INTERNATIONAL INVESTMENT ARBITRATION AND COVID19

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1. Introduction

Coronavirus pandemic has claimed the lives of 6,657,372 people by 7 December, 2022,[1] as well as 652,199,882 confirmed cases[2] around the world. This is the result of an unexpected situation for which governments around the globe were not prepared, and generated a lot of uncertainty. In fact, at the beginning of the pandemic the World Health Organization did not provide a clear guidance to handle the virus, even initially did not even recommend the general use of masks for the population[3], but later changed its initial suggestion to use masks even for healthy people in almost every situation, where human contact was required[4]. Hence, states faced the challenge of protecting lives and addressing the problems related to public health and economic issues generated by the Covid19 pandemic.

In that context, the interests of foreign investors could have been jeopardized by the regulatory measures undertaken by states. Governments around the world implemented various measurements such as lockdowns, curfews, closing borders, restrictions on air traffic, suspending utility payments, and limiting

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1 Worldometers: Coronavirus Death Toll. Available at: https://acortar.link/J7HLVb Accessed on 15 December 2022.

2 Worldometers: Coronavirus Worldwide Graphs. Available at: https://acortar.link/ijfnpP Accessed on 15 December 2022.

3 World Health Organization: Advice on the use of masks in the context of COVID-19. This advice was issued on 6 April 2020. Available at: https://acortar.link/hWKf39 Accessed on 15 December 2022

4 World Health Organization: WHO updated guidance on the use of masks. Coronavirus (COVID-19) update No. 30. This advice was issued on 12 June 2020. Available at: https://acortar.link/ozqsfl Accessed on 15 December 2022.

mobility to essential travels. These measures affected different sectors of the economy, although they were necessary to prevent the spread of the virus, which affected different sectors of the economy.

States also have obligations with foreign investors according to bilateral investment treaties (BIT) or multilateral treaties, or even in chapters of investments in free trade agreements (FTA). Therefore, the exercise of sovereignty might be reduced, which becomes more noticeable in situations such as the Covid19 pandemic, where a response to face the virus was necessary.

In such a scenario there was fear of an increase in the number of cases of investment arbitration against states around the world.[5] In December of 2022 there was a high degree of uncertainty about this possibility because in international investment agreements (IIAs)[6] usually contain a cooling clause, which establishes that it is mandatory to try to reach a settlement before requesting arbitration. Consequently, at this moment it is possible that some investors are trying to initiate the procedures to file their claims before arbitration tribunals, but it is uncertain how many cases have been filed. In this regard, 2021 was the year with the highest number cases registered in disputes between foreign investors and states before the International Centre for Settlement Investment Disputes (ICSID), in the history of that institution[7]. Nonetheless, it is not possible to confirm that this fact is a result of the Covid19 pandemic because in the previous years there was a trend to increase the number of cases before ICSID.

Despite this, it is possible to track at least three cases before international arbitration whose origin is the measures made by states to overcome Covid19 pandemic: ADP international S.A. and Vinci Airports vs Chile, ICSID case ARB/21/40; Komaksavia Airport Invest Ltd. v. Republic of Moldova, SCC EA 2020/130; and Loftleidir Cabo Verde v. Cabo Verde- ICC. By December 2022 these were the most famous cases, which does not mean these are the only ones.

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5 Good examples in this regard are the papers of Valentina Vadi: Crisis, Continuity and Change in International Investment Law and Arbitration. *Michigan Journal of International Law,* Vol. 42, No. 2, 2021. 321–367.; and Peter Bekker: International Law in Time of Crisis: COVID-19 and Foreign Investments, 2020. Available at: https://acortar.link/XNAW49 Accessed on 15 December 2022.

6 It is a general category which includes BITs and chapters of investment in FTA, or even in multilateral agreements (e.g. Pacific Alliance, NAFTA, etc.).

7 In that year were submitted 65 cases, in 2020 were registered 58 cases, and in 2019 the number of cases was 39. ICSID: The ICSID Caseload-Statistics, Issue 2022-1, 2022. 8.

There is a lot at stake for international arbitration in this context because some scholars, such as Chan[8] and Schill[9], *inter alia,* have claimed that the international investment regime is designed to protect mainly the interests of foreign investors, reducing the room for states to undertake regulatory measures to seek general welfare. Likewise, other scholars, such as Blessa[10] and Franck,[11] have drawn the attention to the problem of the vagueness of investment protection standards, which has led to disruptive arbitral decisions. Therefore, this juncture is a pivotal point to ensure protection against arbitrary actions for foreign investors, while also respecting the authority of states to make decisions to overcome extraordinary situations like the Covid19 pandemic.

For that reason, this paper, besides this introduction, presents first the possible standards of treatment which can be involved in the arbitration related to Covid19 pandemic; in second place, possible defensive arguments for states are presented; in third place, some facts of the known cases regard to the measures made to overcome the pandemic are illustrated; finally, some conclusions are proposed.

2. Possible protection standards invoked by claimants in the context of Covid19 pandemic

The most popular standards of treatment in IIAs are fair and equitable treatment (FET), national treatment (NT), most favored nation (MFN), full protection and security (FPS) and non-expropriation.[12] These standards are fundamental guarantees provided to foreign investors, and it is possible that breaches of these standards may be claimed as a result of measures taken to combat the Covid19

8 Shuk Ying Chan: On the international investment regime: A critique from equality. *Politics, philosophy & economics,* Vol. 20, No. 2, 2021. 203.

9 Stephan Schill: Enhancing International Investment Law´s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach. *Virginia Journal of International Law,* Vol. 52, No. 1, 2011. 64.

10 Juan García: Indeterminacy, Ideology and Legitimacy in International Investment Arbitration: Controlling Private Networks of Legal Governance. *International Journal for the Semiotics of Law,* Vol. 35, 2022. 1969.

11 Susan Franck: The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decision. *Fordham Law Review,* Vol. 73. No. 4, 2005. 1545–1547.

12 Alireza Anzari – Leila Raisi: International Standards of Investment in International Arbitration Procedure and Investment Treaties. *Revistas Jurídicas,* Vol. 15, No.2, 2018. 13.

pandemic.[13] Furthermore, it is important to draw attention to the obligations created by customary international law, which in case of investment arbitration is reflected in the minimum standard of treatment (MST). In the following lines some thoughts regarding these standards and the Covid19 pandemic are presented.

2.1. Fair and Equitable Treatment (FET)

The Standard is generally accepted as guarantee of access to justice, due process, good faith, and respect of legitimate expectations of investors.[14] This standard is related to a transparent and stable regulatory framework. However, it does not mean the regulatory framework ought to be frozen,[15] but the change cannot be disproportionate or dramatic.[16] Part of the core of this standard is that host states cannot act arbitrarily, which is based on the rule of law and the principle of access to justice.[17]

The problem is that states had to change the regulatory framework to overcome situations related to the Covid19 pandemic, which could be the basis for foreign investors to claim a breach of the standard, alleging a violation of their legitimate expectations.

Under this standard, measures should be made in a reasonable and proportionality way. The problem is that there was a lot of uncertainty regarding the scope of the pandemic. For example, the measures made in New Zealand at first glance appeared disproportionate (with fewer than 283 people infected by Covid19, the government ordered a strict lockdown on 26 March 2020),[18] but in the end, the country was able to recover its economic activity faster than other countries.[19] For that reason, arbitral tribunals should follow the doctrine established in Philip Morris v. Uruguay, which holds that is important to

13 According to Vadi and Bekker these standards probably will be used by claimants. Vadi (2021) op. cit. 330. and Bekker op. cit. 2.

14 Anzari–Raisi op. cit. 18

15 EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award (8 October 2009), paragraph 217.

16 Philip Morris v. Uruguay ICSID Case No. ARB/10/7, Award (8 July 2016), paragraph 488.

17 Vadi (2021) op. cit. 331.

18 RNZ: Timeline: The year of Covid-19 in New Zealand, 2021. Available at: https://acortar.link/CcOUgW Accessed on 15 December 2022.

19 Nikkei Asia: New Zealand Economy Shows Faster Recovery From COVID-19 Impact, 2020. Available at: https://acortar.link/mQiRvj Accessed on 15 December 2022.

have a great deference with the governmental judgments in matters related to protection of legitimate objectives of public welfare, such as the protection of public health:

> "The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health."[20]

A relevant benchmark to assess the rationality of the measures made is the recommendations given by the World Health Organization because they come from an international organization with wide membership among the states.[21] This does not mean that states cannot make broader regulations according to the particular circumstances in their territories, but such regulations cannot be discriminatory.

2.2. National Treatment (NT) and Most Favored Nation (MFT)

These standards basically mean no discrimination to foreign investors, compared to nationals[22] or others from different nationalities[23]. According to these standards, foreign investors have to be treated equally in similar circumstances, as well as nationals or other foreign investors.[24] This is relevant because measures made by states should be applicable without discrimination. For example, measures to protect employment or to support businesses to recover after the Covid19 pandemic ought to be applied without discrimination, regardless of the nationality of the beneficiary, otherwise it could be deemed as a breach of those standards.

In some cases, however, there might be instances where states use crises as a pretext to nationalize an industry, or a company, such as airlines[25], utility

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20 Philip Morris v. Uruguay op. cit. paragraph 399.

21 Vadi (2021) op. cit. 335.

22 This is the standard of National Treatment. See Anzari–Raisi op. cit. 24.

23 This is the standard of Most Favored Nation. Ibid. 27.

24 Vadi (2021) op. cit. 335.

25 This is part of the debate in Loftleidir Cabo Verde v. Cabo Verde- ICC, which is presented in the next pages.

companies or natural resources companies.[26] Therefore, a crucial aspect of these standards is that states must implement regulatory measures in good faith and seek to protect legitimate public objectives, such as the protection of human and animal life or healthcare,[27] and of course all the measures applicable to face Covid19 pandemic are under the scope of these standards.

2.3. Full Protection and Security (FPS)

According to Anzari & Raisi, "[t]he wording of these provisions implies the notion that the host state is committed to adopt some measures to protect foreign investors against unfavorable events and harmful acts."[28] The protection is not only physical, but also legal and commercial. It implies that states have to act with due diligence to protect the investors from any kind of harm, including legal harm.

The above-mentioned means that states can breach IIAs not only by action but also when they fail to make decisions to address problems related to public welfare objectives such as public health. A good example is Azurix Corp v. Argentina,[29] where this State failed to provide quality water, which had a negative impact on the foreign investor´s investment in providing drinking water to its customers. Therefore, if the state fails to take the appropriate measures to address the Covid19 pandemic, it could face a lawsuit from foreign investors if situation worsens.

2.4. Expropriation

Treaties on international investment regulate direct and indirect expropriation: the first one is to take the property from private owners to the state;[30] while the second one is a set of measurements which do not transfer the property, but

[26] Lucas Bento – Jingtian Chen: Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses. *Kluwer Arbitration Blog,* 2020. Available at: https://acortar.link/Dqv2V8 Accessed on 15 December 2022.

[27] Vadi (2021) op. cit. 339.

[28] Anzari–Raisi op. cit. 22.

[29] Bekker op. cit. 4.

[30] United Nations: Expropriation: A Sequel. *United Nations Conference on Trade and Development. Series on Issues in International Investment Agreements II,* 2012. 6.

constitute a deprivation of the property.[31] For example, denying a concession, imposing high taxes, or freezing investors' bank accounts.[32]

The problem is that the line between legitimate regulatory measures and indirect expropriation is blurred, then the foreign investors can claim to be suffering an indirect expropriation. For instance, compulsory licenses for medicine to face covid or even vaccines.[33]Nonetheless, according to Vadi[34]compulsory licenses are part of a fair use of intellectual property given by the legal framework.

In the context of expropriation, there are two approaches which may be useful to assess the possible effects on the foreign investors´ property: the sole-effects doctrine and police powers doctrine. The first one focuses on how the measures made by the state affects the investor´s property negatively, and in cases where the property is affected economically, the state has to pay compensation regardless of its purpose.[35] The second one is presented later in the paper and focuses on the objectives of the measures, especially whether they are made in good faith, in a non-discriminatory way to protect a legitimate public objective.[36]In these cases there is no compensation for the foreign investor.

The problem with the sole-effect approach is that almost any regulatory measure under the dynamics of the pandemic can negatively affect the assets of foreign investors. As is presented in this work in the following pages, the restriction on air traffic implied a reduction of the income of some airport concessionaires, which could lead to an obligation to pay compensation.[37]Likewise, this reasoning is applicable to other sectors due to the measures imposed on mobility of goods and services.

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31 Ibid. 7.

32 Ali Lazem – Ilias Bantekas: The Treatment of Tax as Expropriation in International Investor-State Arbitration. *Arbitration International,* Vol. 38, Issues 1–2, 2015. 85–130.

33 Vadi (2021) op. cit. 341.

34 Ibid. 341.

35 Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (20 August 2000), paragraph 103.

36 Vadi (2021) op. cit. 343.

37 See cases: ADP international S.A. and Vinci Airports vs Chile, ICSID case ARB/21/40; and Komaksavia Airport Invest Ltd. v. Republic of Moldova, SCC EA 2020/130.

2.5. Minimum Standard of Treatment (MST)

States have duties with foreign investors not only because of international investment treaties, but also they have duties according to customary international law. This offers a MST, then states have to act according to the FET, with good faith and in non-discriminatory manner, avoiding arbitrariness, which implies that the concept has evolved[38] since the *Neer* case. Nevertheless, it does not mean that whatever minor offense under this standard can be deemed as a breach. In Eco Oro v. Colombia, the Tribunal said in this regard: "The conduct in question must engender a sense of outrage or shock, amount to gross unfairness or manifest arbitrariness falling below acceptable standards or there must have been a lack of due process which has led to an outcome which offends a sense of judicial propriety."[39]

The problem is to identify, in the context of a pandemic, where there was a lot of uncertainty, if a conduct made by states was manifestly arbitrary or unfair. During the first year of the pandemic, the information available was not enough to assess if a curfew, lockdown, or restriction on mobility were proportional to the circumstances.

3. Possible Defense of States

Bekker[40] stated that the best possible defense of states in arbitration for claims of foreign investors in the context of Covid19 pandemic are the treaty exceptions, and customary international law.

3.1. Treaty Exceptions

In some IIAs states have included exceptions to specific standards. Especially in the new generation of treaties, namely after 2010, there are references and exceptions to public health and environment with the purpose of guiding arbitrators to take into account, in their decisions, the regulatory powers of

[38] ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award (9 January 2003), paragraph 179.

[39] Eco Oro Minerals Corp. v Colombia, ICSID case ARB/16/41, Award (9 September 2021), paragraph 755.

[40] Bekker op. cit.1–4.

states.[41] This inclusion aims to achieve a better balance between the protection of foreign investors´ interest and public objectives, represented by the ability to make regulatory measures without breaching the treaty.[42]

The exceptions usually follow the structure of Article XX of GATT, and provide that the measures have to be taken in good faith, non-discriminatory way, to protect a welfare public objective.[43]

According to the above-mentioned, states can have sufficient arguments in their defense against possible claims of foreign investors, but only under the condition that the measures taken would have been adopted without parallel intentions. This means without discrimination and in good faith, and clearly to overcome problems related to Covid19 pandemic.

3.2. Customary International Law Defense

Customary international law also has possibilities for the defense of host states, such as the doctrine of police powers, state of necessity, distress or *force majeure.*[44]

3.2.1. Police Power Doctrine

The power of state to limit freedoms and private property to seek a public purpose is inherent. Even states have the duty to protect public health because it is closely related to human rights[45], so they must take measures to overcome the Covid19 pandemic.[46] Additionally, under customary international law, police powers are widely recognized, even as a general principle of international law.[47]

41 Freya Baetens: Protecting Foreign Investment and Public Health Through Arbitral Balancing and Treaty Design. *International & Comparative Law Quarterly,* Vol. 71, 2022. 158.

42 Ibid. 158.

43 Vadi (2021) op. cit. 351.

44 Ibid. 355.

45 Ibid. 343.

46 In fact, according to the FPS states have international obligations to adopt measures adequate to preserve investments of foreign investors in their territory. Then, states have the obligation to take measures to overcome problems related to COVID-19 pandemic.

47 Philip Morris v. Uruguay op. cit. paragraph 301.

Measures taken according to the police power doctrine are not expropriations. This power, however, has to be used in a non-discriminatory and non-arbitrary way, with good faith.[48] In this case compensation is not required, such as it is referenced in Philip Morris v Uruguay.[49] Furthermore, in Saluka v Czech Republic, the Tribunal said that states have to pursue a welfare public objective under the doctrine of police powers, but measures should be adopted in good faith:

> "In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today. There is ample case law in support of this proposition. As the tribunal in Methanex Corp. v. USA said recently in its final award, '[i]t is a principle of customary international law that, where economic injury results from a bona fide regulation within the police powers of a State, compensation is not required'"[50]

3.2.2. Force Majeure

It is a circumstance when a superior force or event which cannot be anticipated nor controlled. For instance, natural disasters, wars, pandemics, etc. Nevertheless, the state must not have contributed to the occurrence of the problematic situation, and it should be unexpected. Additionally, the situation must impede compliance with an obligation.[51] According to Vadi,[52] the Covid19 pandemic might be deemed as *force majeure* because unexpected circumstances have arisen, especially at the beginning. At this stage, nobody knew what the implications would be or how to overcome the health problem.

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48 Valentina Vadi: *Public Health in International Investment Law and Arbitration*, New York, Routledge, 1st edition, 2013. 141.

49 Philip Morris v. Uruguay op. cit. paragraph 307.

50 Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Award (17 March 2006), paragraph 262.

51 Vadi (2021) op. cit. 356.

52 Ibid. 358.

3.2.3. Distress

It is a situation where there is no reasonable option to protect the life of the population.[53] At this point, the state has the option to comply with an international obligation, but it demands an unreasonable burden. The requirements to demonstrate distress are that the action of the state has not contributed to the risk and the chosen option has not created a bigger risk.

In the context of Covid19 pandemic, precisely due to the degree of uncertainty, it is difficult to assure that a set of measures has been the only reasonable options to protect the population´s life. For that reason, it may be complicated to defend the state by arguing distress, but it could be possible if the requirements are met.

3.2.4. Necessity

It is a circumstance when the integrity of the state is at stake, so the concept is related to self-defense.[54] The state must demonstrate that it is the only way to safeguard its essential interests against an imminent or grave peril.[55]Additionally, states must have not contributed to generate the necessity. In the case of Continental Casualty Company v. Argentina, the state used the argument of necessity, but on the ground of the treaty. In that case, Argentina made some decisions to overcome the economic crisis which started in 1989, with the argument to preserve the public order. The Tribunal considered, likewise, as in Philip Morris v Uruguay, that the state should be granted with deference in assessing the circumstances of a crisis.[56]

The main difference between necessity and *force majeure* is that in the first case the state chooses to not comply with an international obligation, while in the second one, the state cannot perform its obligation.[57]Similarly, the necessity differs from distress because in this case, human life is compromised, whereas in necessity not necessarily.

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53 Ibid. 359.

54 Andrea Bjorklund: Emergency Exceptions: State of Necessity and Force Majeure. In: Peter Muchlinski – Federico Ortino – Christoph Schreuer (eds.): *The Oxford Handbook of International Investment Law.* Oxford, Oxford University Press, 2008. 474.

55 Vadi (2021) op. cit. 360.

56 Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9, Award (5 September 2008), paragraph 181.

57 Vadi (2021) op. cit. 360.

4. Some Arbitral Cases Related to Covid19 Pandemic

By December 2022, the most well-known arbitral cases related to the Covid19 pandemic are ADP international S.A. and Vinci Airports vs Chile, ICSID case ARB/21/40; Komaksavia Airport Invest Ltd. v. Republic of Moldova, SCC EA 2020/130; and Loftleidir Cabo Verde v. Cabo Verde- ICC. All of these cases correspond to challenges to measures taken in the air traffic sector. However, in the case of Loftleidir v. Cabo Verde, the discussion is about the nationalization of the airline, but the restrictions on air traffic still contributed to the financial problems of the company.

4.1. ADP International S.A. and Vinci Airports vs Chile, ICSID case ARB/21/40

Groupe Aeroports de Paris Internacional S.A., a French company which manages the international airport of Santiago, filed a claim against Chile before ICSID in August 2021.[58] The company seeks compensation for losses resulting from measures taken by the Chilean government to handle the pandemic. Before the claim, the French company tried to reach a settlement with Chile, seeking an extension on the concession granted to manage the airport, and financial assistance. The original concession, signed in 2015, was for 20 years.[59]

The company invoked the obligation enshrined in the bilateral investment treaty between Chile and France. Apparently, the company claims that Chile should have taken measures to protect their interests because of the losses created by the Covid19 pandemic, specifically due to the reduction of air traffic and the commercial activities at the airport. In this context, the claimant justifies why an extension of the concession contract is the best way for Chile to comply with its obligations, but the Chilean State refused to implement that measure. The company alleges that the fair and equitable treatment, national treatment, and expropriation clauses were violated.[60]

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58 United Nations: UNCTAD. Investment Dispute Settlement Navigator. Available at: https://acortar.link/BuyNNZ. Accessed on 15 December 2022.

59 Ministry of International Relations (Republic of Chile): Chile es notificado de la solicitud de arbitraje presentada por ADP_ VINCI ante el CIADI, 2021. Available at: https://acortar.link/cmXFy0 Accessed on 15 December 2022.

60 International Institute for Sustainable Development: French consortium kicks off an ICSID claim against Chile after USD 37 million loss due to COVID-19 Pandemic, 2021. Available at: https://acortar.link/YOr1cg Accessed on 15 December 2022.

4.2. Komaksavia Airport Invest Ltd. v. Republic of Moldova, SCC EA 2020/130

In August of 2013, the Republic of Moldova signed a concession contract with Komaksavia Airport Invest Ltd to allow this company to manage the international airport of Chisinau.[61] This company is from Cyprus, and according to the agreement has to make some investments on the airport.

Additionally, it is important to consider that the former prime minister of Moldova, Iurie Leanca, was under criminal investigation because allegedly he helped corruptly to grant the airport concession.[62]

In this context, Komaksavia Airport Invest Ltd did not meet with the investment plan, and accumulated a delay of 66.2 million euros in 2019.[63]For that reason, the government of Moldova asked to constitute a financial guarantee to assure the investment plan, but the company refused to do so. As a result, on July 8th of 2020 the Republic of Moldova decided to finish the concession agreement.[64]

Afterwards, Komaksavia Airport Invest Ltd, on 27 July 2020, filed a lawsuit case against the Republic of Moldova before the Stockholm Chamber of Commerce. The company was looking for a compensation of 883.7 million euros.[65]

The standards invoked were full protection and security; most favored nation; minimum standard of treatment; non-expropriation; fair and equitable treatment.[66]

Initially the claimant succeeded with an emergency award rendered by arbitrators, on 2 August 2020, who they decided to order the Republic of Moldova "to refrain from taking any steps to terminate the Concession Agreement[67]", while the case is resolved.

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61 Komaksavia v. Moldova, SCC EA 2020/130, Final Award (3 August 2022), paragraph 61.

62 Balkaninsight: Moldova Wins Case Over Terminated Airport Concession, 2022. Available at: https://acortar.link/V3FwOb. Accessed on 15 December 2022.

63 Nicoleta Banila: Moldova rescinds Chisinau airport concession deal with Avia Invest, 2020. Available at: https://acortar.link/S8auRm Accessed on 15 December 2022.

64 Komaksavia v. Moldova, SCC EA 2020/130, Emergency Award (2 August 2020), paragraph 49.

65 Balkaninsight op. cit. See note 61.

66 Jusmundi: Notice of investment dispute, 2020. Available at: https://acortar.link/Acynv2 Accessed on 15 December 2022.

67 Paragraph 130.3.

The arbitration tribunal, however, dismissed the claim on August 3rd , 2022. For the Tribunal, there was no jurisdiction because the claimant´s investment does not qualify as an investment according to Article 1(1) of the BIT between Cyprus and Moldova.[68]

4.3. Cabo Verde (Loftleidir Cabo Verde v. Cabo Verde-ICC)

Some news portals[69] and the Russian Arbitration Centre[70] have reported this case. They have said that the Icelandic company Loftleidir Cabo Verde accuses the government of Cabo Verde of expropriating the Company. Loftleidir is an equity partner of Cabo Verde Airlines (a state company). Likewise, Loftleidir with Icelandair bought the majority of the shares of Cabo Verde Airlines. They signed an agreement to restart the operation of Cabo Verde Airlines, and Loftleidir had the commitment to pay 30 million USD.

On the other hand, Cabo Verde accuses the company of breaching that commitment and states that it provided a loan of 24.4 million USD to assure the restart of commercial services. Hence, allegedly Loftleidir Cabo Verde did not comply to pay the agreement nor the loan.

For that reason, and the losses created by the Covid 19 pandemic, the government of Cabo Verde decided in December 2021 to renationalize the company. As a result of these events, Icelandic company Loftleidir Cabo Verde filed a lawsuit before the International Chamber of Commerce in Paris.

5. Conclusions

This moment could be the foremost for international investment arbitration, with the highest number of cases in the history of ICSID, and the inherent challenges caused by the Covid19 pandemic, with the consequent response of states around the globe. As previously mentioned, the international investment regime has

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68 Komaksavia v. Moldova, SCC EA 2020/130, Final Award (3 August 2022), paragraph 175.

69 Ch-Aviation: Loftleidir takes Cabo Verde to court, 2021. Available at: https://acortar.link/AtmceP Accessed on 15 December 2022; and Airspace Africa: Loftleidir takes Cabo Verde to the ICC over the nationalization of Flag Carrier, 2021. Available at: https://acortar.link/Jt05Kf Accessed on 15 December 2022.

70 Russian Arbitration Centre: Loftleidir Would Rather Fly, But Has to Go to Arbitration Because of Cape Verde. *Arbitration Digest.* December 2021. 3.

a problem of legitimacy because, *inter alia,* of disruptive arbitral decisions, which have limited the room for making regulatory measures for states. In the context of a pandemic, it is especially problematic due to the necessity of acting accordingly to the circumstances and the international investment regime cannot be a threshold for that. Then, if states perceive that the arbitral decisions are not adequate to the circumstances, they could withdraw from all IIAs, as Ecuador, Bolivia and Venezuela did in the past.

Although there are arguments to defend states against the claims of foreign investors, it is necessary to consider that all measures made by states ought to be without discrimination and arbitrariness. This means, without parallel purposes like fostering national production, but undermining foreign investments, instead of seeking to protect a public legitimate objective.

Another aspect to take into account is that according to FPS, states have the duty to make measures to protect foreign investments against harmful events, such as a pandemic. As a result, some of the challenged measures made by states can be deemed a natural response to comply with international obligations under FPS. Nonetheless, common factors to consider a measure valid are the absence of arbitrariness and non-discrimination.

Finally, it is important to consider that arbitration is a tool to protect foreign investment, but there are available other possibilities, such as conciliation, mediation, or neutral evaluations. Consequently, a good way to protect the international investment regime is to foster these other dispute resolution methods.