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ALINA REVA
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TOPIC

COVID IMPLICATIONS FOR INVESTMENT PROTECTION

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Vilnius, 2022

TABLE OF CONTENT

INTRODUCTION

The relevance of the final thesis. Over the past hundred years of human history, crisis events have affected massively the lives and activities of people around the world. Including political tensions, social and religious crises, and wars that have been and continue to this day. Taking into accounts financial and economic phenomena such as the Great Depression and the 2008 World Economic Crisis have led to significant changes in the structure of humanity. The COVID-19 Pandemic is no exception. Although it seems that the Pandemic affects only the health aspect of the population of different countries, in fact, diving deeper, the crisis of the end of 2019 leads to a significant number of negative consequences.

During the last three years, all over the world, the COVID-19 pandemic[1] has continued to develop. People got used to limitations and new lifestyles, and some countries lifted strict restrictions, but it does not mean that mankind overcame this disaster. Governments face uncertainties about how to prioritize at a time when the pandemic appears to be in transition but when the risk of the emergence of new variants and future surges remains real[2]. The pandemic affected almost all spheres of life irrevocably (medicine, economy, legislation, industry, tourism, and even investment regimes are no exception) and contributed to reforms and improvements according to modern reality. According to the Emergency Situational Updates[3] provided by the World Health Organization, as of 14 December 2022, 645 million confirmed cases and 6.6 million deaths have been reported globally. Mr. Liu Zhenmin, Under-Secretary-General of the UN, described the beginning of the crisis in 2020: "This global pandemic is not only challenging national health systems, but it is also affecting economies, from the smallest to the largest, on an unprecedented scale."[4]

Emergencies require decisive action and exceptional measures. Faced with the high health risks posed by the COVID-19 pandemic, the authorities had to make quick decisions about the future of the entire country in order to curb the spread of the disease. The introduction of lockdown certainly causes certain rights violations, but this is justified by the need to protect the entire

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[1] *"The first cases of novel coronavirus (nCoV) were first detected in China in December 2019, with the virus spreading rapidly to other countries across the world. This led WHO to declare a Public Health Emergency of International Concern on 30 January 2020 and to characterize the outbreak as a pandemic on 11 March 2020"* – "World Health Organization overview," World Health Organization, accessed 20 December 2022, https://www.who.int/europe/emergencies/situations/covid-19.

[2] "Coronavirus disease (COVID-19) Weekly Epidemiological Update and Weekly Operational Update," World Health Organization, accessed 20 December 2022, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports.

[3] "Weekly epidemiological update on COVID-19 – 14 December 2022," World Health Organization, December 14, 2022, https://www.who.int/publications/m/item/weekly-epidemiological-update-on-covid-19---14-december-2022.

[4] Liu Zhenmin, "Message on COVID-19 from USG," United Nations, accessed 20 December 2022, https://www.un.org/development/desa/statements/mr-liu/2020/03/message-on-covid-19.html.

population. The investors encountered problems whether the states breached the international or bilateral investments treaties provisions, violated their protection rights, or did state expropriation without fair compensation to investors to save the national economy at a stable level.

To combat the health and economic crisis, states quickly introduced exceptional and emergency measures to slow the spread of the COVID-19 virus, which has become global. Total lockdowns, travel bans, closed air and transport links between states, restrictions on the transportation of goods, etc., were introduced[5]. Even during the implementation of such restrictions, the question arose whether such decisions could be justified and extremely necessary. The G20 meeting established the general rule for all the affected countries by COVID-19 that emergency measures in the context of the pandemic must be targeted, proportionate, transparent, and temporary.[6] Similarly, the state aims to ensure the public health and economic stability, so it must act in the interests of sustainability while acting impartially, including non-discrimination and proportionality.[7] Governments have been addressing the balance between investment protection[8] and the right to regulate investment treaties through analysis and discussion at the OECD.

It is no exaggeration to think that the outbreak and the measures taken by states to address it may also affect relations governed by public international law. An obvious example is the obligations under foreign investment laws. This principle should be applied in all areas of social existence, and the sphere of foreign investment is no exception. The investment regime has undergone significant changes in many countries since the beginning of the 2019 crisis, and still, different issues remain unresolved. There is no entire opinion on whether it could be determined as expropriation or governmental measures. Can the state only refer to force majeure, necessity, or distress in the case of COVID-19 limitations? The same ambiguous situation from the investor's side: what are the main protection reasons for investors to challenge the state's behavior, whether the state violates fair and equitable treatment, full protection and security, national treatment standards, etc? And the general issue for investors is how to reduce the impact of the pandemic on international investments and how to protect against unpredictable losses. This paper aims to identify the investment regime's main principles, clarify the significant changes caused by the COVID-19 crisis, and applied in investment disputes.

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[5] *See* the analysis of the state's measures in Chapter 2.1.

[6] "Ministerial Statement on COVID-19," Paper presented at G20 Extraordinary Agriculture Ministers Meeting, Saudi Arabia, April 2020, http://www.g20.utoronto.ca/2020/2020-g20-agriculture-0421.html.

[7] Nikos Lavranos and Ahmed Mazlom, "The Investment Treaty Implications of Covid-19 Responses by States," in *European Investment Law and Arbitration Review*, Loukas Mistelis, Nikos Lavranos (London: Queen Mary University and EFILA, 2021), 7.

[8] "OECD investment policy responses to COVID-19," Organization for Economic Co-operation and Development, accessed 20 December 2022, https://www.oecd.org/coronavirus/policy-responses/oecd-investment-policy-responses-to-covid-19-4be0254d/.

Scientific research problem. A study of the related literature shows that there is no unified point of view in the approach of determining what actions the state can take to protect its own interests, ensure security, stability of the population, health, etc. But also, what exactly can an investor rely on in case of violation of his rights in cases of crisis situations. Therefore, the important question arises: *whether the protection of public health can be considered a sufficient reason to justify the restriction of the foreign investment regime by the state*. The current research is aimed at answering such a question.

The novelty of the final thesis. The analysis of the previous scientific researchers shows that there are gaps in the sphere of determining the COVID-19 restrictions as justified for investors. There are determined works that describe the regime of investment protection in general, what are the types of such protection, how the state can limit or decrease foreign investments, and create indirect restrictions to reach its own goals (economic, human, ecological, etc.). But today's events – the unstable economy, the political struggle of countries and continents, and the crisis caused by COVID-19 confirm that states are not ready for sharp fluctuations and do not have time to adapt quickly to critical events. The relevance of the research lies in the fact that it is necessary to investigate how the state acts in moments of crisis and whether it can sufficiently protect public health so as not to violate and limit investors' rights. And if the state has to take critical measures, how can it justify its actions. At the same time, this paper analyzes how to protect the State's interests and examines the main approaches to being exempt from liability – force majeure, necessity, distress, regulatory powers, and non-precluded measures.

Review of the literature. The general scope of this research includes country-to-country analysis of national legal approaches to COVID-19 measures adopted by the governments in European Countries, India, China, and the United States. Carrying out this research, it is required an analysis of scientific and theoretical information in the field of standards of investment protection. The Thesis covers the analysis of crucial points in determining Standards of Investment protection by such authors as Rudolf Dolzer, Christoph Schreuer[9], Frances Wilson[10], James Crawford, Simon Olleson[11], etc.

[9] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (Oxford: Oxford University Press, 2012), 101.
[10] Frances Wilson *et al*., Key Concepts in Public Health, (II edition) (London: SAGE Publications Ltd, 2009), 83–140, https://www.perlego.com/book/861596/key-concepts-in-public-health-pdf.
[11] James Crawford and Simon Olleson, *The Nature and Forms of International Responsibility* (Oxford: Oxford University Press, 2010), 461.

Legal works of scientists in the field of COVID impact on investment protection, such as Arp Bjorn, Edwin Nemesio[12], Chris Quan[13], Ioana Knoll-Tudor[14], Federica Paddeu, Michael Waibel[15], Freya Jephcott[16], Solveiga Palevičienė, Ovidijus Speichys[17], Peter Mazzacano[18], and others will be considered.

Also, the research in the field of investment protection of a number of international institutions, such as the Organization for Economic Cooperation and Development, the International Chamber of Commerce, the International Centre for Settlement of Investment Disputes, and the Colombian Center for Sustainable Investment, will be taken into account. The legal impact of measures of COVID-19 containment measures provided by the World Health Organization conclusions. Investment issues described referring to arbitration practice because the Pandemic has caused dispute resolution changes and influenced case decisions differently.

Significance of the final thesis. The current research will be useful for scholars who explore different investment protection regimes. This work describes not only the states' behavior in a crisis situation but also compares the ways how an investor can protect their own interest. The master thesis tries to show that there are no clear situations when human health protection measures can be justified as a sufficient reason to use limitations and indirect restrictions used by the state.

The research will also be useful for students who would like to deeply explore the court and arbitration awards regarding protecting public health, including the potential issues because of the COVID-19 crisis. This work contains a number of fundamental practice decisions that explain in what cases public health can be sufficient reason to apply to states' limitations in different spheres or not.

This research describes a government's reaction to crisis situations and can help investors to be prepared for measures used by countries. This will provide stability and predictability in

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[12] Bjorn Arp and Edwin Nemesio, "The Practice of Virtual Hearings During COVID-19 in Investment Arbitration Proceedings," in *The Impact of covid on International Disputes*, Shaheeza Lalani and Steven G. Shapiro (Lieden: Brill, 2022).

[13] Chris Quan, "China Travel Restrictions & Travel Advisory," *China Highlights*, November 15, 2022, https://www.chinahighlights.com/travelguide/china-travel-reopen-restrictions.htm.

[14] Ioana Knoll-Tudor, "Fair and Equitable Treatment," Jusmundi, November 7, 2022, https://jusmundi.com/en/document/publication/en-fair-and-equitable-treatment.

[15] Federica Paddeu, and Michael Waibel, "Necessity 20 Years On: The Limits of Article 25," ICSID Review – Foreign Investment Law Journal 37, 2 (2022): 172, https://doi.org/10.1093/icsidreview/siab047.

[16] Federica Paddeu and Freya Jephcott, "COVID-19 and Defences in the Law of State Responsibility: Part I," *Blog of the European Journal of International Law,* March 17, 2020, https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/.

[17] Solveiga Palevičienė and Ovidijus Speichys, "Pandemijos poveikis investiciniam arbitražui," in *Teisė ir COVID-19 pandemija*, Lyra Jakulevičienė et al. (Vilnijus: Mykolo Romerio universitetas, 2022).

[18] Peter Mazzacano, "Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG," *Nordic Journal of Commercial Law,* 2 (2011): 39, https://doi.org/10.5278/ojs.njcl.v0i2.3001.

economic relations and will help to avoid misunderstandings between parties in investment relations.

The aim of the research is to determine the major problems and changes connected with investment protection measures, the main ways of protecting investors' rights that can arise from COVID-19 governmental restrictions, and the problems associated with different governmental regimes from state to state; to unify different approaches for dispute resolution; to explore the main changes to arbitral proceedings caused by Pandemic.

The objectives of the research. The master thesis carried out the following tasks in order to achieve the established aim: 1) to examine the investor's way of protecting investments, what to do in the case of violation by the state policy, and how to receive justified conditions for investments in the host state; 2) to analyze how the state can protect its own interests, including public health; the legal way to use restrictions in what spheres, and how to determine the balance between the state and investor interests; 3) to identify the arbitral proceedings changes caused by COVID-19; to determine what procedural options are available to investors and states in times of crisis; 4) to assess the provisions of old and modern investment agreements and their relevance to modern problems caused by COVID-19.

The defense statements. 1. The effect of International Investment Treaties does not cease to be efficient during times of global crisis. It continues to be an effective tool for protecting Investors' rights in critical situations and Pandemic COVID-19 does not release the State from international obligations.

2. The right of the State to adopt measures aimed at protecting public health cannot be recognized as absolute and requires not only a condition of legitimate goal, but also the ways to achieve this goal should be lawful. The absence of a universal definition of the COVID-19 pandemic in international investment relations may cause speculations from the State's side.

3. The COVID-19 pandemic has become the main reason for an improvement in organizational approaches to investment arbitration and has led to the introduction of new forms of dispute resolution – online hearings, remote work, and electronic document management. This has created conditions to continue the exercising of an inalienable right to judicial protection of the Investor despite the obstacles arising from COVID-19.

The research methodology. The current scientific research is created by using several research methods. First, the primary method used by the author is *data collection and analysis* due to the necessity of studying and exploring a number of legal sources, international treaties and agreements, case law, arbitration practice, and scientific articles. As a result, the collected data is analyzed and structured, and conclusions are deduced.

The second is the *doctrinal method* used for the analysis of international investment treaties to show how it works in written form. Also, the state's legal acts and decisions to use urgent measures caused by COVID-19 were taken into consideration. The author identified specific legal rules, such as the investment protection principle, then discussed the legal meaning of the rule, its underlying principles, and decision-making under the rule.

The next one of the purposes of the current research is to make a *comparative analysis* of different approaches toward the regulation of a considered problem. Therefore, a comparative method will be used as well in order to analyze and compare different jurisdictions' approaches, such as European Union, the USA, and the United Kingdom, as regards the effectiveness of their measures towards the regulation of the issues that are subject to the current research. Moreover, the current research includes a comparative analysis of the old and modern generations of investment treaties and their relevance to modern problems.

The last one is the *case study methodology* – it helps the determination of different approaches of arbitrators. It establishes the general concept and rule of application of the investment treaty provisions in various situations. Analysis of the "investor vs. state" litigation process and different approaches of parties and arbitrators making decisions.

The structure of the research. It consists of three main parts.

The first Chapter examines possible ways of protecting the rights of investors in cases of violations caused by the urgent measures established by the State to overcome the COVID-19 Pandemic. The following standards of investor rights protection are analyzed: protection against illegal expropriation, fair and equitable treatment, national regime, most-favored-nation regime, non-discriminatory measures, etc. The previous arbitration practice on the settlement of investment disputes caused by illegal actions of the state is determined.

The second part describes the emergency measures that were implemented by the states in response to the outbreak of the Pandemic and analyzes the compliance of these measures with the public purpose and necessity. Possible ways of protection for states in response to investor lawsuits are explored, such as force majeure, necessity, distress, and regulatory powers. The protection of public health is described separately as a legitimate purpose of establishing prohibitive and restrictive measures; arbitration practice on the above-mentioned issues is considered.

The third part examines the changes caused by the Pandemic that affected the organizational activities of international investment Tribunals. Various regulatory documents that ensure the procedural activity of different Tribunals are compared. The emergence of such phenomena as – public hearings, remote working mode, etc., were analyzed; as positive and negative consequences; application prospects.

LIST OF ABBREVIATIONS

ARSIWA – Articles of Responsibility of States for Internationally Wrongful Acts

BIT – Bilateral Investment Treaty

CCSI – Colombian Center for Sustainable Investment

CETA – Comprehensive Economic and Trade Agreement

CISG – Convention on Contracts for the International Sale of Goods

DS – Dispute Settlement

FET – Fair and Equitable Treatment Standar

HKIAC – Hong Kong International Arbitration Centerd

FPS – Full Protection and Security Standard

GATT – The General Agreement on Tariffs and Trade

ICC – International Chamber of Commerce

ICSID – International Centre for Settlement of Investment Disputes

IIA – International Investment Agreement

MFN – Most-Favorable-Nation Standard

NAFTA – North American Free Trade Agreement

NTS – National Treatment Standard

OECD – Organization for Economic Cooperation and Development

PCA – Permanent Court of Arbitration

PICC – Principles of International Commercial Contracts

UNCTAD – United Nations Conference on Trade and Development

UNIDROIT – The International Institute for the Unification of Private Law

UNSITRAL – United Nations Commission on International Trade Law

WHO – World Health Organization

1. POSSIBLE WAYS TO PROTECT THE INVESTOR'S RIGHTS

International Investment Agreements (IIAs) that include Bilateral Investment Treaties (BITs), Treaties with Investment Provisions (TIPs) are an integral part of the global investment mechanism. According to the OECD analysis[19], there are currently more than 2500 applicable agreements worldwide. According to UNCTAD[20], there are currently in force 2221 BITs and 354 Treaties with Investment Provisions (TIPs) in the world. Such agreements set minimum standards for ensuring a favorable investment regime in the Host State. But all these agreements do not cease to operate in times of crisis, including the Pandemic.

The provisions of the agreements can vary by establishing general and specific minimum standards.[21] This chapter provides a common overview of the available minimum standards for Investors, including "treatment in accordance with international law, fair and equitable treatment, prohibition of arbitrary and discriminatory measures, full protection and security, most-favored-nation clauses"[22] due to the specifics of the research topic, in order to assess how the Pandemic changes the principle of application of the above standards. These are substantive or "mutual" guarantees provided by countries to Investors to create specific conditions for investing directly in their economy and development.

The main principle of establishing a favorable investment regime by countries was described in article 2.23 of Agenda 21 at the United Nations Conference on Environment & Development in Rio de Janeiro in 1992: "Investment is critical to the ability to develop countries to achieve needed economic growth to improve the welfare of their populations and to meet their basic needs in a sustainable manner, (…) Foreign private investment and the return of flight capital, which depend on a healthy investment climate, are an important source of financial resources."[23] In times of crisis that have befallen not only developing countries but also developed countries, foreign Investors with great opportunities should continue to invest to maintain the economic and social level of nations, including the medical, supplies sector, etc. But on the other hand, states contrary suppress and restrict the activities of foreign Investors in their

[19] "The Future of Investment Treaties," Organization for Economic Co-operation and Development, accessed 20 December 2022, https://www.oecd.org/investment/investment-policy/investment-treaties.htm.
[20] "International Investment Agreements Navigator," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements.
[21] Andrew Newcombe, and Lluís Paradell, *Law and Practice of Investment Treaties. Standards of Treatment* (Netherlands: Kluwer Law International, 2009), 233.
[22] *Ibid.*
[23] United Nations Conference on Environment and Development Rio de Janeiro, *Agenda 21: Programme of Action for Sustainable Development; Rio Declaration on Environment and Development; Statement of Forest Principles: The Final Text of Agreements Negotiated by Governments at the United Nations Conference on Environment and Development (UNCED), 3-14 June 1992, Rio De Janeiro, Brazil.* (New York: United Nations Dept. of Public Information, 1993), art. 2.23. https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf.

country, believing that in this way, the government act in their own interests. For example, by applying expropriation measures, the BITs provisions, that allow deviating from the obligations of the State, referring to exceptional clauses or rules of international law. Emergency measures that were introduced by the governments in the overwhelming majority of countries were implemented in an urgent manner. Thus, the States did not have enough time to create effective restrictions according to the balance of "necessity-justification". Therefore, as a result, we have an imbalance in the system of application of investment protection provisions, which in turn leads to disputes between the Investor and the State.

The following subsection provides a detailed analysis of the abovementioned principles of protection used in International Investment Agreements from the point of view of application by the Investor during the impact of crisis phenomena such as the COVID-19 Pandemic.

1.1 Protection against direct and indirect expropriation without compensation.

It can be noted with confidence that almost all investment agreements contain a clause prohibiting expropriation without fair compensation. Expropriation measures are available only in cases that correspond to a public purpose and must be carried out in a non-discriminatory manner and in accordance with due legal procedure.

Such criteria are defined in the Investment Agreements[24]; in particular, the United States Model BIT (2004) contains a standard definition of expropriation criteria:

> "Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3)."[25]

In addition to the non-discrimination rule, there can be used such a criterion as "*arbitrariness*"; and the "*due to the process*" criterion may be alternative and is not mentioned in all investment treaties[26], although it is an essential element in the case of the application of

[24] *See* "Rwanda – United States of America BIT (2008)," UNCTAD, art. 6, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2241/download; *see* "Japan – Ukraine BIT (2015)," UNCTAD, art. 13(2), accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3324/download; *see* "Estonia – Kazakhstan BIT (2011)," UNCTAD, art. 5(2), accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5757/download.

[25] "United States Model BIT (2004)," UNCTAD, art. 6, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2872/download.

[26] *See* para. 516 of Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia (PCA Case No. 2011-17): "*The Tribunal does not agree. As opposed to the US-Bolivia BIT, which prohibits expropriation "except*

expropriation measures. All these requirements can be interpreted differently by the parties and especially Tribunals because the Pandemic measures created even more misunderstandings and questions regarding the legal application of these treaties' provisions by the States.

The abovementioned criteria will be analyzed further in more detail (and also in the next Chapter) because these main approaches are used not only to determine expropriation measures but also have a predominant influence on other standards of investment protection.

Public purposes. Firstly, lawful expropriation may be applied in cases that meet a public purpose (necessity). Public interest is one of the most common ways to defend used by the States against an Investor's claims for breach of treaty standards of protections (not only in the case of Expropriation but also regarding Fair and Equitable treatment, National treatment) to justify "regulation with a basis other than a state of necessity, national security or the public order."[27] However, no explicit provision in International Investment Law clearly defines the concept of public purposes.[28] This determination originally refers to customary international law and can be described as a State's right to regulate.[29]

Non-discrimination. The following type of measure that can be recognized as expropriation is the discriminatory attitude of the State towards a foreign Investor. The non-discrimination requirement is a standard element both in customary international law and in most of the treaty provisions addressing the legality of the expropriation.[30] Any cases of discriminatory measures prohibit several standards simultaneously – fair and equal treatment, prohibition of arbitrary and/or discriminatory actions, and national treatment.

Discrimination can be defined in different ways. In particular, it means establishing a separate group to which specific requirements are applied. Such criteria may be racial, ethnic, national, or specific groups. In the case of COVID-19 measures, the discriminatory behavior of the State may be aimed at restricting such areas of activity as companies with foreign capital that create medicines and produce medical equipment, prohibiting or limiting the investment activities of Investors from certain countries in preference to the relevant domestic enterprises or industries. In addition, the spheres of production, international transportation, real estate, construction, tourism, etc., suffer significant losses.

(...) in accordance with due process of law", the UK-Bolivia BIT does not explicitly establish due process as a precondition for (...)", ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/italaw3293.pdf.

[27] Catharine Titi, *The Right to Regulate in International Investment Law* (Baden-Baden: Nomos/Hart, 2014), 101.

[28] P.J. Martinez-Fraga, and R.C. Reetz, *Public Purpose in International Law: Rethinking Regulatory Sovereignty in the Global Era* (Cambridge: Cambridge University Press, 2015), 126.

[29] *See* further Chapter 2.4 State's policy powers.

[30] A.F.M. Maniruzzaman, "Expropriation of Alien Property and the Principle of Non-Discrimination in International Law or Foreign Investment: An Overview," *Journal of Transnational Law & Policy* 8, 2 (1998): 57.

If the State decides to provide subsidies or other support measures to selected companies (e.g., domestic only), this may violate the rights of foreign investors operating in the same industries. For example, the governments of the EU Member-States are developing support programs and offering permanent aid to companies most affected by the consequences of the Pandemic.[31] In 2020 Germany planned to provide assistance to small and mid-sized businesses by creating a special fund of 500 billion euros.[32] If such federal aid programs are designed to support only domestic companies, Investors face unequal treatment, and the government's actions can be considered discriminatory.

Another approach applicable if the State measures to expropriate institutions affect only companies of private capital of foreign origin and do not apply them to local institutions, they undoubtedly violate the prohibition of arbitrariness and discrimination. Such measures, which are discriminatory against foreign businesses compared to national ones, may create grounds for lawsuits by foreign investors against the State. At the same time, the scope of investors' rights will largely depend on the text of the relevant agreement on mutual investment protection.

The next issue that can be considered as discrimination is double standards in law enforcement. For example, in Ukraine, some companies could operate in conditions when their competitors were not allowed to do so. The Resolution[33] adopted by the government directly prohibited entrepreneurial activity, with the exception of certain types that were explicitly mentioned in the document. As the Supreme Court noted in its constitutional appeal: "(…) lack of legal certainty in the wording of prohibitions on entrepreneurial activity in the Resolution caused such an interpretation of this prohibition, under which some subjects of entrepreneurial activity continued to carry out their activities, while others did not resume."[34]

The possibility of such a different reading of the Resolution in this part and the improper response of the competent State authorities led to unfair competition, which is expressly prohibited by Article 42 of the Constitution of Ukraine[35].

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[31] "Supporting European businesses during the pandemic," European Commission, accessed 20 December 2022, https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic/supporting-european-businesses-during-pandemic_en.

[32] "Germany: EIB Group and Commerzbank join forces to support small and mid-sized companies in COVID-19 crisis," European Commission, accessed 20 December 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1773.

[33] Resolution of the Cabinet of Ministers of Ukraine, "On the establishment of quarantine in order to prevent the spread of the acute respiratory disease COVID-19 caused by the SARS-CoV-2 coronavirus in Ukraine," Verkhovna Rada of Ukraine, accessed 20 December 2022, https://zakon.rada.gov.ua/laws/show/392-2020-п/ed20200520#Text.

[34] Constitutional Court of Ukraine "Constitutional submission regarding the transfer of compliance with the Constitution of Ukraine of the provisions of the resolution of the Cabinet of Ministers of Ukraine dated May 20, 2022 No. 392," accessed 20 December 2022, https://supreme.court.gov.ua/userfiles/media/konstytytsijne_podannia_1.pdf.

[35] *See* Article 42 of the Constitution of Ukraine: "*The State shall ensure the protection of competition in entrepreneurial activity. The abuse of a monopolistic position in the market, unlawful restriction of competition, and unfair competition shall not be permitted*." accessed 20 December 2022 https://zakon.rada.gov.ua/laws/show/en/254к/96-вр#Text.

Compensation. Adequate compensation when determining lawful expropriation is one of the most essential requirements from the States side. The provision to apply fair payment for government actions has already existed for more than a century, and not only in accordance with Investment Protection treaties but also as a doctrine in customary or international law.

In the previous century, the *Hulu* formula was found to describe an approach to paying compensation: "no government is entitled to expropriate private property, for whatever purpose, without provision for *prompt, adequate and effective payment*, therefore."[36] but there are cases when States violate these criteria for various reasons. In the event of a Pandemic, it can be assumed that the states' budgets are aimed at overcoming the crisis, and the State loses the ability to effectively pay compensation for expropriation measures.

The prompt compensation provides for the payment of funds without justified delay by the State.[37] In certain Bilateral Agreements, it can be specified during what period of time the payment must be made.[38] But most often, such a procedure requires a negotiation process between the State and the Investor. The International Law Commission in the last century defined the main principles in determining compensation:

> "the payment of the agreed compensation necessarily depends on the circumstances in each case and in particular on the expropriating State's resources and actual capacity to pay; even in the case of 'partial' compensation, very few States have in practice been in a sufficiently strong economic and financial position to be able to pay the agreed compensation immediately and in full."[39]

The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) define specific requirements to be met in compensation for internationally wrongful acts – Article 36(1) provides that "the State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution."[40]

There are different approaches to determining a fair price. For example, in the Commentary to the article, the authors define *"fair market value"* methodology for compensation of

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[36] Haywood Hackworth, *Digest of International Law* (Washington: Government Printing Office, 1942), 194.
[37] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (Oxford: Oxford University Press, 2012), 101.
[38] *See* Article 1.5 of "Kuwait – Mauritius BIT (2013)," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3305/download; *see* Article 4(2) of "Croatia – Czech Republic BIT (1996)," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/853/download.
[39] García Amador, "International responsibility. Fourth report," in *Yearbook of the International Law Commission*, United Nations General Assembly (New York: United Nations, 1960), 22.
[40] Article 36(1) of "Draft articles on Responsibility of States for Internationally Wrongful Acts," United Nations, accessed 20 December 2022, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

expropriation.[41] But some BITs propose to determine payment based on *"genuine value," "market value,"* or *"fair market value"*. There is also another opinion in the scientific community when determining fair compensation. For example, scientists believe that determining market value is a reasonably rigid criterion. [42] When calculating the amount of payment, it is necessary to consider all circumstances comprehensively and apply the method of flexibility. That is, it is proposed to apply for partial compensation and take into account extraordinary circumstances, such as national programs and agrarian reforms, in case of war or in other situations where the principle of full compensation can become a significant burden for the State.[43] Under this approach, the Pandemic can be seen as a burden on public policy.

The issue of reimbursement of proportionate, fair, reasonable, and prompt compensation for the ownership of foreign capital is one of the most common cases when investor claims their rights and the reason for applying to arbitration dispute settlement procedure. In times of Pandemic, which concerns not only public health but the economic component of the development of society, the political one, etc., the States do not have sufficient resources for proportionate compensation and rely on the fact that such payment can be postponed or finally refer to justified actions, in which the State is exempted from the obligation to pay compensation.

Due to a process of law. Expropriation can be considered a legal action of the State if such a procedure is provided for in the legislation and the behavior of the State corresponds to the provisions of the law. There are opposite opinions of the Tribunals on such a situation. In a part of Arbitration Decisions, arbitrators also highlight compliance with the condition "the due process of law." In 2021, in the decision Muhammet Çap & Sehil v. Turkmenistan, ICSID noted that even if the criterion "in accordance with the procedure" is not explicitly contained in the treaty, the expropriation must comply with the rules of the relevant procedure, if such process is violated at certain stages, then an illegal expropriation can be invoked[44]

A counterexample is the PCA's decision in Guaracachi v. Bolivia, the Tribunal notes that if the BIT does not expressly contain a direct requirement to act in accordance with the procedure,

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[41] Commentaries to the draft articles on Responsibility of States for internationally wrongful acts, Official Records of the General Assembly (ARSIWA), Fifty-sixth session (Geneva: International Law Commission, 2001), http://www.eydner.org/dokumente/darsiwa_comm_e.pdf.

[42] Newcombe, Paradell, *supra note*, 21: 379.

[43] Commentaries, *op. cit.*

[44] *See* paras. 812-13 of Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Award, *"The Tribunal notes at the outset that "procedural expropriation" does not exist as such in investment law, nor is it contemplated by Article III BIT. However, this does not mean that there cannot be procedural violations or irregularities in the context of the substantive expropriation of an investment. In fact, unlawful expropriations may be carried through the violation of certain procedural guarantees, i.e. a breach of due process. However, these due process violations are assessed in the context(...)"* Jusmundi, accessed 20 December 2022, https://jusmundi.com/en/document/decision/en-muhammet-cap-sehil-insaat-endustri-ve-ticaret-ltd-sti-v-turkmenistan-award-tuesday-4th-may-2021.

then the Investor cannot rely on the violation of such a requirement.[45] So it means that Tribunal individually determine such a criterion, so it is unequivocally to say whether the courts will demand compliance with the legal procedure in cases of the Pandemic.

Transparency. In addition, the decision to expropriate and the conditions of the expropriation must be communicated to Investors in accordance with the principle of full transparency.[46] Transparency in the State's actions is also a different condition – the need to clearly define which assets are being expropriated and the need to inform the Investor in advance about the future procedure. [47] Whether States have followed due process in nationalization actions in crisis situations due to COVID-19 will be determined by the arbitrators on a case-by-case basis.

Direct or indirect expropriation. There are two types of possible ways of expropriation – direct and indirect. If the first option does not raise doubts about the definition, then indirect expropriation carries a more complex meaning. In the case of applying the direct form, the Host State directly seizes the property and receives tangible rights that become the property of the State, i.e. a *de facto* procedure. The Tribunal in Feldman v. Mexico award described such form: "Recognizing direct expropriation is relatively easy: governmental authorities take over a mine or factory, depriving the Investor of all meaningful benefits of ownership and control."[48]

The model situation during the Pandemic can be the seizure of private healthcare institutions by the State control to provide treatment to the population[49] – the actual transfer to the disposal of the State, which involves the need to ensure public purposes (protect public health), at first glance, looks like a case that does not fall under the violation of the expropriation procedure. Still, such an action must be carried out in accordance with the legislation of the Host State, legal procedure, and with the payment of fair compensation.

Since direct expropriation is gaining wide publicity and is an audacious phenomenon from the State side, and can cause significant damage to the investors and establish a negative reputation of the State for possible future investors. Thus, cases of direct seizure occur more rarely, and

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[45] Guaracachi, *supra note*, 26: para. 439 "*Rurelec also alleged that the expropriation was illegal because the Respondent has not complied with its obligation to provide due process of law by refusing to allow Rurelec to participate in the valuation process to assess the fair value of compensation.516 The Tribunal does not agree. As opposed to the US-Bolivia BIT, which prohibits expropriation "except (…) in accordance with due process of law", the UK-Bolivia BIT does not explicitly establish due process as a precondition for(...)*"

[46] *See* para. 705 of "Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Decision," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/italaw11040.pdf

[47] *See* Nemlin Hie Arnaud Oulepo, " Due Process in Expropriation," *Jusmundi*, June 21, 2022, https://jusmundi.com/en/document/publication/en-due-process-in-expropriation.

[48] *See* "Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1 (also known as Marvin Feldman v. Mexico), Award," ItaLaw, accessed 20 December 2022, https://www.acerislaw.com/wp-content/uploads/2022/03/Feldman-v.-Mexico.pdf.

[49] Lauren Frias, "The federal government is reportedly quietly seizing medical supplies from hospitals across the country," *Insider*, April 9, 2020, https://www.businessinsider.com/hospitals-say-federal-government-quietly-seizing-medical-supplies-lat-2020-4.

therefore indirect expropriation comes to the fore, which is more hidden, stretched in time, and ambiguous.

NAFTA, in Chapter 1 part 1, described indirect expropriation as "a measure or measures having an effect equivalent to nationalization or expropriation."[50] CETA contains the most general and widespread description of indirect expropriation: "indirect expropriation occurs if a measure … of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including *the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure*."[51] A similar description was used by Tribunals in Mobil and others v. Venezuela (2014)[52], Plama v. Bulgaria, ICSID (2008)[53], CMS v. Argentina (2005)[54], and RFCC v. Morocco (2003)[55].

Another important aspect is the duration of time when determining indirect expropriation. For example, the definition of the term "short-term" restriction of property rights or use of ownership by the State is not considered indirect expropriation. Still, for example, in the case of Middle East Cement v. Egypt[56], the court determined that the suspension of an export license for a period of 4 months, or Wena Hotels v. Egypt[57] – loss of control over the property by the investor for one year – these long-term restrictions may be indirect expropriation in content.

Analyzing this issue, Lucas Bento and Jingtian Chen in their work wrote: "If the seizure of private production lines to produce medical equipment, as the Spanish government now is empowered to do and the U.S. has done under the Defense Production Act, lasts for a sufficiently long period of time without adequate compensation, investors could have a claim for unlawful

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[50] *See* "North American Free Trade Agreement," Foreign Trade Information System, accessed 20 December 2022, http://www.sice.oas.org/trade/nafta/chap-111.asp; *see* Article 13 of "The Energy Charter Treaty (1994)," Jusmundi, accessed 20 December 2022, https://jusmundi.com/en/document/treaty/en-the-energy-charter-treaty-the-energy-charter-treaty-1994-saturday-17th-december-1994; *see* "Australia – Mexico BIT (2005)," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5314/download.

[51] Annex 8-A, "Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part," EUR-Lex, accessed 20 December 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114(01)#d1e3893-23-1.

[52] *See* para. 186 of "Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/italaw4011.pdf.

[53] *See* para.193 of "Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf.

[54] *See* para. 262 of "CMS Gas Transmission Company v Argentine Republic, ICSID Case No ARB/01/8, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/cases/288.

[55] *See* paras. 67-68 of "Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/ita0226.pdf.

[56] *See* para. 107 of "Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/ita0531.pdf.

[57] *See* para. 82 of "Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/ita0902.pdf.

indirect expropriation."[58] Therefore, the State should be careful in making such decisions, even if the measures have clauses about the temporality and short duration of the event.

Tribunals have found indirect expropriation in a wide array of State measures, including requisition of lands, forced sales, exorbitant taxation, deprivation of profits, interference in the management of a business, termination of rights, such as licenses, contracts, or debts, blocking and harassment of employees, blockage of plants, and the prohibition on the repatriation of profits.[59] And also, new measures implemented by the governments because of COVID-19 can be added to this list of cases of hidden expropriation.

But, for example, the same US Model BIT contains a reservation in the Annex: "Except in rare circumstances, 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."[60] This clause can serve as a general exception to the rule if only the State can determine the necessary measures as not subject to indirect expropriation. This requirement also allows the State to justify its actions and to refer to its own policy – "policy powers" if such behavior corresponds to a public purpose. The separation of expropriation measures from the regulatory powers of the State will be discussed in more detail in the next section.

To sum up, an Investor's claim against the State's actions in the case of direct or indirect expropriation may become a relevant reason for arbitration proceedings due to the measures taken by the States in an emergency and urgent response to the Pandemic. It is difficult to determine whether the courts will evaluate the need to pay full compensation to the Investor if violations of the Investor's rights are established. Also, special attention should be paid to determining public purposes. In this case, the protection of public health may be sufficient to side with the protection of the State, not the Investor.

The presence in investment treaties (especially of the modern generation) of public purpose clauses, in particular, provisions defining public health as a legitimate direction of the State action, and a clear list of distinctions between expropriation with compulsory compensation and cases where payment is not applied, allows the investor to more clearly understand its chances of success in arbitration proceedings and will avoid unreasonable claims from the investor. The possibility of a broad interpretation of specific provisions and criteria allows Arbitrators the right to apply the

[58] Lucas Bento and Jingtian Chen, "Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses," *Kluwer Arbitration Blog*, April 8, 2020, http://arbitrationblog.kluwerarbitration.com/2020/04/08/investment-treaty-claims-in-pandemic-times-potential-claims-and-defenses/.
[59] Newcombe, Paradell, *supra note*, 21: 328.
[60] CETA, *supra note*, 51.

rules of investment treaties flexibly, which adds unpredictability to future decisions related to the Pandemic.

1.2 Fair and equitable treatment standard

The fair and equitable treatment (FET) standard is contained in almost all international investment agreements and modern free trade agreements as a basic standard for protecting investor rights. Christoph Schreuer aptly observed, "It is clear that FET is currently the most promising standard of protection from the investor's perspective."[61]

But the provisions of such treaties do not contain a clear definition of the content of such a guarantee, as well as the interpretation of such provisions, depends on the form of expression contained in the agreements. Just as the provisions of the agreements may differ in meaning, so the arbitration decisions determine in individual cases different violations of this principle. It is noted that the FET standard is applied instead to "plug holes" that may be left by other investor protection standards so that the relevant agreement achieves the desired level of legal protection for foreign investors.[62] There are the following most common cases of indication FET: (1) "the standard alone[63]; (2) the standard together with the *full protection and security* reference[64]; (3) the standard together with the *national treatment and the most favored nation treatment*."[65]

A new generation of Model BITs contains a new type of FET clauses, including an exhaustive list of measures that are considered to breach the FET.[66] For example, CETA in para. 2 art. 8.10 contain a closed list of possible breaches of FET. Instead, Article 3 of the Netherlands-Armenia BIT broadly describes this guarantee with virtually no restrictions[67].

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[61] Christoph Schreuer, "Introduction: Interrelationship of Standards," in *Standards of Investment Protection*, August Reinisch (New York: Oxford University Press, 2008), 2.
[62] Dolzer, Schreuer, *supra note*, 37: 132.
[63] *See* "Gambia – Qatar BIT (2002)," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1312/download; *see* art. 2 of "Albania – Bulgaria BIT (1994)," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/7/download.
[64] *See* Art. 1105(1) of NAFTA "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. (...)", Jusmundi, accessed 20 December 2022, https://jusmundi.com/en/document/treaty/en-north-american-free-trade-agreement-nafta-thursday-17th-december-1992; *see* CETA, *supra note*, 51; *see* Art. 5(1) of "US Model Bilateral Investment Treaty (2012)," USTR.gow, accessed 20 December 2022, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.
[65] Ioana Knoll-Tudor, "Fair and Equitable Treatment," Jusmundi, November 7, 2022, https://jusmundi.com/en/document/publication/en-fair-and-equitable-treatment.
[66] *Ibid.*
[67] *See* Article 3 (1) of "Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Armenia and the Kingdom of the Netherlands," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/140/download.

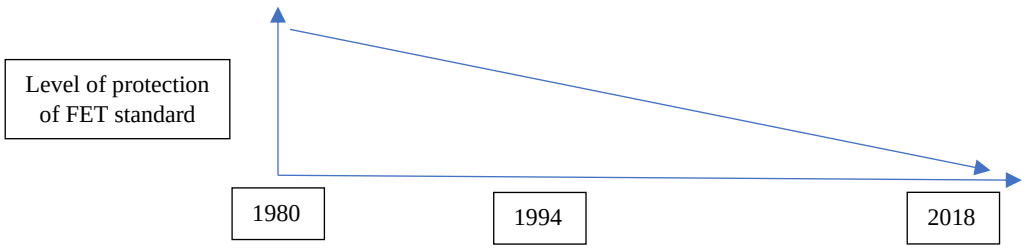

Table 1 The level of protection of the FET standard over time[68]

The table above indicates the level of investor protection under the FET standard over time. In contrast to the provisions about public purposes and necessity, which are characterized in more detail in the new generation agreements – in order to have an accurate and clear understanding for both the investor and the State, the FET standard, on the contrary, is defined with a broad sense. The parties in international investment agreements avoid a detailed description of such a standard (except CETA with a closed list), giving the investor a vast opportunity to identify violations by the State.

In the practice of investment arbitration, the standard of fair and impartial treatment is interpreted as including the requirement of stability and the protection of the investor's legitimate expectations[69]; the requirement of transparency, which is closely related to the security of legitimate expectations and according to which the legal acts regulating the investor's activities must be explicit, and all the State's decisions must be clearly based on these legal acts; the requirement to comply with contractual obligations undertaken by the State in relation to a specific investor[70]; the right to a fair trial[71]; the principle of good faith, which, among other things, means the requirement for the foreign investor not to cause damage on purpose[72]; and protection against pressure and intimidation[73].

Access to justice. One of these violations can be "denial of justice in criminal, civil or administrative proceedings,"[74] which may be interpreted as non-performance or unfair performance of actions by the administrative authorities of the Host State or delay of court proceedings in which the investor is involved. By limiting access to justice, the government's intention of easing financial difficulties carries a different policy objective than protecting public health or securing national provisions.[75] Such issues do not concern the arbitral proceedings but the good faith exercise of their powers by the federal authorities of the State where the investor's

[68] Lavranos, Mazlom, *supra note*, 17.
[69] Dolzer, Schreuer, *supra note*, 37: 145.
[70] *Ibid*, p 152.
[71] *Ibid*, p. 154.
[72] *Ibid*, p. 156.
[73] *Ibid*, p. 159.
[74] CETA, *supra note*, 51.
[75] Lavranos, Mazlom, *supra note*, 17.

assets are concentrated. Therefore, the Tribunal will determine the compliance of such measures with the criterion of reasonableness and public purpose.

During the outbreak of a Pandemic, and the application of such protective measures (which have an indefinite duration in time, although they are considered temporary) as limiting the number of people on the premises, possibly closing some institutions, total lock-down, etc., investors may face a violation of their rights according to fair and equitable treatment. Some countries quickly found their way and switched to online mode, providing the opportunity to receive the necessary requests or documents in digital format. The Pandemic once again showed that digitalization and complex adaptation to new conditions gives an advantage in attracting foreign capital investment.

Legitimate expectations. Another example of a FET violation could be related to the investor's reasonable expectations or the principle of transparency. In a broad sense, the focus on the protection of legitimate expectations allows the investor to rely on the behavior of the Host State (which, among other things, can be expressed in the actions of authorized representatives of the State, their statements to businesses, adopted legislative acts) during the investment, to the extent that the behavior generates the investor's expectations are justified. If the subsequent failure of the Host State to meet such expectations leads to losses for the investor, he has the right to compensation.

Tribunal described broadly this principle in the case Suez v. Argentina: "When an investor undertakes an investment, a host government through its laws, regulations, declared policies, and statements create in the investor certain expectations about the nature of the treatment that it may anticipate from the host State."[76] On the other hand, from the investor's side, it should be expected that before the challenges of the global Pandemic, the State will resort to public health measures, which may have a significant negative impact on business due to their restrictive nature. However, investors should fully expect that such actions, firstly, will pursue a legitimate goal and, secondly, will be reasonable, comparable (proportionate), non-discriminatory, and transparent.

Transparency. Regarding the transparency of government actions, arbitrators evaluate such criteria as the adequacy and openness of communication with investors, access to information about factors and policies that will affect the adoption of measures, as well as the timeliness of notification of their adoption. In the landmark case of Tecmed v. Mexico[77], the tribunal ruled that a government must be fully transparent in its dealings with a foreign investor. That it will the latter

[76] *See* para. 203 of "Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/italaw4365.pdf.

[77] *See* para.154 of "Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award," UNCTAD, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf.

know in advance all the rules and the objectives of the relevant policies and administrative measures that govern its investment in order to plan its actions and comply with such regulations.

In conclusion, it is essential to note that the protection provided by the FET standard does not, in general, deprive the State of the right to use its regulatory (police) powers. But in the event that governments deliberately manipulate or apply extremely restrictive measures, impose disproportionate restrictions on access to judicial proceedings, or slow down administrative hearings, investors have the right to apply to the court, with the aim of determining the State's compensation for the losses they have received as a result of the violation basic expectations of the investor that were in effect at the time when the investor began to carry out his activities.

Indeed, an unpredictable and unreasonable change in legislation by the State that does not help to solve the issues that have arisen in connection with the Pandemic can be defined as a violation of the FET standard. Due to the lack of a clear definition of such a standard in international investment agreements, the investor gets the opportunity to prove the presence of violations of rights by the State in a wide range. Therefore, for State misconduct challenges caused by the Pandemic, the FET is a potentially reasonable standard that an investor can invoke and ultimately obtain a positive outcome.

1.3 Full protection and security

Full protection and security standard (FSP) is included in the overwhelming majority of investment treaties. As mentioned in the previous subchapter, the FPS standard can be mentioned in BITs together with fair and equitable treatment without distinction. This is because such guarantees have a fine line when defined, and these features should be taken into account by the investor when challenging violations by the State.

Some treaties refer to "full," others to "full and complete," "(most) constant,"[78] or "continuous"[79] protection and security. "Protection" and "security" may sometimes be bits interchanged, and the word "security" may be omitted[80], but the content of the standard remains the same. In arbitral practice, "these semantic variations do not change tribunals' interpretations of the standard."[81]

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[78] "Finland – Panama BIT (2009)," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4978/download.

[79] "China – Nigeria BIT (2001)," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3366/download.

[80] "Lithuania – Norway BIT (1992)," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1917/download.

[81] *See* Stanimir A. Alexandrov, "The Evolution of the Full Protection and Security Standard," in *Building International Investment Law: The First 50 Years of ICSID*, Meg Kinnear et al. (Kluwer Law International, 2015), 319.

FPS standard can be defined as the protection of investments from physical interference and ensuring the security of investors' assets by the State. Since modern international agreements contain a more precise definition of standards, modern CETA, for example, limits this guarantee as: "For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments."[82]

However, this standard of investor protection contains an element of not only physical but also legal protection, i.e. protection against violation of the rights of foreign investors or lack of legal stability.[83] This protection is usually provided through the effective functioning of the judicial and law enforcement systems. In the award of Frontier Petroleum Services Ltd. V. The Czech Republic (2010)[84], UNCITRAL mentioned:

> "(…) it is apparent that the duty of protection and security extends to providing a legal framework that offers legal protection to investors – including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights."

Since measures to overcome the Pandemic are aimed more at legal regulation and establishing social stability, the FPS standard defines cases of physical intervention by society, such as raiding or damaging investor property during social unrest or public protests. Such measures are unlikely and are not entirely subject to restrictions related to COVID-19. Therefore, in this case, the reference to the violation of this principle by the State seems not applicable.

In terms of remedies, it may be more appropriate to refer to a violation of the FET standard, as it more broadly outlines the rights of the investor, and ensuring legal stability is more inherent in the definition of fair and equitable treatment.

1.4 National Treatment Standards

The next available option to protect the rights of the investor may be a violation of the National Treatment Standard. The principle of according to national treatment – avoiding discrimination based on nationality – underpins many types of international agreements.[85]

This crucial point is clearly established in Article III of the General Agreement on Tariffs and Trade (GATT). The main point mentioned in this agreement is "…should not be applied to

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[82] CETA, *supra note*, 45; *see* art. 2.5(1) of "EU-Vietnam Investment Protection Agreement (2019)," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download.

[83] Dolzer, Schreuer, *supra note*, 37: 163.

[84] *See* para. 263 of "Frontier Petroleum Services Ltd. v. The Czech Republic, Final Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/ita0342.pdf.

[85] Andrea K. Bjorklund, "National Treatment," in *Standards of Investment Protection*, August Reinisch (New York: Oxford University Press, 2008), 29.

imported or domestic products so as *to afford protection to domestic production*"[86]. Thus, the basic principle is not to apply discriminatory measures aimed at the activities of foreign investors, giving preference to domestic producers. The State should provide clearly established rights and obligations to foreign investors and ensure that the exact scope of such rights and responsibilities is granted to domestic and foreign investors. For example, CETA, in its definition of NTS, refers to the above-mentioned GATT, but in the US Model Treaty, it provided the closed description of possible investors' activities as "(…) with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."[87]

The national treatment standard refers to situations where the Host State gives less favorable treatment, either *de facto* or *de jure*, to a foreign investor than to a domestic investor in similar situations.[88] These measures adopted by the State include the closure of borders, which limits the ability of a non-citizen investor to actually manage and control the capital, while the activities of national investors are not limited, prohibition or restriction on the transportation of certain goods, preference for local producers. Also, the limits that may be applied by the State may not be based on the principle of nationality but may concern specific areas or products. Thus, the State support of a particular local production sector while ignoring or restricting enterprises with foreign capital may be a reason for violation of the National Treatment regime.

In summary, this principle overlaps quite closely with the principle of non-discrimination and the more favorable treatment standard but is narrower in its definition and may be applied in specific situations. Also, during the consideration of the case, the arbitrator must determine such criteria as the similarity of the condition applicable to the national investor and the foreign investor, the field of activity, the duration of restrictive measures in time, etc.

1.5 Most-Favored Nation Treatment

The most favored nation treatment standard is a core guarantee for investors with an almost clear understanding. It can be referred to as a provision in a treaty under which a State agrees to accord to the other contracting party treatment that is no less favorable than that which it accords to other or third states.[89] MFN treatment is a particular form of non-discrimination and is often combined with or compared to the national treatment (NT).[90] Andreas R. Ziegler (2008) wrote:

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[86] *See* Article 3 of "The General Agreement on Tariffs and Trade (GATT 1947)," World Trade Organization, accessed 20 December 2022, https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art3_e.pdf.
[87] US Model BIT, *supra note*, 64, art. 3.
[88] Bento, Chen, *supra note*, 58.
[89] *See* "Indirect Expropriation" and the "Right to Regulate" in International Investment Law," OECD Working Papers on International Investment, accessed 20 December 2022, http://dx.doi.org/10.1787/780155872321.
[90] *See* Bjorklund, *supra note*, 85: 30.

"They are both relative standards as they do not specify the exact treatment to be accorded but rather create a non-discrimination obligation to nationals and individuals of other nations."[91]

As mentioned above, some of the measures imposed by the State could impose bans on all foreign investors, favoring domestic business, while other measures could restrict investors from certain countries. For example, the US ban on all air traffic from Europe explicitly excluded air traffic from the United Kingdom and Ireland.[92] Later the US ban eventually barred flights from the United Kingdom and Ireland, but still, these countries had a privilege for US traffic.

In summary, if the State treats foreign investors from various countries differently, it can potentially lead to a violation of MFN and NT provisions enshrined in international investment agreements.

In conclusion, regarding international investment law in the context of substantive provisions and obligations specified in investment treaties, it can be concluded that such treaties are generally designed to apply the requirements in times of crisis, especially in times of COVID-19. The Pandemic has created new challenges for investment dispute tribunals due to the impact of measures taken to combat the widespread of the virus.

The analyzed investor protection standards contain a wide range of ways of application and therefore allow arbitrators to interpret their provisions in connection with a particular situation. It is important to note that the new generation of investment agreements contains a more precise formulation of the standards and allows investors to take a more specific position in determining what rights have been violated by the State. Flexible application of the rules makes it possible to create a new precedent arbitration practice. Due to the duration of the consideration of cases by the courts, such precedents will be formed during the next few years period of time.

After studying the standards of investment protection, it may be inferred that there is no need to improve and update the substantive provisions of international agreements. But it must be noted that modern ILAs are more intended for use in crisis situations than the treaties of the previous generation. Since the transformation of all existing agreements in a new way will take a long period of time and will have a heavy burden on the material and procedural application, we can conclude that the material base is sufficiently developed in the field of application in situations caused by the Coronavirus.

As can be seen from the analysis of possible ways of protecting investors' rights, international law and investment treaties provide a wide range of recourse to arbitration in cases

[91] Andreas R. Ziegler, "Most-Favored-Nation (MFN) Treatment," in *Standards of Investment Protection*, August Reinisch (New York: Oxford University Press, 2008), 60.
[92] Lavranos, Mazlom, *supra note*, 17: 22.

of discriminatory treatment of foreign-owned enterprises, violation of expropriation conditions, and especially the detection of indirect expropriation without compensation or in case of delayed or disproportionate payment. Violations of such standards as fair and equitable treatment, most-favored-nation, and discrimination may be the most common issues in future investment disputes. The main problem is still the analysis of exceptions when the State is exempted from its obligations and, for example, does not have to compensate for lawfully committed actions toward the investor. Such cases will be analyzed in detail in the next section.

2. POSSIBLE WAYS TO PROTECT THE STATE

This part examines the measures that the States has taken in response to the emergence of the Pandemic; and the negative consequences that foreign investors have suffered in their activities due to the global crisis.

It analyzes the policies of governments aimed at reducing the consequences caused by the Coronavirus. The chapter also identifies important defenses that States may invoke in response to the Investor's claims, such as force majeure, necessity, calamity, police powers, and non-prohibited measures such as the protection of public health. Whether states have the potential to exempt themselves from liability to the investor will be explored further.

2.1 Urgent measures adopted by the States

In order to overcome the Coronavirus, the governments of almost all countries of the world were faced with the need to establish a specific restrictive regime that applied to all spheres of society. These changes in the social life system caused by the activity of the State led to the emergence of new challenges. Such measures differ in number, scope, duration, and location. Some countries[93] introduced a quick and urgent measure as a total lockdown to prevent the spread of the Coronavirus. Still, this action has led to significant consequences, such as social, political, and economic, which sand sometimes have not been resolved to date. Other economically stable and developed countries have not suffered as much from the impact of the Pandemic (Norway, Switzerland). That restrictive measures had a more loyal level and were less long-lasting.

The self-isolation regime in each country is different. The wide range of measures taken by various governments is a challenge for analysts who want to compare these policies over time or across countries. In order to make comparisons, the Oxford COVID-19 Government Response Tracker (OxCGRT)[94] team systematically collects information on policy measures that governments have taken to overcome COVID-19, maintains a database of pandemic response policies, and uses it to produce an index of the overall severity of actions, assessing the severity of measures. Various policy measures have been tracked since 1 January 2020, covering over 180 countries and coded into 23 indicators, such as school closures, travel restrictions, vaccination policies, etc. These policies are recorded on a scale that reflects the extent of government action, and the scores are combined into a set of policy indices. This data can help decision-makers and

[93] *See* Annex 1-2.
[94] "COVID-19 Government Response Tracker," University of Oxford, accessed 20 December 2022, https://www.bsg.ox.ac.uk/research/covid-19-government-response-tracker.

citizens to consistently understand the government's response, contributing to efforts to overcome the Pandemic.

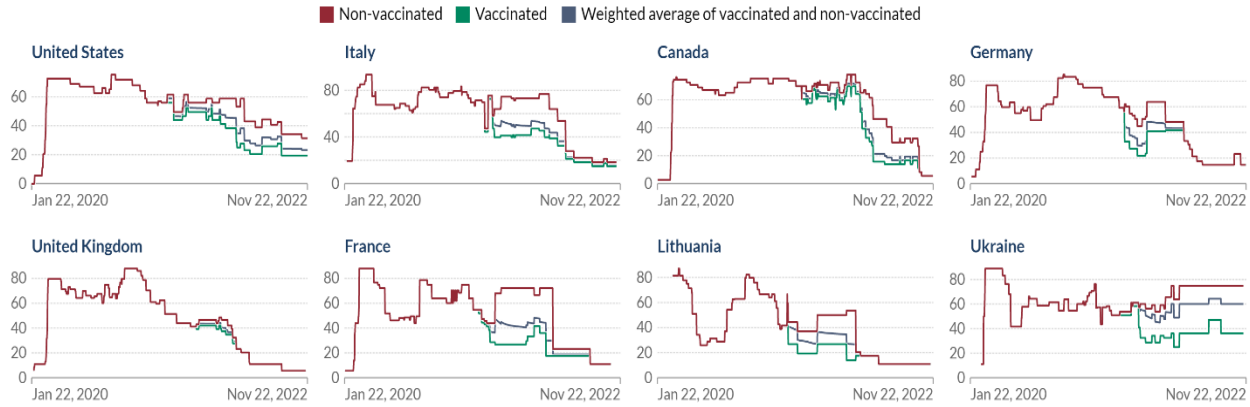

Table 2. COVID-19: Stringency Index.[95]

The stringency index is a composite measure based on nine response indicators, including Government Response Index, Containment and Health Index, Stringency Index, and Economic Support Index rescaled to a value from 0 to 100 (100 = strictest).[96]

Since the measures taken by states are not identical in each country, this section will provide a general classification of the types of measures to prevent the spread of the virus. In particular, such actions will be classified according to their impact on investor relations and the overall investment climate in the countries.

Considering the intentions of executives and legislatures when adopting measures, Loukas Mistelis and Nikos Lavranos, in their work, propose to define such types of measures as State Intervention, State Participation, National Security, and Public Health.[97] This classification is not universal but makes it possible to generally outline the behavior of states in critical crisis situations.

At the moment, the political decisions of the countries regarding the response to the Pandemic are divided into two groups. The first is the isolation of sick and infected areas without the adoption of quarantine and the cessation of the movement of citizens. The second is more stringent measures – the introduction of quarantine, restriction of movement of citizens, and closure of public institutions up to the complete cessation of any business or social activity. At the beginning of the Corona crisis, the governments of most countries chose the second option, that is, strict control measures and restrictions.[98]

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[95] *Ibid*

[96] "Methodology for calculating indices," GitHub, accessed 20 December 2022, https://github.com/OxCGRT/covid-policy-tracker/blob/master/documentation/index_methodology.md.

[97] *See* Lavranos, Mazlom, *supra note*, 17: 7.

[98] *See* "Lockdowns compared: tracking governments' coronavirus responses," The Financial Times, accessed 20 December 2022, https://ig.ft.com/coronavirus-lockdowns/.

Observing how states have begun to ease quarantine measures since the beginning of 2022 because of an alternative to nationwide restrictions[99] (the invention of a vaccine, the development of "collective immunity", the development of a new model of the social organization of life and work – "virtual politics and economy", "social distancing", "remote mode of work and access", etc.) But it is hard to say that the time of crisis has passed, and in particular, restrictive measures in the field of foreign investment continue to be applied.

However, such strict measures had a very high economic price, and there are doubts about their effectiveness in the medium term, given that the epidemic may return in a few weeks or months. In this regard, it is now vital to understand the further development of the situation, for example, how it will be in China. Whether there will be a new outbreak of the epidemic after the restrictions are eased. Any re-isolation will bring again economic and psychological losses and rejection by society and business.[100]

State intervention includes export bans and restrictions, expropriation, moratoriums on proceedings, and suspension of targeted economic activities. For a measure to be considered an intervention, the state must affect how financial markets or industries operate.[101] For example, the government in Paris has announced that the state would intervene in any way necessary to protect the country's economic assets, with Finance Minister Bruno Le Maire saying that this could include capitalizing corporations or taking stakes in struggling companies.[102]

When resorting to export restrictions and prohibitions to safeguard national provisions of essential supplies, States interfere with domestic markets, as well as with supply chains linking industries to global markets. With the aim of securing domestic medicine supplies, India amended its policy to restrict the export of active pharmaceutical ingredients (APIS) effective from 3 March 2020.12 In doing so, India – arguably the world's largest generic drug manufacturer – paralyzed distribution channels that significantly affected foreign markets.[103]

In Europe, Italy is one of the countries that have experienced the highest level of the disease, so after the outbreak of Covid, the government introduced a state of emergency for a

[99] *See* Hurova Dariia et al., "Impact of the COVID-19 Pandemic on the Development of Tourist Regions of the World," in *The III International Science Conference "Interaction of society and science: problems and prospects",* Elena Pluzhnik (London: International Science Group, 2021), 449.
[100] "HOW TO FIGHT WITH COVID-19 IN THE WORLD: options for government decisions," International Centre for Policy Studies, accessed 20 December 2022, https://icps.com.ua/yak-boryutsya-z-covid-19-u-sviti-varianty-uryadovykh-rishen/.
[101] *Ibid.*
[102] Thomas Kohlmann, "European leaders weigh nationalization options," *Deutsche Welle*, March 19, 2020, https://www.dw.com/en/coronavirus-forces-eu-leaders-to-weigh-nationalization-options/a-52838689.
[103] Riley Griffin and Ari Altstedter, "India Restricts Exports of Common Drugs on Fear of Coronavirus Shortages," *Bloomberg*, March 3, 2020, https://www.bloomberg.com/news/articles/2020-03-03/india-cuts-drug-exports-as-threat-of-coronavirus-shortages-rises?leadSource=uverify%20wall.

period of 6 months. Government decrees in Italy provide for the complete closure of shops, bars, and restaurants throughout the country.[104]

Spain's approach focused on acquiring the means of production to secure medical provisions. Royal Decree-Law 463/2020 of 14 March 2020 declared a state of alarm.[105] After the first wave of the COVID-19 outbreak, measures were taken that expanded the government's authority to restrict foreign investment in specific strategic sectors.[106] Moreover, Spain has become almost the only country that, in addition to the widespread strict measures to combat the virus under Article 13, specified actions to ensure the supply of goods and services necessary for the protection of public health. This granted the State the power to intervene and temporarily occupy factories, production units, and private healthcare facilities.[107]

In Ukraine, the quarantine has brought down consumer intentions and almost stopped several industries – retail, hotel and restaurant business, and air transportation. Budget revenues have decreased. As a result of the quarantine, Ukrainian companies have frozen investments and production chains.

In Germany, amendments to the Decree on Foreign Trade and Payments restricted foreign investment in the design, development, and production of vaccines, medicines, protective medical equipment, and other medical products.[108] And on September 8, the German Bundestag approved the proposal of the Ministry of Health "On the application of new measures to combat COVID-19". This decree came into force on October 1 and will be valid until April 7, 2023.

China travel restrictions and bans continue to be lifted or increased as the domestic and foreign pandemic situation changes. Currently, foreign nationals may enter China for work, study, family reunion, or emergency humanitarian needs[109]. Therefore, the borders of China are still closed for tourist purposes, and there is no information about the opening of the country for visiting.

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[104] "Coronavirus: Italy imposes regional lockdown as Europe battles surges," BBC News, accessed 20 December 2022, https://www.bbc.com/news/world-europe-54839429.

[105] "Royal Decree 463/2020, of March 14, declaring the state of alarm for the management of the health crisis situation caused by covid-19," Agencia Estatal Boletín Oficial del Estado, note: article 116 of the Spanish Constitution, and as stipulated in Organic Law 4/1981 of 1 June, differentiates between states of alarm, emergency, and siege. Spain announced a "state of alarm", accessed 20 December 2022, https://www.boe.es/buscar/doc.php?id=BOE-A-2020-3692.

[106] Claudio Di Falco, "Global rules on foreign direct investment: Italy," *Norton Rose Fulbright*, March 2022, https://www.nortonrosefulbright.com/en/knowledge/publications/503220b7/italy.

[107] Adam Payne, "Spain has nationalized all of its private hospitals as the country goes into coronavirus lockdown," *Insider*, March 16, 2020, https://www.businessinsider.com/coronavirus-spain-nationalises-private-hospitals-emergency-covid-19-lockdown-2020-3.

[108] Neil Cuninghame, "The Impact of the Covid-19 Pandemic on Foreign Direct Investment Regimes," *Global Competition Review*, December 10, 2021, https://globalcompetitionreview.com/guide/foreign-direct-investment-regulation-guide/first-edition/article/the-impact-of-the-covid-19-pandemic-foreign-direct-investment-regimes.

[109] Chris Quan, "China Travel Restrictions & Travel Advisory," *China Highlights*, November 15, 2022, https://www.chinahighlights.com/travelguide/china-travel-reopen-restrictions.htm.

Lithuania was one of the European Union countries that responded to the COVID-19 pandemic the earliest and toughest, applying an extremely strict quarantine, during which the activities of many business sectors were restricted.[110]

These measures were taken to protect public health. However, individuals, enterprises with local capital, and foreign investors have felt their negative impact. The United Nations Conference on Trade and Development (UNCTAD) stated that "government measures to limit the negative economic impact of the pandemic are diverse and vary from country to country. While these measures are being taken to protect the public interest and mitigate the negative impact of the pandemic on the economy, some of them, depending on how they are implemented, may increase the risk that States will be involved in arbitration proceedings initiated by foreign investors under international investment treaties and/or investor-State agreements".[111]

The States have implemented different regulatory policies to protect the population from the spread of Coronavirus, as well as set unequal restrictions on foreign investment, in order to ensure the priority goals of economic, social, and political stability.

This section will determine what provisions of international law and investment treaty rule the states can rely on when defending against foreign investors' claims and exempt States from the need to compensate for damage. It is also analyzed whether such reservations can be effective in the case of a pandemic.

2.2 Exclusion from investors' protection guarantees.

When considering the relevant disputes, arbitral tribunals will have to take into account the specific conditions of the Pandemic. States generally have a significant "margin of discretion" to ensure the safety and health of their citizens under international law. The governments will also be able to refer to specific provisions in individual investment agreements that allow them to take measures necessary to maintain public order or protect public health. Although not all agreements contain such provisions.

In addition, international law provides exceptions that can possibly eliminate the illegality of State actions. In favor of the latest ones, there are several mechanisms that have already helped countries to develop successful protection strategies against the claims of foreign investors. This

[110] Bortkevičiūtė, R., et al., *From quick victories to painful defeats: Lithuania's public policy response to the COVID-19 pandemic and this crisis management in 2020 Public Policy Brief with Recommendations for Decision Makers,* (Vilnius: Institute of International Relations and Political Sciences of Vilnius University, 2020).

[111] "Investment Policy Responses to the COVID-19 Pandemic," UNCTAD, accessed 20 December 2022, https://unctad.org/system/files/official-document/diaepcbinf2020d3_en.pdf.

includes the concepts of force majeure, distress, and necessity.[112] The State's regulatory policy is also an integral tool for exercising the powers that define the crucial limits of the state's discretion. Still, each of these exceptions requires compliance with strict requirements, and the mere existence of a Pandemic is not sufficient in itself to justify restrictive measures.

2.1.1 Force major

Force majeure is defined as a basic excuse for the non-performance of an obligation and can be considered a "general principle of law".[113] The force majeure clause is applied in many areas of law – public international law, commercial law, and, less commonly – investment law and dispute settlements. According to international law and most investment agreements, force majeure refers to situations that occur beyond the control of the party (state) and prevent the fulfillment of the latter's obligations. In this sub-chapter, the state's reference to force majeure clauses will be analyzed in the context of national definitions, commercial agreements, and international agreements because the concept of force majeure contained in different sources is closely related to each other.

National framework. The concept of force majeure is not present in every legal system. However, national legislation establishes its own models of the release of the parties from obligations in connection with events that are unforeseeable and beyond the control of the parties, uses different terms, and develops an array of doctrines, such as "*force majeure*" (civil law system), "*frustration*" (United Kingdom), "*impossibility*", "*hardship*" (United States) or "*impracticability*", to deal with the fundamental change in circumstances for contractual performance.[114] But these similarities do not mean that the same event that may occur in different legal systems at the same time will lead to the same consequences.[115] One event may lead to exemption from liability in one country, while another may not recognize the same event as grounds for exemption.[116] Thus, the measures taken by the states cannot be defined in the same

[112] Federica I. Paddeu and Kate Parlett, "COVID-19 and Investment Treaty Claims," *Kluwer Arbitration Blog*, March 30, 2020, http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims/.
[113] For example, in the Mobil Oil Iran case, the Iran-US Claims Tribunal held that "force majeure, as a cause of full or partial suspension or termination of a contract, is a general principle of law which applies even when the contract is silent. "Mobil Oil Iran Inc. v. Iran, Partial Award, Award No. 311-74/76/81/150-3," ICSID, accessed 20 December 2022, https://jusmundi.com/en/document/decision/en-mobil-oil-iran-inc-and-mobil-sales-and-supply-corporation-v-government-of-the-islamic-republic-of-iran-and-national-iranian-oil-company-partial-award-award-no-311-74-76-81-150-3-tuesday-14th-july-1987.
[114] Lu Wang and Wenhua Shan, "Force Majeure and Investment Arbitration," *ICSID Review – Foreign Investment Law Journal*, 37, 2 (2022): 142. https://academic.oup.com/icsidreview/article/37/1-2/138/6593377.
[115] Peter Mazzacano, "Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG," *Nordic Journal of Commercial Law*, 2 (2011): 39, https://doi.org/10.5278/ojs.njcl.v0i2.3001.
[116] *Ibid*, 40.

way, and the very presence of coronavirus in the countries can be determined from their own perspectives. Other aspects are also important, whether such a crisis event can be considered unpredictable and beyond the control of the government; the level of morbidity of the population; the damage caused by the pandemic will also be determined by judges or arbitrators in each case individually.

For example, some States have established restrictive measures as force majeure at the legislative level. The Government of Ukraine has defined quarantine as a force majeure circumstance; the Court of Appeal in Singapore has ruled that the meaning of "force majeure" in a contract includes the COVID-19 pandemic and its consequences[117], the High Court of the United Kingdom has declared the COVID-19 pandemic to be tantamount to force majeure[118]. These decisions are of great importance in determining commercial relations.

Force majeure as such does not exist in the abstract. Thus, it cannot be that due to the declaration of quarantine (state of emergency, emergency situation, etc.), the parties are automatically released from fulfilling all their obligations. As a general rule, force majeure can be established only in relation to a specific commitment by proving that one particular restrictive measure introduced as part of the quarantine makes the performance of the agreement impossible.[119] Failure to perform duties due to force majeure is possible if a cause-and-effect relationship is proven. The circumstance itself does not exempt from the responsibility of fulfilling the agreements.

Commercial law. Regarding the definition of force majeure in commercial law, such clauses are contained in a number of international commercial treaties, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (PICC) and the International Chamber of Commerce.

The CISG does not explicitly disclose such a concept of force majeure and related synonyms used in different legal systems. Still, Article 79 defines an "impediment" that is beyond control, which can release a party from contractual obligations.[120] Peter Mazzacano wrote that the scope of article 79 has been considered so 'extremely broad' as to cover force majeure events and

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[117] "Force majeure clause ruled to cover Covid-19 pandemic and its effects," Pinsent Masons, accessed 20 December 2022, https://www.pinsentmasons.com/out-law/news/force-majeure-clause-ruled-to-covered-covid-19-pandemic-and-its-effects.

[118] David Cran, "High Court finds Covid-19 pandemic amounts to a force majeure event," *Reynolds Porter Chamberlain*, accessed 20 December, https://www.rpc.co.uk/snapshots/commercial-cases/spring-2022/high-court-finds-covid19-pandemic-amounts-to-a-force-majeure-event/.

[119] "Legal consequences of the spread of the COVID-19 coronavirus for the performance of contracts," Sayenko, Kharenko, accessed 20 December 2022, https://sk.ua/uk/news-uk/pravovi-naslidki-poshirennya-koronavi/.

[120] *See* art 79(1) of United Nations Convention on Contracts for the International Sale of Goods: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences." UNSITRAL, accessed 20 December 2022, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg.

other related situations of non-performance.[121] The UNIDROIT Principles[122] put essentially the same meaning into the concept of force majeure as the CISG. But unlike the CISG, the Principles are part of soft law. They are binding only in the event that the parties have agreed to refer to the document in the interpretation or as the applicable law in international commercial arbitrage.

The lack of a precise definition of force majeure in the above-mentioned documents creates a possibility to interpret and apply "impediments" differently. Whether the coronavirus can be unequivocally considered such an obstacle is not clear at first glance. Compared with domestic legislation provisions, international commercial law tends to take a broader and more flexible approach to force majeure circumstances related to the failure to fulfill contractual obligations.[123]

The main criterion for determining force majeure is establishing the event as insurmountable and unpredictable. A separate aspect is the following criterion that the party could not reasonably avoid or overcome the consequences of the impediment. Additionally, there is a classification based on the duration caused by such an event as permanent or temporary.[124] Temporary – that are theoretically or pre-established have a specific time: for example, road closures, floods, storms. Permanent – for an indefinite or pre-established long period: war, export/import restrictions, etc. As Nicolas and others defined it: "If there is a temporary impediment, suspension of obligations is followed, whereas, in the case of a permanent impediment, the exclusion of the liabilities appears."[125] The following analysis of the Pandemic as a possible force majeure event will be analyzed by taking into account the above criteria.

Some international documents establish a clear or exclusive list of phenomena and events that can be defined as force majeure. In Force Majeure and Hardship clauses Commentary prepared by ICC 2020, paragraph 3 (e) states: "plague, epidemic, natural disaster or extreme natural event."[126] A Pandemic is defined in the Oxford dictionary as "an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people."[127] According to this definition, the Pandemic is a concept that includes an epidemic and can be defined as force majeure.

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[121] Mazzacano, *supra note*, 115: 39–40.
[122] Art. 7.1.7 of "UNIDROIT Principles of International Commercial Contracts 2016," UNIDROIT, accessed 20 December 2022, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf.
[123] Lu Wang, *supra note*, 114: 144.
[124] Ş Esra Kiraz and Esra Yıldız Üstün, "COVID-19 and force majeure clauses: an examination of arbitral tribunal's awards," *Uniform Law Review*, 25, 4 (2020): 442. https://academic.oup.com/ulr/article/25/4/437/6055096.
[125] Klaus Peter Berger and Daniel Behn, "Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study," *6 McGill Journal of Dispute Resolution*, 4(2020): 83, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3575869.
[126] "ICC Force Majeure and Hardship clauses," International Chamber of Commerce, accessed 20 December 2022, https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/.
[127] John M. Last, editor, *A dictionary of epidemiology, 4th edition* (New York: Oxford University Press; 2001), 131.

International law. The definition of the force majeure clause in international public law takes place in accordance with the articles of the Responsibility of States for Internationally Wrongful Acts (ARSIWA), adopted by the International Law Commission (ILC) in 2001, which codifies the norms of international customary law.[128] The application of the provisions of this international instrument takes place when the court or Tribunal has reached a preliminary conclusion that the act of the State relied upon was not in conformity with what was required of it under any rule of international law, including obligations under the applicable investment treaty.[129]

In investment arbitration practice, the reference to force majeure may arise from the treaty and contractual clauses. These requirements also may be applied in parallel if the investment agreement contains an *umbrella clause*, which in turn may escalate from a breach of contractual provisions to a violation of the treaty.

Part 1 of Art. 23 of ARSIWA provides that the actions of a State in breach of its international obligation shall not be considered unlawful if the act was committed as a result of force majeure, i.e., a force that cannot be resisted or an event that cannot be foreseen and is beyond the control of the State, making it essentially impossible to fulfill the obligation.

Therefore, force majeure is defined as one of the six circumstances that exclude illegality in the actions of the State and can be applied as a result of the spread of the virus. Paragraph 2 of this article states that paragraph 1 does not apply if the situation of force majeure arose wholly or partly as a result of the actions of a state that relied on it or if the state assumed the risk of such a situation.[130]

It may seem that states can relatively easily defend themselves against the claims of foreign investors by arguing that the Pandemic is an external factor that meets all the criteria of force majeure. However, force majeure is usually interpreted narrowly in relation to the State's responsibility. This is not enough to justify that it has simply made it more challenging to fulfill a particular duty.[131] James Crawford and Simon Olleson consider the ARSIWA's definition of force majeure as 'strict and narrow'[132], that these conditions can be only interpreted in exceptional cases. Further, different approaches to the requirements for determining an event as force majeure will be analyzed in more detail.

[128] Dolzer, Schreuer, *supra note*, 37: 184.
[129] Lu Wang, *supra note*, 114: 146.
[130] "Draft articles on Responsibility of States for Internationally Wrongful Acts," United Nations, accessed 20 December 2022, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.
[131] Solveiga Palevičienė and Ovidijus Speichys, "Pandemijos poveikis investiciniam arbitražui," in *Teisė ir COVID-19 pandemija*, Lyra Jakulevičienė et al. (Vilnijus: Mykolo Romerio universitetas, 2022), 228.
[132] James Crawford and Simon Olleson, *The Nature and Forms of International Responsibility* (Oxford: Oxford University Press, 2010), 461.

Criteria to determine force majeure. There are certain disagreements in the scientific community in defining the criteria that characterize an event as force majeure. The first approach: (1) unforeseeable: the act in question must be brought about by an irresistible force or an unforeseen event; (2) uncontrollable: the act in question is beyond the control of the State concerned; and (3) impossible: it is materially impossible in the circumstances to perform the obligation.[133]

Another approach is broader and identifies five conditions necessary for an event to be defined as force majeure: (1) there must be an unforeseeable event or irresistible force (the "triggering event"); (2) the event must be beyond the control of the State; (3) the event must make it "materially" impossible to perform the obligation; (4) the State must not have contributed to the situation; and (5) the State must not have assumed the risk of the situation.[134]

Comparing these conditions, they look similar, but in this subchapter, force majeure will be analyzed from the point of view of the second approach, as it allows to characterize a particular event in more detail and recognize it as force majeure.

Unforeseeable event. The ARSIWA Commentary states that the triggering event may be either anthropogenic, natural, or a combination of both.[135] Moreover, the possibility of referring to force majeure is excluded if the occurrence of such an event in a certain way aggravated the fulfillment of an international obligation; for example, the political and economic crisis in a certain sense can be excluded from force majeure events.[136]

The criterion of the unpredictability of a Pandemic can be considered from two sides. First, the initial outbreaks of the virus can really be considered unpredictable, as the virus emerged suddenly and began to spread rapidly. The first critical days and weeks for some countries were uncertain, and as long as no one knew how the virus worked, the actions of the state could theoretically be considered a quick response to an emergency.

But over time, the question will arise whether the unpredictability criterion can really work in the long term. Since the virus has already spread worldwide, and there are no conditions for its complete disappearance, it is quite difficult to determine what period of time can be considered an event that could not be foreseen.

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[133] Sebastián Green Martínez and Mariana de la Rosa Riera, "COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure," Investment Arbitration Outlook Uria Menendez 6(2020): 35, https://www.uria.com/documentos/publicaciones/7055/documento/articulo.pdf?id=12837&forceDownload=true.

[134] *See* Federica Paddeu and Freya Jephcott, "COVID-19 and Defences in the Law of State Responsibility: Part I," *Blog of the European Journal of International Law*, March 17, 2020, https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/.

[135] Commentaries, *supra note*, 41: 184.

[136] *Ibid.*

Similarly, the other aspect for countries more distant from the first outbreak sites probably cannot rely on the criterion of unpredictability since, in the first weeks, it was possible to see how the virus spread in other countries and recognize that the same scenario could be observed in this country.

The second aspect of the first condition is an irresistible force. An important point – this power may not be unpredictable. The Commentary does not specify what is meant by "force", but scholars determine that this meaning most likely does not imply an event that has a certain physical force but rather any event that may cause a certain restriction or coercion.[137] In other words, when determining this criterion, the question arises whether the state could have taken any actions or measures to prevent the virus from entering its territory. Some scientists clearly state in their own work that states could not prevent the spread of coronavirus even with the most stringent measures – such as border closures, travel bans, total quarantine, airport checks, etc.[138] But it is difficult to formulate the state's position in this case.

Beyond the control of the State. The second condition is closely related to the other criteria and defines the event as beyond the control of the state. This criterion was added by the Drafting Committee[139] during the first reading of this provision "to further emphasize the element of impossibility" that underlies protection.[140] This criterion is closely related to the following conditions.

Materially impossible to perform the obligation. The next criterion is the main one for determining the event, which is considered the main difference between force majeure and distress. The event must lead to the fact that it is "substantially impossible" to fulfill the state's international obligation. The Commentary to the current Article 23 states only "material impossibility", but scientists also define the criterion "absolute impossibility" and the need to apply these two criteria simultaneously in practice. An example is the "Rainbow Warrior" case, where a need to prove the presence of these two criteria was mentioned. As the Tribunal notes: "a circumstance rendering performance more difficult or burdensome does not constitute a case of force majeure".[141] However, the discussion on this issue is still ongoing, and scholars' opinions and the tribunal's

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[137] Paddeu, Jephcot (Part I), *op. cit.* 124.
[138] *See* Matteo Chinazzi *et al*., "The effect of travel restrictions on the spread of the 2019 novel coronavirus (COVID-19) outbreak," *Science* 368, 6489 (2020): 395-400, https://www.science.org/doi/10.1126/science.aba9757; *see* Joel Hellewell *et. al*., "Feasibility of controlling COVID-19 outbreaks by isolation of cases and contacts," The Lancet Global Health 8, 4(2020) 488-496, https://www.sciencedirect.com/science/article/pii/S2214109X20300747?via%3Dihub.
[139] *See* "Yearbook of The International Law Commission, Volume I," Summary records of the meeting of the thirty-first session (New York: United Nations, 1980), https://legal.un.org/ilc/publications/yearbooks/english/ilc_1979_v1.pdf.
[140] Paddeu, Jephcot, *op. cit.*
[141] *See* "Rainbow Warrior (New Zealand v. France)," France-New Zealand Arbitration Tribunal, 82 I.L.R. 500 (1990), accessed 20 December 2022, https://iilj.org/wp-content/uploads/2016/08/Arechaga-etal-Rainbow-Warrior-1990.pdf.

decisions in applying the provisions differ. The Commentary does not exclude the possibility of avoiding the illegality of the State's actions in case of material impossibility.[142] It is not clear how the arbitrators will determine the presence of the virus as force majeure in practice, but that critical actions of the state that appeared as a result of the Pandemic can be recognized as a force majeure – that is, the initiating circumstance is not the virus itself but the measure taken in response to the disease.

Federica Paddeu and Freya Jephcott pointed out that if States have a choice (even if it is very limited), then the government faces not an absolute impossibility of implementation but a relative one.[143] Thus, the State cannot refer to non-performance due to force majeure but to the necessity and distress.

Non-contribution by the State. The fourth condition is no less complicated to analyze and apply – the state should not contribute to the force majeure situation. At first sight, the countries did not directly contribute to the emergence of the new virus. The scientific community and arbitral practice have not reached a consensus on how to characterize this approach. Federica Paddeu and Freya Jephcott give examples of cases where countries could contribute to force majeure – "chronic underfunding of public health care", "the slow response of some states to prevent and contain the spread of the virus".[144] Again, it is difficult to determine whether the Tribunal will define the criterion of state assistance in the context of the emergence or spread of coronavirus. As well as the definition of "significant contribution". The behavior of the governments of each country should be assessed separately in each case. As an example, it cannot be said that China and European countries have made the same contribution to the spread of the virus, as China has had precedents of different viruses, which, however, had less critical consequences for humanity.[145] Or another example – is the behavior of the Italian government. It did not take significant measures for a month and a half, even after the WHO declared a Pandemic.[146] Whether the behavior of the Chinese government can be regarded as contributing to the emergence and spread of the coronavirus, as well as whether the behavior of the Italian government contributed to the force majeure situation in the country, are questions that may cause discussion and different applications and decisions of Tribunals.

[142] Commentaries, *supra note*, 41: 187.
[143] Paddeu, Jephcot (Part I), *supra note*, 134.
[144] Paddeu, Jephcot (Part I), *supra note*, 134.
[145] See, Robert G Webster, "Wet markets – a continuing source of severe acute respiratory syndrome and influenza?" *The Lancet* 363, 9404(2002): 234-236, https://doi.org/10.1016/S0140-6736(03)15329-9.
[146] Iris Bosa *et. al*., "Response to COVID-19: was Italy (un)prepared?" *Health Economics, Policy and Law* 17, 1 (2021): 9, https://doi.org/10.1017/S1744133121000141.

Despite the link between State responsibility rules and international investment law[147], invocation of force majeure under ARSIWA was not widespread and rarely successful in investment treaty claims.[148] But due to the continuing existence of the pandemic, the concept of force majeure clauses may acquire a new meaning in settlement of investment disputes.

Summing up, it can be noted that the state's reference to force majeure events as exempting from liability will not have much success in investment disputes. Since it may be very difficult to define an event (restrictive measures of the state) as such that falls under all the necessary criteria. Only the next few years will show whether such an exemption from liability takes place in practice because now the practice of considering investment disputes due to restrictions imposed on investors during the pandemic has not gained momentum, but this practice will appear in the coming years.

When analyzing a force majeure situation, particular attention should be paid to the "material impossibility" of the state to fulfill its international obligations. Since this condition is critical in distinguishing force majeure from necessity and distress. The following subchapters reveal these differences in more detail.

Also, in the situation of the COVID-19 pandemic, such a tool may have a rather limited application, in terms of time perspective, because now the state restrictive measures are not of the same nature in different states and are also temporary. Therefore it may be difficult to prove the complete, and not temporary, the disappearance of the possibility to fulfill obligations.

2.2.2 Distress

The next important element of state protection may be the doctrine of distress. This possibility of defense is provided in the above-mentioned treaty on the responsibility of states for internationally wrongful acts (ARSIWA), Article 24. Paragraph 1 of this Article states that an act of a State in breach of its international obligation shall not be considered wrongful if the actor who committed the act had no other reasonable means of saving a life or the lives of persons for whom he is responsible in the circumstances of the disaster. Paragraph 2 of this Article establishes that paragraph 1 does not apply if the disaster situation arose wholly or partly as a result of the State relying on it or if the actions of the State caused a similar or even greater danger.[149]

[147] Crawford, *supra note*, 132: 127.
[148] Lu Wang, *supra note*, 114: 108.
[149] ARSIWA, *supra note*, 41.

The concept of applying the doctrine of calamity as one of the means to justify the actions of the state in determining measures aimed at reducing the spread of COVID-19 is the most difficult to define. The main criterion when referring to this means is the safety and preservation of human life. Thus, there is a rather narrow definition. Marie-Laure Bizeau assures that "it is possible that States will struggle to invoke this defense on the grounds of a pandemic since "[i]t does not extend to […] general cases of emergencies, which are more a matter of necessity than distress."[150]

Article 25 excludes the unlawfulness of a state act only in the case when the state representative could not act in any other way, i.e. there was no other reasonable way to save human lives. It is important to note that the pandemic, caused by a previously unknown virus, was spreading too fast. Therefore, the state has very little time to develop a rapid deterrence mechanism. The virus has a very high mortality rate among the population. That is why it can be possible to say that the virus endangers human lives. For example, if the state does not take any restrictive/deterrent measures, of course, the lives of citizens are exposed to a total risk of mortality, which the state cannot allow in any way. In the Commentary to ARSIWA, it is noted that in the context of Article 24, in the event of a disaster, it is about the immediate interest of saving the lives of people, regardless of their nationality.[151] In other words – a critical situation suddenly arises that endangers human life, and the state representative must act to save lives. The Commentary also gives examples of cases that fall under this definition of disaster – aircraft, and ships that entered the territory of the state under the influence of bad weather conditions or in case of mechanical or navigational malfunction.[152]

Understanding the general possibilities of applying distress as a release of the state from liability, it is possible to define the concept of application in the case of investors' claims against the state from the perspective of the doctrine.

Federica Paddeu and Freya Jephcott define the following criteria regarding the need for the state to prove that: 1) threat to life; 2) a special relationship between the State organ and the persons in question; 3) that there was no other reasonable way to deal with the threat; 4) that it did not contribute to the situation; (5) that the measures were proportionate.[153]

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[150] Marie-Laure Bizeau, "Investment Arbitration and Pandemic," *Jusmundi*, September 27, 2022, https://jusmundi.com/en/document/publication/en-investment-arbitration-and-pandemic?su=%2Fen%2Fsearch%3Fquery%3DInvestment%2520Arbitration%2520and%2520Pandemic%26page%3D1%26lang%3Den%26document-types%5B0%5D%3Dpublication&contents%5b0%5d=en.

[151] Commentaries, *supra note*, 41: 189.

[152] *Ibid.*

[153] Federica Paddeu and Freya Jephcott, "COVID-19 and Defences in the Law of State Responsibility: Part II," *Blog of the European Journal of International Law*, March 17, 2020, https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-ii/.

As analyzed above, in the context of the pandemic, there was definitely a threat to the lives of citizens. Regarding the second criterion for determining special relations, it can be established that the state directly cares about the health and safety of its citizens and determines the public health policy. Such care, in most cases, occurs at all levels of government, both state and local. As an example, in Ukraine, the decision to establish quarantine restrictions is made not only at the government level, but also such measures can be implemented in certain territorial areas, where, for example, the level of morbidity is increased or new outbreaks of the disease are observed.

The third criterion is the impossibility of acting in *another reasonable way* to prevent the threat. Special attention should be paid to the presence of such an element as "reasonableness", which allows a broader interpretation of the possibilities of state action and establishes a certain variability. The commentary to Article 24 describes reasonableness as a means "to provide some flexibility regarding the choices of action."[154]

Arbitrators will determine in each case the proportionality of state regulatory measures with the consequences and the necessity of taking these measures in a particular period of time, as well as the establishment of separate criteria such as necessity and sufficiency. Since the pandemic lasts differently in all countries simultaneously, it requires strengthening or softening the state regulatory policy. It is difficult to say how the arbitrator will determine the aggregate criteria, but only time will tell whether the state can really refer to cases exempting from liability in the context of the pandemic.

For example, some scientists highlight social distancing measures as a reasonable way out due to the lack of vaccines or targeted treatments.[155] In the period of time when there is a situation that a vaccine has not been invented and treatment approaches have not yet been determined, the introduction of social distancing measures is reasonable and proportionate at that time. It is hardly possible that this nationwide mandatory measure will be recognized as appropriate and reasonable when the population has the required number of vaccinations, and the overall situation is stable and under control (do not take into account measures that are of a recommendatory nature). But again, it should be emphasized that arbitrators will have a difficult task in analyzing specific state measures that caused damage to the investor, as states have implemented deterrence policies in very different ways.

The fourth criterion regarding the state's contribution to the danger, i.e. contributing to the situation, can also be interpreted ambiguously, just like the previous criterion. Solveiga Vilčinskaitė notes that it can be questioned whether the governments took certain measures in time. For example, if they reacted very softly to the outbreak of the pandemic, i.e. contributed to

[154] Commentaries, *supra note*, 41: 193.
[155] Paddeu, Jephcot (Part II), *supra note,* 153.

the spread of the coronavirus, in this case, the state later had to take extremely harsh and burdensome measures to combat the pandemic.[156]

To summarize, compared with force majeure clauses, the doctrine of distress is more universal in application, but all states may not apply this concept. But still, the problematic points are the definition of a pandemic as a disaster and the recognition of state actions as those aimed at saving lives and protecting their health. Also, a separate point is the definition of the element of "reasonableness", the correlation of states' measures with the consequences they have led to, and whether this behavior can be considered proportional. The temporal perspective is also of significant importance in determining state conduct aimed at preventing the spread of the virus and protecting lives. If the tribunal finds that all the necessary criteria are met, the investor will not be able to satisfy its own claims.

2.2.3 Doctrine of Necessity

The doctrine of necessity is enshrined in Article 25 of the draft articles on State responsibility (ARSIWA). Paragraph 1 of this Article states that a State may not invoke necessity as a circumstance precluding the wrongfulness of an act in breach of an international obligation: "unless that act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; (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."[157] Part 2 of this article states that a state may not invoke necessity as a circumstance eliminating the unlawfulness of its actions if an international obligation of the state does not allow it to invoke this circumstance or if the state itself contributed to the circumstances that determined the necessity. [158]

The definition of the doctrine of necessity is also interpreted narrowly, as well as the above grounds for exemption from the state's international obligations. Dolzer, in his work, notes that the situation is assessed objectively without attaching much importance to the states' explanations that certain circumstances have led to a situation of necessity.[159]

In order to determine the actions of the state as falling under the definition of necessity, there are four criteria of justification: 1) there must be a serious and imminent danger; 2) the danger must threaten a substantial interest; 3) the state action must not seriously impair another substantial

[156] Palevičienė, Speichys, *supra note*, 131, 224.
[157] ARSIWA, *supra note*, 41: art. 25(1).
[158] ARSIWA, *supra note*, 41: art. 25(2).
[159] Dolzer, Schreuer, *supra note*, 37: 184.

interest; 4) the state action was "the only way" to protect the interest from the danger.[160] Scientists also note a different structure and sequence in the definition of such criteria, but there is no significant difference in the content.

Regarding the first criterion – the existence of a serious and imminent threat. In the commentary to Art. 25, the authors note that it is better to consider this condition through the prism of risk and harm caused – there is an imminent risk that an important interest will be substantially harmed.[161] Federica Paddeu and Freya Jephcott point out that the source of such damage can be both an event that took place in the past, which is continuing now, and an event that will take place in the future.[162]

An additional condition may be the presence of a state's *desire to protect* an essential interest.[163] The Commentary does not contain a list of material interests: the examples given are intended to illustrate the general nature of the protection, not to provide a list of interests that may be considered material.[164] Michael Weibel gives examples of essential interests, such as the existence and independence of the state, the maintenance of public order, the welfare of the state's population, etc.[165]

Also, this essential interest can include the "protection of public health and life" in the context of the Pandemic. As an additional condition for determining a significant interest, the Commentary highlights that: "it extends to particular interests of the State and its people, as well as of the international community as a whole"[166], in other words, "materiality" is not only in the interests of a particular state, but may have an international character or concern other states. In this context, the pandemic has been classified by WHO as an emergency situation in the field of public health, which has an international character and threatens the health and life of people, not only within one state but also beyond its borders.[167]

For example, in the case of National Grid P.L.C. V. Argentine republic, the tribunal noted that "essential interest" depends on the overall circumstances of the case and cannot be determined in advance" and acknowledges that interest as "the actions … as an objective *the protection of social stability and the maintenance of essential services vital to the health and welfare of the*

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[160] Paddeu, Jephcot (Part II), *supra note,* 153.
[161] *Ibid.*
[162] *Ibid.*
[163] See, Leonardo Carpentieri, "Necessity as a Defence," *Jusmundi,* July 25, 2022, https://jusmundi.com/en/document/publication/en-necessity-as-a-defence.
[164] Federica Paddeu, and Michael Waibel, "Necessity 20 Years On: The Limits of Article 25," ICSID Review – Foreign Investment Law Journal 37, 2 (2022): 172, https://doi.org/10.1093/icsidreview/siab047.
[165] *Ibid.,* 173.
[166] Commentaries, *supra note,* 41: 202.
[167] "Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)," World Health Organization, accessed 20 December 2022, https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

population, an objective which is recognized in the framework of the international law of human rights."[168] Analyzing these definitions from the point of view of the Pandemic, it should be noted that if the *essential interest* is public health and life, then the *risk of harm* is the spread of coronavirus. And this *imminent harm*, respectively – is a disease that poses a threat to health and can cause death.

The next requirement is that the state should not seriously limit the essential interest of another state or the international community as a whole by its actions.[169] Solveiga Vilčinskaitė defines this criterion as an "absolute necessity of the state" and notes that "in most cases, it will be difficult to meet such a criterion because the pandemic management measures applied by the states were aimed at controlling the situation within a country."[170] In general, in the practice of investment arbitration, no decisions would analyze this criterion in detail. It is noted that the other party's interests are taken into account unequally when considering disputes. For example, in the case of Impregilo Spa v Argentine Republic[171], the Tribunal takes into account only the interests of another state; in the case of Enron Corporation and Ponderosa Assets LP v Argentine Republic[172], not only the interests of the other party to the agreement are considered, but also the interests of the investor. Special attention should be paid to the decision CMS Gas Transmission Company v Argentine Republic[173], where the interests of the investor are included in the interests of the other party. Therefore, while analyzing this criterion, the Tribunal does not have a universal approach and proceeds from the analysis of the situation in each case individually.

The last criterion is the only possible option for the state to behave. In characterizing such a condition, the Tribunal must clarify the question of whether the state had any alternative options for behavior in a particular case. Michael Weibel notes that, in practice, investment tribunals quite easily establish the existence of available alternatives, thus proving that the state measures were not the only available option.[174] But it is not clear how the Tribunal will determine such a condition. Of course, the measures imposed by the state must be analyzed objectively from the point of view of a retrospective approach and not in comparison with the general situation that exists at the moment. That is, for example, was the closure of borders really the only possible option when the virus had already spread throughout the country, or a total lockdown – did the

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[168] See, para. 245 of "National Grid plc v. The Argentine Republic, UNCITRAL, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/ita0555.pdf.
[169] Paddeu, Jephcot (Part II), *supra note,* 153.
[170] Palevičienė, Speichys, *supra note,* 131, 228.
[171] *See* para. 354 of "Impregilo Spa v Argentine Republic, ICSID Case No ARB/07/17, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/cases/554.
[172] *See* para 342 of "Enron Corporation and Ponderosa Assets LP v Argentine Republic, ICSID Case No ARB/01/3, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/cases/401.
[173] *See* CMS Gas, *supra note*, 54: paras. 357-58.
[174] Paddeu, Waibel, *supra note*, 164.

government have alternative options? Scientists are critical of such extreme measures and determine that in the absence of an effective vaccine or treatment protocol, etc., could essentially be considered the "only way", but such an approach is not individual, and the variability in government actions may differ from country to country and in certain situations.[175]

States cannot invoke such an exemption from liability if the state action "contributed" to the situation. A similar clause was analyzed in the previous exceptions – force majeure and distress but interpreted differently in the Commentary. The text of the Commentary states that such contribution must be sufficiently substantial and not incidental or secondary.[176] Scholars point out that this standard is more "categorical" compared to other exceptions, but this standard is also limited in clarity of interpretation.[177] Currently, there is no unified approach in the practice of investment dispute settlement in determining when the state actions may contribute to the situation, whether a long retrospective of the state policy is taken into account and over what time period, whether there are only specific preconditions that led to the spread of the critical situation, i.e. direct or indirect causal links between the policy and the crisis are established.

For example, in the judgment of the Tribunal in the case of Impregilo S.p.A. v. The Argentine Republic, "(…) a State's contribution to its necessity situation, need not be specifically intended or planned – it can be the consequence, inter alia, of well-intended but ill-conceived policies."[178] Contrary, in the decision of Urbaser S.A. v. The Argentine Republic, the Tribunal interprets the conduct of the state narrowly: "(…) the Government must have known that such crisis and emergency must have been the outcome of its economic and financial policy."[179]

Summing up, when determining the exemption from liability for reasons of necessity, special attention should be paid to the fact that the criterion of the only possible way of behavior from the State's side cannot be applied in many cases. Since there are still ongoing discussions in society and the scientific community about the appropriateness, nature, and scale of pandemic control measures, there is still no precedent practice, and it cannot be established that a certain specific measure was the only possible one in this case. But in that case, the burden of proof is on the State, so if they can provide a really reasonable strategy of protection for their actions at that particular time, the doctrine of necessity can be applicable.

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[175] *See* Paddeu, Jephcot (Part II), *supra note*, 153.
[176] Commentaries, *supra note*, 41: 205.
[177] Paddeu, Jephcot (Part II), *supra note*, 153.
[178] *See* para. 354 of "Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/ita0418.pdf.
[179] *See* para. 711 of "Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

2.2.4 Doctrine of Regulatory Powers

As already noted, public health can be a legitimate aim for imposing restrictions. In the case of COVID-19-19, the lack of consensus on how to overcome the coronavirus may support the State's position on a wide margin of appreciation for the exercise of its functions. The unpreparedness of the world community for the pandemic and the lack of a vaccine and any treatment for the virus may be an additional justification.

In general, the state as a sovereign has a significant margin of discretion to choose certain measures in the public interest. In the context of international law, this is covered by the doctrine of "police powers". This doctrine was recognized as a principle of customary international law and included in the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens[180], and in 1987, The Foreign Relations Law of the United States (the third edition)[181]. The doctrine of regulatory powers of the state is based on the fact that the state has an inherent right to regulate in order to protect the public interest and does not act unlawfully, where under this power, it adopts fair, non-discriminatory and proportionate rules in accordance with due process of law.[182] For example, the legitimate exercise by the state of its police powers in response to the COVID-19 pandemic will, in certain cases, not be considered an expropriation requiring compensation, as public health protection is more often seen as an essential exercise of the state's police power. These cases will be mentioned below.

For example, Art.43 of the Constitution of Italy establishes possible cases of expropriation:

> "*For purposes of general utility the law* may reserve in the first instance or transfer, by means of *expropriation and with payment of compensation*, to the State, to public bodies, or to workers or consumer communities, specific enterprises or categories of enterprises of primary common interest that concern *essential public services* or energy sources, or act as monopolies."[183]

Thus defining public purposes as "purposes of general utility" and "essential services" – these public services also can include cases of national health or economic emergencies. Public interest is defined differently in various investment agreements.

In order to define certain criteria that could characterize the doctrine of regulatory powers, it is necessary to refer to the practice of the Tribunal since this doctrine does not contain a clear

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[180] *See* Louis B. Sohn and B. B. Baxter, "Draft Convention on the International Responsibility of States for Injuries to Aliens," *American Journal of International Law* 55, 3 (1961): 556, https://doi.org/10.2307/2195879.

[181] *See* para. 721, comment. (g) of *The Foreign Relations Law of the United States (III edition*), (Philadelphia: The American Law Institute, 1987), 254.

[182] Alice Osman, "Police Powers Doctrine," *Jusmundi*, accessed 20 December 2022, https://jusmundi.com/en/document/publication/en-police-powers-doctrine.

[183] "The Constitution of The Italian Republic," RefWorld, accessed 20 December 2022, https://www.refworld.org/docid/3ae6b59cc.html.

definition and is not codified at the level of international agreements. This is confirmed by the recent decision of the Tribunal in the case of Magyar Farming v. Hungary(2019): "There is no comprehensive test that may be used to distinguish regulatory expropriation, for which compensation is required, from an exercise of police or regulatory powers, which does not give rise to a duty of compensation."[184] In the words of Saluka v. Czech Republic, "international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered 'permissible' and 'commonly accepted' as falling within the police or regulatory power of States and, thus, non-compensable."[185]

The most frequent cases of determination of regulatory powers appear in cases of expropriation. The practice of investment dispute settlement is developed in the definition of regulatory powers, so the Tribunal proceeds from the definition of such state policy and its compliance with certain criteria and draws parallels in distinguishing the necessary policy from expropriation. In the case of Hydro and others v. Albania, the Tribunal highlights:

> "It is trite that a State may undertake regulation that is bona fide in the public interest without any question of expropriation arising. The question is "whether particular conduct by a state 'crosses the line' that separates valid regulatory activity from expropriation."[186]

The same opinion is confirmed by OCSD Working Papers on International Investments[187]. Some international investment agreements and treaties[188] explicitly contain a reservation to distinguish expropriation with the necessary compensation from non-compensable regulatory measures.[189] However, Sicard-Mirabal, J. and Derains, Y. note that if the tribunal considers the

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[184] *See* para. 365 of "Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27, Award" ItaLaw, accessed 20 December, https://www.italaw.com/cases/7661.

[185] *See* para. 263 of "Saluka Investments B.V. v. The Czech Republic, PCA, Partial Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf.

[186] *See* para. 698 of "Hydro S.r.l. and others v. Republic of Albania, ICSID Case No. ARB/15/28, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/cases/3958.

[187] OCSD, Indirect Expropriation, *supra note*, 81.

[188] *See* "Kuwait – Singapore BIT (2009)," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5015/download; *see* art. 20 of "COMESA Investment Agreement," UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download; *see* para 734-35 of "Oxus Gold v. Republic of Uzbekistan, 2015, Final Award," UNCITRAL, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf.

[189] *See* Art. 20(8) of COMESA Investment Agreement: "*Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article*." UNCTAD, accessed 20 December 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download.

doctrine to form part of customary international law, the State will be allowed to rely on the doctrine even if it is not expressly incorporated into the treaty in question."[190]

And in an exemplary decision for this category Philip Morris v. Uruguay, The Tribunal sets out the main criteria for justifying the state policy: "As indicated by earlier investment treaty decisions, in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory and proportionate. In the Tribunal's view, the SPR and the 80/80 Regulation satisfy these conditions."[191] This decision also noted that the doctrine of regulatory powers is closely related to expropriation measures.

Although this decision is fundamental from the point of view of defining the Powers policy, there is also criticism of the above decision among scholars. In particular, Prabhash Ranjan notes that "The tribunal's reasoning was internally inconsistent and based on abuse of arbitral precedents."[192] The author also criticizes the Tribunal's use of Article 31(3)(c) of the Vienna Convention on the Law of Treaties when interpreting police power and expropriation in a bilateral agreement. That is why a single approach has not been established, and each case is considered taking into account all the details of a specific case.

The police powers allow the state to be exempt from the obligation to compensate the investor in certain cases: when the measures taken by the state fall into one of the following two categories: (a) they are generally applicable regulatory measures aimed at enforcing existing rules aimed at infringing the investor's own rights, such as criminal, fiscal and administrative sanctions and the revocation of licenses and discounts; and (b) they are regulatory measures aimed at reducing the harm caused by the investor's activities that may pose a threat to *public health, the environment or public order, such as banning harmful substances,* requiring the use of plain packaging of tobacco or applying emergency measures in times of political or economic crisis.[193]

In other words, the state's regulatory policy should be aimed at regulating the negative activities of the investor in order to ensure public safety and order (in our case, consider the population's safety). But in the case of the spread of coronavirus, such a negative impact on the

[190] Yves Derains and Josefa Sicard-Mirabal, *Introduction to Investor-State Arbitration* (Netherlands: Wolters Kluwer, 2018), 126.
[191] *See* para.305 of "Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award," ItaLaw, accessed 20 December 2022, https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf.
[192] Prabhash Ranjan, "Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(C) of the VCLT: A Critique of Philip Morris v. Uruguay," *Asian Journal of International Law* (2018), https://ssrn.com/abstract=3280892.
[193] *Ibid.*

political course of the state was caused by external circumstances and not directly through the relationship between the investor and the state.

Another example that may be a useful precedent in determining the criterion of good faith and reasonableness is the "Bischoff" case. It related to the seizure and forced quarantine of a German ship during the smallpox epidemic in 1898 due to the suspicion that the ship was infected with the disease. The ship suffered significant damage during the detention, and its owners demanded compensation. The dispute review commission noted that the detention of the vessel constituted the use of legitimate government functions (police powers). That is, such preventive measures of the state were aimed at protecting the health of the population. During an infectious disease epidemic, the state would not be liable if the use of such functions was reasonable. In this case, the ship was detained for an unreasonably long time, which led the commission to decide that this measure was unreasonable and to award compensation to the owners.[194]

Regulatory policies must also be adopted in accordance with due process of law to be considered a legitimate exercise of police powers. This criterion has been discussed in detail under expropriation above.

The state has a wide margin of appreciation for taking measures in the public interest, especially when it comes to reducing threats to public health. This doctrine has become part of international law and has proven its effectiveness through its application in a number of investment disputes.[195]

Public health protection. The concept of health is regarded as the absence of disease of the public.[196] In defining public health and its place among international agreements, an important place is occupied by analyzing the old generation of treaties and comparing them with the new generation. For example, older agreements contain fewer reservations about this concept (and sometimes do not mention it at all), unlike newer ones. Until 2010, there was almost no tendency to include provisions on public health protection in the "first generation" treaties (Table 3).[197]

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[194] *See* "Biscoff case, Commission Germany-Venezuela, 1903," Jusmundi, accessed 20 December 2022, https://jusmundi.com/en/document/decision/en-bischoff-case-opinion-of-duffield-umpire-thursday-1st-january-1903.

[195] Oleh Alioshyn *et al*., "Will restrictive measures taken during the pandemic become grounds for lawsuits by foreign investors," *LigaZakon*, accessed 20 December 2022, https://uz.ligazakon.ua/ua/magazine_article/EA013927.

[196] Frances Wilson *et al*., Key Concepts in Public Health, (II edition) (London: SAGE Publications Ltd, 2009) pp. 83–140, https://www.perlego.com/book/861596/key-concepts-in-public-health-pdf.

[197] Freya Baetens, "Protecting Foreign Investment and Public Health Through Arbitral Balancing and treaty Design," International & Comparative Law Quarterly 71, 1 (2022): 139-182, https://doi.org/10.1017/S0020589321000488.

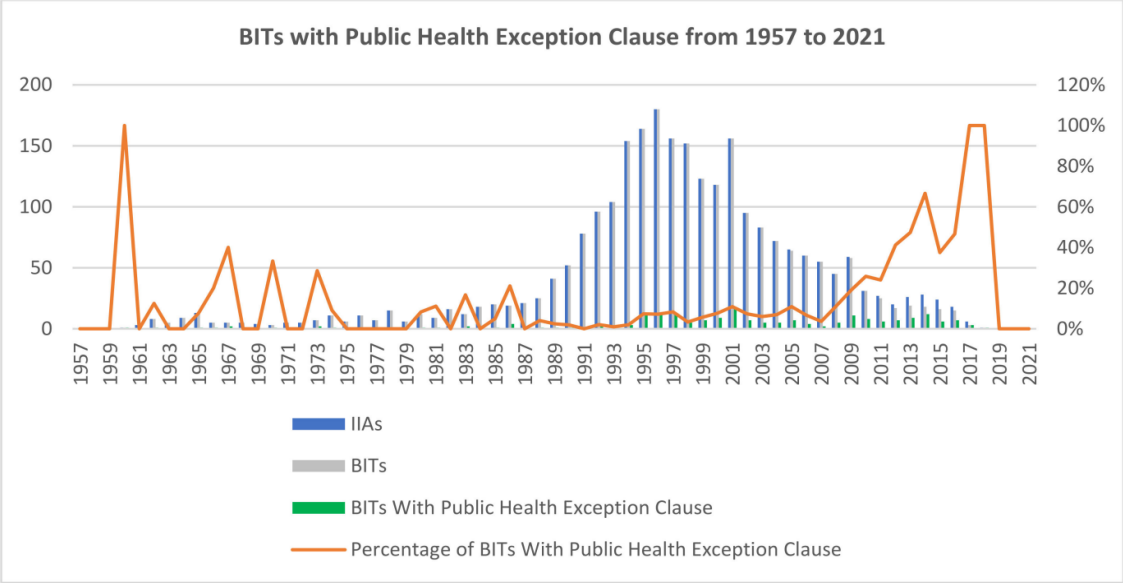

Table 3. BITs with Public Health Exception Clauses from 1957 to 2021.[198]

In total, at least 33 known ISDS cases[199] directly related to public health have been initiated in developed and developing countries. And as a result of investment dispute settlement, the Arbitration had to independently compare the interests of the state in protecting the population and the interests of the investor, which were explicitly protected in the investment treaties. The most famous decisions in the previous proceedings were related to access to medicine, health damage caused by tobacco smoking, and cases related to measures aimed at protecting health caused by the environment.[200]

But it can be assumed that the number of cases that will have a direct or indirect connection with the definition of "public health" will increase significantly due to the impact of COVID-19. UNCTAD, in their published "Notes," described the ongoing COVID-19 pandemic crisis as likely to have further increased the degree of awareness of the tension between investment protection and the State's right to regulate as International Investment Agreements commitments and measures taken to mitigate the impact of the pandemic may potentially come into conflict.[201] Regarding the new generation of agreements, especially the model agreements that concluded after 2010, states began to include references to human rights, the environment, and more detailed references to the protection of public health.

[198] Guangyi Qu and Wei Shen, "Public Health and Investment Protection in the Context of the COVID-19 Pandemic – From the Sustainable Perspective of Exception Clauses," Sustainability 14, 11 (2022): 7, https://www.mdpi.com/2071-1050/14/11/6523.
[199] "International Investment Policies and Public Health," UNCTAD, accessed 20 December 2022, https://unctad.org/system/files/official-document/diaepcbinf2021d5_en.pdf.
[200] *See* Baetens, *supra note*, 197.
[201] *Ibid.*

To sum up, it is a fallacy to associate all COVID-19 policies with public health concerns. The above-analyzed measures aim to tackle disruptions in politics and economics. Though essentially triggered by the pandemic, areas confirm the protectionist, societal, and security aims States might prioritize. Protecting public health is certainly within the discretion of governments, but such regulatory measures should not be unreasonable and absolute. Another aspect of applying regulatory policy is that governments impose such measures in response to investors whose activities adversely affect public safety and public health. The COVID-19 virus exists independently of the activities of investors. Therefore, in the event of a Pandemic, the actions of the state are related to stopping the spread of the virus, which worsened the state of investors' rights, and not in response to the negative actions of the investor.

3. PANDEMIC IMPACT ON INVESTMENT ARBITRATION

In this part, it is considered the impact on the regime of investment arbitration and its main changes since the possibility of challenging the actions of the state by the investor is an inherent right of the latter. Moreover, such an analysis is appropriate from the point of view of opportunities to protect the state and is an integral part of the concept of investment protection as a whole. Since the Pandemic affected not only the state system, society, and politics but also all other areas closely related to the above-listed ones, for instance, the activities of foreign investors, the state in relation to investors, and investment arbitration in general.

Whereas the Pandemic has become a quick and unexpected phenomenon for society, and the measures to fight the virus were sometimes too restrictive[202], the search for a solution to new challenges has begun. For example, restrictions on the ability to work, closure of establishments, shops, etc., and the need for social distancing caused adaptation to modern realities. One of the quick decisions of society was the transfer of activities to the virtual space. As a result, government bodies, companies, courts, and schools worldwide have switched to the "online" format. The need to ensure the effective operation of the Investment Tribunal was not an exception.

A significant number of institutions in the world deal with the settlement of investment disputes; in particular, an important place is occupied by the ICSID – International Center for Settlement of Investment Disputes. Nowadays, this organization does not include all the countries of the world, but 154[203]. However, international investment agreements in their provisions allow this institution and other Tribunals (for example, ICC, UNCITRAL, SIAC, LCIA, etc.) to seek help settling disputes. It can be said that arbitrations started reforming their activities long before the start of the Pandemic, but the biggest changes were caused by state measures to contain the spread of COVID-19.

Among the factors that contributed to the damage caused by the virus, scientists single out the following:

1) the flexibility of the arbitration rules, which allows the parties to adapt the procedure to their needs, for example, to agree on the procedural schedule, easily adjust the terms, postpone the hearing, etc.;

2) using technologies, video conferences, and virtual hearings even before the COVID-19 Pandemic; this is connected with the presence of digitization mechanisms that have already been launched, the preliminary development of numerous documents, recommendations, and the

[202] *See* the analysis of the state's measures in Chapter 2.1.
[203] According to 2020 data, "Database of ICSID Member States," ICSID, accessed 20 December 2022, https://icsid.worldbank.org/about/member-states/database-of-member-states.

implementation of the contactless provision of documents, hearings, decision-making, etc., which was implemented by leading arbitration institutions during the last decade;

3) incessant administrative support of arbitration proceedings by arbitration institutions that continue to function effectively;

4) digitalization: electronic registration and paperless consideration of cases (witness testimony, exhibits, expert opinions, as well as all procedural correspondence can be exchanged only in electronic form, a feature that still does not occur in many national court systems);

5) time and costs: arbitration is generally considered a less expensive and faster alternative to national courts.[204]

As an example, since 2014, the ICC has been on the path to reform, implementing recommendations on the use of new technologies in arbitration. In 2017, a report on the use of information technologies was presented, and the rules of abbreviated procedure for minor cases were introduced, according to which arbitrators were not obliged to conduct hearings and could base their decisions only on the consideration of documents.[205]

In April 2020, the International Court of Arbitration of the ICC (hereinafter – the ICC, the Court) published the ICC Guidelines on possible measures aimed at reducing the consequences of the COVID-19 Pandemic (hereinafter – the ICC Guidelines).[206]

The document covers separate tools related to the organization of virtual hearings, providing and receiving documents from the ICC Secretariat, speeding up the consideration of cases by the arbitration panel, and guaranteeing their delivery of arbitral awards in the conditions of the COVID-19 Pandemic. The ICC Guidelines indicate that the Court recognizes the important role that parties, counsel, and arbitral Tribunals play in ensuring that disputes continue to be resolved fairly, expeditiously, and cost-effectively by listing procedural tools available to parties, counsels, and the composition of the arbitral Tribunal to mitigate delays caused by the Pandemic by improving efficiency and providing recommendations for the organization of conferences and hearings in the context of taking into account the particularities of COVID-19, including the conduct of such conferences and hearings by audio conferencing, video conferencing or other similar means of communication (commonly referred to as "virtual hearings"). The ICC

[204] "Coronavirus (COVID-19) and Courts: Moving from Litigation to Arbitration?", International Arbitration, accessed 20 December 2022, https://www.international-arbitration-attorney.com/coronavirus-covid-19-and-courts-moving-from-litigation-to-arbitration/.

[205] Horacio Grigera Naón and Björn Arp, "Virtual Arbitration in Viral Times: The Impact of Covid-19 on the Practice of International Commercial Arbitration," Washington College of Law, accessed 20 December 2022, https://www.wcl.american.edu/impact/initiatives-programs/international/news/virtual-arbitration-in-viral-times-the-impact-of-covid-19-on-the-practice-of-international-commercial-arbitration/.

[206] "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic," International Chamber of Commerce, accessed 20 December 2022, https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/.

Guidelines also contain two appendices: a protocol checklist for virtual hearings, proposed caveats for cyber protocols, and procedural orders related to virtual hearings.

In addition, Article 26(1) of the ICC Arbitration Rules provides that the arbitral Tribunal, after consultation with the parties and taking into account all the relevant facts and circumstances of the case, may decide that any hearing should be held in person or remotely (video conference, telephone or other appropriate means of communication).[207]

Other leading arbitration institutions have prepared similar recommendations: Hong Kong International Arbitration Center (HKIAC) published HKIAC Guidelines for Virtual Hearings[208], Vienna International Arbitration Center (VIAC) – Vienna Protocol – Practical Checklist for Conducting Remote Hearings[209], Stockholm Chamber of Commerce (SCC) Arbitration Institute prepared a Checklist for Conducting Arbitration and Mediation Hearings in Times of COVID-19, China International Economic and Trade Commission (CIETAC) prepared CIETAC: Guidelines for the Active and Appropriate Conduct of Arbitration during the COVID-19 Pandemic, containing specific measures for the use of the online filing system, delivery of documents and conducting of hearings, including an appendix containing provisions on virtual hearings (entered into force on May 1, 2020, and will cease to be effective after the end of the Pandemic)[210], etc. Also worth mentioning is the position of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), which has proposed its own SCC Platform for conducting ad hoc arbitration involving parties from all over the world, starting in May 2020, which should serve as a safe and free digital platform for communication and exchange of files between the parties and the composition of the arbitration during the COVID-19 Pandemic.

As for the activities of the ICSID, the organization of the hearings has not undergone any changes. Article 32 of the ICSID Arbitration Rules refers to the hearing, although it does not specify if the oral presentations must be done in person or by any virtual means[211]. Bjorn Arp and Edwin Nemesio mentioned that the rules leave a broad margin of discretion to the Arbitral Tribunal

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[207] "ICC Rules of Arbitration," ICC, accessed 20 December 2022, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.

[208] "HKIAC Guidelines for Virtual Hearings," HKIAC, accessed 20 December 2022, https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_3.pdf.

[209] "The Vienna Protocol – A Practical Checklist for Remote Hearings," VIAC, accessed 20 December 2022, https://www.viac.eu/images/documents/The_Vienna_Protocol_-_A_Practical_Checklist_for_Remote_Hearings_FINAL.pdf.

[210] "Guidelines on Proceeding with Arbitration Actively and Properly During the COVID-19 Pandemic," China International Economic and Trade Arbitration Commission, accessed 20 December 2022, http://www.cietac.org/index.php?m=Article&a=show&id=16919&l=en.

[211] *See* rule 32 of the "ICSID Arbitration Rules," ICSID, accessed 20 December 2022, https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf.

to give effect to these provisions.[212] Furthermore, Rule 26 of the Administrative and Financial Rules of ICSID provides that the Secretary General "shall make or supervise arrangements if proceedings are held elsewhere," referring to a place different than the Center.[213] The Tribunal also recalled that it is allowed to submit all procedural documents in electronic form[214], and it is also allowed to hold meetings *virtually*.

Arbitral proceedings impact. From the author's point of view, it is necessary to pay attention to the study of S. Vilske and the conclusions drawn as a result of it, aimed at classifying approaches to responding to the COVID-19 Pandemic, depending on the timeliness of their introduction and effectiveness. Among the short-term solutions, the scientist refers to the closing of access to the premises of arbitration institutions; conducting virtual hearings as a universal solution, which, however, has certain negative consequences in the context of proper questioning of witnesses (especially if it is carried out cross-examination). Medium-term ones include: making changes and introducing more flexible procedures within the arbitration regulations and recommendations; an increase in the number of arbitration proceedings, including in the framework of investment arbitration (it is quite obvious that strict state restrictions and regulations contradict the expectations of any foreign investor regarding the legal framework and economic conditions of his investments).[215]

Meanwhile, in the context of long-term forecasting of the impact of the COVID-19 Pandemic on international commercial arbitration, the researcher points to the central role in the new digitized and virtualized world of arbitration of virtual hearings, expressing the hope that with the introduction of virtual hearings, the arbitration will become faster, cheaper and perhaps even better, given the lower environmental impact due to no travel to the hearing location and the paperless – in fact, even almost contactless – arbitration.[216] Such hopes are not unfounded and speak in favor of a high probability of an irreversible change in the practice of consideration and resolution of disputes by arbitration in the post-Covid world.

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[212] Bjorn Arp and Edwin Nemesio, "The Practice of Virtual Hearings During COVID-19 in Investment Arbitration Proceedings," in *The Impact of covid on International Disputes*, Shaheeza Lalani and Steven G. Shapiro (Lieden: Brill, 2022). 158.

[213] *See* Rule 26 of "ICSID Administrative and Financial Rules," ICSID, accessed 20 December 2022, https://icsid.worldbank.org/sites/default/files/Administrative_and_Financial%20Regulations.pdf.

[214] "Message Regarding COVID-19 (Update)," ICSID, accessed 20 December 2022, https://icsid.worldbank.org/news-and-events/news-releases/message-regarding-covid-19-update.

[215] Stephan Wilske, "The Impact of COVID-19 on International Arbitration – Hiccup or Turning Point?" *Contemporary Asia Arbitration Journal* 13, 1 (2020): 12-27.

[216] *Ibid*, 29.

Because of the sudden surge of the coronavirus, Tribunals were confused at the beginning of the Pandemic, like the other structures, and have been compelled to decide among the options: suspend hearings, cancel hearings, or conduct virtual hearings[217].

The postponement option in some places could cause the proceedings to be delayed and limit the parties' procedural rights: "any decision taken by the Tribunal must preserve the parties' procedural rights, which include the right to be heard, the right to equal treatment, the principle of party autonomy, and the right to efficient proceedings."[218] On the other hand, it is not possible to clearly establish how long such consideration can be postponed.

Proceedings moratorium. At the same time, in some countries, there were attempts to introduce a moratorium and restrictions on all cases of dispute settlement between the investor and the state. In particular, the Colombian Center for Sustainable Investment posted a letter calling for the introduction of such a restriction due to the emergence of the coronavirus.[219] CCSI argues for this proposal by the fact that emergency measures implemented by governments will definitely lead to significant changes in the "business environment", and such actions will lead to dissatisfaction among foreign investors. However, the authors of the idea note that such a moratorium will allow states to "focus their attention on fighting the COVID-19 crisis and not be distracted by unsubstantiated statements."[220] The financial side is also described, that in some places, the compensation to investors is calculated in millions so that it will have too much impact on state budgets. In their studies, scientists James Bacchus and Jeffrey Sachs[221] adhere to a similar opinion.

In society, such a call was received with criticism, and some scientists note the possibility of creating an "infinite" moratorium due to the fact that it is not clearly known when the Pandemic can be considered complete.[222] Moreover, such a moratorium can absolutely limit the investor's right to a fair hearing because it is one thing when states implement policies in accordance with international norms and national legislation, exercise their own powers without manipulating many issues, and another thing when the state clearly uses discriminatory measures in relation to the investor or implements a policy that does not correspond to a legitimate purpose, etc. The analysis

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[217] Santiago Rodríguez Senior, "COVID-19 and Online Hearings," *Uria Menendez*, https://www.uria.com/documentos/publicaciones/7052/documento/articulo.pdf?id=12835&forceDownload=true.

[218] Gary B. Born, *International Commercial Arbitration, Second Edition*, (the Netherlands: Wolters Kluwer Law & Business, 2014), 2149.

[219] "Call for ISDS Moratorium During COVID-19 Crisis and Response," Columbia University, accessed 20 December 2022, https://ccsi.columbia.edu/content/call-isds-moratorium-during-covid-19-crisis-and-response.

[220] *Ibid.*

[221] *See* James Bacchus and Jeffrey Sachs, "Why we need a moratorium on investment disputes during COVID-19," JDS, June 9, 2020, https://www.jeffsachs.org/newspaper-articles/238m3ytcb9zw7y7mn3sllphrf4eaee.

[222] "Call for moratorium on ISDS cases during COVID-19 pandemic," Practical Law Arbitration, accessed 20 December 2022, https://content.next.westlaw.com/practical-law/document/I96970e90939a11ea80afece799150095/Call-for-moratorium-on-ISDS-cases-during-COVID-19-pandemic?viewType=FullText&transitionType=Default&contextData=(sc.Default)&firstPage=true.

of the behavior of the investor and the state in the previous Chapters clearly shows that the proportionality of the measures, the public purpose, and other criteria cannot be unambiguously determined; therefore, the introduction of a moratorium on the consideration of lawsuits is not considered appropriate, especially nowadays.

It can be seen as a limitation to a fair trial, a delay, or a protracted trial. Accordingly, many cases of transfer of proceedings to the online level were applied during the COVID-19 era. Therefore, the Pandemic has created a novelty in the implementation of virtual arbitral proceedings.

To sum up, the most significant changes in international investment law have been in the organization of investment arbitration, as it became necessary to quickly adapt to quarantine restrictions. The development of virtual hearings, online meetings, and electronic submission of documents – all these ways have opened up new opportunities for investors and states involved in disputes. It cannot be said for sure that from now on, only the virtual format of hearings will be used, but it will certainly be an additional opportunity for the full realization of the right to a fair hearing during the crisis. In the near future, the Tribunals will probably continue to use a hybrid form of procedural activity to adapt to modern reality.

CONCLUSIONS

1. Investors have the right to reasonably demand a balance of interests by filing claims for compensation in international arbitration or national courts, referring to various traditional standards of investor protection. The guarantee of such standards established in international bilateral or multilateral investment protection agreements does not cease to apply even when there are crisis events such as COVID-19. These standards are protection against uncompensated direct and indirect expropriation, fair and equitable treatment, most-favored-nation and national treatment, full protection, and security. All of these standards have an equal level of proofing and can be fairly applied by investors when challenged.
2. States have the possibility to defend themselves against investor claims in various ways. These available doctrines are force majeure, necessity, distress, and reference to the state's regulatory policy. In some cases, it will be difficult for the states to prove that they acted only in the public interest and took the only possible (reasonable) decisions to establish measures aimed at mitigating the effects of COVID-19.
3. As a general rule, the goal of protecting public health and safety is considered legitimate and can be considered a part of the discretionary powers of the state (the right to regulate). But it is necessary to note that it is not the *factual presence of the goal of health protection* but the *conditions by which this goal is achieved* – this issue needs a separate discussion. In their decisions, the tribunals should consider each measure comprehensively, taking into account the legitimacy, time constraints, availability of other options at that particular time, and the consequences to which such actions led.
4. The effect of International Investment Treaties does not lose force during times of global crisis. It continues to be an effective tool for protecting the rights of investors in critical situations, and the COVID-19 pandemic does not exempt the State from its international obligations. Comparing the old and new generations of investment agreements, it can be concluded that the new agreements contain more detailed provisions on the need to protect public health, public safety, protection of citizens' rights, etc. In other words, in case of challenging the state actions that caused negative consequences and losses for investors, referring to the provisions of modern treaties, states have more rights and powers to implement measures aimed at protecting the public welfare of people. In contrast to the treaties of the old generation, which almost do not contain the relevant reservations.
5. The existing arbitration practice does not make it possible to clearly establish in which cases the courts will establish violations of investors' rights. The possibility of a broad interpretation of the provisions of investment treaties, as well as the unequal definition of the criteria of

necessity, proportionality, reasonableness, and proportionality – provides equal chances for both states and investors in cases of arbitration. That is why confirming the need for the Tribunals to consider cases justifies the approach of flexibility and full analysis of each case separately from other similar situations.

6. Procedural rules, which have undergone significant changes in contrast to substantive provisions in connection with the Pandemic, have received a new definition and rules of application. The availability of a digitalized format and the development of online hearings create new opportunities for the smooth consideration of cases in crisis cases. The availability of the online format in the work of investment arbitration in the near future will not fully replace the consideration of cases with physical presence but will be an important condition for the full exercise of the right to access justice.

RECOMMENDATIONS

1. The following recommendations to investors on how to protect their interests using such an instrument as an international investment agreement are suggested. Investors are recommended to assess all possible risks of activities in the Host State and to pay attention not only to the provisions of BITs and Contracts but also to examine the provisions of international treaties that exclude the responsibility of states for wrongful acts.
2. It would be recommended that states should develop provisions that can be applied in crisis situations, such as the outbreak of new diseases or the need to apply new restrictions due to outbreaks of COVID-19. Previous years have shown that many states are not ready to respond quickly and intelligently to sudden crisis situations. A reasonable solution for states is to study the shortcomings caused by the emergence of Coronavirus – in order to avoid similar crisis situations in the future. Such state policy will help investors understand how the Host State will act in a similar scenario, which will avoid problems with legitimate expectations of investors.
3. When considering investment disputes, arbitrators are recommended to take into account the severity of measures adopted by states in response to the Pandemic to determine a direct cause-and-effect relationship between state restrictive measures and the violation of rights contested by investors.

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ABSTRACT

The master thesis examines the impact of the COVID-19 Pandemic on investment protection regimes. The paper begins with an analysis of possible ways of protecting investors' rights, such as claims against the State due to a violation of direct or indirect expropriation measures, fair and equitable treatment standards, full protection and security, national treatment, and most-favored-nation regimes.

Further research provides a description of the State's urgent measures adopted to limit the spread of Coronavirus and decrease the negative impact of the Pandemic. Examined the possible ways of protecting the State's interest during unpredictable crisis events and strategy of protection from investor claims. The author examines the State's regulatory policy and the measures to protect public health. Additionally, the thesis analyzes the main changes in procedural frameworks of Arbitral Proceedings and the necessity of applying the hybrid format during hearings.

Keywords: COVID-19, investment protection standards, regulatory policy, public health, investment protection, public hearings.

SUMMARY

The Master Thesis is dedicated to the analysis of major problems and changes connected with investment protection measures. The current topic is explored through the main ways of protecting investors' rights that arose from COVID-19 governmental restrictions and limitations and the problems associated with different governmental regimes from state to state; The paper unified different approaches for dispute resolution; explored the main changes to arbitral proceedings caused by the Pandemic.

The research has the following main objectives: (1) to investigate how an investor protects an investment, what works in the event of a violation of state policy, and how to obtain reasonable conditions for investment in the host state; (2) to analyze how the state can protect its own interests, in particular, the health of the population; how to legally use balance limits in which areas and how to apply the interests of the state and the investor; (3) changes in arbitration proceedings caused by COVID-19; programs, which procedural options are available to investors and states during a crisis; (4) assess the provisions of old and modern investment treaties and their relevance to the current challenges caused by COVID-19.

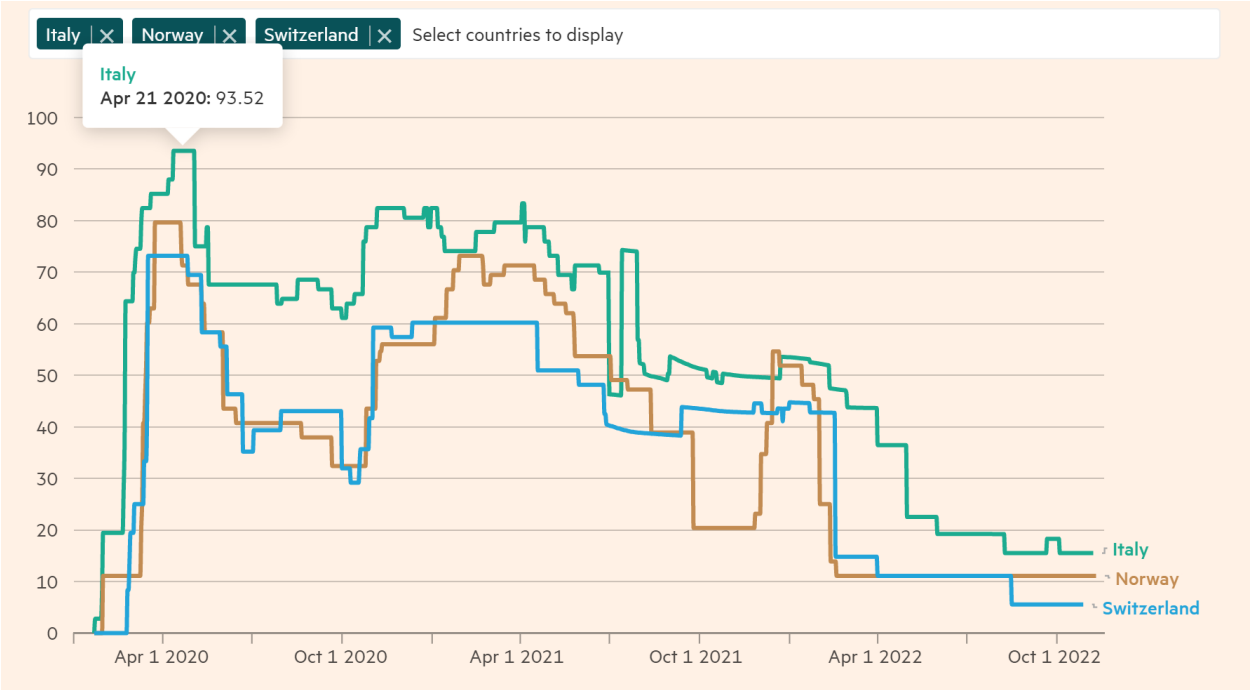
The first Chapter examines possible ways of protecting the rights of investors in cases of violations caused by the urgent measures established by the State to overcome the COVID-19 Pandemic. The following standards of investor rights protection are analyzed: protection against illegal expropriation, fair and equitable treatment, national regime, most-favored-nation regime, non-discriminatory measures, etc. The previous arbitration practice on the settlement of investment disputes caused by illegal actions of the state is determined.

The second part describes the emergency measures that were implemented by the states in response to the outbreak of the Pandemic and analyzes the compliance of these measures with the public purpose and necessity. Possible ways of protection for states in response to investor lawsuits are explored, such as force majeure, necessity, distress, and regulatory powers. The protection of public health is described separately as a legitimate purpose of establishing prohibitive and restrictive measures; arbitration practice on the above-mentioned issues is considered.

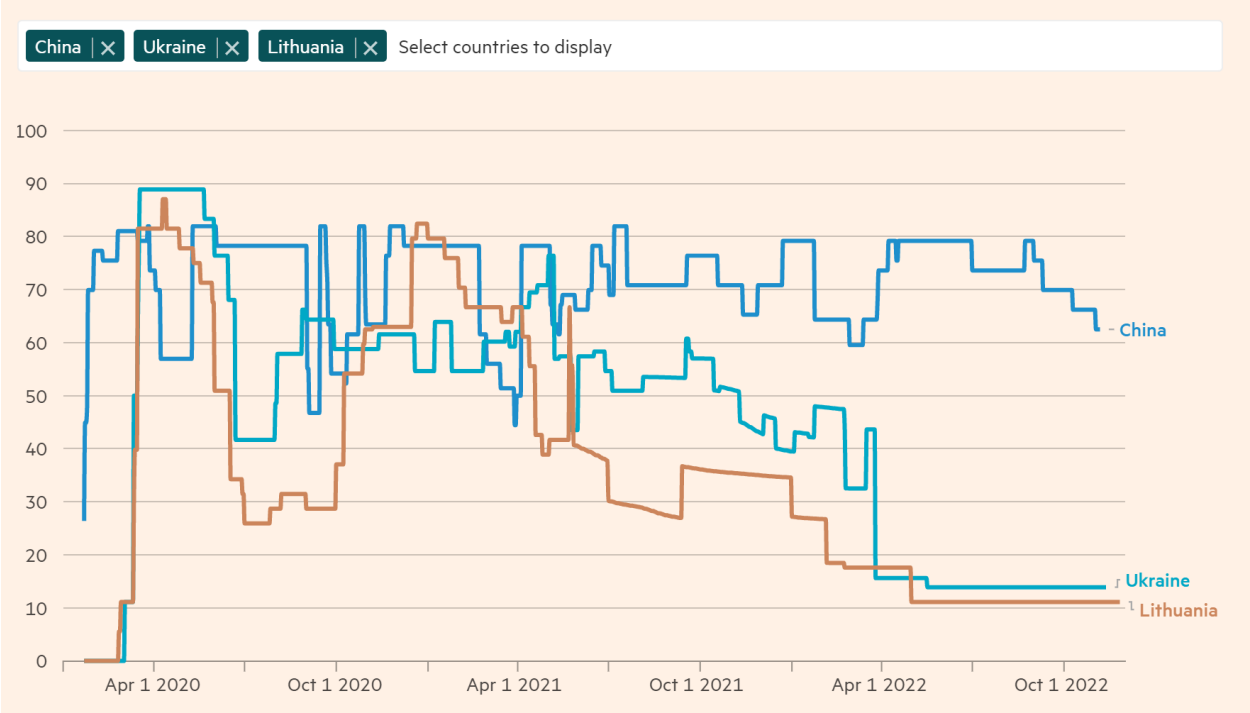
The third part examines the changes caused by the Pandemic that affected the organizational activities of international investment Tribunals. Various regulatory documents that ensure the procedural activity of different Tribunals are compared. The emergence of such phenomena as – public hearings, remote working mode, etc., were analyzed; as positive and negative consequences; application prospects.

ANNEXES

Annex 1. Comparing charts – States COVID-19 Measures. Italy, Norway, Switzerland.[223]



Annex 2. Comparing charts – States COVID-19 Measures. China, Ukraine, Lithuania.[224]



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[224] *Ibid.*