

Why Do International Investment Treaty Standards Limit the Duty to Protect Human Rights? A Historical and Interpretive Analysis

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ABSTRACT: International investment treaties and arbitration have generated serious debate about their potential, and in fact ability, to constrain the policy space and regulatory autonomy States need to protect human rights. This paper holds the view that understanding why investment treaty standards limit sovereign powers with respect to the protection of human rights requires an inquiry beginning from the history of investment protection by treaty and an assessment of the terms of investment treaties in relation to that history. From a historical and interpretive review, the paper argues that the primary objective of the investment regime as it developed then was to limit sovereign powers to protect private business interests. The terms of investment treaties reflect their private business focus. The protection of human rights has never been a primary consideration of the international investment regime. The paper calls for a restructuring of investment treaty objectives and terms to include human rights and other broader societal interests. It also advises countries not to sign investment treaties that are inconsistent with their constitutional and international legal obligations to protect human rights.

Key Words: History, Human rights, international investment treaty, internationalization, investment, policy space, public interest, regulatory autonomy, treaty

Introduction

Much ink has been spilled on the adequacy and future of international investment treaties (“IITs”) and arbitration.¹ Indeed, the key debate engaging the attention of

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investment law scholars and policy makers is the role of investment law and arbitration in protecting legitimate investment interests without compromising the obligations and rights of States to protect the public interest, including in particular human rights and the environment. This paper proposes, through historical and interpretive analysis, to address the ability of IITs and arbitration to simultaneously respond to: (1) States' need for policy space and regulatory autonomy to protect human rights;² and (2) the protection of foreign investment and investors' rights. Are international investment agreements not primarily intended to restrict governmental regulation in the interest of foreign investment protection? Can IITs, given their history, terms and objectives, achieve any effect other than limit governmental regulation? This paper argues that it is not only difficult to understand the IITs framework without first looking at its historical context; it is even more difficult to appreciate the relationship between foreign investment treaties and arbitration on the one hand, and States' policy space and regulatory autonomy on the other, without situating the nature of the relationship within the historical context of IITs.

A fundamental question to consider is whether IITs can address the concerns they are or were designed to resolve without compromising States' need for regulatory autonomy to meet human rights and other obligations. Historically, international IITs were designed in response to foreign investors' and their home countries' concerns over political and regulatory risks, such as expropriation and nationalisation or

¹ Examples: Hartan, G. V. (2007) *Investment Treaty Arbitration and Public Law*, Oxford: Oxford University Press; Rogers, C. A., Alford, R. P. eds (2009) *The Future of Investment Arbitration* Oxford: University Press; Brown, C., Miles, K. (2011) *Evolution in Investment Treaty Law and Arbitration* Cambridge: University Press; and José E Alvarez et al eds (2011) *The Evolving International Investment Regime: Expectations, Realities, Options* Oxford University Press.

² The concepts of *policy space* and *regulatory autonomy* are used here to refer to the freedom of action and administrative, policy and regulatory flexibility and discretion states need to be able to initiate and make policies and laws and to implement them and to regulate the way individuals and businesses should conduct themselves in society.

subsequent changes in regulation that affected investments.³ IITs were thus aimed at limiting regulatory actions from inception. Therefore, the more compelling issue is whether investment treaties could ever have a different effect given their history, objectives and terms. Scholars critical of investment treaty law and arbitration have failed to link the nature and implications of investment treaty law and arbitration to their history and objectives. This paper thus adopts the perspective that an attempt to understand the relationship between IITs, the international investment dispute settlement system, and the policy choices of States with respect to public health, environment, and human rights “must start with an inquiry into the historical context and conditions” within which investment treaty arbitration was constructed.⁴ An understanding of this history will shed light on the terms, interpretation and enforcement of IITs, and the question of “imbalance” between investors’ interests and States’ regulatory autonomy in investment treaty arbitration.

The concerns about the implications of IITs for human rights protection are legitimate because it is a duty of States under municipal law and international law to ensure the protection, realisation, and enjoyment of human rights. For example, the *International Covenant on Economic, Social and Cultural Rights*⁵ states that each State party has an obligation to take all appropriate steps “including particularly the adoption of legislative measures” with a view to achieving the full realisation of the

³ In 1938 Mexico nationalized its petroleum industry, then dominated by the United Kingdom and United States companies. Dugan, C. F. et al (2008) *Investor-State Arbitration* Oxford University Press p. 11. The loss of foreign investment in Germany following World II also led to this country signing the first investment treaty with Pakistan. Jeswald W. Salacuse (2010) *The Law of Investment Treaties* Oxford University Press, 91.

⁴ Yelapaala, K. (2008) “Fundamentalism in Public Health and Safety in Bilateral Investment Treaties [Part I]” in *Asian Journal of WTO and International Health Law and Policy* vol. 3, p. 242 wherein the author rightly stated that:

The apparent imbalance that exists in many BITs between their restraints on the policy choices of sovereign states in the areas of health and safety and the protection of foreign profiteers has historical roots in the political economy of colonialism and the geopolitical conditions surrounding BITs.

⁵ GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976.

rights it recognises.⁶ In other words, it is a duty on States to respect, protect, and fulfil economic, social and cultural rights including the right to: favourable conditions of work (e.g. safe and healthy working conditions); form and join trade unions; social security; an adequate standard of living; freedom from hunger; enjoyment of the highest attainable standard of physical and mental health; education; and participation in cultural life.⁷ The International Covenant on Civil and Political Rights⁸ also recognises various civil and political rights including the inherent right of every human being to life⁹ and requires States to ensure the realisation of the various rights it recognises and protects.¹⁰ Also, under the *Universal Declaration of Human Rights*,¹¹ member States of the United Nations have pledged themselves to achieve the promotion of universal respect for and observance of human rights and fundamental freedoms.¹² All of the foregoing international human rights instruments emphasize the central role of the State in the protection of human rights.

This paper argues that the inadequacy of international investment tribunals to effectively respond to States' need for policy space and regulatory autonomy to perform their usual functions in the protection of human rights lies not so much in interpretations adopted by investment tribunals *per se* but in the history, structure and terms of IITs. This is because the internationalization of foreign investment protection through international investment treaties and their institutional frameworks, historically, was primarily aimed at protecting the private business interests of foreign investors. This overarching historical objective to advance private

⁶ Ibid art 2(1).

⁷ Ibid arts 6-15.

⁸ GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976.

⁹ Ibid art 6(1).

¹⁰ Ibid art 2(1).

¹¹ GA Res 217 A (III), 10 December 1948.

¹² Ibid Preamble, para 5.

foreign investment interests greatly influenced the terms of existing IITs. Therefore, the international investment regime as it was constructed and as it exists was not aimed at protecting the interests of *both* foreign investors and States' need for space to protect human rights; nor do the terms of the treaties allow this objective to be achieved. Therefore, States' need for policy space and regulatory autonomy to respect, protect, and fulfil human rights cannot be attained unless the terms of IITs are reconstructed.

The History of the Development of International Investment Treaties

IITs were developed to replace customary international law and domestic legal systems that had hitherto been used to protect aliens and their property abroad. The basic principles of customary international law ("CIL") regarding the protection of foreign property include prohibition against discriminatory taking of alien property. The Permanent Court of International Justice ("PCIJ") in upholding this principle held that "the prohibition against discrimination... must ensure the absence of discrimination in fact as well as in law. A measure which in terms is of general application, but in fact is directed against... [foreign] nationals... constitutes a violation of the prohibition."¹³ Another principle of CIL aimed at protecting alien property against arbitrary seizure is that the taking of foreign property must be for public purpose or for the purpose of public utility.¹⁴ In the *Case Concerning Certain German Interests in Polish Upper Silesia*,¹⁵ the PCIJ held that the only measures prohibited are those which international law does not sanction in respect of foreigners and "expropriation for reasons of public utility, judicial liquidation and

¹³ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory: Advisory Opinion* PCIJ Ser AB No 44 (1932) p. 28.

¹⁴ Nicholson, F. J. (1965) "The Protection of Foreign Property Under Customary International Law" IN *Boston College Law Review*, vol. 6 no3, p. 399.

¹⁵ *Case concerning certain German interests in Polish Upper Silesia (The Merits)* PCIJ Ser A No 17 (1926)

similar measures are not affected...”.¹⁶ A third principle of CIL is that where there is expropriation of foreign property, the foreigner must be compensated. This principle has generated much controversy. The issue is whether general legislative and policy measures intended to establish better economic conditions or social order, when applied to both foreign investors and nationals alike, should still provide for full compensation of expropriated property.¹⁷

A number of criticisms were raised against CIL for which a new system for the protection of foreign property was advocated. It has been argued for instance that CIL had “virtually nothing to say about the right of foreign investors to make monetary transfers from a host country or to bring foreign managers into the host country to manage their investment.”¹⁸ Secondly, CIL was criticised on the grounds that its principles were subject to varying interpretations. For example, it was argued that CIL did not have principles governing the calculation of compensation.¹⁹ Thirdly, it was submitted that CIL was not suitable for investment protection because it generated controversy and disagreements between home countries and host countries.²⁰ Fourthly, it was argued that “existing international law offered foreign investors no effective enforcement mechanism to pursue claims against host countries that seized their investments or refused to respect their contractual obligations.”²¹

As a result of the foregoing perceived deficiencies of CIL, aliens and foreign investors “had no assurance that investment arrangements and contracts made with host country governments would not be subject to unilateral change by those

¹⁶ Ibid p. 22.

¹⁷ Nicholson note 15, p. 400.

¹⁸ Salacuse, note 3 p. 76.

¹⁹ Ibid.

²⁰ Ibid

²¹ Ibid.

governments at some later time.”²² Foreign investors experienced expropriations and forced renegotiation of contracts particularly in developing countries.²³ Therefore, to:

...[C]hange the dynamics of this struggle to protect the interests of their companies and investors, capital exporting countries began a process of negotiating international investment treaties. As a result of this process, a widespread *treatification* of international investment law took place in a relatively short time.²⁴

It follows that CIL on foreign investment protection had its limitations. The development of IITs was primarily aimed at “effective” protection of investments made abroad, as opposed to the “weak” protections accorded under CIL. There was a deliberate effort on the part of “capital exporting” countries to develop a system of investment protection that was predominantly and primarily private investment protection aimed at replacing the “weak” provided under CIL.

Further, a number of limitations were identified as associated with domestic legal systems for which reason, it was argued, it was necessary to erect an international system for investment dispute resolution. Thus, it was argued that one “serious barrier to obtaining redress in some host-country courts was local bias.”²⁵ The investment treaty arbitration is, therefore, meant to serve as a protection against local prejudice.²⁶ It was also said that, because of State immunity, foreign investors could not successfully pursue claims against host countries.²⁷ Again, “efficiency of

²² Ibid, p. 78. The beginning of the twenty-first century involved the increased use of international treaties to protect foreign investment than was the case during the immediate post-World War II era. Ibid at 79.

²³ Ibid.

²⁴ Ibid, pp. 78-79

²⁵ Dugan, note 3, p. 13.

²⁶ Ibid.

²⁷ Ibid, p. 14.

local courts”²⁸ was identified as another of the many concerns of foreign investors, because “developing countries often lack responsive, robust legal systems capable of effectively adjudicating complex claims.”²⁹ Further in the past, “partially in response to perceived abuses by foreign investors, some host nations tried to restrict a foreign investor’s remedies to their local courts and deprive them of the protection of international law, aware that any remedy there would likely be illusory.”³⁰ In short:

The shortcomings of both national and international remedies for government interference with foreign property rights led to the development of depoliticized alternatives. These efforts were naturally supported by developed countries, which sought both greater protection and greater access to markets for their citizens’ capital, intellectual property, and assets. The efforts were also supported by many developing countries.³¹

This paper mainly argues that although there were claims about developing countries benefiting through increased investment inflows from the protection of foreign private capital if an international rather than domestic dispute resolution system was developed, the international investment protection regime developed principally to protect the interests of developed countries’ private capital. This is because developed countries invested abroad and they and their investors were not satisfied with CIL and domestic legal systems; they instead advocated for the use of IITs. The protection of human rights, the environment, and other public interests concerns did not feature at all in early efforts to protect investment by treaty.

²⁸ Ibid, p. 15.

²⁹ Ibid.

³⁰ Ibid, p. 16.

³¹ Ibid, p. 45.

The Objectives and Terms of International Investment Treaties

The international investment regime is faced with the serious challenge of how to secure the benefits of investment liberalisation and protection without abridging the freedom of governments to pursue legitimate non-investment objectives such as the protection of human rights.³² This paper argues that not only the history, but also the terms of IITs, consistent with that history, make it impossible that the investment regime can secure the benefits of investment liberalisation without abridging States' duty to protect and pursue economic and social rights for citizens. In other words, because IITs developed to replace CIL and domestic legal systems, which were declared ineffective, everything was done under the treaties to secure absolute protections to foreign investment by limiting States' regulatory autonomy as reflected in the broad and ill-defined terms of the treaties. The *challenge* facing the investment system then lies in how to reconcile States' broad and unqualified commitments under IITs with their obligations to protect human rights.

The *bilateralism* of "bilateral" IITs (in that they are intended to advance mutual interests) is questioned on the basis of their structure and terms. The very objectives and terms of "bilateral" investment treaties make any claim about their *bilateralism* seriously suspect. To suggest that a treaty is 'bilateral' is to argue that it is not only agreed to by two parties but also that there are reciprocal give-and-take duties and rights thereto. However, it is very clear from the terms of IITs that they are very asymmetrical and lopsided. IITs accord rights to investors and impose duties on States to ensure the realisation of these rights. IITs are, however, completely silent on the rights of States, except perhaps the right to sue. The IITs do not impose corresponding duties on investors. IITs by their terms provide in favour of foreign

³² Mattoo, A., Subramanian, A. (1998) "Regulatory Autonomy and the Multilateral Disciplines: The Dilemma and a Possible Solution" in *Journal of International Economic Law* vol. 1, p. 303.

investors in terms of: national and most-favoured-nation treatments; fair and equitable treatment; full protection and security; compensations for expropriation, civil wars and disturbances; free transfer of funds and repatriation of investment capital and returns; subrogation on insurance claims; obligation to observe any other obligations undertaken but not expressly contained in the investment treaty; right to protection under laws or rules that provide for better treatment to foreign investors than the investment treaty does; and dispute settlement before investment tribunals.

The foregoing treaty terms are intended to guarantee unqualified protection for private investment interests irrespective of their limiting implications for States' right to regulate and to exercise other sovereign powers to protect human rights. The terms of the IITs reflect the reason for which they were put in place to replace CIL and domestic legal systems, namely, to limit governmental regulation so as to protect private investment abroad. If development and the protection of human rights are at the heart of the international investment protection regime, how do the terms of the treaties as enumerated help advance these objectives? Thus, as a matter of *form*, IITs between two States can be described as "bilateral" in the sense that they are between two States and claim to be aimed at promoting the interests of both States; hence, this paper's use of the concepts "formal bilateralism" and "formal symmetry". Since in *substance*, however, "bilateral" investment treaties contain provisions protecting only the rights of foreign investors, they are substantively unilateral, or "unilaterally symmetrical"; hence, this paper's use of the concepts of "substantive unilateralism" and "unilateral symmetry".³³ The restraining effects of

³³ Yelapaala, note 4, p. 251 stating that:

In a bilateral setting, developing countries suffer from unequal bargaining power in their dealings with developed countries... Negotiations with weak... uninspired and ill-informed governments cannot guarantee the effective protection of the interest of those states... They may, therefore, undertake burdensome obligations without an understanding of the full import of such obligations and without reciprocal benefits.

investment treaties are much about the provisions of these treaties as it is about the history of investment protection and international economic relations.

The Criticisms and Backlash Against International Investment Treaties and Arbitration

IITs and the investment dispute settlement system have come under serious attack in recent times by policy-makers and international investment law scholars. The dominant concern among investment scholars, policy-makers and countries around the world is that investment treaty law and arbitration is not the sole guarantee of foreign investment attraction and development. In fact, investment arbitration is seen as a threat towards States' progress and development because, as argued by D. Z. Cass, a commitment to foreign investment promotion and protection can shape the national policies of States in a variety of fields, including development policymaking, human rights and environmental protection.³⁴ IITs have crippling implications for constitutional understanding and design, ideas about governance, democracy, jurisprudence and policy. David Schneiderman has argued that transnational legal regimes can have numerous domestic legal effects on State projects because they "may directly have the force of law according to domestic constitutional standards or domestic constitutions themselves may be expected to conform to the demands of regional or international integration."³⁵ It "is these implications which... form the most fruitful research agenda for those interested in the system and its development."³⁶

³⁴ Cass, D. Z. (2001) "The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade" in *European Journal of International Law*, vol. 12, p. 74.

³⁵ Schneiderman, D. (2008) *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* Cambridge University Press, p. 114.

³⁶ Cass, note 35, p. 74.

These implications obviously raise “constitutive questions of *legal system making or jurisprudence*, and compliance.”³⁷

States themselves have reacted in varied ways to the implications of investment treaty law and arbitration to limit their right to regulate and to protect human rights. Suzanne Spears has analysed the responses of States regarding IITs’ implications for the right to regulate.³⁸ She argues that a number of States in Latin America have responded by: (1) denouncing, renegotiating or refusing to enter into IITs; (2) withdrawing from the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention); or (3) by seeking to limit the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID).³⁹ Also, the United States, Norway and South Africa are undertaking or have undertaken reviews of their IITs to determine whether they strike an appropriate balance between the principles of investment protection and host States’ need for regulatory flexibility or whether additional changes need be made. Finally, some States have issued joint interpretations of their existing international investment agreements or have adopted new international investment agreements with language that seeks to address the tension between competing interests.⁴⁰ These responses demonstrate that both developing and developed countries have serious concerns about investment treaty law and arbitration in so far as they limit their duty to protect human rights and the environment.

In addressing the limitations of investment treaty arbitration in relation to the protection of human rights, concerns have also been raised and attempts made to

³⁷ Ibid, p. 73.

³⁸ Spears, S. A. (2010) “The Quest for Policy Space in a New Generation of International Investment Agreements” in *Journal of International Economic Law*, vol.13 no 4, pp. 1043-1044.

³⁹ Entered into force on 14 October 1966.

⁴⁰ Spears, note 39.

explain conflicting decisions in arbitration decisions themselves.⁴¹ Investment treaty law and arbitration has also been criticized as lacking transparency, accountability, independence and the rule of law.⁴²

Conclusion

The basic issue, and perhaps the sole one, that has engaged the attention of investment scholars, policy-makers and governments is the concern that investment treaty law and arbitration has the ability to freeze policy space and regulatory autonomy even in times of financial and economic turmoil. This paper argues that the nature and effects of international investment treaties ought to be situated in the context of the history of these international legal instruments. The internationalization of foreign investment protection through the use of international investment treaty law and arbitration, historically, was primarily aimed at protecting the private business interests of foreign investors; human rights and environmental protection was not and has never been a primary consideration of the international investment regime. The terms of IITs as they exist perfectly reflect the historical reasons underlying the erection of investment treaty law and arbitration. Consequently, IITs and arbitration, in their current form, can never work to the satisfaction of both investors and states; they will serve their overriding objective of protecting investors' interests.

The regulatory chilling effects of IITs are inevitable because they were designed to achieve that effect. IITs cannot, therefore, achieve any different effect than limit policy space and regulatory autonomy of States. Therefore, IITs, if they really are to

⁴¹ Schneiderman, D. (2010) "Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes" in *Northwestern Journal of International Law and Business* vol. 30, p. 263.

⁴² Born, G. B., Shenkman, E. G. "Confidentiality and Transparency in Commercial and Investor-State International Arbitration" in Rogers and Alford, note 1, p. 5.

be symmetrical and mutually protective of the rights of parties to them, must spell out the duties and rights of all the parties and not just one of the parties. In other words, there is the need to reconsider the terms of IIAs as a *fundamental* priority if States are to live up to their human rights obligations.

Further, article 103 of the UN Charter makes it clear that in the event of a conflict between the obligations of the members of the United Nations *under the Charter* and their obligations under any other international agreement, their obligations under the Charter “shall prevail”. Article 55 of the UN Charter requires the promotion of “universal respect for, and observance of, human rights and fundamental freedoms for all.” This language is authority for the proposition that human rights obligations trump trade and investment agreements. Principles 17 and 29 of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights⁴³ also state that:

States must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations. Such obligations include those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security.

States must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation. The compliance with this obligation is to be achieved through, inter alia: a) elaboration, interpretation,

⁴³ September 2011.

application and regular review of multilateral and bilateral agreements as well as international standards; b) measures and policies by each State in respect of its foreign relations, including actions within international organisations, and its domestic measures and policies that can contribute to the fulfilment of economic, social and cultural rights extraterritorially.

The Committee on Economic, Social and Cultural Rights has also weighed in on extra-territorial obligations related to trade and investment. The Committee urges full application of a human rights-based approach to international trade and agriculture policies, including an assessment of the impact of subsidies on the enjoyment of economic, social and cultural rights in importing countries. The Committee calls for the need to ensure that policies on investments abroad serve the economic, social and cultural rights in the host countries. Development cooperation policies to be adopted by States should contribute to the implementation of the economic, social and cultural rights and not result in their violation.⁴⁴ By these international human rights instruments, States have a duty to protect, respect and fulfil human rights. This impliedly means that States cannot enter into IITs that are inconsistent with their human rights obligations. Where States have already entered into IITs that contravene their duty to protect human rights, they must renegotiate those treaties to bring them into conformity with their constitutional and domestic legal obligations with respect to human rights.

IITs are created within the context of existing duties and obligations of the States towards society as a whole, including the duty to protect human rights which must be

⁴⁴ Committee on Economic, Social and Cultural Rights *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights* (E/C.12/DEU/CO/520, May 2011) paras 9, 10 and 11.

respected by all including foreign investors. Therefore, even under current practice, where the right to regulate and protect human rights are not spelt out in IITs, the duty remains tacit and must be deemed as acknowledged by both foreign investors and States as being a part of investment treaty commitments. This requires an approach to investment treaty interpretation whereby the duties and responsibilities of States under both domestic law and international law to protect human rights are taken into consideration in enforcing the rights of foreign investors.⁴⁵ Governments should be protected by what is termed here as ***The Public Interest Regulatory Autonomy Doctrine*** by which governments expect that, when public preferences and expectations change or when change is simply necessary in the public interest, they should be able to make such policy, regulatory, legislative or administrative changes in response to new demands and new situations. Above all, countries serious about protecting human rights must not sign IITs that are inconsistent with their constitutional and international law obligations to protect human rights. It does not make sense for States to voluntarily abridge their right to regulate and at the same time say they want their full freedom to protect their national interests.

⁴⁵ See McLachlan, C. (2008) "Investment Treaties and General International Law" in *International and Comparative Law Quarterly* vol. 57, p. 361