

Sleeping Lions

International investment treaties, state-investor disputes and access to food, land and water

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Executive Summary

Today, the world's natural resources are under increasing pressure and are often the object of important power struggles between corporations, states and communities. National governments and international institutions are responsible for shaping the environment in which these different interests operate. As foreign investments in land, water and other natural resources grow in number and magnitude, international investment treaties have become more and more relevant. The international investment legal framework prioritizes the protection of investors' rights over almost any other consideration.

Will this system weaken developing countries' capacity to regulate their food, land and water sectors and introduce policies that promote food security and poverty reduction? What lessons can be learnt from the past? This paper sets forth the principal elements of this debate through the analysis of eleven international cases of state-investor disputes.

Introduction

Managing and accessing land and water will be even more important in the coming years for ensuring food security and poverty reduction. However, these natural resources are often the object of important power struggles between corporations, states, and communities. These struggles do not take place in an institutional vacuum. On the contrary, national governments and international institutions are responsible for shaping the environment in which these different interests operate. Together, they create national and international regulations that enable foreign and domestic corporations to invest in land, water and other natural resources in their home countries and abroad.

This paper focuses on one part of the international framework: international investment treaties¹. International investment treaties are relevant because they reach almost all the corners of the globe and are gaining more and more importance as nearly the only binding instruments regulating global investment flows. Moreover, most of them enable foreign investors to initiate international legal proceedings against host states when they feel their interests are being affected. In some cases, legitimate public policy objectives have been questioned before international arbitration tribunals, forcing host states to pay hundreds of millions of dollars in compensation. According to UNCTAD, the number of international arbitration cases has grown from five in 1995 to 337 in 2010.

The main objective of this paper is to evaluate the international investment regulatory framework and its implications for poor people's access to land and water in their struggle for food justice. Can the fight against hunger be won while the system is still ruled by these norms? Can the challenge to this framework represent a turning point in the fight against hunger and global injustice? Are there feasible reforms that could be made within the existing framework that would bring about tangible improvements in the balance of power between foreign investors, on the one hand, and host country governments and communities on the other?

In sections one to three both the context and the regulatory framework in which this power struggle is taking place will be described. In section four a selection of 11 cases will be presented (out of an initial selection of 26 cases of similar compiled made by Oxfam) that are relevant from the standpoint of regulating access to land and water. It's important to note here that these cases are only the tip of the iceberg as many arbitration cases are deliberately hidden from the public or are resolved informally even before becoming official disputes, with host countries giving in to firms' demands out of fear of the possibility of having to pay out millions in settlements. The cases selected are also very relevant because they give us a look at what may well be happening shortly, once the many current investment projects in land, water and agricultural sectors mature and conflicts between investors and host countries begin to arise. In section five, some important questions for debate are raised on changes that should take place within the international investment law system in order to ensure that it does not represent a barrier to regulation of access to natural resources in the public interest. The conclusion raises a small set of key recommendations in this respect.

Putting natural resources at the service of the public interest

Most human activity relies in one way or another on natural resources. In developing countries this relationship is particularly strong and relevant. A wealth of natural resources and the historical context of their economies' development help to explain certain countries' social, economic, and financial dependence on natural resources.

Even though most of the world's people live in cities, three quarters of its hungry inhabitants live in rural areas, where most of them depend on agriculture (crops, livestock, agroforestry, fisheries and aquaculture) for their subsistence.² Half of them depend on small-scale farming, 20 per cent are landless farmers and 10 per cent earn their livelihoods herding livestock, harvesting and fishing.³ In many developing countries women are the main agricultural workforce and the primary food producers. For all of them, land, water or forests are absolutely essential and represent much more than just means of production.

But it is not just a matter of subsistence. Many developing countries' economies heavily rely on activities that are dependent on natural resources. These activities can be an important source of economic growth, job creation, poverty reduction and investment attraction as well as a prime driver of related industries. In developing countries, agriculture generates 29 per cent of the gross domestic product on average and employs 65 per cent of the labour force.⁴ In 2008, 69.5 per cent of LDCs' exports were in primary commodities resources (62.5 per cent mineral fuels and oil; 3.1 per cent ores, slag and ash; 2.6 per cent precious stones and metals; and 1.3 per cent wood).⁵

Moreover, in a good number of developing countries, natural resources such as land and water still have a special cultural and communitarian significance. In many of these countries, local and community based land and water management institutions and structures coexist with those of the state. This represents a major challenge in terms of blending tradition and modernity under a single regime. In Southern Africa, both Zambia and Mozambique have integrated customary land tenure into the statutory land framework whereas West Africa, Ghana and Mali have strong customary tenure regimes recognized by law. Furthermore, indigenous culture is intrinsically linked to these natural resources, giving them a significance that exceeds their mere use and exchange value.

Therefore, developing countries' chances of achieving sustainable and inclusive growth, poverty reduction and respect for and promotion of their people's rights to food, water and a decent living are intrinsically linked to the future of their natural resources. Their chances will largely depend on how sustainable, fair and well-balanced the management of these natural resources is; on the type of norms that are put in place to regulate them and their level of enforcement. But it will also depend on the level of self-imposed standards of corporate social responsibility that the relevant private sector players decide to uphold in relation to their investment behaviour abroad.

Increasing pressure on food-related natural resources in developing countries

Today, the world's natural resources are under increasing pressure, due to both commercial and non-commercial drivers. This also applies to land and water, two natural resources that will be even more important in the coming years when dealing with food security and sustainable livelihoods in developing countries. There are many interrelated causes behind this state of affairs, as explained below.

Climate change

Climate change is expected to exacerbate land degradation and water scarcity in many areas of the world in the coming years and decades. 200 million people may be on the move each year by 2050 because of hunger, environmental degradation and loss of land.⁶ Melting glaciers and loss of mountain snow from climate change will increase flood risk during the wet season and threaten dry-season water supplies to one-sixth of the world's population.⁷ By 2050, climate change is expected to cut water availability by 10-30 per

cent in dry regions.⁸ Put simply, this will force people to share a 'smaller and poorer pie'. The search for a new equilibrium is already provoking armed conflicts, environmental refugees and outsourced food production in some regions of the world.

The new global climate regime, still being designed in different multilateral processes, is also expected to increase the potential uses of these resources, diverting them from their traditional food-related functions. Feedstock production in developing countries to respond to the policy-driven global biofuels demand and carbon-market-related investments (purchase of carbon credits in agriculture or forests in developing countries) are only two examples of a reality that is already knocking on many developing countries' doors.

More people, larger cities, more demand for food

The combination of population growth, increasing urbanization rates and the expansion of unsustainable diet patterns appears among the factors pushing up global land and water demand, mainly due to the implications of a boost in food needs. By 2030, the world's cereal and meat production will need to be, respectively, 50 and 85 per cent higher than 2000 levels, to respond to anticipated global demand.⁹ Many developing countries' middle classes are adopting western-style eating habits (particularly meat consumption). These habits rely on unsustainable forms of livestock farming and patterns of consumption, which are depleting natural resources and damaging ecosystems worldwide.¹⁰ With around 70 per cent of the world's population living in cities or urban areas by 2050, up from 49 per cent today, the demand for water and land around the cities will increase, along with the percentage of the world's population that depends on food purchases.

Food geopolitics

Spurred by domestic food supply constraints and uncertainty, some wealthy food-import-dependent countries have begun implementing geo-strategic foreign policies to ensure their food supply abroad, through inter-governmental land deals that can then be executed by public or privately owned enterprises. The following examples are only the first of many others that are currently being negotiated: Mali-Libya; Liberia-Libya; Syria-Sudan; Jordan-Sudan; and Qatar's joint ventures with Sudan, Indonesia and Vietnam.¹¹ This, again, increases the pressure on land and water resources in the host countries, with a high risk of involving resources that are key for the countries' own food security. Although concepts such as 'available', 'waste' or 'marginal' land are used to justify land allocations to investors, at times land in these categories is the source of subsistence for the poorest people. Or, as the African Union puts it: 'The land must come from somewhere – whether from small farmers' land, communal land or conservation areas. There is no free land in any of our countries, so communities will inevitably be displaced and denied their territories and natural resources'.¹²

Agricultural sector as new investment opportunity

With particular virulence, the global economic slowdown has affected many of the sectors (financial assets, property, commodities...) that formerly concentrated international speculative investment activities. This fact, together with the expectation of high long-term food prices, has made agricultural production a new niche for international speculative and non-speculative investment, with the resulting impact on the demand for natural resources in developing countries. In many of these countries, direct private foreign investment is much welcomed precisely because of the lack of public investment in agriculture and the limitations of alternative sources of investment funding.¹³ But, as will be extensively discussed in this paper, not all agricultural

investment is good and some can be downright disastrous, while presented as being part of the effort to feed the world or to cut carbon emissions.

Finally, land grabbing appears as the most extreme manifestation of this increased pressure on food-related natural resources. Large-scale land acquisitions are in no way new; new is the pace at which this is happening at the moment. Since 2008, a massive rise in large-scale land acquisitions has taken place. The latest publicly accepted and applied figure is that of the World Bank: 45 million hectares acquired between 2008 and 2009.¹⁴ But some new estimates (by the International Land Coalition) already suggest that in the last few years up to 80 million hectares have been bought or leased in poor countries by investors.¹⁵ Water cannot be considered separately from land. All food and animals are major 'holders of water', so when land is grabbed and food or other products are taken out of the country, water grabbing is 'hidden' in these products. Furthermore, water is not simply a source of irrigation; recent estimations show that 15 million hectares of land grab has taken place for export-oriented aquaculture production, with important environmental and local food security consequences. Land grabs can also result in water contamination, with serious consequences for populations and consumers.

The importance of the regulatory framework

Given the importance of natural resources in developing countries and the constrained resource context presented above, there are both risks and opportunities at hand. The likelihood of an outcome that minimizes risks and makes the most of the opportunities for the most vulnerable sectors of those countries will depend primarily on the willingness and capacity of host states to put sound, equitable and enforceable regulatory frameworks in place. These regulatory frameworks, however, are not developed by one government in isolation. They are embedded in a set of national, regional and international regulations that govern the way investors operate.

Although it lies beyond the focus of this paper, it's also important to take into account that in addition to the regulatory framework there are private sector initiatives to establish voluntary guidelines that encourage responsible corporate behaviour beyond the mandatory levels set by law.¹⁶ It's still a challenge to ensure that companies' behaviour abroad and, more specifically, their approaches to the resolution of state-investor disputes are consistent with the social and environmental standards that they profess to uphold.¹⁷

The national regulatory framework

In many developing countries, domestic laws are not well suited to guaranteeing the sustainable management of natural resources or affording vulnerable groups adequate protection. National and local laws concerning investment, energy, land rights, water rights, public health, capital controls, environmental protection and so on tend to be unclear and insufficient to meet the challenges ahead. When these laws do exist, their implementation tends to be very weak and national governance on these issues is frequently de-prioritized in the face of governments' economic development interests.¹⁸ Those legal systems that rely on customary bases are struggling to merge modern needs with traditional systems.

In contrast to these weak regulatory mechanisms at the national level, the international investment law framework provides strong and enforceable rights for foreign investors.¹⁹ This discrepancy between a weak regulatory framework at the national level and a strong investor protection regime at the international level has been shown to merit serious concern, as will be argued by means of the case studies below. In the past, governments have been hindered by the existing international framework when developing national

laws or implementing policy measures, even when these were meant to pursue legitimate public policy objectives or to fulfil human rights obligations. Even though the international framework does not, as such, determine national laws, governments run the risk of entering into a 'problem zone' when any kind of policy measure has the potential to affect foreign investors' interests in the country.

International human rights law is also failing to provide an effective framework for protecting the rights of affected communities at the national and international level, due to its weak enforcement mechanisms.²⁰

The international investment rules framework²¹

The international legal framework on investment is a vast and decentralized patchwork of multilateral agreements (e.g. General Agreement on Trade in Services, GATS; Trade Related Investment Measures, TRIMs or the Energy Charter), Bilateral Investment Treaties (BITs, e.g. Italian-South African BIT) and bilateral and regional free trade agreements with services and investment components (e.g. NAFTA or EU-Caribbean EPA).²² Investment contracts between states or between a company and a state are also part of this framework (see Box 4). In the last couple of years there has been a significant increase of these contracts in the land and agricultural sectors. The size of land affected by land acquisition agreements signed between 2008 and 2009 was more than ten times what it had been in previous annual averages.²³

This 'gradually grown' set of investment rules governs the \$1.5 bn devoted to cross-border investment activity, covering both portfolio investment and foreign direct investment. There is no single multilateral system that regulates global investment flows. In fact, efforts to develop a single multilateral agreement on investment have failed consistently, among other reasons because of fierce opposition from civil society and developing countries.²⁴ Despite this resistance against a standardized and global framework for investment rules, governments have continued negotiating and signing many investment contracts and bilateral or regional treaties covering investment. The resultant web of investment agreements and legal contracts is 'de facto' very similar to the standardized and global approach that was rejected a decade ago.

BOX 1. 'Development and Sustainability' in the evolution of US, Canadian and EU investment treaties

Canada and the United States were among the first host states to be sued by foreign investors, under the investment provisions of NAFTA's Chapter 11. As a result of this, they realized that these treaties could seriously limit their own policy space and they adapted their investment treaty model accordingly. More concretely, they added certain restrictions related to fair and equitable treatment and expropriation in order to safeguard their own environmental and social policies.²⁵ Development issues were not taken into account in this reform. On the contrary, both the U.S. and Canada continued expanding their network of investment treaties with developing and emerging economies, without incorporating in these agreements any provision to take into consideration these countries' specific needs.

On the European side, most states continue to use the same models as they did 40 years ago. These provide the most extensive protection possible for foreign investors without incorporating any notions of sustainable development. However, since the entry into force of the Lisbon treaty, direct foreign investment has become a key part of the EU's external trade policy and is no longer the competence of individual EU countries. As a result of this, a process of reviewing existing Member States' BITs was initiated in the second half of 2010. The EU is developing the parameters of this new EU investment policy, but most European countries want to keep the system just the way it is. It is too soon to know if this opportunity will be used to improve the treaty model by means of introducing some development and environmental content.

Among developing countries, there is also a broad variety of investment treaty models used. The COMESA-investment treaty, for instance, clearly refers to human rights objectives in the preamble of its model agreement. This model also introduces some important limitations to the rights of investors to a "fair and equitable treatment", allowing host states more leeway when brought to arbitration.

The proliferation of investment agreements has passed relatively unnoticed for the general public, considering the relevance of the issues involved. As of 2009, almost 3000 bilateral investment treaties had been concluded. In 2008, when 59 new BITs were finalized, developing countries were party to 46 (13 between developing countries; 26 with developed countries and 7 with 'others').²⁶ Although increasing their weight in the overall picture, south-south BITs still represent only 26 per cent of all BITs up to 2008.²⁷

These investment treaties are part of the international law system. Their rules put obligations on the signatory countries and become part of their domestic legal systems. There are different possible mechanisms that countries can choose to incorporate international treaties into domestic law (automatically, by governmental decree, after parliamentary approval, by public referendum, etc.). Negotiation authority lies with the governments involved and the same applies to the power to withdraw from a treaty. Each treaty envisages what the parties must do if they want to renegotiate or withdraw from it. Normally, investment treaties remain in force for a period of 10-20 years and are open for renegotiation at the request of one of the parties. In case of withdrawal by one of the states, treaties usually guarantee 10-15 years of protection coverage for the investments made under the previous legislation.

When signing these agreements, governments want to show their willingness to promote bilateral economic cooperation. The signature of an investment agreement is also aimed at boosting the country's image as an investor friendly country. More than promoting foreign investment as such,²⁸ treaties aim to provide the highest possible level of protection for foreign investors and their assets. They provide for the free repatriation of profits and funds, for protection from being treated less favourably than local investors ('national treatment') and investors from third countries ('most favourable nation'), for certain absolute standards of protection ('fair and equitable treatment') as well as a promise of compensation in case of nationalization or expropriation (frequently broadly defined to include cases of 'indirect or regulatory' expropriation as explained in Box 5, below).

These provisions are made enforceable by a powerful dispute settlement mechanism that enables investors, and only investors, to initiate arbitration claims against their host states in the event of a breach of some of these provisions (see Box 3). In this event, investors nominate an arbitrator, the state does the same and a third arbitrator is selected by consensus. These three people will then decide, based on the rules of the arbitration tribunal used (see Box 4), about a government measure's fate. The tribunal will oblige the country to pay compensation to investors if the given measure is considered to be in violation of the investment protection provisions of the applicable investment treaty.²⁹ Usually there is neither the obligation to exhaust local solutions nor the possibility of resorting to an appellate system. Under many investment treaties, if one of the parties so wishes, decisions are made in complete secrecy and without any possibility of third party input. In the more recent U.S. FTAs some of the issues regarding transparency and participation of third parties have been addressed.³⁰

BOX 2. Overview of awards cases brought to UNCITRAL (2009)



Source: Elaborated by the authors based on information provided by the Dutch Permanent Representation to the EU in November 2010.

By contrast, these agreements do not include any type of investor obligation in terms of fulfilment of its contractual obligations, respect for human rights or good governance standards. When foreign investors do not behave according to national regulations, affected communities and host governments can only make use of national courts and regional or international human rights courts with much weaker enforcement mechanisms.³¹ This is even further complicated by the problems associated with the absence of extra-territorial jurisdiction. Due to the complex structure of transnational companies, host countries are often not able to enforce company human rights obligations because the actor responsible for these violations operates from outside their territory. Therefore, access to justice is problematic.

BOX 3. International arbitration on investment treaties: venues and rules³²

International Centre for Settlement of Investment Disputes (ICSID)

The World Bank's ICSID is the only institution created specifically for settling disputes between investors and governments. This ICSID tribunal acts independently from the World Bank. The ICSID is unique in that it publishes a full list of arbitrations taking place under its auspices. However, hearings are in camera unless both parties wish otherwise.

United Nations Commission on International Trade Law (UNCITRAL)

The UNCITRAL does not manage arbitration proceedings but it has drafted procedural rules which can be used by parties wishing to arbitrate their disputes in an 'ad-hoc' fashion. Because UNCITRAL arbitrations do not take place under a single roof it is extremely difficult to know the number underway. Nevertheless, the rules are widely included in BITs and surveys suggest that a substantial number of investment treaty arbitrations take place via this less visible channel.

Stockholm Chamber of Commerce (SCC)

While less commonly included in investment treaties, the SCC rules are found in a minority of Eastern European BITs and the Energy Charter Treaty. Little information is available about the arbitration cases that have taken place here.

International Chamber of Commerce (ICC)

The Paris-based International Chamber of Commerce is a popular arbitration venue for commercial arbitration. However, it has also recently received some cases that relate to investment treaties. Very little is known about these cases.

For many years most investment treaties have been 'sleeping lions' with very limited legal implications. In fact, these treaties were only known inside diplomatic circles and were seen as mere symbolic instruments of foreign policy or perhaps a nice photo opportunity. But in recent years many investors and their legal consultancy firms have

discovered the great potential of these instruments when seeking to protect their particular interests. Between 1995 and the end of 2009 the number of treaty-based arbitration cases grew from six to 357, with 202 of those initiated in the last five years. Numbers show that developing countries are most affected by this new trend. More than half of the countries facing arbitration are developing countries (49 out of 81), while their own investors only initiated 23 out of the 357 existing cases.³³

Investment treaties' provisions are often very generic and ill defined.³⁴ This gives arbitrators a very free hand when interpreting them, as there are many possible international law sources they can draw from. In addition, arbitrators are not obliged to follow previous decisions of other tribunals. As a result of this, arbitration cases have led to unpredictable outcomes that usually favour the rights of investors (see, for example, the different interpretations given by arbitrators to Argentina's 'state of necessity and human rights' arguments as explained in cases 5 and 8, below). This uncertainty can also encourage investors to launch speculative, frivolous or vexatious claims against the host state in the hope of forcing either a generous settlement, the withdrawal of an inconvenient reform or a sizeable award (see the case below on Italian and Luxembourgish investors vs. South Africa).³⁵ All this bias in favour of the investor happens at the expense of regulatory reforms aimed at legitimate public policy objectives, including host countries' domestic human rights obligations. The threat of being faced with multimillion-dollar claims for lost profits will deter many governments from seeking their rights in investment disputes, even when they have a chance of winning a favourable decision. However, some developing countries (e.g. South Africa and Tunisia) that have suffered the negative consequences of investment treaties have started to revise their investment treaty model in order to guarantee the right to regulate. The recent statement made by the Australian Government rejecting the inclusion of investor-state dispute resolution procedures in Australian trade agreements also sets a very positive precedent.³⁶

BOX 4. About investment contracts and investment treaties

The international legal framework on investment consists of both state-to-state investment treaties and agreements concluded between individual investors and host governments. These contracts usually regulate a specific investment project. Investment contracts may take many different forms, including concessions or 'production sharing agreements' for the exploitation of mineral and petroleum resources, 'host-government agreements' for the construction and operation of pipelines and land concessions, or leases for agricultural investments. Usually, these contracts contain so-called "stabilisation clauses", which are specific clauses that ensure that irrespective of changes in the host country's labour, environmental and agricultural laws, the terms of the agreement remain set.

Contracts and treaties do not function in isolation from each other. On the contrary, investment treaties may increase the legal value of contracts by requiring states to respect all contractual commitments to foreign investors through the "umbrella clauses" included in many investment treaties. In a case concerning a gas pipeline project in Bangladesh, for instance, the Italian company involved sought compensation for a breach of contract by the Bangladeshi Gas authority based on the terms of the contract itself and also based on the stipulations of a bilateral investment treaty between Italy and Bangladesh (see ICSID-case, *Saipem vs. Bangladesh*³⁷).

In the last couple of years, there has been a significant increase in land deals, particularly in Africa. Examples of these are the Malybia contract, signed by the Libyan government and Mali; the contract between Biofuel Africa and a local chief in Kpachaa, Ghana; or Saudi Arabia's 'King Abdullah Initiative for Saudi Agricultural Investment Abroad'.³⁸ To our knowledge, none of these land deals have been brought to arbitration yet.

The following section will show by means of different case studies how governments' ability to regulate people's access to land and water can enter into conflict with investor rights that are enshrined in bilateral investment treaties.

Investment treaties' risks – building on lessons from the past

'We have a shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability'.³⁹

As mentioned in the previous section, investment agreements typically consist of a set of guarantees for investors and include the possibility for them to make use of international arbitration mechanisms to enforce their rights. The main standards applied are described in the box below.

BOX 5. The ABCs of investment provisions⁴⁰

Pre-establishment rights or market access (MA): give investors of the signatory country the same investment rights as those given to domestic or third-country foreign investors. Usually market access provisions are included in new comprehensive Regional Trade Agreements, while BITs focus instead on protecting investments that have already been permitted in the country.

Fair and Equitable Treatment (FET) as well as 'full protection and security': while National Treatment (NT) and Most Favoured Nation (MFN) take the treatment of domestic or other foreign investors as a reference point, FET offers a minimum or specific level of protection under which, regardless of the treatment given to a state's own investors, the treatment of investors from the signatory state must not fall below the minimum set by the treaty and should include full protection against damage caused by third parties. In past cases this has been interpreted very broadly by arbitration panels, as a wide range of government activity can potentially be scrutinized on grounds of being unfair and inequitable.

Compensation in the case of expropriation: requires public authorities to pay full and prompt compensation to investors in the case of expropriation. Usually there are only some minor exceptions included where expropriation is justified (national security). Compensation in the case of expropriation becomes problematic when investors consider that they must also be compensated when expropriated from "expected profits".

Indirect expropriation or 'regulatory takings': controversial notion that expropriation can also be an indirect result of a government action: general measures of the state that leave an investor's ownership title intact, but that otherwise cause the investor economic harm (even incidental harm, potentially) may be regarded as a compensable expropriation that requires payment of market value damages to the investor. This opens the door for challenges to all kinds of government policies; for instance, protection measures that increase the costs of environmental exploitation and therefore reduce expected profits. Even when not explicitly mentioned in the treaty, arbitrators have usually interpreted 'compensation in the case of expropriation' as including 'indirect expropriation' as well.

Free transfer of funds: allow investors to repatriate funds related to investments (profits, interests, fees and other earnings) free from obstacles.

Ban on performance requirements: bans the attachment of requirements by the state to foreign investors as a condition of their commercial presence including, for example, requirements to employ local personnel, use local materials, produce for export, or otherwise establish linkages with the domestic economy or protect domestic enterprises.⁴¹

This set of provisions prioritises the protection of investor interests to the detriment of any other interests of the stakeholders involved. Even the provisions against 'unfair treatment' or 'discrimination' that may seem reasonable at first glance frequently turn out to be biased in favour of investor interests due to the way they are applied. Although it's counter-intuitive from a development perspective, under most of the BITs that contain sectors excluded from the application of the MFN or NT provisions, the developing (i.e. capital-importing) country enjoys fewer exceptions than its developed counterpart. Thus,

developing countries accept much wider obligations to allow foreign entry into the economy, free from access conditions, and to refrain from giving preference to domestic firms in their development strategy. These treaties are thus non-reciprocal in this critical respect.⁴²

An additional problem, mentioned in the previous section, is that it is impossible to predict how the arbitrators in the international arbitration tribunals will apply the vague treaty provisions to a specific case. Tribunals interpreting the same type of obligations in the same situations have come to different conclusions (see case 6, below). As shown in case 8 (Argentina v CMS), many have interpreted the treaty standards broadly, expanding the protection provided to investors. An additional complication is the expense. Even if the host state wins the case, the financial costs of the procedure tend to be extremely high and put a significant burden on developing countries' budgets, to the extent that these costs may consume roughly half of the entire Justice Department annual budget of a large developing country.⁴³

The 11 case studies below document the extent to which international investment rules have inhibited governments when they regulate in the general interest. Most of the 11 cases refer to conflicts related to land, water or agriculture. But, even those cases that are less directly related with those three sectors, are also very relevant in order to understand what could be happening shortly, once that the many investment projects that are happening in the land, water and agricultural sectors mature and conflicts between investors and host countries begin to raise. For every case study, the paper presents the background of the specific case, the government measure that was seen as a violation of the investment agreement, the response of the investor and the outcome of the specific case. At the end of each case study some more general lessons are drawn regarding the flaws in the existing investment-rules frameworks and their implications for land, water and food security issues.

Access to Land

Case 1 – Sawhoyamaxa vs. Paraguay⁴⁴

Background

In Paraguay, the population is 47 per cent rural and 14 per cent undernourished. One of the key causes of malnourishment among rural communities is landlessness. Indigenous communities are particularly affected. The Sawhoyamaxa community, consisting of 100 indigenous families, has its traditional territory in the eastern part of the Chaco region. Since the mid-1970s 60,000 hectares in this area – including parts of the Sawhoyamaxa territory – have been owned by a German citizen. After having lived scattered in different places, the Sawhoyamaxa community attempted to overcome hunger and malnutrition and gain legal title to 14,400 hectares of their traditional lands now in the hands of the German citizen. They initiated a series of legal proceedings against Paraguay in 1991. Although the Paraguayan Constitution allows for expropriation (with compensation) of land under similar circumstances and Paraguayan authorities had acknowledged the Sawhoyamaxa community's right to the land, the land was not expropriated and returned to them.⁴⁵

Government Measures

In 2001, after national legal solutions were exhausted, the Sawhoyamaxa brought their case to the Inter-American Human Rights system. In 2006 the Inter-American Court (CIDH) ruled in favour of the community and ordered that the land be returned to the people within 3 years.⁴⁶ In its argumentations, the Court ruled that: *'the enforcement of bilateral trade treaties does not justify non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands by its own and that*

generates rights for individual human beings and does not depend entirely on reciprocity among States. Thus, the CIDH rejected the Paraguayan state's justification for non-enforcement of the Sawhoyamaya Community's land rights.

Investor response

In 2000, in a previous case very similar to this one (the 'Palmital case') the German Embassy in Paraguay had sent a letter warning the Paraguayan government that expropriation of land owned by German citizens would be a breach of the Germany-Paraguay BIT. Since then the Paraguayan senate has kept this in mind and refused to expropriate lands held by Germans, as this could lead to international arbitration. The German government has so far refused the demand of German civil society groups to acknowledge its extraterritorial human rights obligation to cooperate with Paraguayan authorities in the fulfilment of the Sawhoyamaya's land rights. It refused to write a second letter clarifying that the BIT does not exclude expropriations under such circumstances. Such a letter would have helped Paraguayan authorities in this case and in similar ones.⁴⁷

Outcome

Until mid 2010, the Paraguayan government did not enforce the ruling of the Inter-American Court with regard to the expropriation of the German citizen's land.⁴⁸

Key Lessons

BITs combined with the fear of international investment arbitration can be used by the Paraguayan state as an excuse for not implementing measures to resolve conflicts that threaten the human rights of its inhabitants. The measure that needed to be applied in this case was in line with the Paraguayan Constitution, the rulings of the Inter-American Court for Human Rights, the indigenous peoples' right to land as per the UN Experts Seminar on Indigenous People rights, and was crucial for ensuring the food security of this indigenous community. The Paraguayan government refused to apply its own constitution and international commitments, intending to justify itself by a trade treaty, giving priority to possible investments over the rights of an indigenous community. Unfortunately, this is not the only case of its kind in Paraguay. The Palmital peasants faced a similar situation as they claimed legal title to 1,003 hectares of an estate held by German citizens.⁴⁹

This case also shows that, unfortunately, the international human right courts do not have the same power of sanction as international investment arbitration courts to enforce its rulings.

Case 2 – Glamis Gold Ltd. Vs. USA

Background

In 2000, Glamis Gold, a Canadian mining company, applied to the American Bureau of Land Management for approval for an open-pit gold mining project in an area adjacent to the California Desert Conservation Area (CDCA)⁵⁰. This area was created by federal law to protect its special archaeological, environmental, cultural, and economic resources. Glamis' mining project was expected, based on the report of the Advisory Council on Historic Preservation, to cause 'irreparable damage to sacred and historic Native American resources' located around the project.⁵¹

Government Measure

In 2003, as the permit was still being assessed at the federal level, the State of California amended the Surface Mining and Reclamation Act that governs mining activities in the state. The amendment prohibited surface mining located within one mile of a Native American sacred site in the CDCA unless the mine was later backfilled to conditions prior to mining (i.e. to original surface elevation).⁵²

Investor Response

In 2003, Glamis filed a NAFTA claim against the U.S., stating that the amended regulation breached the 'fair and equitable treatment' and 'protection from expropriation' provisions of NAFTA and requesting \$50m in compensation. Glamis claimed that the backfilling requirement was discriminatory and rendered the mining project worthless. Glamis chose to initiate the claim through NAFTA, after having failed its litigation efforts in front of federal and local US courts (but before exhausting all US legal instances).⁵³

Outcome

The ICSID tribunal dismissed both of Glamis' claims and required Glamis to bear two-thirds of the proceedings costs and the United States one-third. The court ruled that the amended regulation did not cause substantial enough economic impact to justify Glamis' expropriation claim and did not 'represent a gross denial of justice' that would validate the claim of breach of minimum standard of treatment. Some specialists argue that this decision was a concrete result of the more precise definition of 'fair and equitable treatment' that had been included in the applicable investment treaty.

Key Lessons

NAFTA's Chapter 11 (like other investment treaties) does not require investors to exhaust local solutions before resorting to costly international arbitration courts. This case shows that even developed countries with strong local regulatory systems, not to mention the average developing country, are also subject to the risk of being brought to international investment courts and paying a share of the arbitration expenses for pursuing measures aiming at protecting the country's resources.

An additional element that facilitates international arbitration by investors is the broad definition of these two main provisions: 'fair and equitable treatment' and 'compensation in the case of expropriation' (see Box 5). In fact, these two provisions are the ones most often invoked by investors and the ones arbitrators have most relied on as a basis for ruling that a treaty has been violated and awarding damages against the state. This is true for the majority of the cases discussed in this paper as well as in, for example, all 30 award cases against Andean Community states.⁵⁴ It's not surprising, given the variety of meanings that can be attached to these standards and the very wide range of government activity that can potentially be scrutinized on grounds of being 'unfair' or 'inequitable' or having otherwise caused the investor any economic harm. As explained in Box 5, a measure can be found to be unfair or inequitable 'regardless of the treatment offered to the state's own investors'.

The broad definition of this provision has made it the easiest to invoke in a variety of cases against state measures and has placed alarmingly wide-ranging discretionary power in arbitrators' hands in resolving investor-state disputes. For example, while in the 'Glamis Gold vs. USA' case ICSID arbitrators understood that 'governments are generally free to change regulatory standards in response to changed circumstances or priorities', another series of tribunal decisions (see Occidental No. 1 case, for example) imposes an obligation on governments not to change regulatory standards that were in effect when a foreign investment was made: 'obligation to ensure a transparent and predictable framework for investors' business planning and investment'.⁵⁵

Access to Water

In July 2010, United Nations General Assembly passed a resolution declaring 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of the right to life'.⁵⁶ This resolution, adopted by 122 countries, has no binding implications. But it means a huge amount to those that fight for water justice against governments and corporations that are not respecting their rights and for those who work to achieve the effective recognition of people's basic human rights (the right to a

livelihood, the right to basic services, the right to be safe from harm, the right to be heard and the right to be treated as equals).

The international investment system is far from incorporating these advances into its rules. Investment treaties consider water a mere commodity and usually no human rights consideration is taken into account when dealing with water-related investment conflicts. The following four cases show the risks this implies for developing countries and how vulnerable they are when trying to protect their people's basic human rights against transnational corporations.

Case 3 – Pacific Rim Mining Corp. vs. El Salvador

Background

El Salvador is a densely populated country with limited water resources that has been witnessing increased interest in investing in its mining sector since the price of gold began to climb in 2000. Pacific Rim, a Canadian-based multinational firm, proposed an underground gold mining project in El Dorado in the basin of El Salvador's largest river using a process employing large amounts of water and cyanide to extract gold from the ore it excavated.⁵⁷ In 2002 Pacific Rim merged with Dayton Mining Corporation (a Canadian mining company that had been operating in El Salvador since 1993), acquired their exploration permits and began exploratory drilling.⁵⁸ In order to obtain the exploitation permit (mandatory to start operating a mine) Salvadoran law requires companies to submit a series of studies, such as an Environmental Impact Assessment (EIA) and a feasibility study, which eventually became the reason for the dispute.⁵⁹

Government Measure

The EIA submitted by Pacific Rim in 2004 was considered inadequate and the feasibility study incomplete by the government, arguing that it lacked information and clarity on the impacts of the project's water usage and the risk of cyanide contamination.⁶⁰ An independent study reported that the project would require between 65 and 120 litres of water per second (an average Salvadoran uses roughly half that amount of water in a day). This will inevitably impact the water table at the local level and will generate an acid drainage that would reach levels well above the limits permitted for drinking water and water in aquatic ecosystems.⁶¹ These concerns regarding the environmental impacts of the project together with the enormous pressure exerted by the Salvadoran civil society organizations against it pushed the Government to reject the exploitation permit, conditioning it to the submission of a more detailed EIA.⁶²

Investor Response

In 2009, Pacific Rim Mining Corp. filed a claim under the US-Central America Free Trade Agreement (CAFTA) through a subsidiary in Nevada (U.S.A.), demanding hundreds of millions in compensation from El Salvador.⁶³ The company claimed that it completed the legal requirements for the acquisition of an operating permit and considered the government's rejection to be a violation of CAFTA's provisions on national treatment, most favoured nation, fair and equitable treatment and 'compensation in the case of expropriation'.⁶⁴

Outcome

The case is still in progress and has received a lot of public attention, partly because CAFTA's transparency provisions are allowing public scrutiny of the process and partly because of the public scandal created by the assassinations in Cabañas of several environmental activists related with the campaign against gold mining activities in central Cabañas area.⁶⁵

Key Lessons

The existing international investment regulatory framework under CAFTA allowed Pacific Rim to challenge the Salvadoran government's ability to enforce an existing legal

requirement that is applicable to all national and foreign investors in the mining sector. The government's rejection is also crucial for the protection of the country's water resources and people's access to this resource.

This case also shows how the system allows investors to 'shop' for the best forum or BIT to be used in arbitration. In order to be able to file a case invoking CAFTA's provisions, Pacific Rim didn't act under its original nationality, Canadian, or through one of its Cayman Island-based subsidiaries, since neither of them are part of CAFTA. Its Nevada office enables the company to utilize CAFTA's investment rules even though it has no operations in the United States.

Even if the case is ruled in favour of El Salvador, the government has already incurred significant arbitration costs. This case is a clear example of how such a framework provides the flexibility and tools for investors to subject governments to lengthy and expensive arbitration processes even when the state is simply enforcing existing legal requirements aimed at protecting the country's resources.⁶⁶ This could be a significant obstacle facing developing country governments as they attempt to issue or enforce food security and land regulations that may involve foreign investors.

Finally, the transparency provisions under CAFTA have allowed this conflict to continue under the scrutiny of the public eye even after being transferred to the ICSID tribunal. Under these conditions, any decision made by the company or the arbitrators in relation to the process will be publicly known, which is something that cannot be said of most of the disputes settled under BIT's rules.

Case 4 – *Aguas del Tunari vs. Bolivia*

Background

In the late 1990s Bechtel (a multinational U.S.-based firm) was granted a 40-year lease to operate the water system of the Bolivian city of Cochabamba through its subsidiary Aguas del Tunari. The company applied a 50 per cent increase in water fees for local users within weeks after it started operating the system. After the increase, water fees represented 25 per cent of the monthly income of families living on minimum wage. The rate increase caused citywide protests, which led the government to warn Bechtel's managers that it could not guarantee their safety.⁶⁷

Government Measure

Bechtel was able to sue the Bolivian government through the ICSID even before it could issue any measure to protect Bolivians' right to water. In fact, it was the omission of any measure taken by the Bolivian government that triggered Bechtel's claim.⁶⁸

Investor Response

Through a subsidiary based in The Netherlands, Bechtel filed for ICSID arbitration in 2000, claiming that the Bolivian government had breached the full protection and security provision (under the 'fair and equitable treatment' article, see Box 5) of the Dutch-Bolivian BIT when it failed to provide protection against protests. Bechtel requested compensation of \$50m.⁶⁹

Outcome

The case remained in arbitration for six years until Bechtel settled for a symbolic payment of 30 cents, after considerable international public pressure and the risk of bad publicity.⁷⁰

Key Lessons

As stated above, the Bolivian government didn't introduce any measures, either before or during the conflict. It seems likely that the bad publicity and public opinion were major factors leading Bechtel to settle, which potentially saved Bolivia millions of dollars in

compensation payments. International investment arbitration cases, however, don't always get to the public eye or, if they arrive, firms are not always very concerned about getting a bad reputation (which could be the case with Pacific Rim, for example, as it has no brand behind it or even other business operations that would be put in jeopardy). BITs often give investors the option to choose the court where the arbitration will be handled. Investors seeking confidentiality out of fear of bad publicity and public pressure may choose courts that allow for such confidentiality (e.g. UNCITRAL) (see Box 4).

Although this specific case was closed without a ruling against Bolivia, it still shows that BITs allow firms to ask for payment of market value damages (including not only actual losses but also anticipated future profits) to the investor if they don't receive 'full protection and security' from the host country 'regardless of the treatment offered to the state's own investors'. This shows the huge level of protection that this system provides to the investor and the financial burden that this can suppose for developing countries. Risk is an intrinsic element of any investment activity and the market has developed instruments that companies use to protect their investments against the risks that may arise over the course of the investment (i.e. comprehensive insurance policies). BITs provide investors an outrageous level of protection that is almost unknown in the context of any other economic activity and that weakens host states' capacity to regulate their most strategic sectors and protect even the most legitimate of their public interests. In this sense, the recent statement made by the Australian Government is very positive, rejecting the inclusion of investor-state dispute resolution procedures in its trade agreements with developing countries and proclaiming that, at the end of the day, it's the responsibility of the investor (and not of the Australian government) to assess the risks of investing third countries and get covered against them.⁷¹

Finally, this case is another example of how 'forum shopping' practices can be used. The Bolivian government argued that they had negotiated the concession on the basis that disputes were to be resolved in accordance with Bolivian laws, and had not consented to ICSID arbitration under the Dutch-Bolivian BIT. They argued that Bechtel had no links with The Netherlands until a subsidiary established a presence there after the concession was awarded in order to acquire Dutch nationality and, therefore, the right to use the Dutch-Bolivian BIT, which best served their interests. The majority of the tribunal decided that it was entitled to hear the case. A dissenting arbitrator stated that further inquiry should have been undertaken by the tribunal to investigate 'the motivations and the timing' of the decision by Bechtel to restructure the corporate ownership of Aguas de Tunari.⁷²

Case 5 – Aguas Argentinas S.A. vs. Argentina

Background

A consortium of local and foreign investors, including Suez (French), Vivendi (French), Anglian Water Group (British) and Aguas de Barcelona (Spanish), created the Argentinian company Aguas Argentinas S.A. ('Aguas'). In 1993, the company entered into a 30-year contract to manage the water and sewage services in Buenos Aires.⁷³ Aguas controlled the provision of the biggest water and sewage services system under private management in the world, covering a region of 10 million inhabitants.⁷⁴

Government measure

As the financial crisis that hit Argentina in the late 1990s became more severe, the government issued a series of measures to mitigate its effects. One of these measures was the freezing of water prices charged to consumers.⁷⁵ In fact, Aguas had already managed to increase prices by 88.2 per cent between 1993 and 2002. This increase was unrelated to the accumulated inflation during that same period, which was only around 7.3 per cent.⁷⁶

Investor Response

In 2003, Aguas filed an ICSID claim stating that Argentina had breached the 'Fair and Equitable Treatment' of the French, Spanish, and UK-Argentina BITs. Aguas argued that it was entitled to 'modifications of rates in order to maintain the economic equilibrium of the project over its lifetime'.⁷⁷ The Argentinian government argued that it should have the right to protect the people's right to water and to put appropriate policies in place to mitigate the impact of crises or states of emergency. The measure freezing water tariffs was intended to ensure continued access to water during the financial crisis.⁷⁸ Furthermore, the government argued that the foreign investors, not being a legal party in the concession contract, should not be allowed to start an arbitration concerning this concession. Instead, the local company should have pursued the case in the local courts.⁷⁹

Outcome

On July 30, 2010, the ICSID tribunal released a decision in which it agreed that there was a breach of the 'fair and equitable treatment' principle. It rejected Argentina's defence of this situation due to a state of emergency. A future decision will determine how much Argentina has to pay.

Although the tribunal ruled in favor of the companies, this case set a fundamental precedent, because for the first time, an arbitration tribunal working under the ICSID rules decided to accept the participation of civil society organizations as *amicus curiae* even though the parties (in this case, the companies) had opposed it.

Key Lessons

The case raises concerns around the ability of BITs to limit government policy space even in 'states of necessity/emergency'. This has significant implications for the ability of developing governments to issue pro-food security and sustainable development policies. A regulatory framework that is not sensitive to developing countries' needs to respond to states of emergency and which is capable of restraining the ability of governments to respond under those circumstances will most likely impede the pursuit of measures intended to deal with more persistent issues such as food security, sustainable management of natural resources or universal access to land and water.

As stated before, this case presents an important precedent not only due to its transparency achievement but also because of the reasons given by the tribunal for allowing the participation of civil society groups in the process. The tribunal argued that the case was 'of special public interest' and that it could pose a wide range of complex issues related to public and international law, including human rights issues. The ICSID tribunal also noted that acceptance of *amicus* briefs could also have the benefit of increased transparency in arbitration proceedings between investors and states.

Case 6 – Biwater vs Tanzania

Background

In the framework of broader privatization efforts, Tanzania obtained funding for \$140m from the World Bank, African Development Bank and European Investment Bank for a comprehensive programme to repair and extend Dar es Salaam's water and sewerage infrastructure. The funding was conditioned on having a private operator replacing DAWASA, the public agency that had been managing and operating the water and sewage system in Dar es Salaam since 1997. In February 2003, after six years of process, the local operating company City Water, which is part of the British-German joint venture Biwater Gauff, was awarded with a 10-year lease contract and became the private operator.

Government Measure

Since the company started operating the water system suffered a continued deterioration. City Water experienced severe infrastructure problems and found it extremely difficult to

bill and collect from customers for the services it provided. According to the Amicus Curiae Submission to the ICSID Tribunal Biwater Vs Tanzania, the information available from different independent auditors' shows that the investment failed mainly due to the company's poor performance, failed business judgement, incompetence and lack of sufficient managerial and financial resources dedicated to the project, rather than by acts or omissions of the Tanzanian Government.⁸⁰ One of these reports on Tanzania's privatization efforts, financed by the World Bank and provided by a former World Bank expert stated quite clearly: 'The primary assumption on the part of almost all involved, certainly from the donor side, was that it would be very hard if not impossible for the private operator to perform worse than DAWASA. But that is what happened'.⁸¹

Therefore, in 2004 when City Water requested an increase in the tariffs paid by the citizens of Dar es Salaam, the Tanzanian Government rejected it. As the worsening of the water system continued, relations between the Government and Biwater started to deteriorate. By mid-2005, after months of negotiations and mediations, Tanzanian authorities announced the termination of the lease contract, occupied the City Water facilities and deported City Water's senior managers.

Investor response

Biwater Gauff brought two claims against Tanzanian authorities. One was based on the investment contract itself (under UNCITRAL rules) and the other was based on the UK-Tanzania BIT (under ICSID rules) alleging expropriation and violation of the principle of fair and equitable treatment. In the ICSID claim, Biwater requested \$20m (the equivalent of two years' worth of water payments by the people of Dar es Salaam). The Tanzanian government argued that Biwater failed to meet its contractual obligations, performing worse than its public predecessor. If the government was to meet its citizens' need for safe water, it had no choice but to terminate the 10 year contract after 22 months.

Outcome

The UNCITRAL tribunal released a decision in January 2008. The tribunal, citing World Bank evidence, found that the water and sewerage services had deteriorated under City Water's management and therefore it awarded \$3m in damages to DAWASA. The ICSID tribunal, however, declared that the Tanzanian government had breached the expropriation provisions of the UK-Tanzania BIT. However, the tribunal argued there was no damage to be compensated financially, as the action of the Tanzanian government did not cause any injury.⁸²

Key lessons

This case shows the inconsistency of investor-state arbitration procedure outcomes. In one tribunal decision, Tanzania was awarded modest damages because Biwater did not fulfil its contractual obligations. In the other decision, Tanzania was found to have violated the BIT rules. It should be kept in mind that in both cases, the investor launched the claim and Tanzania had to defend itself. The current system does not allow governments to impose or enforce any contractual obligations because they can't make claims against investors.

Other Cases

The following cases have a less direct link with public policies aimed at pursuing people's access to land and water. However, they are also very valuable examples, as they show how international investment rules may inhibit governments from putting in place policies aimed at reversing deeply embedded discriminatory situations, protecting public health, responding to a financial crisis or ensuring adequate standards of living for a vulnerable social group. In all of these cases, the link between public policies and measures that could be implemented to promote national food security can easily be

made. In a context where foreign investment in land and water is already on the rise, it's particularly important to draw lessons from these past experiences.

Case 7 – Italian and Luxembourgish Investors vs. South Africa

Background

Until 1994, South Africa's National Party Government imposed an apartheid system that deprived the black South African population of access to adequate education, self-employment opportunities and other rights, and left 62 per cent of black South Africans living below the poverty line. After democracy was installed, the government issued a series of policies known as the 'Black Economic Empowerment (BEE)' aimed at expanding the opportunities available to black South Africans.⁸³

Government Measure

One of these policies/regulations was the 2002 Minerals and Petroleum Resources Development Act which required that 26 per cent of companies in the mining industry be owned by 'Historically Disadvantaged South Africans' that the mineral wealth is owned by the state, and that investors are re-licensed if they met certain criteria (relating mainly to commitment to the BEE).⁸⁴

Investor Response

In 2007, a number of Italian citizens and Luxembourg-based corporations engaged in mining in South Africa registered an arbitration request at the ICSID. The request claimed that the Act breached the BIT's 'protection from expropriation' provision. The Italian Embassy announced its government's support for the investors' claim.⁸⁵

Outcome

In November 2009, the investors requested suspension of the arbitration. Available information suggests that this request was filed soon after the Tribunal accepted two petitions for participation by a coalition of non-governmental organizations and the International Commission of Jurists. In the official proceedings of the case, the claimants argue that they wanted a suspension of the process because there was an offset-agreement reached between the operating companies and the South African mining authorities (the 'offset-agreement') which had brought some partial relief. The authorities had granted them new order mineral rights without obliging the claimants to sell 26 per cent of their shares to Historically Disadvantaged South Africans. Instead, the operating companies would have to comply with a set of performance requirements.⁸⁶

As a result of this request, the case was dismissed on August 4, 2010. The claimants were forced to pay 400,000 euros to the South African authorities.

Key Lessons

Investors' home states (typically capital-exporting countries) are also playing a role in affecting the course of international investment arbitration cases. The German Embassy exerted political pressure on the Paraguayan government by referring to the Germany – Paraguay BIT to prevent the land transfer to the Sawhoyamaxa community. In this case, it was following the intervention and support of the Italian Embassy and government that the Italian investors decided to raise an international arbitration claim against South Africa.⁸⁷ The launch of the ICSID claim was clearly a tactical move by the investors in order to force the South African government to negotiate an agreement.

Although the case was suspended before the tribunal could decide on whether the government action represented expropriation, it will still have implications on the implementation of other BEE policies in other sectors. As other foreign investors resort to lengthy and expensive international arbitration, it will be more difficult for the South African government to enforce its BEE policies. The comparison could also be extended to any pro-food security measures that developing governments may pursue in the future.

Even if it's impossible to draw a clear cause-effect link between the increase of public attention to this case and its closure, this case shows that secrecy and lack of transparency are still, sadly, key elements in most of the instruments of this system (with some exceptions, as we have seen). As already discussed above, it's likely that transnational firms are much less keen to continue with the dispute once it is brought under the scrutiny of the public eye.

Case 8 – CMS Gas Transmission Company vs. Argentina

Background

In 1992, the Argentinian state-owned enterprise Gas del Estado was divided into two gas transportation companies and eight gas distribution companies to be opened for private investment. Transportadora de Gas del Norte (TGN), one of the two gas transportation companies, was granted a 35-year license for gas transportation in 1992. In 1995, CMS, an American gas transportation company, bought 29 per cent of TGN shares.⁸⁸

Government Measure

Towards the end of the 1990's, as a response to the serious financial crisis that unfolded in Argentina at that time, the government enacted a series of decrees and resolutions to mitigate the effects of the crisis. One of these measures was the suspension of the adjustment of gas tariffs to the U.S. producer price index (PPI). In 2000, the gas companies agreed to this suspension for a period of six months. In mid-2000, the companies were requested to agree to an extension of this period to two years.⁸⁹

In 2001, as the crisis became more severe, the government issued another set of emergency measures including completely terminating the right of licenses to adjust tariffs to the U.S. PPI and to calculate tariffs in U.S. dollars.⁹⁰

Investor Response

CMS, who considered U.S. PPI adjustment 'a legitimately acquired right' and a basic condition of the privatization tender, appealed administratively and legally to reinstitute tariff adjustments. All administrative appeals were rejected by the government and its final legal appeal is still pending.⁹¹

In July 2001, CMS filed an ICSID arbitration request claiming that the above mentioned measures had 'devastating consequences' on its share value and tariff revenues. As such, it claimed that the Argentinian Government had breached the 'fair and equitable treatment' and the 'protection from expropriation' provisions of the USA-Argentina BIT. On the other hand, the government based its response on the argument that it had acted out of a state of necessity and emergency.⁹²

Outcome

In 2005, the arbitrators issued their decision in favour of the investor. They rejected Argentina's state of necessity argument and stated that it had breached the 'fair and equitable treatment' provision of the US-Argentina BIT. Argentina was required to pay compensation in the amount of \$133.2m and to purchase CMS's shares in TGN for the amount of \$2.15m.

Key Lessons:

This is another example of the broad definition of both the 'fair and equitable treatment' and 'state of necessity' provisions in BITs. In this case, the arbitrators interpreted the 'minimum standard of treatment' article within the 'fair and equitable treatment' provision as requiring Argentina to maintain a stable business environment even in the middle of a financial crisis⁹³.

A review of dispute cases related to Argentina's financial crisis shows the inconsistency of investment regulations when it comes to interpreting the conflict of interests between investor rights and governments' rights to respond to crises and meet their human rights

obligations. In 2007, an ICSID tribunal accepted the defence of necessity used by Argentina in *LG&E vs. Argentina*, a case based on facts and issues similar to this one⁹⁴. In the two cases – and in most cases against Argentina – it was up to the arbitrators’ discretion whether they chose to apply the ‘state of necessity’ provision under the interpretation provided by the BITs or the one provided traditionally by international law.⁹⁵

Case 9 – Ethyl Corporation vs. Canada

Background

Ethyl Corporation is a U.S. firm and the sole shareholder of Ethyl Canada Inc., which manufactures and distributes MMT (methylcyclopentadienyl manganese tricarbonyl – a fuel additive).⁹⁶

Government Measure

On June 1997 the Canadian government issued a regulation banning the inter-provincial transport and international import of MMT due to public health and environmental concerns⁹⁷. Studies had been reported to show the severe negative health impacts of its inhalation at high doses. Although the health and environmental impacts of long-term lower dose exposure are unknown, the use of MMT had already been banned in California and areas of other 7 U.S.’s States since the 1970s.⁹⁸

Investor Response

In response, on October 1997 the U.S. firm brought a NAFTA arbitration claim against Canada, claiming that the ‘MMT Act’ breached three of Canada’s obligations under Chapter 11 of the NAFTA: expropriation, national treatment and performance requirements.⁹⁹ The company based its claim in the fact that several reports defended that there wasn’t evidence that MMT harmed human health.¹⁰⁰

Outcome

On July 1998, Canada settled by agreeing to remove the ban. Contradicting what had been its own official position until a few months before, the Canadian Government declared publicly that MMT was not an environmental or a health risk and agreed paying \$19m in compensation to Ethyl for its reasonable costs and loss of profits.¹⁰¹

Key Lessons

This case was initiated after Canada implemented a public health and environmental precautionary measure of general application in the country. In fact the case was initiated before, when Ethyl submitted intent to file suit against Canada while the law was still in parliamentary discussions, six months before the Act had come into force. Although the measure was based on serious public interest concerns, in line with U.S’ federal laws and the international public law ‘precautionary principle’,¹⁰² Ethyl was able to challenge it thanks to NAFTA’s provisions.

Although Canada’s Government and Parliament had declared a few months before that ‘the risks and potential impacts on the public interest necessitated regulating the use of MMT’, soon after the arbitration claim was presented the Government decided to remove the measure and compensate the firm.¹⁰³ Time seems to be showing that Canada’s Government precautionary position was adequate. Although there still isn’t scientific consensus about it, concerns about health and environmental risks associated with MMT have remained, and as a result major refiners in Canada have voluntarily stopped using MMT.¹⁰⁴

This case indicates that the Investment Treaties’ dispute settlement system can give private investors power to influence and modify legitimate national policies on their own interests. It also shows the degree to which expropriation standards are open to broad interpretation going beyond direct expropriation to include ‘regulatory’ expropriation by the state.

It's easy to imagine similar cases taking place in the near future in developing countries if they decide to further regulate their agriculture sectors (environmental and safety requirements for agricultural inputs, for example) or the management of their land and water resources with this same 'precautionary approach', in a way that can enter into conflict with foreign investors' interests. The 'Pacific Rim' case explained above is another example along this same line.

Case 10 – Cargill Incorporated vs. Mexico

Background

Cargill is a U.S.-based international producer and marketer of food and agriculture products. In 2004 it was one of Mexico's key importers of High Fructose Corn Syrup (HFCS) from the U.S. HFCS is a sweetener made from yellow corn. Yellow corn production was highly subsidized in the U.S., which made U.S. production artificially competitive. At that time, the sugar cane sector maintained 400,000 direct jobs in Mexico,¹⁰⁵ compared to the 7,000 jobs that the HFCS sector provided.¹⁰⁶

Government measure

In 2004 the Mexican government imposed a 20 per cent tax on soft drinks using sweeteners other than cane sugar.¹⁰⁷

Investor Response

In 2005, Cargill filed an ICSID claim stating that the tax measure breached the national treatment provision of the NAFTA.¹⁰⁸

Outcome

The arbitrators issued an award in September 2009 in favour of Cargill stating that the 'treatment' of the investment of the U.S. investors, who were 'in like circumstances' to Mexican investors because they competed 'face-to-face' in supplying sweeteners to the soft drink industry, was less favourable than that accorded to Mexican investors. The award amounted to \$77.3m in damages plus interest and costs, the largest award in a NAFTA investment dispute to date. The case was not accessible to the public.¹⁰⁹

Mexico's 'soft drink tax' was not only challenged by Cargill. In 2004, the U.S. Government complained before the WTO's Dispute Settlement Body.¹¹⁰ Here again, the Mexican Government was found to have breached its international 'national treatment' obligation as relates to the U.S. under GATT 1994.¹¹¹ In January 2007, Mexico reported that it had complied with its obligations by withdrawing the measure that was the subject of this dispute.

Key Lessons

This case shows, first of all, that through several different mechanisms the international trade system constrains countries' policy space when it comes to instituting certain types of domestic measures to support their strategic economic sectors. On the other hand, this same system allows the continuation of distorting agricultural subsidies, precisely the type of measures that developed countries rely more strongly on.

Although the WTO Dispute Settlement Body's decision is a serious interference in Mexico's policy space, it's not a precedent as dangerous as the Mexico-Cargill case. Unlike the WTO dispute settlement process, cases taken before international arbitrators don't provide access to appeal, are secret and don't allow third parties to participate. Also, their enforcement mechanisms provide for direct execution of the award. The characteristics of this dispute settlement mechanism make BITs unique among international treaties.

If, as foreseen, the presence of foreign investors in the agriculture, land and water sectors in developing countries increases, the 'national treatment' provision can become seriously problematic. Interpreted as broadly as it has been in the past, this provision

would prohibit any domestic measure that prioritises the treatment given to domestic actors, no matter what purpose the measure is designed to pursue.

Case 11 – Vattenfall vs. Germany¹¹²

Background

Vattenfall is a Swedish energy utility company that wanted to build a coal plant on the banks of the river Elbe in the city of Hamburg. This project received a lot of public attention from local politicians and environmental groups who argued that the project would be far larger than what is needed to meet Hamburg's energy needs and that smaller, environmental-friendly alternatives were available. Vattenfall announced its project in 2004 and eventually received a provisional construction permit from the city of Hamburg in 2007.

Government Measure

The City of Hamburg's Urban Development and Environmental Authority issued a final permit to Vattenfall in 2008. Yet this final permit included additional restrictions related to the plant's impact on the water quality of the Elbe River. These conditions seemed to be necessary under EU law and particularly the EU's Water Framework Directive.

Investor Response

In April 2009, Vattenfall launched an ICSID claim against Germany under the arbitration rules of the Energy Charter. The Energy Charter is a multilateral agreement signed by 52 states that governs investments in the energy sector. This agreement guarantees fair and equitable treatment for investors and compensation in the case of expropriation, similar to provisions included in the bilateral and regional investment treaties mentioned in the other cases above. Vattenfall is asking for 1.4bn euro as compensation for the additional requirements imposed by the German authorities.

Outcome

Since the beginning of the case the German Federal Ministry of Economics and Technology, which is responsible for handling the case, has remained resolutely silent on the matter despite the obvious public welfare issues and public interest in the arbitration. Apart from saying that it was in talks with Vattenfall in an effort to reach an amicable settlement, the German government has offered no specifics on the dispute. Thanks exclusively to some media reports, it was made known that both parties had agreed on a six-month halt of the arbitration process to facilitate an amicable settlement.

In October 2010 the German Government confirmed the existence of an amicable agreement to end the arbitration, but refused to publish any detail of the agreement because the case was still pending.¹¹³ According to the information provided by the media reports, Germany will not pay financial compensation but, in return, Vattenfall will get a new licence for the use of water and the permission to build a 200m euro hybrid-cooling tower.¹¹⁴

Key lessons

This case again demonstrates the very secretive nature of investment arbitration. The information about this case has been made available mostly through research work done by NGO's, activists and journalists, even though the potential award would be paid with a significant amount of taxpayers' money. Even if the case is finally closed without a financial compensation award, it will remain an example of how international investment arbitration can undermine legitimate policy decisions, even when the country involved is a big developed country such as Germany.

In this case, the investment rules of the Energy Charter Treaty were invoked to launch international arbitration. Even though this case concerns environmental legislation in a developed country, it's relatively easy to extrapolate it to food security issues in a developing country. The Energy Charter Treaty also covers possible investments in

biofuel projects. Therefore, it's a relevant treaty to be taken into account when looking at access to land and food security issues.

Questions for debate

Throughout the paper it has become clear that many challenges related to international investment rules should be resolved in order to make them more balanced and development friendly and in order to allow host governments to develop their capacity to introduce sound and equitable regulatory frameworks controlling access to natural resources. The questions below summarize the main issues to be dealt with.

Transparency

Traditionally, investment agreements have provided great confidentiality to investment disputes, limiting the possibilities for stakeholders to access information and participate in the dispute settlement process. This has allowed firms and states to escape from public scrutiny. Although some progress has been made recently (the U.S. has improved the transparency and participation provisions of its investment treaties since CAFTA), this issue is still one of the most negative aspects of the international investment system.

- Is it acceptable that cases that may involve billions in public money and very relevant public issues are hidden from public opinion?
- Is defence of the parties' privacy reason enough to keep these cases secret? Could an increase in transparency and participation conditions make a difference on companies approach to the resolution of these disputes or on arbitrators' ruling?
- How relevant can public opinion be? Have U.S. reforms tending towards more transparency shown any positive outcome so far? Will the Pacific Rim vs. El Salvador case (case 3) become an interesting precedent in this sense?
- In a particular case, could social pressure on the investor's asset owners make them engage in the company's decision making process and avoid the company challenging a host country policy measure or least provoke the debate inside the decision making body? How concerned are these asset owners with public opinion?
- Is there any existing private sector's Corporate Social Responsibility framework in which this transparency demand could be integrated, independently of what is established in the relevant investment treaty?

Level of detail of provisions

International investment treaty provisions are usually very generic and brief, which leaves arbitrators huge room for interpretation when judging different cases. As shown by the abovementioned cases, this has frequently led to unpredictable or investor-biased outcomes. How could this issue be tackled?

- Could investment treaties be reformed to clarify the limits of expropriation standards?
- Should investment agreements explicitly recognize the state's right and obligation to protect legitimate public interests (such as human rights, public health and safety, environmental sustainability)? This would avoid broad interpretation of expropriation such as in the Ethyl Corporation vs. Canada case (case 9).
- Should investment agreements recognize that in case of necessity, e.g. a financial or food crisis, host governments have to be able to impose certain measures on investors (foreign and domestic) in order to ensure economic or social stability? As shown in both cases against Argentina (cases 5 and 8), arbitrators have not always recognized the 2001 financial crisis as a state of emergency.

- Could arbitrators' mandates be adapted in that sense too? Could they be forced to explicitly explain in each case how they have weighed the different conflicting interests (state of necessity, legitimate policy objectives, investor's protection...) or how they have taken into consideration relevant international 'soft law' consensus? (i.e. 'FAO/WB' Responsible Agricultural Investment Principles'¹¹⁵).
- If the limits of investor protection under the investment treaties are not clarified, could this mean that any non-discriminatory policy measure that, leaving ownership titles intact, causes the investor economic harm may be regarded as a compensable expropriation (as seen in the Canada-Ethyl case above)? Isn't this an inadmissible interference in the host country's sovereignty? Couldn't this lead to a future scenario in which a developing country, after introducing some investor performance requirements (along the lines of the FAO/WB's 'Responsible Agricultural Investment Principles', for example) is required to compensate foreign investors for the economic harm that this could cause them?

Investor responsibility

How could the system be reformed in order to address the current imbalances between country rights and foreign investor responsibilities? In other words, how to avoid a situation such as the Biwater vs. Tanzania case (case 6), where the Tanzanian government could not make use of any international mechanism to oblige Biwater to fulfil its contractual commitments to the citizens of Dar es Salaam, while Biwater could resort to two different international arbitrators to defend its interests?

What would the best way be to include investor obligations and/or codes of conduct in investment agreements to make them comply with host country laws and regulations, uphold all relevant international treaties in the work place and in the communities in which they are located and, generally, 'do no harm'?

- Allowing host governments, communities and individuals to have access to the same means of protection as investors do; i.e. access to the dispute settlement mechanisms as claimants?
- Ensuring that domestic courts and international human rights courts wield the same sanction power as arbitration courts do to enforce their rulings? This would, for instance, allow sentences such as the one from the Inter-American Court of Human Rights on the Paraguay case (case 1) to be enforced in spite of its contradictions with the German-Paraguayan BIT.

Would the elimination of investor-state dispute settlement mechanisms (to put a stop to foreign investors bringing international legal suits against national governments) be a desirable outcome? The recent Australian Government decision of not including investor-state dispute resolution procedures in its trade agreements is a positive precedent to follow up. As seen in the Foresti vs. South Africa case (case 7), bringing host states before international arbitration courts can be interpreted as a tactical move to force the host state to negotiate an agreement with the investor.

- Are state-to-state negotiations an alternative way of resolving these disputes that would allow the abolition of the investor-state mechanism? Or is the access to dispute settlement mechanisms an important 'asset' when it comes to attracting foreign investment and, therefore, do reforms need to be made 'within the existing system'?

In line with asking investors' home states to assume extra-territorial responsibilities for the actions of their investors abroad, would it be possible to ask home countries to condition investment credits and guarantees on investor compliance with basic standards (such as compliance with host countries' domestic laws or international human rights obligations)?

On some occasions investors' home countries have played an active role in company-state conflicts by exerting direct pressure on host countries to not harm its investor's interests if they don't want to face the consequences of breaking their BIT obligations (as seen with Germany in the Paraguayan case and Italy in the South African case above). By doing this, are home state governments breaking their extra-territorial obligations (especially when human rights violations are involved)? Is there a way for home states' CSOs to hold their governments liable when this happens?

- Even if investment treaties are not reformed, could companies (or even sectors) voluntarily set the limits under which they want the BIT's provisions to be interpreted and applied to them, in the context of their Corporate Social Responsibility policy or any other voluntary guidelines' framework?

Cost of arbitration

The dispute settlement mechanism chosen by signatory countries in most international investment treaties is very costly for the parties involved (both the defence expenses and the potential damages awards).

- Could the fear of facing a long and costly process be making host states, especially developing countries, be more prone to withdrawing controversial policies in favour of the investor? Does this fear deter them from seeking their rights in investment disputes even when they might well get a favourable decision? What could be done to minimize this effect?
- Damages awards are for loss of anticipated future profits and not just actual losses. Could this be a relevant reform to fight for (especially as some of the contracts span several decades)? If not, doesn't this imply that no reforms that somehow affect the investor's profit expectations can be introduced during the life of the contract? Wouldn't this then hinder developing countries' abilities to upgrade their social or environmental standards?
- Shouldn't investment treaties offer developing countries an alternative, allowing them to defend their interests without having to pay such a heavy price? What could this alternative be? The obligation to exhaust local legal solutions before going to international arbitrators? The need to provide legal support or subsidize the defence expenses of developing countries during dispute settlement processes?

Protection of strategic sectors

Some investment treaties (i.e. those signed by the US and Canada) include sectors that are excluded from the application of certain provisions (national treatment, most favoured nation...). Agriculture and related sectors (land and water) are not usually among the 'strategic' sectors excluded.

- Could this be an interesting option for developing countries to consider as a way of maintaining control over the functioning of their agricultural and food sectors? Would an agreement on 'positive lists' of sectors that want to attract foreign investment be a solution?
- What would the reaction of the investors' home states be to this proposal? As it is frequently interpreted from international investment treaties, the 'National Treatment' provision implies that any domestic measure that gives precedence to domestic actors is prohibited, no matter what the purpose of the measure is. This puts very serious constraints on developing countries' abilities to institute domestic measures to support their strategic sectors. Is this fair when this same international trade system allows the continuation of trade distortions (e.g. agricultural subsidies) precisely the type of measures that developed countries rely more strongly on? The

Cargill vs. Mexico case (case 10) shows the consequences of these imbalances in practice.

Conclusion

In recent years, access to the world's natural resources has been the object of important power struggles between corporations, states and communities. Given the recent surge in investment projects covering land, water and other agricultural sectors in developing countries, these conflicts are quite likely to increase. National governments and international institutions shape the legal context in which these different interests operate by means of national laws and international treaties. These govern, for example: foreign direct investment, land use, and environmental and social standards. This paper highlights the importance of one part of this legal framework: the international investment regime.

It must be admitted that developing country governments are not always committed to the defence of their states' general interests. They don't always show the desirable level of political will to propose and defend pro-poor and pro-development policy positions. Without the national powers in developing countries being really committed to achieving these objectives, it will be almost impossible to obtain any outcome that represents a noticeable and sustainable improvement in terms of poverty reduction and food security. But the international investment system has placed all the power in the hands of those who were already powerful. Not even the most committed of governments would find it easy to defy this system and succeed in giving the power over land and water back to the people.

Through the use of 11 case studies of investment arbitration disputes between companies and national governments, some important lessons have been drawn which reveal the main problems that could arise in the absence of a far reaching reform of the current international investment law system. As this paper argues, reform is indeed urgent and much needed.

First, there is a vital need to **increase the transparency and the accountability of the investment arbitration system**. In spite of its social implications and the significant amount of public resources they involve, investment arbitration disputes are held behind closed doors with, in most cases, no possible participation of stakeholders other than companies and national governments. By allowing public hearings and amicus curiae briefs, investors might be more reluctant to engage in arbitration disputes out of fear of bad publicity. More transparency will also foster more accountable behavior by national governments, as stakeholders will know to what extent their national government has been defending the public interest in a given investment dispute.

Beyond just providing more transparency, the parties involved should also consider making more and better use of other methods to deal with investment disputes, such as state-to-state arbitration or investment dispute mediation and avoidance.

Secondly, international investment treaty **provisions should be made more precise and balanced** in order to avoid conflicting interpretations by arbitration tribunals and in order to provide the necessary policy space for governments to regulate in favor of social and environmental objectives. With respect to provisions related to 'fair and equitable treatment' or 'indirect expropriation', for instance, it should be made clear which standard of treatment investors can expect or what exactly could be considered as being 'expropriation,' in order to avoid abuse of these provisions by investors. In more general terms, it is vital that investment treaty provisions provide a better balance between the rights and obligations of investors and host governments.

Third, it is essential that investment **treaties do not ban the use of performance requirements**. The difference between a good and a bad investment when allowing foreign investment into the domestic market often depends on the application of certain 'performance criteria'. These may be aimed at enabling productive spillovers, promoting technology transfer, creating decent jobs, enhancing environmental sustainability or allowing benefit sharing by local communities.

In more general terms, this paper shows that the current international investment regime can do a lot of harm to the public welfare because it hampers the ability of governments to act in response to broader concerns of human development or environmental sustainability. The investment arbitration system takes some important public policy decisions out of the hands of domestic courts and institutions, which in the case of developing countries leads to a further weakening of democratic institutions. Moreover, the mere cost of participating in investment arbitration disputes can be disproportionately high. Lastly, there is no consistent academic evidence arguing that more investment treaties lead to more foreign direct investment.

For all these reasons, it's not surprising that some countries, such as Ecuador, Bolivia, South Africa or Tunisia, have either withdrawn the commitments they made in investment treaties or have started a reform process of their bilateral investment treaty models (such as the recent proposal made by the Australian Government, that sets an interesting and positive precedent), based on arguments similar to the ones set forth here.

However, in the end, investors themselves decide both on how to proceed with their investment activities and on how to deal with investment disputes. Therefore, investors' self-imposed standards on these issues can be an important complement to the legal framework reform process and could help avoid many of the state-investor disputes.

Moreover, it is important to recognize that in many dispute cases, civil society can play an important role in documenting and exposing negative corporate behavior, particularly in the case of high-profile disputes. Many investors have withdrawn their complaints before investment tribunals because of the bad publicity generated.

As investors' attention in developing countries turns to sectors that are more closely related with food security and hunger reduction, the lessons learned from the 11 cases analyzed in this paper become extremely relevant. They anticipate what could be happening shortly in developing countries, once the many investment projects that are underway in their land, water and agricultural sectors mature and conflicts with investors begin to rise.

Notes

- ¹ In these paper a broad definition of 'International Investment Treaties' is used, that includes: Bilateral Investment Treaties (BIT); investment chapters in Regional Free Trade Agreements; WTO's GATS and TRIMS; other multilateral investment agreements (such as the Energy Charter) and firm-State or State-State sectoral investment contracts. A description of each of them can be found in the paper.
- ² FAO (2010), 'The State of Food Insecurity in the World 2010: Addressing food insecurity in protracted crises' Rome: FAO.
- ³ UN Millennium Project Task Force on Hunger, (2005), 'Halving Hunger: It Can Be Done', New York: United Nations Development Programme (UNDP).
- ⁴ World Bank, (2008), 'Agriculture for Development', World Development Report.
- ⁵ Calculations from the authors based in July 2010 data from the International Trade Centre (ITC) Trade map database (<http://www.trademap.org>).
- ⁶ Oxford Refugee Studies Centre, (2008), 'Climate Change and Displacement', Forced Migration Review, Issue 31 October 2008, Oxford, University of Oxford.
- ⁷ N. Stern (2006) 'The economics of climate change: the Stern review', Cambridge: Cambridge University Press.
- ⁸ Z Kundzewicz and JL Mata (2007), 'Chapter 3: Freshwater Resources and their Management', in IPCC WGII Fourth Assessment Report: Climate Change 2007: Climate Change Impacts, Adaptation and Vulnerability.
- ⁹ Rosegrant, Mark et al., (2007), 'Future Scenarios for Agriculture: Plausible Futures to 2030 and Key Trends in Agricultural Growth', Background Research for the World Development Report 2008.
- ¹⁰ Oxfam Novib, (2010), 'People, Planet and Proteins: Towards a just and sustainable livestock system', Discussion Paper, 2010.
- ¹¹ Cotula, L., Vermeulen, S., Leonard, R., y Keely, J. (2009), 'Land grab or development opportunity? Agricultural investments and international land deals in Africa', FAO, IFAD, IEED. Available at: http://www.ifad.org/pub/land/land_grab.pdf.
- ¹² AU Economic Commission for Africa, (2009), 'Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity, and Secure Livelihoods', Revised Version, March 2009.
- ¹³ The FAO estimates that additional investments of \$83 billion annually are needed in developing country agriculture and related downstream activities to meet global food needs in 2050. Developing countries' own capacity to fill that gap is limited. The share of public spending on agriculture in developing countries has fallen to around seven percent, even less in Africa, and the share of official development assistance going to agriculture has fallen to as little as five percent. An urgent, sustained and substantial commitment to investment in agriculture is necessary to reverse the decline in domestic and international funding for food security, agriculture and rural development in developing countries.
- ¹⁴ World Bank (2010), 'Rising Global Interest in Farmland. Can it Yield Sustainable and Equitable Benefits?'. Washington: The World Bank.
- ¹⁵ ILC, Commercial Pressure on Land, Monitoring Land Transactions. Retrieved March 16, 2011 from <http://www.commercialpressuresonland.org/monitoring-land-transactions>.
- ¹⁶ For example, the OECD guidelines for Multinational Enterprises provide a set of voluntary principles for responsible business behaviour which are based on different international human rights, labour and environmental conventions.
- ¹⁷ For more on alternative approaches to investor-state disputes see UNCTAD initiatives on alternative methods to resolve and prevent investor-state disputes www.unctad.org/templates/Page.asp?intItemID=5578&lang=1
- ¹⁸ Cotula, L., Vermeulen, S., Leonard, R., y Keely, J. (2009): 'Land grab or development opportunity? Agricultural investments and international land deals in Africa', FAO, IFAD, IEED. Available at: http://www.ifad.org/pub/land/land_grab.pdf
- ¹⁹ Smaller, C., Mann, H., (2009), 'A Thirst for Distant lands. Foreign investment in land and water', IISD, available on http://www.iisd.org/pdf/2009/thirst_for_distant_lands.pdf
- ²⁰ De Schutter, O. (2005), 'Transnational corporations and human rights: an introduction', Global Law Working Paper 05/01.
- ²¹ For a broader overview, see Singh, K. (2007), 'Why Investment Matters. The Political Economy of International Investments', FERN, The Corner House.

²² It is important to note here that liberalizing trade in services (and particularly WTO GATS' mode 3) can also be considered as liberalizing market access for investment.

²³ From 4 million ha to 45 million ha of land were involved, according to the cautious estimates presented by the World Bank in 2010. World Bank (2010), 'Rising Global Interest in Farmland. Can it Yield Sustainable and Equitable Benefits?' Washington: The World Bank.

²⁴ The Multilateral Agreement on Investment (MAI) was a draft agreement negotiated between members of the Organisation for Economic Co-operation and Development (OECD) in 1995–1998. Its purpose was to develop multilateral rules that would ensure international investment was governed in a more systematic and uniform way between states. When its draft became public in 1997, it drew widespread criticism from civil society groups and developing countries, particularly over the possibility that the agreement would make it difficult to regulate foreign investors. After an intense global campaign was waged against the MAI by the treaty's critics, host nation France announced in October 1998 that it would not support the agreement, effectively killing it due to the OECD's consensus procedures.

²⁵ Bernasconi, N., Johnson, L., Belgium's Model Bilateral Investment Treaty: a commentary, International Institute for Sustainable Development, study commissioned by Oxfam-Solidarité, 2010.

²⁶ UNCTAD, (2009), 'Recent Developments in International Investment Agreements (2008-2009). IIA Monitor No.3 (2009). New York. Geneva.

²⁷ Ibid.

²⁸ The empirical data regarding the effectiveness of investment agreements at promoting investment to developing countries is mixed. See for example: Hallward Driemeier (2003) 'Do Bilateral Investment Treaties Attract FDI? Only a bit... and they could bite' World Bank; or Tobin, J y Rose-Ackermann, S, (2005): 'Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties'. Yale Law School Center for Law.

²⁹ Some tribunals, such as ICSID, have stronger mechanisms for enforcing decisions than others. In addition, it should also be mentioned that some countries (e.g. Zimbabwe) have refused to pay the compensation enforced upon them. Other countries (e.g. Egypt) have been very consistent in fulfilling their obligations.

³⁰ The U.S.-Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) and the Peru-U.S. TPA have fairly extensive transparency provisions in relation to investor-state arbitration. These provisions require the arbitration hearings to be open to the public and that most documents associated with these arbitrations be made public, including pleas and memorials, as well as awards, orders and decisions of the tribunal. The Peru-U.S. TPA also allows arbitration tribunals to accept amicus curiae submissions from third parties (see Investment Treaty News on http://www.iisd.org/pdf/2007/itn_oct30_2007.pdf).

³¹ For a more complete comparison between key aspects of international HR law and international investment law see Peterson, L., (2009), 'Human Rights and Bilateral Investment Treaties. Mapping the role of human rights law within investor-state arbitration'.

³² Peterson, L., (2009), 'Human Rights and Bilateral Investment Treaties. Mapping the role of human rights law within investor-state arbitration'.

³³ UNCTAD, (2010), 'Latest Developments in Investor-State Dispute Settlement, IIA Issues Note. 1 (2010). New York. Geneva.

³⁴ For example, see the 'Fair and Equitable Treatment' provision according to the Netherlands-Bolivia BIT: 'Each Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. More particularly, each Contracting Party shall accord to such investments full security and protection'.

³⁵ Christian Leathley, 'Focus not only on the arbitration tribunals but the laws under which they operate' on 'Join our serious debate for real change' on-line forum of the Network for Justice in Global Investment (<http://justinvestment.org/2009/10/join-our-serious-debate-for-real-change/>). Visited last time: November 29th 2010.

³⁶ For more information see: 'Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity' (April 2011), available in: <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state>. This position is part of the Australian Government trade policy that also indicates that they will not support the inclusion of "provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses or that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses'.

³⁷ Saipem S.p.A. v. People's Republic of Bangladesh (ICSID Case No. ARB/05/7). More information available in: www.icsid.worldbank.org

- ³⁸ For more information about these investment contracts see: Kachika, T. 'Land Grabbing in Africa: Why Governments Should Step It Up for Vulnerable Communities'. Working paper. Oxfam. Dakar. Senegal. See also: <http://farmlandgrab.org/> and <http://www.mofa.gov.sa/Detail.asp?InSectionID=3981&InNewsItemID=88796>.
- ³⁹ 'Public Statement on the International Investment Regime' made by 48 academics the 31st August 2010, www.osgoode.yorku.ca/public_statement/.
- ⁴⁰ Transnational Institute, (2010), 'Reclaiming public interest in EU's international investment policy', May 2010, p. 10, available on <http://www.tni.org/report/reclaiming-public-interest-europes-international-investment-policy>.
- ⁴¹ For an example of a list of performance requirements explicitly banned in a US BIT, see: Ibid, page 26.
- ⁴² Ibid. Pages 18-21.
- ⁴³ Ibid.
- ⁴⁴ For the information on this case, Rolf Kunneman from FIAN International has been consulted, Mr Kunneman has worked with the Sahowyamaxa community on this case. For more information see: R. Künemann (2010), 'Foreign Investment and the Right to Food', in BrotfürAlle et al (2010), *The Global Food Challenge: Towards a Human Rights Approach to Trade and Investment Policies – Case Studies on Trade, Investment and the Right to Food*, p.50'.
- ⁴⁵ Ibid.
- ⁴⁶ Ibid.
- ⁴⁷ Ibid.
- ⁴⁸ See <http://www.amnesty.org/en/region/paraguay/report-2009>.
- ⁴⁹ R.Kunneman (2010), 'Foreign Investment and the Right to Food', in BrotfürAlle et al (2010), *The Global Food Challenge: Towards a Human Rights Approach to Trade and Investment Policies – Case Studies on Trade, Investment and the Right to Food*, p.57, available on <http://www.fian.org/resources/documents/others/the-global-food-challenge/pdf>.
- ⁵⁰ ICSID Award Document in the Case of Glamis Gold Ltd. Vs USA
- ⁵¹ 'Environmental Regulation and NAFTA Investment Claims- Glamis Gold Ltd. v. United States' available on www.leg.state.vt.us
- ⁵² ICSID Award Document in the Case of Glamis Gold Ltd. Vs USA
- ⁵³ Jordan C. Kahn, *Striking NAFTA Gold: Glamis Advances Investor-State Arbitration*, 33 Fordham Int'l L.J. 101 (2009), available on <http://ir.lawnet.fordham.edu/ilj/vol33/iss1/3>.
- ⁵⁴ Van Harten, G (2008): 'Policy Impacts of Investment Agreements for Andean Community States'. Osgoode Hall Law School. York University.
- ⁵⁵ See 'Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador' (ICSID Case No. ARB/06/11).
- ⁵⁶ See: United Nations News Centre, 'General Assembly declares access to clean water and sanitation is a human right'. 28th July 2010. New York. (<http://www.un.org/apps/news/story.asp?NewsID=35456&Cr=sanitation&Cr1>). This UN General Assembly resolution is not the first piece of International Human Rights Law recognizing access to water as a human right. See also: the UN Committee on Economic, Social, and Cultural Rights General Comment #15 (<http://www2.ohchr.org/english/bodies/cescr/comments.htm>).
- ⁵⁷ Robert Moran, PhD, 'Technical Review of the El Dorado Mine Project Environmental Impact Assessment (EIA). Oct. 2005. Accessed September 16th, 2010. Available at: <http://www.miningwatch.ca/en/technical-review-el-dorado-mine-project-environmental-impact-assessment-eia-el-salvador>.
- ⁵⁸ ICSID Tribunal's Published Decisions on Pac Rim Cayman LLC Vs El Salvador (ICSID Case No. ARB/09/12): 'Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5'. Page 31. <http://icsid.worldbank.org/ICSID/Index.jsp>.
- ⁵⁹ Article 37. El Salvador Mining Law (Decreto Legislativo 544/1995).
- ⁶⁰ Robert Moran, PhD, 'Technical Review of the El Dorado Mine Project Environmental Impact Assessment (EIA). Oct. 2005. Accessed September 16th., 2010. Available at: <http://www.miningwatch.ca/en/technical-review-el-dorado-mine-project-environmental-impact-assessment-eia-el-salvador>.
- ⁶¹ Florian Erzinger, et al. 'El Lado Oscuro del Oro' Unidad Ecológica Salvadoreña (UNES) and Development and Peace. December 2008. Page 30. <http://www.unes.org/sv/PUB.HTM>.
- ⁶² FESPAD (2009) 'Resumen Legal: El Caso de Pacific Rim', legal analysis provided by the Fundación de Estudios para la Aplicación del Derecho (FESPAD). El Salvador.

⁶³Pacific Rim has asked for the compensation award to cover not only the expenses incurred during the exploration activities (US \$ 77 million) but also the lost profits sustained as a result of the rejection of the exploitation permit. For more information see: ICSID Tribunal's Published Decisions on Pac Rim Cayman LLC Vs El Salvador (ICSID Case No. ARB/09/12): 'Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5'. Page 31. <http://icsid.worldbank.org/ICSID/Index.jsp>.

⁶⁴ Ibid.

⁶⁵ For more information see <http://www.amnesty.org/en/news-and-updates/salvadoran-environmental-activists-killed-radio-station-staff-threatened-20100105>.

⁶⁶ El Salvador's problems with foreign investors in the mining sector will not end once this case is closed.. Another ICSID tribunal was selected in July 2010 to hear a second claim from two US mining entities against El Salvador under the CAFTA dispute settlement provisions. These companies alleged similar violations to those exposed by Pacific Rim. More details see: ICSID Case No. ARB/09/17 in www.icsid.worldbank.org

⁶⁷ <http://www.foodandwaterwatch.org/global/latin-america/bolivia/>.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ For more information see: 'Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity' (April 2011), available in: <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state>.

⁷² Peterson, L., "Tribunal split in Bechtel-Bolivia case over corporate nationality of investor", Investment Treaty News, 20-5-2005, available at: Peterson, L., "Tribunal split in Bechtel-Bolivia case over corporate nationality of investor", Investment Treaty News, 20-5-2005, disponible en <http://www.iisd.org/itn/page/3/?view=archives>.

⁷³ ICSID Case Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. vs. Republic of Argentina ICSID Case No. ARB/03/19.

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⁷⁸ ICSID Case Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. against Republic of Argentina, ICSID No. ARB/03/19.

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