

PROPOSED TEXT AND COMMENTARY

Agreement for the Coordinated Suspension of Investor–State Dispute Settlement With Respect to COVID-19-Related Measures and Disputes

June 18, 2020

Background

Governments around the world are continuing to act to curb the spread of COVID-19 through emergency interventions such as shutdowns and strict containment while also enacting measures to ensure the supply of essential foods, medical equipment, and health care services. Shops, factories, airlines, mines, and other businesses are drastically downsizing or halting operations due to emergency regulations. Governments have put curbs on exports of medical supplies and medicines, as well as food. At the same time, states are taking emergency measures to address the economic and financial impacts of the COVID-19 crisis.

These emergency measures are hitting businesses hard, and they are creating an unprecedented risk of foreign investors initiating investor–state dispute settlements (ISDSs) under the web of investment treaties concluded across the globe. This note provides language for a multilateral agreement for states to address this risk by suspending treaty-based ISDS for all COVID-19-related measures. It could also be adapted for use in a bilateral context, which would be simpler and faster to implement but less comprehensive in terms of coverage. Ideally, both options are pursued in parallel.

IISD developed the below draft agreement for the coordinated suspension of ISDS with respect to COVID-19-related measures and disputes in April 2020. The text of this draft agreement was subject to public consultations, and the below-revised text reflects comments and submissions provided by developing country investment negotiators, international law experts, and civil society organizations.



Commentary

Agreement for the Coordinated Suspension of Investor–State Dispute Settlement With Respect to COVID-19-Related Measures and Disputes

This instrument sets out an agreement between signatory states to suspend the operation of the investor–state dispute settlement (ISDS) provisions in all investment treaties concluded between them in relation to disputes involving challenges to COVID-19-related measures. The ability of state parties to a treaty to agree to a suspension of the operation of all or part of the treaty is codified in the Vienna Convention on the Law of Treaties, per articles 57 and 58.

COVID-19-related measures are defined to encompass a range of state actions taken after December 1, 2019, to protect public health and manage national economies in relation to the COVID-19 pandemic. Paragraph 1 makes the definition of COVID-19 measures “self-judging.” This means that where the host state declares in good faith that a measure relates to COVID-19, that declaration is determinative, and a tribunal will not have the authority to decide on the question of whether or not a measure is related to COVID-19.

In the definition of COVID-19-related measures, the reference to December 1, 2019, reflects the date of the first identified case of COVID-19 in Wuhan, China. The suspension will apply to the ISDS provisions in the respective investment treaty until either the end of the term of the agreement as set down by the signatories when signing this agreement or until the signatories agree that the agreement no longer needs to be in place.

For multilateral investment treaties to which not all parties are signatory, the suspension has effect only as between the states who have signed the agreement. There is an optional provision that would allow states to exclude certain treaties from the scope of the agreement.

The agreement comes into effect upon signature, and the United Nations Secretary-General is appointed as depositary. Signatories could also designate another depositary, such as one of the signatory states. The term “agreement” could be replaced with any other term, such as “instrument,” “Memorandum of Understanding,” etc., as preferred by the signatory states.

Bilateral Agreement for the Suspension of Investor–State Dispute Settlement With Respect to COVID-19-Related Measures and Disputes

The advantage of a multilateral solution is that one agreement can apply to hundreds or more investment treaties. However, a multilateral solution will likely take some time, especially if states cannot physically meet to negotiate a suspension agreement due to travel and meeting restrictions during the COVID-19 pandemic, and procedures to conclude an agreement without physical presence are not yet in place.



It is therefore important for states to identify those investment treaties that pose a high risk with respect to COVID-related ISDS claims and address these bilaterally. The bilateral option will be faster and easier to implement. The language proposed for the multilateral suspension agreement can be adapted for suspension at the bilateral level, in which case no depositary will be required. Countries resorting to bilateral solutions can still participate in multilateral efforts as a parallel, longer-term effort.

A bilateral suspension agreement could also be negotiated between blocs of countries, for example, between the European Union and another country or regional grouping.

The signatories to this agreement:

Convinced of the need of our governments to have acted, and to be able to continue to act, to protect the health and lives of our citizens and the management of the economy and protection of workers as a result of the health and economic impacts of COVID-19;

Taking into account the United Nations General Assembly resolution of April 2, 2020, recognizing the unprecedented effects of the COVID-19 pandemic and calling for intensified international cooperation to contain, mitigate, and defeat the virus;

Having reviewed and considered the potential for disputes arising between investors and states under investment treaties in relation to the measures taken by governments to respond to the COVID-19 pandemic;

Acting in our capacity as parties to the Investment Treaties covered by this agreement;

Have agreed and consented as follows:

1. The operation of the provision or provisions of any Investment Treaty in force between two or more signatories to this agreement providing for the settlement of disputes between an investor and a state is hereby suspended with respect to claims that the respondent signatory state considers to be concerning COVID-19-related measures.
2. The term “Investment Treaty” means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, investment promotion and protection agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a provision or provisions on the settlement of disputes between an investor and a party to that treaty.
3. For an Investment Treaty in force between more than two signatories to this agreement but where not all parties to that Investment Treaty are signatories to this agreement, article 1 shall apply to that Investment Treaty only as between the parties that are signatories to this agreement.
4. The term “COVID-19-related measures” includes any measure attributable to a signatory to this agreement, taken on or after December 1, 2019, in connection with COVID-19. For greater certainty, this includes any measure relating to the curbing or tracing of the transmission of the virus; ensuring the availability of tangible and intangible goods, services, materials, or technology; or national economic



recovery, stability, or development during or following the spread of the virus and the international response; as well as any other objective relevant to the COVID-19 pandemic and its impact.

5. [*Optional*: Paragraph 1 shall not apply with respect to any Investment Treaty notified by a signatory as a treaty it wishes to exclude from this agreement. Notifications shall identify any excluded treaty by title, names of the parties, date of signature, and, if applicable at the time of the notification, date of entry into force.]
6. This agreement comes into force for each signatory upon signature.
7. Signatures shall be deposited with the [Secretary-General of the United Nations] [country] [regional organization], as Depositary of the present agreement.
8. [The signatories shall consult every five years from the date of the first signature of this agreement to review the ongoing need for suspension.] OR [This agreement shall not apply to any measure adopted after [X] years after the date of the first signature.]

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