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DEFENSES AGAINST INVESTMENT TREATY CLAIMS IN PANDEMIC TIMES: FITTING NEW TRENDS INTO OLD STANDARDS

by Myrto Pantelaki

I. INTRODUCTION

Since the beginning of 2020, the world is witnessing an unprecedented health crisis with high death toll and disruptive consequences not only to public health, but also to the global economy. In response, many States have enacted preventive and rehabilitative measures that have significantly impacted business operations, including foreign investment interests in, *inter alia*, the public services, aviation industry, entertainment, and pharmaceutical sectors.

As it has happened many times in the past, when governments exercises its discretion in regulatory measures, tensions have arisen between the public and the private sectors and investment law has demonstrated a serious potential to constrain State autonomy in mitigating adverse effects of emergency situations.[1] In this regard, foreign investors have availed themselves of the various guarantees included in international investment agreements ('IIAs') and have brought claims against States in relation to a wide variety of areas of governmental policies, challenging only individual treatment by host State authorities, but also generally applicable regulations.

Following this vein, with regard to the present COVID-19 pandemic, there is a high likelihood that State measures adopted in response to the virus will give rise to a plethora of investment treaty claims. Specifically, state responses downplaying the risks of COVID-19 and subsequently, either reversing course and imposing drastic measures[2] or interfering disproportionately in light of the public interest pursued[3] may violate the fair and equitable treatment ('FET') standard. As countries followed Spain's lead in taking control of private hospitals and clinics, investors in the healthcare industry could also file indirect expropriation claims,

[1] The Argentinian financial crisis in late 2001 and the cases that arose thereof serve as relevant examples.

[2] Tecmed S.A. v. Mexican, ICSID No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2009).

[3] Occidental Petroleum Corporation v. The Republic of Ecuador, ICSID No. ARB/06/11, Award, ¶ 338 (Oct. 5, 2012).

if turning over control was involuntary.[4] Moreover, bailout measures that only support certain domestic or foreign companies with significant investments, may constitute a violation of the national treatment or of the Most-Favored-Nation ('MFN') standard.[5] It should be noted that, due to already expressed concerns that pandemic emergency measures could result in investor-State disputes, calls are being made for governments to act multilaterally and suspend treaty-based and investor-State dispute settlement ('ISDS') mechanism for all COVID-19 related disputes.[6]

Critically, these measures will render States susceptible to investment claims under the existing investment law regime as the implementation of such measures might trigger the application of a limited set of treaty-based and customary law 'defenses.' Here, the term 'defenses' encompasses a wide-ranging category of arguments which can be put forward by a party to counter claims brought against it and can be analyzed from a range of perspectives.[7] In light of this, this article is organized using the legal basis of the available defenses as a dividing line and adopts the distinction between defenses arising out of customary law and treaty law, respectively.

To this end, the first part analyzes the defenses available under customary international law, including the exercise of police powers, *force majeure*, and necessity. It discusses that according to the police powers doctrine, measures aimed at the protection of public health are considered a prerogative of state powers. Thus, the loss of property resulting from such measures do not constitute expropriation. Nevertheless, this doctrine is not a 'carte blanche' for States to act in an unfettered manner. Only in case they enact *bona fide*, proportional, and non-discriminatory regulations in accordance with due process, with the aim to

[4] Lucas Bento, Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses, KLUWER ARB. BLOG (Apr.8, 2020).

[5] *Id.*

[6] Nathalie Bernasconi-Osterwalder, Sarah Brewin, and Nyaguthii Maina, Protecting Against Investor–State Claims Amidst COVID 19: A call to action for governments, 10 IISD Commentary, (Apr. 10, 2020).

[7] *See*, *e.g.*, Jorge E. Viñuales, Defence Arguments in Investment Arbitration, 18 ICSID Rep. 9-10, 11 (2020).

address the pandemic, may these measures be considered non-expropriatory in the first place.

Nonetheless, if the underlying measure does not withstand the scrutiny of the above test, it may still be justified under the necessity defense. The latter defense is codified in article 25 of the International Law Commission's Articles on State Responsibility ('ILC Articles'). The odds of success of this particular defense seem, however, rather narrow. This is largely due to the fact that the disputed measure must be the only way for the State to safeguard public health. Necessity constitutes a tightly drafted defense, available in principle but hardly ever in practice, while it remains to be seen whether the present pandemic may redefine the scope of its application.

States may also resort to the plea of *force majeure*, as codified in article 23 of the ILC Articles. However, the reliance of States on this defense again falls flat when it comes to proving that the performance of the State's obligations became 'materially impossible' due to the spread of COVID-19. The threshold of impossibility is considerably high. Thus, both in the case of necessity and *force majeure* the strict conditions for their application seem to deprive them of their viability altogether.

Another plea theoretically available under the ILC Articles is that of distress, codified in Article 24. However, it is excluded from the scope of this paper, because it can only be invoked in cases where there is a special relationship between the state organ and the person in danger. It does not extend to more general cases of emergencies, which are exclusively a matter of necessity than distress.[8]

The second part of this paper addresses treaty exceptions, as legal bases for defending the legitimacy of pandemic measures. The first chapter aims at mapping the universe of health-related exceptions in IIAs currently in force, including recently concluded and old-generation IIAs. Statistics illustrate that in IIAs concluded before early 2000s express exception clauses are quite rare, while still today these old-generation IIAs still outnumber those recently concluded IIAs.

[8] Int'l Law Comm'n, Rep. on the Work of its Fifty- Third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries U.N. Doc. A/56/10, at art. 80 (2001).

In order to ensure that public welfare measures should not invoke liability, governments are now departing from the short and vaguely worded treaty templates that dominated the first generation of IIAs, so as to include, *inter alia*, clearly drafted and well-defined general exceptions. While the need for a robust re-orientation of the treaty regime is indeed a welcome practice, the second chapter focuses on the difficulties relating to the inclusion of general exceptions in IIAs, finding that the latter are largely missing in action, and concludes that general exceptions is not the right answer to address the challenges posed by the present health crisis.

Finally, the third chapter recognizes the need for rethinking the place of investment liberalization in relation to other values, including health in the long term. It specifically argues that the pandemic reveals the structural weakness of the exceptions-oriented paradigm of justification and proposes a re-orientation of the investment regime, so that it becomes balanced, predictable and in alignment with sustainable development goals.

Before proceeding to further discussions, some disclaimers are necessary. First, the purpose of this paper is to analyze the applicability and viability of potential treaty and customary law defenses, specifically through the spectrum of the pandemic, and to flag the issues that might arise in relation to each of them rather than to clarify every lingering uncertainty on any of them. Second, this paper aims to capture the defenses that are expected to apply and to assess their effectiveness based on previous related jurisprudence and scholarship, without, nevertheless, precluding the application of other defenses as well, tailored to each case at hand.

II. DEFENSES UNDER CUSTOMARY INTERNATIONAL LAW

This section examines the argumentative patterns that States may endorse in investor-State arbitrations related to the pandemic with a focus on defenses available under customary international law. It elaborates upon the current contours of the doctrine of police powers, delves into the strict conditions of application of the plea of necessity and of *force majeure* and finally, draws tentative conclusions for the chances of success of these pleas.

A. *The Police Powers Doctrine: Assessing the Allowable Scope of Regulatory Measures*

In the realm of international investment law, the police powers doctrine denotes the right, which exceptionally permits the host State to regulate in derogation of international commitments it has undertaken by means of an IIA without incurring a duty to compensate.[9] When the State legitimately exercises its police powers, there is no expropriation in the first place and it does not incur international responsibility for the measure enacted. In the midst of the COVID-19 pandemic, governments resorted to unprecedented measures to contain the spread of the virus. It is highly likely that these actions brought economic life to a near standstill and inevitably affected many investors. On the basis that these regulatory measures may give rise to investment claims, the question arises as to whether a State can rely on the police powers doctrine as a defense against State liability? The answer is 'yes,' but only if certain conditions are met.

It should be noted from the outset that, although the status of police powers as a customary law defense was not always clear, tribunals have increasingly acknowledged that police powers is an 'accepted principle of customary international law', [10] while it has even started to make inroads in more recent IIAs that enshrine the doctrine in the treaty text.[11]

The doctrine was first invoked in 1903 by the Claims Commission in the *Bischoff* case to justify the State's seizure of a carriage, where two passengers infected with smallpox had traveled. In that case, the tribunal held that 'during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police powers.'[12] The umpire concluded that the measure was lawful and that the damage to the owner's business was 'not legally recoverable.'[13] Although this case dates many years back, it serves as a useful precedent, since it

[9] Alain Pellet, *Chapter 32: Police Powers or the State's Right to Regulate*, in MEG KINNER (ED), Building International Investment Law: The First 50 Years of ICSID, 447 (Kluwer Law International 2015).

[10] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID No. ARB/10/7, Award, ¶ 294 (July 8, 2016); Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, ¶ 262 (Mar. 17, 2006).

[11] United Sates of America – Lithuania, Bilateral Investment Treaties. Date of signature. 14/01/1998. Date of entry into force. 13/06/2004.

[12] *Bischoff*, German-Venezuelan Commission, Award (1903).

[13] *Id.* ¶ 421.

appears to be the only one explicitly referencing the spread of an infectious disease, where the exercise of police powers was regarded as a legitimate basis to preclude state liability.

More recent cases arising out of measures for the protection of public health are of critical importance, so as to clarify the outer limits of application of this doctrine. One of the landmark cases in this respect is *Philip Morris v. Uruguay*. This dispute was brought under the Switzerland-Uruguay Bilateral Investment Treaty ('BIT') and concerned measures enacted by Uruguay that negatively affected tobacco industries operating in the country. The measures violated, according to the claimants, the obligations not to indirectly expropriate foreign investments and the FET standard. The tribunal rejected the claim on indirect expropriation noting that:

> 290. Article 5 (1) of the BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT requiring that treaty provisions be interpreted in the light of any relevant rules of international law applicable to the relations between the parties, a reference which includes customary international law.

In other words, the tribunal considered that, despite the absence of any explicit reference to state police powers in the treaty, Article 5(1) on expropriation must be interpreted in accordance with customary international law, including the police power doctrine. It concluded that Uruguay's measures had been adopted *bona fide* for the purpose of protecting public welfare, were non-discriminatory and proportionate, and therefore, legitimate.[14]

As to the alleged violation of the FET standard, the Tribunal recalled that both measures had been implemented for the protection of public health and explained that, in making public policy determinations, Uruguay enjoyed certain margin of appreciation. According to the tribunal:

> [t]he responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases respect is due to the discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith [...] involving many complex factors.[15]

[14] Philip Morris, *supra note* 10, ¶ 305.

[15] Philip Morris, *supra note* 10, ¶ 399.

In light of this approach, the Tribunal rejected the FET claim, being sufficient that the measures were a good faith attempt and 'reasonable'[16] to address a real public health concern.

Where do these findings of the Philip Morris tribunal ('PM tribunal') leave us? Three main clarifications are essential; firstly, with regard to the range of claims, where the doctrine may apply. Secondly, to the applicable test to determine the legitimacy of public health measures adopted on the basis of police powers. Thirdly, to the degree of deference that arbitral tribunals must attribute to regulatory measures on public health.

Starting from the type of claims where the doctrine is applicable, the reasoning of the PM tribunal on the violation of the FET standard is puzzling on a few accounts. It appears to extend the application of the doctrine to claims for FET-related violations. Notably, the tribunal did not subscribe to the exception of 'police power' in the FET analysis, notwithstanding that much of the majority's views concluded that police power measures were 'reasonable' for the purposes of the FET analysis.[17] However, the scope of application of the doctrine is quite narrow as aptly described in the *Suez v. Argentina* award:

> The application of the police powers doctrine as an explicit, affirmative defense to treaty claims other than for expropriation is inappropriate, because if a tribunal finds that a State has violated treaty standards of fair and equitable treatment and full protection and security, it must of necessity have determined that such State has exceeded its reasonable right to regulate. Consequently, a decision on the application of the police powers doctrine in such circumstance would be duplicative and therefore inappropriate.[18]

Therefore, in spite of views to the contrary,[19] the police powers doctrine applies only to claims for expropriation, as a criterion for the determination of whether an expropriation exists in the first place. Further, regarding the criteria that need to be satisfied for the legitimate exercise of police powers, the PM

[16] *Id.* ¶ 409.

[17] Kate Mitchell, Philip Morris v. Uruguay: an affirmation of Police Powers and Regulatory Power in the Public Interest in International Investment Law EJIL: TALK. BLOG (July 28, 2016).

[18] Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, S.A. v. Argentine Republic, ICSID No. ARB/03/19, Decision on Liability, ¶ 148 (July 30, 2010).

[19] Caroline Henckels, Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration, 15 J Int'l Econ Law, 223-225 (2012).

tribunal clearly spelled out the conditions that need to be met: *bona fide*,[20] non-discriminatory and proportionate measures for a public purpose do not incur international state responsibility.[21] Former tribunals have adopted slightly different versions of this test. The tribunal in *Methanex Corp. v. US* upheld that the application of the doctrine as a defense to the ban of harmful additives to fuels and added a due process prong to the test. The tribunal further concluded that 'a nondiscriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory.'[22] Hence, the test so as to determine whether COVID-19 measures may be justified under the doctrine is formulated as follows: only *bona fide*, non-discriminatory and proportionate measures enacted in due process to counteract the pandemic are considered non-expropriatory, and therefore, do not invoke international state responsibility.

Nonetheless, the unprecedented character of the pandemic is expected to give a new dimension to the assessment of the above parameters and especially to the determination of the proportionality of the contested health measures. The proportionality test was first introduced by the *Tecmed v. Mexico* case [23] and subsequently further clarified in the *Chemtura v. Canada* case. In *Chumtura v. Canada*, the tribunal considered that the measures prohibiting the sale of harmful insecticides and 'motivated by the increasing awareness of the dangers presented by lindane for human health and the environment' were proportionate to meet this aim, since they 'did not amount to a substantial deprivation of the Claimant's investment.'[24] In analogy to the pandemic, the measures at hand in the *Chemtura* case were only motivated by 'increasing awareness' of the dangers presented by the specific substance. Thus, the central question is what should be the focus of a proportionality analysis in the context of global health emergency? In the uncertain conditions of a global pandemic, States might be obligated to carry out

[20] SD Myers, Inc. v. Government of Canada, UNCITRAL Partial Award, ¶ 195 (Nov. 13, 2000).

[21] Saluka, *supra* note 10, ¶ 262.

[22] *Methanex Corporation v. United States of America*, UNCITRAL Final Award on Jurisdiction and Merits (3 August 2005) [7] in Part IV.

[23] Tecmed, *supra* note 2, ¶ 122.

[24] Chemtura Corporation v. Government of Canada, UNCITRAL, Award, ¶ 266 (Aug. 2, 2010).

calculated and preventative risk management. In doing so, they should base their determinations upon scientific evidence, which can often present only provisional or contradictory new findings and models, weigh different and competing interests as well as possible collateral damages and continuously draw new conclusions from further developments in science.[25] This is a reality that may redefine the approach of tribunals with regard to the assessment of the proportionality of measures enacted in the context of COVID-19 pandemic.

Lastly, regarding the deference that tribunals should pay to health measures, the PM tribunal noted in its analysis on the violation of the FET standard that the key issue is whether the contested measure was 'reasonable' when it was adopted and not whether the measure actually had the effects that were intended to materialize by the State.[26] The standard of 'reasonableness'[27] is particularly important in the context of the present health crisis, where States should retain the autonomy to address such crises in ways that are politically feasible, even if those responses disproportionately affects investors. Otherwise, if all regulatory changes affecting foreign investors were held to be expropriatory, governments would be deprived of taking precautionary measures that safeguard public interest. In general, it is suggested that tribunals should not engage into second guessing public health state measures but grant States sufficient leeway in determining what measures to undertake to effectively address the ongoing crisis.[28]

However, the fundamental question is what degree of deference will be adequate? It remains to be seen how they tribunal would react to this specific situation. What is certain is that the fact that public health crises may be tackled only with a multitude of measures that should be characterized as general government regulations instead of measures targeted at a particular investor; the duration of the interruption of the investor's business; the aptness of the measures

[25] Tillman Rudolf Braun, *State Responsibility and Investment Protection in the Time of Pandemic*, in Rainer Hofmann and others (ED), Investment Protection, Human Rights, and International Arbitration in Extraordinary Times 1, 14-15 (Nomos 2021).

[26] *Philip Morris* (n. 10) [409].

[27] Marvin Roy Feldman Karpa v. United Mexican States, ICSID No. ARB (AF)/99/1, Award, ¶ 103 (Dec. 16, 2002).

[28] Janice Lee, Note on COVID-19 and the Police Powers Doctrine: Assessing the allowable scope of regulatory measures during a pandemic, 13 Contemp. Asia Arb. J. 229-244 (2020).

adopted; and lastly, the sufficient or insufficient balancing of the reasonable anticipated public health benefits of the measures with their foreseeable impact on the investors are some of the parameters that should be taken into account by the arbitrators, when determining the legitimacy of measures to tackle the spread of the virus.[29]

In conclusion, expropriation claims arising out of measures relating to the pandemic may withstand arbitral scrutiny on the basis of the police powers doctrine, provided that they are adopted *bona fide* in accordance with due process, as well as being non-discriminatory and proportionate. Only under these circumstances and with sufficient deference paid by the tribunals may the obligations of the State towards its citizens with regard to the protection of their health and safety outweigh the obligations of the State towards foreign investors.[30]

B. *Public Health 'Necessity' Defense: Available in Principle, But Hardly Ever in Practice?*

Necessity is one of the circumstances precluding the notion of wrongfulness enshrined in the ILC Articles. In the absence of *lex specialis*, Article 25 is a defense that may preclude the wrongfulness of state conduct otherwise in breach of a 'primary' rule.[31] Thus, it does not function as a parameter to ascertain the existence of a breach of a primary norm as such, as it is the case with the exercise of police powers. The customary basis of the necessity defense is nowadays widely acknowledged. However, in the name of avoiding its abuse by States, it must only be exceptionally admitted, subject to strict cumulative conditions, of which the State invoking the excuse is not the sole authority to determine its viability.[32] These conditions are examined in turn and include (i) the existence of a grave and imminent peril threatening an essential interest; (ii) the fact that the act is the only way to preclude the peril without seriously impairing interests of

[29] Braun, *supra note* 25, at 17-18.

[30] Valentina Vadi, Crisis, Continuity, and Change in International Investment Law and Arbitration, 42 Michigan J. Int'l. L. 321-350 (2021).

[31] As per James Crawford, primary rules govern the content and the duration of substantive State obligations, whereas secondary rules establish a framework setting forth the consequences of a breach of an applicable primary obligation.

[32] Gabcíkovo-Nagymaros Project (Hungary v. Slovakia), ICJ Reports 1997, Judgment (25 September 1997) [51].

other States or of the international community; (iii) the lack of contribution of the State to the situation of necessity.

1. Grave and Imminent Peril v. Essential Interest

Firstly, despite its seemingly simple formulation, the concept of 'grave and imminent harm' carries some complexities. To meet this requirement, the State must demonstrate the existence of a *risk* of a grave and imminent *harm* to an *essential interest*.[33]

Starting from the latter, a State can act to protect 'an essential interest', which may include its own interests, those of its people, and those of the international community as a whole.[34] The ILC Commentary (hereinafter: 'Commentary') notes that its existence depends on 'all the circumstances, and cannot be prejudged', introducing a weighing exercise between conflicting interests.[35] The International Court of Justice jurisprudence has shed some light on the interests that could be deemed essential, including not only the survival of the State but also ecological interests within the scope of Article 25.[36] The investments tribunals expanded this interpretation to the existence of a State and the maintenance of public order,[37] as well as the State's ability to provide for the fundamental needs of its population, such as water and sewage facilities.[38] Specifically, in *Suez v. Argentina* the tribunal acknowledged that '[t]he provision of water and sewage services certainly was vital to the health and well-being of [the population] and was therefore an essential interest of the Argentine state.'[39]

The Commentary states that the interest protected must outweigh all other considerations, not merely from the perspective of the enforcing State but from an objective inquiry that draws a reasonable assessment of the competing

[33] ibid [54], where the Court stated that 'the word "peril" certainly evokes the idea of risk.

[34] ARSIWA, *supra note* 8, at 83.

[35] *Id.* at 83.

[36] Gabcíkovo, *supra note* 32, at ¶ 53.

[37] Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID No. ARB/10/15, Award, ¶ 628 (July 28, 2015).

[38] Impregilo S.p.A. v Argentine Republic I, ICSID No. ARB/07/17, Award, ¶ 346 (Jun. 21, 2011).

[39] Suez, *supra note* 18, at ¶ 260; see also National Grid P.L.C. v. Argentine Republic, UNCITRAL ,Award, ¶ 245 (Nov. 3, 2008).

interests, whether individual or collective.[40] According to the World Health Organization ('WHO')[41] that classified the outbreak of COVID-19 as a 'Public Health Emergency of International Concern', it seems safe to assume that the wellbeing of a State' s population, or the continued functioning of public services is superior to the interests of investors and/or their home States. Preventing the spread of the pandemic not only does not impair a vital interest of other States but also safeguard the protection of global public health.

Continuing with the other limb of the analysis, the existence of a *risk* of a *grave* and *imminent* harm, the risk can refer to the occurrence of 'triggering events' including the occurrence of natural hazard, such as a pandemic, and it can occur inside or outside the State's boundaries.[42] The threatened harm to the essential interest must be grave, both, in quantitative or qualitative senses. An argument can be made that the loss of millions of lives due to an infectious disease certainly satisfies this threshold.

Furthermore, it must be imminent. The word 'imminent' does not require that the risk is about to materialize (immediacy in temporal terms), rather it has been interpreted as harm not yet having (completely) materialized at the time a state acts in a situation of necessity.[43] This interpretation of 'imminent' requires further elucidation. Firstly, in light of a pandemic that is still evolving giving birth to new variants, when the harm (the spread of the virus) *has commenced* to materialize but continues to progress, the defense should be available to avoid further aggravation, as this minimizes overall harm.[44] In contrast, if the harm is entirely in the past, the plea should not be available.[45] This is in line with the rationale of the defense that allows States to take measures not only to mitigate but also to prevent harm. Secondly, according to the Court, the invoking State must 'sufficiently establish' that the peril was certain and inevitable and not merely

[40] ARSIWA, *supra note* 8, at 83.

[41] WHO, 'Statement on the second meeting of the International Health Regulations (2005)' (WHO website, 30 January 2020) <https://bit.ly/3inpVjn> accessed 19 December 2021.

[42] Sarah Cassella, *La nécessité en droit international*, 159-160 (Martinus Nijhoff, 2011).

[43] Gabcíkovo, *supra note* 32, at ¶ 54.

[44] Federica Paddeu and Michael Waibel, Necessity 20 Years On: The limits of Article 25 ARISWA, 36 ICSID REV. 23 (2021) 1-10.

[45] *Id.* at 7.

apprehended or contingent.[46] This standard seems, however, incompatible with the premise of the plea: to justify state action in the event of risk. Not all risks cannot be established with full degree of certainty: they refer to future threats and harms with high probabilities of occurrences.[47]

To conclude, the ILC recognized the one hand space for risk and uncertainty within necessity, noting that 'a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.'[48] On other hand, this standard fails to clearly explicate the degree of uncertainty beyond which the defense is excluded. Therefore, while States may be able to prove the existence of the *essential interest* of protecting public health against the *grave peril* posed by the spread of COVID-19, they may face difficulties to 'sufficiently establish', in the face of scientific uncertainty about the virus, the element of 'imminence' of the risk. These criteria will carry implications on the various range of measures justified under the defense: the earlier the measures are taken and thus, with less evidence available, the looser the nexus becomes with the imminent risk.

2. The Only Way Criterion

Article 25 para 1(a) states that the act must be 'the only way for the State to safeguard' the relevant interest. Here 'only' means 'only.'[49] Because this rigid condition requires the identification of what constitute 'only' measure that is lawful and safeguards at the same time the essential interest of the State, it has caused the most difficulty in the jurisprudence and is usually the element on which the defense fails.[50] With regard to the pandemic, three aspects of this criterion need to be clarified: firstly, what should be the focus of the assessment in the case of transnational health crises that necessitate the enforcement of a wide range of measures; secondly, from which standpoint should arbitrators evaluate the

[46] Gabcíkovo, *supra note* 32, at ¶ 57.

[47] Paddeu and Waibel, *supra note* 44, at 12.

[48] ARSIWA, *supra note* 8, at 83.

[49] James Crawford, 'Circumstances precluding wrongfulness' in James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 274, 311.

[50] Paddeu and Waibel, *supra note* 44, at 17.

appropriateness of the contested measure; thirdly, how is the availability of better alternatives determined.

First of all, without doubting the need for a strict formulation of the defense with the objective of avoiding its abuse, the 'only way' criterion requires from States to know which measures do not work and to identify the 'only one' that works.[51] Yet most crises, and most importantly the present pandemic, require a package of measures to be tackled efficiently. Investors, however, may consider that only one measure impaired their entitlements under the BIT. The question therefore is: what should be focus of assessment under the plea: the single measure or the package of measures?

The Argentine crisis in the early 21st century illustrates this scenario. In response to its financial crisis, Argentina adopted a wide range of measures. Some tribunals have focused on the specific measure challenged[52] and rejected the plea, noting that there were several policy alternatives available,[53] and others have taken a broader outlook[54] and were able to uphold the plea, granting some discretion to host country and, thus, allegedly inviting abuse.[55]

In this regard, the tribunal in *Urbaser v. Argentina* charts a middle way. Urbaser was a shareholder in a concessionaire that was in charge of the supply of water and sewerage services in Argentina. Argentina's emergency measures resulted into its insolvency with Urbaser filing arbitral proceedings for unlawful expropriation and breach of the FET standard.[56] The tribunal noted that:

> The emergency measures and the state of necessity associated with them were events of nation-wide importance. Therefore, the question whether 'other means' were available has to be captured in both perspectives: the wide one, taking into account the needs of Argentina and its population nation-wide, and the narrower one of the situation of investors engaged in performing contracts protected by the international obligations arising out of one of the many BITs.[57]

[51] *Id.* at 18.

[52] *See*, *e.g.*, Suez, *supra note* 18, at ¶ 238.

[53] CMS Gas Transmission Company v. The Republic of Argentina, ICSID No. ARB/01/8, Award, ¶ 323-324 (May 12, 2005)

[54] LG&E Energy Corp. v Argentine Republic, ICSIDARB/02/1, Decision on Liability, ¶ 257 (Oct. 3, 3 2006).

[55] Michael Waibel, Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E, 20 Leiden. J. Int'l. L. 637, 646 (2017).

[56] Stefanie Schacherer, Urbaser v. Argentina, IISD Investment News, I8 October 2018.

[57] Urbaser SA v The Republic of Argentina, ICSID Case ARB/07/26, Award, ¶716, (Dec, 8. 2016).

Similarly, the pandemic necessitates multipronged responses: travel bans, entry-screening of people coming from affected countries, social distancing. When considered individually, some measures may turn out not to be the 'only way.' Nevertheless, to assess only a single measure of the package is artificial, presupposes the answer and renders the defense illusory.

Secondly, it is suggested that tribunals need to assess the question of the appropriateness of the measure adopted from the standpoint of the State at the time of the decision-making.[58] Provided all the uncertainties in respect of the virus at the time it broke out and the lack of targeted treatments, some form of extreme social distancing measures was all that States could do to mitigate the morbidity and mortality of the virus within their populations.[59] In this respect the tribunal in *Continental* noted that 'this objective assessment must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight.'[60] Hence, it should be made clear that adjudicators should not benefit from hindsight; otherwise they risk considering the projected effectiveness on the basis of what became known only *ex post*.

Thirdly, proving that the measure(s) adopted is the 'only way' to safeguard essential interests involves necessarily a counterfactual, meaning an assessment and rejection of other potential alternatives. Necessity is excluded, if 'there are other (otherwise lawful) means available, even if they may be more costly or less convenient.'[61] Reflecting further on this condition, one can distill three features that an alternative has to possess in order to displace the measure adopted as 'unlawful': Firstly, the alternative measure should be lawful, as it is clearly stated in the Commentary. Secondly, it should be effective in the sense that it sufficiently

[58] See Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment, ¶ 372 (July 30, 2010)

[59] Federica Paddeu and Freya Jephcott, COVID-19 and Defences in the Law of State Responsibility: Part II, EJIL:TALK (17 March 2020).

[60] Continental Casualty Company v Argentine Republic, ICSID Case ARB/03/9, Award, ¶ 181, (Sept. 5, 2008).

[61] ARSIWA (n 8) 83; Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, ¶ 8.48 (Aug. 31, 2018).

safeguards the essential interest under threat. Comparisons between projected effectiveness of alternative measures are likely to be complex, particularly under uncertainty.[62] Finally, the alternative measure should be feasible, in the sense that it is available to the relevant State at the time.[63] For instance, States could build temporary hospitals to reduce pressure on existing healthcare structures during the COVID-19 pandemic. This could be a more costly and perhaps less convenient, yet lawful, way to protect lives and the healthcare system, than impose strict lockdowns and wide-ranging business closures.[64] However, this alternative may still not be feasible as the emergency requires an urgent response and there may be too few medical professionals available to staff these additional facilities.[65]

In general, it seems that the 'only way' requirement sets a very high threshold for States to fulfill and calls for a more lenient approach to permit some practical scope of application.[66] In COVID-related cases tribunals need to broaden the focus of their assessment, so as to include the package of measures, instead of focusing on the contested regulation alone, while factors such as the feasibility of alternative time-consuming measures in times when the death toll was rising should constitute key considerations in their reasoning.

3. Lack of Contribution of the State

The plea of necessity is excluded if the State has contributed to the situation of necessity, namely to the risk of grave and imminent harm to its essential interest. This 'lack of contribution' requirement is vague and has given rise to significant interpretive difficulties in practice. For the plea of necessity to be precluded, the contribution must be sufficiently substantial and not merely incidental or peripheral.[67] Recent tribunals have supplemented this definition with a temporal parameter, stating that the contributory event has to take place in chronological proximity for the necessity to be upheld.[68] What amounts,

[62] Enron, *supra note* 58, ¶ 371.

[63] *See*, *e.g.*,Paddeu and Waibel, *supra note* 44, at 21.

[64] *Id.*

[65] *Id.*

[66] August Reinisch, *Necessity in Investment Arbitration*, 41 Netherlands Yearbook of Int'l L 137, 154 (2010).

[67] See generally ARSIWA, *supra note* 84.

[68] Unión Fenosa , *supra note* 61, ¶ 860.

however, to 'substantial' contribution is the thorny question that tribunals dealing with COVID-related claims are called to answer.

Arbitral tribunals have adopted diverging interpretations. For some, well-intended but ill-conceived policies exclude reliance on the plea.[69] For instance, in *Sempra* v. *Argentina*, the parties argued extensively on whether the 2002 economic crisis had been precipitated by endogenous or exogenous factors. The tribunal concluded that both factors were at play and that, although the 'state of affairs [had] not been the making of a particular administration, the State must answer for it as a whole.'[70] Other tribunals have held that only fault can exclude necessity.[71]

In terms of COVID-19 situation, should one categorize delayed responses that prevent a host State from bringing the virus under control and compels them to adopt new or more extended restrictions affecting foreign investors as 'contribution' to the health crisis? Similarly, is the lack of adequate response in terms of testing and tracing that expands contagions also a contribution to the prolongation of the pandemic? Can the underfunding of health care systems also preclude reliance on necessity? Certainty, future investment tribunals will have a hard time providing responses, because they are evaluating host States' omissions given that COVID-19 was unknown, appeared unexpectedly and its potential impact was uncertain.[72] In that respect, statements by representatives of States may be of importance when they themselves accept the role of their country in the crisis.[73]

What is clear, however, is that a very strict reading of this requirement likely makes the plea indefensible. In most cases, the necessity defense could never operate in economic crises or even in situations of armed conflicts or civil unrests. This is because there will always be some conduct of the invoking State that may

[69] *See*, *e.g.*, Impregilo, *supra note* 38, ¶356.

[70] Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 354 (Sept. 28, 2007).

[71] *See*, *e.g.*, Urbaser, *supra note* 57, ¶ 711.

[72] Alberto Alvarez-Jimenez, The international law gaze: COVID-19 and foreign investors, New Zealand L. J. 271, 281 (2020).

[73] EDF International, SAUR and Leon Participaciones Argentinas v. Argentina, ICSID Case No. ARB/03/23, Award, ¶ 1173 (June 11, 2012).

be said to have contributed to the rising situations.[74] In addition, some have taken the extreme position that the peril must be 'entirely beyond the control of the State whose interest is threatened.'[75] Such a high threshold is not only facially unreasonable, but also inconsistent with the distinction drawn between *force majeure* and necessity. The former applies to an 'irresistible force,' typically a natural disaster, that lies wholly beyond the State's control, whereas necessity clearly involves a relative impossibility: a choice is made between suffering the grave and imminent peril and violating an obligation protecting an interest of lesser importance.[76] If that choice alone is qualified as a contribution sufficient to exclude the plea, necessity could never be successful as a ground for a defense.

Therefore, the invocation of the plea of necessity poses many difficulties that States cannot easily, if not at all, overcome. When States act within the limit of necessity, they cannot know how things will turn out and this may cause inherent challenges at the stage of assessment of the claims by a tribunal. Firstly, while States may be able to prove the existence of the essential interest of protecting public health against the grave peril posed by the spread of COVID-19, they may face difficulties to 'sufficiently establish' for all measures, in the midst of scientific uncertainty about the virus, the element of 'imminence' of the risk. Secondly, the 'only way' criterion does not seem fit to accommodate macro-crises, including pandemics, where States need to adopt packages of measures, assessing their effectiveness on the basis of prediction. Additionally, a State cannot know in advance whether a measure was the 'only way' to tackle an emergency up until it has worked in practice. Lastly, the nature of the crisis caused by the pandemic is different from any economic crisis. In the case of an economic crisis, one could argue that such a crisis was triggered by a State's own actions or omissions. The coronavirus pandemic now challenges this traditional interpretive stance, as it requires full use of the flexibilities that international investment law offers. In total, taking into account the current interpretative approach, the conditions of

[74] Unión Fenosa, *supra note* 61, ¶ 8.60 ; see CMS, *supra note* 53, ¶ 329.

[75] Int'l Law Comm'n, Addendum-Eighth Rep. on State responsibility by Roberto Ago, U.N. Doc. A/CN.4/318/ADD, at art. 5-7, ¶ 13 (1980).

[76] *See*, *e.g.*, Sarah Heathcote, Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 491, 495.

the necessity defense seem nearly impossible to meet, with this defense being eventually available only in theory but hardly ever in practice.

C. *The Plea of force majeure in COVID-19 Times: Dead Letter or Viable Defense?*

Force majeure is codified in article 23 of the ILC Articles and constitutes part of customary international law. This rule is based on the premise that no one should be bound to perform the impossible[77] and it concerns a situation, in which a State is 'in effect compelled to act in a manner incompatible with its obligations.'[78] It is this aspect that distinguishes the plea of *force majeure* from the state of necessity that 'does not involve conduct which is involuntary or coerced.'[79] Additionally, *force majeure* is formulated as requiring a material impossibility of performance, if it is not to slide into the concept of necessity, that only requires a relative impossibility.[80] And it is on the basis of this lack of free choice that *force majeure* exonerates.

Given the unprecedented nature of the COVID-19 outbreak, tribunals are expected to be confronted with this plea, as a circumstance precluding the wrongfulness of novel state measures against the virus. The conditions to be fulfilled for the successful invocation of *force majeure* are clearly set out in article 23 and include (i) the existence of an 'irresistible force or of an unforeseen event' that lies beyond state control; (ii) material impossibility of performance; (iii) not due to conduct of the State invoking it.

1. Irresistible Force or Unforeseen Event Beyond State Control

The triggering event of *force majeure* should be an 'irresistible force' or an 'unforeseen event.' It is sufficient if either of these two conditions is met. The irresistible force or unforeseen event may be either natural (e.g., earthquake or drought) or man-made (e.g., war, revolution) or a combination of the two.[81] To determine in which of the two categories the present pandemic may fall, one has to delve into the distinction between the two, with the classification of the

[77] Federica Paddeu, *Justification and Excuse in International Law* (Cambridge University Press 2018) 285.

[78] ARSIWA, *supra note* 80, ¶ 76.

[79] *Id.* at 80.

[80] Paddeu, *supra note* 77, at 322-323.

[81] Int'l Law Comm'n. Rep. on the Force majeure and Fortuitous event as circumstances precluding wrongfulness, U.N. Doc. A/CN.4/315, ¶ 119 (1977).

pandemic as 'irresistible force' posing less difficulties.

Starting from the definition of 'irresistible force', it is plausible that 'force' here implies any event which can cause some constraint or coercion.[82] In other words, the adjective 'irresistible' emphasizes that there must be a constraint which the State was unable to avoid or counter by its own means.[83] The answer to whether the novel virus satisfies this criterion comes up to whether States could have taken measures to prevent the reach of the virus to their territories. The fact that contact tracing and border closure were proven ineffective to prevent the spread is indicative of the presence of a force which a State has no real possibility of escaping its effects.[84] Therefore, not only its inter-State spread but also the transmission of the virus within the country qualify as 'irresistible,'[85] since the means available to the States were inadequate to confine the spread of COVID-19.

Alternatively, another factor bearing on the success of the plea of *force majeure* is the unforeseeability of the fortuitous or unexpected event. The event must not have been foreseen, but it also must not have been 'of an easily foreseeable kind.'[86] Although claims of *force majeure* have been upheld on this basis in the past, [87] the tribunal in *Autopista v. Venezuela* set the bar for foreseeability high. Autopista undertook the construction of one of Venezuela's main highway systems. The project was to be financed primarily through an increase in relevant tolls, which after a series of violent public protests Venezuela refused to increase. Autopista initiated arbitration proceedings and Venezuela defended its failure to perform its contractual obligation by invoking *force majeure* and arguing that, in view of the violent reaction and civil unrest, it had been impossible to further increase the tolls. While Venezuela acknowledged that the prospect of public opposition to its unpopular measure was indeed foreseeable, it contested the foreseeability of the

[82] Paddeu and Jephcott, *supra note*, ¶ 59.

[83] ARSIWA, *supra note* 8, ¶ 76.

[84] *Id.*

[85] The irresistible nature of the virus is already recognized in the context of the International Chamber of Commerce ('ICC'), where the ICC *force majeure* clause includes epidemics in the list of events triggering *force majeure* situations.

[86] ARSIWA, *supra note* 8, ¶ 76.

[87] Affaire relative à la concession des phares de l'Empire Ottoman France v. Greec, PCA Award , ¶ 219-220 (July 24, 1956)

magnitude and form of such resistance.[88]

The tribunal found that the plea of *force majeure* is available once the following conditions are met: impossibility, unforeseeability and non-attributability.[89] However, on the ground that the protests had been foreseeable it dismissed the plea of *force majeure*.[90] According to the tribunal, for the event to be foreseeable, it does not have to be probable or likely to occur – it is enough that it could not be ruled out as a possibility.[91] The fact that Venezuela anticipated some public disagreement over the toll increase indicated that the possibility of a 'very violent protest' could not have been excluded. The Tribunal also resorted to the country's previous record of conflict as the ultimate yardstick for the determination of foreseeability. Although it had been almost a decade since the last similar upheaval in 1989, these prior incidents of social unrest led the tribunal to conclude that present protests could also have been foreseen.[92] Where does this conclusion leave us? Within the same realm of thought, past health emergencies, such as the SARS outbreak in 2003,[93] could render the current pandemic foreseeable, precluding the plea of *force majeure* on the alternate basis of the existence of an 'unforeseeable event.'

Nevertheless, the jurisprudence evolved since *Autopista*. In *RSM v. Central African Republic* ('CAR') RSM obtained an oil exploration permit in the CAR and due to civil turmoil and armed conflict in the area, it invoked the *force majeure* clause in the contract to suspend its obligations under the latter.[94] The CAR did not accept RSM's request for suspension and RSM submitted the dispute to ICSID. In its reasoning the tribunal departed from the interpretation of the *Autopista* tribunal. Instead of focusing on the past record of violence on the country's territory, it compared the general political and security atmosphere at the

[88] Autopista Concesionada v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Award, ¶ 111 (Sept. 23, 2003).

[89] *Id.* ¶ 108.

[90] *Id.* ¶ 118.

[91] *Id.* ¶ 117.

[92] *Id.* ¶ 115.

[93] Jill Seladi-Schulman, COVID-19 vs. SARS: How Do They Differ?, HEALTHLINE (2 April 2020).

[94] Although the plea of *force majeure* was based on a clause in the contract, the requirements to be fulfilled are the same with the ones of article 23 as noted in [179] of *Autopista*.

relevant time with the type and magnitude of the past civil unrest in order to determine the foreseeability of the event. Eventually, it found that the occurrence of the past unrest could not have foreshadowed the occurrence of a security situation that would have made the performance of the contract impossible, and thus upheld the plea.[95] The approach followed by the *RSM* tribunal introduced additional prong for the application of foreseeability; the type and the magnitude of the event. In terms of COVID-19, this interpretative stance would allow for the consideration of the unprecedented character of the pandemic taking into account its magnitude and disruptive nature and could lead to the characterization of the pandemic as an 'unforeseen event.'

With regard to the analysis on foreseeability, it should be noted that this issue also requires a per State analysis. This is by virtue of foreseeability requiring a subjective element. In other words, its success depends on the circumstances of a subject invoking the defense.[96] Following this vein, one could argue that the initial outbreak of the virus was not foreseen, especially taking into account its nature and magnitude. Taking this requirement as a starting point, it should be noted that the virus did not spread to all the States at the same time. Some States could have benefited from the relative delay in the spread of the virus, from the guidelines of WHO and from the experience of other States already struggling to contain it.

In the first COVID-related case, *Julio Miguel v. Bolivia*, the claimants followed this exact line of argumentation to reject the plea of *force majeure* raised by the respondent State. In response to Bolivia's request for suspension of the time-limit for the submission of its Statement of Defense, the claimants noted that the spread of COVID-19 was not an unforeseen event to Bolivia to the extent that 'the disease and its consequences were known to governments since at least January of 2020.'[97] The tribunal held that it did not need to rule on the plea, stating that

[95] RSM Production Corporation v. Central African Republic, ICSID Case No. ARB/07/2, Award, ¶ 180, 185-211 (July 11, 2011).

[96] Andrea K. Bjorklund, *Emergency Exceptions: State Necessity and Force Majeure*, in Peter Muchlinski, Federico Ortino and Christoph Schreuer (ED), Oxford Handbook of International Investment Law, 459, 490 (OUP 2008).

[97] The Estate of Julio Miguel Orlandini-Agreda and Or v. Bolivia, PCA Case No. 2018-39, Procedural Order No 7, ¶ 28 (Apr. 10, 2020).

'the proceeding can move forward, albeit with some delay, in a socially responsible manner by adapting to the new reality of communicating remotely.'[98] Hence, whether the temporal advantage of the relative delay in the spread of the virus precludes some States from relying on this limb, because the event would not qualify as 'unforeseeable,'[99] remains open for subsequent debates before future tribunals. What appears to be certain in these circumstances is that the argument on the unforeseeability of the virus becomes exceedingly harder the longer the pandemic spreads.

Therefore, the characterization of the spread of COVID-19 as an 'unforeseeable event' is not free from difficulties: arbitral tribunals have not always considered the magnitude and character of the event as decisive factors in the determination of its foreseeability, while, in view of the pandemic, this determination necessitates a per State analysis. However, even if the pandemic is not considered 'unforeseeable', one can argue that it fulfills the conditions of the alternate basis of article 23 and can still be characterized as an 'irresistible force.'

1. Materially Impossible Performance

The 'irresistible force' or 'unforeseen event' must be causally linked to the situation of material impossibility, as indicated by the words 'due to *force majeure* making it materially impossible.' There is no universal standard of the exact threshold of material impossibility in the Commentary. The following paragraphs aim at delineating the outer limits of this notion and inquire whether the impossibility in performance resulting from the spread of COVID-19 falls within the ambit of material impossibility required for *force majeure* to apply.

It is quite clear that difficulty in performance, for example due to some political or economic crisis, does not meet the threshold set for the plea or ground of this kind.[100] Moreover, the tribunal in *Rainbow Warrior* concluded that:

> New Zealand is right in asserting that the excuse of force majeure is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of force

[98] *Id.* ¶¶ 39, 40.

[99] Paddeu and Jephcott , *supra note* 59.

[100] ARSIWA (n 8) 76; *see*, *e.g.*, Sempra, *supra note* 10, ¶ 246; *see*, *e.g.*, Russian Claim for Interest on Indemnities (Russia v. Turkey), PCA Award ¶ 6 (Nov. 11, 1912).

majeure.[101]

In its reasoning, the tribunal read in the material impossibility requirement of article 23 an implicit 'absolute' threshold. 'Material' refers to the kind of impossibility at issue: there must be a physical inability to perform the obligation.[102] 'Absolute' refers to the degree of this impossibility: the State must have no way to perform the obligation in question, it must have no options open to it.[103] This is confirmed by the rationale of the plea, which lays in the fact that the non-performance of the obligation is 'involuntary or involves no element of free choice.'[104]

Whether the coronavirus outbreak results in material impossibility of performance, as defined in the *Rainbow Warrior* case, cannot be answered in general terms: it will depend on the obligation at issue and the underlying circumstances of each case. Nevertheless, it is hard, in general terms, to see how this threshold could be satisfied, when it remains possible for States to continue to run as usual and to let people continue to move and work. In the *Julio Miguel case*, the claimants asserted that the health crisis did not make the filing of the Statement of Defense on behalf of Bolivia 'materially impossible' and that 'all communications services in Bolivia remain available and operating without interruptions.'[105] The claimants further rejected Bolivia's reliance on its difficulties in retaining and liaising with potential witnesses and experts arguing the availability of telephone and internet services, and noted that 'all international arbitral institutions are continuing to operate and administer their cases with no delays or suspensions, suggesting that the system and its participants should adapt to the current circumstances.'[106] Although the tribunal did not rule on the plea, it implicitly agreed with the claimants noting that 'the proceeding can move forward, albeit with some delay, in a socially responsible manner by adapting to

[101] Rainbow Warrior Affair (New Zealand v. France), France- New Zealand Arbitration Tribunal ILR 500, Award, ¶77 (Apr. 30, 1990).

[102] Paddeu and Jephcott, *supra note* 59.

[103] *Id.*

[104] ARSIWA, *supra note* 8, at 76.

[105] Julio Miguel, *supra note* 97, ¶ ¶ 29-32.

[106] *Id.* ¶ 30.

the new reality of communicating remotely.'[107] Therefore, since the conduct of the proceedings remains possible through remote communication, this could also be the case for obligations borne by States to foreign investors under the condition that these obligations could be fulfilled in a manner consistent with the new reality.

One may conclude that state emergency measures against the spread of COVID-19 are voluntary choices that involve an element of free choice. The plea of *force majeure* is available however, when the internationally wrongful act at least involves no element of free choice.[108] If States have choices – as limited as these may be – then they only face a relative and not a material impossibility of performance. And this places States outside of the scope of the plea of *force majeure* and slides them into the defense of necessity that only requires a relative impossibility.[109]

2. Not Due to the Conduct of the State Invoking It

The plea of *force majeure* is excluded in circumstances where the situation of *force majeure* is 'due', either alone or in combination with other factors, to the conduct of the State invoking it.[110] It is not enough that the State has merely contributed to the situation of material impossibility; the situation must be 'due' to its conduct.[111] This threshold is not negligible, but it is lower than the similar provision precluding States from invoking the necessity defense, because it requires that the State 'has caused or induced' the situation of material impossibility. As it stands, for the situation to be 'due' to the state's conduct, its role in the occurrence of the latter must be determinative.[112] It, thus, allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but was decided in good faith and did

[107] *Id.* ¶ 39-40.

[108] ARSIWA, *supra note* 8, at 76.

[109] Paddeu, *supra note* 77, at 322-323.

[110] ARSIWA, *supra note* 8, ¶ 78.

[111] See Libyan Arab Foreign Investment Company and the Republic of Burundi, Award, ¶ 55 (Mar. 4, 1991)

[112] ARSIWA, *supra note* 8, at 78.

not itself make the event any less unforeseen.[113]

In the framework of the COVID-19 pandemic a question that may arise is the following: How far back in the past can contributing causes be found? Would everything ranging from slow reactions in preventing or containing the spread of the disease to chronic under-funding of public healthcare be relevant to the assessment of determinative contribution?[114] As to the prevention and containment of the virus, the answer varies from State to State, however, when it comes to austerity policies, generally measures adopted in good faith only affect the vulnerability of the healthcare systems to provide medical support to the population, thereby increasing the mortality rate of the virus.[115] Bearing that in mind, it seems difficult to argue that the poor financing of healthcare systems has 'induced' or at least had a determinative role in contributing to the outbreak of the health crisis.

After scrutinizing all the requirements for the successful invocation of *force majeure*, it appears that the pandemic may constitute an irresistible force, if not an unforeseen event as well, which could hardly be 'due' to conduct of the State invoking it. Nevertheless, States' possibility to rely on *force majeure* falls flat when it comes to the existence of material impossibility, because this threshold is extremely difficult to meet. The satisfaction of this condition may well depend on the specific obligation at issue, but in most of the cases States are likely to have a choice in respect of compliance (even if a difficult one) and it is this parameter that renders the plea non-viable.[116]

To conclude this first part of the paper the following considerations are due: Firstly, expropriation claims arising out of measures relating to the pandemic may stand arbitral scrutiny on the basis of the police powers doctrine, only if adopted *bona fide* in accordance with due process, are non-discriminatory and proportionate. Further, the analysis of the defenses of necessity and *force majeure* reveals that their current understanding in international law and the reliance on a high threshold seemingly defeats the very purpose of the respective provision

[113] *Id.*

[114] Paddeu and Jephcott, *supra note* 59.

[115] *Id.*

[116] *Id.*

itself, meaning the availability of viable options for States to excuse non-performance in certain unique circumstances. To prevent these defenses from becoming dead letter of the law, their restrictive character should be ensured by their cumulative requirements and not by the restrictive interpretation of each of those requirements by arbitral tribunals. Lastly, the pandemic may become a catalyst for change in the interpretative approaches to these defenses. Customary law as crystallized in the ILC Articles will seep into the framing of challenges and defenses by States, shaping characterization of conduct and being shaped by widespread state practice in turn.[117]

III. DEFENSES UNDER TREATIES

Part II focuses on defenses based on treaty law, meaning treaty exceptions. In the universe of more than 3000 BITs, exceptions included therein may serve as treaty-based safety valves for States seeking to avoid responsibility for COVID-related measures. The first chapter of Part II maps the universe of public health provisions in IIAs that attempt to balance investors' protection with the regulatory autonomy of host States in the health sector. The second chapter stresses out the need to strengthen the 'health' of the system itself and concludes that the inclusion of general exceptions does not provide a satisfactory response to the call for reform. Lastly, the third chapter reflects on the direction towards which a reform attempt should take place, having as the ultimate yardstick the sustainability or non-sustainability of an investment regime that is based on exceptions as the only means to accommodate emergency situations.

A. *Public Health Provisions in IIAs: Contemporary Paradigms and Practice*

The relationship of public health and international investment arbitration is usually framed as one of conflict instead as one of complementarity, with the protection of foreign investors viewed as a constraint to the regulatory power of governments. The COVID-19 pandemic has contributed to the deterioration of this conflict putting into the spotlight the inability of old-generation BITs to achieve an equilibrium between the promotion of foreign investment and the right of States to regulate for the protection of public health. The following paragraphs

[117] Martins Paparinskis, COVID-19 Claims and the Law of International Responsibility, 11 J. Int'l Humanitarian L. Studies, 311, 329-330 (2020).

aim at mapping the available techniques under old-generation and recently concluded BITs that attempt to reconcile these notions through the inclusion of exceptions in the treaty text.

More than 3000 BITs, representing more than 90 per cent of all BITs were signed between 1959 and 2011, with the majority of them being in force today.[118] These treaties generally contain very few provisions that preserve States' regulatory space, with or without explicit reference to health. For example, the preamble of old-generation IIAs references social investment aspects, such as human rights and health, in less than 7 per cent of the agreements, while general public policy exceptions are equally found in less than 7 percent of these IIAs.[119] Also carve-outs for general regulatory measures are featured in the expropriation provisions of less than 2 per cent of old-generation IIAs.[120] Hence, old-generation IIAs fail to explicitly make room for regulatory action in the public interest, including public health.

The proliferation of IIAs and investor-State arbitrations has given rise to concerns that the investment protection function of the IIA regime might unduly fetter a State' s ability to pursue health policies which should be balanced against investor protections. To mitigate the uncertainty about the outcome of protracted litigation as well as fears of regulatory chill, States engaged into a review process of their IIAs with the aim to exclude public health regulations from the range of measures that can be challenged in ISDS proceedings or to acknowledge public health as a legitimate regulatory objective. As indicated in figure 1 below, more than 92 per cent of the IIAs concluded since 2018 contain at least one explicit reference to health in the operative part of the treaty.[121]

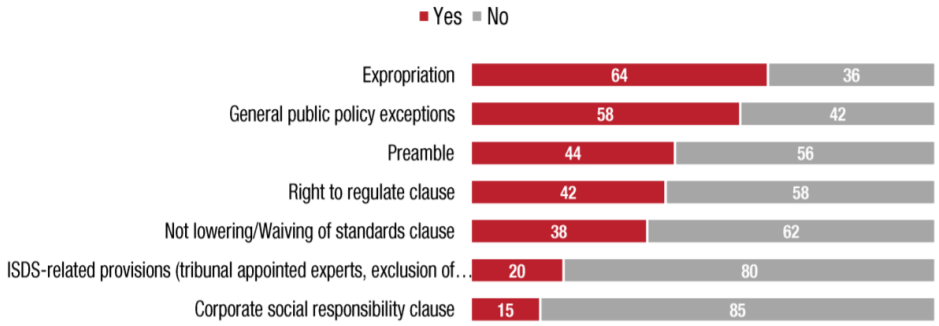
[118] United Nations Conference on Trade and Development (UNCTAD), International Investment Policies and Public Health, 1.2 (UN Publication, July 2021).

[119] *Id.*

[120] *Id.*

[121] *Id.*

Figure 1. Public health provisions in IIAs concluded between 2018-2020 (Per cent)



Source: UNCTAD, 'International Investment Policies and Public Health' <https://unctad.org/system/files/official-document/diaepcbinf2021d5_en.pdf> accessed 02 December 2021.

According to the graph, health-related aspects are covered in recent IIAs mostly in expropriation provisions, where it is explicitly stated that measures adopted in the pursuit of public health do not constitute regulatory takings. Paragraph 3 (b) of Annex 9-B of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP') is an indicative example of this type of carve-out, which provides that 'non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.'[122] The practical impact of these clauses however, is very limited, as discussed in section two.

Other health provisions are in the form of general exceptions, meaning exceptions that serve to justify measures adopted in pursuit of health policy objectives, otherwise incompatible with protection standards under the respective IIA. An indicative example is Article 22.1.3 of the Canada-Korea FTA, which provides that 'this Agreement is not to be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health [...].' According to some commentators, the more compelling reasoning for including general exceptions is that they make express the exceptions for legitimate objectives already reflected in IIA jurisprudence and operate as an insurance policy against overreaching interpretations of obligations

[122] Similar provisions can be found in article 12.8 of the Netherlands Model IIA (22 March 2019).

under IIAs by the tribunals.[123] Nevertheless, the inclusion of these clauses remains full of legal difficulties, which will be analyzed in detail in section two.

B. *Assessing New Trends and Proposed Reforms in* IIAs: *Can General Exceptions Enhance the Health of the Investment Regime?*

The present section first, underlines the need for a robust re-orientation of the treaty regime. It will then emphasize the uncertain consequences of including general exceptions in IIAs as an answer to the need for rebalancing the system. It will finally conclude that proposed reforms are not the ideal way in which States should inject deeper levels of flexibility for public regulation into IIAs.

1. The need for reform

Existing IIAs were not designed to undermine the legitimate regulatory function of States, especially in emergency situations, but they were concluded, for the most part, during a different era. IIAs concluded 20 to 60 years ago do not reflect today's global challenges relating to sustainable development, including public health.[124] Broadly drafted provisions found in IIAs resulted in expansive interpretations by arbitral tribunals, which reduced the capacity of host States to regulate, even when such regulations were taken in the public interest.[125] Taking into account that the number of old-generation treaties far outweighs the number of more recent IIAs and health regulations by governments have already generated, and will, in view of the pandemic, increasingly trigger ISDS disputes, one may realize that the need for treaty reform becomes more urgent than ever.[126]

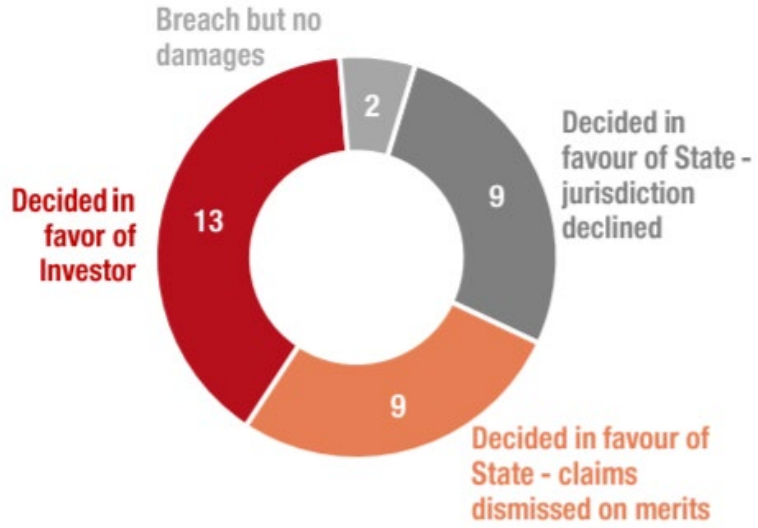
[123] Andrew Newcombe, *General Exceptions in International Investment Agreements*, (BIICL Eighth Annual WTO Conference, May 2008) 1, 3.

[124] UNCTAD, Investment Policy Responses to the COVID-19 Pandemic, 1, 12 (UN Publication, May 2020) 1, 12.

[125] *Id.*

[126] UNCTAD, *supra note* 118, at 2.

Figure 2. Outcome of proceedings in health-related cases



Source: UNCTAD, 'International Investment Policies and Public Health' <https://unctad.org/system/files/official-document/diaepcbinf2021d5_en.pdf> accessed 02 December 2021.

The survey above reveals that at least 33 known ISDS cases directly related to public health have been initiated on the basis of old-generation BITs, with 13 of them filed against developed countries.[127] Although figure 2 indicates that there is a track record of respondent host nations succeeding in health-related cases, the outcome of the proceedings is not always related to the health aspect of the dispute. For example, in 2011 Australia's parliament passed more stringent tobacco packaging laws with the aim to alert citizens to the health risks associated with the use of tobacco. Phillip Morris challenged the rule under the ISDS provision of the Australia-Hong Kong BIT but the claim was ultimately unsuccessful. However, this ended up being only half the story. The reason why the tribunal dismissed the claim was based on the determination that Philip Morris's arbitration claim constituted an abuse of rights under the relevant BIT. Philip Morris underwent a corporate restructuring several years before the passing of the stricter tobacco laws in Australia, so as to bring the dispute under the Australia-Hong Kong BIT as a beneficiary.[128] This case endorses the conclusion that the lower success ratio of host States in health-related disputes reveals a gap in treaty language. Most

[127] *Id.* 6.

[128] Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 585 (Dec.17, 2015).

importantly, it highlights the need for inclusion of clear provisions in the treaty text that would afford States the legal bases to successfully defend themselves against investors' claims on COVID-related measures.

To address this need, governments are departing from the vaguely worded treaty templates that dominated the first generation of investment agreements up to the 1990s and early 2000s and include, among others, clearly drafted general exceptions and expropriation provisions (58% and 64% of new IIAs respectively according to figure 1) as a backstop to make abundantly clear that public welfare measures should not attract liability. However, clarifying the language of exception clauses, adding new flexibilities, or reining in arbitrator discretion is not necessarily the panacea for the realization of the equilibrium between investors' protection and public health that the present pandemic calls for.

2. Are General Exceptions the Answer to the Need for Reform?

Although on their face general exceptions may appear to offer a holistic solution to legitimacy and sustainability concerns regarding the scope of foreign investors' rights under IIAs, this chapter questions the insertion of general exceptions as the preferred paradigm to balance private rights and public health.[129]

As noted above, statistics indicate that in recently concluded BITs the most popular technique among States to safeguard their regulatory space is the inclusion of clauses that define the scope of indirect expropriation and of general exception clauses. Starting from the expropriation clauses, as analyzed in the previous chapter the aim of these provisions is to explicitly exclude certain types of regulations from the definition of an indirect expropriation. The fact that such elements of clarification are being provided for arbitrators is a positive step towards achieving a more accurate definition of indirect expropriation. The effect of these clauses, however, is simply to create a presumption in favor of legitimate regulations, which may be excluded from the definition of an indirect expropriation. And this is because once a regulation designed to protect

[129] *See* Caroline Henckels, Should Investment Treaties Contain Public Policy Exceptions, 59 BC L. Rev. 2825, 2841(2018), where the author notes that 'it is arguable that exceptions still have a role to play even where the substantive obligations are drafted with greater precision'; Gabriele Gagliani, 'The Interpretation of General Exceptions in International Trade and Investment Law: Is a Sustainable Development Interpretive Approach Possible' 43 Denver. J. Int'l. L. and Pol'y 559, 587 (2015).

legitimate objectives such as public health is deemed to fall within a State' s police powers, it may no longer be construed as indirect expropriation.[130] And in the case the regulation does not fall within police powers, for example because it is discriminatory, it will also not fall under the indirect expropriation clause for the very same reason, its discriminatory nature. Thus, clauses regarding the scope of indirect expropriation are rather futile in view of the police powers doctrine that exonerates a measure on the basis of a public welfare objective in the first place.

The most important challenges are, however, posed from the inclusion of general exceptions in IIAs, which are the focus of this chapter. Firstly, there is significant uncertainty about how general exceptions clauses operate in international investment law. The fact that arbitral tribunals predominantly read the balancing of investment and non-investment concerns directly into primary obligations has led scholars to note that the inclusion of general exceptions may actually reduce rather than expand States' policy space.[131] The risk lies in the fact that, since general exceptions provide a closed list of legitimate policy objectives, their inclusion might have the unintended consequence of limiting the range of legitimate objectives generally available to the State.[132]

Indeed, some tribunals have interpreted these exception clauses to counteract implied flexibilities in other provisions. For example, in *Bear Creek v. Peru* the tribunal found that the existence of a general exception clause in the applicable IIA forestalled recourse to the police powers doctrine. Specifically, it noted that the presence of the general exception clause meant that 'no other exceptions [e.g., police powers] from general international law or otherwise can be considered applicable in this case.'[133] That is to say that the factors that would otherwise have been taken into account in the determination of whether a measure was an

[130] *See* Suzy Nikiema, Best Practices: Indirect Expropriation, Institute of Sustainable Development, Best Practices Series 1, 11 (2012).

[131] Wolfgang Alschner and Kun Hai, 'Missing in Action: General Public Policy Exceptions in Investment Treaties' in Lisa Sachs, Jesse Coleman, Lise Johnson (eds.), *Yearbook on International Investment Law and Policy*, (OUP 2018) 363, 376.

[132] *Id.* at 376-7; *see* Andrew Newcombe, *The use of general exceptions in IIAs: increasing legitimacy or uncertainty?*, in Armand de Mestral and Céline Lévesque (ED), Improving International Investment Agreements, 267, 279 (Routledge 2013).

[133] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017) ¶ 473.

indirect expropriation or an exercise of police powers were only relevant insofar as they were embodied in the exception clause.[134] Relatedly, the presence of exceptions in some treaties but not others may send a signal to tribunals that treaties without exceptions do not permit tribunals to examine whether a challenged measure is directed to promoting public welfare at all when determining whether a State has complied with its investment treaty obligations.[135]

Secondly, in light of that interpretative uncertainty, the normative interaction between exceptions and other norms of investment law needs to be clarified. General exceptions and primary obligations often share overlapping conditions that can give rise to confusion.[136] Measures in violation of national treatment or FET are likely to be deemed arbitrary or discriminatory. Equally, most public policy exceptions contain a chapeau, which only exempts from wrongfulness measures that 'are not applied in an arbitrary or unjustifiable manner' or that are 'non-discriminatory' in application.[137] Hence, measures that fall foul of investment law's primary obligations also seem unlikely to be saved by its exceptions, as confirmed by recent jurisprudence.[138] As general exceptions only come into play after a finding that a measure is contrary to a treaty standard, the finding of a violation would automatically preclude the application of the general exception.[139]

Thirdly, paradigms from practice are indicative of the conundrum around the precise operation of these exceptions also among treaty drafters, the States themselves. Specifically, there have been instances, where States failed to raise those exceptions. In *Gold Reserve v. Venezuela*, Venezuela did not raise the general exceptions clause in the annex of the BIT and the tribunal concluded that the

[134] Henckels, *supra note* 129, at 2835-6.

[135] *Id.* at 2836.

[136] Alschner and Hai, *supra note* 131, at 378.

[137] *Id.*

[138] Copper Mesa Mining Corporation v. Republic of Ecuador, PCA No. 2012-2, Award, ¶ 6.67 (Aug. 15, 2016) where the tribunal found that the arbitrariness in Ecuador's withdrawal of a mining license rendered Article XVII of the BIT (general exception) inapplicable, because it only exempted measures 'not applied in an arbitrary or unjustifiable manner' from liability; See Newcombe, *supra note* 123, at 11.

[139] Newcombe, *supra note* 132, at 281; *see* Camille Martini, Avoiding the Planned Obsolescence of Modern International Investment Agreements: Can General Exception Mechanisms Be Improved and How, 59 BC L. Rev, at 2877, 2886 (2018).

State's responsibility to preserve the environment does not exempt it from its international obligations,[140] sidestepping the exception and basing its reasoning on cases decided under treaties that do not contain general exceptions. Similarly, in *Crystallex International Corporation v Venezuela* and in *Rusoro Mining Ltd. v Venezuela*, Venezuela did not raise the general exceptions and the tribunals did not consider the clauses on their own initiative.[141] Last but not least, in the recent *Infinito Gold* award Costa Rica sought to justify the revocation of a mining license based on environmental protection concerns. But rather than invoking an exception from the Canada-Costa Rica BIT, Costa Rica raised the treaty's 'right to regulate clause', which permitted environmental measures 'otherwise consistent' with the treaty. The tribunal made clear that the clause 'is not a carve-out from the BIT's protections, but rather a reaffirmation of the State's right to regulate.'[142] All these cases represent missed opportunities to clarify the intended role of general exceptions in the balancing of rights and obligations in the investment regime.

To conclude, if general exceptions operate as replacements rather than complements to the flexibility already offered under customary international law, such as the police powers doctrine, they will provide little additional policy space or may even detract from it. Similarly, if they are inapplicable on the same grounds that give rise to a violation of the primary obligations in the first place, they will rarely save respondent States from liability.[143] Thus, instead of serving as legal bases for the defense of States against pandemic claims, general exceptions rather reveal the structural weaknesses of the exceptions-oriented formulation of the investment regime.

3. Evaluation of Reform Proposals

Given the strong asymmetries in old-generation IIAs and the uncertainties in the application of general exceptions, international fora urge States to prioritize

[140] Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, ¶ 595 (Sept. 22, 2014).

[141] Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶ 591 (April 4, 2016); Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award, ¶¶ 407- 409 (Aug. 22, 2016).

[142] *See*, *e.g.*, Infinito Gold, *supra note* 29, ¶ 777.

[143] Tarald Laudal Berge & Wolfgang Alschner, Reforming Investment Treaties: Does treaty design matter? International Insitute Sustainable Development, Investment News, (October 2018).

and accelerate the holistic reform of all existing IIAs. The proposals for the reform of the existing regime may be organized in two main streams of argumentation: a first one suggesting the inclusion in IIAs of a general exception clause on health with clear language; and a second one suggesting a carve-out from ISDS for specific health-related measures.

The first of the suggested reforms regards the inclusion of a general exception clause in the IIAs, which would specify that the pursuit of public health is a legitimate objective under the treaty and no compensation would be provided for regulatory measures during health emergencies.[144] Within the same realm of thought are also proposals for revision of the language of general exceptions. Specifically, the United Nations Conference on Trade and Development ('UNCTAD') proposes that, instead of providing that the measure must be 'necessary' to achieve the policy objective (according to the typical wording of the exception), the text could require that the measure be 'designed' to achieve or 'related' to the policy objective, thus lowering the burden of proof for States.[145] Similar more lenient nexus requirements offer allegedly more leeway to host States than the more frequently used and much stricter 'necessity' threshold.[146] However, the more lenient the nexus, the more it risks being circumvented by measures that are protectionist or otherwise hostile to foreign investments.[147] Similar formulations may rather pose risks to investors' protection than safeguard the regulatory autonomy of States, because they create loopholes for misuse of the general exception.

The second stream of reform proposals is directed at ISDS. A carve-out of tobacco measures from ISDS in the CPTPP emerged following the Philip Morris dispute over Australia's tobacco plain-packaging legislation.[148] According to some

[144] UNCTAD, *supra note* 14; *see* Caroline Henckels and others (ED), 'Australia's Bilateral Investment Treaties' (Monash Law School, September 2020) at, 1, 10.

[145] UNCTAD, 'Investment Policy Framework for Sustainable Development' (UN Publication, 2015) 1, 104.

[146] Levent Sabanogullari, 'The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice' IISD Investment News (21 May 2015); Simon Lester and Bryan Mercurio, Safeguarding Policy Space in Investment Agreements, 12 IIEL Issue Brief, at 1, 10 (2017) .

[147] Henckels, *supra note* 129, at 2842.

[148] CPTPP (signed 8 March 2018, entered into force 30 December 2018) Art 29.5 excludes claims challenging tobacco control measures from ISDS or enables the State party to deny the benefits with respect to such claims.

commentators, this could pave the way for more extensive inclusion of health-related carve-outs in forthcoming treaties.[149] This approach is, however, undesirable. Excluding certain types of claims from the scope of the treaty obligations implicitly ranks some public welfare measures above others and singles out a single industry.[150] It also suggests that but for the clause, these measures would be vulnerable to being found to be inconsistent with the State's treaty obligations,[151] while with ISDS taken away, the respective sector would be the lone sector in which foreign investors will have rights under the treaty but no avenue to enforce those rights.[152] The carving out of a specific industry is unnecessary to protect governments' ability to regulate and promote public welfare measures. As will be seen, there are better ways to accomplish this objective.

Generally, the thrust of these reform proposals is the strengthening of the constant and piecemeal update of IIAs, either via the inclusion of health-related exceptions or via the introduction of carve-outs of health-related measures from ISDS. Is, nevertheless, the inclusion of precise exceptions and carve-outs the right path to follow in the present health crisis, as well as to the many yet to come? With 'path' meaning merely perpetuating the reform of exception clauses so as to tailor them to the type of crisis that each time comes up? For example, the slow-moving climate emergency is another area, where the flexibilities of treaty-based exceptions could soon be put to the test. An affirmative answer does not seem persuasive at all, because it provides short-term and shortsighted solutions, missing the forest for the trees. Instead, by re-calibrating away from a reactive model of dispute settlement and endorsing an ISDS model where health and sustainability parameters are built into the system, instead of being its exceptions, investment institutions may yet serve as sources of strength in times of need.[153]

[149] Ashley Schram , Public Health over private wealth: rebalancing public and private interests in international trade and investment agreements, 29 Public Health Res Pract. at 1, 3 (2019).

[150] Lester & Mercurio, *supra note* 146, at 7.

[151] Henckels, *supra note* 144, at 4.

[152] Lester & Mercurio, *supra note* 146, at 7.

[153] Julien Arato, Kathleen Claussen and J. Benton Health, The Perils of Pandemic Exceptionalism, 114 American J. Int'l. L. 627, 636 (2020).

C. *Rebalancing Investor and State Interests through Treaty Exceptions on Public Health: Where does the Limit of Exceptionalism Lie?*

International investment law's responses to the pandemic are likely to accelerate an already existing tendency towards exceptionalism – a paradigm of justification according to which deviations from primary rules are absolved by way of 'exceptions', and in which claims of exception can be expected to proliferate.[154] Which are, however, the consequences of a novel accelerating turn to exceptions, this time in light of the global pandemic? And what could be the way forward so as to enhance the health of the system as a whole?

In the short run, recourse to exceptions provides States with latitude and demonstrates the system's flexibility.[155] But exceptionalism also calls into question the ability of the investment regime to respond adequately to crises. First of all, it posits that the existing system of rules and exceptions is sufficiently flexible to handle crises and need not bend any more than it already does to accommodate urgent governmental interventions into the health sector.[156] While this argument seems logical and justifiable at first glance, it is well-equipped to handle only the occasional extraordinary event for which the exception was tailored. It falls short though of accommodating new forms of national policy or intervention that might emerge from the crisis. Specifically, the crisis-orientation of exceptions can make forward-looking preventative regulations difficult to justify.[157] Moreover, the exhaustive lists of permissible objectives and overly rigid prerequisites may even limit existing flexibility, if the present pandemic represents the threshold, below which any lesser disruption does not fall within the ambit of the exception.[158]

Secondly, the extensive inclusion of public health exceptions into IIAs may lead to an overreach of international investment law to other international law regimes, including the one of international health law. Respondent States to pandemic-related disputes are signatories to international instruments, including

[154] *Id.* at 628.

[155] *Id.*

[156] *Id.* at 632.

[157] *Id.*

[158] Sabanogullari, *supra note* 146.

the International Health Regulations ('IHR') of the WHO.[159] The IHR enable States to 'implement health measures [...] in response to specific public health risks or public health emergencies of international concern' as long as they are not 'more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives.'[160] In that way the IHR share a similar normative orientation with general exceptions under IIAs towards minimizing burdens on international commerce, a fact that makes it likely for parties to economic disputes to refer to the IHR, opening the door for tribunals to pronounce on their scope and interpretation.[161] The Regulations' preoccupation with avoiding undue restrictions on international commerce could, if imported into the hotly contested world of investment arbitration, have negative consequences for the right of States to regulate to attain the highest achievable standard of health.[162] Therefore, this result should be avoided, although proliferating invocations of public health reinforces the opposite.

Taking into consideration the significant weaknesses associated with the currently suggested path of reform focusing on treaty exceptions, a structural reappraisal is urgently needed. While there are still important disagreements among key actors on how to reform ISDS, there is a broad consensus among governments on the directional power of most States' agendas to more narrowly circumscribe and define the rights which investment treaties grant to foreign investors.[163] A precisely drafted norm that is clear about the conduct that is and is not permitted removes the need to have recourse to an exception.[164] As such, a preferable approach would be for treaty parties to clarify the substantive obligations included in the IIAs, so as to achieve a balance between regulatory freedom and investment protection.[165]

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[159] International Health Regulations (adopted 23 May 2005, entered into force 15 June 2007) 2509 U.N.T.S 79 ('IHR 2005').

[160] IHR 2005, Art. 43 (1).

[161] Arato, *supra note* 153, at 632.

[162] Benton Heath, Suspending Investor-State Arbitration During the Pandemic, Int'l. Econ. L. & Pol'y Blog, (May 12, 2020).

[163] Lauge N. Skovgaard Poulsen and Geoffrey Gertz, Reforming the investment treaty regime, Brookings Press, (Mar. 17, 2021).

[164] Henckels, *supra note* 129, at 2838-9.

[165] *Id.* 2839.

Specifically, treaty reform could be directed towards defining with a fair deal of precision the substantive obligations of the State under the respective IIA via the inclusion for example, of an exhaustive list of conduct that could breach the FET standard or constitute indirect expropriation, particularly when legitimate regulations of general applicability are at issue.[166] These sorts of lists have the benefit of tightly constraining the circumstances in which regulatory measures in the public interest may be found unlawful.[167] Additionally, more precise norms place greater constraints on the decision-making criteria employed by the tribunals.

Yet, greater precision in drafting of the obligations under the IIAs will not (and cannot) prescribe a specific outcome in a given dispute, nor always steer adjudicators towards interpretations of provisions that are acceptable to the negotiating parties and their constituencies.[168] The challenge that this proposal poses to the drafters is to provide precise criteria as to when a measure will be in breach of the IIA, but also not impose rigid conditions that will be unable to adapt to all possible contingencies.[169] In any case, nevertheless, this approach does not come with the interpretative uncertainties associated with the dyadic rule-exception structure of the investment regime. In short, a more precise definition of the substantive rules included in the IIAs could obviate the need for exceptions, without limiting the regulatory autonomy of States.[170]

IV. CONCLUSION

They say, '*Desperate time calls for desperate measures.*' However, some of the measures taken for the protection of public health during the COVID-19 pandemic are expected to expose governments to arbitration claims. The risk of investment arbitrations over public health regulations intensifies the difficulty to strike a balance between the obligations of the host nation towards its investors and the obligations of the same nation towards its citizens with regard to the protection

[166] Nikiema, *supra note* 130, at 21; *see*, *e.g.*, Newcombe, *supra note* 132, at 269.

[167] Henckels, *supra note* 144, at 4.

[168] Caroline Henckels, Protecting Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP, 19 J. Int'l. Econ L. 27, 33 (2016).

[169] Henckels, *supra note* 129, at 4.

[170] *Id.*

of their health and safety.

As a first line of defense, States may justify exceptional measures taken during the pandemic of the basis of the police powers doctrine. Especially public health measures can be broad and invasive, but rest on the solid legal basis that recognizes the unique capacity of governments to exercise their police powers in times when global threats pose society-wide risks and collective actions are needed. Nevertheless, police powers should be exercised with caution and care, otherwise a blanket exception for regulatory measures would create a gaping loophole in international protections afforded to investors against expropriation.

States may also seek to justify contested measures on the basis of necessity or *force majeure*. A high threshold for the invocation of these defenses is welcome, in the sense that it should not be easy for States to rely on them to preclude wrongfulness for conducts which would ordinarily constitute as a breach of an international obligation. Nevertheless, tightly drafted conditions of application should not deprive the defenses of their usefulness altogether. On the one hand, one may be tempted to say that under the high standard of the 'one way' criterion any measure adopted would fail the test of necessity, because there will always be an alternative measure potentially available, especially in times of a worldwide health emergency where different States adopted diverse measures to tackle the crisis. On the other hand, States are practically precluded from relying on *force majeure* due to the high threshold of material impossibility, because in most of the cases States have a choice in respect of compliance, even if the choice necessitates the utilization of remote modes of communication and work and no matter how difficult this compliance may be.

In general terms, the jurisprudence on customary law defenses indicated areas where these pleas fall short to be upheld, particularly when applied to macro-crises, such as pandemics that affect various aspects of the States' functioning and require multilevel and multi-faceted measures to be implemented. The reveal of the lack of sufficient regulatory space nudged States towards including exceptions in their IIAs. Nevertheless, although increasingly included in recent IIAs, general exception clauses give rise to interpretative dilemmas that may render existing safeguards, as construed by the arbitral practice, inoperative, and result in even reducing States' regulatory space. What matters however the most, is that viewing

laws and other government actions taken to promote public welfare as exceptional, rather than something that takes place in the ordinary course of governance, undermines the objective pursued.

What should then be the way forward, if not the expansion of the exceptions-oriented paradigm of justification, as it already stands? At a moment when governments around the world are seeking to address mounting pressures on the investment regime, it offers a practical and politically feasible option for them to revisit one of the most contentious corners of international economic law. The pandemic has created new challenges for the ISDS: if tribunals choose to hold States liable for regulations aimed at preventing the spread of the virus, this may permanently damage public trust in investment arbitration and in the long run, it could further strengthen the backlash against it. Nevertheless, by revealing the structural weakness of the status quo, the pandemic also presents a unique opportunity to develop a sustainable response that places a greater emphasis on health issues. A universal panacea probably does not exist, but it is possible to move towards a better balance between public health and investment protection. Through more sophisticated treaty drafting of substantive rules, the international regime of ISDS could provide greater certainty and confidence for both investors and States to commit to long-term investments for the sustainable development of its sovereign actors.

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