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The Investment Treaty Implications of Covid-19 Responses by States

Nikos Lavranos and Ahmed Mazlom***

Abstract

By analysing Covid-19 measures taken by States in eleven jurisdictions – whilst considering a range of international investment agreements (IIAs) including ‘old-school’ European BITs, North American style treaties, and Asian investment treaties – the authors examine to what extent Covid-19 measures could potentially result in investment treaty claims. This study presents these implications through a balanced overview of treaty-based grounds and justifications, which are built upon classical investment protections and fundamental doctrines. When State measures are examined in terms of aim, effect, duration, and scope, a typology emerges that not only classifies, but also reveals similar patterns crystallising across varied jurisdictions – despite a decentralised and disparate approach taken by States. The comparative analysis of generational differences between IIAs determines the probability of successfully invoking claims, whilst simultaneously assessing the risks for States seeking to rely upon treaty-based justifications. Thus, when read by States, this legal analysis amounts to a risk assessment, and when read by foreign investors, serves as a guide on recourse. The authors conclude that States should include ‘pandemic-proof’ provisions in prospective IIA negotiations, and thus, potentially ushering a dawn of new ‘pandemic-proof IIAs’.

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1 Introduction

The global health crisis continues apace as the Covid-19 pandemic spreads exponentially, infecting more than 172 million people and killing over three and a half million so far.¹ Not only are health systems stretched beyond their maximum capacities, but the pandemic is also causing an economic crisis – speculated to be of a similar magnitude to major financial downturns in the early twentieth century.

To cope with both health and economic crises, States have adopted restrictive measures at an unprecedented scale. Countries have been imposing complete lockdowns – implementing and lifting strict regulations on labour and movement multiple times during the pandemic – thus preventing free trans-border movement of goods and persons; be it workers or tourists. With economies in ‘free fall’, States have issued financial packages worth billions of dollars to ease the commercial repercussions and ultimately, save lives and jobs.

To borrow the words of former European Central Bank President Mario Draghi when confronted with the 2008 Financial Crisis, countries are ‘doing whatever it takes’² to contain the severe effects caused by the pandemic.³

States carry an obligation to protect the health of their citizens and of the economy by adopting necessary measures as they deem fit. However, in doing so, States should adhere to basic principles – even when adopting emergency measures – including non-discrimination and proportionality. Core human rights have also been considered inalienable in emergency situations, such as the right to life and to protection of property.⁴ These principles are enshrined in constitutions⁵ and basic laws of States, as well as in civil or administrative

1 ‘COVID-19 Dashboard by the Center for Systems Science and Engineering at Johns Hopkins University’, 4 June 2021 <<https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>> accessed on 4 June 2021.

2 ‘Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London’, 26 July 2012 <<https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>> accessed on 4 June 2021.

3 See also US President Biden’s recent Covid-19 relief measures amounting to several trillions of US dollars. A Barnett and M Linke, ‘Biden’s First 100 Days: Covid-19 Relief Package, Executive Orders and Appointments’, *Wall Street Journal*, 29 April 2021 <<https://www.wsj.com/articles/bidens-first-100-days-covid-19-relief-package-executive-orders-and-appointments-11619698738>> accessed on 4 June 2021.

4 Article 15 of the European Convention on Human Rights (ECHR) 1950 does however allow for States, in times of emergency, to derogate from their obligations to ensure fundamental rights.

5 Articles 2 and 14 Basic Law for the Federal Republic of Germany 1949 (Constitution).

codes. They are also found in international treaties, ranging from human rights treaties⁶ to trade and investment agreements.⁷

This contribution focuses on the potential international investment agreement (IIA) implications of Covid-19 responses by States.

First, the analysis identifies, by way of examples, various types of Covid-19 measures adopted by different States (Section 2).⁸

Second, the study examines protection standards from diverse investment treaties; considering whether they can serve as grounds for possible treaty-based investment claims against Covid-19 measures. Special attention will be paid to fair and equitable treatment (FET), national treatment (NT), most-favoured-nation treatment (MFN), and direct and indirect expropriation clauses (Section 3).

Third, we analyse potential treaty-based justifications for the adoption of measures in response to the Covid-19 pandemic. Justifications revolve around protection of public policy, protection of health, and economic emergency (Section 4).

Since investment treaties reveal differences – at times quite substantial – the analytical framework concerning the grounds for investment treaty claims, as well as justifications for Covid-19 measures, consists of examining various investment treaties from diverse geographical areas concluded at different points in time. Accordingly, we analyse (i) ‘old-school’ European BITs as per the Dutch ‘Gold Standard’ model, (ii) recent North American treaties such as the Comprehensive Economic and Trade Agreement (CETA), North American Free Trade Agreement (NAFTA),⁹ and US BITs, (iii) as well as Asian investment treaties such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and Chinese BITs.

In conclusion, the analysis provides a differentiated answer – depending on the investment treaty and the measures at issue – as to the question whether, and if so, to what extent Covid-19 measures could potentially result in investment treaty claims (Section 5). More specifically, we conclude that it is necessary that States consider amending their investment treaties in order to ensure

6 Article 2 ECHR 1950 and Article 1 First Protocol ECHR 1950; Articles 4 and 14 African Charter on Human and Peoples’ Rights 1981; Articles 4 and 21 American Convention on Human Rights 1969.

7 Article 7(4) Netherlands Model Investment Agreement 2018.

8 With governments amending measures constantly in line with pressures faced from a global surge in Covid-19 cases, all measures in this study are up to date to reflect changing policy landscapes as of 4 June 2021.

9 When referring to NAFTA and NAFTA jurisprudence, we refer to the NAFTA treaty 1994 and not to the revised USMCA treaty.

that they address potential pandemic implications such as those arising out of the Covid-19 health crisis. In Annexes I–VI, we provide comparative table overviews of the relevant provisions within IIAs.

Finally, the authors wish to emphasise that they are not taking a position as to whether or not it is appropriate to initiate investment treaty claims in relation to Covid-19 measures.¹⁰ Instead, we offer a legal analysis that enables investors affected by Covid-19 measures to make informed decisions, whilst at the same time, sensitising States to take appropriate steps in preparation for the potential risk of investment treaty claims.

2 Various Types of Covid-19 Responses by States

States have adopted a myriad of measures in response to the Covid-19 pandemic in their attempts to minimise urgent and forthcoming severe economic, political, and societal repercussions. By and large, these measures have been asymmetrical. Owing not only to unprecedented circumstances, but also to ideological disparities, this lack of uniformity amongst States will test the investment treaty dispute system.

Unlike taxonomic classification of viruses, labelling and organising policies is not a stringent process. Considering the intentions of executives and legislatures when adopting measures, we have grouped government responses under: State Intervention (2.1), State Participation (2.2), National Security (2.3), and Public Health (2.4). The measures are by no means mutually exclusive, and their grouping can overlap amongst the aforementioned sections.

2.1 *State Intervention*

State intervention encompasses export prohibitions and restrictions, expropriation, moratoriums on initiating proceedings, and suspension of targeted economic activities. For a measure to qualify under this rubric, the State must influence the way financial markets or industries operate. This differentiates it from State Participation (2.2), where the State pursues a direct investment in the market, in the form of recapitalisation measures or nationalisations;

10 See however in contrast: P Bloomer et al., 'Call for ISDS Moratorium During COVID-19 Crisis and Response', Columbia Center on Sustainable Investment, 6 May 2020 <<https://ccsi.columbia.edu/content/call-isds-moratorium-during-covid-19-crisis-and-response>> accessed on 4 June 2021.

both of which qualify as State aid schemes, whether under general economic notions or the legalistic EU definition thereof.¹¹

When resorting to export restrictions and prohibitions to safeguard national provisions of essential supplies, States interfere with domestic markets, as well as with supply chains linking industries to global markets. With the aim of securing domestic medicine supplies, India amended its policy to restrict the export of active pharmaceutical ingredients (APIs) effective from 3 March 2020.¹² In doing so, India – arguably the world’s largest generic drug manufacturer – paralysed distribution channels; best reflected when US health regulators conferred with Congress to monitor potential drug shortages resulting from the measure.¹³

Characterised by significant foreign interests, India’s pharmaceutical sector counts a considerable share of foreign-owned companies amongst its investors. And whilst the export policy amendment affected domestic and foreign-owned companies, remaining silent on a distinction between them – *de jure* – the detrimental effect on foreign investments exposed the policy’s discriminatory element – *de facto*.

Initially, the Indian measure appeared indefinite as the amendment carried immediate effect ‘till further orders’. It only took until 6 April 2020 for the Director General of Foreign Trade to ‘free’ the restrictions; ending a short-lived policy that resonated across boardrooms and warehouses alike.¹⁴

Unlike the previous measure that limited the outflow of medical goods, Spain’s approach focused on acquiring the means of production to secure medical provisions. Royal Decree-Law 463/2020 of 14 March 2020 declared a state of alarm.¹⁵ Under Article 13, the decree specified measures to ensure

11 See European Commission Press Release, ‘State aid: Commission approves restructuring plan of Lloyds Banking Group’, 18 November 2019 <https://ec.europa.eu/commission/presscorner/detail/en/IP_09_1728> accessed on 4 June 2021.

12 Amendment in Export Policy of APIs and formulation made from these APIs, Notification, Directorate General of Foreign Trade, 3 March 2020.

13 R Griffin and A Altstedter, ‘India Restricts Exports of Common Drugs on Fear of Coronavirus Shortages’, Bloomberg, 3 March 2020 <<https://www.bloomberg.com/news/articles/2020-03-03/india-cuts-drug-exports-as-threat-of-coronavirus-shortages-rises>> accessed on 4 June 2021.

14 Amendment in Export Policy of APIs and formulation made from these APIs, Notification, Directorate General of Foreign Trade, 6 April 2020.

15 Real Decreto 463/2020, de 14 de marzo, por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19. Boletín Oficial del Estado Núm. 67, de 14 de marzo de 2020, Referencia: BOE-A-2020-3692. Article 116 of the Spanish Constitution, and as stipulated in Organic Law 4/1981 of 1 June, differentiates between states of alarm, emergency, and siege. Spain announced a ‘state of alarm’.

the supply of goods and services necessary for the protection of public health. This granted the State the power to intervene and temporarily occupy factories, production units, and private health care facilities. It also included issuing necessary orders to ensure the supply and operation of production centres affected by product shortages.

There is no explicit distinction made between local or foreign-owned production facilities, as the territorial scope covers the entire national Spanish territory. Even though the decree's temporal scope set at 'fifteen calendar days' conveyed the short-term nature of the policy, by passing multiple extensions, the Spanish government considerably extended its duration. After the extensions lapsed, the government declared a new state of alarm through a different Royal Decree-Law.¹⁶

Regardless of geographic scope, political leanings, or economic thought, this ambiguity over the duration of measures appears in a considerable number of State intervention measures; it is premature to confirm why this pattern exists. Arguably, a measures' indefiniteness is influenced by divisions amongst scientists, economists, and politicians about when the Covid-19 pandemic will 'end' – ironically, this term is ambiguous when used in the current literature as the 'end' could be legalistic, medical, or societal; ranging from the World Health Organization (WHO) officially declaring no confirmed cases in a certain period,¹⁷ to achieving herd-immunity, or the reignition of consumer sentiment in markets.

In a similar vein to Spain, Peru announced a state of emergency. The latter's policy to suspend the collection of toll fees, embedded in a congressional bill, sparked commentators to debate the measure's duration.¹⁸ The bill outlined that the toll suspension would last during the state of emergency; yet, Peru

16 Extensions require authorisation by the Congress of Deputies, Spain's legislative branch. On 4 June 2020, Prime Minister Pedro Sanchez announced the final extension will last until 21 June 2020. Yet, as Spain became the first EU member state to report a million cases, the Prime Minister declared a new state of alarm on 25 October 2020. See Real Decreto 926/2020, de 25 de octubre, por el que se declara el estado de alarma para contener la propagación de infecciones causadas por el SARS-CoV-2. Boletín Oficial del Estado Núm. 282, de 25 de octubre de 2020, Referencia: BOE-A-2020-12898.

17 WHO Technical Information Note, 'WHO recommended criteria for declaring the end of the Ebola virus disease outbreak', 4 March 2020 <<https://www.who.int/publications/m/item/who-recommended-criteria-for-declaring-the-end-of-the-ebola-virus-disease-outbreak>> accessed on 4 June 2021.

18 C Sanderson, 'Peru warned of potential ICSID claims over covid-19 measures', Global Arbitration Review, 9 April 2020 <<https://globalarbitrationreview.com/article/1225319/peru-warned-of-potential-icsid-claims-over-covid-19-measures>> accessed on 4 June 2021.

declared two states of emergency. It declared a health emergency on 11 March 2020, lasting ninety days, and a national state of emergency on 15 March 2020.

Warnings of potential investment treaty claims over the measure derived not so much from the temporal scope of the toll suspension, but on its applicability.¹⁹ As the measure applies to all concessionaires, it means that both local and foreign toll operators must comply with it. With 74 toll roads, 24 of which are state-owned, most toll-operated roads are privately run. Operators of 32 toll roads have voluntarily suspended collection. Deprived of revenue, the remaining operators of the other 18 roads are discontent; so far, warnings have not materialised into claims.

With loss of revenue, unable to pay operational expenses and financial debts, companies are facing bankruptcy. In response, Russia decided upon a moratorium on the initiation of bankruptcy proceedings.²⁰ Unlike other measures, this moratorium was limited in duration; effective for a period of six months starting from 6 April 2020 until 6 October 2020. It applied to debtors that are (i) designated organisations and individual entrepreneurs whose conditions deteriorated in connection with the spread of the coronavirus infection, (ii) 'systemically important organizations', and (iii) strategic companies and strategic joint-stock companies approved by Presidential Decree of 4 August 2004, No. 1009.

This measure aimed to alleviate financial hardships by providing time to resolve said issues; targeting entities and strategic enterprises severely affected by the pandemic. Legal proceedings, as perceived by the State, would only escalate the dire situation faced by debtors. Yet, if the measure proved discriminatory, corporations could initiate investment treaty claims against Russia; an ironic situation for the same State that intended for legal proceedings to be avoided, as under the *spirit* of the governmental measure.

By limiting access to justice, the government's intention of easing financial difficulties carries a different policy objective than protecting public health or securing national provisions, as discussed in previous examples. Yet, these measures reflect the shared sentiment of States that their application is justified due to urgency; combined with the belief that – were it not for State intervention – markets would be abused, vulnerable sectors preyed upon, and unfair advantages formed.

19 Ibid.

20 Decree No. 428 of the Russian Government (3 April 2020), based on the new Article 9.1 'Moratorium on Initiation of Bankruptcy Proceedings' incorporated into Federal Law No. 127-FZ (26 October 2002) 'On Insolvency (Bankruptcy)'; through an amendment by Federal Law No. 98-FZ (1 April 2020).

2.2 State Participation

Under this grouping, all measures that qualify as State participation are – by extension – forms of State intervention. Accordingly, measures such as nationalisations of private corporations or recapitalisation measures, occur not only when States intervene in the market; they also acquire equity in the targeted corporations. States thus ‘participate’ in the market, albeit under a different ‘veil’.

Of note is that recapitalisation measures require European Commission approval as they qualify as State aid. On 19 March 2020, the Commission adopted a Temporary Framework for State aid to support the EU single market under threat from Covid-19 disturbances.²¹ Initially, the Temporary Framework for State aid did not include recapitalisation measures; an amendment on 8 May 2020 expanded the provisions to rectify this omission.²² Most probably, the influx of government initiatives to introduce recapitalisation inspired the much-needed amendment.

This is best exemplified in the nationalisation of Alitalia by the Italian State. Through an Emergency Decree on 17 March 2020, the Italian government authorised state control over the loss-making airline Alitalia.²³ Ending a decade-long saga of failed bids from competing European and Transatlantic airlines, restructuring efforts, bridge loans, trade union upheaval, Franco-Italian governmental tensions, and even a possible merger with Italy’s state-owned railway operator, Ferrovie dello Stato Italiane, that did not go through.

Whilst Rome sought private sector investors for the struggling airline pre-Covid-19, by ‘renationalising’ Alitalia during the Covid-19 crisis, the Italian

21 Based on Article 107(3)(b) of the Treaty on the Functioning of the European Union: ‘3. *The following may be considered to be compatible with the internal market: ... (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; ...*’.

22 European Commission Press Release, ‘State aid: Commission expands Temporary Framework to recapitalisation and subordinated debt measures to further support the economy in the context of the coronavirus outbreak’, 8 May 2020 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_838> accessed on 4 June 2021. See European Commission Press Release, ‘State aid: Commission approves €39.7 million Latvian measures to recapitalise Riga International Airport’, 8 March 2021 <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1013> accessed on 4 June 2021.

23 Decreto-Legge 17 marzo 2020, n. 18, Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19, 20G00034. GU Serie Generale n. 70 del 17-03-2020. See G Fonte and F Landini, ‘Italy presses on with Alitalia nationalisation’, Reuters, 18 March 2020 <<https://www.reuters.com/article/health-coronavirus-airlines-alitalia-idUSL8N2BB4GV>> accessed on 4 June 2021.

government abandoned any plans to sell the carrier – at least for the near future.

The substantial financial backing stemming from the nationalisation by the Italian State caused competing airlines such as Air Dolomiti, a wholly owned subsidiary of Lufthansa, Blue Panorama Airlines, and Neos to claim that the emergency fund granted to Alitalia through the decree created an uneven playing field in the airline industry. They raised this objection to the Italian parliament and claimed the *spirit* of the emergency fund measure should cover the entire Italian aviation sector, not just Alitalia.²⁴ As followed in the previous section, the *spirit* of a measure must be separated from its *effect*.

At the time of writing of this article, the EU has still not issued an official press release on Italy's decision to nationalise Alitalia; let alone conducted any State aid analysis, even though authorisation is pending.²⁵ Interestingly, the Commission approved other forms of Italian State aid to Alitalia such as compensation worth EUR 199.45 million on 4 September 2020, worth 73 EUR million on 29 December 2020, and worth EUR 24.7 million on 26 March 2021, all related to damages arising out of the pandemic.²⁶

Strikingly, 'pre-pandemic State aid' offered by Italy to Alitalia in the form of EUR 900 million loans in 2017 and a EUR 400 million loan in 2019, are both still under investigation by the Commission. These probes launched on 23 April 2018 and 28 February 2020, respectively, when compared to the 'post-pandemic

24 V Gibertini, 'New Alitalia Starts To Take Shape', AirlineGeeks, 30 March 2020 <<https://airlinegeeks.com/2020/03/30/new-alitalia-starts-to-take-shape/>> accessed on 4 June 2021.

25 'State Support to the Air Transport Sector: Monitoring developments related to the Covid-19 crisis', OECD, 22 April 2021 <<https://www.oecd.org/corporate/State-Support-to-the-Air-Transport-Sector-Monitoring-Developments-Related-to-the-COVID-19-Crisis.pdf>> accessed on 4 June 2021.

26 The financial packages involved constitute monetary compensation for damages directly suffered due to the coronavirus crisis (travel restrictions). In this context, it remains unclear why the EU has approved certain measures, whereas other measures such as the nationalisation are under investigation.

See European Commission Press Release, 'State aid: Commission approves €199.45 million Italian support to compensate Alitalia for damages suffered due to coronavirus outbreak', 4 September 2020 <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1538> accessed on 4 June 2021; European Commission Press Release, 'State aid: Commission approves €73 million of Italian support to compensate Alitalia for further damages suffered due to coronavirus outbreak', 29 December 2020 <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2540> accessed on 4 June 2021; European Commission Press Release, 'State aid: Commission approves €24.7 million of Italian support to compensate Alitalia for further damages suffered due to coronavirus outbreak', 26 March 2021 <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1423> accessed on 4 June 2021.

State aid', reflect the EU's urgency in assessing much-needed financial support to companies in struggling sectors such as the aviation industry.²⁷

Building upon its 14 per cent stake in Air France-KLM purchased in pre-Covid-19 times, the Dutch State agreed through a restructuring plan to lend the airline EUR 3.5 billion to prevent further deterioration of its financial position.²⁸ In return and after prolonged negotiations, the Board of Directors and trade unions representing the employees agreed to a reduction of their incomes.²⁹ In contrast to the pending approval concerning the nationalisation of Alitalia, the European Commission approved the Dutch bail-out as acceptable State aid under the Temporary Framework for State aid measures to support the economy during the Covid-19 crisis.

Similarly, by making use of the Temporary Framework for State aid, the Commission on 6 April 2021 approved the EUR 4 billion French measure to recapitalise Air France.³⁰ The approval was grounded on the recapitalisation being carried out through Air France's holding company – Air France-KLM – in which the French State owns a 14.3 per cent stake in. Notably, the Commission affirmed that the other strategic subsidiary, KLM, 'will not benefit from the aid'.

This triumvirate of Franco/Dutch/Italian airlines, with varying degrees of direct State investments extended to them, received such financial support with 'strings attached'. Despite the legislation specifying that recapitalisation will be carried out on market terms, this does not diminish unfair advantages that may arise – competitor discontent with the recent nationalisation of Alitalia serves as a precedent thereof.

27 European Commission Press Release, 'State aid: Commission opens in-depth investigation into Italian State loan to Alitalia', 23 April 2018 <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3501> accessed on 4 June 2021; European Commission Press Release, 'State aid: Commission opens in-depth investigation into €400 million Italian government loan to Alitalia', 28 February 2020 <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_349> accessed on 4 June 2021.

28 Dutch Government Press Release, 'Kabinet stemt in met herstructureringsplan KLM', 3 November 2020 <<https://www.rijksoverheid.nl/actueel/nieuws/2020/11/03/kabinet-stemt-in-met-herstructureringsplan-klm>> accessed on 4 June 2021; 'Dutch government says accepts dilution of Air France-KLM stake', Reuters, 6 April 2021 <<https://www.reuters.com/article/health-coronavirus-air-france-klm-nether-idUSL1N2LZOEP>> accessed on 4 June 2021.

29 European Commission Press Release, 'State aid: Commission approves Dutch plans to provide €3.4 billion in urgent liquidity support to KLM', 13 July 2020 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1333> accessed on 4 June 2021.

30 European Commission Press Release, 'State aid: Commission approves up to €4 billion French measure to recapitalise Air France', 6 April 2021 <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1581> accessed on 4 June 2021.

2.3 *National Security*

What primarily characterises measures under national security – deserving its own section – include (i) transparent or implicit motives to protect strategic sectors, industries, or businesses, (ii) invocation of sentiments arousing political discourse, and (iii) tension between the national and the foreign, usually sparked through an exclusionary element depriving foreign parties from investing in the State. Examples include restrictions, thresholds, bans, and guidelines on foreign direct investment (FDI).

By enacting Royal Decree-Law 8/2020 of 17 March, Spain expanded upon the powers we analysed in the state of alarm decree to limit the economic and social impacts of Covid-19.³¹ In the *chapeau*, the State noted that listed and unlisted Spanish companies faced acquisitions by foreign investors as their equity value declined, predominantly in ‘strategic sectors of our economy’. Upon this perceived threat, a modification to the FDI regime led to an *ex ante* authorisation mechanism for said industries. This governmental approval is mandatory when foreign investors³² acquire 10 per cent or more in the share capital of a Spanish company. Spain justified this urgent FDI suspension based on public security, public order, and public health, in strategic sectors falling under five categories, including critical infrastructures, critical technologies, supply of fundamental inputs (raw materials, food security, etc.), sectors with access to sensitive information, and the media.

On 29 March 2020, Australia reduced the monetary screening threshold for foreign investments to AUD 0.³³ Foreign investors must thus seek approval regardless of the value, nature, or objective of their foreign investment. This change announced by the Morrison Government concerns investments subject to the Foreign Acquisitions and Takeovers Act 1975. Australia’s Treasurer justified the FDI amendment to protect Australia’s national interest, whilst stressing the measure does not constitute an investment freeze.

31 Real Decreto-ley 8/2020, de 17 de marzo, de medidas urgentes extraordinarias para hacer frente al impacto económico y social del COVID-19. Boletín Oficial del Estado Núm. 73, de 18 de marzo de 2020, Referencia: BOE-A-2020-3824.

32 Residents of countries outside the European Union and the European Free Trade Association, or when the investor effectively participates in the management or control of the Spanish company. Royal Decree-Law 11/2020 of 31 March specifies EU or EFTA resident firms with 25 per cent or more of their capital owned by or voting rights controlled by non-EU or non-EFTA resident firms are deemed foreign investors as per the FDI regime.

33 Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 amended the Foreign Acquisitions and Takeovers Regulation 2015; both under authority of the Foreign Acquisitions and Takeovers Act 1975.

This temporary measure will remain in effect for the duration of the Covid-19 crisis. While this indefiniteness is similar to the Spanish FDI amendment, the Australian approach stresses national interest, arguably a broader ground than public security, public order, and public health.

The adoption of the EU's FDI Screening Regulation in March 2019, which entered into effect on 11 October 2020, now provides for an important instrument to protect vital European assets and technology from foreign interests.³⁴ Indeed, even foreign investments completed before the Regulation's application date can still be subject to *ex post* comments by Member States, and opinions from the Commission, for a period of up to 15 months after the investment completion date.³⁵ To accelerate this race for scrutiny, enforcement, and protection – and considering national FDI screening regimes already exist in 14 Member States³⁶ – the guidelines encourage the remaining 13 States to establish screening mechanisms to mitigate the security risks that foreign investments might cause in the EU.

The EU FDI Regulation differs in duration from the Spanish and Australian amendments that altered temporal scopes of existing FDI screening regimes. It also sharply contrasts in terms of application. The Spanish legislation refers to a 10 per cent or more share capital constraint, which will raise scrutiny when exceeded. The even stricter Australian nil-rate threshold virtually compels all foreign investments to obtain government approval. To position the EU approach on this spectrum proves ambiguous as the Regulation is silent on the subject; with no minimum or maximum threshold amount for screening, any foreign direct investment could be covered.

2.4 Public Health

It is a fallacy to associate all Covid-19 policies with public health concerns. The above analysed measures that aim to tackle disruptions in political and economic domains – albeit essentially triggered by the pandemic – confirm the protectionist, societal, and security aims States might prioritise. Dedicating

34 Regulation (EU) 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, OJ L 79I, 21.3.2019, p. 1–14. See N Lavranos, "The new EU Regulation on the screening of foreign direct investments: A tool for disguised protectionism?" EFILA Blog, 22 January 2019 <<https://efilablog.org/2019/01/22/the-new-eu-regulation-on-the-screening-of-foreign-direct-investments-a-tool-for-disguised-protectionism/>> accessed on 4 June 2021.

35 For example, a foreign investment completed in May 2020 can be subject to *ex post* comments from 11 October 2020, the enforcement date of the Regulation, until August 2021.

36 Austria, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Spain, and the Netherlands.

this section to public health effectively separates measures devoted to this goal in *spirit* and in practice. Confiscation of public health related goods and compelling companies to produce medical supplies are salient examples thereof.

Distinguishing this section from the national security segment, despite the overlap, reflects how courts deal with legalistic definitions of ‘security’ and ‘public health’. Interestingly, EU jurisprudence developed the doctrine of ‘overriding reasons relating to the general interest’ covering public policy, public security, and public health grounds.³⁷

On 18 April 2020, Canada announced that it would review foreign investments related to public health to ‘enhanced scrutiny’ as per the Investment Canada Act.³⁸ Despite the policy statement referring to national security risks, it differs from the Spanish and Australian approaches as it interprets national security broadly to include the health and safety of Canadian citizens. It also makes explicit reference to protecting businesses related to public health, as well as to the supply of necessary goods and services. Any foreign investment connected to these areas, regardless of its value or whether it will acquire a controlling or non-controlling stake in a Canadian business, will be subject to increased scrutiny under the Investment Canada Act.

Notably, the measure will apply until the ‘economy recovers from the effects of the Covid-19’.³⁹ This is a broad temporal scope as recovery implies a longer duration than abating the health crisis and stymying the spread of Covid-19 across Canada, or even the globe.

On 13 March 2020, Switzerland issued an ordinance on measures to combat Covid-19.⁴⁰ Section 4, which focused on the provision of essential medical goods, outlined procedures regarding allocation and procurement of such supplies. The most striking measures focused on confiscation and manufacturing. In the instance that essential medical goods cannot be procured, Article 4j

37 CJEU Case C-531/06 *Commission v Italy* ECLI:EU:C:2009:315. The Court of Justice of the European Union recognised public health as an overriding reason relating to the general interest in paragraph 51: ‘Second, the protection of public health is one of the overriding reasons in the general interest which can justify restrictions on the freedoms of movement guaranteed by the Treaty such as the freedom of establishment (see, inter alia, Hartlauer, paragraph 46) and the free movement of capital.’

38 Canadian Ministerial Statement, ‘Policy Statement on Foreign Investment Review and COVID-19’, 18 April 2020 <<https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81224.html>> accessed on 4 June 2021.

39 Ibid.

40 818.101.24 Ordonnance 2 du 13 mars 2020 sur les mesures destinées à lutter contre le coronavirus. Albeit the former law was repealed, measures such as confiscation are still valid and in force based on 818.101.24 Ordonnance 3 du 19 juin 2020 sur les mesures destinées à lutter contre le coronavirus (COVID-19).

granted the Federal Department of Home Affairs the authority to confiscate essential medical goods held by companies by compensating at sale price.

Similarly, if the provision of essential medical goods cannot otherwise be guaranteed through procurement, the Federal Council, based on Article 4*k*, could compel manufacturers to produce such supplies. Less intrusive was the measure to prioritise such medical goods or to increase the production volumes thereof. The State could contribute towards production costs when manufacturers endure financial impediment arising from the opportunity cost of cancelling private orders or due to the increased burden of converting production lines.

The United States also opted for manufacturing measures bearing a close resemblance to the Swiss approach. This involved compelling companies to produce essential goods in response to the Covid-19 pandemic; a measure associated with US wartime economies.

Based on the Defense Production Act of 1950, the United States compelled General Motors Company to switch its production to manufacture medical ventilators.⁴¹ The Memorandum of 27 March 2020 granted the Secretary of Health and Human Services the authority to compel General Motors to ‘... accept, perform, and prioritize contracts or orders for the number of ventilators that the Secretary determines to be appropriate.’⁴² This open-ended request, combined with the silence on the temporal scope, added to the indefiniteness of the measure’s duration. And even though the order only applied to General Motors, it acted as a major precedent for another measure under the Defense Production Act of 1950; reflected when the Memorandum of 2 April 2020 compelled the 3M Company to produce N-95 respirators.⁴³

2.5 *Summary*

By analysing the preceding four categories, a typology emerges:

- (1) State Intervention: a measure wherein the State influences the operation of financial markets or industries.
- (2) State Participation: a measure wherein the State pursues a direct investment in the market.

41 Memorandum on Order Under the Defense Production Act Regarding General Motors Company, Secretary of Health and Human Services, 27 March 2020.

42 Ibid.

43 Memorandum on Order Under the Defense Production Act Regarding 3M Company, Secretary of Homeland Security, 2 April 2020.

This branches into sub-headings of measures with the dominant aim or *spirit* of:

- (a) National Security: characterised by the motive to protect strategic sectors, whilst invoking political sentiments, and a tension between the national and the foreign.
- (b) Public Health: dedicated to said policy in principle and in practice; intrinsically related to the healthcare industry.

All the examined Covid-19 measures can be classified under a set combination. For example, the nationalisation of Alitalia constitutes a 2A measure. Overlaps between sections can also be expressed. For instance, enhanced scrutiny of FDI under the Investment Canada Act is predominantly a 1B measure. Yet, referring to it as a 1B-A measure is justifiable. And as clarified in previous sections, all state participation measures, by definition, are forms of state intervention, but not vice versa, hence why a bifurcation in the typology proves necessary.

By no means should one dogmatically follow this typology. On the contrary, it should be conceptually dismantled by applying other policy areas to test its validity.⁴⁴ It serves a pedagogical purpose; it reveals patterns. These transcend geographies, political leanings, cultures, and economic schools of thought.

On a meta-level, across all four sections, the executive branch implemented most measures – not the legislator. This pattern of States opting for executive emergency decrees overshadows procedures of parliamentary deliberations and conventional legislative processes. As the pandemic escalates, it raises concerns over democratic erosion, civil liberties, and legitimacy.

44 To challenge this typology, Covid-19 measures from policy areas including investment facilitation, tax relief, and SME support need to be applied. In the grouping of tax relief, the EU Commission Decision on 3 April 2020 waived the VAT on imports of medical equipment to combat the pandemic. Through requests by all Member States, the Commission based the waiver on Article 74 of Council Regulation (EC) No 1186/2009 to grant relief for the ‘benefit of disaster victims’, as well as Article 51 of Council Directive 2009/132/EC. This Covid-19 response to ease financial burdens of acquiring masks, testing kits, and ventilators from third countries qualifies as a 1B measure. However, under SME support, the United Kingdom’s Coronavirus Business Interruption Loan Scheme (CBILS) tests the typology. There is no mention of public health or national security goals. In fact, the loans offered of up to GBP 5 million to domiciled businesses severely impacted by the pandemic with an annual turnover of up to GBP 45 million reflect the aim of maintaining economic stability. Hence, either a new branch needs to be included – ‘C. Economic Stability’ – or this measure, with the objective of preserving jobs and social cohesion/order can be broadly interpreted under ‘A. National Security’.

By observing the duration of measures, another pattern crystallises. Characterised by their indefiniteness, most Covid-19 responses remain valid until the pandemic subdues. This implied permanency stems from the complexity of forecasting an ‘end’ to the pandemic. Yet, even measures with short-term effect – such as the Spanish state of alarm limited to fifteen calendar days – lose their temporariness as the executive considerably extended the respective temporal scope. States of emergency become states of permanency.

3 Investment Protection Standards Contained in Different Investment Treaties

In the past decade, States concluded more than 3300 IIAs that differ in terms of content and conclusion dates, as well as the economic and geographical position of Contracting Parties towards the respective IIAs.⁴⁵ To capture these nuances, we selected several IIAs that illustrate this wide spectrum.

At one end of the spectrum, we analysed the Netherlands-Armenia BIT (2006). Notably, it reflects the ‘old-school’ European model of broadly formulated protection standards that served as a blueprint for most European countries; up until very recently.

To avoid a Eurocentric approach, we opted to analyse the China-Tanzania BIT (2013) as well as the Rwanda-USA BIT (2008), both of which can be placed in the middle of the spectrum.

At the other end of the spectrum, we selected NAFTA (1994), CETA (2016), and the CPTPP (2018) agreements. Typically referred to as ‘new generation’ agreements, they contain significantly more detailed provisions than European IIAs.

By following this methodology, the study presents a differentiated picture, without claiming the mosaic to be complete.

3.1 *The Fair and Equitable Treatment (FET) Standard – Typology of FET Standards*

Without doubt, the FET standard is the most often used and thus most important investment protection standard, which is relied upon in most, if not all, investment treaty arbitration disputes.

45 UNCTAD Issues Note 2019-3, ‘Taking Stock of IIA Reform: Recent Developments’, June 2019 <https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf> accessed on 4 June 2021.

As the examples below illustrate, the FET standard underwent significant changes; from a broadly formulated standard with virtually no restrictions such as in the Netherlands-Armenia BIT⁴⁶ to a closed list of breaches as in the case of CETA.⁴⁷ Indeed, the effort to restrict the broad FET definition was already visible when the NAFTA Contracting Parties adopted their Note of Interpretation in 2001.

Compared to the Netherlands-Armenia FET standard, negotiators formulated the China-Tanzania FET⁴⁸ standard more restrictively, by limiting the FET standard to the denial of fair judicial proceedings and obvious discriminatory and arbitrary measures.

While originally the NAFTA FET standard⁴⁹ proved fairly broad, the interpretative note lowers the level of protection of the FET standard to the absolute minimum. It does not require treatment beyond the customary international law minimum standard of treatment of aliens. This effectively turns back the FET standard to the early twentieth century when the protection of aliens – or rather foreigners – became gradually recognised as a legal obligation of host States (see also section 3.2 below on FET jurisprudence).

The Rwanda-USA FET standard⁵⁰ adopts the same standard as in NAFTA, thereby clearly highlighting the distinct North American approach when compared to the European and Asian approaches.

The CETA FET standard essentially builds on the NAFTA FET standard as interpreted by NAFTA arbitral tribunals. However, it contains a novel feature by providing for a closed list of specific FET breaches.⁵¹ According to this closed

46 Article 3 (1), Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Armenia and the Kingdom of the Netherlands, 10 June 2005 (Netherlands-Armenia BIT). *See* Annex I.

47 Article 8.10, Comprehensive Trade and Economic Agreement between Canada and the European Union, 30 October 2016 (CETA). Yet even this limited set of breaches, which includes denial of justice and breaches of due process, can be expanded on. This is initiated through a party request to review the obligation to provide fair and equitable treatment as per Article 8.10. The Committee on Services and Investment then develops such recommendations for submission to the CETA Joint Committee for approval. *See* Annex I.

48 Article 5, Agreement between the Government of the People's Republic of China and the Government of the United Republic of Tanzania concerning the Promotion and Reciprocal Protection of Investments, 24 March 2013 (China-Tanzania BIT). *See* Annex I.

49 Article 1105, North American Free Trade Agreement, 17 December 1992 (NAFTA). *See* Annex I.

50 Article 5, Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, 19 February 2008 (Rwanda-USA BIT). *See* Annex I.

51 Article 8.10(2), CETA. *See* Annex I.

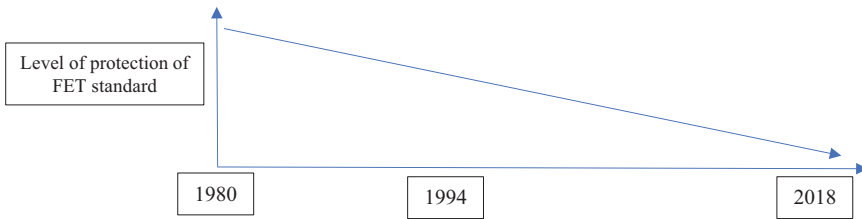


FIGURE 1 The level of protection of the FET standard over time

list, only measures that fall within the closed list could be considered as potential breaches of the FET standard. Moreover, since this closed list is binding on arbitral tribunals, it significantly limits their interpretative scope.

The CPTPP FET standard⁵² combines the customary international law principle of the NAFTA interpretative note without however explicitly limiting it to the minimum standard of customary international law. This suggests the FET standard is closer to CETA or even the European FET standard; depending on which 'customary international law principles' are applied and how they are interpreted. These examples illustrate the broad range of FET standards that different States have adopted in their IIAs over time.

Essentially, while the European style FET standard is unconditional and broadly formulated, the other FET examples contain descriptions of specific treatment that could be considered a violation of the FET standard. NAFTA goes one step further by setting the standard that must be applied by arbitral tribunals, i.e. not beyond the minimum standards of customary international law, while CETA even goes one more step further by prescribing a closed list of FET breaches.

In short, one can identify a sliding scale of FET standards, depending on when the IIAs were concluded; the newer the IIA, the lower the FET standard of protection (see Figure 1). Over time, a convergence between the European and North American FET standard has taken place, in the sense that in CETA the Europeans effectively adopted the NAFTA FET standard, while the Asian FET standard lies somewhere in between, but clearly positioned closer to the NAFTA standard.

52 Article 9.6, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 March 2018 (CPTPP). See Annex I.

3.2 *FET Jurisprudence*

These differences are also reflected in the relevant FET jurisprudence. For example, while in *Saluka*,⁵³ which concerned the Netherlands–Czech Republic BIT, the arbitral tribunal interpreted the FET standard rather broadly, this approach can be contrasted with the NAFTA *Glamis Gold*⁵⁴ arbitral tribunal, which ‘froze’ the NAFTA FET standard to the significantly lower level of the *Neer*⁵⁵ standard. While there is no CETA jurisprudence yet, it can be expected that the CETA standard will be interpreted at least as strictly as the NAFTA standard.

If one applies the above to the various Covid-19 measures, it seems that investors have a better chance of successfully relying on the broad European style FET standard compared to the NAFTA or CETA FET standards. The Asian standard lies somewhere in between the two. Thus, investors’ chances of successfully relying on the FET standard against Covid-19 measures prove analogous to the level of FET protection (see Figure 2).

3.3 *Most-Favoured-Nation Treatment (MFN)/National Treatment (NT) Standard*

In the context of Covid-19 measures, it is clear that the issue of non-discriminatory treatment – be it either compared to other third state investors (MFN)

53 *Saluka Investments B.V. v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2016, paras 301–304 <<https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>> accessed on 4 June 2021. The tribunal held that the FET standard closely tied with the notion of legitimate and reasonable expectations. In determining whether there has been a breach of the FET standard, a ‘balancing’ of interests between investors and host States needs to be considered. It thus wanted to deviate from situations in which ‘... if their terms were to be taken too literally, they would impose upon host States’ obligations which would be inappropriate and unrealistic’. Despite nuanced discrepancies, the tribunal cited *Tecmed*, *CME*, *Waste Management*, and *OEPC* to support this viewpoint. See Annex II.

54 *Glamis Gold, Ltd. v The United States of America*, UNCITRAL, Award, 8 June 2009, paras 600–602 and 616 <<https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf>> accessed on 4 June 2021. On whether the FET standard has ‘evolved’ as argued by the Claimant, the tribunal held that finding a breach of FET standard remains as stringent as it was under the 1926 case *Neer v. Mexico*. It also acknowledged that a change in customary international law must meet the two-step test of: (1) ‘a concordant practice of a number of States acquiesced in by others,’ and (2) ‘a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)’. See Annex II.

55 *L.F.H. Neer & Pauline Neer (USA) v United Mexican States*, US–Mexico General Claims Commission, 15 October 1926, 4 R.I.A.A. 60 <https://legal.un.org/riaa/cases/vol_IV/60-66.pdf> accessed on 4 June 2021.

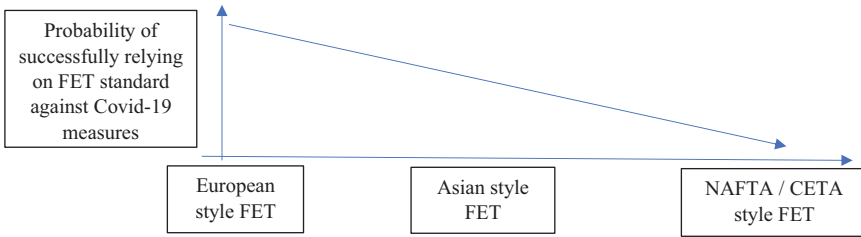


FIGURE 2 Probability of successfully relying upon the FET standard depending on the respective IIA invoked

or domestic investors (NT) who are in the same situation or ‘in like circumstances’ – is of central importance.

As mentioned above, certain Covid-19 measures have been directed against all foreign investors, such as the closure of all borders for any foreign goods and persons, while other measures did not apply to investors or persons from selected countries, for example the US ban on all air traffic from Europe, which explicitly excluded air traffic from the United Kingdom and Ireland.⁵⁶ Likewise, certain Covid-19 measures have been directed only to domestic businesses, this includes the financial support granted to national air carriers or even complete nationalisations of said domestic businesses.

In other words, a different treatment among foreign investors and between foreign investors has been taking place, which could potentially lead to breaches of MFN and NT provisions enshrined in IIAs. As in the case with the FET standard, the wording of the MFN/NT provisions differ in the various IIAs we examined in our analytical framework.

As can be expected, the Netherlands-Armenia BIT contains the broadest possible MFN and NT standards,⁵⁷ while all other IIAs include the additional condition of ‘like circumstances’ and are generally formulated much more restrictively. These IIAs also separate the MFN and NT standards in two separate provisions, which enable further distinctions to be made between those two standards. The Rwanda-USA MFN and NT provisions are an example of that, which in addition, distinguish in the MFN standard between the treatment of *investors* in (1) and *investments* in (2), although the language is near identical for both.⁵⁸

⁵⁶ However, the US ban eventually barred flights from the United Kingdom and Ireland.

⁵⁷ Article 3(2), Netherlands-Armenia BIT. See Annex III.

⁵⁸ Articles 3 and 4, Rwanda-USA BIT. See Annex III.

The China-Tanzania MFN/NT standard is noticeably similar to the Rwanda-USA wording though it extends the NT standard to ‘associated investments’.⁵⁹ Whereas the CPTPP MFN/NT standard⁶⁰ and the NAFTA MFN/NT standard⁶¹ are fairly similar – if not indistinguishable were it not for minor additions such as ‘in its territory’ per the CPTPP – CETA introduces an additional restriction by referring to a ‘covered investment’, which intends to exclude investments and investors that are not covered by CETA.⁶²

3.4 *The MFN/NT Jurisprudence*

The *Cargill v Mexico*⁶³ NAFTA case provided a useful analysis to determine whether a breach of the MFN/NT standard occurred. The arbitral tribunal started its assessment by highlighting the three requirements for a successful claim to be brought under Article 1102; (i) that the investor/investment(s) be in ‘like circumstances’ with domestic investors/investment(s), (ii) that the treatment provided was less favourable compared to treatment accorded to domestic investors/investment(s), (iii) and that the treatment must be ‘with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments’.

The tribunal also held that the ‘like circumstances’ requirement differs from the ‘like products’ notion – and thus, relevant GATT law and WTO jurisprudence concerning ‘like products’ proves irrelevant. It went so far as to argue that had the NAFTA drafters intended to equate ‘like circumstances’ with ‘like products’, they would have done so.⁶⁴ This follows a similar approach as the tribunal’s reasoning in *Methanex*.⁶⁵

Crucially, as held by the tribunal, ‘like circumstances’ is determined by reference to a measure’s *rationale* and its respective policy objective; a decision inspired through precedent set by *GAMI*⁶⁶ and *Pope &*

59 Articles 3 and 4, China-Tanzania BIT. See Annex III.

60 Articles 9.4 and 9.5, CPTPP. See Annex III.

61 Articles 1102 and 1103, NAFTA. See Annex III.

62 Articles 8.6 and 8.7, CETA. See Annex III.

63 *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009, paras 188–189, 193–196, 206, 213–214, 219–221 <https://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf> accessed on 4 June 2021. See Annex IV.

64 *Ibid.*, para 193.

65 *Methanex Corporation v United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005 <<https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf>> accessed on 4 June 2021.

66 *GAMI, Investments Inc. v United Mexican States*, UNCITRAL, Final Award, 15 November 2004 <https://www.italaw.com/sites/default/files/case-documents/ita0353_0.pdf> accessed on 4 June 2021.

Talbot.⁶⁷ Thus, both a measure's *intent* and *effect* prove pertinent to the analysis. Hence, as far as IIAs are concerned that contain the 'like circumstances' condition, the *rationale* for the measure in question is the main relevant factor for determining whether the investor was in 'like circumstances'. The second question to determine is whether there was a 'less favourable treatment' accorded to the foreign investor.

Evidently, for IIAs that do not contain the 'like circumstances' condition, only the second question needs to be determined. Accordingly, for every Covid-19 measure, it must be assessed whether these conditions are met to conclude a breach of the MFN or NT standard occurred.

3.5 *Direct and Indirect Expropriation*

Most if not all potential claims against Covid-19 measures will (also) be based on the ground of direct or indirect expropriation of the investments protected by IIAs. This is particularly the case because, typically, States that adopted Covid-19 measures with an expropriatory effect have not offered any compensation. However, IIAs usually oblige States to pay compensation to affected investors; failing to do so results in a breach of the IIA.

As is the case with the other protection standards discussed so far, significant differences exist between the broad, all-encompassing European approach as compared to the North American and Asian approaches.

The Netherlands-Armenia BIT contains a broadly worded provision regarding (in)direct expropriation.⁶⁸ Of note is the undefined 'public interest', which can be interpreted widely, encompassing the protection of public health but also – arguably – the protection of the economy.

The China-Tanzania (in)direct expropriation provision⁶⁹ is comparable to the Netherlands-Armenia BIT – saliently, as it also refers to a 'public interest' requirement – whereas the Rwanda-USA BIT,⁷⁰ NAFTA,⁷¹ CPTPP,⁷² and CETA⁷³ contain detailed definitions, restrictions, and exceptions.

67 *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 <<https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf>> accessed on 4 June 2021.

68 Article 6, Netherlands-Armenia BIT. See Annex v.

69 Article 6, China-Tanzania BIT. See Annex v.

70 Article 6, Rwanda-USA BIT. See Annex v.

71 Article 1110, NAFTA. See Annex v.

72 Article 9.8, CPTPP. See Annex v.

73 Article 8.12, CETA. See Annex v.

From the above, it becomes clear that all IIAs provide protection against direct and indirect expropriation, while the new generation IIAs contain detailed restrictions and exceptions, which arguably make it more difficult for investors to claim a breach of the (in)direct expropriation provision.

Nonetheless, all the IIAs used as examples state similar main conditions regarding expropriatory measures, namely, that they must be taken for a public purpose, in accordance with due process of law, in a non-discriminatory manner, and upon payment of prompt, adequate, and effective compensation. Accordingly, Covid-19 measures must meet all those conditions in order to be in conformity with the IIAs.

While we may assume for the benefit of the States that most Covid-19 measures have been adopted with the primary aim of protecting the public health and/or the economy, our examples mentioned in Section 2 illustrate that certain Covid-19 measures have not been adopted in a non-discriminatory manner.

More importantly, so far, no State has paid adequate compensation, although some of the support measures might qualify as indirect compensation. Consequently, *prima facie*, investors could successfully base their claim due to a breach of the (in)direct expropriation provision contained in IIAs, unless of course States can justify their Covid-19 measures on the justification and exception grounds contained in IIAs, which will be discussed in the next section.

4 Treaty-Based Justifications for the Adoption of Measures in Response to Covid-19

Typically, IIAs contain several grounds of justifications that States could potentially rely upon in order to justify their Covid-19 measures. As will be illustrated in this section, the wording and type of justification vary between the examined IIAs. They also differ in terms of the protection standards provided and to the consequences resulting from relying on those justifications.

4.1 *Covid-19 Measures Justified under FET*

As highlighted above, the scope of the FET standard has over time been progressively restricted from the perspective of investment and investor protection. Conversely, the policy space of States has increased, thereby allowing them to adopt measures whilst under a significantly reduced risk of being exposed to treaty claims arising out of FET violations.

Accordingly, Covid-19 measures adopted by European States are more likely to result in FET breaches compared to measures adopted under NAFTA, CETA, or the CPTPP.

More specifically, discriminatory or arbitrary measures that do not reach the level of being ‘fundamental’, ‘manifest’, ‘targeted’, ‘outrageous’, or ‘egregious’ in nature, are essentially excluded as FET breaches by CETA and NAFTA and arguably also by the CPTPP.

Consequently, States that have signed North American style investment treaties will face fewer difficulties in justifying any Covid-19 measures, which *prima facie* may be considered to be in breach of the FET standard as compared to their European counterparts.

At the same time, however, it should be noted that arbitral tribunals enjoy a large margin of appreciation under European style BITs. This enables arbitral tribunals to nevertheless decide that – in the particular context of the Covid-19 crisis – certain measures were justified despite the fact that they otherwise would be considered to be in breach of the FET standard.

4.2 *Covid-19 Measures Justified under MFN/NT*

Essentially, the same conclusion can be drawn with regard to the justification of Covid-19 measures under the MFN/NT standards. The use of qualifying terminology such as ‘in like circumstances’ in NAFTA and CPTPP or ‘in like situations’ in CETA, enables States to more easily adopt Covid-19 measures that distinguish between, for example, domestic companies or industries and foreign ones.

In contrast, European States which are stuck with their European style BITs will have to design and apply their Covid-19 measures more carefully and in such a way that they will not provide a basis for a claim grounded on alleged breaches of the MFN/NT standards.

At the same time, it must be acknowledged that investment treaty claims solely based on alleged breaches of the MFN/NT standards have rarely been successful so far. Thus, the risk for States remains relatively low compared to potential violations of the FET standard.

4.3 *Covid-19 Measures Justified under (in)Direct Expropriation*

As regards the justifications for Covid-19 measures in the context of (in)direct expropriation, the starting point is the protection of the ‘public interest’ or ‘public purpose’.

The IIAs examined within this study do not provide a definition of ‘public interest’ or ‘public purpose’. Accordingly, a considerable range of public interests arguably fall within their scope. Indeed, there can be little doubt that the

protection of the public health, when broadly understood, falls within the scope of ‘public interest’.⁷⁴

Also, the protection of the economy or even particular sectors, such as tourism, and/or companies considered of central importance to a State, such as national airlines or car manufacturers, could potentially be considered to fall within the scope of public interest.⁷⁵

Consequently, States enjoy a wide margin of appreciation to adopt a variety of measures which could be qualified as being adopted for the protection of ‘public interest’ or ‘public purpose’. This practice has long been accepted in the context of international trade law as is also confirmed by the long-standing jurisprudence of Article XX GATT and its *chapeau*,⁷⁶ which by extension, is considered to be applicable to the realm of international investment law.

However, the examined IIAs differ significantly concerning the consequences they attach to measures that have been arguably adopted for the protection of the public interest.

Whereas the Netherlands-Armenia BIT does not provide any further details in this regard, the North American approach such as in NAFTA, the Rwanda-USA BIT, and CETA, as well as the Asian approach in CPTPP, define in detail the circumstances in which a measure *does not* constitute indirect expropriation.

In other words, if such measures fulfil certain conditions, they cannot be considered an indirect expropriation *ab initio*, which consequently excludes the possibility of the investor to successfully rely on the ground of (in)direct expropriation.

Thus, the Rwanda-USA BIT contains the formulation of excluding non-discriminatory measures from the scope of indirect expropriation if they are designed and applied for the protection of ‘legitimate public welfare objectives, such as public health, safety and the environment’⁷⁷ which is also contained more or less in similar wording in CETA and the CPTPP.

In this context, it is noteworthy that the CPTPP contains a footnote which explicitly refers to measures, which have been adopted by many States in the context of the Covid-19 pandemic, by referring to:

74 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, paras 291 et seq. <<https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>> accessed on 4 June 2021.

75 WTO Analytical Index, ‘GATT 1994 – Article XX (Jurisprudence)’, December 2020 <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_jur.pdf> accessed on 4 June 2021.

76 *Ibid.*

77 Article 6 and Annex B, Rwanda-USA BIT. *See* Annex v.

regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.⁷⁸

Arguably, this footnote provides the most detailed and explicit justification for Covid-19 measures related directly to protective masks, ventilators, testing equipment, and research linked to developing a vaccine. Thus, within the context of the broad public health exception contained in the CPTPP, which arguably encompasses any public health issue, it explicitly refers to measures related to vaccines and ventilators, which are *a priori* related to a pandemic crisis such as Covid-19. In this sense, one could claim that the CPTPP contains an example of how IIAS could be made ‘pandemic-proof’.

As far as the protection of the economy as a ‘public interest’ is concerned, none of the examined IIAS explicitly refers to this notion, although the wording ‘legitimate public welfare objectives’ used in the Rwanda-USA BIT, CETA, and CPTPP could be interpreted broadly, and thus encompasses the protection of the economy as being part of the public welfare.

Besides the fact that newer IIAS manifestly exclude non-discriminatory measures adopted for the protection of public interests from being qualified as indirect expropriation – except in rare circumstances – these IIAS also shift the burden of proof from the State to the foreign investor, who must prove that ‘rare circumstances’ exist, which would make it possible to consider a certain Covid-19 measure as indirect expropriation. This will not be easy for a foreign investor to achieve.

In short, the chances of States to justify their Covid-19 measures as an exception to the indirect expropriation clause increases with the more recently concluded IIAS (see Figure 3).

4.4 *Jurisprudence on Justifications Used by States*

As the arbitral tribunal in *Philip Morris v Uruguay* summarised, the protection of public health has long since been recognised as an essential manifestation of the State’s police power.⁷⁹

Similarly, the NAFTA arbitral tribunal in the *Chemtura v Canada* case stated that the measure to prohibit a certain chemical for the protection of the public

⁷⁸ Annex 9-B, Footnote 37, CPTPP. See Annex v.

⁷⁹ *Philip Morris v Republic of Uruguay* (n 74) para 291.

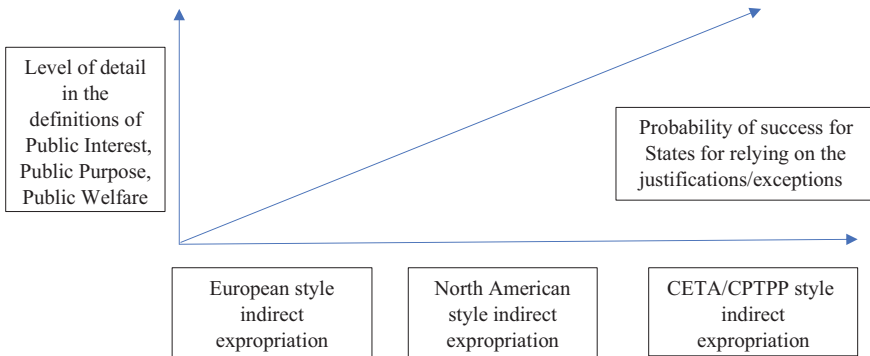


FIGURE 3 Probability of success for States relying upon justifications/exceptions

health is ‘in any event [...] a valid exercise of the Respondent’s police powers’ under Article 1105 NAFTA, in particular since it was adopted in a non-discriminatory manner.⁸⁰ Consequently, the arbitral tribunal concluded that such a measure does not constitute an expropriation.

It is noteworthy that the *Philip Morris* arbitral tribunal referred also to other IIAs in support and confirmation of its view, such as the 2004 and 2012 US model BITs, the 2004 and 2012 Canada model BITs, CETA, and the EU-Singapore FTA, respectively.⁸¹

Thus, it seems that the essential element in this context is whether the measure in question has been designed and applied in a non-discriminatory manner.

If it can be shown that a Covid-19 measure has been designed or applied in a discriminatory manner, this would be reason for considering such a measure to be nonetheless in violation of the (in)direct expropriation provision.

4.5 *Essential Security Exception*

So, while most Covid-19 measures, which clearly have been adopted for the purpose of protecting public health, will not easily lead to a violation of the (in)direct expropriation standard, Covid-19 measures that have been adopted with the aim to protect, or rather, support the domestic economy are arguably more difficult to justify under the essential security exception.

80 *Chemtura Corporation v Government of Canada*, UNCITRAL, Award, 2 August 2010, para 266 <https://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf> accessed on 4 June 2021.

81 *Philip Morris v Republic of Uruguay* (n 74) para 300.

The measures adopted by Argentina when it was suffering a deep economic crisis in the early 2000s resulted in numerous arbitral awards, which have discussed such measures for the protection of the economy under the heading of ‘essential security interests’ as contained in Article XI of the USA-Argentina BIT.⁸²

It is worth mentioning that the Netherlands-Armenia BIT and the China-Tanzania BIT do not contain an essential security interest provision, whereas the Rwanda-USA BIT⁸³ and NAFTA⁸⁴ contain an essential/national security exception limited to real security issues.

CETA contains general exceptions in addition to a specific security exception, although these exceptions do not explicitly mention essential economic interests.⁸⁵

Of note is the CPTPP,⁸⁶ which in addition to the security exception, also contains a provision regulating the adoption of temporary safeguard measures. This exception could be a particularly useful ground of justification regarding economic support measures.

5 Conclusion

The analysis in this article illustrates that Covid-19 measures carry an inherent risk of unfairly or disproportionately affecting foreign investors and their investments, which in turn could form the basis for investment treaty claims.

More specifically, the comparative analysis of various IIA provisions illustrates that, from the perspective of affected foreign investors, the ‘old-school’ European IIAs offer the best chances of successfully bringing a claim against a

82 Article XI, Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991 (US-Argentina BIT). ‘This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests’. See *Continental Casualty Company v Argentina*, ICSID Case No ARB/03/9, Award, 5 September 2008 <<https://www.italaw.com/sites/default/files/case-documents/ita0228.pdf>> accessed on 4 June 2021; *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005 <<https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf>> accessed on 4 June 2021.

83 Article 18, Rwanda-USA BIT. See Annex VI.

84 Article 2102, NAFTA. See Annex VI.

85 Article 19.3, CETA. See Annex VI.

86 Article 29.3, CPTPP. See Annex VI.

State. At the same time, new generation IIAs, which contain significantly more exceptions and more circumscribed provisions, lower States' risk of exposure to investment treaty claims.

The general overview emerging from this analysis is that, when States adopt Covid-19 measures, they should do so in a manner that is consistent with their obligations under their IIAs, in order to reduce or mitigate any exposure towards investment claims. This is not an easy task, considering the fact that many States have concluded a comprehensive range of IIAs spanning the past 50 years, which means that their obligations range from considerably broad to much narrower commitments. Indeed, the use of the MFN clause could enable foreign investors to rely on the more broadly formulated IIAs and import these higher protection standards into the more restrictive new generation IIAs. Therefore, States should use their older IIAs as the baseline for their risk analysis.

The authors conclude that States should include 'pandemic-proof' provisions in their IIAs during prospective (re)negotiations or by agreeing on joint interpretations. Taking inspiration from the CPTPP health protection exception footnote discussed above,⁸⁷ a self-standing provision could – and indeed should – be included in IIAs stating that, in a global pandemic situation, States have the right to adopt non-discriminatory and proportionate measures for the protection of public health and the protection of essential economic interests. Arguably, this could also be done by way of joint binding interpretations of the Contracting Parties to the IIAs without the need for formal amendment of the IIAs.

However, such measures must be strictly and explicitly limited in time for the duration of the pandemic. If arbitral tribunals deem such measures to be discriminatory or disproportionate, foreign investors should be able to obtain compensation for their damages – at least under the 'old-school' European style IIAs.

Alas, Covid-19 is not the first and likely not the last pandemic to impact foreign investors and States alike – and as investment treaty arbitration will continue to evolve – States should consider making their IIAs 'pandemic-proof'.

87 Annex 9-B, Footnote 37, CPTPP. See Annex V.