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PSI REPORT SERIES - SPECIAL REPORT ON THE COVID-19 PANDEMIC



**THE PANDEMIC:
BIG BUSINESS FOR
TRANSNATIONAL
CORPORATIONS**

THE PANDEMIC: BIG BUSINESS FOR TRANSNATIONAL CORPORATIONS

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This article by PSI was adapted from investigations conducted in 2019 and 2020 by the Transnational Institute and the Corporate Europe Observatory, allies in the fight against corporate power.



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***Fundação Friedrich-Ebert-Stiftung (FES)** is Germany's oldest political foundation, with a rich social democratic history that can be traced back to its founding in 1925. FES owes its existence and mission to the political legacy of Friedrich Ebert, the first democratically elected German president.*

***Public Services International (PSI)** is a global union federation bringing together public service workers running water and electricity utilities, health and social services, public administrations and municipal governments, as well as service workers in judiciaries and legislatures. PSI is present in 154 countries representing 30 million workers. In the Americas, PSI is working with organized civil society toward fair taxation through Tax Justice Network for Latin America and the Caribbean (RJFLAC), Tax Justice Network, Global Alliance for Tax Justice, and Latindadd. Other matters PSI is engaged in are trade union rights, free trade agreements, advocacy of quality public services, worker organizing, and equality of opportunities.*

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Free Trade Agreements (FTAs): disseminated in the 1990s, FTAs are trade agreements whose main goal is to increase and diversify trade between two or more countries by eliminating existing fees, tariffs, and regulations in (import and export) trade relations between signatories. With the global decrease in customs tariffs and the new forms of trade, today the main goal of FTAs is to prevent the State from regulating and to allow the market to set policies governing labor, public and private services, foreign investment, the environment, patents and intellectual property, investments, and many other aspects of a citizen's life.

Bilateral Investment Treaties (BITs): treaties between two countries that are purportedly aimed at increasing foreign investment flows between them. In practically every case, capital rules are loosened, and an investor-State dispute settlement (ISDS) system is established, granting exclusive rights to foreign investors, as will be shown in this paper. According to the United States Trade Representative (USTR), bilateral investment treaties help to protect private investments, to develop market-driven economies in partner countries, and to promote US exports.

Do you know what ISDS is?

CKnown internationally by the English acronym ISDS, **Investor-State Dispute Settlement** is a mechanism that is present in most bilateral investment treaties (BITs) and free trade

agreements (FTAs) currently in effect. This mechanism grants multinational companies the exclusive right to sue a State in international arbitral tribunals should a government approve regulations or public policies that may affect their profits.

Only enterprises can bring a case before ISDS tribunals?

Yes, the mechanism is exclusive for transnational corporations (TNCs). Neither national enterprises, nor the States and the population can bring a case before ISDS courts; much less bring a complaint against a TNC when it offers poor quality services, uses abusive pricing, destroys the environment, or violates human or labor rights.

A truly private justice system for the rich

Over and beyond the gap between developed and developing, rich and poor countries, an even greater injustice is created by the ISDS system: by granting all the power to transnational corporations, through an exclusive, parallel, and private “judiciary” system, ISDS jeopardizes public services and the interests of the population by placing profit above people.

And how did ISDS appear? From an ungrounded theory to a true conspiracy

With neoliberalism, the argument backing the creation of the ISDS mechanism in the 1990s was increasingly replicated internationally: the signing of FTAs and BITs with ISDS clauses that ensured investments by TNCs would increase foreign direct investment flows in signatory countries, especially in the less developed ones. However, for a theory to be sustained, it needs to show evidence that may sustain it over time. Along this process, studies by renowned universities researching the relation between these agreements and a hypothetical increase in foreign investments concluded that there was no evidence that these agreements, whether BITs or FTA clauses, did indeed increase foreign investment. On the contrary, they indicated that for most investors these agreements were not a key factor when it came to deciding where to allocate their resources.¹

¹ <https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf>

Creator vs creature – not even the United States wants them anymore

In this context, based on a lack of evidence that would back the arguments in favor of ISDSs, even the United States, the maker and greatest enthusiast of the system, is currently conveniently changing its opinion, seeking to eliminate ISDS mechanisms from some of its trade agreements. Recently, during the NAFTA (North American Free Trade Agreement) negotiations, Washington excluded ISDS clauses with Canada, while ISDS clauses with Mexico were replaced by a new approach that reduces the exorbitant rights of investors.² In all likelihood, these initiatives were taken to prevent Canadian companies from suing the United States government. Among equals, the US does not accept ISDS clauses, in contrast with what it does with poorer countries.

On the other hand, the European Union, a strong supporter of the ISDS system, after strong pressure from civil society organizations, acknowledged the serious asymmetries and privileges for investors brought about by the ISDS system and proposed an international reform toward the establishment of a Multilateral

Investment Court (MIC). According to analyses conducted by PSI and a number of other organizations, and despite the importance of Europe's acknowledgment of ISDS-related injustices, Europe's leaders ended up trading six of one for half a dozen of the other, in a reform only apparent, deceiving the people and public opinion like a wolf in sheep's clothing.³

Doubtful benefits, concrete losses

While benefits from investment protection treaties are intangible for the States, losses for the population not only are concrete, but substantial. Criticized for being a parallel justice mechanism for the rich, the ISDS system increases corporate bargaining power to coerce governments into “not adopting measures that affect corporate profits”. That is, to not regulate, to not protect, even better, to not interfere at all, allowing the invisible hand of the market to settle matters. ISDS mechanisms undermine State autonomy, supersede national judicial systems, transfer dispute settlements from national courts to a distant and biased international private arbitration tribunal.

² https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_publiccitizen.pdf

³ <http://www.world-psi.org/en/investment-court-system-ics-wolf-sheeps-clothing>

“By making it hard for countries to take clear measures against Covid, threatening to file multimillion-dollar lawsuits against public resources, ISDS shows its most perverse face: it only serves to benefit big international corporations. That is why ISDS must be eliminated.” – Rosa Pavanelli, PSI General Secretary

And the monster keeps on growing: The number of ISDS lawsuits worldwide grew from six in 1995 to **1,000 in 2020**.⁴ In these suits, governments were often sentenced to pay millions in damages awards for acting on behalf of the public good, as for example by increasing environmentally protected areas; freezing rates for basic services like water and electricity; making medicines available at affordable prices; canceling contracts with companies proven inefficient in managing public services; increasing taxes on products harmful to a person’s and public health, like tobacco, alcohol, and sugar, among other cases. Even the adoption of wage increases mandated by collective bargaining agreements has already been sued by companies against the State.

ISDS and its financial impact in Latin America: truly a waste of public money flowing to large international companies

The negative impact caused by ISDS on the finances of Latin American countries is as revealing as it is relevant. We know that in other regions, like Asia and Africa, the situation is no different. Although poorer countries lose more money, all States end up losing for the benefit of a few international investors.

Based on figures updated in early 2019, 22 countries⁵ in Latin America have already been sued on the basis of ISDS-related international lawsuits, total cases amounting to 267 cases. Among these, Argentina, Bolivia, Ecuador, Mexico, Peru, and Venezuela account for almost three fourths of total cases (74%).⁶ And these clashes in the international private arbitration arena have not been balanced at all: according to the most recent data available, of total cases, 170 had been settled, with investors winning in 70% of them.

Since 1996, when the first investor-State dispute was filed, Latin American and Caribbean

⁴ <https://investmentpolicy.unctad.org/news/hub/1644/20200407-unctad-isds-navigator-update-investment-treaty-disputes-hit-1-000-mark>

⁵ Argentina, Barbados, Belize, Bolivia, Chile, Colombia, Costa Rica, El Salvador, Ecuador, Grenada, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Trinidad and Tobago, Uruguay, Venezuela.

⁶ https://www.tni.org/files/publication-downloads/isds_en_numerosesapril2019_-final.pdf

countries have been ordered to pay some 22 billion dollars to international investors. This figure may well be much higher, as it does not account for legal counseling expenses, while some court decisions are still not known or have not been issued.

The sum of 22 billion dollars amounts to nearly 55% of Bolivia's annual Gross Domestic Product⁷ in 2018. Argentina has already had to pay some 9 billion dollars in ISDS-related claims, an amount that would be enough to build about 80 400-bed hospitals,⁸ or 32,000 new hospital beds for the country.

All data on ISDS-related disputes in Latin America was updated in early 2019 and can be accessed in full in the report “*ISDS in numbers*”, prepared and published by the Transnational Institute (TNI) and available in Spanish.

Lastly, it is worth pointing out that regardless of the outcome of the arbitration, the States always end up losing. With the ISDS system, international private arbitration has become a big business in which a few specialized firms control great part of the market. The average cost of an investor-State arbitration process is 8 million dollars, which can reach upwards of 30 million dollars. In other words, an above-average arbitration cost can negatively impact small countries, reducing their public investment

capacity and even their capacity to legally defend themselves. In the case of Grenada, a small Caribbean country that has already been the target of claims by TNCs in ISDS-related cases, 30 million dollars amounts to 2.5% of the country's 2018 GDP.





“By creating international private courts, ISDS prevents national judiciary systems from deciding independently important issues for their countries. This is extremely serious, especially in times of pandemic” – Ariel Pringles, Latin American Confederation of Judiciary Workers – CLTPJ.

Less money to fight the pandemic

Besides the nearly 22 billion dollars that Latin American countries have had to pay to foreign investors in ISDS-related claims, 343 claims are currently being arbitrated, with 213 of these claims (62%) in countries of the Global South – in Latin America, Africa, and Asia. Even though a great part of these amounts and cases still remain obscure, the recent article by TNI *Los especuladores de la pandemia: cómo los inversores extranjeros podrían obtener grandes*

7 <https://datos.bancomundial.org/indicador/NY.GDPMKTP.CD?locations=BO>

8 <http://agenciasanluis.com/notas/2019/10/02/trabajan-mas-de-750-personas-la-construccion-del-hospital-central-ramon-carrillo-tiene-un-30-de-avance/>

| Countries | Solved cases | Decided in favor of investors | Cost of lost cases |
|--|--------------|-------------------------------|--------------------|
|  Argentina | 45 | 40 (88,9%) | USD 9 billions |
|  Bolivia | 13 | 13 (100%) | USD 898 millions |
|  Ecuador | 19 | 19 (73,6%) | USD 1,739 billions |
|  Venezuela | 29 | 20 (69%) | USD 9,395 billions |

ganancias con las medidas de la crisis shows that, today, Mexico alone has 12 ISDS claims pending decisions, amounting to 5.4 billion dollars; while India has 13 cases pending a decision, totaling 8 billion dollars. In face of this moment of sharp decline of the economies and, consequently, of tax collection, and of the urgency of social and health-related investments to restart economic activity, the perverse nature of the ISDS system becomes more evident against the backdrop of the needs and basic rights of the population.

Big crises, big business

Coupled with today's ISDS pending cases, the recent experiences of socioeconomic crises in countries with ISDS clauses in effect turn on a red light for governments and society. AS signaled by the TNI, a serious foreign debt-related crisis erupted in Argentina in 2002, leading to the government's announcement of a default on its debt that ultimately

resulted in the currency's devaluation, a freeze on rates, a 28% drop in the economy, and half the population falling below the poverty line. Amidst such a grim setting, 42 ISDS-driven claims by foreign investors were filed worth 16 billion dollars. No wonder Argentina still leads the region in number of claims since the 1990s, while 2003 posted the most claims brought against States in Latin America.

ISDS specialist law firms target measures used to fight Covid-19

“It seems clear... that the current crisis will give rise to investment treaty claims.” The statement was made by British law firm Volterra Fietta, specializing in international private arbitration. The article by the TNI and the Corporate Europe Observatory *Cashing in on the pandemic: how lawyers are preparing to sue states over COVID-19 response measures* stresses that international private arbitration is preparing for a wave

of international investors' claims brought against States for having taken health-related and socio-economic measures to mitigate the effects of the coronavirus.

The article points out that, according to US law firm Ropes & Gray, "Governments have responded to COVID-19 with a panoply of measures, including travel restrictions, limitations on business operations, and tax benefits. Notwithstanding their legitimacy, these measures can negatively impact businesses by reducing profitability, delaying operations or being excluded from government benefits... For companies with foreign investments, investment agreements could be a powerful tool to recover or prevent loss resulting from COVID-19 related government actions."

In such a context, it is imperative that the trade union movement and civil society pressure governments to not bow to threats by investors, denouncing the cases in which transnational companies take advantage of the crisis to extract more valuable resources from the State. According to the TNI and the Corporate Europe Observatory, these are some of the scenarios that may be used by international investment arbitration against government measures implemented during the pandemic:

1 Water and energy: potential claims on the basis of assured supply

Washing one's hands frequently is one of the main orientations against the coronavirus. Hence the importance of ensuring water for all, stressing that, according to UNICEF, 40% of the world's population and 25% of the Latin American population have no drinking water at home. Among those who do, when millions of people become unemployed or see a sudden drop in their revenues, many households find it much harder to pay their bills and have access to such vital service. And that only gets worse when a quarantine includes stay-at-home orders, thus increasing water consumption.

Aware of that, some governments around the world decided to freeze utility rates, suspended the payment of water bills of low-income households, and implemented other basic policies designed to ensure access to these services, all measures that even the World Bank, admittedly a neoliberal institution, applauded.⁹

“Argentina has already paid dearly in ISDS claims because of the necessary measures it took in 2002 to fight

⁹ <https://blogs.worldbank.org/water/latin-america-moving-fast-ensure-water-services-during-covid-19>

the economic crisis. It is a shame the same may happen again in 2020 on account of policies adopted against Covid. We cannot accept that.”

– Federico Dávila, President of PSI Inter Americas

By contrast, international law firms have already begun to counsel transnational corporations in the water supply business to, in due time, invoke the ISDS mechanism and cash in millions of dollars from damages awards for measures taken to rein in the coronavirus. Lower profits will be the basis for the demands. Obviously, in countries and regions where water supply is in the hands of state-run companies, such risk does not exist.

The same can happen in relation to distribution of electricity, essential for the life of households and for ensuring physical and mental health during the self-isolation period, as well as for the continuity of work and school assignments.

It is clear thus that rate freezes, prohibition to suspend supply to defaulting utility services users, and similar measures will surely make the day of transnational corporations in the international private tribunals.

2 Health: claims for attempting to relieve public hospitals

During the pandemic, hospitals all around the world are operating close to their maximum bed capacity. In face of that, some governments, such as those of Spain and Ireland, adopted extraordinary measures including temporarily taking control over vacant private hospital beds for the use of the population.

Even if this kind of decision is allowed in moments of crisis, on a temporary basis and provided hospitals and HMOs are fully compensated for their services, the sector's investor claims brought against countries taking temporary control over private beds are a cause for concern.

According to the Corporate Europe Observatory, lawyers with US-based law firm Quinn Emanuel have already informed health industry investors they may claim damages should public control of private beds have taken place compulsorily – which did happen in some of these cases. These lawyers added that if the State fails to return hospital bed control by the end of the pandemic or if State control should have any permanent effects on the business's profitability, investors will have two more windows of opportunity to claim damages from the government.

Other policies in support of public health systems are being viewed as an opportunity for companies to bring claims and to profit from them. Converting hotels into hospitals and plant rearrangements for the production of protection masks and ventilators (the case of General Motors, in the U.S.) are also being harshly criticized by international law firms, who are threatening a barrage of lawsuits against governments should companies fail to be compensated for the period.

“It’s unacceptable to have to pay ‘damages’ to transnational corporations for fair measures taken to ensure medical assistance for the population during the pandemic. We must denounce this inhumane system, with private tribunals that decide what the States can or cannot do.” – Carolina Espinoza, Chair of PSI’s Inter American Regional Women’s Committee.

3 Claiming damages for the democratization of medicines and tests

Long before the pandemic, medication patents and private rights restricted access of billions of people to adequate treatment. With Covid it is not different: the

price and universality of tests, medicines, and future vaccines might be the difference between the life or death for millions of people worldwide. While some countries bow to corporate interests instead of democratizing access or designing cheaper Covid testing, for example, others try to circumvent patents, that is, to bypass the limits imposed by patent agreements adopted within the framework of the WTO. One of such mechanisms is the compulsory license, which allows other companies and institutions not owning a patent to produce and trade medical inputs. Israel, Germany, and Canada established rules to facilitate compulsory licenses of various products, while, in Latin America, Chile and Ecuador adopted similar measures.¹⁰

Widely recognized civil society organizations, such as PSI and Doctors Without Borders, advocate that profit and patents should not take precedence over Covid tests, medicines, and future vaccines. Yet international law firms see the matter from another point of view. In the view of international investors, measures like establishing price caps on medication or breaking patents should significantly reduce these companies’ earnings, including goods in high demand during the pandemic, which will lead to another wave of privately arbitrated international claims.

¹⁰ <https://www.iam-media.com/coronavirus/the-key-covid-19-compulsory-licensing-developments-so-far>

4 Damage claims for tax policies

We are experiencing one of the greatest socioeconomic crises in history, with a strong recession, and millions or even billions of unemployed and underemployed. Public investment is urgently needed. But the steep drop in tax collection by States will force many countries to adopt new policies to ensure the economy, jobs, and public services can continue.

Instead of simply slashing spending and deepening the recession, these measures should aim at increasing tax collection. Some governments are contemplating that and hinting at measures geared to tax justice: to make transnational companies pay their fair share of taxes, have their tax incentives reviewed, and those registered in tax havens not receive any financial aid from the State. This is what we, PSI and many of our allies, advocate.

In Europe, the governments of Wales,¹¹ Scotland,¹² France, Poland,¹³ Belgium,¹⁴ and Den-

mark¹⁵ are at different stages in the process of approving laws restricting companies headquartered in tax havens from accessing governmental, Covid-related economic bailout funds, since they use tax havens to avoid paying their due taxes. In the Americas, Argentina¹⁶ and Canada¹⁷ are trying to chart the same path. This by itself can trigger countless ISDS-related claims, with these companies claiming discrimination in accessing public funds.

Meanwhile, pressure is mounting for countries to approve legislation taxing large fortunes, with Argentina and Chile leading the initiatives in Latin America. With or without the pandemic, any measures designed to increase tax progressivity, that is, those earning more paying more in taxes, including transnational corporations, directly threaten earnings forecast by investors.

Again, the law firms connected with the international courts of arbitration recognize that, to face the crisis and recover the economy, governments will have to be more aggressive as regards tax matters in

11 <https://www.mirror.co.uk/news/politics/wales-wont-give-coronavirus-bailout-22022841>

12 <https://www.taxjustice.net/2020/05/21/scotland-joins-wave-of-countries-blocking-tax-haven-tied-corporations-from-receiving-covid-19-bailouts-tax-justice-network-responds/>

13 <https://thehill.com/policy/finance/494297-european-countries-exclude-companies-registered-in-offshore-tax-havens-from>

14 <https://www.politico.eu/article/if-you-want-a-bailout-in-europe-dont-use-tax-havens/>

15 https://www.nordicpolicycentre.org.au/denmark_bars_tax_haven_companies_from_covid_19_financial_aid

16 <https://www.pagina12.com.ar/261516-techint-no-califica-para-recibir-la-asistencia-del-estado>

17 <https://www.thestar.com/politics/2020/04/28/no-covid-19-bailouts-for-firms-that-use-tax-havens-prime-minister-justin-trudeau-says.html>

order to increase tax collection by levying taxes from those who never pay them, such as TNCs, or pay very little, i.e. millionaires. Considering that, international law firms are considering how to exploit every legal loophole to enable investors to claim damages from the States.

“The pandemic only exposes what PSI and many other organizations have been advocating for for a long time: we must tax TNCs and the superrich, who pay almost nothing in taxes today, to fund quality public services and jumpstart the economy. We must seize this moment to boost the movement for progressive tax reforms at the national and international levels and to bring an end to tax havens” – Geici Maiara Brig, Youth Committee, PSI Inter Americas.

Conclusion

Almost three decades after the arrival of the ISDS mechanism in Latin America, we can state that, contrary to what was promised, this mechanism did not manage to attract more foreign investments or to drive economic development in the region. On the contrary, if benefits could not be verified, losses are everywhere to be seen. In addition to direct financial losses, e.g. the billions of

dollars Latin American States had to pay to international investors and the high costs of international arbitration, the greatest problem with the ISDS system is the fact that it constrains the actions of governments, legislatures, and judicial systems.

By signing an agreement with ISDS clauses, a country automatically transfers part of the decisions from its own judiciary system to costly international private courts that are often contested for keeping close relations with big international law firms. Moreover, that country submits to corporate dictates and is no longer able to establish legislation regarding the provision of basic services such as sanitation, water, and electricity; to change the profit-oriented rationale of healthcare provision; to protect the environment and original peoples; to make big corporations pay more taxes than the workers; to curb smoking and alcoholism; among other regulations that may raise quality of life and social justice in society.

Although these restrictions have been in place for decades, in moments of crisis, when the population is most vulnerable and the State has to assume a more active role, the perniciousness of the ISDS system becomes even more apparent, as investors and their law firms see in this crisis a great opportunity to further plunder public resources to keep their exorbitant profits.

Therefore, it is of the utmost importance that governments do not yield to corporate threats and that trade unions and civil society be proactive, monitoring and denouncing cases involving companies suing States for measures implemented to mitigate the socioeconomic and health impacts brought about by the coronavirus crisis. Over the last years, initiatives by some countries indicate that it is possible to leave ISDS agreements without economic or diplomatic losses. South Africa, Indonesia, and India left BIT agreements with ISDS clauses,¹⁸ yet there was no decrease in foreign direct investment flows into these countries. More recently, European Union countries signed an agreement to end 130 BITs with ISDS clauses in effect in the bloc.¹⁹

We want the ISDS system gone from our region, we want to set each country's course autonomously and freely, which public policies best meet our interests, without a private justice system for the rich, beneficial to the companies and constantly threatening us. It is high time that we stopped ISDS.

18 https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_0.pdf

19 https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en



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