Reshaping Investor-State Dispute Settlement Before the Next Syndemic

Reformando la solución de controversias inversor-Estado antes de la próxima sindemia

Reformer le règlement des différends investisseurs-état avant la prochaine syndémie

Magdalena **Bas Vilizzio***

* University of Monterrey, México, ORCID: *https://orcid.org/0000-0002-2300-8369; maria.bas@udem.edu*.

Artículo recibido el 20 de julio de 2022
Aprobado para publicación el 3 de octubre de 2022

Anuario Mexicano de Derecho Internacional, vol. XXIII, 2023, pp. 339-364
Ciudad de México, ISSN 1870-4654

ABSTRACT: In the midst of a legitimacy crisis in investor-State dispute settlement regime, COVID-19 syndemic may lead States to the perfect storm as a result of the enlargement of the national policy space in order to tackle health, social and economic impacts. Thus, this piece aims to identify measures adopted by Latin American States which may be challenged by foreign investors' claims. It also addresses the protection of national policy space and argues that the roadmap for reshaping the regime should include the following options: 1) moratorium on pending disputes and restriction on future claims related to COVID-19 measures; 2) introduction of counterclaims as a general rule; 3) reference to right to regulate in investment agreements; 4) exclusion of protected areas or policies.
Key words: Investor-State dispute settlement; syndemic; COVID-19; national policy space.

RESUMEN: En medio de una crisis de legitimidad en el régimen de solución de controversias entre inversores y Estados, la sindemia de COVID-19 puede convertirse en tormenta perfecta cuando los Estados buscan extender su espacio de política pública para abordar los impactos sanitarios, sociales y económicos. Esta pieza tiene como objetivo identificar las medidas adoptadas por los Estados latinoamericanos que pueden ser impugnadas por los reclamos de los inversionistas extranjeros. También analiza la protección del espacio político nacional y argumenta que la hoja de ruta para remodelar el régimen debe incluir las siguientes opciones: 1) moratoria para disputas pendientes y restricción sobre reclamos futuros relacionados con la covid-19; 2) introducción de reconvenciones como regla general; 3) referencia al derecho a regular en los acuerdos de inversión; 4) exclusión de áreas protegidas o políticas.
Palabras clave: solución de controversias inversor-Estado; sindemia, COVID-19; espacio de política pública.

RÉSUMÉ: Au milieu d'une crise de légitimité dans le régime de règlement des différends entre investisseurs et États, la syndémie COVID-19 peut conduire les États à la tempête parfaite en raison de l'élargissement de l'espace politique national afin de faire face aux impacts sanitaires, sociaux et économiques. Ainsi, cette pièce vise à identifier les mesures adoptées par les États latino-américains qui peuvent être remises en cause par les revendications des investisseurs étrangers. Il aborde également la protection de l'espace politique national et fait valoir que la feuille de route pour la refonte du régime devrait inclure les options suivantes: 1) moratoire sur les différends en cours et restriction des futures réclamations liées aux mesures COVID-19; 2) introduction de demandes reconventionnelles en règle générale; 3) référence au droit de réglementer dans les accords d'investissement; 4) l'exclusion des aires protégées ou des politiques.
Mots-Clés: Règlement des différends entre investisseurs et États; syndémique; COVID-19; espace politique national.

I. Introduction

Although the first bilateral investment treaty (BIT) dates from 1959 (Germany-Pakistan BIT), the boom of the International Investment Regime (IIR) coincides with the rise of globalization (1990s). Nowadays it is supported by a network of more than 3,200 international investment agreements (IIA), such as BITs, investment chapters in free trade agreements, and regional or multilateral treaties such as the Energy Charter Treaty. Since the 2000s, the regime is going through a legitimacy crisis. Resistance comes from academics, civil society organizations and States originally from the Global South but nowadays it has spread to different parts of the world.[1]

The main criticisms focus on the role of international arbitration tribunals, regulatory chill and the tension between investment protection and public policy space, or more specifically the right to regulate in public interest issues, for instance environmental or human rights protection. A few recent treaties have paved the way to balance foreign investors and States relation. For instance, Morocco-Nigeria BIT includes the right to regulate recognition,[2] and the Comprehensive and Progressive Agreement for

[1] For critics see, among others: Bas Vilizzio, Magdalena, "¿Soberanía en la encrucijada? Nuevas aproximaciones desde la solución de controversias inversor-estado", in Martens de Willmars, Frédéric (ed.), *Nuevos tiempos, nuevos espacios para las Relaciones Internacionales y el Derecho Internacional*, Valencia, Tirant Lo Blanch, 2022; Echaide, Javier, "Efectividad de los derechos humanos y sociales en jaque: arbitrajes de inversiones en el marco del COVID-19", *Anales de la Facultad de Ciencias Jurídicas y Sociales de la Universidad Nacional de La Plata*, no. 51, 2021, *https://doi.org/10.24215/25916386e092.* Sornarajah, Muthucumaraswamy, *Resistance and Change in the International Law on Foreign Investment*, Cambridge, Cambridge University Press, 2015; De Zayas, Alfred, "Report of the Independent Expert on the promotion of a democratic and equitable international order", A/70/285, New York, United Nations, 2015, disponible en: *https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285*; Eberhardt Pia and Olivet, Cecilia. *Profiting from injustice*, Corporate Europe Observatory, Transnational Institute, 2012. Ministerio de Relaciones Exteriores y Culto de Bolivia, "Bolivia y el CIADI: crónica de un divorcio anunciado", in Valdomir, Sebastián and Santos, Carlos (ed.), *Soberanía de los pueblos o intereses empresariales*, Uruguay, Fundación Solón, Amigos de la Tierra, 2008.

[2] Article 23 "right of the State to regulate": "In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives". This provision should be read in accordance with article 13.2

Trans-Pacific Partnership has the option to exclude access to international arbitration based on tobacco control measures[3]. However, the tension has not been resolved, and it is even more dangerous in health emergencies, such as the COVID-19 crisis.

Therefore, this piece aims to: 1) analyze the evolution of the IIR from its boom to its legitimacy crisis; 2) identify measures adopted by Latin American States that may be susceptible to foreign investors' claims; 3) propose a roadmap that incorporates vulnerability theory in the reshaping of international investor-state dispute settlement (ISDS) regime for the short and middle-term.

II. Investor-State Dispute Settlement: from Boom to Legitimacy Crisis

ISDS regime is a part of a more complex and greater regime: the IIR, in which the expectations of the members converge around a fundamental principle of investment promotion and protection. Originally, this regime was a US – Europe axis' creation, as it was built to protect investors' rights in foreign countries which were conceived as weak or unreliable. Latin American countries entered during the regime boom (1990-2007), when they turned from the Calvo doctrine and the "Tokyo no".[4] In this context, neoliberalism acted as a driver, in particular through Washington consensus policies package, supported by the rise of globalization and the west global

"investment and environment" which states that "each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters".

[3] Article 29.5: Tobacco Control Measures: "A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed".

[4] Twenty-one developing countries opposed to ICSID Convention (1965) during the World Bank Annual Meeting: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Iraq, Mexico, Nicaragua, Panama, Paraguay, Peru, Philippines, Uruguay and Venezuela. Latin American countries were inspired by the Calvo doctrine, which subject foreign investors to domestic courts.

governance model.[5] This period is also known as the "era of proliferation" of IIA[6] or the "neoliberal phase".[7]

The triumph of the ideas of economic liberalization and free movement of investments, included in the 10 points of Washington consensus constituted a fertile ground for IIAs negotiation. These treaties, in particular BITs, are presented as instruments capable of counterweighing political or non-commercial risks, especially in developing countries, neutralizing changes in national legislation that can affect foreign investments and offering flexible *ad hoc* dispute settlement mechanisms. Likewise, the failed attempt to sign the Multilateral Agreement on Investment Agreement —promoted by the Organization for Cooperation and Development in 1995— led to the celebration of a greater number of IIAs. States signed more than 3200 agreements:[8] BITs or other treaties with investment provisions, such as the Energy Charter Treaty (1994), the General Agreement on Trade of Services (1994), the Agreement on Trade-Related Investment Measures (1994).

Academics point out three milestones at the end of the boom of IIR, led the way to the current phase: 1) UNCTAD's recognition that ISDS may constrain national policy space;[9] 2) Bolivia's withdrawal from International Centre for Settlement of Investment Disputes Convention (IC-

[5] Sornarajah, Muthucumaraswamy, *op. cit.*, pp. 26-28; Perrone, Nicolás, "The International Investment Regime after the Global Crisis of Neoliberalism: Rupture or Continuity", *Indiana Journal of Global Legal Studies*, vol. 23, 2016, *https://www.repository.law.indiana.edu/ijgls/vol23/iss2/8*.

[6] UNCTAD, *World Investment Report 2015. Reforming international investment governance*, Geneva, pp. 121-125, *https://unctad.org/system/files/official-document/wir2015_en.pdf*. The report organized the evolution of IIA in four eras: the era of infancy (1950s-1964), the era of dichotomy (1965-1989), the era of proliferation (1990-2007), and the era of re-orientation (2008-Today).

[7] Sornarajah, Muthucumaraswamy, *op. cit.*, pp. 45-46. The author analyses the evolution of IIR in four phases: the formative phase (before 1959), the universalization of conflicts (1959 - 1990), the neoliberal phase (1990-2004), and the current phase (2004-Today). In each phase, Sornarajah identifies struggling forces that form, universalize, build or destroy the regime.

[8] UNCTAD Investment Policy Hub, accessed March 10, 2022, *https://investmentpolicy.unctad.org/international-investment-agreements*.

[9] Ghiotto, Luciana, "¿Unctad pro-desarrollo o pro-liberalización? Un estudio de los cambios en el organismo a la luz de las políticas sobre inversiones", in Echaide, Javier (ed.), *Inversiones extranjeras y responsabilidad internacional de las empresas. Problemáticas en torno al CIADI, los TBI y los derechos humanos*, Buenos Aires, B de F, 2017.

SID Convention);[10] 3) an unprecedented rise of claims.[11] Firstly, there is a turning point at the regime governance; in the "World Investment Report 2003", the UNCTAD introduces to the debate the impact of investor-State arbitration on national policy space. The report explains that States may limit their regulatory autonomy due to economic globalization and liberalization strategies, but the ISDS mechanism include in IIAs play a deeper role as it constrains national public policy, a sovereign prerogative.[12]

The "re-orientation phase" (2007-Today) is characterized by the struggle between the continuation of the neoliberal phase and the resistance to neoliberalism.[13] The milestone of this struggle is Bolivia's withdrawal from the ICSID Convention in 2007, followed by Ecuador (2009-2021[14]) and Venezuela (2012). Bolivia and Ecuador also undertook a process of termination of the BITs in force. The three countries are the first dissidents in the regime[15] and the resistance arose motivated by the defense of natural resources after leading cases (Aguas del Tunari v. Bolivia, Chevron v. Ecuador, among others), reinforced by new constitutional provisions.[16]

Due to an extensive interpretation of the fair and equitable clause, especially in BITs, the number of claims rose dramatically after 2003 and the trend continues until today. About 92% of treaty-based known disputes started during the period 2003 to July 31, 2021.[17] The economic crisis drove to claims and lead the States to a more vulnerable position, as seen

[10] Bas Vilizzio, Magdalena, *América del Sur ante los tratados bilaterales de inversión: ¿hacia un retorno del Estado en la solución de controversias?*, Montevideo, Universidad de la República, 2017.

[11] Sornarajah, Muthucumaraswamy, op. cit.

[12] UNCTAD, *World Investment Report 2015. Reforming international investment governance*, Geneva, UNCTAD, 2015, p. 145, available at: *https://unctad.org/system/files/official-document/wir2015_en.pdf*.

[13] Sornarajah, Muthucumaraswamy, *op. cit.*, p. 48.

[14] On June 21, 2021, Ecuador signed the ICSID Convention after withdrawing it on July 6, 2009.

[15] For a comprehensive account of the typology of States in IIR (members, dissidents, externals, objectors), see: Bas Vilizzio, Magdalena, *América del Sur…*, *cit*. and Bas Vilizzio, Magdalena, *Acuerdo Mercosur-Unión Europea: sombras y ausencia de la solución de controversias inversor-Estado*, Fundación Carolina, 2019, available at: *https://www.fundacioncarolina.es/wp-content/uploads/2019/11/DT_FC_21.pdf*.

[16] Constitution of Ecuador (2008), article 422; Constitution of Bolivia (2009), article 320 section II.

[17] UNCTAD Investment Policy Hub, accessed May 8, 2022, available at: *https://investmentpolicy.unctad.org/investment-dispute-settlement*.

in Argentina (2001) and Spain (2008-2014). Measures adopted in order to face the socio-economic crisis in Argentina led to more than 40 disputes and a number one in the respondent States ranking. A similar situation occurred in Spain (number three in the ranking) as a result of the changes introduced, to subsidies in the renewable energy industry after the crisis.[18]

ISDS regime is currently under attack and the aforementioned factors fed back the criticisms. In addition to the traditional arguments related to procedural issues (e.g., inconsistent jurisprudence, lack of an appellation mechanism, lack of transparency in procedures, international arbitration tribunal bypassing local courts), one of the deepest arguments against ISDS is that *ad hoc* tribunals are not established in Constitutional provisions, but they act as external control boards of the legality of State activity or inactivity.[19] Furthermore, the lack of determinacy and coherence in jurisprudential decisions[20] also feeds the legitimacy crisis.

Another argument focuses on regulatory chill as a result of claims or the mere threat of a lawsuit,[21] that is, the State refrains from regulating: it stops legislative discussions or suspends the adoption or the entry into force of new regulations, among others. Pac Rim v. El Salvador case is an example of regulatory chill. Big-scale metal mining ban was approved five months after the award rejected the claims for compensation, in other terms, Pac Rim's lawsuit —and the dispute itself— operated as a brake to El Salvador's innovative regulation. It is relevant to point out that regulatory chill may also affect third States, for instance, in 2012, New Zealand government decided to suspend the legislative discussion of the tobacco packaging

[18] The highest rise took place in 2015 as a result of lawsuits against Spain in the renewable energy industry (19 out of 86), according to UNCTAD Investment Policy Hub data, accessed May 8, 2022.

[19] Hernández González, José, "Regulación económica y arbitraje internacional de inversiones", *Revista Electrónica de Direito*, vol. 1, 2017, available at: *https://dialnet.unirioja.es/servlet/articulo?codigo=6421947&orden=0&info=link*; Postiga, Andrea Rocha, "A emergência do direito administrativo global como ferramenta de regulação transnacional do investimento estrangeiro direto", *Revista de Direito Internacional*, vol. 10, No. 1, 2013, p. 182, *doi:10.5102/rdi.v10i1.2369*; Van Harten, Gus and Loughlin, Martin, "Investment Treaty Arbitration as a Species of Global Administrative Law", *The European Journal of International Law*, vol. 17, no. 1, 2016, p. 149, *doi:10.1093/ejil/chi159 2016:149*.

[20] Franck, Susan, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", *Fordham Law Review*, vol. 73, 2015, available at: *https://ir.lawnet.fordham.edu/flr/vol73/iss4/10*.

[21] Zayas, Alfred de, *op. cit.*

plan act, because of Philip Morris Asia v. Australia case. The act was finally approved by the Congress after the tribunal dismissed the claim (2015)[22] and the act entered into force in March 2018.[23]

Therefore, when regulatory chill involves areas of public interest, as environment, human rights or public health, it impacts the construction of regulations that protect human being as a vulnerable subject, in terms of Martha A. Fineman.[24] In other words, regulatory chill impacts any set of norms created in order to avert and replicate inequities, preventing responsive State from building resilience. Its main effect lays in the delay, suspension or termination of human related regulation, acting as a brake to human rights progressive realization.

In the light of the above, the current phase in IIR evolution, particularly regarding ISDS, is characterized by the legitimacy crisis.[25] For the purpose of this piece, legitimacy can be defined as "a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process".[26]

[22] Kirk, Stacey, "Tobacco plain packaging likely to be law by end of year-John Key", *Dominion Post*, 15 February 2016, available at: *http://www.stuff.co.nz/national/politics/76917027/tobacco-plain-packaginglikely-to-be-law-by-end-of-year--john-key*.

[23] For a further analysis of New Zealand's experience and the parliamentary proceedings, see: Crosbie, Eric and Thomson, George, "Regulatory chills: tobacco industry legal threats and the politics of tobacco standardised packaging in New Zealand", *New Zealand Medical Journal*, vol. 131, no. 1473, 2018, available at: *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6490166/pdf/nihms-960898.pdf*.

[24] Fineman, Martha, "The Vulnerable Subject and the Responsive State", *Emory Law Journal*, vol. 60, 2010, available at: *https://ssrn.com/abstract=1694740*.

[25] Brower, Charles and Schill, Stephan, "Is arbitration a threat or a boon to the legitimacy of international investment law?", *Chicago Journal of International Law*, Chicago, vol. 9, no. 2, 2009, *doi:10.1093/ejil/chp019*. Dietz Thomas *et al.*, "The legitimacy crisis of investor-state arbitration and the new EU investment court system", *Review of International Political Economy*, vol. 26, no. 4, 2019, available at: *https://doi.org/10.1080/09692290.2019.1620308*. Urzúa Farías, Andrés, "Sistema de solución de controversias inversionista-Estado (ISDS) en crisis: Estados Unidos y la Unión Europea", *Revista de Derecho Económico*, vol. 78, no. 1, 2021, *doi:10.5354/0719-7462.2021.64493*. Franck, Susan, *op. cit*.

[26] Thomas, *The power of legitimacy among nations,* Oxford, Oxford University Press, 1990, p. 24.

Consequently, as Robert Keohane explains, "normatively an institution is legitimate when its practices meet a set of standards that have been stated and defended"[27] while sociological legitimacy lays on the acceptance that a practice is "appropriate and worthy of being obeyed by relevant audiences".[28] The coincidence between both concepts is reached when the relevant audiences accept the principles of a given legal system as worthy to be obeyed.

Applying Keohane's ideas to ISDS regime, resistance builds up to the existing set of norms creating a legitimacy crisis, both normatively and sociologically. As seen before, relevant audiences have rejected the principles of the system when Bolivia, Ecuador and Venezuela withdrew from the ICSID Convention. Such phenomena also take place in the negotiation of agreements that exclude ISDS (e.g., Brazil cooperation and facilitation investment agreement model (CFIA)) or reinforce local remedies (e.g., India BIT model (2016)).[29]

Although the ISDS regime had cracked as a result of the resistance originally focused on the Global South, nowadays objections are growing in both South and North. In Achmea judgment, the Court of Justice of the European Union (EU) argued that the ISDS mechanism in Netherlands — Slovakia BIT was incompatible with EU Law. Under art. 267 of the Treaty on the Functioning of the EU, an ISDS tribunal has no competence regarding the preliminary reference system. Notwithstanding, an ISDS tribunal should interpret EU Law without legal roots.

Following this reasoning, on 5 May 2020, 23 Member States signed the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union that entered into force on 29 August 2020.[30] In addition, for external negotiations the European Union includes an investment court system in bilateral agreements, such as the EU-Canada Comprehensive Economic and Trade Agreement.

[27] Keohane, Robert, "The contingent legitimacy of multilateralism", in Newman, Edward *et al*. (eds.), *Multilateralism Under Challenge: Power, International Order, and Structural Change*, Tokyo, New York, UNU Press, 2006.

[28] *Ibidem*, p. 57.

[29] For further analysis see: Nedumpara, James, "India's Trade and Investment Agreements. Striking a balance between investor protection rights and development concerns", in Morosini, Fabio and Ratton Sanchez Badin, Michelle (ed.), *Reconceptualizing International Investment Law from the Global South*, Cambridge, Cambridge University Press, 2018.

[30] Ratification status is available at: *https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en*.

III. COVID-19 and ISDS: Towards the Perfect Storm?

Although ISDS is facing a legitimacy crisis, the COVID-19 syndemic disruption and the claim for a more proactive State, even from traditionally neoliberal sectors[31], may create the perfect storm for ISDS. The term "syndemic" was coined by Singer[32] and recovered by Horton[33] for the study of COVID-19 impacts through a multidimensional lens. In this analysis, the concurrence of economic and social factors is as important as the biological causes of the pandemic.

Since the first months of 2020, States have taken measures that extended their policy scope to face the health emergency and address the increased vulnerability. During the current phase, this kind of measures still entail the risk that the State could be sued by foreign investors if they consider that an IIA has been violated. According to UNCTAD "Investment policy responses to the COVID-19 pandemic" report, the aforementioned risk may occur because existing IIAs were signed during the "proliferation era" or before, at a moment when States were less concerned for public health or environmental protection.[34]

Even though more modern treaties may include provisions that protect the right to regulate,[35] expansive interpretations made by arbitral tribunals could constrain their capacity to exercise their sovereign. Moreover, due to fragmentation of International Law, ISDS is usually the arena of the tension between self-contained regimes: International Investment Law on one side and International Human Rights Law or International Environmental Law on the other side. The ISDS regime has a history of disputes regarding international regimes' collision.

[31] For instance, see: Financial Times (2020), The Economist (2021).

[32] Singer, Merrill, *Introduction to syndemics. A critical systems approach to public and community health*, San Francisco, Jossey-Bass, 2009.

[33] Horton, Richard, "Offline: COVID-19 is not a pandemic", *The Lancet*, vol. 396, no. 10255, 2020, *doi.org/10.1016/S0140-6736(20)32000-6*.

[34] UNCTAD, *Investment policy responses to the COVID-19 pandemic,* Special Issue no. 4, Geneva, 2020, p. 12, available at: *https://unctad.org/system/files/official-document/diaepcbinf2020d3_en.pdf*.

[35] For instance: Morocco-Nigeria BIT.

Latin America and the Caribbean, a region that accumulates 27.5% of the claims,[36] provides some examples related to human rights and environmental protection: 1) Philip Morris v. Uruguay, for tobacco control measures (public health); 2) Aguas del Tunari v. Bolivia, for the nationalization of the potable water and sanitation service in Cochabamba in order to guarantee affordability (human right to water); 3) Renco v. Peru related to ambient air quality standards (environmental protection);[37] 4) Infinito Gold v. Costa Rica regarding the environmental impact assessment for the gold mining project "Crucitas" (environmental protection); 5) Eco Oro v. Colombia, linked to the protection of the Paramo of Santurban, the main source of fresh water in the country (environmental protection and human right to water).

Based on that experience, which measures adopted to reduce COVID-19 biological, social and economic impacts, in order to reduce vulnerability can be challenged using ISDS? Latin America and the Caribbean, the most sued region in the world, provides relevant examples. In April 2020, Peruvian Congress passed an act[38] that suspended toll payments during the health emergency. A few weeks later, the Embassies of Canada, Australia, France and Colombia[39] in Lima[40] expressed their concern about the investments of their national companies, and one of the road infrastructures concessionaires-initiated pre-arbitration stage (CIAR Global, 2020). On 25 August 2020, the Constitutional Tribunal declared the unconstitutionality of the law because it violated article 62 of the Constitution, according to which contractual terms cannot be modified by laws.[41] Is this just another case of unconstitutionality or is it also an undercover example of regulatory chill?

[36] UNCTAD Investment Policy Hub, accessed May 8, 2022.

[37] Even though the dispute is finished, and the ICSID tribunal decided in favor of the State, the investor filed a new claim under the same agreement (United States-Peru BIT) but in a different jurisdiction: the Permanent Court of Arbitration.

[38] Act 31.018, April 3, 2020, available at: *https://busquedas.elperuano.pe/normaslegales/ley-que-suspende-el-cobro-de-peajes-en-la-red-vial-nacional-ley-n-31018-1866203-1/*.

[39] It is important to point out that States behavior in IIR or ISDS regime may change as a result of their position: State of the nationality of the investor or host State. Furthermore, on some occasion States act in tandem with corporation of their nationality in order to guarantee them more privileges.

[40] Andina, "Embajadas de cuatro países envían carta al Congreso por ley que suspende cobro de peajes", June 5, 2020, available at: *https://andina.pe/agencia/noticia-embajadas-cuatro-paises-envian-carta-al-congreso-ley-suspende-cobro-peajes-800468.aspx*.

[41] Constitutional Tribunal of Peru, Unconstitutionality Sentence 0006-2020-PI, available

However, the first arbitration challenge to COVID-19 measures took place in Chile. On January 2021, the French corporations Groupe ADP International and Vinci Airports, which have 45 and 40% of stalks in Nuevo Pudahuel Airport consortium (Santiago)[42] initiated the six-month cooling-off period under Chile-France BIT (art. 8) before ICSID arbitration. The investors questioned the rejection of the Ministry of Public Works to extend their contract in order to compensate economic losses caused by the pandemic: their incomes decreased 90% and Chile lost 19 routes, 630 weekly frequencies, 70% of passenger during 2020.[43]

On August 13, 2021, the foreign investors registered a request for the institution of arbitration proceedings before ICSID, under Chile-France BIT. According to UNCTAD Policy Investment Hub, the amount of compensation claimed is 455 million of dollars. The tribunal, constituted on 25 March 2022, is composed by Claus Von Wobeser (President), Stephan Schill (appointed by the claimants) and Mónica Pinto (appointed by the respondent). The resolution of the dispute is pending.

In addition, new national laws regarding COVID-19 vaccines deserve special attention. Argentina,[44] Peru[45] and Paraguay[46] enacted laws that established the power of the Administration to sign contracts with laborato-

at: *https://www.tc.gob.pe/wp-content/uploads/2020/08/00006-2020-PI-PROYECTO-PENDIENTE-DE-DELIBERACI%C3%93N.pdf.*

[42] Investment Treaty News, "French consortium kicks off an ICSID claim against Chile after USD 37 million loss due to Covid-19 Pandemic", March 21, 2021, available at: *https://www.iisd.org/itn/en/2021/03/23/french-consortium-kicks-off-an-icsid-claim-against-chile-after-usd-37-million-loss-due-to-covid-19-pandemic/*.

[43] *Idem*.

[44] Act 27.573: "Ley de vacunas destinadas a generar inmunidad adquirida contra el covid-19", 29 October 2020. Argentina, available at: *http://servicios.infoleg.gob.ar/infolegInternet/anexos/340000-344999/343958/norma.htm*.

[45] Supreme Decree 186-2020-PCM, "Decreto Supremo que autoriza al Ministerio de Salud para que, en el marco de los contratos celebrados al amparo del Decreto de Urgencia N° 110-2020, Decreto de Urgencia que dicta medidas extraordinarias para facilitar y garantizar la adquisición, conservación y distribución de vacunas contra la Covid-19, exprese el compromiso del Estado peruano de someter al arbitraje internacional las controversias derivadas de la relación contractual", December 1 2020. Peru, available at: *https://busquedas.elperuano.pe/normaslegales/decreto-supremo-que-autoriza-al-ministerio-de-salud-para-que-decreto-supremo-n-186-2020-pcm-1908302-1/*.

[46] Act 6707: "Que declara bien público la investigación, desarrollo, fabricación y adquisición para la distribución gratuita a la población de las vacunas contra el Covid-19", Ja-

ries that include arbitration or judicial jurisdiction abroad in case of controversies. For that reason, transnational corporations are able to obtain a contractual waiver of immunity from jurisdiction.[47] These contractual provisions reinforce the network of more than 3200 IIAs that challenged sovereign acts in public interest areas.

Finally, the ISDS tribunal could interpret State measures for facing COVID-19 effects as an example of necessity (Resolution AG/56/83, article 25), thus the wrongfulness of an act precludes. In other terms, the State acts that deliberately and voluntary try to safeguard an essential interest (the health of its population) against a severe and imminent peril (the COVID-19 syndemic). Such behavior cannot seriously affect an essential interest of the State, other States, or the international community as recipients of the obligation. In the hypothesis under analysis, the violation of an IIA does not seem to affect any essential interests.

The exception of state of necessity[48] was invoked by Argentina in disputes related to the 2001 economic crisis. The argument was acceptable in LG&E and Continental cases, but not in Enron, CMS and Sempra cases. Therefore, it is pertinent to remember that the decision regarding the legality or illegality of the measures will be up to the arbitrators. At the end of the day, the risk of inconsistency in jurisprudence contributes to the ISDS legitimacy crisis.

IV. The Future of ISDS: a Roadmap

During the COVID-19 era, the number of disputes remained the same as in previous years. In this sense, Echaide affirms that the claims could result in

nuary 14 2021. Paraguay, available at: *https://alertas.directoriolegislativo.org/wp-content/uploads/2021/01/Ley-6707.pdf*.

[47] Unlike Peruvian and Paraguayan law, Argentinian law establishes expressly that the waiver does not reach the immunity from execution. Previous experiences with vulture funds judgments in New York, regarding sovereign debt restructuring, explains the clarification.

[48] "State of necessity reflects an international customary rule according to which a factual situation of grave and imminent peril for the essential interests of a State would legally justify a breach of an international obligation by such State as the only means to safeguard such essential interests". Tanzi, Attila, "State of Necessity", *The Max Planck Encyclopedias of International Law*, 2021, available at: *https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1071*.

a lack of financing in the short and medium term, this could lead to a deterioration in human rights policies which will increase inequality.[49] Thus, is it possible to protect national policy space and human rights at the same time? Fineman's vulnerability theory provides an interesting approach to answer the question.

First of all, "by changing the legal subject to the inherently vulnerable human, [vulnerability theory] provides distinct ontological grounds for this affirmative public responsibility".[50] This approach requests a State that is responsive to human needs and the reconfiguration of current legal structures based on the prioritization of individual liberty at the expense of human basic characteristics: dependency and vulnerability.[51] Focusing on vulnerability and need, this approach detaches from the traditional concept of legal subject based on rationality and liberty.[52] The traditional legal lens can lead to realistic resulted, but human need can only be apprehended with institutions' assistance.[53] Therefore, the State is responsible "for ensuring the proper functioning of markets (and thus, providing equal opportunity or real freedom)", in terms of Fineman.[54]

Vulnerability paradigm focuses on the existence of a State that guarantees access and opportunities to human beings as vulnerable and dependent subjects,[55] so the State cannot be limited or conditioned by markets. Law behaves as an ordering mechanism of society and shapes existing relationships. Law is what makes it possible to address vulnerability and prevent inequities; and it is an essential instrument to achieve an adequate balance in economic relations (inter and intra-States). Spite of the fact that critics may considerer this approach as excessively paternalist,[56] it may still be an "use-

[49] Echaide, Javier, *op. cit.*, p. 544.

[50] Mccluskey, Martha *et al*. "Vulnerability Theory And The Political Economy Of Resilience", *Law and Political Economy Project*, 9 July 2021, available at: *https://lpeproject.org/blog/vulnerability-theory-and-the-political-economy-of-resilience/*.

[51] Fineman, Martha, "Vulnerability and Social Justice", *Valparaiso University Law Review*, vol. 53, No. 2, 2019, p. 342, available at: *https://scholar.valpo.edu/vulr/vol53/iss2/2*.

[52] *Ibidem*, p. 356.

[53] Anderson, Elizabeth, "What is the Point of Equality?", *Ethics*, vol. 109, no. 2, 1999, available at: *https://doi.org/10.1086/233897*. Rich, Phillip, "What Can We Learn from Vulnerability Theory?", *Honors Projects 352*, 2018, *https://scholarworks.bgsu.edu/honorsprojects/352*.

[54] Fineman, Martha, "Vulnerability…", *cit.*, p. 352.

[55] *Ibidem*, p. 39.

[56] It is beyond the scope of this paper to deepen in vulnerability theory limitations or critics.

ful construct around which to structure social welfare policy"[57] in order to define the "particular concern that a policy seeks to address".[58]

Focusing on ISDS regime, it was built to protect investors' rights in foreign legal systems which were conceived as weak or unreliable. However, this set of rights creates relations (connecting foreign investors, States and local communities) and conflicts, which "may concern not only states' right to regulate or distributive tensions but also recognition claims and the social embeddedness of rights".[59] Ünüvar and Küçüksu also point out, "International Investment Law does not concern itself with the broader cultural, social and even macroeconomic factors applicable to an arbitral dispute beyond using them as voluntary counter-balancing considerations vis-à-vis foreign investment protection".[60]

Thus, the protection of public health, human rights or the environment -as global public values- has been challenged in different disputes.[61] Additionally, in a recent publication, the International Monetary Fund recognizes that ISDS regime protects "fossil fuel investments… or alternatively expose authorities to legal action for breach of that protection when seeking to adopt regulatory measures to curtail fossil fuel activity".[62]

According to the characteristics of ISDS regime, in order to protect human beings as vulnerable subjects, it is necessary to strengthen national policy space, that is, the set of policies that a State can adopt in areas of public decision. Its core is the right to regulate, and particularly in IIR, it "denotes the legal right that exceptionally allows the host state to regulate

[57] Kohn, Nina, "Vulnerability Theory and the Role of Government", *Yale Journal of Law & Feminism*, vol. 26, no. 1, 2014, p. 25, *https://ssrn.com/abstract=2562737*.

[58] *Ibidem*, p. 26

[59] Perrone, Nicolás, *Investment Treaties and the Legal Imagination*, Oxford, Oxford University Press, 2021, p. 50.

[60] Ünüvar, Güneş and Küçüksu, Aysel, "From Protection to Governance of Foreign Investment: Vulnerability Theory as a Paradigm Shift in International Investment Law", EJIL: Talk!, 27.12.19, available at: *https://www.ejiltalk.org/from-protection-to-governance-of-foreign-investment-vulnerability-theory-as-a-paradigm-shift-in-international-investment-law/*.

[61] Arato, Julian, "Corporations as Lawmakers", *Harvard International Law Journal*, Cambridge, vol. 56, No. 2, Summer 2015, p. 283, *https://ssrn.com/abstract=2585214*.

[62] Prasad, Ananthakrishnan *et al.*, "Mobilizing Private Climate Financing in Emerging Market and Developing Economies", *International Monetary Fund*, 2022, p. 5, available at: *https://www.imf.org/en/Publications/staff-climate-notes/Issues/2022/07/26/Mobilizing-Private-Climate-Financing-in-Emerging-Market-and-Developing-Economies-520585*.

in derogation of the international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate".[63]

By strengthening public policy space, and especially the right to regulate, public budgets would not be compromised in arbitrations and regulatory chill may not be an option during a syndemic.

In a globalized world, any significant change at the international level will necessarily require cooperation between States.[64] The role of States is crucial to promote different options that could pave the way for deeper long-term actions for reshaping ISDS regime. For the short and middle-term several options are on the table, thus, the roadmap should include: 1) a moratorium on pending ISDS disputes and a restriction on future claims related to COVID-19 measures; 2) introduction of counterclaims as a general rule in ISDS regime; 3) an explicit reference in the IIAs to regulate within their national framework; 4) an explicit exclusion of protected areas or policies.

The first option, in times of COVID-19 syndemic, is imperative. In order to allocate greater budgetary resources to combat the crisis, States need to take steps towards a moratorium on pending ISDS disputes, as well as a restriction on future claims related to health, social and economic measures taken to tackle the spread of the virus, as proposed by the academia[65] and more than 600 civil society organizations.[66] Although both proposals can be considered temporary or intermediate, since they do not solve the core problem, they are still relevant. A generalized moratorium would prevent eventual rejection to requests of suspension on a case-by-case basis, as hap-

[63] Titi, Catherine, *The right to regulate in International Investment Law*, Baden-Baden, Nomos, 2014, p. 18.

[64] Perrone, Nicolás, "Speed, law and the global economy: How economic acceleration contributes to inequality and precarity", *Leiden Journal of International Law*, Leiden, vol. 33, no. 3, June 2020, p. 3, *https://doi.org/10.1017/S0922156520000242*.

[65] CCSI, "Call for ISDS moratorium during Covid-19 crisis and response", 2020, available at: *http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/*; Gallagher, Kevin and Kozul-Wright, Richard, "Breaking Out of the Double Squeeze: The Need for Fiscal and Policy Space during the COVID-19 Crises", *Global Policy Journal*, June 26, 2020, available at: *https://www.globalpolicyjournal.com/blog/26/06/2020/breaking-out-double-squeeze-need-fiscal-and-policy-space-during-covid-19-crises*.

[66] Acafremin *et al*. "Open Letter to Governments on ISDS and COVID-19", 2020, available at: *http://s2bnetwork.org/wp-content/uploads/2020/06/OpenLetterOnISDSAndCOVID_June2020.pdf*.

pened in Orlandini v. Bolivia (procedural order number 7) and Glencore v. Bolivia (procedural order number 11).

The second option is to introduce counterclaims as a general rule in ISDS regime.[67] Counterclaims constitute an instance to enforce human rights and defend the sovereignty, by justifying the measures taken in valid exercise of it. It also gives the State the possibility of requesting compensation for the damages caused by foreign investors. This way, ISDS architecture could turn against foreign investors[68] and reduce the number of claims. This option could be introduced as part of rules of arbitration modernization.

The two following options involve substantive changes to existing or new agreements. Vulnerability theory calls for public institutions to assist individuals in the process of building resilience. To do so, States require having sufficient regulatory space. The recognition of the right to regulate is not an innovation in the system; in fact, one of the most common ways for its incorporation is its enunciation within the preamble of the agreements, seeking to balance the system with general references or in matters of non-economic interest.[69] For instance, some CFIAs have this provision, but these agreements exclude investor-State dispute settlement mechanisms from their articles.

Unlike CFIAs, the Morocco-Nigeria BIT includes ISDS mechanisms. Its preamble reaffirms the right to regulate and adopt domestic measures in relation to investments in order to achieve its public policy objectives. Additionally, under the heading "investments and environment" (article 13), it expressly recognizes the right to act with discretion in relation to regulation, compliance, investigation, prosecution and decision-making regarding to environmental issues. The importance of this provision stems from the

[67] ISDS regime basic rules are: the foreign investor has *locus standi* and *jus standi*; a cooling-off period before international arbitration; not mandatory exhaustion of local remedies; disputes are settled by *ad hoc* tribunals; lack of appeal instance; most favored nation clause applicable to dispute settlement; and sunset clauses that allow claims even after IIAs are terminated.

[68] Abel, Patrick, "Counterclaims based on international human rights obligations of investors in international investment arbitration. Fallacies and potentials of the 2016 ICSID Urbaser v. Argentina Award", *Brill Open Law*, vol. 1, no. 1, 2018, *https://doi.org/10.1163/23527072-00101003.*

[69] Mouyal, Lone, *International Investment Law and the Right to Regulate - A human rights perspective*, London, Routledge, 2016.

recognition that the protection of the environment can be a priority over foreign investment with a wide discretionary margin.[70]

It is important to point out that the claim for enlarging the national policy space has different shades in the Global South and the Global North. Michelle Ratton Sanchez Badin and Fabio Morosini argue that, in the North, the debate emphasizes on "correcting negative externalities, illustrated by health, safety and environmental exceptions", while in some countries in the South, it follows constitutional principles.[71] For example, the domestic policy goals in equitable access to South Africa's mining resources, especially to expand opportunities for historically disadvantaged groups during the apartheid, lead to Piero Foresti case.[72] Although the parties agreed to settle the arbitration, it provided a catalyst for the termination of ten BITs and the review of investment law.[73]

Finally, a deeper option relies on the exclusion of a list of protected areas or policies from ISDS. As a consequence, these areas should not be susceptible of foreign investors' claims. This new State-market balance does not mean that States should follow a trend of less international regulation in order to create a kind of "containment barrier" for the impacts of International Law into policy space.

Deregulating under the liberal logic of *laissez faire - laissez passer* does not seem to be the way. This statement can generate the false idea that the areas governed by the logic of the market, nowadays, have a concise or weak regulation. It is not the case. For instance, International Trade Law may be the most regulated area in International Law: general rules on trade in goods, general rules on trade in services, exceptions to the rules, differential and more favorable treatment, specific rules on technical barriers, subsidies,

70 Kendra, T. *et al*. "The Morocco-Nigeria BIT: A new breed of investment treaty?" *Practical Law Arbitration Blog*, November 16, 2017, available at: *http://arbitrationblog.practicallaw.com/the-morocco-nigeria-bit-a-new-breed-of-investment-treaty/*.

71 Morosini, Fabio and Ratton Sanchez Badin, Michelle, "Reconceptualizing International Investment Law from the Global South: An Introduction", in Morosini, Fabio and Ratton Sanchez Badin, Michelle (ed.), *Reconceptualizing International Investment Law from the Global South*, Cambridge, Cambridge University Press, 2018.

72 ICSID case number ARB(AF)/07/01, award available at: *https://www.italaw.com/sites/default/files/case-documents/ita0337.pdf*.

73 Treaties finished by South Africa can be reviewed in UNCTAD's Investment Policy Hub: available at: *https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa*.

safeguards, among others. At the end of the day, the core of the problem does not lie in having more or fewer rules, but in having better rules, that is, rules that do not constrain national policy space as a channel to reduce vulnerability.

V. Conclusions

During the eighties and the nineties, ISDS has its boom with the proliferation of IIA and international credibility. The global golden age started to crack at the beginning of the first decade of XXI century through dissident voices in the Global South, particularly South America in relation to constitutional provisions and environment and human rights-related disputes. During the last years, the contestation arrives to the Global North, in terms of policy space protection. Therefore, nowadays ISDS regime is facing a legitimacy crisis that is reinforced with the COVID-19 crisis.

This piece argues that COVID-19 crisis may lead States to the perfect storm as a result of the expansion of their regulatory capacity in order to tackle the syndemic. Therefore, vulnerability theory contributes to reshape IIR, and prioritize human being as a vulnerable subject and the responsive State. From more superficial actions to deeper changes, four options should be part of a short and middle-term roadmap: 1) a moratorium on pending ISDS disputes and a restriction on future claims related to COVID-19 measures; 2) the introduction of counterclaims as a general rule in ISDS regime; 3) an explicit reference to right to regulate in IIAs; 4) an explicit exclusion of protected areas or policies.

International Law is a powerful instrument to approach vulnerabilities, to protect policy space and, in terms of the United Nations Secretary-General, Antonio Guterres, to build a "fair globalization".[74] But International Law is also a powerful instrument to deep vulnerabilities, to constrain policy space and build an unfair globalization. The States, and their leaders, have the power to choose which path to follow.

[74] Guterres, António, "Tackling the Inequality Pandemic: A New Social Contract for a New Era", Nelson Mandela Lecture, July 18, 2020, available at: *https://www.un.org/sg/en/content/sg/statement/2020-07-18/secretary-generals-nelson-mandela-lecture-%E2%80%9Ctackling-the-inequality-pandemic-new-social-contract-for-new-era%E2%80%9D-delivered*.

VI. References

Abel, Patrick, "Counterclaims based on international human rights obligations of investors in international investment arbitration. Fallacies and potentials of the 2016 ICSID Urbaser v. Argentina Award", *Brill Open Law*, vol. 1, no. 1, 2018, available at: *https://doi.org/10.1163/23527072-00101003*.

Acafremin *et al*. "Open Letter to Governments on ISDS and Covid-19", 2020, available at: *http://s2bnetwork.org/wp-content/uploads/2020/06/OpenLetterOnISDSAndCOVID_June2020.pdf*.

ADP International S.A. and Vinci Airports S.A.S. v. Republic of Chile International Centre for Settlement of Investment Disputes case number ARB/21/40, available at: *https://www.italaw.com/cases/9727*.

Aguas del Tunari, S.A. v. Republic of Bolivia, International Centre for Settlement of Investment Disputes case number ARB/02/3, available at: *https://www.italaw.com/cases/57*.

Anderson, Elizabeth, "What is the Point of Equality?", *Ethics*, vol. 109, no. 2, 1999, available at: *https://doi.org/10.1086/233897*.

ANDINA, "Embajadas de cuatro países envían carta al Congreso por ley que suspende cobro de peajes", June 5, 2020, available at: *https://andina.pe/agencia/noticia-embajadas-cuatro-paises-envian-carta-al-congreso-ley-suspende-cobro-peajes-800468.aspx*.

Arato, Julian, "Corporations as Lawmakers", *Harvard International Law Journal*, Cambridge, vol. 56, no. 2, Summer 2015, available at: *https://ssrn.com/abstract=2585214*.

Bas Vilizzio, Magdalena, *América del Sur ante los tratados bilaterales de inversión: ¿hacia un retorno del Estado en la solución de controversias?*, Montevideo, Universidad de la República, 2017.

Bas Vilizzio, Magdalena, "Acuerdo Mercosur-Unión Europea: sombras y ausencia de la solución de controversias Inversor-Estado", Fundación Carolina, 2019, available at: *https://www.fundacioncarolina.es/wp-content/uploads/2019/11/DT_FC_21.pdf*.

Bas Vilizzio, Magdalena, "¿Soberanía en la encrucijada? Nuevas aproximaciones desde la solución de controversias inversor-estado", in Martens de Willmars, Frédéric (ed.), *Nuevos tiempos, nuevos espacios para las Rela-*

ciones Internacionales y el Derecho Internacional. Valencia, Tirant Lo Blanch, 2022.

BROWER, Charles and SCHILL, Stephan, "Is arbitration a threat or a boon to the legitimacy of international investment law?", *Chicago Journal of International Law*, Chicago, vol. 9, no. 2, 2009, *doi:10.1093/ejil/chp019.*

CCSI, "Call for ISDS moratorium during COVID-19 crisis and response", 2020, available at: *http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/*.

Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (Chevron II). Permanent Court of Arbitration case number 2009-23, available at: *https://www.italaw.com/cases/257*.

CMS Gas Transmission Company v. The Republic of Argentina, International Centre for Settlement of Investment Disputes case number ARB/01/8, available at: *https://www.italaw.com/cases/906*.

CONSTITUTIONAL Tribunal of Peru, Unconstitutionality Sentence 0006-2020-PI, 25 August 2020, available at: *https://www.tc.gob.pe/wp-content/uploads/2020/08/00006-2020-PI-PROYECTO-PENDIENTE-DE-DELIBERACI%C3%93N.pdf.*

Continental Casualty Company v. The Argentine Republic, International Centre for Settlement of Investment, Disputes case number ARB/03/9, available at: *https://www.italaw.com/cases/329.*

CROSBIE, Eric and THOMSON, George, "Regulatory chills: tobacco industry legal threats and the politics of tobacco standardised packaging in New Zealand", *New Zealand Medical Journal*, vol. 131, no. 1473, 2018, available at: *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6490166/pdf/nihms-960898.pdf*.

DIETZ, Thomas *et al.*, "The legitimacy crisis of investor-state arbitration and the new EU investment court system", *Review of International Political Economy*, vol. 26, no. 4, 2019, *https://doi.org/10.1080/09692290.2019.1620308*.

EBERHARDT, Pia and OLIVET, Cecilia, *Profiting from injustice*, Corporate Europe Observatory, Transnational Institute, 2012.

ECHAIDE, Javier, "Efectividad de los derechos humanos y sociales en jaque: arbitrajes de inversiones en el marco del COVID-19", *Anales de la Facultad de Ciencias Jurídicas y Sociales de la Universidad Nacional de La Plata*, no. 51, 2021, available at: *https://doi.org/10.24215/25916386e092.*

Eco Oro Minerals Corp. v. Republic of Colombia, International Centre for Settlement of Investment Disputes case number ARB/16/41, available at: *https://www.italaw.com/cases/6320*.

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, International Centre for Settlement of Investment Disputes case number ARB/01/3, available at: *https://www.italaw.com/cases/401*.

Financial Times, "Virus lays bare the frailty of the social contract". Editorial. April 3, 2020, available at: *https://www.ft.com/content/7eff769a-74dd-11ea-95fe-fcd274e920ca*.

Fineman, Martha, "Vulnerability and Social Justice", *Valparaiso University Law Review*, vol. 53, no. 2, 2019, available at: *https://scholar.valpo.edu/vulr/vol53/iss2/2*.

Fineman, Martha, "The Vulnerable Subject and the Responsive State", *Emory Law Journal*, vol. 60, 2010, available at: *https://ssrn.com/abstract=1694740*.

Franck, Susan, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", *Fordham Law Review*, vol. 73, 2015 available at: *https://ir.lawnet.fordham.edu/flr/vol73/iss4/10*.

Franck, Thomas, *The power of legitimacy among nations.* Oxford, Oxford University Press, 1990.

Gallagher, Kevin and Kozul-Wright, Richard, "Breaking Out of the Double Squeeze: The Need for Fiscal and Policy Space during the COVID-19 Crises", *Global Policy Journal*, June 26, 2020, available at: *https://www.globalpolicyjournal.com/blog/26/06/2020/breaking-out-double-squeeze-need-fiscal-and-policy-space-during-covid-19-crises*.

Ghiotto, Luciana, "¿Unctad pro-desarrollo o pro-liberalización? Un estudio de los cambios en el organismo a la luz de las políticas sobre inversiones" in Echaide, Javier (ed.), *Inversiones extranjeras y responsabilidad internacional de las empresas. Problemáticas en torno al CIADI, los TBI y los derechos humanos*, Buenos Aires, B de F, 2017.

Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia, Permanent Court of Arbitration case number 2016-39, Procedural Order No. 11: available at: *https://www.italaw.com/sites/default/files/case-documents/italaw11514.pdf*.

Guterres, António, "Tackling the Inequality Pandemic: A New Social Contract for a New Era", Nelson Mandela Lecture, July 18, 2020, available at:

https://www.un.org/sg/en/content/sg/statement/2020-07-18/secretary-generals-nelson-mandela-lecture-%E2%80%9Ctackling-the-inequality-pandemic-new-social-contract-for-new-era%E2%80%9D-delivered.

HERNÁNDEZ GONZÁLEZ, José, "Regulación económica y arbitraje internacional de inversiones", *Revista Electrónica de Direito*, vol. 1, 2017, available at: *https://dialnet.unirioja.es/servlet/articulo?codigo=6421947&orden=0&info=link*.

HORTON, Richard, "Offline: Covid-19 is not a pandemic", *The Lancet*, vol. 396, No. 10255, 2020, *doi.org/10.1016/S0140-6736(20)32000-6*.

Infinito Gold Ltd. v. Costa Rica, International Centre for Settlement of Investment Disputes case number ARB/14/5, available at: *https://www.italaw.com/cases/2258*.

Investment Treaty News, "French consortium kicks off an ICSID claim against Chile after USD 37 million loss due to COVID-19 Pandemic", March 21, 2021, available at: *https://www.iisd.org/itn/en/2021/03/23/french-consortium-kicks-off-an-icsid-claim-against-chile-after-usd-37-million-loss-due-to-covid-19-pandemic/*.

KENDRA, T. *et al*. "The Morocco-Nigeria BIT: A new breed of investment treaty?" *Practical Law Arbitration Blog*, November 16, 2017, available at: *http://arbitrationblog.practicallaw.com/the-morocco-nigeria-bit-a-new-breed-of-investment-treaty/*.

KEOHANE, Robert, "The contingent legitimacy of multilateralism", in NEWMAN, Edward *et al.* (ed.), *Multilateralism Under Challenge: Power, International Order, and Structural Change*, Tokyo, New York, UNU Press, 2006.

KIRK, Stacey, "Tobacco plain packaging likely to be law by end of year-John Key", *Dominion Post*, 15 February 2016, available at: *http://www.stuff.co.nz/national/politics/76917027/tobacco-plain-packaginglikely-to-be-law-by-end-of-year--john-key*.

KOHN, Nina, "Vulnerability Theory and the Role of Government", *Yale Journal of Law & Feminism*, vol. 26, no. 1, 2014, available at: *https://ssrn.com/abstract=2562737*.

LG&E. Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, International Centre for Settlement of Investment Disputes case number ARB/02/1, available at: *https://www.italaw.com/cases/621*.

MCCLUSKEY, Martha *et al.*, "Vulnerability Theory and The Political Economy of Resilience", *Law and Political Economy Project*, 9 July 2021, available at:

https://lpeproject.org/blog/vulnerability-theory-and-the-political-economy-of-resilience/.

Ministerio de Relaciones Exteriores y Culto de Bolivia, "Bolivia y el CIADI: crónica de un divorcio anunciado", en VALDOMIR, Sebastián and SANTOS, Carlos (ed.), *Soberanía de los pueblos o intereses empresariales*, Fundación Solón, Redes Amigos de la Tierra, Uruguay Sustentable, Amigos de la Tierra, 2008.

MOROSINI, Fabio and RATTON SANCHEZ BADIN, Michelle, "Reconceptualizing International Investment Law from the Global South: An Introduction", in MOROSINI, Fabio and RATTON SANCHEZ BADIN, Michelle (ed.), *Reconceptualizing International Investment Law from the Global South*, Cambridge, Cambridge University Press, 2018.

MOUYAL, Lone, *International Investment Law and the Right to Regulate - A human rights perspective*, London, Routledge, 2016.

NEDUMPARA, James, "India's Trade and Investment Agreements. Striking a balance between investor protection rights and development concerns", in MOROSINI, Fabio and RATTON SANCHEZ BADIN, Michelle (ed.), *Reconceptualizing International Investment Law from the Global South,* Cambridge, Cambridge University Press, 2018.

Pac Rim Cayman LLC v. Republic of El Salvador, International Centre for Settlement of Investment Disputes case number ARB/09/12, available at: *https://www.italaw.com/cases/783*.

PERRONE, Nicolás, "The International Investment Regime after the Global Crisis of Neoliberalism: Rupture or Continuity", *Indiana Journal of Global Legal Studies*, vol. 23, 2016, available at: *https://www.repository.law.indiana.edu/ijgls/vol23/iss2/8*.

PERRONE, Nicolás, "Speed, law and the global economy: How economic acceleration contributes to inequality and precarity", *Leiden Journal of International Law*, Leiden, vol. 33, no. 3, June 2020, *https://doi.org/10.1017/S0922156520000242*.

PERRONE, Nicolás, *Investment Treaties and the Legal Imagination*, Oxford, Oxford University Press, 2021.

Philip Morris Asia Limited v. The Commonwealth of Australia, Permanent Court of Arbitration case number 2012-12, available at: *https://www.italaw.com/cases/851*.

Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, International Centre for Set-

tlement of Investment Disputes case number ARB/10/7, available at: *https://www.italaw.com/cases/460*.

POSTIGA, Andrea Rocha, "A emergência do direito administrativo global como ferramenta de regulação transnacional do investimento estrangeiro direto", *Revista de Direito Internacional*, vol. 10, no. 1, 2013, *doi:10.5102/rdi.v10i1.2369*.

PRASAD, Ananthakrishnan *et al*. "Mobilizing Private Climate Financing in Emerging Market and Developing Economies", International Monetary Fund, 2022, available at: *https://www.imf.org/en/Publications/staff-climate-notes/Issues/2022/07/26/Mobilizing-Private-Climate-Financing-in-Emerging-Market-and-Developing-Economies-520585*.

RICH, Phillip, "What Can We Learn from Vulnerability Theory?", *Honors Projects 352*, 2018, available at: *https://scholarworks.bgsu.edu/honorsprojects/352*.

SEMPRA Energy International v. The Argentine Republic, International Centre for Settlement of Investment Disputes case number ARB/02/16, available at: *https://www.italaw.com/cases/1002*.

SLOWAKISCHE Republik v Achmea BV, Case C-284/16, Judgment of the Court, Grand Chamber, 6 March 2018, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0579*.

SINGER, Merrill, *Introduction to syndemics. A critical systems approach to public and community health*, San Francisco, Jossey-Bass, 2009.

SORNARAJAH, Muthucumaraswamy, *Resistance and Change in the International Law on Foreign Investment*, Cambridge, Cambridge University Press, 2015.

TANZI, Attila, "State of Necessity", *The Max Planck Encyclopedias of International Law*, 2021, available at: *https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1071*.

The Economist, "COVID-19 has transformed the welfare state. Which changes will endure?". March 6, 2021, available at: *https://www.economist.com/briefing/2021/03/06/covid-19-has-transformed-the-welfare-state-which-changes-will-endure*.

The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Bolivia, Permanent Court of Arbitration case number 2018-39, Procedural Order No. 7 (on Respondent Request for Suspension of the Time-limit for Submission of its Statement of Defense) available at *https://www.italaw.com/sites/default/files/case-documents/italaw11453.pdf*.

The Renco Group, Inc. v. Republic of Peru [I], International Centre for Settlement of Investment Disputes case number UNCT/13/1, available at: *https://www.italaw.com/cases/906*

The Renco Group, Inc. v. Republic of Peru [II], Permanent Court of Arbitration case number 2019-46, available at: *https://www.italaw.com/cases/6179*.

TITI, Catherine. *The right to regulate in International Investment Law*, Baden-Baden, Nomos, 2014.

UNCTAD, *Investment policy responses to the COVID-19 pandemic,* Special Issue No. 4, Geneva, 2020, available at: *https://unctad.org/system/files/official-document/diaepcbinf2020d3_en.pdf*.

UNCTAD, *World Investment Report 2015. Reforming international investment governance*, Geneva, 2015, available at: *https://unctad.org/system/files/official-document/wir2015_en.pdf*.

UNCTAD, *World Investment Report 2003. FDI Policies for Development: National and International Perspectives*, Geneva, 2003, available at: *https://unctad.org/en/Docs/wir2003light_en.pdf*.

ÜNÜVAR, Güneş and KÜÇÜKSU, Aysel, "From Protection to Governance of Foreign Investment: Vulnerability Theory as a Paradigm Shift in International Investment Law", *EJIL: Talk!*, 27.12.19, available at: *https://www.ejiltalk.org/from-protection-to-governance-of-foreign-investment-vulnerability-theory-as-a-paradigm-shift-in-international-investment-law/*.

URZÚA FARÍAS, Andrés, "Sistema de solución de controversias inversionista-Estado (ISDS) en crisis: Estados Unidos y la Unión Europea", *Revista de Derecho Económico*, vol. 78, No. 1, 2021, *doi:10.5354/0719-7462.2021.64493.*

VAN HARTEN, Gus and LOUGHLIN, Martin, "Investment Treaty Arbitration as a Species of Global Administrative Law", *The European Journal of International Law*, vol. 17, num. 1., 2016, *doi:10.1093/ejil/chi159 2016:149*.

ZAYAS, Alfred de, "Report of the Independent Expert on the promotion of a democratic and equitable international order", A/70/285. New York, United Nations. Available at: *https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285*.