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COVID-19 Measures and Investment Protection: Should Governments Be Afraid of Investor Claims?

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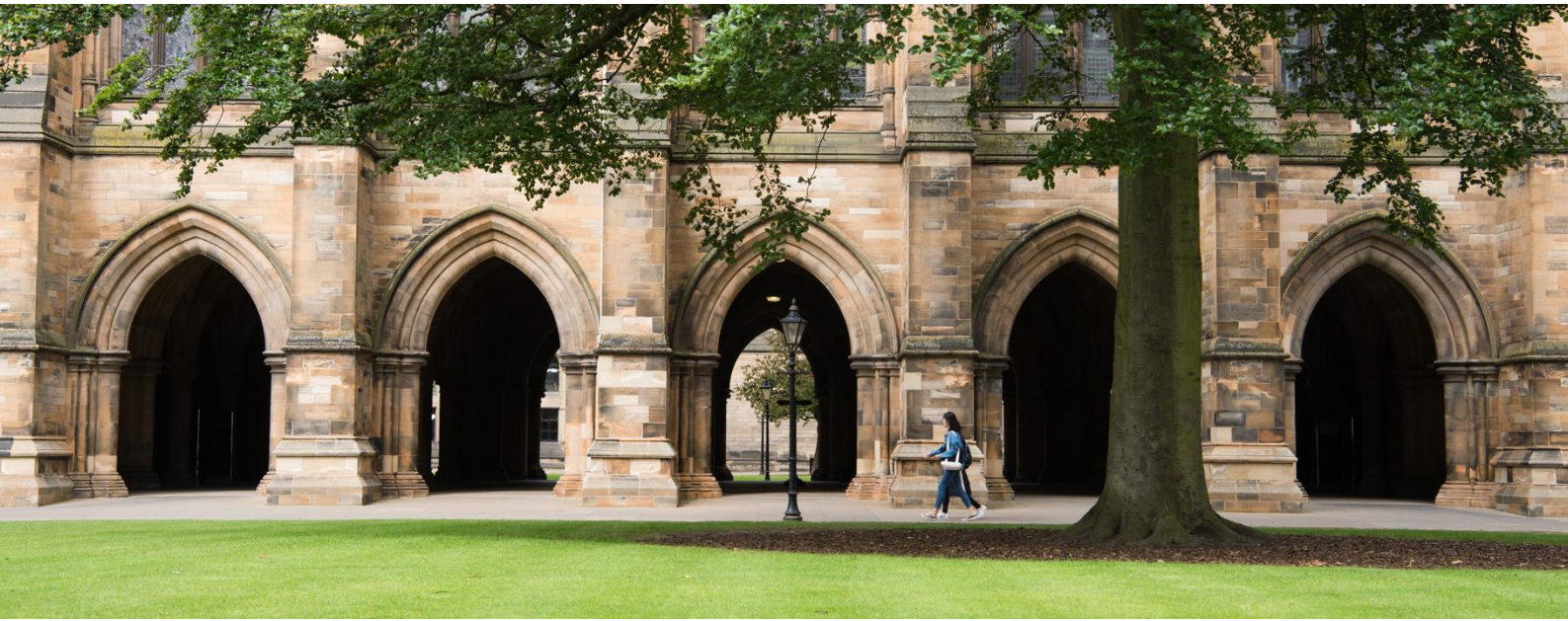

1. Executive Summary

At the start of the pandemic, many law firms were advertising their services to both states and investors in response to state measures introduced to tackle COVID-19 that may violate investor rights under international investment agreements (IIAs). The big question remains: should states be afraid of litigation claims from international investors for actions taken to address the pandemic? International investment law offers a broad scope of protection to investors, yet the legal regime also offers states important defences when they undertake measures out of necessity. A pandemic of the nature of COVID-19 unquestionably threatens the essential interests of the state, constituting a grave and imminent peril. As this brief demonstrates, in the assessment of the legality of a given measure much depends on the substance and scope of the measure in question, as well as on issues such as ensuring due process and making adequate compensation available.

The pandemic has highlighted just how intertwined questions of human rights and protection of the environment are with key sectors of investment, such as energy, and infrastructure. The brief further advises on how the United Nations Sustainable Development Goals agenda and international human rights law present potential challenges to the current international investment regime. The authors underline that the UK and devolved governments may need to react quickly to growing demands for change.

2. International Investment Law & Arbitration

Background

International Investment Law is shaped by a vast network of over 2500 bilateral investment treaties (BITs)[1]. The UK is currently bound by 92 BITs agreed with other States. It is also bound by over 50 additional treaties protecting investors, either in conjunction with measures related to trade or in multilateral treaties. These treaties bind the UK and its devolved nations, including Scotland. They benefit investors from the respective treaty partner, e.g. Chinese companies under the UK-China BIT, or Russian investors under the UK-Russia BIT - just as UK investors are protected in respect of their investment activities in China, Russia etc.

These international investment agreements (IIAs) are designed to incentivise foreign companies to invest abroad. They do so by providing investors with a broad range of rights designed to protect them from regulatory intervention in the State 'hosting' the investment. They also grant investors the right to directly sue the host State before an international arbitral tribunal if they consider that the host State violated rights protected by a BIT. Such proceedings can be brought against all forms of State measures, including acts of legislation, conduct by local government, or administrative measures by regulators. If successful, they typically result in compensation for any damage incurred as a result of the impugned measure.

International investment treaties are drafted and interpreted to protect a large range of assets and investors. The UK model BIT, serving as a template for agreements entered into by the UK, protects 'every kind of asset, owned or controlled directly or indirectly'[2] by an investor on the UK's territory. This protection extends to all kinds of property, including shares in a company, bonds, and compasses 'intellectual property rights, goodwill, technical processes and know-how'[3]. This *prima facie* brings a broad range of 'assets' under the scope of protection of investment law, incl. shares in companies affected by public health measures or the IP rights of pharmaceutical companies.

This broad scope of application means that it is particularly difficult for States to anticipate whether they face the risk of litigation. This risk crucially depends on the scope of the rights granted to foreign investors under BITs and their procedural rights to enforce them before international arbitral tribunals.

[1] Estimates suggest there are over 3,000 international investment agreements (IIAs). See https://www.jonesday.com/en/insights/2020/05/covid19-and-investment-treaties.

[2] UK, Model BIT 2008, art. 1 (a). Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download.

[3] UK, Model BIT 2008, art. 1 (a).

The process of investment arbitration

Where disputes between foreign investors and host States are submitted to litigation, they are typically brought before an international arbitral tribunal. Historically, this is due to the (real or perceived) concerns of investors that the domestic courts of the host State might not be capable of offering an unbiased decision in a dispute implicating the State. As a result, international investment law is shaped by the decisions of international arbitral tribunals. The number of such decisions has sharply increased since the turn of the century, as more and more investors have initiated proceedings. The process for settling such disputes follows models of commercial arbitration. It is increasingly criticised, as not being appropriate for disputes involving State measures and public interests - but it is provided for in binding treaties and remains available to investors.

Where investors initiate proceedings, disputes are settled brought before *ad hoc,* private, arbitral tribunals, usually composed of three arbitrators, one nominated by the investor, one by the State, the third by agreement. Arbitral tribunals operate under one of the recognised frameworks for international arbitration, such as those of the International Centre for the Settlement of Investment Disputes (ICSID) or the UN Commission on International Trade Law (UNCITRAL). Decisions are binding on the parties. Where an investor is awarded compensation, this can be enforced directly in the host State or in other States. While most awards are complied with voluntarily, some controversial disputes have resulted in protracted 'enforcement sagas', with investors seeking to attach host State assets abroad.

Quite apart from the risk of being held accountable, proceedings before investment tribunals are costly and time-consuming. A 2017 study put the average cost for a State defending a case before an investment tribunal at US$ 5,605,000.[4] (These are the costs for legal fees and the arbitration process itself; they do not include potential compensation awarded to investors should they obtain.) There is a chance that a State successfully defending itself against an arbitral claim can recover costs from the (unsuccessful) investor, but frequently, the tribunal requires each party to bear its own costs.

According to data gathered by the UN Conference on Trade and Development, of the 740 decisions rendered by investment tribunals, 210 have been rendered in favoured of governments, 212 rendered in favour of investors, 16 recognised liability but awarding no damage, and 148 were settled[5]. The aforementioned study also provides an average of the compensation granted to investors by arbitral tribunals: US$ 1,333 million[6].

Common BIT clauses

In arbitral proceedings based on BITs, investors rely on a relatively small number of standard provisions. While the scope of protected investments is broad (as noted above), arbitral decisions turn on the interpretation of these standard clauses, and their application to a particular case. While arbitral tribunals will have regard to the exact wording of such clauses in a particular treaty, three standard clauses are particularly significant.

First, investment treaties protect foreign investors against **expropriation**. For expropriation to be legal under international investment law it needs to be undertaken for a public purpose, be non-discriminatory, carried out in accordance with the principles of due process and provide the investor with an adequate

[4] This average includes counsel and expert costs as well as the costs of setting up the tribunal. See: Hodgson M., Campbell C., Damages and costs in investment treaty arbitration revisited, Global Arbitration Review online news, 14 December 2017, available at www.globalarbitrationreview.com.

[5] 90 decisions were discontinued before reaching their conclusion. Data available at https://investmentpolicy.unctad.org/investment-dispute-settlement.

[6] This amount is adjusted to *exclude* the Yukos decision. If this decision is included the average reaches to US$2,376 million. See: Hodgson M., Campbell C., Damages and costs in investment treaty arbitration revisited, Global Arbitration Review online news, 14 December 2017, available at www.globalarbitrationreview.com.

compensation[7]. Investors are also protected against direct or indirect compensations.

Example 1: Litigating tobacco regulation

Packaging regulations on tobacco have not escaped the attention of arbitral tribunal, with two high profile cases being brought by *Philip Morris* against Uruguay and Australia.

In both cases, the cigarette manufacturer alleged a breach of several treaty provisions, including anti-expropriation and FET clauses. The essence of the claims was that the introduction of mandatory graphic images on cigarette packets breached the aforementioned treaty obligations.

While, in both cases, arbitral tribunals ultimately ruled in favour of the governments, many commentators have argued that similar litigation may lead governments to abstain from regulating tobacco use and distribution to avoid having to bear the costs of litigation.

Direct expropriation refers to the outright taking or nationalisation of property by a government, while indirect expropriation can be understood as a loss of control by the owner resulting from regulatory measures implemented by a State. Arbitral tribunals have interpreted treaty provisions protecting investors from indirect expropriation in a relatively extensive manner and considered that environmental laws, tax measures or other forms of regulation can, in principle, result in indirect expropriation. A strand of decisions has expressly noted that the State's intention in adopting measures is not decisive: notably, the pursuit of a legitimate public goal does not shield States from facing responsibility over expropriatory measures. The arbitral tribunal in the *Desarollo* case, for example, noted:

"*While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking".*[1]

Beyond protecting investors against expropriation, BITs and other investment treaties, oblige States to grand investors '**Fair and Equitable Treatment**'. Fair and Equitable Treatment clauses (FET clauses) have been characterised by an influential commentator as '*catch-all provisions for investor protection*', with another adding that their interpretation by arbitral tribunal was '*surrounded by considerable fog*'[8]. FET clause have been interpreted by arbitral tribunals in a wide-ranging way.

The clause has been used to protect investors against bad faith by governments, arbitrariness or lack of transparency, lack of due process, lack of reasonableness in measures implemented by a State, or breach of an investors' 'legitimate expectations'.

The latter interpretation of the clause was, for example, successfully invoked by investors during the Argentinian economic crisis of the early 2000s against emergency measures deployed to alter Argentina's monetary policy. As with the current pandemic the measures enacted by Argentina in the 2000s were taken in the midst of unprecedented circumstances. However, despite record inflation and unemployment, the inability of Argentina to fulfil its debt obligations, and severe humanitarian causes emerging from these financial difficulties, investment tribunals repeatedly recognised Argentina's responsibility under the FET clause and condemned it to pay large amounts in reparation to foreign investors. In other words, breaches of the FET clause can be established on the basis of investors reasonable

[7] Determining whether the compensation granted to an investor is 'adequate' may not be easy for a government as this topic is the subject of a highly technical debate in the case-law of arbitral tribunals.

[8] Waibel M, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101 American Journal of international law, p. 748.

expectations despite the presence of an emergency, and despite the adoption of measures 'in good faith' by a government facing said emergency.

Finally, investment treaties usually guarantee that investors will be treated equally to nationals of the signatory governments, and will be granted '**Most Favoured Nation Treatment**' (MFN treatment). The purpose of MFN clauses is to prevent a State from granting to investors from a third State a level of protection less favourable than the level of protection they grant to nationals of the other signatory to the BIT. In effect, MFN clauses let investors 'import' the protection granted by a State in BITs other than the national State of the investor.

3. Main policy challenges arising from COVID-19

Potential sources of litigation under BITs

The broad protection granted by BITs and other investment agreements, coupled with the high costs of litigation and the high average compensation raises a significant policy risk for States implementing measures to combat COVID-19. In addition, the large number of investment treaties in force, and the fact that shareholders of foreign companies can rely on investment treaties, prevents government from clearly anticipating the number and nature of litigation on covid-measures.

Several of the measures implemented by governments to mitigate the effects of the COVID-19 crisis could potentially lead to litigation under BITs. For example, several governments have, in response to the health crisis mandated the production of Private Protective Equipment (PPE) or of medical equipment such as ventilators. Similarly, several governments have requisitioned PPE to ensure that they benefited from sufficient stockpiles or have enacted legislation allowing for the temporary seizure of private hotels and hospitals to house patients[9].

Example 2: Potential litigation over Peru's COVID-19 measures.

Peru's COVID-19 measures have already lead to threats of recourse to arbitral tribunals by foreign investors. In 2020, Peru's government enacted legislation designed suspending the collection of road tolls during the pandemic in order to facilitate the transport of essential goods and workers by removing financial disincentives to movement in a time of economic downturn.

This decision lead several road toll owners to threaten litigation before arbitral tribunals. The measure, despite its temporary nature could be interpreted as expropriatory by and arbitral tribunal, or lead to litigation on the basis of a Fair and Equitable Treatment clause.

Source: C. Olivet and B. Müller: "*Juggling crises: Latin America's battle with COVID-19 hampered by investment arbitration cases*" 2020, available at https://longreads.tni.org/jugglingcrises

These measures, despite their health-related purpose, and despite the nature of the emergency leading to their adoption, could trigger litigation under anti-expropriation clauses present in BITs. To establish that such a clause has been violated, investors would need to prove that the seizing of their property was discriminatory, that the measures were adopted without due process or that no adequate compensation was provided in return for the taking. It should be noted that failure by a government to fulfil any of these conditions would lead to a recognition of the government's responsibility and the payment of compensation to investors affected by the measure.

The mere fact that measures were adopted during a health crisis will be insufficient to shield governments from findings of violation. Moreover, the adequacy of the compensation provided to investors has led to particularly

[9] See: Baker McKenzie, *"COVID-19 EMEA Life Sciences Survey What measures have EMEA governments taken in the life sciences sector to fight COVID-19?"*, 2020 available at: https://www.bakermckenzie.com/-/media/files/insight/publications/2020/04/emea_survey_presentation_20200409.pdf?la=en ; Hogan Lovells, "COVID-19: will State measures give rise to a new set of investment claims?", 2020, available at: https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2020-pdfs/2020_04_02_covid19-and-investment-arbitration.pdf?la=en.

complex and sometimes contradictory decisions by arbitral tribunals. As such, it is especially difficult for governments to determine whether the measures they adopt could breach anti-expropriation clauses.

Measures designed to preserve national industries in key areas related to health, safety, or infrastructure during the pandemic could similarly lead to litigation. Broadly speaking, the purpose of these measure is to prevent foreign control of companies operating in these essential sectors in this time of crisis. Such measures have been adopted by a broad range of governments, including the EU and Australia. These measures may lead to findings of violation under a MFN, a National Treatment, or a FET clause. Investors could obtain compensation under the MFN clause if tightened controls on investments led them to be treated less favourably than investors from another State having signed a BIT with the government enacting these measures.

Breach of a National Treatment clause on the same grounds could be found if measures lead to foreign investors being treated differently than nationals. Finally, given its broad and open-ended nature, tribunals have found that discrimination based on the nationality of the investor has amounted to a breach of the FET clause. Again, in all these scenarios, the fact that the measures were enacted to safeguard key industries in the midst of a health crisis does not preclude potential findings of violation by investment tribunals.

The temporary closures of businesses across many different sectors during the various periods and tiers of restrictions could similarly lead to litigation from investors seeking to recover profits lost due to temporary closures. Such litigation could be based either on a FET or an anti-expropriation clause. To obtain compensation under the FET clause investors would need to show that said closures were arbitrary, adopted without due process, or, more likely, breached their legitimate expectations. The fact that several arbitral tribunals have read the FET clause as obliging governments to maintain a '*stable legal and business framework*' could, in the context of lockdown measures be a basis for investor litigation or compensation.

Example 3: Litigation against Chile based on COVID-19 measures.

Measures implemented by the Chilean government have already been the object of an investment claim. French shareholders a consortium controlling Santiago's airport claimed that they had suffered consequential losses following the implementation by the government following the COVID-19 crisis.

The investors claim that the measures imposed by the government, notably the additional sanitary measures mandated during the pandemic, caused a loss of $37 millions for which they seek redress. The claim is reportedly based on the FET, national treatment and expropriation clauses.

Source: BNA Americas "*Santiago airport concessionaire starts arbitration procedures*", 2021.

Similarly, mandatory temporary closure of businesses could be interpreted by investment tribunals as a form of indirect expropriation and lead to compensation if investors demonstrate that this expropriation has not been accompanied by sufficient compensation or procedural guarantees. Here again, the fact that the measures enacted by the States were temporary, for an eminently public purpose, and taken in the context of an emergency would not preclude a finding of responsibility.

Several governments, including the UK, have enacted regulatory measures designed to facilitate their acquisition of necessary goods and services during the pandemic, notably by relying on simplified or emergency procedures for public procurement tenders. Investors establishing that they have been negatively affected by these measures, could rely on the FET clause to obtain compensation for lost profits. In order to obtain compensation on this basis, they would have to demonstrate that this departure from usual procedural norms has constituted a breach of due process or has been discriminatory.

Finally, the broad array of measures enacted by governments to alleviate the effects of the pandemic on their population could give rise to litigation. Such measures have included, for example, temporary rent freezes and freezes on eviction or delayed payment for services such as water and electricity. For investors, the loss in profits generated by these measures could constitute a basis for litigation, either on the basis of an FET or an anti-expropriation clause. As with other measures, investors would have to demonstrate arbitrariness, discrimination or a breach of their reasonable expectations under the first clause, or a lack of adequate compensation or procedural guarantees on the second.

Potential ways to mitigate litigation risk

Several avenues are available to mitigate the potential negative effects of litigation. First, **legal defences** arising from the investment treaties themselves or from international law in general are available to governments facing litigation. These legal defences, while they will not prevent litigation costs can allow States to avoid the recognition of their responsibility and the payment of compensation.

First, investment treaties, and international law in general, allows state to escape a finding of responsibility if their breach of an international obligation is covered by the **necessity** defence. Necessity is governed by a particularly narrow set of conditions. In the context of COVID-19 a State would have to demonstrate that the pandemic threatened an essential interest of the state, that it constituted 'a grave and imminent peril', that the specific measure challenged was 'the only way' through which it could prevent this grave and imminent peril, and finally that it had not contributed to the situation leading to recourse to necessity[10].

While the current crisis has clearly constituted and continues to constitute a grave and imminent peril to an essential interest of government, states may struggle in establishing that the specific measures they have implemented were 'the only way' to mitigate the damage caused by coronavirus. Similarly, they may fail to demonstrate that they did not contribute to the development of the crisis.

Second, States could rely on **exceptions** featured in investment treaties, designed to enable regulation of key essential interest of the treaty signatories, including public health. As with necessity, however, investment tribunals have adopted a particularly narrow reading of these clauses. Moreover, investors have sought to circumvent their effects by relying on MFN clauses to benefit from a broader standard of protection granted by other investment treaties.

As these legal defences may not prove sufficient in alleviating the reputational and financial costs of investment litigation, states could explore alternative policies to reduce said risks.

Signatories to investment treaties could issue **joint declarative interpretation** of key treaty clauses, clarifying their meaning to reduce the likelihood of said clauses being used in litigation. Such a course of action has notably been recommended in a recent report published by the UNCTAD[11]. Similarly, joint signatories of BITs could **decide to amend investment treaties** to limit their potentially disruptive effects on health-related measures designed to limit the impact of the current pandemic. For example, investment treaties lacking clauses designed to prevent litigation over health measures could be added to BITs lacking those provisions.

Moreover, co-signatories of an investment treaty could **jointly decide to suspend** the application of the totality or part of the investment treaty, notably its sections enabling in-

[10] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries', 80.

11 UNCTAD, 'Investment Policy Responses to the COVID-19 Pandemic', *Investment Policy Monitor*, 2020 available at https://unctad.org/system/files/official-document/diaepcbinf2020d3_en.pdf.

ternational litigation by investors. Such an option has been advocated for in a recent declaration by the African Union[12]. However, such suspension would necessitate the agreement of all parties to an investment treaty in order to take effect. Similarly, with the agreement of all parties, signatories may decide to **annul the treaty**, effectively stopping the protection it grants to creditors and their ability to sue. This latter solution however would need to be balanced with the potential benefits brought by the signature of investment treaties, notably their potential in attracting foreign investment on the territory of the signatories.

4. Future policy challenges

Towards a Sustainable and Rights-Respecting Investment Regime?

The legal obligations of the UK to respect and protect the rights of foreign investors under BITs are part of a broader tapestry of international obligations, including the UK's responsibilities under international human rights law (IHRL), and its commitments under the United Nations Sustainable Development Goals (SDGs). On one hand, the UK's long-standing obligations under IHRL and its more recent commitments under the SDGs throw up a complex set of policy questions for the UK going forwards.

As a consequence of the pandemic, the UK is arguably under an even greater impetus to steer its economy towards sustainability goals and to address the social and economic inequalities that have been exposed by the uneven impact of the health crisis. Depending on the form that they take, however, policies and regulations designed to address inequalities and improve sustainability could generate future litigation risks. On the other hand, IHRL may offer some additional resources to States seeking to successfully defend policy measures that are designed to respond to public health crises and to enhance sustainability against litigation claims by international investors.

The UK played a central role in the formulation and adoption of the 2030 Agenda for Sustainable Development in 2015, and it is now committed to meeting 17 SDGs underpinned by a further 169 targets which address a wide range of interconnected issues include poverty, inequality, climate change, inclusive societies and access to health and education. States have committed to trying to achieve both the wider goals (e.g., Goal 1: End poverty in all of its forms everywhere; Goal 8: Promote inclusive and sustainable economic growth, employment and decent work for all) and a more specific set of targets by 2030.

The UK's commitments under the SDG framework are not legally binding, but the UK is subject to monitoring procedures to assess progress, notably, the government is asked to carry out a 'Voluntary National Review' leading to a report that is presented to the annual UN High-Level Political Forum.[13] The SDGs are a form of goal-based governance and build on the earlier Millennium Development Goals. They contain no specifications concerning *how* governments are to achieve targets and goals i.e. which specific policies or laws they will need to introduce: these decisions are left to participating States.

FDI is anticipated to play a role in helping States to achieve the SDGs, as the Agenda specifically recognizes the need to mobilize private investment to address key financing gaps in achieving the SDGs, such as funding low carbon and climate resilient development, innovation and clean technologies, and sustainable agriculture. Nevertheless, the impetus that the SDGs place on the UK government, devolved Parliaments, regional councils and other administrative bodies to introduce policies and laws that actively steer the economy towards greener, more sustainable goals could interfere with the broad spectrum of investor rights

[12] Maina N., Nikièma S., 'The African Union's Declaration on COVID-Related ISDS Risks: Why it matters now', 2021, *IISD*, available at https://www.iisd.org/articles/african-union-ministerial-declaration-covid-related-isds-risks-why-it-matters-now.

[13] The UK undertook its first such review in 2016. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818212/UKVNR-web-accessible1.pdf

currently protected under BITs. Governments that thereby implement policies that result in forms of direct or indirect expropriation could face legal challenges if their policies are not judged to meet criteria relating to FET, to give just one example. Moreover, both incoming and outgoing investments may need to meet certain qualitative criteria to be compatible with SDGs, which could encourage governments to start discriminating between investors based on a wide range of policy considerations.

There is an increasingly prominent debate over the legitimacy of the international investment regime and the size of arbitral awards. Critics of the regime contend that governments that take policy decisions that are calibrated to advance the welfare a broad range of domestic and international constituencies, as well as to protect the interests of future generations, should not be made to pay punitive levels of compensation to investors by insular tribunals that are not mandated to consider social goals or the long-term health of the economy. Equally, governments and financial institutions who fail to take action on climate change are now being sued by NGOs and by citizens; hence, other litigation claims may arise in the future if the UK does not take more strenuous action to combat climate change and to advance sustainability goals. Client Earth, a UK NGO, is currently involved in 169 active cases addressing pressing environmental challenges.

Some of the issues relating to IIAs and sustainable development are prefigured in the debate over the compatibility of investment arbitration with IHRL. Critics have argued that the strong protections offered to international investors under BITs result in violations of human rights that typically occur when a) investors are incentivised to buy-up land and fund development initiatives that adversely impact on local populations and environments by causing displacement of persons, or generating pollution, and b) when investors deprive governments of much-needed revenue to meet their human rights obligations by pursuing excessive levels of compensation when their rights under a BIT are infringed. There is an ongoing debate concerning the extent to which investment tribunals must take into account human rights issues in their decision-making, and, crucially, how they should do this.[14] The pandemic has highlighted just how intertwined questions of human rights and protection of the environment are with key sectors of investment, such as energy and infrastructure.

A key policy challenge for the UK going forward will be to grapple with whether BITs and other investment agreements need to be renegotiated and revised—in collaboration with other governments and investors—if economies are to recover from the impact of the coronavirus pandemic, and if the targets set under the SDGs are to be met by 2030. A 2019 article from the Colombia Centre for Sustainable Investment examined the alignment of IIAs with the 2030 Sustainable Development Agenda, and finds that while flows of private investment will play an important role in advancing development outcomes, 'existing treaties must be reformed and future IIAs reimagined in order to achieve deep alignment with the sustainable development goals'.

Covid-19, the UK Constitution, and International Investment Law

[14] Luis Gonzales-Garcia (Barrister at Matrix Chambers) maintains that investment tribunals can and should settle disputes in light of States' broader commitments under international law, which may require consulting the human rights jurisprudence of other international courts and tribunals when balancing the interests of investors with those of the wider public. When tribunals are making determinations with regard to what amounts to expropriation, or whether the investors' right to FET has been respected by the state, and when they are deciding whether compensation is to be awarded, he contends, arbitrators should look to how the balance between the human right to property and the right of states to interfere with investments for other policy goals has been struck in human rights cases. In *Lithgow v United Kingdom,* for example, the ECtHR held that 'legitimate objectives of public interest, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value' (Lithgow and Others v The United Kingdom (1986) Series A No 102 (1986) 8 EHRR 329 121). Luis Gonazales Garcia, 'The Role of Human Rights in International Investment Law' (2016) https://www.matrixlaw.co.uk/wp-content/uploads/2016/05/The-role-of-human-rights-in-international-investment-law.pdf.

Devolved governments have adopted different approaches to the management of the pandemic and are now embarking on ambitious projects to rebuild their economies in its aftermath, including by revisiting their approach to managing incoming investment.[15] The Scottish Government has underlined that the pandemic has 'created a compelling rationale to revitalise Scottish supply chains', and it has stated that it intends to 'build back better' by enhancing investment in Scotland in key sectors. Depending on the shape of the policies that are developed, actions taken by devolved governments may generate litigation risks if they result in trespasses on the rights of investors protected under BITs negotiated by the government in Westminster (as discussed above).

The coronavirus pandemic and Brexit have enhanced support for the independence movement in Scotland. As the painstaking and complex project of extracting the UK from the dense web of laws and regulations that govern the European Common Market has underscored, and as the challenges faced by the UK in trying to negotiating trade deals as an independent nation has further highlighted, the departure of Scotland from the UK would raise a host of complex legal issues concerning Scotland's obligations to existing investors under BITs, how BITs may need to be revised to accommodate the constitutional change, and how Scotland could go about negotiating new BITs as an independent nation. The government of a newly independent Scotland would be confronted with a wide range of economic challenges, not least what to do with regard to its currency, and how to manage its sovereign debt. The possibility that the government could also face litigation challenges that might lead to crippling levels of compensation in arbitral awards could be very damaging. Assessment of the economic outlook for an independent Scotland should consider the impact of existing obligations under BITs, as well as the challenges and potential opportunities that may come from negotiating new ones.

5. Conclusion

Key Findings

- Given the broad scope of protection to investors under international investment law and the broad measures introduced by states to address COVID-19, it is impractical to anticipate the many ways in which litigation might be pursued as a result of investors rights being breached.
- Much of the risk of litigation depends on the substance and scope of the measures introduced, therefore states are advised to assess every potential measure in light of whether it could be perceived as discriminatory and to ensure that it is introduced according to due process and that the scope of the measure extends only as far as necessary to tackle the pandemic.
- States have defences open to them where the measure is necessary because the pandemic threatened an essential interest of the state, that it constituted 'a grave and imminent peril', that the specific measure challenged was 'the only way' through which it could prevent this grave and imminent peril.

- Other options open to states are to issue joint declarative interpretations or to amend or suspend international investment treaties. There are associated risks with annulling

[15] See for example Scotland's 'Inward Looking Investment Plan' https://www.google.com/search?q=scotland+inward+investment+plan&oq=scotland+inward+investment+plan&aqs=chrome..69i57j69i64.6151j1j4&sourceid=chrome&ie=UTF-8

or withdrawing from investment treaties, including the limitation of foreign investment. Given the slow expected economic recovery states are unlikely to see this as an option.

- Litigation will be costly to both investors and states. While attention is often paid to the cost of arbitration and awarding of costs of damages, a large number of cases brought by investors could potentially push states towards amending, suspending or withdrawing from investment treaties, leaving investors unprotected. At the same time, states are unlikely to want to withdraw from investment treaties at such a crucial time of economic recovery. What emerges is a picture where parties must balance enforcing their rights with ensuring systemic stability.
- The SDGs and IHRL present potential challenges to the current international investment regime and the UK and devolved governments may need to react quickly to growing demands for change.