

## GUEST ESSAYS

## EXCLUSION

# CIVIL SOCIETY AND INVESTOR- STATE DISPUTE SETTLEMENT

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## INTRODUCTION

International agreements to promote foreign investment, including both standalone investment treaties and investment chapters in trade and investment agreements, have attracted extensive public attention in recent years. One area of particular controversy has been the effect of investor-state dispute settlement (ISDS) arrangements provided for under investment treaties. These mechanisms allow businesses to sue governments over state conduct that adversely affects them, and have raised concerns about the balance of public and private interests in international economic governance. Their potentially far-reaching implications fuelled extensive civil society advocacy in 2016.

ISDS mechanisms featured prominently in public mobilisation around three proposed trade and investment agreements: the Comprehensive Economic and Trade Agreement (CETA), the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). While the status of the TPP and TTIP are now in doubt given the recent political changes in the USA, ISDS proposals will remain an important issue as other deals are brokered. This includes potential agreements between the UK and other states once the UK exits the European Union, and possibly the bilateral treaties mentioned by the new Trump administration in the USA.

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## ISDS: WHAT IT IS AND WHY IT MATTERS

Under many international investment treaties, states agree to provide each other's investors with specified standards of treatment in the expectation that this will promote cross-border investments. In most cases, the standards involve obligations on how states must protect investments by nationals of other states within their territory, but a growing number of treaties also cover the liberalisation of investment flows. Standards of treatment include provisions that require states to accord foreign investors 'fair and equitable treatment' and limit the government's ability to expropriate foreign investments.

Most investment treaties allow investors to bring disputes to international investor-state arbitration if they consider that the state has breached its treaty obligations. This means that an investor can bypass national courts if they have a dispute with a government and, instead, have it settled by an international arbitral tribunal. Over the years, investors have brought some 700 such arbitrations to challenge state conduct, including in policy areas as diverse as industrial strategy, taxation, environmental protection, planning regulations and public health. Many national laws and investor-state contracts such as public concessions also allow investors to bring disputes to arbitration.

Arbitral tribunals issue awards, which are similar to court judgments, and typically order states to compensate investors if they find violations. Widely ratified multilateral treaties, such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, make it easier to enforce pecuniary arbitral awards globally. Under these treaties, if a state fails to comply with an award, an investor may seek enforcement in any signatory country where the state holds commercial interests. So while many international arrangements suffer from enforcement problems, ISDS systems have legal bite.

## THE PROBLEM: FAR-REACHING POLICIES BUT LIMITED ACCESS AND SPACE FOR INFLUENCE

International investment law involves complex technical issues and, until the relatively recent rise of investor-state arbitration, investment treaty-making and adjudication remained a largely obscure area of international law. Public awareness is often limited, as is publicly available information about developments in treaty negotiations. The low levels of public oversight in investment treaty-making create challenges for democratic governance; a [United Nations Independent Expert](#) went as far as openly questioning the democratic legitimacy of the international investment regime.

At the same time, international investment law can have far-reaching implications. It allows foreign investors to challenge public action by directly accessing international arbitration. The openly-worded investment protection standards contained in many investment treaties delegate considerable power to the arbitral tribunals interpreting those standards. And the growing number of actual arbitrations has extended the reach of international investment law into a wide range of public policy areas.

Damages are the main remedy available to investors under investor-state arbitration, meaning that states can ultimately take the action they deem appropriate so long as they compensate investors. But critical commentators have raised concerns that the risk of exposure to arbitration claims,

possibly involving substantial liabilities in compensation and legal costs, could cause a ‘regulatory chill’ – whereby public authorities would be reluctant to take action in the public interest out of concern about possible arbitration claims.

Methodological constraints make it difficult to find systematic evidence of regulatory chill, but several cases show that these concerns should be taken seriously. And in any case, the financial implications of investment arbitration raise important questions about how the costs of socially desirable measures should be distributed between governments and businesses.

Dispute settlement proceedings have themselves formed the object of concern. Investor-state arbitration is usually not subject to appeal, although depending on applicable law, awards might be annulled or set aside under narrowly-defined circumstances. Also, the system was historically inspired by commercial arbitration, with confidentiality as one of its defining features. This sits uncomfortably with the hearing of cases involving matters of public interest, and reforms over the years have increased transparency in some commonly-used ISDS rules.

Concerns have also been raised about the incentives of arbitrators, who are paid for each arbitration and would therefore stand to gain from allowing more cases to go through, and about the effectiveness of mechanisms to deal with possible conflicts of interests.

## RECENT TRENDS IN CIVIL SOCIETY ADVOCACY

Civil society scrutiny of investment treaty-making and engagement with investor-state arbitration has increased significantly in recent years, particularly in the context of negotiations among medium and high-income polities that offer space for political contestation. Some recent investment treaty negotiations involved significant public mobilisation, especially where investment provisions were folded into more encompassing - and as such, more visible and potentially impactful - trade and investment treaties. These developments are particularly evident in high-income countries.

Civil society conducted public awareness campaigns and promoted mobilisation around major treaty negotiations, and lobbied for greater parliamentary and public oversight of negotiations. In Europe, for example, citizens’ groups filed a request for a ‘European citizens’ initiative’ on CETA and TTIP, asking the European Commission not to conclude the treaties. The European Commission ultimately rejected this request on legal grounds, but civil society pushed ahead with the petition as a tool to catalyse awareness raising and citizen engagement. The petition reportedly marshalled over three million signatures.

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## GUEST ESSAYS

## CIVIL SOCIETY & THE PRIVATE SECTOR

The proposed ISDS system featured prominently in this advocacy, and in response the European Commission proposed an ‘investment court system’ (ICS) to settle investor-state disputes and negotiated its integration into CETA. The ICS differs from current investor-state arbitration rules, but it also presents important areas of continuity. The proposal sparked considerable debate but has so far had only limited success in assuaging civil society concerns and mobilisation.

While systematic data is not available, parliamentary and citizen scrutiny of investment treaties appears to remain more limited in many low and middle-income countries. Nonetheless, documented examples exist, again particularly where investment issues formed part of wider economic treaties.

In Malaysia, for example, a coalition of civil society organisations (CSOs), including consumer groups, public health organisations and trade associations, conducted extensive campaigning, awareness raising and government engagement to advocate on the investment chapter of the proposed TPP, with parliamentarians also scrutinising the negotiations. In Burma/Myanmar, civil society undertook advocacy on proposed bilateral investment treaties, citing concerns that exposure to ISDS claims might affect political space for the democratic transition and the peace process.

Civil society groups have also engaged more extensively with the conduct of arbitral proceedings, challenging both procedural aspects of the investment arbitration system and the substance of investor claims in disputes with particular public policy concerns. Over the years, the strength and increasing professionalisation of civil society advocacy has promoted incremental changes in some arbitration rules, including greater public disclosure of documents, public access to hearings and third-party submissions in arbitral proceedings.

Civil society have also increasingly taken advantage of access to arbitral proceedings by submitting so-called *amicus curiae* (‘friends of the court’) briefs as non-disputing parties. These submissions not only highlight the public interest dimension of the case in question, they also contribute expertise and alternative perspectives to the substantive claims made by the investor and state parties to a dispute.

Despite these openings, space for civil society influence in investor-state arbitration remains constrained. When deciding whether to accept civil society submissions, arbitral tribunals enjoy considerable discretion, and have in some cases refused them. Also, making a written submission does not amount to full-fledged participation in the proceedings, and civil society petitioners face significant restrictions when drafting submissions; for example, they may have no access, or limited and restricted access, to case documents or hearings.

Finally, several tribunals did not fully engage with the arguments civil society articulated in their submissions, and the effectiveness of the submissions in influencing arbitration outcomes seems limited. However, evidence suggests that *amicus curiae* submissions can have important effects outside the arbitral proceeding, for example, by helping to catalyse community mobilisation.

## WAYS FORWARD

Obvious practical challenges are raised when trying to promote informed citizen engagement on complex technical issues. Opportunities for meaningful citizen influence are often 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 for example in lower literacy rates, and political space for genuine dialogue is often limited.

At the same time, international investment law provides a test case for wider efforts to design systems of democracy that are able to deliver, at scale, bottom-up policy-making in relation to politically and economically sensitive issues. Seizing the opportunity requires imaginative ideas and practice, and the sharing of lessons from innovation. It also requires robust evidence and rigorous analysis to ensure that advocacy is properly informed. And it requires civil society to navigate dilemmas it is likely to face, such as the possibility that engaging with an arbitration or negotiation might be perceived to lend legitimacy to a process or an overall system that CSOs might not mean to legitimise.

Against the backdrop of the often blank statements made about the erosion of state power, states remain key sites for civil society action, because states play a central role in shaping the international investment regime, and because, depending on political systems, states may provide the primary spaces for democratic accountability. Therefore a continuing priority for civil society is likely to entail raising public awareness and promoting mobilisation in their polity, engaging with their government and getting parliament to act.

At the same time, international investment law involves the delegation of considerable authority from states to investor-state arbitral tribunals. In addition, many states are grappling with similar challenges, so there is considerable room for lesson sharing and alliance building across national borders. As a result, the sites of civil society action transcend the confines of nation states, and CSOs can deepen their work to develop transnational alliances among groups that have common objectives and different skillsets.

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