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Faced with an economic crisis that could lead to starvation or riots, a finance minister was forced to default on their country's debt, massively devalue the currency and freeze water and electricity tariffs. The actions led to 42 transnational corporations initiating lawsuits for lost profits. This sounds like a story unfolding right now, but it is actually an account of Argentina in the midst of its 2002 financial crisis. And in the wake of COVID-19, it could certainly repeat itself in country after country as they take exceptional measures to grapple with an unprecedented economic shockwave.

The scale of the economic impact of COVID-19 is only starting to become apparent. UNCTAD has warned of a '[looming financial tsunami](#)' that could cut global investment by 40% and have urged a 2.5 trillion-dollar crisis package for developing countries. Worldwide, governments have been forced to take financial and economic measures that were impossible to conceive a couple of months ago. Not only have they been forced to disburse limited public funding to strengthen health systems, to protect the poor and vulnerable, to support workers and small businesses, and to scale up unemployment benefits and social protection, they have also had to take

emergency measures such as suspending payments to private companies or taking over private corporations to manufacture essential health equipment.

The government actions will put unprecedented pressure on already strained public budgets, particularly those of Global South countries. However, less well known is that they could also prompt a wave of lawsuits by multinational corporations and investment lawyers for the emergency measures taken right now to protect citizens. These claims could be made under a mechanism known as Investor-State Dispute Settlement (ISDS), found in the fineprint of almost every investment agreement worldwide. This grants corporations special rights to sue States for laws, regulations and governments' measures that potentially affect their business – even if they were taken in the face of the biggest emergency health crisis the world has ever faced. Perversely, these potential lawsuits and the financial compensation they seek will only add to the already immense financial burden on many States.



ISDS claims are enabled by a complex web of international trade and investment agreements that contain investment protection clauses. ISDS claims have been successfully brought against States for measures aiming to protect the environment and public health, and for extending affordable access to energy, clean water or better working conditions. This privileged access to a parallel private judicial system is exclusive for foreign investors and only works one way - States cannot sue investors for disrespecting national or local regulations at these arbitration tribunals.

The United Nations Conference on Trade and Development (UNCTAD) confirmed recently that there are already more than [1000 investor-State Dispute Settlement \(ISDS\) claims known world-wide](#). Claims by investors suing States have skyrocketed in the last decade, and so has the amount of money involved.

And this exponential curve in claims could grow even further in the wake of COVID-19. Law360, a specialised lawyers' magazine, said in 8 April 2020 *[“For arbitration and litigation funders, the past few weeks may mark the beginning of a boom”](#)*.

While claims by corporations against States may seem extraordinary and politically risky, it would not be without [precedent](#). In fact, transnational corporations, backed by investment lawyers and third-party funders, have a history of using international investment agreements to [scavenge for profits by suing countries in crisis](#).

Argentina's experience is relevant here. Despite a crisis that [shrunk the economy by 28%](#) and pushed half the population below the poverty line, foreign investors were not put off by [initiating lawsuits](#) against the embattled government. 42 corporations launched lawsuits, claiming a total of 16 billion dollars.

Indeed [investment lawyers](#) are already readying their corporate clients for the [opportunities](#). On 26 March 2020, international arbitration [law firm Aceris Law](#) told its clients *“While the future remains uncertain, the response to the COVID-19 pandemic is likely to violate various protections provided in bilateral investment treaties (“BITs”) and may bring rise to claims in the future by foreign investors”*. Several other elite law firms released warnings to investors.¹

The Peruvian government has already been warned that the suspension of the collection of toll fees for the country's road network -a measure the government took in the context of COVID crisis- could result in [several ICSID claims](#).

The lawsuits could seek to get compensation for actions of governments like Spain, which on [14 March 2020 passed a decree](#) that allows the government to “intervene

and temporarily occupy industries, factories, workshops, farms or premises of any nature, including privately owned health centres as well as those that develop their activities in the pharmaceutical sector”, Other countries have enacted similar provisions. The [Italian government](#) is now entitled to requisition of private medical equipment to serve a public function.

Foreign investors could allege that [Italy](#) and Spain are breaching the *direct expropriation* standard of investment treaties by allowing the requisition of private corporate property and equipment. The mandatory lock-down of all commercial activities and the seizure of private production lines could be interpreted by investors as *indirect expropriation*. Governments will certainly argue that measures taken to protect public health in the midst of the current crisis are part of their legitimate goals as States.

International law allows States to defend their actions with an argument of necessity or extreme circumstances (*force majeure*). However, academics have warned “[the plea of force majeure is a very strict one, and States have rarely been successful when invoking it as a matter of international law](#)”. This line of defence has [not proved sufficient in the past](#) to stop lawsuits or successful and expensive claims by investors in the past. In 11² out of the 14 cases where Argentina used the state of necessity as a defence, arbitration tribunals rejected the argument.

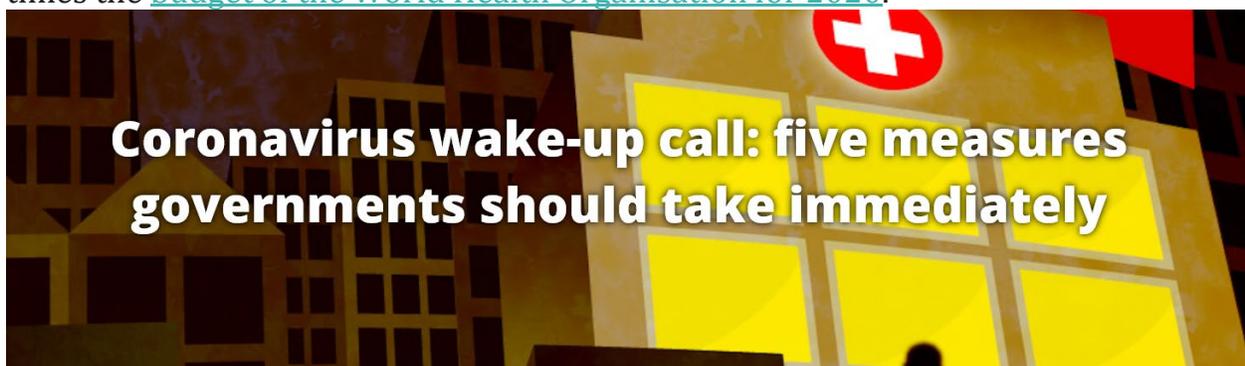


There are currently [343 ISDS claims pending worldwide](#), and the majority of those (213 cases) are against Latin American, Asian and African countries. Some countries

in the Global South have billions outstanding in pending ISDS claims. [Mexico](#) has 12 pending cases, making up a total of 5.4 billion USD in claims. [India](#), has 13 pending cases amounting to 8 billion USD claims. But, this is not just a problem for developing countries. Spain, one of the countries that has been worst affected by COVID-19, is also the second most sued country worldwide. Currently, the Spanish government is legally battling with eight investors that are trying to accelerate the collection of 739 million euros due to them as a result of favourable arbitration rulings.³

By the end of 2018, States worldwide had been ordered or agreed to pay investors in disclosed ISDS cases a staggering US\$88 billion.⁴ Millions of dollars of taxpayers' money have been diverted away from funding for public health, access to food, and employment creation.

The costs of ISDS claims have contributed to the already heavy foreign debt burden of the Global South. The \$88 billion awarded to foreign investors and investment lawyers as a result of ISDS awards until 2018 is almost the same amount the [International Monetary Fund has made available to low-income and emerging economies](#) to tackle the most adverse effects of the Coronavirus crisis. It is also 18 times the [budget of the World Health Organisation for 2020](#).



The fact that we are marking the 1000th ISDS claim in the middle of a profound social and economic crisis should be a wake-up call. Just as the pandemic is revealing profound health

inequities and the dangers of agroindustrial food systems, it is also showing the dangers of trade and investment systems that put corporate profits above health and life.

There is no place for trade and investment agreements that allow investors to profit from suing countries in crisis or seeking to cash-in from scarce public resources which will be needed to recover from the post-COVID-19 recession. Treaties that can potentially curtail governments' sovereignty and drain limited public budgets at a time of crisis are not fit for purpose.

Governments should take urgent action to make sure that transnational corporations and investment lawyers do not become beneficiaries of this pandemic, at the expense of people's well-being and health.

Governments should:

- 1- Suspend all trade and investment treaty negotiations.
- 2- Take all necessary steps to terminate (unilaterally or [multilaterally](#)) existing treaties.
- 3- Institute a comprehensive review (cost-benefit analysis) of their current and planned investment agreements.
- 4- Withdraw [consent](#) to ISDS, to [limit immediate exposure](#) to investor lawsuits.
- 5- Default on the payment of outstanding debts as a result of ISDS awards. Or, at least, discuss ISDS debt relief and/or debt restructuring with creditors.

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