Research-to-Policy Transitions in International Economic Law

By:

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Engaging with legal change in politically sensitive arenas involves distinctive challenges for those of us working at the interface between research and practice. Like many active in this field, I have often grappled with making sense not just of legal problems, but also of the sociopolitical relations in which those problems are embedded. This can shake received conceptions of law: in a thought-provoking article, Francisco-José Quintana and Justina Uriburu contrasted orthodox views of international law as a technical exercise promoting uncontroversial public goods such as the peaceful settlement of disputes, with more politically aware accounts that identify international law "as a terrain for struggle over alternatives, and rival forms of governance and authorities". Recognising the contested nature of law reform, and the power dynamics underpinning it, affects how we frame our research and action.

Consider debates about reforming the international system of investment treaties and investor-state dispute settlement (ISDS). Once negotiated through largely technocratic processes, investment treaties have more recently

attracted significant public scrutiny over what are inherently political decisions about the balance between corporate and public interests. Several states have revised their investment treaty policies and developed diverse – often competing – regulatory models, within international relations premised on unequal political and economic power.

Many reform initiatives occur in bilateral and regional negotiations, such as talks to 'modernise' the Energy Charter Treaty, a regional treaty protecting foreign investment in the energy sector. The United Nations Commission on International Trade Law (UNCITRAL) hosts the main multilateral talks. Its Working Group III on ISDS Reform is discussing procedural reforms such as regulating the financing of ISDS claims, changing the ways adjudicators are appointed and creating an appellate mechanism. The unassuming 'Working Group' label belies the stakes: in the more far-reaching reform options, the talks could establish new institutional structures with significant legal powers and gravitational pull.

Governments lead treatymaking, and UNCITRAL Working Group membership consists of states. But many scholar-practitioners contribute evidence or serve as advisors, government delegates and observers with accredited research institutions and non-governmental organisations. (I have been attending UNCITRAL Working Group sessions as an observer with the International Institute for Environment and Development, a research organisation working to promote a fairer, more sustainable world.) Our being 'insider-outsiders' can create difficulties: we participate by virtue of our perceived technical expertise, but the process is ultimately political, and this requires us to carefully consider our modes of engagement.

Working with evidence in political terrains

Conventional approaches view researchers as detached observers who can objectively analyse and explain the world, and policymakers as mobilising evidence to inform decisions. This paradigm can translate into institutionalised arrangements for linking research to policy. The UNCITRAL Working Group and the Academic Forum on ISDS provide one example, whereby scholars supply legal and empirical analysis for the Working Group's deliberations.

Sound policy needs evidence, but conventional framings of research-to-policy pathways are problematic. Policy problems typically originate in power imbalances as much as – often more than – in knowledge gaps. Ideological assumptions, economic interests and sociopolitical relations warp policy arenas. Researchers are part of this political economy: power permeates knowledge production, and variable proximity, influence and incentive structures shape relations between 'experts' and policymakers.

Investment treaty policy is no exception. The UNCITRAL process started off from an already-existing network of treaties that crystallises historical imbalances in negotiating power between capital-exporting and importing States. And as Nicolás Perrone showed in his book Investment Treaties and the Legal Imagination, the treaties' emphasis on protecting foreign investment – itself a political choice about the roles of State and enterprise in the global economy – implements a specific 'world-making project' developed by a coalition of business leaders, financiers and lawyers in the 1950s and 1960s.

Amidst systemic critiques of the investment treaty regime, the Working Group's remit is restricted to certain procedural reforms; some of these could reconfigure institutional arrangements for settling investment disputes, but the reforms would not change the fundamentals of a legal regime centred on protecting foreign investment. Government delegations from larger economies tend to dominate the Working Group's agenda, while interest groups have mobilised hegemonic narratives – such as the unproven claim that ISDS promotes foreign investment – to influence deliberations. Resourcing asymmetries place many developing countries at a disadvantage, and some developing country delegates were nervous about voicing concerns that might be misconstrued as 'anti-business'. Developing country delegations have participated to varying extents and taken diverse positions, and there has been little by way of collective action – compared to, say, the global climate talks, where the Least Developed Countries Group managed to get its perspective on the agenda.

Such complex contexts raise questions about how evidence might genuinely influence policy. Even more fundamentally, we are often confronted with questions such as: what criteria can inform choices on whether and how we engage? What does research independence look like in terrains shaped by

power imbalances, and how can we ensure it? What role should experts play in political decisions? At root, these are questions of strategy, reflexivity and agency.

Strategy

Policy rarely starts with a blank slate and the parameters of the possible are often restricted. Vested interests and complex procedures mean change is often difficult and slow. And lawyers' instinctive preference for building on existing practice – an approach the Working Group has abundantly emphasised – avoids 'reinventing the wheel' and benefits from tested models but is inherently conservative.

Research offers greater latitude in examining problems and possible responses. But if we want to feed directly into policymaking, we must usually go where it is at that point in time. Scholar-practitioners who identify structural problems and see fundamental departures as the only way to address urgent imperatives, such as human rights violations and climate change, may need to consider different registers and time horizons: interrogating the fundamentals in academic research, while also engaging with the 'here and now' of policy discussions. The former can expose deep-seated problems and lay the foundations for longer-term change; the latter must come to terms with real-life constraints limiting policy options.

This can create dilemmas on whether to engage, how, and when to exit. Narrow but effective reforms can be co-extensive with more far-reaching change, moving in the same direction if not the full distance. They can also be impactful: meaningfully reforming the financing of ISDS claims, and the arrangements that enable shareholders to seek compensation for indirect ('reflective') losses, and the amounts of money at stake – particularly damages awarded to ISDS claimants – could have significant reverberations for the ISDS industry. But narrow reforms can also hinder systemic change, for example if they consolidate legal structures or political legitimacy. Discussing the UNCITRAL process, James Gathii noted the risk that reform could "result in entrenching rather than addressing some of the fundamental problems". And by occupying the policy arena, cosmetic reforms can, in Daria Davitti's words, "foreclos[e] the possibility for more radical transformation".

This assessment of whether a proposed reform, on balance, goes some way towards tackling a problem, or compounds the systemic issues the problem originates in, is, for me, the lodestar when navigating dilemmas on whether to engage, and in what ways, and when weighing the pros and cons of various reform options. The assessment is a function of how we understand the problem, reform prospects and available alternatives, and different people can reach different conclusions. Politics can shift over time, the assessment is always ongoing and we may need to revise our approach in an iterative way.

Reflexivity

A further complexity is that, in many policy contexts, researchers are not detached outsiders but "part of the social world" they study. For example, many practice – or aspire to practice – in the lucrative ISDS industry, or participate in policy processes as delegates with governments or observer organisations. And to access opportunities for providing evidence in policymaking, researchers must be able to 'speak the language' of the process. These factors can limit not just who is included but the perimeter of the policy discussion itself.

Even more subtly, our personal histories, life experiences and worldviews inevitably colour our analysis and action. I work at a research institute advancing sustainable development, and see value in making our normative frameworks transparent. But all research embodies certain assumptions and priorities, reflected in the topics we write about and the ways we frame research questions and methods. (Some social scientists use the term reflexivity to describe this examination of how our experiences and beliefs influence what we do.) Setup also matters. For example, researchers confining their explorations to narrow questions determined in the Working Group will likely serve the interests of delegations that are better able to shape the agenda.

We can ensure rigour in our analysis and integrity in our action, but we all come with a perspective that situates us in the policy arena. And as Jean Ho aptly put it, purported neutrality in political spaces characterised by substantial power imbalances often entails siding with dominant interests, and with status quo or mild reformist positions. In many cases, the debate is not between 'neutral' and

‘political’ positions but between different kinds of politics – from operating within power structures to exposing them and supporting subaltern voices.

Recognising these issues can help us calibrate our research to maximise its independence: for example, by generating ideas that can proactively stimulate Working Group reflection, rather than merely executing its research assignments; earmarking research for developing countries’ themes; and more explicitly organising research as a dialectical process that allows different analyses to come into open-minded dialogue and empirical confrontation.

Agency

The third set of questions is about agency. Investment law is a complex field, and policymaking clearly needs technical expertise. But the fact that law reform involves political as well as technical stakes raises questions about who speaks, whose voice matters and, ultimately, what counts as evidence. Research can inform democratic decisions or sustain technocratic, top-down processes. Certain scholar-practitioners enjoy privileged access to policymaking. Well-established institutions, particularly from the Global North, can more easily feed into UNCITRAL discussions than the many groups affected by investment disputes – for example, citizens relying on privatised utilities and indigenous peoples displaced by mining.

Yet, these people’s life experiences give them specific social legitimacy to discuss investment governance. Their experiences can also provide much-needed insights into policy options. When I met activists and local government officials living in the shadow of multiple ISDS claims in Santurbán, Colombia, they had strong views about the system – but global reform processes could not have felt more removed. And in years working with communities affected by large-scale investments in the Global South, I often wondered whether matters might look different if more international investment lawyers were to come, and meet, and listen.

We should recognise that we can learn not just from legal analyses but from grounded perspectives as well. Legal scholarship rewards detached doctrinal explorations, typically presented in inaccessible academic journals and according to framings that often fail to speak to local realities. But engaging with the legal architecture of global economic governance raises fundamental

questions of method, which also warrant scholarly exploration. For example, which sociolegal approaches can most effectively illuminate the local impacts of international treaties? How can we ensure the framing puts at centre stage those whose fundamental rights are at stake? How can we co-produce knowledge together with our 'research participants'?

We need to develop rigorous methods that can respond to these questions. We also need to create opportunities for peer learning; the IEL Collective exemplifies the shared spaces that can support this reflection as regards international economic law.

Richer research, more effective policy?

Questions of strategy, reflexivity and agency have become common currency in certain action-research approaches at the intersections between law and sociopolitical change. While they depart from orthodox framings of international economic law, they can enrich our understanding of the relationship between research and policy. And by informing our research questions and methods, and our approaches to supporting policymaking, they might, perhaps, help us produce more effective reforms.

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