COVID-19, *Rebus Sic Stantibus* and the Law of Treaties

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As the COVID-19 crisis unfolds, an increasing array of measures are being adopted by States throughout the world in response to this unprecedented situation. These measures include state of emergency declarations which empower States to, among others, close borders, take control of private businesses, enforce stay-at-home orders, quarantine and lockdown measures, suspend loans and utility payments, and even impose import and export restrictions.[1]

Although States have generally adopted these measures to stem the spread of COVID-19 and protect their citizens and businesses, some foreign investors are likely to be affected by these measures and experience losses for which they may seek relief or compensation. If investors are able to establish that substantive treaty obligations have been violated, States may need to resort to defences based on specific treaty exceptions or on customary norms or general principles of international law.[2]

1 World Customs Organization, 'List of national legislation of countries that adopted temporary export restrictions on certain categories of critical medical supplies in response to COVID-19' <http://www.wcoomd.org/en/topics/facilitation/activities-and-programmes/natural-disaster/list-of-countries-coronavirus.aspx> accessed 16 April 2020.

2 See Lucas Bento and Jingtian Chen, 'Investment Treaty Claims in Pandemic Times: Potential Claims and Defences' (*Kluwer Arbitration Blog*, 8 April 2020) <http://arbitrationblog.kluwerarbitration.com/2020/04/08/investment-treaty-claims-in-pandemic-times-potential-claims-and-defenses/> accessed 16 April 2020. Some of the main substantive treaty standards that could be used as a basis for investor claims may include: (i) the fair and equitable treatment standard — e.g. a State's conduct could violate this standard if its interference with the investment is not proportionate

If a State faces an investor claim for an alleged violation of a treaty obligation, the State may first try to find a specific exception in the treaty to preclude its application to the disputed measure. Very few bilateral investment treaties contain general exceptions, or incorporate the general exceptions set out in the GATT and GATS trade agreements.[3] However, some more recent investment treaties provide more compelling specific exceptions.[4]

In cases where States do not find specific treaty exceptions to apply, they can resort to customary norms and general principles of international law.

Under international law, a State may rely on the defences set out in the law of State responsibility.[5] The most potentially relevant in this case are force majeure, state of necessity, and distress.[6] However, there is another potential defence under the law of treaties: the *rebus sic stantibus* principle.

The *rebus sic stantibus* principle, also present in many national legal systems, has been recognized as a general principle of international law[7] that is embodied in Article 62 of the 1969 Vienna Convention on the Law of Treaties (VCLT).[8] This principle is an objective rule[9] which allows a State to terminate, withdraw from, or suspend the operation of a treaty[10] when certain requirements are met:[11]

i. There must be a *fundamental* change of circumstances with regard to those existing at the time of the conclusion of the treaty.

ii. The fundamental change of circumstances must not have been foreseen by the parties.

iii. The existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty.

iv. The effect of the fundamental change of circumstances must be radically to transform the extent of obligations still to be performed under the treaty.

v. The treaty must not establish a boundary.

vi. The fundamental change of circumstances must not be the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

to the public interest pursued; (ii) the full protection and security standard — e.g. a State may violate this standard if it fails to adopt appropriate measures in time and form to provide full protection and security which ends up significantly harming the investment; and (iii) the national treatment standard — e.g. a State may violate this standard if it adopts measures to support predominantly domestic industries and not industries with a prevailing number of foreign investors. Additionally, an investor may also base its claims on a direct or indirect expropriation by the State — e.g. if a private business is seized for a sufficiently long period of time without adequate compensation, an investor could bring a claim for unlawful indirect expropriation.

3 The General Agreement on Tariffs and Trade, 1867 UNTS 190, 33 ILM. 1153 (1994), art XX; and the General Agreement on Trade in Services, 1869 UNTS 183, 33 ILM. 1167 (1994), art XIV.

4 See Federica Paddeu and Kate Parlett, 'Covid-19 and Investment Treaty Claims' (*Kluwer Arbitration Blog*, 30 March 2020) <http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims/> accessed 16 April 2020. For example, the Canada-EU Trade Agreement (Annex 8-A, para 3) specifies that non-discriminatory regulatory measures designed and applied to protect legitimate public welfare objectives, including public health, do not constitute indirect expropriations except in rare circumstances; and the China-Australia Free Trade Agreement (art 9.11, para 4) provides that non-discriminatory measures for legitimate public welfare objectives, including public health, 'shall not be the subject of a claim by an investor.

5 International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts with commentaries' (2001), UNGA Resolution 56/83 Annex, UN Doc A/RES/56/83, see in particular arts 23, 24 and 25.

6 See Federica Paddeu and Freya Jephcott, 'COVID-19 and Defences in the Law of State Responsibility' Parts I and II (*EJIL: Talk!*, 17 March 2020) <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/> accessed 16 April 2020.

7 International Law Commission, 'Draft Articles on the Law of Treaties with commentaries' (1966), Yearbook of the International Law Commission, 1966, vol II, commentary on art 59, para 1. See also *Fisheries Jurisdiction* (*United Kingdom v Iceland*), Jurisdiction of the Court, Judgment, ICJ. Reports 1973 p 3, para 36: '[t]his principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.'

8 Vienna Convention on the Law of Treaties (signed on 23 May 1969 and entered into force on 27 January 1980) 1155 UNTS 331, art 62.

9 International Law Commission (n 7) commentary on art 59, para 7: 'an objective rule of law by which, on grounds of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked by a party as a ground for terminating the treaty.'

10 See International Law Commission (n 7) commentary on art 59, para 8. The application of this principle to both perpetual and limited duration treaties has been recognised.

11 VCLT, art 62.

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The COVID-19 crisis has shaken the world and States have taken measures to help prevent the spread of the virus and to protect their interests. In some cases, the effects of these measures may negatively affect the investments of foreign investors who may decide to claim for relief or compensation by bringing a claim against a State for allegedly infringing its obligations under an investment treaty. However, the State accused of such violation may argue that, under the law of treaties and pursuant to the *rebus sic stantibus* principle, its obligations under the treaty have not been violated as it has terminated, withdrawn from, or suspended the operation of the treaty as a result of a fundamental change of circumstances caused by the COVID-19 crisis *vis-à-vis* the circumstances existing at the time of the conclusion of the treaty.[12]

The particular circumstances of the case will determine whether the specific international law requirements are met in order to apply the *rebus sic stantibus* principle.

As it is evident from the demanding nature of the requirements under international law, the *rebus sic stantibus* principle applies only in extraordinary circumstances as it constitutes an exception to the paramount feature of the law of treaties: the principle of *pacta sunt servanda*, which establishes that every treaty in force is binding upon the parties to it and must be performed by them in good faith.[13] In fact, although parties have often invoked the *rebus sic stantibus* principle before international tribunals, the International Court of Justice and other international tribunals have never applied it to a treaty.[14]

Nevertheless, the fact that this principle has never been applied to treaties should not discourage any State from assessing its viability in any particular case in the future. In fact, the International Law Commission has recognised the fundamental role of this principle in the law of treaties:

[D]espite the strong reservations often expressed with regard to it, the evidence of the acceptance of the doctrine [of rebus sic stantibus] in international law is so considerable that it seems to indicate a recognition of a need for this safety-valve in the law of treaties.[15]

The COVID-19 crisis is certainly unprecedented and may give rise to unparalleled situations in which fundamental changes in some States could meet the strict requirements of the *rebus sic stantibus* principle under international law for it to be lawfully applied to terminate, withdraw from or suspend the operation of a treaty.[16]

12 Although art 65(1) VCLT establishes that a party intending to terminate, withdraw from or suspend the operation of a treaty must previously notify the other parties of its claim, art 65(5) sets out that 'the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.'

13 VCLT, art 26.

14 See International Law Commission (n 7) commentary on art 59, para 2; Hans van Houtte, 'Changed Circumstances and Pacta Sunt Servanda' in Gaillard (ed), *Transnational Rules in International Commercial Arbitration* (1993) 112; and Christoph J.H. Brunner 'Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract' in *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration* (2008) 413.

15 International Law Commission (n 7) commentary on art 59, para 6.

16 Moreover, the mere possibility of a State exiting a treaty by invoking this principle may bring about a renegotiation of the treaty.