Defense or cooperation between states and international investors in times of crisis?

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Abstract

International investment is protected by international law by setting the standards of legal treatment that host state governments have committed themselves to in their investment treaties. Therefore, these standards of protection must be respected even in times of crisis, regardless of the reason that generated it, the policy of attracting and maintaining an investment climate favorable to international investment being an attribute of each state. If he does not find adequate protection or if he cannot negotiate contracts adapted to these conditions, nothing can prevent an investor from changing the direction of his business, in order to protect the investment made. On the other side of the barricade, the states raise the shields of force majeure and necessity. Of course, it is preferable for the barricade to turn into a round table of cooperation. The issue of violating one or more standards by states is one of the most debated at the moment, as international arbitration practice has decisions that oblige states to significant compensation. In my study I used as a research method the interdependent introspection, analysis and synthesis through analogies developed in a comparative method.

Keywords*: crises, foreign investment, protection standards, necessity, force majeure.*

JEL Classification*:* D25, F21, K23

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1. Foreword

Due to the Covid-19 pandemic, the entire system of legal investment treatment standards has entered an era of involuntary and persistent contracture, that is why it is especially important to know and understand the functioning of the international investment protection system.

The problems that arise and that may be violations of the treaty will be highlighted in the next period, depending on the policy of each host state towards the protection of investments on its territory. All this time, the state of necessity remains in the sphere of controversy in which it has been since the negotiations phase of the Draft Articles on State Responsibility, because it has the obvious potential to cause wrongfulness during the crisis. Despite all the effervescent efforts of the specialists to give a better regulation to the state of necessity, the prognosis remains reserved. There is a lack of interest in providing adequate protection, considering

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that other measures such as strengthening or patching (in the case of less developed countries due to insufficient financial resources) the medical system are more important so as to last a variable but uncertain period of time. When the evolution of international investment law takes place, the turbulent political-socio-economic framework that this legal system as an organized structure should regulate determines its development only if the major changes configured by a reform (or revolution) trigger even changing the form of the investment legal system itself. The principles of this field are closely related to the protection of the state, the protection of international investors and the treatment granted. At the same time, they serve to provide a legal and interpretive basis both for completing conventional and customary law and for covering gaps[2].

The hierarchy of principles that govern international investment and which would be ideal to be a source for standards especially during global crises, whose pursuit minimizes the effects of any type of crisis. A substratum principle of the existence of law does not exist because it was formulated but was formulated because it existed[3].

The parties to an investment treaty must comply with certain conditions regarding the treatment and protection of investments established in their territories, so as not to create discriminatory treatment and therefore not to impose additional burdensome conditions on investors in which to operate.

The treatment standards of international investments have settled with the individualization of international investment law. The historical trajectory concluded that these standards are very flexible and dynamic and evolve over time. Overall, the emergence and multiplication of bilateral agreements on the promotion and protection of foreign investment, the inclusion of investment treatment standards in the body of these treaties, and the development of dispute settlement procedures for disputes arising from the application of these standards indicate that these standards they will be more accurate and as a result are not static and evolve[4].

However, legal scientific research plays a key role because any codification activity must be scientifically substantiated. Any codification policy must ensure a balance between the dynamics and the statics of this right.

The legal system is permeable to the environment "absorbing external shocks through feedback on cases"[5]. For these reasons, the analysis of international investment treatment standards follows the reference to regulatory law (e.g.: regulatory autonomy, political space, flexibility to introduce new regulations) or

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[2] See P. Guggenheim, *Traite de droit internațional public,* vol. I, second edition, 1996, pp. 296-297.

[3] Gh. Mihai, *Teoria dreptului/ The theory of law*, third edition, C.H. Beck Publishing House, Bucharest, 2008, p. 118.

[4] Ansari Mahyari, Leila Raisi, *International standards of investment in international arbitration procedure and investment treaties,* Revista Jurídicas*, 2018*, *15* (2), 11-35. DOI: 10.17151/jurid.2018.15.2.2.

[5] See I. Dogaru, D.C. Dănișor, Gh. Dănișor, *General Theory of Law/Teoria generală a dreptului*, 2nd edition, Ed. C.H. Beck, Bucharest, 2008, pp. 49 and following.

reference to social investment issues (e.g., human rights, work, health, CSR - Corporate social responsibility, poverty reduction).

The provisions of the body of the treaties on investors and investment treatment are designed to prevent possible restrictive behavior of the host government and to impose discipline on its governmental actions and to achieve this goal, the treaties define a set of standards against which host states must adhere, comply in their attitude in the legal relations they have with investors and their investments. In order to protect foreign investors against risks, in particular against political risk arising from the placement of their assets under the jurisdiction of a host State, investment treaties stipulate obligations regarding the treatment that host States must accord to investors and their investments. In the absence of such treaties, investors will negotiate hard administrative contracts with host states. Although treaties do not usually define the meaning of treatment, that term in its usual dictionary sense includes the actions and behavior it will take towards another person[6].

In other words, by concluding an investment treaty, a state makes promises about the actions and behaviors it will take towards the investments and investors of the treaty partners[7] and the obligations thus assumed by states generate considerable legal effects, even more so as at a certain level, the legal norm is created by political power, and any codification is, from this point of view, a compromise between political tendencies and the expression of general will.

2. Standards sensitive to periods of crisis

According to relevant statistics issued by Worldometer, the coronavirus COVID-19 is affecting 221 countries and territories, a situation that generates a series of measures that have affected the activity of foreign investors. Against this background, there is a proliferation of arbitration cases that will be visible in the coming years.

This way of choosing governments to respond to the COVID-19 pandemic is sometimes likely to violate various protections provided for in bilateral investment treaties ("BITs").

The investment system is very similar to a two-sided gold coin: the investor-*pajura* (or the emblem usually represented by an eagle, a bird that is protected by law most of the time) - and the head-state (so named because it has usually an image, which can be the coat of arms of the issuing country, the head/bust of a monarch or the name or symbol of another issuing authority). Like ordinary currency, it is guaranteed by the issuer by stamping or printing particular items that are easy to recognize, figuratively speaking. At the moment of the dispute, the coin is thrown in the air and will land only on one of its faces, and in the end, this conjuncture of actions designates the winner of the game.

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[6] Cristina Elena Popa (Tache), *Legal treatment standards for international investments. Heuristic aspects,* Adjuris – International Academic Publisher, 2021, pp. 296-297.

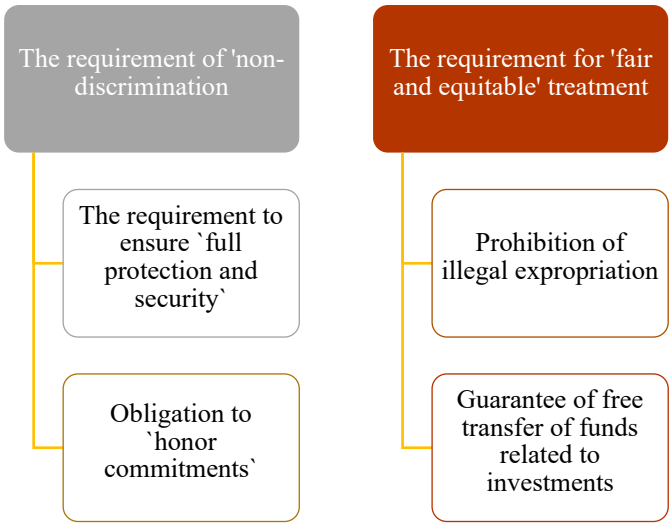
[7] J.W. Salacuse, *The Law of Investment Treaties,* Oxford International Law Library 2013, p. 205.

If we analyze each of the most exposed standards, we notice that National treatment and most-favored nation (MFN) treatment remain the most exposed. Besides all this, it has been observed that in times of crisis it becomes sensitive, both for developed and developing economies, to comply with certain standards of protection such as the prohibition of performance requirements or the free transfer of funds.

Regarding performance requirements, as in many other areas of international investment law, courts invested with such actions will open new avenues in the development of jurisprudence designed to shed light on the application of these prohibitions. In view of the way in which disputes concerning certain performance requirements have been resolved, as well as the textual analysis of how this standard has been taken over in investment treaties or in those containing investment provisions, it follows that the prohibition of performance has evolved from broad provisions to increasingly precise and detailed provisions. However, such measures have the potential to be used successfully when they are well developed, giving the possibility for their host states to use them for the success of development goals, but only if they respect the lessons taught by the arbitration practice.

In general, states can use these clauses depending on when they are applied: pre-established and not after the investment has been made, because, as we have pointed out, bridges can be created towards discriminatory treatment. Excluding this standard from the scope of the NT (national treatment) and MFN (most-favored-nation clause) standards meant that pre-established PRs (performance requirements) could be imposed on domestic investors, and the MFN clause it would not allow more favorable provisions to be imported from other treaties, which would create chaos.

In general, the underlying obligations of the host economy include:

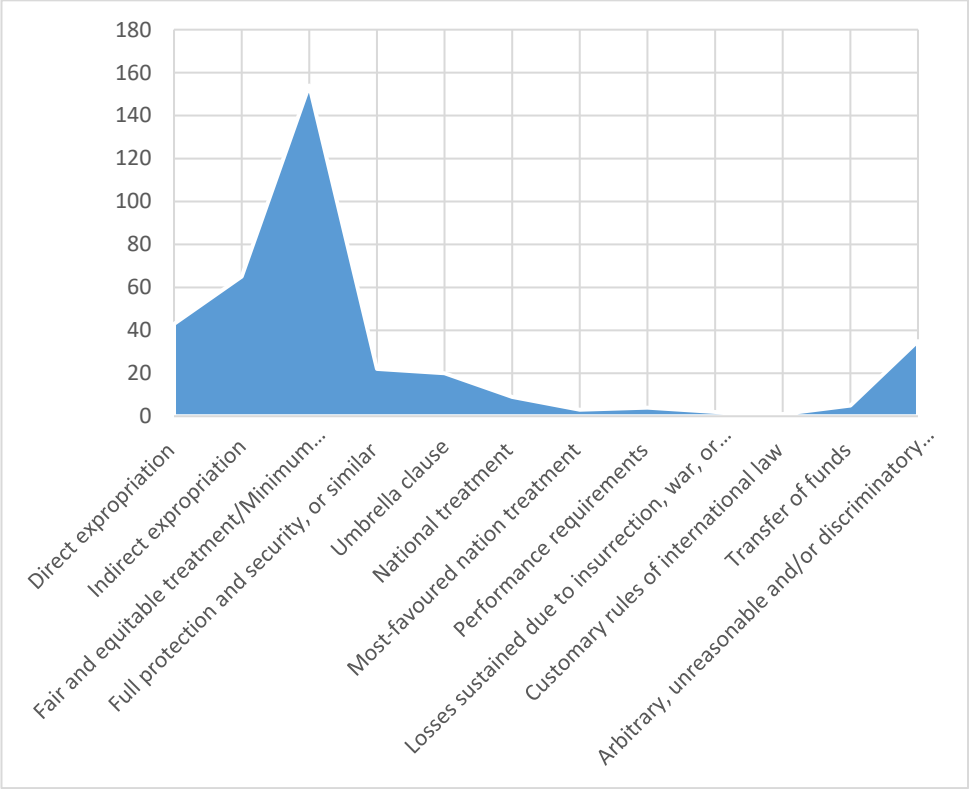


Analyzing the existing documents so far, the result is that there could be a potential limitation of investors' rights by preventing the interpretation of individual standards by investors, with too much emphasis on reducing host state spending. On the other hand, it envisages the opening of new cases for investments that will have as object an excessive limitation of the way in which the protection standards will be applied and respected by the states. In this situation of feeling an inadequate protection, investors will resort to methods of resolving disputes to which they are in fact entitled under international customary law and will raise the shield of concluding solid contracts that will allow them to invest in the best possible conditions and with diminished risks. These refuges of international investors will mainly consist of their determination to use different arbitration clauses by placing their investments and therefore, seeking appropriate protection, in states that have a higher level of protection and where there are Investment Treaties to confers this.

Perhaps during periods of activation of state necessity and force majeure, alternative ways of resolving investment disputes will be activated, such as diplomatic protection. How investors will proceed: they will conclude well-negotiated investment contracts between themselves and the host states, and last but not least, they will pursue an increased investment guarantee. Why? Because any type of foreign investment comes with the measure of its guarantees, as part of its protection. Protection norms mean all the norms of domestic or international law that prevent or sanction the interventions of public authorities on international investments. Investment guarantee mechanism means the set of operations that transfer the financial consequences arising from certain political risks from the investor to the specialized body of domestic or international law[8].

In general, the classification of cases in non-compliance with the standards is presented as in the diagram below, which shows the spread of violations of the provisions contained in investment treaties, found (admitted) by courts invested in resolving disputes with this object (source is UNCTAD, Investment Policy Hub):

[8] D. Carreau, P. Juillard, *Droit internațional economique,* 3'e édition Ed. Dalloz Paris 2007*,* p. 459.



It can be seen, therefore, that the most sensitive standards of protection that are also the subject of complaints in general, but especially in crisis conditions, are: fair and equitable treatment/minimum standard of treatment, including denial of justice claims (154 admitted claims); indirect expropriation (65 admitted claims); direct expropriation (43 admitted claims); followed by arbitrary, unreasonable and/or discriminatory measures (35 admitted claims), full protection and security, or similar having only 22 admitted claims at the date of this study.

However, even if they were not admitted, investors' claims reflect a greater share, which indicates how they perceive the protection that should be granted to them. Thus, the situation with the top breaches of IIA provisions alleged (according to UNCTAD accessed on 01.10.2021) is as follows: fair and equitable treatment/ minimum standard of treatment, including denial of justice claims (555); indirect expropriation (450); full protection and security, or similar (273) and arbitrary, unreasonable and/or discriminatory measures (232).

We cannot fail to notice that the dissatisfaction of investors has reached alarming levels and this results from the number of new arbitrage on investments. In 2020 alone, for the first time in history, the most claims were registered: 68 new cases of arbitration claiming different claims, many of them resulting from the way they were affected by the period of health crisis.

3. Investors, the other side of the investment system coin

Although arbitral tribunals tend to accept the negative effects of (primarily economic) crises, there are cases where the solutions have been on the side of the states. Today we are facing a situation of a pandemic, in which national health systems are at stake, which leads us to think whether the measures chosen by states can be included or not in the fundamental right of conservation, without which the existence of states it cannot be conceived.

It is essential for all investment tribunals how they adapt to the requirements of public international law. Because both the jurisprudence of investment arbitration tribunals and the European Court (within the ECHR), on the latter, demonstrates that public international law can provide a valuable weapon both in protecting commercial arbitration agreements and for commercial arbitral awards handed down by national courts or courts of the States with which investors interfere[9].

That is why it becomes practically important to raise the dispute at international level, in order to be subject to the rules of international law, giving the parties and especially the investor the opportunity to resort for a better protection of his rights to international arbitration[10].

According to public international law, domestic regulations must also be correlated with the minimum set of rights granted to aliens[11], preferably under the corollary of the economic sovereignty of states. It can be said that the economic sovereignty of states is a combination of the opportunities they have in making individual decisions on issues related to the development of their economies, because only a sovereign state can protect its national and economic interests and the interests of its citizens and from abroad, in reality, all states being, to a greater or lesser degree, intermediaries between global and national economies[12].

On the international stage, there are essentially two groups: policy-maker - which includes developed states in general and policy taker (a policy shaper in the best case) - which includes developing countries. E.g., this price (democratic deficit) is becoming more and more difficult for newer generations of Icelanders to accept since the standards concerning democracy and rule of law tend to improve with time[13].

Although the practice of courts designated to settle investment disputes is unstable, its analysis has shown that the State of origin may be inclined to either

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[9] See S. Fietta, J. Upcher, *Public International Law, Investment Treaties and Commercial Arbitration: an emerging system of complementarity?,* Arbitration International Journal (2013) 29 (2): 187-222, first published online: 1 June 2013, Published by Kluwer Law International & London Court of International Arbitration, p. 187.

[10] In A.F. Lowenfeld, *International Economic Law*, Oxford University Press, 2003, pp. 486-488.

[11] G. Geamănu, *Drept internaţional public*, vol. II, Didactic and Pedagogical Publishing House, Bucharest, 1983, p. 87.

[12] M. V. Ershov, *Economic sovereignty of Russia in the global economy*, Ed. Ekonomika, 2005. p. 283.

[13] M. Elvira Mendez - Pinedo, *Iceland and the European Economic Agreement: 25 Years of Cooperation,* International Investment Law Journal, Volume 1, Issue 1, February 2021, pp. 5-21.

preferential or differential treatment, which are not sanctioned by international law which penalizes discrimination or discriminatory treatment in the matter (In Oscar Chinn, Belgium v. The United Kingdom, Judgment of December 1934, p. 87, the Permanent Court of International Justice - CPJI emphasized that "prohibited discrimination is therefore one that will be based on nationality, which would a differentiated treatment for individuals belonging to different national groups depending on their nationality").

At internal level, it is expected that there will be a request from the competent courts with reference to domestic administrative law. If the host state offers a neutral and balanced functioning of its own justice, then indeed the administrative courts could play the serious role of resolving the disputes of the affected investors. Nothing can stop an investor from seeking the protection of treaties before international tribunals when the conditions of the domestic law of the host state do not guarantee the correct settlement of these types of disputes. As mentioned earlier, investment treaties generally provide investors protected by those treaties with fair and equitable treatment (FET), full investment protection and security (including the physical protection of an investment) and the most-favored-nation clause (MFN). These treaties prohibit the direct or indirect expropriation of an investor's property (the expropriation of the investor from his own investment). Under these conditions, customary international law remains a particularly effective means of regulation.

During the elaboration of the Draft Articles, through his study since then, the Special Rapporteur Roberto Ago concluded that necessity belonged to the justifications accepted by customary international law, it was decided to include necessity though under very restrictive conditions. The final version of the text as adopted by the ILC in 2001 is as follows:

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 way 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 the obligation exists, or of 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.[14]

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[14] See Addendum to Eighth Report on State Responsibility by Mr. Roberto Ago, U.N. Doc. A/CN.4/318/ADD.5-7, in: [1980] YBILC Vol. II, Part One, p. 51, *apud* Austust Reinisch, *Editorial: How Necessary is Necessity for International Organizations?,* International Organizations Law Review 3: 177-183, 2006, Koninklijke Brill NV, Leiden, The Netherlands. Here it is mentioned that "[T]he concept of 'state of necessity' is far too deeply rooted in the consciousness of the members of the international community and of individuals within States. If driven out of the door it would return through the window, if need be in other forms".

Against the background of the current situation, investors who qualify for the protection of a certain treaty, can claim the violation of a set of treatment standards, especially the FET standard. Usually, in these situations, the invested courts are to consider whether the government's measures were proportionate, or whether the government could have taken less onerous measures for investors, such as granting subsidies to road users or other forms of financial support, such as it is often mentioned.

Investors may invoke discrimination under the FET standard, national treatment or MFN standards if they conclude that government measures taken to deal with the pandemic have not been appropriate from this perspective. Under these conditions, especially in strategic areas such as transport or energy, the measures taken by governments can affect and usually practice has proven to affect investors involved in these areas.

Because we brought up the transports, an example of a case circulating among those interested in this field can be given: the case that is not singular unfortunately, of the French company Vinci Airports and the French state group ADP who declared that they will take legal measures. Against Chile on the grounds of expropriation, *inter alia*, in response to the government's closure of flight routes from Santiago airport, which is operated by the two companies. We refer here to the measures taken by the affected states to stop the spread of COVID-19, by adopting unprecedented restrictions on travel through strict containment measures, and much of these quarantine measures affect the projects of foreign investors. Travel bans, business nationalization and other economic measures taken in response to the pandemic can be listed.

4. States and their shields

As these pandemic surprised participants in investment relations in the absence of clear and concise regulation of such situations in investment treaties, this marked the beginning of countries' efforts to reform their IIAs to ensure states the specific right to regulate. In the public interest, while maintaining effective levels of investment protection. This is the first and most important defense shield available to states. However, in the case of this epidemic, the regulations existing at the time and place where they should have been can no longer be the subject of future regulations, given the relativity of the application of any legal rule in the sense that the law does not apply retroactively. States become exposed only if the acts which give rise to the liability of the State constitute a violation of international law. Starting from this basic premise, the responsibility of the state, as a general principle, intervenes in two distinct situations:

a. liability for wrongful acts or acts from the point of view of international law, which violates norms of international law, conventional or customary;

b. liability for harmful consequences resulting from activities that are not prohibited by international law (lawful activities per se) and which is a risk-based liability.[15]

As the general headquarters of the matter, the responsibility of the state regarding foreign investments is regulated by the provisions of the Final Draft Articles adopted by the International Law Commission in 2001 on the occasion of its 53rd session. At the proposal of the International Law Commission, the UN General Assembly approved by resolution the Draft Articles, while recommending that, after the solutions provided for in the draft have been confirmed by the practice of States, to adopt, on this basis, a General Multilateral Convention[16].

With regard to the second type of liability, the International Law Commission adopted in 2001 a final draft article entitled "Prevention of transboundary damage caused by dangerous activities", which comprises a number of 19 articles and which was approved by the Assembly UN General.

It must be established that, in the matter of foreign investments, there are no instruments of international law that regulate the institution of state responsibility as such and autonomously. As we will see, both multilateral investment treaties and bilateral investment treaties do not contain express provisions on liability, but constitute the essence of the preconditions necessary to qualify certain acts or facts imputable to the state, in the form of obligations under international law. Whose non-compliance may result in sanctions under international law. The norms regarding the invocation of liability are transposed within the investment treaties, establishing the investor as a plaintiff-entity, which excludes the direct application of the provisions of the RDI Project. The draft Articles do not have the binding force of a treaty[17], but tribunals and practitioners alike consider that the ILC Articles "accurately reflect customary international law on state responsibility"[18].

At present, the methods of attributing and imputing the responsibility of the state are heterogeneous and appreciable not according to a general rule, which practically does not even exist, but from case to case.

The exceptions to the liability of states result in a number of their six shields, which courts invested with the settlement of arbitration disputes usually consider when one or more of these shields are used by the defendant states in their defense.

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[15] D. Popescu, *Drept Internaţional Public*, Titu Maiorescu University Publishing House, Bucharest, 2005, p. 276.

[16] The draft International Law Commission comprises a number of 59 articles, structured in four parts: 1. The liability of States for unlawful international acts, 2. The content of the international liability of a State and the consequences of the unlawful act, 3. The implementation of the international liability of a state, 4. General Provisions. The provisions of the Project will be analyzed during the paper, depending on their application to the field of foreign investments.

[17] M. Feit, *Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 Berkeley J. Int'l Law. 142 (2010), pp. 145, 146.

[18] See the case of ICSID Noble Ventures Inc. c. Romania, ICSID Decision in case no. ARB/01/11, para. 69 (Oct. 12, 2005) which states that: "While these Draft Articles are not binding, they are largely regarded as a codification of customary international law").

The following situations were included in the category of circumstances that exclude the illicit character: consent, self-defense, countermeasures, force majeure, state of peril and state of necessity. Therefore, if the conduct is attributed to the state, it is not qualified as illegal only after analyzing the circumstances that remove this character (consent of the injured state, self-defense, countermeasures, force majeure, extreme danger - distress and state of necessity). The way in which states can make appropriate use of these shields is very strict and limited. In Sempra Energy v. Argentina, the arbitral tribunal did not accept Argentina's defense of the state of emergency, while acknowledging the serious effects of the crisis in the country and concluding that Argentina had breached its FET obligation by choosing measures that affected investors' expectations. There have also been cases in which - as is the case of LG&E v. Argentina - the arbitral tribunal recognized the impact of the economic crisis, accepted Argentina's defense against a state of necessity as an exonerating cause of liability, but the court found that Argentina violated the FET obligation when the state "has gone too far in completely dismantling the legal framework built to attract investors".

In order to ensure that government action complies with its obligations under the investment treaty, it is essential that government officials at all levels and in all branches of government are aware of the obligations of government in investment treaties; understand the link between treaty obligations and the development and implementation of internal policies; and ensure that there are timely communications and consultations within the government regarding the application of these obligations to any investor and investment decisions[19]. From an administrative point of view, the main objective is the administrative implications generated by the regulation or non-regulation of the legislative body with an impact in this field and based on an unequivocal and precisely determined norm with the possible and necessary margin of conduct in law enforcement[20].

It is foreseeable that due to the pandemic strikes, many states will not be able to fulfill their obligations to protect investments under public international law.

Both force majeure and the state of necessity are provided for in the Draft Articles of the Commission on International Law on the Responsibility of States for Illicit International Acts ("ILC Articles"), but are admitted under very strict conditions, which is natural. While health crises are generally considered predictable, it is difficult for states to demonstrate their functioning without endangering large segments of their population, and an incorrect measure can undermine a potential force majeure. This logic leads us to the conclusion that it will be very difficult for states to demonstrate that certain obligations under international law have been impossible to fulfill.

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[19] Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public,* Curs universitar/ *Administrative law. Fundamental issues of public law, University course*, Ed. C.H. Beck, Bucharest, 2016, pp. 808-810.

[20] J. Schwarze, *Droit administratif europeen*, Bruylant Ed., 1994, p. 175.

The most eloquent examples of cases come from Argentine practice. With regard to health and well-being, the court in National Grid v. Argentina ruled that an essential interest depended on the circumstances of each case[21].

In using the six shields mentioned above, states use several modalities: they aim to be based on the "non-excluded measures" (NPM) clause, if one is included in the relevant treaty[22]; states can invoke what is sometimes called the "police powers" doctrine, as in the case of recent measures by Australia[23]; States may also invoke defenses based on common international law on the state of necessity, suffering or force majeure, which have been codified in the articles of the International Law Commission on State Liability, in which cases courts consider whether another government in the same situation, whether or not other measures would have been taken. In the cases I have given as an example, the reasons for the crisis did not spread as quickly and widely as those given by this pandemic. Many states have generally had a certain consensus in adopting uniform measures, a situation that will make it difficult to motivate investors' demands[24].

From an administrative point of view, the main objective is the administrative implications generated by the regulation or non-regulation of the legislative body with an impact in this field and based on an unequivocal and precisely determined whole norm.

Their implementation from an administrative point of view continues to be a challenge for every state, because, viewed in the mirror, they should be visible, in harmony with normative regulations, together with: the principles of organization and functioning of public administration, public administration, executive power, forms of activity of public administration, responsibility and accountability of public employees (civil servants), public administration authorities, administrative acts, public office. The combination of these pieces into a legal mechanism or, better said, the assembly between international investment law and administrative law is an outpouring of sources of legislation, jurisprudence and doctrine, trialism of great utility for evolution and reform.

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[21] See *National Grid plc v. The Argentine Republic*, UNCITRAL Case, Award, 3 November 2008, p. 245. The Argentine government has argued that its measures have been strictly aimed at protecting social stability and maintaining essential services vital to the health and well-being of the population, an objective recognized in international human rights law.

[22] See Argentina's defenses, for example following the 2001/2002 economic crisis (eg CMS Gas Transmission Company/Argentine Republic).

[23] Used more than a century ago in the Bischoff case of 1903 The German-Venezuelan Commission then argued that "certainly during an epidemic of infectious diseases there can be no responsibility for the reasonable exercise of police powers" (1903), 10 UNRIAA 420, (RLA-138)). The situation does not exclude good faith. The government that chooses this measure must act in good faith, and the measures must be non-discriminatory and aimed at solving a serious and real public health problem (Philip Morris v. Uruguay).

[24] In 2003, for example, Venezuela unsuccessfully relied on the doctrine when defending a claim for tolls, arguing in particular that it could not comply with its contractual obligation to increase tolls due to civil unrest in the country, the court finding that the disturbances were predictable (Autopista Concesionada de Venezuela v. Venezuela).

5. Inferences

In the context of investment disputes over government measures in the current pandemic, investors can argue an obvious defense: that pandemics are generally predictable, and governments have all the right structures and prepared to implement effective emergency measures, which makes that the analysis of such cases be particular, just as the measures are specific to each state or to each investment field. At this moment, it is difficult to predict the apex in the system for resolving investment disputes. Certainly, against this background, cooperation between states and investors will be difficult due to their own conservation measures. However, attempts at such cooperation can have lifesaving results for both parties, a solution that both states and international investors need to be aware of.

This article argues that the object of international investment relations, as well as the disputes arising from these relations, have imposed special solutions over time, including from the institutional point of view. In this matter, plays an important role, perhaps decisive, the predilection of the parties involved in the dispute who will choose that settlement court that traditionally has sufficient guarantees that the case will be resolved correctly, as soon as possible, at reasonable costs. Any approach and any changes in the investment treaties should be based on the recognition that an investment agreement is fundamentally structured on good governance, the protection of investors' rights and the obligations and rights of the host state and that liability is part of it essential side of this equation[25]. A significant number of cases are expected regarding investments affected in one way or another by COVID-19 and from governments' responses to it, and what is needed is a clearer understanding of some of these protections and principles, especially as they apply in a crisis, regardless of the nature of the crisis.

For this reason, the majority opinion of specialists leads to the conclusion that for the compliance of government actions with the obligations of a state in the investment treaty, it is essential for all government representatives to appreciate in a real way the obligations of the IIAa government (International Investment Agreements. They are divided into two: (1) Bilateral Investment Treaties ("BITs") and (2) Treaties with Investment Provisions ("TIPs") which can only be achieved through a good understanding of the link between treaty obligations, the development and implementation of internal policies, under the corollary of ensuring timely communication and consultation within government on the application of these obligations to any investor decisions and investments). Governments are not necessarily bad or good. They are neither angels nor demons, although their investment policies can sometimes have beneficial or evil consequences, as history has shown. For example, free international trade affects some domestic producers; low inflation affects creditors; lowering interest rates affects savers and bond buyers; technological innovation affects some workers; pollution taxes affect companies.

[25] See Cristina Elena Popa (Tache), *op. cit.*, 2021, p. 25.

On the other hand, the guarantees granted to the investor mainly refer to the way in which they were observed and applied (executed): national treatment and exceptions, fair and equitable treatment, most-favored-nation clause, direct or indirect expropriation and its conditions, compensation, free transfer of capital, entry and stay of foreign staff, access to local finances, stabilization clause, etc. The importance of establishing and the existence of eloquent and integrated standards of treatment is a condition for survival in the face of international economic crises in order to avoid the chameleon attitude of those involved in an investment relationship and who naturally seek to protect and capitalize on their own rights. In the management of the health crisis, be it economic, legal, social or political management, it has been found that immediate results are preferable, and we get impatient quickly; if we give in to every impulse today, we leave nothing for tomorrow; if we don't save, if we just borrow, if we dance too much tonight, we may have a very long and hard day tomorrow. All this starts with ignoring the standards of specific legal treatment. Society in general and the investment community in particular can only evolve positively when its members think ahead.

All investment sectors need to develop the institutional cultures, resources and components needed to move towards effective sustainable post-crisis recovery.

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