Whose rights are we protecting?

Ensuring the primacy of human rights over investor protections in the international legal regime

A report prepared for the

Regional Working Groups of the

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Africa-Canada Forum

Americas Policy Group

Asia-Pacific Working Group

The **Americas Policy Group (APG)** is a Canadian civil society policy group focused on development and social justice issues in the Americas. It brings together approximately 40 international development and humanitarian NGOs, human rights groups, labour unions, research institutions, church and solidarity groups.

The **Africa-Canada Forum (ACF)** brings together more than 40 NGOs, churches, unions and solidarity groups from across Canada that have a specific interest in development issues and social justice in sub-Saharan Africa.

The **Asia-Pacific Working Group (APWG)** brings together close to 30 NGOs, faith-based organizations, unions and solidarity groups from across Canada that have a specific interest in development, social justice, and human rights in Asia.

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WHOSE RIGHTS ARE WE PROTECTING? ENSURING THE PRIMACY OF HUMAN RIGHTS OVER INVESTOR PROTECTIONS IN THE INTERNATIONAL LEGAL REGIME

OVERVIEW

International Investment Agreements (IIAs) are agreements negotiated between states to govern the *promotion* and the *protection* of foreign investments. They can take different forms, such as Bilateral Investment Treaties (BITs), investment chapters in Free Trade Agreements (FTAs) or multilateral (trade or investment) agreements. While these agreements provide very strong protection to foreign investors and their investments, they do nothing to protect the human rights of those affected by these investments. Moreover, evidence to date indicates that the role of IIAs in generating increased foreign direct investments is "relatively small"[1], let alone generating investments that support sustainable development[i] and the realization of human rights in the host country. Indeed, IIAs in their current form are concerned exclusively with protecting the rights of foreign investors. They limit the policy space necessary for states to legislate in the public interest, and they show little or no consideration for human rights.

Human rights treaties impose binding obligations on the States that have ratified them. These treaties are not discretionary nor are they aspirational – they are international law. Widely ratified, human rights treaties represent an international consensus regarding the responsibilities of States towards people living under their jurisdiction. And in the event of a conflict between human rights treaties and other agreements between states (such as investment agreements), Article 103 of the United Nations Charter specifically says that human rights obligations shall prevail.[2]

The problem is unequal enforcement powers. While human rights treaties have weak enforcement mechanisms, the international investment regime allows foreign investors to sue governments for billions of dollars in private tribunals of questionable legitimacy when they are seeking to enact policies and legislations that promote human rights and protect the environment. Today, IIAs *de facto* trump human rights treaties.

Globally, the total number of IIAs which have been signed exceeds 3,000 and Canada itself is a very active player. As of January 1st 2015, Canada had already signed 57 IIAs. And in 2014, it was

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[i] "In fact, despite some promising innovations in recent years to rebalance the agreements, investment treaties can be counter-productive to achieving sustainable development objectives, imposing high costs on the countries who sign them but questionable returns in terms of attracting investment—much less the quality investment that is so important for sustainable development.". Source: IISD. 2012."Investment Treaties & Why they Matter to Sustainable Development: Questions & Answers". Retrieved from: https://www.iisd.org/publications/investment-treaties-and-why-they-matter-sustainable-development-questions-and-answers

the most active country in the world on that front, signing seven new deals.[ii] Two of the most prominent deals signed recently by Canada are the Canada-China Foreign Investment Protection Agreement (FIPA) (which entered into force in 2014) and the Canada and European Union Comprehensive Economic and Trade Agreement (signed but not yet ratified). Currently, Canada is also involved in the negotiation of more than 20 IIAs involving over 60 countries. This includes the contentious Trans-Pacific Partnership Agreement. In Africa, Canada has signed investment treaties with ten countries and is negotiating deals with six more. In the Americas, Canada has signed investment treaties with 13 countries and is negotiating deals with another 16. And in Asia, Canada signed investment treaties with four countries and is negotiating new deals with ten more. The list of these agreements can be found in Annex I.

All of these IIAs are enforced by the Investor-State Dispute Settlement (ISDS) mechanism. While scarcely used before 2000, the ISDS has become a very popular mechanism for the arbitration of investment disputes in the past 15 years. At the end of 2014, the overall number of known ISDS claims in the world reached 608. Of these, 356 cases were concluded: 37% were decided in favour of the State, 25% were decided in favour of the investor, 28% of cases were settled, and 8% of cases were discontinued.[iii] However, the number of cases won by investors is not necessarily a good indicator of the usefulness of this arbitration mechanism for transnational corporations. Indeed, the "chilling effect" created by the ISDS also pushes government to revise or abandon policies and regulations that would promote human rights or reinforce environmental protections in order to avoid being sued. To this day, more than 100 governments around the world have been respondents to one or more known ISDS claims. (Since IIAs often allow for fully confidential arbitration however, the actual number of cases could be much higher.[3])

The lack of transparency that characterizes both the negotiation of IIAs and the arbitration process is a major issue of concern. The agreements themselves are often negotiated in secrecy and sometimes with little or no parliamentary and public debates. The Canada-China FIPA, for example, was subject to only one hour of study before the parliamentary trade committee.[4] In the case of investor-state arbitration, while the two main venues to hear investors' claims, the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL), have adopted rules to publicly disclose the existence of cases (and in the case of UNCITRAL, only very recently), the parties can still keep the proceedings and written submissions and arguments almost entirely confidential.[5] Luke Eric Peterson, an expert on investment treaties and human rights issues, argues that "[t]his lack of transparency in foreign investment dispute settlement is critical, because states may face disputes when their international commitments on investment protection come into tension with their international (and national) obligations to protect human rights"[6]. Many such cases are presented in section 1. Indeed, as Howard Mann – also an international investment expert –

[ii] Tied in second place with three new agreements in 2014 were Colombia, Côte d'Ivoire, and the European Union. Source: UNCTAD. 2015 Recent Trends in IIAs and ISDS, p.2. Retrieved from: http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf

[iii] In the other 2% of cases, a treaty breach was found but no monetary compensation was awarded to the investor. Source: UNCTAD. 2015 Recent Trends in IIAs and ISDS, p.1. Retrieved from. http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf Retrieved on 27 February 2015.

explains, “the confidentiality of the investor-state process raises issues of democratic rights to basic information about government conduct in relation to public interest issues”.[7]

Aside from the transparency issue, IIAs and the ISDS mechanism also raise many other development and human rights concerns. In the first section of this backgrounder, we discuss how some of the main substantive issues included in IIAs are used by investors in their claims against states. We also highlight the most problematic aspects of the ISDS mechanism and the ways in which both IIAs and the ISDS mechanism limit the policy space of states. In the second section, we highlight the imbalance between the strong protections offered to investors and the absence of consideration for human rights in the international investment regime. The third section presents various paths of action to address the problems related to investment agreements and to ensure that investors’ rights do not trump human rights in the international legal order. Finally, the fourth section looks at the ISDS mechanism in the Canadian context and includes three recommendations from the CCIC regional working groups to the Canadian government on how to address the issues raised by this mechanism.

1. INVESTMENT TREATIES: SPECIFIC PROVISIONS AND THE ARBITRATION MECHANISM

The strong protections granted to foreign investors under international investment agreements (IIAs), which are enforced by the investor-state dispute settlement (ISDS) mechanism, are reducing the capacity of states to adopt policies and regulation to promote human rights and to protect the environment. This section presents the most contentious IIA provisions, as well of the most problematic aspects of the ISDS mechanism.

1.1 THE MOST CONTENTIOUS PROVISIONS OF INTERNATIONAL INVESTMENT AGREEMENTS

IIAs contain several provisions which serve to protect foreign investors, provisions which may vary somewhat from one agreement to the other. In section 1.1, we present four provisions that are found in most agreements and that are very often referred to in cases of investor-state arbitration.

1.1.1 Fair and equitable treatment

The purpose of the fair and equitable treatment (FET) principle is to protect investors against "serious abuse and arbitrary or discriminatory actions by host states by requiring a standard of fair treatment".[8] Unlike the national treatment and most favoured nation standards discussed below, which are relative obligations, the FET obligation is an objective one, i.e. it sets a minimum standard below which the treatment of foreign investors and investment cannot fall.[9]

A major problem with the FET obligation lies in the widely different interpretations that it has been given by international investment tribunals, which are not bound by previous decisions made in other cases. At one end of the spectrum, FET has been interpreted to mean that states should not act in a manner that is "egregious and shocking"[10] towards foreign investors: a relatively low standard. At the other end of the spectrum, FET has been interpreted to mean that states should act in a manner that does not affect the "legitimate expectations" of the foreign investor, and in a manner that is free from ambiguity and totally transparent[11]. The latter interpretation puts a heavy burden on host states and creates unrealistic expectations that become legally binding. Furthermore, the concept of "legitimate expectation" can be used "to frustrate or preclude legitimate changes to legislative, government, and judicial decisions".[12] This concept is particularly problematic because it has been interpreted to mean that any legal or regulatory changes adopted by a state over time can potentially constitute a breach of the FET obligation. The diverse interpretations offered by international investment tribunals have created a high-level of uncertainty which affects the willingness of states to regulate in favor of public interest, i.e. that the fear of being sued by foreign investors creates a "regulatory chill".[13] The FET is the IIA provision most frequently invoked by investors in investor-state arbitration claims.[14] The Canadian model FIPA includes the FET obligation under the heading of "Minimum Standard of Treatment".

The three cases below show how the FET provision has been used by investors to sue states through the ISDS mechanism and to challenge the policies of elected governments.

Case: Azurix Corp. v. Argentina

In 2011, an American water company called Azurix Corp. (an Enron subsidiary) filed a claim against Argentina under the U.S.-Argentina BIT in 2001 over a dispute related to water services contract. The company won a 30-year concession in 1999 to provide water services in the province of Buenos Aires. But popular protests against the company erupted between 1999 and 2001 due to the contamination of the water provided by the company, over-billing and a series of water outages. Azurix blamed the Argentinian government for the contamination while Argentina argued that Azurix had a contractual responsibility to ensure clean drinking water. In the end, the Tribunal ruled that Argentina violated Azurix's right to "fair and equitable treatment" by not allowing rate increases and not investing sufficient public funds in the water infrastructure. It ordered the government to pay the Enron subsidiary $165 million plus interest, in addition to covering almost all of the tribunal's costs.[15]

This case shows how Argentina's obligation to fulfill the right to water of its citizens under International Human Rights Law was trumped by its obligations to provide "fair and equitable treatment" to Azurix Corp. under its investment agreement with the United States.

Case: Philip Morris v. Uruguay

In 2010, Philip Morris International used its Swiss subsidiary to bring a claim against Uruguay under the Switzerland-Uruguay BIT.[16] Philip Morris alleged that by adopting new regulations on tobacco, Uruguay frustrated its "legitimate expectations" concerning its investment. Specifically, Philip Morris argued that two provisions of Uruguay's tobacco regulations - namely the "single presentation" requirement that prohibits marketing more than one tobacco product under each brand, and the requirement that tobacco packages include "pictograms" with graphic images of the health consequences of smoking – "denied it fair and equitable treatment by violating the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)".[17] Philip Morris is thus seeking financial compensation for loss profits by using the more expansive interpretation of the fair and equitable treatment principle.

This case illustrates the conflict between Uruguay's obligation to provide Philip Morris "fair and equitable treatment", under its investment agreement with Switzerland, and its obligation to fulfill the right to health of its citizens under International Human Rights Law.

Case: Tedmed v. Mexico

In an often cited case, a Spanish company called Tecmed sued Mexico in 1998 under the Spain-Mexico BIT after the government refused to relicense an operating waste treatment plant.[18] Tecmed owned a Mexican company called Cytrar, which was operating this waste treatment plant in the State of Sonora, Mexico. In 1996, Cytrar had been issued a license to operate the landfill. But this license needed to renewed every year and, in 1998, the municipal government decided to close the landfill, citing environmental protection and public health concerns[19]. In fact, in December 1997, the association Academia Sonorense de Derechos Humanos (Sonora

Human Rights Academy) had filed a criminal complaint against Cytrar for the commission of acts that could be defined as “environmental crimes”.[20] Tecmed argued that “not renewing the license constitute[d] expropriation and on this premise, sought damages and compensation”.[21] The tribunal ruled that Mexico had breached the FET obligation because it failed to provide Tecmed with a “treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment”.[22] In short, the tribunal considered that it was legitimate for the investor to expect that Mexico would never change its policies. On the other hand, other tribunals have found the Tecmed v. Mexico judgment to lead to inappropriate and unrealistic expectation host state obligations, and that it was not legitimate for investors to expect countries to remain at a legislative standstill.[23]

This case shows how Mexico’s obligations under its investment agreement with Spain conflicted with its commitment to environmental protection, a pre-requisite for the enjoyment of human rights[24].

The FET provision may also conflict with the human rights principle of non-discrimination. The non-discrimination principle obligates each state to respect and ensure to all persons within its territory, and subject to its jurisdiction, the rights recognized in the International Covenant on Civil and Political Rights without distinction of any kind - such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. However, the Human Rights Committee also explains that, “the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.”[25] In a nutshell, the non-discrimination principle sometimes requires differential treatment and affirmative action for the purposes of uplifting vulnerable groups. This conflict is highlighted below in a case (Piero Foresti, Laura de Carli & Others v. The Republic of South Africa) where European mining investors challenged South Africa’s Black Economic Empowerment policy through the ISDS.

Case: Piero Foresti, Laura de Carli & Others v. The Republic of South Africa

In 2006, European mining investors filed a request for international arbitration against South Africa under the Italy-South Africa BIT (1997) and the Belgium & Luxembourg-South Africa BIT (1998).[26] These investors, who controlled some 80% of South Africa’s stone exports, complained that the country’s new Black Economic Empowerment (BEE) mining regime violated their rights under these BITs. More specifically, the claimants alleged that they had been denied fair and equitable treatment because they were forced to divest 26% of their investments to Historically Disadvantaged South Africans (HDSAs).[27] The case was discontinued in 2010 but it led the South African government to reconsider its commitment to bilateral investment treaties. South Africa’s Cabinet expressed concerns that these BITs “pose risks and limitations on the ability of the Government to pursue its Constitutional-based transformation agenda”.[28] Since then, South Africa gave notice of termination of its BITs with Belgium & Luxembourg, Spain, Germany, Switzerland, and the Netherlands.

This case shows how South Africa's obligations under its investment agreements conflicted with the human rights principle of non-discrimination.

1.1.2 National treatment

The national treatment obligation serves to ensure that foreign investors and their investments are treated *no less favorably* than investors from the host state. Its purpose is to protect foreign investors against arbitrary or unfair discrimination by host states in favor of domestic businesses. Nothing precludes however foreign investors being given *more favorable* treatment, such as subsidies, tax holidays, or regulatory exemptions.[29]

A main concern associated with the national treatment obligation is that it prevents host states from implementing programs to support their domestic businesses, and it blocks various measures which most governments have used historically to support local industry or promote regional development.[30] While in theory this standard aims to promote a level playing field between domestic and foreign investors, in fact it favors foreign investors at the expense of domestic investors. Basically, it "allows an un-level playing field so long as it favours foreign investors".[31] Much like the FET, the national treatment provision can conflict with the human rights principle of non-discrimination by making states subject to onerous lawsuits for enacting laws and policies that seek to promote the rights of vulnerable groups.

The Canadian FIPAs limit the obligation of national treatment to investors and investments that are "in like circumstances". This qualification is used to ensure that, in any given case, an investor-state tribunal has to find an *appropriate domestic comparator* to evaluate if a foreign investor has been discriminated against in light of the national treatment obligation. However, focusing only on commercial similarity may result in a disregard for the environmental or social impacts of otherwise similar investments.[32] In the case of Clayton/Bilcon v. Canada presented below, for example, the fact that there was significant opposition to the project by the local community (due to environmental concerns) did not factor in when choosing a possible comparator.

Case: Clayton/Bilcon vs Canada

A NAFTA tribunal decided in March 2015 that Canada had breached the national treatment principle under NAFTA after a joint review panel rejected Bilcon's application for expanding its quarry activities in Nova Scotia because of community opposition. Canada argued in court that the treatment of Bilcon (an American company) should be compared to the treatment of Canadian companies "in like circumstances", i.e. having "to deal with significant opposition within a local community"[33]. But the tribunal rejected Canada's argument, saying that it didn't agree that the analysis of the case should be limited "to such a narrow range of possible comparators".[34]

This particular aspect of the case shows the limits of the strategy consisting in narrowing the scope of application of the national treatment principle.

1.1.3 Most favored nation

The Most Favored Nation (MFN) obligation ensures that foreign investors and their investments are treated *comparably to investors from third states*. In many ways, this obligation is similar to the national treatment obligation, the difference being that treatment received by the foreign investor is compared to other foreign investors rather than to national businesses. The MFN obligation also prohibits *de jure* and *de facto* discrimination[iv], and it is not necessary to show discriminatory intent to conclude there has been a breach of the obligation.[35]

Remarkably, the MFN obligation has been interpreted broadly by some tribunals to allow investors in effect to "mix and match" provisions from all of the treaties concluded by a state in order to construct the most favourable set of provisions for the investor.[36] The use of the MFN clause has led to an increasing distortion of investment treaties and enlarged countries' commitments beyond what they originally intended by allowing investors to create a "super treaty".[37] The Canadian model, like the vast majority of IIAs around the world, includes the MFN clause. Like for the national treatment obligation, Canada limits the scope of application of the clause to investors and investments that are "in like circumstances".

Case: Philip Morris vs Uruguay

In the claim it brought against Uruguay in 2010 (see the case in the section on Fair and Equitable Treatment above), Philip Morris International used the MFN provision to bypass procedural requirements. Indeed, "Article 10 of the Switzerland-Uruguay BIT requires an investor to attempt to negotiate a resolution of a dispute with the host country for at least six months, and then to attempt to litigate the dispute through the domestic courts of the host state for at least eighteen months"[38] before it can bring an investor-state claim. Philip Morris however relied on the MFN provision to argue that it didn't need to comply with these requirements because some of the BITs signed by Uruguay with other countries allowed investors to proceed directly to international arbitration.

This case shows how the most favoured nation principle allowed an investor to choose the provision that was the most favorable to his cause amongst all the investment agreements signed by Uruguay, in this case an agreement with Switzerland.

1.1.4 Expropriation

There is a general consensus that states need to be able to expropriate foreign investors for legitimate public purposes. IIAs allow for such expropriation as long as it is for a public purpose, non-discriminatory, conducted in accordance with due process of law, and that compensation is paid.[39] One of the main issues with the expropriation clause is that what qualifies as an expropriation is not always clear**.** This is important because *expropriation requires compensation*, whereas a state measure that doesn't qualify as an expropriation doesn't require compensation. Generally,

[iv] According to VanDuzer, Simons and Mayeda (2013, p. 126), *de jure* discrimination refers to differences in treatment that are expressed in a host state measure, while *de facto* discrimination refers to differences that result in practice from a state measure that is not discriminatory on its face.

expropriation can take two forms: direct and indirect. Direct expropriation is fairly straightforward and refers to the "physical taking or the nationalization of an enterprise, which usually involves a transfer of ownership to the state".[40] Indirect expropriation, on the other hand, is a fuzzy concept. While it is generally understood to refer to "an action by the state which takes effective control of the investment, but not through a direct taking of the legal property"[41], it has proven difficult to define *which actions* should qualify as indirect expropriation. For example, international investment tribunals have indicated that compensation may be required for investors challenging measures that address legitimate public interest concerns, such as public health or the environment. While a country cannot be forced to repeal a law or regulation, the threat of a massive award to companies as a result of new policy or legislation may deter proposed legal or policy initiatives in virtually any field.[42]

Canada started to incorporate more specific language in its IIAs to specify the scope of indirect expropriation.[43] The Canadian model FIPA thus indicates that measures "that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation".[44]

In contrast, the cases below show how the argument of an "indirect expropriation" has been used by investors to oppose environmental protection requirements and state policies designed to keep energy prices under control. But these cases also show how the burden of legal fees and the threat of massive financial compensation can force countries to settle cases in favor of investors.

Case: TWC vs Dominican Republic

TWC, a U.S. investment management corporation that jointly owned one of the Dominican Republic's three electricity distribution firms, filed a $606 million claim against the country under the Central America Free Trade Agreement (CAFTA) in 2007. TWC argued that the state's failure to raise electricity rates – despite the fact that the country was experiencing a nationwide energy crisis - constituted an indirect expropriation of its investment. The government of the Dominican Republic decided to pay $26.5 million to the foreign firm to drop the cases, reasoning that it was cheaper than continuing to pay legal fees.[45]

This case illustrates two points. One, that the Dominican Republic's obligations under the Central America Free Trade Agreement (CAFTA) conflicted with its commitment to provide affordable access to energy to its citizens during a time of crisis. And, second, that the threat of bringing an ISDS claim for indirect expropriation was enough to force the state to reconsider its policies – a clear example of policy chill.

Case: Vattenfall v. Germany I[v]

In 2009, a Swedish energy firm called Vattenfall filed a claim for $1.9 billion against Germany under the Energy Charter Treaty. Vattenfall was seeking to develop a coal-fired power plant in Hamburg but the release of the required permits was delayed due to public opposition to the plant and environmental requirements to protect the Elbe River. Instead of complying with these environmental requirements however, Vattenfall launched a claim through the ISDS mechanism arguing that these environmental rules amounted to an expropriation. The German government wanted to avoid the uncertainty of a prospective ruling by the ISDS and thus reached a settlement (the amount was not disclosed) with Vattenfall in 2010. The Hamburg government also dropped its environmental requirements and issued the permits to the company.[46]

This case is another example of policy chill and shows how the uncertainty surrounding the concept of "indirect expropriation" has led the German government to drop its environmental protection policies rather than risk being sued by Vattenfall through the ISDS mechanism.

Summary

The four substantive issues discussed above provide strong protections to investors under international investment agreements. The national treatment principle ensures that foreign investors are treated as well as (or better than) national investors. The fair and equitable treatment principle has often been interpreted to protect the "legitimate expectations" of foreign investors, which can include the expectation that national laws and policies of the host countries will never change. The most favored nation principle allows investors to pick and choose the provisions they find most favorable in all the IIAs signed by the host country (not only the one signed with their home country), thereby creating a "super treaty". And the principle of "indirect" or "regulatory" expropriation allows investors to claim large financial compensation for state measures taken to pursue public welfare objectives. These protections - in addition to others such as the ban on performance requirement[vi] and the free transfer of funds[vii] – are implemented by a contentious arbitration mechanism which we discuss in section 1.2.

[v] This case is known as Vattenfall v. Germany I because there is also a Vattenfall v. Germany II. Indeed Vattenfall, which ooperated two nuclear reactors in Germany, decided to file another claim against it when decided to phase out nuclear energy. For more information, see "The State of Play in Vattenfall v. Germany II".

[vi] According to VanDuzer, Simons and Mayeda (2013, p.193), performance requirements are "obligations that a state imposes on an investor to take some specific action with a view to achieving a domestic policy objective".

[vii] According to VanDuzer, Simons and Mayeda (2013, p.183), "[m]ost IIAs provide some form of guarantee regarding an investor's freedom to transfer funds related to its investment out of the host state".

1.2 THE ISDS MECHANISM: CHILLING EFFECT AND LACK OF LEGITIMACY

The two main institutions where investor-state disputes are arbitrated are ICSID and UNCITRAL. Some cases are also heard by the Stockholm Chamber of Commerce (SCC) and the International Chamber of Commerce (ICC).

The Investor-State Dispute Settlement (ISDS) mechanism is a process which allows foreign investors to bring claims against host states directly to international investment tribunals. It was designed originally “to depoliticize investment disputes and create a forum that would offer investors a fair hearing before an independent, neutral and qualified tribunal”.[47]

The initial rationale behind the ISDS mechanism was that it served to protect foreign investors from seeing their assets jeopardized by unilateral action from undemocratic governments in developing countries. This rationale, however, doesn’t always hold up in reality. Indeed, the repeated use of ISDS against developed countries, such as Canada, with mature, reliable legal systems, indicates that investors are bypassing national courts and using this mechanism against any government action they deem unfavorable to their profits.[48] Canada itself has already paid more than $200 million in compensation to investors under NAFTA and is currently facing multiple claims which add up to $6 billion.[49] Venezuela has accumulated ICSID-related debts of close to $3 billion US.[50]

The process of bringing disputes also highlights some differences, for example, from that of the World Trade Organization (WTO), where only states can make claims of treaty violations. Indeed, under the WTO, when private companies believe they have suffered injuries from a foreign government’s improper trade practice, they have to convince their own government to raise the issue at the WTO on their behalf: they cannot present a claim to the WTO on their own.[51] In contrast, the regime governing international investments allows investors to make direct claims against states without going through any domestic process – in effect subverting the national judicial system and treaties designed to protect human rights. Human rights treaties guarantee access to information, to justice, and to remedy when harm has been done.

The use of the ISDS mechanism to implement IIAs has thus become highly contentious internationally. Alfred de Zayas, Independent Expert on the promotion of a democratic and equitable international order, recently declared[52]:

> “I am especially worried about the impact that investor-state-arbitrations (ISDS) have already had and foreseeably will have on human rights, in particular the provision which allows investors to challenge domestic legislation and administrative decisions if these can potentially reduce their profits.”

Countries like Indonesia and South Africa have recently pulled out of international investment agreements which relied on the ISDS to arbitrate disputes. Others like Australia and India have indicated in the past that they would review their support for this mechanism. Meanwhile, however, Canada continues to promote the ISDS mechanism in its international investment agreements.

1.2.1 The chilling effect

The uncertainty created by the widely diverging interpretations of various substantive obligations included in IIAs by investor-state tribunals, in addition to the very large financial compensations awarded by these tribunals, creates a policy and regulatory chill that deters governments from regulating in the public interest to avoid being sued by foreign investors. Toby Landau, a leading arbitration lawyer in the ISDS field, stated recently that this is already happening in countries around the world: [53]

> "Without doubt, "regulatory chill", in my view, definitely exists, and there's palpable evidence of it. There are those who deny it, but I can say that in my role as counsel, on a number of occasions now I've actually been instructed by governments to advise on possible adverse implications or consequences of a particular policy in terms of investor-state (ISDS) cases."

This chilling effect is happening around the world, including in Canada. In its recent study on lawsuits brought against Canada under NAFTA, the Canadian Center for Policy Alternatives (CCPA) stated that, in the mid-1990s, as part of intensive lobbying against proposed federal regulations to require plain packaging of cigarettes, the tobacco industry procured a legal opinion that asserted such regulations infringed NAFTA's intellectual property rules and constituted *expropriation* in violation of NAFTA's investment chapter. The multinational tobacco industry threatened the Canadian government with an investor-state challenge, and the federal government's proposals for plain packaging were abandoned and replaced with watered-down requirements to increase the size of health warning labels on packages.[54] In Australia, a study published in 2015 showed that plain packaging has led to a decline of over 12% of tobacco consumption in just one year, showing that there's a "clear case for action by governments to protect their citizens from the harms of tobacco by introducing this legislation."[55] By forcing Canada to water down its proposed policy on tobacco, the threat of arbitration thus also watered down Canada's contribution to the progressive realization of the right to health of its citizens.

In another case, in March 2015, a NAFTA tribunal published a decision that could lead to an important policy chill on environmental protection in Canada. Bilcon, an American company, had applied to expand its existing quarry operation in Nova Scotia. Following this application, a joint environmental review panel was constituted to study the request. In the end, the panel rejected it because it posed unacceptable risk to the environment and the community. Bilcon argued that it was subjected to a more thorough environmental review than other similar companies and that the review panel considered factors (i.e. community opposition to the project) outside Canada's environmental law. The tribunal decided in favor of Bilcon and found that Canada had breached the fair and equitable treatment principle and the national treatment principle under NAFTA. Bilcon is now seeking at least USD $300 million in damages from Canada in the next phase of the NAFTA tribunal hearing. One member of the tribunal published a dissenting opinion, arguing that "the majority decision could create a significant intrusion into Canada's domestic jurisdiction and create a chill on the operation of environmental review panels".[56] The decision of the arbitrators may encourage other corporations in the future to challenge Canada's environmental regulations through the ISDS, and thus weaken environmental protections in the country. This could be a step back in terms of the realization of human rights given that "a safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation".[57]

The risks may even skew incentives for public action beyond the state directly involved in the dispute. For example, in 2013, New Zealand's Ministry of Health announced that the government planned to introduce a plain packaging legislation for tobacco, but stated that it would wait to proceed until the investor-state case brought by Philip Morris International against Australia was resolved. The Ministry also stated that New Zealand's legislation could be delayed as a result.[58] Again, this case shows how the protection of investors' rights can conflict with the right to health.

1.2.2 The lack of legitimacy of ISDS tribunals

The claims made by investors against states under international investment agreements are heard by private international tribunals with questionable legitimacy. This legitimacy can be questioned on at least four counts.

First, these tribunals lack independence. Indeed, there are no permanent tribunals or independent judges mandated to hear the claims made under IIAs. Instead, arbitrators are chosen on an *ad hoc* basis: one arbitrator is named by the claimant (the investor), another is named by the respondent (the state), and a third one is chosen by both parties.[viii] And the same lawyers who serve as counsel to investors in some cases are called to serve as arbitrators in other cases. Joseph Stiglitz and several other law professors in the United States actually published a letter of concern in 2015 in which they argue that "there is a revolving door between serving on ISDS arbitration panels and representing corporations bringing ISDS claims" and that the ISDS mechanism is neither fair nor independent.[59]

Second, the lack of safeguards to guarantee the independence of these private tribunals also raises questions regarding the impartiality of arbitrators. Indeed, the ISDS mechanism offers perverse incentives to arbitrators - who are paid often more than $3,000 a day - to "accept frivolous cases, let cases drag on, let the only party that can initiate cases (foreign investors) win to stimulate more cases, and please the officials who can appoint arbitrators.[60] Even if all these actors proved to be impartial, the way the system is set up gives a strong impression of a pro-investor bias.

Third, there is insufficient attention to state obligations to respect and fulfil the human right to information. While ICSID began publishing the existence of cases that fall under its rules of procedure – and UNCITRAL adopted a similar requirement in 2014 - it is often very difficult to obtain more information on the cases. There is no requirement to force investors and states to publish the documents related to the claims, to allow public access to court hearings, or even to make the awards public.

[viii] If the parties can't come to an agreement, the third arbitrator is named by an arbitration institution.

Fourth, it is almost impossible to appeal the decisions of these private tribunals. Arbitral awards are enforced by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and the 1965 ICSID Convention. While the New York convention allows for the annulment of an award on very limited grounds, the ICSID convention states that "arbitral awards cannot be resisted or appealed before national courts".[61]

Summary

International investment agreements, and their enforcement through the contentious investor-state dispute settlement mechanism, guarantee very strong protections to foreign investors. This allows them to make large financial claims against host governments in international tribunals of questionable legitimacy for the implementation of state measures or policies that may reduce the expected profits of investors. While these tribunals cannot force a state to repeal its laws, the inconsistency between the interpretations of the different substantive provisions of IIAs from one case to the other, as well as the very large financial compensations awarded by these tribunals, are having a chilling effect on host country governments. This may deter them from implementing laws and policies that would promote the protection of the environment or the realization of the human rights of their citizens, but that may expose them to lawsuits in private tribunals where decisions can't be appealed.

In addition to restricting the policy space available to states to regulate in favor of the public interest, IIAs and the ISDS mechanism also foster an international investment regime where human rights take a backseat to investors' rights. In section 2, we highlight the imbalance between the protection of investors' rights and human rights in this regime.

2. ENSURING THE PRIMACY OF HUMAN RIGHTS OVER INVESTOR PROTECTION

International investment agreements and the investor-state dispute settlement mechanism have created an international investment regime in which unaccountable foreign investors have much stronger rights than individuals and communities of host countries. In this section, we highlight this flagrant imbalance between investors' rights and human rights.

2.1 INVESTMENT TREATIES MAKE LITTLE OR NO REFERENCE TO HUMAN RIGHTS

Typically BITs do not refer to international human rights obligations of the contracting parties, nor do they contain substantive clauses on human rights or any kind of investor obligation to respect human rights.[62] Treaty language referring to "human rights" is extremely rare – it appears in less than 1% of the 2,107 treaties contained in a sample OECD study.[63] Some IIAs have begun to include specific paragraphs reaffirming the state's right to regulate. Properly drafted, such paragraphs could reinforce the decision making powers of states relative to investors. However, many of the so-called right to regulate provisions are not cast in a form that has this legal meaning.[64]

2.2 INVESTMENT TREATIES PROVIDE STRONG RIGHTS TO INVESTORS… WITHOUT IMPOSING OBLIGATIONS

The lack of human rights language in treaties effectively means that while these treaties place limits on how governments may treat foreign investors, they place few countervailing (human rights) obligations on investors. At the moment, the sole purpose of IIAs is to protect foreign investors and their investments from host states, through substantive provisions such as National Treatment, Most Favored Nation, Fair and Equitable Treatment, and Expropriation. These IIAs, however, make no mention of the obligation of foreign investors to respect human rights in the host state where they operate. Also, while the international investment regime allows investors to initiate disputes against states, it doesn't allow states to do the same against investors. As a result, notes Nicolas Perrone, "there is no debate within this regime about the general problems created by multinational corporate activity".[65]

By contrast, human rights and the environment are not being sufficiently protected against the activities of corporations by the international system. The Canadian Network on Corporate Accountability (CNCA) for example argues that "[w]ith few exceptions, those who suffer corporate abuse are unable to access recourse in international courts or tribunals. Mechanisms that exist at the international level, for example through the United Nations, are primarily voluntary or primarily aimed at nation states, not corporations – in other words there are not real, enforceable consequences for a company's failure to comply with standards."[66]

2.3 HUMAN RIGHTS ARE RARELY EVOKED IN ISDS CASES

The lack of human rights language in treaties also means that human rights issues are rarely raised in ISDS cases. On occasion in IIA arbitration, there have been human rights arguments raised by governments in defence of alleged IIA breaches. In these cases, governments cite human rights obligations contained in national constitutions or international treaties. Thus far, this type of argument appears to have arisen most notably in the series of IIA arbitrations that have been brought by foreign investors in the aftermath of the Argentinian financial crisis. Argentina appears to have raised generalized human rights arguments in defence of certain emergency measures adopted by the State. This line of argument has stressed the need to protect the human rights of citizens by ensuring basic order and/or access to those services which are instrumental to public health and welfare. However, IIAs give few instructions as to how such human rights are to be assessed relative to the investment protections guaranteed to foreign investors; and arbitrators have taken widely divergent views of this human rights argument.[ix] Apart from the generalized human rights defence being raised in some of the Argentinian financial crisis disputes, there is also scope for particular human rights obligations to be raised in IIA arbitrations.

In theory, it has been conjectured that the State's duty to promote and protect various individual human rights obligations could be material in IIA arbitrations where a State claims that its treatment of foreign investors was motivated by these human rights obligations. These human rights may range from civil and political rights (freedom of expression or the right to a fair trial) to economic, social and cultural rights (right to the enjoyment of just and favourable conditions of work, the right to be free from hunger or the right to water) or the prevention of slavery and genocide. However, at least to date, there have been no awards which address these issues to a meaningful degree. Thus, it remains very much an open question to what degree alleged breaches of IIA obligations could be mitigated by a government professing to act in furtherance of one or another human rights obligation.

2.4 ISDS ARBITRATORS AND TRIBUNALS LACK THE CAPACITY, EXPERTISE AND MANDATE TO CONSIDER HUMAN RIGHTS

The inclusion of human rights arguments in ISDS cases brings up several challenging question for which there is little guidance in the IIAs themselves. Some examples:

- Should the purpose of an alleged expropriation measure (i.e. one conducted on human rights grounds) have any impact upon a tribunal's assessment of the measure's compliance with the IIA? Should such a purpose affect the level of compensation to be paid?
- Given that there is no hierarchy between human rights, should arbitrators consider cases of imminent bodily harm differently than cases related to social and economic rights, such as the right to the highest attainable standard of physical and mental health? Is there a

[ix] Selected Recent Developments in IIA Arbitration and Human Rights, IIA MONITOR No. 2 (2009) International Investment Agreements: In CMS Gas Transmission Company v. Argentina, the arbitrators denied that there was any "collision" between the investment treaty and the Argentine Constitution. In Continental Casualty v. Argentina (under the US-Argentina BIT) an ICSID tribunal did accept Argentina's necessity defence, and also nodded in the direction of Argentina's responsibility to safeguard basic rights and liberties. It held that the treatment of one particular class of assets did lead to a breach of the United States–Argentina BIT, but otherwise the tribunal upheld Argentina's defence of necessity. In Sempra v. Argentina, the tribunal concluded that the country's constitutional framework and basic rights or liberties were not in danger of collapse. In the National Grid v. Argentine Republic arbitration, the arbitral award acknowledged the human rights arguments raised by Argentina, but was silent as to the persuasiveness of any such human rights reasoning.

range of policy options available to governments in advancing the human rights objectives in question (e.g. measures which might have impacted less onerously upon the foreign investor while fulfilling the human right goals in question)?

Most ISDS arbitrators have commercial backgrounds and lack knowledge of human rights law. Likewise, most human rights experts lack expertise on the technical and business-related aspects of investment law. Investment arbitrators often lack the capacity and expertise to examine a State's human rights law obligations, draw conclusions as to what these demand in practice, and determine how they interact with investment law obligations.

Most arbitrators are wedded to a commercial arbitration procedure model in which there is no process to integrate parties who are able to bring up the wider issues at stake (investors and states are often unwilling or unequipped to do so). However, there is nothing in the existing rules and institutions that preclude this from happening. The problem is primarily that arbitrators bring a commercial arbitration mindset and are resistant to changes that may complicate the process. Changing their mindset through education and training, and encouraging a best practice of soliciting amicus briefs could help address this problem.[67]

2.5 INVESTMENT TREATIES ALLOW INVESTORS TO BYPASS DOMESTIC COURTS

International human rights law requires claimants to exhaust domestic remedies before accessing regional or international arbitration -- as a means of respecting state sovereignty and the principle of subsidiarity (i.e. conflicts should be resolved at a local level to the extent possible).[68] In contrast, the investor-state process allows investors to bypass domestic judicial processes and to bring those cases directly to international courts.[69] This creates a parallel legal system that is exclusively available to foreign investors and multinational corporations.

Furthermore, neither states nor individuals can initiate claims against investors under international investment treaties. This creates a special legal status for corporations that is unique in international law. As the International Institute for Sustainable Development points out, "[t]here are very limited circumstances in international law in which other private entities can bring claims directly against states, much less seek and obtain large damage awards. The main context where this can happen is through international human rights law (…)".[70] As explained above, however, human rights claimants must seek remedies in domestic fora first.

In addition to being able to bypass domestic courts easily thanks to IIAs signed by their home country, investors are also able to take advantage of treaties signed by other countries as well. For example Vanoil Energy, a Canadian oil company, indicated in July 2014 its intention to sue Kenya for US$150 million under UNCITRAL after it failed to secure an extension for a pair of production-sharing contracts (PSCs) for onshore oil exploration in the country - even though Canada and Kenya do not currently have an investment agreement. They may be able to do so because Vanoil Energy has British and Swiss shareholders and Kenya has bilateral investment treaties with both the United Kingdom and Switzerland.[71]

2.6 INTERNATIONAL INVESTMENT LAW AND INTERNATIONAL HUMAN RIGHTS LAW NEED TO BE BETTER CONNECTED

As the previous sections have demonstrated, international law is fragmented. The issue here, in broader international law terms, provides two options: whether international investment law – as applied through the investor-state process – pre-empts the rest of international law by exclusively creating rights for foreign investors, or whether IIAs must be interpreted as part of the greater body of public international law with the limitations and constraints that coherence among legal regimes requires.[72]The evidence to date suggests a mix of the two - that while the international investment law regime does create a parallel legal system and class of rights for investors, it still must technically operate within the wider corpus of public international law.. Hence opportunities for improving connections to other parts of international law do exist.[73]

The United Nations Guiding Principles on Business and Human Rights (UNGPs) provide a useful starting point for making this link between investment activities and human rights. They provide an authoritative policy framework that clarifies State duties and business enterprise responsibilities regarding human rights in the context of business activities. For example, UNGP #9 insists that states should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other states, for instance through investment treaties.[74]

Summary

Investors' rights and human rights are not given the same consideration in the current the international investment regime. In fact, the regime exists almost exclusively to protect investors. IIAs and the ISDS mechanism allows investors to bypass national courts to sue governments in private tribunals for any measure that might reduce their expected profits, even when these measures are adopted to protect and promote the human rights of their citizens. Human rights on the other hand are almost never mentioned in IIAs and in ISDS cases. Even when they are, the arbitrators generally lack the capacity and the expertise to consider them. And when citizens feel that their rights have been violated by foreign investors, they have limited recourse. In the next section, we provide an overview of various paths of action which have been suggested to address the numerous problems that this backgrounder has highlighted in relation to investment treaties and the ISDS mechanism.

3. TAKING ACTION TO ADDRESS THE PROBLEMS RELATED TO INVESTMENT TREATIES AND THE ISDS

The strong protections provided to investors in international investment agreements, and enforced through the investor-state dispute settlement mechanism, have created a situation where the state's capacity to regulate in the public interest is being constrained, and a legal regime in which human rights are given less weight than investors' protections. While the UN Charter clearly states that the human rights obligations of states should prevail over other negotiated agreements, such as IIAs, in reality the unequal enforcement powers between the international investment regime and the human rights regime have led to the opposite situation.

The problems related to IIAs and the ISDS are now widely acknowledged. For example, according to UNCTAD, "at least 40 countries (and 5 regional organizations) are currently in the process of reviewing and revising their approaches to international investment-related rule making."[75] But while there is increasing agreement – outside of Canada and the United States - over the fact that the system needs to change, there isn't a consensus on what this change should look like. Thus far, countries have tried and proposed different paths of action to address the challenges raised by international investment agreements and the investor-state dispute settlement mechanism. In this section, we present an overview of these paths of action. This list is not exhaustive and the various paths are not necessarily mutually exclusive. The intention here is simply to present various available options.

3.1 SELECTIVE ADJUSTMENTS

The path of selective adjustments is one that seeks to revise some aspects of IIAs and the ISDS while leaving the treaties' core largely intact. Five specific actions, among others, could be taken by states under this path.

First, the state could **clarify the meaning of treaty provisions** through authoritative interpretations[x]. The World Investment Report 2013 argues that "(w)hile it is the task of arbitral tribunals to rule on ISDS claims and interpret and apply IIAs to this end, the contracting States retain the power to clarify the meaning of treaty provisions through authoritative interpretations – stopping short, however, of attaching a new or different meaning to treaty provisions that would amount to their amendment."[76]

Second, the state could **revise its IIAs through amendments** used to modify or suppress existing provisions in a treaty or to add new ones. These amendments, however, are not meant "to affect the overall design and philosophy of the treaty". [77] They would be limited in number and length, and they require the consent of all contracting parties.

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[x] According tom UNCTAD, "(…) while it remains the task of the arbitral tribunal to decide a case and interpret and apply an IIA to this end, the contracting States retain the power to clarify the language/meaning of a treaty through an authoritative interpretation." Source: UNCTAD IIA Issues Notes No. 3. December 2011, p. 3. Retrieved from: http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf

Third, the state could **replace its IIAs by renegotiating them** with the other parties or by concluding a new plurilateral/regional agreement**.** An example of the latter is the conclusion of the Central America–Mexico FTA, which replaced the FTAs between Mexico and Costa Rica (1994); Mexico and El Salvador, Guatemala and Honduras (2000); and Mexico and Nicaragua (1997).[78] The objective of this new agreement however was to harmonize trade rules,[79] not to increase the protection and promotion of human rights.

Fourth, the state could propose the **modification of selected aspects of the ISDS system**. This could include the following: setting time limits for bringing claims; increasing the contracting parties' role in interpreting the treaty; establishing a mechanism for consolidating related claims;[xi] providing for more transparency in ISDS; and, including a mechanism for an early discharge of frivolous (unmeritorious) claims.[80]

Fifth, the state could propose to **limit investors' access to ISDS**. This could be done by reducing the subject-matter scope for ISDS claims, by restricting the range of investors who qualify to benefit from the treaty, and by introducing the requirement to exhaust local remedies before resorting to international arbitration.[81]

One example of proposed selective adjustment comes from Australia where the Prime Minister declared that he wanted to include a "carve out for public policy on health and the environment,"[82] as well as certain safeguards in the ISDS provision of the Trans-Pacific Partnership Agreement. Academics from Australia have been quick to point out, however, that "recent experience in other countries suggests that [these safeguards] may prove insufficient to protect public policy from challenge."[83] As an example, they pointed to the case of US investors who exploited a loophole in the safeguards to sue Costa Rica for trying to protect endangered sea turtles.[xii]

The path of selective adjustment doesn't comprehensively address the challenges posed by the existing stock of treaties however. Even if some of the adjustments were implemented, it would not change the fundamental problem which is that in the current state of affairs, international investment treaties trump human rights. And these changes may also be ineffective in practice anyway, unless the selective adjustments address the most-favoured-nation (MFN) clause, which can allow for "treaty shopping" and "cherry-picking.[84]

[xi] According to UNCTA, « [e]stablishing a mechanism for consolidation of related claims (…) can help to deal with the problem of related proceedings, contribute to the uniform application of the law, thereby increasing the coherence and consistency of awards, and help to reduce the cost of proceedings". Source: UNCTAD IIA Issues Note No. 2. June 2013, p.6. Retrieved from: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf

[xii] According to IA Reporter, U.S. investors (Spence International Investments, LLC and others) claim that Costa Rica targeted their properties for expropriation to support the creation of a beachfront ecological park, but that they claimants have not received prompt and effective compensation for these "takings". Source: IA Reporter. 7 October 2013. Costa Rica Update: Gold Miner Sues Over "Legal Vacuum"; Government Also Faces CAFTA Claim Over Beach Expropriations, After Paying 2012 ICSID Award.

3.2 SYSTEMATIC REFORM

The path of systematic reform seeks to address the IIA regime's challenges in a comprehensive manner. Below are three actions that could be taken by states under this path.

First, the state could design **a new IIA treaty model** that effectively protects the states' right to regulate, that rebalances investors' rights and obligations, and that makes explicit references to human rights. Several suggestions in that regard were proposed by Howard Mann and the International Institute for Sustainable Development (IISD). For example, a new IIA treaty model can set human rights performance standards for foreign investors. The enforcement of these standards could be enforced through different approaches:[85]

1) the incorporation of IIAs into domestic law, in order to ensure that the provision becomes part of domestic law and therefore subject to all the judicial enforcement processes of the host state;
2) the expansion of civil remedies against foreign investors by requiring states to remove legal barriers to civil suits against the foreign investor in its home state for acts where the investor has taken key decisions leading to violations of human rights (or other issues) in the host state;
3) the elaboration of a mechanism to vitiate or to invalidate, the rights of the investor under the IIA – this could be done through an arbitral process initiated by the host state for a persistent failure by the investor or its investment to comply with its obligations; and,
4) the elaboration of clear provisions allowing counterclaims against an investor or investment in investor-state arbitrations for damages caused by the breach of the investor obligations.

In a new IIA treaty model, references to human rights could include the following:[86]

- arbitrators are required to consider the relevance of human rights law to the matters in dispute;
- each party shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall strive to continue to improve these laws and regulations; and,
- all parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a party.

In terms of the specific provisions (fair and equitable treatment, national treatment, most favored nation, expropriation) discussed in the first section of this backgrounder, these could be either excluded or significantly revised in a new model treaty.

Second, the state could support the creation of a **new international arbitration** system which would include a standing international investment court and an effective appeals mechanism. A new standing international investment court could replace the current system of *ad hoc* arbitration. This court could consist of judges appointed or elected by States for fixed terms.[87]

Also, governments currently have only minimal avenues for challenging awards and resisting their enforcement, even if the awards are based on errors in law or fact.[88] An appeals mechanism could address this problem.[89] In this new system, all arbitration cases and their related documents should be made public. Of course, creating such a system would require the support of a large number of states.

Third, the state could ensure that IIA negotiations are conducted in a manner that is **transparent** and that allows for significant parliamentary and public debate. As discussed at the beginning of this backgrounder, the negotiation of these agreements is currently characterized by secrecy and an absence of debate that disregards democratic rights to basic information about government conduct in relation to public interest issues.

3.3 DISENGAGEMENT

The path of disengagement seeks the unilateral termination of existing treaties and the denunciation of multilateral arbitration conventions. There are two main steps that can be taken by states to follow the disengagement path.

First, the state could refrain from signing new international investment agreements. This step is pretty straightforward as states can decide unilaterally not to sign new IIAs. They can also choose to abandon ongoing negotiations. Brazil, for example, has never signed on to an agreement which included the ISDS mechanism. And still, it is the country that has the highest volume of foreign investments in all of Latin America.[90] In fact, a large number of studies have shown that there is no correlation between binding a country's policies to the ISDS and attracting foreign direct investment.

In 2011, the Australian government published a Trade Policy Paper in which they had decided to denounce and reject the ISDS, thus becoming the first developed nation to outwardly reject it.[91] This policy has been reversed since then, however, after a Conservative government was elected in 2013.

Second, the state could terminate its current international investment agreements. This can be done unilaterally but is not as straightforward as the first step. The easiest way to terminate an IIA is by mutual consent. Indeed, the Vienna Convention allows parties to terminate their agreement by mutual consent at any time. The unilateral termination of an IIA, however, will be subject to rules that are typically set out in the agreement itself. And it does not immediately protect the State against future ISDS cases. In fact, IIA commitments usually endure for a certain period of time (often between ten and 20 years) through survival clauses.[92] For example, Indonesia terminated its investment agreement with the Netherlands in March 2014, but the agreement will remain in force for a period of 15 years with respect to investments made prior to the date of termination. South Africa terminated its investment agreement with Germany in October 2013, but the agreement will remain in force for a period of 20 years with respect to investments made prior to the date of termination.

Several countries have unilaterally terminated some of their investment agreements in recent years. South Africa terminated its investment agreements with Spain and Belgium in 2013. In 2014, Indonesia announced the termination of its investment agreement with the Netherlands as well as a plan to terminate more than 60 of its bilateral investment treaties. Ecuador has already terminated ten of its investment agreements and is now conducting an audit of many of its remaining pacts to determine if they are in the national interest. [93] Bolivia also denounced its IIA with the United States in 2011.[94] And yet, developing countries that have decided to terminate their IIAs have not seen FDI inflows decline. On the contrary, countries like Ecuador and South Africa have actually seen foreign investment grow as they have exited the ISDS system.[95]

Disengagement from the ISDS could be complemented by a commitment to the Calvo doctrine, which requires foreign investors to file any dispute arising in a host country with that country's legal system, therefore subjecting them to domestic law. The doctrine was influential in Latin America for much of the 20th century. In the past three decades, most countries in the region have shifted away from the Calvo Doctrine, particularly in the wake of the global tide of economic liberalization that began in the 1990s. However, some recent moves within and beyond Latin America suggest that this principle is not dead, but on the rise. This new trend is most perceptible in Argentina, Brazil and Venezuela.

3.4 ALTERNATIVES TO THE ISDS

An alternative to the ISDS mechanism has been proposed in recent years by Latin American countries. In the context of the increasing number of claims filed by international investors against Latin American governments, a Ministerial Meeting was organised in Ecuador in April 2013. At the end of this meeting, Bolivia, Cuba, Ecuador, Nicaragua, Dominican Republic, St. Vincent and Grenadine, and Venezuela signed a declaration launching joint action to tackle the challenges posed by the international investment arbitration system.[xiii] This alliance, known as "the Conference of Latin American States affected by transnational interests", proposed several actions, including the creation of a **regional arbitration centre** to settle investment disputes between corporations and states.[96] It intends to be an alternative to the current ISDS mechanism. The arbitration centre has not been established yet, but constitutes a potential alternative.

Another alternative would be to move away from *investor-state* dispute settlement and instead rely on ***state-state* dispute settlement**, like the World Trade Organization does. The IISD explains that the "State–state dispute settlement can take the form of arbitration or rely on existing judicial mechanisms, such as the International Court of Justice (ICJ) or regional courts"[97]. The investment agreement between the Philippines and Japan subjects investment issues to state–state dispute settlement. And Brazil has also incorporated state–state arbitration in its two recent investment treaties with Angola and Mozambique. This is a contentious issue, however, as some experts consider that the state–state mechanism offers possibilities for states to re-engage with the investment treaty system, while others caution that interstate arbitration may re-politicize

[xiii] Global Policy Forum. (2013). Latin American States Responding to Transnational Corporations' Lawsuits. Retrieved from: https://www.globalpolicy.org/home/221-transnational-corporations/52441-latin-american-states-responding-to-transnational-corporations-lawsuits.html

investment disputes.[98] Indeed, the ISDS mechanism itself was designed in part to depoliticize investment disputes by “creating a forum that would offer investors a fair hearing before an independent, neutral and qualified tribunal”.[99] In practice however, it is none of these things.

3.5 REINFORCING THE HUMAN RIGHTS SYSTEM

As discussed previously, the international investment regime and the human rights regime have highly unequal enforcement powers. One way to address this imbalance would be to strengthen the human rights system to ensure that investors not only have rights, but that they are also held accountable for their obligations.

This could be achieved through the establishment of a fully independent International Court of Human Rights, entrusted with the judicial protection of human rights against all duty-bearers, which would “complement rather than duplicate existing regional courts”.[100] This idea of an International Court of Human Rights is far from new. Australia, for example, was already advocating for the creation of such a court in 1947.[101] Working groups were even mandated by the Human Rights Commission in 1946 to draft a binding Convention and measures of implementation - but these were not adopted in the end because they were “submerged into the ideological debates of the Cold War”. Several international human rights experts (including Mary Robinson, former President of Ireland and former UN High Commissioner for Human Rights) believe, however, that the time has come to create this International Court of Human Rights in order to address the threats to human rights posed by non-state actors such as transnational corporations. As Manfred Nowak, Professor of International Law and Human Rights and former UN Special Rapporteur on Torture, notes[102]:

> “In other words, traditional human rights law does recognize that human rights may be violated by non-state actors, but – apart from individual responsibility under international criminal law for war crimes, genocide and crimes against humanity – does not establish any procedures for holding them directly accountable at the international level. This traditional human rights law approach no longer responds to the actual threats to human rights in the globalized world of the 21st century. (…) Transnational corporations operate on budgets which by far exceed those of smaller states and are so powerful that they can no longer be effectively controlled by governmental authorities of the home state or the states in which they operate.”

An International Court of Human Rights would give enforcement powers to the human rights system and ensure that investors can be held accountable for their obligations.

Another initiative is the newly formed open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Established through a resolution of the United Nations Human Rights Council in June 2014, this working group’s mandate is to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." [103] The working group convened its first session in June 2015.[104] As discussed in the Concept Note prepared by the Chairperson of this working group, the international legal system reflects an asymmetry between rights and obligations of transnational corporations. While they are granted rights through hard law instruments, such as bilateral investment treaties and investment rules in free trade agreements, and have access to a system of investor-state dispute settlement, there are no hard law instruments that address the obligations of corporations to respect human rights.[105] Ms Victoria Tauli-Corpuz, the United Nations Special Rapporteur on the rights of indigenous peoples, declared that "an international legally binding instrument on business and human rights could contribute to redressing gaps and imbalances in the international legal order that undermine human rights, and could help victims of corporate human rights abuse access remedy".[106]

Summary

In response to the challenges raised by international investment agreements and the investor-state dispute settlement mechanism, states have explored different paths of action. In this section, we presented an overview of five of these paths. The first one, the **path of selective adjustments**, seeks to revise some aspects of IIAs and the ISDS while leaving the treaties' core largely intact. Selective adjustments could be made, for example, by clarifying the meaning of treaty provisions; revising IIAs through amendments; renegotiating IIAs; modifying selected aspects of the ISDS system; and limiting investors' access to the ISDS system. The second one, the **path of systematic reform**, seeks to address the IIA regime's challenges in a more comprehensive manner. Actions under this path could include designing a new IIA treaty model which effectively protects the right to regulate, rebalances investors' rights and obligations, and makes explicit references to human rights; promoting the creation of a new international arbitration system which would include a standing international investment court and an effective appeals mechanism; and ensuring that IIA negotiations are conducted in a manner that is transparent and that allows for significant parliamentary and public debate. The third one, the **path of disengagement**, seeks the unilateral termination of existing treaties and the denunciation of multilateral arbitration conventions. This could lead to states refraining from signing new international investment agreements state and terminating their current international investment agreements. The fourth one, the **path of alternatives to the ISDS**, seeks to propose other mechanisms to deal with investor-state disputes. The two suggested alternatives discussed in this section are the creation of a regional arbitration centre, in Latin America, to settle investment disputes between corporations and States; and moving towards a state-state dispute settlement like the one used by the WTO. And the fifth one, the **path of reinforcing the human rights system**, seeks to address the imbalance between investors' protection and human rights. This could be done, for example, by creating an international human rights court and by elaborating an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. In the next section, we look at the position of different Canadian actors towards the ISDS and we make two recommendations to the Canadian government to address the problems related to this contentious dispute settlement mechanism.

4. CANADA AND THE ISDS –CURRENT PRACTICE, FUTURE DIRECTIONS

4.1 THE ISDS IN THE CANADIAN CONTEXT

The Canadian government is a strong proponent of international investment agreements and a strong promoter of the ISDS mechanism. On its website, DFATD notes that "ISDS rules have been a standard feature of Canada's comprehensive free trade agreements since the North American Free Trade Agreement and give assurance to investors that their investments will be protected from discriminatory or arbitrary government actions."[107] While many countries have criticized the ISDS mechanism and either disengaged from it or called for reform, Canada still offers unconditional support for the integration of this controversial arbitration mechanism in investment agreements. A study published in 2015 by the Canadian Centre for Policy Alternatives (CCPA) notes that "[d]espite the proven threat that ISDS poses to democratic governance here in Canada—or perhaps because of it—the federal government continues to aggressively promote ISDS in international treaties."[108] For example, Maude Barlow recently pointed out that, in the ongoing discussions around the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), the Canadian government has been "unwilling to engage in the conversation (…) to explore ways to amend or remove the ISDS provision in CETA to address the growing and substantive concerns among Europeans".[109]

Canadian investors also support the inclusion of the ISDS mechanism in Canada's investment agreements. The Canadian Chamber of Commerce,[110] the Prospectors and Developers Association of Canada,[111] and the Canadian Council of Chief Executives,[112] for example, have all taken clear positions in favor of the ISDS. And several Canadian investors have used the ISDS to file claims against foreign states. In fact, the CCPA study found 55 cases of Canadian investors using the ISDS. Since 2006, 78% of these new ISDS cases have involved a resource or an energy company; 72% have been filed against developing countries; and 72% challenged government measures related to resource management or environmental protection.[113] According to Hadrian Mertins-Kirkwood, the author of the CCPA study, "Canadian investors have abused the ISDS process to challenge legitimate social and environmental regulations in developing countries".[114] He also argues that "Canada's ISDS regime does not work as its proponents suggest it should. Instead of facilitating restitution where domestic legal systems have failed, Canada's promotion of ISDS abroad has resulted too often in investors abusing the process to claim compensation from governments acting in the public interest".[115]

In this context, several Canadian civil society organizations (CSOs) have publicly criticized the ISDS mechanism and asked for its exclusion from Canadian trade and investment agreements. The Council of Canadians, for example, has opposed ISDS provisions in free trade and investment agreements, such as the proposed Canada-India agreement, arguing that these agreements constrain governments from acting in the public interest and entrench corporate rights.[116] The Canadian Labour Congress has denounced the use of ISDS provisions within trade and investment agreements, notably in the TPP and CETA.[117] In an Open Civil Society Declaration on a proposed Comprehensive Economic and Trade Agreement between Canada and the European Union, 32 Canadian CSOs endorsed the following statement:

> "There should be no right for an investor or private company to directly challenge in private tribunals, the laws or regulations of a foreign government that is a party to the trade agreement, but this right to challenge should reside solely with the competent government jurisdiction. Instead, Canada should immediately begin negotiations with the United States and Mexico to remove the investor-rights provisions in Chapter 11 of NAFTA."

In 2013, more than 50 Canadian CSOs also signed onto a "transatlantic statement" opposing the inclusion of the ISDS provision in the CETA because of its potential to frustrate "policies designed to protect the environment, public health, public services, resource conservation and, crucially, to make our social-economies more sustainable and equitable".[118] And this year, Common Frontiers, the Canadian Union of Public Employees (CUPE), MiningWatch Canada, Oxfam Canada, Oxfam Québec, the Public Service Alliance of Canada (PSAC), the United Church of Canada, the United Steelworker and other CSOs supported the "Stop the Suits Tour" which sought to raise awareness in Canada on how investor-state arbitration threatens democratic decision-making, public health and the environment in Canada, El Salvador[xiv] and everywhere else around the world.[119]

Thus, while the Canadian government and Canadian investors doing business abroad support the ISDS system, many Canadian CSOs have taken a strong stance against it. In the next sub-section, the Canadian Council for International Co-operation (CCIC) regional working groups propose their own recommendations to address the problems related to the ISDS system.

4.2 RECOMMENDATIONS OF THE CCIC REGIONAL WORKING GROUPS

This backgrounder has highlighted some of the main problematic aspects related to international investment agreements and the Investor-State Dispute Settlement (ISDS) mechanism. In particular, it showed how the enforcement of these agreements through the ISDS can negatively impact human rights and the capacity of states to enact policies to protect the environment and promote human rights.

Based on the information provided in this backgrounder, the Africa Canada Forum, the Americas Policy Group and the Asia-Pacific Working Group have the three following recommendations to make to the Canadian government:

RECOMMENDATION #1: Remove the Investor-State Dispute Settlement (ISDS) mechanism from the Canadian model of Foreign Investment Protection Agreement (FIPA)

[xiv] Common Frontiers provides a short summary of the El Salvadorian case: "OceanaGold is suing El Salvador for an amount equivalent to 5% of its gross domestic product for not having granted it a permit to put a gold mine into operation, despite its project not having met regulatory requirements. Originally, Pacific Rim Mining launched the suit in 2009 after the first of three successive Salvadoran Presidents committed to an effective moratorium on new mining projects given concerns over potential impacts on already taxed water supplies". Source: Common Frontiers. 5 May 2015. Stop the Suits Tour: International Investment Agreements Threaten People and the Environment from El Salvador to Canada. Retrieved from: http://www.commonfrontiers.ca/

The Africa Canada Forum, the Americas Policy Group, and the Asia-Pacific Working Group believe that the ISDS mechanism is deeply flawed and should not constitute the venue where investment disputes are arbitrated. The ISDS mechanism enforces a system of rules in which the rights granted to investors under international investment agreements trump the state's obligations to respect human rights principles, such as the principle of non-discrimination, and to protect and fulfill the human rights of their citizens, such as the right to health, and the right to water. In the event of a conflict between human rights treaties and investment agreements, Article 103 of the United Nations Charter clearly says that human rights obligations shall prevail.[120] The ISDS mechanism does the opposite: it ensures that investment treaties prevail over human rights treaties.

The claims brought by investors through the ISDS mechanism also create a chilling effect that undermines the capacity of states to enact policies to promote human rights and to protect the environment. The large financial compensations awarded by the ISDS can have a considerable impact on the capacity of states to pay for the provision of basic social services. Moreover, the legitimacy of the ISDS mechanism itself has been questioned due to its lack of independence, the perceived "pro-investor" bias of its arbitrators, the insufficient attention given to state obligations to respect, protect and fulfill human rights, and the absence of an effective appeals mechanism.

Therefore, we ask the government of Canada to remove the Investor-State Dispute Settlement (ISDS) mechanism from the Canadian model of Foreign Investment Protection Agreement (FIPA).

RECOMMENDATION #2: Require that domestic judicial processes take precedence when investor-state disputes occur

The Africa Canada Forum, the Americas Policy Group, and the Asia-Pacific Working Group believe that investment disputes should be resolved through domestic judicial processes. International human rights law requires that claimants exhaust domestic processes before they can access regional or international tribunals. International investment agreements, however, allow investors to completely bypass these domestic processes and have created a parallel legal system, the ISDS mechanism, which can be used exclusively by foreign investors – neither states nor communities can bring claims against investors at the ISDS.

As Joseph Stiglitz and several other eminent professors have written recently in a letter to the American Congress, "[t]hose advocating using this alternative [the ISDS] in lieu of our court system bear the burden of demonstrating why such an exit is necessary, and how the alternate system will safeguard the ideals enshrined in our courts. Thus far, the proponents of ISDS have failed to meet that burden."[121] We agree.

Therefore, we ask the government of Canada to require that domestic judicial processes take precedence when investor-state disputes occur.

RECOMMENDATION #3: Facilitate access to Canadian courts for people who have been seriously harmed by the international operations of Canadian companies

The Africa Canada Forum, the Americas Policy Group, and the Asia-Pacific Working Group believe that the imbalance between investors' rights and human rights needs to be addressed and that investors need to be held accountable for their obligations. Disengaging from the ISDS mechanism and requiring that judicial processes take precedence when investment disputes occur will help ensure that investors are not being granted rights which trump the state's obligations to respect, protect and fulfill their own citizens' human rights. But these first two recommendations do not address the need for individuals and communities to be able to hold investors to account if they violate human rights. As mentioned in section 3.2 above, civil remedies against foreign investors can be expanded by removing legal barriers to civil suits against the foreign investor in its home state for acts where the investor has taken key decisions leading to violations of human rights (or other issues) in the host state.

Therefore, we ask the government of Canada to facilitate access to Canadian courts for people who have been seriously harmed by the international operations of Canadian companies.

ANNEX 1: CANADIAN INVESTMENT AGREEMENTS IN AFRICA, ASIA AND LATIN AMERICA

A. CANADIAN INVESTMENT AGREEMENTS WITH AFRICAN COUNTRIES

Investment treaties already brought into force

- Canada-Bénin (Brought into force: May 12, 2014)
- Canada-Tanzania (Brought into force: December 9, 2013)
- Canada-Egypt (Brought into force: November 3, 1997)

Investment treaties signed but not into force yet

- Canada-Guinea (Date of signature: May 2015)
- Canada-Burkina Faso (Date of signature: April 2015)
- Canada-Mali (Date of signature: November 2014)
- Canada-Côte d'Ivoire (Date of signature: November 2014)
- Canada-Senegal (Date of signature: November 2014)
- Canada-Nigeria (Date of signature: May 2014)
- Canada-Cameroon (Date of signature: March 2014)

Concluded investment treaty negotiations

- Canada-Zambia (Negotiations concluded: March 2013)
- Canada-Madagascar (Negotiations concluded: August 2008)

Ongoing investment treaty negotiations

- Canada-Kenya (Negotiations began in 2014)
- Canada-Ghana (Negotiations began in 2011)
- Canada-Tunisia (Negotiations began in 2009)

Trade agreement with an investment chapter under negotiation

- Canada-Morocco Free Trade Agreement Negotiations

B. CANADIAN INVESTMENT AGREEMENTS WITH ASIAN COUNTRIES

Investment treaties already brought into force

- Canada-Thailand (Brought into force: September 24, 1998)
- Canada-Philippines (Brought into force: November 13, 1996)
- Canada-China (Brought into force October 1st, 2014)

Concluded Investment treaties negotiations

- Canada-Hong Kong (Negotiations concluded: May 2015)
- Canada-India (Negotiations concluded: June 2007)

Ongoing Investment treaties negotiations

- Canada-Indonesia (Eleven rounds so far)
- Canada-Kazakhstan (Negotiations began in 2011)
- Canada-Mongolia (Negotiations began in 2009)
- Canada-Pakistan (three rounds)
- Canada-Vietnam (nine rounds)

Trade agreements with an investment chapter already brought into force

- Canada-Korea (Brought into force: January 1st, 2015)

Concluded trade agreements with an investment chapter

- Trans-Pacific Partnership Agreement (Negotiations concluded: October 2015) Asian countries involved in the agreement: Brunei Darussalam, Japan, Malaysia, Singapore, and Vietnam

Trade agreements with an investment chapter under negotiation

- Canada-India (eight rounds so far)
- Canada-Japan (negotiations began in 2012)
- Canada-Singapore (negotiations began in 2002)

Trade agreements with an investment chapter being explored

- Exploratory Discussions for a Canada-Thailand Free Trade Agreement (since 2012)
- Exploratory Discussions for a Canada - Philippines Free Trade Discussions (since May 2015)

C. CANADIAN INVESTMENT AGREEMENTS WITH LATIN AMERICAN COUNTRIES

Investment treaties already brought into force

- Canada-Peru (Brought into force: June 20, 2007) *This FIPA has been superseded by the investment chapter of the 2009 free trade agreement.
- Canada-Costa Rica (Brought into force: September 29, 1999)
- Canada-Uruguay (Brought into force: June 2, 1999)
- Canada-Panama (Brought into force: February 13, 1998) *This FIPA has been superseded by the investment chapter of the 2013 free trade agreement
- Canada-Venezuela (Brought into force: January 28, 1998)
- Canada-Ecuador (Brought into force: June 6, 1997)
- Canada-Barbados (Brought into force: January 17, 1997)
- Canada-Trinidad and Tobago (Brought into force: July 8, 1996)
- Canada-Argentina (Brought into force: April 29, 1993)

Trade agreements with an investment chapter already brought into force

- Canada-Honduras Free Trade Agreement (Brought into force: October 1, 2014)

Chapter Ten : Investment
- Canada-Panama Free Trade Agreement (Brought into force: April 1, 2013)
  Chapter Nine: Investment
- Canada-Colombia Free Trade Agreement (Brought into force: August 15, 2011)
  Chapter Eight: Investment
- Canada-Peru Free Trade Agreement (Brought into force: August 1, 2009)
  Chapter Eight: Investment
- Canada-Costa Rica Free Trade Agreement (Brought into force: November 1, 2002)
  Chapter Eight: Services and Investment
- Canada-Costa Rica FIPA (1998)
- Negotiations to Modernize the Canada-Costa Rica Free Trade Agreement
- Canada-Chile Free Trade Agreement (Brought into force: July 5, 1997)
  Chapter G: Investment, Services and Related Matters
- North American Free Trade Agreement (NAFTA) (Brought into force: January 1, 1994)
  Chapter Eleven: Investment

Concluded trade agreements with an investment chapter
- Trans-Pacific Partnership Agreement (Negotiations concluded: October 2015)
  Latin American countries involved in the agreement: Chile, Mexico, and Peru.

Trade agreements with an investment chapter under negotiation
- Canada-Caribbean Community (CARICOM) Trade Agreement Negotiations
- Canada-Guatemala, Nicaragua and El Salvador (Formerly Canada – Central American Four) Free Trade Agreement Negotiations
- Canada-Dominican Republic Free Trade Agreement Negotiations (Negotiations launched in 2007)

Trade agreement with an investment chapter being explored
- Canada-MERCOSUR Exploratory Trade Discussions (Exploration started in 2011)

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