



INVESTMENT POLICY MONITOR



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INVESTMENT POLICY RESPONSES TO THE COVID-19 PANDEMIC

EMBARGO

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H I G H L I G H T S

- Investment policies make an important contribution in tackling the devastating economic and social effects of the COVID-19 pandemic. Numerous countries around the globe have taken measures in support of investment or for protecting critical domestic industries in the crisis.
- Support measures include, in particular, the speeding up of investment approval procedures, the accelerated use of online tools and e-platforms, COVID-19-related services of investment promotion agencies (IPAs), incentive schemes for health-related R&D, medical supplies, the acquisition by states of equity in struggling domestic key companies as well as state loans and guarantees for domestic suppliers in value chains.
- To protect their health sector and industries in other sectors considered as particularly important in the crisis, several countries have tightened foreign investment screening mechanisms, introduced new regulations or are planning such steps. Other State interventions in the health industry include mandatory production and export bans for medical equipment, as well as reduction of import duties for medical devices.
- IIAs can come into play in relation to policy responses taken by governments to address the economic impact of the COVID-19 pandemic. Some of the policy measures could potentially be challenged by foreign investors through arbitration proceedings under IIAs. This highlights the need to safeguard sufficient regulatory space in IIAs to protect public health and to minimize the risk of investor–State dispute settlement (ISDS) proceedings.
- Looking ahead, the pandemic is likely to have lasting effects on investment policy making. It may strengthen and solidify the ongoing trend towards more restrictive admission policies for foreign investment in industries considered as being of critical importance for host countries. At the same time, the pandemic may trigger increased competition for attracting investment in other industries as economies seek to recover from the downturn and disrupted supply chains need to be rebuilt. Concerning investment facilitation, the crisis may boost the use of online administrative approval procedures for investors and personnel.

The global spread of COVID-19 is strongly affecting foreign investment. The recent Global Investment Trends Monitor of UNCTAD predicts a drastic drop in global foreign direct investment (FDI) flows – up to 40% – during 2020-2021, reaching the lowest level of the past two decades.¹

This Special Issue of UNCTAD’s Investment Policy Monitor (IPM) analyses what this bleak forecast means for investment policymaking and provides an updated overview of specific investment policy measures that countries have undertaken since the release of UNCTAD’s latest regular IPM in early April 2020. It concludes with some preliminary considerations concerning the preparation of post-pandemic investment policymaking.

A. Investment policies can counter the crisis in numerous ways

Fiscal and financial support for companies and employees are at the core of economic policies in response to the crisis. National and international investment policies can play an important complementary role in various ways, although not all of them can be of immediate effect (table 1). Policy measures can be tailor-made to address the specific needs of those industries particularly affected by the crisis (e.g. health, tourism, airline, automobile).

Table 1. Investment Policy Instruments for Responding to the Pandemic

Investment policy area	Policy measures (examples)
Policy actions at the national level	
Investment facilitation	<ul style="list-style-type: none"> • Alleviation of administrative burdens and bureaucratic obstacles for firms
Investment retention and aftercare by investment promotion agencies (IPAs)	<ul style="list-style-type: none"> • COVID-19 related information services • Administrative and operational support during the crisis
Investment incentives	<ul style="list-style-type: none"> • Financial or fiscal incentives to produce COVID-19 related medical equipment • Incentives for enhancement of contracted economic activities • Incentives for conversion of production
State participation in crisis-affected industries	<ul style="list-style-type: none"> • Acquisition of equity in companies • Partial or full nationalization
Local small and medium enterprises (SMEs) and supply chains	<ul style="list-style-type: none"> • Financial or fiscal support for domestic suppliers (such as SMEs)
National security and public health	<ul style="list-style-type: none"> • Application and potential reinforcement of FDI screening in COVID-19 relevant industries
Other State intervention in the health industry	<ul style="list-style-type: none"> • Mandatory production • Export bans • Import facilitation
Intellectual property (IP)	<ul style="list-style-type: none"> • General authorization of non-voluntary licensing to speed up research and development (R&D) • IP holder-specific non-voluntary licensing to enable imports of medication
Policy actions at the international level	
International support measures for investment	<ul style="list-style-type: none"> • International pledges in support of cross-border investment
IAs	<ul style="list-style-type: none"> • Reform of IAs in support of public health policies and to minimize ISDS risks

Source: UNCTAD.

¹ https://unctad.org/en/PublicationsLibrary/diaeiainf2020d3_en.pdf

1. Investment policy actions at the national level

Facilitating investment

Alleviating the administrative burden for firms and reducing bureaucratic obstacles contributes to more efficient production processes and faster delivery of much needed goods to clients during the pandemic. Several countries have already taken steps in this direction.

For example,

- On 26 March 2020, *China* obligated national economic development zones to take swift and effective actions to make sure Chinese and foreign companies can get equal access to the Chinese government's preferential policies and to help stabilize important industry chains and supply chains. Other Chinese support measures were already reported in UNCTAD's IPM of early April 2020.²
- The *Myanmar Investment Commission* (MIC) announced on 11 April 2020 that it would accelerate approvals for investments in labour-intensive and infrastructure projects. The MIC will also accelerate approvals for health care and medical equipment businesses, including those involved in manufacturing supplies such as face masks, and prioritize pharmaceutical enterprises and health care service providers.³ Already on 9 April 2020, a 50% reduction of investment application fees was announced.⁴
- On 24 March 2020, *Serbia* decided to prolong the validity of identity documentation as well as residence and work permits for all foreigners legally present in the country until the end of the pandemic, so that there is no need for their renewal.⁵
- *Thailand*, on 3 March 2020, declared that it will accommodate visa extension requests from foreign nationals whose travel plans have been disrupted by the pandemic and who wish to stay longer, effective immediately.⁶

Furthermore, the COVID-19 pandemic and the resulting closure or disruption of regular governmental services have accelerated the utilization of online tools and e-platforms that enable the continuity of essential services. These solutions are implemented with assistance from international organizations, including UNCTAD through its eRegistration tool.⁷ Countries that have recently used UNCTAD's assistance include *Mali* for an online registration system; *Lesotho* for eLicenses available through the One-stop Business Facilitation Centre; *Guatemala* – where 150 businesses were registered in the week of 16 March 2020; *Cameroon*, which plans to extend its MyBusiness.cm platform to all provinces; and *Benin*, where additional online services are being developed. In addition, *Iraq* is to launch eRegistrations at the end of April 2020 and in *Cuba* the eRegulations system is being finalized.

Several other options exist for providing administrative support during the crisis.⁸ In its Global Action Menu for Investment Facilitation⁹ UNCTAD has suggested a set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business in host countries. Action Line 3 deals directly with improving the efficiency of investment administrative procedures (box 1).

² UNCTAD, Investment Policy Monitor No. 23, April 2020.

³ <https://www.mmtimes.com/news/mic-accelerate-approvals-labour-intensive-healthcare-investments.html>

⁴ <https://www.mmtimes.com/news/mic-halves-application-fees-investors-coronavirus-bites.html>

⁵ <http://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/vlada/odluka/2020/41/1/reg>

⁶ <http://www.publicnow.com/view/14B94CA9D64DEADE01D1BE5D3CAC37150CE4A1A5>

⁷ https://unctad.org/en/PublicationsLibrary/diae2020inf1_en.pdf

⁸ UNCTAD, Aftercare – A Core Function in Investment Promotion, 2007.

⁹ https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%202023-05-2017_7pm_web.pdf

Box 1.**UNCTAD Global Action Menu for Investment Facilitation – Action Line 3**

- Shorten the processing time and, where appropriate, simplify procedures for investment and license applications, investor registration and tax-related procedures.
- Promote the use of time-bound approval processes or a "no objections within defined time limits" approach to speed up processing times, where appropriate.
- Provide timely and relevant administrative advice; keep applicants informed about the status of their applications.
- Encourage and foster institutional cooperation and coordination. Where appropriate, establish an online one-stop approval authority; clarify roles and accountabilities between national and local government or where more than one agency screens or authorizes investment proposals.
- Create "client charters" in investment agencies that define service delivery standards and good practices.
- Keep the costs to the investor in the investment approval process to a minimum.
- Facilitate, within the framework of relevant legislation, the entry and sojourn of investment project personnel (facilitating visas, dismantling bureaucratic obstacles).
- Simplify the process for connecting to essential public services infrastructure.
- Conduct periodic reviews of investment procedures, ensuring they are simple, transparent and low-cost.
- Establish mechanisms to expand good administrative practices applied or piloted in special economic zones to the wider economy.

Source: UNCTAD.

Retaining Investment and intensifying aftercare by IPAs

The COVID-19 pandemic creates manifold economic, logistical and operational difficulties for foreign companies. Investment facilitation and aftercare measures, including those aimed at investment retention, are an important and immediately effective means to help foreign investors through the crisis.

The response of national investment promotion agencies (IPAs) to the crisis has been mixed. The majority (64% on 3 April 2020) responded rapidly and moved their investor services online, with 19% bringing their online facilitator role to new levels. There are, however, big regional differences: four out of ten European IPAs offer comprehensive COVID-19 related content and services online, while in the developing world most IPA websites do not even refer to COVID-19 or only notify clients of office closures during governments' lockdowns. In Africa in particular, many IPAs are struggling. A majority (56% on 3 April 2020) had no information related to the pandemic on their websites, which is problematic when many investors are desperately looking for information on quarantine measures, conditions and procedures of government business support, supply of essential goods and services, and customs issues.

In its latest IPA Observer of April 2020, UNCTAD has compiled current efforts and best practices of IPAs worldwide to respond to the emergency. The Observer also reports on the results of an online brainstorming session with heads of IPAs and IPA associations on pandemic-related challenges and early actions that IPAs have taken.¹⁰ Further information can be found in UNCTAD's IPM issued in early April 2020.¹¹

Providing investment incentives

Countless companies around the globe – no matter whether big or small, domestic or foreign – are in financial distress and have called for State aid. Developed countries in particular have included financial or fiscal aid for business in their support packages.

¹⁰ UNCTAD, IPA Observer, Special Issue No. 8, April 2020.

¹¹ UNCTAD, Investment Policy Monitor No. 23, April 2020.

Several State aid schemes cover incentives for the rapid development of medication and vaccines (box 2).

Box 2.**A variety of incentive schemes for the rapid development of medication and vaccines (Policy examples)**

In order to address the adverse impact of COVID-19, several countries have recently adopted policy measures to boost investment in those industries that are crucial to containing the spread of the virus. They provide various incentives to increase R&D and expenses in such fields as medical and pharmaceutical research for developing vaccines and treatments. For example:

- The *Czech Republic*, on 23 March 2020, established a CZK 500 million investment subsidy scheme for manufacture of medical devices, pharmaceuticals, and biotechnology.¹²
- The *Republic of Korea*, on 9 April 2020, announced that it would support companies developing COVID-19 medication or vaccines. The President guaranteed that those companies would avoid the situation in which they would not be able to make profits or break even on expenses incurred during the development of medications or vaccines. When they succeed in developing medicines or vaccine, the Korean government will purchase enough final products that the companies will not experience any loss.¹³
- At the regional level, the *European Commission*, on 6 March 2020, announced that it has mobilized up to €140 million in public and private funding to support urgently needed research.¹⁴ On 16 March 2020, the Commission announced that it offered up to €80 million of financial support to CureVac, an innovative vaccine developer from Tübingen, Germany, to scale up the development and production of a vaccine against the coronavirus in Europe.¹⁵ Finally, on 3 March 2020 the Innovative Medicines Initiative, which is a European Union (EU) public-private partnership that funds health research and innovation, launched a fast-track call funded by up to €45 million from the EU's Horizon 2020 research and innovation programme, to be matched by the pharmaceutical industry.¹⁶

Source: UNCTAD.

Other incentive schemes concern the expansion or conversion of production lines to increase medical supplies (box 3).

Box 3.**Incentives for the expansion or conversion of production lines (Policy examples)**

A growing number of countries have announced incentive measures to encourage manufacturers to expand or shift production lines to medical equipment and personal protective equipment (PPE) in order to increase available capacity. For example,

- One federal state of *India* (Tamil Nadu) has announced an incentive package to increase production of medical supplies and machinery used in the COVID-19 response. The package, which is open for both SMEs and large firms, offers a capital subsidy of 30% for fixed assets and waives the requirement for authorizations and clearance from local authorities. The package is applicable for modification or upgrading of production lines for production beginning before 31 July 2020.
- *Italy* has created a €50 million program to encourage manufacturers to convert to or expand their production of medical devices and supplies.
- The *United States* has loosened certain excise tax provisions on ethanol supplies commonly used for distilled spirits for manufacturers that are willing to produce ethanol-based hand sanitizer. No previous authorization or formula approval is required.

Source: UNCTAD.

¹² <https://www.vlada.cz/cz/media-centrum/tiskove-konference/tiskova-konference-po-jednani-vlady--23--brezna-2020-180575/>

¹³ <https://www1.president.go.kr/articles/8446>

¹⁴ https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/overview-commissions-response_en

¹⁵ https://ec.europa.eu/commission/presscorner/detail/en/IP_20_474

¹⁶ <https://www.imi.europa.eu/news-events/press-releases/imi-launches-eur-45m-call-proposals-coronavirus>

A third group of incentives aims to enhance contracted economic activities (box 4).

Box 4. Incentives for the enhancement of contracted economic activities (Policy examples)

In many countries various incentive schemes have been adopted to promote economic activities that have been much reduced by the spread of COVID-19. For example:

- On 6 April 2020, in *Canada*, the province of Quebec announced a subsidy programme for training and capacity-building for enterprises in the following areas: e-skills related to telework, good practices related to health issues, organizational communication and knowledge enhancement. This program offers a 100% refund on eligible expenses such as trainer fees, purchase of equipment and human resources management activities up to a maximum of CAD 100,000. The program is available with immediate effect and will remain in place through 30 September 2020.¹⁷
- On 9 March 2020, *China* announced that the National Development and Reform Commission and the Ministry of Commerce would revise the Catalogue of Industries Encouraging Foreign Investment. Tariffs on self-use equipment imported for foreign investment projects encouraged by the Catalogue will continue to be waived, within the investment quota. For projects exceeding the investment quota, project companies can apply to the Provincial Development and Reform Commission for tariff exemptions.¹⁸
- On 17 March 2020, *Egypt* announced a reduction of nearly 20% in the price of natural gas for industrial use and a cut of nearly 10% in the price for electricity for heavy industries in the context of the pandemic. The government also announced a freeze in electricity prices for other industries for at least three years.¹⁹

Source: UNCTAD.

Finally, companies may be encouraged to divest from host countries that are heavily affected by the COVID-19 pandemic. For example, Japan is implementing a US\$2.2 billion support plan to encourage its manufacturers to relocate production out of China, either back to Japan (US\$2 billion allocation) or to other locations in Asia (US\$217 million allocation). Although this incentive scheme was initially triggered by the trade war between the United States and China in late 2019, major supply chain disruptions in February especially affecting high value-added output, have put the initiative back at the top of the agenda. The Japanese Government has highlighted this incentive scheme as part of the US\$989 billion global economic support package it announced in early April 2020.²⁰

Acquiring shares in crisis-affected companies

Some governments have voiced their readiness to intervene more actively in the market to keep strategic businesses afloat. For example:

- The *Italian* Government moved to nationalize its national airline, Alitalia.²¹
- In *France*, the Minister of Economy announced that he would not hesitate to refer to any instruments at his disposal, including capitalization, equity investment and even nationalization.²²
- The *United Kingdom* Government is contemplating the acquisition of equity shares in airlines, including British Airways, and other companies affected by the crisis.²³
- In the *United States*, on 14 April 2020, the Government adopted a \$25 billion bailout for the airline industry.²⁴ According to the Treasury Secretary, 30% of the assistance will be repaid, and airlines will have to offer stock warrants – giving the Government the right to buy shares in the companies – on a portion of those funds.

¹⁷ <http://www.fil-information.gouv.qc.ca/Pages/Article.aspx?aiguillage=ajd&type=1&lang=en&idArticle=2804063662>

¹⁸ <https://www.china-briefing.com/news/china-covid-19-policy-tracker-benefiting-business-enterprises-comprehensive-updated-list>

¹⁹ Offshore Technology, Egypt reduces energy prices for industrial users during Covid-19

<https://www.offshore-technology.com/comment/egypt-covid-19/>

²⁰ <https://www.bloomberg.com/news/articles/2020-04-08/japan-to-fund-firms-to-shift-production-out-of-china>

²¹ <https://www.businessinsider.com/alitalia-nationalized-by-italy-history-2020-3?r=US&R=T>

²² <https://www.bloomberg.com/news/articles/2020-03-17/france-ready-to-protect-big-companies-through-nationalization>

²³ <https://www.ft.com/content/1a52f686-6b00-11ea-800d-da70cff6e4d3>

²⁴ <https://www.theguardian.com/business/2020/apr/14/us-government-coronavirus-bailout-airlines-industry>

Supporting local SMEs in supply chains

Local SMEs are particularly hard hit by the crisis. Many of them are struggling for economic survival and risk losing their backward linkages with foreign investors as the latter no longer buy parts, components, materials and services from local suppliers or because international value chains are disrupted for other reasons. Other negative effects on SMEs include the potential loss of technology and skill transfers, as well as other human capital spillovers.²⁵ This may create particular challenges in developing countries and affect various industries, such as textiles or mining.

Not surprisingly, financial and fiscal aid for SMEs is a core part of most State aid packages related to COVID-19. They include, in general, guaranteed recovery of delayed payments, indirect financing to suppliers through their buyers, tax credits and other fiscal benefits to firms, co-financing of development programmes, and direct provision of financing to local firms (box 5).

Box 5.

State support for local SMEs (Policy examples)

Financial or fiscal support for local SMEs is a core element of most State aid packages in response to the pandemic. For example:

- *Netherlands*: The Government is providing support for businesses that were forced to close temporarily, and an expansion of government guarantees for loans to SMEs.²⁶
- *Australia*: The Government is providing temporary cash flow support of up to US\$100,000 for eligible SMEs that employ staff to help with their cash flow so that they can keep operating, pay their rent, and other bills, and retain staff.²⁷
- *Malaysia*: The Government announced a US\$57 billion package, of which 40% is directed to financial support for SMEs. A six-month moratorium on all loans has been also announced by the Central Bank.²⁸
- *Brazil*: The Government announced a US\$30 billion package to fund partial subsidies for employee wages in MSMEs, plus a US\$14.9 billion credit line for working capital available to SMEs, as well as a loan program for SMEs that operate in tourism and other services industries. Tax deferrals for SMEs and the possibility to adopt reduced or flexible working arrangements were also announced.²⁹
- *South Africa*: The Government announced a Debt Relief Fund of roughly US\$ 27 million to assist small and medium enterprises in economic distress. A specific fund has been created for assisting SMEs in the tourism and hospitality sectors.³⁰
- *Saudi Arabia*: The Government announced a US\$ 13 billion aid package for the private sector. The package provides several relief measures for SMEs, including deferral of loan payments, concessional financing and extension of deadlines for tax declaration and payment.³¹

Source: UNCTAD.

Protecting national security and public health through foreign investment screening

The COVID-19 pandemic has resulted in intensified screening of foreign investment for national security reasons as countries strengthen their legal frameworks or introduce new regimes. These measures aim at safeguarding domestic capacities relating to health care, pharmaceuticals, medical supplies and equipment. Consequently, countries either expand their screening mechanisms to cover these sectors or broaden the meaning of national security and public interest to include health emergencies. Furthermore, they employ FDI reviews to protect other critical domestic businesses and technologies that may be particularly vulnerable to hostile foreign takeovers.

²⁵ UNCTAD, Creating Business Linkages – A Policy Perspective, 2010. https://unctad.org/en/Docs/diaeed20091_en.pdf

²⁶ Tax Foundation, Coronavirus: Country by country response, <https://taxfoundation.org/coronavirus-country-by-country-response>

²⁷ Tax Foundation, Coronavirus: Country by country response, <https://taxfoundation.org/coronavirus-country-by-country-response>

²⁸ OECD, SME Policy Responses, https://read.oecd-ilibrary.org/view/?ref=119_119680-di6h3qgi4x&title=Covid-19_SME_Policy_Responses

²⁹ Ibidem.

³⁰ SME South Africa, COVID-19: Payment Relief and Other Government and Private Sector Interventions for SMEs

<https://smesouthafrica.co.za/the-small-business-covid-19-survival-guide-where-to-get-help/>

³¹ PMG, Saudi Arabia, Government and Institution measures in response to COVID-19. <https://home.kpmg/xx/en/home/insights/2020/04/saudi-arabia-government-and-institution-measures-in-response-to-covid.html>

Already before the outbreak of the pandemic, according to UNCTAD's count, at least 29 countries had a specific FDI screening mechanism in place.³² In responding to the pandemic, additional investment policy measures have been implemented.

For instance, in *Spain*, the FDI liberalization regime has been suspended.³³ The underlying Royal Decree-Law 8/2020 explains that the pandemic "poses a certain threat to listed Spanish companies, but also to unlisted Spanish companies that are seeing their equity value decline, many of them in strategic sectors of our economy" and that such companies have become an easy target of foreign takeovers, which poses certain risks for public order, public safety and public health. Consequently, in numerous sectors, an *ex ante* governmental approval is required for the acquisition of 10% or more of stock.³⁴

Other countries have strengthened their screening mechanisms or have taken other action in this respect:

- In *Australia*, for example, the monetary screening threshold for all foreign investments has been temporarily lowered to zero to "protect Australia's national interest" thus now covering all foreign acquisitions.³⁵ Likewise, the time frame for the screening procedures has been extended from 30 days to 6 months.
- In the same vein, the *Italian Government* strengthened its special powers in sectors of strategic importance by expanding the scope of FDI screening to the financial, credit and insurance sector and temporarily applying it also in relation to foreign acquisitions from within the European Union.³⁶ The Government is also authorized to initiate relevant procedures *ex officio*, even if a foreign acquisition is not notified as prescribed by law.
- On 18 April 2020, the *Canadian Government* published its Policy Statement on Foreign Investment Review and COVID-19, which announced "enhanced scrutiny" of "foreign direct investments of any value, controlling or non-controlling, in Canadian businesses that are related to public health or involved in the supply of critical goods and services to Canadians or to the Government".³⁷ This measure is a response to "opportunistic investment behaviour" caused by declines in valuations of Canadian businesses as well as by investment of State-owned enterprises that "may be motivated by non-commercial imperatives that could harm Canada's economic or national security interests, a risk that is amplified in the current context". The new policy will apply until economic recovery from the COVID-19 pandemic.
- At the regional level, on 25 March 2020, the *European Commission* issued a Guidance to Member States urging them to "make full use" of existing FDI screening mechanisms "to take fully into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors" or "to set up a full-fledged screening mechanism", if a Member State does not already have one in place.³⁸ The reason behind these guidelines is to adequately respond to "an increased risk of attempts to acquire healthcare capacities (for example for the productions of medical or protective equipment) or related industries such as research establishments (e.g. developing vaccines) via foreign direct investment" during the COVID-19 pandemic. Thus, "vigilance is required to ensure that any such FDI does not have a harmful impact on the EU's capacity to cover the health needs of its citizens".

³² <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2582>

³³ Real Decreto-ley 8/2020, de 17 de marzo, de medidas urgentes extraordinarias para hacer frente al impacto económico y social del COVID-19 and Real Decreto-ley 11/2020, de 31 de marzo, por el que se adoptan medidas urgentes complementarias en el ámbito social y económico para hacer frente al COVID-19. The latter provides some additional amendments to the FDI screening regime introduced by the former. In particular, it specifies that EU resident firms controlled at least 25% by non-EU entities are also considered foreign investors for investment screening purposes.

³⁴ These sectors include i) critical infrastructure (energy, transport, water, health, communications, media, data treatment or storage, aerospace, defence, election or finance, and sensitive facilities); ii) critical technologies and dual-use products, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace technologies, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies; iii) supply of fundamental inputs, in particular energy or those related to raw materials, as well as food security; iv) sectors with access to sensitive information, particularly personal data, or with the ability to control such information; and v) media.

³⁵ <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/changes-foreign-investment-framework>

³⁶ Decreto-Legge 8 aprile 2020, n. 23 Misure urgenti in materia di accesso al credito e di adempimenti fiscali per le imprese, di poteri speciali nei settori strategici, nonché interventi in materia di salute e lavoro, di proroga di termini amministrativi e processuali. (20G00043)

³⁷ <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/k81224.html>

³⁸ https://ec.europa.eu/commission/presscorner/detail/en/ip_20_528

Other State intervention in the health industry

To protect public health and national security during the crisis, countries may resort to investment policies and measures that specifically target the health industry. For example:

- The *United States* Government has issued an order under the 1950 Defense Production Act to compel a car manufacturer (General Motors) to switch its production to medical ventilators. The Act grants the Government the power to eventually oblige other private firms to shift production to manufactured goods related to the COVID-19 emergency.³⁹
- *Spain* has enacted new regulation in order to ensure the supply of goods and services required for public health protection. Royal Decree 463/2020 entitles the Spanish Government to, inter alia, intervene and temporarily occupy factories, production units and private health care facilities, temporarily requisition all types of goods or impose mandatory personal services for the adequate protection of public health.⁴⁰
- *Switzerland* has enacted similar legislation, enabling the Federal Council to order both mandatory production and confiscation of public health related goods, while providing a cost-covering compensation.⁴¹

Looking beyond investment policies, foreign companies may also be affected by export bans on medical equipment and medications that countries adopt for public health reasons and national security. Since the start of the COVID-19 outbreak, several measures in the form of temporary export bans or temporary requirement of export authorizations or licenses have been implemented across the globe. According to UNCTAD's research, as of 14 April 2020, at least 47 countries have implemented one or more measures affecting exports of products or sub-products used in the public health response to COVID-19.⁴² Such products include medical supplies (such as masks, gloves and gowns) and PPE in general, sanitizer products, medical ventilators and other devices, drugs, pharmaceutical ingredients and raw materials for PPE manufacturing.⁴³

Concerning import duties, for example, the *European Commission* decided on 3 April 2020 to provide relief from import and value added tax (VAT) duties on goods needed to combat the effects of the COVID-19 outbreak during 2020. The Commission also approved requests from Member States and the United Kingdom to temporarily waive customs duties and VAT on the import of medical devices and protective equipment from third countries in order to help in the fight against COVID-19.⁴⁴ The *United States* announced that it has ceased imposing import tariffs on certain Chinese medical equipment, such as ventilators, oxygen masks and nebulizers.⁴⁵

Instrumentalizing intellectual property

Countries generally provide IP rights protection for pharmaceutical products to encourage pharmaceutical R&D by individual companies and researchers. But given the extraordinary health emergency situation and R&D challenges related to COVID-19, countries have taken measures to encourage the joint use of IP-protected technologies to speed up effective R&D and to facilitate mass production of needed treatments, diagnostics and vaccines. Countries have issued legislative acts that recognize the pandemic as a health emergency and facilitate the grant of non-voluntary licenses to make use of existing technologies. The legislative acts do not identify a specific IP right. Rather they enable authorities to issue an authorization

³⁹ Memorandum on Order Under the Defense Production Act Regarding General Motors Company of 27 March 2020.

⁴⁰ Article 13, Real Decreto 463/2020 of 14 March 2020.

⁴¹ Ordonnance 2 du 13 mars 2020 sur les mesures destinées à lutter contre le coronavirus.

⁴² Including the 27 member states of the EU as well as the United Kingdom.

⁴³ World Trade Organization, Annex of COVID-19-related trade measures. https://www.wto.org/english/tratop_e/covid19_e/covid_measures_e.pdf

⁴⁴ European Commission, Press Release, 3 April 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_575

⁴⁵ United States Trade Representative, Press Release, 20 March 2020, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/march/ustr-response-coronavirus-crisis>

if a request is made by a government entity or third party to use IP-protected technology in relation to the health emergency. This is based on concerns that ongoing R&D efforts may need to be facilitated by rapid access to IP-protected technologies, or that existing production capacities may not suffice to meet domestic demand for a newly developed IP-protected treatment, diagnostic or vaccine.

Four countries have so far adopted such legislative acts:

- *Canada*, COVID-19 Emergency Response Act, 25 March 2020⁴⁶
- *Chile*, Resolution for the Granting of Non-Voluntary Licenses, 17 March 2020⁴⁷
- *Ecuador*, Resolution to require the National Government to Establish Compulsory Licenses and Other Measures for the Granting of Non-Voluntary Licenses, 20 March 2020⁴⁸
- *Germany*, Amendment to the Prevention and Control of Infectious Diseases in Humans Act, 28 March 2020⁴⁹

Israel is the only country so far to have issued a non-voluntary license allowing the importation of Kaletra, an antiviral treatment protected by patents belonging to AbbVie.⁵⁰ Following the decision by Israel, AbbVie announced that it will not enforce its patents related to Kaletra anywhere in the world, which eliminates the need for a non-voluntary license.

At the request of Costa Rica, the Director General of the World Health Organization (WHO) has begun consultation for the development of a voluntary IP pool to develop anti-COVID-19 products.⁵¹ The objective is to encourage IP rights holders to contribute their rights to a pool and to enable researchers and companies to undertake further R&D as well as production and supply of anti-COVID-19 products under reasonable license terms. WHO's effort is supported by the Medicines Patent Pool, which is mandated to license IP rights from innovator companies and sub-license the rights for manufacturing and supply in developing countries.⁵² The International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) confirmed that it is open to exploring innovative approaches and partnerships to facilitate further R&D to develop new medicines and vaccines for patients suffering from COVID-19 and to expand access.⁵³

2. Investment policy actions at the international level

International declarations in support of investment

In its IPM No. 23 of early April 2020, UNCTAD reported on recent political declarations by various groups of States in support of trade and investment during the COVID-19 pandemic.⁵⁴ In the meantime, further statements have been made to this effect:

- In a statement issued on 27 March 2020, G20 leaders committed to protect workers, businesses, especially micro, small and medium enterprises (MSMEs), and the sectors most affected.⁵⁵ They also stated that they are injecting over \$5 trillion into the global economy, as part of targeted fiscal policy, economic measures and guarantee schemes to counteract the social, economic and financial impacts of the pandemic. They committed to continue to give large-scale fiscal support and to work to ensure the flow of vital medical supplies, critical agricultural products, and other goods and services across borders, and to work to resolve disruptions to global supply chains. They reiterated their goal to realize a free, fair, non-discriminatory, transparent, predictable and stable trade and investment environment, and to keep their markets open.

⁴⁶ Canada, 2020. COVID-19 Emergency Response Act.

⁴⁷ Chile, 18 March 2020, Resolution, <https://www.keionline.org/chilean-covid-resolution>

⁴⁸ Ecuador, 20 March 2020, Resolution, <https://www.keionline.org/ecuador-CL-coronavirus-resolution>

⁴⁹ Germany, 28 March 2020, the Prevention and Control of Infectious Diseases in Humans Act.

⁵⁰ Israel, 18 March 2020. A Permit to the State to Exploit an Invention Pursuant to Chapter Six, Article Three of the Patents Law 5727-1967.

⁵¹ WHO, 6 April 2020. WHO director-general endorses a voluntary intellectual property pool to develop Covid-19 products.

⁵² MPP, 3 April 2020. Medicines Patent Pool and Unitaaid respond to access efforts for COVID-19 treatments and technologies.

⁵³ IFPMA, 6 April 2020. IFPMA remarks on intellectual property management and the global response to COVID-19.

⁵⁴ UNCTAD, Investment Policy Monitor No. 23, April 2020.

⁵⁵ G20 Leaders Statement, G20 Extraordinary G20 Leaders Summit Statement, [https://g20.org/en/media/Documents/G20_Extraordinary%20G20%20Leaders%E2%80%99%20Summit_Statement_EN%20\(3\).pdf](https://g20.org/en/media/Documents/G20_Extraordinary%20G20%20Leaders%E2%80%99%20Summit_Statement_EN%20(3).pdf)

- In a press release on 28 March 2020, the Asia Pacific Economic Cooperation Business Advisory Council recognized that “any eventual recovery would take longer if the engines of trade and investment could not be re-started quickly”. Also, it urged member economies to announce a standstill on all new trade-restrictive measures for the rest of this year and to agree concrete actions to reduce protectionism going forward.⁵⁶
- Inter-Governmental Authority on Development (IGAD) Heads of State and Government issued a declaration on 30 March 2020, in which they appreciated the tremendous efforts of stakeholders that have ensured the continuity of supply chains and the provision of critical and essential services for the population of the IGAD region in Eastern Africa.⁵⁷

COVID-19 and IIAs

The COVID-19 pandemic will slow down the treaty-making pace. To date, a number of negotiating rounds for bilateral investment treaties (BITs) and treaties with investment provisions (TIPs) have been cancelled or postponed due to the pandemic.⁵⁸ This is in addition to the postponement of a number of high-level bilateral summits that typically address trade and investment agreements.⁵⁹ It is likely that 2020 will register the lowest number of IIAs concluded since 1985. The 39th session of the United Nations Commission on International Trade Law Working Group III on the reform of ISDS has been postponed until further notice, and key international meetings dedicated to reform aspects, such as those organized in the Organization for Economic Cooperation and Development (OECD) and in UNCTAD, are being postponed or are under consideration of postponement.

The COVID-19 pandemic and its mitigation measures are also likely to result in a reassessment of countries’ development plans and strategies, including with regard to the role of IIAs and the attainment of the Sustainable Development Goals. Indeed, IIAs can come into play in relation to the policy responses taken by governments to address the COVID-19 pandemic and the economic fallout as these government measures also affect the operations of foreign investors. IIAs provide legal stability and predictability to foreign investors, and as such impact on contracting parties’ regulatory powers to pursue public interests. This can place constraints on government measures (*WIR15*). This is especially true for those IIAs that lack the necessary exceptions and refinements to safeguard policy space. State measures to limit the adverse economic impact of the pandemic are manifold and vary from one country to another (see above). Although these measures are taken for the protection of the public interest and to mitigate the negative impact of the pandemic on the economy, some of them could, depending on the way they are implemented, expose governments to arbitration proceedings initiated by foreign investors under IIAs and/or investor–State contracts.

The annex to this report highlights the most relevant provisions in IIAs that could come into friction with State measures adopted to address the pandemic as well as recommendations to shield such measures from a finding of a treaty violation in line with UNCTAD’s Investment Policy Framework for Sustainable Development (2015) and UNCTAD’s Reform Package for the International Investment Regime (2018). Such reforms would allow States to better respond to severe crises of global magnitudes affecting e.g. public health, economic stability and/or the environment, by reducing the risk of expensive and lengthy ISDS proceedings. Although reforming existing IIAs may take more time than the immediate aftermath of the crisis, it is important to include this issue in the priorities of the post-crisis policy agenda.

⁵⁶ https://www.apec.org/Press/News-Releases/2020/0328_ABAC

⁵⁷ IGAD, IGAD Heads of State and Government Declaration on the Coronavirus (COVID-19) Pandemic, <https://igad.int/>

⁵⁸ Examples include the postponement of negotiations for a Brazil-Nigeria BIT; delays for the negotiations of the new Investment Protocol of the African Continental Free Trade Agreement; and the postponement of the EU-United Kingdom Free Trade Agreement.

⁵⁹ See, for example, the postponement of the EU-India Summit, which was scheduled to take place on 13 March 2020 and the EU-China Summit which was scheduled for the end of March 2020.

Existing IIAs were not designed to undermine the legitimate regulatory function of the State, especially in emergency situations, but they were concluded, for the most part, during a different era and with less consideration for today's global challenges relating to public health and the environment. IIAs concluded 20 to 60 years ago do not reflect today's global challenges relating to sustainable development, public health or climate change. Broadly drafted provisions found in IIAs resulted in expansive interpretations by arbitral tribunals, which reduced the capacity of host States to regulate, even when such regulations were taken in the public interest. Concerns have already been expressed in some countries that emergency measures adopted in the context of the pandemic could result in investor–State disputes,⁶⁰ and calls are being made for governments to act multilaterally and in a coordinated manner to suspend treaty-based ISDS arbitration for all COVID-19 related measures.⁶¹

For the past 10 years, UNCTAD has been calling for the reform of the IIA regime to ensure that the duty of governments to regulate in the public interest is safeguarded and put beyond the scope of ISDS claims. UNCTAD's *IIA Reform Accelerator*, which will be launched this summer, will provide an actionable policy tool for countries wishing to accelerate the reform of their existing and aging network of IIAs to better respond to today's challenges while maintaining investment protection. In addition to reforming their IIA regimes and in order to further minimize the risk of ISDS related to COVID-19 pandemic policy measures, States should ensure that such measures are adopted in a non-discriminatory manner and in good faith and clarify their precise intention as well as their time frames, when possible. Countries may also wish to strengthen existing "early warning systems" for potential disputes with investors and operationalize existing alternative dispute resolution mechanisms.

B. Outlook: Preparing for the post-pandemic period

As the COVID-19 pandemic continues to unfold, vast rescue packages and support programmes of governments and international institutions seek to prevent the worst for the global economy. For investment policies, this means, above all, keeping companies liquid, incentivizing investment in COVID-19 related industries, providing business with a maximum of administrative support in their day-to-day operations, keeping supply chains alive and, if necessary, protecting countries' national security in respect of core domestic industries.

Looking ahead, the pandemic is likely to have lasting effects on investment policy making. It may reinforce and solidify the ongoing trend towards more restrictive admission policies for foreign investment in industries considered as being of critical importance for host countries. At the same time, the pandemic may result in more competition for attracting investment in other industries as economies strive to recover from the crisis and disrupted supply chains need to be re-established. The crisis may also enhance the utilization of online administrative approval procedures for investors and staff.

It is also expected that the post-pandemic period will witness an acceleration of countries' efforts to reform their IIAs to ensure their right to regulate in the public interest, while maintaining effective levels of investment protection.

The magnitude of the post-pandemic reconstruction task and the priorities in this process will differ from country to country. However, all governments will face the common challenge of how to make the best use of investment policies in bringing their economies back onto a sustainable development path. In addition to national efforts, successful international cooperation will be crucial, especially for the recovery of developing countries, including least developed countries.

⁶⁰ See, for example, Sanderson, C., "Peru warned of potential ICSID claims over covid-19 measures", *Global Arbitration Review* (2020), <https://globalarbitrationreview.com/article/1225319/peru-warned-of-potential-icsid-claims-over-covid-19-measures>

⁶¹ See Bernasconi-Osterwalder, N., Brewin, S., and Maina, N. "Protecting Against Investor–State Claims Amidst COVID 19: A call to action for governments", *IISD Commentary*, <https://www.iisd.org/sites/default/files/publications/investor-state-claims-covid-19.pdf>

Annex. IIA provisions that could come into play in relation to State measures adopted to address COVID-19

Provision	Explanation	Recommendation
National treatment and most-favoured-nation (MFN) treatment	<p>National and MFN treatment prevent nationality-based discrimination and guarantee foreign investors a level playing field vis-à-vis comparable domestic investors and investors from third countries. State measures to mitigate the economic impact of COVID-19 that seem to favour certain investors based on nationality could potentially violate these standards. Although these standards are generally considered conducive to good governance, they may constrain governments' ability to grant, in exceptional circumstances, preferential (e.g. differentiated) treatment to specific or domestic investors.</p>	<p>States may wish to maintain a degree of flexibility with regard to national treatment and MFN. They may for example wish to exempt specific policy areas or measures (such as those needed for the protection of public health) as well as sensitive or vital economic sectors or industries from the scope of the obligation in order to meet both current and future regulatory or public policy needs. ((UNCTAD, Investment Policy Framework for Sustainable Development (IPFSD), options 4.1.3 and 4.2.4)</p>
Fair and equitable treatment (FET)	<p>Through an unqualified promise to treat investors "fairly and equitably", States provide maximum protection for investors but also impose important limits on their right to regulate. Broad and unqualified FET provisions in earlier IIAs can potentially create tensions with measures related to COVID-19. For example, breaches of FET could be invoked for imposing export restrictions, and difficulties may arise when assessing the reasonableness and proportionality of a measure under an FET clause.</p>	<p>States may wish to clarify (with a view to giving interpretative guidance to arbitral tribunals) what the FET standard entails, through providing a list of State obligations, and clarify that the FET clause does not preclude States from adopting good-faith regulatory or other measures that pursue legitimate policy objectives. (IPFSD options 4.3.2 and 4.3.3)</p>
Transfer of funds	<p>The COVID-19 pandemic has had an enormous impact on capital outflows, especially from developing countries. As a policy response, some countries are considering implementing capital controls to limit the surge in outflows. Although this option is generally used to respond to financial crises, it is increasingly relevant to address the negative effects of the pandemic on capital outflows. This, however, could raise issues with transfer of funds provisions in old-generation IIAs (notwithstanding Article VIII of the IMF Agreement), as these often include an obligation for States to permit all transfers relating to investments to be made freely and without delay into and out of their territory. The overwhelming majority of old-generation IIAs do not include any exceptions limiting the scope of a transfer of funds clause.</p>	<p>States may wish to provide for an exhaustive list of covered payments or transfers and include exceptions to the free transfer clause in case of serious balance-of-payments difficulties or serious economic crisis related to health or environmental emergencies. (IPFSD options 4.7.1, 4.7.2 and 4.7.3)</p>

Provision	Explanation	Recommendation
Expropriation	A number of measures implemented to combat COVID-19 may involve the requisitioning of hotels and medical equipment. Other measures include e.g. temporary closures of commercial activities. Although these measures were adopted in relation to the COVID-19 pandemic, they could potentially be challenged by protected investors under expropriation provisions in IIAs, which usually also cover indirect expropriation or measures having effects equivalent to expropriation.	To avoid undue constraints on a State's prerogative to regulate in the public interest, States may wish to set out criteria for State acts that should not be considered an expropriation, e.g. legitimate regulation taken in exceptional circumstances for the public interest. While this does not exclude liability risks altogether, it allows for better balancing of investor and State interests. (IPFSD options 4.5.1)
Force majeure	IIAs often contain a clause on compensation for losses incurred under specific circumstances, such as armed conflict or civil strife. Some IIAs expand the coverage of such a clause by including compensation in case of natural disasters or force majeure situations. Such a broad approach increases the risk for a State to face financial liabilities arising out of ISDS claims for events outside of the State's control. This is especially relevant in the current situation, should ISDS be relied on to challenge measures taken to combat COVID-19.	States may wish to limit their financial liability for events outside of their control, such as those relating to COVID-19. (IPFSD option 4.6.2)
Public policy exceptions	Recent treaties increasingly reaffirm States' right to regulate in the public interest by introducing general exceptions. Such exceptions allow for measures otherwise prohibited by the agreement to be taken in pursuit of specified policy objectives. General exception clauses typically include measures that are necessary to protect human life and public health. In order to prevent abuse of exceptions, it is often clarified that the measures must be applied in a non-arbitrary manner and not as disguised investment protectionism. Such public policy exceptions could serve to justify a range of measures taken in response to the spread of COVID-19.	States may wish to include a general exception clause in their IIAs. This clause should specify that the pursuit of public health is a legitimate objective under the treaty. States may wish to prevent abuse of the exception by requiring that such measures are not applied in an arbitrary or discriminatory manner or constitute a disguised restriction on investors and investments, and that they are only temporary and proportionate. (IPFSD options 5.1.1 and 5.1.3)
National security exceptions	A small number of IIAs include a national security exception, listing the types of situations covered by the exception in order to determine its breadth. These include measures to protect a State's essential security interests, to address serious economic crises or to maintain international peace and security. This provision can be drafted to allow the State to digress from treaty obligations when doing so is required for the protection of national security interests. It can also list the specific situations that qualify as a security exception in a more specific manner, by explicitly identifying when they can be invoked (e.g. to justify measures relating to the protection of public health or the outbreak of global pandemics).	States may wish to include a self-judging essential security exception clause and explicitly clarify that public health and serious economic crisis fall under the scope of the exception. (IPFSD options 5.2.0 and 5.2.1)

Provision	Explanation	Recommendation
Investor obligations and responsibilities	<p>Governments and employers, including domestic and foreign investors, have roles to play in ensuring safety and health in the workplace in general and in the context of a pandemic. Investor obligations and responsibilities can promote compliance by investors with domestic and/or international norms at the entry and operation stage. Provisions on investor responsibilities or clauses on investor compliance with domestic laws (other than at the entry stage) are, however, largely absent from the stock of IIAs. This raises general issues related to the interaction between IIAs, domestic law and other areas of international law affecting investment, e.g. public health, labour, human rights or environmental law. Ensuring responsible investor behaviour includes two dimensions: maximizing the positive contribution that investors can bring to societies (“doing good”) and avoiding negative impacts (“doing no harm”).</p>	<p>States may wish to consider setting out investor obligations or responsibilities in IIAs, as a few recent treaties have done. Noting the evolving views on the capacity of international law to impose obligations on private parties, there are two broad sets of options: raising the obligation to comply with domestic laws to the international level and designing corporate social responsibility clauses. (IPFSD options 7.1.1, 7.1.3, 7.1.4, and 7.1.5)</p>
Investor–State dispute settlement (ISDS)	<p>Foreign investors have used ISDS claims to challenge measures adopted by States in the public interest (for example, policies to promote social equity, foster environmental protection or protect public health). Broad ISDS mechanisms typically used in old-generation IIAs provide for the contracting parties’ advance consent to international arbitration and are characterized by broad scope, few conditions for investors’ access to ISDS and a lack of procedural improvements. As ISDS is at the heart of the IIA reform process, in recent IIAs countries have carefully regulated ISDS and at times omitted it.</p>	<p>States may wish to consider their approach to ISDS reform for the development of future treaties, but also the modernization of existing ones. Countries may wish to explore the following ISDS reform approaches (alone or in combination) (IPFSD options 6.1.2, 6.2.1, 6.2.2, 6.3.0, and 6.4.0):</p> <ul style="list-style-type: none"> • A standing ISDS tribunal replacing the system of ad hoc investor–State arbitration) • Limited ISDS (e.g. including a requirement to exhaust local judicial remedies, limiting treaty provisions subject to ISDS, excluding certain policy areas from the ISDS scope – such as public health measures – and/or setting a time limit for submitting ISDS claims) • Improved ISDS procedures (e.g. increasing State control over the proceedings, opening proceedings to the public and third parties, enhancing the suitability and impartiality of arbitrators, improving the efficiency of proceedings or limiting the remedial powers of ISDS tribunals) • Replacing ISDS by settling disputes in domestic courts and/or through State–State dispute settlement



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