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AN ANALYSIS OF FORCE MAJEURE IN INTERNATIONAL INVESTMENT LAW PERTINENT TO THE CHALLENGES OF COVID-19

-Anoushka Singha and Yashasvi Suroliya[1]

ABSTRACT

Globally, judicial systems regulate the consequences of unanticipated events on State and contractual obligations through provisions such as that of force majeure. This essay examines the invocation of force majeure clauses in international investment law as a defence against non-performance and non-responsibility in times of turbulence. A defence of force majeure essentially excuses a party from its contractual obligations in the event of unforeseen circumstances. Although the threshold of impossibility of performance has been lowered to that of 'impracticability', various other challenges such as the degree of foreseeability, neglect in alternate performance and delay in communication of impediment cause arbitration tribunals to rarely enforce force majeure clauses. This essay analyses the usefulness of this claim with reference to the COVID-19 outbreak by expounding upon the various policies and series of measures undertaken around the world, which may have proved to be disruptive in contractual compliance for foreign investors as well as States.

INTRODUCTION

Normalcy, internationally and domestically speaking, can be disrupted by a number of occurrences like wars, natural disasters, riots and rebellions, plagues or trade restrictions. Such unprecedented times can impinge upon the capabilities of States to comply with their contractual obligations towards investors. States may be unable to protect investment assets or personnel from armed conflicts of natural calamities or become deficient financially, making it impossible

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to fulfil their obligations or debts. These events affect not only internal populations but also the interests of foreign investors, States and companies, thus finding importance in international law.

Judicial systems around the world have felt the need to regulate the consequences of uncontrollable events that derange the performance of legal obligations, throughout history. Deriving from both, the French legal notion of *vis major* and the English *doctrine of impossibility*, international law recognizes *force majeure* as both, a defence from responsibility as well as the impossibility of performance as a ground to terminate an accord.[2]

The outbreak of COVID-19 and its subsequent evolution into a global pandemic in 2020 has led to an unprecedented degree of domestic as well as international disruptions in trade and commerce, and as a result, has caused widespread commercial loss and business interruptions. Strict lockdown measures, border closures, travel bans, suspension of non-essential businesses and enterprises, and other preventive measures employed by States, as well as fiscal policies undertaken to revive failing domestic economies, are rapidly giving rise to disputes between States and foreign investors. In light of this, it is important to analyze the defences and protections available to States and other non-performing parties under international law. This essay focuses on one such defence, i.e., the principle of *force majeure*, with due consideration to the special applicability it has in such precarious and uncertain times.

We first look at a contemporary analysis of events and policies undertaken during COVID-19 that are likely to have legal ramifications arising out of breach of obligations under international investment agreements. Next, we address the principles of *force majeure* and challenges to invoking a *force majeure* defence, including the relevant international jurisprudence with regards to the same. We conclude with the contemporary challenges that States are likely to face in protecting themselves against liability through the invocation of *force majeure*, and suggestions for measures that can be undertaken by States, investors, and tribunals alike to provide adequate and just redressal for such disputes.

[2]Federica I Paddeu, A Genealogy of Force Majeure In International Law, 82 BYBIL 381, 385-386 (2012).

I. COVID-19 MEASURES UNDERTAKEN BY STATES

COVID-19, by virtue of its unique status as not just a public health, but also an economic crisis, has caused a myriad of complications for States and foreign investors across the globe. Rapid spread, asymptomatic carriers that made the virus hard to detect and mitigate in its nascent stages, and early instances of negligence and oversight in dealing with COVID-19 have led to governments worldwide resorting to a vast array of draconian measures of questionable efficacy, to curb the spread of the virus. Among these, the ones most likely to attract legal action for breach of obligations under BITs and IIAs, include (i) nationalization of private industries, namely healthcare and hospitals; (ii) restrictions on the export of medical equipment and more recently, COVID-19 vaccinations; (iii) fiscal policies such as bailouts, financial aid and stimulus packages to address the economic crisis plaguing domestic economies. The nature of claims that are rapidly arising as a result of these measures vastly fall under violations of the fair and equitable treatment (FET) standard, national treatment standard accorded to covered foreign investments, and protection against indirect expropriation, as enshrined in most bilateral investment treaties.

For example, Spain, which emerged as the third worst-hit country during the early days of the pandemic, nationalized all its private hospitals and healthcare providers, to better facilitate, through governmental intervention, the functioning of public health systems struggling under the massive bulk of COVID-19 patients.[3] All private hospitals were made open to the public free of cost. On similar lines, the Chinese government took over various pharmaceutical companies and manufacturing units, requisitioning the mass production of personal protection equipment and other medical supplies to effectively curb the spread of the virus. All such measures by State governments are vulnerable to claims of (in)direct expropriation of investments by aggrieved foreign investors, who have substantial capital contributions to private health care industries.

[3]Jon Henley, Kim Willsher & Ashifa Kassam, *Coronavirus: France imposes lockdown as EU calls for 30-day travel ban*, The Guardian (Mar. 16, 2020), https://www.theguardian.com/world/2020/mar/16/coronavirus-spain-takes-over-private-healthcare-amid-more-european-lockdowns.

In India, a ban was instituted on the export of personal protection equipment, to boost domestic production capacity and supply of essential medical commodities to the country's most vulnerable health care workers. Although the ban was relaxed in August 2020, medical goggles and NBR gloves continue to remain in the restricted category of exports.[4] Such an exports ban was also put in place by Italy. Similarly, the European Union has announced measures pertaining to export control of vaccine doses being manufactured within its borders, in an attempt to curb delivery shortfalls to EU member states.[5] Thus, vaccine companies will now have to seek permissions from the EU for the export of vaccines to non- EU states (with a few exemptions), and receiving such approval will be contingent on the companies having fulfilled their contractual obligations concerning vaccine dosage deliveries to EU countries first. Foreign investors who have invested in the manufacture of these products, especially vaccines, are likely to suffer a substantial hit to the economic value of their investment as well as the returns on their capital in the wake of these measures. It could be purported that such measures are in gross contravention to the investor's legitimate investment-backed expectations, giving rise to a breach of the fair and equitable standard of treatment.

With respect to fiscal policies, a number of controversial legislative actions have been taken by governments. The Indian Government's recent amendments to the Bankruptcy and Insolvency Code, with the objective of providing protection to businesses, particularly MSMEs, during this period of economic upheaval, include- an increase in the threshold for initiation of corporate insolvency resolution process to Rs. 1 crore and what seems to be a permanent ban on the initiation of proceedings under Sections 7, 9, 10 of the Code for a default arising on or after March 25, 2020, for a period of six months (or up to one year as may be notified). While the time period for the calculation of default seems to be pegged at six months (extendable up to a year), there is significant ambiguity with respect to the suspension on the initiation of insolvency proceedings with respect to these defaults. While the main provision states that the suspension

[4]Himanshu Parekh, Manish Aggarwal, et al., *India: Government and Institution Measures in Response to COVID-19*, KPMG (July 8, 2020), https://home.kpmg/xx/en/home/insights/2020/04/india-government-and-institution-measures-in-response-to-covid.html.

[5]Gavin Lee, *Coronavirus: WHO criticises EU over vaccine export controls*, BBC News (1st February, 2021), https://www.bbc.com/news/world-europe-55860540.

may be in operation for six months, the proviso to the Section 10A of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020[6] suggests that insolvency proceedings can never be initiated for the said default. This is likely to have a clearly detrimental impact on foreign investors, who have significant capital contributions and stakes in these companies. In the inevitable event of default in payments and inability to pay their debts, Indian companies will be protected against legal action being brought against them by foreign investors, who are now unable to exercise their rights and remedies under the Code, given the amendments. This opens up claims concerning a breach of the fair and equitable standard of treatment and national standard of treatment, pursuant to an investor's legitimate, reasonable expectations at the time of conclusion of the contract.

Italy, too, has introduced a moratorium on the payment of corporate debt, as well as strict rules for FDI screening.[7] This mechanism controls the extent to which a foreign entity can invest in the businesses of strategic (or essential) industries, in the wake of COVID-19. Although the measures were primarily undertaken to protect businesses from foreign takeovers during the pandemic, they could be construed as a violation of umbrella clauses in BITs, which place obligations on States to promote, protect and maintain an environment conducive for foreign investments within their territory. This would bring a claim against FDI Screening within the jurisdiction *rationemateriae* of investor-state dispute resolution tribunals.

The Peruvian government was served notice of potential ICSID claims arising out of its decision to suspend the collection of toll fees on the country's road network.[8]

The question of legal ramifications as a consequence of bailouts to domestic companies, primarily airlines, is also an important angle to note. Travel bans and strict border closures were

[6]Abhishek Kumar and Siddharth Pandey, *India: Insolvency And Bankruptcy Code (Amendment) Act, 2020: A Step Forward,* The Mondaq (7th July, 2020), https://www.mondaq.com/india/insolvencybankruptcy/936938/insolvency-and-bankruptcy-code-amendment-act-2020-a-step-forward.

[7]Alessandra Tronconi, Dario Arban, et al., *Italy: Government and Institution Measures in Response to COVID-19,* KPMG (June 10, 2020), https://home.kpmg/xx/en/home/insights/2020/04/italy-government-and-institution-measures-in-response-to-covid.html.

[8]Cosmo Sanderson, *Peru Hit With Claim by Road Concessionaire,* Global Arbitration Review (June 11, 2020), https://globalarbitrationreview.com/article/1227863/peru-hit-with-claim-by-road-concessionaire.

initiated by almost all countries to control the spread of the virus, which resulted in large scale losses for both domestic and international airline companies. However, as countries gradually resumed domestic flights and eventually reopened their borders, states have executed several agreements, to the tune of billions of dollars, to bail out domestic airline companies crippled by the pandemic. The Trump administration sanctioned a 25 billion USD bailout to prop up a number of domestic and state-owned airlines.[9] However, internationally owned airlines not receiving similar financial aid from states may raise claims of a breach of the national standard of treatment clause, as a result of the bans and subsequent selective bailouts.

II. PRINCIPLES OF FORCE MAJEURE

Force majeure, under international law, is codified in the International Law Commission's Articles on the Responsibility of States for Internationally Wrong Acts (ILC) under Article 23 as 'a circumstance precluding the conformity of an international obligation'; one which excuses a State from the performance of its international obligations granted that the State did not cause or assume the risk of the impeding circumstance. [10]

Force majeure, as a principle, differs all around the world, with varying requirements and conditions that change as per their jurisdictions. With respect to international investment laws, *force majeure* is typically found as a clause under contracts, which are often tailored as per the parties' mutual requirements regarding nature of the business, climate and weather, trade restrictions, etc. Therefore, in order to enumerate contractual uniformity, the International Chamber of Commerce (ICC) introduced a standard *force majeure* clause, thus providing investors around the world a shaping tool to draft agreement specific *force majeure* clauses,

[9]Alan Rappeport and Niraj Chokshi, *Crippled Airline Industry to Get $25 Billion Bailout, Part of It as Loans,* The New York Times (April 14, 2020), https://www.nytimes.com/2020/04/14/business/coronavirus-airlines-bailout-treasury-department.html.

[10]International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Art 23, annexed to UNGA A/RES/56/83 (28 January 2002).

"Force Majeure" means the occurrence of an event or circumstance ("Force Majeure Event") that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment ("the Affected Party") proves:

a) that such impediment is beyond its reasonable control; and

b) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and

c) that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party.

The conditions stated above can be construed as mandatory pieces to the puzzle that is the invocation of a *force majeure* clause. In simpler terms, firstly, the event must be completely unforeseen and irresistible, one which constraints the non-performing party from opposing or avoiding.[11] Next, the event must be beyond control, untainted to be consequential from the party's own actions.[12] Lastly, the unforeseeability, irresistibility and uncontrollability must make it 'materially impossible' for the defaulting party to fulfil its obligations, wherein the term 'materially impossible' implies absolute inability and not just increased difficulty in performance.[13] Additionally, the ICC provides a list of presumed *force majeure* events that are deemed to qualify as uncontrollable and unforeseeable such as wars, acts of terrorism, extreme natural events like tsunamis and volcanic eruptions, explosions and destructions, currency restrictions or labour disturbances like boycotts and strikes,[14] allowing the advantage of pre-fulfilment of two out of three conditions to the affected party.

As per the ICC, the main consequence of successfully invoking *force majeure* is the allowance to relief from the duty to perform contractually, as well as release from the responsibility of

[11]International Law Commission, Draft Articles on Responsibilities of States for Internationally Wrongful Acts with commentaries, Article 23, para 2, 2001.

[12]Ibid.

[13]Ibid.

[14]International Chamber of Commerce, ICC Force Majeure and Hardship Clause, § 3, 2020.

damages, either wholly and permanently or partially and temporarily, according to the nature of the impediment. A *force majeure* event, does not, however, entitle a party to claim sustained damages as a consequence of the impediment. It is further notable, that relief from contractual liabilities is only ascertained from the time at which the impediment creates inabilities for the defaulting party to perform, provided that the notice thereof is given to the other party without delay. Therefore, a timely notice of an event causing a delay in performance to the other party is crucial, in order to seek relief. It is also provided that, both parties of a contract possess the right to terminate the same, in case of a prolonged *force majeure* event which essentially deprives either party, more than it reasonably profits. The Notes to the ICC Clause, do however specify that it is not sufficient to prove the occurrence of an uncertain, unprecedented event in order to grant relief to a non-performing party. It must also be proved that the event could not have been practically avoided, to the satisfaction of the non-defaulting party, which would expect that the defaulting party should have foreseen, if not the event itself, then at least the effects of it. [15] This evidentiary burden falls at the crux of a tribunal's decision, as to the occurrence of a f*orce majeure* event.

III. INTERPRETATION OF FORCE MAJEURE BY INTERNATIONAL TRIBUNALS AND CHALLENGES TO INVOCATION IN LIGHT OF COVID-19

Given the significant disruptions caused to supply chains resulting in the non-performance of contractual obligations, and emergency provisions enacted by States for the protection of domestic businesses at the expense of foreign investors, a large number of investor-state disputes are likely to arise. Therefore, it is important to analyze the invocation of *force majeure* as valid grounds for precluding liability under international law.

Unfortunately, it is found that the invocation of a *force majeure* defence is rather challenging, due to the lack of clarity around the meaning of the above-stated conditions, perhaps largely caused by the blurry scope of contractual *force majeure* clauses. The scope of the defence is

[15]International Chamber of Commerce, ICC Force Majeure and Hardship Clause, Introductory Note, 2020.

heavily influenced by the party invoking it; for investors, even impediments like heavy storms can prove to be out of control leading to non-performance, which can't be said for a State shying away from international obligations since a State is definitely more equipped with authority and resources than an investor company. Moreover, while contractual *force majeure* clauses are commonly customized and precise, the same under international law tend to be open to a large scope owing to the large scale.

From a jurisprudential standpoint, the interpretation of *Force Majeure* under Article 23 of the ILC Articles on State Responsibility by investor-state arbitration tribunals has led to the evolution of a significantly high threshold to preclude non-performance by the defaulting party. For the successful invocation of *force majeure*, there exist four cumulative requirements that must be fulfilled. In considering the applicability of *force majeure*, courts look to whether: (i) there exists an unforeseeable event or irresistible force (the triggering event), beyond the control of the State/party; (ii) performance is truly impossible or impracticable, i.e. there exist no alternative methods for fulfilling its obligations or the ability to mitigate the consequences of the unforeseeable event; (iii) the State/party must not have contributed to the situation and (iv) delay in notice being served by the defaulting party to the non-defaulting party, about the invocation of *force majeure* to preclude non-performance. The high burden of proof placed on the defaulting States particularly could affect the viability of Article 23 in defending governmental measures taken in the wake of COVID-19.

A. Unforeseeability

The foreseeability of an event implies that the defaulting party did in fact have the opportunity to assume and prepare against its risks, making the absence of the same, crucial to claim an event to be uncontrollable. Further, the event in question must have been neither foreseen nor of an easily foreseen kind.[16] Since the composition of a *force majeure* clause differs from contract to contract, arbitration tribunals are usually strict in determining whether the party possessed either

[16]International Law Commission, Draft Articles on Responsibilities of States for Internationally Wrongful Acts with commentaries, Article 23, para 2, 2001.

the ability or the compulsion, or both, of identifying an unprecedented event. Hence, the degree of unforeseeability and its acceptance varies frequently.

The dispute in *Autopista v. Venezuela*[17]arose out of a contract that required the Respondent state to periodically increase highway tolls. In the arbitration proceedings, Venezuela raised a *force majeure* defence, stating that it was unable to comply with its contractual obligations because the increase in tolls resulted in widespread protests. In its analysis of the criterion of "material impossibility", the tribunal applied a less stringent threshold of "reasonable impracticality". It concluded that expecting the Venezuelan government to deploy armed or paramilitary forces in order to control or mitigate the protests, and thereby uphold its commitment under the contract, was an unreasonable interpretation of the impossibility standard. However, setting the bar high, the ICSID tribunal denied Venezuela's claim to unforeseeability, stating that the country had experienced similar protests when gasoline prices were increased in the past, which means that such an event could have been foreseen while drafting of the agreement. Furthermore, the tribunal stated that for an event to be foreseeable, it does not have to be a possibility- it is enough that it could not be ruled out as one.

Despite similarities in the factual circumstances, the tribunal in *RSM v. Central African Republic*[18] arrived at a different conclusion. RSM claimed that political turmoil and civil unrest in the Central African Republic (CAR) made it materially impossible for it to fulfil its obligations under the contract, and subsequently, the Respondent state was requested for a suspension of the same. The request was denied, and RSM approached an arbitration tribunal seeking an extension of the contract. The investor invoked the *force majeure* clause to justify non-performance, owing to the political and civil unrest in the Central African Republic. Here, even though the State possessed a history of frequent political instability, the tribunal held that the situation was not foreseeable. The reasoning employed by the tribunal, in this case, involved a more nuanced focus on the general political and security atmosphere at the time, and the type and magnitude of the past unrest. It was observed that the occurrence of the latter could not have

[17]AutopistaConcesionada v. Republic of Venezuela, ICSID Case No. ARB/00/5, Award, (Sept. 23, 2003).

[18] RSM Production Corp v. Central African Republic, ICSID Case No. ARB/07/02, Award, (Dec. 7, 2010).

indicated the occurrence of a security situation that would render the contractual performance impossible, thus qualifying the defence of *force majeure*.

The unforeseeability of an event, thus, largely depends upon the circumstances of the party invoking it. Generally, the threshold for unforeseeability is higher for a State than for a foreign investor, owing to the fact that events such as war and political calamities are clearly more foreseeable for a State than an investor company, for whom even small events such as strikes could spin out of control. For the successful invocation of *force majeure* due to unforeseeability, apart from the event itself, all elements affecting non-performance namely the scope, magnitude, form, frequency, timing and intensity of the event must be considered.

B. Material Impossibility

The standard of impossibility for the invocation of *force majeure* is codified as that of 'material impossibility', clarifying that increased difficulty in performance does not constitute *force majeure*. However, the ICC, in its model clause, employs the 'the test of commercial reasonableness' which states that an impediment in performance of contractual obligations is sufficient.[19]

The Secretariat of the United Nations Convention on Contracts for the International Sales of Goods (CISG), in a commentary, stated that:

> *'Even if the non-performing party can prove that he could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, he must also prove that he could neither have avoided the impediment nor overcome it nor avoided or overcome the consequences of the impediment. This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance.'*

[19]International Chamber of Commerce, ICC Force Majeure and Hardship Clause, § 6, 2020.

The same approach resounds in the ICC Clause in Section 1(c) which states that a defaulting party should be able to prove the non-existence of any reasonable means of contractual performance. Tribunals do, although, expect defaulting parties to attempt to perform alternately. This is observed in the case of Macromex Srl. v. Globex Int'l Inc[20], wherein the contract required the purchase of chicken leg quarters to be delivered into Romania but due to an outbreak of avian flu, the Romanian government was forced to stop all chicken imports which weren't certified by a particular date. The tribunal, suggesting that the sellers could have alternately, shipped to a port of a non-affected country, denied the claim to impossibility of performance.

In the case of *Royal Moroccan Football Federation v. African Football Confederation*[21], the Claimant state, Morocco, was slated to host the 30th African Cup of Nations but declined to do so on grounds of the rapid spread of the Ebola virus epidemic in West Africa. Upon the Royal Moroccan Football Federation's (FRMF) withdrawal, the event was hosted in Guinea instead. The FRMF was prohibited from participating in the event and further fined USD 1 Million by the African Football Confederation (CAF). The decision was appealed by the FRMF before the Court of Arbitration for Sport, and it was argued by the Claimant that the Ebola epidemic was a *force majeure* event that made it impossible for Morocco to host the African Cup of Nations. Although the tribunal found the penalties imposed by the CAF to be disproportionate and unjustified, it still did not accept the Claimant's *force majeure* defence— the hosting of the event had become difficult, but not impossible, and there was not sufficient evidence to demonstrate that Morocco had done its best to avoid the consequences of the *force majeure* event by exploring alternative remedies for the fulfilment of its contractual obligations. Thus, Morocco had to pay a fine of 50,000 USD.

Similarly, in the case of National Oil Corp v. Libyan Sun Oil Co., the defendant invoked *force majeure* as the U.S. government declared that U.S. passports were invalid for travel to Libya, which led to impediment in performance as citizens of the U.S. could not enter Libya, where the

[20]MacromexSrl. v. Globex Int'l Inc, AAA Case No. 50181T 0036406 (Interim Award dated Oct. 23, 2007).

[21]Fédération Royale Marocaine de Football v. ConfédérationAfricaine de Football, CAS 2015/A/3920, Award of 17 November 2015.

obligations were to be performed. The tribunal went on to reject the claim, reasoning that the defendant could have alternately hired non-U.S. personnel for the contractual performance.[22]

Therefore, tribunals expect to observe that not only the event could not have been avoided but also that any and all modes of performance were undoable, in order to establish that an event prompted impossibility of performance.

C. Non-Performance Resulting from State Action

With respect to investor-State arbitration, in order to claim non-performance due to *force majeure*, it must be proved that the State did not contribute to the impediment i.e., the event was not a consequence of State action. For instance, if investors sustain damages as a result of destruction by state organs amid conflicts and wars, a defence of *force majeure* could be employed; but if a State pleads non-performance on grounds where the impediment was caused by its own organs in the form of policies or hostilities, the defence will succeed only if the necessity of the situation is sufficiently proved. [23]

D. Delay

In order to claim a *force majeure* defence, timely communication, notifying the non-defaulting party of the impediment and its consequences, is crucial. This allows the non-defaulting party an opportunity to alleviate the consequences of the event towards the agreement. Tribunals, enforce this condition strictly, as seen in ICC No. 2478/1974[24] wherein even though it was well established that the event in question was undeniably a case of *force majeure*, the failure to provide timely notice, lapsing a period of six months, deprived the non-performing party of a successful *force majeure* claim.

[22]National Oil Corp v. Libyan Sun Oil Co. ICC Case No. 4462/1985.

[23]International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Art 25, annexed to UNGA A/RES/56/83 (28 January 2002).

[24]ICC Award No. 2478 IN 1974, YCA 1978, at 222 et seq. (also published in: Clunet 1975, at 925 et seq.).

It is also important to consider the wording, language and specific provisions of *force majeure* clauses in individual international investment agreements. Tribunals often place heavy emphasis on the definition, scope and grounds precluding non-performance of contractual obligations in the *force majeure* clause of the relevant contract itself. For example, the dispute in the case of *Gujarat State Petroleum Corporation Limited v. Republic of Yemen*[25] arose during the Arab Spring protests, as a result of widespread riots, attacks, tribal clashes, and kidnappings, leading to the declaration of a State of Emergency in Yemen. A group of Indian investors sued Yemen, seeking declaratory relief on the valid termination of its contracts with the Respondent state, citing the above-mentioned circumstances as a *force majeure* event. However, as per the relevant contract between the investor and the State, a *force majeure* event was classified as "war, riot, strike, etc. 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 was beyond the reasonable control of the party invoking *force majeure*." Thus, there existed only two requirements under the *force majeure* clause of the contract for a party to successfully invoke it. First, the event must not be due to the fault or negligence of the Party choosing to invoke it. Second, the event should be beyond the reasonable control of such a party. The tribunal rejected the Respondent state's claim that the additional requirements of unforeseeability and impossibility were required to be fulfilled.

CONCLUSION

Although the global health and economic crisis created by COVID-19 has caused massive and seemingly unavoidable disturbances to ordinary trade and economic practices, both on domestic and international levels, these circumstances may not be sufficient for countries to preclude non-performance and breach of their treaty obligations under international law. Indeed, international jurisprudence seems to err on the side of caution by placing a high burden of proof on the

[25]Gujarat State Petroleum Corporation Limited v. Republic of Yemen, ICC Case No. 19299/MCP, Award, (10th July, 2015).

responsible State, even in past cases of widespread economic instability, public health crises, or civil unrest, among others.

Taking into account the above analysis, it is reasonable to expect that a lot of governmental measures, while implemented in the interest of combatting the pandemic, may not pass the high liability threshold imposed under the *force majeure* clause. For example, given its geographical location and relative delay in the spread of the virus, it can be argued that India did not take significant steps to avoid the consequences of the pandemic, given that it had a reasonable opportunity to come up with a contingency plan that would have allowed the State to fulfil its treaty obligations with respect to exports despite COVID-19. Similarly, Italy may find itself in an unfavourable position when trying to prove the "material impossibility" of the performance of its obligations, i.e., continuing to allow the acquisition of Italian companies. Given its tenuous nexus of the FDI Screening measure with the economic security or protection of public health, it could be argued that the former is simply a disguised restriction on trade and investment.

Lastly, the nature of COVID-19 was such that governmental action was a critical turning point on the basis of which the magnitude of damage and losses caused to domestic and international institutions was determined. Indeed, several reports on governmental negligence and mismanagement of the pandemic have revealed that such oversights led to an exacerbation of the virus's worst effects and devastations, which means countries like Spain[26] and China[27] will find it hard to prove that their own actions did not contribute to the situation of *force majeure.*

Thus, despite COVID-19 seemingly fitting the bill of a *force majeure* event, the above analysis shows that there exist manifold practical difficulties plaguing its successful invocation. Tribunals must, therefore, employ a reasonable threshold of the "material impossibility" standard, after an individual evaluation of the unique circumstances in every country giving rise to the situations of non-performance. It is also incumbent upon States to pay special attention to the drafting of

[26]Alex Ward, *How Spain's coronavirus outbreak got so bad so fast – and how Spaniards are trying to cope*, The Vox(Mar. 20, 2020), https://www.vox.com/2020/3/20/21183315/coronavirus-spain-outbreak-cases-tests.

[27]Devashish Giri,Responsibility of China for the Spread of COVID-19: Can China Be Asked to Make Reparations, The Jurist (April 10,2020), https://www.jurist.org/commentary/2020/04/devashsish-giri-china-covid19-reparations/.

treaties executed hereafter, particularly the *force majeure* clauses, given the emergence of new strains of the virus which could similarly hamper trade and commerce in the future.