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ISDS Regimes and Democratic Practice: Creating Conflict of Interests between Governments, Investors and Local Populations

Martin Karas

University of Economics in Bratislava

Faculty of International Relations

martin.karas@euba.sk

ORCID: 0000-0002-9916-3074

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Abstract

The recent debate over the Investor-State Dispute Settlement (ISDS) regimes of international arbitration has resulted in concerted efforts aimed mainly at protecting the rights of states to regulate, improving transparency of proceedings and eliminating inconsistency in decision making of the tribunals. While the existing scholarly work frequently addresses issues of the relationship between the existing investment regimes and good governance in general, increased attention is rarely paid to the effects that investment arbitration has on democratic practice. The article applies an "action-based" approach to democracy, in order to analyse the role that the ISDS regimes play in exacerbating conflicts between the local populations, foreign investors and governments. The analysis leads to a conclusion that the ISDS regimes create incentives for the governments and foreign investors to disregard sound democratic practice. The article represents an attempt to move the discussion about the ISDS regimes away from the question of legitimacy of the regimes to the question of the impacts that the regimes have in practice.

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Introduction

Investor-state dispute settlement (ISDS) is a mechanism of international arbitration that enables foreign investors to sue host countries in front of an international tribunal in cases where an international investment agreement has been breached. The rationalization for these regimes is based on the following two assumptions: (1) the neoliberal theory of development, which states that foreign direct investment (FDI) is the main driver of development; and (2) the so-called "home bias" hypothesis, which claims that the domestic court systems will disproportionately favour the home governments against foreign investors. The ISDS regimes are a logical consequence of these two assumptions. The home bias of the courts is eliminated by allowing the foreign investors to bring claims against states in front of an international tribunal and the foreign investment is stimulated by eliminating the fear of arbitrary expropriation.

This system of investment arbitration has recently come under challenge. In the last decade, we have seen a growing amount of scholarly work focusing on investor-state dispute settlement. This surge of interest in regimes of international investment arbitration has been a result of several high-profile cases[1] and explicit concerns of some countries related to the issues of sovereignty, transparency, and inconsistency (Brocková 2016) of the tribunal decisions. In the case of some countries[2], these concerns have led as far as withdrawing from the International Centre for Settlement of Investment Disputes (ICSID) and terminating or renegotiating many of their investment agreements. While most other countries (and trading blocs) have not gone as far, they have nonetheless revaluated their positions towards investment arbitration in the last decade, typically leading to efforts at modernizing their stock of investment treaties by adopting a new generation of bilateral investment treaties (BITs). This emerging debate focused on the reform of the ISDS regimes and bolstering their legitimacy has concentrated mainly on the relationship between the states and the investors, sometimes ignoring the impact that the ISDS regimes can have on democratic practice.

1 Such as *Occidental v. Ecuador, Vattenfall v. Germany, Metalclad v. Mexico*, or the so-called "Argentinian cases" like *CMS v. Argentina and Enron v. Argentina*.

2 This applies in various degrees to Ecuador, Bolivia, Venezuela, South Africa and Indonesia.

This article will be using Cotula´s (2017) framework for analysing interactions between the regimes of investment arbitration and democratic practice. This theoretical framework differentiates between the "rules-based" and "action-based" approach to democracy. The "rules-based" approach is mostly concerned with democratic institutions. It is focused on representative organs and democratic procedures within institutions and their functioning. This approach sees any action taken by a representative organ within a given legal framework as democratic (Cotula 2017: 355-358). The second approach is broader and involves an element of popular pressure and local democracy. Democratic practice in this framework involves a pattern of conflict and compromise between the government and the local populations of the country. This approach to democracy is sometimes called "action-based" and focuses more on practice (Cotula 2017: 355-358). The existing scholarly literature can be most often placed within the framework of the "rules-based" approach. I, however, will be analysing the effects of investment arbitration on democratic practice within the "action-based" framework.

The approach of the article towards the subject is utilitarian, in the sense that I will not be looking at whether the ISDS regimes are democratic in themselves, but rather trying to establish whether some of the results it produces conform to democratic theory. The approach represents an attempt to move the ISDS discussion away from the complicated debate over the legitimacy of the regimes, towards an analysis of their real-life impact. The goal of the article is to show that the current system of ISDS contributes to the defects in democratic practice, while at the same time presents an opportunity to address these defects.

In order to accomplish the goal stated in the previous paragraph, I will first review the existing scholarly literature concerned explicitly or implicitly with the issue of democracy, in relation to the ISDS regimes within the "rules-based" approach. In the second part of the article, I will apply the "action-based" approach to democracy to several mining conflicts in Colombia, which resulted in investment arbitration, in order to demonstrate the role of investment arbitration in democratic practice. This part will show two ways, in which investment arbitration has an influence on democratic practice. Firstly, it lacks incentives for the investor to conduct their activity in line with the interests of local populations. Secondly, it creates disincentives for the

state to regulate foreign investment in line with the interests of local populations. Within the "action-based" approach to democracy, terms "defects in democratic practice" or "negative impact on democratic practice" are to be understood as any outcomes that do not conform to the expressed positions of the local populations, or situations where the local populations are shut out from the decision-making process in matters that directly concern them.

Review of invesment arbitration research dealing with democracy

In this part of the article, I will take a closer look at how the issue of democracy is being dealt with in the existing academic and policy-oriented texts focused on the ISDS regimes. Dominant framework that informs most of the research into ISDS regimes sees states and the investors as the main actors. These two actors come into conflict on the level of investment arbitration in cases where the actions of the nation-states in regulating their investment environment are perceived by a foreign investor to be outside the scope of the powers accorded to states by international investment agreements.

This dominant framework of understanding centred on the dichotomy of states and investors is generally expressed in statements such as: "whereas some sing its praises as a method of protecting private property interests against improper government interference, others decry investment treaty arbitration (ITA) as biased against states" (Franck 2014: 12). When it comes to policy-oriented texts, this framework can be made visible in UNCTAD´s 2017 World Investment Report, which identifies "Promoting and Facilitating Investment" and "Safeguarding the Right to Regulate while Providing Protection" as two of the main areas of the IIA Reform effort (UNCTAD 2017: 126). On the level of states, a joint declaration of Bolivia, Venezuela and Nicaragua on the occasion of announcement of plans to withdraw from the ICSID Convention stated: "(We) emphatically reject the legal, media and diplomatic pressure of some multinationals that ... resist the sovereign rulings of countries, making threats and initiating suits in international arbitration" (quoted in Anderson: 2007).

This framework, which is present in most political writing

on the ISDS regimes does not lend itself to explicit analysis of the relationship between ISDS and democracy within the action-based framework. Most of the scholarly work on the topic is therefore done within the rules-based approach, which focuses on democratic institutions and their interaction with the regimes of investment arbitration. The concept that is central for these authors is the concept of the "right to regulate", as evidenced by its prominent place in academic research and policy-oriented texts. It is related to the issue of internal democratic deficit of the ISDS regimes, in so far as the states in question can be viewed as democratic. The research of the ISDS and the right of states to regulate is focused on the question of whether the ISDS regimes enable investors to block government regulatory measures. The right to regulate has been extensively addressed both in the academic texts (Henckels 2017, Korzun 2016, Giannakopoulos 2017) and policy-oriented texts (UNCTAD 2016, 2017). The research has led to a conclusion there the protection of the state's "right to regulate" needs to be made explicit in the IIAs, especially in areas such as environmental and consumer protection. This has led to tangible results in recent years, with the IIA treaties of the new generation[3] typically including explicit mentions of the "right to regulate" in public interest.

Within the framework of the right to regulate, the existing scholarly litereature is also concerned with the so-called "regulatory chill" phenomenon, which can also be seen in terms of the effects of investment arbitration on democratic practice. Regulatory chill represents an extension of the "right to regulate" concept. However, it is no longer concerned with the comparatively simple issue of *ability* of the state to regulate its investment environment, but rather with its *willingness* to regulate its investment environment in public interest. The question is not whether ISDS enables the investors to prevent government regulation through legal means, but whether the investors are able to use the threat of litigation to block such regulation. This represents an issue of democracy to the extent that the governments are democratically elected and, therefore, represent the population to a certain degree. Any negative impact that the ISDS regimes have on the willingness of the government to regulate can be seen as a negative impact on democratic practice.

3 See for example the EU-Canada Comprehensive Economic and Trade Agreement, China-Australia Free Trade Agreement, or the new United States-Mexico-Canada Agreement.

The most widely used definition of the regulatory chill is the one put forward by Tietjem and Baetens in their study of the impact of ISDS in TTIP for the Ministry of Foreign Affairs of Netherlands. They define regulatory chill as a situation in which "a state actor will fail to enact or enforce *bona fide* regulatory measures because of a perceived or actual threat of investment arbitration" (Tietjem, Baetens 2014: 68). Furthermore, they distinguish between (1) not drafting particular legislation in anticipation of arbitration, (2) chilling legislation upon awareness of arbitration risks, and (3) chilling legislation after the outcome of a specific dispute (Tietjem, Baetens 2014: 68). In other words, the ISDS can work as a deterrent against government regulation, including in the case of legitimate public interest measures.

Although the regulatory chill hypothesis is internally consistent and intellectually appealing, it is problematic on scientific grounds. The sciences simply don´t have reliable methodology to prove causes for absence of a phenomenon. The only way to confirm the hypothesis is to make careful and detailed case studies (Gros 2003). The conditions that need to be met for the hypothesis to be valid are: (1) the governments and the relevant government officials dealing with regulation need to be sufficiently aware of and familiar with the ISDS regimes and their implications; and (2) the governments and the relevant government officials need to take these considerations into account when regulating. Further research on this topic is undoubtedly necessary, but rests outside the scope of this paper.

There is one more element of democratic deficit of the ISDS regimes that the existent research addresses, namely the issue of transparency of the ISDS proceedings. The issue of transparency relates to democracy in the context of public oversight of the government policies. On the level of academic scholarship, it is widely recognized in the arena of international investment policy-making. UNCTAD cites transparency among the main issues of the ISDS regimes in all its major publications (UNCTAD 2016, 2017). The EU has already introduced full mandatory transparency of the arbitration process within the Comprehensive Economic and Trade Agreement (CETA) and is expected to push for the same in the case of the Transatlantic Trade and Investment Partnership (TTIP) (EU 2015). Some progress has also been made on the level of the investment courts, especially the ICSID. In 2008, the ICSID

Arbitration Rules have been amended to improve transparency of the proceedings among other things (Wong, Yackee 2010: 259-260). However, many cases remain subject to confidentiality, especially in cases of discontinued proceedings, where the transparency is subject to agreement of the parties. Both the governments and the investors often have good reasons to keep the details of the ISDS cases confidential. It is illustrative in this regard that when UNCTAD publishes the yearly World Investment Report, they always report the number of *known cases* (UNCTAD 2017:125) (italics mine).

This brief review of research concerned with the relationship between the ISDS and democracy shows that the existing literature deals in significant detail mainly with the "right to regulate" of democratic states applying a rules-based approach to democracy. In comparison, there has been less attention paid by the scholars to the effects that the ISDS regimes have on local democracy within the action-based approach to democracy. The following chapters aim expand the discussion on the relationship between ISDS and democracy to focus more on the aspect of local democracy.

ISDS regimes as a problem: local democracy

In this chapter, I will be analysing the ISDS regimes within the "action-based" approach to democracy. I will be therefore interested in how do the ISDS regimes affect the ability of population to influence the conduct of foreign investors and their governments. Between 2016-2018, Colombia has been subject of five new cases of ISDS having been filed by foreign mining companies against its government. What all five cases have in common is a strong element of local democracy at the beginning of the conflict that led to the foreign investor opting for ISDS arbitration. In the following paragraphs, I will use these cases to create a pattern of conflict that leads to ISDS cases. This pattern shows two ways in which the ISDS regimes create barriers for local populations to control their investment environment: (1) it creates a disincentive for the government to accede to demands of the local populations; and (2) it creates an insurance for the investors for activities that the local populations often view negatively. What we want to achieve with these cases is to highlight the interplay between local democracy, government action and investors filing for ISDS

arbitration. The paradox of the ISDS cases that will be presented here is that these are cases where the democratic practice is observed and the local populations manage to at least partly push through their demands. However, these cases highlight that observance of democratic practice results in punishing ISDS cases and the ability of investors to file these cases on an international level works as a partial disincentive for the investor to seek local support.

While there is existing research into the way the ISDS regimes affect processes on the level of the government in the case of the regulatory chill, there has been considerably less interest in what impact the ISDS regimes have on the way that the local democracy functions. We will demonstrate that the ISDS regimes create a rift between the interests of local populations and their governments in cases where the local populations come into conflict with foreign investors.

The five recent cases we will be looking at here are: (1) Cosigo Resources gold mine in Colombia[4]; (2) Glencore coal mine in Colombia[5]; (3) Eco Oro gold and silver mining concession in Páramos[6]; (4) Galway Gold operation in Páramos[7]; and (5) Red Eagle mine in Páramos[8]. These cases were filed between 2016-2018, and are currently pending.This is not problematic for this article, since we are not concerned with the results of these cases, rather with the interaction of the ability of investors to file these cases under current regimes and conditions, in particular the local democracy.

In 2001, Colombia implemented the Mining Code, which opened the door for foreign investors to develop massive mining projects in Colombia. This has brought a large amount of investment into Colombia, but also created an unprecedented amount of socio-environmental conflicts connected to activities of the mining companies. These conflicts are most often caused by the concerns of indigenous populations over the environmental impact of mining. In the subsequent years, these local populations have created a pressure on local and state authorities to stop mining in many regions of the country,

4 See *Cosigo Resources and others v. Colombia, 2016*. UNCITRAL.

5 See *Glencore International and C.I. Prodeco v. Colombia,* 2016. ICSID Case No. ARB/16/6.

6 See *Eco Oro v. Colombia*, 2016. ICSID Case No. ARB/16/41.

7 See *Galway Gold Inc. v. Republic of Colombia,* 2018. ICSID Case No. ARB/18/13.

8 See *Red Eagle Exploration Limited v. Republic of Colombia,* 2018. ICSID Case No. ARB/18/12.

going as far as organizing local referenda[9] against the mining projects[10]. In several cases, this pressure has resulted in halting of mining projects, either through local municipal decisions, or environmental legislation from the state. This has resulted in an increasing number of ISDS cases being filed against Colombia in relation to mining regulation. In some regions, the situation is more complicated. In Segovia for example, the local economy is based on traditional mining, which is disrupted by big mining companies. The opposition to foreign miners in these regions is based not on environmental, but more on economic and social grounds. These conflicts have been exarcebated by the government´s ban on traditional mining, which has resulted in strikes and violence in affected regions. However, I will not be attempting a holistic analysis of the mining conflicts, I will merely be constructing a base for creating a pattern, which will enable me to make relevant observations on the role of investment arbitration in these conflicts.

Since the early 2000s, the Canadian mining corporation Cosigo Resources has been prospecting the area of Yaigojé in the south eastern part of Colombia for mining potential. The company has also mounted a public relations campaign in order to gain the support of the local population for their mining activities. However, most of the local communities, associated on the ACIYA (Association of Indigenous Leaders of Yaigojé Apaporis) are against mining in the rainforest area, mostly on environmental grounds (Castro 2013). They managed to convince the Colombian government to declare the region a national park, which makes mining prohibited. The national park was established on 27th October 2009. However, two days later, the national geological authority issued a gold mining license for Cosigo. In 2011, the General Prosecutor's Office demanded that the mining concessions for the national park be annulled and in 2013, the National Mining Agency declared Cosigo's mining license to be expired and the mining concessions suspended. The miners then filed for injunction against the establishment of the national park area at the Constitutional Court, but the court ruled against the injunction in 2015 (Corte Constitucional 2015). This prompted Cosigo to file an ISDS case against the government based on the US-Colombia Trade Promotion

9 For example in relation to „La Colosa" mining project in Cajamarca.

10 These popular consultations have been restricted as a means to stop extractive projects by the ruling of the Constitutional Court from the 11th October 2018.

Agreement[11]. The argument of Cosigo is that the annulment of mining concessions amounts to indirect expropriation on the part of the Colombian government and thus constitutes a breach of the US-Colombia Trade Promotion Agreement. The award sought by Cosigo is 1,6 billion dollars mostly as compensation for future profits.[12] Without considering the legal merits of the case here, the filing of the ISDS case demonstrates how the environmentally motivated actions of the Colombian government, petitioned by local communities on sustainable development grounds, clashes with the investment activities of the foreign investors, leading to an ISDS case.

The second case is related to activities of the Glencore conglomerate in the coal mining industry in Colombia. The coal mining has been a major source of pollution in the Cesar region of Colombia for the last twenty years, having severe environmental impacts, most notably leading to forced resettlement of Boquerón, Plan Bonito, and El Hatillo communities in 2010 (Tan, Faundez 2017: 67). The Boqueron community has since been vocal in their opposition to coal mining in Cesar. (Torres et al. 2015). This particular case relates to the expansion of a mine in Calenturias owned by Prodeco, a subsidiary of Glencore. Although the expansion was authorised in 2016, on the back of the public opposition, the government sought to revoke parts of the concession for the mine in question, which led to Glencore filing for ISDS arbitration for an alleged breach of the Colombia-Switzerland BIT[13]. The claims arise out of the government's alleged unlawful interference with the coal concession contract.[14]

The last three cases are all related to mining activities of multinational mining companies in the Santander region in the protected area known as Páramo. The miners were able to secure a controversial exemption to mine silver and gold in parts of the Santurban Páramo during the 1990s. Since the beginning of the projects, a coalition of grassroots activists and local communities has been campaigning against mining in the Páramo on environmental grounds (Rodríguez-Salah

11 Colombia-US Trade Promotion Agreement, Col.-US, 2006. ratified in 2012, avialable at https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text.

12 For details, see http://investmentpolicyhub.unctad.org/ISDS/Details/726

13 Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, Col.-Sw., 2006. ratified in 2009.

14 For details on the case see http://investmentpolicyhub.unctad.org/ISDS/Details/705

2018). The main concerns were related to water pollution and biodiversity. On the back of the popular opposition to mining in the previously protected areas, the Ministry of Environment and Sustainable Development adopted a resolution delineating the Santurban páramo as an area of special protection in 2014 (Ministerio de Ambiente 2014). In 2016, the Constitutional court definitively declared as illegal the mining activities in the Páramo of Colombia (Corte Constitucional 2016). The reaction of Eco Oro was to file a case with the ICSID in Washington. Eco Oro is claiming 764 million dollars in damages, and the main charges are once again related to indirect expropriation of the mining concession as a result of the decision of the constitutional court, with the aim of recuperating the losses and potential future profits. The case was filed under the Canada-Colombia FTA[15][16]. Galway Gold and Red Eagle, also Canadian miners, followed suit in 2018 with the same claims.

While the role of investment arbitration is not the main driver of the dynamics of these socio-environmental conflicts, these cases offer a good illustration of the relationship between investment arbitration and local democracy. By analysing these cases, it becomes clear that the relationship between investment arbitration and local democracy is conflictual. Based on these three cases, the following pattern of environmental conflict related to a mining related activity takes place (1) economic activity of a foreign investor is initiated; (2) the local communities perceive the activity as damaging on environmental ground consistent with sustainable development paradigm; (3) the local communities organize in order to achieve goals that are generally consistent with sustainable development; (4) the government bows to the popular pressure and enacts measures that limit or stop the investment activity; and (5) the transnational company sues the government for breach of the ISDS regime. Other cases (not limited to mining related conflicts in Colombia) that follow the same pattern, but are outside the scope of this article include *Occidental v. Ecuador*[17], *Metalclad v. Mexico*[18], *Dominion Minerals v. Panama*[19], *Glencore v. Bolivia*[20], and other.

15 For details, see http://investmentpolicyhub.unctad.org/ISDS/Details/756

16 Free Trade Agreement between Canada and the Republic of Colombia, Can.-Col., 2008. ratified in 2011.

17 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador,* 2006. (II) ICSID Case No. ARB/06/11.

18 *Metalclad Corporation v. The United Mexican States,* 1997. ICSID Case No. ARB(AF)/97/1.

19 *Dominion Minerals Corp. v. Republic of Panama,* 2016. ICSID Case No. ARB/16/13.

20 *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia*, 2016. PCA Case No. 2016-39.

The role of the ISDS regimes with regard to local democracy that these cases highlight is twofold: (1) they represent a potential punishment for governments when they put interests of the local populations ahead of the interests of the investors; and (2) they represent an insurance policy for the investors in cases where their interests are opposed by the local populations. The obvious paradox here is that in the analysed cases, local democracy was unltimately not hindered, since the local population was able to push through their demands. However, the pattern developed in the previous paragraph shows that the role that investment arbitration puts the arbitration regime in direct opposition to processes of direct democracy, effectively punishing the state for observing sound democratic practice. Moreover, the arbitration is a burde for the states irrespective of the result of the arbitration, with the costs of arbitration and legal representation rising steadily in the past decade.

It is important to stress that the ISDS regimes are not necessarily the main forces in environmental and social conflicts related to foreign investment. Indeed, the responsibility to assure that the investors conduct their activity in a way that is not opposed by the local populations rests on the shoulders of the government, who draft the investment contracts. Although the contracts usually include provisions requiring the investor to publish a sustainable development report and acquire local support for the project, this process is usually flawed, as shown by the 2017 report on the operations of Glencore in Latin America,[21] and as evidenced in the cases analysed previously. At the same time, the current architecture of the ISDS regimes is demonstrably conductive to the conflicts described in this chapter. While investment arbitration is clearly not the main factor in decision-making of the main actors, the role of investment arbitration as a threat to the government against acceding to demands of local populations opposed to investment activities and as an insurance for the investors is clear.

ISDS regimes as a solution: corporate responsibility standards

The last part of this chapter will be dedicated to an analysis of ways to mitigate these negative effects of the ISDS regimes in relation to local democracy. In other words, the question that

21 For details, see http://observadoresglencore.com/blog/informe-sombra/.

the next paragraphs will focus on is: how can the ISDS regimes change from being a part of the problem, to being a part of the solution?

The cases analysed in the previous chapter show that the base of the problem rests in the unwillingness or inability of the governments of democratic countries to bring the conduct of foreign investors in line with the interests of the local populations and the legal framework does not offer strong enough incentives for the investors to conduct their operations in concert with local populations. This is facilitated by the ISDS regimes through punishing the states when acting against the interests of investors and providing a way for the investors to seek compensation when they clash with the local populations. However, at the same time as being a part of the problem in the context of local democracy conflict, the ISDS also presents a potential platform for mitigating the local conflicts described in this and the previous chapter.

The way that the ISDS regimes can contribute to mitigating local conflicts between populations and investors is through a reform of the investment treaties that provide a basis for ISDS. More specifically, the reform effort needs to implement the concept of responsible investment. This concept actually represents one of the pillars of the UNCTAD´s IIA reform plan (UNCTAD 2017: 126), although it is not developed in detail. The concept of responsible investment is also central to the UNASUR efforts in establishing a new ISDS regimes for the Latin America with a permanent court (Patino 2017). The concept of responsible investment consists of incorporating into the IIAs a number of provisions and conditions that the investor needs to meet to have access to ISDS. These conditions would generally relate to sustainable development and democratic participation, since these often represent a basis for the local conflicts that these measures seek to mitigate. These provisions have the advantage of being a part of an international treaty and therefore would take precedence over the government contracts in terms of access to ISDS.

The problem that the concept of the responsible investment faces is the question of whether the structure of international investment regimes allows for the incorporating of such measures, while at same time retaining or increasing the levels of investment. It seems unrealistic to expect that this concept

could be established on the level of the BITs, because of the prevailing narrative of neoliberal development and the need to create as favourable conditions for the investors as possible, which creates a competitive framework that can often result in governments compromising on the level of regulation in an attempt to attract foreign investment.

However, this competitive framework is largely absent in multilateral negotiations. Since these treaties often include all regional players, the government do not face the problem of losing out on investment to their neighbours by applying the admittedly strict concept of corporate responsibility. Therefore, regional and supra-regional free trade agreements represent a platform where the concept of responsible investment can be successfully developed. Indeed, some regional treaties, such as the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol[22] already contain the so-called 'corporate responsibility' provision, which tasks foreign investors with conforming their investment activities with standards of sustainable development. This ought to bring the activities of investors more in line with interests of local populations by creating an added incentive for the investors to pay attention to the issues of local democracy and, therefore, limit the number of local conflicts which can result in ISDS litigation, as shown before.

We can therefore conclude that the best way to mitigate the negative effects of ISDS regimes on local democracy described previously is to incorporate the concept of responsible investment into multilateral investment treaties.

Conclusion

Recent decade has seen a large amount of work focused on legitimacy of the ISDS regimes. Comparatively, a significantly smaller portion of academic texts have been dedicated to the question of the impact that the ISDS regimes have on democratic practice outside the legal ramifications of the system.

Analysis of this impact within the "action-based" approach to democracy shows that cases of socio-environmental conflict, which can trigger investment arbitration proceedings, follow

22 Intra-MERCOSUR Cooperation and Facilitation Investment Protocol, 2017. available at https://investmentpolicyhub.unctad.org/Download/TreatyFile/5548.

a uniform pattern. This pattern shows that ISDS regimes can contribute to defect in democratic practice. This manifests itself in the form of an incentive for the executive power to disregard popular pressures, and a disincentive for the investors to consider the interests of local populations.

The analysis also shows that the possibilities to mitigate the effects of ISDS regimes on the willingness of the governments to regulate in public interest in the face of a potential litigation are limited. However, when it comes to limiting the negative impacts of the ISDS regimes on the ability of the local populations to push through their interests in relation to conduct of foreign investors, the concept of responsible investment applied to multilateral investment treaties offers the best opportunity.

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