International Law Programme
Meeting Summary

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Investment Treaties: A Debate over Sovereignty, Trade, Development and Human Rights

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Introduction

At an event organized by the Chatham House International Law Programme and Doughty Street Chambers, held on 11 October 2017, controversies regarding investment treaties and the rights of states to protect human rights and development were discussed. This summary[1] provides an overview of the main themes that emerged during the discussion. Speakers spoke in a personal capacity.

Do investment treaties undermine human rights and development goals? Is there a need for reform?

- Ecuador established a commission (CAITISA) in 2008 to audit the country's investment protection system, in order to, *inter alia*:
    - determine the legality of Ecuador's bilateral investment treaties (BITs);
    - assess the cases filed against Ecuador via investor–state dispute settlement (ISDS) mechanisms; and
    - examine the extent to which BITs have attracted foreign direct investment (FDI).
- The commission concluded that:
    - many investment protection agreements, including the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention), were illegal under Ecuadorian law, for example by not being ratified by the national congress;
    - there was no correlation between the signing of the agreements and the level of investment in Ecuador;
    - furthermore, much of the investment came from countries with which Ecuador had no BIT;
    - BITs undermined development objectives; and
    - the arbitration system favoured investors over states, including as a result of the ties between arbitrators and transnational corporations.
- Ecuador has terminated all of its BITs.
- Investment needs fair rules, which in turn result in political and juridical stability, and a diversified economy. Noting that the European Union remains one of the biggest recipients of FDI despite being highly regulated, it was argued that deregulation is not a precondition for attracting investment.
- Development may be said to depend on institution building, especially in the Global South; and, according to one view, in bypassing domestic remedies BITs are weakening the institution building process and challenging the domestic judicial system. Indeed it can be argued that BITs undermine the international legal order by creating a parallel legal system.
- It was pointed out, on the other hand, that states' investment treaty obligations reflect rules of customary international law including:
    - the prohibition against the expropriation of the property of aliens without legitimate public purpose and without proper compensation;
    - the international minimum standard of treatment of aliens, which is wholly or partially equivalent to the fair and equitable treatment standard in BITs; and
    - the customary standard and obligation of due diligence, which is broadly equivalent to the full protection and security standard in investment treaties.

[1] This summary was prepared by Olivia Nelson.

- Additionally, it was noted that many of the core rights guaranteed by many investment treaties are equivalent to international human rights obligations, including with regard to property, due process, fair trial and freedom from discrimination.
- Under this view, a major purpose of BITs is to give effect to these obligations in the form of binding dispute resolution procedures, both at the state-to-state level and at the investor-state level, providing an opportunity for meaningful redress to those who have invested in foreign jurisdictions. Without the BITs, enforcement of these obligations would largely be left to diplomatic pressure.
- It was acknowledged that there is room for further debate on:
    - the balance between the substantive obligations of states in BITs, margins of appreciation and sovereign rights; and
    - the preferred mechanism for investment disputes, which under most investment treaties is by way of international arbitration.
- There has been a move towards clarifying the rights, particularly the right to regulate, within modern investment treaties. While the interplay between the right to regulate and the right to compensation, where there has been expropriation, has been addressed in the relevant jurisprudence,[2] greater clarity would serve to bolster the legitimacy of the ISDS process and investment treaties more broadly.

The contribution of Africa to reform

- Investment law in Africa is characterized by fragmentation. Africa has at least three levels of regulation: national investment legislation; BITs; and regional investment agreements. These different layers of regulation tend to contradict one another, making it difficult for foreign investors to know which rules would apply when investing in Africa.
- To eradicate poverty, Africa needs to attract FDI. This requires a clear regulatory framework.
- The Pan-African Investment Code (PAIC) was adopted by the African Union in April 2016. Although not a binding legal instrument, is designed to:
    - create a model for coherence;
    - redress the balance between the rights and obligations of states and investors; and
    - shift the focus from investment protection to investment facilitation, which, it is hoped, will result in a less adversarial investment climate.
- The PAIC is innovating:
    - through its promotion of investment that fosters sustainable development;
    - through its structure, which encompasses state obligations, investor obligations and horizontal obligations; and
    - through introducing exceptions to traditional rules of investment law with a view to creating equity.
- There was discussion among those negotiating the PAIC regarding an arbitration mechanism, with arguments for and against. Such a mechanism had been accepted, but with the inclusion of a right for states to make counter-claims when proceeded against by investors.
- Africa is thus contributing to reform in the international investment regime: here the continent is a rule-creator, rather than simply a rule-follower.

[2] See for example Methanex Corp v. the United States of America, and Philip Morris v. Uruguay.

Dispute settlement mechanisms

- International arbitration is an established method for public international dispute settlement, and is uncontroversial at the state-to-state level. The right of investors to bring claims against states, on the other hand, has been the subject of public concern.
    - Citing an empirical study of 675 publicly known investment arbitrations, where investors prevailed in only 29 per cent of cases, it was argued that ISDS is quite an even-handed process.
    - While arbitrators in investment cases are mostly retired judges, diplomats or academics, and therefore do not necessarily have ties to the investors in these cases, there remains an issue with ‘double-hatting’, whereby sitting arbitrators simultaneously operate as counsel in unrelated cases.
- Nonetheless, it was acknowledged that refinements to the ISDS process have been necessary in order to ensure transparency, public interest and the right to intervene by legitimate third parties.
- An international investment court has been proposed as an alternative to investment arbitration, but this proposal has received a mixed reception, with scepticism as to the likely independence of a court appointed by states and about the question of funding.
- It was argued that redressing the balance of the investment treaty system requires reform of the dispute resolution mechanism because of the perceived imbalance, in the view of civil society, between the right to regulate and the right to compensation. In order for the investment system to continue, it must address these concerns and address the criticisms within the arbitration community.
- The mechanism contained within the EU–Canada Comprehensive Economic and Trade Agreement (CETA) was put forward as the best example of the kind of reform necessary to address the concerns of civil society, as it is the result of an unprecedented democratic process. This process resulted in a joint interpretative instrument and the submission of the dispute resolution mechanism to the European Court of Justice for an opinion regarding its compatibility with EU law. The CETA mechanism involves:
    - a three-member tribunal, randomly chosen from a pool of 15 permanent members – of whom five are Canadian, five are EU nationals and five are from third states; the members have to be qualified for judicial office and have experience in public international law, and must refrain from acting as counsel or as party-appointed expert or witness in pending or new investment disputes; and they have a monthly salary with an additional fee paid by the parties to a dispute.
- The CETA mechanism also addresses some of the concerns of the arbitration community by:
    - introducing an appellate tribunal that will create binding precedent;
    - ensuring the UNCITRAL rules for transparency apply, bar limited exceptions; and
    - providing that the losing party to a dispute will pay costs, rather than each party bearing its own costs, thus reducing the likelihood of abusive claims.
- It is true that many lawyers would need to be involved as tribunal members if this model were to be replicated, and moves to have a permanent multilateral arbitration court are relevant here.

The wider context

The point was made that the system of investment treaties and arbitration has to be seen in a wider context. Many governments have been pressing at the UN for a binding treaty to require transnational corporations to respect human rights. Guiding principles are good but merely voluntary, and there is no legally binding instrument to protect countries from exploitation from transnational companies. By this view, a priority for governments should not be to negotiate a new multilateral instrument on investor protection, but rather to aid in the growth of development by protecting countries from human rights abuse and tax evasion by transnationals.