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Investment Policy Options for Facing COVID-19 Related ISDS Claims

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Abstract

Developing and least developed countries have undertaken a number of measures to fight against the multidimensional impacts of the COVID-19 pandemic. Such measures and those that may be adopted in the context of the recovery efforts are, however, susceptible to challenges by foreign investors using investor-State dispute settlement mechanisms.

This policy brief first considers the kinds of measures States have adopted to limit the spread of COVID-19, protect their strategic sectors and promote economic recovery, including through foreign investment aftercare and retention. It then addresses how the investor-State dispute settlement system (ISDS) has been used by investors in times of crises, based on the analysis of the awards in several cases brought against both developed and developing countries.

Against this backdrop, the brief elaborates on the different options and initiatives States can take for preventing ISDS claims at the national, bilateral, regional and multilateral levels. It concludes with some policy advice for developing and least developed countries to face possible COVID-19 related ISDS claims in the future.

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Les pays en développement et les pays les moins avancés ont pris un certain nombre de mesures afin de lutter contre les conséquences multidimensionnelles de la pandémie de COVID-19. Toutefois, le risque existe que ces mesures et celles qui pourraient être adoptées dans le cadre des efforts de relèvement puissent être contestées par les investisseurs étrangers au travers des mécanismes de règlement des différends entre investisseurs et États.

Le présent rapport sur les politiques explore en premier lieu les différents types de mesures adoptées par les États pour limiter la propagation de la pandémie de COVID-19, protéger leurs secteurs stratégiques et favoriser la reprise économique, notamment en assurant un suivi et le maintien des investissements étrangers. Il explique ensuite, sur la base d'une analyse des sentences prononcées dans plusieurs procédures intentées à l'encontre de pays développés et en développement, de quelle manière le système de règlement des différends entre investisseurs et États a été utilisé par les investisseurs en temps de crise. En réponse, il recense les diverses options et initiatives qui peuvent être mises en œuvre par les États afin d'empêcher les recours aux niveaux national, bilatéral, régional et multilatéral. Il formule, en conclusion, quelques recommandations à l'intention des pays en développement et des pays les moins avancés concernant les politiques susceptibles de leur permettre de faire face, à l'avenir, à d'éventuels recours liés à la pandémie de COVID-19.

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Los países en desarrollo y menos adelantados han adoptado una serie de medidas para combatir los efectos multidimensionales de la pandemia de COVID-19. Sin embargo, tanto ese tipo de medidas como las que puedan adoptarse en el contexto de los esfuerzos de recuperación, pueden enfrentarse a retos relacionados con el uso por parte de inversionistas extranjeros de los mecanismos de solución de controversias entre inversionistas y Estados.

En este informe sobre políticas se consideran en primer lugar las clases de medidas que han adoptado los Estados para limitar la propagación de la COVID-19, proteger sus sectores estratégicos y promover la recuperación económica, entre otras cuestiones, mediante el cuidado posterior y la retención de la inversión extranjera. A continuación, el informe aborda el modo en que los inversionistas han recurrido a la solución de controversias entre inversionistas y Estados (SCIE) en tiempos de crisis, sobre la base del análisis de las sentencias de varias causas incoadas contra países tanto desarrollados como en desarrollo.

En este contexto, el informe profundiza en las distintas opciones e iniciativas a las que los Estados pueden acogerse para evitar reclamaciones a través de la SCIE en los planos nacional, bilateral, regional y multilateral. La publicación concluye con asesoramiento en materia de políticas destinado a los países en desarrollo y menos adelantados a fin de que afronten posibles reclamaciones a través de la SCIE relacionadas con la COVID-19 en el futuro.

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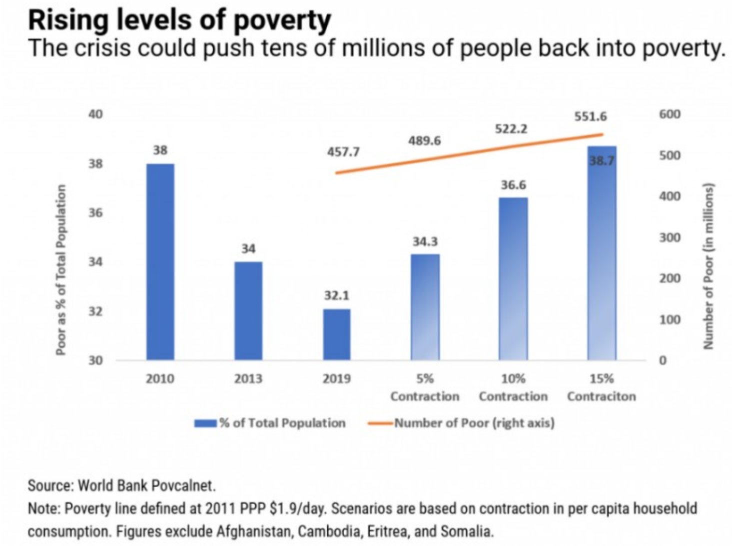
1. Introduction

Developing countries and least developed countries (LDCs) have been particularly vulnerable to the unfolding effects of the COVID-19 pandemic in all its dimensions. Many States have adopted a number of measures aimed at limiting the effects of the pandemic, protecting domestic industries for strategic sectors (e.g. healthcare, energy, telecommunication, food production, etc.), and safeguarding the real economy, particularly by offering bonds or bailouts for the public in general, including companies.[1]

The disruption of the global economy has had a severe impact on foreign investments. According to the United Nations Conference on Trade and Development (UNCTAD), global foreign direct investment (FDI) flows dropped drastically by 42% during 2020-2021.[2] Similarly, the International Monetary Fund (IMF) has suggested that this situation will not only exacerbate inequalities, but also risks "undoing the gains in reducing poverty over the last 7 to 10 years[3] (see Figure 1). Least developed countries would be the most affected as existing debt burdens and reduced policy space could increase these vulnerabilities even further during the pandemic.[4]

Figure 1



Available from: https://blogs.imf.org/2020/08/27/covid-19-without-help-low-income-developing-countries-risk-a-lost-decade/

There is considerable evidence on how the use of investor-State dispute settlement (ISDS) mechanisms in previous crises had exposed governments to international arbitration proceedings initiated by foreign investors under international investment agreements (IIAs) and/or investor–State contracts. For example, Argentina faced 62 claims related to the economic crisis known as the "*corralito*", which included a mass claim brought by almost 60,000 bondholders against the debt restructuring efforts taken by Argentina.[5] Similarly, Egypt became the fourth most challenged nation in the world with 17 cases filed after the Arab Spring in 2011.[6]

In this context, many commentators have raised concerns about an oncoming avalanche of ISDS claims due to COVID-19 related measures[7], from those looking to profiteer from the pandemic[8] and a larger ecosystem of lawyers, law firms and arbitrators which supports them[9]. This situation challenges the international community to accelerate systemic reform of the international investment regime, including ISDS.

According to UNCTAD, the post-pandemic period would 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.[10] Although the extent of current reform efforts differ significantly among States at the bilateral, regional and multilateral level, the current COVID-19 pandemic has evidenced the need to consider risk-reduction and mitigation of arbitration threats against States, particularly in relation to States' responses to crises and resilience-building measures.

This policy brief will first consider measures States have adopted to limit the spread of COVID-19, such as those adopted for protecting strategic sectors of the economy and promoting economic recovery, including foreign investment aftercare and retention. It will also address how the ISDS system has historically been used against States facing crises based on the analysis of the awards in several cases brought against developed and developing countries. Against this backdrop, the brief elaborates on different options and initiatives States can take for preventing ISDS claims at the national, bilateral, regional and multilateral levels. The brief concludes with some policy advice tailored for developing countries for facing possible COVID-19 related ISDS claims in the future.

2. State measures adopted to contain the spread of COVID-19 and promote a better and fairer recovery

The unprecedented nature of the pandemic has obliged countries around the globe to take emergency measures to reduce the spread of COVID-19, while at the same time trying to tackle related economic and social crises. Although this section does not include an exhaustive overview of all measures taken by States, it tries to provide a quick snapshot of the various regulatory actions and public policies implemented by different countries during this period, particularly focusing on measures for maintaining social security, mitigating worst economic impacts and safeguarding their development objectives.

While the COVID-19 crisis has already caused, as noted, a dramatic drop in global FDI,[11] related economic and geopolitical uncertainty could also affect FDI flows. Large multinational corporate groups could reduce geographical diversification of their supply-chains to limit disruptions and exposure to external shocks,[12] while some jurisdictions seek to impose more protectionist measures to protect strategic sectors of their economy.[13] At the same time, some government measures have gone well beyond actions to contain the COVID-19 spread, and have included strengthened FDI screening mechanisms for "acquisitions in any sector where companies suffer from temporary financial stress and value distortions under the exceptional economic conditions associated with the pandemic"[14] and to address the potential risks of FDI for national security interests.[15]

These measures should not be considered in a vacuum or limited to an immediate response to control the spread of COVID-19. On the contrary, these actions showcase the imperative need of States to safeguard sufficient regulatory space to respond to crises, promote sustainable development for all, and build resilience for future domestic and external shocks.

Moreover, a lesson that should be learnt from the current pandemic is that protecting public welfare and well-being is not an 'extraordinary measure'. It requires a continuous and persistent involvement of the public sector, promoting public investment in infrastructure, human talent and capacities to control external and domestic shocks, and to promote a more equitable and fair redistribution of wealth among society. Such goals cannot be attained by austerity measures directed towards reducing welfare and social services, privatization of public services and assets, or by redirecting public funds for the payment of ISDS costs and compensations.[16]

Following this approach, States have also taken measures towards investment aftercare and retention. These are aimed at protecting critical domestic infrastructure and other sensitive industries, and general State aid packages to support domestic economies, among others[17]. Other specific State interventions include measures directed towards facilitating and retaining investment and intensifying aftercare by investment promotion agencies. It also extends to providing investment incentives in strategic sectors, in particular healthcare and allied sectors such as manufacturing of masks and personal protective equipment (PPE). Some of these actions have been conceived to keep strategic businesses afloat, with massive attention being given to the airline industry and small and medium enterprises[18].

2.1. Type of measures to contain the spread of COVID-19

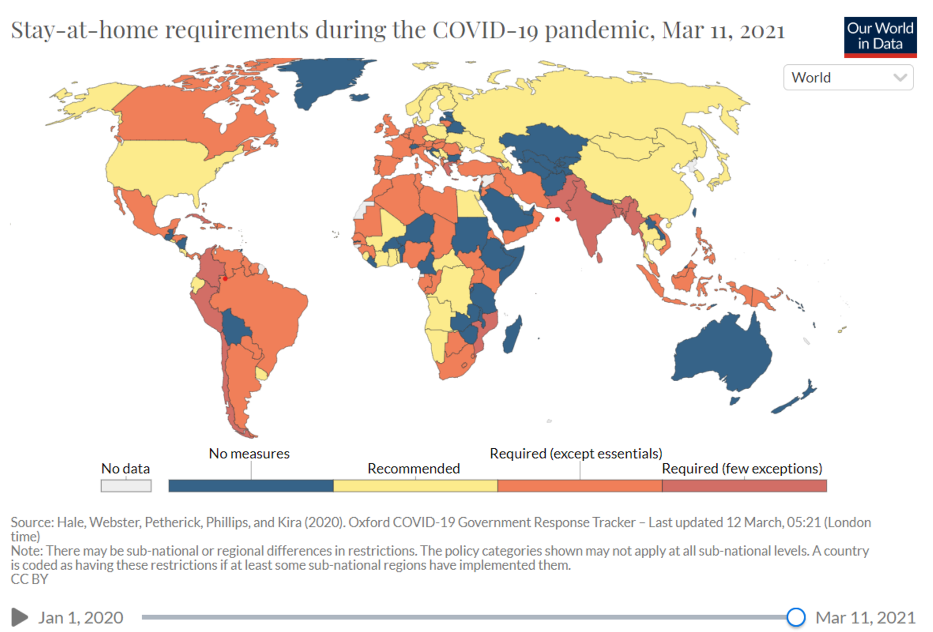
To combat the rapid speed of transmission, almost all countries put in place measures, such as "school closures; workplace closures; cancellation of public events; restrictions on public gatherings; closures of public transport; stay-at-home requirements (see Figure 2); public information campaigns; restrictions on internal movements; and international travel controls."[19] States also came out with many policy responses to address the adverse impacts caused by these measures, *inter alia* for strengthening healthcare, providing fiscal support, unemployment benefits and provision of social security. It is important to consider that these policy measures have been taken by States in emergency circumstances using the best available information. Highest priority was therefore accorded to containment of the virus for the preservation of human life and health[20].

Many health related measures were adopted by countries to stop the spread of the coronavirus and protect the most vulnerable. These policies were particularly focused on procurement of PPE & diagnostic tests, optimizing availability of hospital beds for critical patients, providing special attention to the elderly and increasing the use of telemedicine[21]. Some governments also addressed the mental health challenges posed by the pandemic and provided psychosocial support to the people[22].

The IMF has summarized key policy responses taken by governments to limit the impact of COVID-19 in 197 countries[23]. It highlights the fiscal support packages given by States, the provision of social security benefits, adoption of vaccination strategies and support provided for reopening the economy. The impacts of these interventions have been varied, and have been very successful in some countries for containing the virus, while not so much in others[24]. In one notable instance, cash transfers by the government during the pandemic significantly reduced poverty and inequality in the country, bringing it to near historic lows[25].

However, the size and forms of support provided by States have been very disparate among developed and developing countries. According to the Bank for Interna-

Figure 2



Available from: https://ourworldindata.org/grapher/stay-at-home-covid
(As on 11 March 2021)

tional Settlements (BIS), "the size of the fiscal support is much higher in advanced economies (AEs) than emerging market economies (EMEs). Budgetary measures in AEs have reached 8.3% of GDP – 6.6 percentage points (pp) higher than in the aftermath of the global financial crisis [of 2008], while for EMEs they represent just 2.0% of GDP"[26].

2.2. Social and economic protection measures for a more resilient future

Disruption resulting from the measures adopted to reduce the spread of COVID-19 also evidenced some of the major weaknesses of the social fabric. Not only are vulnerable groups at a higher risk of contracting the virus, but also the economic and social costs of "flattening the curve" have disproportionately affected people living under the poverty line, where suppression strategies, such as social distancing and stay-at-home measures, are difficult or almost impossible to comply with.[27] Some studies have shown that "the poorest quintile of the population in low income countries (LICs) and lower-middle income countries (LMICs) has a 32% higher probability of dying from COVID-19 compared to the richest quintile partly because of lack of access to available treatment, but also lack of protective measures and higher exposure to the virus."[28]

COVID-19 has highlighted the fragility of social protection systems all around the world as "inequality itself may be acting as a multiplier on the coronavirus's spread and deadliness,"[29] widening the socioeconomic divide and health disparities. Social distancing measures and lockdowns have demonstrated that workers in the informal sector are more susceptible to major risks as they are less protected against external shocks and do not have social safety nets. The lack of universal social protection also affected social measures intended to alleviate the impact of the pandemic in low-income households as "subsidies and other forms of assistance during the COVID-19 crisis are easier to implement when using the social insurance infrastructure, which often only includes formal workers."[30] Similarly, while only a percentage of workers have had the option of continuing to work from home, the labor rights in some cases have been curtailed and workers have faced several threats to their livelihoods[31]. States have been increasingly required to protect workers from "poor conditions, unfair dismissals and union suppressions."[32]

As a response, States have adopted several measures intended to reduce, at least temporarily, the detrimental socio-economic effects of the pandemic. Such actions have been implemented in the labor sector (prohibition of layoffs and redundancy on the grounds of lockdown effects on businesses, sick benefits for professional illness for mandatory quarantine, and guarantees of salary for staff working from home), rental and leasing markets (temporary bans on evictions for non-payment, bank credits for rent payment and flexibility plans to liquidate debts by tenants), financial services (compulsory grace periods for late payment of costs and outstanding debts, bans on closure of accounts for non-payment, and reduction of costs), and service markets (ban on the suspension of basic services for non-payment —water, electricity and gas—, suspension of price increase for digital services —internet, mobile telephone and television), among others.[33]

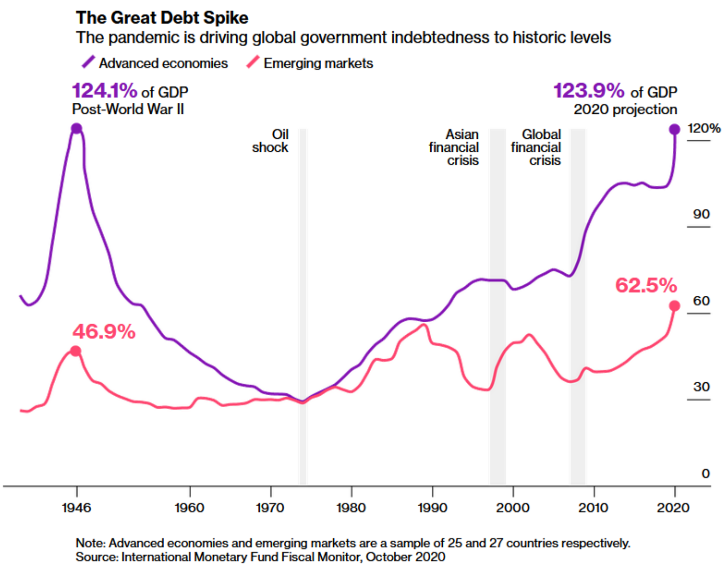
While States have implemented these actions on a temporary basis, it has been recognized that the experiences and knowledge gained from their implementations should allow governments to design more "inclusive social protection systems that include expanded access to health services, sickness benefits, unemployment protection and social protection for the vulnerable and informal households."[34] For achieving these objectives, States will not only require sufficient regulatory space to design and implement these policies, but also secure finance for building more resilient and inclusive health and social protection systems.

2.2.1. Fiscal support and debt restructuring efforts

According to IMF estimates, "discretionary fiscal policy actions that countries have taken to contain the pandemic and its damage to the economy amount to about $9 trillion, (…) This consists of direct budget support—currently estimated at $4.4 trillion globally—and additional public sector loans and equity injections, guarantees, and other quasi-fiscal operations (such as non-commercial activity of public corporations)—estimated at another $4.6 trillion."[35] Meanwhile, estimates also show that the COVID pandemic has added $24 trillion to the global debt over the last year, reaching record levels (see Figure 3).

In this time, the IMF has received over a hundred requests for Emergency Financing and Debt Relief[36], which it will finance through its $1 trillion war chest. Neverthe-

Figure 3



Available from: https://www.bloomberg.com/graphics/2021-coronavirus-global-debt/

less, the costs of the pandemic require major efforts by developing countries and LDCs, as primary sector commodities, tourism, transport and distribution have been directly hit by health restrictions. This has been accompanied by a fall in remittances, which are an important source of development income.[37]

In addition, LMICs are still bound to pay a total of $130 billion in debt service costs, risking broader cuts in public services needed to cope with the human and economic effects of the pandemic.[38] While advanced and emerging market economies have accounted for the bulk of the global fiscal support (around $8 trillion),[39] developing countries and LDCs not only faced existing debt vulnerabilities before the pandemic, but also constrained fiscal space, making their stimulus packages extremely limited[40] (see Figure 4). As a result, it is necessary that States have sufficient fiscal space to respond to the crises with "large fiscal packages needed to save lives and livelihoods."[41]

A recent study comparing countries' responses in 2008 and 2020 has found that "stimulus packages in 2020 are much larger but less channelled towards these key SDGs, which affect basic human needs and underpin societies' ability to achieve sustainable development"[42]. Its authors further add that "some developing countries are facing major fiscal space constraints, including potential debt default, falling remittances and revenues from international trade in goods and services, especially tourism, and foreign direct investment contraction, in 2020, a situation that is likely to continue into 2021".[43]

In order to avoid facing the difficult task of "choosing between saving lives or servicing debt,"[44] developing countries and LDCs require sufficient regulatory and fiscal space to ensure that stimulus packages or debt relief efforts are driven towards closing the social and economic gap, while ensuring the full enjoyment of human rights.[45] This has put countries in a scenario in which they must consider the need to modernize their IIAs in order to avoid expansive interpretation of their investment treaty provisions, which make debt restructuring more costly and difficult,[46] while also continuing the multilateral discussion on debt restructuring and cancellation, particularly by promoting the negotiation of bonds held by the private sector.[47]

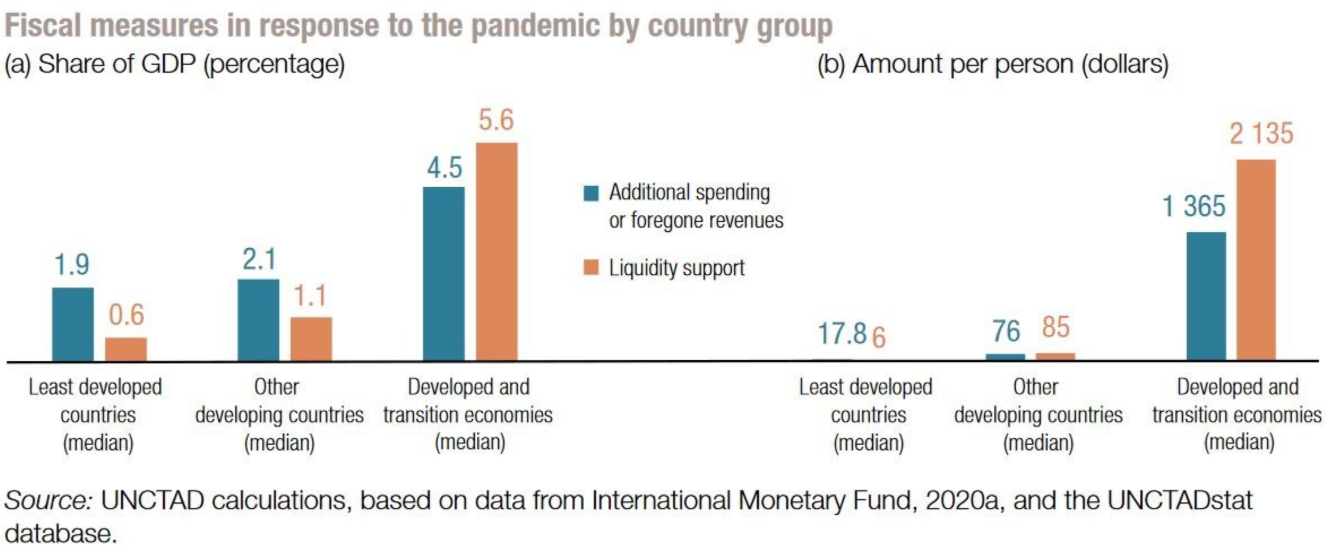
2.2.2. Protecting national strategic interests

During the second half of 2020, global FDI flows fell below 1 trillion USD, and are projected to decrease by further 5 to 10% in 2021.[48] Prolonged uncertainty resulting from the COVID-19 crisis is directly affecting FDI, while further stagnation in 2022 will leave the value of global FDI well below the 2019 level.[49]

Countries which are already vulnerable are most likely to adopt emergency measures, which then make them ripe for investors as they "can easily claim that these undermine earlier understandings of international agreements."[50] It also opens up the door for more third-party financing of these disputes, which is already driven by "the growth of a large supply of investable capital searching for profitable investment opportunities"[51] (see Box 1).

Some countries have introduced policies to alleviate administrative burdens and bureaucratic procedures for foreign investors with the objective of easing investment in strategic sectors, such as the health sector and pharmaceutical research. This has included greater use of online tools and e-platforms by Investment Promotion Agencies[52] and the reduction of investment application fees.[53] Others have introduced more restrictive policies with respect to the admission and screening of foreign investment in industries considered strategic for host countries[54]. These measures have *inter alia* included:

Figure 4



Available from: https://unctad.org/system/files/official-document/osg2020d1_en.pdf, p. 51

Box 1 - Issues on third-party funding and COVID-19

The increase in the practice of third-party funding in ISDS has given rise to fears that speculative financiers will consider COVID-19 related ISDS claims as 'investment opportunities', seeking to profit from the claims of other investors. These financiers can also sharply increase litigations costs, hoping to force settlements from States[55].

In his separate opinion in the case of *Tienver and Others* v. *Argentina*, an arbitrator excoriated the practice of vulture funds acting as third party funders. He notes that "[D]espite not being an 'investor' under the BIT and the funds provided by Burford notbeing 'protected investment' under the BIT, these proceedings have continued because Burford and the Nominated Lawyers have been assured of receiving significant amounts from any award which may be made by the ICSID Tribunal. Burford is a third party and as the Respondent states 'is abusing the ICSID system by bringing forward a claim that is contrary to the purposes and goalsof the Convention in order to make astronomical profits'"[56].

He had good reason to make these observations, as Burford Capital, the world's largest firm for "litigation finance," earned$140 million on a $13 million investment in financing the dispute[57], which is over a 1000% rate of return.

- Intensified screening of foreign investment on national security considerations;
- Broadening the meaning of national security and public interest to include health emergencies;
- Enhanced *ex-officio* screening procedures of foreign investments; and
- FDI reviews to protect other critical domestic businesses and technologies from 'hostile' takeover.

For example, the European Union (EU) enacted the guidance concerning investment from non-member economies for the protection of member States' strategic assets[58] in **"cases where foreign investments could, actually or potentially, now or in the future, have an effect in the single market"** not limited to healthcare-related industries. This was done under the recognition that "EU's openness to foreign investment needs to be balanced by appropriate screening tools and take into account the impact on the EU industry, beyond the healthcare sector."[59]

Given how ISDS has been used in previous crises, exposing governments to arbitration proceedings initiated by foreign investors under IIAs and/or investor–State contracts, there is an urgent need to safeguard sufficient regulatory space in IIAs to protect the public interest, including public health, while protecting and promoting international investment for sustainable development.

3. Learning from past crises

There have been several instances of multiple ISDS disputes being filed following the onset of a crisis. This ties in with the notion that many of these cases are being filed by speculative investors who look at these crises related disputes as an investment opportunity. Indeed, the COVID-19 crisis seems not to be an alien to the same problems that past crises faced, as "[E]very crisis that has occurred - the Argentine economic crisis in 1998-2004, the global economic crisis of 2008 and the Arab Spring - have brought about a spate of arbitrations against states. They have involved expansionist creation of new law that have brought discontent with the system of investment arbitration."[60]

The experiences of States in facing ISDS claims while also trying to tackle economic and political crises could serve as an early warning for some of the challenges that could be raised in the context of the pandemic. Although some critics have argued that the concerns are overrated, as States measures can be 'defended' under exceptions generally included in IIAs, and General Principles of Law; it is necessary to consider that measures that could be challenged through ISDS will encompass not only those measures adopted as response to COVID-19 (e.g. lockdown measures), but also those that could be adopted in the future for facilitating recovery efforts (e.g. State equity participation in companies to avoid bankruptcy and other measures addressing potential intellectual property barriers to access products required to face COVID-19, such as vaccines and medical therapeutics, among others).

3.1. The standard of Fair and Equitable Treatment (FET) and financial crises

A well-known case of a country facing multiple simultaneous ISDS claims during a crisis is Argentina, which till date is the most sued country with at least 62 known disputes[61] having been filed against it. The majority of these disputes came after January 2002, when Argentina enacted its Emergency Law No. 25.56125, which "declared a public emergency, devalued the peso which had been pegged to the dollar since the 1991 Convertibility Law, and redenominated in pesos all domestic contracts, including public utilities tariffs that had previously been calculated and re-adjusted in dollars, at the rate of one peso to the dollar ('*pesification*'). According to Argentina, these economic and financial measures were necessary and the only way to ensure public order, avoid further economic collapse and distribute the cost of the crisis evenly over all participants in the economy, including concessionaires of public utility services, among which there were several foreign investors."[62]

Although Argentina clearly based its defence on a state of necessity and police powers to cope with the financial, political, and social crises in the 2000s, most tribunals interpreted these provisions by assessing the proportionality of the measures adopted and "the pertinence of the hypothetical economic measures that could have achieved the same result as those adopted by Argentina, without affecting the interests of foreign investors."[63] Likewise, tribunals have understood that as "reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be managed,"[64] any subsequent act of the State that frustrates such 'legitimate expectations' will be a violation of the FET standard.[65] Although other tribunals have considered that 'legitimate expectations' cannot be the source of State obligations under a bilateral investment treaty,[66] the tribunals almost uniformly "affirmed that they were not concerned with the legality or soundness of policy measures taken to deal with the crisis, but that the core of the dispute lay in the basic question of whether the government by its actions violated the rights granted to the investors with respect to their investments under international law"[67]. While the tribunals routinely assumed jurisdiction, the final awards have been mixed and inconsistent[68], despite having similar facts, in response to the same government measure, and having been brought under near identical substantive and procedural rules.

The experience of Argentina shows that, as Lavopa concludes, "the ISDS system had a very low capacity to adapt to totally exceptional circumstances for which it did not seem to have been designed. Despite the efforts of the Argentinian attorneys to show that the measures implemented in the post-crisis period were adopted in an emergency context, being so exceptional as to justify any breach of the substantial clauses of the BITs, few tribunals were prepared to sustain this defense."[69]

Similar actions were also seen following the Greek sovereign debt crisis, though at a much lower level. IIAs have made debt restructuring more difficult and costly[70], thus further increasing risks for indebted countries. According to one report, for Greece, "there was also evidently fear that Dart, or smaller holders of the same bonds, might immediately sue Greece — something that could potentially tie up the European bailout funds on which the country is counting on to stay in business"[71].

There is something to be said about the wisdom of pre-emptively avoiding getting dragged to litigation and accompanying legal costs, even if you win. Greece for instance was sued by investors[72] based on legislation enacted in the context of Greece's 2012 sovereign debt restructuring that amended sovereign bond terms, allegedly allowing the imposition of new terms upon bondholders against their consent[73]. The case was initiated through a Request for Arbitration sent to ICSID dated 2 May 2013, and the award was dispatched to the parties on 9 April 2015. For an investment dispute that lasted less than 2 years and was won by Greece, the already cash-strapped country paid out over $5 million in legal fees and expenses[74].

The spillovers of the Greek crisis were felt across the Eurozone, and particularly in Spain, which currently has the second highest number of ISDS disputes filed against it[75]. Concentrated in the renewable energy industry, the claims were triggered by Spain withdrawing the preferential tariff rates for solar power it had promised to investors in early 2000s as a way to incentivize renewable energy production. However, after the 2008 financial crisis, Spain found itself in a deep fiscal deficit and facing severe austerity measures. Unable to sustain such high level of tariff rates amid falling production costs, it reduced them in 2010, prompting an outcry from investors and demands of hundreds of millions of euros in compensation[76].

For filing their claims, investors largely took recourse to the Energy Charter Treaty (ECT), which includes a provision on ISDS and has been referred to as "the world's most dangerous investment agreement"[77]. Spain has argued that "the cuts have been approved by democratically elected parliaments, that a reasonable profit is still to be made from renewable investments, and that above all, Spaniards have been affected just as much as foreign investors"[78].

The various awards which have been rendered till date have been inconsistent, even though they broadly addressed the same regulations[79]. One particular issue which has been scrutinized is about the degree of legal stability that can be expected by investors. While one tribunal said that given the existence of the right to regulate, investors cannot expect absolute regulatory stasis, another found in favor of the investor on the basis of a purported State obligation to "afford fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long-term investments."[80] Spain is facing still more investment claims with liabilities from awards already topping €800 million.[81]

3.2. Political crises and social turmoil

Foreign investors have also brought claims for extraordinary damages even when a country is undergoing domestic political upheaval. A prominent instance of political crises requiring international dispute resolution is the setting up of the Iran - United States Claims Tribunal "as one of the measures taken to resolve the crisis in relations between the Islamic Republic of Iran and the United States of America arising out of the November 1979 hostage crisis at the United States Embassy in Tehran, and the subsequent freezing of Iranian assets by the United States of America"[82].

In the case of Egypt, over seventy percent of its 37 known ISDS cases have been filed in or after 2011[83], in the aftermath of the Arab Spring. While few ISDS claims were directly connected with acts done during that period[84], others were "directly or indirectly involved with the ramifications of the Egyptian revolution… [or] were related to disputes accumulated from a decade"[85]. When asked why such a large number of international arbitration cases were filed against Egypt in the first place, Moustafa El Bahabety, the Egyptian Deputy Justice Minister for Arbitration and International Disputes, said that "it's all because of the period of political transformation we went through" and its consequences.[86] Furthermore, "the timing of the so called Arab Spring was tempting for some investors to the exploitation of such events by bringing meritless claims as a tactical mechanism for obtaining amicable settlements"[87] while "the IMF loan agreement concluded by Egypt in 2016 was an important factor for compelling Egypt to continue in the ISDS system, as Egypt was avoiding any potential implications jeopardizing the loan agreement such as a large investment arbitration award or an indication that Egypt is denouncing its treaty obligations."[88]

One of the most significant cases relevant here is that of *Unión Fenosa v. Egypt*[89] pertaining to a natural gas plant in the country, which held Egypt liable for breach of its FET obligations and awarded damages of more than $2 billion[90]. The award came in the context of measures taken by Egypt as it "faced internal energy shortages in the wake of the political turmoil unleashed by the Arab Spring"[91]. Despite providing expert testimony asserting that "the Egyptian revolution and the Global Financial Crisis [of 2008] constitute a situation of *force majeure*"[92], the tribunal declined to recognize that as a proximate cause of the alleged breach of FET[93].

The investor had filed simultaneous claims under commercial arbitration in Cairo, Paris and Madrid, all three of which were decided in favor of Egypt[94]. In February 2020, an agreement had been reached between the foreign joint venture partners and the Egyptian authorities to reopen the gas plant[95], but that plan had been disrupted due to the pandemic[96]. The investor has thereafter said that it would go back to pursuing a legal claim to the $2 billion in compensation its joint venture was awarded in the case by the ICSID tribunal in 2018[97]. Most recently however, it appears that the plant would restart in the first quarter of 2021[98].

Other similar cases are that of *Maiman and others* v. *Egypt* and *Ampal-American Israel Corporation* v. *Egypt*[99] which relate to an alleged failure to protect a gas pipeline from attacks and prolonged interruption of gas supply during the period of the Arab Spring[100], which affected the claimant's investment. It remains to be seen how these cases will be resolved, though Egypt may settle the cases, as with *ArcelorMittal,* as it "emphasises the Egyptian government's desire to end all disputes with investors in a friendly manner, so as to encourage them and give a boost to the investment climate in Egypt".[101]

Certain commonalities emerge from these ISDS cases across regions in the past two decades. Arbitral tribunals routinely claim jurisdiction to adjudicate these cases, even importing it through the MFN clause. Second, there seems to be limited deference to necessity exceptions or *force majeure* being invoked by States, where its invocation is permitted by the IIAs. These defences have been rarely successful, because requirements to prove the proportionality and adequacy of public measures "as the only possible measure" have been very restrictive,[102] limiting the deference to governments' decisions to respond to crises.

3.3. Concerns arising from the COVID-19 pandemic

Several law firms engaged in investment arbitration have been fishing in troubled waters. One firm has considered that "[S]tates have taken very different measures impacting investments within their territory, all of which they will surely claim are necessary and justified, recognising that traditional defenses would not necessarily cover every measure a State might take, and there may well be grey areas, linked to the breadth and significance of measures, the timing of their application, and aspects of potential compensation."[103] Similarly, other firms considered that **"**the response to the COVID-19 pandemic is likely to violate various protections provided in bilateral investment treaties and may bring rise to claims in the future by foreign investors**".** In a webinar titled "The Coming Wave of COVID-19 Arbitration – Looking Ahead", organized by yet another law firm, participants discussed investment treaty arbitration, construction, and intellectual property, and looked at "the likely wave of disputes that will arise in response to the COVID-19 pandemic and suggest avenues for corporations to minimize risk in the context of such disputes".[104]

Currently, several countries are facing threats of COVID-19 related disputes for measures adopted for containing the spread of the disease, to ease the financial and social impacts of the pandemic,[105] or because of the effects the COVID-19 pandemic has had in certain sectors.[106] Civil society organizations have organized several calls and events to start raising awareness of this threat.[107] Indeed, even in the case of the new generation IIAs, the "ingrained tendency of the arbitrators would be to interpret the restrictions on liability in a narrow manner […] which give discretion to the tribunals to limit the scope of the regulatory powers of states or the scope of the defences by allowing them to review public policy decisions rather than according governments sufficient discretion."[108]

Finally, States have also faced challenges in managing existing disputes during the COVID-19 pandemic, as the collection of information for defending against such claims requires much coordination among State authorities, including at the local level. As the entire state machinery is 'working-from-home,' it is difficult not only to participate in virtual hearings due to lack of or poor connectivity, but also because of difficulties to provide necessary information and documents. This adds to the fact that in 2020, the International Centre for Settlement of Investment Disputes (ICSID) registered its highest ever number of cases,[109] with new cases being brought under bilateral investment treaties, investment contracts and the Energy Charter Treaty, adding pressure to a government system already in deep distress.

4. Policy options and possible responses to ISDS threats

Decisions taken by States during the pandemic are often considered to be in line with all technical guidance provided by the World Health Organization,[110] but should also be "adapted to national risks and capacities."[111] Given that such decisions are science-based, the deference accorded by the tribunal in *Philip Morris v. Uruguay* should also "generate some normative pull in assessing whether measures are reasonable"[112] while recognizing the "local socioeconomic and public-health conditions".[113] Thus, in considering investors' claims, ISDS tribunals should not ignore the special, often dramatic circumstances many developing countries are facing in the context of the COVID-19 crisis.

However, this deference in judgment may not be accorded in practice. Given the concerns about a rash of new claims being raised due to the pandemic, with the first ones already having been filed, States need to be innovative in their thinking to prevent these disputes from arising and escalating in the first place. This section provides some options for consideration.

4.1. Mutual suspension of ISDS provisions in IIAs

During the Thirteenth Extraordinary Session of the Assembly of the Heads of State and Government, the African Union endorsed the 'Declaration on the Risk of Investor-State Dispute Settlement (ISDS) with respect to COVID-19 pandemic related measures', inviting their "Member States to explore all possibilities for mitigating the risks of ISDS, including a mutual temporary suspension of ISDS provisions in investment treaties in relation to COVID-19 pandemic government measures."[114]

This significant effort by African countries does not exist in a vacuum. In recent negotiations at the regional level, States have not yet agreed to include ISDS in the Regional Comprehensive Economic Partnership (RCEP)[115], which includes countries in the Asia-Pacific region. The new United States–Mexico-Canada Agreement (USMCA), which replaced the previous North American Free Trade Agreement (NAFTA), also does not provide for ISDS between USA and Canada.

Bilaterally, New Zealand has signed agreements in the form of side letters with five countries to exclude compulsory ISDS between them under the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP). The terms of the side letters vary as some exclude the use of ISDS between New Zealand and other countries entirely, while other side letters allow for arbitration to proceed only if the relevant Government agrees[116]. These "side letters" have the same treaty-level status as the Agreement.

4.2. Imposing a moratorium on ISDS claims during the COVID-19 crisis

In May 2020, the Columbia Center on Sustainable Investment (CCSI), South Centre and other eminent personalities[117] issued a 'Call for ISDS Moratorium During COVID-19 Crisis and Response' which stresses on the need "for a complete moratorium on all ISDS claims until the pandemic has passed and governments have agreed on principles to ensure that future arbitration cases will not hinder countries' good faith recovery efforts." It clearly outlines how unprecedented changes in the business environment will likely trigger unjustified claims from foreign investors over the loss of their expected profits. It also highlights the need to avoid distractions from the urgent control of the COVID-19 crisis, and preventing awards against States, the legal costs of which alone would run into millions of dollars and would weigh heavily against the dire fiscal crises currently facing developing countries. It suggests imposing an ongoing restriction on ISDS claims related to measures taken during the pandemic, including those targeting health, economic, or social dimensions of the pandemic and its effects.

Another initiative has been led by a coalition of civil society organizations which have penned an open letter to governments on ISDS and COVID-19[118]. With 659 signatories as of date, the letter highlights risks from possible ISDS claims and urges action towards its permanent restriction for COVID-19 related measures; the suspension of ongoing ISDS cases during the crisis; termination of existing agreements with ISDS, among others. The letter also includes an annex on how to implement the proposals, providing details about the legal avenues governments can use.

A similar call for moratorium has been made by the International Institute for Sustainable Development (IISD) [119], which calls for governments to jointly either suspend treaty-based investor–State arbitration for all COVID-19 related measures or clarify the application of international law defences during these extraordinary times. In the meanwhile, they also suggest that governments can limit the risks of international arbitration by withdrawing consent to it.

These calls for a moratorium on ISDS clearly recognize the drastic impacts that ISDS has on countries, particularly developing countries which have been hard hit during the crisis and are likely to suffer its worst financial effects. They have also attracted certain criticisms, with apprehensions being expressed about the moratorium allowing the authoritarian misuse of regulatory powers and undermining of international rule of law principles[120]. However, a letter by several United Nations (UN) mandate holders has conversely highlighted how "the inherently asymmetric nature of the ISDS system, lack of investors' human rights obligations, exorbitant costs associated with the ISDS proceedings and extremely high amount of arbitral awards are some of the elements that lead to undue restrictions of States' fiscal space and undermine their ability to regulate economic activities and to realize economic, social, cultural and environmental rights".[121]

Having a moratorium in the midst of a pandemic and its aftermath would therefore enable States to focus on preserving both the lives of people and corporate interests, without having to provide special rights and privileges for foreign investors alone. States could consider current efforts for the broad reform of ISDS and IIAs to bring the discussion of this moratorium, for example in the upcoming UNCTAD XV or in already established forums like the Second Committee of the United Nations

General Assembly, considering the detrimental effects ISDS COVID-19 related claims could have with respect to the achievement of Sustainable Development, eradication of poverty and global partnerships for development.

4.3. Alternative means of dispute resolution and prevention of ISDS claims

There are several examples that show a definite movement towards termination of IIAs with ISDS or limiting the use of ISDS in new agreements. Similarly, new enhanced measures towards cooperative disputes resolution and a balancing of investor rights with obligations are being included in new generation IIAs. These trends can provide important guidance for States looking towards reshaping their investment policies post COVID-19 pandemic.

For example, the new Brazil - India Investment Cooperation and Facilitation Treaty (ICFT, which is still to enter into force as of date) uses elements from the model treaties of both countries and excludes ISDS. Instead, it includes a dispute prevention mechanism based on a consultation with the Joint Committee in order to find solution to request by one of the parties, and allows individual investors to present such requests as well. Only when the time frame for preventing the dispute lapses (120 days), or there is no participation by any of the parties, the dispute can be raised to ad-hoc international arbitration (Art. 18). In addition, the agreement allows the participation of interested stakeholders during the dispute prevention procedure, and it also includes a code of conduct for arbitrators in case the dispute is raised to an ad-hoc arbitral tribunal (see Annex II Brazil-India ICFT).

Likewise, in December 2020, the European Union and China reached an agreement in principle on the Comprehensive Agreement on Investment (CAI) between them. Chapter 5 of the agreement refers to dispute settlement and includes several means to prevent a dispute before reaching State-State ad-hoc arbitration. Firstly, Article 3 provides the means to reach a mutually agreed solution through consultation carried in good faith between the Parties to the agreement. If agreement is not reached in the lapse of 30 days from the request of consultation, or consultation were not held, the requiring Party may request the composition of an arbitration panel. Nevertheless, Article 4 provides the option to voluntarily move to mediation at any time of proceedings to reach a mutually agreed solution (see Annex I, Chapter V EU – China CAI).

In addition, Chapter 6 of the Draft Pan African Investment Code also offers an option for how ISDS could operate in the future. As per Article 42, States may, in line with their domestic policies, agree to utilize ISDS, which would be conducted at "any established African public or African private alternative dispute resolution center". In the following section, it also allows States to file counterclaims if an investor or its investment is alleged to have failed to comply with its obligations under the Code or other relevant rules and principles of domestic and international law; and if found materially relevant, allow mitigating or off-setting effects on the merits of a claim or on any damages awarded.

In parallel, there have been developments under EU law, with the Court of Justice of the European Union pronouncing its decision in *Slovak Republic* v. *Achmea B.V.*[122] (Achmea), which held that EU law must be interpreted as precluding a provision for ISDS in an international agreement concluded between its Member States. A Communication from the EU Commission[123] and a consequent declaration by EU Member States[124] following the Achmea decision has stressed the inapplicability of ISDS under the Energy Charter Treaty (ECT) for European investors and against EU members. While it appears that there is still ongoing debate on this aspect[125], the EU has moved swiftly towards implementing the Achmea decision through an agreement for the termination of intra-EU bilateral investment treaties[126].

Finally, in light of the challenges and travel restrictions imposed due to the COVID-19 pandemic, many developing countries have been unable to effectively participate in international investment arbitration proceedings, traditionally held in locations like Washington D.C. and The Hague. While there has been greater uptake towards conducting the arbitral proceedings online, States' representatives have found themselves constrained by factors such as not being able to effectively coordinate with local authorities for gathering evidence and not having necessary digital resources to effectively defend against the ISDS claims.

In order to ease the heavy burdens currently being placed on States and ensuring investor confidence, it may be worthwhile for countries to consider the 'localization' of their ISDS proceedings in the host States and regions where the investment is actually located. There are several advantages that localizing ISDS can bring to both host States and investors, such as reduced costs, more efficient proceedings, greater transparency and public participation, among various others. Different regional initiatives are already working towards this purpose, and arbitral institutions in the global South are well equipped for these functions. Relevant aspects show hardly any legal obstacles in this process. States should therefore consider designating their national or regional arbitral institutions as their venue of choice for hearing any investment-related claims[127].

5. Conclusions

Many States have taken similar measures to stop the spread of the pandemic and respond to the economic and social impacts arising from the COVID-19 crisis. Nevertheless, such measures could have unintended effects on existing foreign investment. Given the experience of countries in previous crises, States' measures for responding to crisis situations could be challenged under ISDS.

As COVID-19 has affected all countries, such claims could confirm existing concerns on the legitimacy and adequacy of these agreements for achieving a right balance between States' right to regulate and the protection provided to foreign investors. In the short term, countries could develop mechanisms to prevent possible claims arising from measures taken during the COVID-19 pandemic, and also from policies adopted during the recovery period. In the long term, States could consider how to address situations in which IIAs may limit their regulatory space to respond to new crises while affording almost unlimited protection to investors. This review might reinforce the need for a holistic reform of IIAs, particularly with respect to dispute settlement provisions. Therefore new IIAs should be designed to build more resilient systems for an inclusive and sustainable development.

Similarly, the international community should endeavor to reform IIAs and the ISDS system with the objective of ensuring that investment treaties are not misused to sue States, in particular for their emergency efforts. As COVID-19 tests the current international investment regime, its overhaul is absolutely necessary in order to build a more sustainable, inclusive and resilient economy. The IIAs should serve the needs of developing countries, not only of investors. To this end at least the following elements should be considered in negotiating these agreements:

1. Balancing openness to FDI with respect for national development objectives, such as strengthening domestic industries that are crucial for fast recovery and building resilience;
2. IIAs should be used as an engine to promote innovation in the domestic economy, and achieve both regional and domestic self-reliance for the production of critical supplies; (this is not about 'protectionism' but about the use of the potential positive effect of FDI for the production of local strategic supplies and transfer of technology and knowledge);
3. Safeguarding the right of States to regulate in the public interest, while promoting responsible investment and balancing the protection and obligations of investors, including through promoting alternative means of dispute resolution and prevention of ISDS claims.
4. Conducting risk-assessment processes before signing new, or reforming old generation IIAs, with the objective of securing sufficient regulatory space to build resilience in the face of possible new crises and promote fair, equitable and sustainable recovery for all.

Given that any reform process may take time, the adoption of a moratorium on ISDS claims related to measures adopted during the COVID-19 pandemic should be a priority. Similarly, considering some of the technical challenges faced by developing and least developed countries, in particular access to the Internet and digital services, the moratorium should also be applicable with regards to ongoing investor-State disputes.

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This brief is part of the South Centre's policy brief series focusing on international investment agreements and experiences of developing countries.

While the reform process of international investment protection treaties is evolving, it is still at a nascent stage. Systemic reforms that would safeguard the sovereign right to regulate and balance the rights and responsibilities of investors would require more concerted efforts on behalf of home and host states of investment in terms of reforming treaties and rethinking the system of dispute settlement.

Experiences of developing countries reveal that without such systemic reforms, developing countries' ability to use foreign direct investment for industrialization and development will be impaired.

The policy brief series is intended as a tool to assist in further dialogue on needed reforms.

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