LEGITIMATE EXPECTATIONS IN A TIME OF PANDEMIC: THE HOST STATE’S COVID-19 MEASURES, ITS OBLIGATIONS AND POSSIBLE DEFENSES UNDER INTERNATIONAL INVESTMENT AGREEMENTS

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ABSTRACT

The unprecedented COVID-19 pandemic has drastically changed the world we live in, and exerted negative impacts on business activities, including international trade and investments. In order to flatten the rocketing curve of confirmed COVID-19 cases, countries have implemented preventive measures such as restricting international travel, suspending almost all kinds of businesses, and even nationalizing certain products (e.g., masks) from private enterprises. While the purpose of these government actions is legitimate and reasonable—namely to protect public health—these profound and unprecedented measures will adversely affect both domestic and foreign companies’ managements and businesses. Under the protection of the international investment agreement (hereinafter “IIA”), the affected foreign investor is entitled to initiate the investment claim, asserting that the regulatory environment of the host state has been changed, or arguing that the host state is in breach of the commitments which have been made and constituted the foundation for the investments. And the host state might therefore be claimed

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Electronic copy available at: https://ssrn.com/abstract=3617790
to have failed to provide the fair and equitable treatment (hereinafter “FET”) required by the IIA. The tension between the host state’s COVID-19 measures and the foreign investors’ legitimate expectations hence arises.

This article focuses on the legitimacy of host states’ COVID-19 measures and examines whether those measures, though creating regulatory changes in host states, impede foreign investors’ legitimate expectations and constitute a violation of FET under the IIA. Insomuch that the COVID-19 crisis seems to be unpredictable, this article argues that the protection of foreign investors’ legitimate expectations should not be unlimited, and the preventive measures implemented by host states should be respected, providing that the normative changes are in bona fide nature and proportionate. In addition, this article also proposes certain public health defenses which are available for host states to justify their COVID-19 measures and which should be considered by the arbitral tribunals. In short, it is hoped that the findings and analysis of this article can offer a different angle to understand the scope of the foreign investors’ legitimate expectations and more broadly, host states’ FET obligation in a time of pandemic.

**KEYWORDS:** COVID-19, International Health Regulations (2005), WHO, Public Health, Legitimate Expectations, Fair and Equitable Treatment, Investment Arbitration, International Investment Agreements
I. INTRODUCTION

The outbreak of COVID-19 (i.e., Coronavirus) has lasted for almost five months since December of last year and caused tremendous damage from both economic and non-economic aspects. So far, there are more than 4.8 million confirmed cases and over 300 thousand deaths. In order to combat the spread of COVID-19, on January 30, 2020, the World Health Organization (hereinafter “WHO”) declared that the spread of COVID-19 has met the criteria of a “Public Health Emergency of International Concern” (hereinafter “PHEIC”) under Article 1 of the International Health Regulations (2005) (hereinafter “IHR”) and proposed a variety of preliminary recommendations to fight against the pandemic accordingly, such as reducing human infection, prevention of secondary transmission and international spread.1 Some countries have adopted even more stringent measures with the hope to flatten the rocketing case number and prevent the medical system from collapsing. Such measures include promulgating lockdown orders suspending any forms of non-essential economic activities, imposing travel restrictions, and even nationalizing private businesses.2 While the purpose of these measures is sound and legitimate, they might halt enterprises’ operations, and have already caused a wave of bankruptcies and layoff around the globe.3

While no one can predict the extent of outbreak of COVID-19 and its severity, foreign investors, under the protections of the bilateral investment treaties, do expect that the local government will, on the one hand, adopt an effective approach to ease the spread of the pandemic, and on the other hand, maintain regulatory stability and favorable commitments which constitute the grounds for their investment. Nonetheless, when confronted with emergent and unprecedented situations such as the extensive spread of COVID-19, government authorities have no choice but to prioritize public health, and suspend business activities or even derogate the commitments offered to investors during the time when the investments were being

established. If and when the pandemic gradually vanishes, some foreign investors who have suffered from the preventive measures may call upon the host state to compensate them through initiating investment arbitration, asserting that those regulatory changes or retraction of certain favorable commitments have impeded their legitimate expectations in relation to the host state’s investment environment and hence constitute a violation of fair and equitable treatment (hereinafter “FET”). In such scenario, should the tribunal defer to host states’ measures to combat COVID-19? Or should the legitimate expectations held by foreign investors still be respected?

This article will explore the interpretation and application of the international investment agreement (hereinafter “IIA”) obligations during the time of COVID-19 with the specific focus on FET and investors’ legitimate expectations. Section II of this article will elucidate the foreign investors’ expectations in arbitral jurisprudence. Section III will further attempt to shed light on the appropriate interpretation and application of FET and the boundary of the concept of “legitimate” expectation when confronted with the host state’s measures aiming at fighting against COVID-19. Section IV concludes.

II. FAIR AND EQUITABLE TREATMENT AND FOREIGN INVESTORS’ LEGITIMATE EXPECTATIONS: AN OVERVIEW

A. The Notion of Legitimate Expectations Under International Law

Among the substantive protection standards under the investment agreements, the FET is the one of the most commonly invoked legal claims in investor-state disputes, because the vague wording may be interpreted as intended obligation, intended by obligation, or intended by States. Such a relatively innocuous and benign standard has allowed a number of investors to prevail in cases in which claims of expropriation have failed. 4 Reviewing the past investment arbitration awards that are accessible, in over 83% (499 out of 600) of the disputes, the investors have tried to fit their arguments into the broad and vague formulation of FET standard. 5 Unlike one-off commercial transactions, investment activities usually last a significant period of time and hence their profits highly depend on the host country’s regulatory environment and stability. 6 As a result, any “changes”

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which affect investment activities would be of serious concern to foreign investors.

Protecting foreign investors’ legitimate expectations is an important but controversial element of FET. The notion of assuring the legitimate expectations is to protect foreign investors against arbitrary breaches by the host state of its previous publicly stated position, which constitutes an indispensable element for the foreign investors when they decided to establish their investment.\(^7\) The “expectation” held by investors may be formed on a variety of bases—from the general anticipations such as the presumed stability of the host state’s legal framework and the investment-related policy promulgated by the host state, to more distinct grounds including the specific commitments granted by government authorities or the contractual relationship with the host states.\(^8\) From the host state’s perspective, however, based on the principle of the right to regulate, it should be capable of amending the law and regulation or suspending the privileges accorded to investors with a view to protecting its public interests, including its nationals’ health and welfare, which then might unavoidably bring negative impact on foreign investors. The role of arbitral tribunal is to ascertain an appropriate line to achieve a balance between individuals’ expectation and the regulatory space for host states.\(^9\)

**B. Legitimate Expectations in Investment Arbitral Jurisprudence**

The issue of protecting investors’ legitimate expectations has been repeatedly addressed by arbitral tribunals. In general, if the host state is found to have violated investor’s legitimate expectations, it will constitute a breach of the host state’s FET obligation under the IIA. But when the subject matters are different (e.g., amendments of laws or regulations, changes of administrative conduct, or other specific commitments), arbitral tribunals would apply a different standard of review in order to strike a balance between both needs. The following paragraphs will explain the different level of scrutiny adopted by tribunals.

Concerning the stability of the overall legal framework of the host state, the majority arbitral tribunal consensus is that the state should have the right to adjust its regulatory framework and foreign investors cannot anticipate the legislation or legal environment of the host state will remain unchanged since the time when the investment was established. Moreover, only fundamental and substantial changes to the legal framework would be


\(^8\) See ROLAND KLÄGER, ‘FAIR AND EQUITABLE TREATMENT’ IN INTERNATIONAL INVESTMENT LAW 164-65 (2011).

\(^9\) Id. at 169.
Deemed an infringement of investors’ legitimate expectations. For instance, in *Philip Morris v. Uruguay* case, the tribunal stipulated that “the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State’s rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.”¹⁰ In addition, the arbitral tribunal also recognized that such changes to general legislation are permissible provided that they fall within the host state’s regulatory power in the pursuance of public interest.¹¹ Likewise, the tribunal in *Eiser Infrastructure Ltd. and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* case firstly acknowledged the host state’s right to modify its legal framework by stating that “FET standard does not give a right to regulatory stability per se. The state has a right to regulate, and investors must expect that the legislation will change.”¹² And the tribunal also indicated that the foreign investor’s legitimate expectations would be infringed only when the host state makes the “fundamental change to the regulatory regime in a manner that does not take account of the circumstances of existing investments made in reliance on the prior regime.”¹³ This article is of the view that Eiser’s tribunal established a high threshold to find a breach of the FET standard pertaining to regulatory changes. Namely, such modifications must be fundamental, total, and unreasonable, and must not consider the circumstances under which the existing investment was done.

Turning to the discussion of the concept of legitimate expectations held by foreign investors as regards host states’ administrative conducts and contractual relationships, some arbitral tribunals have ruled that the specific commitments made by governments or violations of contractual obligation seem to deserve relatively higher level of protection compared to general legislative modifications.¹⁴ For example, in *Metalclad Corp. v. Mexico*, the tribunal ruled that Mexico denied issuing the construction permit which was assured by governmental officials when the investment was being made, together with procedural deficiencies, impeded the investor’s expectation and constituted a violation of FET.¹⁵ The tribunal in *CME v. Czech Republic and Eureko BV v. Poland* both emphasized that the stability of the contractual relationship between the investor and the host state is

¹⁰ Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 422 (July 8, 2016) [hereinafter Philip Morris v. Uruguay].
¹¹ Id. ¶ 423.
¹² Eiser Infrastructure Ltd. & Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, ¶ 362 (May 4, 2017).
¹³ Id. ¶ 363.
¹⁵ Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 85-94 (Aug. 30, 2000).
considered the foreign investor’s legitimate expectation and is of relevance within the protection of the FET.\textsuperscript{16} Moreover, the tribunal in \textit{Noble Ventures Inc. v. Romania} suggested that the FET affords a comprehensive protection on the contractual rights between the foreign investor and the host state government without making any serious reservations.\textsuperscript{17} In brief, when the “subjects” being expected to be stable by the foreign investor relate to administrative conducts, contracts or other specific commitments made by the host states, the arbitral jurisprudence reveals a tendency to rule that the breach or change of those subjects by the host government constitutes violations of the FET.

\textbf{C. Weigh and Balance Approach Should Be Applied}

The foregoing arbitral jurisprudence reveals certain limitations as to whether an investor’s expectation is legitimate and protected by the FET. For example, it seems to be the dominant perspective of the arbitral tribunals that, unless investors’ legitimate expectations depend on specific guarantees and representations made by the host state which were the fundamental incentives that induced investors to establish their investment in the first place (e.g., the administrative conduct which specifically applies to the foreign investors at stake and contractual relationship), the change in the provisions of general legislation applicable to non-specific subjects would not impede legitimate expectations in the absence of the host state’s specific undertakings.\textsuperscript{18} In other words, such expectation would be neither legitimate nor reasonable.

In fact, the struggle to determine whether the expectation held by the foreign investor can outweigh the host state’s legitimate regulatory interests is the process of weighing and balancing. A significant number of investment arbitral awards have highlighted the need to balance investor expectations against the legitimate regulatory objectives of the host country. Such balancing approach was solidly laid in \textit{Saluka v. Czech Republic} case. To elucidate whether the foreign investors’ legitimate expectations were frustrated, the tribunal in this case indicated that:

\begin{quote}
In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, \textit{the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well . . . .}
\end{quote}

\textsuperscript{17} Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, ¶ 182 (Oct. 12, 2005).
\textsuperscript{18} See, \textit{e.g.}, Philip Morris v. Uruguay, \textit{supra} note 10, ¶ 426.
The determination of a breach of Article 3.1 [i.e., FET] by the Czech Republic therefore requires a weighing of the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interests on the other.

A foreign investor . . . may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors’ investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination 19 (emphasis added).

In short, the arbitral jurisprudence recognizes host states’ right to regulate as to promulgate regulations with the purpose of protecting public interests such as health and environment provided that they are implemented in a bona fide manner—even though they might adversely affect foreign investors’ interests. The principle of proportionality, which typically comprises the following approach: (1) considering to what extent the regulatory change made by host states can achieve the goal that it set, (2) exploring whether other less investment-restrictiveness measure that can be reasonably applied exists, and lastly, (3) weighing and balancing the vitalness of the host state’s public interests and the negative impacts that the foreign investor suffers, can, in this article’s perspective, be applied as a possible tool to help investigate the boundary of investors’ “legitimate” expectation on host states’ regulator environments during the pandemic period.

III. LEGITIMATE OR ILLEGITIMATE? WHEN THE HOST STATE’S ANTI COVID-19 MEASURES CONTRADICT FOREIGN INVESTORS’ EXPECTATIONS

A. “Reasonably” Legitimate Expectations in a Time of Pandemic

As the previous arbitral jurisprudence concerning the protection of the foreign investors’ legitimate expectations as regards the stability of the host state’s conduct and regulatory change has revealed, arbitral tribunals have established two levels of analysis depending on different objects that constitute the investor’s expectation, namely (1) the overall legal framework of the host states, and (2) the contractual relationship or other

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specific commitments created by the host state. In addition, the principle of proportionality is proposed as the framework for arbitral tribunals to evaluate different interests at stake. Since regulatory changes or actions are enacted in the pursuance of addressing public health concerns for COVID-19, the host state deserves a greater degree of deference, providing that such regulatory changes or actions are not enacted in bad faith or arbitrary (e.g., the real purposes behind the regulatory measures are not for public health protection, but for other political considerations; or the implementation of the measures causes unjustifiable discriminations between domestic and foreign enterprises which are in like circumstances).

The first scenario, namely the change of legal framework of the host state, can be further broken down into two circumstances, namely “promulgating regulations or ordinances by administrative agencies based on current laws”, and “enacting (amending) new (current) legislations.” In the former circumstance, if host state declares the emergency order according to the law or regulation that already existed at the time when the foreign investor made its investment (e.g., many states in the United States have issued the “Shelter in Place Order” requiring all inhabitants staying home and halting all non-essential activities, and the nature of the Order is the executive order and was promulgated based on relevant public health and safety acts), the investor should fully anticipate that such order would be issued and regulatory changes would also take place in the occurrence of a public health crisis. Hence the FET argument in light of infringement of its legitimate expectations in this circumstance should be dismissed by the arbitral tribunal. Regarding the latter circumstance, for instance, Taiwan enacted the “Special Act for Prevention, Relief and Revitalization Measures for Severe Pneumonia with Novel Pathogens” which authorizes the executive branch to impose any necessary measures for COVID-19 prevention; and a maximum of NTD one million fine will be imposed if an individual violates the necessary measures implemented or refuses the requisition conducted by a government authority. Based on the previous analysis, this article argues that such special legislation which primarily focuses on combating the pandemic will meet the requirements as set forth in the prevailing arbitral jurisprudence, insomuch as it was with a

21 More detailed discussions on this Act, see generally Ching-Fu Lin et al., Reimagining the Administrative State in Times of Global Health Crisis: An Anatomy of Taiwan’s Regulatory Actions in Response to the COVID-19 Pandemic, 11 EUR. J. RISK REG. 1 (2020).
22 Yanzhong Teshu Chuanranxing Feiyan Fangzhi ji Shukunzenxing Tebietiaoli [Special Act for Prevention, Relief and Revitalization Measures for Severe Pneumonia with Novel Pathogens] art. 7 (Taiwan).
23 Id. art. 16.
view to protecting the foremost public interest of the host state (the population’s life and health), enacted in a *bona fide* manner, and the substantive content of the legislation does not cause discriminatory treatment between domestic and foreign enterprises. If these conditions are met, such new law or regulation enacted by the host state for the purpose of addressing the spread of the pandemic should be a reasonable regulatory change and foreseeable to foreign investors when they established their investments. In this circumstance, the foreign investors do not hold legitimate expectations. Notably, some recent IIAs explicitly point out that the mere fact that a host state regulates or modifies its laws in a manner which negatively interferes with an investor’s expectations does not amount to a breach of an obligation (e.g., FET) under the agreement.24 This article considers that such provision can better clarify the scope of legitimate expectations.

We now turn to consider the second scenario, namely whether the host state is found to be in breach of the FET on the ground of overthrowing the specific commitments that were promised to the foreign investor, or departing from its contractual obligations in order to cope with COVID-19, with a hypothetical scenario. For instance, a host state’s local government decides to suspend or even terminate the infrastructure project or construction contract with foreign investors due to financial difficulties and to prevent the cluster infection among workers. Since the contractual relationship and/or other specific commitments formed the foundation for which the foreign investor decided to establish the investment, the weight afforded to the foreign investors’ legitimate expectation on the stability of such contractual relationship should theoretically increase.25 However, given the unprecedented nature of the COVID-19 pandemic, it seems unavoidable for the host state to adopt emergency actions to prevent the spread of COVID-19 and ensure the public health and safety of the population—which actions would adversely infringe foreign investors’ investment interests.26 Hence, this article argues that the principle of proportionality should be applied in these circumstances to examine whether the deviations made by the host state remain proportionate with regards to the affected rights and interests owned by the foreign investors.

24 EU–Canada Comprehensive Economic and Trade Agreement, art. 8.9.2 “For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.”
The arbitral tribunal should consider relevant factors to determine whether the foreign investors’ legitimate expectations are impeded, including (1) whether the breach of the contract or infrastructure project can contribute to the prevention of COVID-19, (2) whether there are other less-investment restrictive but equally effective measures available for the host states in lieu of breaking the contract, and (3) a weighing and balancing exercise to figure out whether the host state’s public welfare prevails over the foreign investors’ economic losses. Whether the host state’s breach of its commitment due to COVID-19 would lead to a violation of the FET requires individual examination, and elements such as principles of good faith, non-discrimination and non-arbitrariness, together with the nature of the COVID-19 measure (e.g., whether the measure is temporary or permanent) should all be considered.

In addition, with regards to the competence of deciding the standard of review, this article suggests that the arbitral tribunal should exercise the margin of appreciation doctrine to give appropriate deference to the host state’s measures in a time of pandemic. The notion is that state authorities are usually in better positions than arbitral tribunals to determine the necessity of restrictions imposed on foreign investors, especially in time of public emergency threatening the life and health of the population. In brief, arbitral tribunals differ on the degree of deference through evaluating the importance of the protected public interests behind the measures. In other words, the more vital the protected public interests are (such as the life and health of the host states’ nationals), the more policy spaces shall be afforded to the host state.

B. Potential Public Health Defenses Under IIAs

Even if the arbitral tribunal finds that the legitimate expectations of the foreign investors are impeded and the host state is in breach of its FET obligation, the host state may still contend that its regulatory changes to fight against the spread of COVID-19 can be justified through the carve-out and exception clauses which are explicitly set out in IIAs which aim at

28 Arato, supra note 27, at 566-67.
protecting legitimate public welfare objectives, such as public health. Some more recent IIAs or investment chapter under the free trade agreements explicitly set out these defensive provisions. For instance, Article 31.1 of the Taiwan-India IIA makes reference to the general exception clause in Article XX of the WTO General Agreement on Tariffs and Trade 1994, pointing out that the IIA shall not be construed to prevent the host state from adopting or enforcing necessary measures to protect human life and health, provided that such measures are applied on a non-discriminatory basis. Such provision, in this article’s view, can serve as the safe valves for the host state’s public health-related measures for combating COVID-19 as long as the listed requirements are met. For example, the host state may argue that the decision of suspending most of the businesses is an action with the purpose of protecting inhabitants’ life and health, which are more vital interests compared to foreign investors’ economic interests. Moreover, since there are no less restrictive alternative measures reasonably available that can achieve the same level of protection to the host state’s population, and the suspension is equally applied to both domestic and foreign enterprises, such order should be justifiable under the public health exception clause under the IIA.

However, not all IIAs contain such carve-out provision or public health exception clause; especially for those IIAs concluded in earlier period. Notwithstanding, the preventive measures and possible regulatory changes for COVID-19 can still be justified under customary international laws which are codified in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter “Draft Articles”) adopted by the International Law Commission. According to the Draft Articles, a state’s responsibility for not acting in conformity with its international obligation will be precluded if such deviation is due to force majeure, or if it fulfills

30 Bilateral Investment Agreement Between the Taipei Economic and Cultural Center in India and the India Taipei Association in Taipei art. 31.1, The India Taipei Ass’n in Taipei–The Taipei Econ. and Cultural Ctr. in India, Dec. 18, 2018 (“Nothing in this Agreement shall be construed to prevent the adoption or enforcement by the authorities of the territory, of measures of general applicability applied on a non-discriminatory basis that are necessary to: . . . (b) protect human, animal or plant life or health; . . .”).

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

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the requirements of principle of necessity.\textsuperscript{33} This article considers that COVID-19 is undeniably an “unforeseen event”, a “grave and imminent peril”, which threatens essential interests, namely human life and health. As for the other elements such as “the event is beyond the control of the state”, “the event causes the state ‘materially’ impossible to comply with its obligation”, and “the state’s act is the ‘only way’ to safeguard the interest from the peril” etc., whether a state’s regulatory change in light of halting the rapid spread of COVID-19 can satisfy the foregoing elements will require a case-by-case assessment, depending on the specific modification of the law or regulation, the impact of such regulatory change, and the particular circumstances.

As a branch of international legal system, the investment arbitral tribunal cannot see itself as a self-contained regime. Hence, the above defenses under customary international law should be considered by the arbitral tribunal. Even though those principles have been strictly interpreted by international jurisprudence, this article suggests that arbitral tribunals should adopt a standard of review that displays a high level of deference to the host state, considering the unprecedented nature of COVID-19, and eventually draw an appropriate line between the host state’s right to regulate and the foreign investor’s economic interests.

\textbf{C. The Role of IHR and PHEIC in Arbitral Proceedings}

Given the fact that the outbreak of COVID-19 has been determined to be PHEIC by WHO in accordance with Article 12 of the IHR,\textsuperscript{34} when an investment dispute concerning the measure imposed for the purpose of preventing the spread of the pandemic arises, should the arbitral tribunal take the fact of the existence of PHEIC into account in determining whether the public health consideration behind the measure at issue can outweigh the foreign investor’s interests, and thus be found legitimate under IIAs?

\begin{quote}
the State, making it materially impossible in the circumstances to perform the obligation.
\end{quote}

\textsuperscript{33} \textit{Id.} art. 25:

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.

\textsuperscript{34} WHO, INTERNATIONAL HEALTH REGULATIONS [hereinafter IHR (2005)] art. 12 (3d ed., 2005).
The latest Temporary Recommendations of fighting against COVID-19 issued by WHO suggested that government authorities must “immediately adopt and adapt population-level distancing measures and movement restrictions . . . to reduce exposure and suppress transmission”, including suspending mass gatherings, closing non-essential places of work, restricting national and international travel, and promulgating other movement restrictions which are proportionate to the health risks confronted by the community.\footnote{WHO, 14 April 2020 COVID-19 Strategy Update 9 (2020).} Even though the nature of these temporary recommendations is non-binding\footnote{IHR (2005), supra note 34, art. 1: “[T]emporary recommendation’ means non-binding advice issued by WHO pursuant to Article 15 for application on a time-limited, risk-specific basis, in response to a public health emergency of international concern, so as to prevent or reduce the international spread of disease and minimize interference with international traffic; . . . .” See also Lawrence O. Gostin & Rebecca Katz, The International Health Regulations: The Governing Framework for Global Health Security, 94(2) MILBANK Q. 264, 305-06 (2016).} and may not be qualified as the “relevant international rules” and be taken into account while interpreting the FET under the IIA,\footnote{Vienna Convention on the Law of Treaties art. 31.3(c), May 23, 1969, 1155 U.N.T.S. 331 (“There shall be taken into account, together with the context: . . . any relevant rules of international law applicable in the relations between the parties.”).} this article suggests that the arbitral tribunal should still take those recommendations as factual evidence and give a greater margin of deference to the host state’s discretions if the measure at issue is based on the temporary or standing recommendations provided by WHO.

Such approach has actually been adopted in arbitral jurisprudence. In \textit{Philip Morris v. Uruguay} case, while the subject matters argued and debated in the arbitral proceeding were whether the host state’s regulatory measures were in breach of its treaty obligations under the investment treaty, the Guidelines for Implementation of Article 11 of the Framework Convention on Tobacco Control,\footnote{The Conference of the Parties, Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control, FCTC/COP3(10) (Nov. 2008).} which is also a soft law and not legally binding, was referred to and mentioned by the host state and international/non-governmental organizations for the purpose of deciding whether the objectives of the host state’s measures at issue are legitimate and establishing the evidence base for adjudicating the reasonableness of those measures.\footnote{Philip Morris v. Uruguay, supra note 10, at ¶¶ 399, 407.} The role and status of the Guidelines were identified and affirmed by the arbitral tribunal—namely to demonstrate the \textit{bona fide} public health purpose behind the measure on the one hand, and to serve as the factual evidence and a “point of reference” for the reasonableness, proportionality and justifiability of the measures on the other hand.\footnote{See Suzanne Y Zhou et al., The Impact of the WHO Framework Convention on Tobacco Control in Defending Legal Challenges to Tobacco Control Measures, 28 TOBACCO CONTROL s113, s115-16 (2019). See also McCabe CTR. FOR LAW & CANCER, THE AWARD ON THE MERITS IN}
While the doctrine of *stare decisis* does not exist in investment arbitration *per se*, this article believes the way that the arbitral tribunal in *Philip Morris v. Uruguay* addressed non-binding norms issued by WHO should have positive implication and should also be referenced by future tribunals when confronted with the disputes in relation to the reasonableness of the host state’s COVID-19 measures under the FET.

IV. CONCLUDING REMARKS

The tension between protecting foreign investors’ investment interests and respecting host states’ regulatory space under IIAs has been highlighted in plenty of scholarships. The spread of COVID-19 is just another vivid case displaying such potential conflicts, but it is surely an important case in formulating the narratives of both sides in the contemporary era. This article primarily focused on how the scope and concept of the foreign investors’ legitimate expectations under the FET should be interpreted and applied in this time of a pandemic. Drawing from the investment arbitration jurisprudence, this article firstly argued that the foreign investors’ legitimate expectations are not unlimited, and the best way to analyze whether such expectation is legitimate is the process of weighing and balancing different interests at stake, in which factors such as the vitalness of the host state’s public interests, and whether the regulatory changes are in *bona fide* nature should all be taken into account. This article further examined whether those COVID-19 measures would impede investors’ legitimate expectations using the foregoing analytical framework, and also proposed possible public health defenses that can be argued by the host state. Overall, this article is of the view that insomuch as the impacts of COVID-19 are still unpredictable, unless the host state’s actions are in bad faith or arbitrary, the regulatory changes amid the COVID-19 crisis enacted by the host states with a view to protect public health should be given great deference.

Charles Dickens wrote a well-known phrase in his legendary novel “*A Tale of Two Cities*”, which opens with “[I]t was the best of times, it was the worst of times.” While it is definitely unfortunate to witness the tremendous loss of life and diminution of commercial interests due to COVID-19, it might be an opportunity for lawyers and policy makers to rethink the possibility of reconciliating different interests originating in

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international legal forums. The outbreak of COVID-19 is neither the first public health emergency in history, nor will it be the last. This article contends that the WHO should play a more active role in not only leading countries in combatting the spread of the pandemic, but also closely collaborating with relevant international organizations, including ICSID and WTO, to exchange the opinions from different angles, and timely promulgate effective and hopefully less trade/investment restrictive recommendations amid the pandemic outbreak. This article hopes to shed light on figuring out the reasonable scope of the investor’s legitimate expectation in this time of a global health crisis and provide certain guidance for arbitral tribunals when adjudicating potential investment claims arising from this in the future.

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