Open letter to governments on ISDS and COVID-19

To Governments:

We are writing to you today to urge you to take a lead in ensuring countries around the world do not face a wave of investor-state dispute settlement (ISDS) cases arising from actions taken to tackle the COVID-19 pandemic and ensuing economic crisis.

Globally, some governments are taking actions to save lives, stem the pandemic, protect jobs, counter economic disaster and ensure peoples’ basic needs are met. The level of these actions has been unprecedented in modern times and the need for these actions has been clear. But the expansive reach of the ISDS system could open such critical government actions to claims for millions in compensation from foreign investors. The numbers of such claims could also be unprecedented and impose massive financial burdens on governments struggling under the burden of devastating health and economic crises.

ISDS in various forms is written into many trade and investment agreements. It allows foreign investors – and foreign investors alone – to sue governments in secretive tribunals outside of the national legal system for amounts far higher than are likely to be available to them in domestic courts.

The lawyers, who profit enormously from the ISDS system, are already fishing for corporate clients interested in using ISDS tribunals to extract large sums from governments over actions they have taken in response to the COVID-19 crisis. Law firms, trade experts, UN bodies and human rights experts have already predicted an imminent wave of ISDS cases. Specialist law journals have speculated that: “the past few weeks may mark the beginning of a boom” of ISDS cases. Crisis situations in the past, such as the Argentine financial crisis or the Arab Spring, have led to many cases.

Cases could arise from actions that many governments have taken, such as those with the aim of:

- restricting and closing business activities to limit the spread of the virus and protect workers
- securing resources for health systems by requisitioning use of private hospital facilities, putting private healthcare providers under public control, or requiring manufacturers to produce ventilators
- mandating relief from mortgage payments or rent for households and businesses
- preventing foreign takeovers of strategic businesses stricken by the crisis
- ensuring access to clean water for hand-washing and sanitation by freezing utility bills and suspending disconnections
- ensuring medicines, tests and vaccines are affordable
- debt restructuring

4 http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/
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The damage from a COVID-related wave of ISDS cases could be immense. From among the 1,023 known ISDS cases, thirteen have resulted in awards or settlements of more than US$1 billion, including for lost future profits. By the end of 2018, states worldwide had been ordered or agreed to pay investors in publicly known ISDS cases the amount of US$88 billion. Some developing countries have billions outstanding in pending ISDS claims.

At a time when government resources are stretched to the limit in responding to the crisis, public money should not be diverted from saving lives, jobs and livelihoods into paying ISDS awards or legal fees to fight a claim. And given that the battle against COVID-19 will continue, a spate of cases now could result in a ‘regulatory chilling’ effect, in which governments water down, postpone or withdraw actions to tackle the pandemic from the fear of such payments, which could be deadly.

In order to prevent this, we urge governments to immediately and urgently take the following steps, before the first cases are brought:

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.

More information on how to implement these actions is available in the annex (p12) to this letter.

We urge you 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.

Signed,

International and regional

1. ACAFREMIN
2. ActionAid
3. Africa Europe Faith & Justice Network
4. Amigos de la Tierra América Latina y el Caribe – ATALC
5. Arab NGO Network for Development
6. Asia Pacific Forum on Women, Law & Development (APWLDB
7. Asian Peoples’ Movement on Debt and Development (APMDD)
8. AWID
9. BEACON
10. bilaterals.org

11. Center for International Environmental Law (CIEL)
12. CIDSE
13. Committee for the Abolition of Illegitimate Debt (CADTM)
14. Confederación Sindical de trabajadoras/es de las Américas (CSA)
15. DAWN (Development Alternatives with Women for a New Era)
16. Emmaüs International
17. European Attac Network
18. European Coordination Via Campesina (ECVC)
19. European Environmental Bureau

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%).
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20. European Federation of Public Service Unions
21. European Network Against the Privatization and Commercialization of Health and Social Protection / Réseau européen contre la privatisation et la commercialisation de la santé et de la protection sociale
22. Focus on the Global South
23. Food & Water Action Europe
24. Friends of the Earth Europe
25. Friends of the Earth International
26. Gender and Trade Coalition
27. Global Alliance on Media and Gender (GAMAG)
28. Global Anti-Aerotropolis Movement (GAAM)
29. Global Policy Forum
30. GRAIN
31. Greenpeace
32. Health Action International
33. Health Global Access Project
34. IndustriALL Global Union
35. Institute of the Blessed Virgin Mary – Loreto Generalate
36. International Association of Machinists and Aerospace Workers (IAMAW)
37. International Association of People’s Lawyers
38. International Baby Food Action Network
39. International Corporate Accountability Roundtable (ICAR)
40. International Trade Union Confederation (ITUC)
41. International Treatment Preparedness Coalition
42. International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF)
43. International Women’s Rights Action Watch Asia Pacific
44. Latindadd – Red Latinoamericana por Justicia Económica y Social
45. Médecins Sans Frontières Access Campaign
46. Moana Nui
47. Oxfam International
48. Pacific Network on Globalisation
49. Peoples Health Movement
50. Plataforma América Latina mejor sin TLC
51. Project on Organizing, Development, Education, and Research (PODER)
52. Public Services International – Interamerica
53. Public Services International (PSI)
54. Religious of the Sacred Heart of Mary JPIC / NGO
55. REPEM -LAC
56. RIPESS – Red Intercontinental de Promotion de l’Economía Social Solidaria
57. Social Watch
58. Society for International Development (SID)
59. Soroptimist International
60. SumOfUs
61. Tax Justice Network
62. Third World Network
63. UNI Américas
64. United Methodist Church – General Board of Church and Society
65. UNMGCY (United Nations Major Group for Children and Youth)
66. Urgenci International Community Supported Agriculture Network
67. WeMove Europe
68. WIDE+ (Women In Development Europe+) gender and trade WG
69. WoMin
70. World Rainforest Movement

National

71. Campaign Against Foreign Control of Aotearoa, Aotearoa / New Zealand
72. GE Free NZ in Food and environment, Aotearoa / New Zealand
73. Its Our Future, Aotearoa / New Zealand
74. New Zealand Council of Trade Unions (NZCTU), Aotearoa / New Zealand
75. Sustainable Ōtautahi Christchurch, Aotearoa / New Zealand
76. Acción por la Biodiversidad, Argentina
77. Amigos de la Tierra Argentina, Argentina
78. Asamblea Argentina mejor sin TLC, Argentina
79. Asamblea Jáchal No Se Toca, Argentina

June 2020
| 80. | Asociacion Ciudadana por los Derechos Humanos, Argentina |
| 81. | ATTAC Argentina, Argentina |
| 82. | CENTRAL DE TRABAJADORES ARGENTINOS de los TRABAJADORES (CTA-T), Argentina |
| 83. | Centro de Estudios Legales y Sociales (CELS), Argentina |
| 84. | Colectivo de Estudios e Investigaciones Sociales (CEISO), Argentina |
| 85. | Confederación de Trabajadores Municipales (CTM), Argentina |
| 86. | Confederacion General del Trabajo de la Republica Argentina, Argentina |
| 87. | CTA Autónoma, Argentina |
| 88. | Diálogo 2000-Jubileo Sur Argentina, Argentina |
| 89. | Foro Ciudadanode Participación por la Justicia y los Derechos Humanos FOCO, Argentina |
| 90. | FSM, Argentina |
| 91. | Fundación ECOSUR, Argentina |
| 92. | Fundación GEP, Argentina |
| 93. | Fundacion para Estudio e Investigación de la Mujer, Argentina |
| 94. | Iniciativa Arcoiris de Ecología Política, Argentina |
| 95. | Multisectorial Antixtractivista, Argentina |
| 96. | Ong ALERTA ANGOSTURA, Argentina |
| 97. | PROYECTO CRECER CON ESPERANZA, Argentina |
| 98. | Red de Defensoras del Ambiente y el Buen Vivir, Argentina |
| 99. | Center for Development of Civil Society, Armenia |
| 100. | Confidence Health NGO, Armenia |
| 101. | ActionAid Australia, Australia |
| 102. | Australian Council of Trade Unions, Australia |
| 103. | Australian Fair Trade and Investment Network, Australia |
| 104. | Australian Food Sovereignty Alliance, Australia |
| 105. | Australian Religious Response to Climate Change, Australia |
| 106. | Australians for Justice, Australia |
| 107. | Bougainville Freedom Movement, Australia |
| 108. | Catholics in Coalition for Justice and Peace, Australia |
| 109. | ClimActs, Australia |
| 110. | Data Stream Pty Limited, Australia |
| 111. | Food Intolerance Network, Australia |
| 112. | Frenchs Forest Catholic Parish Social Justice Group, Australia |
| 113. | Friends of the Earth Adelaide, Australia |
| 114. | Friends of the Earth Australia, Australia |
| 115. | GeneEthics, Australia |
| 116. | Grail Global Justice Network, Australia |
| 117. | Locals Into Victoria’s Environment, Australia |
| 118. | Loreto Sisters Justice Network, Australia |
| 119. | Missionaries of the Sacred Heart Justice and Peace Centre, Australia |
| 120. | Mundaring in Transition, Australia |
| 121. | Music Trust, Australia |
| 122. | Nature First, Australia |
| 123. | Pesticide Action Group of Western Australia, Australia |
| 124. | Public Health Association of Australia, Australia |
| 125. | SEARCH Foundation, Australia |
| 126. | Sisters of Charity, Australia |
| 127. | Sutherland Shire Environment Centre, Australia |
| 128. | Union Aid Abroad-APHEDA, Australia |
| 129. | Allianz gerechter Handel, Austria |
| 130. | Anders Handeln, Austria |
| 131. | Attac Austria, Austria |
| 132. | Center for Encounter and Active Non-Violence, Austria |
| 133. | International Fellowship of Reconciliation Austria, Austria |
| 134. | transform!at, Austria |
| 135. | Welthaus Diözese Graz-Seckau, Austria |
| 136. | WIDE, Austria |
| 137. | younion – Die Daseinsgewerkschaft, Austria |
| 138. | AK EUROPA (Chamber of Labour Austria), Austria |
| 139. | Aid Organization, Bangladesh |
| 140. | Bangladesh Krishok Federation, Bangladesh |
| 141. | ELA, Basque Country |
| 142. | 11.11.11, Belgium |
| 143. | Broederlijk Delen, Belgium |
| 144. | CGSP ALR, Belgium |
| 145. | CNCD-11.11.11, Belgium |
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146. Corporate Europe Observatory, Belgium
147. Entraide et Fraternité, Belgium
148. FIAN Belgium, Belgium
149. FOS, Belgium
150. Le Monde selon les femmes asbl, Belgium
151. Links Ecologisch Forum – Forum Gauche Ecolgie, Belgium
152. Solsoc, Belgium
153. Viva Salud, Belgium
154. WSM, Belgium
155. MOC Mouvement Ouvrier Chrétien, Belgium
156. Social Watch Bénin, Benin
157. ANAPA, Bolivia
158. Coordinadora de la Mujer, Bolivia
159. TerraJusta, Bolivia
160. Centar za životnu sredinu/ Friends of the Earth Bosnia and Herzegovina, Bosnia and Herzegovina
161. Adufms, Brazil
162. Aliança RECOs – Redes de Cooperação Comunitária Sem Fronteiras, Brazil
163. Central de Movimento Popular de Pernambuco, Brazil
164. CENTRO ECOLOGICO, Brazil
165. FONASC, Brazil
166. Fórum Sindical de AP, RR e RO, Brazil
167. Gestos (soropositividade, comunicação, gênero), Brazil
168. IBFAN Brasil, Brazil
169. Instituto Oca do Sol, Brazil
170. Instituto Políticas Alternativas para o Cone Sul (PACS), Brazil
171. Internacional de Serviços Públicos, Brazil
172. Movimento Ciencia Cidadã Brasil, Brazil
173. Movimento Mulheres pela P@Z!, Brazil
174. Movimento Negro Unificado de Pernambuco, Brazil
175. Movimento Ouro Preto pela Infância, Brazil
176. Observatório da Cidadania Dom José Alves da Costa, Brazil
177. Observatório da Mulher, Brazil
178. Organização de Cidadania, Cultura e Ambiente (OCCA Pantanal), Brazil
179. REBRIP- Rede Brasileira de Integração dos Povos, Brazil
180. Sindicato dos Psicólogos do Estado de São Paulo, Brazil
181. SINDSEP/AP, Brazil
182. Avtonomna Rabotnicheska Konfederacija – ARK (Autonomous Worker’s Confederation), Bulgaria
183. Federation of Trade Unions – Health services – CITUB, Bulgaria
184. Za Zemiata, FoE Bulgaria, Bulgaria
185. ALTSEAN-Burma, Burma
186. DUKINGIRE ISI YACU, Burundi
187. SFBSP-Burundi, Burundi
188. Terre des Jeunes du Burundi, Burundi
189. Social Action for Community and Development, Cambodia
190. Women’s Network for Unity, Cambodia
191. Worker’s Information Center (WIC), Cambodia
192. Africa Development Interchange Network (ADIN), Cameroon
193. Cadire Cameroon Association, Cameroon
194. Federation of Environmental and Ecological Diversity for Agricultural Revampment and Human Rights (FEEDAR & HR), Cameroon
195. Alliance du personnel professionnel et technique de la santé, Canada
196. AmiEs de Terre de Québec, Canada
197. ATTAC-Québec, Canada
198. Canadian HIV/AIDS Legal Network, Canada
199. Centrale des syndicats démocratiques (CSD), Canada
200. Comité pour les droits humains en Amérique latine (CDHAL), Canada
201. Conseil central du Montréal métropolitain-CSN, Canada
202. Council of Canadians, Canada
203. MiningWatch Canada, Canada
204. National Union of Public and General Employees (NUPGE), Canada
205. Réseau québécois sur l’intégration continentale, Canada
206. Syndicat de professionnelles et professionnelles du gouvernement du Québec, Canada
207. Unifor, Canada
208. CSN, Canada
209. Antimafia Chile, Chile
| 210. | Asociación Nacional de Funcionarios de Impuestos Internos de Chile – ANEIICH, Chile |
| 211. | Chile Mejor sin TLC, Chile |
| 212. | CINTRÁS. Centro de Salud Mental y Derechos Humanos, Chile |
| 213. | Comisión de DDHH Colegio de Enfermeras de Chile, Chile |
| 214. | Comunidad Ecuménica Martin Luther King, Chile |
| 215. | Confederación General de Trabajadores (CGT), Chile |
| 216. | Editorial Quimantu Chile, Chile |
| 217. | Fundación Constituyente XXI, Chile |
| 218. | Observatorio Latinoamericano de Conflictos Ambientales OLCA, Chile |
| 219. | Plataforma Chile Mejor sin TLC, Chile |
| 220. | Confederación de Trabajadores de Colombia – CTC, Colombia |
| 221. | Emisora Comunitaria de Víctimas VCA, Colombia |
| 222. | Federacion Seccional FECOTRASERVIPUBLICOS, Colombia |
| 223. | Fundación IFARMA, Colombia |
| 224. | Grupo Semillas, Colombia |
| 225. | Internacional de Servicios Públicos (ISP) Países Andinos, Colombia |
| 226. | ISP, Colombia |
| 227. | Organización Artemisas, Colombia |
| 228. | Fondation Eboko, Congo (Brazzaville) |
| 229. | CAUSE RURALE, Congo (Kinshasa) |
| 230. | Observatoire d’études et d’appui a la responsabilité sociale et environnementale (OEARSE), Congo (Kinshasa) |
| 231. | Fundacion Justicia y Genero, Costa Rica |
| 232. | PSI, Costa Rica |
| 233. | World Vision LACC, Costa Rica |
| 234. | Ekumenická akademie (Ecumenical Academy), Czech Republic |
| 235. | Global Aktion, Denmark |
| 236. | KULU-Women and Development, Denmark |
| 237. | NOAH – Friends of the Earth Denmark, Denmark |
| 238. | Confederación Nacional de Unidad Sindical (CNUS), Dominican Republic |
| 239. | SITRACORAASAN, Dominican Republic |
| 240. | CEDEAL, Ecuador |
| 241. | Centro de Documentación en Derechos Humanos "Segundo Montes Mozo S.J." (CSMM), Ecuador |
| 242. | Frente Nacional por la Salud de los Pueblos del Ecuador (FNSPE), Ecuador |
| 243. | red Ecuador Decide Mejor sin TLC, Ecuador |
| 244. | UDAPT- Union of those affected by Texaco, Ecuador |
| 245. | CESTA Amigos de la Tierra, El Salvador |
| 246. | Diverse Voices and Action (DIVA) for Equality, Fiji |
| 247. | Finnish Asiatic Society, Finland |
| 248. | Maan ystävä , Finland |
| 249. | TTIP Network Finland, Finland |
| 250. | Adéquations, France |
| 251. | Aitec, France |
| 252. | Alofa Tuvalu, France |
| 253. | Amis de la Terre , France |
| 254. | Association des Femmes de l’Europe Meridionale (AFEM), France |
| 255. | Attac France, France |
| 256. | CADTM France, France |
| 257. | CCFD-Terre Solidaire, France |
| 258. | Collectif Stop CETA-TAFTA, France |
| 259. | Comité Pauvreté et Politique, France |
| 260. | Confederation Paysanne, France |
| 261. | Coordination Nationale des comités de défense des hôpitaux et maternités de proximité, France |
| 262. | Fédération Syndicat CFDT Santé Sociaux, France |
| 263. | France Amérique Latine (FAL), France |
| 264. | FRANCE NATURE ENVIRONNEMENT, France |
| 265. | PHABRE, France |
| 266. | ReAct, France |
| 267. | Réseau Foi & Justice Afrique Europe antenne France, France |
| 268. | SB-ECV, France |
| 269. | Sciences Citoyennes , France |
| 270. | Sherpa, France |
| 271. | Veblen Institute, France |
| 272. | Observatoire gabonais sur la responsabilité sociétale des entreprises, des administrations et des industries (OGARSEA), Gabon |
| 273. | African Women 4 Empowerment e. V., Germany |
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274. Aktionsgruppe Babynahrung e.V., Germany
275. Attac Germany, Germany
276. BUKO Pharma-Kampagne, Germany
277. BUND (Friends of the Earth Germany), Germany
278. Medico International, Germany
279. PowerShift e.V., Germany
280. Pro REGENWALD e.V., Germany
281. UmweltInstitut München e.V., Germany
282. Abibiman Foundation, Ghana
283. AbibiNsroma Foundation, Ghana
284. Alliance for Empowering Rural Communities (AERC-Ghana), Ghana
285. God’s Harvest Foundation, Ghana
286. Consumer Association the Quality of Life-EKPIZO, Greece
287. Nature Friends Greece, Greece
288. CEGSS, Guatemala
289. Consejo de Investigaciones en Desarrollo, Guatemala
290. Coordinación de ONG y Cooperativas CONGCOOP, Guatemala
291. SITRAINFORM, Guatemala
292. Confederation des Travailleurs-euses des Secteurs Public et Prive (CTSP), Haiti
293. Ligue Nationale des Enseignants Haïtiens (LINEH), Haiti
294. PAPDA, Haiti
295. ANAFAE, Honduras
296. CONROA, Honduras
297. Clean Air Action Group, Hungary
298. Egyetemi Zöld Kör, Hungary
299. Fauna Alapítvány, Hungary
300. Fenntarthatóság Felé Egyesület (Towards Sustainability Association), Hungary
301. Fridays For Future Budapest, Hungary
302. Gaja Environmental Non-governmental Organization, Hungary
303. Hatodik Nap Egyesület, Hungary
304. Hungarian Association of NGOs for Development and Humanitarian Aid, Hungary
305. Hungarian Climate Alliance, Hungary
306. Karatson Gabor Kor, Hungary
307. Kisközösségi Program, Hungary
308. Közép-Magyarországi Zöld Kör, Hungary
309. Magosfa Foundation, Hungary
310. Magyar Természetvédelmek Szövetsége / Friends of the Earth Hungary, Hungary
311. Society of Women for the Lake Balaton, Hungary
312. Tanácsadók a Fenntartható Fejlődésért, Hungary
313. Védegylet Egyesület, Hungary
314. Zöld Akció Egyesület (Green Action), Hungary
315. AINLIEF, India
316. Amitava Guha, India
317. Association For Promotion Sustainable Development, India
318. Campaign for access to medicines, diagnostics and medical devices, India, India
319. Delhi Network of Positive People (DNP+), India
320. Food Sovereignty Alliance, India
321. Ibn Sina Academy of Medieval Medicine and Sciences, India
322. Indian Social Institute, India
323. Initiative for Health & Equity in Society, India
324. Innovative Alliance for Public Health, India
325. IT for Change, India
326. Lawyers Collective, India
327. Madhyam, India
328. Indonesia AIDS Coalition, Indonesia
329. Indonesia for Global Justice, Indonesia
330. KRUHA – people’s coalition for the right to water, Indonesia
331. Solidaritas Perempuan, Indonesia
332. Tammuz Org. for Social Development, Iraq
333. Cobh Zero Waste, Ireland
334. Comhlámh Trade Justice Group, Ireland
335. Latin America Solidarity Centre (LASC), Ireland
336. Peoples Movement – Gluaiseacht an Phobail, Ireland
337. Trócaire, Ireland
338. Coordinamento nord sud del mondo, Italy
339. Effe Rivista Femminista, Italy
340. Fairwatch, Italy
341. MAG4 Piemonte sc, Italy
343. MEDICINA DEMOCRATICA, onlus, Italy
344. Partito Umanista, Italy
345. Salviamo il Paesaggio, Italy
346. Stop TTIP Italia, Italy
347. Stop TTIP NordOvest, Italy
348. Transform! Italia, Italy
349. Tripla Difesa Onlus Internazional No Violence ODV, Italy
350. Jamaica Association of Local Government Officers, Jamaica
351. AM-net (Advocacy and Monitoring Network on Sustainable Development), Japan
352. National Coalition for Joint Action to Stop the Second Stage of USJTA, Japan
353. Pacific Asia Resource Center(PARC), Japan
354. People’s Action against TPP, Japan
355. Popoki Peace Project, Japan
356. ZENROREN, National Confederation of Trade Unions, Japan
357. Feminist League, Kazakhstan
358. East African Tax and Governance Network, Kenya
359. Haki Nawiri Afrika, Kenya
360. International Relations Society of Kenya, Kenya
361. Jamaa Resource Initiatives, Kenya
362. PELUM Kenya, Kenya
363. PA women’s organization Alga, Kyrgyzstan
364. National Institution of Social Care and Vocational Training, Lebanon
365. Policy Analysis and Research Institute of Lesotho, Lesotho
367. National Health Workers Union of Liberia (NAHWUL), Liberia
368. Mouvement Ecologique, Luxembourg
369. Centre for Social Concern and Development (CESOCODE), Malawi
370. Accessible and Affordable Medicines for All Malaysia (A2MAM), Malaysia
371. Consumers Association of Penang, Malaysia
372. EMPOWER Malaysia (Persatuan Kesedaran Komuniti Selangor), Malaysia
373. IDRIS Association, Malaysia
374. MyWATCH – Malaysian Women’s Action on Tobacco Control and Health, Malaysia
375. National Union of Transport Equipment and Allied Industries Workers, Malaysia
376. Positive Malaysian Treatment Access & Advocacy Group (MTAAG+), Malaysia
377. PT Foundation, Malaysia
378. Sahabat Alam Malaysia (Friends of the Earth Malaysia), Malaysia
379. SOCIALIST PARTY MALAYSIA, Malaysia
380. University Malaya General Staff Union (UMGSU), Malaysia
381. Friends of the Earth Malta, Malta
382. ONG Mer Bleue, Mauritania
383. Réseau Mauritanien pour l’Action Sociale, RMAS, Mauritania
384. Asamblea Veracruzana de Iniciativas y Defensa Ambiental – LAVIDA, Mexico
385. Asociación Nacional de Industriales de Transformación (ANIT), Mexico
386. Centro de Derechos Humanos Fray Francisco de Vitoria O.P. A.C., Mexico
387. Centro de Promocion y Educacion Profesional Vasco de Quiroga, Mexico
388. Equidad de Género: Ciudadanía, Trabajo y Familia, Mexico
389. Fundación Mexicana para la Planeación Familiar, A. C. MEXFAM, Mexico
390. Grupo Tacuba, A. C., Mexico
391. Iniciativas para el Desarrollo de la Mujer Oaxaqueña (IDEMO), Mexico
392. MY World Mexico, Mexico
393. Red Mexicana de Acción frente al Libre Comercio (RMALC), Mexico
394. STUNAM, Mexico
395. LGBT Centre, Mongolia
396. Oyu Tolgoi Watch, Mongolia
397. Global South Coalition for Dignified Menstruation, Nepal
398. National Alliance of Women Human Rights Defenders, Nepal
400. Radha Paudel Foundation, Nepal
401. Tarangini Foundation, Nepal
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402. Union of Public Services in Nepal, Nepal
403. Both ENDS, Netherlands
404. CBSM, Netherlands
405. Centre for Research on Multinational Corporations (SOMO), Netherlands
406. FNV, Netherlands
407. Handel Anders! coalitie, Netherlands
408. Milieudefensie, Netherlands
409. Transnational Institute, Netherlands
410. Vrijsschrift, Netherlands
411. Water Justice & Gender, Netherlands
412. WO=MEN Dutch Gender Platform, Netherlands
413. De Groenen, Netherlands
414. CAFSO-WRAG for Development, Nigeria
415. Center for Peace Education and Community Development, Nigeria
416. Civil Society Coalition on Sustainable Development, Nigeria
417. Enowem Network, Nigeria
418. Girls Voices Initiative, Nigeria
419. IMAAP Projects, Nigeria
420. Nigeria Private Sector Alliance (NiPSA), Nigeria
421. Nigerian Women Agro Allied Farmers Association, Nigeria
422. Peace Point Development Foundation (PPDF), Nigeria
423. Society for the Improvement of Rural People (SIRP), Nigeria
424. Youth and Small Holder Farmers Association, Nigeria
425. Association ESE, North Macedonia
426. Campaign For the Welfare State, Norway
427. EL og IT Forbundet, Norway
428. Handelskampanjen, Norway
429. Norwegian Forum for Development and Environment, Norway
430. Oslo/Akershus Handel og Kontor, Norway
431. Spire, Norway
432. All Pakistan Labour Federation, Pakistan
433. Human Unity Movement, Pakistan
434. Roshib Tariqiyati Tanzeem, Pakistan
435. Pakistan Kissan Mazdoor Tehreek, Pakistan
436. Roots for Equity, Pakistan
437. Badil, Palestine
438. Hermanas de la Misericordia, Panama
439. Sociedad de Economía Política del Paraguay, Paraguay
440. COOPERACCION, Peru
441. CUT Perú (Central Unitaria de Trabajadores del Perú), Peru
442. FENTAP, Peru
443. Grupo Emancipador, Peru
444. ISP – PERÚ, Peru
445. Red Peruana por una Globalización con Equidad (RedGE), Peru
446. Freedom from Debt Coalition, Philippines
447. Sanlakas Filipinas, Philippines
448. Sentro ng mga Nagkakaisa at Progresibong Manggagawa (SENTRO), Philippines
449. Trade Justice Pilipinas, Philippines
450. WomanHealth Philippines, Philippines
451. Institute of Global Responsibility (IGO), Poland
452. TROCA- Plataforma por un Comércio Internacional Justo, Portugal
453. ZERO – Association for the Sustainability of the Earth System, Portugal
454. SAGAMBA, Rwanda
455. Ole Siosiomaga Society Incorporated (OLSSI), Samoa
456. Samoa Workers Congress, Samoa
457. Ekvilib Institute, Slovenia
458. Coalition of African Lesbians, South Africa
459. SEATINI- South Africa, South Africa
460. Trade Collective, South Africa
461. Association of Physicians for Humanism, South Korea
462. Center for Health and Social Change, South Korea
463. Knowledge Commune, South Korea
464. Korea Breastfeeding Network, South Korea
465. Korean Dentists Association for Healthy Society, South Korea
466. Korean Federation Medical Group for Health Right (KFHR), South Korea
467. Korean Pharmacists for Democratic Society, South Korea
468. PSPD (People’s Solidarity for Participatory Democracy), South Korea
469. AFMD-Asociación Federal para el Derecho a Morir Dignamente, Spain

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470. Amigas de la Tierra, Spain
471. Asociacion de Usuarios de Sanidad de la Region de Murcia, Spain
472. ATTAC Catalunya, Spain
473. ATTAC España, Spain
474. Campaña No a los Tratados de Comercio e Inversión, Spain
475. Campanya Catalunya No als Tractats de Comerç i Inversió, Spain
476. CCOO – CS de Comisiones Obreras, Spain
477. CCOO Aragón, Spain
478. Coordinadora Estatal de Comercio Justo, Spain
479. Debt Observatory in Globalisation (ODG), Spain
480. Ecologistas en Acción, Spain
481. Ecoloxiste n’Aición d’Asturies, Spain
482. Entrepueblos/Entrepobles/Entrepobos/Herriarte, Spain
483. Federación de Asociaciones para la Defensa de la Sanidad Pública, Spain
484. LA TENDA DE TOT EL MÓN, Spain
485. Mareas Blancas / White Tides, Spain
486. Medicusmundi Spain, Spain
487. Novact, Spain
488. Observatori DESC, Spain
489. Observatorio de la Deuda en la Globalización, Spain
490. OME (Asociación vasca de Salud Mental), Spain
491. Ong AFRICANDO, Spain
492. Osalde, Spain
493. SETEM Catalunya, Spain
494. Solidaridad Internacional Andalucía, Spain
495. UGT, Spain
496. Unión Sindical Obrera (USO), Spain
497. Unión Universal Desarrollo Solidario, Spain
498. National Fisheries Solidarity Movement, Sri Lanka
499. Jordens Vänner – FoE Sweden, Sweden
500. Alliance Sud, Switzerland
501. Arbeitsgruppe Schweiz Kolumbien ask! (Swiss Working Group on Colombia), Switzerland
502. MultiWatch, Switzerland
503. Public Eye, Switzerland
504. SOLIFONDS, Switzerland
505. Mom Loves Taiwan Association, Taiwan
506. Governance Links, Tanzania
507. HakiMadini, Tanzania
508. National Union of Mine and Energy Workers of Tanzania (NUMET), Tanzania
509. Sustainable Holistic Development (SUHODE), Tanzania
510. AIDS Access Foundation, Thailand
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512. FENASSEP, Togo
513. Les Amis de la Terre-Togo, Togo
514. Humanitaire Plus, Togo
515. Network of Rural Women Producers Trinidad & Tobago, Trinidad & Tobago
516. Public Services International, Trinidad & Tobago
517. FGEG/UGTT, Tunisia
518. Equator School, Uganda
519. Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI) Uganda, Uganda
520. Uganda Land Owners Association, Uganda
521. Baby Milk Action, United Kingdom
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523. Bretton Woods Project, United Kingdom
524. Catholic Agency for Overseas Development (CAFOD), United Kingdom
525. Centre for Human Ecology, United Kingdom
526. Coal Action Network, United Kingdom
527. Compassion in World Farming, United Kingdom
528. CORE Coalition UK, United Kingdom
529. Farms not Factories, United Kingdom
530. Fresh Eyes, United Kingdom
531. GardenAfrica, United Kingdom
532. Global Justice Now, United Kingdom
533. GMB, United Kingdom
534. Health Poverty Action, United Kingdom
535. Jubilee Debt Campaign, United Kingdom
536. Keep Our NHS Public, United Kingdom
537. London Mining Network, United Kingdom
538. One World Week, United Kingdom
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Open letter to governments on ISDS and COVID-19

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 630 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 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.

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606. Pride at Work, United States
607. Public Citizen, United States
608. R-CALF USA, United States
609. RootsAction.org, United States
610. Salud y Fármacos, United States
611. SERR- Servicios Ecumenicos para Reconciliacion y Reconstruccion, United States
612. Sierra Club, United States
613. Sisters of Charity Federation, United States
614. Social Security Works, United States
615. UE, United Electrical, Radio and Machine Workers of America, United States
616. UNITE HERE, United States
617. United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), United States
618. United Brotherhood of Carpenters and Joiners of America, United States
619. United Church of Christ, Justice and Witness Ministries, United States
620. United Steelworkers (USW), United States
621. Urgent Action Fund for Women’s Human Rights, United States
622. Washington Fair Trade Coalition, United States
623. Western Organization of Resource Councils, United States
624. Women’s International League for Peace & Freedom US, United States
625. Womens Environment and Development Organization, United States
626. REDES-Amigos del Tierra (FoE) Uruguay, Uruguay
627. Coalición de Tendencia Clasista (CTC-VZLA), Venezuela
628. Yemeni Observatory for Human Rights (YOOHR), Yemen
629. Action for Development (AfD), Zambia
630. Zimbabwe Institute for International Affairs, Zimbabwe

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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. 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.

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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)
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 UNICITRAL 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.\(^9\)

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.

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