Investment-related Dispute Settlement: Towards Comprehensive Accountability and Inclusive Access to Remedy

Background Paper

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Trade and investment can be a potentially powerful tool to support economic growth, job creation, and the realization of human rights. Yet, the rules that govern the global trade and investment regime are not written in a manner that enable or allow for inclusive growth and sustainable development. In echoing this, the UN Sustainable Development Goals call for "respect [of] each country's policy space and leadership to establish and implement policies for poverty eradication and sustainable development."[1] Similarly, the UN Guiding Principles on Business and Human Rights affirm that "States should maintain adequate domestic policy space to meet their human rights obligations" when pursuing, *inter alia*, investment treaties.[2]

At present, we are faced with a system that prioritizes corporate rights over human rights, and as a result, there has been an increasing worldwide backlash against globalization and its ill effects. The collapse of the Trans-Pacific Partnership (TPP) and the global rise in protectionism are indications of this failing system.

As the international community continues to interrogate the benefits of globalization, it is time for all governments to critically reflect on the impacts of the global trade and investment regime on human rights, inequality, and sustainable development. Structural changes to the trade and investment regime should be prioritized to ensure that it benefits all, this includes addressing the negative impacts of Investor-State Dispute Settlement (ISDS) clauses.

Investor-State dispute settlement (ISDS)

The global trend of providing for Investor-State arbitration in investment agreements has expanded to cover nearly all modern trade agreements. A 2012 OECD analysis of a sample of 1660 bilateral investment treaties and investment chapters in trade agreements found that 93% of these treaties contained language on ISDS.[3] According to UNCTAD, at present, ISDS clauses are found in an estimated 3,000 different investment agreements worldwide.[4] Since the 1990s, ISDS has been increasingly invoked, with the number of known claims arising from just a few dozen in the early 1990s to nearly seven hundred by 2016.[5]

ISDS clauses enable investors to bypass State courts and bring claims directly against States before private arbitration tribunals if they consider a law or policy to violate the broad investor rights granted in the treaty. For example, while the ISDS system was originally created to address the risk of direct expropriation, the provisions of most modern ISDS clauses allow for compensation for "indirect expropriation" as well—a term which has been broadly interpreted by many ISDS tribunals to include a wide range of public interest measures taken by States, including in areas such as taxation, public health, and environmental protection. Awards can easily run up to hundreds of millions, if not billions, of dollars, particularly when expected future profits are included.

Cases are heard by arbitral tribunals that consist of three private attorneys who often rotate between bringing claims on behalf of corporations and serving on tribunals. As arbitrators are rewarded on a case-by-case basis, this raises at the very least the suspicion of bias towards foreign investors as the only party that can bring cases in this one-sided system: ISDS clauses give foreign investors, and only foreign investors, a private right of action to access remedy for perceived wrongs perpetrated by the State. However, individuals and communities most impacted by the investments of these actors have no recourse to specialized remedy in the international system. This imbalance of power is unjust, and unjustified.

Undermining State sovereignty and the State duty to protect human rights

Awards granted to today's large multinational corporations can have a significant impact on a State's budget, as they are payable out of taxpayers' money. In the case of *Occidental v. Ecuador*, the 2.3 billion USD award amounted to Ecuador's annual health care budget for seven million people. The award was later scaled down by half, but even so, the sum awarded is still the equivalent of half the country's health budget. Even defending an ISDS-case is costly: the OECD has estimated that legal costs in an ISDS case average 8 million USD, and can reach as much as 30 million USD.

ISDS also has a chilling effect on a State's ability to regulate. ISDS, or the threat of ISDS, is increasingly used by multinational corporations to challenge State regulation in the public interest. Recent cases provide evidence that the threat of ISDS claims has dissuaded States from fully respecting, protecting, and fulfilling their human rights obligations under international law. For example, in *Vattenfall v. Germany*, the German government weakened its "strict environmental conditions" on a coal-burning power plant as part of a settlement to an ISDS claim brought by energy company Vattenfall.[6] As a result of these lowered standards, the European Commission has filed a claim against Germany before the EU Court of Justice for failure to uphold the standards of EU environmental law.[7]

ISDS claims have also led States to abandon measures to protect public health and the environment. For example, in Indonesia, threats by potentially affected mining companies of bringing an ISDS case over a proposed measure to ban open-pit mining in protected forests led the government to alter the proposed legislation and exempt specific companies.[8] Similarly, in the *Renco v. Peru* case, the Peruvian government, after refusing to grant the company an extension to an environmental compliance agreement, was pressured by the threat of an ISDS claim into allowing the company to continue running a smelter whose outputs were severely contaminating the environment, posing a threat to the health of local residents.[9]

In many cases where investors utilize ISDS procedures in an attempt to undermine State regulation in the public interest, the lives, health, and livelihoods of individuals and communities hang in the balance. To illustrate, La Oroya, the community that hosts the Renco smelter, has consistently been cited as one of the most polluted places in the world.[10] According to the Interamerican Association for Environmental Defense (AIDA), since 1999, the "government has shown that nearly all children (more than 99%) living near the complex suffer from lead poisoning" and the community as a whole suffers from respiratory diseases, reproductive issues, and various forms of cancer.[11]

Investors have also used ISDS claims to penalize States who regulate in the public interest to protect human rights. As an example, in the *Metalclad v. Mexico* case, the Mexican government was ordered to compensate waste management company Metalclad $16.7 million for denying the permits for a waste landfill facility based on environmental and health hazard concerns and for ultimately declaring the land a natural reserve when the company went forward with developing the site without the correct permits.[12]

Additionally, ISDS claims have been utilized by companies to avoid liability for human rights harms committed abroad. In the *Chevron v. Ecuador* case, the company filed an ISDS claim against the Ecuadorian government for loss of profits following the 2011 decision by the Supreme Court of Ecuador sentencing the company to pay 9.5 billion USD in damages to a group of indigenous Ecuadorians for the ill-effects of massive contamination.

Companies have also used ISDS provisions to undermine unrelated criminal prosecutions. A recent report found that of the publicly available information on three hundred ISDS claims filed since 2011, more than thirty-five cases have involved company or executive officials that were accused of criminal activities.[13] In at least eight of these cases, "bringing an ISDS claim got results for the accused wrongdoers, including a multimillion-dollar award, a dropped criminal investigation, and dropped criminal charges."[14]

Aversion and alternatives to the ISDS system

In recognition of the negative impacts of ISDS provisions on a State's ability to regulate, a number of States have spoken out against the system, choosing to withdraw from or renegotiate bilateral investment treaties (BITs) with ISDS clauses; some States have also begun proposing alternatives.

In Bolivia, following the reversal of a highly controversial water privatization scheme and pursuant ISDS claim by the project investor, the government of Evo Morales rejected all ISDS mechanisms.[15] In 2007, the country withdrew from International Centre for Settlement of Investment Disputes (ICSID).[16] Additionally, the new Bolivian Constitution (2009) prohibits the

State from settling investment disputes with foreign investors in international tribunals, and calls on the State to renounce and renegotiate all treaties found in contravention of the new Constitution.[17]

Similarly, in July 2008, Ecuador, the fourth most challenged country in ISDS mechanisms, withdrew from ICSID.[18] A new State constitution was approved in September 2008 which prohibits the country from submitting to arbitration "unless the counter party is a Latin American citizen and the arbitration takes place in a forum within Latin America."[19] On May 3, 2017, Ecuador's National Assembly issued a recommendation to the government to terminate all of the country's bilateral investment treaties.[20]

The Brazilian government has never signed on to a treaty with an ISDS provision; instead promoting the use of Agreements on Cooperation and Facilitation of Investments (ACFIs).[21] ACFIs are based on the three pillars of: (1) investment cooperation and facilitation; (2) improved institutional governance; and (3) risk mitigation, dispute prevention, and settlement.[22] ACFIs have been signed between Brazil and Mozambique, Angola, Mexico, Malawi, and Colombia respectively.[23]

Other countries, including Indonesia, India, and South Africa, have announced they will withdraw from and renegotiate treaties with ISDS clauses.

Since 2014, Indonesia has embarked upon the termination of all its bilateral investment agreements, on the basis that they run contrary to Indonesia's current development; the first Indonesian BIT to be terminated was the agreement with Indonesia's fifth largest investor, the Netherlands.[24] Indonesia seeks to tie foreign investment to social and economic development objectives in its model BIT, including by extending preferential treatment to domestic entrepreneurs by taking measures to strengthen domestic production capacity, to promote employment, and to support marginalized groups in society.[25] Indonesia's model BIT also includes an obligation for investors to comply with domestic and international standards on labor and the environment, as well as to abide by the UN Guiding Principles on Business and Human Rights, and/or any future binding instruments that may yet be developed. In all of these areas, the Indonesian model BIT stipulates that the highest standard must count. The model BIT also includes language stating that any measure taken to comply with Indonesia's international obligations under other treaties or conventions do not imply a breach of the investment treaty and consequently also do not entitle foreign investors to seek compensation. This leaves regulatory flexibility to comply with, for example, the Paris climate agreement or the country's obligations under international human rights law.

In 2016, India served diplomatic notices to fifty-eight countries to terminate the BITs between them.[26] India wants to replace its BITs with a model that limits the scope of investment protection provisions and sets prior exhaustion of local remedies as a condition for access to investor-State dispute settlement. Like Indonesia, India's new model BIT also seeks to place binding obligations on investors to better ensure that incoming investments contribute to the country's domestic development. India seeks to significantly limit substantive clauses, such as the controversial ‘fair and equitable’ treatment standard (FET) and the clauses on national treatment (NT), most-favored nation (MFN) treatment, and to abolish the indirect expropriation clause.[27] The FET and indirect expropriation clauses are notorious for enabling transnational investors to challenge almost any government intervention before an international arbitration tribunal. However, India’s model BIT contains no binding social, environmental, and human rights responsibilities for foreign investors, but continues to rely on the voluntary adoption of international corporate social responsibility frameworks.

The model BIT established by the Southern African Development Community (SADC) also calls for the exhaustion of local remedies before investors can bring claims against States under ISDS provisions.[28] South Africa began the process to terminate its BITs in 2012, amidst concerns over investment arbitration inhibiting the government’s freedom to enact public interest policies and following the outcome of a government survey which found no clear correlation between the existence of a BIT and the inflow of foreign investments. South Africa has since taken the route of offering foreign investors protection through the domestic legal system.[29]

In relation to alternatives to existing BIT models, there have been a number of attempts to address some of the leading critiques of the ISDS system. For example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) provides for “full transparency of proceedings and clear and unambiguous investment protection standards.”[30] The CETA also establishes a permanent Appellate Tribunal and establishes a roster of fifteen people to comprise future arbitral tribunals under the agreement.[31] The EU’s new ‘Investment Court System’ (ICS) has also been included in the EU-Vietnam free trade agreement, concluded in December 2015. Furthermore, the European Commission has launched a public consultation for the creation of a Multilateral Investment Court (MIC) as an alternative investor dispute resolution forum.[32] However, the EU’s ICS reforms, as well as its MIC proposal, only deal with reforms to the process of investment arbitration, and do nothing to limit the investment protection provisions that foreign investors can base their claims on. The one-sidedness of the system, where only foreign investors can bring cases, is left intact, and no binding obligations for investors are included.

Making international trade and investment work for all

There is a growing international realization that foreign direct investment is not necessarily always good. It can help foster economic growth, in the right conditions; however, it can also undermine social development, environmental conservation, and human rights, in particular if not properly regulated. Current trade and investment agreements hinder countries in their ability to impose the necessary regulatory frameworks on foreign investors. There is also a growing international awareness that in order for trade and investment to foster inclusive, sustainable, and climate-neutral growth, international investment agreements must be tailored to better protect human rights and the environment. As policy-makers continue to advance trade and investment agreements as instruments to contribute to the implementation of the Paris climate agenda and the achievement of the Sustainable Development Goals, the disconnect between rhetoric and policy must be addressed.

As the fissures in the global economic order continue to deepen, now is a critical moment to reassess the human rights impacts of trade provisions, with the goal of making global trade more beneficial for all. Addressing ISDS and its negative impacts on human rights will be a first step towards achieving this goal.

ENDNOTES

[1] G.A. Res. 70/1. U.N. Doc. A/RES/70/1, 17.15 (Oct. 21, 2015).

[2] John Ruggie (Special Representative of the Sec'y Gen. on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters.) *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, at 11, U.N. Doc. A/HRC/17/31 (2011), http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf.

[3] Pohl, J., K. Mashigo & A. Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* (OECD Working Papers on International Investment, Paper No. 2012/02, 2012).

[4] *Id*.

[5] *See* UNCTAD Report "Investor-State Dispute Settlement: Review of Developments in 2015" http://investmentpolicyhub.unctad.org/Upload/ISDS%20Issues%20Note%202016.pdf, at 2.

[6] Claire Provost & Matt Kennard, *The Obscure Legal System that Lets Corporations Sue Countries,* THE GUARDIAN (June 10, 2015, 6:00 BST), https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid.

[7] *Id.*

[8] Stuart G. Gross, *Inordinate Chill: BITS, Non-NAFTA MITS, and Host-State Regulatory Freedom—An Indonesian Case Study*, 24 MICH. J. INT'L L. 893, 894 (2003).

[9] Alfred-Maurice de Zayas, Rep. by the Independent Expert on the promotion of a democratic and equitable international order, ¶31, U.N. Doc. A/70/285 (Aug. 5, 2015) [hereinafter de Zayas Report].

[10] *See, e.g., The World's Most Polluted Places,* TIME (Sept. 12, 2007), http://content.time.com/time/specials/2007/article/0,28804,1661031_1661028_1661020,00.html; Diego M. Ortiz, *Peruvian city among top 5 worst polluted in the world, according to study,* PERU THIS WEEK (Aug. 29, 2013), http://www.peruthisweek.com/news-peruvian-city-among-top-5-worst-places-to-live-according-to-study-100778.

[11] *Case of the Community of La Oroya, Peru,* INTERAMERICAN ASSOCIATION FOR ENVIRONMENTAL DEFENSE (Aug. 2016), http://www.aida-americas.org/sites/default/files/projects/la_oroya_fact_sheet_0.pdf.

[12] de Zayas Report, *supra* note 9, ¶28.

[13] Chris Hamby, *The Court that Rules the World*, BUZZFEED NEWS (Aug. 28, 2016, 9:00 AM), https://www.buzzfeed.com/chrishamby/super-court?utm_term=.uj2pWRE0o#.clyXrGK2x.

[14] *Id.*

[15] Aldo Orellana López, *Bolivia Denounces its Bilateral Investment Treaties and attempts to put an end to the Power of Corporations to sue the country in International Tribunals* (June 2014), http://justinvestment.org/wp-content/uploads/2014/07/Bolivia-denounces-its-Bilateral-Investment-Treaties-and-attempts-to-put-an-end-to-the-Power-of-Corporations-to-sue-the-country-in-International-Tribunals1.pdf.

[16] *Id.*

[17] CONSTITUCIÓN POLÍTICA DEL ESTADO PLURINACIONAL DE BOLLIVIA (2009), Art. 320, Ninth "Disposiciones Transitorias."

[18] *Ecuador shakes up international fora,* ISDS Platform (July 2009), http://isds.bilaterals.org/?ecuador-shakes-up-international.
[19] *Id.*
[20] Cecilia Olivet, *Auditing Commission to release report as Ecuador moves to terminate investment agreements*, TRANSNATIONAL INSTITUTE (May 4, 2017) https://www.tni.org/en/article/auditing-commission-to-release-report-as-ecuador-moves-to-terminate-investment-agreements.
[21] FABIO MOROSINI & MICHELLE RATTON SANCHEZ BADIN, THE NEW BRAZILIAN AGREEMENTS ON COOPERATION AND FACILITATION OF INVESTMENTS (ACFIS): NAVIGATING BETWEEN RESISTANCE AND CONFORMITY WITH THE GLOBAL INVESTMENT REGIME (2015).
[22] *Id*. at 19.
[23] *Id.* at 1.
[24] *What is Going on with Indonesia's Bilateral Investment Treaties?,* GLOBAL BUSINESS GUIDE INDONESIA (June 13, 2016), http://www.gbgindonesia.com/en/main/legal_updates/what_is_going_on_with_indonesia_s_bilateral_investment_treaties.php. Salient fact: the BIT between Indonesia and the Netherlands was the first to contain the now increasingly controversial ISDS mechanism.
[25] For an analysis of Indonesia's model BIT, see: Abdulkadir Jailani, Indonesia's Perspective on Review of International Investment Agreements. In: Kavaljit Singh and Burghard Ilge (eds.), Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices, BothEnds/Madhyam/SOMO, 2016.
[26] *India set to remodel its investment regime with new BITs*, LEXOLOGY (Mar. 30 2017), http://www.lexology.com/library/detail.aspx?g=a493e664-6cd4-43d8-8f10-476d00207cdc.
[27] The model text for the Indian investment agreements can be accessed here: https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf. For a detailed analysis, see: Kavaljit Singh, 'An Analysis of India's New Model Bilateral Investment Treaty'. In: Kavaljit Singh and Burghard Ilge (eds.), Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices, BothEnds/Madhyam/SOMO, 2016. Pp. 81-100.
[28] SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (2012), http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf; MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY, MYGOV.IN, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.
[29] Mohammad Mossallam, *Process Matters: South Africa's experience exiting its BITs* (The Global Economic Governance Programme, University of Oxford, Paper No. 2015/97, 2015).
[30] Press Release, European Commission, CETA: EU and Canada agree on new approach on investment in trade agreement (Feb. 29, 2016), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468.
[31] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, Art. 8.27, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
[32] *The Multilateral Investment Court project,* EUROPEAN COMMISSION (Dec. 21, 2016), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.