

Preparing for the COVID aftermath



Sofia Baliño considers the threat of ISDS arbitration against emergency measures, and warns governments to mobilize as they have in the health sphere and apply it to their international investment agreements and policies

In the months since COVID-19 escalated into the international public health crisis that we are now living through, governments around the world have had to take rapid, comprehensive, and costly action. These steps have focused on how to keep the strain on public health systems at manageable levels, facilitate access to essential medicines and technologies, and minimize lost jobs and income, while ensuring that support systems are in place for those jobs and livelihoods affected.

The long-term effects of COVID-19 are too soon to know, and as the virus now takes hold in Latin America and Africa, economies in Europe, Asia, and Oceania are testing out reopening measures and preparing for the likely 'second wave' of infection, which could take place in the last quarter of 2020¹.

Meanwhile, the death toll of COVID continues to rise, with 371,166 lives lost and over six million sickened as of June 1, 2020, according to World Health Organization figures². Along with trying to save lives, governments are also having to strike a delicate and contentious balance between public health and economic health, amid growing concerns that poverty levels and hunger levels will skyrocket in the months and years to come³.

Governments are therefore enacting stimulus packages aimed at revitalizing their economies, while calibrating their foreign aid initiatives to respond to health and humanitarian needs and much leaner budgets⁴. There is also a growing push from experts, civil society, and many officials to *"build back better"* and use the difficult lessons of COVID to develop more resilient economies⁵.

They are also looking to boost trade in goods and services, especially with sectors such as tourism and freight transport overseas hit hard by the lockdowns⁶, and taking steps to promote, incentivize, and facilitate investment⁷. Some of the sectors that have seen the largest drops in foreign direct investment flows include energy and aviation, according to UN figures⁸.

As these efforts advance, there is another concern that governments may soon face, which could place their economies under even further strain and which would complicate their efforts at undertaking the public interest measures needed to rebuild sustainably and safely. Governments could find themselves grappling with investor-state arbitration claims that challenge their COVID emergency measures, as foreign investors use the dispute settlement mechanism built into many international investment agreements (IIAs) and treaties with investment provisions.

The international economic legal systems and policy frameworks in which we operate have useful flexibilities that have yet to be explored fully, and which can be mobilized to support the COVID recovery

Should this occur, these arbitration cases would exacerbate the challenges that public budgets are already facing due to the need for stimulus measures and the difficulty in collecting government revenue. It could also lead to 'regulatory chill' as governments weigh the need for taking public interest measures against the risk of being brought up in front of an arbitral tribunal to defend them.

Investor-state dispute settlement (ISDS) has long been recognized as a deeply problematic mechanism, spurring calls from multiple quarters for reform over the past several years. The latest figures from the United Nations Conference on Trade and Development (UNCTAD) place the total number of ISDS arbitration cases at over 1,000⁹. Damages awards from these cases are often hefty, with some of the largest awards in the billions of USD. There are also over 3,000 international investment agreements and treaties with investment provisions, many of which have an ISDS mechanism¹⁰.

There are already ongoing processes at the bilateral, regional, and multilateral levels to address ISDS's many procedural and substantive challenges. These include the deliberations at the United Nations Commission on International Trade Law (UNCITRAL) on ISDS reform solutions; the move by some states to renegotiate their older treaties or terminate them; and the efforts some states have taken to develop model treaties that no longer rely on ISDS, as seen in the cases of Brazil's Cooperation and Facilitation Investment Agreements and the country's recent bilateral investment treaty with India¹¹.

These efforts are important and must continue, but the current COVID landscape requires a more immediate approach. Early data from the International Monetary Fund is already showing that the global economy could shrink by 3 percent this year, which could worsen substantially¹².

The pandemic has severely disrupted global supply chains, hurting workers and consumers, while the World Trade Organization is warning of sharp contractions in trade flows of anywhere between 13 and 32 percent¹³. Concurrently, UNCTAD predicted in late March that flows of foreign direct investment over the 2020-2021 period could drop between 30 to 40 percent¹⁴.

With the global economy heading towards its darkest period in generations, the temptation for investors to take legal action to remedy the losses will be great, even if the costs to governments and their citizens will be far greater.

Learning from past experience, developing a concerted response

This risk may appear hypothetical. Past history has shown, however, that major crises of various forms, ranging from the economic to the humanitarian, have often been followed by ISDS arbitration as foreign investors make the claim that their investments have been unfairly expropriated, or that they have not been subject to *“fair and equitable treatment.”*¹⁵

Moreover, some international law firms have already published guidance on how to approach these cases in the post-COVID landscape, should foreign investors feel that they have been discriminated against relative to their domestic counterparts, or have had their investments expropriated¹⁶.

The prospect of COVID emergency measures being challenged in front of three-person arbitral panels is already expected. The Peruvian government debated whether to move ahead with plans to stop collecting toll fees on its roads during its current state of emergency, with concerns being raised that the move could lead to ISDS claims further down the line^{17,18}.

Argentina's sovereign debt crisis, which has dominated international headlines in recent weeks, has fuelled concerns from some experts that debt restructuring efforts could end up involving arbitration in front of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), given similar past experiences¹⁹.

The impact of COVID-19 on the economy, including on foreign investors, is understandably worrisome. In times of crisis, however, there are more productive avenues than resorting to investor-state arbitration. It is also important, in these difficult times, for governments to demonstrate solidarity as they prepare for the long road to COVID recovery, especially during an era that has already seen myriad challenges to multilateralism and international development cooperation.

Indeed, an important example of this solidarity came on Friday May 29, 2020, when the World Health Organization (WHO) and Costa Rica announced the *COVID-19 Technology Access Pool*, bringing together dozens of countries and institutions in an initiative to facilitate technology transfer, share diagnostics and essential medicines, and in other ways take collective action in response to COVID²⁰.

Their associated 'Solidarity Call to Action' calls for the voluntary pooling of *"knowledge, intellectual property and data necessary for COVID-19"* in order to effectively *"leverage our collective efforts to advance scientific discovery, technology development and broad sharing of the benefits of scientific advancement and its applications based on the right to health."*²¹

This move builds on the important momentum garnered by the World Health Assembly COVID resolution earlier in May, where the WHO's member countries endorsed language on using the intellectual property flexibilities inherent in international trade rules, though with the notable dissociation of the United States from the relevant paragraph on intellectual property rights²².

These initiatives and pledges are important, both for their practical impact on ensuring health access, but also in reminding us that governments can and should act in concert.

Indeed, there are some efforts underway at the international level among some non-binding forums to agree on steps to address the trade and investment-related difficulties that are arising from COVID-19 and show a united front moving forward.

Trade and investment ministers from the G20, for example, endorsed on May 14, 2020, a document entitled *G20 Actions to Support World Trade and Investment in Response to COVID-19*, which spanned the subjects of trade facilitation and regulation; the need to understand the crisis' impact on micro, small, and medium-sized enterprises; and investment promotion, especially in developing and least developed countries, together with determining where investment is most needed, such as in the health space or 'sustainable agriculture production' and exchanging best practices²³.

While the G20 actions and associated statements are important and outline many promising areas of future cooperation, they also miss an opportunity to address the growing risk of investor-state arbitration targeting COVID-19 emergency measures. There are, understandably, many questions that arise from the idea of suspending the application of ISDS to COVID-related measures. These include the definition of a COVID measure, the length of such a suspension, and the impact of such a move on the perception of a state's business climate, especially in such tenuous economic times.

Another question is how to pursue such an initiative – such as whether negotiating suspensions of ISDS on COVID measures should be conducted bilaterally, or if groups of like-minded states can agree on such an approach together and how²⁴.

Discussions on these questions, and any others that arise, are important and should be had in order to craft an approach that is appropriate for countries' economic contexts, national development priorities, and legal systems. There is also the risk of ISDS under domestic laws and contracts, which should not be ignored, and which should be considered alongside any suspension of ISDS on COVID measures under investment treaties.

The international economic legal systems and policy frameworks in which we operate have useful flexibilities that have yet to be explored fully, and which can be mobilized to support the COVID recovery, as the health community has already shown.

It is far from perfect, however, and its failings can easily be exploited in times of crisis, unless governments mobilize the same solidarity and goodwill that they have used in the health sphere and apply it to their international investment agreements and policies. ■

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Endnotes

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