



Virtual meeting on ISDS & COVID-19 measures

Monday 4 May 2020



Virtual meeting agenda

1. **ISDS risks in respect of COVID-19 measures:** Sarah Brewin & Nyaguthii Maina, IISD.
2. **Draft language for a multilateral agreement to suspend ISDS for COVID-19 related measures:** Nathalie Bernasconi-Osterwalder, IISD.
3. **Comments:** Professor Markus Krajewski
4. **Open discussion**
 - This is a closed virtual meeting for developing country investment negotiators only. The meeting will take place under ‘Chatham House Rule’.
 - During the presentations, use the chat function to ask questions of the speakers in writing.
 - During the open discussion, use the “raise hand” function when you wish to make a comment. The technical moderator will then un-mute your mic.



Protecting Against Investor–State Claims Amidst COVID-19: A call to action for governments

Nathalie Bernasconi-Osterwalder
Sarah Brewin
Nyaguthii Maina
April 2020

Introduction

The COVID-19 pandemic has plunged the world into a massive health and economic crisis. Governments are acting to curb the spread of the virus through emergency interventions and measures such as lockdowns and strict containment. They are also taking steps to ensure supplies of essential foods, medical equipment, and health care services. While crucial from a health perspective, many of these measures are hitting businesses hard, creating an unprecedented risk of investment arbitration arising from the more than 3,000 investment treaties concluded across the globe.

In a foreseeable scenario, hundreds of foreign investors could potentially bring claims to challenge governments' virus-related emergency measures. Many could be supported by third-party funders and through contingency fee payments to lawyers, both seeking high returns on their investment arbitration portfolios. Under the investor-state arbitration systems, each case will be decided by an individual tribunal consisting of a different combination of international arbitrators, forcing governments to fight on multiple fronts, each time at a multi-million dollar cost. Outcomes, if they follow current patterns, will be unpredictable and largely contradictory, with some awards possibly reaching hundreds of millions—or even billions—of dollars while other cases based on similar facts lead to decisions finding no treaty breach at all.

In a time of severe economic stress, support to public health systems is more important than ever. Governments need the fiscal space to issue economic support packages without risking an all-consuming wave of investment arbitration cases. The only way to do that is for governments to come together to suspend the application of treaty-based investor-state arbitration for all COVID-19 related measures or clarify how international law defenses apply to this extraordinary situation.

Protecting Against Investor-State Claims Amidst COVID-19: A call to action for governments

Nathalie Bernasconi, Sarah
Brewin & Nyaguthii Maina

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Available at

<https://www.iisd.org/library/investor-state-claims-amidst-covid-19>



States worldwide have been taking wide-ranging measures to control the spread of COVID-19 and manage its economic impacts

Measures to prevent the spread of the virus

shut-downs, curfews, movement restrictions, border closures

Measures to strengthen the public health response to the virus

Nationalizing private hospitals, powers to compulsorily acquire drugs and medical equipment

Measures to ensure adequate food and medical supplies

Export bans on staples, drugs, and PPE

Measures to address financial and economic fallout

FDI screening, suspension of loan repayments & dividends, stimulus and bailouts → increasing levels of public debt



Meanwhile, law firms are already foreshadowing COVID-19 related investor–state arbitration

Herbert Smith Freehills:

“Even in times of crisis, states nonetheless have domestic and international law obligations (including under investment treaties), which impose standards against which their conduct may be held to account....”

Volterra Fietta:

“Foreign investors might argue that the requisition of means of production, particularly if of a permanent nature, could constitute an uncompensated expropriation. Others might argue that more temporary measures, including restrictions on exports of essential goods, are contrary to their legitimate expectations, in breach of the Fair and Equitable Treatment standard...”



Past cases show that states' actions in times of crisis are not immune from ISDS challenges

E.g. cases stemming from

- The Argentine financial crisis
- Greek debt crisis
- Global financial crisis
- The Arab Spring

Outside times of crisis, government measures to protect public health have also come under challenge (e.g. Philip Morris cases)

→ These cases show how difficult it can be for states to rely on customary international law defences, which have very high thresholds and are interpreted inconsistently.



As states face public health and economic challenges on an unparalleled scale, the need to avoid ISDS claims has never been greater.

- Multiple claims under identical material facts challenging the same measure with unpredictable outcomes.
- The lack of clarity of how vague treaty standards will apply to COVID-19 measures; lack of binding precedent
- Litigation funders driving speculative or marginal claims
- High costs of defending claims
- ‘Mega awards’ in the hundreds of millions or billions, undermining public spending, bailouts and debt structuring



In light of these risks, states should act collectively to avoid a surge of investor-state arbitration...



Bilateral or multilateral suspension of ISDS for COVID-19 related measures

- Suspension of operation of ISDS with respect to all COVID-19 related measures in accordance with public international law
- Extends beyond period of pandemic and includes health and economic measures
- Bilateral, regional, multilateral approach possible
- Leaves treaty otherwise intact
- Entry into force upon signature
- Other public international law options: termination, amendment, interpretation
- Unilateral options



***Agreement for the coordinated suspension of investor-state dispute settlement
with respect to COVID-19 related measures***

The signatories to this agreement:

Convinced of the need of our governments to have acted, and to be able to continue to act, to protect the health and lives of our citizens and the management of the economy and protection of workers as a result of the health and economic impacts of COVID-19;

Mindful of our obligations under the WHO International Health Regulations (2005) and the right of states to regulate in order to achieve the highest standard possible of physical and mental health;

Having reviewed and considered the potential for disputes arising between investors and states under investment treaties in relation to the measures taken by governments to respond to the COVID-19 pandemic, and conscious of the various existing alternatives in practice;

Acting in our capacity as parties to the Investment Treaties covered by this agreement;

Have agreed and consented as follows:



Have agreed and consented as follows:

1. The operation of the provision or provisions of any Investment Treaty in force between two or more signatories to this agreement providing for the settlement of disputes between an investor and a state are hereby suspended in respect of claims over COVID-19 related measures.



2. The term “Investment Treaty” means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, investment promotion and protection agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors, and a provision or provisions on the settlement of disputes between an investor and a party to that treaty.

3. For an Investment Treaty in force between more than two signatories to this agreement but where not all parties to that Investment Treaty are signatories to this agreement, article 1 shall apply to that Investment Treaty only as between the parties which are signatories to this agreement.



4. The term “COVID-19 related measures” includes any conduct by a signatory to this agreement, whether in the form of a law, regulation, rule, procedure, decision, decree, administrative action, judgment, order, award, or any other form, taken on or after December 1, 2019 by:
 - (a) central, regional, or local governments and authorities;
 - (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities; and
 - (c) courts, regulatory authorities, judicial and administrative institutions; in response to the health or economic impacts of the COVID-19 virus, inter alia:
 - i. preventing and slowing the transmission of the COVID-19 virus within, into, or outside the territory of a signatory;
 - ii. ensuring the sufficient availability of goods and services to prevent the transmission of, and treat persons infected by, the COVID-19 virus within the territory of a signatory;
 - iii. addressing the economic impacts of the COVID-19 virus and national and international responses to its health impacts and risks, including:



- A. maintaining a level of financial reserves adequate for the implementation of its programme of sustainable economic development;
 - B. preventing or addressing serious balance-of-payments crises, external financial difficulties, or the threat thereof;
 - C. regulating the disposition or acquisition of distressed assets in sensitive sectors;
 - D. imposing constraints or conditions on businesses receiving state aid;
 - E. maintaining business liquidity, especially for micro, small, and medium-sized enterprises;
 - F. protecting national economic stability;
 - G. maintaining employment and wages, including providing wage substitution; or
- iv. otherwise pursuing objectives consistent with international practice in response to the COVID-19 pandemic.
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5. [*optional*: Paragraph 1 shall not apply with respect to any Investment Treaty notified by a signatory as a treaty it wishes to exclude from this agreement. Notifications shall be made at the time of signature of this agreement, and shall identify any excluded treaty by title, names of the parties, date of signature, and, if applicable at the time of the notification, date of entry into force.]
6. This agreement comes into force for each signatory upon signature.
7. Signatures shall be deposited with the Secretary General of the United Nations as Depository of the present agreement.



For discussion

Leading questions

- What do you think about the objective and scope of the proposal?
- Should a multilateral option be pursued, or should countries pursue bilateral or regional solutions?
- If a multilateral option were deemed useful, what should be the forum?
- How could countries kick-start a process to suspend ISDS?



Open discussion

Instructions

We are now entering the open discussion component of our meeting. Please remember:

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Thank you.