

COMMENTARY

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

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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 system, 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 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 policy 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 defences apply to this extraordinary situation.



State Measures to Address the Health and Economic Impacts of COVID-19

Almost all states are taking drastic, wide-ranging measures to address the public health and economic impacts of COVID-19. To limit the spread of the virus, as recommended by the World Health Organization,¹ governments are closing down non-essential services and restricting local or national movement, while also taking steps to ease the transport of essential goods and workers within the country. Shops, factories, airlines, mines, and other businesses are drastically downsizing or halting operations due to emergency regulations. Government measures to halt the spread of the virus across borders, including cancelling flights and closing airports, are in place for an estimated 93% of the world population.² As a result, the International Air Transport Association predicts global revenue losses to airlines in 2020 at USD 63 billion to USD 113 billion.³

Governments are also reorganizing health care and social service networks to protect the ability of public hospitals to treat the large numbers infected by the virus, as well as taking steps to ensure supplies of medicines and personal protective equipment. Canada,⁴ Ecuador,⁵ and Germany⁶ have all taken steps to ensure they can more easily issue compulsory licences over patented drugs and devices. African countries are being urged by the UN to “demand urgent access to medical intellectual property,”⁷ while Israel has already issued a compulsory licence for an HIV drug it considers to have potential COVID-19 application.⁸ To support their overburdened public healthcare systems, Spain⁹ and Ireland¹⁰ have opted to temporarily nationalize private hospitals, while the Spanish government has taken over the management of private health care companies until the crisis ends. The Italian government has passed the “Cura Italia” decree, enabling a number of emergency measures including the temporary or permanent requisition of medical devices and other movable assets.¹¹

Governments have also put a curb on exports of medical supplies and medicines, as well as food.¹² For example, India was reported to have banned the export of the antimalarial drug hydroxychloroquine, claimed by some to be a potential treatment for COVID-19.¹³ Other states are imposing export bans to ensure domestic food security. Russia, the world’s top wheat exporter, imposed a 10-day ban on the export of rice and buckwheat,¹⁴ and Vietnam, another major exporter, put in force a moratorium on new rice export contracts.¹⁵ Kazakhstan has suspended the export of wheat flour, buckwheat, sugar, and sunflower oil, while Cambodia has banned all rice exports.¹⁶ At the same time, some states are trying to promote the movement of essential goods and workers

¹ World Health Organization. (2020). *Coronavirus disease 2019 (COVID-19) Situation report – 72*. https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200401-sitrep-72-covid-19.pdf?sfvrsn=3dd8971b_2

² Connor, P. (2020). More than nine-in-ten people worldwide live in countries with travel restrictions amid COVID-19. *Pew Research Centre*. <https://www.pewresearch.org/fact-tank/2020/04/01/more-than-nine-in-ten-people-worldwide-live-in-countries-with-travel-restrictions-amid-covid-19/>

³ International Air Traffic Association. (2020, March 5). *IATA updates COVID-19 financial impacts -Relief measures needed*. <https://www.iata.org/en/pressroom/pr/2020-03-05-01/>

⁴ Government of Canada. (2020, March 24). *BILL C-13: An Act respecting certain measures in response to COVID-19*. <https://www.parl.ca/DocumentViewer/en/43-1/bill/C-13/third-reading#ID0ETAA>

⁵ Médecins Sans Frontières. (2020). *MSF calls for no patents or profiteering on COVID-19 drugs and vaccines*. <https://www.msf.org/no-profitteering-covid-19-drugs-and-vaccines-says-msf>

⁶ Ibid.

⁷ United Nations Economic Commission for Africa. (2020, March 27). *Trade policies for Africa to tackle Covid-19*. https://www.uneca.org/sites/default/files/PublicationFiles/briefing_paper_on_trade_policies_for_africa_to_tackle_covid-19_290820.pdf

⁸ Scheer, S. & Steenhuisen, J. (2020). Israel approves generic HIV drug to treat COVID-19 despite doubts. *Reuters*. <https://www.reuters.com/article/us-health-coronavirus-israel-drug/israel-approves-generic-hiv-drug-to-treat-covid-19-despite-doubts-idUSKBN216237>

⁹ Matthews, D. (2020). Spain nationalizes private hospitals to combat coronavirus outbreak. *Daily News*. <https://www.nydailynews.com/coronavirus/ny-coronavirus-spain-privatizes-hospitals-outbreak-20200316-4nhlxvys3jhfxhxw7wgibore3y-story.html>

¹⁰ Private hospitals will be made public for duration of coronavirus pandemic. *The Journal*. <https://www.thejournal.ie/private-hospitals-ireland-coronavirus-5056334-Mar2020/>

¹¹ Ashurst. (2020). *Law Decree No 18 of 17 March 2020 - Cura Italia Decree*. <https://www.ashurst.com/en/news-and-insights/legal-updates/law-decree-no-18-of-17-march-2020---cura-italia-decree/>

¹² At the time of writing, the University of St. Gallen’s Global Trade Alert project has estimated there have been around 82 curbs on exports of COVID-19 related medical supplies and medicines by 68 governments.

¹³ Singh, R.K. (2020). India bans all exports of virus drug often touted by Trump. *Bloomberg*. <https://www.bloomberg.com/news/articles/2020-04-05/india-bans-all-exports-of-trump-s-game-changer-virus-drug>

¹⁴ Medetsky, A. (2020). Virus puts risk of Russian wheat-export curbs back in focus. *Bloomberg*. <https://www.bloomberg.com/news/articles/2020-03-25/virus-puts-threat-of-russian-wheat-export-curbs-back-in-focus>

¹⁵ Vu, K. (2020). Vietnam’s ban on rice exports still in force, government may set limit: traders. *Reuters*. <https://www.reuters.com/article/us-health-coronavirus-vietnam-rice/vietnams-ban-on-rice-exports-still-in-force-government-may-set-limit-traders-idUSKBN21H0GO>

¹⁶ Johnson, K. (2020). Cambodia to ban some rice exports April 5 due to coronavirus. *Reuters*. <https://www.reuters.com/article/us-health-coronavirus-cambodia-rice/cambodia-to-ban-some-rice-exports-april-5-due-to-coronavirus-idUSKBN21H1E6>



within their borders. For example, Peru’s congress has approved a bill that would suspend the collection of fees on privately run national toll-roads to promote the free movement of key goods and workers within the country.¹⁷

States are also taking emergency measures to address the economic and financial impacts of the COVID-19 crisis. As of March 3, China had issued 4,811 force majeure certificates to limit the liability of Chinese businesses unable to meet their contractual obligations.¹⁸ Australia has temporarily set the monetary threshold for the screening of foreign investments to USD 0 (where it previously ranged from USD 170 million to USD 740 million, depending on the sector) to protect against the buying of distressed assets in sensitive sectors.¹⁹ The European Union (EU) has flagged the potential risk to strategic industries from foreign direct investment (FDI), warning that “vigilance is required to ensure that any such FDI does not have a harmful impact on the EU’s capacity to cover the health needs of its citizens” and urged member states to engage in FDI screening.²⁰

In the banking sector, the UK’s prudential regulator pressured the country’s largest banks to suspend the issuance of dividends, share buybacks, and executive bonuses in the wake of the crisis. The banks duly complied, resulting in the cancellation of payouts to shareholders worth GBP 7.5 billion.²¹

The financial fallout of the pandemic is also exacerbating high levels of public debt in many countries. Zambia has reportedly called in advisers to assist it in restructuring its sovereign debt.²² Emerging markets commentators are also warning holders of Zambian, Ecuadorian, and Argentine sovereign bonds to expect significant losses on their value.²³

Learning From the Past: Investor–state arbitration in times of crisis

States’ public interest measures—be they health-, trade-, or finance-related—can come under challenge from investors, including measures taken in times of severe national crises. Investors can challenge these measures using investor–state arbitration provided for under the investor–state dispute settlement (ISDS) provisions found in most bilateral investment treaties (BITs) and investment chapters of trade agreements. A foreign investor can bring an ISDS claim asserting that a state’s measure breached one or more of the protections owed by the state to the investor under the treaty. In most investment treaties, these protections are broadly and vaguely defined. They require the state to compensate in case of expropriation, to treat foreign investors “fairly and equitably,” to afford them “full protection and security,” and not to treat foreign investors less favourably than national or other foreign investors. Treaties also typically disallow the restriction of capital flows, some subject to limited exceptions.

The global financial crisis of 2007–2008, and the recent periods of national and regional political and economic instability around the world, provide illustrations as of how foreign investors can use ISDS in times of crisis.

Perhaps the most notable example is that of Argentina. In 2001, Argentina faced a near-total economic collapse, marked by “a fall in GDP per capita of 50 percent, an unemployment rate of over 20 percent, a poverty rate of 50 percent, strikes, demonstrations, violent clashes with the police, dozens of civilian casualties and a succession

¹⁷ This has sparked warnings that private toll-road operators could bring ISDS claims under their concession contracts. See Sanderson, C. (2020). Peru warned of potential ICSID claims over covid-19 measures. *Global Arbitration Review*. <https://globalarbitrationreview.com/article/1225319/peru-warned-of-potential-icsid-claims-over-covid-19-measures>

¹⁸ Tan, H. (2020). *China invokes ‘force majeure’ to protect businesses — but the companies may be in for a ‘rude awakening’*. CNBC. <https://www.cnbc.com/2020/03/06/coronavirus-impact-china-invokes-force-majeure-to-protect-businesses.html>

¹⁹ Remeikis, A. (2020). Australian authorities to check every proposed foreign investment during coronavirus crisis. *The Guardian*. <https://www.theguardian.com/world/2020/mar/29/australian-authorities-to-check-every-proposed-foreign-investment-during-coronavirus-crisis>

²⁰ European Commission. (2020). *Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)*. https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf

²¹ Morris, S. Crow, D. & Giles, C. (2020). British lenders suspend dividends after BoE pressure. *Financial Times*. <https://www.ft.com/content/c13d3d21-b6f3-4449-a916-2ba4271818e4>

²² Stubbington, T. & Fletcher, L. (2020). Zambia’s bonds drop on expected restructuring. *Financial Times*. <https://www.ft.com/content/a3755cf3-34a9-4992-a54b-686a6b5380b2>

²³ Maki, S. (2020). A trio of downgrades spell default danger for emerging markets. *Yahoo Finance*. <https://finance.yahoo.com/news/trio-downgrades-spell-default-danger-214000184.html>



of 5 presidents in 10 days.”²⁴ During this period, the government took a range of emergency measures, including freezing utility rates, nationalizing assets, devaluing the currency, and restructuring sovereign bonds. By the end of 2014, Argentina was respondent to over 50 ISDS cases, the majority of which stemmed from measures taken during the crisis.²⁵ Known final awards against Argentina amounted to well over USD 2 billion,²⁶ and several claims were settled in the hundreds of millions of dollars.²⁷

During the global financial crisis of 2008, the Belgian government restructured and nationalized the banking and insurance group Fortis. Ping An, one of Fortis’s major shareholders, initiated a claim against the Belgian government seeking nearly USD 1 billion in compensation to try and recover its loss in investments following the reforms. The claim was subsequently dismissed on jurisdictional grounds (the dispute had arisen before the entry into force of the applicable BIT).²⁸

In 2013, regulatory actions taken by the Cypriot government to limit the exposure of Cyprus’s second largest bank to defaulting Greek debt during the Greek debt crisis were the subject of an ISDS claim for EUR 1.05 billion. The arbitral tribunal set up to hear this case accepted jurisdiction but dismissed the investor’s claim.²⁹

The social and political upheaval of the Arab Spring in 2011–2012 was followed by a spike in ISDS claims against North African and Middle Eastern governments,³⁰ some of which stemmed from state measures taken to address the impacts of the crisis. In Egypt, unprecedented levels of violence and social unrest resulted in a drop in domestic gas supplies, which the state considered to be “a threat to the basic functioning of society and the maintenance of internal stability.”³¹ The government’s decision to suspend sales of gas to a Spanish-owned plant to prioritize the supply of natural gas for domestic electricity markets resulted in an ISDS claim in which the investor was awarded over USD 2 billion.³²

More recently, the government of Lebanon has imposed capital controls such as limiting bank withdrawals to address its liquidity challenges, sparking protests and demonstrations across the country.³³ Law firms specializing in investment arbitration are already exploring ways in which affected foreign investors can bring ISDS claims under Lebanon’s stock of BITs.³⁴

Outside times of crisis, government measures to protect public health have also come under challenge in ISDS claims, including tobacco labelling laws³⁵ and bans on health-harming chemicals.³⁶ In 2016, the Colombian government’s pressure on the Swiss drug company Novartis to cut the price of a cancer drug (including allusions to the use of compulsory licencing) was met with a threat of ISDS proceedings.³⁷ In 2013, Eli Lilly, a US pharmaceutical company, brought a claim against Canada for the invalidation of two of its drug patents.

²⁴ Lavopa, F. (2020). *Crisis, emergency measures and the failure of the ISDS system: The case of Argentina* (Investment Policy Brief #2). South Centre. https://www.southcentre.int/wp-content/uploads/2015/07/IPB2_Crisis-Emergency-Measures-and-the-Failure-of-the-ISDS-System-The-Case-of-Argentina.pdf

²⁵ United Nations Conference on Trade and Development. (2015). *Recent trends in IIAs and ISDS*. https://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf

²⁶ UNCTAD. (n.d.). *Investment policy hub: Argentina*. <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/8/argentina/>

²⁷ See for example, El Gobierno pagó US\$ 677 millones por juicios perdidos ante el Ciadi, Oct. 19, 2013. *La Nación*. <https://www.lanacion.com.ar/1630428-el-gobierno-pago-us-677-millones-por-juicios-perdidos-ante-el-ciadi>

²⁸ Rabinovitch, S. & Fontanella-Khan, J. (2012). Ping An in arbitration claim over Fortis. *Financial Times*. <https://www.ft.com/content/87437290-0620-11e2-bd29-00144feabd0c>

²⁹ Papazoglou, S. (2019). Cyprus legitimately exercised its police powers, defeats ICSID claims by Greek bankers. *Investment Treaty News*. <https://www.iisd.org/itm/2019/04/23/cyprus-legitimately-exercised-its-police-powers-defeats-icsid-claims-by-greek-bankers-stephanie-papazoglou/>

³⁰ Foty, C. (2019). *Impact of the Arab Spring on the international arbitration landscape*. Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2019/07/26/impact-of-the-arab-spring-on-the-international-arbitration-landscape/>

³¹ Koroteeva, K. (2018). Egypt found liable for the shut-down of an electricity plant during the 2011 uprising. *Investment Treaty News*. <https://www.iisd.org/itm/2018/12/21/egypt-found-liable-for-the-shut-down-of-an-electricity-plant-during-the-2011-uprising-ksenia-koroteeva/>

³² Unión Fenosa v. Egypt. (2014). *Investment Policy Hub*. <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/567/uni-n-fenosa-v-egypt>

³³ Scolding, E. (2020). Tensions mount at Lebanon’s banks as customers push against capital controls. *Middle East Eye*. <https://www.middleeasteye.net/news/confrontations-mount-lebanons-banks-customers-push-against-capital-controls>

³⁴ Farchakh, M. (2020). *The ongoing Lebanese financial crisis: Is there potential for investor–state arbitration?* <http://arbitrationblog.kluwerarbitration.com/2020/03/08/the-ongoing-lebanese-financial-crisis-is-there-potential-for-investor-state-arbitration/>

³⁵ Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12; Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7.

³⁶ Chemtura Corporation v. Government of Canada, UNCITRAL (formerly Crompton Corporation v. Government of Canada), Methanex Corporation v. United States of America, UNCITRAL.

³⁷ Williams, Z. (2016). Investigation: As Colombia pushes for cancer drug price-cut and considers compulsory licensing, Novartis responds with quiet filing of an investment treaty notice. *Investment Arbitration Reporter*. <https://www.iareporter.com/articles/investigation-as-colombia-pushes-for-cancer-drug-price-cut-and-considers-compulsory-licensing-novartis-responds-with-quiet-filing-of-an-investment-treaty-notice/>



Though the claim was dismissed, the tribunal was tasked with deciding whether the Canadian courts had complied with the treaty’s standards of investor treatment when invalidating the patents.³⁸

State Defence on Shaky Ground

Potential legal defences are available to states in ISDS cases initiated by foreign investors to challenge measures taken during and in the aftermath of the COVID-19 pandemic and the resulting global economic crisis. However, past cases show that these defences can be difficult for governments to use successfully to avoid a finding that they were in breach of a treaty and must pay compensation. Of particular relevance is the customary international law doctrine of necessity, which can be used to justify a state’s breach of its international obligations in situations of grave and imminent peril for the essential interests of the state.³⁹

The threshold for the defence of necessity is very high, requiring that the act of the state be “*the only way* for the State to safeguard an essential interest against a grave and imminent peril.”⁴⁰ This element of the defence requires the tribunal to consider the whole range of alternative measures available to the state in the circumstances, even those which may be more expensive or inconvenient. It is then up to the tribunal to determine whether one of these measures could have achieved the same effect without breaching the state’s obligations to the investor.⁴¹ Egypt’s defence of necessity was dismissed by the tribunal in the natural gas case mentioned above, partly on the grounds that the state failed to establish that the measures taken were the “only way” to prevent a threat to an “essential interest.”⁴²

The defence of necessity has been interpreted and applied inconsistently by investment tribunals considering the same or very similar factual circumstances. For instance, in respect of the Argentina claims mentioned above, in one case, the tribunal dismissed the defence of necessity where it considered the state had contributed to the “situation of necessity.”⁴³ A different tribunal upheld Argentina’s necessity defence in similar circumstances.⁴⁴ These cases were decided barely 18 months apart.⁴⁵

Most BITs are silent on the doctrine of necessity, leaving it for arbitral tribunals to decide how to interpret that silence. Since each tribunal, usually consisting of three arbitrators, is set up for the specific case, interpretations will vary widely, leading to a wide range of potential contradictory outcomes, as seen in the Argentina cases.

In contrast to older BITs, newer-generation BITs are typically more protective of the policy space states need to take measures to safeguard the public interest. The effectiveness of these new approaches still needs to be tested, however, and there is still much room for interpretation through arbitral tribunals. Arbitral outcomes under these treaties, like their predecessors, remain highly unpredictable.

Exceptions and defences, where available, would need to be raised by states in the ISDS proceedings.⁴⁶ It would be for the three individual arbitrators to determine whether or not the state breached the relevant treaty and should compensate the foreign investor for the emergency measures taken in response to the COVID-19 crisis. Not all measures will be found in breach. This does not detract from the fact that the state would have to defend actions taken to protect the public interest during a time of unprecedented global turmoil, before three lawyers,

³⁸ Musmann, T. (2017). *Eli Lilly v. Canada – The first final award ever on patents and international investment law*. Kluwer Patent Blog. <http://patentblog.kluweriplaw.com/2017/04/04/eli-lilly-v-canada-the-first-final-award-ever-on-patents-and-international-invest-ment-law/>

³⁹ ILC Articles p. 80 https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

⁴⁰ See Article 25 of the International Law Commission’s *Articles on State Responsibility*. https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

⁴¹ Paddeu, F., & Parlett, K. (2020). *COVID-19 and investment treaty claims*. Kluwer Arbitration Blog. <http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims/>

⁴² Charlotin, D. (2018). *Union Fenosa v. Egypt: In now-surfaced award, tribunal dismisses necessity defence and sees no abuse in investor pursuit of multiple arbitrations*. *Investment Arbitration Reporter*. <https://www.iareporter.com/articles/union-fenosa-v-egypt-in-now-surfaced-award-tribunal-dismisses-necessity-defence-and-sees-no-abuse-in-investor-pursuit-of-multiple-arbitrations/>

⁴³ Whitsitt, E. (2009). *Tribunal rebuffs defense of necessity in recently published award: National Grid p.l.c. v. Argentine Republic*. *Investment Treaty News*. <https://www.iisd.org/itn/2009/03/02/tribunal-rebuffs-defense-of-necessity-in-recently-published-award-national-grid-p-l-c-v-argentine-republic/>

⁴⁴ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1).

⁴⁵ Waibel, M. (2007). *Two worlds of necessity in ICSID arbitration: CMS and LG&E*. *Leiden Journal of International Law*, 20(3). https://www.researchgate.net/publication/228213318_Two_Worlds_of_Necessity_in_ICSID_Arbitration_CMS_and_LGE

⁴⁶ For a discussion of potential defences available to states in the context of COVID-19 measures, see Pathirana, D. (2020). *COVID-19, preventative measures and the investment treaty regime*. *Afronomics Law*. <https://www.afronomicslaw.org/2020/04/13/covid-19-preventative-measures-and-the-investment-treaty-regime/>



likely with little knowledge of public health or macro-economic stability, or the constitutional laws and national legal frameworks of the defending government.

The Need to Avoid Investor–State Claims Has Never Been Greater

At a time when states are facing public health and economic challenges on an unparalleled scale, the need to avoid ISDS claims has never been greater. Unless dealt with by governments as suggested below, the imminent threat of investor–state arbitration will hang over governments. Multiple foreign investors will be able to file claims under identical material facts challenging one and the same measure with unpredictable outcomes. This is due to both the broad—and vaguely framed—treaty obligations in over 3,000 investment treaties and the fact that each case brought to arbitration is decided by a different tribunal. Case law has led to inconsistent interpretation of both the treaty standards themselves and the customary international law that applies to all treaties. The divergent conclusions reached by different tribunals considering the same or similar sets of government measures in the Argentina cases mentioned above, as well as in a series of recent renewable energy arbitrations against Spain, provide key examples of this.⁴⁷

The lack of clarity of how vague treaty standards will apply to COVID-19 measures, and the fact that no tribunal is bound by a previous decision, may incentivize lawyers and third-party funders to speculate by bringing multiple claims challenging similar measures across the globe. The fact that claimants can resort to litigation funders who have a significant stake in the outcome of the case could further drive speculative or marginal claims in times of crisis.⁴⁸ Arbitration newsletters and law firms are already foreshadowing COVID-19 related investor–state arbitration.⁴⁹

Some investor–state tribunals could conclude that the COVID-19 related measure before them is a treaty breach to which the state has no valid defence. As a consequence, defendant states could be ordered to pay large amounts in compensation to foreign claimants. Previous tribunals have awarded compensation amounts of over USD 100 million in at least 46 known treaty-based investor–state cases to date, with one award amounting to USD 40 billion.⁵⁰

Mega-awards pose especially serious challenges for developing countries. These countries are also likely to be more severely impacted by the dual crisis of COVID-19 and the global economic recession, which, ultimately, will worsen existing debt burdens. In the Unión Fenosa gas case discussed above, Egypt was ordered to pay USD 2 billion plus interest.⁵¹ This figure represented 12% of Egypt’s combined national budget for health and education in 2018/19, which was USD 15.82 billion.⁵² The high amounts are in large part due to the methodology that investment arbitrators use to calculate damages, which tends to be inconsistent and speculative and fails to take into account key contextual factors.⁵³

Finally, defending an ISDS claim—even if ultimately successful—is expensive, time-consuming, and absorbs valuable human resources. A study of the OECD estimates the average cost to defend a claim is USD 8

⁴⁷ Reynoso, I. (2019). Spain’s Renewable Energy Saga: Lessons for international investment law and sustainable development. *Investment Treaty News*. <https://www.iisd.org/itn/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-law-and-sustainable-development-isabella-reynoso/>

⁴⁸ Some consider that the asymmetric structure of the investment treaty regime, lack of system of precedent in ISDS and the resulting inconsistency and unpredictability of arbitral outcomes lend themselves to third-party funding in speculative or marginal claims. See for example Garcia, F. (2018, July 30). The case against third party funding in investment arbitration. *IISD Investment Treaty News*; International Council for Commercial Arbitration & Queen Mary Task Force. (2017, October 17). *Third-party funding in investor-state dispute settlement*. Draft report for public discussion. Round Table Discussion of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration.

⁴⁹ Benedeteli, M. (2020). Could COVID-19 emergency measures give rise to investment claims? First reflections from Italy. *Global Arbitration Review*. <https://globalarbitrationreview.com/article/1222354/could-covid-19-emergency-measures-give-rise-to-investment-claims-first-reflections-from-italy>; Aceris Law LLC (2020), The COVID-19 pandemic and investment arbitration. Aceris Law. <https://www.acerislaw.com/the-covid-19-pandemic-and-investment-arbitration/>

⁵⁰ Hulley Enterprises Ltd. v. Russian Federation (PCA Case No. 2005-03/AA226).

⁵¹ Charlotin, D. (2018). Arbitrators hold Egypt liable for more than \$2 billion as a result of unfair treatment of gas plant investors. *Investment Arbitration Reporter*. <https://www.iareporter.com/articles/arbitrators-hold-egypt-liable-for-more-than-2-billion-as-a-result-of-unfair-treatment-of-gas-plant-investors/>

⁵² Per the exchange rate of Egyptian Pounds to USD at October 2019.

⁵³ Bonniticha, J., & Brewin, S. (2019). *Compensation under investment treaties*. International Institute for Sustainable Development. <https://www.iisd.org/sites/default/files/publications/compensation-treaties-best-practices-en.pdf>



million.⁵⁴ It sometimes greatly exceeds that figure. The Philippines spent USD 58 million to defend two cases brought by a German investor,⁵⁵ and Australia spent USD 28 million defending the tobacco labelling case mentioned above.⁵⁶

Bailouts and Debt Restructuring in Peril

Many governments will request support from the International Monetary Fund (IMF) or the World Bank to help them weather the COVID-19 crisis. Liabilities resulting from COVID-19 related investor–state arbitration should be avoided so as not to undermine that financial support. In 2019, an investment tribunal awarded foreign mining companies USD 6 billion in compensation against Pakistan.⁵⁷ Just two months earlier, the IMF had agreed a bailout with Pakistan to save its economy from collapse—also for USD 6 billion.⁵⁸ COVID-19 related investor–state disputes could make future bailouts just as worthless.

Similarly, governments, especially in the developing world, need the flexibility to restructure their debt now more than ever. Investment claims brought by Italian bondholders against Argentina show how investor–state arbitration could make debt restructuring more complicated. In 2011, an arbitral tribunal for the first time allowed foreign bondholders (60,000 Italian nationals) to bring claims against a government under a BIT.⁵⁹ The bondholders challenged Argentina’s default and partial restructuring of its sovereign debt through changes to its bond repayments. Due to the current health and economic crises, many countries will not be able to service their debts, which could lead to the need for a global stay on debt repayment to avoid a string of defaults.⁶⁰ Allowing bondholders to file a mass claim under a BIT to challenge a government’s debt restructuring could limit governments’ options to manage their sovereign debt.

The Need for Collective Action to Avoid a Surge of Investor–State Arbitration

On April 2, 2020,⁶¹ the UN General Assembly unanimously approved a resolution⁶² recognizing “the unprecedented effects” of the coronavirus pandemic and calling for “intensified international cooperation to contain, mitigate, and defeat” the COVID-19 disease. The resolution reaffirms the General Assembly’s “commitment to international cooperation and multilateralism” and calls on UN Secretary-General Antonio Guterres to lead the mobilization and coordination of a global response to the pandemic “and its adverse social, economic, and financial impact on all societies.”⁶³

In line with this resolution, states should come together and recognize the potentially overwhelming impacts of a surge of investment arbitration led by foreign companies, shareholders, portfolio investors, and bondholders against cash-strapped governments. In these times of turmoil, governments will not have the capacity to handle multiple claims and pay large amounts in compensation, with important consequences on health budgets, debt management, and the effectiveness of IMF and other bailouts.

⁵⁴ Gaukrodger, D. & K. Gordon (2012). *Investor-state dispute settlement: A scoping paper for the investment policy community* (OECD Working Papers on International Investment, 2012/03). OECD Publishing. http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf

⁵⁵ Olivet, C., & Eberhardt, P. (2012). *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*. Transnational Institute.

⁵⁶ Per the exchange rate of Australian dollars to USD at July 2018. Hutchens, G. & Knaus, C. (2018, July 1). Revealed: \$39m cost of defending Australia’s tobacco plain packaging laws. *The Guardian Australia*. <https://www.theguardian.com/business/2018/jul/02/revealed-39m-cost-of-defending-australias-tobacco-plain-packaging-laws>

⁵⁷ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1.

⁵⁸ Masood, S. (2019, May 12.). Pakistan to accept \$6 billion bailout from I.M.F. *New York Times*. <https://www.nytimes.com/2019/05/12/world/asia/pakistan-imf-bailout.html>

⁵⁹ As seen in the cases of *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 and *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9.

⁶⁰ Stiglitz, J. (2020, April 7). World must combat looming debt meltdown in developing countries. *The Guardian*. <https://www.theguardian.com/business/2020/apr/07/world-must-combat-looming-debt-meltdown-in-developing-countries-covid-19>

⁶¹ General Assembly of the United Nations. (2020, April 2). *Global solidarity to fight the coronavirus disease 2019*. <https://www.un.org/pga/74/2020/04/02/global-solidarity-to-fight-the-coronavirus-disease-2019/>

⁶² United Nations General Assembly. (2020, March 27). *Strengthening of the United Nations system*. <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/03/A-74-L.52.pdf>

⁶³ The resolution was approved without the presence of the governments through a so-called “silence procedure” according to which a resolution is adopted unless a single country objects.



A global, coordinated response to this risk can foster solidarity and shield governments from a worst-case scenario. One possible response would be for governments to jointly suspend the application of investor–state arbitration with respect to COVID-related measures. They could also issue a joint interpretation clarifying, for instance, that governments are to be considered as acting in necessity and therefore cannot be found in breach of their investment treaty obligations for COVID-related measures. States would have to be mindful that, depending on the option chosen, states might still end up defending multiple claims. But at the very least, the multilateral response could put a jurisdictional hurdle in front of investors seeking to challenge COVID-19 measures or give guidance to tribunals when assessing states’ defences should investors clear that hurdle. Any concerns about intentionally wrongful state actions disguised as COVID-related measures could be addressed in the state–state dispute settlement mechanisms included in virtually all investment treaties.

An emergency response could be coordinated through the United Nations Conference on Trade and Development (UNCTAD) which has extensive expertise on investment treaties and related reform. Another option is the United Nations Commission on International Trade Law (UNCITRAL), in particular its Working Group III, which is already set up to deal with ISDS reform. An emergency response could also be developed at the World Health Assembly, currently scheduled to be held in May 2020.⁶⁴

Withdrawing Consent to Investor–State Arbitration Until a Multilateral Solution Is Found

Multilateral emergency options, such as suspending the application of investor–state arbitration or issuing joint interpretive statements, will likely require some time. In light of this, a state might consider complementing the multilateral process by notifying its treaty partners that it withdraws its offer to submit to investor–state arbitration until further notice. This process is also referred to as “withdrawal of consent” to ISDS.

It has been argued that withdrawal of consent to treaty-based investor–state arbitration by one state party is possible because the arbitration agreement—the ISDS clause—in treaties has been concluded between states, and not between the state and the claimant-investor.⁶⁵ That ISDS clause is considered to contain an offer by the state to consent to the jurisdiction of an arbitral tribunal in the event of a future investor–state dispute (without knowing who the investor might be). The state’s consent does not become “perfected” (and therefore irrevocable) until an investor accepts the *offer*. The filing of a claim is considered as the acceptance of the offer in respect of that individual investor’s claim.⁶⁶ Therefore, with respect to future disputes, the state can withdraw consent at any time by notifying the other state party. Of course, foreign investors and their lawyers may still attempt to challenge the legality of such an action, requesting that a tribunal decide whether it has jurisdiction over the claim in light of the withdrawal of consent. But should an arbitral tribunal accept jurisdiction without prior consent of the parties, this would make the arbitral decision vulnerable to annulment or being set aside. Finally, the home state (from where the investment originates) could also challenge the withdrawal of consent.⁶⁷ However, given the exceptional circumstances in light of the COVID-19 pandemic, home states may not consider such action to be appropriate.

⁶⁴ World Health Organization. (2019). *Seventy-Second World Health Assembly*. <https://www.who.int/about/governance/world-health-assembly/seventy-second-world-health-assembly>

⁶⁵ Porterfield, M. (2014). Aron Broches and the withdrawal of unilateral offers of consent to investor–state arbitration. *Investment Treaty News*. <https://www.iisd.org/itn/2014/08/11/aron-broches-and-the-withdrawal-of-unilateral-offers-of-consent-to-investor-state-arbitration/>; Howse, R. (2017). A short cut to pulling out of investor–state arbitration under treaties: Just say no. *International Economic Law and Policy Blog*. <https://worldtradelaw.typepad.com/ielpblog/2017/03/a-short-cut-to-pulling-out-of-investor-state-arbitration-under-treaties-just-say-no.html>

⁶⁶ United Nations Conference on Trade and Development. (2003). *Dispute settlement*. International Centre for Settlement of Investment Disputes. https://unctad.org/en/docs/edmmisc232add2_en.pdf

⁶⁷ Johnson, L., Coleman, J. & Güven, B. (2018). *Withdrawal of consent to investor–state arbitration and termination of investment treaties*. <https://www.iisd.org/itn/2018/04/24/withdrawal-of-consent-to-investor-state-arbitration-and-termination-of-investment-treaties-lise-johnson-jesse-coleman-brooke-guven/>



Conclusion

Governments are facing an imminent threat of investor–state arbitration as they take difficult decisions to support public health systems in a time of severe economic stress. They need the fiscal policy space to create economic support packages focused on helping people and navigating their economy through this crisis. Our call to action is for governments to come together to either suspend treaty-based investor–state arbitration for all COVID-19 related measures or clarify the application of international law defences during these extraordinary times. Governments wishing to limit the risks under their investment treaties can withdraw consent to investment arbitration until a multilateral solution is found.

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