Claims after COVID?

COVID-19 and state defenses in response to investment claims

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COVID-19 continues to wreak havoc – not only by taking the lives of thousands of people across the world but also by impacting the national and international economy. The pandemic has disrupted business in all of its manifestations and caused millions of workers to be laid off.

Many companies, including those owned and run by foreign investors, are subjected to an unprecedented host of state measures. These unexpected circumstances have brought international investment law center stage, as legal scholars and practitioners evaluate the current position of foreign investors and host states. In this vein, the most critical questions are: Will a state be shielded from its responsibility resulting from responses to COVID-19 if the emergency measures taken by the host government are challenged by foreign investors? And more specifically, which defenses can, and should a host state invoke in response to such claims?

Generally, host states may rely on two grounds to legally defend themselves against treaty claims regarding the measures in question. The first ground is exemption provisions of international investment agreements (*IIAs*). The second possible ground is defenses under customary international law, especially *force majeure* and necessity.

Exemption provisions of International Investment Agreements

Many recently concluded IIAs contain specific exceptions which prevent the host state from incurring responsibility if the measures contravening the IIA serve the protection of public health. A notable example can be found in the Australia-Uruguay Free Trade Agreement (AUFTA) concluded on 5 April 2019, in which Article 15 provides that "nothing in this Agreement shall be construed to prevent a party from adopting or enforcing measures: (a) necessary to protect human, animal or plant life or health."

In the Canada-EU Trade Agreement (CETA), concluded on 30 October 2016, Article Annex 8-A (3) states that non-discriminatory measures of a party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in "rare circumstances".

As most implemented measures regarding the pandemic ostensibly serve to protect public health, these exceptions could help the host state as a defense against treaty claims. While the CETA provision expressly only protects host states against the

claim of indirect expropriation, the provisions of AUFTA could be relied on more broadly. However, a closer reading also reveals differences. Notably, AUFTA limits the scope of the exception to measures "necessary" to protect human health. This seems to open the door to a case-by-case analysis of tribunals, which have in the past opted for different standards of review in light of such public purpose exceptions. Yet generally, the measures taken to tackle the pandemic seem to fall squarely within the ambit of the exceptions.

However, not all investment treaties contain such exceptions. Accordingly, the pandemic may also serve as a catalyst for some countries, especially developing ones, which have faced many investment claims in the past to reconsider the reform of their IIAs so as to include exceptions that equip the governments to effectively deal with future challenges.

Yet, even in the absence of exceptions provisions in the IIAs, a host state may invoke customary international law defenses to itself defend against treaty claims.

Host state defenses under customary international law

According to the International Law Commission (ILC)'s articles on state responsibility, there is a list of six defenses precluding the wrongfulness of an act of a state. These include consent, self-defense, countermeasures, force majeure, distress, and necessity. Two of these mentioned defenses are particularly relevant to the host state measures in response to COVID-19, namely: (1) *force majeure* and (2) necessity.

a. Force majeure

Force majeure is defined in Art. 23 (1) ILC Articles as the occurrence of an irresistible force or an unforeseen event, beyond the control of the state, making it materially impossible to perform the obligation. In *Autopista v. Venezuela,* the ICSID tribunal further contoured *force majeure* and held that there are only three conditions that must be met for a host state to rely on *force majeure* defense: (1) impossibility, (2) unforeseeability, and (3) non-attributability. Generally, the standard to accept *force majeure* is very strict, and respondent states have frequently failed to substantiate these requirements before investment tribunals.

The spread of COVID-19 likely amounts to an unforeseen event, but host states will probably struggle to prove that the pandemic made the performance of its IIA obligations not only difficult but impossible. In any event, an arbitral tribunal would need to carry out an in-depth analysis of of the specific circumstances in a given host state in light of the *force majeure* requirements before excusing the state from its obligations.

b. Necessity

A host state may also rely on the necessity doctrine to avoid its international obligations, including duties owed with regards to foreign investors. According to Art. 25 (1) ILC Articles, to successfully invoke the necessity defense, the host state must

prove that (1) the state's act was sought to protect its essential interest; (2) the state faces a grave and imminent peril; (3) the act in question is the only way for the state to protect that essential interest; and that (4) the act does not seriously impair the vital interests of another state or the international community. A host state, however, cannot rely on the necessity defense to avoid a wrongful act if (1) the obligation in question arises out of a peremptory norm of international law; (2) invoking necessity for the commitment in question is precluded by an international agreement which the state is a party to; or (3) the state concerned has contributed to the state of necessity it finds itself in.

Given the publicly available information pertinent to COVID-19, it seems that the outbreak of the virus meets the requirements to invoke the necessity of the state defense. The staggering number of deaths due to COVID-19 indicates that the disease poses a grave and imminent peril to people around the world. It, therefore, threatens an essential interest of any country and the international community. The COVID-19 pandemic has also been an unprecedented event; therefore, states' interventions in response to the epidemic appear inevitable to protect their essential interest. Furthermore, at the time of writing, no cure or immunization has been developed for COVID-19, and states have taken measures from social-distancing to shutdowns as the only feasible way to slow the spread of the pandemic, as recommended by the WHO. Arbitral tribunals will still analyze and examine all the measures that host states have adopted in response to the epidemic. If a tribunal finds that other lawful ways had existed for states to address the threat, regardless of whether these ways are expensive or inconvenient, the plea will likely fail (*Suez v. Argentina*, and *Enron v. Argentina*).

This in turn, might render it difficult for some countries to plead the necessity defense in response to the emergency measures taken to combat COVID-19. For instance, developing countries with poorly funded healthcare systems could be barred from relying on the necessity defense, if the feebleness of the healthcare system is considered a significant contributing element. In *Impregilo v. Argentina*, the tribunal held that "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." However, other arbitral tribunals adopted a narrower approach in interpreting the non-contribution requirement. In *Urbaser v. Argentina,* the tribunal provided that the government's acts should have been directed towards a crisis resulting in the emergency, or at least of such nature that the Government must have known that such a crisis must have been the outcome of its acts. Under this standard, it seems more likely, that tribunals would not consider weak healthcare systems a contributing element in itself.

In short, the requirements to accept a state of necessity due to the pandemic seem likely to be fulfilled. However, because the necessity plea under customary international law standard is stringent and difficult to satisfy, a case-by-case analysis by tribunals will be needed before excusing it from its obligation based on the necessity doctrine.

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The COVID-19 pandemic is a grave threat to the vital interests of states. It affects not only the health of individuals all over the world but also whole economies, including foreign investments. COVID-19 continues to spread rapidly in many parts of the world, and governmental measures are essential to respond to the unprecedented health crisis it poses. In these circumstances, foreign investors will likely suffer substantial losses, which may lead them to claim a breach of their rights under IIAs by means of arbitration. Host states may defend themselves against investment claims by relying on treaty exceptions or defenses under customary international law, particularly *force majeure*, and the necessity defense. One of the lessons to be learned from this current crisis is that a reform of IIAs to include exception provisions that allow host states to effectively protect their population's health in times of crises should be an essential objective, especially for developing states.

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