Democratising international investment law

Recent trends and lessons from experience

Lorenzo Cotula

iied

Legal tools for citizen empowerment

Around the world, citizens' groups are taking action to change the way investments in natural resources are happening and to protect rights and the environment for a fairer and more sustainable world. IIED's Legal Tools for Citizen Empowerment initiative develops analysis, tests approaches, documents lessons and shares tools and tactics amongst practitioners (www.iied.org/legal-tools).

The Legal Tools for Citizen Empowerment series provides an avenue for practitioners to share lessons from their innovative approaches to claim rights. This ranges from grassroots action and engaging in legal reform, to mobilising international human rights bodies and making use of grievance mechanisms, through to scrutinising international investment treaties, contracts and arbitration.

This paper is one of a number of reports by practitioners on their lessons from such approaches. Other reports can be downloaded from www.iied.org/pubs and include:

- Bringing community perspectives to investor-state arbitration: the *Pac Rim* case. 2015. Orellana, M *et al.*
- Advocacy on investment treaty negotiations: lessons from Malaysian civil society. 2015. Abdul Aziz, F.
- Community-based monitoring of land acquisition: lessons from the Buseruka oil refinery, Uganda. 2015. Twesigye, B.
- Catalysing famers' influence in shaping law reform: experience from Senegal. 2015. Coumba Diouf, N.
- Legal advice for environmental justice: experience from eastern India. 2015. Upadhyay, S and Jain, S.
- Walking with villagers: How Liberia's Land Rights Policy was shaped from the grassroots. 2014. Kaba, A and Madan, G. Also available in French.

In addition, under our Land, Investment and Rights series, we generate evidence around changing pressures on land, multiple investment models, applicable legal frameworks and ways for people to claim rights.

Reports in the Land, Investment and Rights series can be downloaded from www.iied.org/pubs. Recent publications include:

- Land rights and investment treaties: exploring the interface. 2015. Cotula, L.
- Agro-industrial investments in Cameroon: large-scale land acquisitions since 2005. 2015. Nguiffo, S and Sonkoue Watio, M.
- Understanding agricultural investment chains: lessons to improve governance. 2014. Cotula, L and Blackmore, E.

To contact IIED regarding these publications please email legaltools@iied.org

Democratising international investment law

Recent trends and lessons from experience

Lorenzo Cotula

About the authors:
Lorenzo Cotula is a principal researcher in law and sustainable development at the International Institute for Environment and Development (IIED), where he leads the Legal Tools Team and the Legal Tools for Citizen Empowerment programme.

Acknowledgment
This report was prepared as part of "Legal Tools for Citizen Empowerment", a collaborative initiative to strengthen local rights and voices in natural resource investments in low and middle-income countries (www.iied.org/legal-tools). It was produced with the generous support of Danida (Denmark), Irish Aid and Sida (Sweden). The views expressed do not necessarily represent those of the institutions involved. Thierry Berger, Philippine Sutz and Halina Ward provided helpful comments on an earlier draft of the report.

First published by the International Institute for Environment and Development (UK) in 2015

ISBN: 978-1-78431-199-5
IIED order no.: 12577IIED

For copies of this publication, please contact IIED:
International Institute for Environment and Development
80-86 Gray's Inn Road
London WC1X 8NH
United Kingdom

Email: newbooks@iied.org
Twitter: @iied
Facebook: www.facebook.com/theIIED
Download more publications at www.iied.org/pubs

A catalogue record for this book is available from the British Library.

Citation: Cotula, L. (2015) Democratising international investment law: recent trends and lessons from experience. IIED, London.

Cover photo: Deliberating on international investment law? A community meeting in Africa.
© Duncan Macqueen / IIED
Typesetting: Judith Fisher, www.regent-typesetting.co.uk

Contents

Acronyms

BIT	Bilateral investment treaty
CAFTA	Dominican Republic-Central America-United States Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
EU	European Union
ICSID	International Centre for Settlement of Investment Disputes
TPP	Transpacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States

Abstract

Around the world, citizens' groups are stepping up advocacy on international investment law – by scrutinising treaty negotiations, intervening in investor-state arbitrations, catalysing grassroots mobilisation or promoting public debate. Rapid, far-reaching and partly contrasting policy developments make this a particularly important point in time for shaping the future of international investment law. Building on two international lesson sharing webinars, this report discusses the conceptual underpinnings of a fundamental challenge to "democratise" international investment law; reviews trends in citizen engagement with international investment law; and distils lessons from some recent civil society experience.

1. Introduction

The international legal regime governing the admission and treatment of foreign investment is at a crossroads. The large number of investment treaties and dispute settlement proceedings has made international investment law one of the most dynamic branches of international law, and an important part of the legal architecture underpinning economic globalisation.

But the proliferation of treaties and disputes has also made international investment law a contested field: some experts and campaigners have questioned substantive standards and dispute settlement mechanisms (Van Harten, 2007; Bernasconi *et al.*, 2012; Eberhardt and Olivet, 2012), and some commentators have talked of a "legitimacy crisis" or "backlash" against the investment regime (Franck, 2005; Waibel *et al.*, 2010). There have been vocal calls for reform, and new opportunities are emerging for multilateral dialogue on the "transformation" of the investment treaty regime.[1]

There is also uncertainty about the future direction of international investment law. Several states have terminated at least some of their investment treaties. Others are negotiating "mega treaties" that could create some of the world's most ambitious investment treaties ever (UNCTAD, 2014). At the same time, several states have sought to "recalibrate" (Alvarez, 2010) their investment treaties, nuancing formulations in ways that shift the balance between multiple policy goals. Yet others have explored entirely novel approaches to the drafting of investment treaties, increasing diversity in the international treaty landscape.

These rapid, far-reaching and partly contrasting evolutions in public debates and policy choices make this a particularly important point in time for shaping the future of international investment law. And in many parts of the world, civil society and citizens' groups are stepping up advocacy on international investment law – by scrutinising treaty negotiations, intervening in disputes between investors and states, catalysing grassroots mobilisation or promoting public debate. This growing citizen engagement may help to rethink important aspects of international investment law, and to strengthen its perceived legitimacy.

This short report responds to a fundamental challenge to "democratise" international investment law. After providing some background information for readers who may who have limited familiarity with international investment law, the report articulates the case for greater citizen engagement with the development and implementation of international investment law. It also reviews recent trends

1 See e.g. the expert meeting convened by the United Nations Conference on Trade and Development (UNCTAD) on "Transformation of the International Investment Agreement Regime: the Path Ahead", Geneva, 25–27 February 2015, http://unctad-worldinvestmentforum.org/followup-events/single-year-expert-meeting/.

in citizen activism, and distils lessons learned from two experiences of civil society advocacy on investment treaties and investment dispute settlement.

These two cases were among several experiences presented at two international lesson-sharing webinars in April 2014 and February 2015. They were subsequently written up and published as reports (Abdul Aziz, 2015; Orellana *et al*., 2015).[2] The webinars were part of the Legal Tools for Citizen Empowerment programme, a collaborative initiative to strengthen local rights and voices in natural resource investments in low and middle-income countries. The Legal Tools initiative supports local-to-global citizen empowerment through developing analysis, testing approaches and sharing lessons from innovation. International lesson sharing relies on multiple interlinked channels, including workshops, webinars, practitioner-authored and -oriented publications and newsletters (www.iied.org/legal-tools).

The Legal Tools programme is primarily concerned with natural resource investments in low and middle-income countries. But most investment treaties have multi-sectoral coverage; states increasingly negotiate investment law as part of integrated trade and investment treaties; policy preferences in high-income countries can significantly influence the outcomes of investment treaty negotiations affecting low and middle-income countries; and important lessons can be learned from recent experience with citizen engagement developed in high-income countries. Ultimately, the challenge of increasing citizen engagement with international investment law is of global relevance.

So while this report primarily targets readers working on the governance of investments in low and middle-income countries, it reviews experience from around the world. Also, the report covers both investment treaties and investment chapters of wider trade and investment treaties.

2 The other presentations made at the webinars are Brickhill (2014) and Purugganan (2015).

2. International investment law: what it is and why it matters

International investment law is the body of international law concerning the admission and treatment of foreign investment. In turn, investment treaties are the backbone of international investment law. They are concluded between two or more states, and aim to promote investment flows between the state parties by establishing obligations about how investments by nationals of one state will be admitted and protected in the territory of the other state.

Numerically, most investment treaties are bilateral (i.e. they have just two state parties) and solely deal with investment; but regional and bilateral trade agreements that contain an investment chapter are increasingly common. Because international investment law is dominated by bilateral and regional treaties, the law applicable to different investments may vary depending on their respective host and home states.

Many treaties present broadly comparable terms and significant uniformity of underlying principles (Schill, 2009). Yet the detailed wording can vary considerably, and so too can the specific standards of treatment to which investors are entitled. Commonly used standards of treatment include:

- "National treatment" and "most-favoured-nation" clauses that typically require states to treat foreign investors or investments no less favourably than investments in similar circumstances by their own nationals (national treatment) or by nationals of other states (most-favoured nation treatment).
- "Fair and equitable treatment" clauses that require states to treat foreign investment according to a minimum standard of fairness, irrespective of the rules they apply to domestic investment under national law.
- "Full protection and security" clauses, which are usually interpreted as requiring states to take steps to protect the physical integrity of foreign investment, but have in some cases been interpreted more broadly to cover legal protection too.
- Clauses that limit a government's ability to expropriate foreign investments. These often state that any expropriation must be for a public purpose, be non-discriminatory, and that governments must follow due process and pay compensation according to specified standards typically linked to market value.
- Provisions on currency convertibility and profit repatriation, which allow investors to repatriate returns from their activities.

As well as determining substantive standards of treatment, most investment treaties allow investors to choose to bring disputes against the host state to international investor-state arbitration, rather than national courts. There are several international arbitration centres, each with its own procedural rules. One prominent institution is the World Bank-hosted International Centre for the Settlement of Investment Disputes (ICSID). ICSID sees dozens of arbitrations per year. Arbitrations can also be carried out outside any standing institutions, often following the rules adopted by the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules).

In investor-state arbitration, the investor typically alleges that the state has violated the treaty, and will usually seek monetary compensation. In deciding the case, the tribunal issues a binding award – effectively a document similar to a judgment. If the tribunal finds treaty violations, it usually orders the state to compensate the investor. Widely ratified multilateral treaties facilitate the enforcement of these awards.[3] If a host state fails to comply with an award covered by one of these multilateral treaties, the investor may seek enforcement in any signatory country where the host state holds interests, for instance by seizing goods or freezing bank accounts.

Because in a globalised world virtually all states hold assets overseas, this type of legal action can be effective. In addition, governments are often under pressure to honour arbitral rulings in order to keep attracting investment. So investment treaties and arbitration are assisted by relatively effective enforcement mechanisms, and as such they can have real bite and far-reaching financial implications for host states. However, in recent years some states have refused to pay arbitral awards.

Investment treaties and arbitration create a unique space for international review of state conduct. They empower arbitral tribunals, usually comprising three private individuals, to review the conduct of (often democratically elected) governments or legislatures, or of national courts, based on broadly formulated treaty standards that can leave significant discretion to tribunals.

Over the years, investors have relied on investment treaties to challenge the legality of a wide range of measures taken by local or national governments, by courts and by parliaments. Public action challenged through investor-state arbitration has included impact assessment procedures and government refusals to issue environmental permits; legislation to discourage smoking; measures to promote locating part of "research and development" activities in the host country; contract termination to sanction contractual breaches; affirmative action to redress historical injustice; environmental regulations to protect sensitive cultural and environmental heritage; and programmes to promote more equitable land distribution.

3 Namely, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, for ICSID awards, Article 54 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").

Arbitral tribunals have awarded investors large compensation payments for breaches of investment treaties. Arbitration can itself be costly and difficult. Many commentators have voiced concerns that the prospect of large compensation pay-outs, and of costly arbitration proceedings, could discourage public authorities from taking socially desirable public action – particularly in low-income countries where public finances face harder constraints (e.g. OHCHR, 2003; Tienhaara, 2009).

Systematic empirical evidence on the extent of these restrictions on what is often dubbed "regulatory space" is difficult to find, partly because information is not in the public domain and methodological challenges are at play. But reports that even high-income countries consider the risk of liabilities in their national policy-making processes (e.g. Peterson, 2013) show that we should not be complacent about the restrictions that investment treaties can create. And irrespective of restrictions on regulatory space, there are real questions about how the costs of socially desirable public action should be distributed between public and private actors.

In addition to measures initiated by public authorities, large-scale investments may also be associated with grassroots contestation linked to actual or feared adverse social or environmental impacts (e.g. land takings, soil degradation, water pollution). This has resulted in investors resorting to investor-state arbitration to challenge court proceedings initiated by civil society, or government failure to respond to direct action (e.g. farm occupations) led by grassroots groups.

This circumstance highlights the complexities underpinning the notion of regulatory space; for regulatory space defines not only space for action by public authorities but also, in a broader sense, space for contestation and negotiation involving a wider range of both public and private actors seeking to influence national decision making.

3. The case and channels for citizen engagement

Debates about investment treaties are often framed in technical and legal terms. But choices on whether to conclude investment treaties, and in what form, are eminently political. Investment treaties provide a legal tool for economic policy, and different interest groups can legitimately have different positions on desirable economic policies and acceptable balances between competing policy goals. These political dimensions raise questions about how public decisions are made, and more generally about active citizenship – broadly defined here in political, non-legalistic terms as the active participation of citizens in the management of public affairs (Gaventa, 2002).

Many treaty negotiations take place with little transparency and citizen participation. Outside a few jurisdictions where treaties must be ratified by parliament, parliaments play a minor role in treaty ratification and more generally in the oversight of investment treaty making (Kurtz, 2014). Many investment treaties have been concluded with little public debate about the pros and cons of ratification, particularly in low-income countries.

Other areas of international law have also evolved with limited public participation. But the extensive involvement of civil society and citizens' groups in the international negotiations shaping international environmental law shows that it is possible to open up international law making.

Given the far-reaching implications that investment treaties can have for wide-ranging policy areas, a low level of public oversight creates real challenges of democratic governance and accountability. It undermines the democratic ideal that ties the legitimacy of legal norms to their grounding in democratic deliberation (Rousseau, 1762/1963; Kant, 1795/2010).

Never fully realised, and severely curtailed in countries with authoritarian regimes, this ideal is under further pressure as a result of increased economic interdependence, leading some democracy theorists to critique political systems where elections are held, opinions are expressed and governments change, yet important decisions are taken by the executive in the name of economic necessity and outside deliberative democracy (Crouch, 2000; Rancière, 2006; Wolin, 2008; and specifically in relation to investment treaty making, Crouch, 2014).

Some commentators have likened investment treaties to the constitutional safeguards that, in liberal democracies, aim to minimise the risk of a "tyranny of the majority" – namely, through the affirmation of rights that even majority vote cannot overturn.[4] Like constitutions, investment treaties are more difficult to change than

4 On this issue, see Schneiderman (2008) and Montt (2009). See also the Separate Opinion of Bryan Schwartz in *S.D. Myers, Inc. v. The Government of Canada*, para. 34.

ordinary national legislation: "termination clauses" typically prevent unilateral treaty termination for specified periods of time (often 10 or 15 years) and provide that the treaty continues to apply to investments made before termination (often for another 10 or 15 years). Renegotiating treaties with often multiple states parties is more difficult than changing national laws.

However, constitutions – at least in theory – reflect the social contract, and their drafting or modification is – or should be – carried out through mechanisms that "guarantee extraordinarily high levels of democratic consent" (Kurtz, 2014:263). Investment treaty making has not been accompanied by comparable levels of democratic deliberation. And unlike constitutional bills of rights, investment treaties are increasingly complex instruments reflecting legitimately reversible political preferences about economic policy, as the recent rise of investment liberalisation ("pre-establishment") commitments illustrates.

The limited parliamentary oversight of investment treaty making can create uncomfortable situations. In one recent instance that I was personally able to observe, a low-income country government concluded an investment treaty with a major high-income state. The treaty was largely drafted by the high-income state and contains pre-establishment obligations – meaning that, outside exceptions and reservations, the admission of foreign investment cannot be subjected to restrictions that are not applicable to nationals.

In that low-income country, parliament was not involved in the negotiation or ratification of this treaty. At the same time, parliament was discussing a new Investment Law purporting to restrict foreign investment in sensitive sectors of the economy, in ways incompatible with the pre-establishment provisions of the new treaty.

Opinion is divided on whether this type of legislation is a sensible policy choice. But the point here is that, with regard to investments from one major capital-exporting state, and potentially other investments depending on the operation of most-favoured-nation clauses, the ratification of the investment treaty in effect emptied a legislative process of its normative relevance, or at least placed that legislative process on a collision route with international law.[5]

In this context, the response to what has been dubbed the "legitimacy crisis" of international investment law (Franck, 2005) cannot be just a technical fix; a reflection on technical options for the recalibration of the investment treaty regime. A full response requires a democratisation of investment treaty making, through rethinking constitutional practices to allow parliament to play a more prominent role in guiding the negotiation or at least approving the ratification of investment treaties; but also through ongoing, day-to-day citizen engagement with the management of public affairs.

5 I encountered almost precisely this situation in 2014, in the course of policy support work with government officials and parliamentarians in a low-income country.

And in the context of real-life social processes, vested interests and power imbalances, citizen engagement involves not just the individual citizen of the 1789 French Declaration of the Rights of Man and the Citizen, but the practices of deliberation, participation and contestation by citizens in their collective and organised capacity – as civil society, trade unions, indigenous peoples, social movements and internet-based campaigning groups, for example.

Spaces for citizen engagement with international investment law are evolving rapidly, particularly in middle and high-income countries where citizen groups have so far been more active in claiming deliberative space. A few examples illustrate the multiple channels that could allow greater citizen participation in the making of investment law.

In some polities, parliaments are taking a more active role in investment treaty making. For example, the European Parliament has provided guidance on the European Union's approach to investment treaty making (European Parliament, 2011) and on the negotiation of individual investment treaties (e.g. European Parliament, 2013). Unlike many jurisdictions, consent of the European Parliament is legally required before the European Union (EU) can ratify trade and investment treaties.[6]

In the United Kingdom, the House of Lords and the House of Commons carried out inquiries and held debates on the proposed Transatlantic Trade and Investment Partnership (TTIP) between the EU and the United States (US) (House of Lords, 2014a; House of Commons, 2015a, 2015b and 2015c). In 2014, controversy on the ratification of the bilateral investment treaty (BIT) between the United Kingdom and Colombia, including civil society concerns that the treaty might get in the way of Colombia's land restitution programme (ABColombia, 2014), triggered a debate in the House of Lords (2014b), albeit after the treaty was ratified.

There is also some experience with mechanisms for direct democracy and public consultation. In 2007, Costa Rica became the first country to hold a referendum on a trade and investment deal, the Dominican Republic – Central America – Unites States Free Trade Agreement (CAFTA). The "yes" vote won by a narrow margin, paving the way to Costa Rica's ratification of the deal (Breuer, 2009).

Although public consultations on investment treaties remain rare, they are becoming more common. Examples include the multi-stakeholder consultation processes carried out for the elaboration of the US Model BITs of 2004 and 2012 (ACIEP, 2004 and 2009), and the (carefully circumscribed) online consultation launched by the European Commission on the investment chapter of the proposed TTIP (European Commission, 2015).

6 Articles 207(2)-(3) and 218(6) of the Treaty on the Functioning of the European Union.

Outside formal consultations, public scrutiny of investment treaty making is on the rise. In the Philippines, for example, civil society advocacy on investment treaties has involved campaigning, awareness raising, alliance building and engagement with government (Purugganan, 2015). Civil society in Malaysia has deployed comparable strategies in connection with the investment chapter of the proposed Transpacific Partnership (TPP; Abdul Aziz, 2015).

In Europe, civil society groups filed a request for a "European citizens' initiative" on two major proposed treaties. A European citizens' initiative is an invitation to the European Commission to propose legislation. A citizens' initiative must be backed by at least one million EU citizens, coming from at least seven member states.[7]

The citizens' initiative asked the Commission "to repeal the negotiating mandate for the Transatlantic Trade and Investment Partnership (TTIP)" with the United States, and "not to conclude the Comprehensive Economic and Trade Agreement (CETA)" with Canada. The European Commission rejected this request in light of the requirements of European legislation (European Commission, 2014a). However, civil society is pushing ahead with the petition as a tool to catalyse awareness raising and citizen engagement.

There has also been greater citizen engagement with investor-state arbitration, leveraging new entries provided by changes in arbitration rules (including revised ICSID Arbitration Rules and new UNCITRAL Transparency Rules) and by new investment treaty clauses providing for greater transparency and public input into arbitration processes.

This trend is exemplified by increasing numbers of civil society submissions in investor-state arbitration, including in connection with disputes relating to natural resource investments,[8] and more broadly to the natural resource sector (Brickhill, 2014; Orellana *et al*., 2015). Civil society groups have also used "freedom of information" legislation to obtain access to arbitral awards where these had not been published (see e.g. Hepburn and Balcerzak, 2013).

Despite these developments, opportunities for citizen participation have presented limitations. Even Costa Rica's experience with holding a referendum on CAFTA – so far the clearest application of direct democracy tools to trade and investment treaty making – has not been without critics. Some commentators pointed to the pressures exercised by business groups during the referendum campaign, and to significant asymmetries in the financing of the "yes" and "no" campaigns, going as far as arguing that these circumstances "made the referendum appear as a tool for citizen manipulation rather than an instance of informed citizen participation" (Breuer, 2009:464).

7 The legal basis for the European citizens' initiative is provided by Article 11(4) of the Treaty on the European Union, Article 24(1) of the Treaty on the Functioning of the European Union, and Regulation No. 211/2011 of the European Parliament and of the Council of 16 February 2011 on Citizens' Initiatives.
8 E.g. *Glamis Gold Ltd. v. United States of America*; *Pac Rim Cayman LLC v. Republic of El Salvador*; *Infinito Gold Limited v. Republic of Costa Rica*.

In Europe, the online questionnaire for the EU public consultation on the investment chapter of TTIP included seven questions on specific aspects of investor-state arbitration; but it did not include a question on whether an investor-state arbitration clause should be allowed in the first place (European Commission, 2014b). Yet public concerns about inclusion of investor-state arbitration were a major factor leading to the consultation. About a third of the nearly 150,000 responses to the consultation answered most of the questions with the same statement: “No comment – I don’t think that [investor-state arbitration] should be part of TTIP” (European Commission, 2015:10).

4. Lessons from civil society experience

The recent surge in citizen activism on international investment law has seen pursuit of multiple channels but also to the real challenges facing citizens seeking to influence policy in this arena. As discussed, investment law is an important part of the legal architecture underpinning economic globalisation, because it shapes the terms for the treatment of foreign investment. Therefore, policy choices can affect major economic interests, and this is bound to affect ease of reform.

Also, promoting informed citizen engagement on complex technical issues raises obvious practical challenges. Opportunities for meaningful citizen influence are particularly constrained in low and middle-income countries where awareness of international investment law issues tends to remain low, capacity constraints may be particularly hard (as reflected e.g. in lower literacy rates) and political space for genuine dialogue is often limited.

Looking beyond investment law, these experiences highlight the challenges of making democratic participation work in arenas dominated by complex technical issues, major economic interests and significant power imbalances. In many contexts, democratic processes must come to terms with entrenched power relations that undermine the principle of equality – the very foundation of democratic deliberation. So applying democratic tools to international investment law will still leave important questions unanswered.

At the same time, international investment law provides a test case for wider efforts to design systems of democracy that are able to deliver bottom-up policy making and pursuit of sustainable development.[9] Despite the constraints they face, citizens are increasingly making use of the spaces for deliberation and influence that they do have, aided by increasing public awareness of the potential implications of investment deals. While it is often too early rigorously to assess what approaches work where, and under what conditions, it is certainly not too early to start sharing lessons from this growing experience.

International lesson sharing can provide insights on how to address practical issues arising in citizen engagement strategies. It can also help to create alliances and inspire new groups into action. The Legal Tools webinars, mentioned above, are a step in these directions. Both reports stemming from those webinars (Abdul Aziz, 2015; Orellana *et al.*, 2015) have been written by civil society practitioners who advanced approaches for citizen influence on investment law.

9 On the link between democracy and sustainable development, see the "Manifesto for Democracy and Sustainability" (http://www.democracyandsustainability.org/manifesto/).

The intention has not been to produce detached, impartial research on the effectiveness of multiple strategies. Rather, the intention is to share reflections developed by the practitioners that have been involved first hand with the experiences. The primary interest lies not so much in the analysis of issues, over which people may disagree, even within civil society; but in the practical approaches that citizen groups can and have taken to shape the future of international investment law, or to raise public concerns in a dispute settlement context.

The first experience relates to national and transnational civil society advocacy on Malaysia's participation in the negotiation of the Transpacific Partnership (Abdul Aziz, 2015). The second concerns civil society submissions to an investor-state arbitration related to a mining project in El Salvador. The submissions were part of a wider advocacy strategy conducted by a local-to-international coalition of grassroots groups and environmental, human rights and faith-based organisations (Orellana *et al.*, 2015).

Both experiences provide important insights for citizen initiatives to influence investment treaty making and dispute settlement systems. Against the backdrop of the often blank statements made about the erosion of state power and the diffuse nature of decision making in economic globalisation, the experiences confirm the continued centrality of states as the key sites for citizen action (see Schneiderman, 2013).

Two factors underpin this continued centrality. First, states play a central role in shaping the legal regime for cross-border investment flows. States have the legal authority to do and undo investment treaties, or to recalibrate their content, even though their ability to influence negotiations varies significantly due to imbalances in negotiating power (Schneiderman, 2013). Second, depending on political systems states may provide the primary spaces for democratic accountability.

For these reasons, much recent citizen action has targeted state authorities in relation to their participation in international treaty making – as illustrated by the experience from Malaysia (Abdul Aziz, 2015). Context does matter, however, particularly given the diverse degrees of political space that exist in different polities – from democratic countries to authoritarian regimes. Operating in diverse contexts requires different strategies, and thus more fine-grained analyses to inform choices on relevant tools to implement those strategies.

While state frameworks remain very important, international investment law involves the delegation of considerable authority from states to investor-state arbitral tribunals. These tribunals have the power to review the legality of state conduct based on the standards embodied in investment treaties, and to order payment of compensation if they find that the standards have been breached. In addition, multiple states are grappling with similar challenges, so there is considerable room for lesson sharing and alliance building. As a result, the sites of citizen action transcend the confines of nation states.

The experience from El Salvador, involving civil society engagement with an ICSID arbitral tribunal, illustrates the spaces for citizen action that these transnational processes can provide (Orellana *et al.*, 2015). There is as yet no systematic assessment of the difference that civil society submissions can make to the outcomes of dispute settlement processes. But the experience from El Salvador highlights multiple potential benefits – not only in terms of dispute settlement outcomes, but also in catalysing wider grassroots and civil society mobilisation.

The two experiences highlight the diversity of possible targets for citizen engagement strategies – from the advances that can be achieved through engaging with individual arbitral proceedings, to efforts to promote systemic change in fundamental policy choices about investment treaty making. They also highlight some of the dilemmas that civil society can face – for example, where engaging with a specific arbitration or negotiation might be perceived to lend legitimacy to a process or an overall system that civil society organisations might not mean to legitimise.

Significantly, both experiences point to the importance of harnessing both law and politics, and multiple strategies and approaches, in citizen engagement efforts. In Malaysia, civil society advocacy ranged from public campaigning to directly engaging with government. While the experience from El Salvador illustrates the workings of a legal process, albeit accompanied by social mobilisation, the Malaysian case illustrates the importance of navigating the politics, and of creating alliances with social groups that have considerable political influence, in order to ensure that key messages are heard.

Both experiences highlight the relevance of local-to-global alliances among groups that have common objectives and different comparative advantages. In the case from El Salvador, civil society engagement with investor-state arbitration has been underpinned by an alliance including grassroots groups based in the areas affected by mining; national civil society capable of escalating local issues into national policy debates; and international organisations with the legal expertise and campaigning clout needed to take the issue to a global level.

In the case of Malaysia, the national coalition advocating on the TPP includes interests as diverse as consumer groups, public health organisations and trade associations representing economic interests feeling threatened by the negotiation. International alliance building has occurred at multiple levels – from sharing information and analysis among civil society groups active in the twelve countries negotiating the TPP, through to joint letters calling for greater transparency signed by parliamentarians from several of those countries.

At the same time, coalitions of diverse interests can also be fragile, because promises of carve-outs can appease issue-specific concerns and take the wind off the activists' sail. The proposed carve-out for tobacco control measures proposed by the Malaysian government provides an example of this. Malaysia's apparent determination to sign the TPP in the face of civil society advocacy is also a vivid reminder of the difficulties of achieving policy change on such politically sensitive issues.

Research can play an important role in facilitating lesson sharing and citizen debate. The combination of sensitive political choices and complex technical issues calls for informed as well as inclusive debate. In turn, this requires rigorous analysis of multiple considerations involved in concluding, renegotiating or terminating investment treaties. There is much scope for new collaborations that harness research and advocacy for greater citizen influence over policy choices affecting the future of international investment law.

References

Cases

Glamis Gold Ltd. v. United States of America, Application for Leave to File a Non-Party Submission and Submission of the Quechan Indian Nation, 19 August 2005, UNCITRAL, http://www.state.gov/documents/organization/52531.pdf.

Infinito Gold Limited v. Republic of Costa Rica, Petition for *Amicus Curiae* Status, 15 September 2014, ICSID ARB/14/5, http://www.italaw.com/sites/default/files/case-documents/italaw4014.pdf.

Pac Rim Cayman LLC v. Republic of El Salvador, Application for Permission to Proceed as *Amici Curiae*, 2 March 2011, ICSID Case No. ARB/09/12, http://www.italaw.com/sites/default/files/case-documents/ita0609.pdf.

S.D. Myers, Inc. v. The Government of Canada, Partial Award, Separate Opinion of Bryan Schwartz, 12 November 2000, UNCITRAL.

Literature

ABColombia, 2014, 'The UK-Colombia Bilateral Investment Treaty', http://www.abcolombia.org.uk/subpage.asp?subid=547&mainid=23.

Abdul Aziz, F., 2015, "Advocacy on Investment Treaties: Lessons from Malaysia", International Institute for Environment and Development.

ACIEP, 2004, *Report of the Subcommittee on Investment Regarding the Draft Model Bilateral Investment Treaty*, Advisory Committee on International Economic Policy (United States), http://www.ciel.org/Publications/BIT_Subcmte_Jan3004.pdf.

ACIEP, 2009, *Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty*, Advisory Committee on International Economic Policy (United States) http://www.state.gov/e/eb/rls/othr/2009/131098.htm.

Alvarez, J.E., 2010, "Why Are We 'Recalibrating" Our Investment Treaties?", 4(2) *World Arbitration & Mediation Review* 143–161.

Bernasconi-Osterwalder, Cosbey, A., Johnson, L., and Vis-Dunbar, D., 2012, *Investment Treaties and Why They Matter to Sustainable Development: Questions & Answers*, International Institute for Sustainable Development, http://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf.

Breuer, A., 2009, "Costa Rica's 2007 Referendum on the Dominican Republic - Central American Free Trade Agreement (CAFTA-DR): Citizen Participation or Manipulation?" 45(4) *Representation* 455–469, http://ssrn.com/abstract=2179433.

Brickhill, 2014, "Investor-State Arbitration: A Role for Civil Society as Intervening Parties?", Presentation made at the Legal Tools civil society webinar "Investor-State Arbitration: Lessons from Civil Society Advocacy", 23 April, available at http://www.iied.org/investor-state-arbitration-lessons-civil-society-advocacy.

Crouch, C., 2000, *Coping with Post-Democracy*, Polity.

Crouch, C., 2014, "Democracy at TTIP'ing point: Seizing a Slim Chance to Reassert Democratic Sovereignty in Europe", 6 December 2014, blog, http://www.ippr.org/juncture/democracy-at-a-ttiping-point-seizing-a-slim-chance-to-reassert-democratic-sovereignty-in-europe.

Eberhardt, P., and Olivet, C., 2012, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom*, Transnational Institute, http://www.tni.org/sites/www.tni.org/files/download/profitingfrominjustice.pdf.

European Commission, 2015, *Report: Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf).pdf.

European Commission, 2014a, "Your Request for Registration of a Proposed Citizens' Initiative Entitled 'STOP TTIP'" [motivated refusal to register the citizens' initiative], 10 September 2014, C(2014) 6501 final, http://www.euractiv.com/sections/trade-industry/commission-opposes-european-citizens-initiative-against-ttip-308406.

European Commission, 2014b, "Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP): Consultation Document", http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

European Parliament, 2013, Resolution of 9 October 2013 on the EU-China Negotiations for a Bilateral Investment Agreement (2013/2674 (RSP)), http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-411.

European Parliament, 2011, Resolution of 6 April 2011 on the Future of European Investment Policy (2010/2203(INI), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0141+0+DOC+XML+V0//EN.

Franck, S.D., 2005, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions", 73 *Fordham Law Review* 1521.

Gaventa, J., 2002, "Introduction: Exploring Citizenship, Participation and Accountability", 33(2) *IDS Bulletin* 1–11.

Hepburn, J., and Balcerzak, F., 2013, "Polish Court Rules on Release of Investment Arbitration Awards under Freedom of Information Law", *Investment Arbitration Reporter*, 2 January, http://www.iareporter.com/articles/20130102_3.

House of Commons, 2015a, *Environmental Risks of the Transatlantic Trade & Investment Partnership – Inquiry Report*, Environmental Audit Committee (10 March 2015, HC 857), http://www.parliament.uk/documents/commons-committees/environmental-audit/Letter-trade-commissioner-TTIP.pdf.

House of Commons, 2015b, "Letter to EU Trade Commissioner on the Committee's TTIP Report", Environmental Audit Committee, 17 March 2015, http://www.parliament.uk/documents/commons-committees/environmental-audit/Letter-trade-commissioner-TTIP.pdf.

House of Commons, 2015c, *Transatlantic Trade and Investment Partnership – Inquiry Report*, Business, Innovation and Skills Committee (25 March 2015, HC 804) http://www.publications.parliament.uk/pa/cm201415/cmselect/cmbis/804/804.pdf.

House of Lords, 2014a, *The Transatlantic Trade and Investment Partnership – Inquiry Report*, European Union Committee (13 May 2014, HL 179) http://www.publications.parliament.uk/pa/ld201314/ldselect/ldeucom/179/179.pdf.

House of Lords, 2014b, "The Bilateral Agreement for the Promotion and Protection of Investments between the United Kingdom and Colombia", 30 July, http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/140730-gc0001.htm#14073054000271.

Kant, I., 1795/2010, *Toward Perpetual Peace: A Philosophical Sketch*, transl. J. Bennett (http://www.earlymoderntexts.com/pdfs/kant1795_2.pdf).

Kurtz, J., 2014, "Building Legitimacy through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law", in Z. Douglas, J. Pauwelyn and J.E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice*, Oxford University Press, pp. 257–296.

Montt, S., 2009, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*, Hart Publishing.

OHCHR, 2003, *Human Rights, Trade and Investment*, United Nations Office of the High Commissioner for Human Rights, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/148/47/PDF/G0314847.pdf?OpenElement.

Orellana, M., Baños, S., and Berger, T., 2015, *Bringing Community Perspectives to Investor-State Arbitration: The* Pac Rim *Case*, International Institute for Environment and Development.

Peterson, L.E., 2013, "First Hearing in Philip Morris v. Australia Arbitration is Pushed into 2014, as New Zealand Reveals it is Awaiting Outcome of Australian Cases", *Investment Arbitration Reporter*, http://ww.iareporter.com/articles/20130228_2.

Purugganan, J., 2015, Presentation made at the Legal Tools civil society webinar "CSO Advocacy on Investment Treaties: Lessons from Experience", 26 March, available at http://www.iied.org/rise-civil-society-advocacy-investment-treaties-malaysia-philippines.

Rancière, J., 2006, *Hatred of Democracy*, transl. S. Corcoran, Verso.

Rousseau, J.-J., 1762/1963, *Du Contrat Social*, Union Générale d'Éditions.

Schill, S.W., 2009, *The Multilateralization of International Investment Law*, Cambridge University Press.
Schneiderman, D., 2013, *Resisting Economic Globalization: Critical Theory and International Investment Law*, Palgrave Macmillan.
Schneiderman, D., 2008, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*, Cambridge University Press.
Tienhaara, K., 2009, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge University Press.
UNCTAD, 2014, *World Investment Report 2014 – Investing in the SDGs: An Action Plan*, United Nations Conference on Trade and Development, http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf.
Van Harten, G., 2007, *Investment Treaty Arbitration and Public Law*, Oxford University Press.
Waibel, M., Kaushal, A., Chung, K.L., and Balchin, C. (eds), 2010, *The Backlash against Investment Arbitration: Perceptions and Reality*, Wolters Kluwer.
Wolin, S.S., 2008, *Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism*, Princeton University Press.

Democratising international investment law: recent trends and lessons from experience

Around the world, citizens' groups are stepping up advocacy on international investment law – by scrutinising treaty negotiations, intervening in investor-state arbitrations, catalysing grassroots mobilisation or promoting public debate. Rapid, far-reaching and partly contrasting policy developments make this a particularly important point in time for shaping the future of international investment law.

Building on two international lesson sharing webinars, this report discusses the conceptual underpinnings of a fundamental challenge to "democratise" international investment law; reviews trends in citizen engagement with international investment law; and distils lessons from some recent civil society experience.

ISBN: 978-1-78431-199-5
IIED order no.: 12577IIED

Knowledge Products

Research Report
June 2015

Law

Keywords:
Investment treaties, Legal tools, Citizen action, International arbitration

iied