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The Brave New World of Foreign Investment in the Wake of Covid-19 Pandemic: Current Situation and Potential Disputes

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ABSTRACT

The Covid-19 pandemic might have a negative effect on Foreign Direct Investment (FDI) worldwide. Namely, the pandemic may have a long-lasting impact on policymaking trends in the context of international investment law and international trade. It may accelerate the interventionism, protectionism, and reverse globalization trends already present in the changing landscape of international law. In this paper, the author will further examine the consequences of restricting and tightening foreign investment regimes worldwide. First, the author will analyze whether the Covid-19 pandemic and growing anti-globalization have decreased FDI and whether such decline is likely to continue in the future. Secondly, the author will examine whether implemented policies put the States at risk of facing ISDS claims. History teaches us that times of crisis attract an increased number of investment claims, e.g. Argentina faced about 50-known ISDS cases due to measures undertaken to combat the crisis.

INTRODUCTION

In recent years, international investment law has faced rising criticism. Protection standards afforded to foreign investors under international investment agreements (IIAs) have been criticized from both angles – the substantive provisions and dispute resolution in the form of investor-State dispute settlement (ISDS) clauses. Once wishing to attract more foreign direct investments (FDI), some States began wishing that they could "put the genie back in a bottle"[1] and revoke the undertaken obligations under IIAs due to the increasing number of claims. A backlash against ISDS has been evident from the outset – several States decided to opt-out of that dispute settlement mechanism.[2] The changing

[1] Christoph Schreuer, "The future of International Investment Law" in *International Investment Law* (C.H.BECK, 2015) 1904 at 1906.

[2] E.g. Alison Ross, "India's termination of BITs to begin", <https://globalarbitrationreview.com/article/1138510/indias-termination-of-bits-to-begin> accessed on 8 March 2021; Rian Matthews, Nandakumar Ponniya, "Withdrawal from Investment Treaties: An omen for waning investor protection in

approach to resolving disputes went hand in hand with the substantive reform under which IIAs introduced more restrictive protection obligations and underlined the States' right to regulate.[3]

These negative sentiments against FDI protection will certainly be strengthened by the Covid-19 pandemic, which broke out in 2020 and pushed all economies into recession.[4] In times of crisis, the governments are likely to adopt protectionist and interventionist policies in order to guard their economies. These policies may have a long-lasting effect and may not be easily withdrawn. Especially in the social context, past pandemics teach us that such states of emergency may fuel xenophobia and discrimination against foreigners[5], which may also prove to be true in the context of foreign investment. We have already been facing deglobalization trends in recent years which might be even more strengthened by the current crises and simply accelerate its progress.[6] The States all over the world began to question whether their global supply chains have been located too far. Therefore, the States began wishing to protect to a greater extent their critical infrastructure. The Covid-19 pandemic may force foreign investors to pause, reshore, or near-shore their activities in order to reduce reliance on the global supply chains. Experts are predicting that globalization could become regionalized as the companies have already started rethinking these extended supply chains, which are not easy to manage

in the midst of an international crisis.[7] Moving supply chains closer is seen as a beneficial solution at the moment.

Covid-19 may therefore accelerate nationalization trends on a global scale. Namely, the pandemic may have a long-lasting impact on policymaking trends in the context of international investment law and international trade. It may accelerate the interventionism, protectionism, and

AP?" <https://www.lexology.com/library/detail.aspx?g=4bdc087c-20f0-4729-9166-1d6de9b8d2de> accessed on 8 March 2021.

[3] E.g. some new generation IIAs impose obligations upon States, *see* Naomi Briercliffe, Olga Owczarek, "Human-rights-based Claims by States and "New-Generation" International Investment Agreements", <http://arbitrationblog.kluwerarbitration.com/2018/08/01/human-rights-based-claims-by-states-and-new-generation-international-investment-agreements/>, accessed on 8 March 2021.

[4] COVID-19 to Plunge Global Economy into Worst Recession since World War II, <https://www.worldbank.org/en/news/press-release/2020/06/08/covid-19-to-plunge-global-economy-into-worst-recession-since-world-war-ii>, accessed on 8 March 2021.

[5] Przemysław Kowalski, "Will the post-COVID world be less open to foreign direct investment?" in *Covid-19 and Trade Policy: Why Turning Inward Won't Work* (CEPR Press), at 132.

[6] Douglas A Irwin, "The pandemic adds momentum to the deglobalization trend", <https://www.piie.com/blogs/realtime-economic-issues-watch/pandemic-adds-momentum-deglobalization-trend>; Philippe Legrain, "The Coronavirus Is Killing Globalization as We Know It", <https://foreignpolicy.com/2020/03/12/coronavirus-killing-globalization-nationalism-protectionism-trump/>; accessed on 8 March 2021.

[7] Marina Leiva, Sebastian Shehadi, "Will Covid-19 kill FDI?", <https://investmentmonitor.ai/global/will-covid-19-kill-fdi>, accessed on 8 March 2021.

reverse globalization trends already present in the changing landscape of international law.

The policymaking changes will most likely depend on the restrictions undertaken by the States and the foreign investor's reaction to those undertaken measures. The States' actions will most likely face foreign investors' resistance. Restrictions in place were said to be contradictory with obligations undertaken by some States under IIAs, and several foreign investors have already threatened to pursue their claims. History teaches us that times of crisis attract an increased number of investment claims. The most known example of that is Argentina which faced about 50-known ISDS cases resulting out of the measures undertaken to combat the financial crisis.

In this paper, the author will further examine the consequences of restricting and tightening foreign investment regimes worldwide. First, the author will analyze whether the Covid-19 pandemic and growing anti-globalization have decreased FDI and whether such decline is likely to continue in the future. Secondly, the author will examine whether implemented policies put the States at risk of facing ISDS claims.

2. FDI in the wake of Covid-19

2.1. FDI Decline

Pursuant to UNCTAD's report, FDI fell by 42% in 2020 and expects to remain weak in 2021.[8] In accordance with UNCTAD's predictions, after a further drop in 2021, the potential recovery might start in 2022.[9] However, given the multiple mutations of coronavirus and the state response, worse scenarios cannot be excluded.[10] The impact of Covid-19 has been severe all over the world. However, certain economies are observing a more significant drop, namely developing countries. Africa, developing Asia and Latin America, and the Caribbean are expected to take the biggest hit because developing economies rely more on investment in the global value chain – intensive and extractive industries which mainly were affected. Moreover, developing countries do not have the capacity to introduce the same economic support measures as developed States.[11] The sharp decline in FDI is especially undesirable for developing economies which count on foreign investors to increase employment and create better-paying jobs, as well as bring technical know-how and increase productivity.[12]

[8] Investment Trends Monitor, January 2021, <https://unctad.org/system/files/official-document/diaeiainf2021d1_en.pdf>, accessed on 8 March 2021.

[9] World Investment Report 2020, <https://unctad.org/system/files/official-document/wir2020_en.pdf>, accessed on 8 March 2021.

[10] Michelle Roberts, "UK finds more coronavirus cases with 'concerning' mutations", <https://www.bbc.com/news/health-55900625>, accessed on 8 March 2021.

[11] World Investment Report 2020, *supra* note 9.

[12] "How Developing Countries Can Get the Most Out of Direct Investment", <https://www.worldbank.org/en/topic/competitiveness/publication/global-investment-competitiveness-

As a response to the Covid-19 pandemic, various countries implemented restrictive FDI screening procedures. Such practices may hinder the process of the global economy bouncing back after the recession.

2.2. New restrictions

The outbreak of the Covid-19 pandemic has changed the approach to FDI worldwide. In order to protect national security and public health, some countries put in place restrictions on incoming investment either by tightening foreign investment screening mechanisms, introducing new regulations, or planning such steps. The governments have always been tempted to protect their economies in times of crisis through restrictions on inward FDI. There are concerns that controlling stake by large multinational corporations in critical industries may hinder exercising power by domestic authorities to control such industries.[13] The Covid-19 pandemic brought about the same concerns and, as a result, tightening investment screening mechanisms. In addition to restrictions placed on inward investment, the States adopted measures restricting traveling, export, and shutting down non-essential services.

As a result of impending risk, the governments decided to introduce restrictions on incoming investment, allowing for an upfront review of investment proposals. Such regulations were implemented, e.g., by the European Union (E.U.) and several European countries (such as, e.g., France, Spain, Italy, Germany, to name a few), as well as others (e.g., Australia and Canada).

The question remains whether these new regulations are here to stay. On the one hand, the pandemic could have lasting effects on policymaking in the foreign investment sector. On the other, recovering economies may attempt to encourage foreign investment in strategic industries and thus implement policies attracting FDI.[14]

3. Framework for foreign investment screening in the E.U.

In 2019, the E.U. adopted Regulation 2019/452, which introduced a new framework for screening FDI in the E.U.[15] In accordance with these regulations, E.U. Member States may make comments, and the European Commission may issue opinions on FDI in another E.U. Member State's territory. Pursuant to Art. 6 of Regulation 2019/452, Member States must notify the European

report#:~:text=A%20new%20report%20and%20investor,and%20creating%20better-paying%20jobs.>, accessed on 8 March 2021.

[13] Foreign Direct Investment Restrictions in OECD Countries, <http://www.oecd.org/economy/reform/2956455.pdf>, accessed on 8 March 2021.

[14] Impact of the Covid-19 Pandemic on Trade and Development: Transitioning to a New Normal, <https://unctad.org/system/files/official-document/osg2020d1_en.pdf>, accessed on 8 March 2021.

[15] COVID-19 crisis inspires global tightening of Foreign Investment Screening, <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/global-rules-on-foreign-direct-investment/global-rules-on-foreign-direct-investment---eu.pdf?la=en-it&revision=77a04ef5-8fe5-41ed-aa21-db2acc38768f>, accessed on 8 March 2021.

Commission and the other E.U. Member States of any FDI in their territory undergoing screening procedures. The notification may include a list of the E.U. Member States whose security or public order may be affected by the incoming investment. Such a possibility also extends to completed investments not undergoing screening for a period limited to 15 months after completing the foreign direct investment. The cooperation mechanism nonetheless does not apply to foreign direct investments completed before 10 April 2019.[16] The said E.U. Member State is obliged to give those opinions and comments due consideration.[17] The Regulation constitutes a next step in the international investment law in the E.U. by enhancing the role of the European Commission with regard to foreign investment in the E.U. Member States.

Regulation 2019/452 was supposed to enter into force from 11 October 2020. However, given the current crises, in March 2020, the E.U. issued its Guidance for FDI screening in which it advocated for appropriate screening tools in the light of the Covid-19 pandemic.[18] It mentions the risk of increased attempts to acquire healthcare capacities or related industries such as research establishments via FDI, which can result in E.U.'s decreased ability to cover the health needs of its citizens. The E.U. urged its Member States to "be particularly vigilant to avoid that the current health crisis does not result in a sell-off of Europe's business and industrial actors, including SMEs." The Guidance encourages E.U. Member States to make full use of the already existing mechanisms for FDI screening, and those who have not implemented them yet, "to set up a full-fledged screening mechanism and in the meantime to use all other available options to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to the security or public order in the E.U., including a risk to critical health infrastructures and supply of critical inputs." The Regulation became fully operational on 11 October 2020 and aimed at creating a cooperation mechanism under which the E.U. Member States and the Commission may exchange information and raise concerns regarding specific investment, share best practices and information on adopted screening mechanisms and set certain requirements for the E.U. Member States. Under the Regulation, the E.U. Member States may nonetheless maintain or introduce new screening mechanisms, which correspond with the key requirements provided therein.[19] That will allow for safeguarding the E.U.'s

[16] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (Regulation 2019/452), Art. 7.

[17] Regulation 2019/452, Art. 7.7

[18] Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 ("FDI Screening Regulation").

[19] Screening of foreign direct investment, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2006>, accessed on 8 March 2021.

security and public order has given the extent to which E.U. Member States' markets and infrastructure are connected, which means that foreign investment could pose a security risk beyond the E.U. Member States where the investment is made.[20] The E.U. Member States followed in the E.U.'s footsteps and tightened the investment screening mechanisms.

3.1 Germany

In the light of the Covid-19 pandemic and the E.U.'s approach to foreign investment, the German Government revised its Foreign Trade and Payments Ordinance, which changed procedural and substantive regulations concerning the investment screening procedure by, e.g., defining certain infectious disease-related businesses as critical infrastructures. Additionally, the German legislator updated the German Foreign Trade and Payments Act aligning its national regulations with Regulation 2019/452.[21] The Federal Ministry of Economic Affairs and Energy will scrutinize every investment which reaches or exceeds 10% in a company covered by the list of assets and technologies in respect of which public order and security are likely to be affected. The new regulations require a notification, which triggers the screening procedure. Germany took a serious approach to the investment screening procedures – it introduced criminal liability with regard to disclosure of security-relevant information and certain consummation actions pending screening.

3.2 France

In France, the investment screening threshold applied to non-EU investors acquiring at least 25% of the voting rights or more. On 23 July 2020, France temporarily lowered the threshold to 10% for companies listed on a regulated market.[22] Under the new provisions, transactions which fall between the 10%-25% threshold are subject to an accelerated review procedure and a "lighter" screening. The foreign investment control regime applies to the strategic sector, including, e.g., public security, national Defense, public health, R&D, biotechnologies, and food safety.

3.3 Italy

On 7 April 2020, the Italian Government issued Law Decree No. 23, which includes protection

[20] MEMO - Frequently asked questions on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, <http://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157945.pdf>, accessed on 8 March 2021.

[21] List of screening mechanisms notified by Member States, <https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf>, accessed on 8 March 2021.

[22] Décret n° 2020-892 du 22 juillet 2020 relatif à l'abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations sur un marché réglementé.

mechanisms of Italian assets.[23] Pursuant to the new regulations, the Italian Government is empowered to restrict FDI flows with regard to industries deemed strategic for Italy. The screening of foreign investments applies to acquisition by the non-EU entity of a corporate capital of 10% or more, or at least 10% of the voting rights. Under the Decree, the Italian Government is also empowered to review any transaction in, e.g., Defense and national security, energy, transportation, and communication sectors.

3.4 Framework for investment screening in selected States worldwide

Tightening of foreign investment screening took place all-over-the-world, the E.U. and its Member States' regulations do not constitute an exception. The international crises caused by the outbreak of Covid-19 and the inevitable economic recession require measures to protect national security and protect critical industries from takeovers.

3.5 Canada

In Canada, FDI has been regulated by the Investment Canada Act, which prior to the pandemic empowered the federal Minister of Innovation, Science and Economic Development as well as the federal Minister of Canadian Heritage (with regard to investments in cultural business) to review foreign investments that could pose a threat to Canada's national security. Pursuant to Art. 25.1 of the Investment Canada Act, its regulations apply when a non-Canadian establishes a new business or acquires control of an existing Canadian business. Suppose the transaction exceeds the financial threshold set forth in the Act, which differs depending on specific criteria such as e.g. type and origin. In that case, the transaction is subjected to a "net benefit" review. Before the closing of the transaction, it is necessary to determine whether it will result in a net benefit to Canada based on various factors prescribed by the Act. If the transaction does not exceed the threshold provided in the Act, the foreign investors are required to file a notification of the transaction within 30 days. The Act also allows for a review of foreign investment irrespective of whether it is subject to net benefit review if they could be injurious to national security. The expression "national security" has not been defined. However, the Canadian Government has published guidelines that provide examples of transactions that could trigger national security concerns.

With the outbreak of the pandemic, the Canadian Government did not decide to introduce any changes to the foreign investment framework. Instead of doing so, it decided to rely on the already existing mechanisms to ensure that foreign investment is adequately reviewed and critical industries would be sufficiently protected. In the

[23] DECRETO-LEGGE 8 aprile 2020, n. 23, Misure urgenti in materia di accesso al credito e di adempimenti fiscali per le imprese, di poteri speciali nei settori strategici, nonche' interventi in materia di salute e lavoro, di proroga di termini amministrativi e processuali. (20G00043) (GU Serie Generale n.94 del 08-04-2020).

Policy Statement on Foreign Investment Review and COVID-19 issued on 18 April 2020, the Government warned against opportunistic investment behaviour and announced enhanced scrutiny of foreign investment until the economy recovers.[24] In these turbulent circumstances, the Government will pay attention especially to Canadian business that are related to public health or involved in the supply of critical goods and services to Canadians or the Government.

3.6 Australia

After temporary changes to Australia's foreign investment review framework caused by the pandemic, on 10 December 2020, the foreign investment regime in Australia was revised by introducing the Foreign Investment Reform (Protecting Australia's National Security) Act 2020 and the Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020 (together referred to as "Major Reform"). The changes took effect on 1 January 2021.

Pursuant to the new legislation, certain transactions reaching the threshold provided in the Major Reform require approval of the Foreign Investment Review Board. The acquisition of a direct interest in national security business will also require such approval regardless of the investment value. The national security business includes, e.g., critical infrastructure assets under the Security of Critical Infrastructure Act 2018 such as those in the electricity, gas, water, and ports sectors, carrier or carriage service providers under the Telecommunications Act 1997, critical goods, services, or technology intended for military end-use, businesses that store or have access to information that has a security classification, businesses that store or maintain personal information collected by Defense national intelligence agencies.[25] Acquiring an interest in Australian land that is national security land regardless of its value will also require the approval of the Foreign Investment Review Board.

4. Should States expect investment claims?

The governments adopted various measures as a response to the Covid-19 pandemic. They involve, among others, closing the borders, mandatory quarantines, closure of non-essential business, and even export restrictions.[26] Many governments imposed restrictions on food exports as well as medical supplies. Export of hydroxychloroquine

[24] Policy Statement on Foreign Investment Review and COVID-19, <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81224.html>, accessed on 8 March 2021.

[25] Major reforms to Australia's foreign investment framework to commence on 1 January 2021, <https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2020-pdfs/2020_12_24_firb-reform.pdf>, accessed on 8 March 2021.

[26] Lucas Bento, Jingtian Chen, "Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses", <http://arbitrationblog.kluwerarbitration.com/2020/04/08/investment-treaty-claims-in-pandemic-times-potential-claims-and-defenses/>, accessed on 8 March 2021.

(once believed to constitute a suitable treatment for Covid-19) was banned, e.g., in India and Brazil. Due to the imposed travel restrictions and closing of borders, the airline industry suffered losses amounting to as much as USD 314 billion and that number is still growing.[27] Restrictions impacting FDI may have profound implications with regard to the States' obligations under numerous investment treaties concluded across the globe. Currently, there are approx. 3,000 international investment treaties.[28] They resemble a tangled web often referred to as a "spaghetti bowl."[29] The majority of government authorities are not aware of the obligations undertaken by the State and thus of any potential breaches. Frequently, governments are not aware of emerging investment disputes, and only once the claim is filed, they take notice of issues concerning a certain investment. Thus, the States may not be yet aware of impending investment claims brought due to measures undertaken by the States to deal with the Covid-19 pandemic.

History teaches us that foreign investors seeking relief in times of crisis are not an unprecedented situation. Many ISDS claims have been filed as a result of the Argentine financial crisis and the Arab Spring.[30] In 2001, Argentina was undergoing a severe economic and social crisis – GDP per capita fell by 50%, the unemployment rate reached 20%, and the poverty line hit 50%.[31] Strikingly, Argentina went through a succession of 5 presidents in the course of just 10 days, many strikes, violent protests, and plenty of casualties. The crises brought upon about 50-known ISDS cases (some of which have not been decided to this day), most of which were decided in favor of investors[32], and the total amount of awarded damages exceeded USD 2 billion.[33] The claimants were mostly relying on the breach of the Fair and Equitable Treatment (FET) standard under numerous BITs. Such a violation was, in their view, a result of measures implemented by Argentina, which consisted in suspension and ultimately elimination of rate-indexing mechanisms,

[27] Coronavirus: impact on the aviation industry worldwide - statistics & facts, <https://www.statista.com/topics/6178/coronavirus-impact-on-the-aviation-industry-worldwide/>, accessed on 8 March 2021.

[28] International Investment Agreements Navigator, <https://investmentpolicy.unctad.org/international-investment-agreements>, accessed on 8 March 2021.

[29] Investment provisions in economic integration agreements, <https://unctad.org/system/files/official-document/iteiit200510ch1_en.pdf>, accessed on 8 March 2021.

[30] Cashing in on the pandemic: how lawyers are preparing to sue states over COVID-19 response measures, <https://corporateeurope.org/en/2020/05/cashing-pandemic-how-lawyers-are-preparing-sue-states-over-covid-19-response-measures>, accessed on 8 March 2021.

[31] Nathalie Bernasconi-Osterwalder, Sarah Brewin, Nyaguthii Maina, "Protecting Against Investor–State Claims Amidst COVID-19: A call to action for governments", <https://www.iisd.org/system/files/publications/investor-state-claims-covid-19.pdf>, accessed on 8 March 2021.

[32] Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/8/argentina>, accessed on 8 March 2021.

[33] Bernasconi-Osterwalder/Brewin/Nyaguthii Maina, *supra* note 31.

including the reversal of pegging the Argentinian peso to the USD at a fixed exchange rate.[34]

The current worldwide crises caused by the Covid-19 pandemic seems to pose even greater danger. As explained in the section above, most States implemented various measures to minimize the spread of Covid-19. Some investors have already announced that they will are considering bringing investment treaty claims. Several investors contemplate bringing action against Mexico, which placed restrictions on renewable energy production. Mexico adopted two resolutions on 29 April and 15 May 2020, which restricted solar facilities from selling electricity through Mexico's national grid. Mexican authorities attempted to justify Mexico's decision to adopt such measures by explaining that the Covid-19 pandemic caused a falling demand for electricity. That explanation, however, raises doubts.[35] In the South American region, investors have also indicated their intent to bring claims against Chile. Two French airport operators have considered such a step after their concession for Santiago's international airport was disrupted by undertaken measures. Under the contract, Group ADP and Vinci Airports served a notice of dispute under the Chile-France bilateral investment treaty and will be seeking losses suffered due to the pandemic.[36]

Given the potential severity of investment claims worldwide, on 5 May 2020, the Columbia Center on Sustainable Development (CCSI) released its proposal for ISDS Moratorium During COVID-19 Crisis.[37] It underlined that "[t]he COVID-19 pandemic is the greatest threat to humanity since World War II," and thus extraordinary measures (potentially impacting foreign investors) are necessary. The call for ISDS moratorium was signed by, e.g., Juan Pablo Bohoslavsky, a former U.N. Independent Expert on Foreign Debt and Human Rights, Olivier de Schutter, UN Special Rapporteur on Extreme Poverty and Human Rights, Pierre Hubbard General Secretary, Trade Union Advisory Committee to the OECD. However, there has also been a lot of criticism concerning the proposed moratorium. As observed, it is still difficult to predict when the pandemic will end. Such a moratorium could encourage the States to use the pandemic to implement measures infringing foreign investor's

[34] Arturo C Porzecanski, "The Origins of Argentina's Litigation and Arbitration Saga", (2016) 40 Fordham Int'l L.J.

[35] Cosmo Sanderson, "Mexico faces potential claims over pandemic response ", <https://globalarbitrationreview.com/coronavirus/mexico-faces-potential-claims-over-pandemic-response>, accessed on 8 March 2021.

[36] Jack Ballantyne, "Chile threatened over airport pandemic disruption", <https://globalarbitrationreview.com/chile-threatened-over-airport-pandemic-disruption>, accessed on 8 March 2021.

[37] Call for ISDS Moratorium During COVID-19 Crisis and Response, <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>, accessed on 8 March 2021.

rights and use the pandemic as an excuse.[38] Given a rather skeptical view on suspension on investment treaty claims, it is worth exploring which obligations the foreign investors will most likely invoke violations and what the potential Defenses might be.

4.1. Potential violations

Indirect expropriation

Whilst expropriation may take a form of a direct or an indirect expropriation, the former has not occurred frequently in recent years. As observed by Dolzer and Schreuer, the main difference between these two consists of whether the owner's legal title is affected by the measure adopted by the State.[39] In the case of indirect expropriation, an investor is not deprived of the title but uses the investment in a meaningful and profitable way.[40] In other words, an investor loses its ability to exercise the economic benefits of the investment.[41] The contours of the definition of indirect expropriation are not entirely clear. Thus in some cases, the tribunals have preferred to find a violation of a fair and equitable standard.[42]

In Metalclad vs. Mexico, a municipality refused to grant a construction permit irrespective of its assurances to the investor. The Tribunal, in that case, found that such a refusal constituted an indirect expropriation: "[t]hese measures, taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the **denial by the Municipality of the local construction permit, amount to an indirect expropriation**." Similarly, in Tecmed vs. Mexico, the Tribunal found that refusal to renew an operating permit violated obligations arising out of Mexico-Spain BIT. It entailed "a decrease in assets or rights and a de facto expropriation that deprives those assets and rights of any real substance."[43] The Tribunal in S.D. Myers, Inc. vs. the Government of Canada took a different approach to the issue of expropriation. It stated that: "[t]he general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of a legitimate complaint under Article 1110 of NAFTA, although the Tribunal does not rule out that possibility".[44]

[38] Call for moratorium on ISDS cases during COVID-19 pandemic, <https://uk.practicallaw.thomsonreuters.com/w-025-4323?transitionType=Default&contextData=(sc.Default)&firstPage=true>, accessed on 8 March 2021.

[39] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (Oxford 2014).

[40] *Ibid*.

[41] Ursula Kriebaum, "Expropriation" in International Investment Law (C.H.Beck 2015) at 971.

[42] Dolzer/Schruer, *supra* note 39.

[43] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, (Award) (2003), (ARB (AF)/00/2), para. 115.

[44] *S.D. Myers, Inc. vs. the Government of Canada, (Partial Award) (2000), (UNCITRAL)* at 281.

At the same time, the deprivation in question must be substantial (either financially or in terms of control).[45] It means that the investor has to be deprived of all or most of the economic benefits permanently or at least during a substantial period of time.[46] The Arbitral Tribunal found that suspension of an export license for a prolonged period of time, i.e., so much as 4 months, may amount to a breach of the State's obligation under the investment treaty – i.e., that it constitutes indirect expropriation.[47] In Wena Hotels v. Egypt, the arbitral Tribunal found that losing control over a property may also constitute indirect expropriation.[48]

Under international law, establishing the intent of the State concerning the expropriation is irrelevant. The State's motive to expropriate is not a requirement for the existence of expropriation.[49] In ISDS, combining "sole effects doctrine" with the "all or nothing approach" results in an investor receiving full compensation in case of lawful expropriation or case of unlawful expropriation damages.[50]

Expropriation may also take a form of a "creeping expropriation." It consists of depriving investors of their investment through a series of acts, a series of cumulative effects which, taken together into consideration, amount to the same effect as an expropriation outright.[51] In light of the continuing restrictions and the rising number of companies going out of business, the notion of creeping expropriation may be relied upon by the investors.

Fair and Equitable Treatment

Violation of the FET standard constitutes one of the most frequently invoked infringements of investment protection standards raised by investors.[52] It constitutes an absolute standard of protection as it does not depend on treatment granted to other investors.[53] However, the standard's contours are vague and frequently led to differing arbitral awards in the past. There are at least two different meanings that can be attributed to FET: (i) its plain meaning – i.e., the treatment accorded to the investor must be "fair" and "equitable," and (ii) that the standard of protection is identical to the same under the minimum standard of treatment existing under customary international law.[54] Due to that fact, the new generation of BITs included a more precise definition in the text of the treaty to avoid

[45] John D H Wires, "Regulatory expropriation under NAFTA: Where to from Here?", SSRN at 17.

[46] Kriebaum, *supra* note 41 at 995.

[47] *Middle East Cement v. Egypt*, (Award) (2002), (ARB/99/6), para. 107.

[48] *Wena Hotels v. Egypt*, (Award) (2000), (ARB/98/4) para. 82.

[49] Kriebaum, *supra* note 41 at 995.

[50] *Ibid*, at 997.

[51] Dolzer/Schruer, *supra* note 39.

[52] *Ibid.*

[53] Norah Gallagher, Wenhua Shan, *Chinese Investment Treaties* (Oxford 2009), at 105.

[54] Stephen Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice", 70 British Yearbook of International Law (2018).

overreaching interpretation of the FET clauses by arbitral tribunals.[55]

Certain elements are comprising the FET standard that may be distinguished: (i) the requirement of stability, predictability, and consistency of the legal framework; (ii) the principle of legality; (iii) the protection of investor confidence or legitimate expectations; (iv) procedural due process and denial of justice; (v) substantive due process or protection against discrimination and arbitrariness; (vi)the requirement of transparency; and (vii) the requirement of reasonableness and proportionality.[56]

Whilst arbitral tribunals adopted an expansive approach to the scope of the FET standard in Metalclad v. Mexico[57], SD Myers v. Canada[58], and Pope & Talbot v. Canada[59], the later jurisprudence under NAFTA shows the change of their approach. In Waste Management v Mexico, the Tribunal applied a higher threshold for finding a breach of this protection standard: "[…] that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, **grossly** unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a **manifest** failure of natural justice in judicial proceedings or a **complete** lack of transparency and candour in an administrative process".[60] The arbitral Tribunal in Glamis Gold v. the USA took a similar approach by finding that "[…] a violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and **shocking**—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—to fall below accepted international standards and constitute a breach of Article 1105. Such a breach may be exhibited by a "gross denial of justice or manifest arbitrariness falling below acceptable international standards;" or **the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations**".[61] That change in approach to the severity of infringement required to violate the

[55] E.g. Art. 8.10 CETA introduces a list of measures violating the FET obligation.

[56] Stephan W Schill, "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law", 6 IILJ Working Paper (2006).

[57] *Metalclad Corporation v. the United Mexican States*, (Award) (2000), (ARB(AF)/97/1).

[58] *SD Myers v Canada*, (First Partial Award) (2000), (UNCITRAL).

[59] *Pope & Talbot v Canada*, (Award on the Merits) (2001), (UNCITRAL).

[60] *Waste Management Inc. v Mexico*, (Final Award) (2004), (ARB(AF)/00/3).

[61] Glamis Gold v. USA, (Award) (2009), (UNCITRAL), para. 22

FET standard was brought about by the Member States of NAFTA issuing a binding note of interpretation under Art. 1131(2) NAFTA. The aim of the Member States of NAFTA was to limit the scope of the FET standard to the minimum standard of treatment under customary international law. The new generation of BITs follows in these footsteps. CETA, the EU-Vietnam FTA, and the EU-Singapore FTA all contain provisions providing a restrictive definition of the FET standard.

In the Covid-19 context, restrictions affecting foreign investment may give rise to claims concerning violation of the FET obligation. Especially if the measures impacted legitimate expectations of foreign investors.[62]

National Treatment and Most Favored Nation

National Treatment and Most Favored Nation Treatment standards constitute standards of "comparative" or "relative nature" since they accord treatment determined based on the level according to national or foreign investors.[63] What must be emphasized is that these standards aim to eliminate nationality-based discrimination – and "nationality-based discrimination alone"[64]. Some treaties accord such an obligation solely to the post-establishment phase, especially European treaties[65]. It means that the standards of protection will affect a specific investment once the investment is already established in the host State. However, some investment treaties, e.g. concluded by the USA and Canada contain provisions granting the right to access a national market on the basis of national treatment, i.e. expanding the scope of these standards of protection.[66]

Additionally, the determination of whether National Treatment and MFN obligations were violated consists of a two-step analysis. First, it is essential to determine (i) which domestic investments should be compared to the investment made by the foreign investor, i.e., whether the "in like circumstances" requirement was met; (ii) what "less favorable treatment" means in specific circumstances[67]. In Saluka Investments B.V. v. the Czech Republic, the Tribunal found that: "[t]o show discrimination the investor must prove that it was subjected to different treatment in similar circumstances without reasonable justification".[68] More insight into the "in

[62] Bento/Chen, *supra* note 26.

[63] August Reinisch, "National Treatment" in *International Investment Law* (C.H.Beck 2015) at 847.

[64] Nicholas DiMascio & Joost Pauwelyn. "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" (2008) 102:1 American Journal of International Law 48 at 88.

[65] August Reinisch, "Most Favoured Nations Treatment" in *International Investment Law* (C.H.Beck 2015) at 816.

[66] Dolzer/Schruer, *supra* note 39.

[67] Nicholas DiMascio & Joost Pauwelyn. "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" (2008) 102:1 American Journal of International Law 48 at 71.

[68] *Saluka Investments B.V. v. Czech Republic*, (Partial Award) (2006), (UNCITRAL), para. 313.

like circumstances" under NAFTA provisions and justified differentiation was provided in Pope & Talbot. In that case, the Tribunal found that: "[…] the application of the like circumstances standard will require evaluation of the entire fact setting surrounding, in this case, the genesis and application of the [softwood lumber] Regime".[69] The Tribunal went on further and included "room for justified differentiation"[70] by stating that "differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA"[71]. Pope & Talbot, in fact, articulated a three-step test that demands (i) analysis of whether a foreign investor is in like circumstances, (ii) identification of whether there is the difference in treatment, and (iii) analysis of whether there was an objective justification for different treatment. The three-step test was later adopted by the Arbitral Tribunal in the Methanex case.[72]

The analysis of whether a foreign investor is "in like circumstances" with domestic competitors is of tremendous importance. That is due to the fact that the lack of "the like circumstances" will lead to a rejection of a discrimination claim.[73] In general, arbitral tribunals have found that investors operating in the same business sector and in a competitive relationship with domestic investors are "in like circumstances,", e.g. in S.D. Myers[74] and Pope & Talbot[75]. Depending on whether the Tribunal undertakes a narrow approach to likeness standard or a broad one (e.g., finding that all those investors operating commercially are in like circumstances as in Occidental[76]), the determination of comparators may significantly vary.

Now, the next step is to establish whether a foreign investor was treated less favorably. However, as noted by some arbitral awards, what matters is the discriminatory effect and not the discriminatory intent.[77] However, some arbitral tribunals held that discrimination requires both discriminatory intent and a disparate adverse effect.[78]

[69] *Pope & Talbot, supra* note 59, para. 75.

[70] Reinisch, *supra* note 63 at 854.

[71] *Pope & Talbot*, *supra* note 59, para. 78.

[72] *Methanex Corporation vs. the United States of America*, (Final Award) (2005), (UNCITRAL), para. 13.

[73] Reinisch, *supra* note 63 at 856.

[74] *S.D. Myers, Inc. vs. the Government of Canada*, *supra* note 58.

[75] *Pope & Talbot*, *supra* note 59.

[76] *Occidental Petroleum Corporation and Occidental Exploration and Production Company vs. the Republic of Ecuador*, (Award) (2012), (ICSID).

[77] Reinisch, *supra* note 63 at 861 .

[78] Andrew D Mitchell, David Heaton & Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Elgar International Investment Law series 2016) at 137, *see also* Methanex Corp v United States of America (Final Award on Jurisdiction and Merits) (NAFTA Chapter 11, 3 August 2005).

The discrimination can consist of de facto or de jure discrimination. The difference between them is that whereas de jure discrimination is openly linked to a regulation that favors certain nationality, de facto discrimination means that the treatment disadvantages foreign investors as a practical matter even though it may be neutral on its face[79]. The last step of the three-step test is establishing whether the State had an objective justification for different treatment. In Parke rings Compensate AS v. Lithuania that "an objective justification **may justify differentiated treatments** of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context".[80]Thus, there is no treaty violation where a measure sufficiently pursues a legitimate objective.[81]

Various restrictions impacting foreigners may lead to claims concerning violation of these nondiscrimination standards. E.g., the States have been implementing various border closures and mobility restrictions upon non-citizens, which may prompt such claims.[82]

4.2. Potential Defenses

There are various potential Defenses to which the States may resort. However, the ISDS jurisprudence shows that the States might not get off the hook that easily. Even though the new generation of international investment treaties focuses more on protecting the policy space and regulatory powers, arbitral decisions under these treaties remain yet to be tested.[83]

Carve-outs

The new generation of IIAs represents a more protective approach to the issue of regulatory space of the States and the need to provide the possibility to adopt measures in order to safeguard the public interest. These type of non-precluded measures clauses (NPM clauses) provide that the States have the right to take measures that are necessary to protect "specific and identified fundamental interests, including maintenance of public order, national security, as well as measures necessary for the maintenance of international peace and security".[84] To fall under the scope of the NMP clause, the measure must (i) be adopted for the protection of selected public interests, (ii) meet the nexus requirement of 'necessary', 'imposed for', or 'in pursuance of' attached to the different public interests, and (iii) be applied in a manner that does not constitute a means of arbitrary or unjustifiable discrimination against, or a disguised restriction on,

[79] Reinisch, *supra* note 63 at 862 .

[80] *Parkerings-Compagniet AS v. Republic of Lithuania*, (Award) (2007), (ICSID Case No. ARB/05/8), para. 368.

[81] Mitchell/Heaton/Henckels, *supra* note 78 at 138.

[82] Bento/Chen, *supra* note 26.

[83] Bernasconi-Osterwalder/Brewin/Nyaguthii Maina, *supra* note 31, at 5.

[84] Borzu Sabahi, Noah Rubins, Don Wallace, *Investor-State Arbitration* (Oxford 2019).

the investors or investments.[85] Only after fulfilling all the criteria will the State's right to regulate be upheld. Examples of NPM clauses may be found e.g., in Iran-Japan BIT[86], and Qatar-Turkey BIT[87].

In case there is the NPM clause in a treaty on which the investor is relaying, the States will most likely raise such a Defense. Thus, the burden of proof will be placed upon the State to prove that such an exception should be applied in those circumstances.

The doctrine of police powers

Pursuant to the doctrine of police powers, the State has an inherent right to regulate in its interest that might affect foreign investors' projects. If the State's measure falls within the notion of police powers, the adverse effects it would have on the investment would not entail compensation. These measures must pursue a legitimate objective, be of non-discriminatory nature, and fall within the State's general regulatory or administrative powers.[88] Several tribunals have also followed a proportionality test to assess if such a Defense would be applicable. In this respect, proportionality analysis may be used to restrict the invocation of police powers to measures only taken in good faith and pursuit of legitimate regulatory objectives, and where such power resulted in is proportionate means of pursuing such objectives.[89] This doctrine has been recognized as a principle of customary international law.[90]

The police powers doctrine was relied upon in e.g., Philip Morris v. Uruguay. The arbitral Tribunal underlined the importance of the State's right to exercise its police powers "in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor".[91] Similarly, in Lauder (U.S.) v. the Czech Republic, the Tribunal found that "Parties to [the Bilateral] Treaty are not liable for the economic injury that is the consequence of bona fide regulation within the accepted police powers of the State". In Tecnicas Medioambientales Tecmed S.A, v. The United Mexican States, even though the Tribunal found an expropriation, it stated that: "the principle that the State's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them

[85] Wei Wang, "The Non-Precluded Measure Type Clause in International Investment Agreements: Significances, Challenges, and Reactions", (2017) 32:2 ICSID Review 447.

[86] Art. 13 Iran-Japan BIT.

[87] Art. 7 Qatar-Turkey BIT

[88] Caroline Henckels, "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration" (2012) 15 Journal of International Economic Law 223.

[89] Jasper Krommendijk, John Morijn, "'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration" in *Human Rights in International Investment Law and Arbitration* (Oxford: 2009) 436–37.

[90] *Saluka v. Czech Republic*, *supra* note 68, para.262, *UP and CD Holding v. Hungary*, (Award) (2018), (ICSID), para.408

[91] *Philip Morris v. Uruguay*, (Award) (2016), (ARB/10/7).

to any compensation whatsoever is undisputable". However, such a measure, in line with the growing importance of proportionality as a general principle of international law, must satisfy several requirements, i.e., it must (a) be one that is suitable by nature for achieving a legitimate public purpose, (b) be necessary for achieving that purpose in that no less burdensome measure would suffice, and (c) not be excessive in that its advantages are outweighed by its disadvantages."[92]

Thus, in order to successfully rely on the doctrine on police powers, the State will have to prove that all the above-mentioned criteria were fulfilled.

Necessity

The doctrine of necessity is one of the principles stemming from customary international law. It is set forth in Art. 25 of the International Law Commission's Draft Articles on State Responsibility. The article provides that: "[n]ecessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the Act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity, or (b) the State has contributed to the situation of necessity". Thus, if a State is successful, the Defense will preclude the wrongfulness of the State's conduct.

As underlined in the commentary, the plea of necessity is of exceptional character and may only be applied after fulfilling strict criteria.[93] That is because otherwise, "it would open the door to elude any international obligation," and thus investment protection under international investment treaties would not be effective.[94] The plea of necessity was successfully invoked in e.g., the Continental Casualty and LG&E cases. In the vast majority, however, the Defense was unsuccessful.[95] In AWG Group Ltd. v. the Argentine Republic, the Tribunal found that the undertaken measures were not the only means to satisfy Argentina's essential interests and because Argentina itself contributed to the emergency situation.[96] Similarly, in another case against Argentina, B.G. Group Plc. v. Republic of

[92] *PL Holdings v. Poland*, (Partial Award) (2017), (SCC), para.355

[93] *Responsibility of States for Internationally Wrongful Acts: a General Commentary* (United Nations 2008), at 80.

[94] *Enron v. Argentine Republic*, (Award) (2007), (ARB/01/3), *Sempra v. Argentine Republic*, (Award) (2007), (ARB/02/16).

[95] E.g. *AWG Group Ltd. v. Argentine Republic*, (Decision on Liability) (2010), (UNCITRAL), para. 243, *BG Group Plc. v. Republic of Argentina*, (Award) (2007), (UNCITRAL), para. 411, *CMS Gas Transmission Company v. Republic of Argentina*, (Award) (2005), (ARB/01/8), para. 331

[96] *AWG Group Ltd. v. Argentine Republic*, *supra* note 95, para. 243.

Argentina, the Tribunal found that the State did not meet very restrictive conditions of the plea of necessity.[97]

In deciding whether the Defense of necessity was legitimate, arbitral tribunals have focused on the respondent proving whether there were no alternatives to safeguard their essential interests. In Total S.A. v. the Argentine Republic, the Tribunal notes that Argentina failed to submit any evidence to support its position that freezing the tariffs was necessary and no alternatives.[98]

Therefore, if the States decide to rely on the necessity Defense, they will carry the burden of proof that it was the only possible way to safeguard their interests against the pandemic.

Force Majeure

Similar events may give rise to both necessity and force majeure Defenses. Thus, it is oftentimes the case that respondents plead both of them alternatively. Whilst necessity may be invoked to preclude wrongfulness if the State undertook the only measure which could safeguard an essential interest against a grave and imminent peril, force majeure may be invoked if an unforeseen event takes place which makes it impossible for the State to abide by its obligations. Pursuant to Art. 23 of Responsibility of States for Internationally Wrongful Acts of 2001, force majeure has been described as "an irresistible force or of an unforeseen event, beyond the control of the state, making it materially impossible in the circumstances to perform the obligation". Under that article, a situation of force majeure precludes the wrongfulness of a state as long as it exists.[99] Pursuant to the General Commentary, "the situation must be irresistible so that the State concerned has no real possibility of escaping its effects. Force majeure does not include circumstances in which performance of an obligation has become more difficult, for example, due to some political or economic crisis".[100] It further notes that in practice, cases concerning the increased difficulty of performance as opposed to impossibility have failed. Thus, force majeure under the International Law Commission's Draft Articles on Responsibility

[97] *BG Group Plc. v. Republic of Argentina*, *supra* note 95, para. 411.

[98] *Total S.A. v. Argentine Republic*, (Decision on Liability) (2010), (ARB/04/01), para. 223.

[99] *Responsibility of States for Internationally Wrongful Acts: a General Commentary* (United Nations 2008), at 76.

[100] *Ibid* at 76.

of States for Internationally Wrongful Acts also regards the concept of force majeure as resulting in impossibility to perform the obligation. Therefore, whilst under force majeure Defense performance of the obligation was impossible, and thus State's wrongfulness is excluded due to an irresistible and unforeseen event, necessity will be applicable when the State voluntarily violates its obligations under the treaty, however, does so to protect essential interests.[101]

In the Covid-19 pandemic context, relying on such a Defense might be more difficult. It has been found that economic difficulties, no matter how severe, do not suffice to excuse the non-performance of an obligation of payment to the foreign investor.[102] Thus, only an absolute impossibility to perform would preclude wrongfulness on the State's part.

Distress

Distress constitutes another possible defense of the State. It has been provided for in Art. 24 of Responsibility of States for Internationally Wrongful Acts of 2001, which provides that: "1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the Act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care. 2. Paragraph 1 does not apply if: (a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the Act in question is likely to create a comparable or greater peril". Therefore, this article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving a life.[103] However, since the Defense of distress does not extend to situations beyond a State agent acting to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger[104], it is fair to assume that necessity will be invoked more often than distress.

5. Conclusion

Foreign investment screening mechanisms were already present in some countries prior to the Covid-19 era. However, following the pandemic outbreak, this trend has increased, and the scope of investment screening measures widened. The objective of such regulations is to increase national security and public

[101] Andrea K Bjorklund, "Emergency Exceptions: State of Necessity and Force Majeure" in *The Oxford Handbook of International Investment Law* (Oxford 2012).

[102] *Duke Energy v. Ecuador*, (Award) (2008), (ICSID) para.237, *CMS v. Argentina*, *supra* note 95 paras 355-356.

[103] *Responsibility of States for Internationally Wrongful Acts: a General Commentary* (United Nations 2008, at 78.

[104] *Ibid* at 80.

health in times of crisis. But is it only a temporary change? Or maybe the pandemic is driving the world economy to deglobulisation at a faster pace?

The effects of the Covid-19 pandemic with regard to FDI are two-folded. First, the imposed restrictions and measures affecting the already-made investments may invoke investment claims. With the benefits of hindsight, a vast majority of these claims may prove to be successful. Secondly, the pandemic may have lasting effects on investment policymaking and introduce a shift towards restrictive admission policies for FDI and stronger national interests. It may render bouncing back from the coronavirus-induced economy drop quite tricky. That issue is all the more pressing given the significant drop in FDI in 2020 and the uncertain prognosis for 2021.

The Covid-19 situation also sparked further discussions concerning the future of resolution of investment disputes. As warned in the ISDS Moratorium During COVID-19 Crisis, the possibility of facing numerous investment claims may potentially have negative effects on rebuilding the economic situation. Should that be the case, one may not exclude the possibility of opting out of ISDS. E.g., In the past, Venezuela, Ecuador, and Bolivia withdrew from ISDS due to the number of initiated claims.[105]

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