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Energy Arbitration in Latin America: Potential State Defences in Future Covid-19-Related Cases

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Energy Arbitration in Latin America: Potential State Defences in Future Covid-19-Related Cases

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Summary

IN SUMMARY

States in Latin America, as around the world, have taken strong measures to combat the covid-19 pandemic. Some of these measures have inevitably impacted the economy and hurt businesses in Latin America, including businesses in the energy sector. As a result, some foreign investors in Latin America may see the value of their investments diminish and may look to bring claims against their host states pursuant to bilateral investment treaties (BITs) or free trade agreements (FTAs). In addition to defences a state can make specific to the merits of a particular claim, a state may also have available defences based on the wider social circumstances. These defences, whether found in the applicable treaty itself or in international customary law, are based on the premise that in certain exceptional circumstances a state may be excused from responsibility even if it otherwise has breached its international obligations. In analysing these defences, we look back to the Argentina investor-state arbitrations in the early 2000s, many of which involved the energy sector, and Argentina's claims that the government measures at issue in those cases were justified due to a state of necessity.

DISCUSSION POINTS

- Investor-state energy arbitration in Latin America.
- Covid-19-related government measures affecting the energy sector.
- Emergency clauses in BITs.
- Force majeure under customary international law.
- State of necessity under customary international law.

REFERENCED IN THIS ARTICLE

- Articles 23 and 25 of the International Law Commission's Articles on State Responsibility.
- *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela*.
- *Sempra Energy International v Argentine Republic.*
- *Impregilo SpA v Argentine Republic I*.
- *National Grid plc v Argentine Republic*.
- *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*.
- *CMS Gas Transmission Company v Republic of Argentina*.
- *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic.*
- *Unión Fenosa Gas, SA v Arab Republic of Egypt*.
- *Bischoff* case (Germany–Venezuela Mixed Claims Commission).

In past years, we have provided a high-level overview of the regulatory frameworks in Latin America that govern the energy sector, and described how regulatory changes have led to the most significant energy-related international arbitrations (both investor state and commercial) in the region this past decade. We also provided our view regarding current and future trends in the region.[1] This year, given the covid-19 pandemic, we have narrowed our

focus to how the pandemic has affected the energy sector in Latin America and may affect investor-state disputes in the future.

This year's chapter is organised as follows: first, we describe some of the covid-19-related measures Latin American countries have taken that have impacted the energy sector.[2] Second, we discuss potential claims investors may be able to bring to challenge these state measures. Finally, we examine defences that may be available to states under investment treaties and customary international law to avoid responsibility in exceptional circumstances. Our final analysis draws upon prior investor-state cases, including energy cases in Latin America in which force majeure or state of necessity was alleged as a defence.

GOVERNMENT MEASURES IN LATIN AMERICA RELATED TO COVID-19

As in the rest of the world, covid-19 has had a disastrous effect on Latin America's economy, affecting almost every sector.[3] With respect to the energy sector, oil prices have plummeted to historic lows, many projects are at a standstill or have slowed down, and auctions and privatisations have been suspended.[4] As a result, Latin American oil producing and exporting countries such as Brazil, Venezuela, Mexico, Colombia, Ecuador and Argentina face decreases in energy income and investment. Colombia has seen an unprecedented number of layoffs in the energy sector.[5] In addition, these countries and others in the region have taken measures that have had a negative impact on energy companies, both local and foreign. These measures and their impact are described in more detail below.

Slowdown In Development Projects

The construction of oil and gas projects has been interrupted in countries throughout the region, including Chile and Colombia, due to curfews and lockdowns of non-essential workers and businesses.[6]

Cancellation Of Auctions And Projects

In Brazil, the Ministry of Mines and Energy decided to postpone all electricity auctions planned for 2020.[7] Additionally, the National Agency of Petroleum cancelled a new round of bids for oil and natural gas exploration and production areas that was scheduled for later in the year.[8] In Mexico, in May 2020, the Mexican National Centre for Energy Control moved to block all new renewable energy projects indefinitely, citing the covid-19 pandemic as the reason behind this decision.[9] Some stakeholders viewed this unprecedented measure as a bid by Mexico's President to hurt renewable energy producers in favour of the state-owned Federal Electricity Commission, which operates non-renewable energy plants.[10]

Slowdown In Energy Demand

Nationwide mandatory lockdowns have resulted in a steep decrease in the demand for electricity in the region. This contraction is affecting the earnings of distributors and grid operators.[11]

Suspension Of Payment Of Electric Bills

In several countries, including Chile, El Salvador and Guatemala, the government has suspended the payment and collection of residential consumer electricity bills. The measures also prohibit electric companies from suspending services to defaulting customers.[12]

Nationalisation

Since the outset of the pandemic, states around the world have discussed and, in some cases, carried out, the nationalisation of companies in certain key industries, including hospitals[13] and airlines.[14] Although there have been no nationalisations in the energy sector, if the sector continues to be severely affected by the pandemic, nationalisation may not be out of the question given the economic and political importance of the sector.

POTENTIAL INVESTMENT CLAIMS THAT COULD ARISE AS A RESULT OF GOVERNMENT MEASURES RELATED TO COVID-19

Foreign investors that perceive they have been harmed by some of the government measures taken in response to covid-19 may look to bring claims under BITs or FTAs. In this section, we describe in general terms possible claims investors could potentially bring against host states. Whether viable claims exist in any concrete case will of course depend on the specific facts and specific treaty.

Expropriation

As outlined above, some Latin American states have imposed nationwide lockdowns and curfews, which have decreased energy consumption. Some states have also prohibited energy companies from collecting electricity bill payments from consumers and from discontinuing service for defaulting customers. These measures, depending on their duration and severity, could significantly reduce the profitability of the affected energy companies or even make them unprofitable. As a result, investors could potentially bring a claim for indirect expropriation.[15]

Foreign investors may also be able to bring claims for indirect expropriation in the event of cancelled auctions and postponement of approved energy projects. Investors may argue that the capital spent in preparation for an auction or the execution of a new project amount to investments and that, by cancelling auctions and postponing approved projects, the investments were effectively rendered valueless. This argument, however, may have a difficult time succeeding given that several tribunals have held that pre-contractual expenditures standing alone do not count as an investment.[16]

Finally, while no nationalisations have taken place in the energy sector due to covid-19, if such a nationalisation did take place an investor may be able to bring a claim of direct expropriation.

Fair And Equitable Treatment

The fair and equitable treatment (FET) standard is a broad and amorphous concept that may apply in a variety of circumstances.[17] Below are some ways the measures described above could be alleged to violate the FET standard.

Disproportionate measures – namely measures that are more extreme than necessary to address the government concern – can constitute an FET violation.[18] A foreign investor may argue that lockdowns and curfews were not proportionate if, for instance, the state ordered a lockdown in a remote area, which affected the construction of an energy project but where arguably there existed little chance of covid-19 infection. Investors affected by the prohibition of collecting energy bill payments may also argue that the state measures did not satisfy the required element of proportionality if, for example, discounting electricity bills would have sufficed to address the underlying concern. Similarly, foreign investors may also argue that the decisions to cancel auctions and postpone new projects were disproportionate, depending on the government's rationale for such measures.

Discriminatory measures can also constitute an FET violation.[19] Lockdown and curfew orders usually contain exceptions under which the measures do not apply to 'essential businesses'. These businesses are thus allowed to continue their normal operations while 'non-essential businesses' are forced to shut down. What is considered an essential business is for the most part left to the sole discretion of the state. A foreign investor whose business was deemed non-essential and forced to cease operating may choose to bring an FET claim. The investor may argue that its business was arbitrarily discriminated against if there were no clear parameters for deeming a business non-essential.

A breach of an investor's legitimate expectations could also violate the FET standard.[20] An investor may argue that the state measures forcing its business to shut down were contrary to the regulatory framework the investor relied upon when making the investment and, therefore, a breach of its legitimate expectations.

DEFENCES POTENTIALLY AVAILABLE TO STATES FACING CLAIMS BASED ON COVID-19-RELATED MEASURES

The viability of any of the hypothetical treaty claims discussed above would depend on the specific treaty and facts at issue. But, in addition to whatever arguments a state can make on the merits in a particular case, there may also exist defences that could excuse a state from liability even if a treaty breach would otherwise exist. These defences are premised on the basis that there are certain exceptional circumstances that exempt a state from responsibility. As a starting point, these defences may be found in the language of the applicable treaty and in customary international law.[21]

Emergency Clauses In Investment Treaties

Latin American countries are parties to a large number of international investment agreements currently in force, some of which date back as early as 1980.[22] Generally, investment treaties concluded between 1980 and 1990 tend to be broader in their substantive protections than more recent investment treaties.[23] Additionally, these treaties seldom contain express exceptions to the application of their substantive provisions.

However, as states gained experience with foreign investment disputes, they began adopting, albeit not uniformly, new and more detailed investment treaties. Some of these more recent treaties contain what are typically called 'emergency clauses'.[24] These provisions condition or limit the obligations of host states towards foreign investors in certain emergency situations.

The language of these provisions excludes the applicability of certain substantive protections of the relevant treaty with respect to measures taken to protect vital state interests. For example, article 18 of the recently updated BIT between Chile and Hong Kong provides that 'nothing in this agreement shall be construed to prevent a party from adopting or maintaining measures, including environmental measures: (a) necessary to protect public morals or to maintain public order . . . [or] (c) necessary to protect human, animal or plant life or health'.[25] According to one tribunal, an emergency clause 'restricts or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met'.[26] Another tribunal stated that an emergency clause 'is a threshold requirement: if it applies, the substantive obligations under the treaty do not apply'.[27]

Argentina successfully argued the application of a treaty's emergency clause in ***LG&E v Argentina***.[28] The dispute in ***LG&E*** concerned a claim brought by US investors who held

equity interests in three Argentinian gas distribution companies acquired during the country's privatisation waves in the 1990s.[29] During the privatisation period, and with the aim of attracting foreign investment,[30] Argentina enacted legislation that provided, among other guarantees, that gas transport and distribution tariffs were to be calculated in US dollars and that the Argentinian government could not rescind or modify gas licences without the consent of the licensees.[31] In late 1998, Argentina suffered a devastating financial crisis that lasted until 2003.[32] As one of the many measures the country took to tackle the crisis, Argentina passed legislation that abolished the tariff calculation regime for the gas distribution contracts.[33] This measure resulted in significant loss in revenue for the gas companies. As a result, the foreign investors brought a claim against the state for the alleged expropriation of their investment and the failure to accord fair and equitable treatment, among other allegations.

As a defence to the claims of expropriation, Argentina relied on the emergency clause in article XI of the 1994 US–Argentina BIT. Article XI provides:

> 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.[34]

Argentina argued that the state was 'excused from liability'[35] because the challenged measures were adopted amid a 'state of political, economic and social crisis'.[36] The tribunal sided with Argentina and noted that 'from 1 December 2001 until 26 April 2003, Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests'.[37] The tribunal also found that Argentina underwent '[e]xtremely severe crises in the economic, political and social sectors',[38] which 'threaten[ed] total collapse of the government and the Argentine state'.[39] In the view of the tribunal, the conditions suffered by Argentina 'triggered the protections afforded under article XI of the treaty to maintain order and control the civil unrest'.[40] Thus, following the application of article XI of the BIT, the tribunal decided that Argentina was 'exempted from liability'[41] and 'the damages suffered during the state of necessity should be borne by the investor'.[42] The tribunal went on to note, however, '[t]hat this exception is appropriate only in emergency situations; and once the situation has been overcome, ie, a certain degree of stability has been recovered; the state is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately'.[43] Thus, depending on the circumstances, a finding of necessity may only partially exempt a state from responsibility.

It is possible that a tribunal faced with a provision similar to the one in ***LG&E*** would conclude that the covid-19 pandemic presented a sufficient danger to a state's public order and security interests to excuse it from liability for instituting measures that might otherwise violate the state's treaty obligations. In such a case, a state would likely need to show not only that the emergency was sufficiently serious to excuse liability but also that the specific measures at issue were necessary to maintain public order in the particular circumstances.

State Defences Under Customary International Law

When the applicable investment treaty does not contain an emergency clause, a respondent state may still be able to avail itself of one of the defences available under customary international law.

Unlike emergency clauses, defences under customary international law are not an exception to the application of the underlying treaty's substantive rights. Instead, these defences constitute general exceptions to state responsibility. As such, the defences come into play when a tribunal has established that a state's conduct was not in accordance with the treaty's substantive provisions.[44] If one of the customary international law defences applies, the state's breach of the treaty would be excused and no compensation to the investor would be due.

These defences are codified in the International Law Commission's Articles on State Responsibility (the ILC Articles).[45] The ILC Articles identify six defences that states may advance to avoid international responsibility: consent, self-defence, countermeasures, force majeure, distress and necessity. In a covid-19-related scenario, the most likely available defences to states would be force majeure (article 23) and necessity (article 25). Both defences have previously been advanced by states in the context of investment claims, including energy-related cases resulting from the Argentine financial crisis in the early 2000s. We discuss each of these defences below.

FORCE MAJEURE

Article 23 of the ILC Articles provides:

> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
> 2. Paragraph 1 does not apply if:
> (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
> (b) the State has assumed the risk of that situation occurring.[46]

In ***Autopista Concesionada v Venezuela***,[47] Venezuela invoked force majeure when facing a claim by US investors based on the failure of the state to increase the price of road tolls that financed the claimants' investment. Venezuela argued that violent protests against the tolls prevented the fulfilment of the state's obligation.[48] The tribunal rejected Venezuela's contention that the civil unrest constituted force majeure and found that the alleged events did not meet the foreseeability and irresistibility elements required by article 23. In particular, the tribunal found that the events were not unforeseeable since the state was in a position to reasonably predict that the adoption of a toll-payment system could lead to social unrest.[49] Additionally, the tribunal noted that Venezuela admitted that the protests were not irresistible as they could have been averted through the use of police force.[50]

It is unusual for states to invoke a force majeure defence. As ***Autopista Concesionada*** shows, the strict elements required under force majeure are difficult to meet. In the context of an investment claim arising out of covid-19-related measures, the most difficult element to establish might be that the performance of a state's international obligations became 'materially impossible' as a result of the spread of the pandemic. The ILC Articles do not define when the performance of an obligation is considered materially impossible. However, the commentaries to the ILC Articles clarify that '[f]orce majeure does not include circumstances in which performance of an obligation has become more difficult.'[51] Thus, a future tribunal assessing a covid-19-related measure will first need to define when a

state's performance becomes materially impossible before assessing whether the pandemic was sufficiently serious to meet this threshold. A tribunal might also consider whether the state's own conduct contributed to the state of force majeure by, for example, failing to take appropriate health measures.

NECESSITY

Article 25 of the ILC Articles identifies the elements of a necessity defence:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
> (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
> (a) the international obligation in question excludes the possibility of invoking necessity; or
> (b) the State has contributed to the situation of necessity.[52]

Several investor-state tribunals have considered necessity defences.[53] These tribunals have recognised that the necessity defence is exceptional in nature.[54] As such, necessity is subject to strict conditions[55] and will 'rarely be available to excuse non-performance of an obligation'.[56]

Most of the cases where tribunals have addressed necessity defences arose out of the Argentinian financial crisis of the late 1990s and early 2000s. As noted above, a steep economic crisis developed in Argentina in 1998, throwing the country into one of the worst recessions in its history. At the time the crisis hit, Argentina had adopted a fixed exchange rate policy that pegged the country's currency to the US dollar. In 1999, Argentina's GDP shrank, and the country entered a deflationary period, resulting in increased unemployment and poverty. The crisis worsened in 2001 when Argentina defaulted on its sovereign debt. In response, the government passed legislation enacting a variety of measures to counter the crisis, including untethering the Argentinian peso from the US dollar, converting all internal public debt into pesos, and freezing utility rates.

More than 40 investor-state arbitrations were filed in response to Argentina's economic measures. Foreign investors who held rights in local companies, including energy companies, that were parties to governmental contracts originally denominated in US dollars suffered significant losses due to the steep devaluation of the peso. These investors alleged that the government's measures caused a substantial decrease in the value of their investments and breached the state's commitments and representations on which the investors relied at the time of the making of their investments. Argentina, in turn, relied on the necessity defence, among other defences, to avoid responsibility.

In the sections below we discuss in more detail the different components of article 25 of the ILC Articles as applied in energy arbitrations arising from the Argentinian financial crisis.

Arbitral Tribunal Decisions Concerning Article 25 Of The ILC Articles

Article 25(a)(1)

Article 25(a)(1) contains two threshold requirements for establishing a necessity defence. First, a state must face a grave and imminent peril that threatens a state's essential interest. Second, the measure taken must have been the only way to safeguard the threatened essential interest.

According to one tribunal, the term 'essential interest can encompass not only the existence and independence of a state itself, but also other subsidiary but nonetheless essential interests, such as the preservation of the state's broader social, economic and environmental stability, and its ability to provide for the fundamental needs of its population'.[57]

In ***National Grid v Argentina***, regarding the effect of state measures on the claimant's shares in an electric company, the tribunal found that '[t]he actions of the respondent had as an objective the protection of social stability and the maintenance of essential services vital to the health and welfare of the population, an objective which is recognised in the framework of the international law of human rights'.[58]

The more difficult element for a state to meet, however, is the need to show that the measure is the only way to safeguard the state's essential interest. This difficulty was illustrated in ***Enron v Argentina***, a case regarding the effect of state measures on the claimant's shares in a gas distribution company. The tribunal in that case noted that '[a] rather sad world comparative experience in the handling of economic crises shows that there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case'.[59]

Showing that the measures chosen were the only way to protect the state's interests will likely also pose an obstacle for states asserting a necessity defence in future covid-19-related cases.

Article 25(1)(b)

Article 25(1)(b) requires that the measure the state takes must not seriously impair an essential interest of another state or of the international community as a whole. Tribunals evaluating this element have generally given states wide room to invoke measures in favour of the well-being of the state's population and its national interests, and we are unaware of a tribunal that has found that a state's measure impaired an essential interest of another state or of the international community.[60]

However, the tribunals that have addressed a necessity defence in the past have arguably done so in the context of measures that have been of local reach addressing a local crisis. Examples of such crises include not only the 2001 Argentinian financial crisis, but also social unrest in Egypt in 2011[61] and the 2015 Zimbabwean crisis.[62] A tribunal would be in somewhat novel territory when evaluating government measures with effects that extend beyond a state's borders. With respect to covid-19, such measures could include travel restrictions and export bans.

Article 25(2)(b)

According to article 25(2)(b) of the ILC Articles, a state may not invoke the necessity defence when the state contributed to the situation of necessity. The commentaries to the ILC Articles provide that 'for a plea of necessity to be precluded . . . the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral'.[63]

The element of contribution was widely debated in the context of the Argentinian financial crisis cases. However, tribunals reached different and conflicting conclusions. While some tribunals found that Argentina had substantially contributed to its financial crisis by the adoption of ill-advised economic policies,[64] other tribunals did not.[65]

In ***National Grid v Argentina***, the tribunal noted that some of the internal factors that caused the Argentinian financial crisis, such as external indebtedness, fiscal policies and labour market rigidity, were under the control of the state.[66] In the view of the tribunal, these internal factors 'created a fertile ground for the crisis to develop'.[67] The tribunal also found that Argentina's adoption of inappropriate economic measures as a response to the crisis 'further contributed to it'.[68]

In contrast, in ***LG&E v Argentina***, the tribunal found that there was no evidence that Argentina substantially contributed to the financial crisis that hit the country.[69] According to the tribunal, given the extremely grave circumstances that the state faced, 'an economic recovery package was the only means to respond to the crisis',[70] including measures that affected the calculation of energy tariffs. Moreover, the tribunal noted that the Argentinian government showed 'a desire to slow down by all the means available the severity of the crisis'.[71]

A more recent case, ***Unión Fenosa Gas v Egypt***, suggests that to find that a state contributed to a state of necessity the alleged contribution must be both 'sufficiently substantial'[72] and close in time to the state of necessity.[73] In that case, Egypt sought to excuse the curtailment of gas to the claimant's natural gas liquefaction plant by alleging a state of necessity under article 25 of the ILC Articles in connection with the social unrest related to the Arab Spring revolution of 2011. Specifically, Egypt alleged that violent social unrest led to a dramatic drop in the supply of natural gas both internally and for exportation, which led to repeated blackouts across the country and consequently to more widespread violence and unrest.[74] While the defence failed for other reasons, the ***Unión Fenosa*** tribunal found that Egypt had not contributed to the alleged state of necessity. In making this finding the tribunal observed: 'to an extent, a situation of necessity can always be traced back, as a matter of history, to political and economic mistakes made by a state years, if not decades, earlier'.[75] The tribunal further noted that, at the time of the measures, a state may not even realise it made a mistake. Thus, the 'element of contribution requires a common-sense interpretation, placing the contributory event in chronological proximity to the situation of necessity'.[76]

While it is unlikely that a state could be alleged to have caused the pandemic, future arbitral tribunals analysing investment claims based on covid-19-related state measures will likely consider whether a state acted diligently in addressing the pandemic based on the information known at the time. Arbitral tribunals may weigh differently the conduct of a state that at the outset of the pandemic took informed and careful action and the conduct of a state that adopted an uninformed or chaotic approach.

CONCLUSION

To conclude, it is worth recalling the 1903 ***Bischoff*** case.[77] The dispute in ***Bischoff*** arose in the context of a smallpox epidemic in Venezuela. In 1898, local police in Caracas took and retained a German national's carriage because the carriage had allegedly transported two people afflicted with smallpox. When the police offered to return the carriage to its owner, the claimant rejected the offer due to the carriage's damaged state and instead requested compensation. In resolving the dispute, an umpire of the German-Venezuelan Commission

noted that while generally the owner of wrongfully taken, damaged property was entitled to compensation, this rule did not apply to a confiscation like the one in the underlying case. The umpire noted that '[c]ertainly during an epidemic of an infectious disease there can be no liability for the reasonable exercise of [a state's] police powers'.[78]

Future investor-state cases related to covid-19 may very well test what constitutes a reasonable exercise of a state's power during a 21st century epidemic.

Endnotes

1 C. Salas, Energy Arbitration in Latin America, in The Arbitration Review of the Americas 2020 (2020). Back to section

2 Countries in other regions of the world have taken similar measures. See Oxford University's Coronavirus Government Response Tracker at https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker [last accessed 7 May 2020]. Back to section

3 See https://www.lac.ox.ac.uk/article/the-impact-of-covid-19-in-latin-america [last accessed 14 May 2020]. Back to section

4 See https://www.ft.com/content/a5292644-958d-4065-92e8-ace55d766654 [last accessed 7 May 2020]; https://www.theguardian.com/environment/2020/apr/29/fate-of-vaca-muerta-oil-and-gas-fields-may-point-way-forward-on-fossil-fuels-after-coronavirus [last accessed 7 May 2020]. Back to section

5 See https://www.bnamericas.com/en/news/colombias-oil-sector-plots-way-forward-as-shut-ins-layoffs-loom [last accessed 7 May 2020]. Back to section

6 See https://id.presidencia.gov.co/Paginas/prensa/2020/Decreto-593-dispone-Aislamiento-Preventivo-Obligatorio-27-de-abril-al-11-de-mayo-territorio-nacional-200425.aspx [last accessed 7 May 2020]; see https://www.prochile.gob.cl/int/noticia/chilean-government-implements-covid-19-measures-in-chile/?lang=en [last accessed 7 May 2020]. Back to section

7 See https://www.bnamericas.com/en/analysis/spotlight-the-impacts-of-brazils-decision-to-postpone-all-electricity-auctions [last accessed 7 May 2020]. Back to section

8 See https://anba.com.br/en/anp-suspends-oil-and-gas-tender/ [last accessed 7 May 2020]. Back to section

9 See https://www.bloomberg.com/news/articles/2020-05-03/mexico-indefinitely-halts-new-clean-energy-plans-blaming-virus [last accessed 7 May 2020]. Back to section

10 See https://www.pv-tech.org/news/industry-promises-legal-action-as-mexico-blocks-renewables-on-stability-gro [last accessed 7 May 2020]. Back to section

11 See https://www.bnamericas.com/en/news/argentine-power-distributors-delay-payments-to-cammesa [last accessed 7 May 2020]. Back to section

12 See https://www.europapress.es/internacional/noticia-salvador-suspende-pago-electricidad-agua-congela-cobro-hipotecas-coronavirus-20200319020433.html [last accessed 7 May 2020]; see https://republica.gt/2020/04/03/ley-servicios-basicos/ [last accessed 7 May 2020]; see https://www.iagua.es/noticias/europa-press/chile-prohibira-cortes-luz-agua-y-otros-servicios-basicos-durante-crisis-covid [last accessed 7 May 2020]. Back to section

13 See https://www.pri.org/file/2020-03-25/spain-nationalizes-private-hospitals-battle-covid-19 [last accessed 15 May 2020]. Back to section

14 See https://www.businessinsider.com/alitalia-nationalized-by-italy-history-2020-3?r=US&IR=T [last accessed 15 May 2020]; see https://www.telegraph.co.uk/politics/2020/03/17/airlines-train-companies-could-nationalised-prevent-going-bust/ [last accessed 15 May 2020]. Back to section

15 Unlike a direct expropriation, which happens when the state takes physical possession of or title to a business, an indirect expropriation occurs when government measures substantially deprives an investment of its value without the formal transfer of title or seizure. See, eg, Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan, ICSID Case No. ARB/13/13, Award, dated 27 September 2017, at para. 822 ('an indirect expropriation is characterised by the total or near-total deprivation of an investment, but without the formal transfer of the title or outright seizure'); Crystallex International Corporation v Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, dated 4 April 2016, at para. 667 ('an "indirect" expropriation occurs where a state's action or series of actions result in the investor being deprived of the enjoyment or benefit of its investment, although title to the property or the rights remains with the original owner'). Back to section

16 See, eg, Nordzucker AG v Republic of Poland, UNCITRAL, Partial Award (Jurisdiction), 10 December 2008, at para. 189. Back to section

17 See, eg, RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, dated 30 November 2018, at para. 260 ('The Tribunal is convinced that it is of no avail to cite the long litany of the case-law in which investment tribunals have tried to define the FET standard. Suffice it to say that there can be no doubt that (i) transparency. (ii) constant protection and security, (iii) non-impairment including (iv) non-discrimination and (v) proportionality and reasonableness, are elements of the FET'). Back to section

18 See, eg, RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Kingdom of Spain, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, dated 30 December 2019, at para. 748 (determining that the state's measures requiring investors to repay sums previously paid by the state were disproportionate); Serafín García Armas and Karina García Gruber v Bolivarian Republic of Venezuela, PCA Case No. 2013-03/AA473, Final Award, dated 26 April 2019, at para 345 (finding a military action by the state to be 'extremely disproportionate' as a response to the investors' alleged violation of local law). ^ Back to section

19 See, eg, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, dated 27 August 2009, at para. 178 (finding that the fair and equitable standard of treatment obligates the state to refrain from taking arbitrary or discriminatory measures); Víctor Pey Casado and President Allende Foundation v Republic of Chile, ICSID Case No. ARB/98/2, Award, dated 8 May 2008, at para. 670 (noting a jurisprudence constante according to which discriminatory treatment of foreign investors by state authorities constitutes a violation of fair and equitable treatment). ^ Back to section

20 See, eg, Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic, ICSID Case No. ARB/09/01, Award, dated 21 July 2017, at para. 667 ('the fair and equitable treatment language has been interpreted to oblige a State not to frustrate an investor's legitimate expectations, either at the time of the investment or in the course of the investment, as long as those expectations were objectively reasonable, created by the State (the state intended for the investor to rely upon them), and relied upon by the investor'); Venezuela Holdings B.V. and others v Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, dated 9 October 2014, at para. 256 (the fair and equitable standard of treatment 'may be breached by frustrating the expectations that the investor may have legitimately taken into account when making the investment. Legitimate expectations may result from specific formal assurances given by the host state in order to induce investment'). ^ Back to section

21 See M. Reisman, J. Crawford & D. Bishop, Foreign Investment Disputes: Cases, Materials and Commentary 511-82 (2 ed. 2014). ^ Back to section

22 The Agreement for the Reciprocal Promotion and Protection of Investments between the French Republic and the Government of the Republic of Paraguay entered into force in 11 December 1980. ^ Back to section

23 See https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/850.pdf [last accessed 14 May 2020]. ^ Back to section

24 R. Dolzer, Emergency Clauses in Investment Treaties: Four Versions, in M. Arsanjani et al. (eds.), Looking to the Future: Essays on International Law in Honor of W. Michael Reisman 706 (2011). ^ Back to section

25 Investment Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Chile, Article 18. The agreement entered into force in 14 July 2019. ^ Back to section

26 Continental Casualty Company v The Argentine Republic, ICSID Case No. ARB/03/9, Award, dated 5 September 2008, at para. 164. ^ Back to section

27 CMS Gas Transmission Company v The Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, dated 25 September 2007, at para. 129. ^ Back to section

28 LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic, ICSID Case No. ARB/02/1. ^ Back to section

29 LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, dated 3 October 2006, at para. 52. ^ Back to section

30 id, at para. 49. ^ Back to section

31 id, at para. 41. ^ Back to section

32 id, at paras. 54-62. ^ Back to section

33 id, at paras. 63-67. ^ Back to section

34 Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Article XI. ^ Back to section

35 LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, dated 3 October 2006, at para. 201. ^ Back to section

36 id. ^ Back to section

37 id, at para. 226. ^ Back to section

38 id, at para. 231. ^ Back to section

39 id. ^ Back to section

40 id, at para. 237. ^ Back to section

41 id, at para. 261. ^ Back to section

42 id, at para. 264. ^ Back to section

43 id, at para. 261. Back to section

44 CMS Gas Transmission Company v The Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, dated 25 September 2007, at para. 134. Back to section

45 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part. 2), Yearbook of the International Law Commission (2001), Vol. II (2). Back to section

46 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part. 2), Yearbook of the International Law Commission (2001), Vol. II (2), Article 23. Back to section

47 Autopista Concesionada de Venezuela, C.A. v Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5. Back to section

48 Autopista Concesionada de Venezuela, C.A. v Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Award, dated 23 September 2003, at para. 85. Back to section

49 id, at para. 115. Back to section

50 id, at para. 124. Back to section

51 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part. 2), Yearbook of the International Law Commission (2001), Vol. II (2), Article 23, Commentary ¶3. Back to section

52 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part. 2), Yearbook of the International Law Commission (2001), Vol. II (2), Article 25. Back to section

53 See, eg, Impregilo S.p.A. v Argentine Republic I, ICSID Case No. ARB/07/17, Award, dated 21 June 2011; Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, dated 30 July 2010; BG Group Plc. v Republic of Argentina, Award, dated 24 December 2007; Enron Corporation and Ponderosa Assets, L.P v Argentine Republic, ICSID Case No. ARB/01/3, Award, dated 22 May 2007; CMS Gas Transmission Company v Argentine Republic, ICSID Case No. ARB/01/8, Award, dated 12 May 2005. Back to section

54 Sempra Energy International v Argentine Republic, ICSID Case No. ARB/02/16, Award, dated 28 September 2007, at para. 345. Back to section

55 Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v Argentine Republic, ICSID Case No. ARB/01/3, Award, dated 22 May 2007, at para. 304. Back to section

56 South American Silver Limited v Plurinational State of Bolivia, PCA Case No. 2013-15, Award, dated 30 August 2018, at para. 613. Back to section

57 Impregilo S.p.A. v Argentine Republic I, ICSID Case No. ARB/07/17, Award, dated 21 June 2011, at para. 346. Back to section

58 National Grid plc v Argentine Republic, UNCITRAL, Award, dated 3 November 2008, at para. 245. Back to section

59 Enron Corporation and Ponderosa Assets, L.P v Argentine Republic, ICSID Case No. ARB/01/3, Award, dated 22 May 2007, at para. 308. Back to section

60 Impregilo S.p.A. v Argentine Republic I, ICSID Case No. ARB/07/17, Award, dated 21 June 2011, at para. 354; Enron Corporation and Ponderosa Assets, L.P v Argentine Republic, ICSID Case No. ARB/01/3, Award, dated 22 May 2007, at para. 310; CMS Gas Transmission Company v Republic of Argentina, ICSID Case No. ARB/01/8, Award, dated 12 May 2005, at para. 325. Back to section

61 Unión Fenosa Gas, S.A. v Arab Republic of Egypt, ICSID Case No. ARB/14/4. Back to section

62 Bernhard von Pezold and others v Republic of Zimbabwe, ICSID Case No. ARB/10/15. Back to section

63 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part. 2), Yearbook of the International Law Commission (2001), Vol. II (2), Article 25, Commentary, ¶20. Back to section

64 National Grid P.L.C. v Argentina Republic, UNCITRAL, Award, dated 3 November 2008, at paras. 260-261; Sempra Energy International v Argentine Republic, ICSID Case No. ARB/02/16, Award, dated 28 September 2007, at para. 352; CMS Gas Transmission Company v Republic of Argentina, ICSID Case No. ARB/01/8, Award, dated 12 May 2005, at paras. 328-329. Back to section

65 LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, dated 3 October 2006, at para. 256. Back to section

66 National Grid P.L.C. v Argentina Republic, UNCITRAL, Award, dated 3 November 2008, at para. 260. Back to section

67 id. Back to section

68 id. Back to section

69 LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, dated 3 October 2006, at para. 257. Back to section

70 id. Back to section

71 id, at para. 256. Back to section

72 Unión Fenosa Gas, S.A. v Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, dated 31 August 2018, at para. 8.60 Back to section

73 id. Back to section

74 id, at para. 8.10. Back to section

75 id. Back to section

76 id. Back to section

77 Germany–Venezuela Mixed Claims Commission, Bischoff case (1903) 10 RIAA 420. This case was recently cited by the Philip Morris v Uruguay tribunal in evaluating Uruguay's defence that tobacco control measures did not constitute an expropriation but a legitimate exercise of the state's police powers. Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, dated 8 July 2016, at para. 298. Back to section

78 Germany–Venezuela Mixed Claims Commission, Bischoff case (1903) 10 RIAA 420. Back to section

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