COVID-19: PUBLIC HEALTH EMERGENCY MEASURES AND STATE DEFENSES IN INTERNATIONAL INVESTMENT LAW

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In response to the escalating COVID-19 crisis, States around the world have taken a variety of measures seeking to stem the spread of COVID-19 and to provide for medical supplies and protective equipment, including emergency declarations empowering governments to take control of private businesses, closure of borders, quarantines, stay-at-home orders, suspension of mortgage and utility payments, closure of non-essential businesses, and in some cases, export controls. While States have begun to undertake measures to support their citizens and businesses, it is likely that some foreign investors may seek relief and/or compensation for any losses resulting from State measures [1, p.1]. Investment treaty tribunals regularly consider State measures enacted in the context of major crises. While the COVID-19 pandemic is unprecedented in scope and effect, investment arbitrations addressing measures taken by States in prior crises have raised issues that are likely to be relevant in investment disputes that may arise out of the current health emergency. International investment law affords broad discretion to States to regulate in the public interest, including to protect public health. In the first instance, States may contend that measures taken to respond to the current health emergency are within the bona fide exercise of a State's regulatory discretion, or "police powers". In addition, States may attempt to raise defenses under the express terms of IIAs, such as under "national and essential security" clauses which explicitly carve out certain measures from the scope of treaty protections [2, p.3].

Substantive protection of foreign investments. In the current public health emergency, foreign investors may be particularly concerned about the nationalization of assets, since certain States have enacted legislation permitting the requisitioning of goods and services by the

State where necessary to counter the pandemic [3]. The expropriation of foreign investments by States is generally permitted in IIAs provided that expropriation is carried out for a public purpose, is made against adequate compensation, and is done in accordance with due process and in a nondiscriminatory manner. In determining whether States are required to compensate foreign investors, arbitral tribunals constituted under IIAs may consider whether the State measures were discriminatory or disproportionate, frustrated the investor's legitimate expectations, or violated specific commitments made by the State to the investor.

State Discretion to Regulate for Public Health Reasons. As a general matter in international investment law, States are afforded broad "police powers" to regulate in the public interest. The broad discretion of States to regulate for reasons of public health is well established. For example, the arbitral tribunal in Philip Morris v. Uruguay held that measures taken by Uruguay to regulate tobacco products were justified as the bona fide nondiscriminatory exercise of the State's "police powers" to regulate for reasons of public health that did not amount to an indirect expropriation or a breach of the FET standard [4, para.306, 420, 434]. Other investment tribunals, notably *Chemtura v. Canada* [5, para. 266] and *Apotex v. United States* [6, para. 8.75], have confirmed the broad discretion of States to regulate in the interests of public health.

State Defenses Under Customary International Law. In the context of the COVID-19 pandemic, States may also seek to rely on the customary international law defenses of (*i*) necessity, (*ii*) force majeure and, in limited circumstances, (*iii*) distress to justify measures that would otherwise violate their obligations under IIAs. Although numerous States have declared national crises or states of emergency as a result of the COVID-19 pandemic, arbitral tribunals will independently determine whether the requirements of necessity, force majeure, and distress are satisfied under international law. (*i*) Necessity - States facing crises have frequently invoked necessity, alleging that contested measures were necessary to address a crisis or emergency faced by the State. Pursuant to the customary international law rule

codified in Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (the "***ILC Articles***"), a State may raise the defense of necessity to preclude the wrongfulness of an internationally wrongful act where the act in question, "(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" [7, art.25(1)]. (*ii*) Force Majeure - the defense of force majeure is codified in Article 23(1) of the ILC Articles. It provides that the wrongfulness of an act is precluded "*if the act is due to force majeure, that is the occurrence of 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*" [7, art.23(1)] For a State to successfully invoke the defense under Article 23(1) of the ILC Articles, it must have become "materially impossible" to perform the obligation in question. Here, investment tribunals have found that the defense of force majeure does not exempt a State from international responsibility where "performance of an obligation has become more difficult, for example due to some political or economic crisis.[8, para. 246; 9, para. 451] In addition, to successfully rely on the force majeure defense, a State must demonstrate that: (a) an unforeseen event or irresistible force exists that is beyond the control of the State; (b) the State did not contribute to the situation in question; and (c) the State did not assume the risk of the situation occurring [7, art.23; 10, para 119]. (iii) Distress - in limited circumstances, States may be able to raise the defense of distress. Article 24 of the ILC Articles provides that the defense of distress may be raised where "*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*" [7, art. 24]. In sum, if investment claims arise in relation to measures taken by States in response to the current health emergency, it is likely that States may raise an array of defenses against such claims, either on the grounds that

the measures were part of the legitimate exercise of their regulatory discretion or fell within a treaty exception.

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