

Non-Precluded Measures Clauses in Times of COVID-19

**Heidi López Castro**

International Arbitration and
Litigation

**Jana Lamas de Mesa**

International Arbitration and
Litigation

These are challenging times. Challenging, among others, for the States who faced with a global pandemic must adopt severe measures aimed at curbing the spread of the disease among their citizens and mitigating the enormous impact that it will have on their economies. These are also challenging times for many foreign investors that have been deeply impacted both by the health crisis and by the measures adopted by host States to cope with it.

Even though the essence and origin of the challenge is the same, the situation in each country is not identical and therefore each State has adopted its own array of measures. Some of these measures are compulsory while others are recommendations, and some are more severe or will have longer-lasting effects than others.

The lack of a homogeneous response from States prompts several questions: are these measures necessary and proportional or are they in fact ill-

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suit? Has each State complied with its international obligations towards foreign investors, particularly those contained in the applicable bilateral investment treaty (BIT) or can the foreign investor expect some sort of compensation for its losses? Are foreign investors merely a passive observer of the situation or is a certain type of conduct also expected of them?

One answer to these questions can be found in the so-called Non-Precluded Measures clause (NPM clause) contained in many BITs.¹ In a nutshell, NPM clauses

allow the host State to take, under certain conditions, actions that would otherwise violate its BIT obligations to safeguard predetermined public policy interests, such as public order, public health, and essential national or international security interests.

Although NPM clauses were already present in some 'old generation' BITs, they have become more common, sophisticated and complex in more recent treaties. Their inclusion is a response to strong criticisms against tribunals for allegedly limiting, through the application of BITs, the power of States to adopt measures to protect public interests in times of crises.

However, the wording of these provisions can vary greatly from one BIT to another. Hence, a BIT-by-BIT and case-by-case analysis is crucial in order to ascertain

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the scope of a given NPM clause and the level of discretion it accords a State.

What Public Policy Interests are Protected by the NPM Clause?

The first difference that can be found between types of NPM clauses lies in the description of the public policy interests. The objectives protected by NPM clauses are diverse and the precision of their terminology and scope can vary. One of the oldest and most typical interests protected by NPM clauses is the maintenance of national or international peace. An example of this type of clause can be found in Article 18 of the 2012 US Model BIT, which reads as follows:

Nothing in this Treaty shall be construed: [...] to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

When faced with such wording, determining what interests fall under 'essential security interest' and whether situations such as the one we are now facing can be understood as falling within this category will be a matter of interpretation and require case-by-case analysis. Other NPM clauses are more explicit as to the inclusion of health and safety matters. For example, Article 14.16 of the new Agreement between the United States of America, the United Mexican States, and Canada² (USMCA) states that:

Nothing in this [Investment] Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.

This clause in the USMCA is also a good example of an NPM clause which



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leaves the door open to 'other regulatory objectives' This suggests that the list of covered regulatory interests is not exhaustive. As we will see below, the broader the terms, the wider the State's margin of discretion.

Does it Constitute an Exception to All Substantive Investor Protections or Only to Certain Ones?

NPM clauses are deemed to have essentially similar effects to those of other types of provisions included in new investment treaties which aim to limit the scope of application of certain substantive protections. However, these two types of clauses are different and should not be confused. While the 2012 US Model BIT's NPM clause contains a carve-out that applies to any measure, irrespective of the substantive investor protections that it has breached, the USMCA, in lieu of providing for such type of provisions, opts for clarifying in Annex 14-B, paragraph 3(b) that regulatory State actions aimed at protecting certain public objectives will not qualify as an indirect expropriation under the treaty except *in rare circumstances*, provided that the controversial action is not discriminatory:³

³ In the same vein, see also the Comprehensive Economic and Trade Agreement between Canada and the European Union, Annex 8-A, para 3('For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations') and Peru-Japan BIT, art 19.

The wording of these provisions can vary greatly from one bilateral investment treaty to another

Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.

Among the latter type of provisions, we can find other clauses which include the proviso that the concerned State measure must not be 'applied in a manner which would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment'.⁴ In other words, while NPM clauses strictly speaking generally cover conduct otherwise inconsistent with any of the obligations under the BIT, other types (and more recent) provisions achieve a similar effect by instead restricting the scope of application of specific substantive standards in the name of the public interest.

⁴ Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China, art 18. See also the 2018 EU-Singapore Investment Protection Agreement, art 2.3.3 and para 2 of Annex 1, which establishes the carve-out specifically in respect of the national treatment standard and indirect expropriation, respectively.



How Much Discretion Does a State Have to Adopt the Measure Contemplated under the NPM Clause?⁵

Another textual distinction relating to a State's margin of discretion is whether the clause qualifies as 'self-judging' or 'non-self-judging.' The abovementioned 2012 US Model BIT is an example of the former. From its wording ('which it [the State] considers'⁶) one could say that the State's subjective determination that the measure pursues the essential interest that it claims is sufficient. Nonetheless, such clauses are rare in international

⁵ Some recent BITs impose notification requirements on the State taking the non-conforming measure (e.g. Agreement between Japan and the Republic of Peru for the Promotion, Protection and Liberalisation of Investment, art 19). Such requirements (and the like) should not be disregarded as they could lead to the inapplicability of the NPM clause.
⁶ 2012 US Model BIT, art 18.

agreements. In any case, even when faced with a self-judging NPM clause, an arbitral tribunal may still analyse whether the State has made its decisions in good faith and find the NPM clause not to apply if it considers that the State has abused its powers.⁷

However, the more common non-self-judging NPM clauses, such as Article 14.16 of the USMCA, do not explicitly stipulate that a State's subjective determination is conclusive. In that context, the objective factors justifying a State's adoption of a measure under an

⁷ Even when faced with a self-judging NPM clause, the claimant may argue that the object and purpose of the BIT is to apply even in situations of economic and political difficulty and hardship in order to guarantee the rights of the investors, and that pursuant to Article 31 of the Vienna Convention on the Law of Treaties the NPM clause must not be interpreted in a way that would in practice give the state an escape route from its treaty obligations.

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NPM clause and the link between the measure taken and the policy objective that allegedly precludes the measure can be questioned. On the other end of the spectrum, some NPM clauses do not leave any margin of discretion to the State and only allow a measure to be adopted under the NPM clause if the measure follows a resolution or decision



of a third-party body, for example a United Nations resolution.⁸

The nexus requirement between the policy objective and the measures adopted is also symptomatic of the degree of discretion held by the State. Wording such as 'necessary for' or 'required for' appear to allow stricter scrutiny of a measure, whereas more open expressions such as 'taken for the reason of/in the interest of,' 'directed for' or 'related to' *a priori* lead one to think that the State may be granted a wider margin of discretion.⁹

Are All Types of Measures Permitted?

Even in the situation that we are currently facing, where the WHO has declared COVID-19 a pandemic and where its severity and impact are hard to dispute, not all types of measures would be permitted under an NPM clause.

⁸ E.g. Agreement between the Republic of Hungary and Ukraine for the Promotion and Reciprocal Protection of Investments, art 16.3.b: 'Nothing in this Agreement shall be construed: [...] to prevent any Contracting Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security'. According to art 39 of the UN Charter, the Security Council has the competence to determine the existence of any threat to international peace, breach of the peace, or act of aggression and to decide what measures States must implement to maintain or restore international peace and security.

⁹ The Energy Charter Treaty (art 24 'Exceptions'), for instance, contains different nexus requirements depending on the public policy exceptions: '(2) *The provisions of this Treaty [...] shall not preclude any Contracting Party from adopting or enforcing any measure:(i) necessary to protect human, animal or plant life or health; [...] // (3) The provisions of this Treaty [...] shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary: (a) for the protection of its essential security interests including [...] ; [...] (c) for the maintenance of public order*' (emphasis added).

Although the analysis can vary depending on the specific wording of an NPM clause, arbitral tribunals examining measures adopted under such clauses may apply a three-tiered proportionality test including (i) the necessity of the measure; (ii) the suitability of the measure; and (iii) the proportionality *stricto sensu* of the measure.

A variety of circumstances may be weighed up against the proportionality of the measure, such as whether the measure or its implementation procedure was negligent, contributed to the exceptional situation or worsened it;¹⁰ whether the measure, despite being temporary, had perpetual and irreversible effects; whether there were other less restrictive means available to the host State with similar impact; and how long the measure was applied.¹¹

What Can be Expected of the Foreign Investor?

Even though NPM clauses make no reference to investor conduct in situations where State intervention for public policy reasons is advisable or necessary, certain conduct from the investor is still expected.

¹⁰ Although an analysis of such an argument is likely to be based on customary international law's state of necessity defence under art 25 of the Articles on Responsibility of States for Internationally Wrongful Acts, this is usually not warranted by the text of NPM clauses.

¹¹ 'Even if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present' (*CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005) para 382).

For instance, the investor must not provoke in any manner the State's controversial actions or the situation underlying them, aggravate the public objective pursued by the State or fail to take all appropriate measures to mitigate its losses.

While the conduct of the investor might not have a direct impact on an NPM clause, it can influence the compensation that the investor may recover to the extent the NPM is not applicable.

Conclusion

The response given by many States during the COVID-19 crisis may be covered by NPM clauses, if and when such clauses are included in BITs.

States are however generally not given a *carte blanche* in this area and careful consideration must be given to the specific wording of the clause, namely, the public policy interests protected, the exemption granted to the State, the degree of discretion given to the State, the types of measure permitted, and the need to avoid any abuse of powers.

Foreign investors are not free of scrutiny either; they must ensure that their conduct does not exacerbate the situation to the detriment of the public interest being protected and must make sure they mitigate their losses to the extent possible.

In any case, if NPM clauses are to come into play in international investment practice, it is now or never.

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