Article 27. Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) the question of compensation for any material loss caused by the act in question.

Commentary

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Secondly, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause, because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation, and as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) Subparagraph (*a*) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes it clear that chapter V has a merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly. The words "and to the extent" are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the tribunal in the *"Rainbow Warrior"* arbitration,[1165]419 and even more clearly by ICJ in the *Gabčíkovo-Nagymaros Project* case. In considering Hungary's argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives."[1166] 420 It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus a breach of a treaty justifying countermeasures may be "material" in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty by the injured State. Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to "compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists". Here "compliance with the obligation in question" includes cessation of the wrongful conduct.

[1165] 419 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 251–252, para. 75.

[1166] 420 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 63, para 101; see also *ibid*., page 38, para. 47.

(4) Subparagraph (*b*) of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although the article uses the term "compensation", it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather, it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference to "material loss" is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) Subparagraph (*b*) is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse, the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns onto an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčíkovo-Nagymaros Project* case. As ICJ noted, "Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner."[1167] [421].

(6) Subparagraph (*b*) does not attempt to specify in what circumstances compensation should be payable. Generally, the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina case*,[1168] [170] after having concluded its examination of Argentina's defence based on state of necessity and article XI of the relevant bilateral treaty,[1169] [171] stated that it was "also mindful" of the rule embodied in subparagraph (*a*) of article 27, as finally adopted by the International Law Commission in 2001 (which it quoted), adding thereafter:

> 380. The temporary nature of necessity is thus expressly recognized and finds support in the decisions of courts and tribunals. The commentary cites in this connection the *Rainbow Warrior* and *Gabcíkovo Nagymaros* cases. In this last case the International Court of Justice held that as soon 'as the state of necessity ceases to exist, the duty to comply with treaty obligations revives'.
>
> …

[1167] [421] *Ibid.*, p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project (*ibid.*, p. 81, paras. 152–153).

[1168] [170] See footnote [1100] 163 above.

[1169] [171] See [pp. 281–283] above.

382. Even if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present.[1170] 172

The tribunal then quoted subparagraph (*b*) of article 27 finally adopted by the International Law Commission, observing that it found support again in the *Gabcíkovo Nagymaros Project* case, as well as in earlier decisions such as the *Compagnie générale de l'Orinoco*, the *Properties of the Bulgarian Minorities in Greece* and *Orr & Laubenheimer* cases (in the latter cases, the tribunal noted, "the concept of damages appears to have been broader than that of material loss in article 27"). After having described the positions of the parties on this issue, the tribunal continued as follows:

390. The Tribunal is satisfied that article 27 establishes the appropriate rule of international law on this issue. The Respondent's argument is tantamount to the assertion that a Party to this kind of treaty, or its subjects, are supposed to bear entirely the cost of the plea of the essential interests of the other Party. This is, however, not the meaning of international law or the principles governing most domestic legal systems.

391. The Tribunal's conclusion is further reaffirmed by the record. At the hearing the Tribunal put the question whether there are any circumstances in which an investor would be entitled to compensation in spite of the eventual application of article XI and the plea of necessity.

392. The answer to this question by the Respondent's expert clarifies the issue from the point of view of both its temporary nature and the duty to provide compensation: while it is difficult to reach a determination as long as the crisis is unfolding, it is possible to envisage a situation in which the investor would have a claim against the government for the compliance with its obligations once the crisis was over; thereby concluding that any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events.

393. The Tribunal also notes that, as in the *Gaz de Bordeaux* case, the International Law Commission's commentary to article 27 suggests that the States concerned should agree on the possibility and extent of compensation payable in a given case.

394. It is quite evident then that in the absence of agreement between the parties the duty of the Tribunal in these circumstances is to determine the compensation due. This the Tribunal will do next.[1171] 173

[A/62/62, para. 98]

LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. *Argentine Republic*

In its 2006 decision on liability, the arbitral tribunal constituted to hear the *LG&E Energy Corp.*, *LG&E Capital Corp.*, *LG&E International Inc.* v. *Argentina*, having found that Argentina was under a state of necessity that excused it from liability for any breaches of the 1991 bilateral investment treaty under article XI of that treaty,[1172] 174 responded to the claimants argument, based on article 27 finally adopted by the International Law Commission in 2001, that Argentina should compensate them for losses incurred as a result of the government's actions:

With regard to article 27 of the United Nations draft articles alleged by Claimants, the Tribunal opines that the article at issue does not specifically refer to the compensation for one or all the losses incurred

[1170] 172 See footnote [1100] 163 above, paras. 379, 380 and 382.

[1171] 173 *Ibid.*, paras. 390–394 (footnotes omitted).

[1172] 174 See [pp. 283–285] above.

by an investor as a result of the measures adopted by a State during a state of necessity. The commentary introduced by the Special Rapporteur establishes that article 27 "does not attempt to specify in what circumstances compensation would be payable". The rule does not specify if compensation is payable during the state of necessity or whether the State should reassume its obligations. In this case, this Tribunal's interpretation of article XI of the Treaty provides the answer.[1173] 175

The tribunal later added that:

Article 27 of the International Law Commission's draft articles, as well as article XI of the Treaty, does not specify if any compensation is payable to the party affected by losses during the state of necessity. Nevertheless, … this Tribunal has decided that the damages suffered during the state of necessity should be borne by the investor.[1174] 176

[A/62/62, para. 99]

Ad hoc committee (under the ICSID Convention)

Patrick Mitchell v. *Democratic Republic of the Congo*

In its 2006 decision on the application for annulment of the award rendered on 9 February 2004 in the *Patrick Mitchell* v. *Democratic Republic of the Congo* case, the *ad hoc* committee noted that even if the arbitral tribunal had concluded that the measures at issue were not wrongful by reason of the state of war in the Congo, "this would not necessarily have had any impact on evaluating the act of dispossessing Mr. Mitchell, and on the need for compensation; possibly, it could have had an influence on the calculation of the amount of such compensation". The *ad hoc* committee thereafter quoted in a footnote the text of article 27 finally adopted by the International Law Commission in 2001, "bearing witness to the existence of a principle of international law in this regard".[1175] 177

[A/62/62, para. 100]

International arbitral tribunal (under the ICSID Convention)

Sempra Energy International v. *Argentine Republic*

The arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentina* case, in its 2007 award, noted that the requirement of temporality in subparagraph (*a*) of article 27 was not disputed by the parties, even though "the continuing extension of the emergency … [did] not seem to be easily reconciled with the requirement of temporality". That in turn resulted in "uncertainty as to what will be the legal consequences of the Emergency Law's conclusion",[1176] 36 which related to the application of subparagraph (*b*) of article 27. In the face of an interpretation of subparagraph (*b*), offered by the respondent, that the provision would require compensation only for the damage arising after the emer-

[1173] 175 ICSID, Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 260 (footnote omitted).

[1174] 176 *Ibid.*, para. 264.

[1175] 177 ICSID, *Ad Hoc* Committee, Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 57, footnote 30.

[1176] 36 See footnote [1026] 25 above, para. 392.

gency was over, and not for that taking place during the emergency period, the tribunal expressed the following view:

> Although [Article 27] does not specify the circumstances in which compensation should be payable because of the range of possible scenarios, it has also been considered that this is a matter to be agreed with the affected party. The Article thus does not exclude the possibility of an eventual compensation for past events. The 2007 agreements between the Respondent and the Licensees appear to confirm this interpretation … [1177] 37

[A/65/76, para. 27]

Ad hoc committee (under the ICSID Convention)

Continental Casualty Company v. *The Argentine Republic*

The *ad hoc* committee in *Continental Casualty Company* v. *The Argentine Republic* noted that the applicant's claim relied primarily on article 27 of the State responsibility articles. The committee recalled that the "Tribunal [had] expressly found … that the effect of the application of Article XI of the BIT [was] different to the effect of the application of Article 25 (and by logical implication, of Article 27) of the ILC Articles".[1178] 142

[A/68/72, para. 99]

International arbitral tribunal (under the ICSID Convention)

EDF International S.A. et al. v. *Argentine Republic*

The arbitral tribunal in *EDF International S.A. et al.* v. *Argentine Republic* found that the respondent had failed to demonstrate, as required under article 27, that it had "return[ed] to the pre-necessity *status quo* when possible, or compensate[d] Claimants for damage suffered as a result of the relevant measures".[1179] 143

[A/68/72, para. 100]

Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa v. *the Argentine Republic*

In *Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa* v. *the Argentine Republic*, the arbitral tribunal recognized articles 25 and 27 of the State responsibility articles as reflecting "in large part general principles of international law".[1180] 148

[A/74/83, p. 27]

[1177] 37 *Ibid*., para. 394 (footnote omitted).

[1178] 142 See footnote [1126] 136 above, para. 127.

[1179] 143 See footnote [167] 31 above, para. 1171.

[1180] 148 ICSID, Case No. ARB/07/26, Award, 8 December 2016, para. 709.

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

The tribunal in *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, referred to the commentary of Article 27 and stated that "the defence of necessity under international law lapses 'if and to the extent that the circumstance precluding wrongfulness no longer exists'".[1181] [149]

[A/74/83, p. 28]

Eco Oro Minerals Corp. v. *Republic of Colombia*

The arbitral tribunal in *Eco Oro Minerals Corp.* v. *Republic of Colombia* referred to articles 27, under which the invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act in question, and to article 36.[1182] [112] The tribunal therefore determined that under the applicable investment treaty, "whilst a State may adopt or enforce a measure pursuant to the stated objectives" in the treaty, "this does not prevent an investor claiming … that such a measure entitles it to the payment of compensation".[1183] [113]

[A/77/74, p. 22]

[1181] [149] ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 8.47.

[1182] [112] See footnote [401] 51 above, para. 835.

[1183] [113] *Ibid*., para. 830.