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Corporate Wealth Over Public Health? Assessing the Resilience of Developing Countries' COVID-19 Responses Against Investment Claims and the Implications for Future Public Health Crises

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CORPORATE WEALTH OVER PUBLIC HEALTH? ASSESSING THE RESILIENCE OF DEVELOPING COUNTRIES' COVID-19 RESPONSES AGAINST INVESTMENT CLAIMS AND THE IMPLICATIONS FOR FUTURE PUBLIC HEALTH CRISES

Tim Hagemann*

ABSTRACT

In the wake of the Covid-19 pandemic, states around the world swiftly enacted a multitude of far-reaching emergency responses to contain the viruses' spread and to cope with the economic repercussions of the ensuing crisis. However, these measures detrimentally impacted the operating conditions of many businesses or, at the least, decreased their profitability. As this inevitably affected foreign investments, investors could be tempted to invoke "Investor State Dispute Settlement" ("ISDS") clauses in International Investment Agreements (IIAs) to initiate proceedings before arbitral tribunals and seek compensation for loss of profit caused by states' Covid-19 responses. Due to the specific circumstances in most developing countries, they were hit particularly hard by the crisis and are especially vulnerable to the threat of investment claims. It is therefore important to enable developing countries to realistically anticipate the risk of investment arbitration by assessing the chances of success of foreign investment claims against those policies that were most frequently adopted by them amidst the crisis. Against this background, this paper assesses how likely developing countries' Covid-19 responses breached substantive standards of investor treatment under

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typical IIAs and which defense strategies states may invoke to justify their regulatory action. Based on this analysis, this paper concludes by formulating policy recommendations on how developing countries may enhance the resilience of their emergency responses against foreign investors amidst future public health crises.

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I. INTRODUCTION

Ever since the outbreak of SARS-CoV-1 in 2002, health experts have warned governments of the scenario of a globally evolving pandemic.¹ Yet, when the World Health Organization (WHO) first learned of the existence of SARS-CoV-2 (“Covid-19”) on New Year’s Eve 2019,² not even the most pessimistic experts anticipated that the world was on the edge of a historic public health crisis that would, within just one year, cause over 2 million casualties, severely impair the globalized economy, and impact the lives of the world’s population in an unprecedented manner.³ Indeed, it was not until the end of January, when the WHO first classified Covid-19 as a “public health emergency of international concern,”⁴ and later as a “pandemic,”⁵ that most governments became clearly aware of the severe and imminent threat to human health posed by the virus.⁶

Many countries reacted swiftly by adopting emergency measures that included drastic restrictions of business activities such as the closing of factories and retail outlets, restriction of international trade, or government takeover of entire sectors.⁷

¹ Unterrichtung durch die Bundesregierung [Briefing by the Federal Government], Deutscher Bundestag: Drucksachen[BT]17/12051, <https://dipbt.bundestag.de/dip21/btd/17/120/1712051.pdf> (Ger.).

² *Novel Coronavirus (2019-nCoV) Situation Report 1*, WORLD HEALTH ORGANIZATION [WHO] (Jan. 21, 2020), <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf> [hereinafter *Situation Report 1*].

³ *How COVID-19 is changing the world: a statistical perspective, Volume III*, COMM. FOR COORDINATION STAT. ACTIVITIES 3 (2020), <https://unstats.un.org/unsd/ccsa/documents/covid19-report-ccsa.pdf>.

⁴ *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)*, WORLD HEALTH ORGANIZATION [WHO] (2020), [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

⁵ Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, 91 ACTA BIOMEDICA 157, 157 (2020).

⁶ *Situation Report 1*, *supra* note 2, at 3–5.

⁷ See Oriol Güell & Inés Santaaulalia, *Spanish government puts private healthcare firms at the orders of the regions*, EL PAÍS ONLINE (Mar. 16, 2020), <https://english.elpais.com/society/2020-03-16/spanish-government-puts-private-healthcare-firms-at-the-orders-of-the-regions.html> (discussing how Spain took all private hospitals and healthcare providers under government control).

However, by attempting to contain the virus, they involuntarily added an economic dimension to their public health crisis.⁸ According to predictions by the International Monetary Fund (IMF), the world economy shrunk by 4.4% and even the volume of internationally traded goods and services decreased by 10.4% in 2020.⁹ As a consequence, numerous businesses had to close, over 100 million jobs were permanently lost, and more than 90 million people, predominantly in developing countries, fell under the threshold of extreme poverty.¹⁰

Considering these severe repercussions, some foreign investors may be tempted to question the compliance of states' Covid-19 responses with their obligations under IIAs. With only very limited exceptions,¹¹ the vast majority of IIAs provide investors with an ISDS mechanism, i.e. with the opportunity to initiate arbitral proceedings against the host state where they see their investment unduly impaired by its actions.¹² While so far, there has been no case where an investor has actually made use of ISDS in relation to states' Covid-19 responses, this should not obscure the fact that foreign investors are aware of their rights and willing to invoke them whenever they expect an advantageous outcome. This is underscored by the fact, that only within a few months after the outbreak of the virus,

⁸ Güell & Santaaulalia, *supra* note 7.

⁹ To put these numbers into perspective, even the Global Financial Crisis of 2008–2009 reduced global growth by a comparably low 0.1%. IMF, *A Long and Difficult Ascent*, World Economic Outlook *xiii*, 9 (Oct. 2020) [hereinafter *IMF WEO 2020*].

¹⁰ U.N. Conf. on Trade & Dev., Trade and Development Report 2020 - From Global Pandemic to Prosperity for all: Avoiding another lost Decade, U.N. Doc. UNCTAD/TDR/2020, at I-II (2020) [hereinafter UNCTAD TDR 2020].

¹¹ For instance, Brazil omits Investor-State Dispute Settlement mechanisms completely from its BITs; instead, so-called “Dispute Prevention” mechanisms are implemented. See Arush Mittal, *Bilateral Investment Treaty Between India and Brazil: A Dispute Prevention Mechanism*, CBCL BLOG (July 17, 2020), <https://cbcl.nliu.ac.in/trade-law/bilateral-investment-treaty-between-india-and-brazil-a-dispute-prevention-mechanism/>.

¹² KRISTA NADAKAVUKAREN SCHEFER, INTERNATIONAL INVESTMENT LAW: TEXT, CASES AND MATERIALS 11–12 (Edward Elgar Publ'g, 3d ed. 2020).

investors had already threatened Peru¹³ and Mexico¹⁴ to initiate ISDS on grounds of their Covid-19 responses, and similar threats against other governments followed shortly thereafter.¹⁵ Developing countries with their comparably lower financial capacities should not rely on investors' restraint to demand compensation amidst a public health crisis, but instead should be cautious of potential pitfalls when crafting their Covid-19 responses.

Due to the existence of certain common features, which will be further elaborated in the first chapter, the Covid-19-Crisis confronts developing countries with a unique economic and public health challenge that makes them particularly susceptible to investment claims. Consequently, this article will systematically analyze the chances of success of ISDS claims that are directed against developing countries' Covid-19 measures and provide recommendations on how they may improve the resilience of their emergency responses for future public health crises.

Structurally, this article seeks to accomplish this goal by first assessing the economic and public health impact of the pandemic on developing countries and why this makes them particularly vulnerable to Covid-19 related investment claims. The second chapter will discuss the most commonly adopted measures that potentially interfere with foreign investments. The third chapter will then analyze if these measures likely violated the most commonly invoked substantive standards of investment protection. The fourth chapter will consequently examine in detail which defenses developing countries have at their disposal to justify their otherwise wrongful behaviour and how likely these will hold up before arbitral tribunals. Finally,

¹³ Cosmo Sanderson, *Peru warned of potential ICSID claims over covid-19 measures*, GLOB. ARB. REV. (Apr. 9, 2020), <https://globalarbitrationreview.com/article/1225319/peru-warned-of-potential-icsid-claims-over-covid-19-measures>.

¹⁴ Cosmo Sanderson, *Mexico faces potential claims over pandemic response*, GLOBAL ARB. REV. (May 22, 2020), <https://globalarbitrationreview.com/article/1227136/mexico-faces-potential-claims-over-pandemic-response>.

¹⁵ E.g., against Argentina's public debt restructuring. See Cecilia Olivet & Bettina Müller, *Juggling crises: Latin America's battle with COVID-19 hampered by investment arbitration cases*, TRANSNAT'L INST.: LONGREADS (Aug. 25, 2020), <https://longreads.tni.org/jugglingcrises>.

the fifth chapter will then consider the preceding analysis to recommend policies that would put developing countries in a better position to craft more resilient emergency responses in times of public health crises.

II. THE VULNERABILITY OF DEVELOPING COUNTRIES AMIDST THE COVID-19-CRISIS

Developing countries were affected particularly hard by the repercussions of the Covid-19 crisis: not only were they heavily tormented by the pandemic itself but – in contrast to former economic crises – also severely hit by the ensuing economic recession.¹⁶

While the term “developing country” has recently come under scrutiny for its purported scientific blurriness,¹⁷ this article will not position itself in the ongoing debate but will rather follow the classification utilized by the IMF, which instead distinguishes low and middle-income countries (LMICs) from more developed economies.¹⁸ This decision results from a pragmatic approach that explains the situation most LMICs are experiencing amidst the pandemic on the basis of certain economic and public health conditions this group of countries share.

A. Public Health and Economic Conditions

First, most LMICs suffer from underfunded health care systems which only provide citizens with a very limited access to health care facilities and a comparably low standard of hygiene and treatment.¹⁹ This extremely limits their capacity to

¹⁶ According to the UNCTAD, the severe economic repercussions of the Covid-19-crisis will likely result in a “lost decade” for developing countries regarding the accomplishment of the UN’s Sustainable Development Goals (SDGs). See UNCTAD TDR 2020, *supra* note 10, at II.

¹⁷ See Tariq Khokhar & Umar Serajuddin, *Should we continue to use the term “developing world”?*, WORLD BANK BLOGS (Nov. 16, 2015), <https://blogs.worldbank.org/opendata/should-we-continue-use-term-developing-world> (questioning the use of the term “developing word” to describe dissimilar countries).

¹⁸ See, e.g., IMF, *How do Climate Shocks Affect the Impact of FDI, ODA and Remittances on Economic Growth?*, WP/21/193, 13 (June 2021) (using “LMIC” categories to describe subgrouping of developing countries).

¹⁹ Ryan Cronk & Jamie Bartram, *Environmental conditions in health*

appropriately respond to severe public health emergencies as illustrated by their exceedingly high Covid-19 mortality rates.²⁰ The public health situation is further aggravated by the fact that many higher-income countries have already secured large quantities of Covid-19 vaccines which, in turn, makes it extremely difficult for LMICs to purchase relevant amounts.²¹ As a consequence, vaccinations are progressing very slowly in LMICs and it is expected that herd immunity will not be accomplished in the foreseeable future.²²

Second, the economic conditions in most developing countries make them especially prone to the effects of the recession.²³ On the one hand, most LMIC economies are positioned on the lower end of the “Global Value Chain” (GVC) and, as such, mostly export commodities to industrialized economies.²⁴ With decreasing economic activity by the industry of commodity importing countries amidst the pandemic, prices for raw materials have declined by 21.5% since January 2020.²⁵ This directly led to a devaluation of those countries’ currencies

care facilities in low- and middle-income countries: Coverage and inequalities, 221 INT'L J. HYGIENE & ENV'T. HEALTH 409, 420 (2018); Anne Mills, *Health Care Systems in Low- and Middle-Income Countries*, 370 NEW ENG. J. MED. 552, 552 (2014).

²⁰ Lars Jensen & George Gray Molina, *COVID-19 and health system vulnerabilities in the poorest developing countries*, UNDP GLOB. POL'Y NETWORK BRIEF – HEALTH 3 (July 2020).

²¹ See J. Peter Figueroa et al., *Urgent needs of low-income and middle-income countries for COVID-19 vaccines and therapeutics*, 397 LANCET 562, 562 (2021) (explaining the challenges of the COVID-19 vaccine in low- and middle- income countries).

²² See Victoria Rees, *Rich countries buy up majority of COVID-19 vaccine doses*, *People's Vaccine Alliance says*, EUR. PHARMACEUTICAL REV. (Dec. 10, 2020), <https://www.europeanpharmaceuticalreview.com/news/136170/rich-countries-buy-up-majority-of-covid-19-vaccine-doses-peoples-vaccine-alliance-says/> (discussing that civil society organizations are already warning that the stockpiling of vaccine by developed countries means that only one in every ten LMIC citizen will be able to get vaccinated by the end of 2021).

²³ Figueroa et al., *supra* note 21, at 564.

²⁴ See generally Jakob Engel & Daria Taglioni, *The middle-income trap and upgrading along global value chains*, WTO (2017), https://www.wto.org/english/res_e/booksp_e/gvcs_report_2017_chapter5.pdf (explaining the impact of a export driven economy in relation to the Global Value Chain).

²⁵ See UNCTAD TDR 2020, *supra* note 10, at 22 (reporting that the price for fuel commodities decreased 36.9% in 2020, disproportionately impacting developing countries).

and thus contributed to a drastic increase of foreign debt.²⁶ At the same time, decreasing commodity prices meant a sharp decline in government revenues, which left most developing countries unable to afford wide-ranging stimulus measures like those initiated in more developed economies.²⁷

Assessing the public health and economic background of developing countries is important for understanding the ISDS environment in which this article navigates for two reasons. First, lack of adequate health care capacities and insufficient access to vaccines will prolong the period in which restrictions to economic activities will be necessary.²⁸ This will increase both the probability of foreign investors filing for investment arbitration and the corresponding damages claimed. Second, containing the virus by restraining business operations without the capacity to initiate appropriate economic stimulus will likely lead to a further deterioration of the economic situation for the state and its citizens.²⁹ The drastic increase of poverty could spawn social unrest and create a situation where states feel compelled to stabilize their economy and restore social peace by promulgating drastic economic relief measures that impair foreign investments. The recourse to ISDS would not be without precedent in such a situation. For example, when Argentina faced a severe economic recession around the turn of the

²⁶ See generally *id.* at 26 (stating that the causality between currency devaluation and debt increase stems from the fact that the external debt of most developing countries is repayable in foreign currencies, and if the home currency loses value in comparison to the currency of the loan, the state must invest more financial means to repay its debt).

²⁷ See UNCTAD TDR 2020, *supra* note 10 at 15.

²⁸ See generally M. Mofijur et al., *Impacts of COVID-19 on the social, economic, environmental, and energy domains: Lessons learnt from a global pandemic*, 26 SUSTAINABLE PROD. & CONSUMPTION 343, 343–59 (2020) (suggesting that interdisciplinary involvement, healthcare improvements, sustainable development, and others are key aspects of recovery from the COVID-19 pandemic).

²⁹ According to predictions by the World Bank, extreme poverty rose in 2020 for the first time in the last two decades. By the end of 2020, almost 10% of the global population will be affected by extreme poverty. Most notably, over around 80% or 72 million of those people newly pushed under the poverty line stem from middle-income countries. See WORLD BANK GRP., POVERTY AND SHARED PROSPERITY 2020: REVERSALS OF FORTUNE 1, 5–6, 149 (2020), <https://openknowledge.worldbank.org/bitstream/handle/10986/34496/9781464816024.pdf>.

millennium, its ensuing efforts to restructure its debt prompted investors to file fifty ISDS proceedings³⁰ which were found to violate substantive standards of investment protection under several IIAs and eventually culminated in awards obliging Argentina to pay compensation in the amount of more than 1.6 billion USD.³¹

B. Regulatory Chill

Against the threat of potential compensatory claims amounting to billions of USD, some developing countries may be tempted to refrain from adopting necessary public health responses where investor interests could be impaired. The theory of “Regulatory Chill” assumes that the looming threat of investment arbitration and the financial risks associated with its outcome impedes states’ willingness to promulgate regulatory measures in the public interest.³² This is especially problematic for many LMICs, whose economies – even in times of economic upturn – would be severely impaired by detrimental ISDS outcomes.³³ While a considerable number of recently signed IIAs contain provisions aimed at defusing this situation by better balancing states’ regulatory autonomy with foreign investor interests, it is worth noting that they are still vastly outnumbered by treaties that do not contain such provisions.³⁴ For instance, in 2017, these old-generation treaties still made up for 95% of all IIAs in force,³⁵ and all fifty-five investment claims initiated in 2019 were based on such treaties, 70% of which were

³⁰ Frederico Lavopa, *Opinion: Crisis, Emergency Measures and Failure of the ISDS System: The Case of Argentina*, INTER PRESS SERV. NEWS AGENCY (Aug. 12, 2015), <http://www.ipsnews.net/2015/08/opinion-crisis-emergency-measures-and-failure-of-the-isds-system-the-case-of-argentina/>.

³¹ Arturo C. Porzecanski, *The Origins of Argentina’s Litigation and Arbitration Saga, 2002-2016*, 40 FORDHAM INT’L L. J. 41, 75 (2016).

³² Atif M. Alenezi, *Preventing the Regulatory Chill of International Investment Law and Arbitration*, 9 INT’L L. RSCH. 85, 85 (2020).

³³ See, e.g., *ConocoPhillips v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/30, Award, 329 (Mar. 8, 2019) (serving as a drastic example where the claimants were granted a compensation of over 8.5 billion USD, an amount that surpasses the entire annual budget of a large portion of LMICs).

³⁴ U.N. Conf. on Trade & Dev., Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties, U.N. Doc. UNCTAD/DIAE/PCB/2017/3, at 3, 14 (2017) [hereinafter Phase 2 of IIA Reform].

³⁵ *Id.* at 3.

against developing countries.³⁶

But irrespective of the IIA's substantive standards, arbitration remains a very costly affair. The average costs for the parties' legal representation, the arbitrators' fees and charges, and institutional fees and charges stand at over nine million USD,³⁷ and there are cases where the costs of litigation even exceeded this amount by the factor twelve.³⁸ Irrespective of the outcome, tribunals frequently split these litigation costs among the parties.³⁹ While these numbers might sound relatively low compared to the compensatory claims outlined above, it must be noted that for many LMICs with limited financial capabilities, the litigation costs alone would amount to a considerable percentage of their annual budget and may thus deter LMICs from taking regulatory action.⁴⁰

Thus, developing countries are facing a dilemma: they may either adopt emergency measures to mitigate the crisis and risk costly foreign investor claims or refrain from such action and aggravate the public health and economic situation even further – potentially to the point where they have no other choice than to intervene anyways. Accordingly, their only choice to overcome this dilemma is to craft resilient Covid-19 responses capable of prevailing before investment tribunals.

III. DEVELOPING COUNTRIES' COVID-19 RESPONSES

In the course of their Covid-19 responses, developing countries adopted a wide range of different measures to contain

³⁶ U.N. Conf. on Trade & Dev., World Investment Report 2020 - International Production beyond the Pandemic, U.N. Doc. UNCTAD/WIR/2020, at 110–11 (2020).

³⁷ See Diana Rosert, *The Stakes Are High: A review of the financial costs of investment treaty arbitration*, INT'L INST. FOR SUSTAINABLE DEV. 8 (2014), <https://www.iisd.org/system/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf>.

³⁸ See, e.g., *Hulley Enterprises Ltd. (Cyprus) v. Russian Fed'n*, PCA Case No. 2005-03/AA226, Award, 576 (Perm. Ct. Arb. 2014) [hereinafter *Hulley*] (observing that the claimant's costs for legal representation amounted to 79,628,055.56 USD and an additional 1,066,462.10 GBP).

³⁹ SCHEFER, *supra* note 12, at 562.

⁴⁰ Compare *Belize*, THE WORLD FACTBOOK (last updated Oct. 12, 2021), <https://www.cia.gov/the-world-factbook/countries/belize/#economy> (demonstrating that in Belize, the litigation costs of the *Hulley* arbitration alone would amount to over 1/5 of the annual government revenue), with *Hulley*, *supra* note 38 (highlighting the high cost of litigation).

the spread of the virus and deal with the crisis' economic consequences.⁴¹ While they are tailored to fit the specific circumstances of their domestic environment, it is noteworthy that certain types of measures are commonly adopted throughout LMICs.⁴² Certain of these measures are particularly prone to play a role in investment arbitration because they either negatively affect the conditions under which foreign investors operate in the host state, restrict trade and market access, interfere with due process of law, or indirectly threaten investors' interests.⁴³

Investors' operating conditions are impaired if Covid-19 measures negatively affect investors' capacity to manufacture products, supply services, or otherwise enjoy their investment.⁴⁴ A particularly popular type of regulation that deprives investors of the enjoyment of their investment is the suspension of utility bills, i.e., payments for water, gas, telephone, electricity and like services that citizens receive.⁴⁵ An illustrative example for this category can be found in El Salvador, where the government temporarily freed people and businesses affected by the crisis from paying their electricity, phone, and internet bills and froze payments for mortgages, rent, and loans.⁴⁶ Another example is a Peruvian regulation that, under the pretext of protecting toll booth workers from contracting Covid-19, fully suspended road

⁴¹ François Gerard et al., *Social protection response to the COVID-19 crisis: options for developing countries*, 36 OXFORD REV. ECON. POL'Y 281, 281–82 (2020).

⁴² Rajiv Chowdhury et al., *Long-Term strategies to control COVID-19 in low and middle-income countries: an options overview of community-based, non-pharmacological interventions*, 35 EUR. J. EPIDEMIOLOGY 743, 743 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7354877/pdf/10654_2020_Article_660.pdf; see also Leila Abdullahi et al., *Community interventions in Low-And-Middle-Income Countries to inform COVID-19 control implementation decisions in Kenya: A rapid systematic review*, PLOS ONE 1, 3, 19 (2020) (describing the common measure implemented).

⁴³ Julien Chaisse, *Both Possible and Improbable – Could COVID-19 Measures Give Rise to Investor-State Disputes?*, 13 CONTEMP. ASIA ARB. J. 99, 123 (2020).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ David A. Wemer, *What Latin American countries are doing to confront coronavirus*, ATL. COUNCIL (Mar. 23, 2020), <https://atlanticcouncil.org/blogs/new-atlanticist/what-latin-american-countries-are-doing-to-confront-coronavirus/>.

toll collection for the country's highway system.⁴⁷ Yet, the most severe interferences were the imposition of so-called "lockdowns" or "shutdowns," i.e. emergency measures aimed at enforcing social distancing obligations by restricting businesses, declaring curfews, closing private and public spaces of social interaction, or imposing quarantines.⁴⁸

Moreover, a considerable number of measures may raise questions on their compliance with due process of law because of the system of rules and procedures that are envisaged to protect private rights from undue state interference.⁴⁹ In other words, these are measures that disregard prescribed judicial and administrative rules and procedural safeguards to the detriment of the investor. In the context of states' Covid-19 responses, this is particularly relevant in cases where states seized investors' property in the early stages of the outbreak without regard for the appropriate procedure.⁵⁰ Another relevant factor may be the closure or limited access to courts and tribunals which led to the interruption or rescheduling of many trial proceedings, which precluded investors from effective judicial remedy in cases where their investments were detrimentally affected.⁵¹ Due

⁴⁷ See Sanderson, *supra* note 13 (explaining possible arbitration by private toll booth concessionaires who were prohibited from collecting road tolls by the Peruvian government in March 2020).

⁴⁸ While many states imposed lockdowns to curb the pandemic, one of the most severe set of measures was employed by India, where, at its height, nearly all types of businesses including factories, restaurants and retail stores were compelled to cease operations. See Ministry of Home Affairs, Government of India issues Orders prescribing lockdown for containment of COVID-19 Epidemic in the country, Release No. 1607997 (Issued on March 24, 2020); see also Xiaohui Chen & Ziyi Qiu, *COVID-19: Government interventions and the economy*, VOXEU & CEPR (May 13, 2020), <https://voxeu.org/article/government-interventions-covid-19-and-economy> (describing the widespread imposition of strict measures to contain the virus's spread).

⁴⁹ Chaisse, *supra* note 43, at 132.

⁵⁰ See *id.* at 133 (describing the authorization that some Chinese city governments had to temporarily seize private property from private entities without adhering to prescribed administrative procedures).

⁵¹ See *COVID-19 in Latin America and the Caribbean: An overview of government responses to the crisis*, OECD 17 (2020), https://read.oecd-ilibrary.org/view/?ref=129_129907-eae84sciiov&title=COVID-19-in-Latin-America-and-the-Caribbean_An-overview-of-government-responses-to-the-crisis (explaining the use of an online judiciary as a replacement to in person proceedings); see also Laney Zhang, *China: Supreme People's Court Issues Online Litigation Rules, Addressing Review of Blockchain Evidence*, LIBR.

process might also be undermined by governments exploiting the crisis to tighten their grasp on the country in declaring a state of emergency and giving themselves extraordinary powers.⁵² In many cases, this includes the dismantling of many rights and procedural safeguards along with limited legislative and judicial supervision over the exercise of those powers.⁵³ Consequently, where such emergency powers are used to interfere with investors' enjoyment of their investment, these measures may be particularly vulnerable to investment claims.

Although many measures do not directly target foreign investments, they may do so indirectly. Most importantly, these are measures that relate to the restructuring of public debt.⁵⁴ As outlined above, developing countries' debt has surged amidst the pandemic to such a degree that it may soon be necessary for some to declare a state default if they are unable to adopt drastic restructuring measures.⁵⁵ However, such restructuring

CONG. (2021), <https://www.loc.gov/item/global-legal-monitor/2021-07-21/china-supreme-peoples-court-issues-online-litigation-rules-addressing-review-of-blockchain-evidence/> (explaining how China's Supreme People's Court published an order for all lower courts to move litigation to a new online system).

⁵² *Venezuela: A Police State Lashes Out Amid Covid-19*, HUM. RTS. WATCH (Aug. 28, 2020, 12:00 AM), <https://www.hrw.org/news/2020/08/28/venezuela-police-state-lashes-out-amid-covid-19#> (describing how the Venezuelan government declared a state of alarm in March 2020 and granted President Maduro wide ranging powers to adopt Anti-Covid measures without effective judicial or legislative oversight); see generally Frances Z. Brown et al., Commentary, *How Will the Coronavirus Reshape Democracy and Governance Globally?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 6, 2020), <https://carnegieendowment.org/2020/04/06/how-will-coronavirus-reshape-democracy-and-governance-globally-pub-81470> (arguing that the Cambodian Prime Minister obtained virtually unlimited power to adopt any kind of measure in the country's fight against Covid-19 and as one of several African states, Togo allowed its president to rule virtually unchallenged by decree).

⁵³ Magnus Lundgren et al., *Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness* 5-6 (Stockholm Univ., Research Paper No. 78, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3641384.

⁵⁴ Lundgren et al., *supra* note 53, at 122, 155.

⁵⁵ Covid-19 related state defaults have indeed already happened in Lebanon and Zambia and experts expect more to follow. See Homi Kharas & Meagan Dooley, *COVID-19's legacy of debt and debt service in developing countries* 5 (Center for Sustainable Development at Brookings Institution, Working Paper No. 148, 2020), https://www.brookings.edu/wp-content/uploads/2020/12/COVID-19-legacy-of-debt_final.pdf.

measures are particularly prone to provoke investment arbitration as seen by the recent examples of Greece⁵⁶ and Argentina.⁵⁷ Thus, when the latter attempted to restructure its debt again in August 2020, its debtors immediately confronted Argentina with threats of investment arbitration that pushed the country to largely accept the demands.⁵⁸ Finally, some developing countries adopted tax concessions and deferrals for their businesses and nationals.⁵⁹ As this has already spawned ISDS proceedings in the past, developing countries should be especially careful not to craft or apply these measures discriminatorily by affecting the competitive relationship between domestic businesses and foreign investors.⁶⁰

In conclusion, developing countries have enacted a multitude of measures that target, or at least indirectly impair, foreign investments. Naturally, the noncompliance with investors' interests is not *per se* an indicator for a measure's illegality. Nevertheless, it can be concluded from this assessment that if investors initiate ISDS proceedings, they will likely be on the grounds of the aforementioned measures. In the

⁵⁶ *Poštová banka, a.s. and ISTROKAPITAL SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 13, 33 (April 9, 2015) (demonstrating that during the height of the European Financial Crisis in 2012, the Troika offered financial help subject to the condition that Greece would reduce the face value of their sovereign bonds, which influenced bond holders, like the Slovakian Postova Banka, but worsened the restructuring efforts and resorted to arbitration).

⁵⁷ From 1991 to 2001, Argentina gave out sovereign bonds in the amount of almost 140 billion USD but saw itself unable to repay them amidst a severe economic crisis in the early 2000s. When in 2005, Italian bond owners rejected Argentinian debt restructuring measures which foresaw a severe reduction of its bonds' face value, they initiated investment arbitration. See Kai-Wei Chan, *The Relationship Between the International Investment Arbitration and Sovereign Debt Restructuring*, 7 CONTEMP. ASIA ARB. J. 229, 233 (2014).

⁵⁸ Olivet & Müller, *supra* note 15.

⁵⁹ For instance, Viet Nam extended the deadlines for tax and land use fee payments for businesses suffering from the COVID-19 pandemic and introduced an income tax reduction of 30% for the 2020 financial year. *Policy Responses to COVID-19*, INT'L MONETARY FUND (July 1, 2021), <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>.

⁶⁰ Amrit Bhatia, *Covid-19 and Standards of Investment Protection*, 38 YOUNG ARB. R. 23, 25 (2020) (explaining that in *Feldman v. Mexico*, the host state was found to have violated its National Treatment obligation by unduly offering tax rebates to domestic resellers of cigarettes).

following sections, there will be further analyses to assess the chances of success before investment tribunals.

IV. POTENTIAL VIOLATIONS OF SUBSTANTIVE IIA PROVISIONS

As of January 2021, there were 2,258 Bilateral Investment Treaties and additionally 324 Treaties with Investment Provisions in force.⁶¹ While these treaties are all individually crafted to fit the circumstances of the involved parties, the overwhelming majority of IIAs share certain common standards of investment protection.⁶² These include the obligations of Fair and Equitable Treatment (FET), National Treatment, Most-Favoured-Nation (MFN) Treatment, the prohibition of unlawful expropriation, and the commitment to provide investors with Full Protection and Security (FPS).⁶³ While this chapter will assess the compliance of developing countries with those standards very broadly, it is important to note that the predictability of investment arbitration is limited by two decisive factors: the circumstances of the individual case and the interpretation given by the tribunal for the relevant substantive standard, which will be reflected in the following analysis.⁶⁴

A. Fair and Equitable Treatment

FET has long been a controversial issue between proponents and critics of the investment law regime.⁶⁵ On the one hand, FET remains immensely popular with foreign investors, as it has become the most litigated and successful substantive standard for investment claims.⁶⁶ On the other hand, critics

⁶¹ *Investment Policy Hub - International Investment Agreements Navigator*, UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited Oct. 15, 2021).

⁶² Alenezi, *supra* note 32, at 86 (recognizing the existence of customary international standards used by IIAs).

⁶³ *Id.* at 86–88.

⁶⁴ See U.N. Conf. on Trade & Dev., Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements II, U.N. Doc. UNCTAD/DIAE/IA/2011/5, at 29 (2012) (discussing how outcomes of investment arbitration are unpredictable due to varied interpretations of relevant fair treatment clauses) [hereinafter FET: UNCTAD].

⁶⁵ Nicholas Wiggins, *T-Tip Negotiations Round Two: An Opportunity to Redirect the Trajectory of International Investment Law*, 169 UNIV. PA. L. REV. 1289, 1314 (2021).

⁶⁶ RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF

have outlined the vagueness of FET and the associated lack of predictability regarding its interpretation by investment tribunals, which makes it difficult to anticipate violations and effectively restraints states' steering capacity to regulate for the public good.⁶⁷ Not surprisingly, the UNCTAD identified the FET standard as one of the major issues of the current investment law regime that frustrates developing countries' ambitions to realize the UN's Sustainable Development Goals and explicitly argued for its reform.⁶⁸

1. Scope

The main reason for its ambiguous reception is the fact that FET's often vague formulation tempted investment tribunals to interpret the standard in various ways.⁶⁹ For instance, some tribunals interpret FET as the minimum standard of treatment prescribed under customary international law.⁷⁰ Dating back to the "Neer Arbitration" of 1926, a state was held to breach FET, if its conduct amounted to an outrage of injustice, bad faith, willful neglect, or a pronounced degree of improper governmental action.⁷¹ Nowadays, most tribunals recognize the standard of treatment where the relevant FET provision directly references customary international law.⁷²

In contrast, where the relevant IIA lacks any reference to customary international law, the vast majority of investment tribunals interpret FET as an autonomous standard of investor treatment whose scope must be assessed independently of other substantive standards and the minimum standard of treatment under customary international law.⁷³ Subsequently, the vague

INTERNATIONAL INVESTMENT LAW 130 (OUP, 2d ed. 2012).

⁶⁷ FET: UNCTAD, *supra* note 64, at 2.

⁶⁸ FET: UNCTAD, *supra* note 64, at 14.

⁶⁹ Nicolette Butler & Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation?*, 64 NETH. INT'L L. REV. 43, 51 (2017).

⁷⁰ Glamis Gold, Ltd. v. U.S., Award, ¶ 627 ICSID Rep. (2009).

⁷¹ L. F. H. Neer and Pauline Neer (U.S.) v. United Mexican States, 4 R.I.A.A. 60, 61–62 (1926).

⁷² DOLZER & SCHREUER, *supra* note 66, at 137.

⁷³ *Id.* at 133; Tecnicas Medioambientales Tecmed S.A. v. United Mexican States (Tecmed v. Mexico), ICSID Case No. ARB (AF)/00/2, Award, ¶ 155 (2003); MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 110 (2004).

language of FET provisions gave tribunals significant discretion in determining their scope and led to a substantially higher level of investment protection than the “Neer standard.”⁷⁴ Although investment tribunals emphasized the circumstances of the specific case,⁷⁵ they soon developed several recurring elements that are usually considered to determine a violation of FET.⁷⁶ These elements are the prohibition to take on measures arbitrarily without purpose or explanation, to deny investors justice and due process of law, to discriminate on wrongful grounds, to coerce or harass, or to frustrate the legitimate expectations of investors vis-à-vis the investment.⁷⁷

It is especially the latter ground on which the majority of tribunals concentrate their assessment of FET.⁷⁸ Since the beginning of widespread FET litigation, the interpretation of legitimate expectations has undergone a significant evolution. Some tribunals in the early 2000s defined “legitimate expectations” from the investor’s subjective point of view and hence as comprising all of the basic expectations regarding the investment.⁷⁹ This would entail that all rules and regulations that concern the investment must have been outlined to the investor prior to the undertaking of the investment and may not be changed to its detriment.⁸⁰ This very demanding approach has since been replaced by a more nuanced view of tribunals that emphasizes whether investors’ expectations are “legitimate.”⁸¹ Nowadays, virtually all tribunals base the legitimacy of expectations on specific representations made to the investor by the host state.⁸² Additionally, tribunals now give greater deference to states’ public policy choices.⁸³ Only where the

⁷⁴ SCHEFER, *supra* note 12, at 401.

⁷⁵ *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 118 (2002).

⁷⁶ FET: UNCTAD, *supra* note 64, at xv-xvi.

⁷⁷ *Id.* at xvi.

⁷⁸ SCHEFER, *supra* note 12, at 437.

⁷⁹ *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, ¶ 154.

⁸⁰ *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, ¶ 154.

⁸¹ SCHEFER, *supra* note 12, at 430.

⁸² *See inter alia* *Ioan Micula v. Rom.*, ICSID Case No. ARB/05/20, Award, ¶ 669–70 (2013) (“This promise, assurance or representation may have been issued generally or specifically, but it must have created a specific and reasonable expectation in the investor.”).

⁸³ *Id.* at ¶ 266.

state's failure to treat investors fairly and equitably outweighs its sovereign right to regulate for the public good, will a breach of the FET standard be found ("*Right to Regulate*").⁸⁴ Nevertheless, tribunals retain a high level of discretion regarding the assessment and elements of FET which led to an incoherent arbitral practice that still makes it difficult for states to foresee where the line between investor and host state interest will be drawn.⁸⁵

Accordingly, states are now actively seeking to narrow the scope of the FET standard in new IIAs by linking FET to the customary international law standard of treatment, explicitly referencing the elements that tribunals are allowed to consider in finding a violation or omitting it altogether.⁸⁶ Yet, most old-generation IIAs that predominantly form the basis for investment claims against developing countries still operate under unrestricted FET clauses.⁸⁷ Accordingly, to assess the resilience of developing countries' Covid-19 responses, it is necessary to base the following analysis of specific measures on the broad interpretation of FET as an autonomous standard.

2. Imposition of Lockdowns

As outlined in the preceding chapter, many LMICs tempted to curb the spread of the pandemic by imposing strict lockdowns on its citizens and businesses during the height of the Covid-19 outbreak. Where these measures shut down retail outlets and industrial production like in India,⁸⁸ the potential for impairing foreign investments is particularly high. This puts tribunals in the position to assess if the relevant measure is a legitimate exercise of regulatory power or if it unduly impairs foreign investments. In this regard, tribunals give particular weight to

⁸⁴ Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 284. (2010).

⁸⁵ SCHEFER, *supra* note 12, at 450.

⁸⁶ See U.N. Conf. on Trade & Dev., Policy options for IIA reform: treaty examples and data, Supplementary material to World Report 2015, <https://investmentpolicy.unctad.org/publications/133/policy-options-for-ii-reform-treaty-examples-and-data> (last updated June 24, 2015) (explaining the IIA regime's push to link FET to customary international law).

⁸⁷ *Id.*

⁸⁸ Annexure to Ministry of Home Affairs, Order No. 40-3/2020-D (Issued on March 24, 2020) (India).

the principle of proportionality, i.e. the obligation to ensure that state conduct is suitable, necessary and not excessive in view of the pursued policy objective.⁸⁹ Hence, where states go beyond what is seen as proportionate by tribunals in light of all stakeholders' rights and interests, a state measure might not comply with FET.

In the context of lockdowns, tribunals will likely agree that the imposition of strict social distancing measures that effectively reduce the risk of contracting the virus is generally suitable to curb the pandemic. However, they still may call into doubt if the strict closing of factories and retail outlets and the imposition of curfews that subsequently interfered severely with the profitability of investments was necessary and proportionate. While there is solid evidence that hard lockdowns do indeed play an important role in containing the pandemic,⁹⁰ other studies called into question if its benefits outweigh the accompanying detrimental mental health and economic effects.⁹¹

Indeed, tribunals could find the most severe forms of lockdown to be excessive where the data already indicated a serious decline in Covid-19 cases, or critically scrutinize the necessity of certain lockdown measures such as the closing of industrial facilities with very little personal interaction.⁹² However, it should be noted that tribunals are inclined to grant states a margin of appreciation for assessing the effectiveness of public health regulation.⁹³ For instance, in *Philip Morris v. Uruguay*, the majority of arbitrators rejected the premise that the host state had to produce evidence for a measure's effectiveness to attain an envisaged public health goal.⁹⁴ Instead, the tribunal found the WHO's assessment that the

⁸⁹ *Hydro Energy 1 S.À R.L. v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 573–74 (2020).

⁹⁰ Paul Smith, *Hard lockdown and a "health dictatorship": Australia's lucky escape from covid-19*, BMJ (Dec. 23, 2020), <https://www.bmj.com/content/bmj/371/bmj.m4910.full.pdf>.

⁹¹ Hasan Ahamed et al., *Lockdown Policy Dilemma: COVID-19 Pandemic versus Economy and Mental Health*, 3 J. BIOMEDICAL ANALYTICS 37, 38, 49 (2020).

⁹² Bhatia, *supra* note 60, at 27.

⁹³ *Philip Morris Brands SÀRL. v. Oriental Republic of Uru.*, ICSID Case No. ARB/10/7, Award, ¶¶ 388, 399 (2016).

⁹⁴ *See id.* at ¶ 396 (This was *inter alia* based on the difficulty to provide such evidence in a future "hypothetical scenario").

underlying policy rationale was sufficiently evidence-based to satisfy the element of proportionality.⁹⁵ Yet, it should be noted that the third arbitrator in the case firmly rejected the lawfulness of a margin of appreciation under the applicable BIT and international law and instead argued that the absence of evidence provided by the host indicates the disproportionality of the measure.⁹⁶ This underscores the large discretion tribunals enjoy in their assessment of the boundaries of public policy decisions where the relevant IIA does not specify the scope of FET.⁹⁷ It should also be noted that in the current situation, the WHO critically reflects on the negative repercussions of the imposition of lockdowns and instead recommends to only apply them restrictively “where and when needed” to slow down the transmission of Covid-19.⁹⁸ While tribunals usually grant states a large degree of deference for pursuing public health objectives,⁹⁹ this should not be misinterpreted as a *carte blanche* for the imposition of severe lockdowns. Tribunals retain the discretion to demand a higher standard of evidence for the effectiveness of Covid-19 related measures.¹⁰⁰ States should therefore be cautious not to implement severe lockdowns without considering its negative repercussions and taking adequate countermeasures or might potentially be found to violate the applicable FET standard.

3. Emergency Powers

As elaborated above, several governments in developing countries have utilized this crisis to confer themselves emergency powers that are normally reserved to the legislative branch and widely exceed their regular constitutional capacities

⁹⁵ *Id.*; See also Philip Morris Brands SÀRL v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Amicus Curiae Brief, ¶ 10 (2015).

⁹⁶ See Philip Morris Brands SÀRL v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion, ¶¶ 5, 125 (2016).

⁹⁷ Tania Voon, *Philip Morris v. Uruguay: Implications for Public Health*, 18 J. WORLD INV. & TRADE 320, 328 (2017).

⁹⁸ *Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19*, WORLD HEALTH ORGANIZATION [WHO] (Dec. 31, 2020), <https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19>.

⁹⁹ Philip Morris v. Uru., ICSID Case No. ARB/10/7, ¶ 399.

¹⁰⁰ See Chaisse, *supra* note 43, at 118-19.

to act.¹⁰¹ Without the scrutiny of the legislature and their moderating influence, state of emergency powers are particularly prone to result in arbitrary treatment.¹⁰² Consequently, this could become an issue of investment arbitration where they are employed arbitrarily to the disadvantage of investors to, for example, close their businesses and factories or otherwise reduce the profitability of their investments.

According to the International Court of Justice (“ICJ”) in *ELSI*, the concept of arbitrariness describes a range of different measures that, due to their deliberate disregard for due process, are incompatible with the rule of law.¹⁰³ Subsequently, numerous tribunals recognized the ICJ’s high threshold by adding some new factors in their assessment of arbitrariness or narrowing its scope even further.¹⁰⁴ Nowadays, several types of measures can be identified as arbitrary by tribunals.¹⁰⁵ These include measures that do not serve a legitimate purpose, are intended to harm the investor while pretending to pursue a public policy goal, are not based on legal standards but personal discretion, or that deliberately disregard due process and procedure.¹⁰⁶

In the context of Covid-19 related emergency measures, the latter two elements play a particularly important role. This is highlighted by the case of Venezuela which serves as a rather drastic but illustrative example for how unrestrained state of emergency powers may lead to arbitrary policy making.¹⁰⁷ On

¹⁰¹ *Id.* at 119.

¹⁰² Bhatia, *supra* note 60, at 24; Chaisse, *supra* note 43, at 135.

¹⁰³ See *Elettronica Sicula SpA (ELSI) (U.S. v. It.)*, Judgment, 1989 I.C.J. 15, ¶ 128 (July 20) (“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law [. . .]. It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”).

¹⁰⁴ See *Alex Genin v. Republic of Est.*, ICSID Case No. ARB/99/2, Award, ¶ 371 (2001) (adding the element of bad faith to the arbitrariness definition); see also *Ronald S. Lauder v. Czech*, UNCITRAL, Award, ¶ 221 (Sept. 3, 2001) (requiring an arbitrary measure to be also discriminatory or prejudicial).

¹⁰⁵ Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, in *THE FUTURE OF INVESTMENT ARBITRATION* 186–87 (Catherine A. Rogers & Roger P. Alford eds., 2009).

¹⁰⁶ Schreuer, *supra* note 105, at 188.

¹⁰⁷ Jesús María Casal Hernández & Mariela Morales Antoniazzi, *States of Emergency without Rule of Law: The Case of Venezuela*, VERFASSUNGSBLOG

13 March 2020, Venezuelan president Nicolás Maduro declared a state of alarm that granted him virtually unchallenged powers to rule by decree.¹⁰⁸ These powers were then used to impose social and economic lockdowns, even stricter price controls, and more governmental influence over private entities.¹⁰⁹ However, these measures are based on a precarious legal framework. The executive disregarded the constitutional procedure that prescribes the approval of any state of alarm by the National Assembly and instead prolonged the president's emergency powers over the constitutionally accepted period of time.¹¹⁰ Moreover, instead of following the procedure set out by the state of alarm and issuing the corresponding measures in the relevant decrees, Maduro frequently resorted to public announcements and modified the scope and content of the measures at will.¹¹¹ At the same time, undue interference of the executive branch with the state's court system has rendered rule of law and judicial oversight virtually non-existent in Venezuela over the last years.¹¹²

As outlined above, tribunals will generally grant states a considerable margin of appreciation for pursuing their public health objectives. However, the displayed degree of disregard for due process of law and legal procedure will make it difficult for Venezuela and similarly acting states to argue that their regulatory action complied with FET. As a result, investors that see the profitability of their investments arbitrarily impaired by such emergency measures (e.g. in the form of lockdowns or price controls), may be relatively well positioned to claim a breach of the host's FET obligation.

4. Denial of Justice

Another key factor of due process of law, and of FET, is the

(May 22, 2020), <https://verfassungsblog.de/states-of-emergency-without-rule-of-law-the-case-of-venezuela/>.

¹⁰⁸ *Id.*

¹⁰⁹ Hernández & Antoniazzi, *supra* note 107.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Press Release, Inter-Am. Comm'n H.R., IACHR Presents Preliminary Observations and Recommendations Following Historic On-Site Visit to Monitor the Human Rights Situation in Venezuela (May 8, 2020).

international legal concept of denial of justice.¹¹³ After exhausting all local remedies,¹¹⁴ a denial of justice can be invoked where the host state's courts refuse to hear a case brought by an investor, subject it to undue delays, administer justice inadequately, or clearly and maliciously misapply the law.¹¹⁵

Accordingly, investors may claim that the closure of the host's court system during the height of the Covid-19-outbreak and the subsequent interruption and rescheduling of court cases in relation to their investment precluded them from seeking effective judicial remedy.¹¹⁶ A relevant number of LMICs may argue that they had neither the appropriate financial capacities nor the technical infrastructure to establish alternative procedures such as online hearings.¹¹⁷ However, it is important to note that denial of justice is an objective standard that is not subject to the resources that the host has at his disposal.¹¹⁸ Consequently, tribunals will have to assess the legitimate interest of states to protect the health of judicial officials while considering that the conduct by states must not reach the threshold of denial of justice.¹¹⁹ Many countries avert this threshold by following the model of India which exclusively allowed court proceedings in matters of urgency, i.e. cases concerning life and death or imminent seizure or destruction of property.¹²⁰ Or is it reasonable to demand that states make use of modern technology like mainland China, that swiftly changed its proceedings to an online format to keep distortions to judicial

¹¹³ DOLZER & SCHREUER, *supra* note 66, at 174.

¹¹⁴ *Toto Costruzioni Generali S.P.A. v. Republic of Leb.*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 164 (2009).

¹¹⁵ *Robert Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, ¶ 102–103 (1999).

¹¹⁶ *Bhatia*, *supra* note 60, at 24–25.

¹¹⁷ *Id.*

¹¹⁸ *See Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Alb.*, ICSID Case No. ARB/07/21, Award, ¶ 76 (2009) (noting in regard to denial of justice that “a relativistic standard would be none at all”).

¹¹⁹ *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Alb.*, ICSID Case No. ARB/07/21, Award, ¶ 76 (2009).

¹²⁰ Sayra Kakkar, *Global Court Functioning and the Impact of COVID-19 on Arbitration*, JURIST (May 17, 2020, 3:04 AM), <https://www.jurist.org/commentary/2020/05/sayra-kakkar-court-functioning-covid19/>.

proceedings to a minimum?¹²¹ The answer to this question cannot be assumed in general and will ultimately rely on the individual circumstances of the case, especially the duration of the procedural delays, the urgency of judicial relief and the investor interest at stake.

B. Unlawful Expropriation

Being one of the most severe interferences with foreign investments imaginable, the prohibition of unlawful expropriation,¹²² is a key substantive standard that can be found in virtually every IIA in force. It is important to note that the expropriation of foreign investments is not per se a violation of international law and explicitly provided for in most IIAs.¹²³ This means that states retain the right to lawfully expropriate foreign property if they comply with the relevant conditions set out in the applicable IIA or customary international law.¹²⁴ Generally, the expropriation must be conducted for a public purpose, in accordance with due process of law, applied non-discriminatorily, and against adequate compensation.¹²⁵ In turn, where the conduct of a state does not comply with all of these conditions, the expropriation becomes unlawful.¹²⁶ The investor can then claim financial compensation not only for the expropriated investment but also for the loss of expected future profits,¹²⁷ which will have devastating consequences for developing countries with limited financial capacities.

1. Scope

There are two categories of expropriation: direct and indirect expropriation.¹²⁸ Direct expropriation is a process that

¹²¹ *Id.*

¹²² SCHEFER, *supra* note 12, at 207.

¹²³ *Id.* at 243, 252.

¹²⁴ DOLZER & SCHREUER, *supra* note 66, at 99–100.

¹²⁵ SCHEFER, *supra* note 12, at 254.

¹²⁶ David Khachvani, *Compensation for Unlawful Expropriation: Targeting the Illegality*, 32 ICSID REV. - FOREIGN INV. L. J. 385, 395 (2017).

¹²⁷ The Factory at Chorzów (Ger. v. Pol.), Judgement, 1928 P.C.I.J. (ser. A) No. 17, at 17, 47 (Sept. 13); Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 353 (2007).

¹²⁸ U.N. Conf. on Trade & Dev., Expropriation: UNCTAD Series on Issues in International Investment Agreements II, U.N. Doc.

involves the seizure or mandatory legal transfer of a property's legal title by the state.¹²⁹ Due to the negative incentives for Foreign Direct Investment (FDI) set by expropriating foreign investors' properties, this has become exceedingly rare in the recent past.¹³⁰ In contrast, indirect expropriation does not involve the seizure or transfer of title of a foreign investment by the state, but produces effects tantamount to expropriation by depriving the investor of any meaningful opportunity to enjoy his investment.¹³¹ This is recognized for instances where the state "neutralized" the investment. Neutralization describes a substantial interference with the investment that lasted a sufficiently long period of time and caused a severe loss of value, profitability, or managerial control.¹³² However, the neutralization of an investment does not necessarily mean that it has been unlawfully expropriated. In the cause of evolving case law, tribunals have recognized that the interest of investors to protect their investment must be counterweighed by the states' interest to adopt regulations for the general welfare.¹³³

Unfortunately, diverging case law on this issue makes it difficult to anticipate where a tribunal will find an indirect expropriation for which the state owes the investor adequate compensation and where it will reject a claim in the context of the state's right to regulate for a public interest. For instance, until recently, most tribunals treated every state act that

UNCTAD/DIAE/IA/2011/7, at 128 (2012) [hereinafter UNCTAD Expropriation].

¹²⁹ *Id.* at 6.

¹³⁰ DOLZER & SCHREUER, *supra* note 66, at 101; *but see* Campbell v. Republic of Zim., SADC (T) Case No. 2/2007, Judgement, 44 (2008) (highlighting that they did not disappear completely, especially in the context of ongoing post-colonial ethnic and land conflicts in Southern Africa).

¹³¹ DOLZER & SCHREUER, *supra* note 66, at 101; UNCTAD Expropriation, *supra* note 128, at 7.

¹³² It should be noted that it is disputed when a state interference is severe enough to amount to a neutralization. *See* Tippetts. v. TAMS-AFFA, 6 Iran-U.S. Cl. Trib. Rep. 219 (1984) (reasoning that every interference that is not merely ephemeral would constitute a severe interference); *see* LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, ¶ 23 (Apr. 30, 2004) (setting the bar considerably higher by requiring a severe deprivation of the investor's rights or an almost complete annulment of the investment's value); *see also* SCHEFER, *supra* note 12, at 255, 259.

¹³³ Saluka Investments BV (Neth.) v. Czech, UNCITRAL, Partial Award, ¶ 253 (2006) [hereinafter *Saluka*].

neutralized a foreign investment as indirect expropriation without considering the state's motivation for that act ("*Sole Effects Doctrine*").¹³⁴

However, tribunals nowadays overwhelmingly acknowledge the state's sovereign right to regulate as a rule of customary international law.¹³⁵ Accordingly, where the state acted in good faith to attain a public policy objective and adhered to the principles of reasonableness, non-discrimination, due process of law, and proportionality, tribunals will interpret a regulation not as an unlawful expropriation but as a lawful exercise of its regulatory powers ("*Police Power Doctrine*").¹³⁶ Even though the term "Police Power Doctrine" is mostly associated with indirect expropriation and it has been argued that its application is limited to corresponding claims,¹³⁷ it must be noted that its concept largely overlaps with the "Right to Regulate" discussed above and is often used synonymously by tribunals.¹³⁸ Consequently, tribunals grant states a high degree of deference in cases of alleged indirect expropriation where a regulation seeks to accomplish a public policy goal in a reasonable, non-discriminatory, and proportionate fashion.¹³⁹ While the doctrine

¹³⁴ See *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 7.5.20 (2007); *Saipem S.p.A. v. People's Republic of Bangl.*, ICSID Case No. ARB/05/7, Award, ¶ 133. (2009); *AES Summit Generation Ltd. v. Republic of Hung.*, ICSID Case No. ARB/07/22, Award, ¶ 14.3.1 (2010).

¹³⁵ See Saluka, *supra* note 133, ¶ 262 ("[T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are commonly accepted as within the police power of States' forms part of customary international law today.").

¹³⁶ *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶¶ 235, 240 (2011); *Fireman's Fund Ins. Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, ¶ 176(j) (2006); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 195 (Oct. 3, 2006).

¹³⁷ Alain Pellet, *Police Powers or the State's Right to Regulate*, in *BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID* 447, 457 (Kinneer et al. eds, 2016); *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic*, ICSID Case No ARB/03/17, Decision on Liability, ¶ 148 (July 30, 2010).

¹³⁸ See *ADC Affiliate Ltd. v. Republic of Hung.*, ICSID Case No. ARB/03/16, Award of the Tribunal, ¶ 423 (Oct. 2, 2006) (utilizing the term "right to regulate" in a similar manner as the police power doctrine).

¹³⁹ Maryam Malakotipour, *The Chilling Effect on Indirect Expropriation Clauses on Host States' Public Policies: a Call for a Legislative Response*, 22

is applicable to every type of sovereign policy making,¹⁴⁰ it is worth noting that it is particularly rooted in public health regulation going back as far as 1903, when an arbitral tribunal recognized states could not be held liable for reasonably exercising their regulatory powers vis-à-vis foreign nationals' property to contain an infectious disease.¹⁴¹

Nevertheless, tribunals retain a high degree of discretion in drawing the line between rightful execution of public policy objectives and unlawful expropriation that revolves around their individual assessment of the elements of reasonableness, non-discrimination, and proportionality. The resulting uncertainty for states has created concerns that this could deter them from regulating in the public interest.¹⁴² Accordingly, many recent treaties narrow the scope of indirect expropriation by explicitly referencing factors that constitute or exclude its applicability or even omit the element of indirect expropriation altogether.¹⁴³ Yet, similar to the situation regarding the reform of the FET standard, most IIAs in force still include unrestrained provisions on indirect expropriation.¹⁴⁴ Thus, the assessment of the following measures will be based on the unrestrained scope of indirect expropriation in these old-generation IIAs.

2. Requisition of Foreign Property

In the wake of the crisis, some governments resorted to the requisition of medical supplies and equipment as well as to the seizure of properties and businesses as part of their Covid-19

INT'L CMTY. L. REV. 235, 239 (2020).

¹⁴⁰ Catharine Titi, *Police Powers Doctrine and International Investment Law*, in 12 GENERAL PRINCIPLES OF LAW AND INVESTMENT ARBITRATION 323, 324 (Andrea Gattini et al. eds., 2018).

¹⁴¹ *See, e.g.*, Bischoff, 10 R.I.A.A. 420, 420 (1903) (noting the court denied a damage claim against Venezuelan police after they seized a carriage from a German businessman amidst a smallpox epidemic because the tribunal ruled that the taking constituted a reasonable exercise of police authority amidst a dangerous health crisis).

¹⁴² SCHEFER, *supra* note 12, at 283.

¹⁴³ *See* Phase 2 of IIA Reform, *supra* note 34, at 11; *see also* Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Oct. 30, 2016, 2017 O.J. (L11) 23, 272 (clarifying that some measures, specifically public health regulations, as seen in CETA, have been indirectly excluded from the scope of expropriations).

¹⁴⁴ Phase 2 of IIA Reform, *supra* note 34, at 11.

response.¹⁴⁵ As outlined above, the expropriation of foreign property is not per se unlawful under IIAs and customary international law. For instance, if medical supplies were seized non-discriminatorily against the payment of an adequate compensation and regard for due procedure to increase the state's capacity to curb the pandemic, the expropriation will be likely found lawful.

However, where states temporarily requisitioned foreign property without mandatory transfer of title or paying adequate compensation, investors may claim that they were subjected to unlawful indirect expropriation.¹⁴⁶ Indeed, tribunals recognized an unlawful expropriation where the state temporarily seized a foreign owned property in such circumstances.¹⁴⁷ Yet, there is a considerable disagreement on the question of how long the interference with the investment must have lasted to amount to expropriation.¹⁴⁸ Where one tribunal rejected a claim based on a measure that lasted 18 months,¹⁴⁹ a period of just one year was sufficient for another.¹⁵⁰ Yet, in the context of the Covid-19-crisis, most properties have been returned within several months after the outbreak once the first wave of the virus had been sufficiently under control. Accordingly, tribunals may likely reject the claim of indirect expropriation where states did not acquire permanent or at least longer lasting control over the foreign investment.

Even where the circumstances justify the assumption of an indirect expropriation, it must be considered that under the police power doctrine, tribunals grant states a considerable degree of deference for regulating in the public interest.¹⁵¹ Only where they find that a regulation does not comply with the principles of reasonableness, non-discrimination, due process

¹⁴⁵ Chaisse, *supra* note 43, at 119.

¹⁴⁶ UNCTAD Expropriation, *supra* note 128, at xi.

¹⁴⁷ Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, ¶ 99 (2000).

¹⁴⁸ SCHEFER, *supra* note 12, at 260.

¹⁴⁹ S.D. Myers, Inc. v. Gov't of Can., UNCITRAL (NAFTA), First Partial Award, ¶ 284 (Nov. 13, 2000).

¹⁵⁰ Wena Hotels Ltd. v. Arab Republic of Egypt, *supra* note 147, ¶¶ 82, 99.

¹⁵¹ "Indirect Expropriation" and the "Right to Regulate" in International Investment Law 8 (Org. for Econ. Co-operation and Dev., Working Paper No. 4, 2004).

and proportionality, the claim of an unlawful indirect expropriation might be accepted.¹⁵² In this context, tribunals will particularly assess if the interference was excessive in view of the investors' legitimate expectations and if the expropriatory conduct duly regarded the corresponding procedure. Especially the latter element could become problematic for those developing countries that resorted to court closings amidst the pandemic. Indeed, tribunals recognized an unlawful expropriation where the courts could not provide adequate protection for the expropriated investor.¹⁵³ This raises questions similar to those in relation to FET concerning the fair equilibrium between the protection of court officials and access to a judicial remedy.¹⁵⁴ Indeed, several states such as India seem to have already acknowledged the importance of due process of law in the context of expropriation and excepted corresponding cases from the general suspension of court proceedings.¹⁵⁵

3. Suspension of Utility Payments

As illustrated by the examples of Peru and El Salvador, the suspension of utility payments has been another popular measure among many developing countries to curb the economic repercussions of the Covid-19-crisis.¹⁵⁶ Although the investments' legal title remains with the investor in these cases, its effects could nevertheless be tantamount to expropriation and thus potentially constitute an unlawful indirect expropriation.¹⁵⁷ Indeed, there can only be little doubt that the state's interference with the investment was substantial. The suspension of road tolls in Peru and phone, internet, and electricity bills in El Salvador deprived investors from any meaningful opportunity to generate income and, in turn, the enjoyment of their investment.¹⁵⁸

¹⁵² *Id.* at 6-7.

¹⁵³ *See Amco Asia Corp. v. Republic of Indon.*, ICSID Case No. ARB/81/1, Award, ¶ 292 (1984) (explaining that the Jakarta Appellate Court's judgment was insufficient regarding the Indonesian party's rights).

¹⁵⁴ *Id.* ¶¶ 198-203.

¹⁵⁵ *See Kakkar*, *supra* note 120.

¹⁵⁶ Sanderson, *supra* note 13 (explaining how Peru eased the transportation costs of essential goods during the Covid-19 pandemic).

¹⁵⁷ *See id.*

¹⁵⁸ *Id.*; *See Wemer*, *supra* note 46; *Foreign investment in Latin America*

Yet, policies suspending the payment for utilities have so far been exclusively designed as short-term measures to help citizens curb the immediate financial hardships associated with states' lockdown policies.¹⁵⁹ As outlined above, short interferences do not suffice the time component of expropriation.¹⁶⁰ Accordingly, it is unlikely that tribunals will hold that the suspension of utility payments as enacted by states in the wake of the Covid-19-crisis is tantamount to expropriation. Nevertheless, this should not obscure the fact that unrestrained suspension policies could indeed amount to indirect expropriation and thus be subject to an assessment of reasonableness and proportionality by the tribunal.

C. Full Protection and Security

The concept of the FPS standard is to protect investors and their investments from physical harm by third parties and state organs.¹⁶¹ However, this does not imply strict liability of the host for every injury sustained by the investor,¹⁶² but instead entails the obligation to diligently adopt all measures that are necessary to protect the investor.¹⁶³ What is especially important in this context is the fact that the standard of due diligence is not an absolute one but relative to the financial and institutional capacities of the host state.¹⁶⁴

expected to halve in 2020, UNCTAD (June 16, 2020), <https://unctad.org/news/foreign-investment-latin-america-expected-halve-2020> (explaining the lack of foreign investors in Latin America due to the pandemic's impact on local economies).

¹⁵⁹ *E.g.*, Chaisse, *supra* note 43, at 123 (explaining that utility payments in El Salvador were suspended for only three months, from March to June 2020).

¹⁶⁰ UNCTAD Expropriation, *supra* note 128, at 69.

¹⁶¹ SCHEFER, *supra* note 12, at 384.

¹⁶² Asian Agric. Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 49 (1990) (“[A]n obligation to provide ‘protection and security’ or ‘full protection and security required by international law’ . . . could not be construed according to the natural and ordinary sense of the words as creating a ‘strict liability’ . . . The State into which an alien has entered . . . is not an insurer or a guarantor of his security.”).

¹⁶³ Am. Mfg. & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award, ¶ 6.05 (1997).

¹⁶⁴ Pantechniki v. Alb., *supra* note 118, ¶ 77 (discussing the need for consistent application of protection and security in order to prevent civic disorder).

Furthermore, some tribunals have expanded the scope of protection of FPS beyond mere physical security as an obligation of the host to create a stable and secure commercial and legal environment.¹⁶⁵ This would mean that theoretically, the host may not only be held liable for the impairment of the investor's health, but also for subsequent regulatory changes which would not have been necessary if adequate preventive containment strategies were taken in the early stages of the pandemic.¹⁶⁶

However, considering that even states with the most advanced economies were not able to prevent the outbreak and further spread of Covid-19 in their territories,¹⁶⁷ it is unlikely that developing countries will be held liable for the failure to fully contain the virus where they diligently adopted measures to curb the pandemic.

D. Non-Discrimination

The obligation of host states to treat investors non-discriminatorily is another key element of IIAs. In practice, the principle of non-discrimination is implemented in the form of a general prohibition of discriminatory treatment and is accompanied by more specific national and MFN treatment obligations.¹⁶⁸ They all have in common that they prohibit less favorable treatment of investors in like circumstances without proper justification¹⁶⁹ but differ in terms of the relevant

¹⁶⁵ See *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, ¶ 174 (Sept. 1, 2009) (defining full protection and security as going “beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view.”); see also *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 729 (July 24, 2008) (adhering “to the *Azurix* holding that when the terms ‘protection’ and ‘security’ are qualified by ‘full’, the content of the standard may extend to matters other than physical security.”); see also *CME Czech B.V. v. Czech*, UNCITRAL, Partial Award, ¶ 613 (Sept. 13, 2001) (requiring the host State “to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued.”).

¹⁶⁶ Bhatia, *supra* note 60, at 24–25.

¹⁶⁷ Dyani Lewis, *Why many countries failed at COVID contract-tracing - but some got it right*, NATURE (Dec. 17, 2020), <https://www.nature.com/articles/d41586-020-03518-4>.

¹⁶⁸ SCHEFER, *supra* note 12, at 359.

¹⁶⁹ *Id.* at 376.

reference groups and the grounds for the differential treatment.¹⁷⁰ While the general prohibition of discriminatory treatment obliges the host not to subject the investor to detrimental treatment on the basis of their race, gender, or sex, national and MFN treatment include the nationality of the investor.¹⁷¹ In turn, MFN treatment obliges hosts not to treat foreign investors disadvantageously in relation to third-party investors while national treatment prescribes the same duty vis-à-vis the host's own nationals.¹⁷²

In the context of states' Covid-19 responses, the latter could become an issue of investment arbitration where the host state's economic relief measures have discriminatory effects on foreign investors. As outlined above, some developing countries resorted to tax deferrals and concessions to address the detrimental economic repercussions of the crisis.¹⁷³ This could become problematic, where states craft or apply tax measures in a way that treats its own nationals or third-party investors more advantageously,¹⁷⁴ even if the discriminatory effects are involuntary.¹⁷⁵ However, the principle of non-discrimination as a standard of investment protection is limited by two elements. The first is the relevant treaty language, used in a considerable number of recent treaties, that narrows the applicability of the national and MFN treatment standard by excluding tax measures from their scope.¹⁷⁶ The second is the fundamental

¹⁷⁰ See *id.* at 362, 371 (comparing one tribunal's "any-investor-is-comparable" approach to determining likeness to another's "only-direct-competitors-are-comparable" approach).

¹⁷¹ *Id.* at 358.

¹⁷² SCHEFER, *supra* note 12, at 376.

¹⁷³ See *Policy Responses to COVID-19*, *supra* note 59 (summarizing the key economic responses 197 governments are taking to limit the human and economic impact of the COVID-19 pandemic).

¹⁷⁴ For instance, in cases where host states conferred tax reductions and deferrals exclusively to domestic actors, tribunals have acknowledged a violation of the relevant national treatment obligation. See *Marvin Feldman v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 188 (2002).

¹⁷⁵ Nowadays, the vast majority of tribunals regard discriminatory intent neither as a necessary nor sufficient precondition for the existence of discrimination. See SCHEFER, *supra* note 12, at 358–59.

¹⁷⁶ Julien Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution - A Cut above Dedicated Tax Dispute Resolution?*, 35 VA. TAX REV. 149, 162 (2016). It should be noted that the broad exclusion of tax measures from national and MFN treatment is a more recent development to

principle that differential treatment is not prohibited where it is justified by the public interest.¹⁷⁷ As outlined in the first chapter, the Covid-19-crisis severely impaired developing countries' economies.¹⁷⁸ Naturally, these states have a significant interest in protecting their domestic industry and businesses from peril and indeed, tribunals have acknowledged that safeguarding the solvency of important local industries constitutes a legitimate base for differential treatment.¹⁷⁹ Against this background and given the severity with which many LMICs were hit by the economic effects of the Covid-19-crisis, tribunals will likely grant them a significant leeway for adopting corresponding relief measures.

V. DEFENSES AGAINST COVID-19 RELATED INVESTMENT CLAIMS

Even if a tribunal will recognize that a measure employed by a state in conjunction with its Covid-19 response amounts *prima facie* to a violation of its obligations under the relevant IIA, the state may still successfully argue that the wrongfulness of its conduct was warranted through a relevant exception. Most notably, the arsenal of defenses on which developing countries may rely and which will be outlined further in this chapter can be put into two categories: defenses that are explicitly set out in the applicable IIA and those that relate to the state's responsibility under customary international law.

A. IIA-based Defenses

An emerging trend among a number of more recent IIAs is the explicit incorporation of provisions that allow states to disregard their treaty obligations where they act to protect a

safeguard states' regulatory capacity in tax matters and as such, the majority of IIAs in force do not contain them. *See id.* at 164.

¹⁷⁷ In their assessment of potential justifications, tribunals "must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest." *See* S.D. Myers, Inc. v. Gov't of Can., UNCITRAL (NAFTA), First Partial Award, ¶ 250 (2000).

¹⁷⁸ *COVID 19 Brief: Impact on the Economies of Low-Income Countries*, U.S. GLOBAL LEADERSHIP COALITION (Aug. 12, 2021), <https://www.usglc.org/coronavirus/economies-of-developing-countries/>.

¹⁷⁹ *Gami Investments Inc. v. The Gov't of the United Mexican States*, UNCITRAL (NAFTA), Final Award, ¶ 114 (2014).

defined set of interests.¹⁸⁰ In general, IIAs distinguish between two types of these provisions: so-called “Essential Security Exceptions” (ESE) and “General Public Policy Exceptions” (GPPE).¹⁸¹

1. Essential Security Exceptions

ESE describes a group of self-judging IIA-based defenses that broadly define security interests for which the parties may deviate from if they deem an act necessary to safeguard such an interest.¹⁸² It must be noted that ESE are not necessarily restricted to the traditional understanding of national security as protection against military threats and internal unrest: indeed, tribunals have recognized that major economic crises may be covered by ESE.¹⁸³

However, as no state has ever actively invoked a security exception to justify its otherwise wrongful conduct so far, it is difficult to anticipate how tribunals will assess ESE defenses in Covid-19 related investment proceedings.¹⁸⁴ Nevertheless, it has been argued that tribunals may draw inspiration from the recent WTO Panel Report *Russia – Traffic in Transit*,¹⁸⁵ which comprised a detailed analysis of the national security exception in Art. XXI GATT 1994.¹⁸⁶ Most notably, the WTO panel

¹⁸⁰ Mao-wei Lo, *Legitimate Expectations in a Time of Pandemic: The Host State’s Covid-19 Measures, its Obligations and Possible Defenses Under International Investment Agreements* 13 CONTEMP. ASIA ARB. J. 249, 260 (2020).

¹⁸¹ Chaisse, *supra* note 43, at 159, 161–62 (distinguishing between the ESE and General exceptions).

¹⁸² Chaisse, *supra* note 43, at 159.

¹⁸³ For instance, under the pretext of assessing the necessity of the host’s measures, the tribunal in *CMS v. Argentina* argued that Argentina’s economic relief measures which were taken amidst the Argentine economic crisis to promote economic and social stability could not generally be excluded from the scope of the ESE in the underlying Argentina-US BIT. *See id.* at 160 n.222.

¹⁸⁴ Jaemin Lee, *The Coronavirus Pandemic and International Investment Arbitration – Application of ‘Security Exceptions’ Clauses in Investment Agreements* 13 CONTEMP. ASIA ARB. J. 185, 193 (2020).

¹⁸⁵ *See generally* Panel Report, *Russia - Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (Apr. 5, 2019) (defining the national security exception in Article 21 of the 1994 General Agreement of Tariffs and Trade.) [hereinafter *Russia – Traffic in Transit*].

¹⁸⁶ Lee, *supra* note 184.

concluded that an “essential security interest” relates to the quintessential functions of the state such as protecting its population from threats.¹⁸⁷ While the Art. XXI GATT 1994 grants states a margin of appreciation in defining their essential security interests and to act accordingly, this discretion is limited by the state’s obligation to act in good faith.¹⁸⁸ This is the case where the state’s intention is to address the essential security interest and not to simply circumvent its obligations.¹⁸⁹

Applied to the Covid-19-crisis, the panel’s reasoning would mean that containing the pandemic and hence protecting citizens’ lives qualifies as an essential security interest. Accordingly, states would be allowed under ESE to deviate from its treaty obligations as long as they act in good faith, i.e. with the intention to curb the pandemic rather than to circumvent their treaty commitments.¹⁹⁰

As a result, developing countries might successfully invoke ESE where they regulate *bona fide* for reasons of public health.¹⁹¹ However, there are two limiting factors to the applicability of ESE. First, many old-generation treaties do not yet contain ESE.¹⁹² Second, even where IIAs feature ESE provisions, their treaty language and scope differ widely.¹⁹³ Accordingly, while ESE could indeed constitute a promising defense for states to justify their public health responses, it is yet difficult to anticipate how tribunals will interpret individual ESE in the context of Covid-19.

2. General Security Exceptions

In contrast to ESE, GPPE is not limited to the protection of essential security interests but extends the bases on which a

¹⁸⁷ *Russia – Traffic in Transit*, *supra* note 185, at ¶ 7.130.

¹⁸⁸ *Id.* at ¶¶ 7.131–32.

¹⁸⁹ *Id.* at ¶ 7.133.

¹⁹⁰ Lee, *supra* note 184, at 199.

¹⁹¹ Claudia Annacker et. al., *COVID-19: Public Health Emergency Measures and State Defenses in International Investment Law*, MONDAQ (May 20, 2020), <https://www.mondaq.com/france/litigation-contracts-and-force-majeure/937558/covid-19-public-health-emergency-measures-and-state-defenses-in-international-investment-law>.

¹⁹² See Tania Voon, *Can International Trade Recover? The Security Exception in WTO Law: Entering a New Era*, 113, *AJIL UNBOUND*, 45, 45 (2019) (explaining how the security exception has “lain dormant”).

¹⁹³ Chaisse, *supra* note 43, at 159.

state may deviate from its treaty obligations to a number of essential interests such as public morals and human, animal, and plant life.¹⁹⁴ However, the scope of GPPE is not unlimited. Their invocation is bound by the principles of necessity and non-discriminatory application.¹⁹⁵ As GPPE are identical or at least similar in design to Art. XX GATT 1994, the compliance of a policy with the provision must be oriented towards the corresponding three step analysis in WTO Law.¹⁹⁶

Accordingly, the state measure's objective must correspond with that of the relevant essential interest described under the GPPE provision.¹⁹⁷ Moreover, the measure must have been necessary, which is assessed by considering the value of the policy objective for society, the extent to which the measure contributes to promote or protect this value and the measure's impact on conflicting interests.¹⁹⁸ The more important the value and the protection of the policy objective is for society, the more the measure is allowed to impair conflicting interests as long as no equally effective alternative exists.¹⁹⁹ Finally, the measure must neither arbitrarily nor unjustifiably discriminate against the investor or be made in bad faith.²⁰⁰

While it is clear, from the explicit reference in Art. XX(b) GATT 1994 to the protection of human life, that the containment of a severe public health crisis such as Covid-19 constitutes an essential interest under GPPE provisions, the assessment of the other preconditions will rely on the individual measure in question.²⁰¹ Tribunals will therefore have to balance the interests of investors with that of the general public to contain the virus. Considering the enormous threat that Covid-19 poses, it can be assumed that tribunals will grant states a high degree

¹⁹⁴ See *id.* at 163 n.233 (stating GPPE are usually modelled after the General Exceptions provision of Art. XX GATT 1994 and hence predominantly extend their protection to the interests listed under this provision).

¹⁹⁵ *Id.* at 163.

¹⁹⁶ Chaisse, *supra* note 43.

¹⁹⁷ *Id.* at 163 n.234.

¹⁹⁸ PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION – TEXT, CASES AND MATERIALS* 560 (Cambridge Univ. Press, 4th ed. 2017).

¹⁹⁹ Chaisse, *supra* note 43, at 159.

²⁰⁰ Schreuer, *supra* note 105, at 198.

²⁰¹ VAN DEN BOSSCHE & ZDOUC, *supra* note 198, at 553.

of deference where they adopt *bona fide* regulations to curb the pandemic.²⁰²

While it is therefore likely that developing countries could successfully rely on GPPE to justify their Covid-19 responses, its relevance is curbed by the fact that GPPE provisions are still very rarely included in IIAs.²⁰³ In 2018, there were only 3.5% of all IIAs in force.²⁰⁴ Although their number is consistently rising, the little more than 100 IIAs that include a general exceptions clause will therefore become relevant in only a very limited number of cases.²⁰⁵

B. Customary International Law Defenses

IIAs are treaties that set out international obligations in the form of procedural and substantive safeguards vis-à-vis the other state party and its investors.²⁰⁶ Therefore, if the state parties do not comply with the treaty's provisions, they can be held financially responsible.²⁰⁷ However, when and how exactly a state must assume responsibility for its failure to perform an international obligation is governed by the customary international law of state responsibility enshrined in the ILC's Draft Articles on State Responsibility (ARSIWA).²⁰⁸ Hence, even where a state violates its IIA obligations vis-à-vis a foreign investor, it may avert responsibility where the conditions of a justification under the ARSIWA exist.²⁰⁹

In contrast to IIA-based defenses, justifications under the law of state responsibility have two decisive advantages for

²⁰² Chaisse, *supra* note 43, at 156, 164.

²⁰³ Wolfgang Alschner & Kun Hui, *Missing in Action: General Public Policy Exceptions in Investment Treaties* 4 (Ottawa Fac. of L., Working Paper No. 2018-22, 2018).

²⁰⁴ *Id.*

²⁰⁵ Alschner & Hui, *supra* note 203.

²⁰⁶ MARTIN A. WEISS ET AL., CONG. RSCH. SERV., R44015, INTERNATIONAL INVESTMENT AGREEMENTS (IIAs): FREQUENTLY ASKED QUESTIONS 4 (2015).

²⁰⁷ Mian Sami Ud Din & Umaira Iqbal Raza, *International Investment Arbitration and the Conduct of National Courts*, COURTING LAW. (Feb. 19, 2020), <https://courtingthelaw.com/2020/02/19/commentary/international-investment-arbitration-and-the-conduct-of-national-courts/>.

²⁰⁸ It is widely accepted that Chapter V of the ARSIWA reflects customary international law. See JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 250 (Cambridge Univ. Press 2013).

²⁰⁹ *Id.* at 274–75.

developing countries. First, as customary international law, the existence of these defenses does not depend on the inclusion, language, and scope of the relevant treaty provisions.²¹⁰ Second, this also means that their assessment is less subjected to ambiguous and dogmatic treaty interpretations by tribunals.²¹¹

Chapter V of the ARSIWA describes six circumstances that exclude the wrongfulness and hence the state's responsibility for breaches of international obligations: consent (Art. 20 ARSIWA), self-defense (Art. 21 ARSIWA), countermeasures (Art. 22 ARSIWA), force majeure (Art. 23 ARSIWA), distress (Art. 24 ARSIWA) and necessity (Art. 25 ARSIWA).²¹² However, the applicability of consent, self-defense,²¹³ and countermeasures²¹⁴ are very limited in the context of Covid-19 arbitration. Accordingly, the following analysis will revolve around the defenses of force majeure, distress and necessity.

1. Force Majeure

According to Art. 23 of ARSIWA, a state cannot be held responsible for an internationally wrongful act, if a force majeure, the occurrence of an extraordinary and unforeseen event or an irresistible force that is not attributable to the state, makes it impossible for the state to act in conformity with its international obligations.²¹⁵ In order to be able to rely on *force*

²¹⁰ *Id.* at 217.

²¹¹ See generally U.N. Conf. on Trade & Dev., *Investment Policy Framework for Sustainable Development*, U.N. Doc. UNCTAD/DIAE/PCB/2015/5, at 20 (2015) (discussing the challenges of IIA's including "ambiguities in treaty interpretation by arbitral tribunals.").

²¹² Simone Olleson, *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts*, 142 (Oct. 10, 2007) (preliminary draft) (on file with the British Institute of International and Comparative Law).

²¹³ INTERNATIONAL LAW AND PANDEMICS: A PRIMER 25 (Halsey Diakow & Juliana Hefern eds., Trustees of Tufts Coll. 2021).

²¹⁴ See *Corn Products Int'l, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶ 161 (2008) (Indeed, states have tried to invoke countermeasures before investment tribunals to justify their interference with foreign investments. In *CPI v. Mexico*, the respondent argued that its infringement of IIA obligations was justified by the preceding breach of treaty obligations by the other state party. The tribunal thoroughly rejected Mexico's argument by pointing out that a countermeasure may only be invoked against the party breaching the international obligation, not unconcerned third parties such as the investor.).

²¹⁵ CRAWFORD, *supra* note 208, at 295.

majeure, the invoking state must establish the aforementioned three elements: (a) unforeseeability, (b) non-attributability, and (c) impossibility to comply with its obligations.²¹⁶

a) Unforeseeability

Unforeseeability necessitates the existence of an unforeseen event or irresistible force. That is the case where the state did not have the capacity to avoid or resist the constraint that the relevant circumstances pose and where the occurrence of said circumstances was neither foreseen nor easily foreseeable for the state.²¹⁷ Indeed, just slightly over a year ago, very few would have been able to anticipate the occurrence of a public health crisis of global proportions. Likewise, the unprecedented manner in which Covid-19 caused loss of human life and disruption of international trade and business proved to overburden even the most powerful developed countries.²¹⁸ Accordingly, tribunals will likely be inclined to agree with developing countries on the existence of the first element.

b) Non-attributability

Further, the occurrence of the relevant event must not be attributable to the state, i.e. where the state is either directly responsible for the occurrence of force majeure or subsequently assumed responsibility.²¹⁹ This is not already the case where a state contributed in some way to the existence of the force majeure.²²⁰ Where a state acted in good faith and unknowingly contributed to the force majeure, it retains its right to defend its actions on the basis of Art. 23 ARSIWA.²²¹ Yet, the element of non-attributability remains somewhat vague. It is neither entirely clear what substantive threshold a state's contribution

²¹⁶ Chaisse, *supra* note 43, at 158.

²¹⁷ Int'l Law Comm'n Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 76 (2001) [hereinafter Int'l Law Comm'n].

²¹⁸ *COVID-19 and International Trade: Issues and Actions*, OECD (June 12, 2020), https://read.oecd-ilibrary.org/view/?ref=128_128542-3ijg8kfswh&title=COVID-19-and-international-trade-issues-and-actions&_ga=2.127836749.1580248333.1633395070-1942820127.1633395070.

²¹⁹ Chaisse, *supra* note 43, at 118, 158.

²²⁰ *Id.* at 159.

²²¹ Int'l Law Comm'n, *supra* note 217, at 27, 30.

must exceed nor what time frame it covers.²²² For instance, both the specific containment measures during the outbreak and the more general policies, such as the funding of public health, had an impact on the development of the pandemic.²²³ Tribunals will therefore most likely assess the contribution of states in light of their individual capacities, which makes it difficult to assume the likelihood with which the defense will hold up in general. Given the fact that most states never had to cope with a comparable disease that incorporated high virality and asymptomatic transmission, it can be expected that they will practice a certain leniency towards states in this regard.

c) Impossibility

Finally, the prevailing circumstances must have made it impossible for the state to comply with its international obligations.²²⁴ Impossibility is to be understood rather strictly. A force majeure cannot be assumed merely because the performance of the obligation has become difficult or burdensome.²²⁵ This general perception led tribunals to apply this standard restrictively, even amidst instances of economic and political crisis.²²⁶ While there is some discrepancy on whether the relevant threshold amounts to material and absolute impossibility of performance²²⁷ or a slightly more lenient standard,²²⁸ it must be noted that the fulfilment of the criterion will, in either case, remain very selective and be reserved only to circumstances of exceptional difficulty. If tribunals will acknowledge the existence of a force majeure, they will therefore rely heavily on the relevant obligation and the reaction by the state. For instance, while imposing an export

²²² *Id.* art. 4–11.

²²³ See Chaisse, *supra* note 43, at 109, 112 (highlighting several causes for the delay in addressing COVID-19).

²²⁴ Chaisse, *supra* note 43, at 158.

²²⁵ CRAWFORD, *supra* note 208, at 298.

²²⁶ See, e.g., *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 246 (2007) (highlighting the restrictive nature of the impossibility standard, especially concerning the performance of a frustrated obligation due to political or economic crisis).

²²⁷ Chaisse, *supra* note 43, at 158; *Rainbow Warrior Aff. (N.Z. v. Fr.)*, 20 R.I.A.A. 215, 250 (1990).

²²⁸ CRAWFORD, *supra* note 208, at 299.

ban for certain medical items has made it easier for states to acquire the necessary supplies, they had the choice to refrain from this measure. Even though this would have made it considerably more difficult for the state and its public health institutions to contain the spread of Covid-19, they factually had the discretion to simply not impose the ban.²²⁹ Accordingly, tribunals will most likely reject the claim that the threshold of impossibility has been reached.

As a result, developing countries will only be able to make very limited use of the force majeure defense. While tribunals will likely determine that the pandemic was unforeseeable and there is a good chance that its repercussions will not be attributed to the state, the high threshold of impossibility limits the defense's applicability to only the most extreme circumstances.

2. Distress

Distress is another circumstance that precludes the wrongfulness of a breach of obligation, cf. Art. 24 ARSIWA.²³⁰ It exists where an internationally wrongful act is committed as the only reasonable way to safeguard the life of its author or third parties under his care.²³¹ Whereas force majeure requires a material impossibility to act differently, distress comprises an element of choice in the form of a voluntary breach of an international obligation in the face of peril.²³² If developing countries seek to make a plea of distress to justify their actions amidst the crisis, they will have to produce evidence that they fulfil five preconditions that are derived from the wording of Art. 24 ARSIWA.²³³ This includes (a) a situation of life and death that (b) relates to an individual with whom the acting entity has

²²⁹ Simon Evenett, *Sickening thy neighbour: Export restraints on medical supplies during a pandemic*, VOX EU (Mar. 19, 2020), <https://voxeu.org/article/export-restraints-medical-supplies-during-pandemic>.

²³⁰ Int'l Law Comm'n *supra* note 217, at 78.

²³¹ ROBERT KOLB, *THE INTERNATIONAL LAW OF STATE RESPONSIBILITY* 125 (Edward Elgar Publ'g 2017).

²³² MALCOLM N. SHAW, *INTERNATIONAL LAW* 604 (Cambridge Univ. Press, 8th ed. 2017).

²³³ See Int'l Law Comm'n, *supra* note 217, at 78–80 (highlighting the conditions that must be fulfilled before properly invoking distress to preclude the wrongfulness of a conduct).

a special relationship, (c) the absence of other reasonable alternatives to the measure, (d) its non-attributability to the state and (e) its proportionality.²³⁴

a) Threat to Life

First, a situation must constitute a medical threat to life or a comparably urgent emergency.²³⁵ As Covid-19 is responsible for millions of deaths and continues to pose a dangerous threat that particularly targets the vulnerable sections of society, states will not face exceeding difficulties in confirming this point.²³⁶ On the other hand, this specific condition does relate exclusively to physical harm. Even though the public health dimension of Covid-19 is therefore covered by the scope of distress, this cannot be said for the corresponding economic recession. Accordingly, the further analysis will exclusively relate to public health regulation.

b) Special Relationship

Second, there must be a relationship of care between the acting entity and the protected individuals.²³⁷ This does not extend to the occurrence of general emergencies which are covered by the defense of necessity.²³⁸ In contrast, distress seems to be applicable in circumstances where the responsibility for the wellbeing of a person rests with the acting entity.²³⁹ While this implies that the state's general care of its citizens' well-being is not sufficient to invoke the plea of distress, things could be different amidst the current pandemic. Due to the rapid spread and high virality of Covid-19, it is almost impossible for

²³⁴ *Id.*

²³⁵ *Id.* at 79.

²³⁶ *The Territorial Impact of COVID-19 Managing the Crisis Across Levels of Government*, OECD 3, 8 (updated Nov. 10, 2020), https://read.oecd-ilibrary.org/view/?ref=128_128287-5agkkojaaa&title=The-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government&_ga=2.163937215.1292240561.1633830698-1131894969.1632586395.

²³⁷ Chaisse, *supra* note 43, at 158.

²³⁸ Int'l Law Comm'n, *supra* note 217, at 80.

²³⁹ *See id.* at 79 (using *Rainbow Warrior* to show how circumstances of distress and urgency can affect acting entities' responsibility for a person's wellbeing).

individuals to effectively contain the virus and protect themselves. In this regard, the control over their concrete wellbeing lies in the hands of the acting state, and only the state may avert the life-threatening danger posed by the pandemic. It is therefore possible that tribunals will adopt this interpretation to the current crisis and accept the existence of a special relationship.

c) Absence of Reasonable Alternatives

In contrast to force majeure, distress does not require the complete absence of other available choices to act.²⁴⁰ Yet, from all the available venues, the employed measure must have been the only one reasonable for states to avert the threat. This means, that from all available equally effective alternatives, the one taken was the one that least impaired the obligation and hence, states retain a certain flexibility to act.²⁴¹ If tribunals will agree on the fact that the employed Covid-19 response was the only reasonable option, they will heavily rely on the specific measure in question. For instance, due to the scarcity of vaccines, the appearance of new, more aggressive Covid-19 mutations, and the limited financial and institutional capacities of many developing countries, tribunals do not seem to dispose of other equally effective and available alternatives.

d) Non-attributability

In general, the element of non-attributability corresponds with the standard under Art. 23 ARSIWA, but additionally incorporates a particular leniency for life saving measures.²⁴² Accordingly, where a state acted in good faith and unknowingly contributed to the dangerous situation, it can still rely on the defense of distress, especially where it must intervene to save its citizens' lives.²⁴³ This corresponds well with states that employ

²⁴⁰ Int'l Law Comm'n, *supra* note 217, at 78.

²⁴¹ CRAWFORD, *supra* note 208, at 301; *see also* Int'l Law Comm'n, *supra* note 217, at 80 (describing the balance of flexibility that State agents have in assessing the conditions of their distress).

²⁴² Int'l Law Comm'n, *supra* note 217, at 80 (proclaiming that saving the lives of passengers or a crew is an example where leniency is given, as it precludes wrongfulness).

²⁴³ *Id.* at 79 (explaining the use of distress during situations involving

public health measures to contain a deadly virus, where tribunals could be inclined to practice a certain leniency on this point.

e) Proportionality

Finally, the measure must not be disproportionate. As outlined by Art. 24(2)(b) ARSIWA, the defense of distress is precluded where the measure likely creates a greater peril than it averts.²⁴⁴ Accordingly, the status quo as it presents itself after the measure was employed must be compared with the situation that would have hypothetically existed without the measure.²⁴⁵ In other words, only if the impact of the state's measure on its people outweighs its detrimental effects, the plea of distress will be considered. Indeed, this could become a controversial point before tribunals in light of diverging opinions concerning the benefits of the most severe social distancing restrictions like lockdowns and curfews. Nevertheless, considering again the high virality and severe danger posed by Covid-19, at least those measures that are indispensable for containing the spread of the virus are likely to hold up before tribunals. For instance, the closure of places that attract large crowds of people in relatively small, confined spaces that makes it virtually impossible to comply with even basic social distancing measures would, in all likelihood, be considered proportionate. In contrast, the imposition of limited opening hours for stores that sell essential household products could be deemed unproportionate where the policy leads to the stores' overcrowding and hence increases the risk of contracting the virus for its customers. Ultimately, the tribunals' assessment of proportionality will rely on the actual capacity of the state to enact and apply nuanced regulations that consider the detrimental effects of strict social distancing measures while not losing sight of the primary health objective which is to effectively contain the further spread of Covid-19. As it can thus be expected that tribunals will grant a certain deference to states with limited financial and institutional capacities, developing countries have good chances to pass the test of proportionality where they demonstrate sufficient nuance

the misconception).

²⁴⁴ Int'l Law Comm'n, *supra* note 217, art. 24(2)(b).

²⁴⁵ Chaisse, *supra* note 43, at 159.

in the design and application of their Covid-19 responses.

As a result, the defense of distress is a justification with a very narrow scope that will only hold up in the most extreme situations of life and death. Indeed, as far as it is known, distress has never been invoked by a state party in an investment proceeding.²⁴⁶ It must be noted, though, that Covid-19 poses a public health emergency of unmatched proportions. It could be then that tribunals will affirm the existence of a life and death situation. Nevertheless, the existence of a life and death situation exclusively relates to the public health dimension of the current pandemic and disregards measures that are taken in relation to the ensuing economic crisis. Still, the plea of distress may play an important role for developing countries to justify their public health responses and their chances of success will be reasonably high as long as they adhere to the preceding principles.

3. Necessity

The final defense set out by Art. 25 ARSIWA is the plea of necessity.²⁴⁷ Unlike the other ARSIWA defenses, necessity has been frequently invoked before investment tribunals, and successfully in some cases.²⁴⁸ It can be invoked where a state has no other choice to avert a grave and imminent peril that threatens an essential state interest without impairing an essential interest of another state or the global community.²⁴⁹ Yet, it follows from Art. 25(2) ARSIWA that the plea of necessity is limited to circumstances where the relevant international obligation allows the invocation of necessity and where the invoking state did not contribute to the occurrence of the relevant circumstances.²⁵⁰ Accordingly, an invoking state must establish that there was (a) an essential interest (b) threatened with grave and imminent peril, (c) no reasonable alternative

²⁴⁶ *Id.* at 158 (suggesting the defense of distress would likely not succeed before an investment tribunal, even when factoring in the very narrow scope under life and death circumstances in a global pandemic).

²⁴⁷ Chaisse, *supra* note 43, at 158.

²⁴⁸ *Cont'l Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 219 (2008).

²⁴⁹ SHAW, *supra* note 232, at 604.

²⁵⁰ Jure Vidmar, *The Use of Force as a Plea of Necessity*, 111 AJIL UNBOUND 302, 303 (2017).

available to avert the peril, (d) no relevant third party interest impaired and (e) neither an explicit exclusion of the plea nor a relevant contribution of the underlying circumstances by the invoking state.²⁵¹

a) Essential interest

An essential interest cannot be generalized, but instead relies heavily on the circumstances of the specific case.²⁵² The practice of international courts and tribunals shows that the existence of an essential interest is not solely limited to instances that threaten the very existence of the state.²⁵³ Indeed, tribunals accepted a wide variety of interests as satisfying the threshold, including environmental protection,²⁵⁴ health and welfare, and the functioning of essential public services.²⁵⁵ This makes it very likely that tribunals will consider the protection of citizens' health and the functioning of public health services an essential interest. Moreover, tribunals have extended the range of essential interests to instances of economic turmoil that threaten the survival of the state.²⁵⁶ In light of the unprecedented economic crisis accompanying the pandemic that severely hit developing countries, it is likely that tribunals will extend the essential interest element to economic relief measures.

b) Grave and Imminent Peril

As a second condition, the state must provide that there is an imminent risk for the identified essential interest to be severely harmed.²⁵⁷ While complete certainty is not required,

²⁵¹ Marie Christine Hoelck Thjoernelund, *State of Necessity as an Exemption from State Responsibility for Investments*, [2009] 13 Max Planck U.N.Y.B. 434.

²⁵² Thjoernelund, *supra* note 251, at 437.

²⁵³ *Id.* at 436.

²⁵⁴ Mari Nakamichi, *The International Court of Justice Decision Regarding the Gabčíkovo-Nagymaros Project*, 9 FORDHAM ENV'T L. REV. 337, 350–51 (2017).

²⁵⁵ Nat'l Grid P.L.C. v. Argentine Republic, UNCITRAL, Award, ¶ 245 (2008).

²⁵⁶ LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 251 (2006).

²⁵⁷ Roman Boed, *State of Necessity as a Justification for Internationally*

the existence of the risk must not be merely potential or contingent but objectively established on the basis of the available evidence.²⁵⁸ Additionally, it must be established that the essential interest faces “peril,” i.e. a severe danger that goes beyond mere material damage, and that the act is the only means of protecting that interest.²⁵⁹ Finally, the imminence of the risk must be construed as necessitating a high proximity between the risk and its realization.²⁶⁰ In turn, this means that the risk may not have materialized where the state acts to avert its further aggravation.²⁶¹

After almost a year of living in times of the pandemic, it is now relatively easy to see how rapidly and severely Covid-19 has impacted states’ public health and economic capacities.²⁶² On one hand, the aggravating economic situation brought several developing countries to the verge of economic collapse.²⁶³ And on the other, the scarcity of vaccines and the limited capacities of their health care system severely endanger their public health situation in the face of the newly discovered Covid mutations.²⁶⁴ Against this background, it is rather likely that tribunals will recognize a state of imminent peril in those developing countries where a severe aggravation of the economic and public health situation can be expected in the near future.

Wrongful Conduct, 3 YALE HUM. RTS. DEV. L. J. 1, 25 (2000).

²⁵⁸ Int’l Law Comm’n, *supra* note 217, at 83.

²⁵⁹ CRAWFORD, *supra* note 208, at 311; Thjoernelund, *supra* note 251, at 437.

²⁶⁰ Int’l Law Comm’n, *supra* note 217, at 83.

²⁶¹ Federica Paddeu & Freya Jephcott, *COVID-19 and Defences in the Law of State Responsibility: Part II*, EJIL:TALK! (Mar. 17, 2020), <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-ii/>.

²⁶² *COVID-19 and International Trade: Issues and Actions*, *supra* note 218, at 2.

²⁶³ See Radmilla Suleymanova, *Developing countries face economic collapse in the COVID-19 fight: UN*, AL JAZEERA (Mar. 30, 2020), <https://www.aljazeera.com/economy/2020/3/30/developing-countries-face-economic-collapse-in-covid-19-fight-un> (noting the disproportionate impact COVID has had on already impoverished countries including India and Africa).

²⁶⁴ Angel Gurría, Sec’y-Gen., OECD, Opening Remarks: Imagining Emerging Economies in a Post-COVID World - 4th Annual OECD–Emerging Markets Forum (Apr. 30, 2021).

c) No Reasonable Alternative

Even where a situation exists that would, *prima facie*, justify the employment of normally wrongful acts under the defense of necessity, the plea is precluded where the risk had already ceased to exist or where the state goes beyond what is strictly necessary to avert the relevant risk.²⁶⁵ Accordingly, where lawful, equally effective alternatives exist – even if they are more onerous or costly – states are barred from invoking the defense of necessity.²⁶⁶ In practice, the assessment of this element will strongly depend on the specific circumstances of the relevant case and the nature of the employed measure. Still, at times where vaccination rates are extremely low in most LMICs, and given their limited capacities to act, it can be assumed that there are no equally effective, less restrictive alternatives available to curb the pandemic than imposing strict social distancing measures. Regarding the economic dimension of the crisis, the assessment depends on the specific measure in question. For instance, where governments resorted to the suspension of utility payments, states had the reasonable alternative to adequately compensate the foreign investors whose profits were impaired by the measure or confer stimulus checks to its citizens in the amount of their utility payments, even if this would have been very costly.²⁶⁷ In contrast, the situation could be assessed differently, where states are facing a situation of imminent state default. If there is virtually no other solution for a state than to resort to the restructuring of its debt, tribunals might be inclined to negate the existence of reasonable alternatives.

d) No Opposing Interests

Further, the interest of the state relying on the plea of necessity must be weighed against the interest of a third state in relation to which the obligation exists.²⁶⁸ Accordingly, where a third party interest that is no less essential than the one

²⁶⁵ Thjoernelund, *supra* note 251, at 437–38.

²⁶⁶ *Id.* at 438.

²⁶⁷ *See generally id.* (providing general background information about international arbitrations and balancing criteria between international and state interests that led to this conclusion).

²⁶⁸ Int'l Law Comm'n, *supra* note 217, at 83–84.

protected is impaired, the existence of necessity is precluded.²⁶⁹ The standard of assessing the balance between these interests is not limited to the subjective perspective of the state invoking necessity, but an objective one that considers all conflicting interests.²⁷⁰ As outlined above, tribunals have recognized the immense value of public health as an essential interest in its preceding decisions and hence, third party interests that would outweigh the populations' well-being are hard to construe. As Art. 25(1)(b) ARSIWA speaks of obligations "towards a state or states," it could be controversial whether this includes the investors' interest to enjoy their investment.²⁷¹ While there are conflicting views whether IIAs directly confer substantive rights to investors²⁷² or are merely derivative,²⁷³ it is rather safe to assume that in the majority of cases that only relate to proprietary interests of investors, those will not suffice to outweigh developing countries' essential interest to contain a public health emergency or avert economic peril.²⁷⁴

e) No Exclusion or Contribution

According to Art. 25(2) ARSIWA the plea of necessity is further precluded if the relevant obligation excludes the defense or the invoking state contributed to the underlying circumstances.²⁷⁵ In the context of investment arbitration, the former is of very little interest as it relates predominantly to instances of law or conflict.²⁷⁶ In contrast, claimants may invoke that necessity is precluded due to states' contribution to the current situation. According to the ILC this means that the contribution must be "sufficiently substantive and not merely

²⁶⁹ *Id.* at 83–84.

²⁷⁰ Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 46 (Sept. 25); Int'l Law Comm'n, *supra* note 217, at 83–84.

²⁷¹ Int'l Law Comm'n, *supra* note 217, art. 25.

²⁷² See Corn Products Int'l, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/01, Decision on Responsibility, ¶ 65 (2008).

²⁷³ Archer Daniels Midland Company v. United Mexican States, ICSID Case No. ARB(AF)/04/05, Award, ¶ 163 (2007).

²⁷⁴ Tillmann Rudolf Braun, *State Responsibility and Investment Protection in the Time of Pandemic*, INV. PROT., HUM. RTS., & INT'L ARB. EXTRAORDINARY TIMES 9 (forthcoming 2021).

²⁷⁵ *Id.* at 22.

²⁷⁶ Int'l Law Comm'n, *supra* note 217, at 84.

incidental or peripheral.”²⁷⁷ Yet, the ambiguous decision-making by tribunals makes it difficult to anticipate what threshold they will apply. While some tribunals based their analysis on the pure causality of states’ measures,²⁷⁸ others have narrowed the preclusion to instances where states’ contribution was not “merely incidental or peripheral,”²⁷⁹ or included a certain degree of fault.²⁸⁰ In essence, a state shall not be able to profit from its own shortcomings to the detriment of others.²⁸¹ This could be relevant both regarding the general preparedness of developing countries for the crises and their specific approach in containing it.

Although the SARS-CoV-1 outbreak in East Asia in 2002 demonstrated the latent danger posed by globally transmitted viruses, no government foresaw a public health emergency of this proportion. Both developing and developed countries alike were hit mostly unprepared. While it could be argued that developed countries with relevant financial and public health capacities could have done more to be properly prepared, this can hardly be said for developing countries, that even under regular circumstances rarely had the appropriate means to avert such an unprecedented crisis. Indeed, tribunals have considered the limited capacities of developing countries on several occasions in their assessment,²⁸² and hence, it is possible that they will assess this point rather generously. Still, if the relevant measures led to an aggravation of the crisis it must naturally be assessed on a case by case basis. In this regard, it could be especially relevant in how far the state responded belatedly, incoherently, or insufficiently or employed an inadequate information policy.²⁸³ Nevertheless, the assessment of the Covid-19 response must always be made against the severity of the crisis and the scarcity of reliable information,

²⁷⁷ *Id.*

²⁷⁸ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶ 356 (2011).

²⁷⁹ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/08, Award, ¶ 328 (2005).

²⁸⁰ *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 711 (2016).

²⁸¹ *Enron Corp. Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 311 (2007).

²⁸² Braun, *supra* note 274, at 32.

²⁸³ *Id.* at 32–33.

especially in its early stages. Where a state had no sufficient data to indicate which measures may effectively contain the viruses spread and provide effective relief, it is indeed possible that tribunals will take a rather lenient approach in their assessment.

In summary, the plea of necessity may provide an effective defense strategy for developing countries to justify their public health policies amidst the pandemic. What makes necessity stand out from other ARSIWA defenses is that its protection may likely extend to current economic relief measures. Still, the above analysis should be taken with a grain of salt. Necessity is construed as a narrow exception and shall only be applied very restrictively.²⁸⁴ The success of pleas of necessity will ultimately rely on the current public health and economic situation of the invoking state. The closer the state is to approaching a situation of imminent public health or economic breakdown and the less capacity it has to create alternative venues that may avert this outcome, the more likely tribunals will be inclined to justify states' breaches of IIA obligations under the plea of necessity.

VI. IMPLICATIONS FOR FUTURE PUBLIC HEALTH RESPONSES

On the basis of this analysis, it is possible to draw certain conclusions on how developing countries may craft resilient public health responses and streamline their investment environment to be optimally prepared against investor claims in upcoming public health emergencies. In this context, the most promising approach is a multi-faceted one that incorporates action on treaty, policy design, and justification levels.

First, where old-generation treaties are still in place, developing countries should make the renegotiation or replacement of existing IIAs a major foreign policy objective. In doing so, they should be especially cautious to include the necessary instruments to guarantee appropriate discretion for the adoption of emergency public health and economic relief measures. In particular, IIAs should clearly define the criteria that must be met to amount to a violation of a substantive treaty standard and exclude or narrow the applicability to sensitive

²⁸⁴ KOLB, *supra* note 231, at 130.

policy areas like public health or taxation.²⁸⁵ This is particularly important for standards like FET and indirect expropriation which have been interpreted broadly and ambiguously in the past.²⁸⁶ Moreover, the preceding assessment has shown that the inclusion of ESE and GPPE is capable of providing states with the necessary discretion to adopt regulatory measures where an essential state interest is impaired.²⁸⁷ The effectiveness of these reform provisions is out of question. As indicated above, none of the investment claims filed in 2019 were based on a new-generation treaty.²⁸⁸ More importantly, the current crisis provides the reform movement with a strong momentum. The majority of treaties in force have recently entered a phase where they can either be renegotiated or terminated.²⁸⁹ Additionally, the pandemic has made it clear to both developed and developing countries that old-generation treaties may restrict their capacity to respond to upcoming public health emergencies. Consequently, states should seize the opportunity to overcome the old investment regime and replace it with one that meets its demands in times of crisis.

²⁸⁵ See Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 29.3, 29.5, Dec. 30, 2018, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/29.aspx?lang=eng> (trying to strike a balance between investor and host state interests. Instead of excluding public health measures generally from its scope of application, it takes account of the restrictive tobacco policies adopted by its member state New Zealand by barring ISDS claims on this matter. Furthermore, the CPTPP provides its state parties the opportunity to adopt economic relief measures, but explicitly restricts their applicability to temporary safeguard measures in times of economic hardships).

²⁸⁶ *COVID 19: Public Health Emergency Measures And State Defenses In International Investment Law*, CLEARY GOTTlieb (April 28, 2020), <https://www.clearygottlieb.com/-/media/files/alert-memos-2020/public-health-emergency-measures-and-state-defenses-in-international-investment-law-pdf.pdf>.

²⁸⁷ Both ESE and GPPE should be modelled after the relevant provisions in the GATT 1994. This has the advantage that tribunals may base their analysis of the provisions on the existing decisions by the relevant WTO panels and Appellate Bodies, which increases predictability and transparency for all involved parties. Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions?*, 59 B.C. L. Rev. 2825, 2826 (2018).

²⁸⁸ U.N. Conf. on Trade & Dev., World Investment Report 2020, *supra* note 36, at 110.

²⁸⁹ *International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal*, UNCTAD 1 (June 2013), https://unctad.org/system/files/official-document/webdiaepcb2013d9_en.pdf.

Still, even where no new-generation IIA is in place, developing countries may reduce the risk of investment arbitration noticeably by emphasising their adherence to the key principles of non-discrimination, proportionality and due process of law. For instance, where states seize foreign investors' property, this should only be done in a way that guarantees that the seizure will be repealed as soon as its purpose has ceased to exist, domestic and foreign investors in like circumstances are equally subject to the corresponding measure, and basic standards of due process and legal review are adhered. Admittedly, this will not always be a valid option where a sudden outbreak of a public health or economic crisis makes it inevitable to impose immediate and far-reaching measures. In these instances, developing countries should act in conformity with the defense strategies under public international law.²⁹⁰ Most notably, the plea of distress may likely act as a strong defense for regulatory action that is taken in times of public health crises as long as developing countries take sufficient account of the principles of reasonableness and proportionality. Likewise, the plea of necessity provides states with an effective instrument to justify emergency responses in times of an imminent public health or economic breakdown. While tribunals will likely take account of the limited capacities of developing countries and hence grant them a certain degree of deference, they should nevertheless attempt to assess diligently if reasonable, less interfering alternatives to their regulatory action exist.

VII. CONCLUSION

The Covid-19-crisis prompted developing countries to adopt a multitude of measures that are clearly contravening investor interests, most notably by altering their operating conditions and decreasing the profitability of their investments. Even though many tribunals recognize the states' sovereign right to regulate in the public interest, some measures related to

²⁹⁰ See U.N. Conf. on Trade & Dev., International Investment Agreements Reform Accelerator, U.N. Doc. UNCTAD/DIAE/PCB/INF2020/8, at 2 (2020) (discussing the need to devise policy that will reform old-generation treaties thereby reducing risks against state measures to pursue public policy and cites COVID 19's as highlighting the importance of this reform).

developing countries' Covid-19 responses may still be found to violate substantive treaty provisions, especially where old-generation IIAs are involved. While this renders the initiation of investment proceedings possible, their chances of success are still limited. This is especially due to the fact that states may invoke several lines of defense to justify their emergency measures. On the one hand, ESE and GPPE are capable of providing states with the appropriate regulatory discretion to act where an essential or security interest is impaired, although they still play a relatively minor role in investment proceedings. More importantly, the ARSIWA defenses of distress and necessity might be the most promising trump cards developing countries have at their disposal. Still, due to the case by case approach and the weighing of the circumstances most tribunals apply, the outcome of investment proceedings cannot be predicted with appropriate certainty. Nevertheless, developing countries may be able to enhance the resilience of future public health responses by replacing old-generation IIAs with frameworks that grant them the necessary discretion to effectively respond in times of crises. While it remains uncertain how long the Covid-19 pandemic will go on and what lasting impact it will have on the global economy, there is one thing this crisis has made absolutely clear: in our globalized and interconnected world, the appearance of the next global public health emergency is not a possibility, but a certainty – and the global community must prepare itself in accordance.

