

ANNEX

How to implement the proposals from the open letter on ISDS and COVID-19?

This annex is a companion to the open letter to governments on ISDS and COVID-19 signed by **XX** organisations from around the world.

The letter addresses the imminent threat of ISDS lawsuits as the result of the COVID-19 pandemic and the related unfolding economic crises^[8] and urges governments to take immediate action to ensure that the duty of governments to regulate in the public interest is safeguarded and put beyond the scope of ISDS claims.

The letter proposes six measures governments should urgently take. These proposals are legally sound and within the full prerogative of governments' sovereignty to implement.

This annex aims to give more details about the legal avenues governments can take to implement the proposals from the letter.

1- Permanently restrict the use of ISDS in all its forms in respect of claims that the state considers to concern COVID-19 related measures.

This measure is already gathering [wide support](#) worldwide. There are, however, different ways to implement this proposal:

1. Governments can, in some treaties, **withhold consent to ISDS**. There are 98 of the 2577 IIAs mapped by [UNCTAD](#) that require case by case consent to ISDS disputes. This means that investors cannot sue unless governments explicitly agree to be sued. Therefore, withholding consent to arbitrate is the legal right of governments and it is an easy step to take.
2. In 96% of the IIAs in force, governments have agreed to automatic consent. However, **governments** have the option to **withdraw consent to ISDS**. This legal avenue has already been flagged years ago by [academics](#) and more recently, [detailed language](#) has been developed on how this could be achieved.
It is important to note that while this measure will send a strong signal to the international community about the desire of governments to put a break to ISDS, it is unlikely to stop the actual filing of ISDS cases by investors. In the past, even after [Latin American governments](#) decided to withdraw consent to be sued at the International Centre for Settlement of Investment Disputes (ICSID), investors continued suing and ICSID arbitrators accepted to decide on those disputes.
3. One other way to restrict the use of ISDS would be by following the IISD proposal of an [“Agreement for the coordinated suspension of investor-state dispute settlement with respect to COVID-19 related measures and disputes”](#). IISD proposes the signing of a multilateral agreement, but also offers the option of a bilateral suspension agreement that could be negotiated between countries or blocs of countries. Countries resorting to bilateral solutions can still participate in multilateral efforts as a parallel, longer-term effort.

When we refer to ISDS in all its forms, we are making reference to other models of investor-state dispute settlement beyond the traditional included in most international investment agreements. In particular, the phrase is meant to include the investment court system proposal as embedded in the European Union (EU)-Canada Comprehensive Economic and Trade Agreement (CETA), EU-Singapore and EU-Vietnam free trade agreements. It would also include the Multilateral Investment Court proposal currently being discussed in the United Nations Commission on International Trade Law (UNCITRAL).

2- Suspend all ISDS cases on any issue against any government while it is fighting COVID-19 crises, when capacity needs to be focussed on the pandemic response.

There are currently 397 open ISDS cases against 83 countries. All of these governments, one way or another, are dealing with the COVID-19 crisis. Yet, they also have to worry about responding to the demands of the ongoing ISDS cases.

For example, Bolivia, has already asked tribunals in two ongoing cases ([Glencore v. Bolivia](#) and [Orlandini and Compania Minera Orlandini v. Bolivia](#)) to suspend proceedings explaining the government was unable to prepare its defense due to the pandemic crisis. In both cases, the Tribunals rejected the request for suspension of the cases. This is unacceptable at a time when the World Health Organization's Director General has [said](#) the whole of government must refocus on suppressing and controlling COVID-19.

Furthermore, from 1 March until 25 May 2020 when most governments were in the midst of the pandemic crisis, 12 new ISDS cases were filed at the International Centre for Settlement of Investment Disputes ([ICSID](#)) alone.^[9] Most of those were against Latin American countries, and Colombia was the worst hit with three lawsuits.

Unfortunately, it is not in governments' power to suspend ongoing proceedings. It is the decision of investors and arbitrators. So, in this case, governments will need to come together in a political declaration, which gathers the support of key international institutions, asking for a moratorium on all ongoing ISDS cases.

3- Ensure that no public money is spent paying corporations for ISDS awards during the pandemic.

Foreign debt moratoriums and cancellation programmes have recently received widespread support, including from international bodies such as the World Bank, UNCTAD among others.

From a policy perspective, the same rationale that applies to foreign debt payments should apply to ISDS debt. It would be rational for governments to stop payment of outstanding debts as a result of any ISDS awards while they face the mounting health and economic crises related to COVID-19, as well as reject payment of any ISDS awards related to actions that the state considers to concern COVID-19 related measures. Countries should discuss relief or restructuring of the payments with the creditors, in this case investors who have won an ISDS case.

Legally, ISDS awards can be set aside by the courts of the country that is the 'seat' of the arbitration, based on grounds set in the national law of arbitration. Generally, the grounds for annulment are limited and the number of successful annulments is consequently low. Grounds included in national arbitration laws, usually based on the UNCITRAL Model Law or the New York

Convention, are limited to validity of the form and substance of the arbitration agreement, procedural elements pertaining to the constitution of the arbitral tribunal and compliance with its mandate, and public policy grounds. Given the exceptional circumstances attached to the COVID-19 crisis, states could take action to clarify these grounds in their national laws, particularly making ISDS awards that result from claims challenging COVID-19 related measures and undermining the capacity of the losing state to respond to the national COVID-19 crisis, incompatible with public policy considerations. Moreover, states could consider clarifying that the validity of the arbitration agreement does not hold where a respondent state had unilaterally withdrawn consent to ISDS as a result of the COVID-19 pandemic.

4- Stop negotiating, signing, and or ratifying any new agreements that include ISDS.

There are hundreds of investment treaties that are currently under negotiation or have been signed but [await ratification](#) to enter into force. It is the prerogative of any government to put a stop to that process.

For example, recently the government of New Zealand [decided](#) to oppose ISDS in new agreements, [including](#) in the Regional Comprehensive Economic Partnership (RCEP). Also, all governments part of RCEP negotiations decided to [exclude ISDS](#) from the negotiations.

5- Terminate existing agreements with ISDS, ensuring that ‘survival clauses’ do not allow cases to be brought subsequently.

There are four possible avenues for governments to terminate their current investment agreements:

1. **Multilateral termination:** On 5 May 2020, 23 European Member States signed a [joint agreement](#) for the termination of intra-EU bilateral investment treaties among themselves. This is a clear example of how multilateral termination could be achieved.
2. **Unilateral termination:** many other countries have terminated bilateral investment treaties unilaterally (e.g. South Africa, Indonesia, India, Ecuador, Bolivia, Venezuela, Tanzania, and Italy, among [others](#)).
3. **Mutual consent of the parties involved** based on Article 54(b) of [the Vienna Convention on the Law of Treaties](#) (examples of recent termination by mutual agreement include Czech Republic terminated its BITs with Denmark, Italy, Malta and Slovenia; also Argentina and Indonesia agreed to terminate their BIT).
4. **Joint agreement of the governments in free trade agreements** to remove ISDS from the investment chapter.^[10]

The easiest option to pursue (unilateral termination), would trigger the survival clause which allows investors that were already in the country at the time of termination to continue suing the government for a set time (up to 20 years) after the treaty was terminated.

It is worth noticing that options 1, 3 and 4 could annul the effects of survival clauses, so investors would not be allowed to continue suing the government after the termination of the treaty.

IISD has recently [published](#) a briefing on Best Practices about “Terminating a Bilateral Investment Treaty” that offers specific language and addresses different considerations to take into account for governments.

It is worth mentioning that [recent studies](#) have found that termination of investment agreements does not affect investment flows.

6- In light of threats exposed by the pandemic, comprehensively review existing agreements that include ISDS to see if they are fit for purpose

Twenty years after most of these treaties were signed, there is a clear need to carry out comprehensive reviews of these type agreements. This need becomes even more urgent seeing the threats that the international investment regime poses in light of the current pandemic. Assessing the risks of these agreements vis a vis the benefits becomes imperative.

During the last decade, several governments have launched comprehensive reviews of their investment treaties. Among those, [South Africa](#) and [Ecuador](#) for example carried out publicly available reviews following different methodologies. In all cases, however, they ended up establishing that the risks of the agreements outweighed any possible benefit, and therefore recommended that governments roll back ISDS commitments and refrain from committing to ISDS in the future.

Furthermore, academics like Lauge N Poulsen, Jonathan Bonnitcha and Jason Webb Yackee have developed an [analytical framework for assessing costs and benefits](#) of Investment Protection Treaties, that provides clear methodology for how this type of assessment could be implemented.

[1] See for example: <https://www.alston.com/en/insights/events/2020/04/the-coming-wave-of-covid-19-arbitration/> , <https://www.ropesgray.com/en/newsroom/alerts/2020/04/COVID-19-Measures-Leveraging-Investment-Agreements-to-Protect-Foreign-Investments> , <https://www.reedsmith.com/en/perspectives/2020/05/reed-smith-quarterly-international-arbitration-focus> , <https://globalarbitrationreview.com/article/1222354/could-covid-19-emergency-measures-give-rise-to-investment-claims-first-reflections-from-italy> , <https://www.acerislaw.com/the-covid-19-pandemic-and-investment-arbitration/>

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

[3] https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf

[4] <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>

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

[6] <https://investmentpolicy.unctad.org/investment-dispute-settlement>

[7] Calculation based on the UNCTAD database for cases up to December 2018. Out of the 310 disclosed cases which had been decided in favor of the investor or settled, information on damages was provided for 213 cases (69%).

[8] <https://longreads.tni.org/pandemic-profiteers/>, <https://longreads.tni.org/cashing-in-on-the-pandemic>; <https://www.iisd.org/library/investor-state-claims-amidst-covid-19>; and https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf

[9] 12 ISDS cases (11 based on IIAs and 1 based on a contract) were filed against the following countries: Colombia (3 cases), Peru (2), Panama (1), Mexico (1), Dominican Republic (1), Norway (1), Croatia (1), Serbia (1), Romania (1)

[10] For example the recently concluded Agreement between the United States of America, the United Mexican States, and Canada (USMCA) amended the North American Free Trade Agreement (NAFTA) to completely remove ISDS between the US and Canada and, partially, between US and Mexico. <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.