty to compensate" (CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005, at § 388). Therefore, compensation for measures taken in emergency times may be required, regardless of whether necessity exists as a circumstance excluding wrongfulness.

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That being said, in LG&E, another approach was taken asserting that "article 27 does not specify if compensation is payable during the state of necessity or whether the State should reassume its obligations" (LG&E, Decision on Liability, see above, § 260).

In general, tribunals consider that difficult economic circumstances should be taken into consideration in the valuation process even if the necessity defense was not successful.

Conclusion

Investment protection standards can be violated because of significant legislative changes. Awards show that the regulatory authority of the host government is not absolute. Non-precluded measures clauses in BITs allow governments to take actions that would otherwise be prohibited by the agreement if they are necessary to protect essential security or maintain public order in the State. Because of the many cumulative requirements that must be met, the necessity defense cannot guarantee the success of a claim. The resolution of a dispute will depend on a case-by-case evaluation of the particular regulatory framework and legislative measures against the standards of protection.

When a crisis strikes, governments must have the necessary political leeway and financial flexibility to implement economic support initiatives without running the risk of becoming swamped by investment disputes. Investment litigation against a foreign government typically leads in the investor leaving the country, so investment arbitration should only be used as a last resort.

Perhaps States should manage the risks collectively to prevent an increase in investor-State arbitrations. This can entail finding a solution on a global, regional, or bilateral level, encouraging solidarity, and protecting host countries. Some call for an end to the use of treaty-based investor-State dispute resolution. A multilateral response might be coordinated by the United Nations Conference on Trade and Development (UNCTAD), while investor-State dispute settlement reform could be handled by UNCITRAL. International investor-State dispute settlement clauses may be suspended by groups of nations, or bilateral suspensions may be negotiated with treaty partners.

Prevention is better than cure. Economic crises cost governments a lot in terms of compensating foreign investors for failed claims. Early warning models (EWMs), instruments designed to detect these very costly crises and prevent them, are among those most important economic models being developed by States and international financial organizations. In all cases, the arbitral tribunal must rigorously as-

sess whether the finding about the seriousness and imminence of the specific economic crisis is based on sufficient, objective, and cohesive evidence from the EWMs.

One thing is certain, the enthusiasm for arbitration will not cease overnight, as some surveys show[1]. Fast-track arbitration rules are becoming more and more common in arbitral institutions. Nevertheless, fast-track proceedings are not always appropriate for all disputes, especially those requiring specialists, numerous witnesses, or evidence gathering since they may violate basic arbitration principles like the right to be heard or the equal treatment of parties.

[1] Pinsent Masons (2023). Effects of Russia-Ukraine conflict to drive energy disputes, study finds, Available at: https://www.pinsentmasons.com/out-law/news/russia-ukraine-conflict-energy-disputes-driver (accessed September 22, 2023)

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