

Pandemic Responses and the Threat of Investor-State Disputes¹

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Introduction

Bilateral investment treaties (BITs) and trade treaties with investment provisions (TIPs) are collectively referred to as international investment agreements (IIAs). This paper reviews how IIAs could be used by foreign investors to challenge measures used by governments of states that are parties to these agreements in their responses to the COVID-19 pandemic (SARS-CoV-2). Part 1 of this paper describes the rationale for such investment treaties, their key provisions, the scale and outcomes of past investor-state disputes, controversies in dispute settlement procedures, and obligations that could potentially trigger a COVID-19 Investor-State Dispute Settlement (ISDS) claim. Part 2 identifies the range of government pandemic responses that could be open to such claims. Part 3 discusses government defensive arguments in response to ISDS pandemic-related challenges. Part 4 concludes with an overview of different preventative measures governments have taken, or could take, to minimize future ISDS risks.

Part 1: How Investment Treaties Can Affect Government Health Measures

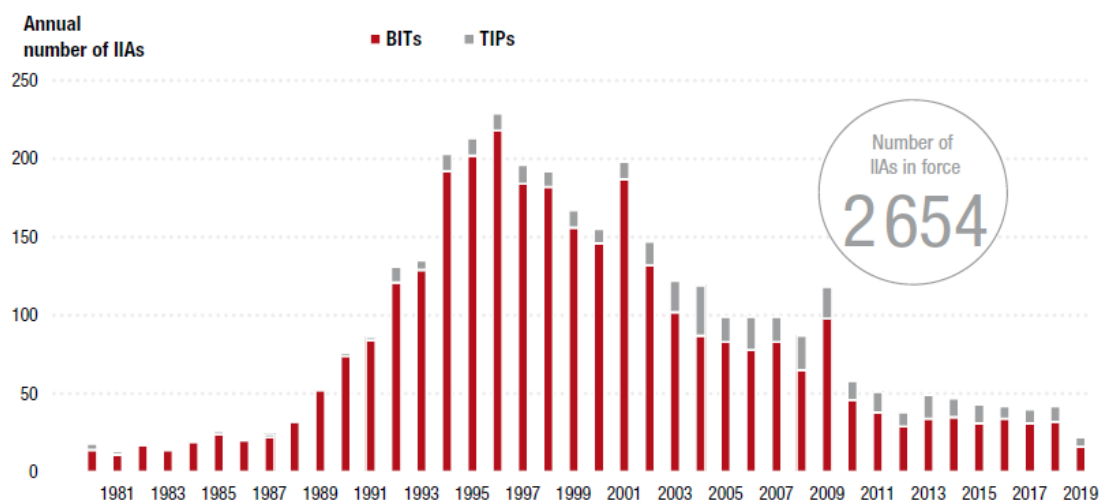
Bilateral investment treaties (BITs) are agreements between two countries aimed at promoting and protecting investments by investors from respective countries in each other's territory. Although they date back to the late 1950s, BITs only began to grow in number in the 1980s and 1990s (Figure 1). As of July 2020, 2902 BITs have been signed, of which 2341 are presently in force². Treaties with investment provisions (TIPs) refer to agreements between two or more countries which include obligations similar to those in BITs. Of 389 TIPs, a number which includes some agreements that contain only limited or non-enforceable commitments, 321 are in force³.

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² <https://investmentpolicy.unctad.org/international-investment-agreements>

³ *Ibid*

Figure 1. Number of IIAs signed, 1980–2019



Source: UNCTAD, IIA Navigator.

BITs arose in response to two geopolitical conditions characterizing the post-World War II global economy: (1) ‘developing’ countries (today more commonly referred to using the World Bank categorization of low- and middle-income countries, or LMICs) needed foreign investment (capital) to grow their domestic economies; and (2) in the decolonizing bipolar world that characterized much of the 1960s through the early 1990s there was a fear that newly autonomous governments would nationalize foreign investors’ assets (direct expropriation, with or without compensation), and that their judicial systems could be prone to ‘regulatory capture’ by political interests denying investors just settlement⁴. By providing substantive standards of protection, like a prohibition on expropriation without compensation, and allowing investors to seek financial compensation where those standards are breached before independent tribunals, BITs were thought to incentivize the first by preventing the second.

Although the majority of IIAs are bilateral agreements, the number of free trade agreements (FTAs) with investment chapters rose dramatically after 1994, following the inclusion of an investment chapter in the North American Free Trade Agreement (NAFTA)⁵. The World Trade Organization (WTO) refers to such FTAs as ‘preferential trade agreements’ (PTAs) because they provide Parties to such agreements preferential access to each others’ markets not afforded to

⁴ UNCTAD, World Investment Report 2015. Geneva: United Nations; 2015.

⁵ OECD, International Investment Law; 2008.

<https://www.oecd.org/daf/inv/internationalinvestmentagreements/40471729.pdf>

other WTO member states⁶. An analysis of 230 PTAs in 2018 found that 111 of these contained substantive investment protection provisions⁷.

Whether under a BIT or a TIP, investor-state dispute tribunals generally consist of three trade/investment lawyers, one appointed by the investor, one by the government being challenged, and a third agreed upon by the other two to chair. Most tribunals are governed by the arbitration rules administered by the International Center for the Settlement of Investment Disputes under the auspices of the World Bank. Investor-state arbitrations are sometimes held under the arbitration rules of the United Nations Commission on International Trade Law and, more rarely of the International Chamber of Commerce in Paris⁸.

ISDS: Winners & Losers

All countries continue to compete with each other for foreign investment. One of the projected consequences of the COVID-19 pandemic is a dramatic decline (over 40 per cent) in foreign direct investment (FDI), with export-oriented LMICs reliant on commodity-linked investments expected to be the most seriously affected⁹. Although the pace of new IIAs has slowed, there has been only minimal reduction in the number of ISDS cases initiated by investors (Figure 2)¹⁰. Cases are usually brought against LMICs, generally by investors from high-income countries (HICs), although an increasing number of disputes are being brought against HICs. In 2019, LMICs represented 80 per cent of all respondent countries, while 70 per cent of the ISDS cases were initiated by investors from HICs¹¹.

Most 2019 disputes were made under older IIAs (1990s or earlier), which is of particular concern with respect to potential COVID-19 pandemic responses. As UNCTAD notes, IIAs originally negotiated 20 to 60 years ago do not reflect today's global challenges relating to sustainable development, climate change, or public health¹². Although not designed to undermine the regulatory function of states, the broadly drafted provisions in early IIAs allowed

⁶ The WTO has two agreements that reference foreign investment: the Agreement on Trade Related Investment Measures (TRIMS), and Mode 3 (commercial presence) of the General Agreements on Trade in Services (GATS). TRIMS prohibits WTO member states from placing domestic purchase requirements on foreign investment. GATS Mode 3 encourages member states to commit to market access and national treatment for investments in health services. Neither agreement allows investors to sue governments directly via international tribunals. As such, they are not considered in this paper.

⁷ Crawford & Kotschwar, *Investment Provisions in Preferential Trade Agreements: Evolution and Current Trends*, 2018. https://www.wto.org/english/res_e/reser_e/ersd201814_e.pdf

⁸ Pohl, Mashigo & Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD Working Papers on International Investment, 2012/02, OECD Publishing. <http://dx.doi.org/10.1787/5k8xb71nf628-en>

⁹ UNCTAD, *World Investment Report*, 2020. https://unctad.org/en/PublicationsLibrary/wir2020_en.pdf

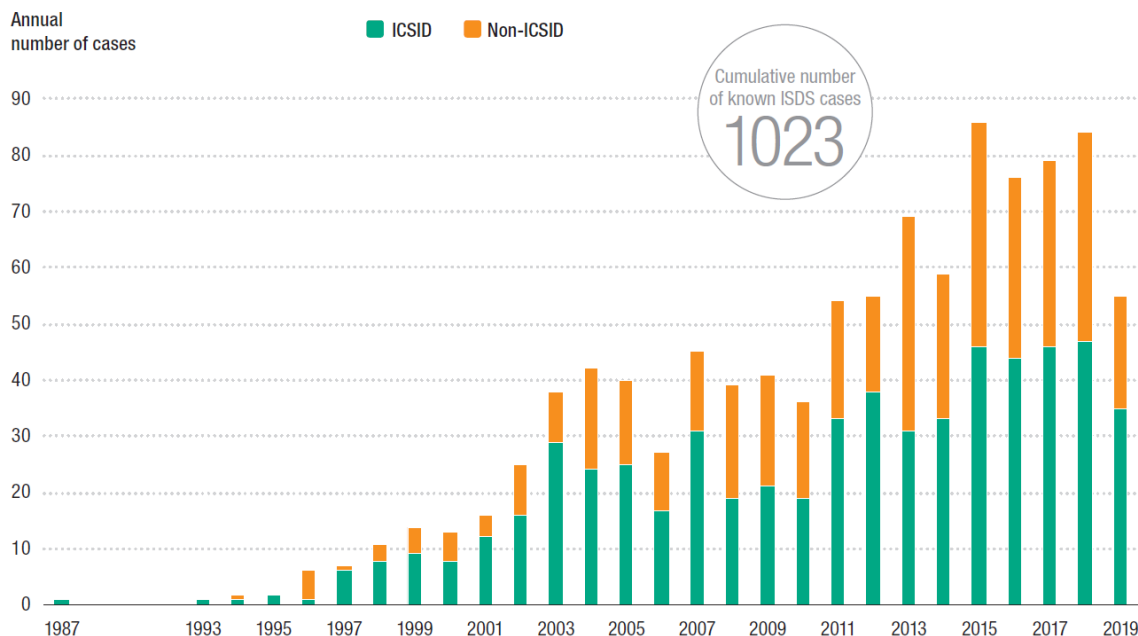
¹⁰ *Ibid*

¹¹ *Ibid*

¹² UNCTAD, *Investment Policy Monitor Special Issue No.4*, May 2020. https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf

for “expansive interpretations by arbitration panels, which reduced the capacity of host States to regulate, even when...in the public interest”¹³.

Figure 2: Trends in known treaty-based ISDS cases, 1987–2019



Cumulatively, of 674 concluded ISDS cases (1987-2019) 29 per cent favoured investors and 37 per cent states; 21 per cent were settled (but results not made public), 2 per cent found state liability but were awarded no damages, and 11 per cent were discontinued¹⁴. In defense of continued ISDS arbitration, it is sometimes argued that states can ‘win’ in these disputes¹⁵. But ‘winning’ merely means that states can proceed with the regulations that foreign investors had attempted to challenge. Legal costs on both sides of a dispute can be very large¹⁶, and states are not always awarded compensation for all (or even some) of their costs when they ‘win’. When Philip Morris sued Uruguay over its tobacco control measures and lost, the tribunal ordered the tobacco multinational to cover \$7 million of Uruguay’s \$10.3 million in legal costs¹⁷.

¹³ *Ibid* p.12

¹⁴ UNCTAD WIR 2020 *op. cit.*

¹⁵ As noted by an international legal firm that is involved in such disputes:

<https://www.nortonrosefulbright.com/en-ca/knowledge/publications/8014c6b7/frequently-asked-questions-about-investor-state-dispute-settlement>

¹⁶ Average legal fees/case are \$7.4 million (claimants), \$5.2 million (respondent States), and \$1 million (tribunal costs). Cf. Hodgson & Campbell, *Global Arbitration Review*, 2017, <https://globalarbitrationreview.com/article/1151755/damages-and-costs-in-investment-treaty-arbitration-revisited>

¹⁷ Samples, *Winning and Losing in Investor-State Dispute Settlement*, *American Business Law Journal* 65(1) 115-75. 2019. <https://onlinelibrary-wiley-com.proxy.bib.uottawa.ca/doi/epdf/10.1111/ablj.12136>

“Sovereigns cannot win in ISDS...[They] only lose a lot, lose a little, or—at best—break even¹⁸.”

The size of financial awards to investors has also increased since the 1990s, with two multibillion awards made in 2019 (\$4 billion in *Tethyan Copper v. Pakistan*, and \$8.4 billion in *ConocoPhillips v. Venezuela*)¹⁹. In the Pakistan case, the finding was based on the country’s denial of a mining licence following the company’s preliminary explorations. The denial was considered to be an indirect expropriation. An example of one the main criticisms of ISDS, the award was not based on the actual loss of the mining company’s original investment (around \$150 million) but on its “legitimate, investment-backed expectations” of the profits that the mine would earn²⁰. Pakistan is seeking relief from the award²¹, which would consume almost the entire amount of a \$6 billion IMF stabilization loan the country received in 2019²². Billion-dollar ISDS awards are rare, but UNCTAD estimates the average award at \$522 million.

Key Provisions of IIAs

ISDS claims are based on an alleged breach of substantive investor protections within an IIA. The main provisions in such IIAs are:

National treatment: Similar to the obligation in trade treaties covering goods and services, in IIAs national treatment requires states to provide no less favourable treatment to foreign investors that they accord to domestic investors.

Most favoured nation (MFN): All foreign investors from home countries must be given the same treatment by host countries²³.

Full protection and security: Requires states to exercise due diligence in ensuring the physical protection of an investment. Some IIAs include protection against ‘unreasonable’ or ‘arbitrary’ measures that significantly damage the value of the foreign investment, which expands the subject areas that could fall under ISDS procedures.

¹⁸ *Ibid* p.139

¹⁹ UNCTAD WIR 2020 *op. cit.*

²⁰ Murard, Tribunal finds Pakistan breached FET, expropriation and non-impairment obligations in the context of a mining joint venture with Australian investor Tethyan Copper Company, 2019. Investment Treaty News. <https://cf.iisd.net/itn/2019/12/17/tribunal-finds-pakistan-breached-fet-expropriation-non-impairment-obligations-mining-joint-venture-with-australian-investor-tethyan-copper-company-tethyan-copper-company-v-pakistan-icsid-arb-12-1/>

²¹ New York Times 7 September 2020 <http://isds.bilaterals.org/?pakistan-seeking-relief-from-5-8b>

²² Similarly, Ecuador, in a 2017 review of its BITs and TIPs commitments that urged their termination, noted that outstanding ISDS claims against it amounted to over half the annual government budget, while there was little evidence that it increased FDI flows to the country. Cf. Samples *op. cit.* p.148

²³ Home country refers to States that are the domicile of foreign investors; host country refers to States in which their investment is made.

Most IIAs also provide for compensation in cases of armed conflicts or domestic strife²⁴. Full protection and security obligations are only rarely invoked in ISDS cases.

No expropriation (direct or indirect) without prompt compensation: IIA rules on direct expropriation (where the state nationalizes the physical property of foreign investor) are straightforward: governments are required to provide compensation. Indirect expropriation is more open to interpretation, as it does not require any direct taking by the state, only that such measures destroy the value of the investment or the ability of the investor to manage, use, or control the investment. Cases of direct expropriation are increasingly infrequent while cases of indirect expropriation have increased and are now the second most alleged breach of IIAs and of tribunal findings in favour of investors. Most new IIAs now contain carve-outs for indirect expropriations made to protect public welfare goals²⁵.

Fair and equitable treatment (FET): States are obliged to treat foreign investors “fairly and equitably”²⁶. There is no precise or consistent definition of FET within IIAs, leaving its interpretation largely a matter of tribunal discretion and often by reference to other IIA provisions (such as ‘full protection and security’ or ‘national treatment’) or to minimum standards under customary international law²⁷. Although initially invoked rarely, since the 1990s most alleged breaches of IIAs and most tribunal decisions favouring investors have been based on FET provisions²⁸. FET has become the most litigated standard in ISDS, accounting for 83% of such claims²⁹. This rise in the role of FET in ISDS is attributed, in part, to promotion of its use by investment lawyers, and by a shift from cases alleging direct expropriation to indirect expropriation³⁰. Breaches of FET identified by analyses of tribunal decisions include failure to protect, denial of due process or justice, state coercion, lack of providing a stable and predictable legal framework, arbitrary and discriminatory treatment, and frustration of investors’ legitimate expectations³¹.

²⁴ Crawford & Kotschwar *op. cit.*

²⁵ *Ibid*

²⁶ UNCTAD May 2020 *op. cit.*

²⁷ OECD, Fair and Equitable Treatment Standard in International Investment Law, 2004.

<http://dx.doi.org/10.1787/675702255435>

²⁸ Schram, International Trade and Investment Agreements and Health: The Role of Transnational Corporations and International Investment Law, 2016. <https://ruor.uottawa.ca/handle/10393/35231>

²⁹ Bernasconi-Osterwalder & Bonnitza, Investment Negotiations at the WTO and the IIA Regime: Anticipating unintended interactions, 5 October 2020. <https://cf.iisd.net/itn/2020/10/05/investment-negotiations-at-the-wto-and-the-iaa-regime-anticipating-unintended-interactions-nathalie-bernasconi-osterwalder-jonathan-bonnitza/>

³⁰ Schram *op. cit.*

³¹ *Ibid* Cf. also Knoll-Tudor, Fair and Equitable Treatment, Jus Mundi. 14 April 2020. <https://jusmundi.com/en/document/wiki/en-fair-and-equitable-treatment>

Free transfer of capital: States are obliged to permit all capital transfers relating to foreign investments 'to be made freely and without delay' into and out of their territory. Older IIAs provide no limiting exceptions to this obligation³².

Key Criticisms of ISDS

As ISDS cases began to increase dramatically in the 1990s (the first ISDS case only completed in 1990), so did concerns over perceived procedural and substantive shortcomings. Procedurally, ISDS has been criticized for a lack of transparency, little or no opportunity for public input into proceedings (i.e. inadequate opportunity for *amicus curiae* submissions), conflicts of interest in tribunals, and no appeals processes.

The *lack of transparency* still common to many IIAs reflects their legacy in confidential private commercial arbitration (disputes between private economic actors). Investor-state disputes, in contrast, raise fundamentally important issues of public interest³³, including states' obligations under other international treaties such as human rights laws. There have been improvements in requirements for transparency in ISDS, both incorporated in more recent IIAs or under UNCITRAL arbitration rules and, to lesser extent, ICSID arbitration rules^{34 35}. Several IIAs concluded in 2019, however, still lack transparency provisions or opportunities for public input (e.g. *amicus curiae* participation)³⁶, suggesting that these issues are not yet fully resolved.

Concerns of *conflicts of interest* amongst arbitrators are based on arguments that ISDS arbitrators' substantial fees (\$3000/day) could lead to biases in favour of investors in order to attract future tribunal appointments^{37 38 39 40}. Indeed, the international investment law industry is one of the largest beneficiaries of ISDS litigation, with law firms earning up to \$1000/hour in advising either claimants or states involved in a dispute. The investment law industry is also known to actively promote disputes, including against measures governments

³² UNCTAD May 2020 *op. cit.*

³³ Bernasconi-Osterwalder & Johnson, Transparency in the Dispute Settlement Process: Country best practices. February 2011. https://www.iisd.org/system/files/publications/transparency_dispute_settlement_processes.pdf

³⁴ *Ibid*

³⁵ Roberts & Bouraoui, UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims, 6 June 2018. EJIL:TALK! <https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/>

³⁶ UNCTAD, The Changing IIA Landscape: New Treaties and Recent Policy Developments, July 2020. https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf

³⁷ Van Harten G. Sovereign choices and sovereign constraints: judicial restraint in investment treaty arbitration. United Kingdom: Oxford University Press; 2013

³⁸ Transnational Institute, FOE, Corporate Europe Observatory, Lawyers subverting the public interest. 2015. https://corporateeurope.org/sites/default/files/efila_report-web.pdf

³⁹ Eberhardt & Olivet, Profiting from injustice, November 2012. <https://www.tni.org/files/download/profitfrominjustice.pdf>

⁴⁰ Van Harten G. Is It Time to Redesign or Terminate Investor-State Arbitration? 2017. CIGI. <https://www.cigionline.org/articles/it-time-redesign-or-terminate-investor-state-arbitration>

have taken in response to the pandemic⁴¹. Some reform efforts to reduce the potential for interest conflicts have been recently implemented. The Comprehensive and Progressive Transpacific Partnership Agreement (CPTPP) in 2019 issued a Code of Conduct for arbitrators, although the Code remains largely a statement of good intent and transparency rather than binding rules that limit arbitrators' roles in future claims which can create interest conflicts⁴². The Investment Court System (ICS) of the Comprehensive Economic and Trade Agreement (CETA), between Canada and the European Union⁴³, would appoint arbitrators on fixed terms with rules to limit their post-term ability to advise governments or investors on future claims⁴⁴.

The ICS would also establish an appeals tribunal, in response to complaints that tribunal rulings are considered to be final and that there are “*no appeal mechanism[s]* ... legally or otherwise operative under any IIA”⁴⁵.

Criticisms apply more to the substantive investor protections obligations of IIAs themselves. Mention has already been made of the broad scope in most, and particularly earlier, IIAs for interpretation of FET and indirect expropriation. More recent IIAs have tried to limit their interpretative scope, some by eliminating reference to FET altogether⁴⁶, and others by circumscribing its obligations⁴⁷. CETA's international investment tribunal model sometimes referred to as an international investment court system, or ICS, also permits states to provide binding interpretation notes to tribunals⁴⁸. Of IIAs signed in 2019, three omitted ISDS or made such disputes dependent on the willingness of states to proceed⁴⁹. Another substantive criticism is that tribunals are not bound by previous decisions and, although these may be invoked in their rulings, it adds to the lack of interpretative predictability of IIA obligations.

In recent years there has been an uptick in third-party financing of ISDS claims, especially in the wake of the 2008 global financial crisis and the search by speculative finance for new investment vehicles⁵⁰. Under ‘no win-no pay’ agreements, speculators offer to finance ISDS claimant's legal costs in return for 30% to 50% of the final award. Given that awards frequently

⁴¹ Lawyers cash in on coronavirus pandemic, Deutsche Welle June 1 2020. <https://www.dw.com/en/lawyers-cash-in-on-coronavirus-pandemic/a-53647303>

⁴² Gleeson & Labonté. *Trade Agreements and Public Health: A Primer for Health Policy Makers, Researchers and Advocates*, London: Palgrave, 2020.

⁴³ CETA, although provisionally in force with exception of its investment chapter, must still be ratified by all 27 member states of the EU. As of October 2020, only 15 member states have done so.

⁴⁴ *Ibid*

⁴⁵ AJ van den Berg, *Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions*, *ICSID Review - Foreign Investment Law Journal*, Volume 34, Issue 1, Winter 2019, Pages 156–189, <https://doi-org.proxy.bib.uottawa.ca/10.1093/icsidreview/siz016.p.159>. Awards, however, may be subject to review by national courts or an annulment committee, but only on very limited grounds.

⁴⁶ Crawford & Kotschwar *op. cit.*

⁴⁷ UNCTAD July 2020 *op. cit.*

⁴⁸ Gleeson & Labonté *op. cit.*

⁴⁹ UNCTAD July 2020 *op. cit.*

⁵⁰ Garcia, *The Case Against Third-Party Funding in Investment Arbitration*, *Investment Treaty News* July 2018. <https://cf.iisd.net/itn/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia/>

dwarf the cost of litigation, even if many such cases rule in favour of the state the returns to speculators can be significant⁵¹, and there is even a secondary market whereby litigation funders in an ISDS case may sell their stake to a fourth party⁵². Contingency fee arrangements, whereby investment lawyers are only paid if they are successful in a case, and on a percentage of award basis, are also becoming more common⁵³. The incentive-to-litigate nature of such financing arrangements is argued to be in conflict with the United Nations' goal of promoting equal access to justice⁵⁴. Litigation investment firms have already identified the pandemic as 'the beginning of a boom' with such firms receiving 'a significant uptick in inquiries' from potential claimants⁵⁵.

Part 2: Potential Pandemic Responses Open to ISDS Challenge

Past experiences of governments enacting measures during periods of crisis suggest good reason for concern that some pandemic responses could be challenged by foreign investors, especially under older IIAs without reforms attempting to limit their use against legitimate public regulatory measures. Argentina's government measures to mitigate a severe economic crisis in 2001, for example, included freezing utility rates, nationalizing assets, devaluing its currency, and restructuring sovereign bonds. Over 50 ISDS challenges were subsequently launched, with known final awards exceeding over \$2 billion. Several individual claims were in the hundreds of millions of dollars⁵⁶. The upheavals following the 2011-2012 Arab Spring led to a surge of new ISDS cases. Although most were ruled in favour of the respondent state, many were settled with the threat of tribunal arbitration appearing to serve tactically to obtain an amicable outcome for the investor⁵⁷. In 2013, the Egyptian government suspended sales of gas to a Spanish-owned plant in order to prioritize domestic electricity markets, arguing this was necessary to reduce domestic strife⁵⁸. A tribunal disagreed, finding that 'necessity' was not demonstrated and that other means to reduce unrest were available; it awarded the investor over \$2 billion⁵⁹. In 2020, Lebanon imposed capital controls to address its liquidity challenges, a

⁵¹ Chen & Hough, Researching Third-Party Funding in Investor-State Dispute Settlement, May 2019. Global Lex. https://www.nyulawglobal.org/globalex/Third-Party_Funding_Investor-State_Dispute_Settlement.html

⁵² Eberhardt & Olivet *op. cit.*

⁵³ *Ibid*

⁵⁴ Sanosuosso & Scarlett, Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance, Boston College Law Review, 60(9) 2019.

<https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3745&context=bclr>

⁵⁵ Simson, Third-Party Funders' Business Is Booming During Pandemic, Law 360, 8 April 2020.

<https://www.law360.com/legalethics/articles/1261213/third-party-funders-business-is-booming-during-pandemic>

⁵⁶ Bernasconi-Osterwalder, Brewin & Maina. Protecting Against Investor-State Claims Amidst COVID-19: A call to action for governments, April 2020. <https://www.iisd.org/system/files/publications/investor-state-claims-covid-19.pdf>

⁵⁷ Foty, Day. Impact of the Arab Spring on the International Arbitration Landscape, 26 July 2019.

<http://arbitrationblog.kluwerarbitration.com/2019/07/26/impact-of-the-arab-spring-on-the-international-arbitration-landscape/>

⁵⁸ *Ibid*

⁵⁹ Bernasconi-Osterwalder et al *op. cit.*

decision opposed by many within the country as affecting primarily low- and middle-income earners⁶⁰. At the same time law firms specializing in investment arbitration have begun outlining how Lebanon's BITs might allow for ISDS challenges by foreign investors, ranging from a violation of the 'free transfer' of investors' funds in and out of Lebanon, to the government's failure through inaction to provide 'full protection and security' of the investment⁶¹.

As early as May 2020, UNCTAD began warning about the ISDS implications of pandemic responses. It begins by noting how investment policy instruments can assist governments in dealing with the pandemic (Table 1) and concludes with the need for governments to reform IIAs in support of public policies to minimize ISDS risk. Steps to facilitate foreign investment, provided they do not violate the MFN rule (that is, do not extend to investors in states with which the host country does not have an IIA), are unlikely to be challenged. Incentives to companies to research, manufacture, or distribute pandemic-related personal protective equipment (PPE), treatments, vaccines, or sanitizing products, provided they are open to foreign investors covered by IIAs under the same terms as domestic firms (the national treatment rule), are also unlikely to be challenged, insofar as these measures seek to *increase* the stock of foreign investment, rather than limit it. Increasing oversight of FDI in COVID-relevant industries are also unlikely to trigger a dispute, provided it does not affect IIA provisions concerning the free flow of capital in and out of host countries with respect to existing investments; although it may still be interpreted as a breach of FET in some cases.

Acquisition or nationalization of crisis-affected industries, providing supports to domestic industries, issuing mandatory production orders, imposing export bans, and issuing non-voluntary (compulsory) licenses for medications, however, are all at some risk of an ISDS challenge. The May 2020 UNCTAD Special Bulletin on ISDS and COVID-19 provides numerous examples of country measures falling under each of the categories in its Table⁶².

⁶⁰ Farchakh, The Ongoing Lebanese Financial Crisis: Is There Potential For Investor-State Arbitration? 8 March 2020. <http://arbitrationblog.kluwerarbitration.com/2020/03/08/the-ongoing-lebanese-financial-crisis-is-there-potential-for-investor-state-arbitration/>

⁶¹ *Ibid*

⁶² UNCTAD May 2020 *op. cit.*

Table 1. Investment Policy Instruments for Responding to the Pandemic

Investment policy area	Policy measures (examples)
Policy actions at the national level	
Investment facilitation	<ul style="list-style-type: none"> • Alleviation of administrative burdens and bureaucratic obstacles for firms
Investment retention and aftercare by investment promotion agencies (IPAs)	<ul style="list-style-type: none"> • COVID-19 related information services • Administrative and operational support during the crisis
Investment incentives	<ul style="list-style-type: none"> • Financial or fiscal incentives to produce COVID-19 related medical equipment • Incentives for enhancement of contracted economic activities • Incentives for conversion of production
State participation in crisis-affected industries	<ul style="list-style-type: none"> • Acquisition of equity in companies • Partial or full nationalization
Local small and medium enterprises (SMEs) and supply chains	<ul style="list-style-type: none"> • Financial or fiscal support for domestic suppliers (such as SMEs)
National security and public health	<ul style="list-style-type: none"> • Application and potential reinforcement of FDI screening in COVID-19 relevant industries
Other State intervention in the health industry	<ul style="list-style-type: none"> • Mandatory production • Export bans • Import facilitation
Intellectual property (IP)	<ul style="list-style-type: none"> • General authorization of non-voluntary licensing to speed up research and development (R&D) • IP holder-specific non-voluntary licensing to enable imports of medication
Policy actions at the international level	
International support measures for investment	<ul style="list-style-type: none"> • International pledges in support of cross-border investment
IAs	<ul style="list-style-type: none"> • Reform of IAs in support of public health policies and to minimize ISDS risks

Source: UNCTAD.

These potential COVID-19 ISDS flashpoints underscore the importance UNCTAD gives to reform of IAs to minimize or prevent public health-related challenges, a point returned in Part 4 of this paper.

The UNCTAD Special Bulletin focuses on health-specific measures governments have taken in response to the pandemic. A longer list of other pandemic-related government measures only indirectly related to health that might run afoul of ISDS rules has also been generated by commentators, including:

1. travel bans or restrictions

2. requisitioning private hotels for quarantine or recovery facilities (if wholly or partially foreign owned)
3. reducing or suspending payments to ensure affordable supplies (e.g. rent, mortgages, utilities)
4. regulations affecting the price of essential goods (e.g. food, PPE, sanitizing products)
5. tax measures affecting the value of foreign investments or discriminating positively in favour of domestic investors
6. lockdowns or other measures affecting businesses that are partly or wholly foreign owned
7. failures to prevent pandemic-associated social unrest damaging the value of foreign investments

IIA provisions that could lead to challenges include⁶³:

National Treatment and MFN: As noted above, state measures that seem to favour investors based on nationality could lead to a dispute.

FET: FET provisions, notably those with unqualified obligations in early IIAs, can be used to challenge many of the state pandemic measures identified in Table 1.

Transfer of funds: Many pandemic-affected countries have implemented, or are considering, capital controls to limit any surge in outflows.

Force majeure: Many IIAs contain provisions for compensating investment losses incurred by force majeure situations not foreseen or necessarily under state control, with specific reference to armed conflicts or strife. Compensation may also apply for losses arising from natural disasters or pandemics which affect the state's ability to fulfill a contract.

Several specific examples of potential ISDS disputes have also been identified. Italy provides an initial summation of several of these ISDS risks.

*Italy*⁶⁴

Italy was one of the first countries severely impacted by the pandemic, with many of its measures open to investor-state claims. The government's legal requisition of hotels and medical equipment, for example, is permitted if the investor is compensated according to market value, but the Italian law does not specify how that value would be calculated, making the state liable to compensation if the value is less than the compensation required under an IIA expropriation provision. More broadly, mandatory lockdowns of industrial and commercial

⁶³ *Ibid*

⁶⁴ Benedetti, Coroneo & Minella, Could covid-19 emergency measures give rise to investment claims? First reflections from Italy, *Global Arbitration Review*, 25 March 2020. <https://globalarbitrationreview.com/article/1222354/could-covid-19-emergency-measures-give-rise-to-investment-claims-first-reflections-from-italy>

activities could be vulnerable to an ISDS claim for indirect expropriation. Other decrees liable to indirect expropriation claims include suspension of payment on certain mortgage loans or financial leases, and the right to withdraw from tourism package contracts. FET claims, which are the most likely, could apply to a number of Italian pandemic responses by violating investors' 'legitimate expectations' of the value of their investment, including any of the examples above. Any support to Italian companies not also extended to foreign investors could be a breach national treatment, especially if supports are marketed as a 'buy national' campaign. Investors could also claim that government failure to act promptly and sufficiently leading to investment losses breach IIA requirements of 'full security and protection.'

Other countries enacting similar measures to Italy's could be liable to ISDS suits. A more generic listing of vulnerable measures under a range of scenarios was developed by the Corporate Europe Observatory⁶⁵. A few are described below.

Providing clean water

Frequent handwashing is promoted as an important means to prevent the spread of the coronavirus. To assist poorer households' access to water, many Latin American countries have provided differing forms of direct support during the crisis, such as suspending payments on water bills water service disconnections due to lack of payment. In a client alert, a corporate law firm noted that this eliminates foreign-invested firms' revenue streams⁶⁶.

Temporary take-over of private health care

In March, with its public hospitals overrun with COVID-19 cases and half-empty private hospitals refusing to take COVID-19 patients, the Spanish government took temporary control over private hospitals. Ireland and China have done the same. Canada took over management operations of several private long-term care facilities following revelations of neglect and high mortality rates amongst elderly residents⁶⁷. Several countries, like Italy, requisitioned hotels to serve as temporary hospitals or quarantine venues. Even if private firms are provided some compensation or indemnities, it may not be at the same level required for under international investment law.

⁶⁵ Corporate Europe Observatory, Cashing in on the pandemic: how lawyers are preparing to sue states over COVID-19 response measures, 18 May 2020. <https://corporateeurope.org/en/2020/05/cashing-pandemic-how-lawyers-are-preparing-sue-states-over-covid-19-response-measures>

⁶⁶ Hogan Lovells, COVID-19: will State measures give rise to a new set of investment claims? 2 April 2020. https://www.hoganlovells.com/~/_media/hogan-lovells/pdf/2020-pdfs/2020_04_02_covid19-and-investment-arbitration.pdf?la=en

⁶⁷ Howlett, Stone, Mahoney & Ha, Ontario to take control of five long-term care homes after military report citing neglect, abuse, Globe and Mail, 28 May 2020. <https://www.theglobeandmail.com/canada/article-ontario-to-take-control-of-five-long-term-care-homes-after-military/>

Mandating production of medical supplies

Some countries (notably Spain and the USA) compelled companies to shift production to much needed medical supplies. Foreign investors in these firms, if not compensated or feel that payments are below the value of their ‘legitimate expectations’, could make a claim for indirect expropriation (if the requirement production shift extends beyond what an investor thinks reasonable), but more likely as a breach of FET⁶⁸. Capping prices on, or restricting export of, medical equipment could also affect foreign investors’ anticipated revenues⁶⁹. Since intellectual property rights (such as drug treatment or vaccine patents) are also considered investments under many IIAs, legislation granting non-voluntary licences could trigger an ISDS if the compensation to the foreign patent holder is not considered sufficient. As of May 2020, four countries have introduced such legislation (Canada, Chile, Ecuador, Germany)⁷⁰. Recent IIAs that contain carve-outs for intellectual property rights may avoid such risks, although this remains to be tested and older IIAs have no such safeguard⁷¹.

Imposing restrictions on certain industries

To assist in the transportation of essential goods and workers during the pandemic, and to avoid transmission via toll collectors, the Peruvian Congress suspended toll collection on all of the country’s 74 toll roads⁷². Twenty-four of these roads are run by a state company which voluntarily suspended fees, as did 32 of the remaining private toll roads. Eighteen of the concessionaires, however, did not, and at least one of them has threatened an ISDS suit. Several investment law firms are mooted the potential for such a suit, suggesting that there were other measures Peru could have pursued to achieve its policy aims, and that eliminating the tolls may not be proportionate to the avoided risk⁷³. Peru is currently facing several investor suits related to its toll roads, leading some to speculate that the country could face the world’s first pandemic ISDS legal challenge.

Mandatory lockdowns

Especially in the early stages of the pandemic, many countries imposed economy-wide lockdowns or related measures that dramatically affected businesses. Many also provided

⁶⁸ Bento & Chen, Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses, Kluwer Arbitration Blog, 8 April 2020. <http://arbitrationblog.kluwerarbitration.com/2020/04/08/investment-treaty-claims-in-pandemic-times-potential-claims-and-defenses/>

⁶⁹ Hogan Lovells *op. cit.*

⁷⁰ UNCTAD May 2020, *op. cit.*

⁷¹ Gervais, Intellectual Property: A Beacon for Reform of Investor-State Dispute Settlement, Michigan Journal of International Law. 289 (2019).

<https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2100&context=faculty-publications>

⁷² Sanderson, Peru warned of potential ICSID claims over covid-19 measures, Latin Lawyer, 15 April 2020.

<https://latinlawyer.com/article/1225491/peru-warned-of-potential-icsid-claims-over-covid-19-measures>

⁷³ Ropes & Gray, COVID-19 Measures: Leveraging Investment Agreements to Protect Foreign Investments, 28 April 2020. <https://www.ropesgray.com/en/newsroom/alerts/2020/04/COVID-19-Measures-Leveraging-Investment-Agreements-to-Protect-Foreign-Investments>

different amounts of compensation or assistance, ranging from covering all or part of employee costs, rent assistance, suspension of tax payments, emergency loans, and direct financial aid. Losses experienced by foreign invested companies resulting from such measures could lead to ISDS challenges under IIA provisions on FET and indirect expropriation or, if foreign investors are excluded from relief offered to domestic firms, discriminatory treatment (national treatment)⁷⁴.

Travel bans and quarantine restrictions

To the extent that travel bans destroy the investment value of foreign-owned airlines (or such airlines are not given the same level of government financial support as domestically-owned airlines), resulting losses could form an ISDS claim. Even quarantine restrictions, if they delay foreign investment projects, could be deemed a violation of FET and/or an indirect expropriation⁷⁵.

Reducing or suspending mortgage, rent and energy payments

Income loss in average households due to the pandemic has led several governments to mandate reductions or suspension of rent payments or energy costs. Spain, for example, banned suppliers from suspending service of water, gas and electricity if households cannot pay their bills. With other countries, it also suspended mortgage payments. Several Canadian provinces suspended evictions for tenants unable to meet rent payments due to the pandemic-related income losses⁷⁶. Some countries suspended bankruptcy proceedings and creditor protections, which could sufficiently harm financial sector investors thereby triggering an investment dispute⁷⁷.

Restructuring debt, imposing capital controls, and changing tax measures

To respond to the fiscal fallout of the pandemic, many countries facing a looming debt crisis undertook different financial measures. Some of these, such as sovereign debt restructuring, obligatory bank bail-ins (confiscating savings of depositors), restricting bank withdrawals, and restricting capital transfers, and based on past non-pandemic financial crisis experiences, could lead to investor disputes⁷⁸. If governments change their domestic tax regimes to recover the costs of pandemic measures, and if these significantly reduce the value of a foreign investment,

⁷⁴ UNCTAD May 2020 *op. cit.*

⁷⁵ Paddeu & Jephcott, COVID-19 and Defences in the Law of State Responsibility: Part I, 17 March 2020.

<https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/>

⁷⁶ Dunham, Rent relief: What each province is doing to help residential tenants during the pandemic, CTV News. 1 April 2020. <https://www.ctvnews.ca/health/coronavirus/rent-relief-what-each-province-is-doing-to-help-residential-tenants-during-the-pandemic-1.4877615>

⁷⁷ Dechert, COVID-19 Economic Crisis: Protecting International Banking and Finance Investors and their Investments, 30 April 2020. <https://www.dechert.com/knowledge/onpoint/2020/4/covid-19-economic-crisis--protecting-international-banking-and-f.html>

⁷⁸ *Ibid*

discriminate in any way against foreign investors, or revoke a tax agreement made at the time of the initial foreign investment, they could face an ISDS challenge^{79 80}, even if the IIAs include ‘tax carve-out’ provisions presumed to exempt them from such suits⁸¹.

Failure to prevent social unrest

Lockdown or other government imposed measures aimed at controlling the pandemic that lead to social unrest that negatively affects foreign investments (such as looting businesses, or suspension of normal business activities) could face ISDS challenges⁸². More generally, foreign investors could sue states if early measures to mitigate the pandemic were inadequate leading to more drastic measures with escalating harm to their investments caused by social unrest, indicative of a failure to provide full ‘protection and security’⁸³.

At time of writing (October 2020), no ISDS challenge has been initiated. The potential breadth of such suits, however, has international investment law firms, and many legal and investment treaty observers, convinced that it is only a matter of time before such challenges arise, especially as the pandemic subsides.

Part 3. Potential State Defensive Arguments

States are not without potential defensive arguments if eventually faced with a pandemic-related ISDS challenge. Some of these defenses rest in customary international law, others within the treaty language of IIAs themselves, many of which, in turn, reference customary international law with respect to FET and expropriation provisions.

Force majeure

Under the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARS), a defense of *force majeure*, *necessity*, or *distress* may be attempted. Defense under *force majeure* requires that the occurrence be ‘of an irresistible force or an unforeseen event beyond the control of the State’⁸⁴. Although the SARS-CoV-2 pandemic was unforeseen, the risk of zoonotic pandemics was not. As many commentators have noted, the pandemic has actually revealed the parlous state of many countries’ pandemic preparedness and public health underfunding. These considerations make a *force majeure* defence unlikely to succeed. Moreover, a state plea of *force majeure* has rarely been successful

⁷⁹ *Ibid*

⁸⁰ Ropes & Gray *op. cit.*

⁸¹ Uribe & Montes, Building a Mirage: The Effectiveness of Tax Carve-out Provisions in International Investment Agreements, Investment Policy Brief 14, March 2019. https://www.southcentre.int/wp-content/uploads/2019/03/IPB14_Building-a-Mirage-The-Effectiveness-of-Tax-Carve-out-Provisions-in-International-Investment-Agreements_EN.pdf

⁸² Corporate Europe Observatory 2020 *op. cit.*

⁸³ Bento & Chen *op. cit.*

⁸⁴ Paddeu & Jephcott Part 1 *op. cit.*

in international law⁸⁵, although at least one private commercial dispute was able to invoke a pandemic as a *force majeure*⁸⁶.

Necessity

An argument of necessity is considered a second likely plea by states facing a pandemic-related ISDS claim. As with *force majeure* there are conditions that states must meet to be able to invoke necessity, i.e., that derogation from the treaty obligations ‘is the only way to safeguard an essential interest against a grave and imminent peril’ to which the state itself has not contributed⁸⁷. Although the pandemic meets most of the requirements of necessity, and is a more promising defence than *force majeure*, some of states’ particular measures (such a travel bans or lockdowns) may be challenged for not being the ‘only way’ to contain or mitigate the disease⁸⁸. Shortcomings in pandemic preparedness or public health financing could also be argued as a state contribution to the COVID-19 peril itself⁸⁹. Older IIAs are generally silent on necessity, and tribunals have so far reached inconsistent rulings, making it difficult to predict what a dispute based on a state defence of necessity might rule⁹⁰.

Distress

A third plea afforded by ARS is that of distress, which is considered the most likely to succeed⁹¹. If a state is faced with an ISDS pandemic challenge it needs to demonstrate that it had ‘no other reasonable way...of saving...the lives of others entrusted to [its] care’⁹². The hurdle a state may encounter, however, is that the distress defence is not intended to apply to ‘general emergencies,’ and so the pandemic must be shown to be a special and unique emergency. Measures that are not regarded as ‘reasonable’ (once again, travel bans once within-country transmission exists) could still be vulnerable. Moreover, this defence has never been successfully invoked in an ISDS case⁹³.

⁸⁵ *Ibid*

⁸⁶ Rainey & Leung, COVID-19: When is a pandemic force majeure? And what should new force majeure provisions address? Lexology 31 March 2020. <https://www.lexology.com/library/detail.aspx?g=a8d707d1-c344-4f83-8ec3-790aa95382c6>

⁸⁷ Paddeu & Jephcott, COVID-19 and Defences in the Law of State Responsibility: Part II, 17 March 2020. <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-ii/>

⁸⁸ *Ibid*

⁸⁹ Davitti, Ho, Vargiu & Vastardis, COVID-19 and the Precarity of International Investment Law, Medium. 6 May 2020. <https://medium.com/iel-collective/covid-19-and-the-precarity-of-international-investment-law-c9fc254b3878>

⁹⁰ Bernasconi-Osterwalder et al *op. cit.*

⁹¹ Paddeu & Jephcott Part II *op. cit.*

⁹² Cited in *Ibid*

⁹³ Van Duzer, 12 October 2020. Personal communication.

Police powers

The police powers doctrine holds that the state has the sovereign power to regulate matters of public policy, such as public safety and health⁹⁴, and is generally viewed as a defence to an indirect expropriation. Although non-discriminatory measures to achieve a public purpose should not give rise to a compensation claim to investors for their losses, interpretation of this doctrine is heavily contested. Newer IIAs provide greater clarity for its use by states, but the doctrine is rarely included in older IIAs. Some disputes under ICSID arbitration rules, for example, reject the doctrine, relying not on the intent of a regulation but only on its expropriatory effect on investments. This means that unless it is explicitly referenced in an IIA, the police powers doctrine may not offer a strong defence. But there are disagreements on this point with some investment lawyers arguing that the doctrine of police powers to protect public health is well established in international law and should be the locus of COVID-19 dispute resolutions⁹⁵. The police powers defence, however, is not regarded as an affirmative defence to an FET claim.

Exceptions

IIAs may contain exceptions to states' obligations for measures to protect the environment or public health or for national security, although fewer than 10 percent of IIAs currently in force have such provisions. Most EU and US treaties do not⁹⁶, apart from security exceptions in US IIAs. Carve-outs (exemptions) for general regulatory measures to protect public welfare goals are found in most newer treaties, although often with the caveat 'except in rare circumstances', a clause that still awaits tribunal interpretation. Criticisms of ISDS described earlier have led to newer IIAs granting more exceptions, such as the right of state parties to the CPTPP agreement to exclude tobacco measures from any ISDS claim. Several CPTPP members also signed side-letters with each other excluding or severely restricting use of ISDS rules⁹⁷. A post-treaty Declaration by three CPTPP members attempted to clarify the 'right of each party to regulate within its territory to achieve legitimate policy objectives' although the Declaration still defers to the investment chapter and is written in unenforceable language⁹⁸. The revised NAFTA (the United States/Mexico/Canada Agreement, or USMCA) excludes ISDS between the US and

⁹⁴ Bose, Police Powers as a Defence to COVID-19 Liability: Does it Protect Host States? *The American Review of International Arbitration*, 6 August 2020. <http://aria.law.columbia.edu/police-powers-as-a-defence-to-covid-19-liability-does-it-protect-host-states/?cn-reloaded=1>

⁹⁵ Millán, COVID-19 and the risk of foreign investor challenges, *National Magazine* 9 September 2020. <https://nationalmagazine.ca/en-ca/articles/law/in-depth/2020/covid-19-and-the-risk-of-foreign-investor-challeng?feed=rss>

⁹⁶ Lester, *The ISDS Controversy: How We Got Here and Where Next*, International Centre for Trade and Sustainable Development, 1 July 2016. <https://www.cato.org/publications/commentary/isds-controversy-how-we-got-here-where-next>

⁹⁷ Gleeson & Labonté *op. cit.*

⁹⁸ *Ibid* p.29

Canada (apart from legacy claims that can be initiated up to three years after the agreement enters into force), but not between the US and Mexico.

Exceptions in IIAs, as with exceptions in trade treaties, can be challenging for states to defend in a dispute. This is partly an artefact of wording in IIA texts. Newer IIAs such as the CPTPP and the USMCA attempt to emphasize governments' retained regulatory authority with texts stating that 'Nothing in this Chapter shall be construed to prevent a party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives'⁹⁹. The phrase 'otherwise consistent with this Chapter', however, essentially means that governments can regulate in the public interest only if they comply with all the other investment obligations defined in the Chapter, a weakness that has been found in other recent (and presumably improved) IIAs¹⁰⁰. Even carve-outs, such as CETA's investment chapter's carve-out for states' non-discriminatory regulatory measures aimed at protecting legitimate public welfare objectives, such as public health, could be challenged over whether it is sufficiently balanced against a breach of investment obligations¹⁰¹.

The uncertainties of governments' possible defences should they face an ISDS challenge is particularly worrying given the procedural and substantive critiques discussed earlier. As a group of investment lawyers summarized the present state of play:

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 crisis¹⁰².

Part 4. Preventative Options

Setting aside the legality of potential ISDS claims for pandemic measures, the ethical optics of foreign investors making a claim, especially when advised to do so by lawyers or third-party litigation funders with secondary financial interests in their doing so, has led to calls for governments to take steps to prevent such suits from arising in the first instance. Several preventative options have been identified.

⁹⁹ *Ibid* p.29

¹⁰⁰ Davitti et al *op. cit.*

¹⁰¹ Bento & Chen *op. cit.*

¹⁰² Bernasconi-Osterwalder et al *op. cit.*

Withdraw consent to arbitration

Since IIAs are between states, and not between claimant-investors and states per se, one option is for a state to notify its treaty partners that it withdraws consent to arbitration until further notice, although as yet this remains an untested argument. This could be challenged by a foreign investor by calling for a tribunal to rule on whether it has jurisdiction to hear the claimant's suit. Should the tribunal elect to do so, its arbitral decision, given the circumstances of COVID-19, could be annulled¹⁰³, although once more, this remains an untested argument.

Terminate IIAs

States could also choose to terminate their present IIAs, notably BITs; they may still have interests in the broader trade treaties with investment chapters (TIPs) making that option less desirable. Many countries, primarily LMICs, have already begun terminating their IIAs. In 2019, 22 terminated IIAs entered into effect¹⁰⁴. In 2016 the number was 19¹⁰⁵, and by the end of 2019 effective IIA terminations numbered 349¹⁰⁶. India and South Africa are among the countries notifying their intent to terminate many of their BITs, while other countries, including Bolivia, Ecuador, and Venezuela, have withdrawn from the ICSID Convention. The EU, in response to a ruling by the European Court of Justice, is terminating all intra-EU BITs, including their sunset ('survival') clauses. The existence of such clauses may pose a challenge to states attempting unilateral terminations of their IIAs. While unilateral terminations may be permitted under the Vienna Convention on the Law of Treaties under certain circumstances, they would not take effect until their sunset period expires (often 10 – 15 but as long as 30 years), unless both states mutually agree to terminate the treaty. Even then, it is possible that an investor may initiate arbitration and a tribunal would then have to decide if mutual early termination of an IIA extinguishes the investor's claim¹⁰⁷.

Intergovernmental Declaration to exempt all ISDS related to the pandemic

The International Institute for Sustainable Development (IISD) in June 2020 issued the text of a draft agreement to suspend all ISDS settlements related to COVID-19 measures¹⁰⁸. The draft text states that the 'agreement comes into force for each signatory upon signature.' States that sign this treaty could use this to signal their intent to notify their IIA treaty partners of their intent to withdraw consent to arbitration. In a more explicit statement, 630 international and national civil society groups in June 2020 issued an open letter urging governments to

¹⁰³ *Ibid*

¹⁰⁴ UNCTAD July 2020 *op. cit.*

¹⁰⁵ Samples *op. cit.*

¹⁰⁶ UNCTAD July 2020 *op. cit.*

¹⁰⁷ Zarowna, Termination of BITs and Sunset Clauses – What Can Investors in Poland Expect? Kluwer Arbitration Blog 28 February 2017. <http://arbitrationblog.kluwerarbitration.com/2017/02/28/booked-22-february-polish-bits/>

¹⁰⁸ IISD, Agreement for the coordinated suspension of investor-state dispute settlement with respect to COVID-19 related measures and disputes, 18 June 2020. <https://www.dropbox.com/s/q3v3lokjns453c4/ISDS-suspension-COVID-EN-updated.pdf?dl=0>

permanently restrict from ISDS any emergency measures enacted during a pandemic, and to suspend all ISDS cases or payment of awards during the course of the pandemic¹⁰⁹. Another open letter, signed by a group of prominent lawyers, economists, and former UN Special Rapporteurs, similarly calls for an ISDS moratorium related to COVID-19, and a permanent restriction on all arbitration claims related to government measures targeting health, economic, and social dimensions of the pandemic¹¹⁰.

Remove or reform ISDS provisions in current and future treaties

The civil society open letter, reiterating procedural and substantive critiques of ISDS, goes beyond the immediacy of the pandemic by calling on governments to stop negotiating, signing, or ratifying any new agreements that include ISDS. This argumentation is one of three recently mapped ISDS reform positions: paradigm shifting, in which the existing ISDS system is regarded as fundamentally flawed and in need of replacement¹¹¹. Rather than international tribunals, it is argued that investor-state disputes should remain within domestic court jurisdiction or confined to state to state arbitration. Systemic reformers are less critical, and favour retention of an international tribunal system but with overhauls of its procedural weaknesses, much as the CETA ICS attempts to do. Incrementalists are in favour of instituting only modest reforms to address specific shortcomings, such as the limited ISDS reforms made by the CPTPP.

UNCTAD in 2015 outlined a series of IIA reforms that combined both incremental and systemic options, accepting the possible utility of an ongoing international tribunal mechanism¹¹², though preferably one within a multilateral rather than bilateral or regional treaty. In responding to the risk of COVID-19 investor disputes, UNCTAD recommends the inclusion of general exception clauses in future IIAs for government measures taken to protect public health or more broadly stated public policies¹¹³. Similar exceptions can be found in WTO agreements for non-discriminatory measures that might otherwise violate trade rules, if such measures are found to be ‘necessary to protect human, animal or plant life or health’¹¹⁴. Trade exceptions, however, have proved difficult to uphold in disputes partly due to the need for governments to demonstrate a measure’s ‘necessity’ given counter-arguments of less-trade-restrictive alternatives. Similarly worded exceptions in IIAs may also face interpretative limitations. If such exceptions were worded more strongly as exclusions (carve-outs), ISDS cases on such measures would be less likely to proceed or to succeed.

¹⁰⁹ Open letter to governments on ISDS and COVID-19, June 2020. http://s2bnetwork.org/wp-content/uploads/2020/06/OpenLetterOnISDSAndCOVID_June2020.pdf

¹¹⁰ Columbia Center on Sustainable Development, Call for ISDS Moratorium During COVID-19 Crisis and Response. 6 May 2020. <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>

¹¹¹ Roberts, Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration. *American Journal of International Law* 112 (3) 410-32. July 2018. <https://doi-org.proxy.bib.uottawa.ca/10.1017/ajil.2018.69>

¹¹² UNCTAD, Investment Policy Framework for Sustainable Development, 2015. https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf

¹¹³ UNCTAD May 2020 *op. cit.*

¹¹⁴ Gleeson & Labonté *op. cit.*

ISDS reform remains an active and contested area of international diplomacy. Relative to COVID-19, countries will need to balance between their need for foreign investment to recover from the pandemic's economic losses with the importance of them avoiding future investor-state disputes, while taking into account the extent to which IIAs are actually effective in attracting foreign investment – something which has proven difficult to establish empirically¹¹⁵.

Conclusion

Until an investor suit is launched against a pandemic-related government measure, how serious might be the mooted risk for states remains unknown. Nonetheless, there is reason for governments to embrace a precautionary principle and enact preventative measures in the near-term. The options outlined in Part 4, and notably the first three, merit careful consideration by all governments.

Update

The African Union of Ministers of Trade issued a declaration (November 24, 2020) alerting its member states to these risks, urging them to explore mutual suspension of ISDS provisions in existing treaties and to consider renegotiating treaties to accommodate such exceptional situations.¹¹⁶ It is the first such governmental declaration recognizing the potential threat of ISDS suits.

¹¹⁵ A recent meta-analysis of 74 studies of the relationship between investor protection and FDI concluded that 'the effect of international investment agreements is so small as to be considered zero,' although the effects may be positive if the home country of the investor is an advanced economy. Brada, Drabek & Iwasaki, Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis, *Journal of Economic Surveys* 2020. p.26. <https://bilaterals.org/IMG/pdf/joes.12392.pdf>

¹¹⁶ UNCTAD, Investment Policy Monitor 24, 2021. https://unctad.org/system/files/official-document/diaepcbinf2021d2_en.pdf