How can the state measures in the Bilateral Investment Treaties be compensated in Americas?

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Abstract

The Bilateral Investment Treaty (BIT) is between the states; but only the private corporation in the foreign country can sue for damaging their property rights. Therefore, the litigation is the private company versus state. The litigations are in the International Centre for Settlement of Investment Disputes (ICSID), Overseas Private Investment Corporation (OPIC), United Nations Commission on International Trade Law (UNCITRAL), North American Free Trade Area (NAFTA) Chapter 11 Arbitral Panels, or Iran-US Claims Tribunal. The corporations claim the compensation for the damage on their property rights. Cases between the North and South American BITs involve the expropriation; the regulatory taking of the foreign government; and in times of emergent circumstances in the state, e.g., the Argentinian economic crisis in 2001-2002. The damage is compensatory in the Favorable Equal Treatment (FET) principle. The Argentina-US BIT indicates in the Article IV-3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events, shall be treated no less favorable than the third parties. However, the state can avoid the responsibility to compensate in the exceptional circumstances ad hoc. The Article XI says, “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.” This essential security measure has been adopted from the World Trade Organization (WTO) Article XXI that precluded the security measures from the state responsibility. Definition on “security measures” is case by case, but shall be “ordinary meaning” in the Vienna Convention on Law of Treaties (VCLT) Article 31-(1). The state measures in Argentinian Tribunals indicate their financial measures to fix the currency rates in the ad hoc times. The state responsibility never occurs if the host succeeds to argue their security interests. By contrast, the state responsibility incurs the compensation if it fails to argue. Argentina has been filed multiple suits with bundles of the US FDIs because of
their financial crisis in 2001-2002. The state-defense of the “essential security interest” did not work in three Tribunals-CMS v. Argentina\(^1\), Sempra v. Argentina\(^2\), Enron v. Argentina\(^3\)- in the ICSID and one Tribunal of CMS v. Argentina in the OPIC\(^4\); and only one Tribunal-LG&E v. Argentina\(^5\)- accepted that the Argentinean measures were necessary for their essential security interest; therefore, the compensation has been waived \textit{ad hoc} during the particular period in 2002. Exogenously, the BIT has the limit that the treaty can be temporarily suspended, withdrawn, and terminated if the contracting state argues it is their \textit{force majeure} situation under the International Law Commission’s Draft on the State Responsibility (ILC)\(^6\). Ecuador, Venezuela, and Colombia terminate their BITs upon declarations of their states of emergencies that are too frequent. The US FDIs have been suffering from expropriation in the gas or oil industry in those countries. After the state-measures cannot recover the extreme conditions, compensation in litigations can either be efficient or not efficient for the corporations; if it is not satisfied in the corporate side; they can file the same issue to the different courts. In the \textit{ex-post} emergency, the project finds the strict liability rule and negligence rule to compensate against the wrongful acts of the state.

**Keywords**

The BIT, the exceptional circumstances, essential security interests, non-precluded-measures (NPM), risk, state-responsibility, compensation, strict liability, negligence, cost

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\(^1\) CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. Arb/01/8)
\(^2\) Sempra Energy International v. Argentine Republic (ICSID Case No. Arb/02/16)
\(^3\) Enron Corporation Ponderosa Assets, L.P v. Argentine Republic (ICSID Case No. Arb/01/3), Award
\(^4\) Memorandum of Determinations, Expropriation Claim of Ponderosa Assets, L.P. Argentina-Contract of Insurance No. D733
\(^5\) LG&E ENERGY CORP. LG&E CAPITAL CORP. LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1)
\(^6\) "Force majeure" and "Fortuitous event" as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine - study prepared by the Secretariat Extract from the Yearbook of the International Law Commission:-1978, Document:-, vol. II(1)
Index

Sub questions

1. Prior to emergency in the host state, how the BITs can insure the security of the foreign investments independent from the state measures?
2. Post to emergency in the host state, how the foreign investments can be compensated with efficiency?

Case review (case number and dates omitted)

– in the view of the state behaviors, state-wrongfulness

The ICJ
Nicaragua-US Military and Paramilitary
Tadić case
Teheran Hostages case (US v. Iran)
Gabčíkovo-Nagyamaros Project case

The ICSID
EDF (Services) Ltd. v. Romania

The Iran-US Tribunal

– in the extra-ordinary circumstances, expropriation

The ICSID
-LG&E v. Argentina
Research Objectives

The project discusses the new BIT and compensation-efficiency in order to prevent the discouragement of the FDIs in the ex-ante and in the ex-post emergency in the host countries against their wrongful acts.

1. Legal approach

In the ex-ante, insurance reduces the risk for the corporations. There is no insurance in the BIT, but compensatory nationalization or expropriation. The European Convention of Human Rights (ECHR) has the precedents of nationalization and expropriation. Sporrong and Lönroth v. Sweden\(^7\) and James v UK\(^8\) cases deals with direct and indirect expropriation on the foreign properties with the “national treatment” (World Trade Organization Article 1); not to discriminate the property owners among the nationals and non-nationals on the regulatory taking. The project discusses how to fill out the substantive gaps in the BITs in the national treatment. Next, the OPIC has insurance. The US investments can be insured, reinsured, and loaned\(^9\). Can the new BIT model the OPIC’s insurance plan? Next, it reviews lex specialis; the BIT; which is one-side variant, and each different; but it adopts the WTO’s Article XXI in the extreme circumstances; but the phenomenon is that the US is the victim of

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\(^8\) James and others v UK A 98 (1986); 8 Eur. Ct. H.R. 123
\(^9\) Foreign Assistance Act of 1961 (P.L. 87–195) at 125
the exceptional departure from the BIT obligations, while the Latin American countries are the beneficiaries of the exception. The project reviews the misuse of the emergency law in Argentina, frequent declaration of emergency in Ecuador; and what they imply. *Pacta sunt servanda* is the fair and equitable treatment principle that is different from the WTO’s nondiscriminatory clauses but plays the pivotal role in the BIT. Philip Morris v. Uruguay Tribunal stated that fair and equitable treatment does not apply to “all matters governed by the treaty” so that it cannot be extended to dispute resolution\(^\text{10}\). Last, *lex societatis* is the national law where the company’s personality is internationally recognized or where the company is incorporated; often, the concerning countries of the FDIs is Switzerland (Philip Morris Tribunal) and the US (the rest FDIs). The ICSID Tribunals specifically reviews the national property laws as a way to interpret the claims on damage compensation. The project compares how the international investment Tribunals tolerate the national jurisprudence to protect the property rights on the concerning companies; as well as reviewing the shareholder’s rights distinguished by the company’s rights in the multinational enterprises in the customary international law basis. In legal contexts, it gives a rough draft on the insurance texts to protect the FDIs from the risks of nationalization or expropriation *ex ante* emergency in the BITs.

2. The State of the Art (Economic Methodology)

Costs

The emergency circumstance is a huge and inadvertent externality. Demsetz\(^1^1\) and Coase argue that securing the property rights is to internalize the externalities. Demsetz argument extends that the property protection is to compensate the opportunity costs of the potential future exercise of the properties; until the foreign corporation would have been placed in the different foreign territory and exercise their properties. Coase extends that the bargaining cost should be zero to compensate in efficiency; in the real world, it is not

\(^{10}\) Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. V. Riental Republic of Uruguay, (ICSID Case No. ARB/10/7) para 51 (Sep. 24, 2011)

possible. The project theoretically compares the internalization of the huge costs of externality in emergency in the host countries in many ways. In the *ex-ante*, insurance is necessary to reduce the risks of the FDIs. For example, eruption of the volcano in Ecuador physically damages the foreign company’s building on the verge of the mountain regardless of the declaration of the state of emergency that waives the state compensation. If the company has insured in the contract, the compensation accords the private insurance between the country and the foreign company. The BITs does not have it as the model formalities; but the OPIC provides the *ex-ante* insurance against the political risk of the host countries\(^\text{12}\). However, what if buying insurance is too expansive? How to compensate if the uninsured corporation has been damaged and files a suit not in the OPIC? Does the full insurance incentivize the FDIs in the developing countries? Is it possible to predict the risk of the host countries with insurance plan? The project finds the key to the risk averse, risk neutral, and risk loving of the corporations; and calculates the expected damages in the state liability rule.

**Strict liability and Negligence**

In the *ex-post* of emergency, depending on the risk averse, risk neutral, or risk loving, the foreign corporations can either face the efficient compensation or not. Shavell’s theory of the strict liability and negligence\(^\text{13}\) will be studied. Strict liability is inefficient in emergency *ad hoc* because it aims to compensate all the damages ex-ante-the-breach and full reconstruction that has prohibitive transaction costs. Negligence is more efficient because it compensates the corporation only if the state-measure that affected them was inefficient. The methodology put the state is injurer and the corporation is the victim. Harm, fault, and

\(^\text{12}\) Investing in emerging markets can be unpredictable, even for the most sophisticated investors. While developing markets can offer great opportunity, they can also present a variety of political risks beyond an investor’s control. Among them: War, civil strife, coups and other acts of politically-motivated violence including terrorism; Expropriation, including abrogation, repudiation and/or impairment of contract and other improper host government interference; Restrictions on the conversion and transfer of local-currency earnings, available at [https://www.opic.gov/what-we-offer/political-risk-insurance](https://www.opic.gov/what-we-offer/political-risk-insurance)

\(^\text{13}\) S. Shavell, Strict Liability versus Negligence, the Journal of Legal Studies, Vol. 9, No. 1 (Jan., 1980) pp. 1-25
causation are the elements to draw the efficient equilibrium to be compensated in accidents. The project excludes the litigation costs and the chilling effects. The effect of liability on the state action incentivize them not to overuse the declaration on the emergency, and not to engage in such activities that are wrongful, and how much care to exercise to reduce risk against the foreign investments. The liability system acts as an implicit insurer for accident victims and it imposes risk on potential injurers. In this regard, the potential victims (the foreign corporation) for the host’s emergent escape can insure through the BIT as well as the host state can insure through the essential security interests. Designing the strict liability rule and negligence rule is a difficult and complex task. The last consideration is the litigation burden; the administrative expanse; the cost of legal services, the value of litigant’s time, and the operating cost of the courts. Liability is also compared to other methods of controlling harmful state-activities, notably, to corrective taxation to the host state and to regulation through the ICSID Tribunals. It is to induce the injurers and victims to internalize these costs by making the injurer compensate the victim. It can be to weaken the “essential security interests” and integrate it to the compensation and loss articles in the BITs that shall be done when the party concludes the BIT in the ex-ante.

**Potential Application of the methodology**

1 identifying the emergency and damages: incidents, accidents, and who is liable: no liability or unilateral liability or bilateral liability?

2 the ex-ante

(1) Drafting the insurance in the BIT (internalize the external danger of extraordinary circumstances in the host country)

(2) Risk analysis

(3) Black lettering the expropriation or nationalization in the value-free-ridden approach

3 the ex-post

(1) The strict liability, contributory negligence, or negligence rule to compensate the victim;

optimal care in equilibrium

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(2) Induce compliance by tax, penalty, or regulation beyond the litigation

Insurance cost: \( C(x) = x + p(x)h \)

\( H(x) \) = harm function

\( x \) = care level

In the ex-ante drafting on insurance, the host state wants to minimize the insurance costs; optimal care of the state = \( x^* \)

**Negligence:**

1) Type 1 Property Rights: For example, the building of McDonalds was destroyed in Bali because of the civil protestors. McDonalds in Bali claimed the damage compensation. Bali government compensates the McDonalds regardless of the exposition of emergency.

2) Type 2 Property Rights: For example, the Coca cola was expropriated by the Bali companies. The Coca cola corporation in Bali claims it expropriation under the BIT. Bali should compensate it.

\( x^* > x \): state-liability, \( x^* < x \): state-immunity

**Negligence with a defense of contributory negligence:**

1) Type 1 Property Rights: For example, the building of McDonalds was destroyed in Bali because of the civil protestors. McDonalds in Bali claimed the damage compensation. Bali government argues that Bali declared the state of emergency but McDonalds did not take care of the security of the building while the state took all the necessary measures for their “essential security interests.”

2) Type 2 Property Rights: For example, Bali government has an “essential security measures” to expropriate the Coca cola bottle-design to plan the export for their own.
“essential security measures” functions like a negligence of the Coca Cola that they were not aware of the plan.

Injurer at fault, $x < x^*$ and victim faultless $x = x^* \rightarrow$ injurer liable
Injurer faultless, $x = x^*$ or victim at fault, $x < x^* \rightarrow$ injurer not liable

**Comparative negligence:**

Injurer at fault, $x < x^*$, and victim faultless, $x = x^* \rightarrow$ injurer bears 100 percent
Injurer faultless, $x = x^*$, and victim at fault, $x < x^* \rightarrow$ victim bears 100 percent
Injurer at fault, $x < x^*$, and victim at fault, $x < x^* \rightarrow$ bear cost in proportion to negligence

**State liability with a defense of contributory negligence:**

Victim at fault, $x < x^* \rightarrow$ injurer not liable;
Victim faultless, $x = x^* \rightarrow$ injurer liable

1)Type 1 property rights: Under this rule, the corruptive Bali government is liable for the harm it causes for the civil protesters to the McDonalds which knew the causes of protestors and not liable for the harm it causes to McDonalds which were negligent on the risk of their investment.

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**Hypothesis:** perfect compensation and each legal standard equal to the efficient level of care, every form of the negligence rule gives the injurer and victim incentives for efficient precaution.

**Potential Application of the methodology**

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identifying the emergency and damages: incidents, accidents, and who is liable: no liability or unilateral liability or bilateral liability?

Making the state liable induces the ex-ante incentives for non-misusing the essential security interests as a state defense.

The incentive structure can be effective in terms of negligence rule rather than strict liability rule.

Strict liability rule aims to compensate the damage too much. It aims the absolute performance of the state ex-ante-the-breach. The host state should re-construct all the damages after the exceptional circumstances, which is sometimes impossible; its transaction cost of bargaining or reconstructing the damage is prohibitively high. Coase theorem indicates the bargaining is only efficient if the transaction cost is zero. However, the ex-post of the emergency bears the high transaction costs for the state and the corporation that their ex-post bargaining cannot be efficient. Thus, compensating under the strict liability rule is not efficient.

Negligence rule can be efficient. The state and the host can internalize the externalities of the BIT. For example, to induce more incentives for the hosts not to misuse the narrative of the state of emergency, the new BIT can stipulate the insurance; such as the numeral limit of declaration, descripting or categorizing the emergencies, and the penalties for the state not to misuse. Those recapitalizations of the exceptional circumstances of the host-state are to internalize the externalities in legal treaties. The externalities of the BIT can be the moral hazard of the host state that cause either the over-protection or mis-protection of the UN or the ILC. The states over consume the emergency regime, or hide the armed conflict and do not pay the damage compensation to the foreign corporations.

Harm

Loss
The graph is the indifference curve of the multinational corporation. The x axis is the corporate reputation or the brand value. The y-axis is the wealth. Assuming that the host state is the developing nation which has the hidden hostility against the US corporation in a political view; they sell patriotism as means to nurture the national economy. The Coca cola corporation in that state has the trade off between the wealth and reputation. If they dominate more of their market and earn more sales, their reputation or brand-value is in shreds and attacked by the rival-Cokes who have mimicked them in the state. If they dominate less market, their reputation is good because it looks like they do not eat out the domestic market but rather assist their rivals who shape the representatives of the patriotism. Under this trade off, in the usual times, the Coca cola corporation in the foreign territory had the indifference curve u0. However, the inadvertent emergency, for example, the economic crisis has been occurred in that state, making the u0 to u1 for the corporation. The wealth0 200 and the reputation u0 370 has been dropped to the wealth 100 and the reputation 100 because of the government measures to recover the crisis. The Coca cola claimed the state to compensate their damage; the state claims their economic measures were the legitimate NPM. Under strict liability rule, the damage compensation should be ex-ante-the-emergency. The state has to compensate the wealth to W0, and the reputation to 370. How to reconstruct the damaged reputation or brand-value which has been free-ridden? It is not reparable; or costs prohibitively high in terms of time. Under negligence rule, the state can compensate the wealth from wealth 0 100 to wealth * 300, from the curve u1 to the curve of the u0. The reputation is still stuck in 10, but the wealth of the Coca cola is well traded off.

Table numeral example of the indifference curve of the foreign corporation

<table>
<thead>
<tr>
<th>Corporate</th>
<th>Corporate</th>
</tr>
</thead>
</table>

11
Perfect compensation means a sum of money sufficient to make the victim of an injury equally well off with the money and the injury as he or she would have been without the money or injury; perfect compensation is the right goal for courts trying to internalize costs, but implementing the goal is difficult for intangible, but real, harms\textsuperscript{16}.

Cause-But-For-test

To prove the $x>x^*$, meaning the state protection was not liable in the exceptional circumstances with the claim of the “essential security interests,” proof of negligence is a necessary condition for liability\textsuperscript{17}. To make the state liable, the foreign corporation should argue the state of emergency was wrong, or the essential security measures are not legitimate; the state did not due-care the foreign properties and they were not aware of the moral hazard of the state. In contrast, under a rule of strict liability, proof of causation is a necessary condition for liability,

\begin{table}
\centering
\begin{tabular}{|c|c|c|}
\hline
Wealth & reputation u1 & reputation u0 \\
\hline
Wealth 1 & 100 & 100 & 500 \\
Wealth 0 & 200 & 70 & 370 \\
Wealth * & 300 & 10 & 200 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{16} R. Cooter & T. Ulen, Law and Economics, 5\textsuperscript{th} ed., (2008) at 328

\textsuperscript{17} R. Cooter & T. Ulen, Law and Economics, 5\textsuperscript{th} ed., (2008) at 333
and proof of negligence is not necessary. Thus, the foreign corporation does not have to argue that the state was not in due-care and they were reckless to care for the moral hazard of the state, but they have to argue their damage was caused by the inter alia measures of the states, for example, they have to proof the sale of the Coca-cola has been dropped because of the policing measures against the civil protestors; but for the policing measures, the sales would not have been dropped.

When the prohibitively high transaction costs preclude the BIT, tort liability can induce injurers to internalize the costs that they impose on other people.

**Harm= damage= hedonic damage + materialistic damage**

**Cause = but-for-test**

**Fault = wrongful conduct in the ILC; (attributive) responsibility**

The elements of the state tort law consist of the costs of avoiding the harm and the costs of harm.

The cost of harm: A.
The cost of avoiding the harm: wx.
w is consists of time, money, convenience for precaution.
P(x)= probability of accident
The cost of harm: p(x)A

**Minimizing the Social Costs of Accidents**

Expected Social Costs= the cost of avoiding the harm+the cost of harm  
E(SC)= wx +p(x)A  
The efficient level of precaution:  
Derivative of E(SC)=0  
E(SC)'= w+p(x)'A=0  
w= -p'(x*)

* marginal social cost= marginal social benefit*  
where x*, the slope of the E(SC) is zero, which means the minimum point of the y-axis, the minimum costs of the SC.  
Efficient level of precaution=x*

In the foreign investment, the efficient level of precaution for the host is to insure the foreign corporation to safeguard the property rights in the black-letter law in the BIT in the ex-ante; for example, the state-penalty for morally hazardous declaration of emergency; or delineating the “essential security interests;” whether

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it is bound by the GATT Article XX or the GATT Article XXI; or applying the safeguard measures stemmed from the WTO. The precaution for the corporation is to assess the host’s risk, identify the previous state of emergencies, and monitor the state’s comparable industry with hiring the local auditors against the expropriation or nationalization, etc; or just exit their market.

![Figure 8.3](image)

**Incentives for Precaution Under No Liability and Strict Liability**

In case of natural disaster, no one is liable for the injuries. There was an accident in Latin America that the foreign corporation building where was located on the verge of the volcano has been destroyed by the eruption. However, the corporation cannot claim the damage compensation to the state unless they have pre-consented for the particular circumstance in the insurance. The solution is that they put efforts for the precaution given that their location is dangerous. The victim pays the cost $w$ for $x$ units of precaution. Now consider the cost of harm $A$, which is suffered by the victim. Because there is no liability for the host state, the potential victim (corporation) bears the expected harm $p(x)A$. The total costs that the victim expects to bear equal the cost of precaution plus the expected cost of harm: $wx+p(x)A$.

$$w = -p'(x^*)A$$

**victim’s marginal costs= victim’s marginal benefit.**

The rule of no liability causes the victim to internalize the marginal costs and benefits of precaution, which gives the victim incentives for efficient precaution.
2 the ex-ante
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**Outline**

The first chapter reviews the BIT’s “compensation and loss” Article which protects the security of the FDI against nationalization or expropriation, and the “security” Article that protects the interest of the host state. It observes the various usages of them. The BIT’s “investor” is dominantly the private companies. The UAE-BITs include the government as investors; in such, the nationalized FDI can be a claimant in the ICSID in the third host. The project finds how the BITs are concluded in terms of nationalization, expropriation, and essential security interest. The project also reviews the relevant cases in the ICSID, OPIC, and UNCTRAL.
The second chapter reviews nationalization or expropriation of the FDI in the host state in the property law. Property rights is the fundamental human rights, but in the BIT context, it is the corporeal rights, shareholder’s rights, or company’s rights. It is to enjoy the possession in peace, and also the state-right to limit for public interest. In the civil law, it is in the European Court of Human Rights (ECHR) Article 1, Treaty of Functioning European Union (TFEU) Article 335, 345, and the US case laws. Nationalization is held-up of the FDI through the state ownership or control; whereas expropriation is either regulatory talking of the FDI. Many expropriation cases are found in the EU countries. In the Sporrong and Lönroth v. Sweden case; the city of Stockholm’s development-plan was concluded not to consist of the deprivation of the peaceful enjoyment of the possessions for the property owner. Non-discrimination between the nationals and non-nationals is supported by Latin American countries; Calvo doctrine; it is the national treatment in the WTO Article 1.

Nationalization or expropriation is linked with the state defence of the non-precluded-measures because the foreign corporations claim the damage after the long-expropriation of their subsidiaries (e.g. LG&E v. Argentina). Thus, in order for the state to take responsibility or avoid responsibility, the ad hoc review of the extraordinary circumstances has causality with the expropriation accumulated in the prior times. The project excludes the doctrinal definition on nationalization or expropriation but views expropriation in the retro-perspective to give the causal consequences of emergency when they have to compensate the foreign corporations.

The US BITs find that the declaration of “emergency” or “essential security interests” is self-judging; in phenomenon, the Latin American countries are the users of those, while the US is the victim of those.

The third chapter discusses how to compensate. Demsetz and Coase argue the efficiency can be achieved when the parties can internalize the externality. In the ex-post, compensation is to internalize the external effect of the host’s emergent circumstances; in the ex-ante, insurance is the way. The project finds out if the BITs can establish the insurance to deter the moral hazard of the state measures and their wrongfulness. In the ex-post, Shavell’s strict liability and negligence rule will be theoretically modeled. Strict liability re-

20 S. Shavell, Strict liability versus Negligence, 9 J. Legal Stud. 3 (1980)
establishes the condition ex-ante the breach; that costs prohibitively. Negligence compensates merely the amount of the inefficient operation; contributory negligence compensates the yielded-amount in response of the victim's recklessness. This methodology will be applied the NPM emergency ad hoc.

[Diagram] Coca-cola goes to the Somalia’s domestic market with the BIT

The Draft of the State Responsibility in the International Law Commission

The article on the damage (Tort literature: damage= hedonic + material damage)

<table>
<thead>
<tr>
<th>Article 1. Responsibility of a State for its internationally wrongful acts</th>
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<tbody>
<tr>
<td>Every internationally wrongful act of a State entails the international responsibility of that State.</td>
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</table>

<table>
<thead>
<tr>
<th>Article 2. Elements of an internationally wrongful act of a State</th>
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</table>
There is an internationally wrongful act of a State when conduct consisting of an action or omission:
(a) is attributable to the State under international law; and
(b) constitutes a breach of an international obligation of the State.

James Crawford says the Article 1 and 2 deny that there is a categorical requirement of moral or material damage before a breach of an international norm can attract responsibility\(^21\).

The article of Necessity in the circumstances to waive the state responsibility

**Article 25. Necessity**

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
(a) the international obligation in question excludes the possibility of invoking necessity; or
(b) the State has contributed to the situation of necessity.

The article of the state invocation of responsibility in the exceptional circumstances

**Article 27. Consequences of invoking a circumstance precluding wrongfulness**

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:
(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
(b) the question of compensation for any material loss caused by the act in question.

The article of compensation for the loss

\(^{21}\) The Law of International Responsibility (James Crawford, at al. eds., 2010) at 59
Article 36. Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

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