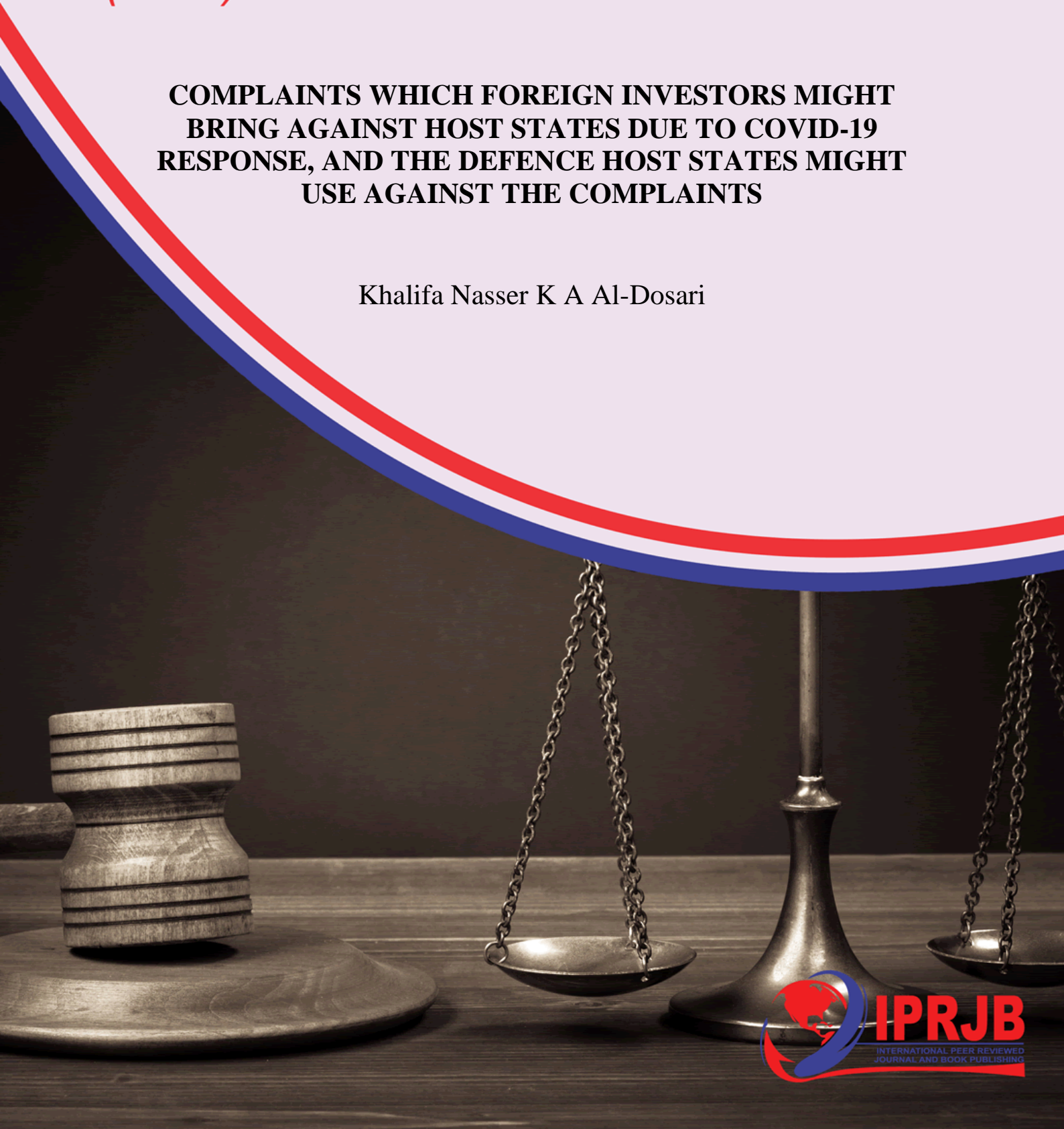


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## **COMPLAINTS WHICH FOREIGN INVESTORS MIGHT BRING AGAINST HOST STATES DUE TO COVID-19 RESPONSE, AND THE DEFENCE HOST STATES MIGHT USE AGAINST THE COMPLAINTS**

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## **COMPLAINTS WHICH FOREIGN INVESTORS MIGHT BRING AGAINST HOST STATES DUE TO COVID-19 RESPONSE, AND THE DEFENCE HOST STATES MIGHT USE AGAINST THE COMPLAINTS.**

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### **Abstract**

**Purpose:** This summative assignment sought to explore the possible complaints that foreign investors might raise against host states, as well as how host states might defend themselves from such complaints.

**Methodology:** This being a summative assignment, the author relied on review of existing literature, reference to case law and reflective learning, as well as, critical thinking to provide a critical analysis to the question. Fundamentally, the author explored the international investment treaty standards that could be used by foreign investors to raise their complaints, as well as the treaty-specific exceptions that may inform the defences by host states in response to foreign investor claims. The researcher adopted a case study design through a qualitative content analysis technique towards analysis documented information in the form of case laws, existing research literature, constitutional reports, such as international investment arbitration reports and agreement.

**Findings:** First and foremost, the author found out that foreign investors might complain about the violation of the full protection and security standard. However, states might invoke the doctrine of force majeure to defend against such claims. Also, the author found out that foreign investors might complain about unfair and inequitable treatment insofar as imposing Covid-19 measures are concerned. Nevertheless, host states might rely on the defence of distress to counter any complaints that may be brought about by foreign investors. Finally, the author explored the potential complaints insofar as direct and indirect expropriations are concerned, which host states may defend themselves against through the provisions of the defence of necessity as well as the defence of public health.

**Unique contribution to theory, policy and practice:** The author recommends that host states and foreign investors need to strike a balance between the protection of investments and public interests.

**Keywords:** *Full Protection and Security, Force Majeure, Fair and Equitable Treatment, Expropriation, Defence*

## 1.0 INTRODUCTION

The Covid-19 pandemic has brutally uncovered one of the greatest unprecedented challenges in meeting the requirements, terms and conditions established under bilateral investment treaties (BITs) in safeguarding foreign direct investments among foreign investors and host states. As noted by the law firm, Ropes and Gray, in response to the Covid-19 pandemic, governments have responded with a panoply of regulatory measures such as lockdowns, restrictions on movement and travel, limitations on investments and business operations, tax measures, closure of borders, government control of private businesses and imports controls.<sup>1</sup> Notwithstanding the legitimacy of these measures, there is no contention that they have adverse impacts on foreign investments by delaying investment operations and reducing profitability. Furthermore, it is likely that foreign investors may raise claims against host states seeking relief and compensation for the losses incurred as a result of government response to Covid-19 pandemic.<sup>2</sup> However, complaints likely to be raised by foreign investors will focus on the violation and/or breach of international investment agreements.

Fundamentally, foreign investors have various international rights concerning foreign investments cover by the host government. These rights include the right to national as well as most-favoured national treatment, right of protection from both indirect and direct expropriation, right to guaranteed standard of treatment, right to special protection against performance of their investments, and right to repatriation.<sup>3</sup> Besides, host states also have a right to exercise jurisdiction on the activities of foreign investors in their territories in accordance with legal entities, such as investment agreements, customary international law, and territorial jurisdiction that control the operationalisation of these rights.<sup>4</sup> However, the operationalisation of these entities are restricted from violation of protection and security standards, unfair and inequitable treatments as well as arbitrary and discriminatory of foreign investors.<sup>5</sup>

Various studies have been done in this area of investor-state dispute in response to Covid-19 pandemic. For instance, a study<sup>6</sup> was conducted to evaluate whether the doctrine of the police

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<sup>1</sup> Ropes and Gray, "COVID-19 Measures: Leveraging Investment Agreements to Protect Foreign Investments," Law Firm Alert, (2020) pp. 1-3

<sup>2</sup> Mao-Wei Lo, "Legitimate Expectations in a Time of Pandemic: The Host State's COVID-19 Measures, Its Obligations and Possible Defences under International Investment Agreements," *Contemporary Asia Arbitration Journal* 13, no. 1 (2020) pp. 249-268.

<sup>3</sup> Mann, Howard, and Konrad Von Moltke. "Protecting investor rights and the public good: assessing NAFTA's chapter 11." In *Conferences on NAFTA*. 2002.

<sup>4</sup> Ku, Julian G. "The limits of corporate rights under international law." *Chi. J. Int'l L.* 12 (2011): 729.

<sup>5</sup> S.R Subramanian, "Too Similar or Too Difficult: State of Necessity as a Defence under Customary International Law and the Bilateral Investment Treaty and their Relationship" *Manchester J. Int'l Econ. L.* 9 (2012) pp. 68

<sup>6</sup> Ranjan, Prabhash. "COVID-19, India and Indirect Expropriation: Is the Police Powers Doctrine a Reliable Defence?." *Contemporary Asia Arbitration Journal* 13, no. 1 (2020): 205-228.

powers would be a reliable defence of indirect expropriation. However, the study narrowed the focus to only the complaint against indirect expropriation, therefore, informing the need for a study that focused on a broader perspective of the various complaints and different defences that host states may rely against foreign investors' claims. Besides, other studies focused on the assessment of the possible and improbable measures that host states used in response to Covid-19, which might attract investor-state disputes.<sup>7</sup> However, this study did not explore the type of complaints and defences that investors and host states might rely on in investor-state disputes. Therefore, this study sought to provide a comprehensive analysis of various complaints that foreign investors may raise against host states measures in response to Covid-19 and the defence host states might use in response to these complaints.

## 2.0 METHODOLOGY

The study employed a case study design and a qualitative content analysis technique to analyse information that has been documented insofar as investor-state disputes in relation to host states response measures to Covid-19 were concerned. Fundamentally, the following key words were used to search documented information for analysis: Full Protection and Security, Force Majeure, Fair and Equitable Treatment, Expropriation, Defence by host states. Moreover, various materials were used in compilation and analysis of document information. These comprised, case laws of cases experienced, constitutional rights provided in international investment treaties, relevant legislation such as Article 23 of the International Law Commission's Articles on State responsibility and Article 25 (a) (b) of the International Law Commission's Articles on State responsibility, as well as legal opinion from recognised law firms on matters of foreign investment agreements and dispute resolution.

## 3.0 FULL PROTECTION AND SECURITY

Under International Investment Agreements (IIA), host states are obligated to provide full protection and security for both the investors and their foreign investments. Fundamentally, the host state ought to be aware of the risks of investments and take appropriate measures to protect foreign investments from financial harm. This requirement was underscored in *Wena Hotels Limited v. Arab Republic of Egypt*, where the arbitration tribunal averred that host states should take all appropriate measure in pursuit of protecting foreign investments in their territories. In the wake of the Covid-19 pandemic, different countries responded with drastic measures aimed at protecting foreign investments from the financial and economic risks associated with Covid-19, such as the possibility of losing labour for manufacturing investments. For instance, the UK did the furlough scheme by closing restaurants. However, foreign investors may raise complaints regarding the failure of host states to provide full protection as anticipated in international investment agreements. The rationale for such a claim is that some states failed to take early measures towards containing the spread of the

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<sup>7</sup> Chaisse, Julien. "Both Possible and Improbable—Could COVID-19 Measures Give Rise to Investor-State Disputes?." *Contemporary Asia Arbitration Journal* 13, no. 1 (2020): 99-184.

virus,<sup>8</sup> and only took drastic and avoidable measures (delayed lockdowns) at a later stage of the spread of the virus when foreign investments had already been significantly affected. In other words, foreign investors may raise complaints against host countries that failed to initiate measures immediately the pandemic struck, leading to the massive spread of the virus, necessitating avoidable measures taken at a later time, leading to adverse financial implications, such as losses on foreign investment projects.

Moreover, foreign investors may raise complaints against host states in the perspective of inaction or failure as well as reduced vigilance during the Covid-19 crisis, leading to significant harm to foreign investments, contrary to the obligation of states to offer full protection and security. An excellent example of a host country that may face such complaints is South Africa, which has been on the news for rampant looting of supermarkets and shops, due to lockdown measures that necessitated locals to resort to looting due to lack of basic needs, such as food.<sup>9</sup> In such instances, the government has a duty to use its police or military to protect foreign investors from losing their investments due to widespread looting. The rationale for such a complaint is that the government failed to carry out policing operations, thus contributing to the looting of investment property and goods, thus failing to offer full protection and security. Such a complaint was raised in *Azurix Corp v. The Argentine Republic*, where the arbitration tribunal held that the failure by the host state to carry out improvement works on the quality of a dam contributed to a water crisis. Equally, the failure of host countries to enhance patrolling by the military and police during Covid-19 lockdowns increased the risk of looting, thus affecting foreign investments negatively. Fundamentally, “the standard of full protection and security imposes an obligation of vigilance and due diligence upon the government.”<sup>10</sup> Therefore, foreign investors may raise complaints against host states for the violation of international investment law entailing the responsibility of host countries, because the mere want or lack of diligence constitutes a violation of the responsibility of diligence and vigilance in protecting foreign investments from eventualities such as looting and destruction of property.

### **3.1 THE DEFENCE OF FORCE MAJEURE**

As discussed, the host state may face the complaint of violation or failure to provide full protection and security on two accounts. Firstly, the failure to take early measures in combating Covid-19 pandemic, leading to drastic and avoidable measures being taken later to the financial and economic detriment of foreign investments. Secondly, due to the government failure to enhance policing and patrolling operations, leading to the looting of investment products during lockdowns. However, under customary international law, host states may seek to be excused for any breaches or violation of the obligation to provide full

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<sup>8</sup> Mao-Wei Lo, "Legitimate Expectations in a Time of Pandemic: The Host State's COVID-19 Measures, Its Obligations and Possible Defences under International Investment Agreements," *Contemporary Asia Arbitration Journal* 13, no. 1 (2020) pp. 249-268.

<sup>9</sup> Surabhi Sabat, "Video Showing South Africans Looting Shops During COVID-19 Lockdown," Blog Post, (2020).

<sup>10</sup> *Ibid*, 142

protection and security by defending their actions or inactions as outcomes of acting out of force majeure.<sup>11</sup> Fundamentally, force majeure is provided for in Article 23 of the International Law Commission's Articles on State responsibility.<sup>12</sup> Furthermore, force majeure applies where the state is neither responsible nor assumed the investment risks associated with an unforeseen event, such as Covid-19. There is no contention that the outbreak of Covid-19 was unforeseen, unprecedented, and the impacts of the pandemic have been irresistible no matter how governments have tried to combat the pandemic. Therefore, host states might invoke the doctrine of force majeure to defend themselves from lawsuits and investment disputes arising in the context of the provision of full protection and security as discussed herein.

### **3.2 THE DEFENCE OF NATIONAL TREATMENT STANDARD**

Host states may invoke the standard of national treatment in defending the unprecedented occurrence of looting investment property, as evident in the South African scenario discussed herein. Generally, the standard of national treatment implies situations where host governments accord more favourable treatment to domestic investors as compared to foreign investors.<sup>13</sup> For instance, the looting evident during Covid-19 lockdowns did not occur only in shops and supermarkets owned by foreign investors, but also those belonging to domestic investors. Therefore, host states might argue that the claims raised by foreign investors are unreasonable because all investors, whether foreign or local, have been affected by the lack of full protection and security. Moreover, in *Cargill v. Mexico*,<sup>14</sup> the tribunal held that government measures that do not afford favourable treatment to domestic investors at the disadvantage of foreign investors do not constitute a violation of full protection and security to foreign investors. However, the shortcoming of this defence is that it would depend on the interpretation of the arbitration tribunal as to what constitutes similar situations for both domestic and foreign investors during pandemics, such as the Covid-19 crisis.

### **4.0 UNFAIR AND INEQUITABLE TREATMENT**

The fair and equitable treatment standard encompasses substantive and procedural elements that have been most invoked in investment treaty arbitrations. The legal and contractual requirements of this standard were emphasised in *Waste Management, Inc. v. United Mexican States*.<sup>15</sup> Procedurally, host states are obliged to accord investments the due process when

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<sup>11</sup> Norton Rose Fulbright, "International arbitration report," Issue (2020) pp. 1-42

<sup>12</sup> Art 23 of the Articles states that "*for force majeure to work, the situation should not only be extraordinary and unforeseeable but it should be as a result of an occurrence of an irresistible force, beyond the control of the state, making it materially impossible in the circumstances to perform the obligation.*"

<sup>13</sup> Lo, M.W, "Legitimate Expectations in a Time of Pandemic: The Host State's COVID-19 Measures, Its Obligations and Possible Defences under International Investment Agreements." *Contemporary Asia Arbitration Journal* 13, no. 1 (2020) pp.249-268.

<sup>14</sup> *Cargill v. Mexico* [2009] ICSID Case No. ARB (AF)/05/Z)

<sup>15</sup> ICSID Case No. ARB (AF)/00/3 [2004] *The tribunal held that "state should avoid conduct that is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the*

coming up with various measures that impact on foreign investments within their territory. In the case of *Tecmed v. Mexico*,<sup>16</sup> the tribunal determined that host states should “act in a consistent manner, free from ambiguity and totally transparently” in relation to foreign investors.” This determination provides a strict view upon which foreign investors can raise complaints against host states. The rationale for a complaint insofar as a violation of the free and equitable treatment standard is concerned is that some states downplayed the risks and perceived consequences of Covid-19, but reversed course later, imposing drastic measures, thus violating the strict view of consistent actions free from ambiguity from host governments. Moreover, had such states taken the drastic measure at an earlier stage, foreign investors could not be exposed to subsequent drastic measures that undermined investment operations. Therefore, failure to act consistently, free from ambiguity in imposing measures<sup>17</sup> to combat Covid-19 violate the fair and equitable treatment standard.

Moreover, countries such as the UK have taken measures such as restrictions on the importation of commodities that have affected foreign investors and their investments due to limited access to raw materials and other investment commodities.<sup>18</sup> Others, such as Kenya and Tanzania, closed borders and restricted movement of all trucks, including cargo trucks.<sup>19</sup> Moreover, major cities manufacturing plants, and places of business, as well as construction sites, experienced physical closures, necessitating immediate delays in the full implementation and profitability of investment projects.<sup>20</sup> Besides, key investments such as those involving capital expenditures and Greenfield investments have significantly been affected as a result of the governments issuing executive orders and tax policies that had not been contemplated during the foreign investment and bilateral agreements.<sup>21</sup> Such measures have left foreign investor with no option but to hold investment projects that rely on the importation of products and commodities. However, for domestic investors who do not need an importation of commodities have been on course with their investments.

In such a situation, foreign investors could initiate investor-state dispute due to unfair treatment and unfavourable treatment of foreign investors as compared to domestic investors.

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*claimant to sectional, or involves a lack of due process leading to an outcome which offends judicial propriety, as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”*

<sup>16</sup> *Tecmed v. Mexico* [2003] ARB (AF)/00/2

<sup>17</sup> Ioana Tudor, “The fair and equitable treatment standard in the international law of foreign investment,” Oxford University Press, (2008) pp. 1-311

<sup>18</sup> Norton Rose Fulbright, “International arbitration report,” Issue (2020) pp. 1-42

<sup>19</sup> *Ibid*, 19

<sup>20</sup> James Zhan, “Covid-19 and investment—an UNCTAD research round-up of the international pandemic’s effect on FDI flows and policy,” *Transnational Corporations Journal* 27, no. 1 (2020) pp. 1-2

<sup>21</sup> *Ibid*, 2

Fundamentally, foreign investors can invoke the fact situations that arbitration tribunals have used before in international investment disputes, such as failure to protect foreign investors' legitimate expectations, procedural propriety, failure to comply with contractual obligations and violation of the requirement to afford investments due process when imposing measures.<sup>22</sup>

#### 4.1 Defence of Distress

Despite the context of the prevailing Covid-19 pandemic, host states are still obliged to afford fair and equitable treatment to foreign investors. However, considering that host states may take emergency measures in combating Covid-19, they may breach the fair and equitable treatment standard, discriminate against foreign investors or fail to accord due process to foreign-owned investments. However, host states might defend such alleged violation on the grounds of reasonable justifications, such as distress as set out in *Saluka v. Czech Republic*.<sup>23</sup> Generally, the defence of distress concerns serious threats to life for the host states and its citizens as well as those under the care of host states, such as foreign investors. Fundamentally, the defence of acting out of distress applies when "there is no other reasonable way, in a situation of distress, of saving the life or lives of other persons entrusted to the state's care, and that the state must not have contributed to the threat."<sup>24</sup> Moreover, many international investment agreements, such as the comprehensive and economic trade agreement (CETA) define and provide the circumstances in which the standard of fair and equitable treatment, may not apply.<sup>25</sup>

Therefore, host states might rely on the defence of acting out of distress to protect human health and lives of those they are entrusted to take care of, leading to emergency and drastic measures that violated the standard of fair and equitable treatment. Moreover, hosts states might argue that they are entitled to a margin of appreciation<sup>26</sup> if their actions in response to Covid-19 pandemic were proportionate and struck a balance between their interest in safeguarding public health and human life and the damage or loss on foreign investments as a result of initiating measures aimed at combating Covid-19 pandemic. Besides, a government that gave executive orders and temporary legislation just to combat Covid-19 pandemic might argue that such measures did not amount to fundamental and substantial changes to the

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<sup>22</sup>Rudolf Dolzer, and Schreuer Christoph, "Principles of international investment law," Oxford University Press, (2012) pp. 1-407

<sup>23</sup> *Saluka v. Czech Republic* [2006] Case 2001-04

<sup>24</sup> Norton Rose Fulbright, "International arbitration report," Issue (2020) pp. 1-42

<sup>25</sup> *Ibid*, 19: CETA provide that "states may take action that would otherwise breach the IIA in order to preserve public order, or to protect human health."

<sup>26</sup> Martins, Paporinkis, "The international minimum standard and fair and equitable treatment," Oxford University Press, (2013) pp. 1-274



existing international investment legal framework, and as such did not infringe investors' legitimate expectations as held in *Philip Morris v. Uruguay*.<sup>27</sup>

#### **4.2 Complaint about Expropriation**

In most cases, expropriation claims and complaints under international investment treaties encompass both direct and indirect expropriation. Generally, direct expropriation occurs when governments take full possession and control of investment property held by foreign investors through legislation. Indirect expropriation entails government interference with the ownership of investment property through taxation and regulation, leading to deprivation of investors' right and ability to use their investments profitably. Fundamentally, the justification advanced by the modern view of the international investment law is that states have a right to regulate as well as control economic resources and property within their territory to enhance critical objectives such as economic stability.<sup>28</sup> Due to the emergence of Covid-19, Norton Rose Fulbright made the following observations insofar as direct and indirect expropriation is concerned in response to Covid-19 pandemic.<sup>29</sup> First and foremost, states such as Spain, through the ministry of health announced measures to take all private health care providers, some of which are foreign investors in the pharmaceutical industry, turning their facilities under public control. Similarly, the United States of America, through the governors of New York and California authorised requisition of private facilities and equipment for treating Covid-19 patients. Also, the UK government rationalised rail franchises. Fundamentally, all these measures have not been accompanied by reasonable or any compensation.<sup>30</sup>

Therefore, foreign investors affected by such measures may raise complaints against host states for indirect expropriation that led to the loss of control, such as in the case of Spain mentioned above, or for direct expropriation through full seizure and requisition of private facilities as in the case of the U.S measures without compensation. The rationale for such complaints might be informed by the ruling in *Wena Hotels Limited v. Arab Republic of Egypt*, where the tribunal held that loss of control of investment property as a result of government regulation, restrictions and seizure without adequate compensation could attract investor claims for unlawful expropriation, whether direct or indirect. Moreover, most of the government measures of combating Covid-19 have been issued and implemented without the consent of investors due to the urgency of tackling the escalating cases of the virus. As such, foreign investors might raise a complaint about such measures as taking control of private hospitals and clinics without the voluntary consent of affected investors. This complaint was

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<sup>27</sup> *Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay* [2016] ICSID Case No. ARB/10/7; *the tribunal held that "the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances."*

<sup>28</sup> Mathew Porterfield, "State practice and the (purported) obligation under customary international law to provide compensation for regulatory expropriations," *NCJ Int'l L. & Com. Reg.* 37 (2011) pp.159-196

<sup>29</sup> Norton Rose Fulbright, "International arbitration report," Issue (2020) pp. 1-42

<sup>30</sup> *Ibid*, 18

underscored in *Generation Ukraine Inc. v. Ukraine*<sup>31</sup> as the tribunal held that investors might raise indirect expropriation claims if the control of their investment taken or regulated by the government was involuntary.

#### 4.3 Defence of Necessity.

In response to the complaints of expropriation that an investor may raise against host states, host countries may invoke the defence of necessity that exists under customary international law, regardless of what the text of the bilateral investment treaty stipulates. Fundamentally, necessity implies that the host states are excused for their actions because such actions were as a result of lack of any other option and as a consequence of a very serious and severe situation that arose without the states having caused it.<sup>32</sup> Moreover, Article 25 of the International Law Commission's Articles on State responsibility provides for the defence of necessity<sup>33</sup> that host states might invoke in defending complaints of direct and indirect expropriation discussed herein. Furthermore, in *CMS Gas Transmission Co v. Argentina*,<sup>34</sup> the annulment committee held that the defence of necessity is only applicable if the actions of the state are temporary. This applies to the covid-19 measures that most countries imposed, and later lifted as the situation improved. Therefore, host states, by invoking the defence of necessity might argue that they have met the requirement of temporary actions out of necessity, such as indirect expropriation of the private healthcare facility to respond to Covid-19 crisis. Besides, the defence of necessity requires that expropriation by the state "must not be arbitrary and discriminatory within the generally accepted meaning of those terms."<sup>35</sup> Therefore, host states might argue that the expropriation was not done just because the investments belong to foreign investors, but because the actions and measures taken were necessary in pursuit of containing the spread of the Covid-19.

Also, host states may invoke the defence of public health in defending investment treaty complaints from foreign investors.<sup>36</sup> For instance, the Canada-EU trade agreement offers a

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<sup>31</sup> *Generation Ukraine Inc. v. Ukraine* [2002] ICSID CASE No. ARB/00/9

<sup>32</sup> S.R Subramanian, "Too Similar or Too Difficult: State of Necessity as a Defence under Customary International Law and the Bilateral Investment Treaty and their Relationship" *Manchester J. Int'l Econ. L.* 9 (2012) pp. 68

<sup>33</sup> Art 25 of the ILC Articles on State Responsibility provides "that a state can invoke the doctrine of 'necessity' as a ground for precluding the wrongfulness of an act that is not in conformity with an international obligation of that state. This is provided that: a) It is the only way for the State to safeguard an essential interest against a grave and imminent peril. b) It does not seriously impair an essential interest of the State or State towards which the obligation exists or of the international community as a whole."

<sup>34</sup> *National Grid v Argentina* [2008] ICSID Case No. ARB (AF)/06/Z

<sup>35</sup> S.R Subramanian, "Too Similar or Too Difficult: State of Necessity as a Defence under Customary International Law and the Bilateral Investment Treaty and their Relationship" *Manchester J. Int'l Econ. L.* 9 (2012) pp. 68

<sup>36</sup> Norton Rose Fulbright, "International arbitration report," Issue (2020) pp. 1-42

carve-out for non-discriminatory regulatory measures that protect states from legitimate public welfare such as initiating lockdown measures, restriction of movement and expropriations in pursuit of promoting public health during the Covid-19 pandemic. Fundamentally, arbitration tribunals under international investment agreements have established that public interest, such as promoting public health would excuse host states from performing international investment obligations because such interests amount to necessity.<sup>37</sup>

#### **4.4 Discussion: Reasoning of the Host States in defence of the measures they have taken**

There is no contention that the various response to foreign investors' complaints must be informed by reasoning's of the host states, based on the existing defences in line with international investment law. One of the reasoning of host countries on the issue of providing full protection and security is that the outbreak and spread of Covid-19 was an unforeseeable circumstance that prevented them from fulfilling their obligation of protecting and ensuring security of foreign investments. Furthermore, the states are not responsible for the investment risk for such unforeseen occurrences, such as Covid-19.<sup>38</sup> Insofar as complaint on violation of national treatment standard, the reasoning in defence of this complaint is that host states did not treat foreign investors unfavourably, as compared to local investors in protecting their investments. Besides, their reasoning in invoking the defence of distress is that Covid-19 pandemic would have posed a more serious threat to lives of both locals and foreign investors, leaving host states with no other reasonable way they could have responded to such threats. In other words, they reasoned it prudent to protect the lives of the people they are entrusted to protect, rather than upholding investor's rights and putting lives of many people at risk of infection and death. Moreover, such necessity allowed them to reason it wise to take actions that were due to lack of any other options and as a consequence severe situation that occurred without the states having caused it.<sup>39</sup>

## **5.0 CONCLUSION AND RECOMMENDATION**

### **Conclusion**

The unprecedented outbreak and spread of the Covid-19 continue to impact on international investment as the pandemic unravels with disregard to national borders. Almost all countries in the world continue to experience economic challenges, brought about by the public health hazards of Covid-19 pandemic. In the context of international investment law, such situations do not entail a binary choice of measures and government actions, but require a balancing between protections of foreign investors and protect the interests, such as public interests of host states. However, disputes, claims and complaints in international investments are

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<sup>37</sup> *National Grid v Argentina* [2008] ICSID Case No. ARB (AF)/06/Z)

<sup>38</sup> Article 23 of the International Law Commission's Articles on State responsibility

<sup>39</sup> S.R Subramanian, "Too Similar or Too Difficult: State of Necessity as a Defence under Customary International Law and the Bilateral Investment Treaty and their Relationship" *Manchester J. Int'l Econ. L.* 9 (2012) pp. 68

inevitable. Therefore, this summative assignment has provided the possible complaints that foreign investors may raise against host states as well as the defences that host states might advance to defend their actions.

### **Recommendation**

The author, therefore, recommends a thorough analysis of the complaints and defences raised herein for merit prior to any investor-state dispute. Further, upon discovering that indeed the rights of foreign investors have been violated, host governments and international investment regulatory systems such as the International Centre for Settlement of Investment Disputes (ICSID) should; first and foremost, invoke the principle of full compensation to restate foreign investors be repaired for the losses they may have incurred, as a consequence of wrong measures and actions by host states. Besides, governments and international investment regulatory systems should adopt common parameters in compensating foreign investors to avoid further complaints on the basis of unfair and inequitable compensation.

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### **Legislation**

- Article 23 of the International Law Commission's Articles on State responsibility.
- Article 25 (a) (b) of the International Law Commission's Articles on State responsibility