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How the Coronavirus Crisis Challenges International Investment (Customary) Law Rules: Which Role for the Necessity Defense?

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HOW THE CORONAVIRUS CRISIS CHALLENGES INTERNATIONAL INVESTMENT (CUSTOMARY) LAW RULES: WHICH ROLE FOR THE NECESSITY DEFENSE?

*Federica Cristani**

ABSTRACT

The COVID-19 pandemic is affecting every aspect of our daily life; what's more, it is affecting and will affect for some years from now the global economy. The present working paper offers a reflection on how State's restrictive trade measures are affecting foreign investors' rights. The study investigates how the exceptional circumstances of the COVID-19 pandemic can justify State's measures affecting foreign investors' rights and whether they can be legally justified under the customary international rule of the necessity defense.

The first part of the paper will analyze the requirements of the states of necessity, as codified in article 25 of the ILC Draft Article. The second part of the paper will apply the requirements of the customary law rule of the necessity defense to the COVID-19 pandemic, taken into account national measures that have been taken by States during this period; it will be questioned whether the global and exceptional circumstances of the spread of COVID-19 will influence (and maybe change) the way we interpret and apply this customary rule.

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I. THE EFFECTS OF THE COVID-19 PANDEMIC ON INTERNATIONAL INVESTMENT POLICIES: AN INTRODUCTORY OVERVIEW

We are in the midst of the one of the “greatest economic, financial and social shock[s] of the 21st century”—as the Organization for Economic Co-operation and Development (“OECD”) Secretary General, Angel Gurría has labelled the COVID-19 health crisis.¹ The COVID-19 pandemic² (“Pandemic”) is affecting every aspect of our daily lives. What’s more, it is affecting, and will likely affect, the global

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1. *OECD Secretary-General: Coronavirus ‘War’ Demands Joint Action*, OECD (Mar. 21, 2020), <http://www.oecd.org/newsroom/oecd-secretary-general-coronavirus-war-demands-joint-action.htm> [<https://perma.cc/3C7L-4NLA>].
 2. The World Health Organization [hereinafter WHO] defined the COVID-19 outbreak as a Public Health Emergency of International Concern on January 30, 2020 and, on March 11, 2020, declared it a pandemic. *See the WHO, Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, WORLD HEALTH ORG. (Jan. 30, 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-\(2019-ncov\)](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)) [<https://perma.cc/BN9E-TSMY>]; *WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [<https://perma.cc/S53F-HS2G>]; *see generally* Armin von Bogdandy & Pedro Villarreal, *International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis*, in MPIL RSCH, SERIES (Raffaella Kunz ed.) (forthcoming); Philippe Sands, *COVID-19 Symposium: COVID-19 and International Law*, OPINIO JURIS (Mar. 30, 2020), <http://opiniojuris.org/2020/03/30/symposium-covid-19-and-international-law> [<https://perma.cc/L3KZ-TP42>].

economy for years after, including international investment flows.³ Actually, financial and economic crises have always affected investment policies worldwide.⁴ The 2008–2009 financial and economic crisis led to unemployment, debt, low growth, and poor access to financing across Europe.⁵ This resulted *inter alia* in reduced foreign direct investment (“FDI”) in the EU.⁶ Foreign investors worldwide were prudent in making their investment decisions as the risk of facing insolvency was very high.⁷ Indeed, when a state is coping with an economic crisis, its domestic legislation undergoes constant change.⁸ In such circumstances of legal uncertainty, foreign investors find it difficult to make adequate business decisions, which negatively influences FDI inflows in the country.⁹

This is even more true when we consider the current COVID-19 crisis: the Pandemic is something new,¹⁰ and this health/economic/social crisis is incomparable in our modern history.¹¹ Most countries have declared national state of emergencies and are adopting restrictive measures (e.g. social distancing, quarantines and even state control of certain strategic companies) on the ground of exceptional circumstances.¹² Some countries have established export controls over certain medical products (e.g. medical ventilators, certain drugs, personal protective equipment) in the form of temporary export

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3. Adnan Seric & Jostein Hauge, *Foreign Direct Investments Could Contract by 40% This Year, Hitting Developing Countries Hardest*, WORLD ECON. F. (June 2, 2020), <https://www.weforum.org/agenda/2020/06/coronavirus-covid19-economics-fdi-investment-united-nations/> [https://perma.cc/VMJ3-VSTC].
 4. See, e.g., U.N. Conference on Trade and Development, *World Investment Prospects Survey 2010–2012*, UNCTAD/DIAE/IA/2010/4 (Aug. 31, 2010).
 5. *Id.* at 1.
 6. *Id.*
 7. See *id.* at 5.
 8. See U.N. Conference on Trade and Development, *Assessing the Impact of the Current Financial and Economic Crisis on Global FDI Flows*, 41–46, UNCTAD/DIAE/IA/2009/3 (Apr. 2009).
 9. See *id.* at 44–45.
 10. See *OECD Secretary-General: Coronavirus ‘War’ Demands Joint Action*, *supra* note 1.
 11. *Id.*
 12. Sándor Lénárd, *The COVID-19 and the ‘State of Necessity’*, MANDINER (Apr. 13, 2020), https://precedens.mandiner.hu/cikk/20200413_the_covid_19_and_the_state_of_necessity [https://perma.cc/29MG-FHEW] (interviewing Federica Cristiani).

bans or the addition of licensing/authorisation requirements.¹³ Other countries, concerned with food security, have introduced export restrictions over specific agricultural products.¹⁴ Most countries are introducing screening mechanisms on foreign investment, with the aim to safeguard national businesses from foreign hostile takeovers.¹⁵ Such measures have a great impact on international trade and investment.¹⁶

The United Nations Conference on Trade and Development (“UNCTAD”) latest estimates project a dramatic 30–50% drop in FDI flows worldwide for 2021, with the hardest-hit sector being Manufacturing.¹⁷

Accordingly, states around the world are adopting investment-related policies and regulations that aim to stimulate foreign investment and conversely, reinforce their own national economies.¹⁸ Overall, this approach can be detrimental to the rights of foreign investors that are guaranteed by international investment treaties and customary law rules.

This Article investigates how states’ new trade and investment regulatory measures are affecting and will likely affect foreign investors’ rights, and to what extent the exceptional circumstances of the Pandemic can justify such measures under international investment law.

A. States’ regulatory measures affecting foreign investors during the pandemic

The UNCTAD is constantly monitoring the national regulatory measures countries around the world are adopting to address the

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13. *COVID-19: Measures Affecting Trade in Goods*, WORLD TRADE ORG. (Oct. 7, 2020), https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm [https://perma.cc/K44N-YY2A].
 14. See *Agency Chiefs Issue Joint Call to Keep Food Trade Flowing in Response to COVID-19*, WORLD TRADE ORG. (Mar. 31, 2020), https://www.wto.org/english/news_e/news20_e/igo_26mar20_e.htm [https://perma.cc/C8R7-PYC3], for the joint statement by the Directors-General of the Food and Agriculture Organization, the WHO and the WTO, who remarked that “[u]ncertainty about food availability can spark a wave of [additional] export restrictions, creating a shortage on the global market.”
 15. See U.N. Conference on Trade and Development, *World Investment Report 2020*, 92, UNCTAD/WIR/2020 (June 2020).
 16. *Id.* at 88.
 17. *Id.* at 5–7.
 18. See Press Release, World Trade Org., Trade Set to Plunge as COVID-19 Pandemic Upends Global Economy (Apr. 8, 2020), for a general overview of trade measures that states are adopting to face the COVID-19 pandemic crisis.

Pandemic.¹⁹ These measures are diverse in nature and scope, ranging from measures supporting investors and domestic economies in general, to policies aimed at protecting critical domestic infrastructure and industries, particularly in the health sector.²⁰ For the most part, they affect future FDI inflows and respond to two main concerns: 1) offering incentives to prospective foreign investors (trying to face the forthcoming FDI inflow breakdown); and 2) safeguarding national critical infrastructures (by applying screening mechanisms).²¹

Among the different regional realities around the world, the European Union (“EU”) is quite interesting because it enjoys exclusive competence over international trade matters.²² This covers trade in goods and services, commercial aspects of intellectual property, and—since the 2009 Lisbon Treaty—FDI.²³ However, despite several interventions by EU institutions on FDI policies, a regional uniform approach is still lacking on foreign investment policies and thus many uncertainties remain.²⁴ This lack of uniformity becomes even more evident in times of economic crises, where states tend to adopt economic and financial decisions at the national level without (or with very little) coordination at the regional level (with the EU).²⁵ Indeed, some EU member states have autonomously adopted national measures regarding FDI; for example, France expanded its foreign investment screening regime by broadening the relevant sectoral scope.²⁶ Italy increased the scope of disclosure requirements and extended the timeframe for review procedures, while also introducing the so-called golden power mechanism to protect strategic national businesses from

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19. *See Investment Policy Monitor*, U.N. CONF. ON TRADE & DEV., <https://investmentpolicy.unctad.org/investment-policy-monitor> [<https://perma.cc/75U9-3NRA>].
 20. U.N. Conference on Trade and Development, *Investment Policy Monitor*, 1 (Apr. 2020).
 21. *See id.*
 22. *See generally* Stephen Woolcock, Directorate-General for External Policies, *The EU Approach to International Investment Policy After the Lisbon Treaty*, EXPO/B/INTA/FWC/2009-01/Lot7/07-08-09 (Oct. 2010).
 23. *See id.* at 6.
 24. *See id.* at 14–15.
 25. *See id.* at 10.
 26. *France — Government Extends FDI Screening Regime as a Response to the COVID-19 Pandemics*, U.N. CONF. ON TRADE & DEV.: INV. POLICY MONITOR (Apr. 30, 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3517/france-the-government-extends-fdi-screening-regime-as-a-response-to-the-covid-19-pandemics> [<https://perma.cc/22X2-NU4U>].

foreign hostile takeovers.²⁷ Spain suspended the liberalization of the foreign investment regime in its territory with regard to some critical areas, such as infrastructure, technologies and media.²⁸ Most countries are adopting measures to support domestic industries through state subsidies; for example, Germany is considering measures to protect its national industrial sector,²⁹ and the Italian deputy economic minister stressed that Italy will not “become someone’s shopping territory.”³⁰

Simultaneously, the EU is adopting supporting measures.³¹ Among those measures is an allowance for member states to adopt maximum flexibility when applying EU rules on state aid measures—to support national businesses and workers—and on public finances and fiscal policies, with a view to accommodate exceptional national spending.³²

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27. *See Amid the COVID-19 Pandemic, the Government Strengthens its Special Powers in Strategic Sectors*, U.N. CONF. ON TRADE & DEV.: INV. POLICY MONITOR (Apr. 6, 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3506/italy-amid-the-covid-19-pandemic-the-government-strengthens-its-special-powers-in-strategic-sectors> [<https://perma.cc/SFN3-6FRN>]; *see also* Francesca Torricelli & Pietro Missanelli, *Italian Law: Corporate Transparency and ‘Golden Power’ Provisions in Emergency Legislation for Coronavirus Disease 2019*, NAT’L L. REV. (Apr. 23, 2020), <https://www.natlawreview.com/article/italian-law-corporate-transparency-and-golden-power-provisions-emergency-legislation> [<https://perma.cc/LLQ6-QA35>].
28. U.N. Conference on Trade and Development, *Investment Policy Responses to the COVID-19 Pandemic*, 8 (May 2020).
29. *See Responses to COVID-19 by Tightening FDI Screening*, U.N. CONF. ON TRADE & DEV.: INV. POLICY MONITOR (May 20, 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3526/germany-responses-to-covid-19-by-tightening-fdi-screening> [<https://perma.cc/Y3Q3-XUKR>].
30. Giuseppe Fonte, *Italy to Defend ‘Strategic Companies’ from Foreign Takeovers*, REUTERS (Mar. 18, 2020), <https://www.reuters.com/article/us-italy-m-a-government/italy-to-defend-strategic-companies-from-foreign-takeovers-idUSKBN21512L> [<https://perma.cc/L6CU-HQLC>].
31. *See A European Roadmap to Lifting Coronavirus Containment Measures*, EUR. COMM’N, https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/european-roadmap-lifting-coronavirus-containment-measures_en [<https://perma.cc/6AN3-QB4Q>].
32. *See COVID-19 Coronavirus Pandemic*, COUNCIL OF THE EUR. UNION, <https://www.consilium.europa.eu/en/policies/covid-19-coronavirus-outbreak-and-the-eu-s-response> [<https://perma.cc/P8KT-HEHA>]; *see also* *Guidance on Customs Issues Related to the COVID-19 Emergency*, EUR. COMM’N (Apr. 27, 2020), https://ec.europa.eu/taxation_customs/covid-19-taxud-response/guidance-customs-issues-related-covid-19-

In the field of FDI, it is worth recalling the recent guidelines published by the European Commission (“Commission”) directing member states on how to deal with FDI and, in particular, on how to apply the 2019 FDI Screening Regulation during the Pandemic.³³

On March 19, 2019, the EU adopted Regulation 2019/452 (“FDI Screening Regulation”), which established a framework for the screening of foreign direct investments into the EU from non-EU countries.³⁴ Such a framework aims to establish a cooperation mechanism where member states and the Commission can exchange information regarding the screening of FDI on the grounds of security and public order.³⁵ The Regulation, as specified in the 2017 Background Communication of the Commission, should “[w]elcom[e] foreign direct investment while protecting essential interests” of member states and the EU.³⁶ The Regulation took effect October 11, 2020.³⁷ Previously, on March 25, 2020, the Commission drafted guidelines on how to use the FDI screening mechanism in a time of public health crisis.³⁸

As of the date of this writing, national foreign direct investment screening mechanisms are in place in 14 member states (including, Italy, Spain, and France).³⁹ The Commission stated that,

“Today more than ever, the EU’s openness to foreign investment needs to be balanced by appropriate screening tools. In the context of the COVID-19 emergency, there could be an increased risk of attempts to acquire healthcare capacities . . . or related industries such as research establishments (for instance developing vaccines) via foreign direct investment. . . . At present, the responsibility for screening FDI rests with Member States.

emergency_en#heading_9 [<https://perma.cc/VCJ4-DLFL>], for a list of exceptional measures taken by the customs authorities of member states during the COVID-19 crisis.

33. See Regulation 2019/452, of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union, 2019 O.J. (L 79) 1, 1.

34. *Id.*

35. *Id.* at 2.

36. *Welcoming Foreign Direct Investment While Protecting Essential Interests*, at 1, COM (2017) 494 final (Sept. 9, 2017).

37. Regulation 2019/452, *supra* note 33, at 12.

38. See *Guidance to the Member States Concerning Foreign Direct Investment and Free Movement of Capital from Third Countries, and the Protection of Europe’s Strategic Assets, Ahead of the Application of Regulation (EU) 2019/452 (FDI Screening Regulation)*, at 1, COM (2020) 1981 final (Mar. 25, 2020) [hereinafter *Guidance to the Member States*].

39. *Id.* at 2, Annex.

FDI screening should take into account the impact on the European Union as a whole, in particular with a view to ensuring the continued critical capacity of EU industry, going well beyond the healthcare sector.”⁴⁰

The Commission further specified, “investments that do not constitute FDI, i.e. portfolio investments, may be screened by the Member States in compliance with the Treaty provisions on free movement of capital.”⁴¹ Moreover, “[b]esides investment screening, Member States may retain special rights in certain undertakings (“golden shares”). . . . Like other restrictions to capital movements, they must be necessary and proportionate to achieve a legitimate public policy objective.”⁴² Accordingly, the Commission advised member states not only on FDI (which are under the exclusive competence of the EU), but also on portfolio investment and golden shares, whose regulations remain under the competence of the member states, in compliance with the EU rules of the internal market.⁴³ And in this respect, the Commission made it clear that “[g]rounds of public policy, public security and public health can be relied on [for restrictions for capital movements] if there is a genuine and sufficiently serious threat to a fundamental interest of society”⁴⁴ and that “[t]he permissible grounds of justification may also be interpreted more broadly.”⁴⁵

Regarding the consequences of such measures to foreign investors in the EU, it is useful to make some distinctions 1) between foreign investors already present in host states that are or will be affected by national measures (e.g. nationalizations of foreign investment during the period of emergency or state aid measures addressed to national businesses) and incoming foreign investors; and 2) with regard to incoming foreign investors, as already seen, the measures of the host state likely to affect them can be divided between incentives and restrictions following screening mechanisms.

Since all such measures are very new (and other measures will likely be adopted), it is too early to predict exactly how they will be applied and the exact economic consequences they will produce. However, we

40. *Id.* at 1.

41. *Id.* at 2, Annex.

42. *Id.*

43. Axel Schulz, Geneva Forwood, Orion Berg, & Matthias Vangenechten, *COVID-19 – Commission Issues Guidelines to Protect European Critical Assets from Foreign Investment*, WHITE & CASE (Apr. 1, 2020) <https://www.whitecase.com/publications/alert/covid-19-commission-issues-guidelines-protect-european-critical-assets-foreign> [<https://perma.cc/ET8K-F4TR>].

44. *Guidance to the Member States*, *supra* note 38, at 3, Annex.

45. *Id.*

might elaborate on some questions that states should address to avoid international responsibility for breaching international obligations under international investment law.⁴⁶ In particular, foreign investors may likely question the breach of international investment obligations by host states, claiming that the national measures constitute a breach of non-discrimination and fair and equitable treatment, or amount to indirect expropriation.⁴⁷ For example, to support the national healthcare systems, Spain⁴⁸ and Ireland⁴⁹ have decided to temporarily nationalize private hospitals; Italy has also adopted several emergency measures including, among others,⁵⁰ the temporary or permanent requisition of medical devices from private businesses.⁵¹

In this respect, it is crucial to understand to what extent the exceptional circumstances of the Pandemic can justify states' measures

46. See generally Pieter Bekker, *International Law in Times of Crisis: COVID-19 and Foreign Investments*, LEXOLOGY (May 4, 2020), <https://www.lexology.com/library/detail.aspx?g=c8c46035-4e4f-4f9f-8f16-66b23b5942a0> [<https://perma.cc/BZ4E-SXZ3>].
47. See Nathalie Bernasconi-Osterwalder, Sarah Brewin, & Nyaguthii Maina, *Protecting Against Investor-State Claims Amidst COVID-19: A Call to Action for Governments*, IISD (Apr. 14, 2020), <https://www.iisd.org/articles/protecting-against-investor-state-claims-amidst-covid-19-call-action-governments> [<https://perma.cc/EJY4-LFPV>]; Michael Ostrove, Kate Brown de Vejar, & Ben Sanderson, *COVID-19 — a Legitimate Basis for Investment Claims?*, DLA PIPER – PUBLICATIONS (Apr. 16, 2020), <https://www.dlapiper.com/it/italy/insights/publications/2020/04/covid-19-a-legitimate-basis-for-investment-claims> [<https://perma.cc/PYP3-VQ8E>].
48. Adam Payne, *Spain has Nationalized all of its Private Hospitals as the Country Goes into Coronavirus Lockdown*, BUSINESS INSIDER (Mar. 16, 2020), <https://www.businessinsider.com/coronavirus-spain-nationalises-private-hospitals-emergency-covid-19-lockdown-2020-3?IR=T> [<https://perma.cc/36ZG-JA7S>].
49. Órla Ryan, *Private Hospitals will be Made Public for Duration of Coronavirus Pandemic*, THE JOURNAL (Mar. 24, 2020), <https://www.thejournal.ie/private-hospitals-ireland-coronavirus-5056334-Mar2020/> [<https://perma.cc/279L-F589>].
50. Massimo Benedetti, Caterina Coroneo, & Nicolò Minella, *Could COVID-19 Emergency Measures Give Rise to Investment Claims? First Reflections from Italy*, GLOBAL ARBITRATION REV. (Mar. 26, 2020), <https://globalarbitrationreview.com/article/1222354/could-covid-19-emergency-measures-give-rise-to-investment-claims-first-reflections-from-italy> [<https://perma.cc/PS7A-ZYR9>].
51. Carloandrea Meacci, *Law Decree No 18 of 17 March 2020 - Cura Italia Decree*, ASHURST – NEWS & INSIGHTS (March 30, 2020), <https://www.ashurst.com/en/news-and-insights/legal-updates/law-decree-no-18-of-17-march-2020---cura-italia-decree/> [<https://perma.cc/7PVZ-VFJP>]; see also Bernasconi-Osterwalder, *supra* note 47.

affecting foreign investors' rights. The following Section II illustrates the tools international investment law offers to states for measures adopted under exceptional circumstances and how states can apply these measures during the Pandemic.

II. JUSTIFICATIONS FOR STATES' EXCEPTIONAL MEASURES AFFECTING FOREIGN INVESTORS' RIGHTS UNDER INTERNATIONAL (INVESTMENT) LAW

Foreign investors may rightly question a breach of international investment obligations by host states, claiming that the national trade and investment-related measures adopted to cope with the Pandemic constitute a breach of international obligations that are guaranteed in the relevant international investment agreements ["IIAs"].⁵² Accordingly, foreign investors may bring host states before international investment arbitration tribunals — as provided for in IIAs — and ask for reparation.⁵³ Indeed, some investment arbitration cases have already started.⁵⁴ According to an open letter sent in June 2020 by the *Seattle to Brussels Network* to national governments and signed by 630 organizations, "from 1 March until 25 May 2020 when most governments were in the midst of the Pandemic, 12 new [investor-state dispute settlement] cases were filed Most of those were against Latin American countries . . . : Colombia (3 cases), Peru (2), Panama (1), Mexico (1), Dominican Republic (1), Norway (1), Croatia (1), Serbia (1), Romania (1)."⁵⁵

52. See generally Kevin O'Gorman et al., *Investor-State Claims in the Era of the COVID-19 Pandemic*, 14 NORTON ROSE FULBRIGHT INT'L ARB. REP. 17 (Jun. 2020).

53. Bernasconi-Osterwalder, *supra* note 47. Most IIAs provide for investor-state dispute settlement mechanisms, according to which the foreign investor may bring the host state before an independent and international arbitral. *Id.*

54. See generally Maxi Scherer et al., *International Arbitration and the COVID-19 Revolution (Part 2 of 2)*, WOLTERS KLUWER (Oct. 15, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/10/15/international-arbitration-and-the-covid-19-revolution-part-2-of-2/> [<https://perma.cc/L88F-N2T3>].

55. *Open Letter to Governments on ISDS and COVID-19*, SEATTLE TO BRUSSELS NETWORK (June 2020), <http://s2bnetwork.org/sign-the-pen-letter-to-governments-on-isds-and-covid-19/> [<https://perma.cc/5RAB-9C8S>]; see also BRETTON WOODS PROJECT, *Fears of lawsuits at World Bank's tribunal constrain efforts to fight pandemic*, THE BRETTON WOODS OBSERVER (July 16, 2020), <https://www.brettonwoodsproject.org/2020/07/fears-of-lawsuits-at-world-banks-tribunal-constrain-efforts-to-fight-pandemic/> [<https://perma.cc/KJD7-XHY3>].

International investment law gives host states two kinds of defenses in case of investment claims:⁵⁶ 1) exceptions envisaged by the applicable Bilateral Investment Treaty (“BIT”) or IIA giving a safeguard to regulations that were created for, among other reasons, the maintenance of public order or the protection public health (called non-precluded measure clauses);⁵⁷ and 2) defenses under customary international law—most notably, the state of necessity and force majeure, as codified by the International Law Commission in the Articles on Responsibility of States for Internationally Wrongful Acts [“ILC Articles”].⁵⁸

Moreover, it has also been proposed (regarding measures taken during the 2008-2009 financial and economic crisis) that treaty obligations under IIAs might be temporarily suspended during a grave crisis, as a consequence of Article 62 of Vienna Convention on the Law of Treaties, according to which a “fundamental change of circumstances” may justify the termination, withdrawal, or suspension of the treaty when “the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty” and “the effect of the change is radically to transform the extent of obligations” — e.g. a host state might claim an essential necessity to privilege primarily for domestic investors due to a severe national economic situation.⁵⁹

The following sections of this Article are devoted specifically to the state of necessity defense, which has already been invoked by host states to justify breach of international investment obligations due to national economic and financial crises.⁶⁰ Then, this Article will investigate whether and to what extent such defense can be relied on as a

56. See generally Federica Paddeu & Kate Parlett, *COVID-19 and Investment Treaty Claims*, KLUWER ARB. BLOG (Mar. 30, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims> [<https://perma.cc/MZ5W-5DXX>].

57. See generally Alex Martinez, *Invoking States Defences in Investment Treaty Arbitration*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION* (Michael Waibel et al. eds., 2010).

58. G.A. Res. 56/83, art. 23 (Jan. 28, 2002); see also JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY* (2002) [hereinafter ILC COMMENTARY]; see also William Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT’L L., 307–410 (2008).

59. See Hermann Ferré & Kabir Duggal, *The World Economic Crisis as a Changed Circumstance*, 43 COLUMBIA FDI PERSPECTIVES (Aug. 1, 2011); Lénárd, *supra* note 12.

60. See generally Burke-White & von Staden, *supra* note 58.

justification for the breach of obligations towards foreign investors during the Pandemic.

III. STATE OF NECESSITY AS A JUSTIFICATION FOR THE HOST STATE IN INVESTMENT CLAIMS

As mentioned, international investment law offers a number of instruments to host states to relieve their international responsibilities, towards foreign investors, when facing exceptional circumstances.⁶¹ Most IIAs already include provisions that provide host states with different lines of defense in investment claims brought by foreign investors, such as non-precluded measure clauses, which allow states to adopt measures to protect public objectives.⁶²

When such clauses are not expressly included in IIAs though, states may turn to customary international law defenses, like the state of necessity, codified in the ILC Articles as one of the “circumstances precluding wrongfulness.”⁶³

The necessity defense was Argentina’s core defense in a set of investment claims it faced against U.S. investors following the country’s 2001-2002 financial and economic crisis.⁶⁴

The proceeding Sections illustrate how the ILC Articles codified the customary defense of necessity and how the defense has been applied by investment arbitral tribunals; this preliminary overview is necessary to understand what circumstances the Pandemic can successfully justify the invocation of the necessity defense by host states in investment claims.

A. The requirements of the necessity defense under customary international law, as codified in article 25 of the ILC Articles and applied so far by investment arbitral tribunals

Under general international law, the concept of necessity has been subject to an evolving interpretation. However, it was finally codified in Chapter V of the 2001 ILC Articles as one of the circumstances precluding wrongfulness.⁶⁵ According to Article 25—which has come to be considered as reflecting customary international law on necessity—

61. *Id.*

62. Michael Ostrove et al., *State Defences to Investment Claims Arising From COVID-19*, DLA PIPER GLOBAL LAW FIRM (Apr. 29, 2020), <https://www.dlapiper.com/en/morocco/insights/publications/2020/04/state-defences-to-investment-claims-arising-from-covid-19> [<https://perma.cc/783R-S4BD>].

63. *Id.*

64. *Id.*

65. *See id.*; *see also* ILC COMMENTARY, *supra* note 58, at ch. V.

⁶⁶ a State may not invoke necessity as a ground for precluding the wrongfulness of an act not in conformity with an international obligation, unless the act is the only way for the State to safeguard an essential interest against a grave and imminent peril and the act does not seriously impair the essential interest of another states of the international community.⁶⁷ Additionally, a state cannot invoke the defense if it has contributed to the situation of necessity.⁶⁸

The cumulative conditions that must be met by a state to be able to successfully invoke this defense, according to Article 25 of the ILC Articles, are the following:

(1) The act in question must be the *only way* for the State to safeguard an *essential interest* against a *grave and imminent peril*.⁶⁹ The plea of necessity is excluded if there are other lawful means available to protect the “essential interest” at stake, even if they are more costly or less convenient.⁷⁰ The “only way” requirement has been interpreted by international practice in a very strict way. For example, the International Court of Justice, in *Gabčíkovo-Nagymaros*, found that Hungary had other means than suspending and abandoning works under the 1977 treaty with Czechoslovakia, even though these other means would have involved “a more costly technique”.⁷¹ Regarding the meaning of “essential interests”, the 2001 ILC Commentary specifies that “necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or the internationally community as a whole”.⁷² Here, the question of defining whether an interest is “essential” is very

66. See Ostrove et al., *supra* note 62.

67. *Id.*

68. See ILC COMMENTARY, *supra* note 58, at art. 25 (“1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which an obligation exists, or the international community as a whole. 2. in any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity”).

69. Ostrove et al., *supra* note 62.

70. *Id.*

71. Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 55 (Sept. 25) [hereinafter Gabčíkovo-Nagymaros].

72. See ILC COMMENTARY, *supra* note 58, ¶ 2.

fact specific.⁷³ Furthermore, according to Article 25, the state's "essential interest" should be threatened by a "grave and imminent peril".⁷⁴ In *Gabčíkovo-Nagymaros*, the International Court of Justice observed that the "imminence" requirement has to be interpreted as "immediacy" or "proximity", and not as a merely "possibility" of the peril.⁷⁵

(2) The State's act *must not seriously impair an essential interest of another State or of the international community as a whole*.⁷⁶ In particular, a plea of necessity is valid if the "the interest relied on [...] outweigh[s] all other considerations".⁷⁷

(3) The State *cannot invoke necessity if it has contributed to the situation of necessity*.⁷⁸ In its 2001 Commentary, the ILC emphasized that "the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral."⁷⁹ This view was also endorsed by the International Court of Justice in *Gabčíkovo-Nagymaros*, when it stated Hungary could not invoke the necessity defense since "it had helped, by act or omission to bring it about".⁸⁰

Finally, if a situation of necessity is found, it should be assessed in the period during which it was applicable.⁸¹ As stated in Article 27 of the ILC Articles, "the invocation of a circumstance precluding wrongfulness . . . is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness *no longer exists*."⁸² Accordingly, as soon as the situation of "grave and imminent peril" ceases, the State's conduct is not justified by necessity and is unlawful under international law.⁸³

73. LG&E Energy Corp. v. Republic of Argentina, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 251 (July 25, 2007).

74. G.A. Res. 56/83, *supra* note 58, at art. 25(1).

75. *Gabčíkovo-Nagymaros*, *supra* note 71, ¶¶ 42, 54.

76. G.A. Res. 56/83, *supra* note 58, at art. 25(1)(b).

77. ILC COMMENTARY, *supra* note 58, ¶ 17.

78. G.A. Res. 56/83, *supra* note 58, at art. 25(2).

79. ILC COMMENTARY, *supra* note 58, ¶ 20.

80. *Gabčíkovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. Rep 7, ¶ 57 (Sept. 25).

81. *Id.* ¶ 54.

82. G.A. Res. 56/83, *supra* note 58, at art. 27(a).

83. *See generally* LG&E Energy Corp. v. Republic of Argentina, ICSID Case No. ARB/02/1, Decision on Liability, (July 25, 2007).

Once assessed the existence of the state of necessity, Article 27 of the ILC Articles further establishes the possibility of compensation for any material loss caused by the measures adopted.⁸⁴ However, the ILC Articles are not specific about the modalities of compensations; some tribunals, such as the one in *LG&E v. Argentina*, “decided that the damages suffered during the state of necessity should be borne by the investor,”⁸⁵ while others, such as that in *BG v. Argentina*,⁸⁶ decided that, even if a situation of necessity is established, states have an obligation to compensate investors for damages occurred *during* the period of necessity.⁸⁷

As mentioned above, more than 40 cases were brought against Argentina in the early 2000s regarding international investment law.⁸⁸ Claimants (mostly U.S. private investors) alleged that the Argentine Government’s regulatory measures adopted to cope with the financial crisis that hit the country in 2001 had breached a number of BITS obligations.⁸⁹

In most of the cases, Argentina invoked the necessity defense to justify the alleged violations of applicable BITS, relying on both the emergency clause included in Article XI of the applicable 1991 US-Argentina BIT⁹⁰ and on the customary rule of necessity.⁹¹ Investment arbitral tribunals, which had to deal with such pleas in the Argentinean cases, recognized the possibility to invoke such a justification in case of financial and economic crises.⁹² However, they did not deal with the

84. G.A. Res. 56/83, *supra* note 58, at art. 27(b).

85. *LG&E Energy Corp. v. Republic of Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 264 (July 25, 2007).

86. *BG Group Plc. v. Argentine Republic*, UNCITRAL case, Final Award, ¶ 382 (Dec. 24, 2007).

87. *Id.* ¶ 409.

88. William W. Burke-White, *The Argentine Financial Crisis: State Liability under BITS and the Legitimacy of the ICSID System*, 3 *ASIAN J. WTO & INT’L HEALTH L & POL’Y* 199, 204 (2008).

89. *BG Group Plc. v. Argentine Republic*, UNCITRAL case, Final Award, ¶ 86(b) (Dec. 24, 2007).

90. Burke-White, *supra* note 88, at 205; *see generally* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Arg.–U.S., art. XI, Nov. 14, 1991, 31 *I.L.M.* 124 (1992) [hereinafter Arg.–U.S. BIT] (stating “this Treaty shall not preclude the application . . . of measures necessary for . . . the Protection of [a Party’s] own essential security interests” and invoked in the majority of Argentina’s investment arbitration cases).

91. Burke-White, *supra* note 88, at 205.

92. Avidan Kent & Alexandra R. Harrington, *The Plea of Necessity under Customary International Law: A Critical Review in Light of the Argentine*

necessity defense in the same way, resulting in inconsistent decisions.⁹³ Since the treaty-based emergency clause included in Article XI of the U.S.-Argentina BIT refers to a situation of “emergency,” which is similar to the concept of “necessity,”⁹⁴ as it has frequently been interpreted and applied by arbitral tribunals through reliance on Article 25 of the ILC Articles.⁹⁵ This approach—and generally the relationship between treaty-based emergency clauses and the customary rule of necessity defense—was subject to judicial and scholarly debate,⁹⁶ which goes expands beyond this article’s scope. What concerns this article is how the customary rule of necessity defense has been interpreted and applied in the context of international investment arbitration so far (in particular the “pre-Pandemic” period).

In almost all of the previously mentioned cases, Argentina argued that the gravity of the crisis affecting the country threatened the very existence of the State⁹⁷ and the need to face the situation had led to the adoption of the national measures that allegedly impaired U.S. foreign investors.⁹⁸ As for the application of the necessity defense under customary international law (as codified in Article 25 of the ILC Articles),⁹⁹ according to Argentina, the measures adopted were the “only means” to safeguard an essential interest against a “grave and

Cases, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 246, 247 (Chester Brown & Kate Miles, eds., 2011).

93. *Id.*
94. *Compare* Arg.-U.S. BIT, *supra* note 90, at Art. IV(3) (referring to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events) *with* G.A. Res. 56/83, *supra* note 58, at art. 25(1)(a) (treating necessity as the only way for the State to safeguard essential interests against grave and imminent peril).
95. Robert M. Ziff, *The Sovereign Debtor’s Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law*, 10 RICH J. GLOBAL L. & BUS. 345, 366–68 (2011).
96. *See, e.g.*, Christina Binder, *Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 608–630 (Christina Binder et al. eds., 2009) (examining the relationship between treaty-based emergency clauses and the rule of necessity in customary international law).
97. *See* Enron Corp et al. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 289 (May 22, 2007); *see also* Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 326 (Sept. 28, 2007).
98. *See* Enron Corp et al. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 290 (May 22, 2007).
99. ILC COMMENTARY, *supra* note 58, at Art. 25.

imminent peril.”¹⁰⁰ Moreover, Argentina maintained it did not contribute to the situation of necessity, since most of the intervening factors were exogenous.¹⁰¹

Claimants (private investors), instead, generally maintained that Argentina could not rely on the necessity defense under customary international law.¹⁰² According to the claimants, the Argentine crisis had its origins in endogenous factors and resulted from Argentina’s own policy failures (particularly, from the failure to implement its structural reforms in the 1990s and to ensure open foreign trade and the maintenance of the currency board’s credibility).¹⁰³ Moreover, the economic crisis could not fall within the concept of “essential interests,”¹⁰⁴ which should be “limited to war, natural disaster and other situations threatening the existence of the State.”¹⁰⁵

Most arbitral tribunals stated that Argentina somehow contributed to the situation of economic emergency because of bad decisions taken at the governmental level.¹⁰⁶ Accordingly, the arbitrators did not agree that Argentina could claim a state of emergency.¹⁰⁷ However, most of the arbitral decisions agreed that in principle a grave economic crisis, likely to undermine the social structure of a state, might amount to a situation of necessity.¹⁰⁸ Most notable, arbitral tribunals in *CMS*,¹⁰⁹

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100. *Enron Corp et al. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 295 (May 22, 2007); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 334 (Sept. 28, 2007).
 101. *See Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 342 (Sept. 28, 2007) (referencing the First Expert Report of Professor Nouriel Roubini of July 13, 2005). *See also Enron Corp et al. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 297 (May 22, 2007) (referencing the Expert Opinion of Nouriel Roubini of February 24, 2005).
 102. *See, e.g., Enron Corp et al. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 299 (May 22, 2007).
 103. *Id.* ¶ 301 (referencing the Expert Opinion of Professor Sebastián Edwards of April 27, 2005); *see also Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 341 (Sept. 28, 2007) (referencing the Expert Report of Professor Sebastián Edwards of September 13, 2005).
 104. *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 170 (Sept. 5, 2008).
 105. *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 340 (May 12, 2005) 11 ICSID Rep. 237 (2007).
 106. *Kent & Harrington*, *supra* note 92, at 259.
 107. *Id.*
 108. Lénárd, *supra* note 12.
 109. *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 217 (May 12, 2005) 11 ICSID Rep. 237 (2007).

Enron,¹¹⁰ *Sempra*,¹¹¹ *Suez / Vivendi* and *AWG*,¹¹² *Suez / InterAgua*,¹¹³ *Impregilo*,¹¹⁴ *Total*,¹¹⁵ and *BG*¹¹⁶ concluded that Argentina could not rely on the necessity defense as codified in Article 25 of the ILC Articles in the given situations.¹¹⁷

In particular, the *CMS* tribunal—which decided one of the very first cases to be quoted by most of the following arbitral tribunals in their decisions—asserted that the need to avoid a major crisis, with all the social and political consequences that it implied, might constitute an “essential interest of the State.”¹¹⁸ According to the tribunal, the “crisis was indeed severe”¹¹⁹ enough to justify the actions of the government to prevent an escalation and risk the total collapse of the economy.¹²⁰ However, the tribunal did not consider that the crisis was of such gravity to justify an invocation of the necessity defense.¹²¹ Nevertheless, the tribunal took note of the gravity of the economic

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110. *Enron Corp et al. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 293 (May 22, 2007).
 111. *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 346 (Sept. 28, 2007); *see also* Marie Christine Hoelck Thjoernelund, *State of Necessity as an Exception from State Responsibility for Investments*, 13 MAX PLANCK Y.B. U.N. L. 423, 466–474 (2009) (discussing the arbitral court’s decision not to find necessity); Federica Cristani, *The Sempra Annulment Decision of 29 June 2010 and Subsequent Developments in Investment Arbitration Dealing with the Necessity Defence*, 15 INT’L COMM. L. REV. 237 (2013) (tracing the development of the necessity defense after the *Sempra* case).
 112. *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/03/19; *AWG Group v. Argentine Republic*, UNCITRAL Case, Decision on Liability (July 30, 2010).
 113. *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (July 30, 2010).
 114. *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶ 359 (June 21, 2011).
 115. *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 485 (Dec. 27, 2010).
 116. *BG Group Plc. v. Argentine Republic*, UNCITRAL case, Final Award, ¶ 381 (Dec. 24, 2007).
 117. *See Binder*, *supra* note 96.
 118. *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 93 (May 12, 2005) 11 ICSID Rep. 237 (2007).
 119. *Id.* ¶ 320.
 120. *Id.* ¶ 356.
 121. *Id.* ¶ 322.

situation in Argentina when determining the amount of compensation due to the claimants.¹²²

As for the “only way” requirement, laid down in Article 25 of the ILC Articles,¹²³ the tribunal took note that the positions of the parties and of the economists diverged on the point.¹²⁴ Indeed, while Argentina supported that the measures adopted were the “only ones” available, the claimant argued that alternatives were available to Argentina (but it did not specify which measures Argentina could have adopted).¹²⁵ The tribunal agreed with the claimants, finding that “which of these policy alternatives would have been better is a decision beyond the scope of the Tribunal’s task, which is to establish there was only one way or various ways and thus whether the requirements for the preclusion of wrongfulness have or have not been met.”¹²⁶ According to the tribunal, Argentina had other means available to deal with the crisis (but it did not refer to specific means that could be available) and, therefore, did not meet the requirements imposed by Article 25 of the ILC Articles.¹²⁷ Finally, the tribunal concluded that Argentina’s contribution to the crisis was “sufficiently substantial and not merely incidental or peripheral.”¹²⁸

In this respect, the difficulty in bringing policy-relevant issues to judicial evaluation should be highlighted.¹²⁹ Some States have indeed argued the existence of a general principle under international law, according to which disputes involving political questions are exempted from review by international courts and tribunals.¹³⁰ However, there are some factors that are worth mentioning in this respect. First, states have often brought cases involving national security issues in international *for a*.¹³¹ Moreover, international tribunals, including the

122. *Id.* ¶ 356.

123. G.A. Res. 56/83, art. 25 (Jan. 28, 2002).

124. *See* Thjoernelund, *supra* note 111, at 446.

125. *Id.*

126. CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 323 (May 12, 2005) 11 ICSID Rep. 237 (2007).

127. *Id.* ¶ 324.

128. *Id.* ¶ 329, at 95–96; Thjoernelund, *supra* note 111, at 448.

129. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 90, (1933).

130. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 178 (June 27); *see also* Ian Brownlie, *The Justiciability of Disputes and Issues in International Relations*, 42 BRIT. Y.B. INT’L L. 123 (1967); William W. Thayer, *International Arbitration of Justiciable Disputes*, 26 HARV. L. REV. 416 (1912–1913).

131. *See* Burke-White & Von Staden, *supra* note 58, at 377.

International Court of Justice, the European Court of Justice, the European Court of Human Rights as well as several arbitral tribunals, have regularly decided cases concerning national security matters.¹³² Also investment arbitral tribunals, although established to deal specifically with “merely” investment disputes, have faced questions of a quasi-constitutional nature, such as the legally permissible responses to a massive economic collapse or the definition of public morality.¹³³ In particular, these tribunals dealt with regulatory acts of host states, as in the case of Argentina, which enacted domestic measures to overcome a national financial and economic crisis.¹³⁴ Measures of this kind can be considered an expression of the public’s concern of the State in financial and economic matters, since these matters are aimed at the economic and financial stability of the State itself.¹³⁵

As a general rule, the legitimate exercise of regulatory powers, aimed at protecting the environment, health and other welfare interests of society, requires a case-by-case, fact-based inquiry that considers, among other variables, the economic impact, the degree of interference with the investor’s reasonable expectations, and the character of the governmental action.¹³⁶ Consequently, the issue still largely depends on the consideration of arbitral tribunals.¹³⁷

The arbitral tribunal in the *Suez* case has perhaps endorsed the most well-reasoned analysis of regulatory measures taken during a financial and economic crisis. Here, the arbitral tribunal recognized that Argentina, in enacting measures aimed at coping the financial and economic crisis, has exercised its *police powers*.¹³⁸ Consequently, it found that no unlawful expropriation had occurred because of such measures.¹³⁹ Indeed, the tribunal stated that:

In evaluating a claim of expropriation it is important to recognize a State’s legitimate right to regulate and to exercise its police

132. See Richard B. Bilder, *Judicial Procedures Relating to the Use of Force*, 31 VIRGINIA J. INT’L. L. 242, 269 (1991).

133. See Burke-White & Von Staden, *supra* note 58, at 372.

134. See AWG Group v. Argentine Republic, UNCITRAL Case, Decision on Liability (July 30, 2010).

135. Federica Cristani, *From Silence to Equitable Compensation: ‘Valuing’ Financial and Economic Crises in Investment Arbitration* 1, 23 (Pázmány Law Working Papers Nr. 2016/3 2016).

136. *Id.* at 24.

137. Paolo Bertoli et al., *Regulatory Measures, Standards of Treatment and the Law Applicable to Investment Disputes*, FOREIGN INVESTMENT, INT’L LAW AND COMMON CONCERNS 26, 33 (Tullio Treves et al. eds., 2014)

138. AWG Group v. Argentine Republic, UNCITRAL Case, Decision on Liability, ¶¶ 139–40 (July 30, 2010).

139. *Id.* ¶ 140, at 52.

power in the interests of public welfare and not to confuse measures of that nature with expropriation. [...] In 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. [...] The Tribunal therefore concludes that such measures did not violate the above quoted BIT articles with respect to direct or indirect expropriation.¹⁴⁰

However, as the tribunal clearly pointed out, "that is not to say that they have not violated other treaty commitments."¹⁴¹ The tribunal found that the same measure, while not constituting unlawful expropriation of the rights of foreign investors, did nevertheless breach the fair and equitable standard, as included in a provision of the applicable BIT.¹⁴² In this respect, the tribunal did "balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service,"¹⁴³ concluding that, "when faced with the crisis, Argentina . . . enacted various measures . . . Such actions were outside the scope of its legitimate right to regulate and in effect constituted an abuse of regulatory discretion".¹⁴⁴

A few months after the *Suez* decision, the arbitral tribunal in *Total* summarized the criteria to be followed when assessing the impact of regulatory measures taken during a financial and economic crisis:

The host-State's right to regulate domestic matters in the public interest . . . requires . . . a weighing of the Claimant's reasonable and legitimate expectations on the one hand and the Respondent's legitimate regulatory interest on the other. Thus . . . [t]he context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality . . . have to be taken into account.¹⁴⁵

Consequently, the balance between the state's regulatory powers and the investor's expectations must be assessed on a case-by-case

140. *Id.* ¶¶ 139–140, at 52.

141. *Id.* ¶ 140, at 52.

142. *Id.* ¶ 245, at 95.

143. *Id.* ¶ 236, at 91.

144. *Id.* ¶ 237, at 92.

145. *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 123 (Dec. 27, 2010).

basis, taking into consideration all the relevant circumstances.¹⁴⁶ Looking at investment case law, one may observe a quite recent tendency to apply the proportionality test to balance the different interests involved.

In *Suez* the arbitral tribunal denied Argentina's claim of the necessity defense.¹⁴⁷ However, the case differs from the others involving Argentina because the necessity defense was raised to claim that the alleged unlawful measures were *necessary* to comply with human rights obligations, i.e. the obligation to afford rights to water to its population.¹⁴⁸ Under such circumstances, "[the tribunal] must balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service."¹⁴⁹ Nonetheless it concluded that the measures adopted by Argentina did breach the fair and equitable obligation towards foreign investors.¹⁵⁰

In *Saur*, similar to *Suez*, the tribunal affirmed that it had account for "human rights in general and the right to water in particular" insofar as they belong to the general principles of international law.¹⁵¹ However, such a finding was of no particular help for Argentina.¹⁵²

As has been affirmed, notwithstanding some attempts by arbitral tribunals to balance all the interests at stake, "the impact of human rights considerations on the decision by [investment] tribunals remains a matter for speculation."¹⁵³

One last note should be made on how an emergency situation may affect the question of compensation. In the Argentine investment arbitration cases, the situation of emergency, even though it did not justify the successful invocation of the necessity defense under customary international law, was nevertheless taken into account by arbitrators in the determination of the amount of the "equitable"

146. Bertoli et al., *supra* note 137, at 36.

147. Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 345 (Dec. 27, 2010).

148. Attila Tanzi, *On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector*, 11 THE LAW & PRAC. OF INT'L CTS. & TRIBUNALS 47, 57 (2012).

149. AWG Group v. Argentine Republic, UNCITRAL Case, Decision on Liability, ¶ 345, at 91 (July 30, 2010).

150. See Cristani, *supra* note 135.

151. *Saur International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, ¶ 330 (June 6, 2012).

152. See generally AWG Group v. Argentine Republic, UNCITRAL Case, Decision on Liability (July 30, 2010).

153. Attila Tanzi, *Public Interest Concerns in International Investment Arbitration in the Water Service Sector. Problems and Prospects for an Integrated Approach*, in FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS 318, 323 (Tullio Treves et al. eds., 2014).

compensation due.¹⁵⁴ For example, in *CMS*, the tribunal decided to take into account the “magnitude of the crisis faced by Argentina in determining the amount of compensation due to the claimant;”¹⁵⁵ in *Sempra*, the tribunal took into account the crisis conditions affecting Argentina when determining the compensation due for the liability found in connection with the breach of the Treaty standards;¹⁵⁶ and in *National Grid*, the tribunal took into account the economic crisis when determining the *quantum* of compensation due.¹⁵⁷

In the framework of investment arbitration, therefore, a uniform and conclusive interpretation and application of the necessity defense has not yet been reached. Indeed, when dealing with the customary rule of necessity, a State is faced with the difficulty to meet the stringent requirements imposed by Article 25 of the ILC Articles.¹⁵⁸ To date, no arbitral tribunal (at least in the investment arbitration context) has successfully upheld a state’s necessity defense under customary international law.¹⁵⁹

However, the reasonings of the arbitral tribunals reviewed in this Article can be useful in determining how the Pandemic can be invoked by host states to justify alleged breaches of international obligations towards foreign investors.

B. Applying the customary law rule of the necessity defense during the pandemic

As mentioned, during the Pandemic, states around the world adopted regulatory measures to contain and mitigate the spread of the Pandemic.¹⁶⁰ These measures affect foreign investors.¹⁶¹ This adoption could trigger investor-state arbitrations, with foreign investors claiming the breach of international investment obligations by host states.

154. See Cristani, *supra* note 135, at 21–22.

155. *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶¶ 356, 444–55, at 103, 129–33 (May 12, 2005) 11 ICSID Rep. 237 (2007).

156. *Sempra* case, note 98, ¶ 397, at 117.

157. *National Grid P.L.C. v. Republic of Argentina*, UNCITRAL case, Award ¶ 274 (Nov. 3, 2008). See also Cristani, *supra* note 135.

158. See *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 345 (Dec. 27, 2010).

159. See *e.g.*, *AWG Group v. Argentine Republic*, UNCITRAL Case, Decision on Liability ¶¶ 260–65 (July 30, 2010).

160. See Ostrove et al., *supra* note 62.

161. See Paddeu & Parlett, *supra* note 56.

Some BITs already include public health exceptions or, more generally, allow for the exercise of police powers, which can be invoked by host states to justify measures adopted during the Pandemic.¹⁶²

Moreover, host states might invoke the customary rule of the necessity defense. As mentioned, to successfully invoke a necessity defense, a state shall meet the following requirements: (1) there must be a grave and imminent peril; which (2) must threaten an essential interest; (3) the act must not seriously impair the essential interest of another states of the international community as a whole; and (4) it should be the only way to safeguard the interest of the state.¹⁶³ A state cannot invoke the defense if it contributed to the situation of necessity.¹⁶⁴

The outbreak of the Pandemic could be understood as being a “grave and imminent peril” for a state, taken also into account the global scale of the phenomenon,¹⁶⁵ which constitutes an imminent threat and harm to the public health and well-being of the population in each state.¹⁶⁶

Furthermore, the WHO decision to classify the Pandemic as a Public Health Emergency of International Concern, coupled with the declaration of emergencies in several EUC states and the consequent emergency measures that have been adopted to contain the spread of the Pandemic make it quite apparent that it threatens an essential interest of the state (and the international community).¹⁶⁷ Notably, the well-being of a states’ population has already been considered an “essential interest” by investment arbitral tribunal.¹⁶⁸ For example, in *National Grid*, the arbitral tribunal affirmed that “the actions of the

162. See, e.g., Free Trade Agreement Between the Government of Australia and the Government of the People’s Republic of China (entered into force Dec. 20, 2015). See also Federica Paddeu et al., Italian Branch of the International Law Association (ILA), *Litigating COVID-19 under International Law*, YOUTUBE (May 27, 2020), <https://www.youtube.com/watch?v=RaQmSImsqWY> [<https://perma.cc/C8NZ-RZ26>]; Paddeu & Parlett, *supra* note 57; Bekker, *supra* note 46.

163. See Paddeu & Parlett, *supra* note 56.

164. See Federica Paddeu & Freya Jephcott, *COVID-19 and Defences in the Law of State Responsibility: Part II*, EJIL: TALK! BLOG (March 17, 2020), <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-ii> [<https://perma.cc/TD2H-YNMG>].

165. See Ostrove et al., *supra* note 62.

166. Paddeu & Jephcott, *supra* note 164; Paddeu & Parlett, *supra* note 56; *The COVID-19 Pandemic and Investment Arbitration*, ACERIS LAW (Mar. 26, 2020), <https://www.acerislaw.com/the-covid-19-pandemic-and-investment-arbitration> [<https://perma.cc/D7JG-V2CR>].

167. Paddeu & Jephcott, *supra* note 164.

168. See Paddeu & Parlett, *supra* note 56.

[state] had as an objective the protection of social stability and the maintenance of essential services vital to the health and welfare of the population, an objective which is recognized in the framework of the international law of human rights”.¹⁶⁹ In *Suez*, the tribunal recognized that “[t]he provision of water and sewage services . . . was vital to the health and well-being of . . . [the] people and was therefore an essential interest of the . . . State”.¹⁷⁰

On the other hand, demonstrating that the measures adopted are “the only way” to safeguard the essential interest against the grave and imminent peril might be quite challenging. For example in *Enron*, the tribunal stated, “there are always many approaches to address and correct . . . critical events.”¹⁷¹ And indeed, EU states did not adopt uniform approaches to contain the Pandemic in their own territory.¹⁷²

As to the requirement that the measures must not seriously impair an essential interest of another state or of the international community as a whole, arbitral tribunals have been consistent in assessing the well-being of a state’s population as superior to the interests of foreign investors.¹⁷³

Instead, one problematic aspect might be non-contribution by the state invoking the necessity defense,¹⁷⁴ which, in the words of the ILC, must be “sufficiently substantial and not merely incidental or peripheral.”¹⁷⁵ While some arbitral tribunals interpreted such requirement in a restrictive way, as in *Impregilo*, according to which “a State’s contribution to its necessity situation need not be specifically intended or planned—it can be the consequence, inter alia, of well-intended but ill-conceived policies,”¹⁷⁶ others considered that a certain degree of fault should be assessed, as stated by the tribunal in *Urbaser* that “it should be shown that the Government’s acts were . . . at least of such a nature that the Government must have known that such crisis

169. *National Grid P.L.C. v. Republic of Argentina*, UNCITRAL case, Award ¶ 245 (Nov. 3, 2008).

170. *AWG Group v. Argentine Republic*, UNCITRAL Case, Decision on Liability ¶ 260–65 (July 30, 2010)

171. *Enron Corp et al. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 308 (May 22, 2007); *see also* *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 323 (May 12, 2005) 11 ICSID Rep. 237 (2007). For a comment, see Paddeu, *supra* note 164 and Paddeu & Parlett, *supra* note 56.

172. *See* Paddeu & Jephcott, *supra* note 164.

173. *See id.*; Paddeu & Parlett, *supra* note 56.

174. *See* Paddeu & Jephcott, *supra* note 164.

175. *See id.*

176. *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶ 356 (June 21, 2011).

and emergency must have been the outcome of its economic and financial policy.”¹⁷⁷

Actually, the assessment of non-contribution by a state would need to be considered on a case-by-case basis. While the virus outbreak might be considered something that states could not foresee, the consequences of the measures adopted to monitor and contain the Pandemic could be understood as being envisaged by the states themselves.¹⁷⁸ Accordingly, tribunals might determine that the states contributed to the crisis, to the extent that they could foresee the economic and social consequences of the anti-COVID-19 measures adopted.

Finally, if a situation of necessity is found, the period during which it was applicable needs to also be assessed. In this respect, an arbitral tribunal will also have to consider the exact starting and ending dates of the emergency situation.¹⁷⁹

Overall, there will be several challenges for states to rely on the customary rule of necessity with regard to the anti-COVID-19 measures.¹⁸⁰ However, given the exceptional character of the Pandemic, a more flexible approach in applying the necessity defense requirements may be needed.¹⁸¹ It will be interesting to see how investment arbitral tribunal will address these questions.

Finally, in recent years, a number of states have invoked the police powers doctrine as a defense in investment claims involving the assessment of the implementation of regulatory measures¹⁸² aimed at protecting public health. The *Philip Morris* case is quite telling in this respect.¹⁸³ In *Phillip Morris*, the arbitral tribunal concluded that the decision of the state to require a plain packaging for tobacco products was adopted in the exercise of the state’s police power with the aim to protect public health.¹⁸⁴ The tribunal reasoned that “[p]rotecting public health has since long been recognized as an essential manifestation of

177. *Urbaser S.A. v. Republic of Argentina*, ICSID Case No. ARB/07/26, Award, ¶ 711 (Dec. 8, 2016).

178. *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 328 (May 12, 2005) 11 ICSID Rep. 237 (2007).

179. On the difficulties in assessing a ‘final’ date for the emergency situation caused by the COVID-19 pandemic, see Federica Paddeu & Michael Waibel, *The Final Act: Exploring the End of Pandemics*, 114 AM. J. INT’L L. 698, 698 (forthcoming 2020).

180. See Paddeu & Parlett, *supra* note 56; Paddeu & Jephcott, *supra* note 166.

181. Paddeu & Jephcott, *supra* note 166.

182. Ostrove et al., *supra* note 62.

183. *Philip Morris Brands Sàrl. v. Oriental Republic of Uruguay*. ICSID Case No. ARB/10/7, Award ¶ 197 (July 8, 2016).

184. *Id.* ¶ 307.

the State's police power;"¹⁸⁵ accordingly, "the Challenged Measures were a valid exercise by Uruguay of its police powers for the protection of public health,"¹⁸⁶ reaffirming that,

The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases respect is due to the 'discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith' . . . [and] '[t]he sole inquiry for the Tribunal . . . is whether or not there was a manifest lack of reasons for the legislation.'¹⁸⁷

The arbitral tribunal in that case also recalled the award rendered in 1903 by the Germany-Venezuela Claims Commission in the *Bischoff* case, according to which "[c]ertainly during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police powers."¹⁸⁸ Other investment tribunals, like in *Chemtura*¹⁸⁹ and *Apotex*¹⁹⁰, confirmed this approach.¹⁹¹

On this issue, it can be also briefly mentioned that the recent EU-Singapore Investment Protection Agreement restates the Parties' "right to regulate . . . to achieve legitimate policy objectives, such as the protection of public health" and provides that "the mere fact that a Party regulates . . . in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation" under the treaty.¹⁹²

185. *Id.* ¶ 291.

186. *Id.* ¶ 307.

187. *Id.* ¶ 399.

188. Germany – Venezuela Mixed Claims Commission, *Bischoff Case*, 10 RIAA 420 (1903); see also Ostrove et al., *supra* note 62.

189. *Chemtura Corporation v. Government of Canada*. UNCITRAL Case, Award, ¶ 266 (Aug. 2, 2010).

190. *Apotex Holdings Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, ¶ 8.75 (Aug. 25, 2014).

191. Cleary Gottlieb Law Firm, *COVID-19: Public Health Emergency Measures and State Defenses in International Investment Law*, ALERT MEMORANDUM (Apr. 28, 2020), <https://www.clearygottlieb.com/news-and-insights/publication-listing/covid-19-public-health-emergency-measures-and-state-defenses-in-international-investment-law> [<https://perma.cc/TDY2-YNHD>].

192. Investment Protection Agreement, EU–Sing., art. 2.2, Oct. 19, 2018, O.J. L 279 1; for a comment, see Cleary Gottlieb Law Firm, *supra* note 191.

Accordingly, states might find it more convenient to rely on the police power doctrine when justifying the measures adopted during the Pandemic before investment arbitral tribunals—especially, as already mentioned, when it is already envisaged by the applicable IIA.

IV. CONCLUSION

International investment law and customary international law provide a range of instruments that can be used during emergency situations. These instruments are meant to be used as a justification for states that choose not to comply with international obligations because of a grave situation undermining national essential interests.¹⁹³

Nevertheless, especially when it comes to the customary rule of the necessity defense, investment arbitration case law is not very helpful, since the defense has been subject to diverse interpretations.¹⁹⁴ In responding to the Pandemic, several EU states have declared states of national emergency or epidemiological emergencies and have adopted anti-COVID-19 measures on such grounds.¹⁹⁵ In such cases, states may seek to invoke the state of emergency when relying on an essential security clause in the applicable IIA or under the customary law rule of the necessity defense.¹⁹⁶

However, it should be noticed that emergency clauses in IIAs and the customary rule of necessity have developed as *temporary* exceptions and defenses, with stringent requirements for their application.¹⁹⁷ If the state of emergency is likely to persist in the medium- or long-term, maybe we should rethink how we want to reshape international obligations of states towards foreign investors and the relevant exceptions, allowing for a higher degree of flexibility in their application by investment arbitral tribunals that will be asked to assess all the circumstances at stake that have led to the adoption of national measures affecting foreign investor's rights.¹⁹⁸

193. See generally Paddeu & Parlett, *supra* note 56.

194. CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶¶ 353–55 (May 12, 2005) 11 ICSID Rep. 237 (2007); LG&E Energy Corp. v. Republic of Argentina, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 229 (July 25, 2007); see also Cleary Gottlieb Law Firm, *supra* note 191.

195. *States of Emergency in Response to the Coronavirus Crisis: Situation in Certain Member States III*, EUROPEAN PARLIAMENTARY RSCH. SERV. (June 2020), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651972/EPRS_BRI\(2020\)651972_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651972/EPRS_BRI(2020)651972_EN.pdf) [<https://perma.cc/9C26-3P44>].

196. Cleary Gottlieb Law Firm, *supra* note 191.

197. See Paddeu & Parlett, *supra* note 56.

198. Lénárd, *supra* note 12.