

THE CORONAVIRUS PANDEMIC AND INTERNATIONAL INVESTMENT ARBITRATION—APPLICATION OF “SECURITY EXCEPTIONS” CLAUSES IN INVESTMENT AGREEMENTS

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ABSTRACT

Many states are taking a variety of measures to cope with the unprecedented global threat arising from COVID-19. To the extent that these measures affect the interest of foreign investors, they could implicate various provisions of international investment agreements. In particular, the pandemic situation in 2020 raises the possibility of invoking national security exceptions clauses contained in recent investment agreements. Although it is still too early to judge, recent jurisprudence indicates that a bona fide measure to counter COVID-19 may constitute an instance to invoke security exceptions in investment agreements. At the same time, current security exceptions clauses are not detailed enough to deal with new types of national emergency such as pandemics. Nor have there been sufficient discussions so far to clarify and fine-tune the clauses. Keen attention having been paid to national security exceptions even before the pandemic is now signaling that the provision is likely to be invoked more actively and robustly in the investment context. Existing and future investment agreements need to revisit this provision to ensure it does not become a source of conflict or a carte blanche for treaty

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violations.

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