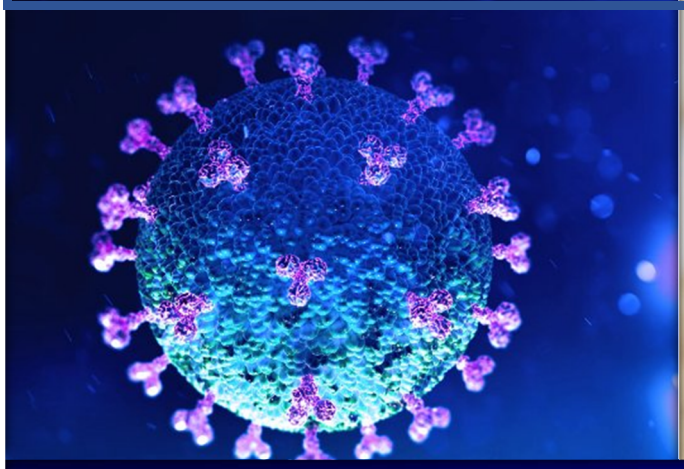
Gli effetti dell'emergenza Covid-19 su commercio, investimenti e occupazione

Una prospettiva italiana

a cura di

Pia Acconci **Elisa Baroncini**



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Questo volume è stato sottoposto a una procedura di valutazione anonima da parte di due *referees*.

Dipartimento di Scienze giuridiche Direttore Michele Caianiello Università di Bologna
Via Zamboni 27/29 40126 Bologna

ISBN – 9788854970243
DOI – 10.6092/unibo/amsacta/6440

Editing dei contributi, impaginazione, copertina e quarta di copertina: dott. Francesco Paolo Cunsolo, dott. Gian Maria Farnelli

Immagine di quarta di copertina: Carta di Frederick de Wit, sec. XVIII, Museo di Palazzo Poggi, Sistema Museale di Ateneo, Alma Mater Studiorum - Università di Bologna. Si ringraziano il Presidente del Sistema museale d'Ateneo, prof. Roberto Balzani, e la dott.ssa Cristina Nisi, dei Servizi tecnico-museali dell'Alma Mater Studiorum – Università di Bologna

Prima edizione: luglio 2020

Co-funded by the
Erasmus+ Programme
of the European Union

La pubblicazione del presente volume rientra tra le attività di divulgazione dei risultati delle attività del Modulo Jean Monnet (Programma Erasmus+) su "EU Investment Law" (EUIL) finanziato dall'Agenzia Esecutiva per l'Istruzione, gli Audiovisivi e la Cultura (EACEA) dell'Unione Europea (project number 600086-EPP-1-2018-1-IT-EPPJMO-MODULE), di cui è coordinatore scientifico la prof.ssa dr. Pia Acconci (2018-2021). I contenuti riflettono le opinioni degli autori. La Commissione non ne è responsabile ad alcun titolo.
This book is published as an implementing activity of Jean Monnet Module (Program Erasmus+) on "EU Investment Law" (EUIL) with the support of the Erasmus+ Program of the European Union under the Jean Monnet Action (2018-2021) coordinated by prof. dr. Pia Acconci (project number 600086-EPP-1-2018-1-IT-EPPJMO-MODULE). The contents reflect the views only of the authors. The Commission cannot be held responsible for any use which may be made of the information contained therein.

Con la collaborazione di ILA Italy - Sezione italiana dell'International Law Association

Con la collaborazione del Gruppo di interesse della Società Italiana di Diritto Internazionale (SIDI) sul diritto internazionale dell'economia (DIEcon)

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NOTA DELLE CURATRICI

Il presente volume nasce grazie alle attività del Modulo *Jean Monnet* "EU Investment Law" (EUIL) di cui è coordinatrice scientifica Pia Acconci, in collaborazione con il Gruppo di interesse sul "Diritto Internazionale dell'Economia" della Società Italiana di Diritto Internazionale e dell'Unione Europea (SIDI), di cui è co-coordinatrice Elisa Baroncini, e con l'*ILA Italy* - Sezione italiana dell'*International Law Association* (ILA). Esso propone a studenti, accademici, amministratori di enti pubblici e organismi privati chiavi di lettura variegate delle modalità di risposta alle emergenze sanitarie collettive e alle crisi economiche transnazionali.

La sua realizzazione ha visto il fondamentale supporto di AlmaDL, la Biblioteca digitale dell'Ateneo di Bologna, che, attraverso il servizio AMS Acta, consente di pubblicare prontamente, digitalmente e in open access. Altrettanto prezioso è stato l'accurato lavoro di impaginazione e definizione delle copertine del Dott. Francesco Cunsolo e del Dott. Gian Maria Farnelli. A loro e ad Alma DL esprimiamo la nostra gratitudine, come pure al Sistema museale dell'Ateneo di Bologna per l'uso della Carta di Frederick de Wit nella quarta di copertina. Ringraziamo inoltre i servizi di comunicazione dei nostri rispettivi Atenei per la promosione dell'opera e infine tutti gli organi della SIDI e dell'*ILA Italy* per il patrocinio.

Pia Acconci Elisa Baroncini

Teramo e Bologna, luglio 2020

PREFAZIONE

Pia Acconci

L'emergenza sanitaria internazionale generata dalla nuova malattia infettiva Covid-19 ha minato gli scambi transnazionali e gli investimenti all'estero, nonché peggiorato il tasso di disoccupazione in molti Stati tanto economicamente avanzati quanto in via di sviluppo. Il lungo periodo di quarantena istituito dai governanti di numerosi Stati – col corollario della chiusura di molte attività produttive e sospensione dell'erogazione di servizi, alcuni anche di pubblica utilità – è considerato la causa principale di quest'altra emergenza. È diffuso inoltre il timore che i provvedimenti nazionali di quarantena, ripercuotendosi negativamente sul sistema economico mondiale, possano provocare una recessione sistemica di portata equiparabile a quella avvenuta un secolo fa circa, successivamente alla nota epidemia di "influenza spagnola", con culmine nel 1929. Esiste tuttavia una differenza significativa tra quel momento storico e quello attuale. Questa differenza scaturisce principalmente da due fenomeni consolidatisi con l'accettazione pressoché generalizzata del processo di liberalizzazione nella vita di relazione internazionale: l'interdipendenza economica e l'intensificazione delle forme di coordinamento e cooperazione.

Sotto entrambi i profili, le organizzazioni internazionali hanno assunto una posizione importante mediante l'adozione di molteplici atti volti a indirizzare le azioni degli Stati membri aventi per oggetto i rapporti economici transnazionali, onde mitigare conflitti di interesse derivanti dalla diversificazione normativa tipica del diritto internazionale, ossia dall'eterogeneità, quanto a portata e natura, delle norme applicabili ad ambiti di cooperazione materiale distinti. Merita segnalare che si è intensificata anche la stipulazione di trattati internazionali in materia di commercio internazionale e protezione degli investimenti stranieri, nonché, nel corso dell'ultimo decennio, la conclusione di trattati internazionali di portata regionale volti all'istituzione di forme più accentuate di cooperazione e liberalizzazione nei rapporti economici tra parti contraenti e all'attenuazione dei conflitti tra norme nazionali derivanti, in

particolare, dalle diversità tra standard tecnici e tradizioni culturali. Tali trattati di nuova generazione ampliano la rilevanza della salvaguardia di interessi non economici, quali ambiente, salute e talvolta occupazione, nel quadro della disciplina internazionale in materia di scambi, servizi e investimenti, seppure a titolo di deroga. Già il *General Agreement on Trade and Tariffs* (GATT) del 1947 e i trattati sul commercio internazionale amministrati dall'Organizzazione Mondiale del Commercio sin dal 1995 contemplano deroghe tese a rendere flessibile il proprio ambito di applicazione e giustificare quindi una parte contraente, qualora questa abbia la necessità di adottare, in maniera proporzionata e non discriminatoria, provvedimenti unilaterali per la tutela di un interesse non economico di natura pubblica, quale preservazione delle risorse naturali, patrimonio artistico-culturale ovvero salute.

Il diritto dell'Unione Europea include anch'esso un sistema di deroghe per la tutela di interessi analoghi nella disciplina del funzionamento del mercato interno, sin dalla nascita della Comunità Economica Europea col Trattato di Roma del 1957. La rilevanza della tutela di interessi sociali si è estesa con l'approfondimento istituito dai vari Trattati di riforma di quel Trattato succedutisi fino a quello di Lisbona del 2007, in particolare con l'integrazione dell'ambiente e dello sviluppo sostenibile quali obiettivi strumentali dell'Unione. Questa rilevanza si è ampliata, per quanto concerne la struttura delle norme e il loro ambito materiale di applicazione, a seguito della conclusione dei trattati internazionali su commercio e investimenti di nuova generazione segnalati in precedenza. Siffatto ampliamento si è verificato invero soprattutto nel quadro della disciplina del trattamento degli investimenti stranieri. La tutela della salute rientra sovente tra gli interessi non economici così salvaguardati sulla base di disposizioni specifiche.

Tale carattere innovativo mira infatti alla prevenzione dei conflitti e delle difficoltà interpretative sperimentate da taluni giudici e/o arbitri nella soluzione di controversie sorte dalla pretesa di Stati e/o privati investitori di esigere l'applicazione nel corso dello stesso procedimento di norme internazionali di origine pattizia relative a materie diverse, quali potrebbero essere le norme sulla protezione dei diritti della persona e quelle sul trattamento di investimenti stranieri.

Alcuni Stati economicamente avanzati, come Australia, Canada, Germania e Stati Uniti, hanno favorito siffatto riorientamento delle norme internazionali pattizie in materia di investimenti stranieri dopo essersi trovati convenuti davanti a tribunali arbitrali a seguito dell'adozione di provvedimenti normativi nazionali di carattere non discriminatorio per la tutela di un interesse pubblico, tra cui quelli già richiamati, ossia ambiente, patrimonio artistico-culturale e salute. È così che numerosi trattati internazionali di nuova generazione si riferiscono all'esercizio del "right to regulate" dello Stato ospite di investimenti stranieri in relazione a tali interessi in quanto «legitimate public objectives».

L'Unione Europea ha anch'essa contribuito al suddetto rinnovamento di prospettiva per quanto concerne le norme internazionali pattizie in materia di investimenti diretti all'estero. Nell'esercizio della propria competenza in materia – attribuitele nel quadro della politica commerciale comune per la prima volta col Trattato di riforma concluso a Lisbona nel 2007 – la Commissione Europea ha seguito un approccio innovativo. Questo ha esteso la portata non solo di tale politica comune dell'Unione, ma anche degli accordi internazionali da essa conclusi in materia con l'inclusione talvolta, per esempio, di una clausola sullo sviluppo sostenibile riferibile specificamente all'applicazione delle norme in materia di investimenti.

La posizione proattiva – sotto i profili sia procedurale sia materiale – assunta dalla Commissione Europea nell'esercizio della nuova competenza attribuitele dal Trattato di Lisbona è stata una delle ragioni principali per le quali ho incentrato il progetto per la partecipazione al bando *Jean Monnet* del 2018 sull'attivazione di un Modulo di insegnamento e ricerca dedicato al diritto dell'Unione Europea in materia di investimenti (*EU Investment Law*, EUIL). Ho congegnato tale progetto per elaborare e proporre una sistemazione del quadro normativo e politico in siffatta materia, partendo dal dibattito sui conflitti tra norme internazionali relative a settori distinti sorti a causa dell'interazione tra interessi eterogenei nel corso di procedimenti arbitrali istituiti sulla base di trattati internazionali in materia di investimenti. In virtù della diversificazione normativa internazionale, questi conflitti sono risultati un rischio ulteriore tanto per gli operatori del commercio e gli investitori quanto per gli Stati nella fase attuale di turbolenza del processo di liberalizzazione e

interdipendenza causata tanto dalle scelte di carattere protezionistico effettuate da alcuni Stati quanto dall'instabilità dei mercati transnazionali. L'emergenza sanitaria Covid-19 ha amplificato tale turbolenza provocando timori e aspettative negative, là dove le strategie di mitigazione del rischio e l'esigenza dell'individuazione di risposte comuni a problemi comuni macroscopici richiederebbero un clima internazionale foriero, nella misura del possibile, di certezze e prevedibilità.

Quest'opera collettanea trae origine dal desiderio di rendere pubbliche le riflessioni maturate nel corso di due *webinar* relativi agli "effetti dell'emergenza Covid-19 su commercio, investimenti e strumenti finanziari transnazionali" da me organizzati, in collaborazione col Gruppo di interesse sul "diritto internazionale dell'economia" della Società Italiana di Diritto Internazionale e dell'Unione Europea (SIDI) e dell'*Italian Branch* dell'*International Law Association*, quali azioni di attuazione del Modulo *Jean Monnet* su *EU Investment Law*, rispettivamente i giorni 9 e 11 maggio 2020, durante il periodo di quarantena istituito dal Presidente del Consiglio dei Ministri in Italia. I partecipanti a questi *webinar* hanno esaminato quali norme internazionali potessero risultare applicabili per la sorveglianza e la prevenzione dei pregiudizi cagionati dall'emergenza sanitaria all'andamento dei flussi di scambio transnazionali, degli investimenti all'estero e del mercato del lavoro. Al fine di contribuire alla circolazione delle idee e alla costruzione di prospettive di rinnovamento della "normalità" in un momento storico ancora di emergenza, ho accolto volentieri la proposta gentile della collega professoressa Elisa Baroncini di collaborare, per la pubblicazione delle riflessioni emerse durante tali *webinar*, curando un'opera collattanea fruibile anch'essa gratuitamente attraverso il *web* in tempi rapidi. Questo genere di pubblicazione soddisfa peraltro gli obiettivi di pubblicità e divulgazione del Modulo *Jean Monnet*. Allo scopo di comunicare più diffusamente quanto realizzato finora per la realizzazione del progetto del Modulo, l'opera raccoglie anche i contributi di alcuni studiosi specialisti di diritto internazionale e dell'Unione Europea in materia di rapporti economici transnazionali. Questi avevano partecipato a precedenti eventi organizzati presso l'Università degli studi di Teramo. Si tratta dei contributi di Agostina Latino, Lorenza Mola in collaborazione con Stefano Saluzzo, Luca Pantaleo, Elisa Ruozzi ed Emma Luce

Scali. Tali contributi arricchiscono l'opera grazie ad approfondimenti relativi agli effetti dell'emergenza sanitaria sulle transazioni di prodotti farmaceutici nel mercato interno dell'Unione Europea e alla rilevanza della sicurezza nazionale quale clausola di eccezione all'applicazione delle norme internazionali e dell'Unione in materia di investimenti. Altri di questi scritti estendono la portata dell'opera mediante l'esame degli effetti dell'emergenza sanitaria sotto profili ulteriori, come quello relativo alle norme applicabili al diritto dei contratti internazionali, ai rapporti di lavoro transnazionali nel settore marittimo e alla politica di bilancio dell'Italia in quanto Stato membro dell'Unione.

Dall'opera emerge che l'emergenza sanitaria ha posto in risalto l'importanza delle clausole di eccezione e deroga contemplate nel diritto dell'Unione Europea, negli accordi internazionali in materia di scambi e investimenti, nonché nel diritto internazionale generale. Quest'emergenza ha reso peraltro più flessibile l'applicazione di tali norme generando tuttavia il rischio di una dilatazione del ricorso all'unilateralismo. Le attività delle organizzazioni internazionali e dell'Unione Europea sono risultate così preminenti per il coordinamento delle azioni eterogenee degli Stati membri. L'emergenza ha rinnovato, d'altra parte, interrogativi sul ruolo delle numerose organizzazioni e finanche sulla loro attendibilità quali protagoniste della vita di relazione internazionale in grado di guidare gli Stati membri nella reazione e prevenzione di emergenze di carattere vuoi sociale vuoi economico e finanziario. In virtù della portata senza precedenti delle emergenze, alcuni Stati hanno espresso critiche e/o perplessità sull'operato di organizzazioni internazionali che hanno plasmato tale vita negli ultimi decenni, come, da un lato, l'Organizzazione Mondiale del Commercio e l'Unione Europea e, dall'altro, l'Organizzazione Mondiale della Sanità. Tra queste l'Unione ha dimostrato, per la verità, capacità reattive suscettibili di rinvigorirne l'importanza. La Presidente della Commissione, Ursula von der Leyen, è riuscita a congegnare e, in parte, attivare azioni diverse nel quadro di una "Common Response" sostenendo il funzionamento del mercato interno e il sistema economico degli Stati membri più colpiti dall'emergenza, quali l'Italia, favorendo anche iniezioni di liquidità. Quest'opera collettanea intende sostenere tale genere di sviluppi in quanto contributo indispensabile alla ripresa e alla ricerca di "nuove

normalità". Ringrazio pertanto tutte le autrici e gli autori per l'incoraggiamento tramite il lavoro di studio e ricerca realizzato.

Ai colleghi dell'Università degli studi di Teramo professori Andrea Ciccarelli, Pietro Gargiulo e Alessandra Gianelli un ringraziamento speciale per il consueto apporto scientifico anche nell'organizzazione di numerose attività del Modulo *Jean Monnet*. Ai professori Giorgio Sacerdoti e Attila M. Tanzi la mia gratitudine per il sostegno nei momenti più impegnativi di organizzazione dei *webinar* e di quest'opera collettanea.

TEMPORAL LIMITS TO TRADE AND INVESTMENT MEASURES COPING WITH A SANITARY EMERGENCY UNDER INTERNATIONAL LAW

Lorenza Mola – Stefano Saluzzo[*]

1. Governments' response to the Covid-19 pandemic has mostly been adopted under state-of-emergency legislation. In this scenario, a remarkable number of States affected by the spreading of the Covid-19 have resorted to measures partly departing from their international commitments. International trade and investment law have been particularly involved in the process, with most countries adopting export or import restrictions and pieces of legislation potentially affecting foreign investors.

In the context of international trade, measures have been imposed especially on medical goods, with the aim to cope with the severe shortage brought by the emergency. Restrictions are primarily concerned with pharmaceuticals, medical equipment and personal protection products. When one considers that exports and imports of medical products account for the 5% of global trade, the relevance and the impact of these measures become quite self-evident ([1]). Moreover, such restrictions have produced a considerable backlash on the availability of medical goods for countries not possessing a domestic production and having to rely on imports. To date, it would appear that at least 80 countries and customs territories have

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([*]) The entire contribution has been jointly coordinated and agreed by the Authors. However, Lorenza Mola is the author of Sections 2 and 5; Stefano Saluzzo is the author of Sections 3 and 4.

([1]) WTO, *Trade in Medical Goods in the Context of Tackling Covid-19 – Information Note*, 3 April 2020, pp. 2-3.

introduced trade restrictions or prohibitions as a result of the Covid-19 pandemic ([2]).

As regards foreign investment, governments have adopted measures directed to domestic industries in the health sector and other sectors considered critical in relation to the crisis. Governments' intervention has pursued a double goal: ensuring domestic capacities of countering the pandemic by facilitating and incentivizing investments, and protecting domestic health and security interests by strengthening control over foreign investment. Measures such as State aid to certain sectors or State companies, the nationalization or acquisition of equity shares in airlines and other companies, broadened FDI screening mechanisms, mandatory production and confiscation of health-related goods, temporary occupation or requisition of factories, the relaxation of IPRs protection in relation to technologies may all affect foreign investment which finds protection under a State's international law obligations ([3]).

The adoption of measures to face the challenges of the pandemic outbreak have already raised numerous questions regarding the requirements for their legitimacy and potential justifications under international law ([4]). The purpose of the present contribution is not

([2]) World Customs Organization, *List of national legislation of countries that adopted temporary export restrictions on certain categories of critical medical supplies in response to Covid-19*, accessible through this link: www.wcoomd.org/en/topics/facilitation/activities-and-programmes/natural-disaster/list-of-countries-coronavirus.aspx

([3]) UNCTAD, *Investment Policy Responses to the Covid-19 Pandemic*. *Investment Policy Monitor*, Special Issue No. 4, May 2020, accessible on this link https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf.

([4]) In addition to the contributions in this collection, see GLÖCKLE, *Export Restrictions under Scrutiny – the Legal Dimensions of Export Restrictions on Personal Protective Equipment*, 7 April 2020, available on *EJIL:Talk!* (www.ejiltalk.org/export-restrictions-under-scrutiny-the-legal-dimensions-of-export-restrictions-on-personal-protective-equipment/); ADINOLFI, *Il ruolo delle politiche commerciali a fronte della pandemia da Covid-19: brevi riflessioni alla luce del diritto OMC*, 20 April 2020, available on *SIDIBlog* (www.sidiblog.org/2020/04/20/il-ruolo-delle-politiche-commerciali-a-fronte-della-pandemia-da-covid-19-brevi-riflessioni-alla-luce-del-diritto-omc); LAVRANOS, *The Investment Treaty Implications of Covid-19 Responses by States*, 30 June 2020, available on *Arbitration Blog*

to address the whole set of issues linked to trade and investment measures. It rather focuses on the temporal element or the duration of adopted measures in these two fields of international law. The research will try to understand to what extent measures adopted during an emergency have to present a temporary nature and what role the temporal element plays in the assessment of their legitimacy. In order to do so, the article analyses the existing international legal framework on both trade and investments and the related practice of international judicial organs or arbitral tribunals.

Temporariness is posited as an inherent component of the response to an emergency. It is generally rooted in constitutional clauses on emergency powers and in the principle of proportionality, basically meaning that «emergency measures cannot last longer than the emergency itself» ([5]). To investigate more on the "international law of emergency", so to say, the conceptual framework for the analysis may be deduced through a row of questions. Provided that the first question on whether a temporary requirement exists under international law is answered positively, the following questions would concern whether and how temporariness is qualified: whether the duration of the measures at stake is self-judged, or which margin of discretion is left to States, and which parameters are employed to assess the legality of the measures taking the temporal dimension into account ([6]).

The choice of conducting a parallel analysis of trade and investment regimes is prompted not only by the wide coverage of the response to the pandemic, but also by the growing space for convergence between these two sets of rules, especially as far as derogations and exceptions are concerned ([7]). This assertion regards both the grounds for legitimacy of emergency measures and the

(www.arbitrationblog.practicallaw.com/the-investment-treaty-implications-of-covid-19-responses-by-states/).

([5]) Venice Commission, *Emergency Powers*, CDL-STD (1995)012, Strasbourg, 1995. See, among many, GROSS, NÍ AOLÁIN, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge, 2006, Ch. 5.

([6]) For example, in the instant case of Covid-19, determinations made at the international level, especially by the World Health Organization.

([7]) See KURTZ, *The WTO and International Investment Law. Converging Systems*, Cambridge, 2016, p. 168 ff. See also, more generally, SUNGJOON, KURTZ, *Convergence and Divergence in International Economic Law and Politics*, *European Journal of Int. Law*, 2018, p. 169.

standard of review that may be exercised in the context of dispute settlement. Thus, the temporal element of the concerned measures will be addressed in a two-fold perspective: the express or implied requirement of measures' temporariness and the margin of discretion left to States in determining the duration of the emergency.

The contribution is structured as follows. A first part is devoted to frame the analysis by addressing the concepts that may be relevant in a discourse of international law on emergency measures (especially that of necessity in the context of circumstances precluding wrongfulness) (para. 2) and by overviewing the temporal requirements of derogations in human rights law (para. 3). The second part focuses specifically on defenses of emergency measures in international trade and investment law (paragraphs 4 and 5 respectively). The final part draws some conclusive remarks on the role of the temporal element in measures adopted to face the emergency of Covid-19 (para. 6).

2. At a first sight, in the law and practice on international trade and investment, and in the respective literature, the temporal component of emergency measures has been mostly left implicit, while it has received more attention in the human rights sphere ([8]).

Two considerations might help develop our conceptual framework. The first concerns the "referent" of "temporariness" ([9]). A distinction may be drawn between "factual" and "legal" temporariness. The former idea points to the circumstances, i.e., the facts and events which determine the emergency: the limited duration in time of an emergency may be identified with the period occurring from the emergence of a threat and/or the impact of a peril, to the dilution of the intensity of the danger and/or the disappearance of its effects. As the impact of an emergency may extend temporally beyond the existence of the danger entailing it (in the Covid-19 case, the virus may disappear at a certain point in time but some health consequences on humans affected by the virus may still be in place afterwards), and may concern other spheres than the one(s) directly affected by the emergency (notably in the Covid-19 case, the

([8]) See Section 3 below.

([9]) ODGEN, RICHIARDS, *The Meaning of Meaning: A Study of the Influence of Language upon Thought and of the Science of Symbolism*, New York/Harcourt, 1923.

economy as a whole), a distinction also stands out between the "scientific" and the "political" evaluation of the time over which an emergency and its effects take place. This leads to the idea of "legal temporariness" as encompassing the temporal limitations which are foreseen, or required, by law. The issue is how "legal temporariness" must be identified with respect to the factual one.

The second consideration pertains to the international legal sources where temporariness may come into play as a parameter for the legality of States' conduct in times of emergency. State-of-emergency measures are seen through the prism of extraordinariness, as States formally adopt them under special circumstances by departing from "ordinary" legal regimes, though in contemporary law being still subject to the rule of law ([10]). Indeed, this does not necessarily imply that measures adopted by a State under an emergency contrast with the State's primary international obligations. Certainly, however, emergency measures are (to be) intended of temporal application, i.e., that they will (have to) be superseded by the ordinary regime – be it the one previously in force or a new one. Thus, be they adopted in line or in contrast with international obligations, the temporal element of the measures counts for State responsibility under international law.

Within the realm of defences, the element of temporariness may seem inherent to any defence, by virtue of the principles of necessity and proportionality. With respect to treaty law, this view is reflected in the Convention on Facilitation of International Maritime Traffic, which states *expressis verbis* that «[n]othing in the Convention shall be interpreted as precluding a contracting Government from applying *temporary* measures necessary to preserve public morality, order and security or *to prevent the introduction or spread of diseases or pests* affecting public health, animals or plants» ([11]). It

([10]) See DE WILDE, *Locke and the State of Exception: towards a Modern Understanding of Emergency Government*, *European Constitutional Law Review*, 2010, pp. 249-267.

([11]) Article 5, para. 1 (italics added). Signed at London on 9 April 1965; *UNTS*, vol. 591, p. 26. Quoted in ILC, Study prepared by the Secretariat, *"Force majeure" and "Fortuitous Event" as Circumstances Precluding Wrongfulness: Survey of State Practice, International Judicial Decisions and Doctrine*, *Yearbook of the Int. Law Commission*, 1978, vol. II, part one, para. 98, and in AGO, *Eighth Report on State Responsibility*, *Yearbook of the Int. Law Commission*, 1980, vol. II, part one, para. 148.

cannot go unnoticed that the temporality of a measure has been considered to distinguish "exceptions" from "derogations", at least in the field of human rights: to mention Trapp's words, «[t]here is … a temporal distinction between exceptions to qualified rights and derogations. An exception carves out a space for governmental action from the rights protection which space can exist on a permanent basis provided that the balancing of the interests at stake does not shift. A derogation, by contrast, is intended to be a temporary measure to respond to a specific crisis which has arisen. … Derogations are meant to be *exceptional* and *temporary*» ([12]). Indeed, the carve out of permissible conduct through "exceptions" extends *ratione temporis* as long as «the balancing of the interests at stake does not shift»: the difference between exceptions and derogations thus rests on their respective indeterminacy and necessary limitation in time. This consideration grasps the distinction between the temporal component of measures taken in ordinary times, which may for example be assessed through the evaluation of the necessity and proportionality of "exceptions", and the temporal dimension of emergency-related measures. This consideration grasps the distinction between the temporal component of measures taken in ordinary times, which falls under the assessment of the necessity and proportionality of "exceptions", and the temporal element of emergency-related measures, as a distinct and explicit requirement of "derogations". This also help address the question whether "exceptions" and "derogations" may be gathered in the same legal ground in a "genus-species" relationship in the light of the respective temporal component, that is to say, more concretely, if a traditional general exception clause in a treaty may provide coverage to both. On the contrary, the aforementioned different premises do not seem relevant to distinguish the way "exceptions" and "derogations" operate, (arguably, respectively) as justifications of the legal order permitting conduct and as excuses of otherwise unlawful conduct ([13]).

Moving to defences under customary law, temporariness is also a distinguishing feature of the invocation of the state of necessity

([12]) TRAPP, *Human Rights Exceptions*, in *Exceptions in International Law* (Bartels, Paddeu eds.), Oxford, 2020, p. 313.

([13]) See PADDEU, *Justification and Excuse in International Law. Concept and Theory of General Defences*, Cambridge, 2018, p. 3.

under customary law, along the lines of the ICJ in *Gabčíkovo-Nagymaros* whereby «[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives» ([14]). The temporal dimension of "circumstances precluding wrongfulness" is altogether addressed by the International Law Commission (ILC)'s Draft Articles 2001 on State responsibility in Article 27, subparagraph (a). The provision envisages the issue of «compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists», i.e. «the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate» as it «gradually lessen and allow[s] for partial performance of the obligation» ([15]). As is evident, although Article 27 is a «without prejudice provision» and «does not answer questions about *how* to resume performance of an obligation» ([16]), it does tell, or at least suggest, *when* to do it. By comparing the ICJ's and the ILC's formulations, one may notice that both envisage that "legal temporariness" must be sequential to "factual temporariness". However, they differ on the way they identify the sequencing connection: the ICJ shapes it quite strictly ("as soon as" the state of necessity "ceases to exist"), suggesting that only one specific point in time will be relevant, while the ILC expresses it more vaguely ("once") and contemplates that it can be established parallelly to a gradual downturn of the curve of danger. Noting that Article 27 is an across-the-board, without-prejudice provision ([17]), one may speculate that the temporary component of the state of necessity is

([14]) *Gabčikovo–Nagymaros Project (Hungay v Slovakia)* (Judgment), I.C.J. Reports, 1997, p. 7, para 101. In his Eight Report on State responsibility (*supra* footnote 11), Roberto Ago, listing the features of state of necessity as a circumstance precluding wrongfulness, envisaged the «necessarily temporary nature of this 'justification' depending on the continuance of the feared danger» (para. 33).

([15]) ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *Yearbook of the Int. Law Commission,* 2001, vol. II, part two, p. 86.

([16]) CRAWFORD, *State Responsibility: the General Part*, Cambridge, 2013, p. 282 (italics added).

([17]) And indeed, within the ILC works on responsibility, temporariness seemed not necessarily shape the design of *force majeure*. Study prepared by the Secretariat (*supra* footnote 11), para. 14, footnotes 25-27, but see also para. 533.

as specific and strict as drawn by the ICJ ([18]). This is in line with the refusal of broad, self-judged invocation of necessity by States under post-modern international law, which allows States to recur to this defence only upon very strict conditions (a conception reflected by the ILC Draft Article 25) ([19]).

Within the ILC's works on State responsibility, a conceptual distinction was also outlined across primary law on treaties and secondary law on responsibility, between the temporary or definitive impossibility to perform a treaty obligation implying suspension or termination respectively, on the one side, and the intrinsically temporary effects of circumstances precluding wrongfulness, on the other side ([20]). It was recurrently noted that non-performance of an international obligation is temporarily justified insofar as the facts justifying the preclusion of wrongfulness do not also justify the termination of the obligation, but only its suspension. These aspects were exemplarily put forward by the Special Rapporteur Ago in his Eight Report on State responsibility (1980) in respect of the state of necessity, when he observed that «once the peril had been averted through the adoption of the conduct not in conformity with the international obligation, any subsequent persistence in that conduct would again become wrongful, even if its wrongfulness had been precluded during the preceding period. Compliance with the international obligation which was infringed must, in so far as this is still materially possible, immediately resume» ([21]).

On a final note, that temporariness is an inherent component of a state of emergency, at least at the current state of development of legal theory and international law, may also be implicitly derived *a contrario* by the paradoxical and dubitative argument that is advanced by several authors when addressing the invocation to

([18]) The possibility of suspending an obligation «for the shortest possible period, during the continuance of an admitted over-ruling necessity» was emphasized by the UK envoy to the US during the Caroline incident in 1837, see CRAWFORD, *State Responsibility* (*supra* footnote 16), p. 310.
([19]) See DESIERTO, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation*, The Hague, 2012.
([20]) This difference is expressed, for example, in the Study by the Secretariat (*supra* footnote11), at paragraphs 14 and 76.
([21]) AGO, *Eighth Report* (*supra* footnote 11), para. 14.

permanence and normalization of the response to terrorist threats, especially within the human rights legal field ([22]).

3. The field of international human rights law (IHRL) and the practice developed therein has extensively contributed to the definition of a conceptual framework of States' measures adopted to cope with emergency situations ([23]). The majority of international treaties on human rights provides specific grounds on the basis of which it is legitimate to adopt derogatory measures in time of emergency ([24]). Most renowned examples are Article 4 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of the European Convention on Human Rights (ECHR). Both these provisions allow for temporary derogation of certain human rights (except for the so-called absolute rights), provided that certain requirements are met. Some of them relate to the concept of emergency and the extent to which the national measures can be

([22]) See, e.g., DYZENHAUS, *The Permanence of the Temporary: Can Emergency Powers be Normalized?*, in *Security of Freedom: Essays on Canada's Anti-Terrorism Bill* Daniels, Macklem, Roach (eds.), Toronto, 2001, pp. 21-37; GREEN, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, Oxford, 2018; PANDOLFI, *From Paradox to Paradigm: the Permanent State of Emergency in the Balkans*, in *Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions* Fassin, Pandolfi (eds.), New York, 2010, pp. 153-172.

([23]) See CRIDDLE, *Protecting Human Rights during Emergencies – Delegation, Derogation and Deference*, in *Human Rights in Emergencies* (Criddle ed.), Cambridge, 2016, p. 32 ff.; REYNOLDS, *Empire, Emergency and International Law*, Cambridge, 2017, p. 111 ff.

([24]) In such contexts, the distinction between limitations and derogations is worth mentioning. While the first deal with the necessary balance between individual fundamental rights and general collective interests, the latter exclusively concerns the partial or absolute suspension of rights for the time of the emergency. In other words, while the first type of measures has an inherent structural nature (based on their permanent duration), the second type produce its consequences on a contingent basis, for as long as the emergency requires. See DE SCHUTTER, *International human rights law: cases, materials, commentary*, Cambridge, 2010, p. 288. Limitations and derogations also differ as regards the requirement for their legitimacy. See *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc. E/CN.4/1984/4, Annex, 28 September 1984, principles 1–14.

considered strictly necessary to respond to the exceptional situation ([25]).

As to the temporal scope of such measures, practice and case-law are not indicative of a specific and autonomous requirement of temporariness. Under the ICCPR, the State has the duty to specify the duration of derogatory measures, but this is connected with the more general obligation of communication of the measures concerned ([26]). Accordingly, for instance, when adopting derogations to the ICCPR, State are expected to make «an official proclamation of the existence of the public emergency» and to notify the adopted provisions to UN Secretary-General, by which they will also detail «the effective date of the imposition of the state of emergency and the period for which it has been proclaimed» ([27]).

The temporal scope of derogatory measures is more often taken into consideration within the "strict necessity" requirement. In certain instruments, the link between the measures' scope of application *ratione materiae* (the emergency) and *ratione temporis* is expressed in clear terms.

This is the case of the American Convention on Human Rights, whose Article 27 states that «[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and "for the period of time strictly required by the exigencies of the situation"». In the *Miskito Indians* case on forced relocation, the Inter-American Commission confirmed that as soon as the emergency is over, derogatory measures have to be terminated and the situation before the emergency must be re-established. Measures going beyond the

([25]) See SOMMARIO, *Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters*, in *International Disaster Response Law* de Guttry, Gestri, Venturini (eds.), The Hague, 2012, p. 323 ff.

([26]) See e.g. Article 15(3) ECHR: «[a]ny High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed».

([27]) *Siracusa Principles on the Limitation and Derogation*, para. 45(c).

duration of the emergency will entail a responsibility for the violation of derogation clauses ([28]).

The same principle was upheld also by the European Commission on Human Rights in the early case *De Becker v. Belgium*, where is stated that «Article 15, paragraph 3 [of the ECHR], clearly means that the measures of derogation which it provides for are only justified in the circumstances defined in paragraph 1, with the result that if they remain in force after those circumstances have disappeared they represent a breach of the Convention» ([29]). In this context, it is quite relevant that the ECHR does not impose a strict temporal requirement for the existence of an emergency ([30]). The European Court of Human Rights (ECtHR) has never «explicitly incorporated the requirement that the emergency be temporary, although the question of the proportionality of the response may be linked to the duration of the emergency» ([31]). While the ECtHR has always been somewhat reluctant to address the temporal element of derogations, the Council of Europe has criticized prolonged and undetermined derogations for exceeding what is "strictly required" ([32]). This, however, did not imply that the derogation could no longer be justified.

In relation to the ICCPR, the Human Right Committee has also highlighted the relevance of the temporal element within the necessity test in its *General Comment* n. 29: «[a] fundamental

([28]) Inter-American Commission of Human Rights, *Report on the situation of human rights of a segment of the Nicaraguan population of Miskito origin*, 29 November 1983, p. 117, para. 14.

([29]) European Commission of Human Rights, *De Becker v. Belgium*, Report of 8 January 1960, para. 271.

([30]) Note, however, that in the wake of the Covid-19 pandemic, most States derogating from ECHR obligations have also specified the duration of their measures. See ISTREFI, *To Notify or Not to Notify: Derogations from Human Rights Treaties*, 18 April 2020 (www.opiniojuris.org/2020/04/18/to-notify-or-not-to-notify-derogations-from-human-rights-treaties/).

([31]) ECtHR, *A. and Others v. United Kingdom*, Application no. 3455/05, 19 February 2009, para. 178.

([32]) The Council of Europe's position related to derogations made by Turkey after the failed "coup d'état" of 2016. See Parliamentary Assembly of the Council of Europe, *Resolution 2209 (2018): State of emergency – proportionality issues concerning derogations under Article 15 of the European Convention of Human Rights*, 24 April 2018, para. 4. See also Venice Commission, *Emergency Powers* (*supra* footnote 5).

requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates *to the duration*, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency» ([33]).

However, in contrast with the ECtHR's practice, the HRC also made clear that, in order to be legitimate, derogations must be temporary ([34]).

Although one can argue that a temporal limit is inherent to the very structure of derogations from human rights in times of emergency ([35]), the assessment of this limit may vary depending on the applicable legal framework and the margin of discretion left to the State in determining the existence and the duration of an emergency. Deferential approaches towards the State's authorities will generally accept derogations lasting for a long period of time or even lacking any specific indication as to their duration. On the other hand, a more "independent" scrutiny will likely take into account the temporariness of a derogatory measure, whether expresses or implied in the measure itself.

In both cases, however, derogatory measures cannot escape an evaluation regarding their duration, even when the latter is considered as one of the elements of the necessity assessment.

4. As outlined in our introduction, measures of export restrictions or prohibitions of medical products have been widely adopted throughout the world in the wake of the pandemic. Such measures raise the issue of their compatibility with international trade obligations, especially with rules provided by the WTO framework. This question will be here addressed from one specific

([33]) Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, adopted at the Seventy-second Session of the Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 4.

([34]) *Ibid*., para. 2, according to which «[m]easures derogating from the provisions of the Covenant must be of an exceptional and temporary nature».

([35]) For a comprehensive discussion see. ISTREFI, SALOMON, *Entrenched Derogations from the European Convention on Human Rights and the Emergence of Non-Judicial Supervision of Derogations*, *Austrian Review of Int. and European Law*, 2019, pp. 14-16.

angle, that is the temporal scope of emergency measures required by WTO law.

Quantitative restrictions are generally forbidden by Article XI GATT 1994. Under Article XI:1

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The prohibition of quantitative restrictions set forth by Article XI has been construed following quite a strict approach. There is no need for the complainant to demonstrate the adverse trade effects of the challenged measure nor the protectionist intent behind it ([36]).

Article XI:2(a) specifies that the prohibition of quantitative restrictions does not extend to «export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party» ([37]). Although the exception is generally considered as

([36]) See MAVROIDIS, *Trade in Goods. The GATT and Other Agreements Regulating Trade in Goods*, Oxford, 2007, p. 55. In the *Argentina – Hides and Leather* case, the WTO Panel has nonetheless established the need for a causal link between the challenged measures and the reduced level of imports. Moreover, the burden of proofs should be higher for *de facto* quantitative restrictions. See WTO Panel, *Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, 16 January 2001, paragraphs 11.21-11.22.

([37]) Quantitative restriction measures are required to be non-discriminatory under Article XIII GATT, thus imposing an MFN obligation (VAN DEN BOSSCHE, ZDOUC, *The Law and Policy of the World Trade Organization*[3], Cambridge, 2013, p. 492). Article XIII:2 also imposes a duty in the administration of restrictions to minimize their impact «by attempting to approximate under such measures the trade shares that would have occurred in the absence of the regime». See WTO Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU, 22 May 1997, para. 7.69.

covering only agricultural products ([38]), almost every country having adopted export restrictions of medical goods during the pandemic has made reference to Article XI:2(a) to support the legitimacy of such measures ([39]).

The limited temporal scope of export restrictions covered by this exception is expressed in clear terms in the provision itself. The requirement that permitted restrictive measures are adopted temporarily is further strengthened by obligations relating to transparency and notification. According to the 2012 Decision on Notification Procedures for Quantitative Restrictions, Members are expected to notify every two years every restrictive measure in place, both on import and export of goods. Notifications shall include a general description of the adopted measures, the national legal basis, the date of entry into force and the date they cease to be in force ([40]).

The temporal limit to Article XI exceptions is also a corollary of the material requirements identified in para. 2(a). In order to be justified under the exception clause, the products covered by the restriction must not only be essentials but also in "critical shortage". When the latter requirement is missing, a measure cannot be considered as being temporarily applied ([41]). Indeed, measures covered by the exception under Article XI:2(a) are measures taken to «bridge a passing need» ([42]). Thus, one may argue that the limited temporal scope of export prohibitions or restrictions is an inherent character of the permitted measure itself.

([38]) See BUTTON, *The Power to Protect. Trade, Health and Uncertainty in the WTO*, Oxford/Portland, 2004, p. 21, according to whom Article XI:2(a) does not concern health protection. The exception should be read in conjunction with the obligations set forth by the WTO Agreement on Agriculture. See PICONE, LIGUSTRO, *Diritto dell'Organizzazione Mondiale del Commercio*, Padova, 2002, p. 297.

([39]) WTO Secretariat, *Export Prohibitions and Restrictions – Information Note*, 23 April 2020, p. 5.

([40]) WTO Council for Trade in Goods, *Decision on Notification Procedures for Quantitative Restrictions*, G/L/59/rev.1, 3 July 2012.

([41]) WTO Panel, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394-DS395-DS398/R, 5 July 2011, paragraphs 7.345-7.346.

([42]) WTO Appellate Body, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394-DS395-DS398/AB/R, 30 January 2012, para. 323.

The determination of the "essentiality" and "critical shortage" requirements of a certain good is not left entirely to member States' discretion. In the *China – Raw Materials* case, both the Panel and the Appellate Body identified quite a strict standard of review of whether the challenged measures where adopted in order to respond to a critical shortage ([43]). The Appellate Body stated that Article XI refers to those deficiencies that are crucial and that reach a vitally important or decisive stage ([44]). Moreover, it expressly linked this requirement to the temporal scope of quantitative export prohibitions:

> […] the characteristics of the product as well as factors pertaining to a critical situation, may inform the duration for which a measure can be maintained in order to bridge a passing need in conformity with Article XI:2(a). Inherent in the notion of criticality is the expectation of reaching a point in time at which conditions are no longer "critical", such that measures will no longer fulfil the requirement of addressing a critical shortage ([45]).

While the duration of export prohibitions or restrictions is to be determined by the competent national authorities, it seems that for such measures to comply with Article XI GATT it is not sufficient that they are simply envisaged as temporary measures. Their duration can be scrutinized by taking into account the nature of the emergency and the necessity of quantitative restrictions addressing the critical shortage. Moreover, the aim to "prevent" future critical shortages could not be invoked to impose undetermined restrictions or prohibitions. The preventive character of such measures is still to

([43]) On export restrictions in the context of natural resources see ESPA, *Export Restrictions on Critical Minerals and Metals - Testing the Adequacy of WTO Disciplines*, Cambridge, 2015.
([44]) *Ibid*., paragraphs 324-325. In this sense «the kinds of shortages that fall within Article XI:2(a) are more narrowly circumscribed than those falling within the scope of Article XX(j)».
([45]) *Ibid*., para. 328.

be read together with the world "temporarily" and can only be justified when reacting to specific and concrete warning signals ([46]).

In contrast to the Article XI:2(a) exception, other grounds in the GATT allowing derogations from trade commitments do not encompass an explicit temporal requirement. This is the case of general exceptions regulated by Article XX. Subject to the requirements of the *chapeau*, members can adopt derogatory measures necessary to protect certain public policy interests, among which "human, animal or plant life or health" is expressly mentioned. It is worth recalling that Article XX(b) on the protection of health is the alternative legal basis member States have invoked to justify export restrictions of medical goods in the context of the pandemic ([47]). The relevance of this provisions raises a two-fold question, regarding the construction of the temporal element and its relationship with the exception under Article XI:2(a).

As to the first question, lacking an express temporal requirement, the assessment of the duration of an emergency measure within Article XX may be conducted within the necessity test. Considerations as to the measure's time framework have been addressed when evaluating the contribution of the measure to the attainment of the specific objective it pursues among those listed in Article XX. The identification of the objective is certainly relevant in determining the temporal dimension of a legitimate measure. For instance, in the *Brazil – Retreaded Tyres* case, the Appellate Body recognized that

> In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive

([46]) HOWSE, JOSLING, *Agricultural Export Restrictions and International Trade Law: A Way Forward*, International Food and Agricultural Trade Policy Council, 2012, p. 18.

([47]) WTO Secretariat, *Export Prohibitions and Restrictions* (*supra* footnote 39), p. 5. Export restrictions could also be justified under Article XX(j) when they are «essential to the acquisition or distribution of products in general or local short supply». However, besides the difference with the factual circumstances triggering the applicability of Article XI:2(a), such measures have to comply with the principle that «all contracting parties are entitled to an equitable share of the international supply of such products».

> policy. Moreover, the results obtained from certain actions – for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time – can only be evaluated with the benefit of time ([48]).

Demonstrating the necessity of a measure by means of a prospective projection in the future might be unavoidable when dealing with long-term objectives. In certain cases, depending on the objective pursued at national level, «a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable» ([49]).

Although this construction is strictly linked to the predictable effects of a given measure, it also sheds some light on how to evaluate the temporariness of measures under Article XX. This assessment will depend not only on the specific objective invoked by the adopting member State, but also – and more directly – by the factual circumstances lying behind that objective. Thus, one might argue that the circumstances of a sanitary emergency, although triggering the applicability of Article XX(b) on the protection of human health, will determine a different assessment of the challenged measures from the one conducted on measures adopted to fight climate change. And this will inevitably reflect upon the relevance of a defined temporal framework and the legitimacy of exceptional measures as to their necessity.

As to the relationship between Article XX and Article XI:2(a), the two exceptions can be considered as mutually exclusive. In the context of exhaustible natural resources, the Appellate Body held that

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([48]) WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, para. 151.

([49]) WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, 21. See more recently WTO Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431-432-433/AB/R, 7 August 2014, para. 5.98.

> Members can resort to Article XX of the GATT 1994 as an exception to justify measures that would otherwise be inconsistent with their GATT obligations. By contrast, Article XI:2 provides that the general elimination of quantitative restrictions shall not extend to the items listed under subparagraphs (a) to (c) of that provision. This language seems to indicate that the scope of the obligation not to impose quantitative restrictions itself is limited by Article XI:2(a). Accordingly, where the requirements of Article XI:2(a) are met, there would be no scope for the application of Article XX, because no obligation exists ([50]).

Member States cannot invoke indistinguishably Article XI:2(a) and Article XX ([51]). When a measure imposing quantitative restrictions is fully compliant with requirements under Article XI:2(a) there would be no need to add a further layer of justification under Article XX ([52]). Accordingly, Article XX shall be invoked in two instances: firstly, when a measure adopted to protect health does not qualify as a quantitative restriction; and secondly, when a measure of quantitative restriction (such as export prohibitions) does not meet the parameters of Article XI:2(a).

This in turn has a relevance also for our present discussion: export restrictions not temporally contained will constitute a violation of Article XI, which may be justified under the less restrictive standard of Article XX as to the temporal requirement. Although States may be inclined to invoke Article XX instead of Article XI:2(a), it is worth recalling that some of the features of

([50]) WTO Appellate Body, *China — Raw Materials* (*supra* footnote 42), para. 334. For a critique on the application of Article XX in the *China – Raw Materials* case see BARONCINI, *The Applicability of GATT Article XX to China's WTO Accession Protocol in the Appellate Body Report of the China-Raw Materials case: Suggestions for a Different Interpretative Approach*, *China-EU Law Journal*, 2013, p. 1 ff. Note that the Appellate Body was here questioning the concern of the Panel that «if Article XI:2(a) is not interpreted as confined to measures of limited duration, Members could resort indistinguishably to either Article XI:2(a) or to Article XX(g) to address the problem of an exhaustible natural resource».
([51]) WTO Appellate Body, *China — Raw Materials* (*supra* footnote 42), para. 333.
([52]) The reach of the two provisions is different. See ESPA, *Export Restrictions* (*supra* footnote 43), p. 182.

general exceptions under the GATT can place upon members more burdensome obligations. First of all, the *chapeau* of Article XX imposes additional conditions: the measure must be applied so as not to constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or so as to constitute a disguised restriction on international trade ([53]). Secondly, the proportionality test inherent in the Article XX compliance assessment entail the duty of member States to choose less restrictive measures when available, thus potentially impairing their capacity to enact absolute export prohibitions ([54]). Finally, the open-textured tests of Article XX have always left much space for judicial discretion, entailing a lower degree of certainty and predictability ([55]).

A final remark must be made on Article XXI, allowing members to adopt measures necessary for the protection of their essential security interests taken in time of war or other emergency in international relations. Given the wording of the exception, measures imposed to face the Covid-19 pandemic seem to fall outside the scope of Article XXI, as they are not strictly related to a situation of crisis or tension in international relations ([56]).

5. Within international investment law, the temporality of an activity, a conduct, or an act comes into relevance for a plurality of determinations: the definition of an investment by contrast with purely commercial transactions ([57]); the delimitation of the concept

([53]) MAVROIDIS, *Trade in Goods* (*supra* footnote 36), pp. 260-261.

([54]) WTO Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, 5 April 2001, para. 172.

([55]) HARRIS, MOON, *GATT Article XX and Human Rights: What do We Know from the First 20 Years*, *Melbourne Journal of International Law*, 2015, p. 25.

([56]) This seems also confirmed by the interpretation given in the *Russia – Traffic in Transit* case by a Panel, according to which «[a]n emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests». See WTO Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS/512/R, 5 April 2019, para. 7.76.

([57]) *MCI power group v Ecuador*, ICSID Case No. ARB/03/6, *Award*, 31 July 2007, para. 139: «[a]ccording to Ecuador, in the Seacoast Contract the

of expropriation with respect to temporary takings ([58]); the assessment of the compatibility of a measure with a substantial standard of treatment, notably with reference to the concepts of reasonableness and proportionality of governmental action ([59]); and, what has prompted the most interesting considerations from the perspective addressed in this paper, the review of the legality of government defences, especially when it comes to measures taken in extraordinary times ([60]).

As regards treaty law, exception clauses in international investment agreements tend not to express any temporary requirement. In this regard, as will be briefly reviewed below, the temporary dimension of emergency measures has been given relevance when considered inherent to the operation of the defence in extraordinary times, or included in the analysis of the necessity requirement of the measures at stake. Recent international investment agreements increasingly contain clauses concerning general exceptions (also relating to health), and national-security-

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requirements of duration and shared risk do not exist. It is in fact a supply contract of uncertain duration, conceived as a response to a temporary emergency. … given that this transaction is purely commercial, it is excluded from the Jurisdiction of ICSID».

([58]) E.g., *Cargill v Mexico*, ICSID Case No. ARB(AF)/05/Z, *Award*, 18 September 2009, para. 515, where the Tribunal concluded that «the Claimant has failed to prove that customary international law has evolved to include a claim for temporary expropriation»; *Ulysseas v Ecuador*, UNCITRAL Arbitration Rules, 12 June 2012, *Final Award*, paragraphs 145 ff.; *Burlington v Ecuador*, ICSID Case No. ARB/08/5, decision on liability, 14 December 2012, para. 505, also quoting *Motorola Inc. v. Iran National Airlines Corporation and The Government of the Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, *Award*, 28 June 1988, para. 59 (Exh. EL-154).

([59]) See *Burlington v Ecuador*, para. 505: «Ecuador's intervention was necessary, adequate, proportionate under the circumstances, and meant to be temporary». See the claimants' claim in *Abaclat v Argentina*, ICSID Case No ARB/07/5, decision on jurisdiction and admissibility, 4 August 2011, at para. 320: «(i) [t]he violation by Argentina of its obligations under Article 2(2) BIT to accord Claimants fair and equitable treatment, by ignoring any concept of *proportionality* in responding to its *temporary financial crisis* and continuing to impose through arbitrary legislative and other regulatory actions an *unjust excessive burden* on Claimants *long after* the abatement of any issues» (italics added).

([60]) BURKE-WHITE, VON STADEN, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, *Vanderbilt Journal of Int. Law*, 2008, p. 307

related exceptions. Quite interestingly, the recent Morocco Model BIT introduces «measures adopted to react to a situation which presents effects resulting from *force majeure* or from an unforeseen external event», within the General Exceptions Article, together with measures pursuing such public interests as health, public morals, and culture. This clause excerpts the covered measures from the scope of the obligation to pay compensation, provided that they are adopted in good faith, are non-discriminatory and of general application ("chapeau") ([61]). A separate Article provides for "[e]xceptions concerning security" by way of the "classical", US-led formulation, according to which nothing in the treaty shall be construed to preclude a party from applying measures (that it considers) necessary for the protection of its own essential security interests ([62]).

As regards arbitral practice, arguably the early 2000s Argentina financial crisis has provided a reference experience to identify and outline the international legal framework on the protection of foreign investments in times of emergency. The body of arbitral decisions and doctrinal analyses which have been prompted by the Argentine crisis have extensively addressed the issue of the legitimate reaction of a State in circumstances presenting an immediate threat. They have singled out the legal grounds for emergency measures departing from international obligations of investment treatment, finding such grounds in treaty clauses (namely security exceptions where included in the applicable treaty, as Article XI of the US-Argentina BIT), and/or in the customary international norm on state of necessity as a circumstance precluding wrongfulness ([63]).

([61]) Text (in French) accessible at this link: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download

([62]) VANDEVELDE, *United States Investment Treaties, Policy and Practice*, Deventer/Boston, 1992.

([63]) Broadly, three main approaches have been adopted on the relation between the treaty exception on security and the customary excuse of state of necessity: one approach construes the treaty exception as *lex specialis* to the general norm; another approach conflates the two; a third approach distinguishes their functions, seeing the treaty exception as a provision on non-precluded measures, thus excluding the covered State conduct from the scope of application of the treaty, while the customary defence as an excuse to a wrongful conduct preventing State responsibility or its effects to arise. Across *all* approaches, however, one may note

Before presenting our investigation into this body of decisions and studies, a world of caution is needed as to whether the analyses emerging therefrom fit the current Covid-19 crisis. They certainly offer some hints for understanding the legal framework applying to the protection of foreign investment in a Covid-19 like situation, in two regards: the circumstances prompting States to adopt measures in both cases, the Argentine financial crisis and the Covid-19 emergency, consisting of a threat or existence of a peril; the wide notion of "essential security interests" which has been adhered to within international investment law from the Argentine experience, to identify the scope *ratione materiae* of the two legal defences above. However, it must also be observed that not all investment measures that States have introduced or applied during the Covid-19 crisis serve the aim of preventing or reacting to an immediate threat to the health of the population and the implications its directly ensuing from such threat. Some measures, especially FDI screening, are also and especially meant to strategically preserve the capacity of the sanitary system to react to future threats, or to avoid the predatory foreign acquisition of strategic assets which have suffered pauperization in the context of the Covid-19 crisis and which relate not necessarily with the capacity to face a health emergency but with national security more generally ([64]).

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that the treaty exception or some elements thereof have been construed with, or without looking at the customary standard for the purposes of the interpretation of the treaty clause.

For presenting our discussion we adopt to the third legal construction, firstly drawn by the *Continental Casualty Company v Argentina* Tribunal (ICSID Case No ARB/03/09, *Award*, 5 September 2008, paragraphs 162-168) and the *CMS Gas Transmission Company v Argentina* Annulment Committee (ICSID Case No. ARB/01/8, decision on annulment, 25 September 2008, para. 129 ff.). See among many others KURTZ, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, *International Comparative Law Quarterly*, 2010, p. 325.

([64]) These considerations partly owe to the OECD *Webinar on Investment Screening in times of Covid-19 – and beyond* which took place on 25 June 2020. See, in this vein, European Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), C(2020) 1981 final, 25 March 2020; ROBERT-CUENDET, *Filtrage des investissements directs étrangers*

Arbitral tribunals and scholars confronted with the Argentine financial crisis have considered the temporal qualification and application of emergency measures depending on the way they have construed the two, treaty and customary, "necessity defences" from the viewpoint of State relief of responsibility, liability, and/or the duty to pay compensation ([65]). Accordingly, the temporal element has contributed to identify the measures that can be covered by the emergency-related defences, in the light of the time they have been adopted. It has been determinant in discriminating between lawful or unlawful application of those measures over time, with the turning point being set somewhen "around" the decrease of the emergency circumstances. It has thus also helped distinguish the legal regimes applicable to the period of validity of emergency measures and to the subsequent period when their effects may continue to be felt. And different implications have been drawn as regards the obligation to compensate in connection to the crisis.

When a security exception treaty clause has been construed as rendering the relevant treaty inapplicable to measures coping with an emergency, two implications have been drawn. Noting that the disadvantageous restructuring of the treasury bills (LETEs) by Argentina took place when the financial situation "was evolving towards normality", the *Continental Casualty* Tribunal implied that only those measures taken within a period of "grave and imminent peril" ([66]) can be shielded from the application of the relevant treaty ([67]). In the literature, this "legitimizing effect" of the timing of adoption of emergency measures has been pinpointed, for example, by Eisenhut ([68]). In addition, some arbitral practice has found that

dans l'UE et Covid-19: vers une politique commune d'investissement fondée sur la sécurité de l'Unione, *European Papers*, 2020, p. 1 ff., www.europeanpapers.eu.

([65]) See decisions in footnote 63.

([66]) Quoting ILC Draft Article 25.

([67]) *Continental Casualty Company* (*supra* footnote 63), para. 221-222. In this sense, Anne-Marie Slaughter acting as a witness in *El Paso* said that Article XI was «a temporary opt-out provision of the treaty as a whole». See *El Paso Energy International Company v Argentina*, ICSID Case No ARB/03/15, Anne-Marie Slaughter, witness, para. 88.

([68]) EISENHUT, *Sovereignty, National Security and International Treaty Law: the Standard of Review of International Courts and Tribunals with Regard to 'Security Exceptions'*, *Archiv des Völkerrechts*, 2010, vol. 48, No. 4, pp. 431-466, 441.

also the effects, whether temporary or permanent, of the emergency measures, which continue to be felt once the crisis is over, fall under the treaty carve-out on grounds of security ([69]).

Those tribunals addressing the customary plea of necessity in line with ILC Draft Articles have consistently stressed that to be covered, breaches must be temporary. The *CMS* Tribunal found that «compliance with the obligation would re-emerge as soon as the circumstance precluding wrongfulness no longer existed» ([70]). The *EDF* Tribunal observed that «even if Respondent's conduct might be excused under the State of Necessity Defence, Respondent remains obligated to return to the pre-necessity *status quo* when possible» ([71]). Accordingly, the Tribunal noted that the investor's economic equilibrium should have been re-established by the concessionaire through timely efforts to raise tariffs to a reasonable level; but because the adjustment took effect only after the claimant investors had decided to withdraw their investment, the Tribunal concluded that the breach could not be kept temporary ([72]). Similarly, outside the Argentine context and more recently, the *Union Fenosa v. Egypt* Tribunal has found an obligation of resumption of the previous situation (the gas supply to the investor's plant) after the cease of the Egyptian revolution by 2015, under the customary state of necessity. This and the other mentioned tribunals have also referred to ILC Draft Article 27(a) in support of their construction ([73]).

([69]) *Continental Casualty Company* (*supra* footnote 63), Decision on Annulment, 16 September 2011, para. 126. See, on a different note, José E. Alvarez in his Separate opinion to the *Sempra* Award (*Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, 28 September 2007), stressing that «the underlying principles of law that Article XI of the US-Argentine BIT was intended to encompass are time-sensitive [and] permit only temporary circumscribed and proportional relief from international legal obligations while the 'imminent' or existing threat persists» (para. 68).

([70]) *CMS* (*supra* footnote 63), Decision on the Merits, 12 May 2005, para. 382.

([71]) *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23, *Award*, 11 June 2012, para. 1177.

([72]) *Ibid*., paragraphs 914, 1171, 1178.

([73]) *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt,* ICSID Case No. ARB/14/4, para. 8.47.

Once established that the temporal limits of the emergency situation affect the legitimacy or the justification of the measures meant to address it, investment tribunals have not showed deference towards the respondent State's own determination as to the end of the emergency or towards the State's decision to maintain or extend emergency legislation. Quite the opposite, irrespective of the formal, temporal scope of national emergency laws, arbitral tribunals have themselves identified the factual end of the emergency, and aligned the legal temporariness requirement to it. To establish when the emergency was over, tribunals have relied upon evidence brought before them by the parties, by witnesses, and as contained in domestic documents or international organizations' reports, and/or have conducted their own analysis of the facts ([74]). Some tribunals have highlighted political events ([75]), while others have given relevance to the decreasing intensity and spread of the repercussions of the crisis disregarding persistent effects or aftershocks ([76]). It results that, while sharing the approach of an objective review, arbitral tribunals knowing of the Argentine financial crisis have fixed the end of the emergency at different moments, with some

([74]) See the *EDF* Tribunal (*supra* footnote 71), at para. 913: «[t]he imbalance of [the investor's] economic equilibrium … persisted beyond the end of the third quarter 2002, when economic indicators in Argentina showed a stable trend toward recovery». The *LG&E* Tribunal stressed its reliance upon evidence brought before it, encompassing all major economic indicators, capital outflows, unemployment, poverty and indigency rates, prices of pharmaceuticals, shortage of basic supplies at hospitals, fraction of the population under the minimum amount of food (*LG&E v Argentina,* ICSID Case No ARB/02/1, decision on liability, 3 October 2006). As another example, the *El Paso* Tribunal (*supra* footnote 67, *Award*, 31 October 2011) made recourse to statistics from the Economic Commission for the Latin America and the Caribbean.

([75]) Such as the replacement of transition authorities and the beginning of a period of institutional stabilization in Argentina with the election of President Kirchner on 26 April 2003, in the *LG&E* decision on liability (*supra* footnote 74), paragraphs 70, 227-228.

([76]) *CMS* (*supra* footnote 63), decision on the merits, 12 May 2005, para. 249: «[t]he Tribunal does not wish to imply that the crisis in Argentina is fully over, because aftershocks are still felt in the economy, particularly in the social sector, but the repercussions are no longer as intense or widespread».

tribunals setting a specific date, others referring to a certain period ([77]).

Finally, moving to the consequences of the invocation of these defences, specifically on the obligation to pay compensation - a long-debated issue in relation to defences under international law ([78]) -, one may observe diverging voices in the international arbitration and the literature under consideration too, on whether and how a State should compensate damages incurred by foreign investors as a consequence of the emergency measures. The general stance found in the investment field is that the temporally circumscribed relief of responsibility under a treaty clause on non-precluded measures implies a parallel preclusion of liability ([79]). However, with reference to the temporary operation of the treaty carve-out, some authors have suggested that some form of indemnity for damages incurred during a crisis is due "in certain cases" ([80]), and others have seen a question arising as to the period for which liability should be deemed precluded ([81]). The latter issue may be connected to the effects of emergency measures which are still felt once the emergency is over; in this case, whether the carve-out is crafted so

([77]) Temporal delimitation is relevant for calculating damages for breaches not falling under the scheme of temporary exclusion of wrongfulness, or from breaches arising from conduct exceeding the carve-out period under a treaty exception. See, for example, the *Mobil* Tribunal in a recently disclosed decision: «damages might be awarded for measures taken during the state of emergency and not cancelled when the state of emergency has ceased to exist or taken when such state had ceased to exist» (*Mobil Exploration v Argentina*, ICSID Case No. ARB/04/16, 10 April 2013, para. 1058). While the *LG&E* Tribunal fixed a specific date (the day after 26 April 2003 – see *supra* footnote 74), Professor Antonio Remiro Brotóns in his Separate Opinion to the *Mobil* Award observes that certain flexibility should be applied when defining the end of the state of emergency because it is too simple to set a fixed date to put an end to a period of factual emergency.

([78]) PADDEU, *Justification and Excuse* (*supra* footnote 13), p. 78.

([79]) DESIERTO, *The Modern International Law of Necessity with and beyond Economics: a Response to Alan Sykes on Investment Treaty Making and Interpretation*, *Houston Journal of Int. law*, 2016, pp. 715-754, 731 ff.

([80]) ALVAREZ-JIMÉNEZ, *The Interpretation of Necessity Clauses in Bilateral Investment Treaties After the Recent ICSID Annulment Decisions*, *Yearbook of International Investment Law and Policy 2010-2011* Sauvant (ed.), 2012, pp. 419, 420.

([81]) BURKE-WHITE, VON STADEN, *Investment Protection* (*supra* footnote 60), p. 386.

as to catch the effects of the emergency over time or not may be determinant for identifying non-compensable damages ([82]). Arbitral tribunals having applied the customary norm on state of necessity or otherwise referred to it to, have pointed to ILC Draft Article 27 (b) according to which the invocation of a circumstance precluding wrongfulness is without prejudice of «the question of compensation for any material loss caused by the act in question». Different approaches may be detected in this regard, too. Some tribunals have interpreted the "without prejudice" element of the provision so as to affirm that compensation is due ([83]). Some voices have suggested that, alongside the temporary respite from responsibility under the customary plea of necessity, the right to compensation for damages suffered during the emergency could be conceived as actionable, although not during the emergency, at some point in the future ([84]). Some others have identified a break (and a resumption) of the duty to compensate in parallel with the time when the circumstance precluding wrongfulness (no longer) operates, exempting the State and thus leaving on the investors the burden of the damages suffered during the emergency ([85]).

6. While a gap in the literature exists on the specific topic, from our analysis of trade and investment law and dispute settlement practice temporariness emerges to be an element of emergency measures as well as a requirement thereof under international law. In certain fields, such as human rights law, temporal limits to emergency measures are based on explicit provisions or on a consistent body of case-law, demonstrating the existence of a proper principle of temporariness. However, even in trade and investment law, the temporal scope of emergency measures has received due consideration and has shaped the limits to national authorities'

([82]) See the *Continental Casualty Company* Annulment Committee (supra footnote 63).
([83]) *CMS* (*supra* footnote 63), Decision on the Merits, 12 May 2005, paragraphs 388-394.
([84]) As argued by the Claimant in *CMS*. See KENT, HARRINGTON, *The Plea of Necessity Under Customary International Law: A Critical Review in Light of the Argentine Cases*, in *Evolution of Investment Treaty Law and Arbitration* Brown, Miles (eds.), Cambridge, 20112, pp. 46, 262.
([85]) *LG&E* (*supra* footnote 74), paragraphs 262-266.

discretion. In such regimes, temporariness allows to circumscribe the specific measures directed to counter an emergency crisis from other measures departing from international commitments but having less compelling temporal limits, to identify the relevant defences, and to refine their legal standard of review.

In the international trade domain, a temporal limit is expressly provided for certain measures such as export restrictions under Article XI:2(a) GATT. The provision thus allows a more thorough review of the temporal scope of such measures, which are intended to be inherently linked to an emergency situation. At the same time, such a strict requirement also implies that when the emergency (the "critical shortage") is over, restrictions or prohibitions have to be withdrawn. As States have realised that access to medical products might be essential also for future health crisis, one might wonder whether such measures will be maintained for the future. However, from the perspective of trade commitments, in order to be legitimate they will have to be adjusted to other requirements, namely those provided by the general exceptions, where the temporal limit can be shaped differently. The temporal element of export restrictions thus becomes a distinctive feature, necessary to qualify a measure under Article XI:2(a). Lacking a precise temporal delimitation – even by means of indefinite renewals – the restrictions and prohibitions imposed during the Covid-19 emergency will need to be justified in the pursue of a more general, long-term objective, which will in turn require States to adopt less restrictive measures when available. More importantly, States will be required to pay due regard to the interests of other countries and to guarantee the access to medical goods on the global market.

Within the investment field, a temporary requirement is usually not expressly provided for measures adopted by governments under the applicable treaties. It has sometimes alluded to, within the assessment of reasonableness and proportionality of a measures under substantive standards of treatment. However, it has been clearly distinguished under the treaty security exception when invoked in times of emergency and under the customary plea of necessity. This defences are susceptible to cover a situation like the current Covid-19 emergency given the broad interpretation of the notions of "essential security interests" and of "necessity" which has emerged in international investment arbitration. At the same time,

left apart all other requirements enshrined in these defences, the temporal element may by itself circumscribe the scope of these defences in regard to the measures in response of the Covid-19 crisis. The objective attitude of international arbitral tribunals towards this requirement has shaped the international legal standard on temporariness of emergency measures as one that goes beyond procedural limits placed upon States, does not refer (solely) to a declaration of emergency under domestic law, even when found constitutionally legitimate, and does not necessarily rely upon "legislative emergency' (i.e., the period from the enactment to the abrogation of the emergency law ([86])) ([87]).

The objective attitude seen above certainly emphasizes the potential role to be played by international organizations and internationally coordinated responses ([88]). It triggers the question of the margin of appreciation left to States to assess that the emergency does not persist. This would especially be relevant if emergency measures were intended, under international law, to be able to cover not only the reaction to an immediate threat but also to avert the effects over time of that threat, if not also to prevent the return of the crisis ([89]). This would also be relevant in front of those measures that

([86]) *Ibid*., para. 228.

([87]) See *CMS* (*supra* footnote 63), decision on the merits, 12 May 2005, para. 217: «… the Tribunal is persuaded that the state of necessity under domestic law does not offer an excuse if the result of the measures in question is to alter the substance or the effects of contractually acquired rights. This is particularly so if the application of such measures extends beyond a strictly temporary period». In the previous paragraph, the Tribunal said that «more than five years have lapsed since the adoption of the first measures in 2000. Delays can be explained ... However, if delays exceed a reasonable period of time the assumption that they might become permanent features of the governing regime gains in likelihood».

([88]) See e.g., on the case of Ebola, ACCONCI, *The Reaction to the Ebola Epidemic within the United Nations Framework: What Next for the World Health Organization?*, *Max Planck Yearbook of United Nations Law*, 2015, p. 405 ff.

([89]) This argument was put forward by Argentina in the *Mobil* dispute, but rejected by the tribunal as falling under the applicable BIT security exception clause. See Professor Antonio Remiro Brotóns in his Separate Opinion to the *Mobil* Award (*supra* footnote 77), para 73. In his opinion, «Argentina urges the Tribunal to analyze whether the emergency measures were necessary to prevent a return to the crisis. Argentina argues that the duty to fulfill treaty obligations does not imply restoring the system in force before the crisis but to comply with treatment standards in the new context, which requires analyzing the new factual circumstances».

will take some time to become effective and will have an impact on the supply chain in the longer term. It is too soon to prospect whether some measures adopted under the Covid-19 emergency will be claimed to be maintained as a *dorénavant* permanent, structural component of a government trade and investment policy. However, would this happen to be the case, their legitimacy under international law would probably have to be based and reviewed differently than in relation to the emergency context, with significant implications on the burden of their adverse impact to be borne by the State concerned.