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### FOREIGN INVESTMENTS IN DISPUTED MARITIME ZONES: MARITIME DISPUTES AS EVENTS OF FORCE MAJEURE IN INTERNATIONAL LAW AND INTERNATIONAL INVESTMENT CONTRACTS

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## INTRODUCTION\*

The regime of foreign investments is built upon an assumption that the sovereignty of host states creates an imbalance in the relation between the later and foreign investors. The host state being far more powerful than the investor is once the investment agreement is made.<sup>1</sup> Hence, the need to a legal regime capable of providing foreign investments the adequate protection against a possible misuse of a host state's sovereignty.<sup>2</sup> This legal regime covers foreign investments wherever a host state exercises sovereignty or jurisdiction, including in maritime zones where host states exercise sovereign rights.<sup>3</sup>

Contrarily to territorial sovereignty, sovereign rights in Exclusive economic zones and Continental shelves are functionally limited to the economic exploitation of these zones.<sup>4</sup> Moreover, in the case of disputed maritime zones these sovereign rights are neither exclusive nor necessarily constant. Two claimant States of a single maritime zone are both presumed to be entitled to economically exploit the disputed zone until the reaching of a final agreement.<sup>5</sup> The exploitation is subject to procedural and substantive limitations, which aim to preserve the chances of reaching a final delimitation agreement.<sup>6</sup>

The interaction between the legal regime of foreign investments on the one hand and the legal regime of disputed maritime zones on the other hand is not an evident question. Foreign investments regime provides foreign investments protection and legal stability within the territory of a sovereign host state,<sup>7</sup> while the second temporarily governs the competing claims and sovereign rights of more than one state. A disputed maritime zone generates rights, which are inherently temporary and limited. Nevertheless, states are still expected to provide the investments established in these zones the same guarantees they should provide in their territory where they exercise full and constant sovereignty.<sup>8</sup>

Hence arises the main question the thesis addresses. If a host state agrees to the establishment of an investment in a maritime zone that become later contested, do the occurrence of the contestation and the hazards arising from such contestation relieve the host state from its contractual and treaty obligations toward the investment.

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<sup>1</sup> I. ALVIK, *CONTRACTING WITH SOVEREIGNTY: STATE CONTRACTS AND INTERNATIONAL ARBITRATION* 2 (2011).

<sup>2</sup> Christopher M Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 37.

<sup>3</sup> Odysseas G. Repousis, *On Territoriality and International Investment Law: Applying China's Investment Treaties To Hong Kong And Macao*, 37 *MICH J INTL L* 113, 123–126 (2015).

<sup>4</sup> Y. TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 130–151 (2015), Lea - Brilmayer & Natalie - Klein, - *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, - *N. Y. UNIV. J. INT. LAW POLIT.* 703.

<sup>5</sup> Oil and Gas Development in Disputed Waters under UNCLOS, , *J. LAW JURISPRUD.*, 64 (2016); Rainer Lagoni, *Interim Measures Pending Maritime Delimitation Agreements*, 78 *AM. J. INT. LAW* 345, 349–354 (1984).

<sup>6</sup> Lagoni, *supra* note 5 at 69.

<sup>7</sup> K.N. SCHEFER, *INTERNATIONAL INVESTMENT LAW: TEXT, CASES AND MATERIALS*, SECOND EDITION 271–360 (2016).

<sup>8</sup> Marianthi Pappa, *The Impact of Judicial Delimitation on Private Rights Existing in Contested Waters: Implications for the Somali-Kenyan Maritime Dispute*, 61 *J. AFR. LAW* 393–418 (2017).

This question is driven by concerns regarding how these seemingly opposing regimes operates hand in hand.<sup>9</sup> Two interests are supposed to coexist in the realm of foreign investments in disputed maritime zones, the protection of foreign investments on the one hand and the peaceful resolution of maritime disputes. However, the balance between these two interests does not seem guaranteed.

Generally, the regime of investment protection has been observed to adopt a tendency to prioritize the interests of investors over other rights of host states and the functions of international law.<sup>10</sup>

This tendency is reflected in some overlapping observations. Foreign investors are given clear rights through international law by means of investment agreements and customary international law. However, it does not seem that foreign investors are bound by clear obligations towards host states or under international law.<sup>11</sup> Moreover, while states as subjects of international law are bound by international legal obligations capable of limiting their capacity to honor their contractual agreements, investors are relatively free from such bounds under the assumption that they do not have legal personality in international law.<sup>12</sup> Accordingly, the obligations arising from the investment's protection regime are often falling on the host state's side, affecting state's sovereignty and its regulatory authority.<sup>13</sup> States capability to enter in international agreements<sup>14</sup> as well as instigating internal policies<sup>15</sup> is perceived to be largely hampered by the fear of conflicting with foreign investors' expectations.

The problems that are noticeable from a political approach are also perceivable from a formalist or positivist approach. The inherent nature of disputed maritime zones as areas subjected to unstable sovereign rights until the dispute resolution, as well as the hazards which may arise from the disputes like possible provisional measures by competent tribunals or the reaching of agreement transferring the disputed zone to a contesting state, make the disputed zone permanently subjected to events that would qualify as events of force majeure. In fact, investment agreements and contracts generally refer to events of that nature as events of force majeure susceptible of precluding wrongfulness in case of the un-fulfillment of the party's obligations.

This paper demonstrates that approached with a traditional interpretation, the concept of force majeure as contained in investment agreements and contracts collides with the purpose of peacefully settling maritime zonal disputes. Host states become bound by investment agreements that might prevent them from providing the necessary concessions in order to resolve their maritime disputes. These concessions are required whether in the context of delimitation agreements or in the context of governing the overlapping of maritime claims between multiple states. Moreover, in order to benefit from "force majeure" clauses; host states and investors are not obliged by the same standards and obligations despite being parties to one investment agreement. States must abide by the regulations of the law of the sea in respect of their maritime disputes, while investors are only bound by their agreement with the host states. Additionally, the force majeure concept as traditionally interpreted is susceptible of discouraging states from adhering to the United Nations convention on the law of the sea and its mechanisms of dispute resolution.

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<sup>9</sup> Peter Tzeng, *Investment Protection in Disputed Maritime Areas*, J. WORLD INVEST. TRADE 828–859 (2018); Christine Sim, *Investment disputes arising out of areas of unsettled boundaries: Ghana/Côte d'Ivoire*, 11 J. WORLD ENERGY LAW BUS. 1–16 (2018); T. TREVES, F. SEATZU & S. TREVISANUT, FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS (2013).

<sup>10</sup> Muthucumaraswamy Sornarajah, *Power and Justice: Third World resistance in international law*, 10 SYBIL 19 (2006); M. Sornarajah, *The clash of globalizations and the international law on foreign investment: The Simon Reisman lecture in international trade policy*, 10 CAN. FOREIGN POLICY J. 1–20 (2003).

<sup>11</sup> M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 145 (3rd ed. 2010).

<sup>12</sup> *Id.* at 145.

<sup>13</sup> Jan Kleinheisterkamp, *Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions*, 78 MOD. LAW REV. 793–825, 793–825 (2015).

<sup>14</sup> Maja Stanivukovic, *Legitimate Expectations: A Commentary of Micula v. Romania*, 5 YB INTL ARB 165 (2017).

<sup>15</sup> Gus Van Harten & Dayna Nadine Scott, *Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada*, J. INT. DISPUTE SETTL. idv031 (2016).

A host state can be considered to have triggered an event hampering the investment in case of a subsequent adherence to the convention or its mechanisms after the establishment of the investment if such adherence led to the latter is suspension.

This paper provides an understanding of the force majeure concept that balances the interests of private foreign investments on the one hand and the necessities of peaceful resolution of maritime disputes on the other hand. It proposes a contextualist and subjective interpretation of the concept of force majeure that is based upon what the parties of an agreement have agreed to be bound to, according to the provisions of the legal regime governing the exploitation of disputed maritime zones and the purpose of peaceful resolution of maritime disputes.

It provides this understanding using instruments, which are already existent in international investment agreements and contracts. Most long-term investments adopt a relaxed approach of the force majeure concept. A similar policy can also be traced in some bilateral investment agreements. Approaching the force majeure concept from such perspective creates a certain balance between investor's need to legal stability for promoting their investments and state's need to maneuverability to peacefully resolve their maritime disputes.

The first part examines the doctrine of force majeure and its function. This part is divided into three sections; the first deconstructs the concept of force majeure to deduct its elements considering its different interpretations in multiple legal systems. The second inspects international law instruments, namely bilateral investment treaties' approach of the concept of force majeure. The third studies the common elements of the notion of force majeure in long-term investment contracts, focusing on maritime investment contracts.<sup>16</sup> This research has been based upon the study of twenty-nine maritime investments related contracts. All these contracts are different sorts of petroleum agreements. Twenty-six out of them are directly or indirectly related to maritime disputes. This sample is widespread on different geographical areas and governing legal systems. The relevant areas of these contracts cover disputed maritime zones in the Caribbean Sea, the South China Sea, East Mediterranean, West African shores. The investors parties to these contracts are resortissants of several nations bounded with the host states by different BITs. Most of these areas have witnessed incidents related to maritime disputes that have affected foreign investments. Some of these incidents have been brought to investment tribunals<sup>17</sup> and some of these maritime disputes have been subject to international adjudication.

Part two discusses the qualification of a maritime dispute or contestation as an event of force majeure. It demonstrates that different interpretations of each element of the force majeure leads to different outcomes in respect of host states' obligations under the international law of the sea. The first section explains the element of "impossibility to fulfill the obligation" and its relationship with the state's obligation not to hamper the final agreement. section two studies the element of exteriority and the state's duty to precede the economic activity with seeking to enter into a provisional agreement. This section analyzes the failure of the state to fulfill this obligation as a participation in the rise of the force majeure event. Part three inspects the element of predictability in relation to the general rules of delimitation. It addresses the geographical location of the investment and its relation to predictability in light the rules of delimitation.

Part three discusses the legal hazards emanating from a maritime contestation. The first section examines the qualification of provisional measures banning the economic activity in the disputed zone as an event of force majeure. The second section discusses the occurrence of an unfavorable delimitation as an event of force majeure. This section proposes a contextualist interpretation of force majeure that allows states a greater margin of maneuver to enter into delimitation agreements and to adhere to the dispute resolution mechanisms proposed by the United Nations convention of the law of the sea.

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<sup>16</sup> There is an overlapping consensus among national laws on a doctrine that operates to excuse the performance of contractual obligations when unforeseen events beyond the party's control occur which make the party's performance impossible. The divergence among national laws concern mainly the question of impracticability as cause of relief from obligation and the nature of compensation and damage.

<sup>17</sup> RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14

## I. FORCE MAJEURE IN INTERNATIONAL LAW AND INTERNATIONAL CONTRACTS

The concept of force majeure is often presented as universal concept in the sense that most legal regimes contain a mechanism allowing a party to be exonerated from an obligation if it becomes impossible to perform.<sup>18</sup> However, the constitutive elements of this concept “unforeseeability, irresistibility and impossibility” differ in their interpretation from one legal regime to another.<sup>19</sup> Some legal regimes retain the three elements while others retain some of them. Among the regimes adopting the concept of force majeure or a similar concept, the interpretation of each element differs from one another. The governance of foreign investments is subject to several legal regimes at a time.<sup>20</sup> Host state’s national laws, international law and the investment contract constitute the components of the legal regime governing the investment.

The relationship between a foreign investment and a host state usually begins with negotiation then an agreement concerning the establishment of an economic activity or investment according to the laws of the host state. However, this contractual relationship does not arise unexpectedly. It does not live and operate within a legal vacuum independently from the laws of the host state. It is the host state’s national law that regulates the principle of “the autonomy of the parties” which give them the relative freedom to enter into a relationship that is governed by their own laws, namely the law of the contract. It is also the national law of the host state (unless otherwise agreed) that is going to govern the contractual relationship as well as disagreements as the interpretation and the fulfillment of the contract’s provision.<sup>21</sup>

On the other hand, bilateral investment treaties (BITs) have become the most important instrument of investors/investment protection. They are the main source of international investment treaty law. In contrast with diplomatic protection, these treaties provide investors the possibility of raising claims against a sovereign state before international instances without the need of another sovereign state to elevate its claim to the international plane. BITs contain the essential means of protection of foreign investments and the standards that host states are obliged to follow when dealing with the investments belonging to nationals of the other contracting state. These three legal instruments govern foreign investments simultaneously. Each one of them governs the relation between the investor and the host state before the relevant instance and they can interact with each other before the same instance.

Therefore, it becomes impracticable to address the qualification of a maritime dispute as a force majeure before establishing a definition of the concept that encompasses its meaning in those regimes.<sup>22</sup> This section tries to establish an understanding of force majeure that encompasses its multiple interpretations in order to reach a universal definition for examining the question of investments in disputed maritime zones. The focus of this section is national laws, investment contracts and bilateral investment agreements as the more relevant instruments in respect to foreign investments.

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<sup>18</sup> F. I. Paddeu, *A Genealogy of Force Majeure in International Law*, 82 BR. YEARB. INT. LAW 381–494, 385 (2012).

<sup>19</sup> Pierre Moisan, *Technique contractuelle et gestion des risques dans les contrats internationaux : les cas de force majeure et d'imprévision*, 35 CAH. DROIT 281, 289–310 (1994).

<sup>20</sup> J.W. SALACUSE, *THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL* 35 (2013).

<sup>21</sup> on the interaction between national law, international law and contracts see SALACUSE, *supra* note 20.

<sup>22</sup> Otherwise, a specific case is susceptible of being governed by any of the 3000 existent BIT or the countless investment contracts in force.

## A. The Concept of Force Majeure and its Elements

The requirements of force majeure are a reflection of the basic principles governing contractual performance. The choice of adjectives referring to these elements varies from one legal regime to another. For instance, one legal regime uses the word irresistible while another would use the word inevitable. It can be argued that regardless of the appellation of the elements of the concept of force majeure, they reflect an understanding of the principles of contractual performance. These elements can be categorized in two categories. A conduct indicating that the party has not assumed the occurrence of the impediment or to perform the obligation within a paralyzing context. The second one is related to the characteristics of the impediment rendering the performance impossible.

### 1. Obligations Assumed by the Parties and the Objective Elements of Force Majeure

A contract or an agreement is an engagement to a specific obligation. Accordingly, parties are only bound by the obligations to which they agree to be bound to. The obligations and risks a party engage to perform and assume are to be enforced according to principle of “pacta sunt servanda”. In contrario, parties should not be held accountable for obligations and risks they did not assume at the conclusion of the agreement. According to the adage “no one is bound to do the impossible”, the force majeure concept presumes an assumption that the parties could not have normally agreed to be bound by a specific obligation if that obligation is in fact unrealizable.<sup>23</sup> Hence, the most important characteristic of force majeure in most legal regimes is the notion of impossibility. The obligation must be rendered impossible to perform because of the supervening event. However, the interpretation of the notion of impossibility is not a subject of consensus among different legal regimes.<sup>24</sup> Impossibility can be interpreted objectively by assessing the characteristics of the event in the abstract, regardless of the situation of the parties. Accordingly, impossibility exists when it becomes impossible for anyone to perform the required obligation. Impossibility can also be interpreted subjectively. Accordingly, impossibility exists when it becomes impossible for the party to execute the obligation regardless whether could be executed by someone else. An example is Article 275 of the German Civil Code BGB providing that “the obligation is extinct when its performance is impossible for the debtor or anyone else”.<sup>25</sup>

Another characteristic of force majeure that seems to rely on the idea of assumed obligations is the characteristic of un-foreseeability. If a certain event is foreseen at the time of conclusion of the agreement, it is assumed that the parties have considered it and assumed to bare the occurrence of the event. In that case, the parties are presumed to have implicitly agreed either to handle this foreseeable event or to bear the consequences of its occurrence. However, nuance is necessary if the foreseeable event renders the performance of the obligation objectively impossible. In such cases, most legal regimes consider the contract void or null. It seems safe to assume that a degree of un-foreseeability is an inherent constituent of force majeure even when the law does not explicitly require it. For instance, despite the fact that the old French law hasn’t explicitly required “un-foreseeability” as an element of force majeure, the case law has made it a cardinal element of force majeure.<sup>26</sup> In contrast, German law in article 275 BGB does not put an accent on the notion of un-foreseeability. However, even if the accent is not textually placed on foreseeability, it can be said that a relaxed requirement of foreseeability is required. Accordingly, subjective foreseeability is considered.

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<sup>23</sup> T. GENICON, LA RESOLUTION DU CONTRAT POUR INEXECUTION 91 (2007).

<sup>24</sup> Moisan, *supra* note 19 at 289–310; Rivkin, David R., Lex Mercatoria and Force majeure, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration (ICC Publ Nr. 480,4), Paris 1993, at 161 et seq. | Trans-Lex.org, [https://www.trans-lex.org/116100/\\_rivkin-david-r-lex-mercatoria-and-force-majeure-in:-gaillard-transnational-rules-in-international-commercial-arbitration-paris-1993-at-161-et-seq/#Footnote-ce3749ff48f90cecb8ba82cdbf896349](https://www.trans-lex.org/116100/_rivkin-david-r-lex-mercatoria-and-force-majeure-in:-gaillard-transnational-rules-in-international-commercial-arbitration-paris-1993-at-161-et-seq/#Footnote-ce3749ff48f90cecb8ba82cdbf896349) (last visited Aug 31, 2018).

<sup>25</sup> Rivkin, David R., Lex Mercatoria and Force majeure, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration (ICC Publ Nr. 480,4), Paris 1993, at 161 et seq. | Trans-Lex.org, *supra* note 24 at 178.

<sup>26</sup> *Id.* at 175.

The circumstances surrounding the contract and the view of the parties indicate whether they have assumed the occurrence of a certain event.

## 2. The Obligation of Good Faith, Normal Conduct and the Subjective Elements of Force Majeure

The other facade of force majeure are the ideas of good faith and attributability. A preliminary explanation of the force majeure concept is the absence of a fault attributable to the debtor. Accordingly, a party should not be held accountable if no fault is attributed. However, faulty actions can take several forms. It can be in the form of an active conduct of the party resulting in the occurrence of the event. National laws and commentators use several adjectives to describe this requirement; it seems that they all indicate the same idea. For instance, some refer to it as (exteriority), other laws and commentators describe it as an event beyond the control of the debtor. The difference between the two notions seems to be in the required degree of control of the party claiming force majeure. Accordingly, an event falling outside the sphere of the debtor's control or activity cannot qualify as a force majeure if the requirement is (exteriority).

For instance, the illness of the debtor or an internal strike would not be considered as exterior to the debtor. The requirement of (control) seems to attenuate the notion of exteriority by relying onto a subjective approach (the capacities of the debtor) instead of an abstract qualification of the event (the event being within the sphere of the debtor).

The conduct attributing the event or its consequences can also take the form of an omission to do what a normal execution of obligations would require for overcoming the occurrence of the event or its effects. Therefore, the notion of (control) aside from being used to situate the event in or out the debtor's sphere of control also indicates that the event should be the "do" of the debtor nor a consequence of his actions. So does the word "irresistible". Aside from its objective usage to describe the relevant event it also indicates an obligation on the debtor to take the necessary means to resist the occurrence or to overcome the consequences of the force majeure. These requirements seem to be a natural implication of a good faith execution of the contract. If an event arises, which the parties have means to resist or overcome and yet do not use these means it is assumed that the parties have not acted in good faith. The required effort however should be assessed according to the relevant force majeure clause or law as will be examined later.

The conduct's obligation according to the concept of force majeure does not cease to exist with the occurrence of the event. The parties are still expected to overcome the consequences of the event. This expectation is indicated by the terms inevitable, irresistible and control. The usage of these terms is often not bound by a specific temporal scope; they operate to cover the supervening event from its occurrence to its consequences.

## 3. Objective vs Subjective Approach and the Expansion of Force Majeure

Commentators have tried to find several justifications for the concept of force majeure. While some have found it in the risk allocation theory and the (*res perit debitori*) principle.<sup>27</sup> Others see its justification as an interpretation a contrario to the principle of (*pacta sunt servanda*).<sup>28</sup> Due to this lack of consensus, the definition and elements of force majeure differ from one legal system to another. Some legal systems like the French and the Egyptian law require the elements of irresistibility, un-foreseeability and exteriority to be existent all together.<sup>29</sup> Other systems retain only the irresistibility element, while others do not mention un-foreseeability at all. However, despite this disparity it seems that all these elements and their synonyms are constituent of the force majeure concept by virtue of the application of the principles of assumed obligations, good faith and attribute-ability.

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<sup>27</sup> Y.M. LAITHIER, *ÉTUDE COMPARATIVE DES SANCTIONS DE L'INEXECUTION DU CONTRAT* 317 (2002).

<sup>28</sup> GENICON, *supra* note 23 at 70–122.

<sup>29</sup> CODE CIVIL., 1174–1180 (2006).

A party is normally bound by the assumed obligations of the contract. Foreseeable events susceptible to hampering the execution should normally be in the parties' mind at the time of the contract.

Normal good faith behavior requires the parties to prevent the occurrence of these foreseeable events. It is contrary to the notion of good faith that a party instigates an event leading to obstruct the execution of the obligation and finally, a party should seek to honor the obligation despite the occurrence of an event obstructing it. In that sense, the traditional elements of force majeure overlap in respect their meanings and interpretation.<sup>30</sup> The real difference however resides in the degree of subjectivity or objectivity retained by each system. In contrast with a traditional or objective approach, a relaxed approach of force majeure tends to adopt a subjective approach to some of the elements of force majeure or even all the elements all together.

It seems however that a development towards a more relaxed or subjective approach to excused inexecution in general is becoming the norm among different legal regimes. For example, the introduction of the inherently subjective concept of "imprevision"<sup>31</sup> in the traditionally conservative French civil law<sup>32</sup> has been celebrated as a development in contract law.<sup>33</sup> The new German contract law adopts a subjective notion of foreseeability as well as a relative notion of impossibility.<sup>34</sup> Accordingly, impossibility is assessed subjectively, but impossibility can lead to the termination of the contract if the execution of the obligation becomes unbearable for the debtor. The Norwegian law was traditionally an adept of the strict liability principle and therefore limiting the scope of force majeure. In 1988 a new sale of goods act implemented the notion of the event "beyond the control" of the debtor. This trend can also be found in multiple international instruments like the CIGC and the UNIDROIT principles. This general trend of subjectifying the traditionally objective concept of force majeure blurs the line separating it from other concepts like hardship and change of circumstances. The degree of required foreseeability is not necessarily retained by legal systems in a rigid form. The requirement of exteriority or sphere of control can be attenuated to a subjective requirement of conduct. Even the cardinal notion of impossibility can move from an absolutist approach to a relative one aligned with that of hardship or imprevision, only wider in the sense that it is not limited to economic impossibility or impartibility.

The expansion of the scope of application of force majeure leans towards the protection of the debtor's interests. Despite being presented as an application of the principle of "res perit debitori"<sup>35</sup>, the force majeure concept is designed to excuse a failing of performance from the side of the debtor. The wider the scope of the force majeure concept, the more protected the debtor becomes. In that sense, the contractual balance becomes in favor of the debtor. In contrast, the narrower this scope becomes, the more protected becomes the "creditor". In the context of investments in disputed maritime zones, this research focuses on the situation where the debtor or the host state fails to execute its obligation (providing permission to work in the disputed zone). The different approaches of force majeure can influence this equation; it will be discussed further in the next chapter.

On the other hand, this expansion of the application of the "res perit debitori" principle in favor of the debtor comes along with more guarantees to the debtor, which helps in maintaining the balance of the parties' interests. National laws and commentators are becoming clearer in differentiating between definitive impossibility and partial or temporal impossibility. Some commentators proposed to consider "notification of the event of force majeure" as an element of the concept of force majeure.

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<sup>30</sup> CLOTILDE JOURDAIN-FORTIER & MARC MIGNOT, *ANALYSE COMPAREE DU DROIT FRANÇAIS REFORME DES CONTRATS ET DES REGLES MATERIELLES DU COMMERCE INTERNATIONAL* 308–319 (2016).

<sup>31</sup> M. KASSEM, *L'ABUS DE DOMINATION EN MATIERE CONTRACTUELLE: ETUDE COMPARATIVE* 193–206 (1992).

<sup>32</sup> *Id.* at 181–192.

<sup>33</sup> JOURDAIN-FORTIER AND MIGNOT, *supra* note 30 at 281–302.

<sup>34</sup> SHARIF GHANAM, *CHANGE OF CIRCUMSTANCES IN INTERNATIONAL COMMERCIAL CONTRACTS*, DUBAI 2010 (IN ARABIC)

<sup>35</sup> According to which the debtor should bear the consequences of inexecution.

International contracts go even further by elaborating detailed clauses on the process of negotiating the post-event phase, a process borrowed from the hardship and imprevision concept.

## **B. Force Majeure in International Law**

International law constitutes the principal element of the foreign investment's protection regime. It provides foreign investors a layer of protection, which has seen its importance, amplified since the first bilateral investment agreement in 1959. Since then, has developed a discipline of international economic law, namely the international investment law. The development of this discipline has found its strength in a huge amount of jurisprudential arsenal that has not stop growing for several decades. The main sources of International Investment Law are treaties, costumes and general principles of law.

Bilateral investment treaties (BITs) have become the most important instrument of investors/investment protections.<sup>36</sup> They are the main source of international investment treaty law.<sup>37</sup> In contrast to diplomatic protection, these treaties provide investors the possibility to raise claims against a sovereign host state before international instances without the need of another sovereign state to elevate its claim to the international plane.<sup>38</sup> BITs contain the essential means of protection of foreign investments; the standards that host states are obliged to follow when dealing with the investments belonging to nationals of the other contracting state.

### **1. Investment Agreements and the International Customary Law of Force Majeure**

As previously, mentioned, international law constitutes a principal layer of protection to foreign investments. By means of the substantive guarantees, it provides to these investments, as well as the procedural guarantees taking the form of international tribunal's competence to hear the relevant disputes.<sup>39</sup> These guarantees can be found in both customary and treaty law, the latter taking the ascendant over the former with the proliferation of BITs.<sup>40</sup>

BITs Like all other binding international treaties creating obligations on states are governed by the Vienna convention on the law of treaties<sup>41</sup> and they constitute a source of international law as stipulated by article 38 of the ICJ statute.<sup>42</sup> Therefore, the customary law of state responsibility as reflected in the ILC daft articles is applicable to BITs and states are responsible for the breach of their provisions. And as the draft articles stipulate the regulation of state responsibility, they also demonstrate the circumstances precluding wrongfulness namely; force majeure, necessity, distress, consent, counter measures and self-defense.

Article 23 of the ILC Draft Articles addressing force majeure shows that the elements of "force majeure" in international law are not different from those known in national laws.<sup>43</sup> Force majeure in international law is an unpredictable or irresistible event that is exterior to the will or control of the state and that makes it impossible for the state to perform its international obligation. That definition shows that the requirements for an event to be qualified as a force majeure are generally the same as those required in national systems.

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<sup>36</sup> K.N. SCHEFER, INTERNATIONAL INVESTMENT LAW: TEXT, CASES AND MATERIALS, SECOND EDITION (2016), at 33-35

<sup>37</sup> *Id.*

<sup>38</sup> SORNARAJAH, *supra* note 11. at 216-219

<sup>39</sup> R. DOLZER & C. SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012); K.N. SCHEFER, INTERNATIONAL INVESTMENT LAW: TEXT, CASES AND MATERIALS, SECOND EDITION (2016).

<sup>40</sup> see Patrick Dumbery, *Are BITs Representing the "New" Customary International Law in International Investment Law?*, SSRN ELECTRON. J. (2010); see also M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 172 (3rd ed. 2010).

<sup>41</sup> see GeorgeK Foster, *Recovering "Protection and Security": The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance* 63, 1105.

<sup>42</sup> see SORNARAJAH, *supra* note 11 at 79.

<sup>43</sup> see Responsibility of States for Internationally Wrongful Acts, , in INTERNATIONAL DOCUMENTS ON ENVIRONMENTAL LIABILITY 323-331 (2008).

It is worth noticing that Article 27 of the draft articles has left the door opened to compensation of the material damages that might occur because of state actions under force majeure.<sup>44</sup> International law seems to adopt the principle of *res perit debitori* in the sense that the risks are allocated to the debtor of the obligation who would not be able to request the other party to fulfill his counter obligation. However, the draft articles seem to avoid the critique made to the risk allocation as applied by force majeure in domestic law where the creditor is not entitled to compensation for damages in the case of non-performance for force majeure. International law in this sense is more balanced in term of risk allocation by permitting the allocation of the risk to both parties.

In order to examine how “force majeure” operates in the realm of BITs, it is important first to look into the relation between BITs and international customary law as the main source of the “force majeure” defense.<sup>45</sup> Most commentators agree that International Investment Law is not a self-contained regime,<sup>46</sup> in fact, BITs are the product of international law and they remain governed by international law as an international treaty.<sup>47</sup> Unless contained by a *lex specialis*, customary international law remains the law of the treaty upon which the interpretation and the application of the treaty relies.<sup>48</sup> It is also relied upon to fill the vacuum that left by the provision of a given treaty.<sup>49</sup> The most relevant example is the rules of state responsibility governing the obligations by which the states party to a treaty are bound and the consequences of breaches to these obligations as well the circumstances precluding wrongfulness.

## 2. Non-Precluded Measures in Bilateral Investment Agreements

Some BITs contain what are known as “non-precluded measures” clauses or NPM clauses. Generally, the NPM clause is the mechanism by which a State party to a BIT can rely on to take measures that would be otherwise inconsistent with the provisions of the BIT.<sup>50</sup> Despite that, the number of BITs containing such clause are relatively small, they are still important enough to be considered.<sup>51</sup> Especially that this type of clauses has attracted the interest of commentators, being a major component of the cardinal cases known as “the Argentinian gas cases”.<sup>52</sup> In our examination of this clause the focus on the Argentine – USA BIT clause will be as a model clause, on one hand because of the interest it has attracted during and after the Argentinian cases, and on the other hand because of its wide scope and the vagueness of its wording are prone to conflictual interpretation as shown by the Argentinian experience.

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<sup>44</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries - 2001, , STATE RESPONSIBILITY. 114 ar. 27 .

<sup>45</sup> See Jorge E. Viñuales, *CUSTOMARY LAW IN INVESTMENT REGULATION*, 23 ITAL. YEARB. INT. LAW ONLINE 23–48, 25 (2014).

<sup>46</sup> see Campbell McLachlan, *INVESTMENT TREATIES AND GENERAL INTERNATIONAL LAW*, 57 INT. COMP. LAW Q. 361, 369 (2008).

<sup>47</sup> See *Id.* at 29.; see also Campbell McLachlan, *INVESTMENT TREATIES AND GENERAL INTERNATIONAL LAW*, 57 INT. COMP. LAW Q. 361, 369 (2008).

<sup>48</sup> See Viñuales, *supra* note 45 at 25.

<sup>49</sup> See *Id.* at 28.

<sup>50</sup> see WILLIAM W. BURKE-WHITE & ANDREAS VON STADEN, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT. LAW 104, 311; Elizabeth Martinez, *Understanding the Debate over Necessity: Unanswered Questions and Future Implications of Annulments in the Argentine Gas Cases*, 23 DUKE J COMP INTL L 149, 160 (2012).

<sup>51</sup> see WILLIAM W. BURKE-WHITE and ANDREAS VON STADEN, *supra* note 50 at 314 “Of the 2000 BITs presently in force, NPM clauses appear in at least 200 such treaties.”

<sup>52</sup> In response of its major financial crisis of 2001, Argentina has taken severe financial measures, which led to a wave of more than forty cases brought against it before ICSID tribunals. Among the first cases to be filed were the four cases filed by the four American gas companies; CMS, Enron, Sempra and LG&E. Four different tribunals had to examine the alleged breach of Argentina to the USA – Argentina BIT, as well as the Argentinian defense of necessity under both customary law and article XI of the BIT.

The most interesting feature of the “Argentinian gas cases” is that they all rely on the same factual grounds, the same Argentina – USA BIT, the claimants have made more or less very close claims in respect of the alleged violation of the BIT and finally, Argentina relied of the same defense in all the cases, namely the necessity defense under article XI of the Argentina – USA bilateral investment agreement and customary law. Therefore, it was a rare occasion where it could be observed how several arbitral bodies would work on practically the same case and interpret NPM clauses simultaneously.<sup>53</sup>

#### a. Examples of Non-Precluded Measures Clauses

The wording of the NPM clause differs from one BIT to another.<sup>54</sup> For instance, the Germany – China BIT stipulates that “ Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed ‘treatment less favorable’ within the meaning of Article 3” [article 3 contains the most favored nation standard of treatment ].<sup>55</sup>

The Belgium / Luxemburg economic (BLEU) union and Montenegro treaty includes an NPM clause in article 3 stating as following “Except for measures required to maintain public order, such investments shall enjoy continuous protection and security, i.e. excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof”<sup>56</sup>.

A similar clause is also found in article 11 of the India – UK BIT stipulating the following “(I) Subject to the provisions of this Agreement, all investment shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made. (2) Notwithstanding paragraph (I) of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis.”<sup>57</sup>

Comparing the above-mentioned clauses with the USA – Argentina BIT, some commentators have noted the difference between them in respect to the required circumstances triggering this clause.<sup>58</sup> It seems that the most important difference resides in the scope of each clause.<sup>59</sup> The German and the Belgium BITs limit the scope of their respective NPM clauses to attenuate only specific provisions of the BIT (BLEU limiting the scope of “protection and security” clause and the German limiting the scope of the “less favorable nation” clause).<sup>60</sup> Therefore, there is very little ground for arguing that a circumstance mentioned in these NPM lead to the suspension of the whole BIT.

Article XI of the USA – Argentina BIT provides that “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests”.

The article contemplated the cases where it would be triggered. These cases are the maintenance of public order, fulfilling the state’s obligations in respect to the maintenance of international peace and security and finally, the preservation of its essential national interests.

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<sup>53</sup> see Martinez, *supra* note 50; see also Cynthia C. Galvez, *Necessity, Investor Rights, and State Sovereignty for NAFTA Investment Arbitration*, 46 CORNELL INTL LJ 143 (2013).

<sup>54</sup> WILLIAM W. BURKE-WHITE and ANDREAS VON STADEN, *supra* note 50 at 326.

<sup>55</sup> China - Germany BIT (2003),, <https://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/905> (last visited Jan 21, 2019).

<sup>56</sup> BLEU (Belgium-Luxembourg Economic Union) - Montenegro BIT (2010),, <https://investmentpolicyhub.unctad.org/IIA/countryGrouping/16/treaty/514> (last visited Jan 21, 2019).

<sup>57</sup> India - United Kingdom BIT (1994), , <https://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/1968> (last visited Jan 21, 2019).

<sup>58</sup> see WILLIAM W. BURKE-WHITE and ANDREAS VON STADEN, *supra* note 50 at 330.

<sup>59</sup> see *Id.* at 331.

<sup>60</sup> see *Id.* at 331.

The wording of article XI is general and wide enough to sustain a claim that it is establishing a general rule or regime the preclusion of wrongfulness.

There is however, no consensus on whether this article constitutes a “lex-specialis” or whether it is a mere reflection of customary international law as reflected in the ILC draft articles on state responsibility.

## **b. Non-Precluded Measures and International Customary Law**

The tribunals in *Sempra*, *CMS*, *Enron* and *LG&E* have all agreed that Argentina’s measures in response of its economic crisis constituted a violation of the provisions of the USA – Argentina BIT. The issue is to determine if Argentina is liable for these violations or if they were excused according to customary law on necessity or the NPM clause. *CMS* considered the NPM clause as a reflection of customary law and therefore, it referred to the element of necessity in customary law to assess the Argentinian defense.<sup>61</sup>

*Enron* and *Sempra* refused to consider article XI “lex-specialis”. In the view of both tribunals, the lack of specific requirements to invoke the state of necessity and the article’s only stipulating cases or circumstances to preclude wrongfulness in respect of the BIT means that it is necessary to look for these requirements in customary law.<sup>62</sup>

*LG&E* tribunal’s accepted Argentina’s claim and considered article XI to be a “lex-specialis”, accordingly the tribunal found that the Argentinian measures were within the scope of this article and decided that Argentina didn’t commit any breach to the BIT.

## **c. Non-Precluded Measures, a Grandfather Clause of Force Majeure**

Most commentators address the NPM clause in accordance with the defense of “necessity” whether based on customary law or a treaty provision.<sup>63</sup> It seems the NPM clause has been taken hostage of the Argentinian cases and the Argentinian defense of necessity. This situation led most commentators who have approached this subject to examine it as a necessity clause or at least a clause to be studied within the necessity conditions and requirements. This tendency might be due the fact that the tribunals of the Argentinian cases have discussed article XI of the BIT through its relation to customary law on necessity without looking at it as a wider rule on state responsibility and preclusion and wrongfulness.<sup>64</sup> It is also possible that the impression of an organic relation between the NPM clause in a BIT and the “necessity defense” in customary law is the usage of the word (necessary measures) to stipulate the article.<sup>65</sup> That is despite the fact that the normal meaning of the word (necessary) is not necessarily the equivalent of “necessity” as a legal concept, which has a narrower, meaning due to the conditions required to be acknowledged as such.

There is no claim that widening the perspective of looking to NPM clauses would have necessarily changed the outcome of any of the Argentinian cases which is not going to be a subject of an in-depth examination here, being deeply examined elsewhere.<sup>66</sup>

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<sup>61</sup> see Martinez, *supra* note 50 at 161.

<sup>62</sup> This approach is consistent with the method of interpretation of “force majeure” clauses in contracts, which considers a clause containing only an exhaustive or illustrative list of events as merely a guidance for the interpretation of the force majeure concept.

<sup>63</sup> see e.g. Martinez, *supra* note 50; Sergey Ripinsky, *State of Necessity: Effect on Compensation* (2007); Galvez, *supra* note 53 at 148–154; Marie Christine Hoelck Thjoernelund, *State of Necessity as an Exemption from State Responsibility for Investments*, 13 MAX PLANCK YEARB. U. N. LAW ONLINE 421–479, 440–478 (2009); Viñuales, *supra* note 45 at 36–39.

<sup>64</sup> See *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1;

<sup>65</sup> Article XI USA – Argentina BIT: This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.

<sup>66</sup> WILLIAM W. BURKE-WHITE and ANDREAS VON STADEN, *supra* note 50.

However, that a wider understanding of NPM clause would have been of more contribution to the understanding of state responsibility in the realm of investment agreements.

It is now clear how different tribunals and commentators differ in their analysis of the nature of the NPM clause. That each opinion relies on plausible arguments. To consider the NPM clause as a mere reflection of customary law discharges the interpretation process from the principle of effectivity as a rule of interpretation.<sup>67</sup> Interpretation must give meaning and effect to all terms of a treaty; an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs to redundancy or inutility.<sup>68</sup> It seems inadequate to consider a clause stipulated by the parties of an agreement as void of a given meaning they both meant, that is unless they have both made this presumed reference clear.<sup>69</sup> Otherwise, it is imperative to determine the meaning wanted by the parties without widening the interpretation or narrowing it to the extent of disregarding the intent of the state's parties when the agreement was made.

On the other hand, to consider the NPM clause as a contained system that is independent and self-reliant is a broad interpretation that is sustained neither by the purposes of the BIT, nor by the explicit stipulation of the clause. A BIT (and there is nothing to sustain that Argentina US is an exception) means to protect the investments of both parties made in the other party's territory, broadening the scope of the NPM clause leads to limit the scope of application of the BIT to normal and regular times, while removing un-regular circumstances and times out of the scope of application of the BIT. This seems a radical interpretation that goes against to the purpose of A BIT which is normally to provide foreign investments a layer of protection that is independent of the national legal and political regime and that ensures a certain stability and certainty to foreign investments. Furthermore, nothing prevents states from explicitly limiting the scope of application of their BIT to regular times, which is in fact a policy followed by a number of states in respect to their BITs.

Nevertheless, this is not a reason to disregard the article or to reduce it to redundancy. Article XI of the Argentinian – USA BIT denominates the circumstances that trigger the clause; however, it does not define any of these circumstances and their features, nor the conditions of the measures that states are entitled to take upon the existence of these circumstances. Giving this vacuum, I do not think that considering article XI as a “lex specialis” necessarily lead to a negation to the role of customary law as the general law of interpretation.

The ILC Draft Articles have determined the required elements of force majeure. They also require “impossibility” as the main effect. However, it is hard to claim that exists a uniform conception of the notion of impossibility as a general principle of law. Some national laws have adopted a narrow definition of force majeure while other have expanded it. Generally, impossibility means (the absolute impossibility of performance) not merely to be extremely difficult or onerous. Article XI seems to establish a lower threshold in respect of the meaning of impossibility in the realm of the USA - Argentina BIT.

The circumstances mentioned by the article (international peace and security for example) are all of such a nature where it is hard to determine if it is possible for a state to overcome them or even to determine the proper means of overcoming them. For instance, it is obvious how the tribunals in the Argentinian cases have agreed that Argentina was facing a major economic crisis and that the crisis was not imputable to Argentina. Even the tribunals that dismissed Argentina's defense of necessity considered the crisis when assessing compensation. Nevertheless, they have differed as to whether the measures taken by Argentina were “the” necessary measures to face its crisis. Taking article XI into consideration in respect to “force majeure”, the article stipulates a list of events or circumstances forming a threshold to instigate a non-compliance system that the treaty omitted to mention.

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<sup>67</sup> see *Id.* at 323.; World Court and United Nations Charter: The Principle of Effectiveness in Interpretation, , 1962 DUKE LAW J. 85 (1962).

<sup>68</sup> White, Gillian --- "Treaty Interpretation: The Vienna Convention 'Code' as Applied by the World Trade Organisation Judiciary" [1999] AUyrBkIntLaw 17; (1999) 20 Australian Year Book of International Law 319

<sup>69</sup> On the question of ascertaining the meaning of a specific BIT provision see WILLIAM W. BURKE-WHITE and ANDREAS VON STADEN, supra note 11 at 384, Russian delegation negotiating a BIT with the USA insisted on explicitly affirming the self-judging character of the NPM Clause in a protocol.

The non-compliance system known in customary law is the “circumstances precluding wrongfulness” as reflected in the ILC draft articles. One of these circumstances is “force majeure”. The ILC articles set the elements and requirements of force majeure but they do not prevent states from modifying these requirements in their own agreements. One of the common ways to modify or to relax the elements of “force majeure” clauses is to include an exhaustive or non-exhaustive list of events upon which an interpreter can rely to deduce the notion of force majeure as intended by the parties. This private law approach seems to be the approach by which *Sempra* and *Enron* tribunals tackled this issue. By doing so, these tribunals opened a space for arguing that NPM clauses can have the same function of “lists of events” in international contracts as will be seen in the following section.

### C. Force Majeure in International Contracts

“Force Majeure” clauses are a recurrent feature in most international contracts and investment agreements.<sup>70</sup> Given that, the investment relationship is going to be long and potentially with many legal and political changes. Even in civil law countries where “force majeure” is already defined by law, the parties to an investment contract tend to design their own force majeure clause adapted to their needs.<sup>71</sup> This practice is sustained by the fact that the “force majeure” concept is not of public order in most legal systems, therefore parties are free to design their own “force majeure” regime.<sup>72</sup> In common, law countries where the doctrine of “force majeure” does not exist, it becomes primordial for the parties to insert it in their contract.

The “force majeure” clause function is to anticipate the occurrence of an event of force majeure during the execution of the contract. Generally, this clause contains the definition<sup>73</sup> of “force majeure” or the hypothesis upon which it rests,<sup>74</sup> the effects of the occurrence of an event of force majeure to be considered as such, and it can also contain the modalities of its activation.<sup>75</sup> Sometimes, the “force majeure” clause defines its scope of application by precluding certain obligation from being covered by such defense<sup>76</sup> or even by eliminating the executory effect of force majeure in certain cases.<sup>77</sup>

The ideal drafted force majeure clause must contain the definition, effects and modalities of “force majeure” as conceived by the parties to be able to be fully effective.<sup>78</sup> However, some clauses define force majeure only by inserting an illustrating list of events.<sup>79</sup>

For example, the “force majeure” clause in this “Philippine / shell” contract stipulates the following: “a) Any failure or delay ..... shall be excused to the extent attributable to force majeure b) (provides the modalities of extension of the contract in case of force majeure) c) force majeure shall include act of God, unavoidable accidents, acts of war or conditions arising out of or attributed to war declared or undeclared, laws, rules, regulations and orders ...”<sup>80</sup>

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<sup>70</sup> J. MESTRE & J.C. RODA, *LES PRINCIPALES CLAUSES DES CONTRATS D’AFFAIRES* 397 (2011); Hubert Konarski, *FORCE MAJEURE AND HARDSHIP CLAUSES IN INTERNATIONAL CONTRACTUAL PRACTICE* 25, 407.

<sup>71</sup> See *Id.* at 397.; J.M. MOUSSERON & M.L. MATHIEU-IZORCHE, *TECHNIQUE CONTRACTUELLE* 67 (1999); M. FONTAINE & F. DE LY, *DRAFTING INTERNATIONAL CONTRACTS* 402 (2009).

<sup>72</sup> Certain limits exist in some legal systems, French cassation court declared null a force majeure clause exonerating from inexecution due to fraud acts, see MESTRE AND RODA, *supra* note 70 at 398.

<sup>73</sup> *Id.* at 397.

<sup>74</sup> See FONTAINE AND DE LY, *supra* note 71 at 402.

<sup>75</sup> See MESTRE AND RODA, *supra* note 70 at 397.

<sup>76</sup> *Id.* at 397.

<sup>77</sup> See MOUSSERON AND MATHIEU-IZORCHE, *supra* note 71 at 386.

<sup>78</sup> See Robert Guillaumond, *La gestion des difficultés d’exécution résultant de force majeure ou d’imprévision* at 14 (2014).

<sup>79</sup> See MESTRE AND RODA, *supra* note 70 at 400.

<sup>80</sup> Article 16.3 *Shell Philippines Exploration B. V. - SC No. 38, 1990*, <https://www.resourcecontracts.org/contract/ocds-591adf-6297501032/view> (last visited Jan 16, 2019)

The illustrative list should serve as guidance to deduce (or in other cases to sustain an already defined notion of force majeure) the characteristics of “force majeure” as meant by the parties. For instance, a list containing events of an “act of god” might indicate that the parties refer to a traditional notion of force majeure. Nevertheless, this technique seems to be defective as it is often complicated to deduce the elements of force majeure from such lists. Most importantly, the events stipulated in an exhaustive list cannot qualify as “force majeure” unless they have the characteristics of force majeure.<sup>81</sup> For instance, if a list contains “war” as an example of a force majeure, a party cannot claim “force majeure” when a war happens if it does not affect the performance of the obligation.

## 1. Defining Force Majeure Clauses by Reference

Some clauses define force majeure with reference to a certain legal regime. It can be the national law of the contract or another legal instrument.<sup>82</sup> Some clauses do not contain an illustrative list nor a definition of force majeure and the elements upon which force majeure should be assessed.<sup>83</sup> In this case, the clause settles with mentioning the applicable regime and effects if a force majeure occurs.<sup>84</sup> For instance, the “force majeure” clause in the contract made between Cameroon’s Société Nationale des hydrocarbures / Perenco oil / Kosmos energy provides the following “ For the purposes of this Agreement, Force Majeure means any act of God, perils of navigation, storm, flood, earthquake, lightning, explosion, fire, hostilities, war (declared or undeclared), blockade, insurrection, civil commotion, acts of public enemy, quarantine restriction, epidemics, accident, riot, strike or labor disturbance, any act or failure to act of a Governmental agency or local body (provided such act or failure to act is the proximate cause of non-performance or delay in performance of any obligation under this Agreement or the exercise of any right dependent thereon) or any other cause beyond the control of any affected Party.”<sup>85</sup>

In this clause, the parties rely on an illustrative list to refer to “force majeure”. In such cases, it seems reasonable to assume that the national law or the applicable law of the contract on the characteristics of force majeure would apply.<sup>86</sup>

## 2. Clauses Defining Force Majeure with an Abstract Definition

Generally, clauses in long-term contracts define force majeure in a traditional way by stipulating the three usual elements or characteristics of force majeure being irresistibly, unpredictability and exteriority. Such clause can be found in the Cypriot model of “production sharing agreement” stipulating that “For purposes of this Contract, cases of Force Majeure are considered to include all events which are unforeseeable, irresistible and beyond the control of the Party which invokes it, such as earthquake, riot, insurrection, civil disturbances, acts of war or acts attributable to war. The intent of the Parties is that the term Force Majeure shall be interpreted in accordance with the principles and practice of international law.”<sup>87</sup>

Most clauses contain a definition of force majeure as well as an illustrative list of events.<sup>88</sup> In such cases, the illustrative list might help to sustain the already defined notion of force majeure. When parties define the notion of “force majeure”, they are free to emphasize a given element while relaxing another.

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<sup>81</sup> see MOUSSERON AND MATHIEU-IZORCHE, *supra* note 71 at 399; see also FONTAINE AND DE LY, *supra* note 71 at 415–416.

<sup>82</sup> FONTAINE AND DE LY, *supra* note 71 at 408.

<sup>83</sup> see Konarski, *supra* note 70 at 410.

<sup>84</sup> FONTAINE AND DE LY, *supra* note 71 at 408.

<sup>85</sup> Perenco Oil and Gas (Cameroon) Ltd., Kosmos Energy Cameroon HC, Société Nationale des Hydrocarbures, Kombe-Nsepe permit, JVA, 2008, <https://www.resourcecontracts.org/contract/ocds-591adf-5424836511/view> (last visited Jan 16, 2019).

<sup>86</sup> FONTAINE AND DE LY, *supra* note 71 at 408.

<sup>87</sup> Cyprus Model Contract, PSA, 2012, <https://www.resourcecontracts.org/contract/ocds-591adf-1348839751/view> (last visited Jan 16, 2019)

<sup>88</sup> MESTRE AND RODA, *supra* note 70 at 400.

### 3. Clause Reconfiguring the Requirements of Force Majeure

In some cases, parties use clauses that broaden or tighten the definition of force majeure according to the specificities and characteristics of their investment.<sup>89</sup> Some contracts contain clauses that relax the traditionally required elements of force majeure or emphasize one of these elements. Such clauses help parties to adapt the force majeure clause to the nature of their economic activity as well as the geopolitics of a given host state.

#### a. Un-Foreseeability

In the case of a long-term investment in a geopolitically hazardous location, parties might feel the need to relax the notion of un-foreseeability. It is clear that un-foreseeability despite being a traditional element of force majeure is subject to legislative and jurisprudence traction on the national level. The practice of attenuating “un-foreseeability” is therefore not foreign to legal drafting in general. In the following clause from this contract between Ghana’s GNPC / ENI and others, the parties omitted to expressly require *un-foreseeability* “Force Majeure” means any event beyond the reasonable control of the Party claiming to be affected by such event which has not been brought about directly or indirectly at its own instance or which has not been brought about directly or indirectly at the instance of an Affiliate. Force Majeure events may include, but are not limited to, acts of God, accidents, fires, explosions, earthquake, storm, flood, hurricanes, tidal waves, cyclones, tornados, lightning or other adverse weather conditions or any other natural disasters, war, acts of war, acts of terrorism, embargo, blockade, riot, civil disorder, or strike”.<sup>90</sup> In other clauses parties could require that to qualify as a force majeure, an event must not be “reasonably foreseeable”<sup>91</sup>

#### b. Irresistibility and Sphere of Control

The relaxation or relativization can also extend to the unavailability or the irresistibility of an event.<sup>92</sup> The party must not have passively contributed to its occurrence by not taking adequate measures to prevent it or to surmount its effects.<sup>93</sup> The event qualifying as a force majeure must not be attributed to the party that is claiming it. The party must not have actively contributed by its conduct to the occurrence of the event. This requirement is also referred to as the exteriority element.

The force majeure clause indicates whether the obligation to prevent the force majeure is an absolute or relative obligation. Whether any measure exists to surmount the effects, or the occurrence of a given event and whether the party is capable of taking these measure (or making the proper effort) are two separate questions.

The usage of phrases such as “reasonably” or “beyond reasonable control” indicates that the parties mean to relax the notion of unavailability.<sup>94</sup>

This clause for example provides that “Force Majeure” means an event, other than the obligation to pay money (unless payment is prohibited by government instruction or order as noted below), which could not reasonably be expected to have been prevented or controlled and is beyond the ability of the affected Party to control using reasonable efforts... ”<sup>95</sup> Another example can be found in this clause from a contract between Guyana and CGX resources

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<sup>89</sup> See FONTAINE AND DE LY, *supra* note 71 at 403.

<sup>90</sup>Article 1.39 ENI Ghana Exploration & Production Limited, Vitol Upstream Tano Limited, Woodfields Upstream Limited, Ghana National Petroleum Corporation, Explorco, Cape Three Points Block 4, Concession Agreement, 2016, 2, <https://www.resourcecontracts.org/contract/ocds-591adf-2887938326/view> (last visited Jan 16, 2019)

<sup>91</sup> see FONTAINE AND DE LY, *supra* note 71 at 404. However, it seems that petroleum agreements tend to either adopt unforeseeability as an element of force majeure or to completely eliminate it.

<sup>92</sup> see *Id.* at 404.; see Konarski, *supra* note 70 at 410–411.

<sup>93</sup> JOURDAIN-FORTIER AND MIGNOT, *supra* note 30 at 315.

<sup>94</sup> see FONTAINE AND DE LY, *supra* note 71 at 404.

<sup>95</sup> Kosmos Energy Suriname, Block 45 Offshore, PSA, 2011., <https://www.resourcecontracts.org/contract/ocds-591adf-8649797663/view> (last visited Jan 16, 2019).

stipulating that “ *In this Article, the term "force majeure" shall mean any event beyond the reasonable control of the Party claiming to be affected by such event...* ”<sup>96</sup>

A similar clause can also be found in the contract between Grenada and RSM stating “*force majeure*” means any event beyond the reasonable control of the party claiming to be affected by such event which has not been brought about at its instance and which has caused such non-performance or delay in performance”<sup>97</sup>

### c. Impossibility and the Effects of an Event of Force Majeure

National laws are not uniform in their conception of the “impossibility” of performance. Some legal systems opt for a narrow interpretation of impossibility requiring it to be absolute, while other systems opt for a wider concept that only requires impossibility to be relative. Similarly, contract clauses can strengthen and relax the element of impossibility according to each contract necessity. For instance, the following clause indicates the relaxation of the element of impossibility, “If either party is prevented from or delayed in carrying out any of the provisions of this Agreement by reason of ... [enumeration of events] ” ... or any cause beyond its control making it impossible or *exorbitant from an industrial or commercial standpoint* to perform its obligations hereunder .... ”<sup>98</sup>

This clause has explicitly relaxed the required threshold for an event to qualify as rendering performance impossible. Some commentators note that such clauses remove the difference between “force majeure” and “hardship”. These clauses coincide with the practice of some national laws aiming to relax the concept of force majeure. However, the event must be near to crippling the party’s capability to perform their obligations.

The traditional effect of force majeure is to liberate the party from the obligation becoming impossible to perform and exonerating the party from responsibility of non-performance. Parties who are keen on the survival of the investment contract (which is often the case in long-term investment agreements) include a suspensive effect to the force majeure clause.<sup>99</sup> Accordingly, the obligation is only “temporarily” suspended as long as the force majeure event is temporary or surmountable.<sup>100</sup> That entails an obligation of due diligence or best effort onto the parties to surmount the event of force majeure and its effect. In the latter case however, the parties must have adopted a rather relaxed definition of the element of impossibility being in that case a surmountable event despite its rigorousness.

## 4. Common Features of Force Majeure Clauses in Long Term Investment Contracts

The first observation to be made in respect to international maritime investment contracts is the fact that “force majeure” clauses seem to constitute an important and common element in practically all these contracts. The “force majeure” regime is always mentioned in the contract whether it is by reference to a given legal system or by a special design stipulated by the contract. Most of the contracts studied for the purpose of this research seem to abandon the requirement of “un-foreseeability” as an element of “force majeure” as well as adopting a relaxed notion of irresistibility and impossibility of performance<sup>101</sup> .

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<sup>96</sup> Guyana, CGX Resources Inc, PSA, 2013, <https://www.resourcecontracts.org/contract/ocds-591adf-4468639289/view> (last visited Jan 16, 2019).

<sup>97</sup> RSM Production Corporation v. Grenada, Award, ICSID Case No. ARB/05/14, 13 March 2009, , <http://www.kluwerarbitration.com.libproxy.aucegypt.edu:2048/document/download/?ids=ipn91379&searchTerm=> (last visited Mar 11, 2018) para. 122.

<sup>98</sup> see FONTAINE AND DE LY, *supra* note 71 at 405.

<sup>99</sup> see *Id.* at 425.

<sup>100</sup> see MESTRE AND RODA, *supra* note 70 at 398–399; see also Konarski, *supra* note 70 at 417.

<sup>101</sup> ResourceContracts.org - AGM Petroleum Ghana Limited, Ghana National Petroleum Corporation, GNPC Exploration and Production Company Limited, South Deepwater Tano Block, Concession Agreement, 2014, , <https://www.resourcecontracts.org/contract/ocds-591adf-2262702985/view> (last visited Jan 16, 2019); ResourceContracts.org - ENI Ghana Exploration & Production Limited, Vitol Upstream Tano Limited, Woodfields Upstream Limited, Ghana National Petroleum Corporation, Explorco, Cape Three Points Block 4, Concession Agreement, 2016, , <https://www.resourcecontracts.org/contract/ocds-591adf-2887938326/view>

Very few contracts retain the element of un-foreseeability either by explicitly requiring it<sup>102</sup> or by referring to a national law adopting un-foreseeability as a required element of force majeure.<sup>103</sup> The reason behind the adoption of a relaxed notion of “force majeure” might reside in two elements. First, the longevity of the investments, which makes it complicated to foresee events that might happen in years or maybe decades. Second is the fact that most of the studied contracts are performed in either maritime areas that are disputed or are related to a disputed area. The different implications of such clauses in the case of a maritime dispute will be further addressed in the following parts.

## II. MARITIME DISPUTES AS EVENT OF FORCE MAJEURE: THE SUPERVENIENCE OF A ZONAL CONTESTATION

The previous part has demonstrated that the concept of force majeure is a flexible concept that can be interpreted rigidly or flexibly according to the relevant legal regime. The elements of this concept are designed differently, according to the context into which they are supposed to operate. Each interpretation of each element of the force majeure concept can affect the party’s obligations and required conduct within the specific context of their investment agreement or contract. This part will apply the different interpretations of the elements of force majeure on the elements of maritime zonal disputes. It will demonstrate that different constructions of the elements of foreseeability, irresistibility and the notion of impossibility can change the outcome when defining whether a maritime zonal dispute qualifies as a force majeure event.

Coastal states in dispute are both entitled to explore and exploit the disputed area. It is legally presumed that both states may claim the relevant rights over the contested zone.<sup>104</sup> However, this right is conditioned by procedural<sup>105</sup> and substantive conditions.

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(last visited Jan 16, 2019); ResourceContracts.org - Tullow Ghana Limited, Sabre Oil and Gas Limited, Kosmos Energy Ghana HC, Deepwater Tano, Concession, 2006, , <https://www.resourcecontracts.org/contract/ocds-591adf-8934817155/view> (last visited Jan 16, 2019); ResourceContracts.org - GNPC Operating Services Company Ltd, Heritage Exploration and Production Ghana Limited, Blue Star Exploration Ghana Limited, GNPC Exploration and Production Company Limited, Offshore South West Tano, Concession Agreement, 2015, , <https://www.resourcecontracts.org/contract/ocds-591adf-5573742588/view> (last visited Jan 16, 2019); ResourceContracts.org - Erin Energy Ghana Limited, GNPC Exploration and Production Company Limited, Base Energy Limited, Ghana National Petroleum Corporation, Expanded Shallow Water Tano, Concession Agreement, 2015, <https://www.resourcecontracts.org/contract/ocds-591adf-1707203194/view> (last visited Jan 16, 2019); ResourceContracts.org - Tullow Ghana Limited, Sabre Oil and Gas Limited, North, South and West Tano Fields, Concession, 2006, , <https://www.resourcecontracts.org/contract/ocds-591adf-8293745677/view> (last visited Jan 16, 2019); ResourceContracts.org - Anadarko Guyana Company, Roraima, PSA, 2012, , <https://www.resourcecontracts.org/contract/ocds-591adf-7941034659/view> (last visited Jan 16, 2019); ResourceContracts.org - Esso Exploration and Production Guyana Ltd, CNOOC Nexen Petroleum Guyana Ltd, Hess Guyana Exploration Ltd, PSA, 2016, , <https://www.resourcecontracts.org/contract/ocds-591adf-1399550295/view> (last visited Jan 16, 2019); ResourceContracts.org - Esso Exploration and Production Guyana Ltd., Liza Well, PSA, 1999, , <https://www.resourcecontracts.org/contract/ocds-591adf-2947803650/view> (last visited Jan 16, 2019); ResourceContracts.org - CGX Resources Inc, PSA, 2013, , <https://www.resourcecontracts.org/contract/ocds-591adf-4468639289/view> (last visited Jan 16, 2019); ResourceContracts.org - Kosmos Energy Suriname, Block 45 Offshore, PSA, 2011, , <https://www.resourcecontracts.org/contract/ocds-591adf-8649797663/view> (last visited Jan 16, 2019); ResourceContracts.org - Perenco Oil and Gas (Cameroon) Ltd., Kosmos Energy Cameroon HC, Société Nationale des Hydrocarbures, Kombe-Nsepe permit, JVA, 2008, , <https://www.resourcecontracts.org/contract/ocds-591adf-5424836511/view> (last visited Jan 16, 2019).

<sup>102</sup> ResourceContracts.org - Model Contract, Societe Nationale d’Operations Petroliers de la Cote d’Ivoire, PSA, 1990, , <https://www.resourcecontracts.org/contract/ocds-591adf-7309139976/view> (last visited Jan 16, 2019); ResourceContracts.org - Cyprus Model Contract, PSA, 2012, <https://www.resourcecontracts.org/contract/ocds-591adf-1348839751/view> (last visited Jan 16, 2019).

<sup>103</sup> ResourceContracts.org - Cameroun Model Contract, JVA, 1980, <https://www.resourcecontracts.org/contract/ocds-591adf-8372045258/view> (last visited Jan 16, 2019).

<sup>104</sup> Oil and Gas Development in Disputed Waters under UNCLOS, *supra* note 5 at 64.

<sup>105</sup> *Id.* at 69.

Paragraph 3 of Articles 74 and 83 of the UNCLOS reads as follows: “Pending [delimitation]... the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement”.<sup>106</sup> The text do not prevent the exploitation or exploration of a disputed area, on the contrary, it creates a framework of procedural and substantive elements to organize the economic activity of the states in dispute. States claiming a given maritime zone are both entitled to explore and exploit it. They just become under an obligation of restraint while practicing their right. The restraint obligation is reflected in articles 74(3) and 83(3) of the convention, which impose an obligation of conduct on both states as well as a limitation of the permissible activities.

A dispute over a maritime zone in the sense of the law of sea is an event created by a state’s “contestation” of another state’s claim that imposes an “obligation of conduct” on claiming states and renders “illegal” or impermissible the performance of some kinds of economic activities. In the language of the concept of force majeure, a maritime dispute can be a “supervening” event rendering the parties’ obligations in the realm of an investment agreement “illegal / impossible” by activating the provisions of articles 74(3) and 83(3). This event in order to create the possible “illegality” provided by these provisions must satisfy three elements. First, a contestation must occur. Second, contesting states must fail to abide by the obligation of conduct provided by articles 74 and 83. Third the economic activity must be of a nature which jeopardizes the reach of a final agreement and therefore un-permissible.

In order to determine whether a maritime dispute is a “force majeure” these elements must be deconstructed and analyzed separately to determine if they satisfy the required elements of “force majeure” (unpredictability, irresistibility) and it has the effect required to qualify an even as a force majeure, which is rendering performance “illegal / un-permissible”.

## **A. The Regime Governing the Economic Exploitation of Undisputed and Disputed Maritime Zones**

This section begins with a discussion of the regime governing the economic exploitation of maritime zones to identify the inherent sovereign rights of coastal states upon their maritime zones.

### **1. The Economic Exploitation of Undisputed Maritime Zones**

Coastal states are entitled to an exclusive economic zone that extend to 200 nautical miles from their baseline.<sup>107</sup> Sovereign rights over a maritime zone differs from sovereignty over land. The latter requires physical presence and effective control over land, the former is merely dependent on a claim of the concerned coastal state.<sup>108</sup> In this sense, a state’s rights upon its EEZ is merely a legal assertion rather than a factual reality. UNCLOS has given coastal states the exclusive right to explore and exploit their exclusive economic zones. These rights are an inherent constituent of the right to an exclusive economic zone. The powers of coastal states however may not exceed the necessities of exercising these rights.<sup>109</sup>

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<sup>106</sup> UNCLOS, , [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) (last visited Nov 10, 2017).

<sup>107</sup> *Id.* article 57.

<sup>108</sup> - Brilmayer and - Klein, *supra* note 4.

<sup>109</sup> see Y. TANAKA, *A DUAL APPROACH TO OCEAN GOVERNANCE: THE CASES OF ZONAL AND INTEGRATED MANAGEMENT IN INTERNATIONAL LAW OF THE SEA* (2016); - Brilmayer and - Klein, *supra* note 88; Angela Del Vecchio Capotosti, In Maiore Stat Minus : *A Note on the EEZ and the Zones of Ecological Protection in the Mediterranean Sea*, 39 OCEAN DEV. INT. LAW 287–297, 287–297 (2008); Robert C. Beckman & Clive H. Schofield, *Defining eez Claims from Islands: A Potential South China Sea Change*, 29 INT. J. MAR. COAST. LAW 193–243, 193–243 (2014); DANIEL J. DRUZEK ET AL., *PARTING THE RED SEA: BOUNDARIES, OFFSHORE RESOURCES AND TRANSIT* (2001).

The cornerstone of the economic legal regime of exclusive economic zones is article 56 of the UNCLOS III which provides the following:

“1. In the exclusive economic zone, the coastal state has: (a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds”

The examples provided by this article are not exhaustive. State’s sovereign rights extend to all kinds of economic activities using the resources of the EEZ. As some commentators have noted, the drafters of UNCLOS could not anticipate at the time of the elaboration of the text all the possible ways of exploiting the maritime resources.<sup>110</sup> Therefore, the language of the treaty came general to encompass future activities that would fall within the scope of “economic exploitation”.

In order to exercise their sovereign rights upon their EEZ, States are entitled to construct installations and structures for economic purposes.<sup>111</sup> UNCLOS has also granted coastal states the right to build artificial islands and other installations that interfere with the exercise of their accorded rights. Coastal states are also entitled to jurisdiction on these structures and installations.

Third states continue to enjoy the right of freedom to use and navigate the exclusive economic zones of the coastal state through all means that are lawful and do not prevent the coastal state of exercising its sovereign rights. The UNCLOS balances between the need to exploit the natural resources of waters beyond territorial waters and the established rights of all nations such as the free navigation in oceans.<sup>112</sup> It is not random that the convention tries to regulate state’s sovereign rights on their exclusive economic zones in a manner that do not prevent third states from enjoying their rights of free navigation, overflight and the laying of submarine cables.

The UNCLOS requires coastal states not to interfere with these rights while exercising their exclusive rights within their EEZ. For instance, coastal states are required to notify of any installation of structure to be built the requirement as well to maintain and the removal of abandoned structures.

On the other hand, coastal states are entitled to maintain a reasonable safety zone around installations and islands that all ships must respect. The only aspect of freedom of navigation that prevails over coastal states sovereign rights is non-interference with recognized sea-lanes essential to international navigation.<sup>113</sup>

## **2. The Economic Exploitation of Disputed Maritime Zones**

In some cases, coastal states entitlement to an exclusive economic zone interferes with the same right of another state. For example, when the distance between the shores of two coastal states is less than 400 nautical miles. In that case, until a delimitation occurs, if the relevant states make overlapping claims over a certain area, a legal presumption exists that both states are entitled and may claim the relevant sovereign rights upon the same disputed zone made in bona fide.

Articles 74(3) and 83(3) are the main instrument of UNCLOS regulating the economic exploitation and exploration of exclusive economic zones and continental shelves where overlapping claims interact. The adopted regime is a merge of two different approaches regarding the exploitation of contested maritime zones that competed during the discussions preceding UNCLOS III.

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<sup>110</sup> see Carola Stefanie Fink, *The International Regulation of Offshore Wind Farms: under the 1982 Law of the Sea Convention (UNCLOS)*, 2005.

<sup>111</sup> UNCLOS article 60.

<sup>112</sup> see TANAKA, *supra* note 4 at 123.

<sup>113</sup> UNCLOS article 67

Some states proposed a suspension of economic activities in disputed areas and others proposed the requirement of provisional arrangement pending final agreement.<sup>114</sup> The convention took elements from both approaches. On one hand, the prevention of some activities susceptible of hampering the final decision. On the other hand, the requirement that states should seek provisional arrangements.<sup>115</sup> Two interests ought to be protected in this schema. On the one hand, permitting the economic exploitation of the disputed area and on the other preserving the residual rights of the state to which the disputed zones are granted after the delimitation. Articles 74 and 83 are to provide a balance between these two interests. In sum, it can be said that a dispute over a given maritime zone creates procedural and substantive limitations on the economic activity while expanding the concept of exclusivity to encompass both claiming states.

## **B. Maritime Zonal Contestation as a Force Majeure Event**

The following section will examine the procedural and substantive requirements governing the economic exploitation of disputed maritime zones in more depth. The examination of those requirements will be dealt with from the perspective of the elements of “force majeure”.

### **1. Foreseeability**

The foreseeability of a maritime contestation is the primary element to be determined in order to establish whether the contestation satisfies the requirements of force majeure. As mentioned previously, the element of foreseeability extends to both the occurrence of the event as well as to its consequences. In the context of maritime zonal disputes, both the contestation and the consequent illegality or un-permissibility arising from this contestation must be unpredictable. Maritime zonal disputes arise initially from a lack of delimitation that supersedes the overlap of claims. However, the overlap of claims is not a fatal consequence of the lack of delimitation. It is therefore not necessary to predict an overlap of claims upon the mere lack of delimitation. Moreover, the lack of delimitation is not as such a decisive element in the prediction of a subsequent illegality or un-permissibility of a certain economic activity. Finally, the rules and factors governing delimitation in international law must be taken into consideration to assess if a contestation is predictable or not.

#### **a. The Difference between Undelimited Zones and Disputed Zones**

Each coastal state is entitled to an exclusive economic zone up to 200 nm. States define their maritime spaces by unilaterally establishing the limits of their maritime zones.<sup>116</sup> However, if these spaces are in contact with the space of another state, the sovereign rights of these states are considered overlapping. The resolution of this contact requires a delimitation between the concerned states. Hence, the difference between limitation and delimitation resides in the first being a national act and the second being an international act whether in form of agreement or a judicial decision.<sup>117</sup>

The lack of delimitation is not the corollary of a zonal dispute. The maritime zonal dispute being an overlap of claims over a defined area arises only when both states make their claims resulting in the contestation of each other’s claimed zone. The wording of articles 74 and 83 “pending agreement” creates uncertainty as to whether the obligations required by the articles are triggered by the mere lack of delimitation or by an overlap of claims.<sup>118</sup> The latter interpretation seems more adequate for practical considerations. There is no reason to assume an obligation of restraint on behalf of a coastal state whose maritime claim is not challenged by another state.

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<sup>114</sup> Lagoni, *supra* note 5 at 349–354.

<sup>115</sup> *Id.* at 349–354.; Oil and Gas Development in Disputed Waters under UNCLOS, *supra* note 5 at 67–69.

<sup>116</sup> see TANAKA, *supra* note 4 at 197.

<sup>117</sup> see *Id.* at 197.; Y. TANAKA, PREDICTABILITY AND FLEXIBILITY IN THE LAW OF MARITIME DELIMITATION 8–9 (2006).

<sup>118</sup> see REPORT ON THE OBLIGATIONS OF STATES UNDER ARTICLES 74(3) AND 83(3) OF UNCLOS IN RESPECT OF UNDELIMITED MARITIME AREAS / BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, 33 (British Institute of International and Comparative Law ed., 2016).

It is also not conceivable that a state's economic activity in a claimed maritime zone that is uncontested hampers or jeopardizes reaching a final agreement that would not eventually encompass the relevant zone. The tribunal's reasoning in both *Ghana vs Cote d'Ivoire* and *Suriname vs Guyana* indicates that the tribunals adopted the criteria of "overlapping claims" to deduce the scope of the dispute. In the first case, the tribunal begins the assessment of the legality of Ghana's conduct by determining Ghana's knowledge of the existence of a dispute. The lack of delimitation was not enough to determine such knowledge; in fact, the tribunal relied on previous correspondence between the two states indicating that specific areas were being disputed between the parties.<sup>119</sup>

Accordingly, the maritime zones falling outside the geographical scope of the claim of the other state cannot be considered disputed despite the lack of an official delimitation.<sup>120</sup> Unilateral activity in an un-delimited area falling outside the geographical scope of another state's contestation is not governed by the obligations provided by articles 74 and 83.<sup>121</sup>

## **b. The Geographical Scope of a Potential Contestation in Case of Lack of Delimitation**

The lack of a delimitation between two or more maritime zones in contact is susceptible to the creation of overlapping claims. The unsurmountable geography that makes it impossible for a state to claim a 200 nm area imposes on states the duty to make their claims upon different criteria and in good faith. The question is to determine the criteria upon which a state might formulate its claim in the absence of the applicability of the 200 NM rule. To answer this question, it is necessary to observe the law of maritime delimitation of overlapping maritime zones as reflected in jurisprudence and state practice, to determine what the scope of a state's claim and the potential area that might be disputed might be.

## **c. The Prevalence of the Equidistance Approach and Other Factors of Delimitation**

Articles 74(1) and 83(1) Of the UNCLOS provides "The delimitation of the exclusive economic zone/continental shelf with the opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."<sup>122</sup>

However, the convention does not provide a specific method for determining how a delimitation is made.<sup>123</sup> The methodology of maritime delimitation grew out of jurisprudence that began with the *North Sea Continental Shelf* case.<sup>124</sup> It is safe to affirm that established a corrective – equity approach to maritime delimitation has now been established.<sup>125</sup> This approach consists of a delimitation based upon three stages. The First stage is the establishment of a median line or an equidistant line between the base points of each state. The Second stage is a shift of this median line if relevant (geographical and non-geographical) circumstances justify it. The most important factors that are commonly retained by international tribunals are the configuration of the coasts and the coasts length. The third stage is a general test of equity, which is applied to determine whether the result of the first two stages is equitable.

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<sup>119</sup> *Ghana vs cote d'ivoire* para. 586

<sup>120</sup> Delimitation can take the form of a tacit agreement, contesting an area of a maritime claim of one state can be interpreted as an approval of this state's claim over the remaining area.

<sup>121</sup> A relevant case is occurring between Lebanon and Israel in east Mediterranean, there is no delimitation agreement between the two parties and their maritime claims overlap in certain areas (block 9). The Lebanese government accorded a consortium formed of TOTAL & ENI the right to begin exploration and in a later stage exploitation in the outer limits of the Israeli claims. Despite the latter's contestation, the operations are ongoing, Lebanon and TOTAL arguing the relevant area isn't disputed since falling outside the scope of the Israeli claim.

<sup>122</sup> Articles 74 and 83 of the 1982 UNCLOS.

<sup>123</sup> TANAKA, *supra* note 4 at 201; TANAKA, *supra* note 117 at 47.

<sup>124</sup> see D. ROTHWELL & T. STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* 397–398 (2010).

<sup>125</sup> see Laurent Lucchini, *La Délimitation des Frontières Maritimes dans la Jurisprudence Internationale: Vue d'Ensemble* 18, 5; TANAKA, *supra* note 10 at 125; TANAKA, *supra* note 12 at 204; D. ROTHWELL & T. STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* 398 (2010).

This method, despite giving tribunals a margin of appreciation that is based upon predictable factors like the geographical factors has the advantage of retaining a degree of predictability by incorporating the equidistance approach.<sup>126</sup>

#### d. The Predictability of a Zonal Contestation

Looking at it from an absolutist approach, a force majeure event is always predictable. To predict an event is to foresee the future according to an analysis of what is naturally, socio-politically and legally possible. Accordingly, only events that seem at the moment of making the contract impossible to happen can be qualified as force majeure. Therefore, a strike or a typhoon being a natural event, which occurs in nature in the abstract, cannot qualify as a force majeure. Following this logic, a contestation of a maritime area belonging to a state who has not delimited its maritime areas is always possible and therefore cannot be an unforeseeable event. However, as a commentator has noted, the law cannot ask someone to be a superhuman who can predict what is unpredictable.<sup>127</sup> Therefore, national laws do not adopt such an extreme interpretation of the element of foreseeability. All national laws tend to relax the notion of un-foreseeability to one degree or another. Likewise, contractual clauses adopting a force majeure regime are inclined not to tighten the degree of required foreseeability.<sup>128</sup>

Most national laws adopt a relative approach to the concept of force majeure and the element of foreseeability. This approach is followed by most long-term investment contracts seeking to establish a balance between the stability of the contract and the possibilities of the future. The expression of “reasonably foreseeable” seems to be a common instrument to indicate this approach. According to this approach, considering the lack of delimitation to be a reason to foresee a zonal contestation seems to be a higher threshold than indicated by the clause. This is still not a reason to completely eliminate the lack of contestation as an element of appreciation.

A contestation arising while investing in a non-delimited zone is always a possibility. However, the probable scope of the contestation should be a key element to determine whether it could have been reasonably expected. For instance, giving the prevalence of the equidistance method of delimitation, it is reasonable to assume that an opposite or adjacent state would possibly make a claim that corresponds approximatively to the equidistant line. Furthermore, an extreme concavity, convexity, or disproportionality of the relevant coasts should indicate that a claim from the other state that is shifting accordingly would not be an unreasonable claim. Therefore, one can assume that the closer the investment is to the equidistant line, the greater the foreseeability of a contestation encompassing the area of the investment.

Some notions of force majeure do not retain the foreseeability element. That approach is followed by some contracts.<sup>129</sup> The lack of un-foreseeability is not corollary with the event being already in place at the moment of the contract. For instance, if two parties agree invest in an already disputed zone; they cannot claim the dispute to be a force majeure at a later stage. (They can however claim the hazards arising from this dispute as will be addressed later). In such case, the parties are assumed aware of the already existing circumstance and assuming the relevant risks.

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<sup>126</sup> see TANAKA, *supra* note 4 at 207–209; see also TANAKA, *supra* note 117 at 331–355.

<sup>127</sup> Moisan, *supra* note 19 at 291.

<sup>128</sup> Muriel Marmursztejn, *Les Clauses De Force Majeure Dans Les Contrats De L'Amont D'Une Compagnie Petroliere: Une Etude de Cas*, 1998 INT. BUS. LAW J. 781–806, 720 (1998).

<sup>129</sup> See e.g. RSM Production Corporation v. Grenada, Award, ICSID Case No. ARB/05/14, 13 March 2009, *supra* note 9 ; the force majeure clause of this contract did not retain unforeseeability and opted to put an accent on the element of impossibility stating that : " In this Article the expression “force majeure” means any event beyond the reasonable control of the party claiming to be affected by such event which has not been brought about at its instance and which has caused such non-performance or delay in performance, including, Without limitation, market prices for Petroleum" .

However, not requiring foreseeability indicates that the parties have adopted a very low threshold in respect to foreseeing the future. Arguably, under a relaxed approach of un-foreseeability, the fact that a maritime area is not delimited or that it is disputed does not suffice as such as an event of force majeure. For instance, In *RSM vs Grenada*, the investment agreement between the parties has been concluded and the dispute between Grenada and its neighbors was already known. Applying a foreseeability test using a relative or absolutist approach would have resulted in considering the event as foreseeable. However, in this case, the parties and the tribunal agreed that the event was tantamount to a force majeure. The force majeure clause did not retain foreseeability as an element of force majeure. Despite that, the tribunal did not elaborate on the force majeure question, it seems that the Grenadian maritime dispute would have satisfied the element of force majeure as required by the contract.

## 2. “Irresistibility and Control” in Light of the Obligation to Seek an Arrangement

States in dispute shall make every effort to enter into a provisional agreement regarding economic exploitation. The procedural obligation mentioned here is not to actually enter into a joint agreement but rather to seek a practical arrangement.<sup>130</sup> The *Guyana/Suriname* tribunal defined the content of this obligation as a “conciliatory approach to negotiations”.<sup>131</sup> Accordingly, this obligation would be breached if one state insists on making no concession to reach an agreement. However, the obligation remains to seek an agreement in good faith and to make every possible effort to achieve that. The tribunal listed examples for what would be considered as acts of good faith in the relevant context such as “offering to share the result of the exploration...”.

This obligation provided in articles 74 and 83 of the UNCLOS is an obligation of conduct. States involved in a zonal dispute are encouraged to adopt an approach of understanding and make a credible effort to reach a mutual understanding upon their different interests. Otherwise, the conduct of the state would qualify as illegal.

In this sense, the provisions of articles 74 and 83 of the UNCLOS are coinciding with the requirement of “resisting the occurrence of the force majeure” to satisfy the element of irresistibility. Articles 74 and 83 are a special legal regime that constitutes a derogation from the normal regime governing the exploitation of Exclusive Economic Zones and Continental Shelves to an exceptional one aiming to coordinate the rights of the contesting states. Consequently, acting outside the realm of this regime by breaching its provisions makes the exploitation illegal. In order to resist making the exploitation illegal, states are meant to make the effort provided by articles 74 and 83.

The tribunal in *Guyana vs Suriname* considered that Suriname refusal to send a delegation to negotiate a practical arrangement with Guyana tantamount to a breach of the obligation in to seek the reach of an agreement.<sup>132</sup> It also sets examples for conduct that qualifies as a breach of the obligation to “seek an arrangement” such as not informing the other state about its activities in the contested area.<sup>133</sup> The latter argument was brought by Cote Ivoire against Ghana as evidence for the latter being in breach of the obligation to seek arrangement.<sup>134</sup> The tribunal’s reasoning is an example for how a host state might fail to fulfill its obligations in a maritime disputed zone, which may lead to render the exploitation unpermissible. In that case, the host state might also be found to have failed to fulfill its obligation to resist or avoid the occurrence of the force majeure.

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<sup>130</sup> see Enrico Milano & Irini Papanicolopulu, *State Responsibility in Disputed Areas on Land and at Sea* 54, 613–616 (2011); Lagoni, *supra* note 5 at 354–356.

<sup>131</sup> *Guyana/Suriname* case (Arbitral tribunal) (2007) para 461. See also *Cote D’Ivoire vs Ghana* para. 267

<sup>132</sup> *Guyana vs suriname* para 473

<sup>133</sup> *Guayana vs suriname* para. 477.

<sup>134</sup> *Cote D’Ivoire vs Ghana* para. 612.

### 3. “Impossibility” and Permissible Activities in Disputed Maritime Zones

The consequence of an event claimed to be a force majeure must be to render the execution of the relevant obligation impossible. In the realm of maritime contestations, the zonal dispute renders some activities un-permissible if performed unilateral by one of the contesting states.

#### a. The Obligation not to Hamper the Reach of a Final Agreement

The substantive obligation regarding the permitted economic activity in disputed areas rests on the requirement not to hamper or jeopardize the reaching of a final agreement. The ICJ in the *Aegean Sea* case explained the nature of this obligation as “the requirement not to cause irreparable damage”.<sup>135</sup> For instance, the exhaustion or the appropriation of the resources of the disputed area or the deformation of the natural environment can be qualified as an activity that causes irreparable damages.<sup>136</sup> These sorts of activities are susceptible of depriving the state to which the disputed area would be later gained from exercising its sovereign rights upon it. It is not irrational in that case to expect these activities to raise the political tension between the states in dispute who would want to preserve their future rights to exploit their natural resources. The reasoning of the ICJ was followed later in *Guyana vs Cote d’Ivoire* when the tribunal declared the seismic surveys occurring in the disputed area as legally permissible due to their lower threshold of impact.<sup>137</sup>

#### b. Permissible Unilateral Activities in Disputed Maritime Zones

The limitations of the permitted economic activities in disputed waters does not however diminish the scope of the economic activities occurring and susceptible to occurring in disputed waters. The offshore oil industry for example heavily relies on exploration activities. It requires an advanced level of technology and huge amounts of investments. The information that comes out of exploration is of huge value to any upcoming exploitation of a maritime zone. In this respect, petroleum contracts usually divide operations to two separate phases.

The first one is the exploration phase, which takes a long time to be achieved. The second is the exploitation phase. In many cases, companies operating in disputed zones make the choice of performing the first phase pending the resolution of the dispute.

Another growing field of maritime economic exploitation is the wind energy field. The progress realized in the offshore wind farms now permits to establishment of these farms in waters beyond the territorial waters where the density of winds is more adequate for the functioning of the farms. Moreover, windfarm activities are related to non-living (and non-exhaustible) resource, which makes them less susceptible to hampering the reach of a final agreement. The last decade has also witnessed the rise of a touristic exploitation of maritime zones. In the disputed waters of the South China Sea, the Chinese government has built a set of installation and artificial islands and it has started to organize a tourism industry around these installations and islands.<sup>138</sup>

A last example is the fishery industry. Despite being mainly preserved from foreign investments in practically all states, few states have started to allow the participation of foreign investors in this segment by establishing harvesting factories on the shores to process the production of fishing operations. Fisheries being a renewable non-exhaustible resource is also less susceptible of being framed of deprivation contesting states from their (possible) future sovereign rights.

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<sup>135</sup> *Aegean sea CS Case (n 11) para 33.*

<sup>136</sup> see Milano and Papanicolopulu, *supra* note 130 at 616; P. M. Blyschak, *Offshore oil and gas projects amid maritime border disputes: applicable law*, 6 J. WORLD ENERGY LAW BUS. 210–233, 229 (2013); Constantinos Yiallourides, *Calming the Waters in the West African Region: The Case of Ghana and Côte d’Ivoire*, 26 AFR. J. INT. COMP. LAW 507–526, 519 (2018); Lagoni, *supra* note 5 at 362.

<sup>137</sup> *Guyana/Suriname case (n 48) para 469.*

<sup>138</sup> see Ian Rowen, *Tourism as a Territorial Strategy in the South China Sea*, in ENTERPRISES, LOCALITIES, PEOPLE, AND POLICY IN THE SOUTH CHINA SEA 61–74 (Jonathan Spangler, Dean Karalekas, & Moises Lopes de Souza eds., 2018).

It is hard to establish a complete list of economic activities susceptible to occurring in deep maritime zones; however, the above-mentioned examples show that the range and scope of activities susceptible of being permitted even in disputed zones is still broad. That is of course acknowledging that it is impossible to make a preset list of permissible activities, each case should be assessed according to its own individual circumstances.

Accordingly, the primary determination should be whether the economic activity is permitted to be conducted unilaterally in a disputed zone. The substantive criteria of such determination are whether the activity irreparably damages the environment or the sovereign rights of contesting states. A seismic exploration for example should not qualify as hampering the reach of a delimitation or agreement since it does not cause damage or change to the environment. An exploitation drilling on the other hand could constitute an irreparable damage to the contesting state's sovereign rights if later attributed the disputed zone.

Obviously, force majeure does not necessarily lead to the termination of the obligation or of the contract. Rather it may lead only to its suspension if the event has a temporary nature. Also, the contract's suspension or the obligation's suspension period, requires a reasonable envisaged suspension period which does not discharge the contract of its substance and its value for the parties. The extent to which the period of suspension is reasonable, is a relative matter related to each case. The parties may agree on the periods and the mechanisms of this suspension -providing the notice, the agreement and the periods. Further, force majeure might be partial and not holistic. Meaning, it may lead to the impossibility of a contractual obligation but necessarily to the totality of the contract. In such cases, the force majeure event gives rise to the suspension of a part of the obligations for a temporary period that ends with the situation of force majeure.

An example is production-sharing agreements. In this type of agreement, the economic operation is divided into two consecutive and consequent phases.<sup>139</sup> The first one is the exploration phase and the second one is the exploitation phase. Despite being economically inseparable in certain cases, each phase is susceptible of being performed independently. A rise of a temporary force majeure can lead to a suspension of the second phase while permitting the first one. It is common that in disputed zones, companies and states start the exploratory activities until the prevention to continue the second part ends to gain time and money. In the *Cote d'Ivoire / Ghana* dispute for instance, the operator (Tullow Petroleum) and the host state (Ghana) decided to continue in its exploratory drillings until the tribunal had rendered its decision on delimitation.<sup>140</sup>

#### **4. Maritime Zonal Dispute as a Legal Impossibility**

From an abstract perspective, the impossibility arising from a maritime dispute as previously presented is a legal impossibility. The notion of impossibility as recognized in national laws is flexible enough to encompass cases of impossibility going from acts of god and material impossibility to relative impossibility and virtual ones, such as legal impossibility.

Contractual clauses seem to follow a relaxed approach to the notion of impossibility. As mentioned above the notions of relative, temporary and partial impossibility are not foreign to the construction of force majeure clauses in contracts. Moreover, virtual impossibility or legal impossibility seems to be an inherent element of the definition of force majeure in all relevant contractual clauses. The lesser degree of resistibility, the lesser the threshold of conduct imposed on the parties. The lesser the degree of impossibility leave to assume that force majeure in this context encompasses virtual impossibility including economic and legal.

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<sup>139</sup> see Julie Ing, *Production sharing agreements versus concession contracts* 37, 7; South East Asia Journal of Contemporary Business, Economics and Law, Vol. 4, Issue 3 (June) ISSN 2289-1560, , 4 8, 36 (2014).

<sup>140</sup> These drillings were later challenged by Cote D'ivoire as breaching the provisional measures rendered by the tribunal, a challenge that was rejected in the final decision. See *Cote D'ivoire vs Ghana* para. xx

The question however is more complicated in the realm of general international law / BITs. It is not clear if virtual impossibility falls within the scope of force majeure in customary law or not. The reluctance of international tribunals in elaborating on questions like economic impossibility makes it complicated to deduce a jurisprudential approach to this subject. The ILC draft articles have not made things easier by using the adjective “MATERIAL” to describe the required impossibility.

Most BITs do not contain specific provisions regarding force majeure or circumstances precluding wrongfulness in general. Hence, the applicability of customary international law, which makes it uncertain that, a case of legal impossibility could reach a positive end in a treaty / BIT claim. However, the USA model of NPM is quite evocative in this respect. It is possible that the *illustrative list* contained in this BIT could indicate that a circumstance precluding wrongfulness in the form of force majeure should be approached according to the characteristics of the events provided by the list. Those events are flexible and wide enough to encompass cases of virtual impossibility, namely legal impossibility.

### **III. PROVISIONAL MEASURES AND UNFAVORABLE DELIMITATION AS EVENTS OF FORCE MAJEURE**

The precedent part has examined the interaction between each element of the force majeure concept and the elements of a maritime zonal dispute. It has shown that a host state's ability to handle its international maritime disputes is highly dependent on the construction of the force majeure concept contained in its investment agreements and contracts. However, practice reveals that despite the legal qualifications and the material implications of a maritime contestation, an investment might well survive the occurrence of the dispute and continue to operate despite the existence of an ongoing dispute. This could be due to several reasons such as the political or military implication of the investor's home state<sup>141</sup> or a political environment inciting the parties to simply omit to trigger the force majeure clause.<sup>142</sup> This does not mean that the investment is immune from facing legal implications arising out of the contestation, which can also have the effect of crippling the investment and rendering its performance legally impossible. This part examines the main legal obstacles an investment might confront in disputed zones, provisional orders and final delimitation agreement. The peaceful resolution of a maritime dispute supposes that states can resolve their disputes through the reliance on a third party's decision or their capability to negotiate a mutual agreement.

This part will demonstrate that rigidly applied, the concept of force majeure can operate as an obstacle to the adherence of host states to the mechanisms of peaceful resolution of disputes through international instances. It is also susceptible of discouraging states from negotiating delimitation agreements in an effective and constructive attitude. However, a contextualist approach to the force majeure concept can enhance the chances of accepting the jurisdiction of international tribunals to resolve maritime disputes and the reaching of delimitation agreements.

#### **A. Provisional Measures**

As the appellation indicates, provisional measures aim to ensure that a provisional regime protects the potential rights of the parties. This purpose coincides with that of articles 74(3) and 83(3) of the UNCLOS, the similarities between the substantive conditions of provisional measures and the substantive obligations of states in disputed maritime zones are striking.

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<sup>141</sup> See *With ExxonMobil to Drill, US Navy Sending Ships, Marines Off Cyprus* – The National Herald, , <https://www.thenationalherald.com/192690/exxonmobil-drill-us-navy-sending-ships-marines-off-cyprus/> (last visited Mar 23, 2019). The US marine is said to have provided protection to Exxon Mobil drilling operations in the disputed zone between Cyprus and Turkey. The latter has previously prevented Italy's ENI from running an exploratory mission through alleged military intimidation.

<sup>142</sup> For instance, in the TEN field case, neither Ghana and Tullow have triggered the force majeure clause after the commencement of the dispute with Côte d'Ivoire but the activities were later suspended by a provisional order of a special chamber of ITLOS.

The function of provisional measures in the realm of a dispute regarding the sovereign rights of states in a contested zone is to recalibrate state's behavior in accordance with their obligations prescribed by articles 74(3) and 83(3). The obligation of states not to hamper or jeopardize the reaching of a final agreement have been extensively interpreted by tribunals as an obligation to refrain from inflicting irreparable damage to sovereign rights of other states.<sup>143</sup> The “irreparable damage” criteria as elaborated in *the Aegean case*<sup>144</sup> explains the authority of the findings of the Aegean Sea case tribunal.<sup>145</sup>

The previous assessment indicates that from a substantive standpoint, the conditions upon which a provisional measure / order would qualify as a force majeure are not different than what was examined earlier.

However, assessing the predictability of a provisional measure can be more complicated than assessing the predictability of a contestation. In addition to the substantive criteria addressed above, the question of the jurisdiction of a tribunal or instance to issue a provisional order is crucial to determine the predictability of such a measure. Generally, the lack of competence to issue a provisional order reduces the predictability of such order. On the other hand, the existence of a competent instance having jurisdiction to issue a provisional order enhance the possibility and predictability element.

However, despite being portrayed as a legal body heavily drawn onto compulsory jurisdiction<sup>146</sup>, the jurisdictional schema to order a provisional measure in the realm of a maritime dispute entails complications that deserve to be examined.

The obligations of conduct in respect to the occurrence of force majeure is also relevant in cases where the host state accepts the jurisdiction of the tribunal subsequent to the occurrence of the dispute. The force majeure event cannot be triggered by the behavior of the claimant party. The question that arises is whether a provisional measure hampering the investment is attributable to the host state, and therefore prevents it from claiming force majeure because it has accepted the tribunal's jurisdiction.

## 1. The Function and Purpose of Provisional Measures

Article 290 of the UNCLOS provides that “If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.”<sup>147</sup>

As indicated, the main purpose of the provisional measures is to preserve the rights claimed by a party when according to the circumstances; the nonprescription of these measures can impair these rights or leads to the aggravation of the dispute.<sup>148</sup> Provisional measures are ought to guarantee the serenity of an international adjudication by assuring the parties that their claimed rights will not become impossible to enjoy by the time a decision is made<sup>149</sup> or that a party might not instaur a “fait accompli” during the procedure.<sup>150</sup>

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<sup>143</sup> Guyana vs Suriname case para. 465,

<sup>144</sup> Aegean Sea, Interim Protection, Order, I.C.J. Reports 1976, p. 3, at para. 30.

<sup>145</sup> Oil and Gas Development in Disputed Waters under UNCLOS, *supra* note 5 at 73.

<sup>146</sup> Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT. COMP. LAW Q. 37–54, 37 (1997).

<sup>147</sup> UNCLOS, *supra* note 106 article 290.

<sup>148</sup> Santiago Torres Bernárdez, *Provisional Measures and Interventions in Maritime Delimitation Disputes* 30, 37; CAMPBELL McLACHLAN, *Interim Measures in International Law / Les mesures provisoires en droit international* 12, 7.

<sup>149</sup> Thomas A Mensah, *Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)* 12, 43 (2002).

<sup>150</sup> Natalie Klein, *Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes* 39, 427.

The provisional measures prescribed by a tribunal can take the form of a prohibition to conduct certain activities<sup>151</sup>, to suspend ongoing activities<sup>152</sup>, to refrain from divulging information related to the ongoing activities to third parties<sup>153</sup> or to limit activities.<sup>154</sup> The key question upon which the nature of the provisional measures depends is what harm the claimant is afraid of suffering<sup>155</sup> and the adequacy of the requested provisional measure to deal with this potential harm. For instance, in *Cote D'Ivoire vs Ghana* the claimant argued that it could suffer considerable and irreparable damage if it cannot conserve the exclusivity of the information obtained from the exploration activities, which led the tribunal to prescribe a prohibition upon Ghana to divulge the results of the exploration operation.<sup>156</sup>

## 2. The Question of Jurisdiction to Order a Provisional Measure and Predictability

A preliminary requirement to the admissibility of a provisional measure request is the existence of a dispute that is duly submitted to the court or the tribunal. By consequence, a request of a provisional measure is organically related to the existence of a dispute duly submitted regardless of the stage of the proceedings.<sup>157</sup> The word “dispute” has a double meaning in this respect. The First is the legal sense of the word dispute.<sup>158</sup> Accordingly, a litigatory relationship must exist between the parties according to the provisions of the convention and the statute of the court or tribunal. This relationship is established based on the prior ratification either of UNCLOS or by special agreement. Second, there must be convergence on the interpretation of the provisions of the convention. A dispute related to the interpretation or application of a body of law other than UNCLOS would fail to qualify as a “dispute” in the sense of article 290 unless an incidental jurisdiction is established.

The second sense overlaps in some respect with the condition of prima facie jurisdiction. The court or tribunal must satisfy that it has a prima facie jurisdiction upon the dispute submitted to it. It has been argued that the threshold of jurisdiction in the realm of provisional measures is lower than what is required in general jurisdiction.<sup>159</sup> Therefore, it is not unconceivable that a court declares a prima facie jurisdiction to find later that it lacks jurisdiction to hear the dispute.<sup>160</sup>

UNCLOS has a clear penchant for compulsory jurisdiction.<sup>161</sup> However, exceptions to the compulsory jurisdiction have been reiterated in article 290 in order to deflate a state's reservations to a constraining regime. Accordingly, disputes about delimitation and the management of living resources are excluded from the compulsory regime instated by article 290.

The recurrent question for the purpose of this study is the question of jurisdiction to hear a case concerning the sovereign rights entitled by articles 74 and 83. If the host state is a member of UNCLOS and has declared an exemption from the compulsory jurisdiction of delimitation cases, a tribunal constituted under UNCLOS would still have jurisdiction to hear a dispute related to the exercise of sovereign rights in a disputed zone, and potentially the jurisdiction to order provisional measures.

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<sup>151</sup> Cote D'Ivoire request for provisional measures para. 108 (a)

<sup>152</sup> Id para. 108 (a)

<sup>153</sup> Cote D'Ivoire request for provisional measures para. 108(b)

<sup>154</sup> Id.

<sup>155</sup> Klein, *supra* note 150 at 427.

<sup>156</sup> Cote D'ivoire request for provisional measures para. 108

<sup>157</sup> Bernárdez, *supra* note 148 at 44.

<sup>158</sup> Francisco Orrego Vicuña, *The International Tribunal for the Law of the Sea and Provisional Measures: Settled Issues and Pending Problems*, 22 INT. J. MAR. COAST. LAW 451–462, 454 (2007).

<sup>159</sup> Antonios Tzanakopoulos, *Provisional Measures Indicated by International Courts: Emergence of a General Principle of International Law Premiere Partie - Articles*, 57 REV. HELL. DROIT INT. 53–84, 66 (2004).

<sup>160</sup> Tzanakopoulos, *supra* note 159.

<sup>161</sup> Boyle, *supra* note 146; Alexander Proelss, *THE LIMITS OF JURISDICTION RATIONE MATERIAE OF UNCLOS TRIBUNALS* 15, 49–50.

A zonal maritime dispute is primarily a dispute between states on the interpretation or the application of the provisions of articles 74(1) and 83(1) UNCLOS. This dispute entails and encompasses complications regarding the management of state's sovereign rights in the disputed zone, the latter not being necessarily addressed by the exception to compulsory jurisdiction. This corollary between multiple (issues) creates doubts as to whether a tribunal would have jurisdiction over a dispute covered by the "exempting" clause that is linked to another non-exempted dispute.

The case law provides us with contradictory indications in this respect. In the *Chagos MPA case*, the tribunal adopted a progressive approach to the interpretation of article 297(3) which excluded the management of living resource from compulsory settlement, by ruling that the question of fishery management despite being initially outside the scope of compulsory jurisdiction, could well fall within this scope as an environmental dispute according to article 297(1).<sup>162</sup> A similar reasoning was adopted in the South China Sea case where the tribunal<sup>163</sup> responded to the Philippine request to decide whether low tide elevation rocks would qualify as an island capable of generating an EEZ in the sense of UNCLOS. Despite being related to the maritime delimitation dispute of the parties which should be outside the scope of compulsory jurisdiction and despite that the qualification of "island" would have a direct impact of the parties maritime claims, the tribunal considered that Philippines request was built upon a dispute regarding the interpretation of an article of the convention that is not exempted from compulsory jurisdiction, regardless of the effects that would have on the delimitation dispute<sup>164</sup> (delimitation and historic titles).

The approach followed by the tribunals indicates that the jurisdiction of the tribunal is assessed based on the source of the legal claim or dispute regardless of its link with a potentially (exempted) dispute. Accordingly, the link between the claim and the (exempted) dispute should not prevent the tribunal from ruling on the case.

In the case of articles 74(3) and 83(4), it is clear that a dispute regarding the management of state's sovereign rights in a disputed zone is directly related to a dispute regarding the interpretation or application of maritime delimitation rules.

A contractionist approach entails putting these kinds of disputes within the scope of delimitation disputes and prohibiting the jurisdiction to rule over such disputes, hence decreasing the predictability of the occurrence of a provisional measure.

An expansionist approach on the other hand would argue that the sovereign rights of states in maritime zones are governed by articles 74(3) and 83(3), which separates their origin from that of delimitation provisions originating from articles 74(1) and 83(1). Moreover, a decision on the management of sovereign rights in a disputed zone cannot be said to influence the outcome of the dispute. As established, the regime managing the sovereign rights in a disputed zone is inherently of a provisional nature. The tacit or explicit arrangement and the policy of states regarding the exercise of their sovereign rights should not have an effect of the final delimitation. Articles 74(3) and 83(3) clearly provide that provisional arrangement are without effect on the final delimitation. Moreover, the jurisprudence is settled on the rule saying that resource and their management are not an indicator as such to the existence of an agreement onto a maritime boundary.

In assessing the "jurisdiction" issue in respect to predictability, it is arguable that the ratification of UNCLOS makes the occurrence of a provisional measure an anticipated legal event. The declaration of a host state regarding exceptions to compulsory jurisdiction is not a reason for diminishing the probability of such an event to happen. The degree of predictability of a legal event such as a provisional measure would depend on the requirements of the governing law of the investment. Unpredictability is enhanced if the host state is not a signatory of the UNCLOS.

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<sup>162</sup> Alan Boyle, *UNCLOS DISPUTE SETTLEMENT AND THE USES AND ABUSES OF PART XV* 24, 192.

<sup>163</sup> constituted pursuant to article 287 annex VII

<sup>164</sup> Yuki Morimasa, *How do the compulsory dispute settlement procedures of the United Nations Convention on the Law of the Sea deal with disputes concerning land sovereign issues?* 49, 26–31.

The degree of unpredictability decreases if the host state is a signatory of the UNCLOS, the declaration of an exception (of delimitation disputes) should not have an effect in this respect. Finally, the occurrence of a provisional measure becomes highly predictable if the host state has made no reservations to the compulsory jurisdiction in the LOSC.

### 3. Subsequent Jurisdiction and the Element of Exteriority

In some cases, the investment might take place in a host state that is not bound by the provisions of UNCLOS, yet at later stage, the host state might accept the jurisdiction of an international tribunal-giving rise to a provisional measure hampering the investment. This is the case in the Ghana vs Cote d'Ivoire dispute. At the time of the conclusion of several contracts between foreign investors and Ghana, the latter has previously triggered (the exceptionality clause) in 15 December 2009 to remove delimitation disputes from the scope of compulsory jurisdiction.<sup>165</sup> However, in December 2014 Ghana signed a special agreement with Cote d'Ivoire accepting to submit their maritime dispute to a special chamber of ITLOS. Later on, the tribunal ordered a moratorium on Ghana's activities in the disputed area upon Ivorian request of provisional measure. The tribunal's order has led to the suspension of several ongoing activity occurring in the contracted area.<sup>166</sup> The tribunal's order being a temporary undetermined legal obstacle before the continuity of the investments could have been the basis of a force majeure claim by any of the parties if it met the relevant requirements. However, the problem arising from this specific situation is the question of whether the provisional order can be considered the result of Ghana's conduct and therefore preventing Ghana from claiming force majeure.

It is a general characteristic of force majeure that it should not be the result of a party's conduct. However, the degree of attributability of the force majeure event to a party's conduct varies from a clause to another.

As illustrated earlier, an absolutist approach to exteriority means that the party should not have contributed to the occurrence of the force majeure event nor directly neither partially. Accordingly, it is possible to argue that Ghana would have been unable to claim force majeure in respect to the provisional order of the court.

A relaxed approach diminishing the required threshold such as the contract's clause requiring the force majeure to be beyond the "reasonable control" of the parties should result in a different outcome. Accordingly, the conduct of the parties should be assessed objectively taking into consideration the normal expected conduct in a given situation. The effect of the contribution of this conduct in the occurrence of the force majeure event should be attenuated by the reasonability and normality of the conduct. In the Ghana example, the question is whether the Ghana agreement to peacefully resolve the maritime dispute with Cote d'Ivoire through international adjudication is beyond the normal conduct states are supposed to follow in this context and should the presence of foreign investment in the disputed area be an obstacle before Ghana opting for such adjudication.

The tribunal in *RSM vs Grenada* has addressed the question of resorting to litigation in the context of assessing Grenada's conduct regarding force majeure. RSM claimed that Grenada failed to adopt the proper conduct towards the removal of the force majeure by refusing to bring Trinidad and Venezuela to litigation. Grenada on the other hand countered RSMs claim by emphasizing both legal and political reasons according to which litigation seemed unreasonable from the Grenadian view. The tribunal accepted Grenada's claim, affirming that resortion to international adjudication isn't an international obligation and that the appreciation of such policy shouldn't be transferred from the discretion of the sovereign

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<sup>165</sup> Declarations or Statements upon UNCLOS ratification,, [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#Ghana](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Ghana) (last visited Mar 20, 2019).

<sup>166</sup> benson, *Oil drilling to resume offshore Cape Three Points by year end*, HOME | GOLDSTREET BUSINESS (2018), <https://goldstreetbusiness.com/news/oil-drilling-to-resume-offshore-cape-three-points-by-year-end/> (last visited Mar 20, 2019).

state to a private party. Moreover, the tribunal seems to have acknowledged the reasonability of Grenada's omission to resort to litigation for reasons of public policy of the state.<sup>167</sup>

Contrarily, it can be said that the choice of a sovereign state to settle its disputes by the means permitted by international law including litigation seems like a normal conduct. Assuming that the maritime dispute originated from different interpretations of legal and factual rules, it is assumed that both contesting states have good reasons to believe in their righteous entitlement to their claimed zone. It also seems a reasonable conduct to try to establish these entitlements through international adjudication as a mean of the peaceful settlement of disputes. Accordingly, a contextualist interpretation of the force majeure concept should assume that the parties have anticipated the possibility of an international adjudication.

## B. Unfavorable Delimitation

The regime governing the exploitation of disputed maritime zones is meant to be temporary, hence the appellation "provisional". Even though maritime delimitation can take decades to be achieved and even though states might opt to instaure a provisional arrangement that could last for decades, maritime boundary disputes ought to be resolved. The delimitation of a disputed maritime zone might become fatal to an investment if the delimitation turns out to be unfavorable to the host state by transferring its location to the definitive maritime zones of the contesting state.<sup>168</sup> On the one hand, the lack of a contractual framework between the investor and the contesting state deprive the former from an elementary layer of protection as a foreign investor. On the other hand, presuming that a BIT exists between the investor's home state and its new host, it is doubtful that a BIT would encompass investments made in the territory of the contesting state of a disputed maritime zone. Therefore, it is also possible that the investment also loses the protection of this international instrument. The problem is more acute if the hampering of the investment in such case is found to be due to the conduct of the initial host state by virtue of a delimitation agreement transferring the investment to the geographical scope of the contesting state.

Delimitation agreements usually follow the criteria found in adjudicational delimitation. Accordingly, the equidistance approach occupies a major position as to the guidelines of delimitation agreements especially in the case of opposite coasts.<sup>169</sup> Other geographical factors have minorly influenced the delimitation agreements such as the configuration of coasts<sup>170</sup>, proportionality,<sup>171</sup> the presence of islands,<sup>172</sup> straight baselines<sup>173</sup> geological factors,<sup>174</sup> . Non-geographical factors such as economic factors have also minorly influenced delimitation agreement.

It would be unrealistic to think that the presence of confirmed or potential resources is absent from the background of a delimitation negotiation, the whole purpose of maritime delineation being the management of natural resources. Accordingly, there is no reason to assume that the presence of resources has not played a role in the negotiations that preceded the agreement despite not being a legal criterion to delimitation. Interestingly thought, despite being affirmatively not a factor of the law of maritime delimitation, the presence of natural resources has directly and explicitly determined the frame of some delimitation agreements. The presence of an investment in a given maritime area is probably an indication of the presence of valuable resources; it is therefore not strange that a negotiation on delimitation encompasses the invested area.

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<sup>167</sup> RSM Production Corporation v. Grenada, Award, ICSID Case No. ARB/05/14, 13 March 2009, *supra* note 97 at 330.

<sup>168</sup> Sim, *supra* note 9; Tzeng, *supra* note 9.

<sup>169</sup> TANAKA, *supra* note 117 at 132–137.

<sup>170</sup> *Id.* at 152–160.

<sup>171</sup> *Id.* at 179–182.

<sup>172</sup> *Id.* at 207–2017.

<sup>173</sup> *Id.* at 225–230.

<sup>174</sup> *Id.* at 234–237.

Moreover, the complexity and longevity of maritime border disputes can be an incentive for states involved in the dispute to make concessions from their original positions in return for the resolving of the dispute

## 1. Unfavorable Delimitation and Foreseeability

Most maritime delimitations occur through the process of agreement. Delimitation through agreement might enjoy a certain preference for states who are not keen on involving third parties regarding the settlement of their maritime boundaries.<sup>175</sup> Delimitation through adjudication might also be perceived as unpredictable and uncontrollable in cases where the application of delimitation rules do not lead to a clear cut result in demarcating the contesting state's claims.<sup>176</sup> In fact, articles 74 (1) and 83(1) clearly emphasize the prominence of agreements as the primary mean of boundary dispute settlement.

As one commentator has observed, one possible explanation for the prominence of delimitation agreements in force, is the easiness of these cases in comparison with those that have not been settled yet.<sup>177</sup> Accordingly, it can be argued that the easiness and clearness of a maritime zonal dispute is more susceptible of being resolved by means of agreement, hence increasing the predictability of the occurrence of a negotiation process and potentially an agreement. This remains depending on the circumstances surrounding each dispute, which can negate this effect.

Another element that might indicate the possibility of an engagement in negotiations to delimit disputed maritime boundaries is the lack of jurisdiction of a competent instance to adjudicate onto the dispute. Dispute settlement through adjudication is one of the means to resolve maritime boundaries disputes. Its absence as a viable alternative by the parties enhances the predictability of the parties resolving to negotiations and agreement. A nuanced view should also be taken in consideration if the surrounding circumstances invites it.

The predictability of the transfer of sovereignty as an element of force majeure becomes more persistent if the investment is established in a disputed zone where the host state is engaged in a negotiation process with a contesting state at the time the investment is made. Unless otherwise proven, the ongoing negotiations presume the host state's readiness to draw back from its initial claim. Accordingly, the transfer of sovereignty should become more or less predictable with an investment established in the near proximity of the equidistance line. For instance, both Guyana and Venezuela have been engaged in a long-standing maritime dispute going back to 1899. The negotiations between the two contesting states has been on and off for nearly fifty years.<sup>178</sup> If an investor decided to establish the investment in near proximity of the median line separating the contesting claims knowing the existence of negotiations, it can be assumed that the investor has born the risk of an unfavorable delimitation.<sup>179</sup>

## 2. Delimitation Agreements and "Sphere of Control"

Generally, the irresistibility of a legal impossibility constituting a force majeure resides primarily in the fact that the occurrence of the legal situation (promulgation of a law, legal situation) is independent from the party's (will) and that the parties have no means to overcome the legal impossibility.

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<sup>175</sup> International Law and Negotiated and Adjudicated Maritime Boundaries: A Complex Relationship  
Alex G. Oude Elferink

<sup>176</sup> Pappa, *supra* note 8 at 3.

<sup>177</sup> TANAKA, *supra* note 117.

<sup>178</sup> APPLICATION INSTITUTING PROCEEDINGS IN THE INTERNATIONAL COURT OF JUSTICE  
CO-OPERATIVE REPUBLIC OF GUYANA v. BOLIVARIAN REPUBLIC OF VENEZUELA para 8

<sup>179</sup> This scenario assumes a simple case clear of relevant geographical or non-geographical circumstance for the purpose of making an illustration.

As presented in the case of provisional measures and the occurrence of a maritime contestation, the source of the legal regime and its effects emanates from a body of laws that are initially independent from the parties will. In some cases, the means of overcoming the legal impossibility resulting from such cases exist but the law that imposes the impossibility is independent of the parties will.

The situation is different in case of a delimitation agreement since the legal event in question such as the transfer of sovereign rights is the act of the host state / party and therefore attributed to it. A delimitation agreement depends of the choice and appreciation of the state of its own interests, there is room for arguing that in such case a state / party should bear the consequences of its sovereign actions in respect to a third parties' interest.

However, such interpretation of the notions of irresistibility and control can hamper the objectives of articles 74 and 83. The interim regime governing the exploitation of resources in disputed areas is meant to balance between the need to use resources and the peaceful settlement maritime disputes. Accordingly, the exploitation of resources should not become a reason for contesting state's inability to reach a final agreement. It is presumed that a negotiation in good faith entails party's willingness to abandon their initial positions to reach a middle ground of agreement. As the ICJ provided in *North Sea* case, the parties of a negotiation "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it"<sup>180</sup>

It is obvious that the presence of resources can be a determinant factor in the realm of maritime delimitation agreements. The economic harm that a host state / party may encounter in the event of a transfer of sovereign rights might act as a deterrent for the state to negotiate with a readiness to give up some of its initial position. The whole purpose of negotiation in that case becomes frustrated. Moreover, it might be in the best interest of the host state to accept a concession of a disputed zone in exchange for an equivalent concession from the contesting state or for the sake of reaching a final agreement pursuant to the objectives of UNCLOS.

A more relaxed interpretation of the notion of (irresistibility and control) is envisageable according to the usage of the wording (reasonable control) in long-term investment contracts as a required threshold. The reasonability of the state/party's conduct will of course remain an objective question to be appreciated according to the circumstances of each case. However, taking into consideration the characteristic and complexity of a given maritime dispute might provide a basis for arguing the reasonability of the host state's conduct.

### **3. Unfavorable Delimitation and the Element of Irresistibility**

If an event of force majeure occurs, the parties are under an obligation to overcome the effects of the event qualified as such. Some agreements reiterate this obligation by providing for detailed provisions on the way and means parties should overcome the effects of the force majeure. Even if an agreement omits to explicitly provide for this obligation, it remains the positive façade of the notion of irresistibility. Accordingly, it has been ruled that the blockade of the Suez Canal could not be considered as a force majeure because the transporter could overcome this event by using another maritime path despite being more onerous.<sup>181</sup>

Practice has shown that a delimitation agreement transferring the sovereign rights of a maritime zone does not necessarily entail the ignorance of economic resource and interests of private third parties. In the *1909 Grisbadarna case*, the Permanent Court of arbitration in the maritime delimitation between Sweden and Norway opted for a shift of the median line between the two parties, taking in consideration the presence of third parties interest that would be transferred to Norway if the median line is confirmed according to the latter's proposal.<sup>182</sup> This jurisprudence has been abandoned since and it is settled now that the presence of resource is not as such a legal factor of maritime delimitation.

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<sup>180</sup> North Sea continental shelf cases, judgment of 20 February 1969, para. 85(a).

<sup>181</sup> E. MCKENDRICK, FORCE MAJEURE AND FRUSTRATION OF CONTRACT 43 (2013).

<sup>182</sup> J A Loeff, F V N Beichmann & K Hj L Hammarskjöld, *Unofficial English Translation* 9, 6.

Despite economic resources having a minor impact on delimitation agreements in general,<sup>183</sup> the presence of economic resources and the interests of third parties have been taken in consideration in some maritime delimitation agreements in several forms.<sup>184</sup> For instance, the 1988 agreement on the delimitation of the continental shelf between Sweden and the Soviet Union if each party is entitled to a specific tonnage of fisheries in area falling within the jurisdiction of each other party.<sup>185</sup> In 1993, as a deblocage of their long lasting maritime dispute<sup>186</sup>, Senegal and Guinea Bissau opted for establishing a joint development venture to explore and exploit the resources of their disputed maritime zone.<sup>187</sup> The agency created by this agreement has been given exclusive titles to the resources of the disputed zone as well an independent legal personality.

Finally in the 2000 Nigeria and Equatorial Guinea agreement concerning their maritime boundaries,<sup>188</sup> it is provided that if the maritime boundary “ run through any field of hydrocarbon deposits so that part of the field lies on the Nigerian side of the boundary and part lies on the Equatorial Guinea side, the Contracting Parties shall seek to reach appropriate unitization arrangements for each such field”.<sup>189</sup> It is also provided that “ the Contracting Parties shall authorize the relevant government entities in association with the relevant concession holders to establish appropriate unitization and other arrangements to enable this area to be developed in a commercially feasible manner”<sup>190</sup>

As shown from the preceding examples, the submission of an investment to the scope of the sovereignty of a contesting state (potentially hampering the investment) is not a fatality in respect of maritime delimitation. It exists several approaches to provide the investment a proper protection and to protect the interests of private parties. The examples of the Senegalese agreements show that the parties haven’t necessarily put the accent onto a definitive delimitation which facilitated the creation of the joint venture. However, in the Nigerian agreement, the parties have opted for a definitive demarcation of their maritime boundaries. Nevertheless, that did not prevent them from guaranteeing the stability of the private interests lying on the border line as explicitly mentioned in their agreement. Accordingly, it can be argued that the impact of an unfavorable delimitation can be resisted or avoided by means already experimented in international practice. The obligation to resist or avoid the effect of an unfavorable delimitation remains however an obligation of conduct, each case according to the surrounding circumstances

#### 4. Unfavorable Delimitation as an Event of Force Majeure

A rigid interpretation of the concept of force majeure in the realm of maritime delimitation agreements could hamper states ability and margin of maneuver to conclude such agreements.

Rigidly approached, the outcome of a boundary delimitation is initially dependent on the host state’s will either by reaching an agreement or by leaving the faith of the dispute to a third party. According to this interpretation, there is no reason to assume that the host state accepted the establishment of a private investment while intending to concede its maritime claim.

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<sup>183</sup> TANAKA, *supra* note 117 at 276.

<sup>184</sup> *Id.* at 276–288.

<sup>185</sup> Agreement on Principles for the Delimitation of the Sea Areas in the Baltic Sea between the Kingdom of Sweden and the Union of Soviet Socialist Republics, 13 January 1988 SWEDEN, , <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SWE.htm> (last visited Mar 28, 2019).

<sup>186</sup> Ifesinachi Okafor-Yarwood, *The Guinea-Bissau–Senegal maritime boundary dispute*, 61 MAR. POLICY 284–290 (2015).

<sup>187</sup> MASAHIRO MIYOSHI & CLIVE SCHOFIELD, THE JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS IN RELATION TO MARITIME BOUNDARY DELIMITATION 35 (1999); TANAKA, *supra* note 117 at 283.

<sup>188</sup> NIGERIA, , <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/NGA.htm> (last visited Mar 28, 2019).

<sup>189</sup> Treaty between the Federal Republic of Nigeria and the Republic of Equatorial Guinea concerning their maritime boundary, 23 September 2000 article 6(1)

<sup>190</sup> *id.* Article 6(2)

The host state's acceptance of a private investment in its claimed maritime zone should be a decreasing factor to the probability and predictability of the former to concede its claimed zone. Reaching a delimitation agreement is not an obligation under international law. Accordingly, the conclusion and the outcome of the agreement are not only within the control of the host state but the effects resulting from the agreement could be attributed to the host state's conduct.

On the other hand, a relaxed approach to the concept of force majeure would enhance state's ability to balance between the purposes of peacefully settling its maritime disputes and the preservation of investor's interests. As shown, a relaxed interpretation of the concept of force majeure still retains a degree of predictability to the host state's conduct. It also still requires that the circumstances surrounding a given dispute reasonably justify the conclusion of an unfavorable agreement. Moreover, several mechanisms exist to protect the integrity of the investment in case of an unfavorable delimitation. This relaxed approach is sustained by the clauses of force majeure found in most investment agreements and several NPM clauses.

## CONCLUSION

The concept of force majeure is a flexible concept. It is susceptible to being narrowed down to a very limited scope that encompasses a limited number of events, but it is also susceptible of being broadened to encompass unlimited possibilities. The scope of the force majeure concept depends on whether it is built upon a subjective or an objective approach. The more subjective and contextualist it is, the more ability it has, to encompass events which would not traditionally fall within its scope. As a doctrine construed to protect the debtor from perturbations susceptible of occurring during the contractual relationship, it is in the interest of the debtor to widen the scope of this doctrine.

The main problem this research examined is the problem of the revocation of a state's permission for a foreign investment to operate in a subsequently disputed maritime zone. In this schema, the state is the debtor of the obligation to permit the investment to operate. This research established that to determine if a maritime contestation is tantamount to an event of force majeure, the dispute must be deconstructed and analyzed according to the multiple elements of the concept of force majeure. Once this is done, the outcome of this equation would vary according to the approach followed in evaluating whether a force majeure exists or not. An objective analysis of the concept of force majeure would probably tighten up its scope and may potentially be a burden on state's margin of maneuver to handle its maritime disputes.

The collision between the necessities of foreign investments protection on the one hand and the peaceful resolution of maritime disputes on the other may hamper the development of disputed maritime zones as conceived by the UNCLOS III. However, practice have shown that international contracts followed by international investment agreements tend to adopt a subjective approach to the force majeure concept. Accordingly, the concept of force majeure starts to encompass situations that would not have normally been encompassed by the objective approach. Hence, giving host states more freedom in claiming force majeure for the purpose of peacefully settling their maritime dispute, abiding with judicial orders and entering into maritime delimitation agreements. In the meantime, investors are not left without safety measures to cope with the expansion of host state's ability to claim force majeure. The outcome of a successful force majeure invocation is not necessarily the end of the investment.

Partial and temporary suspension of the agreement is well elaborated in national, international law, international contracts usually contain elaborated procedures governing the post-force majeure phase allowing them to enter into a renegotiation of their agreements and States are still expected to look after the investment's interest in case of a delimitation agreements. It is therefore safe to argue that the balance or the imbalance in the host state – investor relation within a force majeure schema is highly dependent on the approach taken to address the force majeure concept.