

Towards a Repository of Policy Options for IIA Reform

Meeting

CIGI ILRP First International Economic Law Consultation Workshop on Emerging Issues in International Trade and Investment Law¹ⁱ

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Concrete research findings, innovative ideas and proposals for achieving sustainable development and inclusive growth related to IIA or ISDS reform that were discussed at the event:

1. **Strike a multi-disciplinary multi-stakeholder research approach to international trade and investment and global value chain legal regimes**
2. **Consider how to reconcile and modernize WTO & preferential trade & investment agreements to create policy space to address pressing global issues**
3. **Consider reforms that would harmonize, unify, modernize and enhance rule of law legitimacy in international investment agreements**
4. **Consider how to enhance international, transnational and domestic regulation in the global value chain for more equitable distribution of benefits and to control for environmental and human rights costs**

Multi-disciplinary Multi-stakeholder Research Approach. Create a forum for WTO DSU and ISDS experts, leading domestic jurists, human rights and environmental experts and political economists to discuss across their fields and identify the problems and possible solutions to dispute settlement involving developed and developing states, civil society and multinational corporate investors. Conduct research in such a way as to show the many sides of the issues. Generate tools for public education and teaching so that civil society in the developed and developing world is better able to assess and contribute to reform.

Analyse how measures to encourage transfer of climate change technology and protect the human right to a safe environment can be reconciled with trade and investment obligations. Could there be an international consensus to not litigate on environmental issues?

WTO and Preferential Trade & Investment Agreements. Is multilateralism presently in such a state of crisis that the only way to make progress in building resilient and responsive international rule of law is for like-minded groups to develop their own treaties? Or does such behaviour undermine efforts to salvage multilateralism? Is this how we eventually arrive at multilateral agreement (norm-entrepreneur states leading and pulling others to join)? Is there a way to save multilateralism by incorporating the pluri-lateral preferential trade and investment agreements into the WTO and permit other states to accede if they can meet the necessary conditions? How to deal with the requirement of consensus?

If the new mega regional trade agreements use the WTO DSU would the WTO be able to evolve to address the new issues at stake in these new agreements (e.g. better balance of environmental, human rights considerations)? Conduct a substantive review of the subsidies agreement to determine whether it is serving the policy purposes intended by governments. Study how to reconcile, rationalize or replace the varying and overlapping treaty obligations

¹ The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

(e.g. preferential trade agreements vs. general obligation of non-discrimination in the WTO)? New mega trade deals tend to include investment chapters. Could study if there would be interest in greater harmonization, although there may be preference for variation reflecting newer thinking about trade and investment (e.g. definition of investment, rules on establishment, recourse to local remedies).

Given the above problems with working within the WTO, the business community is most focused on PTAs and BITs that can bring real economic improvements. What practical approaches can be taken to advance rule of law? Are there lessons from the WTO DSU that could be usefully adapted to ISDS?

Study lessons learned from NAFTA, after twenty years, as an example of a relatively successful international trade and investment agreement: what worked, what did not, what has improved, what still needs to be changed? Could it be modernized to address today's pressing issues e.g. clean energy and climate change, green economy and sustainable development? Were the improvements to ISDS sufficient to address the current global critique of ISDS?

International Investment Agreements. Study whether the time is right for a multilateral investment treaty to replace the 3000 plus BITs? If this were contemplated what would civil society want added to it (e.g. counterclaims in domestic law)? Would this provide an opportunity to create an appellate body, and if so how would it interface with ISDS systems (*NY Convention, ICSID Convention*). How would an appellate body deal with variations in language between different agreements (e.g. MFN, NT clauses)? Is there a way to reconcile trade and investment treaties and processes to avoid forum shopping, inconsistent rulings and double awards? Or is it best to accept the occasional inconsistency in order to preserve what works in WTO? Consider a norm entrepreneur project: revising a smaller number of BITs among willing innovator States to see how they could be harmonized, modernized and improved.

Study whether it would be feasible to move away from arbitration as a means of ISDS to domestic adjudication of IS disputes and thereby improve global rule of law capacity. What would it take to enhance domestic rule of law to generate the needed confidence? E.g. study by CIGI Senior Fellow Armand de Mestral on ISDS between developed democracies with functioning domestic rule of law systems. What are the implications for ISDS when applied between developing and developed countries? As some developing countries withdraw from ISDS should a substitute system be developed or could domestic courts and private international law adjudicate all issues appropriately?

Study how to integrate sustainable development goals more carefully into international investment agreements by having more balanced objectives including investor responsibilities, so it is not all about protection of the investor at the expense of domestic civil society, e.g. including social policy objectives such as the Black Economic Empowerment legislation in South Africa; ensuring that the foreign extractive industry investor undertakes to protect the environment and human rights.

International, Transnational and Domestic Regulation in the Global Value Chain. Study regulatory issues that arise in relation to the global value chain: regulatory fragmentation and harmonization of standards, taxation avoidance by transnational corporations, inequitable distribution of benefits and externalization of environmental and human rights burdens and social and political costs, limits of state jurisdiction and the shift to private global regulation.

Consider how to develop the Ruggie's *Guiding Principles on Business and Human Rights* into an enforceable body of international, transnational and domestic law. Study how a treaty or model law could target a non-state actor conducting business globally. Study how individuals can enforce against corporations for human rights violations, bribery and corruption, and environmental degradation committed in their operations around the world. Consider whether this is best done through voluntary codes or through multilateral processes to ensure development of transparent standards? What is the appropriate role of governments with particular reference to the extractive sector?

ⁱ Web link to the Event's page: <https://www.cigionline.org/events/first-international-economic-law-consultation-workshop-emerging-issues-international-trade-an>; Related Project page: <https://www.cigionline.org/activity/investor-state-arbitration>.