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Responses to the Covid-19 Pandemic: Customary Law Defenses: Force Majeure and the State of Necessity

David Collins*

ABSTRACT:
Measures implemented by many countries around the world to deal with the Covid-19 pandemic could lead to claims by adversely affected foreign investors against host states in investment arbitration tribunals. In addition to defences which may be available in applicable investment treaties, customary international law may afford some protection for host states in responding to these charges. These customary defences include *force majeure*, distress and necessity. The police powers doctrine, which may be an aspect of customary international law, could also be relevant. Necessity would appear to be the best option for host states to argue, however problems may arise for respondents when seeking to demonstrate their requisite non-contribution to the circumstances of the immanent peril and in proving that the measures were proportionate / reasonable to the threat. In the context of many countries' response to Covid-19 it would seem that these two requirements are mutually exclusive. Ultimately, the success of customary international law defences in investment arbitration will likely depend on whether countries' various measures are viewed as effective or counterproductive – unquestionably a matter of much controversy throughout the world.

I Introduction

Many countries around the world instigated measures to combat the transmission and adverse health effects of the Covid-19 pandemic to varying degrees, shutting down innumerable businesses and destroying livelihoods in the process. Some of these businesses were foreign in origin, raising the prospect of claims of excessive interference or regulatory over-reach, necessitating compensation. Other chapters of this book have examined the types of measures that were applied, such as cancelled contracts, restrictions on capital flows and the general anti-business consequences of 'lockdowns,' investigating the potential claims which may generated under investment treaties.[1]

Since we now know that Covid-19 is a serious health risk to a small minority of the population (perhaps 1%), it may be argued, with some legitimacy, that the response to the crisis

* Professor of International Economic Law, City, University of London <David.collins.1@city.ac.uk>
[1] See e.g. J Chaisse, 'Both Possible and Improbable: Could COVID-19 Measures Give Rise to Investor-State Disputes?' 13 Contemporary Asian Arbitration Journal 99, 165 (2020).

was disproportional – hysterical even. This is arguably compounded by the fact that there is convincing evidence that 'lockdowns' did not even work to supress the virus, nor, according to some, did travel bans or mask mandates. Some have argued that governments went beyond the WHO's recommendations in January 2020, which did not recommend any travel or trade restriction based on the current information available. In the UK for example, the government departed from its own influenza pandemic preparedness strategy, which did not advocate actions which subsequently became known as 'lockdowns'[2] yet which became universally accepted policy, often unchallenged, in the UK and elsewhere since first instigated by China and duplicated by Italy in the early weeks of the pandemic. The lack of scientific evidence in support of measures such as lockdowns and restrictions on businesses, such as social distancing and masking, suggests that the response by many countries was not proportional to the actual risk, which again is now known to be much less than was gauged by mathematical modelling of expected deaths, which turned out to be grossly inaccurate. These mis-judgments, now known in hindsight, but perhaps partially justifiable at the time, could, or perhaps should, play a role in states' ability to take advantage of available legal defences.

When assessing the potential of investment claims against states on the basis of Covid-19 response, or, as in the case of this chapter, evaluating the way in which states might defend themselves against such claims through customary international law, it is important not to fall into the trap of 'exceptionalism' in international economic law, a term used to describe a paradigm of justification according to which deviations from primary rules are absolved by way of 'exceptions' (express or implied), and in which claims of exception can be expected to proliferate. By allowing exceptional responses, adjudicators accepting responses to the Covid-19 pandemic as negating legal obligations poses significant risks for the legitimacy and stability of international investment law.[3] Conventional, established understandings of international investment law, including customary international law ('CIL'), must therefore be the basis of an appropriate legal assessment of how states might resist challenges to their responses and whether these might (or should) be successful.

CIL is a primary source of international law, along with treaties and general principles of law.[4] CIL is also a body of law arising from established practices that states consider to be

[2] 'UK Influenza Pandemic Preparedness Strategy' Department of Health <https://www.gov.uk/government/publications/review-of-the-evidence-base-underpinning-the-uk-influenza-pandemic-preparedness-strategy> 5 June 2014 (accessed August 2022)
[3] J Arato, K Claussen, JB Heath, 'The Perils of Pandemic Exceptionalism' 114:3 American Journal of International Law 627 (2020)
[4] Art 38(1) Statute of the International Court of Justice

binding – it exists even in the absence of specific reference in a treaty. As a consequence of its varied sources, CIL is therefore difficult to pin down, in contrast to the more specific provisions typically found in treaties. Its precise contents defy definitive identification. Nevertheless, the International Law Commission (ILC)'s Articles on State Responsibility for Internationally Wrongful Acts, 2001 (ARSIWA) are often regarded as a 'codification' of CIL, capturing many of CIL's essential principles.[5] Chapter V of the ARSIWA contains six defences that states may invoke to avoid responsibility: referred to as "circumstances precluding wrongfulness." These exist in addition to defences which may be specified in treaties, including investment treaties, which will not be explored in this chapter.

Three of the defences listed in ARSIWA a may be appropriate CIL defences for Covid-19 response measures which harmed foreign investors: force majeure, distress, and necessity. Several commentators have argued that these are the most likely defences that states will seek to rely on in defending themselves against Covid-19 response claims.[6] The police powers doctrine, which may be part of CIL, may also be relevant. Each of these defences will now be explored in turn. Conclusions will be presented in the final section, generally illustrating the conflicted position of states being seen to have done either too much or too little to deal with the pandemic to make much use of CIL in protecting themselves against legal action by foreign investors.

II Customary International Law Defences

i) Force majeure

Force majeure enables a state to claim that it is materially impossible to fulfil an international obligation, such as an investment treaty. China, for example, declared *force majeure* in relation to some contracts signed by Chinese companies, as a way to shield them from claims for non-delivery or non-purchase of products and product inputs contracted before the pandemic. According to the ARSIWA, *force majeure* exception precluding wrongfulness will apply only if several conditions are satisfied:

(i) the act in question must be brought about by an irresistible force or an unforeseen event;

[5] J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' 96:4 American Journal of International Law 874 (2002)

[6] Chaisse, above n 1 at 99; F Paddeu and F Jephcott, 'COVID-19 and Defences in the Law of State Responsibility: Part I' EJIL Talk, 17 March 2020 and F Paddeu and F Jephcott, 'COVID-19 and Defences in the Law of State Responsibility: Part II' EJIL Talk, 17 March 2020

(ii) which is beyond the state's control; and

(iii) which makes it materially impossible in the circumstances to perform the obligation.[7]

Furthermore, the state applying the measure must not have contributed to the situation and not have assumed the risk of the situation occurring.[8]

Force majeure often applies to acts of war.[9] The assertion of *force majeure* is rarely successful outside these circumstances. For example, in a claim brought by a foreign investor for breach of contract, Venezuela failed to justify its failure to increase highway toll fees due to civil unrest on the basis of *force majeure.*[10] Commentators agree that host states will encounter difficulties in proving material impossibility in the performance of their Covid-19 related actions.[11] States will bear a high burden in establishing that the pandemic rendered the performance of their obligations impossible.

It would seem as though most countries 'lost control' to varying degrees intermittently throughout the pandemic. On the other hand, there was no breakdown of government or society – order prevailed, subject to severe constraints. Covid-19's status as an irresistible force is uncertain, as clearly the vaccines have been able to 'resist' it to a degree. It also has a very low infection fatality rate for all but the most vulnerable. Regarding foreseeability, it is not certain that the spread of Covid-19 could have been both anticipated and mitigated against in light of previous outbreaks of diseases such as Severe Acute Respiratory Syndrome (SARS) and Middle East Respiratory Syndrome (MERS) seen in the last decades. Many countries had pandemic preparedness protocols in place, suggesting that they were aware that one was a distinct possibility. Finally, it is arguable that states contributed to the worsening of the pandemic, for example by not shutting borders or locking down sooner (although the efficacy of both of these strategies in dealing with Covid-19 is now highly questionable).

ii) Distress

A state may rely on distress to justify its actions if resulting measures aimed to prevent loss of life. Distress refers to a factual situation of extreme peril, where there is no other reasonable way, of saving the lives of other persons entrusted to the state's care. Such a defence can be

[7] ARSIWA, Commentary for article 23, 76.
[8] ARSIWA, Article 23 (a) and (b).
[9] Crawford above n 5 at 564; I Brownlie, *Principles of Public International Law*, (3rd edn, Clarendon Press, 1979) at 465.
[10] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award of 23 September 2003, at [111] to [129]
[11] Paddeu and Parlett, above n 6 and Chaisse above n 1

used where a state that acted wrongfully and did not conform to an international commitment, yet it can be shown that the state had no other rational means in an emergency situation and that the act was taken for the purpose of saving lives.

Under the ARSIWA, to use distress, the state will have to prove:

(i) a special relationship between the state organ and the persons in question whose life were in danger;
(ii) the impossibility to deal with the threat differently;
(iv) that it did not contribute to the situation; and
(v) that the measures were proportionate.[12]

The criterion of reasonableness is designed to provide a level of 'flexibility regarding the choice of action.'[13] In such situations, the government must take strong, rapid action to minimise the loss of life.[14] Some commentators believe that host states could cite the defence of distress in response to claims by investors, in certain circumstances.[15] A successful defence on this basis would require a state to prove that there was a particular connection between that nation and those whose lives were endangered.[16]

Since public health and the life of the citizens were at stake during the Covid-19 pandemic, the threat to life condition would appear to have been met. Regarding the 'special relationship' condition must be established between the state organs adopting the measure and the people concerned. The control between the state entity and the individuals whose life are under threat is essential.[17] As states are required to safeguard the health and safety or their citizens (indeed this is arguably the primary function of a government), the state had to protect those who were vulnerable to Covid-19 and took measures such as social distancing, confinement or business closures to meet this objective. Moreover, since the central government has the authority to instigate lockdowns, some contend that it is plausible that the special relationship criterion is met because there is a such a relationship when 'the fate of the population is within the control of the central authorities.'[18] However, others have argued that

[12] See ARSIWA, Article 24, 79 – 80
[13] Ibid.
[14] M Ostrove and K Brown de Vejar and B Sanderson, 'State defences to investment claims arising from Covid-19', (DLA Piper, 29 April 2020) https://www.dlapiper.com/fr/france/insights/publications/2020/04/state-defences-to-investment-claims-arising-from-covid-19/ (accessed August 2022)
[15] 'COVID-19: Public Health Emergency Measures and State Defenses in International Investment Law' Cleary Gottlieb, 20 April 2020 (accessed August 2022)
[16] Ostrove, Brown de Vejar and Sanderson above n 14.
[17] O Inan, 'Can States Successfully Resort to the Customary International Defences against the Possible Claims Arising out of COVID-19 Measures?' (2020) 14 Romanian Arbitration Journal, 131
[18] Paddeu and Jephcott, above n 6

this condition may be difficult to meet as Covid-19 measures were only implemented to protect the entire population.[19] Indeed, targeted protection of the vulnerable appeared to have been completely disregarded as a strategy across most of the world.

The requirement for reasonableness aims at providing a 'certain degree of flexibility in the assessment of the conditions of distress.'[20] The concept of proportionality requires that the measures go no further than required to address the harm. Some measures taken to cope with Covid-19, such as social distancing, were arguably reasonable since they were believed to have reduced the transmission rate of the disease, ultimately saving lives by reducing the burden on healthcare systems. On the other hand, the arbitrary nature of some of the social distancing rules (varying distances, changing distances over time, different distances for different sizes of room etc) makes this assertion more dubious.

The issue is more problematic in relation to country-wide lockdowns and travel bans.[21] The success of Sweden, as well as US states such as Florida, which did not implement severe restrictions and with substantially lower death rates than many other countries, suggests that many of the measures, such as social distancing in its various forms, were not necessary.

Distress can only preclude wrongfulness where the interests sought to be protected (e.g. the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress.[22] In that regard, we do not know how many lives were lost because of the lockdown. In the UK this is believed to potentially be in the millions (cancelled medical treatment, psychological harm etc).[23]

The defence of distress will not apply if: (a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the state invoking it; or (b) the act in question is likely to create a comparable or greater peril.[24] The interest protected must 'clearly outweigh the other interests at stake in the circumstances.'[25] A potential difficulty here is that that the measures were not implemented with regards to a specific section of the population (the shielding strategy) but rather to the entire population.

[19] Ostrove and de Vejar and Sanderson, above n 14
[20] ARSIWA, Commentary for article 24, 80, at [6]
[21] Paddeu and Jephcott above n 6
[22]ARSIWA, Commentary for article 24, 80, [10]
[23] See e.g. L Elliott 'A Year of Covid Lockdowns has Cost the UK Economy £251 Billion' The Guardian (UK) 22 March 2021
[24] ARSIWA, Article 24, para 2 (a) and (b).
[25] ARSIWA, Commentary for article 24, 80, at [10]

iii) Necessity

The defence of distress does not extend to more general cases of emergencies.[26] Instead, the doctrine of necessity is invoked by respondent states facing international legal claims to cover more general situations of crisis. It then can function as an excuse for the breach of an international law obligation, such as the obligations contained in an IIA as determined by an arbitration tribunal. The defence of necessity, as a principle of customary international law, thereby empowers host states to breach its commitments to investors during times of crisis so long as the actions are taken in good faith.

A state can only invoke the defence of necessity if the following conditions are met:

(i) the act in question must be the only way for the state to safeguard an essential interest against a grave and imminent peril;
(ii) the state's act must not seriously impair an essential interest of another State or of the international community as a whole; and
(iii) the state cannot invoke this defence if it has contributed to the situation.[27]

States have to be careful to ensure the measures they enact under this defence are necessary and in proportion to the stated objective and achieve a legitimate policy outcome. Some believe that host states had a responsibility to prevent the spread of the pandemic through the imposition of strict measures, such as shutting down businesses, since this was thought to be the only way to deal effectively with the pandemic.[28] Qualifying for a defence of necessity is based on identifying a need to uphold public's safety by preventing harm to the community, and secondly, whether any delay in taking action might lead to imminent or future harm to the community.[29]

Finally, it is important to note that an essential interest may be valid if it might affect the international community, even when it does not threaten the host state.[30] From this perspective, it can be argued that it was essential for governments to shut down businesses

[26] ARSIWA, Commentary for article 24, 80, at [7]
[27] ARSIWA, Article 25, 80
[28] R Joshi, 'Force Majeure under the ILC Draft Articles on State Responsibility: Assessing its Viability against COVID-19 Claims' [2020] 24(24) American Society of International Law <https://www.asil.org/insights/volume/24/issue/24/force-majeure-under-ilc-draft-articles-state-responsibility-assessing> accessed August 2022.
[29] Paddeu and Jephcott, above n 6
[30] Ibid.

during the global pandemic, since again these types of measures, along with travel bans were seen (rightly or wrongly) as only way for the state to manage the spread of the virus and limit associated fatalities.[31]

There have been several investment arbitration cases dealing with necessity, making it one of the more well-developed defences available under CIL in international investment law. In the aftermath of the Argentinean economic crisis in the early 2000s, the state of Argentina invoked the defence of necessity with varying degrees of success. The similar factual background has led to the Argentina cases becoming somewhat of a test-case for the applicability of the defence of necessity to international investment as it applies to various adaptations several across sectors.

While the *CMS* and *Enron* tribunals recognised the severity of the economic crisis which had gripped Argentina,[32] they felt that Argentina had contributed to the crisis in both cases, defeating a claim of necessity. The *CMS* Annulment Committee[33] upheld the tribunal's rejection of the defence although in that case the arbitrators erroneously considered whether Argentina qualified for the defence of necessity at all.[34] The Annulment Committee in *Enron*[35] also annulled parts of the award because the tribunal had concluded too promptly that the defence of necessity would only apply if the challenged measures were the 'only' means available to the state to protect its essential interests. The tribunal also ruled that Argentina could not benefit from the defence because it had contributed to the state of necessity.[36] The tribunal reasoned that the Argentine economic crisis did compromise the very existence of the state and its independence, qualifying as involving an essential interest of the state.

Argentina did succeed in using the defence of necessity as it had restricted transfers out of its territory. The tribunal in *Continental Casualty* held that necessity precluded Argentina's liability for breaching its obligations.[37] It also observed, somewhat expansively, that

[31] Ostrove, Brown de Vejar and Sanderson above n 14.
[32] *CMS Gas Transmission Co. v. Republic of Argentina,* ICSID Case No. ARB/01/8, Award of 12 May 2005, at [324.]
[33] Contained in Article 52(1) of the ICSID Convention, an annulment procedure is a form of review for a narrow range of procedural errors – it is not a substantive appeal.
[34] F Marshall, '*CMS Gas Transmission Co. v. Republic of Argentina,* ICSID Case No. ARB/01/8' (IISD, 18 October 2018) https://www.iisd.org/itn/en/2018/10/18/cms-v-argentina/ [Accessed 30 June 2021].
[35] *Enron Corp. and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007, at [306] and [312].
[36] L Johnson, 'Second Argentine award annulled in one month Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3) - Annulment Proceeding' (IISD, 23 September 2010) https://www.iisd.org/itn/en/2010/09/23/awards-and-decisions/ (accessed August 2022)
[37] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008, at [193]

international law was not 'blind to states' needs to exercise their sovereignty in the interest of their populations, free from internal as well as external threats to security.'[38]

These exercises of sovereignty could well include protecting citizens' health.[39] This purpose must be assessed objectively, according to the *Continental Casualty* tribunal and it must contain 'a significant margin of appreciation for the state applying the particular measure: a time of grave crisis is not a time for nice judgments, particularly when examined by others with the [advantage] of hindsight.'[40] It would seem as though states should be accorded a wide degree of discretion in assessing the nature of the risks and appropriate responses.

In another case, the *LG&E* tribunal found that Argentina's actions were taken during a state of necessity between December 2001 and April 2003 (during the worst period of its economic crisis). It should be absolved from its responsibility for losses that occurred during this period.[41] Argentina was able to demonstrate that the provision of water and sewage services were vital to its population and were an essential interest of the state.[42] By analogy, states will probably be able to successfully argue that public health qualifies as an essential interest.

Investment tribunals will most likely consider that the Covid-19 pandemic was a 'grave and imminent peril,' having led to the deaths of almost 6 million people by mid-2022.[43] This is despite the fact that we now know that the disease posed a serious threat only to the most vulnerable members of society. A state may have more difficulty proving that the measures that it implemented in response to the pandemic were 'the only way' to safeguard against the peril.[44] This is all the more so now that data is available to show that many of the measures such as lockdowns had a dubious effect on suppression of the disease. Targeted isolation for the *vulnerable*, along the lines of the strategy advocated in the much-maligned Great Barrington Declaration[45], may have achieved the same reduction in mortality with far less adverse consequences on society and the economy.

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[38] Ibid at [175].
[39] Ibid. at [177].
[40] Ibid. at [181].
[41] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, at [229]
[42] *Suez, Sociedad General de Aguas de Barcelona S.A., and Inter Aguas Servicios Integrales del Agua S.A. v. The Argentine Republic,* ICSID Case No. ARB/03/17, Decision on Liability of 30 July 2010, at [238]*; Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic,* ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010, at [260]*; Impregilo S.p.A. v. Argentine Republic,* ICSID Case No. ARB/07/17, Award of 21 June 2011, at [346].
[43] See World Health Organization: https://covid19.who.int/ (accessed August 2022)
[44] *Enron* above n 35 at [308]; and *CMS* above note 32 at [323].
[45] https://gbdeclaration.org/ (accessed August 2022)

A state also has an obligation to ensure that its actions do not seriously impair an essential interest of another state or of the whole community. States may accordingly struggle to justify their ban on exports of personal protection equipment or vaccines as these measures arguably shifted harms to countries that were less able to bear them.[46] It is worth noting, however, that there does not appear to be a clear correlation between GDP per capita and Covid-19 fatalities.

Also problematically, the state cannot invoke the defence of necessity if it contributed to the situation of necessity, meaning that the causal contribution of the state was 'sufficiently substantial or merely incidental or peripheral.'[47] The proportionality and reasonableness of the state's conduct in this regard will examined on a case-by-case basis. It will also be evaluated in light of the conduct of other states 'in comparable circumstances.'[48] While there were outliers which imposed limited suppression measures, such as Sweden, most countries in the world readily embraced lockdowns and other strict measures at various points throughout the pandemic, suggesting that there was a policy consensus regarding appropriate responses.

iv) Police Powers

Some have argued that the 'police powers' doctrine could provide a way for states to avoid liability for the actions they took to combat Covid-19 which adversely affected foreign investors.[49]The police powers doctrine, often associated with defences to claims of indirect expropriation, states that non-discriminatory measures that aim to achieve a public purpose will not give rise to a duty to compensate investors for losses incurred. It is widely believed that there does not need to be an express police powers clause in a treaty. But if police powers are expressly excluded, this could be sufficient for a tribunal to deny this defence.[50]

Although some investment tribunals have treated the police powers doctrine as a customary rule of international law, this is far from settled.[51] ICSID tribunals have refused to apply the police powers doctrine when addressing defences to expropriation, instead turning to the 'solo effects doctrine.' Under this doctrine, the test to determine whether a regulation constitutes an expropriation entitling the investor to compensation depends entirely on the effect

[46] Ostrove and de Vejar and Sanderson above n 14
[47] *CMS* above above n 32 [328].
[48] *Continental* above n 37 [227].
[49] N Potin, 'Lines of attack and defences for foreign investors and states in future investment disputes post-pandemic' 28:2 International Trade Law and Regulation 90 (2022)
[50] N Zamir, 'The Police Powers Doctrine in International Investment Law' (2017) 14 Manchester J Int'l Econ L 318 and Chaisse above n 1
[51] C Titi, 'Police Powers Doctrine and International Investment Law' in A Gattini, A Tanzi, and F Fontanelli, *General Principles of Law and International Investment Arbitration* (Brill, 2018)

of the measure on the investment with no regard for its objective. In *Vivendi v. Argentina*, for example, the tribunal ruled 'the effect of the measure on the investor, not the state's intent, is the critical factor.'[52] It is clear that states may rely on the police powers doctrine to respond to claims from international investors.[53] Police powers was denied in several cases[54] but was successfully pleaded in several situations where claims were rejected which challenged regulatory measures designed to protect public health.

States bear the obligation of protecting and preserving life within their boundaries. Police powers accordingly require that governments must function as agent for the protection of society's interests and adopt measures as necessary, even if those measures deprive an investor of benefits or control of their investment. In doing so, though, governments must demonstrate a reasonable balance between the extent of the deprivation and the aim sought. In *Azurix Corp. v Argentina*,[55] the tribunal established that this intent must be demonstrated and cannot simply be asserted.

In enacting lockdown and other disease suppression measures, governments were arguably exercising their police powers. Some may view these as inadequate whereas others might suggest that they were excessive. In the *Philip Morris v Uruguay* dispute, the arbitral tribunal rejected a claim of indirect expropriation against legislation enacted by Uruguay on public health grounds. Instead, the tribunal accepted that Uruguay's measures protected public health and were adopted 'in good faith' in a 'non-discriminatory' fashion, and were 'proportionate to the objective they meant to achieve.'[56] Since the incidence of smoking declined as sought, the Philip Morris tribunal felt that the plain packaging requirement for tobacco products was 'a valid exercise' of Uruguay 'police powers for the protection of public health.'[57] That governments pursued Covid-19 suppression strategies in good faith may hopefully be presumed. Proportionality between costs and benefits will be more difficult to demonstrate.

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[52] Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3, Award (20 August 2007), at [7.5.20]

[53] Zamir, above n 50 and P Ranjan, 'Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay', (2019) 9(1) Asian Journal of International Law 98.

[54] *Compainiia Del Desarrollo De Santa Elena, S.A. v. The Republic of Costa Rica,* ICISD Case No. ARB/96/1, Award of 17 February 2000, at [72]; *Pope & Talbot, Inc v. Government of Canada,* UNCITRAL case, Interim Award of 26 June 2000, at [99].

[55] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006

[56] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Award of 8 July 2016, at [306].

[57] Ibid. at [307].

A case from near the turn of the 20th Century may be illustrative with regards to the specific situation engendered by Covid-19 and the legality of state action. *Bischoff's Case* of 1903 dealt with the taking of a carriage by Venezuela for the purpose of carrying passengers contaminated with smallpox. The court dismissed the claim for damages by the carriage owner, holding that '[c]ertainly during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police powers.'[58] This case indicates that the prevention of the spread of disease entitles governmental authorities to infringe the ownership rights of individuals in a manner that would otherwise be prohibited.

The applicability of police powers as a defence may be a fraught exercise and tribunals will face difficulties in relieving states of claims of indirect expropriation on its basis.[59] Some have cautioned that enabling states to breach their investment obligations through resort to defences premised on the existence of exceptional circumstances, such as a public health crisis, harmfully compels investment arbitrators to adjudicate in relation to health policy, which is outside their disciplinary competence.[60] This is a valid point – indeed, the concept of public health has expanded in recent years, enabling interventions in matters that are arguably extraneous to a government's purview, such as poverty, housing and climate change.

III Conclusion

The extent to which states were transparent in the application of the Covid-19 response measures as well as their scope and purpose could dictate whether or not any of the above defences are operative. Failure of states to consult with potentially affected enterprises and stakeholders when assessing policy options, including the presentation of draft regulations for public scrutiny and comment could also help.[61] States probably did not pay much regard to the impact of their decisions on foreign investors when deciding emergency interventions or measures such as lockdowns. Indeed it would seem that the long-term consequences of lockdowns and other measures may have been suppressed by governments eager to be seen to be doing something to assuage the publics' fears.[62]

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[58] *Bischoff* Case, Reports of International Arbitral Awards, 1903, Volume X, 420-421.
[59] Zamir above n 50, 333-337.
[60] Arato, Claussen and Heath above n 3
[61] Y Ribeo Borman, 'Perspectives - COVID-19 & International Investment Protection', (Shearman & Sterling, 14 April 2020) <https://www.shearman.com/Perspectives/2020/04/COVID-19-International-Investment-Protection> (accessed August 2022)
[62] C Turner, 'Mistake to "Empower Scientists" in Covid Pandemic' The Telegraph, 25 August 2022 [quoting the former UK Chancellor of the Exchequer Rishi Sunak]

Some have urged that vagueness of treaty standards will apply to Covid-19 measures, and further the lack of precedent in arbitration may 'incentivize lawyers and third-party funders to speculate by bringing multiple claims challenging similar measures across the globe.'[63] Others controversially proposed that countries should come together 'to suspend the application of treaty-based investor–state arbitration for all Covid-19 related measures or clarify how international law defences apply to this extraordinary situation.'[64] Claims brought under newer generation IIAs which contain wider rights of states to enact public policy measures (and correspondingly narrower protections for foreign investors) reduce the likelihood that such claims will succeed. Such treaties are more protective of the state's right to regulate and the state's need to safeguard the public interest.[65] Many IIAs contain specialized exceptions for state action in circumstances of 'public emergency,' to protect 'essential security interests,' for 'public order,' or sometimes to 'protect public health,' many of which were probably engaged by the pandemic. The ambiguity of these concepts affords very broad scope for governments to infringe on the activities of investors that might in the past have triggered liability under international law.

This chapter has illustrated the following CIL defences available to states for claims brought by investors in relation to Covid-19 response measures. *Force majeure* involves an occurrence of an irresistible force or an unforeseen event beyond the control of the state making it materially impossible to perform an obligation. Investment arbitration tribunals have held that *force majeure* can only be used when there is: i) impossibility of performance; ii) unforseeability; and iii) non-attribution to the state, the last of which is probably the hardest to satisfy. In the context of Covid-19, it will be difficult for states to prove loss of control and unforseeability given continued functioning of government and experience of previous pandemics. States may have contributed to the worsening of pandemic by not reacting faster, although in hindsight this appears unlikely as the many interventions appeared to have a minimal impact on the spread of the disease or its severity.[66]

[63] N Bernasconi-Osterwalder, S Brewin and N Maina, 'Protecting Against Investor–State Claims Amidst COVID-19: A call to action for governments' (IISD, April 2020), <https://www.iisd.org/articles/protecting-against-investor-state-claims-amidst-covid-19-call-action-governments> (accessed August 2022)
[64] N Maina and H. Suzy Nikièma, 'The African Union's Declaration on COVID-Related ISDS Risks: Why it matters now', (IISD, 2 March 2021) <https://www.iisd.org/articles/african-union-ministerial-declaration-covid-related-isds-risks-why-it-matters-now> (accessed August 2022)
[65] Potin, above n 49
[66] P Kerpen, S Moore and CB Mulligan, 'A Final Report Card on the States' Response to Covid-19' National Bureau of Economic Research <https://www.nber.org/papers/w29928> April 2022 (accessed August 2022)

The defence of distress is available where the state is required to take action to prevent loss of life where there is no other reasonable way. The state must show that there is a special relationship between it and the persons whose lives are in danger. Distress also requires that the state did not contribute to the event and that the measures were proportionate. But
distress is narrow in scope – it does not extend to more general cases of emergencies (where defence of necessity is more appropriate). When it comes to the pandemic, the special relationship likely met because of state's responsibility for its citizens' lives, particularly where there is public healthcare. Non-contribution could be problematic because of the perceived slow / inadequate response of some governments. Proportionality questionable because of uncertain benefits of some measures (e.g. lockdowns, travel bans) possibly even resulting in a worsening of harms. The acceleration of inflation across the industrialized world in 2022 is perhaps the most obvious collateral damage from the Covid-19 responses. Untreated illnesses because of missed doctors' appointments, an explosion of mental illness through isolation and stunted education of children due to closed schools other leading contenders.

The defence of necessity is available when the measure is the only way for state to safeguard an essential interest against a grave an immanent peril. The state's act must not seriously impair the essential interests of another state, or the international community and the state cannot have contributed to the situation. States (notably Argentina) have used necessity as a defence in many investment claims, in some cases successfully. While public health likely to be viewed as an essential interest, the 'only way' will be difficult to prove because some measures were arguably excessive (e.g. lockdowns, travel bans). States may have contributed to the situation by failing to act faster – but this will be assessed by conduct of other comparable states. It appears that harsh suppression at an early stage, as in the case of China and Italy, did little to alleviate later surges of infections. Additionally, some measures impaired other states' interests (e.g. vaccine & PPE export bans).

Finally, the police powers doctrine, which may be part of CIL, protects the state's right to regulate over important matters such as public health, order or morality. Measures taken under PP will not be subject to claims of expropriation or give rise to compensation to investors. Protecting public health has been viewed as an aspect of PP by international tribunals but reasonableness and proportionality must be shown. Again, this could be problematic since many measures may be viewed as excessive

It would seem that necessity is probably the best avenue for a state to defend itself against a claim from a foreign investor based on responses to the pandemic. Necessity is the most commonly invoked of the discussed defences in investment arbitration and has general

application to emergencies such as a serious, widespread public health crisis. The main problems with using necessity, and indeed some of the other defences, seem to be non-contribution and proportionality / reasonableness. Paradoxically these requirements seem to be mutually exclusive: if a state contributed to the worsening of the pandemic because it did not do enough (a claim that is increasingly uncommon) then logically it cannot have acted excessively (a far more prevalent assertion as of mid-2022)?

If they are accepted as lawful, there is a danger that some of the pandemic responses may end up remaining in place or being re-tried in similar circumstances. Indeed, some politicians are on record of saying that the pandemic can be used to instigate a new era of state-led interventions in many aspects of society. While CIL defences were designed to respond to once-in-a-generation crises, they are less-well suited to address these kinds of interferences.[67] Consequently tribunals adjudicating international law must ensure that they are not wielded by states lightly. Taking a narrower view of CIL defences to state responsibility could also help forestall overreach in situations when needing to be seen 'doing something' drives decision-making whereas doing nothing, or something markedly less severe, would have been wiser.

[67] Arato, Claussen and Heath above n 3