Submission to the review of Australia's bilateral investment treaties conducted by the Department of Foreign Affairs and Trade

Sarah Brewin – 30 September 2020

Overview

This submission responds to the question 'Do you have concerns about Australia's existing BITs? If so, please comment on any specific provisions of concern.' The submission will focus on one key area of concern, being the definition of investor in almost all of Australia's BITs. This submission illustrates concerns with the definition of investor by highlighting the risk it poses to Australia in the context of possible investor-state dispute settlement (ISDS) claims stemming from the government's COVID-19 measures.

With the exception of China, none of Australia's BIT partners are major investors in Australia.[1] This fact may be seen to imply that there is not a significant prospect of ISDS claims being brought against Australia under its current BITs. Indeed, to date Australia has been respondent to only one public treaty-based ISDS case - *Philip Morris Asia Limited v. The Commonwealth of Australia.*[2] However, the definition of investor in most of Australia's BITs would allow investors from third states to readily assume the corporate nationality of one of Australia's BIT treaty partners for the purposes of bringing an ISDS claim. This greatly increases Australia's exposure to ISDS claims.

The issue of manipulation of corporate nationality was a central feature of the Philip Morris case. While Australia succeeded in that case on relatively narrow jurisdictional grounds (discussed further below), the issue of definitions of investor that permit 'treaty shopping'[3] remains a salient one for the country. It is of particular concern in the current context, in which many commentators[4] (including the author of this submission[5]) are anticipating a rapid influx of treaty-based investor-state claims resulting from governments' COVID-19 related measures – be they related to public health, or economic stability and recovery. This context may create a particularly urgent impetus for DFAT to act to address the broad definition of investor in Australia's BITs, which could provide access to treaty-based ISDS to a far larger number of investors than the drafters likely envisaged. Given the strong and ongoing response of the federal and state governments of Australia, ranging from the extended lockdown in Melbourne (currently subject to a domestic law challenge[6]), international traveller caps and new screening thresholds for foreign investment, the prospect of ISDS challenges to COVID-19 measures may be especially concerning to DFAT.

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[1] DFAT (2019). Statistics on who invests in Australia. https://www.dfat.gov.au/trade/resources/investment-statistics/Pages/statistics-on-who-invests-in-australia

[2] UNCITRAL, PCA Case No. 2012-12

[3] The term "treaty shopping" refers to the practice of investors who specifically seek to benefit from the most advantageous protection of a BIT that has been signed between the host State in which they have invested and another State of which they do not hold the nationality. See further Nikièma, S. (2012). Best Practices Definition of Investor. *International Institute for Sustainable Development.* https://www.iisd.org/system/files/publications/best_practices_definition_of_investor.pdf

[4] See for example, UNCTAD. (2020). The Changing IIA Landscape: New Treaties and Recent Policy Developments. https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d4.pdf

[5] Bernasconi, N., Brewin, S., Maina, N. (2020). Protecting Against Investor–State Claims Amidst COVID-19: A call to action for governments. *International Institute for Sustainable Development*. https://www.iisd.org/articles/protecting-against-investor-state-claims-amidst-covid-19-call-action-governments

[6] Australian Associated Press. (15 September 2020). 'Victoria's coronavirus curfew subject to legal challenge by Mornington Peninsula cafe owner'. *The Guardian.* https://www.theguardian.com/australia-news/2020/sep/15/victorias-coronavirus-curfew-faces-legal-challenge-by-mornington-peninsula-cafe-owner#:~:text=A%20Mornington%20Peninsula%20cafe%20owner%20has%20mounted%20a%20legal%20challenge,under%20Melbourne%20stage%2Dfour%20lockdown.

Definitions of investor in Australia's BITs that permit treaty shopping

Most of Australia's BITs contain a relatively uniform definition of investor, which, in effect:

a) Define an 'investor' as being a natural person or a company; and
b) Define a 'company' as being a corporate entity registered in accordance with the laws of a party to the BIT or controlled by a natural person who is a national of a party to the BIT.

This type of definition is found in Australia's BITs with the China, the Czech Republic, Egypt, Hungary, Lao PDR, Pakistan, Lithuania, Poland, Romania, Sri Lanka, Turkey and the still in-force BIT with Uruguay.[7] Although some definitions have slightly different wording or presentation, the essential features of this definition are the same: to be a covered investor, a company needs only to be established in accordance with the laws of the BIT partner.

For example, per the Australia-Czech Republic BIT:

> *"investor" means a national or a company of either Contracting Party;*
>
> *"company" means any corporation, association, partnership, trust or other legally recognised entity that is duly incorporated, constituted, or otherwise duly organised:*
>
> *(i) under the law of a Contracting Party*
> *(ii) under the law of a third country and is owned or controlled by an entity described in paragraph (1)(d)(i) of this Article or by a natural person who is a national of a Contracting Party under its law,*
>
> *regardless of whether or not the entity is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;*

Per the Australia-Egypt BIT:

> *"investor" of a Party means:*
>
> *(i) a company; or*
> *(ii) a natural person who is a citizen or permanent resident of a Party;*
>
> *"company" means any corporation, association, partnership, trust or other legally recognised entity that is duly incorporated, constituted, set up, or otherwise duly organised:*
>
> *(i) under the law of a Party; or*
> *(ii) under the law of a third country and is owned or controlled by an entity described in paragraph 1(d)(i) of this Article or by a natural person who is a citizen or permanent resident of a Party;*
>
> *regardless of whether or not the entity is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;*

This definition does not include any of the criteria for defining a protected investor found in modern treaty language, such as requiring that a company have its corporate seat, and/or substantial business

[7] There are two notable exceptions, one is the Australia-Argentina BIT which provides that an Argentine investor is a natural or legal person, and legal person is defined as "any entity constituted according to the laws and regulations of the Argentine Republic *or having its seat in the territory of the Argentine Republic*;" and the Australia-Philippines BIT which provides that a Filipino investor is a natural person or a company, which is defined as "legal entities, including corporations, partnerships, companies, trusts, associations of companies, trading corporate entities and other organisations that are incorporated or, in any event, are legally organised *and actually doing business under the laws of the Philippines and which have their place of effective management in the Philippines.*"

operations in that country, or requiring that a company be beneficially owned or substantially controlled by the investor.[8] This type of definition is the type that encourages treaty shopping, because it allows investors from third countries, or Australian investors (as in the case of Philip Morris) to establish shell companies in Australia's BIT partner countries and use them to launch ISDS claims against Australia.

The definition of investor used in most of Australia's old BITs can be contrasted against the narrower and more closely circumscribed definition used in the 2019 BIT with Uruguay, which provides:

> *(c) "investor of a Party" means a natural person of a Party or a company of a Party who has made an investment in the territory of the other Party;*
>
> *(d) "company of a Party" means any corporation, association, partnership, trust or other legally recognised entity that is duly incorporated, constituted, set up, or otherwise duly organised under the law of a Party, regardless of whether or not it is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability, and carrying out substantial business activities in the territory of that Party;*
>
> *(e) For the purposes of this Agreement, a company is:*
>
> *(i) "owned" by an investor if more than fifty percent of the equity interest in it is beneficially owned by the investor; and*
> *(ii) "controlled" by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions;*

Other examples of treaty language designed to limit the risk of treaty shopping is available in recent treaty models, including from developed countries such as the Netherlands. Notably, the Netherlands' 2019 model BIT[9] requires a covered investor to have "substantial business activities" in the territory of the contracting party, but it also provides useful guidance to tribunals on how to determine whether an investor carries out such business activities in its claimed home country. Article 1(c) of the Dutch model BIT provides:

> *(c) Indications of having 'substantive business activities' in a Contracting Party may include:*
>
> *(i) the undertaking's registered office and/or administration is established in that Contracting Party;*
> *(ii) the undertaking's headquarters and/or management is established in that Contracting Party;*
> *(iii) the number of employees and their qualifications based in that Contracting Party;*
> *(iv) the turnover generated in that Contracting Party; and*
> *(v) an office, production facility and/or research laboratory is established in that Contracting Party;*
>
> *These indications should be assessed in each specific case, taking into account the total number of employees and turnover of the undertaking concerned, and take account of the nature and maturity of the activities carried out by the undertaking in the Contracting Party in which it is established.*

[8] Nikièma, S. (2012).
[9] Dutch Model BIT (2019). https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden

Denial of benefits clause

It should be noted for completeness that most of Australia's BIT contain some form of 'denial of benefits' clause. The most common formulation is that found in the Australia-Czech Republic BIT which provides:

> *'Where a company of a Contracting Party is owned or controlled by a citizen or a company of any third country, the Contracting Parties may decide jointly in consultation not to extend the rights and benefits of this Agreement to such company.'*

There is some variation in these clauses, for instance in the Australia-Turkey BIT, the words 'subject to their national law' appear. In the Australia-Sri Lanka BIT, the clause reads:

> *'Each Party reserves the right to deny to a company of the other Party the advantages of this Agreement where that company is owned or controlled by a citizen or a company of any third country. Where a Party exercises this right, that Party shall promptly notify the other Party and enter into mutual consultations if considered necessary by either Party.'*

These clauses do not mitigate against the risks of treaty shopping claims as a result of the broad and unqualified definition of investor used in Australia's BITs, for several reasons:

1) In the case of the formulation of the Czech and other BITs, the requirement that the treaty partner agree to the denial of benefits is one major impediment.
2) The reference to 'third countries' does not protect against treaty shopping by nationals of the host state (e.g. Philip Morris)
3) Tribunals have interpreted denial of benefits clauses as having non-retroactive effect, meaning that States may only deny the benefits of the treaty to foreign investors in cases of treaty shopping before a claim had been brought and at the point at which the investor settled in the territory.[10]

Defences against treaty shopping claims

There are legal defences available to states to answer claims brought by treaty-shopping investors. Australia was able to successfully defend the treaty-based claim brought by Philip Morris on the basis that the tribunal lacked jurisdiction because the claim constituted an abuse of process. Key to this successful argument was the foreseeability of the dispute at the time of Philip Morris's corporate restructure which it argued afforded it the status of a protected investor under the Australia – Hong Kong BIT. The tribunal held that:

> 'the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable [emphasis added]. The Tribunal is of the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the Tidewater tribunal, that a measure which may give rise to a treaty claim will materialise.' [554]

In the Australian government's own submission, the two key factors were:

> a. "[K]nowledge of the existing or foreseeable dispute" and in particular where "the relevant party can see *an actual dispute or can foresee a specific dispute as a high probability and not merely as a general future controversy*"; [emphasis added] and
>
> b. "[C]orporate restructur[ing] of an investment such that BIT protection is then obtained with a view to bringing a preconceived BIT claim in respect of that actual or specific future

[10] *Plama Consortium v. Bulgaria; Yukos Universal v. Russia.* For further discussion see Nikièma, S. (2012).

dispute" (i.e. "[t]he timing of the corporate restructur[ing]" and "[t]he purpose of or motivation for the corporate restructur[ing]").[11]

In the context of COVID-19, this type of abuse of process defence may be little comfort to Australia. International and domestic law firms have been for many months now been publicly encouraging their clients to restructure to obtain the benefit of as many BITs as possible. Sometimes this is in veiled language, such as this statement from the firm Volterra Fietta:

> "as companies address the economic and business ramifications of COVID-19, they should also consider their potential access to investor-State arbitration and the protections of international law. A sophisticated understanding of an investor's protections under a BIT can be an essential part of any restructuring process..."[12].

In other cases it is more blatant, for example the firm Jones Day states that:

> "Investors should ensure that they have restructured their foreign investments to afford maximum IIA protection in the event of improper State conduct."[13]

If investors in Australia have engaged in this type of preventative restructuring in light of the unprecedented amount of COVID-19 related government regulation in general, but not in anticipation of an existing or foreseeable specific dispute, then a tribunal may not be amenable to the type of abuse of process defence successfully mounted in Philip Morris. In any event, the high cost to the Australian taxpayer of successfully defending an ISDS claim,[14] even one which does not proceed to the merits, would encourage a more proactive approach to the risk of COVID-19 claims from treaty-shopping investors than relying on legal defences.

Moreover, Australia remains exposed to claims arising from companies that might have proactively and opportunistically structured their corporate arrangements in order to access to ISDS before investing in Australia and prior to the COVID-19 pandemic. Indeed, corporate law firms took the lessons of Philip Morris as an opportunity to advise their clients on the need to exercise foresight in this regard. From Allen Overy:

> It is recommended that consideration be given to structuring transactions for investment treaty protection at the time they are entered into (in the same way considerations as to tax and other matters are factored in). This ensures protection for investments from the outset. While restructuring existing investments is not in itself illegitimate, the PM Asia case demonstrates risks associated with such restructuring if it is not done correctly. This is particularly the case if the restructuring is done with the aim of securing treaty protection against a backdrop of events that may form the basis of, or be relevant to, a future claim under the treaty. Specialist

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[11] Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12. Award on jurisdiction and admissibility. https://pcacases.com/web/sendAttach/1711 para 402

[12] Volterra Fietta. (2020). Client Alert: Restructuring, COVID-19 and Investor-State Arbitrations: Often Overlooked Issues. https://www.lexology.com/library/detail.aspx?g=ebbcecc9-cd74-4bce-9e95-02a6a347aa05. See also, Simmons & Simmons: "Investment treaty protections are no longer viewed as remedies of last resort, but important tools in an investors' armoury. Investor-State cases are frequently high-value and complex. The largest investor-State award (against Russia in respect of claims by the former shareholders of Yukos under the Energy Charter Treaty) is worth in excess of US$50b. The availability of investment treaty protections should always be considered when an investor is making a significant investment decision into another territory and during any international corporate restructuring."

[13] Jones Day. (2020). COVID-19 and Investment Treaties: Balancing the Protection of Public Health and Economic Interests. https://www.jonesday.com/en/insights/2020/05/covid19-and-investment-treaties

[14] Hutchens, G. and Knaus, C. (1 July 2018). Revealed: $39m cost of defending Australia's tobacco plain packaging laws. *The Guardian Australia.* https://www.theguardian.com/business/2018/jul/02/revealed-39m-cost-of-defending-australias-tobacco-plain-packaging-laws

> advice should be taken before any restructuring of this kind takes place. Failure to do so could result, as it did in PM Asia, in a claim being deemed inadmissible as an abuse of process.[15]

From Ashurst:

> Most notably, in the Philip Morris case, the Australian Government succeeded in arguing in its defence that the Philip Morris tobacco company had restructured its investment (so as to route it through Hong Kong) primarily for the purpose of gaining access to the ISDS provisions in the Hong Kong-Australia BIT once it became likely that tobacco plain packaging laws would be introduced, which it would want to dispute... Early consideration of the factors likely to impact a foreign direct investment, and a careful approach to any restructuring, will be crucial if investor protection rights are to be preserved. Therefore, if restructuring is considered necessary, it should be conducted in a timely manner, long before any specific dispute arises or becomes likely. Properly documenting the reasons for the restructuring will also be key.[16]

The issue of the definition of investor is critical in the context of COVID-19, but also beyond.

Options for Australia to address treaty shopping risk and the risk of COVID-19 related ISDS claims

To address the risk of COVID-19 related treaty shopping in the immediate term, the Australian government may wish to consider approaching its BIT partners to request a suspension of the ISDS provisions of their agreements, in accordance with article 57 of the Vienna Convention of the Law on Treaties. In this respect, DFAT may wish to review and consider this proposed language for effecting such a suspension,[17] which was developed following a consultation period with national investment negotiators, international law experts, and civil society organizations. While suspension may be the most efficacious option in this context to address the risk of COVID-19 related ISDS claims for states, there are other options available, which are outlined in Annex A.

To address the issue of treaty-shopping in Australia's BITs more generally (i.e. not related to COVID-19 measures), of the full list of policy options described in the briefing note to this consultation,[18] there are four options which are potentially applicable:

1) Full renegotiation
2) Amendment
3) Termination
4) Replacement of a BIT with an FTA chapter that may or may not include ISDS

In all options except for termination, if ISDS was retained there would need to be new text developed for the definition of investor that closed off the prospect of treaty-shopping, along the lines of the 2019 Uruguay text or Dutch model BIT excerpted above. However, it should be noted that any inclusion of ISDS (in the form of arbitration) carries risks for states, even where key definitional issues such as the definition of investor are better addressed.

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[15] Allen Overy. (2016). Restructuring business to take advantage of investment treaty – a cautionary tale. https://www.allenovery.com/en-gb/global/news-and-insights/publications/restructuring-business-to-take-advantage-of-investment-treaty--a-cautionary-tale

[16] Ashurst. (2018). Investment protection: Managing investment risk in an uncertain world. https://www.ashurst.com/en/news-and-insights/insights/investment-protection-managing-investment-risk-in-an-uncertain-world/

[17] International Institute for Sustainable Development (2020). Agreement for the coordinated suspension of investor state dispute settlement with respect to COVID 19 related measures and disputes. https://www.dropbox.com/s/q3v3lokjns453c4/ISDS-suspension-COVID-EN-updated.pdf?dl=0

[18] DFAT. (2020). Review of Australia's Bilateral Investment Treaties. https://www.dfat.gov.au/sites/default/files/review-australia-bilateral-investment-treaties.pdf

Which option is taken will depend on the cost and benefits of each treaty, as identified during this public consultation process, weighing up the risks of ISDS claims against the benefits to Australia's outward investors, as well as the cost to the government of engaging in extensive (re)negotiation processes.

Consideration of ISDS risk for treaty partners

Noting that DFAT's portfolio includes Australia's overseas development programme, a holistic review of Australia's international investment agreements should take into account the negative impacts that these instruments can and do inflict on Australia's developing country partner states. All seven known instances in which Australian investors have brought treaty-based claims under Australia's BITs, FTAs, and the Energy Charter Treaty, have been brought against developing countries. In *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan,*[19] an Australian investor was awarded USD4.8 billion plus interest for the decision of the Province of Balochistan to refuse to grant a mining licence for a gold and copper mine – an investment project which never commenced operation.[20] Australia's total overseas development assistance to Pakistan in the 2019 – 20 period represented less than 0.7% of this award (minus interest).[21] Australia's old generation BITs have the potential to inflict serious financial liabilities on its developing country partners, undermining its aid programme, and interfering with developing states abilities to provide basic services to their populations and recover from COVID-19. It is the hope of this author that the DFAT BIT review will take this perspective into account when deciding how to address Australia's stock of BITs and IIA commitments more generally.

About the author

Sarah Brewin is an Australian lawyer working in international investment law and policy for a sustainable development think tank. The views expressed in this submission are entirely her own.

[19] (ICSID Case No. ARB/12/1)
[20] UNCTAD International Investment Agreement Navigator. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/463/tethyan-copper-v-pakistan
[21] DFAT. Overview of Australia's aid program to Pakistan. https://www.dfat.gov.au/geo/pakistan/development-assistance/Pages/development-assistance-in-pakistan#:~:text=Over%202019%2D20%20the%20Australian,through%20the%20bilateral%20country%20program.

Annex A: Options for governments to mitigate against COVID-19 related ISDS claims

Termination

Termination is the process by which the term of a treaty is ended. There are two types of termination: 'unilateral' (one state party wants to terminate) or 'by mutual consent' (all state parties want to terminate). Under customary international law which is codified in the Vienna Convention on the Law of Treaties (VCLT),[22] parties to a treaty can terminate it by mutual consent at any time. In contrast, unilateral termination is only permitted in accordance with the terms of the treaty itself. Usually, a treaty states that it can be unilaterally terminated after the expiry of the first term, often 10 or 15 years.

Most BITs include 'survival' clauses. These allow for established investors to continue to bring ISDS claims under a terminated treaty, usually 10 or 15 years. It is important to note that in a termination by mutual consent, the state parties can agree to extinguish the survival clause, so that it no longer applies. However, in the case of a unilateral termination, this is not possible.[23]

Termination is a good option for those states who want to take this moment, when international travel and diplomatic missions are largely on pause, to address their current treaty stock. Those states could use termination to either replace their older BITs with more modern ones, or to exit the international system in favour of domestic options for international investment governance. Termination would not be a targeted response to the risk of COVID-19 related investor-state dispute settlement (ISDS), but rather a broader approach to reform.

While termination by consent with an agreement to extinguish the survival clause would be a way of barring COVID-19 related ISDS, its main drawback in this context is that it is slow. States would need to negotiate to terminate each treaty one by one with each treaty partner, and in each case also reach an agreement regarding the survival clause. Unilateral termination would not be an effective way to bar COVID-19 related ISDS claims, because of the survival clause which would continue to allow ISDS challenges to COVID-19 measures by established investors.

Amendment

Amendment is a consensual process by which state parties to a treaty agree to change the treaty's content by adding new provisions or changing or removing existing ones. The general power of states to amend their treaties is codified in the VCLT, which also sets down rules for amendment that will apply if the treaty itself is silent on the issue of amendment. While many newer BITs contain rules on how the BIT can be amended, most BITs do not.[24] An amendment that, for example, carves out COVID-19 related measures from the scope of ISDS, could be an effective way to mitigate against ISDS claims. However, like termination by consent, an amendment would likely need to be negotiated treaty by treaty. This could involve potentially lengthy considerations of the applicable rules and procedures for amendment (whether they are to be found in the VCLT or the BIT itself), as well as an agreement on how the BIT will be amended, and negotiation of the language giving effect to the amendment. An additional drawback of amendment in this context, is that amendment usually requires a domestic ratification process to come into effect, for instance parliamentary approval, or

[22] Article 54.

[23] For further discussion on this point and details on termination, see Bernasconi, N. Brewin, S., Nikièma, S., Dietrich Brauch, M. 'Terminating a Bilateral Investment Treaty' (2020). https://www.iisd.org/library/iisd-best-practices-series-terminating-bilateral-investment-treaty.

[24] According to the UNCTAD IIA Mapping Project, 607 of 2,577 mapped treaties include modalities on amendment or renegotiation.

whatever is constitutionally required for each state party.[25] This means it would not be a timely option to respond to the threat of ISDS challenges to COVID-19 measures.

Joint interpretation

Joint interpretation is a process by which state parties to a treaty, through a consensual process, develop an instrument which is designed to clarify the meaning of a treaty provision and to narrow a tribunal's interpretive discretion. States could use such a statement, for example to define 'COVID-19 related measures,' and assert that the parties consider such measures to fall within one of the treaty's public interest exceptions, or to fall outside the scope of the treaty's substantive protections.

One benefit of joint interpretation is that does not require the potentially slow domestic process of ratification, and the joint interpretation can begin to be applied immediately, even by tribunals hearing pending disputes.[26] On the other hand, similar to amendment and termination by consent, a joint interpretation requires a treaty-by-treaty negotiation process, which could be time consuming. In addition, arbitral tribunals do not always consider themselves bound by interpretive statements, especially those which go beyond clarifying the states' original intent when concluding the treaty and instead relate to the parties current understanding of the treaty. This issue will be minimized if the treaty itself provides for binding joint interpretations, however very few BITs currently do so.[27] As such, a joint interpretation is likely to leave tribunals with a some discretion on how to handle COVID-19 related measures,[28] and so would not conclusively address the risk of ISDS challenges to those measures.

Suspension

The ability of state parties to agree to suspend the operation of all or part of a treaty is codified in the VCLT.[29] Article 57 governs suspension of a treaty where all state parties agree to the suspension. Article 58 applies to multilateral treaties where two or more, but not all, parties agree to the suspension. Article 57 does not require a suspension to be temporary, whereas article 58 does.[30] An agreement to suspend the operation of ISDS for all COVID-19 related measures could be concluded multilaterally, regionally, or bilaterally. A suspension agreement could be initiated by and concluded between a small group of like-minded states, after which additional states could sign on. This would minimize the potential for lengthy negotiations and could address multiple treaties at once. In order to comply with the requirements of article 58 that the suspension be limited in time, the suspension agreement could include a '*rendez-vous'* clause requiring the parties to consider, at fixed intervals, whether the suspension agreement needs to continue.

The effectiveness of this option relies on there being significant buy-in from states – particularly those states whose investors are the most frequent users of ISDS. Given that virtually all states have taken COVID-19 related measures to protect public health and the economy, the risks of ISDS challenging those measures is universal to all states with investment treaties. As such, opposition to or support of this type of agreement may not fall along traditional capital importing vs capital exporting lines. In any event, sustained diplomatic engagement and moral persuasion to convince as many states as possible to sign on would be a necessary complement to this option.

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[25] The United Nations Conference on Trade & Development (UNCTAD) Reform Package for the International Investment Regime (2018). Page 78. https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf.
[26] Ibid, p.79.
[27] According to the UNCTAD IIA Mapping Project, 126 of 2,577 mapped treaties include modalities on amendment or renegotiation.
[28] Supra note 25.
[29] Articles 57 and 58.
[30] Dörr, O., & Schmalenbach, K. (2011). Vienna convention on the law of treaties. Springer.