

UNCTAD Virtual IIA Conference

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- Some law firms have been advising investors on how to use international investment agreements (IIAs) to challenge measures that governments have taken to deal with COVID-19 and its economic and social crises.¹ Therefore:
 - 659 civil society organisations (CSOs) from around the world have urged governments to:
 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.
 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.
 3. Ensure that no public money is spent paying corporations for ISDS awards during the pandemic.
 4. Stop negotiating, signing, and or ratifying any new agreements that include ISDS.
 5. Terminate existing agreements with ISDS, ensuring that ‘survival clauses’ do not allow cases to be brought subsequently.
 6. In light of threats exposed by the pandemic, comprehensively review existing agreements that include ISDS to see if they are fit for purpose.’²
 - In addition, UN Special Rapporteurs and other eminent persons have called for ‘an immediate moratorium on all arbitration claims by private corporations against governments using international investment treaties, and a permanent restriction on all arbitration claims related to government measures targeting health, economic, and social dimensions of the pandemic and its effects.’³
- While adding health and other general exceptions to IIAs (including as part of IIA reform) can help address these concerns, the commonly copied health/general exception from GATT/GATS at the World Trade Organization (WTO) has been shown to be difficult to use: 1/44 success rate at the WTO.⁴
- Given the way investor-to-state dispute settlement (ISDS) can be used to challenge health and other measures, the recent US-Mexico-Canada Agreement largely removes ISDS from the North American Free Trade Agreement⁵ and the Regional Comprehensive Economic Partnership (which was signed a few days ago) has no ISDS⁶.
 - Other IIAs which include ISDS have an explicit carve out for health measures. E.g. the recent Indonesia-Australia Comprehensive Economic Partnership Agreement (IACEPA) stipulates that no ISDS claims can be brought ‘in relation to a measure that is designed and implemented to protect or promote public health’⁷. Despite a health exception equivalent to the GATS one in the IACEPA and which applies to the investment chapter,⁸ the Parties did not appear confident it would be sufficient and so still explicitly excluded health measures from ISDS.
- In light of COVID-19 and the economic and social crises it has caused, ISDS reform, including in the context of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III should not be limited to mere tweaks to make arbitration work better or have more legitimacy. A more fundamental rethink of ISDS is needed since it (and IIAs more broadly) are not proven to attract foreign direct investment (FDI).⁹ Studies have found that other factors such as market size and growth, natural resources, labour and infrastructure are more important drivers of FDI.¹⁰ Therefore it is not clear that the benefits of IIAs outweigh the costs, especially during the COVID-19 pandemic when governments around the world have needed to take unprecedented measures.

¹ E.g. see <https://longreads.tni.org/cashing-in-on-the-pandemic>

² <http://s2bnetwork.org/sign-the-pen-letter-to-governments-on-isds-and-covid-19/>

³ <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>

⁴ https://www.citizen.org/sites/default/files/general-exception_4.pdf. In addition, the WTO's privacy etc exceptions are commonly seen as self-cancelling because they are only for 'laws or regulations **which are not inconsistent with the provisions of this Agreement**'.

⁵ <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>

⁶ It may be added later, <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep/rcep-text-and-associated-documents>

⁷ <https://www.dfat.gov.au/trade/agreements/in-force/iacepa/iacepa-text/Pages/iacepa-chapter-14-investment>

⁸ <https://www.dfat.gov.au/trade/agreements/in-force/iacepa/iacepa-text/Pages/iacepa-chapter-17-general-provisions-and-exceptions>

⁹ E.g. see http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf; World Bank. (2003). Global Economic Prospects and the Developing Countries 003: Investing to Unlock Global Opportunities. pp133. Washington DC, World Bank; <http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-3121>; Australian Productivity Commission 2010, Bilateral and Regional Trade Agreements, p.269;

http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=lauge_poulsen;

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887

¹⁰ E.g. see Paulo Eliche Tembe & Kangning Xu (2012) "Attracting Foreign Direct Investment in Developing Countries: Determinants and Policies-A Comparative Study between Mozambique and China"; U.S. Agency for International Development (2005) Foreign Direct Investment: Putting It to Work in Developing Countries. Washington, DC; <https://openknowledge.worldbank.org/handle/10986/11060>