Extra-Contractual Remedies under Investment Treaties for Foreign Investors in Cross-Border Construction Projects in the Time of Coronavirus: An Arsenal Worth Considering?

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Abstract

The construction industry has been hit hard by the COVID-19 crisis and the corresponding measures used by States to contain its consequences. These circumstances may trigger potential State liability vis-à-vis foreign investors in the construction sector who suffer economic losses. This situation takes on even greater importance when State actions are excessive and disproportionate, and trespass on the legal protections found within the investment treaties. While investment treaty arbitrations may be a viable option, the uncertainties and novelty of the pandemic mean that investors must consider whether or not their losses can be recovered; doing so will require case-specific examinations.

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CHAPTER 1
INTRODUCTION

Background: The COVID-19 Pandemic and Investment Treaty Claims

Owing to its novel circumstances, which have had a considerable effect on social, economic, and political stability all over the world, it can be argued that the worldwide spread of the coronavirus (COVID-19) has evolved into a global crisis.[1] The pandemic has clearly established a substantial surge of uncertainties and has triggered the transformation of all industry sectors.[2] According to the World Health Organization (WHO), at the time of writing, the number of confirmed COVID-19 cases has reached 202,608,306 globally, including 4,293,591 deaths.[3] The far-reaching nature of the outbreak meant that, on 11 March 2020, the WHO declared it to be a pandemic.[4]

Extraordinary times call for extraordinary measures. As noted by the United Nations Conference on Trade and Development (UNCTAD), governments across the world have been implementing a variety of control measures, according to their various situations, to curb the spread of the virus.[5] These measures include travel restrictions, quarantines, self-isolation, suspension of mass gatherings, and social distancing. Additionally, various emergency measures have been implemented on a local and a national level; these measures have severely affected foreign investors.[6] It is not surprising that, due to the global reach of the COVID-19 pandemic and the resulting State measures, UNCTAD noted that the outbreak has caused a dramatic drop in

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[1] Maxi C Scherer and Niuscha Bassiri, *International Arbitration and the COVID-19 Revolution* (Wolters Kluwer 2020) 8.
[2] ibid.
[3] WHO, 'WHO Coronavirus (COVID-19) Dashboard' (2021) <https://covid19.who.int/> accessed 10 August 2021.
[4] WHO, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020' (11 March 2020) <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed 5 July 2021.
[5] UNCTAD, 'Investment Policy Responses to the COVID-19 Pandemic' (May 2020) Special Issue 4 Investment Policy Monitor < https://investmentpolicy.unctad.org/publications/1225/investment-policy-monitor-special-issue---investment-policy-responses-to-the-covid-19-pandemic> accessed 5 July 2021.
[6] Ahmed Bakry, Yulia Levashova, and Julia Sherman, 'The COVID-19 Crisis and Investment Arbitration: A Reflection from the Developing Countries' (*Kluwer Arbitration Blog*, 2021) <http://arbitrationblog.kluwerarbitration.com/2020/04/21/the-covid-19-crisis-and-investment-arbitration-a-reflection-from-the-developing-countries/> accessed 5 July 2021.

foreign direct investment; it fell 35% in 2020, to USD 1 trillion, which is the lowest it has been since 2005.[7] While it has been essential that States take emergency measures to curb the spread of the virus, many of these measures have hit businesses hard and have potentially breached the State's obligations under investment treaties.

As an industry that heavily relies upon uninterrupted global supply chains for equipment, materials and plants, as well as for the mobilisation and deployment of personnel, the construction industry has been inevitably and substantially impacted by the COVID-19 pandemic.[8] This is evidenced by the rising number of infrastructure construction works being delayed, reduced in scope or cancelled, as well as by those encountering other practical challenges in their implementation, despite government efforts in some jurisdictions to mitigate the negative impact of COVID-19 measures by exempting critical construction activities from certain applicable restrictions.[9] Even when measures are eased or lifted, it has been suggested that considerable time may be needed in order to remobilise the goods and services and to revitalise the projects that have been suspended or cancelled. If the measures adopted by a State are unreasonable, disproportionate, or otherwise discriminatory, in that it is possible to establish the circumstances in which a construction project may be significantly prejudiced, such measures may amount to a breach of an applicable standard of protection under the investment treaties that exist between the investor's State and the host State.[10]

At this juncture, invoking investment treaty claims might be an alternative worth exploring. As far as public health is concerned, according to UNCTAD there are at least 33 investment treaty cases, covering issues that have varying impacts on public health. These include cases that directly relate to public health due to the measures taken by the host State to protect individuals from imminent and future harm to their health, as observed in *Philip Morris v Uruguay* and *Philip Morris v Australia*, both of which involved investors' challenge against the host States' tobacco control

[7] UNCTAD, *World Investment Report 2021: Investing in Sustainable Recovery* (United Nations 2021) 2.
[8] Scherer and Bassiri (n 1) 204.
[9] ibid 211.
[10] James Pickavance, 'A Look Beyond the Lockdown' (2020) ICLR 353, 379.

legislation, which was aimed at curbing the prevalence of smoking.[11] As seen in the figure below, the host States were successful in all investor–State dispute settlement (ISDS) cases, either on jurisdictional grounds or on merits, in 55% of all ISDS cases.[12]

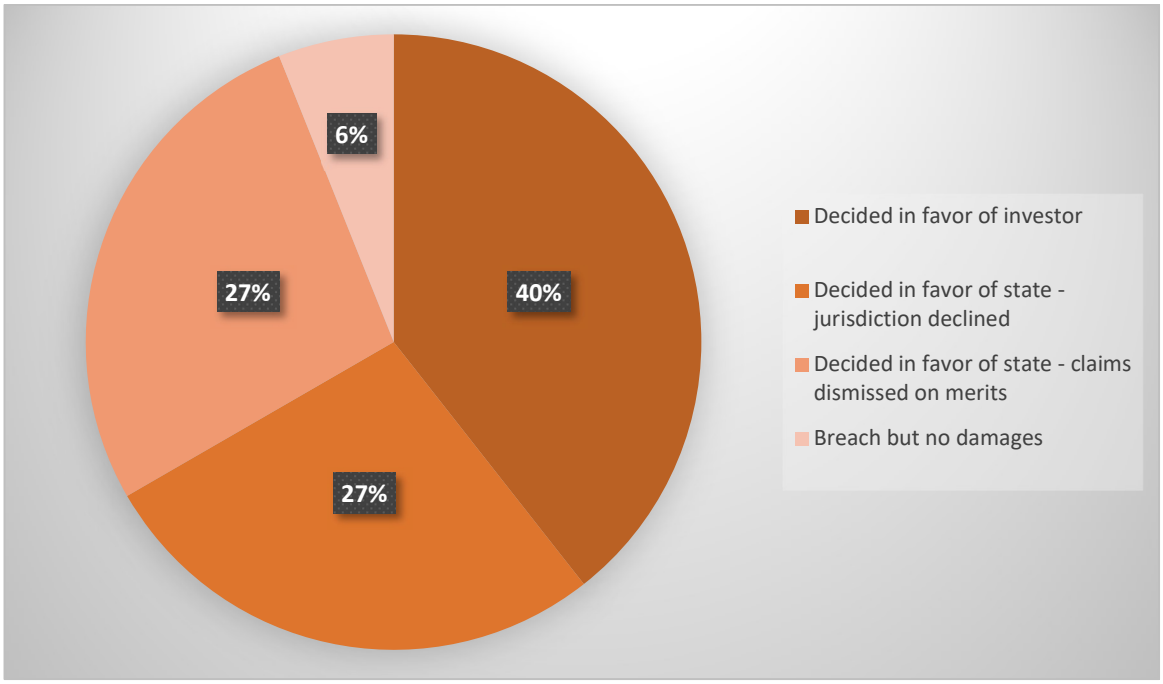

Figure 1: Outcome of health-related ISDS proceedings.[13]

However, in the context of COVID-19, initiating such claims might not be straightforward, as the State might raise the defence that those measures were taken to mitigate and address the global public health and economic crises arising from the pandemic.[14] Whether the COVID-19 pandemic will trigger a wave of ISDS proceedings is yet to be seen; however, it is readily apparent that government restrictions imposed thus far could potentially lead to future investment disputes.[15] In

[11] UNCTAD, 'International Investment Policies and Public Health' (July 2021) 2 IIA Issues Note 1, 5 <https://investmentpolicy.unctad.org/news/hub/1678/20210729-iia-issues-note-on-public-health-provisions-isds> accessed 10 September 2021. See also *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (*formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*) (*Philip Morris v Uruguay)*, ICSID Case No ARB/10/7, Award (8 July 2016); *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012–12, Award on Jurisdiction and Admissibility (17 December 2015).
[12] ibid.
[13] ibid Figure 4.
[14] Nathalie Bernasconi-Osterwalder, Sarah Brewin, and Nyaguthii Maina, 'Protecting Against Investor–State Claims Amidst COVID-19: A Call to Action for Governments' (14 April 2020) IISD Commentary 1, 5 <https://www.iisd.org/articles/protecting-against-investor-state-claims-amidst-covid-19-call-action-governments> accessed 10 September 2021.
[15] Mark Stadnyk, 'Global Geopolitics and International Energy Arbitration: A Report from the 4th Annual ITA–IEL–ICC Joint Conference' (*Kluwer Arbitration Blog*, 2017)

light of the continuing COVID-19 pandemic and its complex consequences for international construction projects, this dissertation seeks to address the question as to whether initiating treaty claims remains a viable option and in under what circumstances the parties involved in international construction projects might seek such extra-contractual relief against the host State.

Methodology

The analysis of the subject presented in this dissertation will primarily be carried out using a doctrinal methodology. By definition, this approach will entail a comprehensive and thorough examination of a set of primary written sources of law, focusing on statutes and cases and, to a lesser degree, on academic commentaries on the foregoing sources,[16] using the latter as interpretative tools with which to support this study's hypothesis through a well-established traditional framework.[17] The existing doctrinal research relating to the subject matter is also used to demonstrate a wider understanding of the issues and to clarify any ambiguous provisions. The writer believes this approach will generate a wealth of information that will support the critical and qualitative analysis of the meaning, interpretation, and implications of the legal rules and their underlying principles, while considering current legal development.

While the analysis predominantly has a legal character, in light of the dissertation's objectives, an interdisciplinary and industry-focused approach that incorporates insights from different disciplines and fields of study will also be used; this will allow an exploration of the interplay between public health and investors' rights under international law. Specifically, reference will be made to public health studies and literature relating to COVID-19, as well as to recent trends and developments in international investment law and the construction industry. While the legal bases of the investment treaty claims and the States' defences are not in themselves novel, there remains a lacuna in the study regarding the possibility of investment treaty claims in the context of the COVID-19 pandemic. For this purpose, the study will revisit existing

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<http://arbitrationblog.kluwerarbitration.com/2017/03/07/global-geopolitics-and-international-energy-arbitration-a-report-from-the-4th-annual-ita-iel-icc-joint-conference/> accessed 2 June 2021.

[16] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson/Longman 2007) 118.

[17] ibid 50.

investment treaty issues, looking at them through the lens of the COVID-19 pandemic and while considering the latest developments in the construction industry. This approach will allow the writer to gain the contextual perspective needed to conduct a critical and empirical analysis of the prevailing issues.

The Focus of the Study

It is expected that the analysis outlined in the dissertation will be able to respond, in a suitable and object-oriented manner, to the question as to whether pursuing legal remedies under an investment treaty is worth considering by foreign investors in the construction industry as an additional or alternative tool that can be leveraged to their advantage. This dissertation aims to explore the circumstances under which the parties engaging in cross-border construction projects may refer their dispute to ISDS proceedings due to losses arising out of and/or relating to State measures imposed in response to the COVID-19 pandemic. Additionally, the dissertation will analyse the opportunities and challenges involved in situations where the parties in international construction projects seek redress, considering the factors involved in pursuing such claims, and provide an answer as to whether the COVID-19 crisis gives the State carte blanche to impose public health–related restrictions. It is also necessary to note that, due to the ongoing crisis, this dissertation does not purport to be an exhaustive analysis of all the potential claims and issues that might arise from the COVID-19 pandemic, but will only address the most relevant of these.

The Structure of the Study

This dissertation's analysis will be divided into six chapters, including this chapter (Chapter 1), which is the introduction. Chapter 2 elaborates on a range of COVID-19 measures and policies adopted by the States and their impact on the construction industry. Chapter 3 aims to provide a general overview of the role and function of investment treaties and the ISDS in the construction industry. Chapter 4 will provide an analytical review of why it is relevant for foreign investors to seek relief under an investment treaty, by considering the wide-ranging governmental interference (from within the COVID-19 framework) and their impacts on multiple aspects of the construction projects. Chapter 5 will discuss the possible defences the States could raise in order to reduce or otherwise mitigate any challenges by or entitlement of the investor under the investment treaties. Chapter 6 looks at some final considerations for

the parties involved in international construction projects to pursue their claims against the host State. Finally, Chapter 7 will revisit this study's overall focus and draw some conclusions.

CHAPTER 2
STATE ACTIONS IN RESPONSE TO THE COVID-19 CRISIS

An Overview of COVID-19 State Measures

In response to the COVID-19 pandemic, as recommended by the WHO,[18] almost all States have adopted a wide range of public health measures, including (but not limited to) securing social and physical distancing, closing down non-essential services and facilities, imposing staying-at-home measures, and restricting local or national movement. Businesses have significantly suspended or ceased their operations due to these emergency regulations. While the exact nature of such measures may vary between States, some of them have had significant economic and financial repercussions on construction projects, raising the risk of an ISDS challenge by foreign investors. Figure 2 shows a depiction of the COVID-19 Government Response Stringency Index;[19] it indicates that, even after over a year of restrictions, in August 2021 stringent government measures can still be found in most countries, albeit at varying degrees.

[18] WHO, 'Coronavirus Disease 2019 (COVID-19) Situation Report – 2' (1 April 2020) <https://www.who.int/docs/default-source/coronaviruse/situationreports/20200401-sitrep-72-covid-19.pdf?sfvrsn=3dd8971b_2> accessed 11 August 2021.

[19] Thomas Hale and others, 'A Global Panel Database of Pandemic Policies (Oxford COVID-19 Government Response Tracker)' (*Nature Human Behaviour*, 2021) <https://ourworldindata.org/grapher/covid-stringency-index> accessed 12 August 2021.

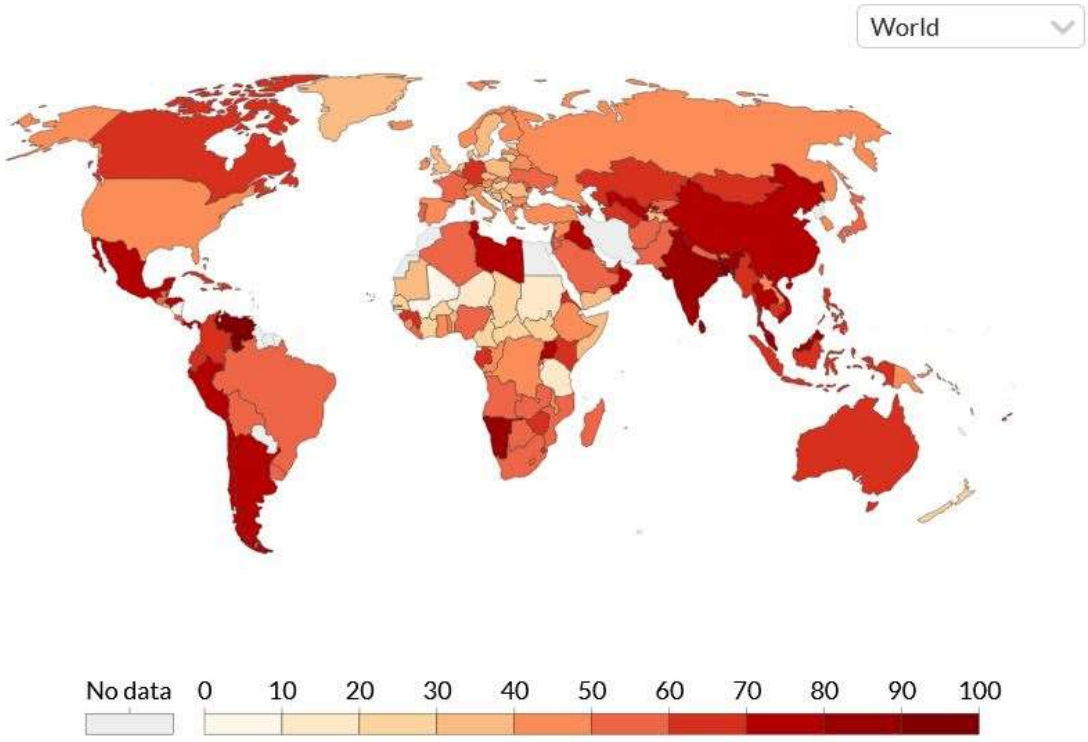

Figure 2: COVID-19 Stringency Index.

This is a composite indicator based on nine reaction indicators, including school and workplace closures and travel restrictions. It has been rescaled to a value between 0 and 100 (with 100 indicating the strictest restrictions).

State-mandated lockdown and travel restrictions have significantly affected private investments in almost all business sectors. It has been estimated that, as at 1 April 2020, at least 91% of the world's population were living in countries with travel and entry restrictions imposed due to COVID-19.[20] China was the first country to impose lockdown in an effort to prevent the rapid spread of COVID-19. This was no surprise, given that the COVID-19 outbreak first manifested as mysterious pneumonia cases in Wuhan, the capital of Hubei province in mainland China.[21] In March 2020, the WHO declared that Europe had become the epicentre of the pandemic,[22] at which point most

[20] Phillip Connor, 'More than Nine-in-Ten People Worldwide Live in Countries with Travel Restrictions amid Covid-19' (*Pew Research Center*, 1 April 2020) <https://www.pewresearch.org/fact-tank/2020/04/01/more-than-nine-in-ten-people-worldwide-live-in-countries-with-travel-restrictions-amid-covid-19/> accessed 11 August 2021.
[21] Kaisha Langton, 'China Lockdown: How Long was China on Lockdown?' *Express* (30 May 2020) <https://www.express.co.uk/travel/articles/1257717/china-lockdown-how-long-was-china-lockdown-timeframe-wuhan> accessed 5 August 2021.
[22] WHO, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (13 March 2020) <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-mission-briefing-on-covid-19---13-march-2020> accessed 12 August 2021.

European countries began to take steps to contain its spread. Italy was the first European country to impose a nationwide lockdown in an effort to curb the spread of the virus.[23] Spain declared a similar state of emergency on 14 March 2020, placing strict restrictions on all non-essential movement and closing its borders to all non-citizens and non-residents.[24] Due to this lockdown, the Spanish construction industry, being the second most labour-intensive sector in the country, has suffered an approximate loss of €345 million for each day that work activities were suspended.[25] Nationwide travel restriction and a ban on the entry of foreign nationals was also introduced in Brazil.[26] According to one study, Brazil's construction industry lost roughly 885,000 jobs between February and April 2020, with the industry's overall activity expected to have shrunk by 6% in 2020.[27]

Legislation introducing a series of restrictive measures and suspending all non-essential activities was also issued in some other countries as a part of country-level measures against COVID-19. Such measures were seen in Mexico,[28] where, accordingly, those construction works that were not categorised as essential had to be suspended. In Peru, Congress passed a bill that would suspend charges on all of the country's toll roads in order to ease the movement of essential goods during the crisis, which is predicted to lead to an avalanche of ISDS claims.[29]

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[23] The Economist Group Limited, 'Italy, the First Country in Europe to Enter lockdown, Starts to Emerge' *The Economist* (London, 9 May 2020) <https://www.economist.com/europe/2020/05/09/italy-the-first-country-in-europe-to-enter-lockdown-starts-to-emerge> accessed 12 August 2021.

[24] Council of Ministers, 'Government Decrees State of Emergency to Stop Spread of Coronavirus COVID-19' (*La Moncloa*, 14 March 2020) <https://www.lamoncloa.gob.es/lang/en/gobierno/councilministers/Paginas/2020/20200314council-extr.aspx> accessed 13 August 2021.

[25] Olivia Delagrange and Marta Parrondo, 'March 2020 State of Alarm in Spain: Potential Claims and the Use of Force Majeure' (*Kennedys*, 12 May 2020) <https://kennedyslaw.com/thought-leadership/article/march-2020-state-of-alarm-in-spain-potential-claims-and-the-use-of-force-majeure/> accessed 12 August 2021.

[26] Proinde, 'Brazil Bans Entry of Non-resident Foreigners Amid Covid-19 Outbreak' (1 July 2020) <https://proinde.com.br/news/brazil-bans-entry-of-non-resident-foreigners-amid-covid-19-outbreak/> accessed 12 August 2021.

[27] Design Build Network, 'Brazil's Construction Industry Is Set to Contract Sharply This Year Amid the COVID-19 Pandemic' (15 June 2020) <https://www.designbuild-network.com/comment/brazil-construction-industry-covid-19/> accessed 12 August 2021.

[28] Pedro A Villarreal, 'Mexico: Legal Response to Covid-19', *The Oxford Compendium of National Legal Responses to Covid-19* (April 2021) <http://dx.doi.org/ 10.1093/law-occ19/e14.013.14> accessed 12 August 2021.

[29] Cosmo Sanderson, 'Peru Warned of Potential ICSID Claims Over COVID-19 Measures' (*Latin Lawyer*, 15 April 2020) <https://www.bilaterals.org/?peru-warned-of-potential-icsid> accessed 12 August 2021.

States also take trade-related and other emergency measures in order to address the economic fallout of the COVID-19 crisis. World Trade Organisation (WTO) recorded that, more than 80 member States have adopted new trade measures in response to the COVID-19 crisis; these have taken the form of export bans, restrictions, and the imposition of stricter safety standards.[30] However, some countries have also introduced legal relief in support of the construction industry and other affected sectors. For example, the Singapore government has enacted legislation that extends temporary relief to businesses in several different sectors (including construction) that are unable to perform their contractual obligations due to the COVID-19 outbreak.[31]

It is to be noted that these measures shall not be construed to be exhaustive and are outlined to provide a backdrop in which this study was conducted. Apart from the above, there are still other pandemic responses taken by the States, including nationalisation of crisis-affected industries and issuance of mandatory production order, as seen in examples compiled by UNCTAD in Table 1 below.[32]

Table 1: UNCTAD's Examples of Policy Measures Taken in Response to COVID-19

Investment policy area	Policy measures (examples)
Policy actions at the national level	
Investment facilitation	Alleviation of administrative burdens and bureaucratic obstacles for firms
Investment retention and aftercare by investment promotion agencies	COVID-19–related information services; administrative and operational support during the crisis
Investment incentives	Financial or fiscal incentives to produce COVID-19–related medical equipment; incentives to enhance contracted economic activities; incentives for converting production
State participation in crisis-affected industries	Acquisition of equity in companies; partial or full nationalisation

[30] WTO, 'COVID-19: Measures Affecting Trade in Goods' (26 August 2021) <https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm> accessed 11 September 2021.
[31] COVID-19 (Temporary Measures) Act 2020 Part 2.
[32] UNCTAD, 'Investment Policy Responses to the COVID-19 Pandemic' (May 2020) Special Issue 4 Investment Policy Monitor 2, Table 1 <https://investmentpolicy.unctad.org/publications/1225/investment-policy-monitor-special-issue---investment-policy-responses-to-the-covid-19-pandemic> accessed 10 September 2021.

Local small- and medium-sized enterprises (SMEs) and supply chains	Financial or fiscal support for domestic suppliers (such as SMEs)
National security and public health	Application and potential reinforcement of foreign direct investment screening in COVID-19–relevant industries
Other State intervention in the health industry	Mandatory production; export bans; import facilitation
Intellectual property (IP)	General authorisation of non-voluntary licensing to speed up research and development; IP-holder-specific non-voluntary licensing to enable the importing of medication
Policy Actions at the international level	
International support measures for investment	International pledges in support of cross-border investment
International investment agreements (IIAs)	IIA reform in support of public health policies, in order to minimise ISDS risks

Furthermore, government-imposed restrictions aimed at controlling the COVID-19 pandemic have triggered the rise of social unrest,[33] which may be an indication of a government's failure to protect its people's livelihoods, an obligation that takes on greater relevance during a pandemic. In this context, foreign investors may have legitimate claims against a government if the necessary preventive measures or vigilance are deemed to be absent or inadequate, only resulting in the undertaking of more severe measures with escalating and substantial harms to their investments.

The Impact of COVID-19 State Actions on Construction Projects

The consequences of COVID-19 have emerged as legitimate reasons for the delay of and disruption to the procurement and operational phases of construction projects around the globe. This is particularly true for cross-border construction projects, which often require the use of supply chains for their equipment, materials, and plants. Such

[33] Andreas Kluth, 'Social Unrest Is the Inevitable Legacy of the Covid Pandemic' (*Bloomberg*, 14 November 2020) <https://www.bloomberg.com/opinion/articles/2020-11-14/2020-s-covid-protests-are-a-sign-of-the-social-unrest-to-come> accessed 16 August 2021.

delays and disruption are primarily due to the adverse impacts of government-mandated lockdowns and restrictions placed on the mobilisation of construction-site personnel and plants and the imposition of health and safety requirement protocols. Such measures have resulted in labour shortages, working hour and site access limitations, supply chain and delivery interruptions, schedule delays, changes in work patterns and productivity,[34] and the escalation of material costs.[35] Having been severely affected by the pandemic, major players in the global construction supply chain, such as China and Italy, have significantly slowed or shut down their production, leading to a sharp decline in the manufacturing and export of construction materials.[36] As a result, countries that are dependent upon these players' materials have struggled to source both their raw and manufactured construction materials. As demand and cost rise, it should be anticipated that the rate of progress of many construction projects will inevitably be frustrated, if not halted outright.

In addition to disruption in materials procurement, employers and contractors involved in construction projects that heavily rely on imported labour forces, or those involved in projects located in remote areas, have faced impediments when mobilising personnel due to travel restrictions and quarantine measures. It has also been reported that many foreign workers have been repatriated following the closure of construction sites due to COVID-19.[37] In practice, this means that international construction projects are exposed to the risk of labour shortages, even where local regulations and guidelines would allow work to proceed. For example, China's construction industry is extensively dependent on rural migrant workers; according to the National Bureau of Statistics of China, around 54 million rural migrant workers work in the construction industry and due to lockdown, most of the migrant workers returning to their

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[34] Scherer and Bassiri (n 1) 211.
[35] See the Department for Business, Energy, and Industrial Strategy, 'Monthly Statistics of Building Materials and Components. Commentary, April 2021 – UK and Great Britain' (5 May 2021) <https://www.gov.uk/government/statistics/building-materials-and-components-statistics-april-2021> accessed 12 August 2021, which shows that the price of construction materials increased by 7.8% between March 2020 and March 2021.
[36] Matt Hickman, 'Coronavirus-Related Slowdowns Poised to Pummel Construction Supply Chain' (*The Architect's Newspaper*, 24 March 2020) <https://www.archpaper.com/2020/03/coronavirus-construction-supply-chain/> accessed 12 August 2021.
[37] Shuvu Batta, 'Gulf States Force India and Other South Asian States to Repatriate Impoverished Migrant Workers' (*WSWS*, 25 May 2020) <https://www.wsws.org/en/articles/2020/05/25/gulf-m25.html> accessed 12 August 2021.

hometowns for the Lunar New Year holiday were unable to return to the work sites.[38] In response to a survey undertaken by the China Construction Industry Association, 60.95% of participants stated that their business operations had been significantly and adversely affected by the pandemic, while 66.04% of this number reported labour shortage issues.[39]

As is to be expected, market uncertainty and the overall decline in productivity resulting from novel working arrangements will also unfavourably affect the cash flows of all industry stakeholders. For those projects that had to be completely shut down throughout the lockdowns, the consequent loss of progress has been absolute. Even where projects have been allowed to resume, they will still be subject to strict on-site health and safety requirements, which include the regular sanitation of tools and the working environment and the adoption of social distancing protocols.[40] As an industry that typically requires the on-site involvement of all project members, these measures have had certain and direct consequences on the manner in which execution, implementation, inspection and other on-site construction activities may be carried out. In the United Kingdom (UK), for example, the government has imposed guidelines regarding how to work safely on construction sites, urging employers to reduce the number of workers on site to the minimum strictly necessary while still observing sanitary and social distancing requirements.[41] In practice, even if such measures are announced as 'guidelines' (rather than mandatory obligations), contractors and employers have been keen to adhere to them, in line with the health and safety culture that rightfully exists in the construction sector.

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[38] International Labour Organization, 'Policy Brief: China – Rapid Assessment of the Impact of COVID-19 on Employment' (July 2020) <https://www.ilo.org/emppolicy/areas/covid/WCMS_752056/lang--en/index.htm> accessed 12 August 2021.

[39] China Construction Industry Association, 'Investigation Report on How Covid-19 Impacted the Chinese Construction Enterprises' (15 April 2020) <http://www.zgjzy.org.cn/menu20/newsDetail/8428.html> accessed 12 August 2021.

[40] Scherer and Bassiri (n 1) 213.

[41] HM Government, 'Working Safely During COVID-19 in Construction and Other Outdoor Work' (5 November 2020) <https://assets.publishing.service.gov.uk/media/5eb961bfe90e070834b6675f/working-safely-during-covid-19-construction-outdoors-110520.pdf> accessed 12 August 2021.

CHAPTER 3
THE ROLE OF INVESTMENT TREATIES IN THE CONSTRUCTION INDUSTRY: WHY ARE THEY RELEVANT FOR PARTIES INVOLVED IN INTERNATIONAL CONSTRUCTION PROJECTS?

Investment Treaty Protection for Parties in International Construction Projects

Investment treaties – either bilateral or treaties with investment provisions, collectively referred to herein as IIAs – are essentially international instruments between States which are regulated by the international law of treaties.[42] In the absence of a single comprehensive global treaty, IIAs have become the most effective machinery with which to establish reciprocal investment protection obligations between States; this is because the provisions thereunder not only reflect the agreed positions of the relevant States, but also legally bind the contracting States.[43] The prominence of IIAs can be seen from the number of IIAs that have been executed to date; as at September 2021, there are 2,842 bilateral investment treaties currently in force worldwide.[44]

While the terms of each IIA may differ and must, therefore, be examined individually, they essentially share the common objectives of providing foreign investors with a 'level playing field' and guaranteeing that the host State will not undertake any opportunistic measures that would be detrimental to foreign investors. For this reason, IIAs have been strategically encouraged by both developed and developing countries, albeit for different reasons. Host countries, which are commonly developing and least-developed countries, have broad obligations to protect foreign investors, for the sake of attracting foreign investments. Investors from developed countries are then obligated to adhere to these dealings in order to protect their economic interests and obtain favourable standards,[45] as well as to obtain direct access to the ISDS mechanism as an alternative to national court proceedings in the host State.[46]

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[42] Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 6.
[43] UNCTAD, *International Investment Agreements: Key Issues – Volume 1* (United Nations 2004) 17.
[44] UNCTAD, 'International Investment Agreements Navigator' (September 2021) <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 11 September 2021.
[45] Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Routledge 2013) 13.
[46] ibid 49.

In the construction context, the protections offered by IIAs are increasingly relevant for both large and cross-border construction projects,[47] especially in the increasingly competitive environment surrounding engineering, procurement, and construction contracts. This is particularly the case where a project is being carried out in a politically and economically unstable environment.[48] International construction and infrastructure projects generally involve long-term transactions with considerable commercial and technical complexity. While each State has unique cultural and legal nuances that need to be thoroughly understood, issues will often emerge when foreign investors are not well acquainted with the host State's regulatory landscape.[49]

Construction claims may not only arise where the project owner is a State or a State-owned or State-run entity, but also where the policies and measures adopted by the State in which the investment has been made have negatively impacted the project. In the past, significant changes in political regimes, coupled with economic uncertainty and unpredictable government policies, have led to substantial disruption for contractors undertaking construction projects in the affected regions, particularly in developing countries. Some examples of this are the conflicts across the Middle East that were triggered by the Arab Spring in 2010 to 2012, which led to a massive disruption or abandonment of construction and infrastructure projects in the region[50] and to the 2014 oil price slump, which negatively impacted international construction projects in the Middle East, triggering claims from contractors.[51] It is, therefore, unsurprising that, in recent years, appreciation for the existence of IIAs as an effective risk management tool (particularly for international construction projects has grown.[52]

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[47] Frederic Gillion and Leonardo Carpentieri, 'Construction Arbitration and BITs: Is There Still a Future for Intra-EU Investment Arbitration?' (2018) ICLR 167, 167.
[48] Randall Walker and Jay Randhawa, 'The Resolution of Construction Claims through Investor–State Dispute Settlement: Alternative Opportunities for Relief for International Contracts' (2019) ICLR 255, 257.
[49] Simon Hughes, 'The Investment Treaty Arbitration Review: Investment Treaty Arbitration: Construction and Infrastructure Projects' (*The Law Reviews*, 18 June 2021) <https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/investment-treaty-arbitration-construction-and-infrastructure-projects> accessed 12 August 2021.
[50] James MacDonald and Dyfan Owen, 'The Effects on Arbitration of the Arab Spring' (*GAR*, 20 April 2016) <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2016/article/the-effects-arbitration-of-the-arab-spring> accessed 16 August 2021.
[51] CM Staff, 'Oil Price Slump Brings Late Payment and Cancelled Projects to Middle East' (*Construction Manager*, 24 November 2015) <https://constructionmanagermagazine.com/oil-price-sl8ump-bri3ngs-late-paym4ent-cancelled/> accessed 8 September 2021.
[52] Walker and Randhawa (n 48) 256.

Availability of ISDS Proceedings in the Construction Industry

As Professor Thomas Wälde once said, substantive rights protections under IIAs will render themselves meaningless without the company of an effective international enforcement procedure,[53] the latter of which can be found in the ISDS mechanism. ISDS provisions are an important valve that allows aggrieved foreign investors to enforce their rights under a treaty and directly claim against the host State through international arbitration and under the auspices of various arbitration institutions such as the International Centre for the Settlement of Investment Disputes (ICSID). In light of the growing tide of ISDS proceedings, it has been argued that the entering into effect of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), to which there are now 164 signatory and contracting States,[54] has become the most significant contribution to the securing of foreign investors' rights to initiate arbitral proceedings against a host State.[55] A growing number of contractors that are carrying out cross-border projects have become more aware on the benefits of relying on the substantive safeguards provided by IIAs through ISDS proceedings. According to the *ICSID Caseload – Statistics* 1966-2020, the construction industry accounts for 9% of all ICSID cases; however, construction section disputes make up 17% of all ICSID cases registered in 2020.[56]

Whether the parties involved in international construction projects will be able to initiate a claim against the host State theoretically depends on several factors, including whether the parties qualify as 'investors', whether the projects qualify as 'an investment', and whether the legal dispute itself arises due to an alleged breach of an IIA.[57] This will be discussed further in the following sections.

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[53] Thomas W Wälde, 'The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases' (2005) 6 JWIT 183, 194.
[54] ICSID, 'Database of ICSID Member States' (September 2021) <https://icsid.worldbank.org/about/member-states/database-of-member-states> accessed 11 September 2021.
[55] Virginie Colaiuta and William Laurence Craig, 'Construction Contracts as 'Investments for the Purpose of Investment Treaty Arbitrations' in Renato Nazzini (ed), *Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes* (Routledge 2018) 98-99, para 8.4.
[56] ICSID, 'The ICSID Caseload – Statistics' (Issue 2021-1) 12 (Chart 8), 25 (Chart 6) <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics> accessed 11 September 2021.
[57] Erin Miller Rankin, Sami Tannous, and Matei Purice, 'Construction Disputes in Investment Treaty Arbitration' (*GAR*, 2 August 2017) <https://globalarbitrationreview.com/guide/the-guide-

Compliance with 'Investor' and 'Investment' Requirements

In addition to obtaining the consent of the parties, a critical jurisdictional threshold that will need to be satisfied by investors if they wish to initiate ISDS proceedings is whether the parties in international construction projects can be classified as 'investors' and whether any claims arise out of or in relation to the protected 'investment', all of which fall within the definitions given by the relevant IIA.[58] This element is specifically regulated by Article 25 of the ICSID Convention, which outlines the objective requirements for ICSID jurisdictions to apply, referring to the nature of the dispute (*ratione materiae*) and to the parties (*ratione personae*).[59] Failure to meet these requirements means that ICSID has no jurisdiction to adjudicate the dispute. Article 25(1) of the ICSID Convention states that:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.[60]

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construction-arbitration/first-edition/article/construction-disputes-in-investment-treaty-arbitration> accessed 16 August 2021.

[58] Walker and Randhawa (n 48) 258; See also *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/00/2, Award (15 March 2002) para 30.

[59] Christoph H Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 82 para 3; International Bank for Reconstruction and Development*, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (18 March 1965) para 25: 'While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.'

[60] ICSID Convention art 25(1).

Qualifying Parties in International Construction Projects as 'Investors'

While there is no uniform standard for an 'investor', following the applicable principles in the investment protection regime, which aims to protect foreign investors, most IIAs stipulate that any national of a contracting State that is not the host State (i.e., where the investment is made) will qualify as an 'investor'.[61] The nationality of the investors thus becomes a key determinant of whether they are entitled to benefit from treaty protections; this, in turn, determines the *ratione personae* jurisdiction of the ISDS tribunal. In the context of ICSID proceedings, the definition under the IIA should be interpreted together with those found in the ICSID Convention, which define a 'national of another Contracting State' as any natural or juridical person that is a national of a contracting State other than the State party to the dispute, both at the time the parties consented to submit the dispute to ICSID and on the date the request for arbitration is registered.[62] Thus, to satisfy this requirement, the investors must be nationals of a contracting State and must not have the nationality of the host State. Accordingly, unincorporated joint ventures or consortia (which are frequently found in the construction industry) do not qualify as a legal person and, therefore, do not have any standing to claim in their own names.[63] However, as confirmed in the seminal case *Impregilo v Pakistan*, a member of such a joint venture may still independently claim against the measures affecting the investment for their own share of any losses.[64]

As a matter of international law practice, when determining the nationality of juridical persons, there are several possible criteria that can be used, with the place of incorporation or seat being the approach commonly adopted by tribunals.[65] In this regard, locally incorporated companies will not generally qualify as 'investors'. However, Article 25(2)(b) of the ICSID Convention further establishes that the parties may agree that a company incorporated in the host State can be considered as a foreign investor due to the existence of foreign control.[66]

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[61] Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) 156.
[62] ICSID Convention art 25(2).
[63] See, for example, *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction (22 April 2005) paras 128-139.
[64] ibid paras 165-174.
[65] Schreuer (n 59) 279, para 694. See also *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (New Application: 1962) [1970] ICJ Rep 3, Separate Opinion of Judge Jessup, 5 February 1970, 183 para 39.
[66] ICSID Convention art 25(2)(b).

Qualifying Construction Contracts as an 'Investment'

It has long been a subject of debate on whether a construction contract would amount to a foreign investment, thus entitling the parties involved to claim against the host State on the basis of a breach of an investment treaty.[67] Tribunals have typically interpreted IIAs' definition of 'investment' as including 'every kind of asset', thereby covering an extensive range of assets.[68] If the arbitration is administered under ICSID proceedings, the investment must additionally satisfy the necessary conditions to be classified as an 'investment' under the ICSID Convention. However, Article 25 of the ICSID Convention, as cited above, provides no further elucidation regarding the 'investment' concept referred to in the provisions. It has been mentioned in the *travaux préparatoires* that this was intentional, in order to allow the parties themselves to determine what constitutes foreign 'investment'.[69] In the absence of a clear definition, the term has been largely guided by ICSID jurisprudence. In this regard, the tribunal in *Fedax v Venezuela* stated that:

> The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development.[70]

This definition was later reinforced in *Salini v Morocco*,[71] which is known as the leading case for guidelines to determine whether a construction contract constitutes an 'investment' pursuant to the treaty and to the ICSID Convention. In this case, a contractor brought a claim against Morocco, whereupon the latter argued that no investment had occurred within the framework of the IIA between Morocco and Italy or under the ICSID Convention. The tribunal then established four basic requirements,

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[67] Colaiuta and Craig (n 55) 98 para 8.2.
[68] Mahnaz Malik, 'Definition of Investment in International Investment Agreements' (August 2009) IISD Best Practice Series, 4 <https://www.iisd.org/publications/definition-investment-international-investment-agreements> accessed 11 September 2021.
[69] Tony Cole and Kumar Vaksha, 'Power-conferring Treaties: The Meaning of "Investment' in the ICSID Convention' (2011) 24 Leiden Journal of International Law 305, 318.
[70] *Fedax NV v Republic of Venezuela*, ICSID Case No ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997) para 43.
[71] *Salini Construction SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001).

later known as the 'Salini test', that define the existence of an 'investment' within a construction contract. These requirements are the existence of a certain duration of the contractual performance; an element of risk in the transaction; contribution of money or assets; and benefits to the economic development of the host State.[72] When implementing these requirements, the tribunal determined that these criteria had been fully complied with and, therefore, the contractor's activities when constructing a highway constituted an investment.[73]

Generally speaking, construction contracts tend to meet the Salini test and thus will readily fall within the requirement of an 'investment' for the purpose of ISDS proceedings. Further to this, the tribunal in *Joy Mining v Egypt* confirmed that these requirements are to be assessed on a case-by-case basis, depending on the prevailing circumstances behind each case.[74] That being said, not all construction contracts constitute an 'investment'. In *Joy Mining*, the tribunal held that bank guarantees would not constitute an investment, because they were merely a contingent liability and were not linked to a contract that fell within the ambit of an investment.[75] In *Mihaly v Sri Lanka,* the tribunal established that pre-contractual expenditure on construction projects could not amount to an investment because Sri Lanka had indicated that it was not until the execution of the contract that it was willing to enter into a legally binding arrangement and to admit that an investment had been made.[76] Against this backdrop, and in the context of ISDS proceedings, it may be safe to conclude that (subject to an individual assessment of each case) some free-standing elements of construction projects may not be interpreted as 'investments'.[77]

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[72] ibid para 52.
[73] ibid paras 53-55, 57.
[74] *Joy Mining Machinery Ltd v. Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction (6 August 2004) para 53.
[75] ibid paras 44, 53-63.
[76] *Mihaly v Sri Lanka* (n 58) para 51.
[77] Colaiuta and Craig (n 55) 107 para 8.32.

Breaches of State Obligations under IIAs

The subsequent requirement that must be satisfied before initiating an investment treaty claim is whether the State has committed breaches of its obligations under an IIA. IIAs are essentially dynamic instruments, whose substance evolves over time in order to strike a balance between investment protection needs and the regulatory scope of the host State.[78] While each IIA may contain different terms, the protections available to foreign investors against government responses to the pandemic will generally follow a wide range of standard patterns.[79] These standards impose substantive obligations in connection with foreign investments upon States. Typically, investment treaty provisions incorporate a suite of minimum rights and protections for non-discrimination measures vis-à-vis national treatment (offered to nationals of the host State) or most-favoured nation treatment (offered to nationals of any other State), fair and equitable treatment (including obligations relating to transparency and consistency, the protection of investors' legitimate expectations and the obligation to comply with contractual obligations), full protection and security (including the obligation to exercise due diligence and to put in place reasonable measures to protect investors and their investments against physical violence) and protection against unlawful expropriation, both direct and indirect.[80]

Claims under IIAs may not only arise where the project owner is a State or an emanation of a State, but also where certain measures are adopted by the host States (or their organs or agencies) that involve the exercising of State power, potentially giving rise to a breach of substantive obligations under the IIA. The ways in which COVID-19–related measures have affected the construction industry have been discussed in Chapter 2; as such, the next chapter will consider whether such measures provide a legitimate basis for a breach of the safeguards provided by IIAs.

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[78] UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review* (United Nations 2005) 31.
[79] John Uff and Alexander Uff, 'The Availability of Treaty Arbitration in Construction' (2010) ICLR 402, 403.
[80] Vadi (n 45) 15; Bart Ceenaeme, 'ICSID Arbitration as an Option for International Construction Disputes' (2011) ICLR 220, 231–242.

CHAPTER 4
COVID-19 PUBLIC HEALTH EMERGENCY MEASURES AND STATE OBLIGATIONS UNDER INVESTMENT TREATIES: IS THERE ANY LEGITIMATE BASIS FOR INVESTMENT TREATY CLAIMS IN THE CONSTRUCTION SECTOR?

While States have undertaken measures to mitigate the serious challenges imposed by the COVID-19 pandemic on the global health system, it is inevitable that the parties involved in international construction projects may seek relief and/or compensation for the losses resulting from these measures. In this chapter, the substantive treaty standards that could potentially become the basis for such claims will be further analysed. First, however, it is important to note that any ISDS proceedings for breach of IIA obligations will be examined by the tribunals on a case-by-case basis, with due observance of the facts of and circumstances surrounding each case, as well as the availability of defence, which will be analysed in Chapter 5.

Fair and Equitable Treatment

In regards to their treatment of foreign investors, the fair and equitable treatment (FET) standard requires States to 'act in a consistent manner, free from ambiguity and totally transparently'.[81] In the absence of a general agreement as to how to interpret this standard, its interpretation will typically rely upon the tribunal's discretion, which is often influenced by the parties' intentions under the IIA, the treaty objectives, and/or the applicable minimum standards under customary international law.[82] Breaches of the FET standard can be very broad; they may include denial of justice, failure to establish a stable and certain legal framework, absence of transparency, coercion by the State, the frustration of investors' legitimate expectations and discriminatory treatment.[83] In *Rumeli v Kazakhistan*, for example, the tribunal established that the FET standard encompasses the principles of transparency, good faith, non-arbitrary

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[81] *Técnicas Medioambientales Tecmed, SA v the United Mexican States* (*Tecmed v Mexico*), ICSID Case No ARB (AF)/00/2, Award (29 May 2003) para 154.
[82] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (2004) OECD Working Papers on International Investment, 2004/03, 2–3 <http://dx.doi.org/10.1787/675702255435> accessed 21 August 2021.
[83] Ioana Tudor, 'Fair and Equitable Treatment' (*Jus Mundi*, 14 June 2021) <https://jusmundi.com/en/document/wiki/en-fair-and-equitable-treatment> accessed 21 August 2021.

and non-discriminatory actions, procedural propriety and due process and the protection of legitimate expectations.[84] Thus, it is not surprising that, according to UNCTAD, the FET standard does not only exist in most IIAs, but also emerges as one of the most significant grounds for finding an IIA breach, becoming the most litigated standard in investment disputes.[85]

The FET standard encompasses the concept of legitimate expectations, which must be based on 'the host State's legal framework and on any undertakings and representations made explicitly or implicitly by the host State.'[86] As such, it is sensible for foreign investors not to expect to receive the same level of stability and administrative efficiency from a developing country as that offered by a developed country.[87] Substantively, tribunals therefore vary on the degree of deference afforded to the States when reviewing the measures adopted for the sake of protecting public interests. The simplest method with which to ascertain whether certain actions constitute a violation of the FET standard is to examine the relevant jurisprudence.

In *Occidental v Ecuador*, the tribunal, having interpreted the FET standard as requiring the existence of the 'stability of [the] legal and business framework',[88] established that the inconsistent and obscure changes to the implementation of Ecuador's VAT system constituted a breach of FET.[89] The tribunal viewed that the FET criterion was objective and did not rely on Ecuador's good faith or lack thereof.[90] Changes in a legislative framework that prejudice investors' legitimate expectations have also been found to constitute a breach of the FET standard, as seen in a case relating to a series of reforms affecting Spain's renewable energy subsidy and feed-in tariff scheme.[91] These cases further underline a State's obligations to afford a stable and predictable legal regime upon which foreign investors can rely when making long-term investments. Assessing

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[84] *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (29 July 2008) para 609.
[85] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 130.
[86] ibid 145.
[87] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008) 165.
[88] *Occidental Exploration and Production Company v the Republic of Ecuador*, LCIA Administered Case No UN 3467, Final Award (1 July 2004) para 183.
[89] ibid paras 184-196.
[90] ibid para 186.
[91] *Antin Infrastructure Services Luxembourg Sàrl & Antin Energia Termosolar BV v the Kingdom of Spain*, ICSID Case No ARB/13/31, Award (15 June 2018) paras 568-573.

the legitimacy of a particular policy and the adverse effect of the measures imposed, the tribunal in *EDF v Romania* noted that, in addition to a legitimate aim in the public interest, there must be 'a reasonable relationship of proportionality between the means employed and the aim sought to be realized'.[92] Thus, a State's conduct may be deemed to violate the FET standard if it can be established that its interference in the investment was disproportionate to the public interest that was served by the policies concerned.

When implementing the foregoing principles, it is clear that, in the context of COVID-19, the tribunal will likely find that a substantial number of the measures adopted by States will fall within the ambit of FET. The issuance of legislation imposing travel or export bans or restrictions on operating businesses or their outright closure is an example of changes to the existing legal framework that may frustrate the legitimate expectation of foreign contractors or owners that their projects will be properly undertaken. If the legislation is inconsistent, ambiguous, changes over time, or otherwise lacks due process or transparency (all of which are not improbable in a pandemic) this may bolster the argument that it constitutes a violation of the FET standard.

Investors in the construction industry whose investments have been harmed by COVID-19 measures could argue that the lockdown or business closures were excessive in comparison with the legitimate interest pursued and that the States could have enacted less stringent measures in an attempt to recover their economies. An example where this might apply is legislation in Peru that prevented toll-road operators from collecting fees,[93] in which case it might be argued that the government could have adopted less onerous measures, such as providing road users with subsidies or other forms of financial aid. In the event the investment is a concession, such an action may also amount to a unilateral change of a contract.[94] While the situation needs to be assessed on a case-by-case basis, submission of expert evidence may hold a determinant role in deciding whether those measures that are alleged to be a breach of FET were proportionate, given their likely effect on investors.

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[92] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) para 293.
[93] Sanderson (n 29).
[94] Lucas Clover Alcolea, 'The COVID-19 Crisis: Core Investment Law Issues Revisited' (May 2020) TDM, 11 <https://ssrn.com/abstract=3740542> accessed 21 August 2021.

Expropriation

Expropriation, the most extreme type of interference with foreign property, manifests both in the taking of alien property by direct means and through indirect expropriation.[95] Direct expropriation refers to an official act that takes the title or assumes ownership of a foreign investor's property,[96] which is usually undertaken through the nationalisation of an investor's assets[97] or the transfer of the legal title of the assets.[98] Indirect expropriation does not involve any direct takeover by the State, only requiring that the measures taken by the State reduce the value of an investment or deprive the investor of control over or of substantial benefits from the investment. The latter type is more complicated, as such a measure will leave the investor's title uninterrupted but deprive the investor of the ability to exercise their rights over the value of or benefits from the investment.[99] UNCTAD has subdivided this category into 'creeping expropriation' (where the State employs a series of measures that aim to deprive the investor of the economic value of the investment) and 'regulatory expropriation' (where the measure is taken for regulatory purposes, but affects the economic value of the properties owned by the foreign investor in such a way that means it can be deemed an expropriation).[100]

Given the definition, taking over private hospitals or business supplies is an example of possible direct expropriation, while restrictions imposed on businesses (such as mandating business closures or operational restrictions, enforcing social distancing measures that limit the number of workers on site, imposing price controls, and border closures or lockdown orders that have resulted in projects being permanently shut down) may constitute possible instances of indirect expropriation. As highlighted by UNCTAD, the critical issue herein is how to determine the difference between a lawful use of State's discretion that impairs the enjoyment of foreign-owned property, and a regulatory take that demands compensation. As such, there must be a balance between

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[95] Dolzer and Schreuer (n 85) 98, 101.
[96] ibid 101.
[97] *Rusoro Mining Limited v the Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/12/5, Award (22 August 2016).
[98] *Bernhard von Pezold and Others v the Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award (28 July 2015).
[99] Dolzer and Schreuer (n 85) 101.
[100] UNCTAD (n 78) 42.

accomplishing public policy objectives that may decrease the value of privately owned assets and preserving the economic worth of such assets.[101]

Under customary international law, a foreign-owned property may not be expropriated unless such an act of expropriation is for a public purpose, is non-discriminatory and non-arbitrary, is in accordance with the due process of law, and is accompanied by prompt, adequate and effective compensation.[102] As a preliminary point, in the context of COVID-19, it is easy to see that the measures adopted by the various States are meant to serve a public purpose. However, a case-by-case assessment based on the measures at hand and the corresponding factual and legal context continues to be the cornerstone of each tribunal's analysis. In general, a tribunal would assess the severity of any interference with the investors' property rights (including its duration, the nature and objective of the measures, the proportionality between a policy's objectives and its impact on the investment) and whether it tampered with the investors' legitimate expectations.[103] In practice, it will be considered if the investor has been deprived of the 'use or reasonably-to-be-expected economic benefit of property.'[104] While this approach is rather expansive, the claimant must first be able to prove that the loss suffered 'amount[s] to a deprivation of property'[105] in order to establish the basis for a claim of indirect expropriation. In addition, the tribunal will need to assess not only the effect of the State measures, but also their nature and objectives; this was seen in *Saluka v the Czech Republic*, where it was said that a deprivation may be justified when the State implements non-discriminatory and bona fide rules aimed at public welfare in the ordinary remit of its regulatory authorities.[106]

Expropriation claims against COVID-19 measures might encounter issues, as 'expropriation usually amounts to a lasting removal of an owner to make use of its

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[101] ibid.
[102] Dolzer and Schreuer (n 85) 99-100.
[103] Katia Yannaca-Small, 'Indirect Expropriation and the Right to Regulate: Has the Line Been Drawn?' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn, OUP 2018) 576, para 22.49.
[104] *Metalclad Corporation v the United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) para 103.
[105] *Charanne and Construction Investments v Spain*, SCC Case No V 062/2012, Award (21 January 2016) para 464.
[106] *Saluka Investments BV v the Czech Republic,* UNCITRAL, Partial Award (17 March 2006) para 255.

economic rights'.[107] As such, an ephemeral deprivation of property would arguably not constitute expropriation. Nonetheless, in the absence of any standardised formula that can be used to establish the appropriate temporal duration of measures, determination of such will most likely be context-specific. For example, tribunals have determined that both the suspension of an export license for four months[108] and an investor's loss of control of their property for one year[109] could amount to expropriation. It is worth noting that, in the context of the ongoing pandemic, it is difficult to predict how long the COVID-19 crisis will persist. If a COVID-related measure taken only lasts for a month or two, it is difficult to see how this would amount to expropriation, given that such measures were initially only intended to apply for a brief period.[110] However, if the measure is likely to endure for a sufficiently long period of time that it will have a significant effect on investments, and if there is no governmental support to mitigate the impact of the measure on the business, aggrieved investors may have a claim for unlawful expropriation.

A general principle of proportionality will usually be adopted by the tribunal, which must determine whether a State's actions should be deemed to be proportionate to the protection of public interest or to another objective in order to decide whether there has been a breach of an IIA, as observed in the seminal case *Tecmed v Mexico*.[111] When examining the COVID-19 measures, such a proportionality analysis should be given prominence, having been stated as one of the criteria mandated by the WHO[112] and adopted in one of the few public health–related ISDS cases: *Philip Morris v Uruguay*.[113] Referring to the earlier example, in Peru, instead of banning toll-road operators from charging tolls, it might be argued that the government could have initially imposed a reduced toll or otherwise attempted to first engage with the

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[107] *SD Myers Inc v Government of Canada*, UNCITRAL Ad Hoc (Partial Award) (13 November 2000) para 283. See also *Tecmed v Mexico* (n 81) para 116.
[108] *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award (12 April 2002) para 107.
[109] *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (8 December 2000) para 82.
[110] *Achmea BV v the Slovak Republic*, UNCITRAL, PCA Case No 2008-13, Award (7 December 2012) para 289.
[111] *Tecmed v Mexico* (n 81) para 122.
[112] WHO, 'Addressing Human Rights as Key to the Covid-19 Response' (21 April 2020) 2 <https://www.who.int/publications/i/item/addressing-human-rights-as-key-to-the-covid-19-response> accessed 9 September 2021.
[113] *Philip Morris v Uruguay* (n 11) para 305.

operators prior to the enaction of such legislative action. As it did not do so, there is a possibility that the State has not satisfied the proportionality examination.[114] As it is self-evident that proportionality must be examined on an individual basis (depending, in part, on the severity of the measures and the extent of loss) States would need to prove that their actions were evidence-based and backed up by scientific studies.[115]

Full Protection and Security

IIAs often incorporate the obligation for the host State to provide full protection and security (FPS) for investors and their investments, requiring the host State to 'take all measures of precaution to protect the investment' on its territory.[116] In practice, FPS includes an 'obligation of vigilance and due diligence', which mandates that the State must take reasonable measures to prevent any undue interference in foreign investments ('duty of prevention') and affirmatively protecting investments from any lawful actions by third parties ('duty of repression').[117] While FPS is primarily concerned with the State's obligations to safeguard the physical security of investments, some tribunals placed emphasis on the term 'full' and suggested that 'security' cannot be confined to *physical* security,[118] as it also applies to 'any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment.'[119] The broad interpretation of this standard can be seen in several notable cases. For example, in *Azurix Corp v the Argentine Republic*, FPS was interpreted as going beyond physical security, as it also includes the stability afforded by a secure investment regime and compliance with the FET obligation.[120] Similarly, in *National Grid v Argentina*, a significant change in the

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[114] Alcolea (n 94) 10.
[115] ibid.
[116] *American Manufacturing & Trading Inc v the Republic of Zaire*, ICSID Case No ARB/93/1, Award (21 February 1997) para 6.05.
[117] *Oxus Gold v the Republic of Uzbekistan*, UNCITRAL, Final Award (17 December 2015) para 353.
[118] *Biwater Gauff (Tanzania) Ltd v the United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) para 729.
[119] *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v the Argentine Republic*, ICSID Case No ARB/97/3, Award (20 August 2007) para 7.4.15.
[120] *Azurix Corp v the Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006) para 408.

regulatory regime where the investor was operating was held to breach the FPS obligation.[121]

With such a wide-ranging perception of the FPS standard being adopted, it may well be argued that a State's failure to take preventive and immediate action to prevent the spread of COVID-19 has contributed to the crisis, thereby constituting a violation of the FPS standard by the State. For example, some States (such as the UK) initially resisted the idea of imposing lockdowns and border closures, before eventually enforcing them.[122] This is particularly relevant if such a failure requires the State, at a later date, to take avoidable and drastic measures that substantially prejudice investments. Furthermore, the FPS standard may also apply to the imposition of excessive restrictions that may impact the regulatory environment of the construction industry, in which investors may operate. As with the FET obligation, the proportionality (or lack thereof) of the imposed measures will be critical to establishing whether or not there has been a violation of the FPS standard; therefore, again, an individual analysis of each circumstance is required.

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[121] *National Grid plc v the Argentine Republic*, UNCITRAL, Award (3 November 2008) paras 188-190.

[122] Michael Savage, Phillip Inman and Robin McKie, 'Covid: Johnson's U-turn Puts England Under Tough New Lockdown' *The Guardian* (1 November 2020) <https://www.theguardian.com/world/2020/oct/31/johnsons-u-turn-puts-country-under-tough-new-lockdown> accessed 23 August 2021.

CHAPTER 5
POTENTIAL STATE DEFENCE: IS THERE ANY DEFENCE FOR STATES IN RESPECT OF COVID-19 MEASURES THEY ADOPTED THAT HAVE AFFECTED CONSTRUCTION PROJECTS AND INVESTMENTS?

As seen in the previous chapter, the potential legal issues arising out of the COVID-19 pandemic are likely to revolve around an assessment of whether or not the measures taken by States were sufficiently necessary in order to protect public health and mitigate the consequential economic crisis, or if such actions were implemented in a manner that otherwise violated the States' obligations under the applicable IIA. This chapter will, therefore, analyse the defences that the States could raise against such claims.

Non-Precluded Measures under IIAs

An IIA may incorporate a non-precluded measures (NPM) clause, which includes express exceptions to the States' obligations to take action in extraordinary circumstances. Where an NPM clause exists under an IIA and the exception applies, the State's obligations under the IIA may not apply to the COVID-19 measures it has imposed, as observed in *Continental Casualty Company v the Argentine Republic*, where a public order exception was successfully relied upon by Argentina as a way to avoid liability.[123] Therefore, while the existence of this clause may serve as a safety valve for the measures a State has used to combat COVID-19 (to the extent that the requirements are met) it is worth noting that the effective invocation of this defence is conditional on a variety of factors, which differ among IIAs due to the typological variations in NPM clauses.

One example is the NPM clause that is based on Article XX of the General Agreement on Tariffs and Trade (GATT) and on Article XIV of the General Agreement on Trade in Services (GATS), which, essentially, states that a party will not be prevented from adopting or enforcing measures that are necessary to protect human life or health, provided that the measures are not applied in an arbitrary or unjustifiable manner or

[123] *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008).

do not establish disguised international trade or investment restrictions.[124] Pursuant to WTO jurisprudence, incorporation of the word 'necessary' has evidently set a higher threshold for demonstrating a means–end relationship between the contested measures and the State's objectives that entails weighing and balancing a number of factors, including the measures' contribution to achieving the objectives and possible alternative measures that might reasonably be available.[125] While the objective of COVID-19 restrictions could be, generally speaking, easily justified, such measures may not be considered 'necessary' if possible alternative measures were reasonably available that would allow the State to achieve its health policy objectives.

A less stringent example of the NPM clause can be found in the China–Australia Free Trade Agreement (ChAFTA), which provides that non-discriminatory measures for 'legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim' by an investor.[126] This stipulation provides a potentially comprehensive defence to claims arising from the COVID-19 crisis. While it may be argued that COVID-19 measures can be classified as an action taken by the State to protect public health, the implementation of such stipulation, however, is contingent upon a State demonstrating that the measures taken have been implemented in a non-discriminatory manner. Should the restrictions be implemented unfairly (for example, in a way that only applies to investors from certain countries) it will be difficult for a State to rely on the exception clause.

Police Powers Doctrine

Even in the absence of NPM clauses, States may generally rely on the police powers doctrine, which provides a mechanism through which measures that are in derogation of a State's obligations will not trigger a responsibility to compensate investors for losses suffered, as long as they serve public policy objectives.[127] Viewed as an expression of the State's right to regulate, the idea of police powers is often understood

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[124] GATT (1994), art XX(b); GATS (1995), art XIV(b). See, for example, art 5(6) of the Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion, and Protection of Investment (2011).
[125] Gisele Kapterian, 'Critique of the WTO Jurisprudence on 'Necessity'' (January 2010) 59 ICLQ 89, 107.
[126] ChAFTA (2015) art 9.11.
[127] Nicholas J Diamond, 'Pandemics, Emergency Measures, and ISDS' (*Kluwer Arbitration Blog*, April 13, 2020) <http://arbitrationblog.kluwerarbitration.com/2020/04/13/pandemics-emergency-measures-and-isds/> accessed 23 August 2021.

to be a characteristic of State sovereignty, whereby the State is authorised to control varying public policy issues.[128] While the doctrine forms part of customary international law, it was appropriate for the tribunal in *Saluka v the Czech Republic* to state that there is, as yet, no comprehensive and widely acknowledged formula determining what constitutes permissible or commonly accepted regulations that fall within the ambit of the regulatory power of the State.[129] In other words, the police powers doctrine is susceptible to a great degree of discretion by the tribunal. Against this background, States presumably have considerable leeway in the present COVID-19 pandemic, even when the emergency measures substantially burden a particular industry.

As regards public health regulatory measures, the exercising of police powers can be found in *Philip Morris v Uruguay,*[130] which concerns claims regarding, among other things, indirect expropriation against Uruguay due to the promulgation of public health instruments featured on the packaging and marketing of tobacco products. The tribunal was in favour for Uruguay on all counts, confirming that the measures taken fall within the sovereign right of the State to address public health concerns and were, therefore, a valid exercise of the State's police powers and so did not constitute an expropriation.[131] The view adopted by the tribunal was that a bona fide, non-discriminatory regulatory measure adopted for public welfare shall not constitute an expropriation, to the extent such a measure is proportionate.[132] This case provides an example of the circumstances whereby a tribunal might interpret that police powers are contingent to the requirement of proportionality. In determining the proportionality, the tribunal in *Tecmed v Mexico* stated that there must be a reasonable relationship between the charge or weight placed on the foreign investor and the objectives pursued by the State's measures.[133] Subjecting the police powers rule to a proportionality analysis means that, if the restriction on foreign investment outweighs the benefit derived from the measure, the regulatory measure will fall outside the scope

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[128] *Marvin Roy Feldman Karpa v United Mexican States,* ICSID Case No ARB(AF)/99/1, Award (16 December 2002) para 103.
[129] *Saluka v Czech Republic* (n 106) para 262-263.
[130] *Philip Morris v Uruguay* (n 11) para 295.
[131] ibid paras 287, 291.
[132] ibid paras 305-306.
[133] *Tecmed v Mexico* (n 81) para 122.

of the police powers doctrine, even if the measure is non-discriminatory and adopted in order to protect the public's welfare.

In *AWG v Argentine*, the police powers doctrine was applied by the tribunal to emergency situations. The tribunal stated that

> [I]n analyzing the measures taken by Argentina to cope with the crisis, the Tribunal finds that, given the nature of the severe crisis facing the country, those general measures were within the general police powers of the Argentine State, and they did not constitute a permanent and substantial deprivation of the Claimants' investments.[134]

In consequence, it is submitted that this doctrine may be applicable to COVID-19–related claims. Should the proportionality approach be adopted, a State should be prepared to demonstrate, specifically, that the actions taken under its police authority (such as export and travel restrictions and business closures) were weighted appropriately to address the threat presented by COVID-19 and to justify the resulting impacts on investment. While it appears that the doctrine can provide an effective defence for the State, the lack of certainty regarding its limits (which can often lead to discrepancies in the rulings) is likely to impose challenges. In the unprecedented situation of the COVID-19 pandemic, such concerns may even be greater due to the difficulties in determining what is deemed 'reasonable' in this rapidly developing and unusual scenario. For this purpose, States may rely on expert evidence or refer to WHO guidelines, which may be helpful in this respect.[135]

Defences under Customary International Law

Under customary international law, a State may be excused for a breach of international obligations in the event that such actions were taken due to force majeure, distress, or necessity, as outlined in the following paragraphs. It is to be noted, however, that none of these defences are assuredly available to every State – let alone to all States. Their availability in any given case will depend on the particular obligations that have allegedly been violated and the specific measures that are being contested.

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[134] *AWG Group Ltd v the Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010) para 140.
[135] Alcolea (n 94) 29.

Force Majeure

Force majeure is 'the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation'.[136] In such a situation, the State shall not be held responsible for the occurrence of the event and has not assumed the risk thereof. The material impossibility is not merely an increased difficulty of performance;[137] as can be seen in *Rainbow Warrior*, the impossibility must be material and absolute.[138] By definition, the State must have no other options available to it before performing the obligation in question, and the non-performance of the obligation must be involuntary.[139]

In terms of actions taken against COVID-19, the strict requirements for force majeure, which entail the satisfaction of a high threshold for the material impossibility of performance, are unlikely to be met. While the COVID-19 pandemic amounts to circumstances that might potentially trigger a force majeure event, States may experience difficulties in establishing the impossibility of performance required by this defence because (to the extent that they still have choices, however restricted they may be) it cannot be said that they have encountered an absolute impossibility of performance.[140] While it does not appear to be contested that social distancing is necessary to control the spread of COVID-19, concerns may arise over whether businesses should have been compelled to shut by the States. It is possible that the latter measure may be considered voluntary and, therefore, will fall foul of the force majeure threshold.

State of Necessity

'Necessity' is defined as circumstances whereby a State must take an action 'to safeguard an essential interest against a grave and imminent peril' and that action must 'not seriously impair an essential interest of the State or States towards which the

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[136] International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001* (United Nations, 2008) art 23(1).
[137] ibid art 23 Commentary, para 3.
[138] United Nations, *Reports of International Arbitral Awards Volume XX* (30 April 1990) 215–284 para 77.
[139] ILC (n 137) art 23 Commentary, para 1.
[140] See, for example *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award (23 September 2001) paras 111-129.

obligation exists, or of the international community as a whole'.[141] However, the defence will be barred if the obligation in question precludes a reliance on necessity, and the State contributes to the necessity situation.[142] The COVID-19 outbreak and its repercussions for the global population would appear to meet the requirement of the existence of an imminent risk that an essential interest will be gravely harmed. The infection's rapid spread, combined with a possibly large and as-yet-unknown mortality rate, posed a major threat to the population, such that it was declared a Public Health Emergency of International Concern by the WHO.[143] These circumstances have undoubtedly jeopardised the continuous operation of public health services. As seen in *National Grid v Argentina* (2008), the health and welfare of a State's population and the continuous operation of its public services have both been acknowledged as essential interests.[144]

However, as with other defences, it is to be understood that there is no one-size-fits-all approach to addressing the COVID-19 pandemic. Additionally, the execution of these policies might vary due to a variety of factors, including the spread of the virus and the stage of the epidemic in a particular State's territory. While the argument of necessity is more compelling than that based on force majeure, certain challenges remain, as States may struggle to demonstrate that their actions were the 'only way' and that their past behaviour did not contribute to the necessary situation.[145]

To evoke the necessity defence, a State's actions must have been the only option available with which to safeguard the essential interests against impending harm at the point at which the State took the measures concerned and with the degree of knowledge available to it at the time. If there were alternative lawful means of addressing the threat (even if they were likely to be more expensive or inconvenient) the defence will fail. Given the uncertainties surrounding COVID-19 at the time of its outbreak – many

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[141] ILC (n 137) art 25(1).
[142] ibid art 25(2).
[143] WHO, 'Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee regarding the Outbreak of Novel Coronavirus (2019-nCoV)' (30 January 2020) <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)> accessed 23 August 2021.
[144] *National Grid v Argentine Republic* (n 121) para 245.
[145] Federica Paddeu and Freya Jephcott, 'COVID-19 and Defences in the Law of State Responsibility: Part I' (*EJIL: Talk!*, 17 March 2020) <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/> accessed 23 August 2021.

of which have persisted well into 2021 – and the lack of effective vaccine distribution in some States, extreme social distancing measures (including quarantining, travel restrictions, and the prohibition of mass gatherings) may have been the only sensible measure some States could have adopted in order to mitigate the spread of the virus within their borders. Nonetheless, limitations apply whereby the defence may not be invoked if the State 'contributes' to the situation, in which case the contribution must be 'sufficiently substantial and not merely incidental or peripheral'.[146] This is particularly relevant where a State has adopted somewhat contradictory measures to contain the COVID-19 spread; for example, in the UK, lockdown was initially rejected, and the threat level of the virus was downgraded, which caused experts to argue that the UK's responses were too little and too late.[147]

However, it must be noted that the interpretation of this requirement varies. For example, the tribunal in *Impregilo v Argentina* took the view that the contribution does not have to be specifically deliberate or premeditated.[148] As such, it held that Argentina's long-standing economic policies (which were imposed before the crisis) had rendered the country vulnerable to external shocks; as a result, Argentina's necessity plea was rejected.[149] In comparison, the tribunal in *Urbaser v Argentina* accepted Argentina's reliance on the plea, holding that there was no causality link between the economic policies adopted by Argentina before the financial crisis and the emergency situation that the country encountered in early 2002.[150] The tribunal was of the opinion that, in order to invoke the State's contribution, the State either had to have committed actions directed toward the crisis that resulted in the emergency circumstances, or must have known that its actions would result in such a crisis.[151] If a tribunal adopts the latter approach, it may be argued that, as long as a State can prove that the COVID-19 measures were well-intended, it is unlikely that there would be an reason why it could not invoke the necessity defence; however, if the tribunal sets a higher bar for contribution, there is a possibility that a delay in providing an adequate

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[146] ILC (n 137) art 25 Commentary, para 20.
[147] Gabriel Scally, Bobbie Jacobson, and Kamran Abbasi, 'The UK's Public Health Response to COVID-19' (15 May 2020) 369 BMJ < https://doi.org/10.1136/bmj.m1932> accessed 27 August 2021.
[148] *Impregilo v Argentina* (n 63) para 356.
[149] ibid para 358.
[150] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v the Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) paras 712-714.
[151] ibid para 711.

response to the COVID-19 crisis or a situation whereby the State's austerity policy impacts adequate access to healthcare provision could be interpreted as contributory to the current emergency situation.

Distress

The defence of distress will preclude wrongful conduct by a State during a situation of peril if it can be proved that there were no other reasonable means of saving lives.[152] Aiming to provide a certain degree of balance between flexibility (in terms of the choice of life-saving measures that might be adopted by a State) and the necessity of limiting the scope of the defence,[153] the reasonableness requirement purports to be a considerably more lenient standard than the defence of necessity, which requires that the measures be the 'only way' to deal with the emergency. In addition, it is necessary that such a situation not be induced or caused by the State itself and that the act concerned will not likely establish a comparable or greater peril.[154] For this purpose, this defence must be assessed with a sense of proportionality between the measures adopted and the interest protected by the obligations that have been impaired; that is, the interest protected must 'clearly outweigh the other interests at stake in the circumstances'.[155]

The operation of this defence may mean that reasonable actions taken by States to protect the population under their control from the threat posed by COVID-19 will be excluded from the scope of treaty violations. However, given the nature of the defence, it is essential to emphasise that the measures adopted by each State may need to be individually scrutinised.

[152] ILC (n 137) art 24 Commentary, para 1.
[153] ibid art 24 Commentary, para 6.
[154] ibid art 24(2).
[155] Paddeu and Jephcott (n 146).

CHAPTER 6
INVESTMENT TREATY RELIEF FOR CLAIMS ARISING FROM COVID-19 MEASURES THAT AFFECT FOREIGN INVESTORS IN CONSTRUCTION PROJECTS: IS IT AN ALTERNATIVE WORTH CONSIDERING?

Alternative (and Effective) Remedies for Claims Arising from COVID-19 State Measures

Despite being often overlooked, the capacity of foreign investors involved in cross-border construction projects to initiate ISDS proceedings against a host State that has violated relevant treaty safeguards remains a critical instrument. Given the unprecedented nature of the COVID-19 circumstances (which have presented both States and foreign contractors in the construction sector with a unique situation and far-reaching consequences) it remains unclear whether ISDS claims would meet the international law criteria used by tribunals. Until an investor submits its claim against COVID-19 State measures, how severe the alleged risk for States may be remains unknown.

Even so, foreign investors in cross-border construction projects should be aware of the practical benefits of this avenue, as it may provide them with an additional claim in circumstances where a contractual claim would be frustrated or prove difficult to sustain. This extra-contractual relief provides an opportunity whereby foreign investors can file claims for the total loss they have suffered, without being bound by any limitations on contractual entitlements as set out in the construction contract (such as limitations to liability caps or consequential loss provisions).[156] In addition, such relief will arguably enable the investors to avoid potential rights and entitlements being restricted or otherwise excluded due to non-compliance with notice or time-bar provisions. Furthermore, the awards are enforceable in most jurisdictions.[157]

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[156] Walker and Randhawa (n 48) 274.

[157] See, for example, ICSID Convention, arts 53(1) and 54(1), which essentially state that ICSID awards are not subject to the review of national courts. Instead, the national courts of the contracting states are obliged to enforce such awards as if they were the final decisions of a court in that state.

The measures adopted by States to cope with the unprecedented impact of COVID-19 will undoubtedly serve as the basis for claims by foreign investors in international construction projects whose interests have been severely jeopardised. Foreign investors may be able to use relevant IIAs as a means of seeking binding international arbitration for any interim relief that can mitigate the consequences of a State's wrongful conduct or pay damages for the losses they have incurred or are expected to suffer as a result of measures adopted by a State. Of course, the merits of the claims will be fact-specific, both in terms of the State actions at issue and the particular circumstances surrounding the investments. In this regard, the global financial crisis has demonstrated how foreign investors might utilise ISDSs in times of crisis. One of the most noteworthy examples is that of in Argentina in 2001, when the country encountered a near-total economic collapse (evidenced by, among other things, a 50% fall in GDP per capita, a 50% poverty rate, strikes and five successive presidents within 10 days).[158] The Argentine government took a variety of emergency measures during this period, including imposing restrictions to transferring funds abroad and restructuring sovereign debt. Due to this package of measures, Argentina received a torrent of claims from international investors via ISDS proceedings; between 2003 and 2007, claims against Argentina accounted for almost a quarter of all cases brought under the ICSID Convention.[159]

Foreign investors may also consider initiating ISDS proceedings as an additional tool that can leverage their advantage because such disputes would be heard by an international arbitration tribunal, becoming a matter of a public record.[160] Transparency in ISDS proceedings can benefit foreign investors because the existence of an investor's claim against a State may jeopardise the State's ability to attract additional potential investors and/or may persuade other potential claimant investors to consider, threaten or initiate a similar action. Furthermore, any refusal by the State to comply with an ISDS award would deprive it of credibility in the international

[158] Federico Lavopa, 'Crisis, Emergency Measures and the Failure of the ISDS System: The Case of Argentina' (July 2015) 2 Investment Policy Brief, 1 < https://www.southcentre.int/wp-content/uploads/2015/07/IPB2_Crisis-Emergency-Measures-and-the-Failure-of-the-ISDS-System-The-Case-of-Argentina.pdf> accessed 11 September 2021.
[159] ibid.
[160] Walker and Randhawa (n 48) 274.

business community, which could undermine its ability to attract other potential investors.[161]

Finally, to the extent that it is relevant, another advantage of ISDS proceedings is that they can enable foreign investors to take a 'second bite at the cherry' in terms of claiming for their losses. Although not without controversy, it is generally accepted that secondary and parallel attempts at recovery through ISDS proceedings are permissible, on the basis that contractual claims arise from a different and separate cause of action to that of ISDS claims. In this regard, it is suggested that whether there has been an abuse of process will depend on the facts of the case concerned. In the recent decision in *Unión Fenosa Gas v Egypt*,[162] the tribunal determined that there was no abuse of process arising from the claimant's commencement of parallel proceedings – the first being pursuant to the contract between the investor and the relevant State entity, and the second being ISDS proceedings against Egypt under the relevant IIA.[163] In doing so, the tribunal appears to have confirmed that parallel contract- and treaty-based proceedings will not be considered an abuse of process, even in situations where they arise from the same factual scenario, and that a breach of an IIA is generally considered a separate and distinct cause of action from a breach of an underlying contract.[164]

Some Final Considerations

While it may be tempting for investors to speculate by bringing claims against States (due to the lack of clarity as to how treaty obligations would apply to COVID-19 State measures and the fact that no ISDS tribunal is yet bound to any prior decisions), they will need to be mindful when evaluating their rights of recourse and the remedies available to them. This is particularly relevant considering how expensive ISDS proceedings can be[165] and the already difficult financial situation encountered by

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[161] Chloe Carswell and others, 'COVID-19 and the Construction Sector: Potential Relief under International Investment Treaties' (*Reed Smith*, October 2020) 7 <https://www.reedsmith.com/en/perspectives/2020/10/covid-19-and-the-construction-sector-potential-relief> accessed 10 September 2021.

[162] *Unión Fenosa Gas SA v Arab Republic of Egypt*, ICSID Case No ARB/14/4, Award (31 August 2018).

[163] Ibid paras 6.80-6.83.

[164] ibid. See, for example, *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (n 119), Award (21 November 2000).

[165] See Matthew Hodgson, Yarik Kryvoi, and Daniel Hrcka, '2021 Empirical Study: Costs, Damages and Duration in Investor–State Arbitration' (*BIICL.org*, 2021)

investors. In this matter, in order to determine whether it is appropriate for investors in the cross-border construction industry to initiate ISDS proceedings, several factors will need to be taken into account, including whether there is any solid strategic basis for and advantages to pursuing such a claim and whether the claim is admissible under the relevant IIA.

On a related note, when deciding whether to file an investment claim, foreign investors should also ensure that the applicable IIA does not incorporate clauses that preclude them from bringing a treaty claim if they have previously started proceedings in a domestic court. While numerous procedures may be appealing, these 'fork-in-the-road' restrictions may limit the availability of remedies. This provision requires an investor to choose a particular dispute resolution forum with the host State (usually between litigation in domestic courts and international arbitration) and the choice, once made, shall be final and binding.[166] Once the forum has been selected, the investor would be prohibited from commencing proceedings, in parallel or subsequently, in a different forum.[167] While the impact of these provisions will mainly depend on their exact wording and the tribunal's interpretation, recent authorities have held that fork-in-the-road provisions will only be triggered if the parties, object and cause of action are identical.[168] Having said that, and noting that the cause of action is submitted against COVID-19 State measures (which are unlikely to fall within the ambit of contract-based claims) it may be argued that this would not affect a tribunal's jurisdiction over investors' treaty claims.

<https://www.biicl.org/publications/empirical-study-costs-damages-and-duration-in-investor-state-arbitration> accessed 10 September 2021. This states that, according to the study examining over 400 ISDS proceedings, the mean cost for investors has exceeded USD 6.4 million.

[166] Yannaca-Small (n 104) 392 para 15.72.

[167] ibid.

[168] For example, in *Toto Costruzioni Generali SpA v the Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction (11 September 2009) para 211, the tribunal held that '… in order for a fork-in-the-road clause to preclude claims from being considered by the Tribunal, the Tribunal has to consider whether the same claim is "on a different road," i.e. that a claim with the same object, parties and cause of action, is already brought before a different judicial forum. Contractual claims arising out of the Contract do not have the same cause of action as Treaty claims.'

CHAPTER 7
CONCLUSION

The COVID-19 pandemic has placed labour-intensive sectors such as construction at risk. This issue became increasingly evident when States chose and implemented legal and administrative measures to combat the pandemic, including the imposition of quarantining, construction site closure, prohibitions or restrictions on travel and the movement of goods and the imposition of strict health protocols. States that have implemented particularly intrusive preventive and rehabilitative measures that have severely impacted foreign investments will need to carefully examine the measures they have adopted in order to minimise any potential responsibility for ISDS proceedings, particularly when the States themselves are already in a vulnerable condition. For this purpose, States must ensure that the measures taken, generally speaking, are reasonable, non-discriminatory, proportionate and bona fide.

As claims and disputes in the construction industry arising from the COVID-19 crisis are likely to increase, the possibility of using ISDS proceedings as an alternative means of remedy has become more relevant than ever. ISDS proceedings appear to be an attractive option for foreign investors, owing largely to the fact that the process is not subject to national law of the host State. Furthermore, they provide an additional yet effective avenue for investors to claim for their COVID-19–related losses. It is worth noting that resorting to ISDS proceedings does not preclude contractors from pursuing conventional contractual remedies; indeed, in certain circumstances, engaging in parallel commercial and ISDS proceedings may provide contractors with substantial leverage, potentially leading to a greater chance that they will recover their damages.

While the criteria for classifying international construction contracts as an investment and the parties involved as an investor under the ICSID Convention and in most IIAs are well established on merits, foreign investors in construction projects will need to prove that the host State has violated one or more of the standards of protection set forth in the applicable IIA. Among all the possible treaty protections (given the temporary nature of the States' measures) expropriation claims may potentially be the most difficult to prove. In contrast, FET and FPS claims are likely to be simpler to establish, to the extent that the investors can prove that the measures impeding the

investors' legitimate expectations are disproportionate. This can be achieved by balancing and weighing the different interests at stake, by which process the State's interest in protecting public health and the effect of the measures imposed on the investors' protected rights shall all be considered. This approach is rather dynamic – much like the COVID-19 pandemic itself. Thus, as events unfold and new evidence emerges, it is important to note that changes in the severity level of the public health risk will also have affected the actions that the States have needed to adopt.

Regardless of international investment protection commitments, States usually have flexibility when responding to crises by relying on the NPM clauses in IIAs, which allow them to legitimately derogate from their treaty obligations for the sake of safeguarding public interests. However, the success of this line of defence will be co-contingent not only on the specific nature and wording of such provisions, but also on the approach adopted by the tribunal. In the absence of such clauses, a State may generally seek to justify its measures by exercising its police powers discretion, provided that its actions have not been arbitrary, excessive or discriminatory. While this defence is likely to succeed, the interpretation of this doctrine will be subject to a high degree of discretion by the tribunal, due to a lack of clarity regarding its extent. States may also rely on the defences of necessity, distress or force majeure under customary international law; however, each of these defences sets a considerably high bar. Whether or not a particular defence will prove successful will depend on the individual circumstances at the time of the measure and the characteristics of the measure itself. Overall, whichever defence a State chooses to employ, chances are it will not cover any government COVID-19 measures that have been implemented discriminatorily, unfairly, arbitrarily or for an excessive duration.

In summary, determining whether the foreign investors in an international construction project can recover their losses from the host State will require a fact-intensive examination. Such an examination will need to evaluate the severity of the crisis, the proportionality of the State measures, and whether the government has a viable defence, either under a particular IIA or under international law in general. As such, whether or not the COVID-19 State measures violate any treaty obligations will largely depend on the circumstances surrounding each case and will ultimately be determined by a tribunal. Against this backdrop, while ISDS proceedings are generally viewed as an arsenal worth considering, exceptional and uncertain circumstances presented by

the COVID-19 pandemic have, in fact, emphasised the need for more thoughtful consideration by investors before any claims are initiated by them against a host State.

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