Article 23. Force majeure

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

2. Paragraph 1 does not apply if:

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

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

Commentary

(1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.[1005] [345] It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (art. 24) or necessity (art. 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.

(2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (*a*) the act in question must be brought about by an irresistible force or an unforeseen event; (*b*) which is beyond the control of the State concerned; and (*c*) which makes it materially impossible in the circumstances to perform the obligation. The adjective "irresistible" qualifying the word "force" emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been "unforeseen" the event must have been neither foreseen nor of an easily foreseeable kind. Further the "irresistible force" or "unforeseen event" must be causally linked to the situation of material impossibility, as indicated by the words "due to *force majeure* … making it materially impossible". Subject to paragraph 2, where these elements are met, the wrongfulness of the State's conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (*e.g.* stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (*e.g.* loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular, the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic

[1005] [345] "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", study prepared by the Secretariat (*Yearbook … 1978*, vol. II (Part One), p. 61, document A/CN.4/315).

crisis. Nor does it cover situations brought about by the neglect or default of the State concerned,[1006] [346] even if the resulting injury itself was accidental and unintended.[1007] [347]

(4) In drafting what became article 61 of the 1969 Vienna Convention, ILC took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.[1008] [348] The same view was taken at the United Nations Conference on the Law of Treaties.[1009] [349] But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty on grounds of supervening impossibility, as ICJ pointed out in the *Gabčíkovo-Nagymaros Project* case:

> Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties … Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.[1010] [350]

(5) In practice, many of the cases where "impossibility" has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred, *e.g.* where a State aircraft is forced, due to damage or loss of control of the aircraft

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[1006] [346] For example, in relation to occurrences such as the bombing of La Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered (study prepared by the Secretariat, *ibid*., paras. 255–256).

[1007] [347] For example, in 1906 an American officer on the USS *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

> "While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire."

M. M. Whiteman, *Damages in International Law* (Washington, D. C., United States Government Printing Office, 1937), vol. I, p. 221. See also the study prepared by the Secretariat (footnote [1005] 345 above), para. 130.

[1008] [348] *Yearbook … 1966*, vol. II, p. 255.

[1009] [349] See, *e.g.*, the proposal of the representative of Mexico, *United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, p. 182, para. 531 (*a*).

[1010] [350] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 63, para. 102.

owing to weather, into the airspace of another State without the latter's authorization. In such cases the principle that wrongfulness is precluded has been accepted.[1011] 351

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone (the United Nations Convention on the Law of the Sea, art. 18, para. 2), as well as in article 7, paragraph 1, of the Convention on Transit Trade of Land-locked States. In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless, its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.[1012] 352 In the *Lighthouses* arbitration, a lighthouse owned by a French company had been requisitioned by the Government of Greece in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeure*.[1013] 353 In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.[1014] 354 *Force majeure* was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by PCIJ in the *Serbian Loans* and *Brazilian Loans* cases.[1015] 355 More recently, in the *"Rainbow Warrior"* arbitration, France relied on *force majeure* as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The tribunal dealt with the point briefly:

[1011] 351 See, *e.g.*, the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the study prepared by the Secretariat (footnote [1005] 345 above), paras. 250–256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946, United States of America, *Department of State Bulletin* (Washington, D. C.), vol. XV, No. 376 (15 September 1946), p. 502, reproduced in the study prepared by the Secretariat, para. 144, and the incident provoking the application to ICJ in 1954, *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

[1012] 352 See, *e.g.*, the decision of the American-British Claims Commission in the *Saint Albans Raid* case, Moore, *History and Digest*, vol. IV, p. 4042 (1873), and the study prepared by the Secretariat (footnote [1005] 345 above), para. 339; the decisions of the United States-Venezuela Claims Commission in the *Wipperman* case, Moore, *History and Digest*, vol. III, p. 3039, and the study prepared by the Secretariat, paras. 349–350; *De Brissot and others* case (footnote [234] 117 above), and the study prepared by the Secretariat, para. 352; and the decision of the British-Mexican Claims Commission in the *Gill* case, UNRIAA, vol. V (Sales No. 1952.V.3), p. 157 (1931), and the study prepared by the Secretariat, para. 463.

[1013] 353 *Lighthouses* arbitration (footnote [702] 182 above), pp. 219–220.

[1014] 354 UNRIAA, vol. XI (Sales No. 61.V.4), p. 421, at p. 443 (1912).

[1015] 355 *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 39–40; *Brazilian Loans, Judgment No. 15, ibid., No. 21*, p. 120.

New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.[1016] 356

(8) In addition to its application in inter-State cases as a matter of public international law, *force majeure* has substantial currency in the field of international commercial arbitration, and may qualify as a general principle of law.[1017] 357

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company and The Republic of Burundi*, the arbitral tribunal rejected a plea of *force majeure* because "the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State … "[1018]358 Under the equivalent ground for termination of a treaty in article 61 of the 1969 Vienna Convention, material impossibility cannot be invoked "if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty". By analogy with this provision, paragraph 2 (*a*) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For paragraph 2 (*a*) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be "due" to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Paragraph 2 (*a*) requires that the State's role in the occurrence of *force majeure* must be substantial.

(10) Paragraph 2 (*b*) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.[1019] 359 Once a State accepts the responsibility for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

[1016] 356 *"Rainbow Warrior"* (footnote [40] 46 above), p. 253.

[1017] 357 On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306–320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, *e.g.*, case 145/85, *Denkavit* v. *Belgium*, *Eur. Court H.R., Reports* 1987–2, p. 565; case 101/84, *Commission of the European Communities* v. *Italian Republic*, *ibid*., *Reports* 1985–6, p. 2629. See also article 79 of the United Nations Convention on Contracts for the International Sale of Goods; P. Schlechtriem, ed., *Commentary on the UN Convention on the International Sale of Goods*, 2nd ed. (trans. G. Thomas) (Oxford, Clarendon Press, 1998), pp. 600–626; and article 7.1.7 of the UNIDROIT Principles, *Principles of International Commercial Contracts* (Rome, Unidroit, 1994), pp. 169–171.

[1018] 358 ILR, vol. 96 (1994), p. 318, para. 55.

[1019] 359 As the study prepared by the Secretariat (footnote [1005] 345 above), para. 31, points out, States may renounce the right to rely on *force majeure* by agreement. The most common way of doing so would be by an agreement or obligation assuming in advance the risk of the particular *force majeure* event.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal

Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair

In its 1990 award in the *Rainbow Warrior* case, the arbitral tribunal referred to the text of draft article 31 provisionally adopted by the International Law Commission,[1020] [139] as well as to the commentary thereto, and concluded that France could not invoke the excuse of *force majeure* to preclude the wrongfulness of the removal of Major Mafart from the island of Hao for health reasons, in violation of the agreement between the Parties. Having quoted paragraph 1 of draft article 31, the tribunal stated the following:

In the light of this provision, there are several reasons for excluding the applicability of the excuse of *force majeure* in this case. As pointed out in the report of the International Law Commission, article 31 refers to "a situation facing the subject taking the action, which leads it, as it were, *despite itself*, to act in a manner not in conformity with the requirements of an international obligation incumbent on it" (*Yearbook … 1979*, vol. II, p. 122, para. 2, emphasis in the original). *Force majeure* is "generally invoked to justify *involuntary*, or at least unintentional conduct", it refers "to an irresistible force or an unforeseen external event against which it has no remedy and which makes it 'materially impossible' for it to act in conformity with the obligation", since "no person is required to do the impossible" (*ibid*., p. 123, para. 4).

The report of the International Law Commission insists on the strict meaning of article 31, in the following terms:

> the wording of paragraph 1 emphasizes, by the use of the adjective "irresistible" qualifying the word "force", that there must, in the case in point, be a constraint which the State was unable to avoid or to oppose by its own means … The event must be an act which occurs and produces its effect without the State being able to do anything which might rectify the event or might avert its consequences. The adverb "materially" preceding the word "impossible" is intended to show that, for the purposes of the article, it would not suffice for the "irresistible force" or the "unforeseen external event" to have made it *very difficult* for the State to act in conformity with the obligation … the Commission has sought to emphasize that the State must not have had any option in that regard (*Yearbook … 1979*, vol. II, p. 133, para. 40, emphasis in the original).

In conclusion, New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because

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[1020] [139] The part of this provision concerning *force majeure* was amended and incorporated in article 23 finally adopted by the International Law Commission in 2001. Draft article 31 provisionally adopted read as follows:

> Article 31
> *Force majeure* and fortuitous event
>
> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.
>
> 2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*. Consequently, this excuse is of no relevance in the present case.[1021] 140

[A/62/62, para. 87]

International arbitral tribunal

Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi

In its 1991 award, the arbitral tribunal established to hear the *LAFICO-Burundi* case stated that the defence by Burundi according to which it was objectively impossible for the shareholder, Libyan Arab Foreign Investment company (LAFICO), to continue to participate in the management of the Libyan Arab Republic-Burundi Holding Company (HALB)[1022] 141 was to be appraised in light of "certain circumstances precluding wrongfulness which the International Law Commission has sought to codify in its draft articles on State responsibility". The tribunal first referred to the exception of *force majeure*, and in this regard quoted in extenso draft article 31 provisionally adopted by the International Law Commission. The tribunal found that it was "not possible to apply this provision to the case … because the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi".[1023] 142

[A/62/62, para. 88]

International arbitral tribunal (under the ICSID Convention)

Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. *Bolivarian Republic of Venezuela*

In its 2003 award, the arbitral tribunal constituted to hear the *Aucoven* v. *Venezuela* case, in examining whether Venezuela's failure to increase the toll rates (as provided by the relevant concession agreement) was excused by the civil unrest existing in the country in 1997, considered that *force majeure* was "a valid excuse for the non-performance of a contractual obligation in both Venezuelan and international law".[1024] 143 It then referred, *inter alia*, to the International Law Commission articles on State responsibility in general (and implicitly to article 23 finally adopted in 2001) to support its finding that international law did not impose a standard which would displace the application of Venezuela's national law referring to *force majeure*:

… the Arbitral Tribunal is not satisfied that international law imposes a different standard which would be called to displace the application of national law. The Tribunal reaches this conclusion on the basis of a review of the decisions issued under international law to which the parties have referred (see in particular *General Dynamics Telephone Sys. Ctr.* v. *The Islamic Republic of Iran*,

[1021] 140 See footnote [40] 46 above, pp. 252–253.

[1022] 141 In this case, LAFICO had contended that the expulsion from Burundi of Libyan managers of HALB and one of its subsidiaries, and the prohibition against LAFICO carrying out any activities in Burundi constituted an infringement by Burundi of its shareholder rights and had prevented HALB from realizing its objectives (*i.e.* to invest in companies operating within certain sectors of the Burundi economy), thereby violating *inter alia* the 1973 Technical and Economic Cooperation Agreement between the Libyan Arab Republic and the Republic of Burundi.

[1023] 142 See footnote [824] 127, para. 55 (English version in: *International Law Reports*, vol. 96, p. 318).

[1024] 143 ICSID, Case No. ARB/00/5, Award, 23 September 2003, para. 108.

Award No. 192–285–2 (4 Oct. 1985), 9 Iran-U.S. Cl. Trib. Rep. 153, 160, Resp. Auth. 18. See also *Gould Marketing, Inc.* v. *Ministry of Defense of Iran*, Award No. ITL 24–49–2 (27 July 1983), 3 Iran-US Cl. Trib. Rep. 147, Cl. Auth. 23, and *Sylvania Tech. Sys., Inc.* v. *Iran*, Award No. 180–64–1 (27 June 1985), 8 Iran-U.S. Cl. Trib. Rep. 298, Cl. Auth. 32.), as well as on the basis of the draft articles on State Responsibility of the International Law Commission, and the legal arguments of the parties.[1025] 144

[A/62/62, para. 89]

Sempra Energy International v. Argentine Republic

In its 2007 award, the arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentina* case, which arose under the 1991 bilateral investment treaty between the United States and Argentina, was faced with a claim arising out of changes in the regulatory framework for private investments made in the wake of the economic crisis in Argentina in the late 1990s. The tribunal was presented, *inter alia*, with an argument on the part of the respondent that "the theory of 'imprévision' has been incorporated into Argentine law", to which the tribunal responded:

Insofar as the theory of 'imprévision' is expressed in the concept of *force majeure*, this other concept requires, under Article 23 of the Articles on State Responsibility, that the situation involve the occurrence of an irresistible force, beyond the control of the State, making it materially impossible under the circumstances to perform the obligation. In the commentary to this article, it is stated 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'.[1026] 25

[A/65/76, para. 25]

Ad hoc committee (under the ICSID Convention)

Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. *The Argentine Republic*

In *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P.* v. *The Argentine Republic*, the *ad hoc* committee upheld the arbitral tribunal's rejection of the applicability of the principle of "*imprevisión*" under Argentine law, as well as the tribunal's comparison with article 23 of the State responsibility articles, made in support of its decision, to the extent that "the theory of 'imprevisión' is expressed in the concept of *force majeure*".[1027] 122

[A/68/72, para. 89]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct

[1025] 144 *Ibid.*, para. 123.

[1026] 25 ICSID, Case No. ARB/02/16, Award, 28 September 2007, para. 246.

[1027] 122 ICSID, Case No. ARB/01/13, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 287.

of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1028] [82]

[A/77/74, p. 17]]

International arbitral tribunal (under the ICSID Convention)

(DS)2, S.A., Peter de Sutter and Kristof de Sutter v. *Republic of Madagascar*

The arbitral tribunal in *(DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar* cited article 23, indicating that "under the law, *force majeure* occurs when a wrongful act is due to 'the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation'."[1029] [108] However, the tribunal concluded that in the facts of the case, there was nothing to indicate that it had been materially impossible for the State to perform its obligation.

[A/77/74, p. 21]

[1028] [[82] See footnote [126] 14 above, para. 155.]

[1029] [108] ICSID, Case No. ARB/17/18, Award, 17 April 2020, para. 347.