Towards a Repository of Policy Options for IIA Reform

Research Project
The Impact of International Investment Law on Government Behaviour: Enabling Good Governance?[1i]

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This research aims to offer some **insights into the currently underexplored issue of how international investment law influences host government behaviour, particularly in developing economies.** As the past two decades witnessed a rise in the number of investment arbitrations against host states, including against less-developed economies, with tribunals granting investors significant sums in damages awards, it has been argued that investment arbitration 'must fulfil *some* useful societal function' – something beyond just allowing investors to recover their losses. Can investment treaty law benefit not just foreign investors but also host state communities by bringing about change in governance practices?

We argue that for international investment law to have a wider transformative impact on governance in host states and thus benefit a broader range of stakeholders, government officials ought to understand the scope and meaning of investment protection guarantees under existing bilateral and multilateral agreements. Investment treaty prescriptions need to be internalised and embedded in domestic legal culture. To uncover the channels through which the IIA regime could have such impact on host states, we conducted a small-scale empirical case-study which focuses on how international investment law is perceived by government officials in developing countries whilst also elucidating how governments have so far responded to investment treaty disciplines after experiencing the regime's bite.

The case-studies comprised semi-structured interviews with government officials and analysis of national legislative material relating to investment policy-making and dispute settlement, as well as rules on the enforcement of judgements against government agencies and officials in Turkey and Uzbekistan. **The interviews (21 respondents in total) were conducted among government officials working in ministries and agencies** that have had involvement in investment treaty making and dispute settlement, as well as government officers who interact with foreign investors outside the context of investment treaty law and dispute settlement, i.e. in making, implementing and otherwise applying national laws in domestic, not international, settings. **Two principal foci of the study were (1) the extent of awareness of investment treaty law and (2) the ways in which investment treaty law is internalised leading to changes in government behaviour.** In addressing the latter, empirical interviews were accompanied by analysis of national laws and regulations. The case study is built into a broader analytical framework which evaluates the empirical findings from theoretical and normative angles.

[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.

The preliminary findings of the study can be summarised as follows:

- **The first exposure to investment arbitration claims entailed a spike in the level of awareness of investment treaty law among government officials** who were directly involved in regulating and implementing foreign investment projects (e.g. ministries of energy, economic development, justice and foreign affairs) and/or directly or indirectly involved in the process of defending the government in that particular investment arbitration.

- **However, there is a pervasive lack of awareness of investment treaty law among officials in the lower tiers of government and among the judiciary.** The case-studies suggest that, even after the respective governments became exposed to a number of investment treaty arbitrations, many government officials in the executive and judicial organs have remained unaware of both the very existence of investment treaty law and of the fact that their acts or omissions affecting foreign investors may lead to investment arbitration claims.

- Investment treaty law can be internalised by government officials but not necessarily in the way predicted by the proponents of the good governance narrative or those predicting a chilling effect of treaties on national regulatory activities. **In some cases, despite the previous exposure of the host state to investment treaty arbitration claims, government officials chose to ignore the risk of a new claim** which their action could entail. In another case, after a first encounter with investment arbitration, **government officials were instructed not to include ISDS clauses in investment contracts**, and the government sought to change the interpretation of ISDS guarantees in national laws through constitutional review.

- While, the interviews reveal that a positive experience in arbitration (when government is successful in defending itself) lead to an overall positive perception of the ISDS regime and prevents states from engaging in a backlash against the regime, there is a sense that international investment law is not inclusive in that developing countries have a limited input in shaping its norms. Also, an historical analysis of how a host state's investment protection policy reveals a significant input from international organisations and think-tanks. However some of the most recent **guidance documents for government officials** in developing countries continue to advise host states to use the old OECD-style treaty models whilst leaving out most recent developments in treaty drafting and thus failing to facilitate an informed participation of developing countries in shaping investment treaty rules.

- In theory, holding a host state liable for an investment treaty breach should compel the state to **create a governmental agency** responsible for detecting, identifying, and controlling risk-increasing activities in which its government agencies and officials may engage. UNCTAD has promoted the model of a response and early detection system adopted by Peru. However, our analysis suggests that a focus on dispute prevention does not enable such prevention and monitoring systems to act as a channel for a "spill-over" of good governance standards into domestic environments. In some countries, the governments have focused on setting up an agency that would facilitate an optimal defence of state interests in investment arbitration rather than seeking to examine the root causes of investment treaty disputes and foster a bottom-up reform of governance practices. If the focus of dispute monitoring mechanisms were to remain on the optimisation of defence and representation of host state interests and prevention of foreign investment disputes, foreign investors would continue to be seen as an over-protected and privileged group of stakeholders, thus disadvantaging national businesses and entrenching concerns over the regime's bias.

- In order for IIAs to fulfil their good governance promise, in promoting model's such as Peru's international capacity-building organisations such as UNCTAD should **shift the focus from the exclusive goal of investment protection to the promotion of inclusive access to good governance by a broader range of beneficiaries, including host communities and national business actors.**

[i] Empirical and legal (doctrinal and policy) research conducted by Dr Mavluda Sattorova in collaboration with Dr Mustafa Erkan, University of Marmara, Turkey, from 2011-2014.