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PROTECTING FOREIGN INVESTMENTS AMIDST COVID-19: THE BALANCE BETWEEN LEGITIMATE EXPECTATIONS AND PUBLIC INTEREST

Abstract: *The protection of foreign investments has long been enshrined in a variety of international treaties throughout the world. These treaties include both substantive standards of protection, as well as a unique form of arbitration, commonly called Investor-State Dispute Settlement (ISDS). While the treaties do provide a theoretically high degree of regulatory autonomy to host states, in actual practice, it is frequent that governments must take into account the interests of foreign investors. As a consequence of COVID-19, every government adopted a slew of measures, some of which have harmed the interests of foreign investors, or frustrated their legitimate expectations, thus potentially giving rise to ISDS. The recent controversy over the legitimacy of intra-EU ISDS further complicates the matter. This paper seeks to examine the complex interplay present in the subject, studying the balance between private interest, public economic interest and public health interest. It analyzes the question both in abstract, and with regards to specific 'points of friction' that already started rearing their heads. Through this, the study will be able to determine in which direction the balance leans more, and answer how ISDS influenced the COVID-19 situation and vice versa.*

Keywords*: investment, ISDS, COVID-19, FET, BIT.*

1. INTRODUCTION

The protection of foreign investments has long been enshrined in a variety of international treaties throughout the world. These treaties include both substantive standards of protection, as well as a unique form of arbitration, commonly called Investor-State Dispute Settlement (ISDS). Through these provisions, foreign investors enjoy significantly stronger and broader protections than domestic ones. They are entitled to a variety of treatment standards, and host states are obliged

to respect their various obligations with regards to legislation, especially in connection with subjects that could infringe on the treaty-provided rights of foreign investors, or cause a loss of value or profit in their investments.

While the treaties do provide a theoretically high degree of regulatory autonomy to host states, some more explicitly than others, in actual practice, it is frequent that governments must take into account the interests of foreign investors. Due to the practical realities of the world economic system, it is not possible for most host states to simply disregard the interests of foreign investor, as even if they refuse to partake in the ISDS processes such disregard could incur, they still depend on foreign capital to maintain and develop their domestic economies. The loss of this foreign capital is thus a serious risk, and host states are naturally encouraged to not scare off foreign investors. As such, the so-called right to regulate that is often provided by these investment treaties (either explicitly or implicitly) is not necessarily sufficient enough of a counterbalance to these practical economic interests.

As a consequence of COVID-19, every government adopted a slew of public health and other measures. By imposing these limits on economic activity, many of these measures have naturally harmed the interests of foreign investors, or potentially frustrated their legitimate expectations. For example, the travel restrictions imposed by many countries significantly interfered with the tourism industry, where foreign investments are a rather common sight. While, as already referred to, many investment treaties provide public health "exceptions" for the host state to rely on, it is ultimately the duty of an investment arbitration tribunal conveyed through the ISDS system to determine whether such an exception is extant in the context of a given treaty, and if so, what are its requirements for applicability and whether the host state met them.

As a result of these above-mentioned factors, public interest and foreign investor interest frequently clash, and has likewise clashed with regards to COVID-19 as well. The international investment regime might not be particularly suited to dealing with global pandemic situations, and thus arbitrators had to and have to largely rely on their own judgment when it comes to say, the proportionality of a COVID-19 host state measure. From a European perspective, the question of ISDS is also very complicated. On one hand, the EU has drawn foreign investment protection regulation into its own sphere of influence via the Lisbon Treaty. Meanwhile, recent controversy emerged over the legitimacy of intra-EU ISDS, as with regards to the so-called *Achmea v. Slovakia* case[1], the CJEU has determined that the ISDS procedure is not compliant with EU law.[2] Of course, even if ISDS is

[1] Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13, *https://www.italaw.com/cases/417*, 28 September 2021.

[2] See in more detail: Clement Fouchard, Marc Krestin, "The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!", *Kluwer Arbitration Blog*, *http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/,* 28 September 2021.

diminished with regards to intra-EU disputes between host states and foreign investors, it is still a notable means of solving investment disputes globally.

This paper seeks to examine the complex interplay present in the subject, studying the balance between private investor interest, public economic interest and public health interest. It analyzes the question both in abstract, and with regards to specific 'points of friction' that already started rearing their heads. In particular, the paper will begin with a review of the general status of regulatory rights of the host state in investment treaties. This will help the reader better contextualize the issues at hand. Secondly, the paper will examine the already-mentioned specific points of friction, looking at the type of measures most likely to provoke an ISDS reaction. In relation to the latter, the paper will also briefly refer to the case law, principally to past ISDS cases where parallels could be drawn to the COVID-19 situation. Through these, the study will be able to determine in which direction the balance leans more, and answer how ISDS influenced the COVID-19 situation and vice versa.

2. THE RIGHT TO REGULATE

The most dominant, and arguably, the original form of investment protection treaties were the so-called Bilateral Investment Treaties, or BITs.[3] As such, the primary focus of this section shall be on these BITs. As for the subject matter, we have to stress that the public interest of host states do not always align with the personal interests of foreign investors and their investments, and as already mentioned in the introduction of this paper, the right to regulate is a supposed tool for safeguarding legitimate public interest from the obligations found in these BITs.

To begin with, the right of host states to regulate was not originally an intrinsic part of BITs, in fact, we would be hard pressed to find a provision attesting to such in older BITs. As such, this right to regulate only became truly defined later on. In the original BITs dating back to the late 1950s, 1960s and 1970s, it was only possible to derive the existence of this right implicitly from certain provisions where it was possible to conjecture it from the provision's language. In particular, expropriation clauses of these early investment treaties were sometimes worded in such a way as to imply the existence of this right (within the specific context of expropriation).[4] These provisions prohibited the host state from expropriating investments of foreign investors covered by the given BIT, except if the

[3] For a history of BITs, see: Kenneth J. Vandevelde, "A Brief History of International Investment Agreements", *U.C. Davis Journal of International Law & Policy,* Volume 12, No. 1, 2005, 157-194, 168-171.

[4] See: Inga Martinkute, "Right to Regulate in the Public Interest: Treaty Practice", *Jus Mundi*, *https://jusmundi.com/en/document/wiki/en-right-to-regulate-in-the-public-interest*, 16 October 2021.

expropriation happened for public benefit (and compensation). For example, the very first BIT, the Germany – Pakistan BIT of 1959, used exactly this language in its third article.[5]

However, these early treaties tied even this somewhat vague and limited implication to specific elements of the treaties, they did not cover the treaty as a whole. Eventually, other approaches started emerging, which took a more general tone, though they still didn't outright state a right to regulate. Rather, they used a negative approach to describe the right, providing so-called exceptions to the treaty's application to the host state's measures (though other terms are also used to describe these provisions). These exceptions were provisions that theoretically ensured that the investment treaties could not be interpreted to mean that the host state is restricted from taking actions necessary for the protection of various goals / interests. An example of this is the China – Singapore BIT of 1985, which stated that the provisions of the BIT could not be interpreted in a way that would limit the right of the contracting parties (China and Singapore) to apply prohibitions, restrictions or take any other measure directed towards the protection of essential security interests, or towards the protection of public health, the prevention of diseases and pests in animals or plants.[6] This phrasing is rather significant, both from the perspective of the COVID-19 situation, and in the general development of the right to regulate. Some later BITs also followed this general approach, such as the Peru – Singapore BIT of 2003[7], the Barbados – Mauritius BIT of 2004[8] and the Bosnia-Hercegovina – India BIT of 2006[9] to list a few examples, all of which contain similar provisions about exceptions to the treaties' application, some being noticeably more sophisticated than the China – Singapore BIT of 1985.

By contrast, while the exceptions became more sophisticated, the right to regulate as an explicit provision only started consistently appearing (if only in some BITs) in the 21st Century. If we look to the 2000s, we can find examples of this right appearing as part of the BIT's preamble, such as the Ethiopia – South Africa BIT of 2008[10]

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[5] Germany – Pakistan BIT (1959), *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1732/germany---pakistan-bit-1959*, 16 October 2021.

[6] China – Singapore BIT (1985), *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/968/china---singapore-bit-1985*, 18 October 2021.

[7] Peru – Singapore BIT (2003), *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2753/peru---singapore-bit-2003*, 18 October 2021.

[8] Barbados – Mauritius BIT (2004), *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/400/barbados---mauritius-bit-2004*, 18 October 2021.

[9] Bosnia-Hercegovina – India BIT (2006), *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/609/bosnia-and-herzegovina---india-bit-2006*, 18 October 2021.

[10] Ethiopia – South Africa BIT (2008), *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1488/ethiopia---south-africa-bit-2008*, 18 October 2021.

or if we use a later example, the Iran – Slovakia BIT of 2016.[11] From the 2010s, however, we can also start finding a few examples of the explicit right to regulate provision migrating from the preamble to the main body of the treaty, such as the Morocco – Nigeria BIT of 2016.[12]

As demonstrated by the listed examples, the right to regulate, especially if described in positive language, is still not necessarily a given in investment treaties. The motivation for contracting states to include these provisions, as also implied in the introduction of this paper, is that ISDS arbitration might threaten the regulatory autonomy of vulnerable host states.[13] Thus, the question becomes: how can the regulatory autonomy of host states be endangered by ISDS specifically with regards to the COVID-19 situation? In the next section of this paper, we will examine these points of friction in some detail.

3. POINTS OF FRICTION

BITs and investment treaties in general provide a broad range of protections to the foreign investor and their investment, mainly by ensuring that the given host state adheres to a number of obligations. These include holding themselves to specified rules on matters such as expropriation, pre-consenting to a specified dispute resolution method with the foreign investor (typically ISDS arbitration), and most notably, accepting a number of general standards when it comes to measures that could potentially affect the foreign investor and its investment. These standards can include most-favored nation (MFN) treatment (meaning that if a third party foreign investor receives a more beneficial treatment via a given measure, then that should be extended to the foreign investors covered by the treaty providing the MFN treatment), national treatment and prohibition of discrimination (meaning that a measure should not unduly differentiate between foreign and domestic investors, the former (if covered by the given treaty) should receive at least the same treatment as domestic investors), the minimum treatment standard (the foreign investor's investment should be treated according to a minimum standard of protection established by international law), and the fair and equitable treatment standard.[14]

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[11] Iran – Slovakia BIT (2016), *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3633/iran-islamic-republic-of---slovakia-bit-2016*, 18 October 2021.

[12] Morocco – Nigeria BIT (2016), *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3711/morocco---nigeria-bit-2016*, 18 October 2021.

[13] For more detail on the rationale behind the right to regulate, see: Aikaterini Titi, *The Right to Regulate in International Investment Law*, Nomos, 2014, 67-75.

[14] For a more in-depth look on standards of protection, see for example: Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, Michael Waibel, *The Political Economy of the Investment Treaty Regime*, OUP, 2017, Chapter 4.

Measures undertaken by states against COVID-19 include travel restrictions, quarantines (justified by a public health rationale) and a variety of financial and economic measures aimed at mitigating the impact of the pandemic on the domestic economy.[15] These measures can naturally run afoul of the aforementioned standards. For example, as already mentioned in the introduction, travel restrictions might impair the profitability of tourist industries, which can easily involve foreign investments (examples of ISDS cases dealing with investments in the tourism sector include *Elitech and Razvoj v. Croatia*[16]and *Marion Unglaube v. Costa Rica*[17], though typically, previous ISDS disputes involving tourism related to environmental protection[18] and are thus of limited use for this paper).

In order for an ISDS arbitration to go ahead, the foreign investor must have a legal basis, that the disputed measures somehow infringed their treaty-given rights. When it comes to COVID-19, the foreign investors have several options in this regard, based on what was previously discussed. One of these could be referring to the requirement of national treatment / prohibition of discrimination. If a COVID-19 measure differentiates between the foreign and domestic investors, it might provoke ISDS arbitration. Examples of measures that could potentially be considered differentiating include those undertaken by Germany or Hungary to tighten domestic control of COVID-19 relevant industries and increased screening of foreign direct investment respectively.[19] It is naturally expected that governments would seek to reinforce their economies and ensure the functioning of COVID-19 relevant industries in the name of national interest. However, national interest might not be sufficient enough of an argument to deter ISDS arbitration. For example, in the *Feldman v. Mexico* case[20], the arbitral tribunal found that even a *de facto* difference in treatment between domestic and foreign owned cigarette resellers/exporters is sufficient enough to establish a denial of national treatment under the North American Free Trade Agreement (the treaty under which the ISDS case was launched).[21] As such, we can logically conclude that even if a COVID-19

[15] Nathalie Bernasconi-Osterwalder, Sarah Brewin, Nyaguthii Maina, "Protecting Against Investor–State Claims Amidst COVID-19: A call to action for governments", *IISD,* 1-3, *https://www.iisd.org/system/files/publications/investor-state-claims-covid-19.pdf,* 18 October 2021.

[16] Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia, ICSID Case No. ARB/17/32, *https://www.italaw.com/cases/6623*, 18 October 2021.

[17] Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, *https://www.italaw.com/cases/1134,* 18 October 2021.

[18] Sarah Brewin, "Tourist Trap: Is tourism's explosive growth hurting countries? ", *IISD,* https://www.iisd.org/articles/tourist-trap, 18 October 2021.

[19] Peter Veranneman, Alberto Salvadè, "Foreign direct investment in times of the COVID-19 pandemic", *Bird & Bird, https://www.twobirds.com/en/news/articles/2020/global/foreign-direct-investment-in-times-of-the-covid-19-pandemic*, 18 October 2021.

[20] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, *https://www.italaw.com/cases/435*, 18 October 2021.

[21] *Ibid., para. 169* (Award).

measure does not *prima facie* differentiate between domestic and foreign investments, if that measure's practical application leads to a *de facto* difference of treatment, an arbitral tribunal might find that contrary to the prohibition of discrimination / national treatment clause of a given investment treaty.

A similar issue might arise with relation to indirect expropriation. In general, investment treaties demand that expropriation can only occur for a legitimate public purpose and with appropriate compensation.[22] Indirect expropriation occurs when the host state's government does not explicitly expropriate the property of the foreign investor via a direct measure, but rather creatures a regulatory environment with is measures that makes it impossible for the foreign investor to retain control of their property in actual practice, or diminish its value sufficiently enough for the foreign investor to be forced to sell their property for an undercut price. It is closely tied to the concept of hidden / creeping expropriation.[23] COVID-19 related economic measures could theoretically create such a situation, as in seeking to mitigate the impact of the pandemic on their economy, the host states might end up creating measures that negatively impact a foreign investor's investment and thus lead to a claim of indirect expropriation.

Beyond national treatment and indirect expropriation, fair and equitable treatment could also pose a risk for host states seeking to implement COVID-19 measures. Fair and equitable treatment is arguably the most nebulous of all protection standards, and its exact definition is remarkably hard to pin down, and tends to somewhat differ for each treaty and each arbitration tribunal.[24] For example, some tribunals and theorists hold that it simply covers all other standards, and the violation of any standard concurrently means the violation of fair and equitable treatment as well.[25] In a few treaties, it is clearly defined, such as in the 2012 US Model BIT,[26] which holds it to be access to justice and due process. It is also often combined with the concept of legitimate expectations in academic theory and arbitral practice (but not in the language of actual investment treaties), which holds that the host state has an obligation respect the expectations that legitimately arose in the foreign investor when making their investment, and should not frustrate them unduly.[27] Given this nebulous nature, it is easy to see how COVID-19 measures

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[22] Zoltán Víg, Tamara Gajinov, "The Development of Compensation Theories in International Expropriation Law", *Hungarian Journal of Legal Studies* 57, 4, 2016, 447.

[23] Zoltán Víg, *Taking in International Law,* Patrocinium, Budapest, 2019, 33-36.

[24] Zoltán Víg, *The fair and equitable treatment in the Energy Charter Treaty*, Iurisperitus Publishers, Szeged, 2021, 11.

[25] See for example: Fulvio Maria Palombino, *Fair and Equitable Treatment and the Fabric of General Principles*, T.M.C. Asser Press, 2018.

[26] 2012 US Model Bilateral Investment Treaty, *https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf*, 18 October 2021.

[27] Z. Víg (2021), 15.

negatively impacting foreign investments could be labelled as frustrating the legitimate expectations of investors, or otherwise being unfair to foreign investments.

In general, the host states have a few ways to countermand these claims and justify their actions. One of these is the aforementioned reliance on the right to regulate, though only a handful of investment treaties explicitly provide for it. Instead, the host state might seek to utilize it in the form of a public health exception. Of course, this can only be applied to measures that directly relate to public health, and not to the economic impact caused by COVID-19.

As far as we are aware, there are no ISDS cases that directly deal with pandemic-related public health measures. However, we have cases where for example, a host state attempted to address a public health crisis, or when it acted in the interests of the public health of a given community within the state and this resulted in ISDS. Examples of this include *Philip Morris v. Uruguay*[28] where Uruguay introduced anti-tobacco legislation in an effort to curb the widespread smoking of its population, or *Renco v. Peru (I)*[29], where a public health issue arose with relation to the toxic emissions of a metal foundry. Arbitral practice is inconclusive here, in our opinion, and as such, a reference to the public health exception (provided it actually exists in the treaty, of course) might not be sufficient in itself to deter a successful claim. The arbitration tribunal will likely examine the exception's applicability, the factual motives of the disputed measures, and whether they were proportional to the public health objective. Given the peculiar nature of a pandemic, where rapid regulatory response can save lives, this latter element can be particularly problematic in our opinion, as host states might not have had the luxury of time to consider the necessary level of proportionality when issuing COVID-19 measures.

A potential way out of this issue for host states would be to claim *force majeure* or a state of necessity. The first instance refers to circumstances beyond the state's ability to control, while the second refers to some grave and imminent risk to the state.[30] While this might seem like an easy solution, *force majeure* is not an immediate way out for host states. In cases such as *Autopista v. Venezuela*[31], the tribunal dismissed the applicability of *force majeure*. However, we have to note

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[28] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, *https://www.italaw.com/cases/460*, 18 October 2021.

[29] The Renco Group, Inc. v. Republic of Peru [I], ICSID Case No. UNCT/13/1, *https://www.italaw.com/cases/906*, 18 October 2021.

[30] See: The COVID-19 Pandemic and Investment Arbitration, *https://www.acerislaw.com/the-covid-19-pandemic-and-investment-arbitration/,* 18 October 2021; Alexandra Readhead, "Force Majeure and COVID-19: Legal risks of a double-edged sword", *IISD, https://www.iisd.org/publications/force-majeure-and-covid-19-legal-risks-double-edged-sword*, 18 October 2021.

[31] Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, *https://www.italaw.com/cases/3458,* 18 October 2021.

that extant examples of this were mostly relating to political upheavals, and not public health crises. In our opinion, it would stand to reason that a tribunal would approach a pandemic differently than a political riot.

However, it cannot be discounted that *force majeure* is typically understood to only excuse obligations that have been rendered impossible to perform for the host state. If these obligations to the foreign investors were not technically impossible to perform, then that could theoretically defeat this defense by the host state.[32] It should also be noted that treaties (and individual investment contracts where applicable) might have differing language for *force majeure,* some may expressly mention pandemics as a case of *force majeure,* while others may be more nebulous.[33] In our opinion, this last point is rather problematic, as foreign investors are rather adept at manipulating their nationality in order to achieve access to a more favorable investment treaty (such as *Philip Morris v. Australia,*[34] where the investor successfully manipulated its nationality through a corporate restructuring, in order to rely on the Australia – Hong Kong BIT). As such, we consider it likely that if a treaty would explicitly provide for a pandemic *force majeure,* the diligent foreign investor would do its utmost to utilize a different treaty for ISDS.

As for state of necessity, the key issue for host states here is that it is usually understood to apply only if the disputed actions were the only means to deflect this grave and imminent risk to the state.[35] In our opinion, this poses a similar issue as proportionality above, since a tribunal might determine that the disputed measures were not the only means to safeguard against COVID-19, and thus exclude this line of argumentation.

4. CONCLUSIONS

We have seen both that the right to regulate is not particularly well-developed in ISDS treaties, and we have reviewed the various points of friction that could occur between foreign investors and host states over COVID-19-related measures. In the introduction, we have asked which way the balance between the two swings. In our opinion, the balance is somewhat even. There are several ways for the foreign investors to attack host states over COVID-19 measures, but the host states themselves potentially have a few ways to defeat these claims. Moreover, in our opinion, the good faith intent of host states is perhaps easier to prove in a pandemic situation, and this could contribute to arbitral tribunals being more willing to

[32] The COVID-19 Pandemic and Investment Arbitration, *https://www.acerislaw.com/the-covid-19-pandemic-and-investment-arbitration/,* 18 October 2021.

[33] A. Readhead.

[34] Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, https://www.italaw.com/cases/851, 18 October 2021.

[35] The COVID-19 Pandemic and Investment Arbitration, *https://www.acerislaw.com/the-covid-19-pandemic-and-investment-arbitration/,* 18 October 2021.

accept the host state's actions as applicable for the relevant provisions of the given treaty. These treaties were in large part designed to counteract bad faith behavior by host states, after all.

Nevertheless, ISDS could prove a risk for governments across the world for the next few years. Foreign investors, as business entities, are driven by the need for profit, and thus will almost certainly attempt to recoup their losses in whatever ways they can manage in our opinion. One of these ways could be ISDS. It is why certain organizations such as the International Institute for Sustainable Development drafted an agreement on the suspension of ISDS with regards to COVID-19 measures[36], or why the African Union adopted a declaration aimed at helping its member states mitigate the risk of ISDS proceedings over COVID-19 measures (such as by potentially suspending ISDS provisions temporarily with regards to COVID-19 measures, or by investigating means to reform existing treaties).[37] Whether these attempts will bear fruit, we will see. The COVID-19 crisis is far from over from a global perspective, and thus future government measures are not out of the question. As for existing measures, ISDS arbitration typically takes years to get into motion, and as such, it is likely that COVID-19-related ISDS cases will only start appearing in numbers in the next few years, and arbitral awards might take even longer to appear. As such, it will be beneficial to revisit this topic once we have case law.

[36] Draft Agreement for the Coordinated Suspension of Investor–State Dispute Settlement With Respect to COVID-19-Related Measures and Disputes, *https://www.iisd.org/publications/suspension-investor-state-dispute-settlement-covid-19*, 18 October 2021.

[37] Draft Declaration on The Risk of Investor-State Dispute Settlement With Respect to Covid-19 Pandemic Related Measures, *https://bit.ly/3nsyuMr*, 18 October 2021.

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A külföldi beruházások védelme és a covid-19: a legitim elvárások és közérdek közötti egyensúly

Absztrakt: *A külföldi beruházások védelmét régóta nemzetközi egyezmények biztosítják világszerte. Ezek az egyezmények rendelkeznek anyagi jogi standardokkal, illetve egy speciális választottbírósági eljárással, az ISDS eljárással. Habár ezek az egyezmények elméletben tisztelik és biztosítják a szerződéskötő államok jogalkotási autonómiáját, a gyakorlatban az egyes kormányzatoknak figyelembe kell venniük a külföldi befektetők érdekeit. A COVID-19 következtében minden kormányzat új rendelkezéseket vezetett be világszerte, amelyek közül néhány megsértette a külföldi befektetői érdekeket, vagy frusztrálta a legitim elvárásaikat, így az ISDS eljárás lehetősége felmerülhet. Az EU-n belüli ISDS eljárások legitimációja körüli újabb viták pedig csak tovább fokozzák a probléma komplexitását. Ez a tanulmány arra törekszik, hogy megvizsgálja a téma körüli bonyolult összefonodásokat, kitérve a magánérdek, gazdasági és egészségügyi közérdek közötti egyensúlyra. A kérdést elméletben is megvizsgálja, illetve bizonyos már érzékelhető súrlódási pontokon. Ez alapján a tanulmány el tudja dönteni, hogy merre áll a mérleg, és hogyan befolyásolta az ISDS a COVID-19 helyzetet és fordítva.*

Kulcsszavak*: beruházás, ISDS, COVID-19, FET, BIT.*

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Заштита страних улагања услед ковида – 19: равнотежа између легитимних очекивања и јавног интереса

Сажетак: *Заштита страних инвестиција одавно је садржана у разним међународним уговорима широм света. Ови уговори укључују и суштинске стандарде заштите, као и јединствени облик арбитраже, који се обично назива Решавање спорова између инвеститора и државе (ISDS). Док уговори теоретски пружају висок степен регулаторне аутономије државама домаћинима, у стварној пракси је често да владе морају узети у обзир интересе страних инвеститора. Као последица КОВИД-19, свака влада је усвојила низ мера, од којих су неке нашкодиле интересима страних инвеститора или осујетиле њихова легитимна очекивања, што је потенцијално довело до пораста ISDS спорова. Недавна контроверза око легитимности ISDS-а унутар ЕУ додатно компликује тематику. Овај рад настоји да испита сложено узајамно дејство које је присутно у предмету, проучавајући равнотежу између приватног интереса, јавног економског интереса и интереса јавног здравља. Анализира питање како апстрактно, тако и у погледу конкретних „тачака трења" које су већ почеле да дижу главе. Кроз ово, студија ће моћи да утврди у ком правцу више напиње равнотежа и одговори како је ISDS утицао на ситуацију са КОВИД-19 и обрнуто.*

Кључне речи: *инвестиције, ISDS, КОВИД-19, ФЕТ, БИТ.*