WEBINAR

COVID-19 RESPONSE MEASURES AND THE PROTECTION OF FOREIGN DIRECT INVESTMENTS
Protecting Legitimate Expectations or Cashing In On the Pandemic?

Abstracts of the webinar presentations

Keynote speech

Too Much or Not Enough: Can International Investment Law Provide a Framework through which States are Held Liable for Covid-19? – David Collins, Professor of International Economic Law and Assistant Vice President (Research/REF), City University of London

This presentation will consider whether Host States could be held liable under international investment treaties for their disproportionate response to Covid-19 and the ensuing economic harm to foreign firms. It will further contemplate whether equally Host States could be held liable for failing to respond adequately to the dangers of Covid-19, also inflicting economic harm on investors. It will then ask whether the Law of State Responsibility might have some role in achieving redress for the consequences of the pandemic.

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Panel 1: EU foreign investment policies in a Covid-19 world: General and sectoral challenges

The EU FDI Screening Framework in the context of the COVID-19 pandemic – Leonie Reins, Assistant Professor at the Tilburg Institute for Law, Technology, and Society (TILT), Tilburg Law School

The COVID-19 pandemic reinforced already existing efforts across the globe to implement new or extend existing mechanisms aimed at the screening of foreign direct investments ("FDI"). This contribution focuses on the EU FDI Screening Regulation that applies as of 11 October 2020 after having entered into force on 11 April 2019, and examines its operation in the context of policy responses at EU Member State level to protect certain critical (health) infrastructure at a time of grave economic crisis. First, the presentation discusses the content of the Screening Regulation, including an examination of the roles of the European Commission and the EU Member States. Second, the presentation focuses on the manner in which the EU and its Member States have reacted to the COVID-19 pandemic by providing for certain additional guidance.

The backlash against intra-EU ISDS and the modernization of the Energy Charter Treaty in a post-COVID world – Ilaria Espa, Assistant Professor of International Economic Law, Università della Svizzera Italiana

The negotiations for the modernization of the Energy Charter Treaty (ECT) are under way, including its investor-State dispute settlement (ISDS) provisions. The EU has advocated that ongoing ISDS reforms (such as those within UNCITRAL Working Group III, including the establishment of a multilateral investment court) be applied to the ECT. Yet, EU's proposals have thus far not garnered consensus among the other ECT contracting parties. Likewise, while the ECT withstands the 2020 Intra-EU BITs 'Termination Agreement', the EU has not succeeded to rule out the applicability of the dispute settlement provisions enshrined in Article 26 ECT to intra-EU disputes, in spite of the CJEU Achmea judgment. This presentation sheds light on the EU position in the negotiations for the modernization of the ISDS mechanisms in the ECT, within the more general context of ISDS reforms promoted by the EU in recent trade and investment agreements. It also focuses on the implications of the criteria laid down in the CJEU's Opinion 1/17 for the non-applicability of Article 26 ECT to intra-EU BITs. Taking stock of such developments, this presentation assesses, on the one hand, their influence on the outcome of the ECT negotiations on ISDS, and on the other hand the EU's stakes within the ECT. Lastly, it offers some reflections on how, and to which extent, the impacts of the COVID-19 pandemic could affect the prospects for ECT reform in the direction envisaged by the EU and, in turn, inform the EU's overall stance within the ECT (negotiations).

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Panel 2: Current developments in the regulation of foreign direct investments: A global perspective

Work-from-Home Asian Tigers: Investment Liberalization in a Pandemic World – Soo-Hyun Lee, UN 2030 Agenda Programme PhD Researcher, Lund University

At the start of the Covid-19 pandemic, investors responded by holding onto assets as businesses lost confidence. In the months to follow, technology firms enjoyed titanic initial public offerings. It became a guessing game as to what would be the most resilient in pandemic conditions. This guessing game was also present at the state level, where economies modified their investment law and policy regimes that were favourable for foreign firms. However, the wave of force majeure reservations during the first several months of the pandemic served as a grim reminder of the consequences of an overzealous approach to facilitating new investments. One economy that we see embodying this dilemma is Viet Nam. Its exponential liberalization during Doi Moi ushered in hot money from international investors. However, rapid and large-scale injections resulted in consequences such as low quality investments with little absorption and spillover due to low total factor productivity. Today, Viet Nam is going through a second phase of investment law and policy liberalization, hoping to be a prime destination for capital-rich footloose technology companies that some have been calling a "Doi Moi 2.0". This presentation builds on a study prepared in 2019 on the first Doi Moi applied as an economic policy model in North Korea and explores some of the key differences in this the current round of FDI liberalizations in Viet Nam.

The 2020 CFIUS/FIRRMA setup and its relationship with the US executive powers amidst the COVID-19 crisis – Chijioke Chijioke-Oforji, Lecturer in Law, School of Law, Liverpool John Moores University

The authority of the United States government over national security risks is extensive, and often unamenable to judicial review. In response to perceived threats to the national, economic, and technological security of Americans, the U.S. government has implemented extensive regulatory frameworks. This includes reviews of foreign inward investments for national security risks, a task undertaken by the Committee on Foreign Investment in the United States (CFIUS). CFIUS jurisdiction over foreign transactions has grown exponentially since the enactment of the Foreign

Investment Risk Review Modernisation Act (FIRRMA) in 2018. The FIRRMA grants the CFIUS enhanced powers over a larger pool of foreign investment transactions. This has raised concerns of an inordinately restrictive environment for foreign investors and US businesses during the current pandemic. This presentation argues that recent reforms to the CFIUS process amount to a radical expansion of US executive government control of foreign direct investment in the United States. Such expansion risks a further politicisation of the review process, which might imperil the flow of capital needed to finance a broad-based economic recovery. The introduction of rebalancing mechanisms is therefore needed as to the national security review process, information sharing mechanisms between US regulators and capital exporting countries, safe harbours over specific investments and an ad hoc adjudication system to ensure adequate review of CFIUS' decisions.

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Panel 3: A global moratorium on ISDS: Opportunities and challenges

ISDS Moratorium During COVID-19 Crisis and Response – Lise Johnson, Head: Investment Law and Policy, Columbia Center on Sustainable Investment

Extraordinary times call for extraordinary measures. The COVID-19 pandemic is the greatest threat to humanity since World War II. The fate of billions of people, and potentially millions of deaths, hang in the balance, particularly in the developing world. The United Nations Secretary General has recognized that COVID-19 is "the fight of a generation." For this reason, the global community has taken and continues to take extraordinary and necessary actions. Governments have to take all appropriate measures to save lives and fight global emergencies, even when these measures result in a loss of profits or business opportunities, including by foreign investors. In order to ensure that future arbitration cases do not hinder countries' good faith efforts at responding to, and recovering from, the COVID-19 pandemic, a number of global experts and dignitaries joined CCSI in calling for a moratorium on all arbitration claims by private corporations against governments using investment treaties during the COVID-19 crisis and response, as well as a permanent restriction on all claims related to government measures targeting health, economic, and social dimensions of the pandemic. CCSI also worked with partners on potential legal solutions for implementing this call. CCSI's head of Investment Law and Policy will discuss the motivations for the moratorium proposal, and how its implementation aligns with ongoing reforms of the investor-state dispute settlement (ISDS) process.

Potential Effects and Systemic Impacts of a Global ISDS Moratorium – Kabir Duggal, Lecturer in Law, Columbia Law School

The presentation will explore how a moratorium may be applied in light of the threatened cases against ISDS and what impact it may have on such cases. More generally, ISDS is currently facing a global backlash and calls for reform appear on various fronts. The presentation will discuss what impact the moratorium may have on the overall reform agenda.