FORCE MAJEURE AND INVESTMENT TREATY ARBITRATION: CONTRACTORS' REMEDIES AND STATE DEFENCES IN TIMES OF WAR.

The term "Force majeure" is of French term which, when loosely translated means "superior force" and although the principle originated from a Civil Law jurisdiction it is now widely recognized in both Civil and Common Law jurisdiction as a situation that may excuse or suspend the liability for the non-performance of a contract. It is also referred to as "Vis Major" or "Act of God" and may include, the occurrence of wars, protest, civil unrest, strikes, natural disasters and other circumstances which may impair a contracting party's ability to fulfil its contractual obligations.

Force Majeure in Investment Treaty Arbitration is one of the defences available to states alongside the defences of necessity, corruption and legitimate use of sovereignty. It is considered to be "any act which a State may rely upon to excuse itself of its conduct, where it is prima-facie in breach of an international/contractual obligation on the grounds that it compelled or coerced by external events outside the state's control"[1].

Force Majeure is recognised as a State defence by **Article 23 United Nations International Law Commission Articles on responsibility of States for wrongful Conducts** Act, which states that;

> *The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation*

This principle has been adopted in many Bilateral Investment Treaties and most States have local Statutes that allow the State to raise the defence of Force Majeure when necessary.

Although Force Majeure is generally considered a defence that may be available to a State when it is a breach of its contractual obligation, it is however not a "get out of jail free cards" absolving the State of all liability once it pleaded. A State claiming the defence of Force Majure must sufficiently prove its case as Investor-State Dispute Settlement tribunals have employed a narrow approach in interpreting the defence of Force Majeure. Furthermore, Article 23 (supra) provides for two exceptions to the application of Force Majeure, it states that;

> Article 23 *does not apply if "(a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the State has assumed the risk of that situation occurring."*

A State that intends to rely on the defence must prove that unforeseeable, unpreventable and that that it did not contribute to the occurrence of the act of Force Majure. The State must also show that upon the occurrence of the act, it did all it could to mitigate the effect of the act. The defence of Force Majeure has been largely unsuccessful because in most cases the Investors have been able to prove to ISDS tribunals that the alleged act of Force Majeure, was

foreseeable or that the State contributed to the situation or the State failed to mitigate the effect of the act in question.

In **CMS *Gas Transmission v Argentina*** [2] the defence of Force Majeure raised by Argentina was "laconically rejected as the events discussed were foreseeable and foreseen." Also, the ***Amoco International Finance Corporation Vs Philips Petroleum Company Iran***[3] where the tribunal held that the conditions of Force Majeure merely suspended the contract, it did not invalidate it or annul the States obligations. The court went further to use a two-prong approach; first, it found that the contract provided only for the suspension of the obligation. Secondly, it found that after the revolution ended the parties returned to the status quo ante[4]. Also, in the case of ***Autopista Concesionada de Venezuela vs Venezuela*** [5] where the state of Venezuela raised the defence of Force Majeure but it was rejected by the Tribunal.

However, in the recent case of ***General Dynamics United kingdom LTD V State of Libya*** *[6]* Force Majeure was raised as a defence on the grounds of the relates to the political upheaval which took place in Libya and affected investments in its oil and gas industries. An International Chamber of Commerce (ICC) tribunal in that case in which Force Majeure was established by the state of Libya which excused it from liability.

The defence was also successfully relied in the ***USA -IRAN Tribunal Claims-In Gould Marketing Inc. v Ministry of National Defense*** **[6]** the tribunal (which was a non-binding legal tribunal) found that the strikes and riots in the Iranian Islamic revolution of 1979 constituted "socio-economic forces beyond the power of the state to control through the exercise of due diligence" and were, therefore, classic Force Majeure conditions. The tribunal was of the view that the conditions of force Force Majeure prevented the state from carrying out its obligations and therefore ruled the contract had been terminated and the claims dismissed.[7] It is important to point out also that in two other cases in the same Tribunal the defence failed.

It can be deduced from the above that despite the availability of the defence of Force Majeure to States under Investment Treaty Arbitration the tribunals tend to give narrow interpretation given to Force Majure and State would usually not be allowed to use the defence of Force Majure to escape liability particularly cases where the act of Force Majure in question was reasonably foreseeable or the State is culpable in one contributory form or the other.

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Depth – 20/30
Presentation – 15/30

Total Grade - 50%