

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

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ABSTRACT

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

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to have failed to provide the fair and equitable treatment (hereinafter “FET”) required by the IIA. The tension between the host state’s COVID-19 measures and the foreign investors’ legitimate expectations hence arises.

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

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