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An Analytical Study of Expropriation and Emergency Measures in the Context of Covid-19: A Comprehensive Assessment of Seizure of Private Property under International Investment Law

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ABSTRACT

Expropriation, as an extraordinary state measure has increasingly become a common recourse during emergency situations, often raising concerns of being unwarranted and arbitrary. This research paper aims at examining one of the most contentious issues of international investment law that emerged during the Covid-19 pandemic – namely the determination of the limits of the exercise of the state's power to expropriate private property under the guise of emergency measures. This paper sheds light on the general conceptual framework governing expropriation under international investment law. It then proceeds to examine the extent of the use of states power to requisition health care facilities during the global health emergency. Moreover, it also examines the controversies surrounding expropriations and the justification given by the government. Additionally, this study examines the treaty framework and expropriation provisions to assess whether pandemic related emergency measures may be invoked as a valid defence within the interpretive scope of investment treaties. Further, it also analysis the dimension and the controversies associated with treaty shopping and the rights of minority shareholders. It also includes an examination of jurisprudence from past crisis and an analysis of arbitral precedents to determine the doctrinal challenge in balancing investor protection and public welfare. This research paper finally concludes by examining the post Covid-19 reforms in influencing state practice and the future of investment arbitration in the light of emergency expropriation measures.

Keywords: *Expropriation, Bilateral Investment Treaty, compensation standards, treaty shopping, state sovereignty, investor protection, Denial of Benefits Clause (DoB)*

I. INTRODUCTION

The Covid-19 pandemic created an unprecedented global crisis causing disruption in legal,

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economic and social landscape. The governments took extensive emergency measures to address the dual imperative of maintaining economic stability and safeguarding public health. The states invoked a series of extraordinary measures, such as requisitioning of private property, modification of contracts, profit repatriation, restriction on capital movement and nationalization of industries.

Notable examples of the state interventions include the Lufthansa case[2]. Due to the severe negative impact on the airline industry, the German carrier Lufthansa was under immediate threat of insolvency. To avert the significant economic repercussions that could arise, including massive unemployment, impediments to foreign trade, investment and connectivity, the European Union and the German government provided Lufthansa a €6 bailout. This intervention was necessary to safeguard domestic and international interests. However, in certain instances state intervention creates tensions between the state and investor interests. As illustrated in the case of Spain[3] where the government implemented extraordinary measures by requisitioning private health care facilities. While these measures were defended as serving public interest, in the absence of appropriate compensation, such actions effectively constituted indirect expropriation.

These emergency interventions have profound implications on the investors. Such measures trigger concerns of indirect expropriation and violation of the Fair and Equitable Treatment (FET) clauses enshrined in the investment treaties. Faced with these measures, investors resort to Investor State Dispute Settlement (ISDS) mechanism or negotiated settlement or diplomatic resolution to seek compensation for losses and mitigate the adverse impact of state interventions. Against this backdrop, this paper adopts a doctrinal analysis underpinned by treaty interpretation, arbitral jurisprudence and a comparative assessment of state practice.

Hypothesis

Whether states' emergency measures during the Covid-19 pandemic disregarded the corporate governance principles, compromising investor rights and resulting in unlawful expropriation.

Review of Literature

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[2] European Commission, *Commission welcomes agreement on SURE – a €100 billion instrument to protect jobs and support unemployed people in the pandemic*, IP/20/1179 (Oct. 9, 2020), https://ec.europa.eu/commission/presscorner/detail/hu/ip_20_1179.

[3] *Investor-State Claims in the Era of the COVID-19 Pandemic*, Norton Rose Fulbright (June 2020), https://www.nortonrosefulbright.com/es-419/knowledge/publications/e8979151/investorstate-claims-in-the-era-of-the-covid19-pandemic.

1. Necessity' due to COVID-19 as a Defence to International Investment Claims[4]:

Author: Dimitrios Katsikis

Journal: ICSID Review – Foreign Investment Law Journal

Publisher: Oxford University Press (OUP) on behalf of the International Centre for Settlement of Investment Disputes (ICSID)

This paper recognises that 'Covid 19' is to be considered as an extraordinary event which may trigger states to take measures that impact foreign investments. The author acknowledges the legal foundation for such actions is rooted in international customary law. This paper also examines the doctrine of police powers by reviewing relevant precedents. It offers a doctrinal analysis of various measures that the states adopted during the pandemic such as requisitions and regulatory interventions and examines the role of arbitral tribunals in ensuring appropriate compensation and maintaining the proportionality of such measures. The lack of empirical case studies would have augmented the analysis. The paper provides limited engagement with the impact of such measures on shareholders, investors rights, and corporate governance.

2. Potential Investor Claims and Possible State Defenses During the Covid-19 Emergency: [5]

Author: Sefriani & Seguito Monteiro

Journal: Sriwijaya Law Review

Publisher: Faculty of Law, Universitas Sriwijaya, Indonesia

This paper examines the impact of the emergency measures taken during the pandemic into triggering potential claims under international investment law. It also considers the possible defences that states may resort to justify the restrictive measures that they might take. The author discusses investment treaties and state obligations to abide by the terms of the treaties. This paper also stresses for the need for clear treaty drafting to reduce the friction and tensions between state sovereignty and investor protection. However, it does not explore the concept of treaty shopping and minority shareholders rights. This paper does not discuss the adequacy of the doctrines governing treaties in handling the economic implications of the states action

[4] Dimitrios Katsikis, "'Necessity' Due to COVID-19 as a Defence to International Investment Claims," 36 ICSID Rev. – Foreign Inv. L.J. 46 (2021).

[5] Sefriani & Seguito Monteiro, *Potential Investor Claims and Possible State Defences During the COVID-19 Emergency*, 5 *Sriwijaya L. Rev.* 236 (2021), https://media.neliti.com/media/publications/539211-potential-investor-claims-and-possible-s-d4ee77d3.pdf.

during the pandemic. While the author discusses about compensation it does not explore the underlying issues associated with the valuation of compensation.

3. Covid-19 In Investment Arbitration. A Legal Answer[6]:

   Author: Bianca Maria Krzizok

   Journal: Prudentia Iuris

   Publisher: Universidad Católica Argentina (UCA), Facultad de Derecho

This paper examines the three streams of arbitral jurisprudence that govern the relationship between the state and investor rights: solo effects doctrine, police powers doctrine and the migrated police powers doctrine. The author examines the dichotomy of public health regulation and economic regulation, highlighting how measures aimed that protecting public health may conflict with economic rights of the investors. This paper however pays heavy reliance on hypothetical scenarios instead of real documented cases. It offers sparse discussion on compensation mechanism and considers that investors as a homogenous group. The author does not explore the explore impact of Covid-19 on Bilateral Investment Treaties and International Investment Agreement drafting. The limited jurisdictional scope of the study does not offer a comparative study into the topic.

4. Covid-19 and the Regulation of Foreign Investment Law: A Necessary Paradigm Shift[7]:

   Author: W.A. Mutubwa & Mohamed Fauz

   Journal: Journal of Contemporary Management and Development Studies

This paper explores the legal doctrines and the impact of host states regulatory powers. It provides specific examples of taxation policies and economic measures. It also highlights the potential disputes from indirect expropriation which often breach the fair and equitable treatment clause. A notable view expressed by the author include the argument that the pandemic revealed inherent limitations in the current international investment law framework. The author urges for a paradigm shift in the approach to govern state measures, without providing for detailed proposals ad concrete recommendations. A stronger and broader analysis of the economic implications with real world cases would have been

[6] Bianca Maria Krzizok, *COVID-19 in Investment Arbitration: A Legal Answer*, 92 *Prudentia Iuris* 65 (2021), https://repositorio.uca.edu.ar/bitstream/123456789/13121/1/covid19-investment-arbitration.pdf.

[7] W.A. Mutubwa & Mohamed Fauz, *COVID-19 and the Regulation of Foreign Investment Law: A Necessary Paradigm Shift*, 4 *J. Contemp. Mgmt. & Dev. Stud.* 1 (2020), https://journalofcmsd.net/wp-content/uploads/2020/06/Covid-19-and-the-Regulation-of-Foreign-Investment-Law.pdf.

valuable.

5. Public Health and Investment Protection in the Context of the COVID-19 Pandemic—From the Sustainable Perspective of Exception Clauses[8]:

   Author: Guangyi Qu & Wei Shen

   Journal: Sustainability

   Publisher: MDPI (Multidisciplinary Digital Publishing Institute)

This paper is centred around the discussion regarding the conflict between public health measures and protection of the rights off foreign investors. This paper provides an in-depth explanation of the structure of International Investment Agreement, with a particular focus on the interpretation and the application of the public health exception clause. The author offers an illustrious representation of a statistical analysis. The paper puts forth recommendations for optimising exception clauses, aiming to enhance the capacity of the international investment law framework to accommodate risks associated with global health crises. However, the paper provides a broad and generalised study on the impact on minority shareholders and corporate governance. The paper also does not provide a detailed assessment of the remedies available to the investors in cases of expropriation. The author adopts a legal-normative approach that assumes the equality of bargaining power between the state and the investor. The asymmetry of power between the parties is a key determinant in the shaping treaty design, enforcement and investor state dispute settlement outcomes.

II. Conceptual foundation

In the context of international investment law, the concept of emergency state measures refers to extraordinary acts or omissions undertake by a sovereign authority during national crisis or emergency. They are regarded as emergency state measures as they are often beyond the scope of ordinary state action. Such measures are usually taken only for a temporary period or during the period of emergency. Emergency measures can be legislative, executive, judicial or administrative in nature, spanning from enactment of new laws, restriction on trade and investment, requisitioning of property and other health or public related measures

Within the spectrum of emergency state measures, the practice of expropriation remains a particularly contentious concept. The term connotes the exercise of authority by a sovereign state by appropriating private property, directly or indirectly in the pursuit of public

[8] Guangyi Qu & Wei Shen, *Public Health and Investment Protection in the Context of the COVID-19 Pandemic—From the Sustainable Perspective of Exception Clauses*, 14 *Sustainability* 6523 (2022), https://doi.org/10.3390/su14116523.

objectives[9]. However, the core difficulty lies in reconciling the competing interests of investors while upholding the authority of the state. The Covid-19 crisis marked one of the most pronounced instances of the exercise of emergency state measures[10], manifesting in the form of expropriation in the pursuit of public and health objectives. During the pandemic an unprecedented wave of emergency measures in the form of public health regulations, economic and financial measures, emergency legislation and trade control were undertaken.

- **Domestic legal framework**

The domestic legal framework governing expropriation and other emergency state measures is embedded within an interplay of constitutional provisions, statutory authority and underlying doctrinal foundation. Part XVIII of the Constitution of India provides the government the authority to proclaim a national[11], financial[12] or state emergency[13]. However, the court in numerous instances has held that even in when the state exercise emergency measures which operate to the prejudice or a person or entity it must have a legal backing[14].

The legitimacy of emergency state measures is principally grounded in doctrine of necessity, police powers doctrine, the doctrine of proportionality and along with other complimentary principles such as due process, non-discrimination and public purpose[15] –

The doctrine of necessity is rooted in the maxim 'necessitas non habet legem', which acknowledges that in order to safeguard public health, safety order or to discharge other essential state functions, the state can act beyond the conventional legal boundaries and undertake acute legal measures. During the Argentinian crisis of 2002, the economic state had worsened to such an extent that an emergency had to be declared. During the same, Argentina failed to adhere to its obligations in the Bilateral Investment Treaties. In a case where the claimants alleged the breach of various treaty standards, Argentina argued that the state measures were necessitated under dire economic circumstances. However, as Argentina failed to restore the investor rights even after the state of emergency had ended, it was held liable[16]. The police powers doctrine further affirms the inherent authority of the states to enact

[9] Rudolf Dolzer, Ursula Kriebaum & Christoph Schreuer, *Principles of International Investment Law* (3d ed. 2022) (Oxford Univ. Press).
[10] Ursula Kriebaum, *State Measures in Response to the COVID-19 Pandemic and International Investment Law*, 36 ICSID Rev. 579 (2021).
[11] Constitution of India art. 352 (proclamation of national emergency).
[12] Constitution of India art. 360 (provisions as to financial emergency).
[13] Constitution of India art. 356 (provisions in case of failure of constitutional machinery in States)
[14] *Bennett Coleman & Co. v. Union of India*, (1973) 1 SCC 788, ¶ 38–39.
[15] C. Schreuer, *Claimants' Documents – Exhibit CL-0272*, ICSID (Aug. 2018), https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0272.pdf
[16] *LG&E Energy Corp., LG&E Capital Corp. & LG&E International, Inc. v. Argentine Republic*, ICSID Case No.

regulations in order to safeguard public welfare. At times, such actions affect the rights of investors as when the actions are genuinely and purely regulatory, they do not constitute compensable expropriation.

The doctrine of proportionality requires that any emergency state measure should be proportionality and suitable to achieve its legitimate aim. There must be a balance between the restrictions or the harm that it causes it to persons or entity and state or public necessity. In Tecmed v. Mexico[17] the court explicitly stated that there should be a reasonable relationship and equivalence between the burden or the limitations that are imposed on the investor and the aim that is to be realized through the state measure. The courts when determining the proportionality should give equal importance to the rights of the investors. The aforementioned case dealt with refusal of the renewal of license of a company producing hazardous wastes. The court ruled that the said act of the state amounted to indirect expropriation and violation of the Fair and Equitable Treatment (FET) clause.

The doctrine of non-discrimination and due process require that, despite the extraordinary

nature of expropriation and other state measures, the principles of due process, namely fairness, justice and equitable action ought to be upheld. This ensures protection to ordinary persons against unwarranted and arbitrary state action. The duties that are imposed on the state in this regard are to act fairly, to avoid discriminatory treatment and ensure that the principles of justice and rule of law are upheld. A notable case in this regard is the Metalclad Corp. v. United Mexican States[18] case, where the petitioner company was refused the permit to carry on business activities by the state citing ecological and community concerns. As the state failed to ensure a transparent and predictable legal framework, violating the treaty and the due process obligations, it was held liable.

These principles hold that sovereignty and legitmicay are go hand in hand when there are derogations from the normal procedures. Therefore, exercise of emergency measures requires the state to balance investor interests and public necessity.

III. Expropriation and emergency measures during Covid-19

The Covid-19 pandemic witnessed wide spread requisitioning of private property by the state citing public health and safety reasons. Although temporary in nature, such requisitions

ARB/02/1, Decision on Liability (3 Oct. 2006), 245–257; Award (25 July 2007), 39–47.

[17] *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award 121–122 (May 29, 2003)

[18] *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 76, 103–107, https://www.italaw.com/cases/671.

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amounted to violation of the investment obligations, taking a major toll on the rights of the investors. In the wake of the emergency, various courts in India and administrative authorities issued directions and sanctioned the requisitioning of private hospitals including hospitals, hotels, industrial facilities to ensure adequate healthcare capacity and augment the states healthcare response.

Expropriation can be of two types – direct and indirect. Where there is a formal overtaking of property by the state and a clear deprivation of legal control and title over the said property, it constitutes direct expropriation. On the other hand, where the state substantially deprives the investor of the value or benefit associated with the investment without transferring or taking over the investment, the act amounts to indirect expropriation.

In the landmark case of Suo Moto v. State of Gujrat[19], the High Cort considered the reports submitted by various state governments regarding the utilization of private health care infrastructure during the pandemic. The reports indicated numerous hospitals being requisitioned pursuant to the directions issued under the Epidemic Diseases Act, 1897 and the Disaster Management Act, 2005. The extent of the states exercise of emergency powers was evident in several aspects of the report: the government was authorities to assume control over private property and prosecute the non-compliant individuals. Expropriation was not the only emergency measure employed, rather, the governments were empowered to negotiate the rates for rooms and beds to make them affordable and ensure accessibility. Although these measures were approved in light of public interest, the implications on investor rights and private ownerships cannot be understated.

In a recent order of the Supreme Court, the bench refused to grant the blanket requisitioning of private properties[20]. The state governments are already empowered to take temporary control over private property. The issuance of a blanket direction would have had wide spread implications on private property ownership and could have triggered claims under unlawful expropriation-related protection measures.

In addition to the requisitioning of healthcare facilities, other forms of private property such as hotels and commercial establishments, such as in the case of Delhi where Hyatt and Accor chain of hotels were requisitioned and linked to various hospitals. [21]

A similar instance happened in Chile, where the government introduced a series of regulatory

[19] *Suo Motu v. State of Gujarat*, Suo Motu Writ Petition (PIL) No. 42 of 2020 (Guj. HC May 22, 2020).
[20] *Alakh Alok Srivastava v. Union of India*, 2020 SCC OnLine SC 352 (India).
[21] Chaturvedi, Anumeha, *Delhi government passes new orders requisitioning four more city hotels to convert them into hospitals*, The Economic Times (12 June 2020) (NT Delhi).

measures affecting airport and hospital concession contracts[22]. Certain French corporations owning a significant portion of the consortium of airports in Chile, initiated negotiations regarding the determination of compensation. The relief requested was an extension of the concession period to off-set the losses. These measures had a substantial impact on the concessionaires' revenue. However, the authorities classified the pandemic as a force majeure event and refused to provide compensation to the affected. The said refusal amounted to a breach of the Fair and Equitable Treatment Obligations and the protection against indirect expropriation contained in the France-Chile Bilateral Investment Treaty (BIT). The claimants contended that the states action constituted a breach of its treaty obligations under the investment agreements, as the measures created a significant imbalance in an already fragile economic situation.

Further in Peru[23], several directives were issued through the Decreto de Urgencia (Emergency Decree) which empowered the government to require cooperation and requisition any public or private entities for achieving governmental objectives and supporting the framework to combat the health crisis. Despite the fact that these decrees have the force of law that are only issued during the period of emergency, does not override the fact that they constitute an act of indirect expropriation.

IV. IMPACT ON INVESTORS

The invocation of emergency measures has triggered complex debates regarding the scope of investor protection under the international investment law framework. It is within this premise that the need to analyze how these measures have affected investors, both at the level of corporate entities and the individual shareholders.

A) Impact on majority and minority shareholders –

The impact on the majority and the minority shareholders differ significantly. This is essentially due to the stark contrast in the control and decision-making power that they hold, the nature of loss, degree of risk exposure and their right to bring claims. Given the extent of decisive control that majority shareholders exercise over the company, they bore the burnt of state interventions. The emergency measures had a direct impact on their autonomy and the economic value of their investments. The key areas that the majority shareholders faced a hit

[22] Elina Mereminskaya & Álvaro Jara Burotto, *The COVID-19 Pandemic in the Recommendations of the Chilean Technical Concessions Panel*, 18 Constr. L. Int'l (Jan. 2024).
[23] White & Case LLP, *COVID-19 Emergency Decree Research – Peru* (Int'l Fed'n of Red Cross & Red Crescent Societies Mar. 2021), https://disasterlaw.ifrc.org/sites/default/files/media/disaster_law/2021-03/COVID-19%20Emergency%20Decree%20Research%20-%20Peru.pdf

was the loss of operational control and the pressure to continuously restructure the corporate architecture. Besides this, state interventions also impose excessive regulatory compliance and lead to exposure to sovereign and political risk. Ultimately the principal detriment for the majority shareholders is the long-term erosion of investor confidence and the violation of the general legitimate expectations of a stable environment and steady returns. As the impact on the majority shareholders is direct and evident, their locus standi in investment disputes is correspondingly stronger.

In contract the impact on the minority shareholders is derivative in nature typically affecting the value of their investment. Since the impact is not clearly evident, their locus standi is relatively weaker. However, this does not mean that the losses that they suffer are undermined or that there are no remedies available to them.

During the pandemic, the doctrine of reflective loss came into the picture, that provided for a rational basis to determine how an impact on the investment or the company can impact the investors. This concept of great importance, as when there is a breach of an obligation under a Bilateral Investment Treaty involving a state and a corporate entity, although the primary harm is to the company, the action is instituted by the investors affected by such state measures.[24]

B) Treaty shopping to secure Bilateral Investment Treaty (BIT) Protections –

Treaty shopping is the practice of restructuring the corporate entity. Corporate restructuring to secure BIT protections, typically includes activities such as changing the corporate domicile of the entity, creation of a intermediary company, share transfer or reallocation of shares, internal reorganization of management, mergers and other forms of capital restructuring. The sole of objective of such corporate measures to secure a favorable protection under the treaty and to reduce the negative impact on the investors.

Treaty shopping is a legal and jurisdictional strategy. This involves the identification of a favorable treaty network by examining the treaties to look for certain provisions such as Fair and Equitable Treatment (FET), Full Protection and Security (FPS), and other forms of remedies through the settlement mechanism. Once a favorable jurisdiction is identified, either the holding company creates a subsidiary company or transfers the ownership to that specific jurisdiction. When treaty shopping is done legitimately and for bonafide commercial reasons,

[24] Ren, Raphael, *Shareholder Reflective Loss: A Bogeyman in Investment-Treaty Arbitration?* (2023) 39 Arbitration Int'l 425.

it is valid[25], however, where it is undertaken in anticipation of a dispute, then no protection or benefits would be granted, rendering the restructuring ineffective[26].

During the Covid-19 pandemic, risk control practices and mechanisms were activated. Many entities had to resort to 'treaty shopping' to safeguard their investments. However, during the same period, many such forms of corporate restructuring were deemed abusive, since they often occurred after the lockdown measures were taken. In cases where treaty shopping was done after the emergency measures were put in place, it was jurisdictionally barred and unenforceable.

As opposed to relying on treaty shopping where the benefits are uncertain and limited, the investors should refer their claims to Investor-State Dispute Settlement mechanism[27]. The pandemic has thus revealed the limitations in treaty drafting and the available protections to the investors. It stresses on the need to ensure harmony between the investor protection and the exercise of emergency powers by the state.

C) Denial of benefits clause as a defense –

It is not that the states do not resort to any measures to any measures to avoid such instances of treat shopping. The inclusion of the Denial of Benefits Clause (DoB) is a defensive treaty mechanism used by the host states to refuse the investor protections granted under the treaty.

The operation of such a Denial of Benefits clause is observed during the establishment of business activity with a particular jurisdiction[28]. The burden of proof lies on the investors to demonstrate that the establishment of the entity is aimed at engaging in genuine economic activity. Where the corporate entity is unable to prove this, the state may lawfully deny the benefits of the treat. This is rooted in the notion that the sole aim of such entities is often to ensure only a nominal presence in the jurisdiction in order to obtain treaty protection

During the pandemic as the phenomenon of treaty shopping became rampant, the states had to resort to such measures. The practical operation of such clauses was witness through screening of claimants, engaging in strategic deterrence and introducing preventive measures such as notice before arbitration. To balance treaty shopping and investor protection, states must make it their normative aim to provide temporal safeguards, ensure proper interpretation

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[25] *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 (Oct. 21, 2005).
[26] *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5 (Award Apr. 15, 2009).
[27] **Volterra Fietta**, *Client Alert: Restructuring, COVID-19 and Investor-State Arbitrations: Often Overlooked Issues* (Apr. 29, 2020), Volterra Fietta, https://volterrafietta.com/client-alert-restructuring-covid-19-and-investor-state-arbitrations-often-overlooked-issues/.
[28] Lindsay Gastrell & Paul-Jean Le Cannu, *Procedural Requirements of "Denial-of-Benefits" Clauses in Investment Treaties: A Review of Arbitral Decisions*, 30 ICSID Rev. – Foreign Inv. L.J. 78 (2015).

and drafting of treaties and safeguard the legitimate expectation of the investors.[29]

V. INVESTOR REMEDIES AND ARBITRAL FRAMEWORK

The outbreak of the Covid-19 pandemic prompted an unparalleled level of state intervention across various sectors. Emergency measures were adopted to safeguard public health and safety. In most instances, these measures encroached upon on the rights of the investors. Once a breach of an investment obligation occurs, the determination of remedies becomes important. The remedies available to the investors include the payment of compensation, restitution, declaratory relief, injunction and other forms of moral damages.

The Articles on the Responsibility of States for Internationally Wrongfully Acts (ARSIWA) establish that the states are responsible for the injury that are caused to any entity whether domestic or foreign. The obligations to provide for full reparation is discharged through restitution, compensation and satisfaction. Article 12 of the statute states that the sates are to be held liable for a breach of the obligations when their act is not in conformity with the agreed terms or the principles of law. Article 35-38 govern the provision for reparation of injury. The principle of restitution requires the state to reestablish the entity in the same position in which they would have been had the loss never occurred.[30] The law further requires the payment of reasonable compensation.[31] In the context of state responsibility the principle of satisfaction is a form of reparation that includes a formal acknowledgement of the wrongful act or any other form of apology or regret.[32]

- **Investor state dispute settlement (ISDS) mechanism**

Investor state dispute settlement is a treaty-based dispute resolution mechanism. This platform serves as a neutral and depoliticized platform adjudicatory platform. ISDS also ensures that the states adhere to the obligations contained within the treaties such as the Fair and Equitable obligations and the Full Protection and Security obligations.

There are various principles of compensation and dispute resolution such as the Hull formula and the Calvo doctrine. The Hull formula requires the payment of prompt, adequate and effective compensation. While the Calvo doctrine required the exhaustion of local remedies before seeking diplomatic protection. The ISDS and other dispute settlement mechanisms aim at resolving the dispute through the application of such doctrines.

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[29] Zachary Douglas, *Good Faith, Corporate Nationality, and Denial of Benefits*, in *Good Faith and International Economic Law* 247 (Andrew D. Mitchell, M. Sornarajah & Tania Voon eds., Oxford Univ. Press 2015).
[30] *Responsibility of States for Internationally Wrongful Acts*, art. 35, G.A. Res. 56/83, U.N. Doc. A/RES/56/83
[31] *Responsibility of States for Internationally Wrongful Acts*, art. 36, G.A. Res. 56/83, U.N. Doc. A/RES/56/83
[32] *Responsibility of States for Internationally Wrongful Acts*, art. 37, G.A. Res. 56/83, U.N. Doc. A/RES/56/83

The traditional method od dispute resolution could not have been effectively undertaken during the pandemic. Several procedural adaptations were made to accommodate the extraordinary circumstances. Virtual hearings became the default format, electronic evidence management systems were introduced and protocols were established for remote witness examination and online negotiation. Further, recognition was provided for the use of electronic signatures in arbitral awards.

- **Role of the International Centre for the Settlement of Investment Disputes**

The International Centre for the Settlement of Investment Disputes (ICSID) provides for an institutional framework for the resolution of investment disputes. The aim of the dispute resolution mechanism is to balance the interests of the investors and to depoliticize investment disputes. ICSID offers two distinct procedures for conflict resolution – arbitration and conciliation. ICSID has also laid down several notable precedents governing the obligations of the states when they requisition any private property. In the case of Tidewater v. Venezuela[33], the Tribunal upheld the principles established in the Chorzow Factory case regarding the standards of compensation. The Tribunal observed that where a state undertakes any expropriation, there exists an underlying obligation to provide full reparation.

ICSID has played a vital role as a dispute resolution mechanism during several other emergency-like situations like that of the pandemic. The most notable intervention made by ICSID was during the Argentinian crisis. In CMS Gas Transmission Co. v. Argentina[34], the court explained the meaning and scope of the term 'essential interests' of the state. Under Article 25[35] of the International Law Commissions Articles on the state responsibility, the states can plead necessity as a ground of defence for a breach of its obligations under a treaty. It was held that unless a grave situation persists where there is a total collapse of the economy or compromise on the independence of the state, the terms of the treaty will always prevail over any plea of necessity. Numerous cases and authorities have held that the emergency measures undertaken by the state to preserve public health and safety in light of pandemic, qualifies as an essential interest of the state[36].

In several cases ICSID has played a remarkable role in dispute resolution, such as Sempra

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[33] *Tidewater Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5.
[34] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8.
[35] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, art. 25, in *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 80, U.N. Doc. A/56/10 (2001).
[36] Dimitrios Katsikis, *'Necessity' Due to COVID-19 as a Defence to International Investment Claims*, 36 ICSID Rev. – Foreign Investment L.J. 46 (2021).

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Energy International v. Argentina[37], Enron Creditors Recovery Corp. & Ponderosa Assets L.P.) v. Argentina[38] and Continental Casualty Co. v. Argentina[39], where the investors were prejudiced due to the emergency measures implemented by the state.

In order to expediate the process of dispute resolution during the dire circumstances of the pandemic, ICSID introduced the Guidance Note on Online Hearings[40], which aimed to standardize the procedural aspects of online hearings. During the Covid-19 pandemic, authorities like those established under the Investor Dispute Settlement Mechanism (ISDS) and the International Centre for the Settlement of Investment Disputes (ICSID) served as key instruments in balancing the police powers of the state with the rights of the investors.

VI. Ethical and policy considerations

The pandemic tested the resilience of the legal system and underscored the ethical and policy dimensions of the international investment law framework governing emergency state measures. It exposed the inherent limitations of the system and called for the establishment of a regime that balances investor rights, state sovereignty and public interest.

The key ethical and policy considerations revolve around the need to balance conflicting interests. Ethical governance requires that emergency state measures ought to be fair, just and reasonable. Although the state may invoke necessity as a defense, the payment of adequate compensation is a mandator. Further the demonstration of immediacy and indispensability of the measure are an essential legal obligation. Adherence to due process and access to justice is an integral aspect of ethical administration. From a policy perspective, there is a grave need to revise and review treaty clauses and standards of drafting. This ensures that essential legal prinicples and doctrines are embedded within a binding legal framework and not left to the arbitrary discretion of the states. Policy initiatives and ethical responsibility call for multi-lateral cooperation to align global solidarity with economic justice.

The pandemic revealed the need for the states to prove the legitimacy of their actions. Covid-19 pandemic necessitated digitalization of the traditional dispute resolution mechanisms. Policy makers have to make sure that the ethical concerns pertaining to confidentiality and fairness of the process are maintained. Where an extraordinary action is undertaken citing essential interests of the state, a justification and commitment to public reflected must be

[37] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16.
[38] *Enron Creditors Recovery Corp. (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3.
[39] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9.
[40] International Centre for Settlement of Investment Disputes (ICSID), *Brief Guide to Online Hearings at ICSID* (May 2020), https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid.

evident. Since such actions directly affect the rights of the investors, ensuring transparency and public accountability becomes both an ethical and a legal responsibility.

VII. CONCLUSION AND RECOMMENDATIONS

The outbreak of covid-19 profoundly reshaped the global investment order, underscoring the complexities between states sovereignty and investor rights. The public health crisis required the states to take unprecedented emergency measures, which were often justified under the doctrine of necessity. The underlying issues with such measures being the erosion of investors confidence, impairment of investment value, weakening of institutional credibility and absence or delay or undervaluation in the provision of compensation for requisitioned property. The doctrinal analysis revealed the extent of the emergency state measures employed by the state during the pandemic. The study highlighted the limits of the doctrine of necessity, deficiencies in treaty interpretation and the inherent instability and incapacities of the international investment law framework to accommodate such emergencies.

The states have to strive to strengthen the legal and institutional framework governing the exercise of emergency measures. It is important that the states codify the extent and prescribe the limitations on emergency measures like expropriation. The establishment of a robust and standardized dispute resolution mechanism is needed. Further, various institutions ought to provide for comprehensive standards governing treaty drafting ensuring that there are enough safeguards for the investors during such emergencies. The treaties should be periodically reviewed to examine its adaptability and contemporary relevance. In its essence the states need to coordinate their efforts to provide for the establishment of a global investment solidarity framework.

The role of the remedial framework in accommodating the changes is notable. The pandemic did reveal certain ethical and policy challenges, that is left on the states to work upon. Although emergency state measures are necessary for ensuring public health and safety and preserving the essential interests of the state, the measures should confirm with the principles of legitimacy, fairness, proportionality, adequate and just compensation and other due process obligations.

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