

United Nations Forum on Business and Human Rights | Crowd-Drafting: Designing a Human Rights-Compatible International Investment Agreement

Submission by: Dr Daria Davitti (Postdoctoral Fellow, Department of Law, Lund University; Assistant Professor, University of Nottingham, School of Law); **Ms Kathryn Greenman** (PhD Candidate, Amsterdam Center for International Law, University of Amsterdam; Fellow, Melbourne Law School); **Dr Ntina Tzouvala** (ARC Laureate Postdoctoral Fellow and Senior Fellow, Melbourne Law School).

Introduction

The debate about the proper relationship between international human rights law (IHRL) on the one hand and international trade (ITL) and investment law (IIL) on the other is neither new nor free from controversy (Alston 2002; Howse 2002; Petersmann 2002). However, the contemporary debate about IHRL and international economic law is determined by at least four novelties: the global backlash against core aspects of economic globalisation; the admission even by relatively mainstream economists that economic orthodoxy rests partly on dubious assumptions and foundations; the rise of an anti-liberal far-right that directly confronts human rights and institutions; and a growing unease with the contemporary human rights regime, which is seen as at least partly unwilling and unable to confront some core tenants of neoliberalism (Moyn 2018; Alston 2018). In this context, we argue that it is essential for the human rights community to form a strategic alliance with those voices both from within the Global North and the Global South who have called for a fundamental rethinking of ITL and IIL. These challengers have consistently singled-out for criticism investor-state dispute settlement (ISDS) clauses, even though their objections are much broader and concern the systemic privileging of the interests of Western (and increasingly global) capital at the expense of other values, rights and interests (Miles 2013; Greenman 2018; Davitti 2019). We are, thus, of the opinion that the maintenance and restoration of national policy space in accordance with Principle 9 of the UNGPs requires at the very minimum the elimination of such clauses and the restoration of domestic jurisdiction over disputes between investors and states. Importantly, we argue that the replacement of ISDS by an international investment court, even one with a mandate to examine human rights counterclaims, would not solve the existing problems. Rather, human rights would be appropriated by ITL and IIL, which would further exacerbate the legitimacy crisis of IHRL.

Historical Overview

Historically, ISDS has its antecedents in the mixed claims commissions that adjudicated alien protection claims, largely against capital-importing Latin American states, in the nineteenth and early twentieth centuries (Sornarajah 2010: 19-20; Miles 2013: 19-70). The enforcement of alien protection claims through international arbitration strongly favoured capital-exporting states' interests. The international law of alien protection gave foreign nationals internationally enforceable rights to an internationally determined standard of property, contractual and personal protection, in effect using the language of rights to mandate trade and investment liberalisation and limiting the extent to which host states could, at first, allocate the costs of political instability to foreign investors and, later, carry out economic reforms. From the beginning, this raised concerns within host states about the lack of space left for national authorities to assert domestic priorities. This became evident in the resistance with which it was met, most notably in the form of the Calvo doctrine, which sought to guarantee that foreign investors would have to resolve any disputes in domestic courts and in accordance with domestic law. It is worth noting that the eventual acceptance of ISDS in its current form was not necessarily intended or informed (Aisbett and Poulsen 2013).

United Nations Forum on Business and Human Rights | Crowd-Drafting: Designing a Human Rights-Compatible International Investment Agreement

This regime was justified on a number of grounds but two are of direct interest from a human rights perspective: the idea that alien protection was a predecessor to contemporary human rights law and the linking of arbitration to peace, particularly ‘peace through commerce’. Despite later efforts to reconceptualise alien protection as human rights (García Amador 1956; Lillich 1984), during this period, the protection of individual rights was secondary to the protection of commerce. Little or no attention was paid to domestic populations, other than to the extent that alien protection might have a ‘trickle-down effect’, incidentally raising overall standards (note that in contrast to today, claimants generally had to exhaust domestic remedies before bringing an international claim). Although ‘aliens’ included individuals as well as commercial actors and alien protection claims captured loss of life, torture and inhumane or degrading treatment, and deprivation of liberty, the commercial interests of foreign investors and merchants were always the central concern behind the establishment of the mixed claims commissions. The rise of international arbitration during this period is commonly associated with the peace movement and the overcoming of gunboat diplomacy and oppressive protection of commercial interests. However, a more detailed consideration of this period reveals arbitration to be a continuation of the latter policy (Koskeniemi 2008). Although giving investors international standing to bring claims directly against host states was meant to put an end to this for good by ‘depoliticising’ investment disputes, recent empirical research undermines the depoliticization justification for ISDS (Geertz, Jandhyala and Poulsen 2018).

International Economic Law, the Remaking of the State, and IHRL

IIL and IHL have not been neutral mechanisms for state co-ordination. They have sought to profoundly remake the state (Orford 2015). In the case of ISDS in particular, neoliberal thinkers and lawyers such as Roepke or Hayek considered the internationalisation and judicialisation of economic decision-making to be essential steps for the curtailment of decolonisation and the rolling-back of the Keynesian and developmental state-models (Slobodian 2018; Tzouvala 2018). The basic rationale behind ISDS is that domestic politics is inherently irrational, corrupt and unstable (Orford 1997), while international actors are the only guarantors of ‘good governance’ and legality. Importantly, propositions for the replacement of ISDS with a multilateral investment court (European Commission 2017; Howse 2017) finally acknowledge that arbitration has been profoundly dysfunctional. A limited number of highly remunerated arbitrators circulate between arbitration, legal advocacy and drawing heavily from their (disproportionately represented) commercial law background (Puig 2014) and delivering an expansive and also incoherent jurisprudence. Nonetheless, the replacement of ISDS by an investment court would in the best-case scenario solve only some of these problems, but would not rectify the fundamental imbalance at the heart of the system that affords asymmetrical rights to bring claims to foreign investors. Moreover, it would not alter in the least the fact that negotiations between investors and governments take place under the threat by the latter to have recourse to international justice if their demands are not met (Koskeniemi 2017). Finally, the maintaining of international jurisdiction means that both foreign investors and to an extent governments remain uninterested in improving domestic courts and other domestic systems of dispute resolution (such as mediation) in ways that could benefit both foreign investors, but also small domestic businesses and citizens of the host state (Yilmaz-Vastardis 2018).

The Limits of Using IHRL within the Current Architecture

The suggestion that it is possible, and indeed desirable, for international investment tribunals to ‘balance’ IIL and IHRL obligations through treaty interpretation has, in recent years, gained

United Nations Forum on Business and Human Rights | Crowd-Drafting: Designing a Human Rights-Compatible International Investment Agreement

some momentum. Scholars have dedicated attention to the possibility of pursuing such balancing through systemic integration (Simma 2011; Bücheler 2015)—mainly by using Article 31(3)(c) of the Vienna Convention on the Law of Treaties—and through harmonization—mainly by means of a proportionality assessment (Vadi 2018; Henckel 2015; Bücheler). The idea of introducing strategic exemptions and/or carve-out clauses in IIAs to safeguard a host state’s regulatory space or to enable human rights counterclaims has also gained some traction, which is also evidenced by the call to which this submission responds. Easing the tension between IIL and IHRL, however, has been described as ‘aiming at two moving targets’ (Simma 2011). Skilfully crafted clauses, which may enable a human-rights-friendly reading of investment protection standards, will always remain contingent upon the adjudicators’ discretion in a system that, as discussed so far, is not appropriately placed to carry out such balancing. Recent examples of arbitral tribunals’ interpretation of human rights and/or environmental clauses demonstrate that investment treaty or contract design is not sufficient to ensure effective human rights protection. Even in awards that have been celebrated as a victory for the host state (e.g. *Glamis Gold v US*; *Philip Morris v Uruguay*) or as breaking new grounds towards human rights protection in IIL (*Urbaser v Argentina*), standards of investment protection have in fact been significantly expanded, not least through the doctrine of legitimate expectations. The latter has also been used to grant substantive, rather than merely procedural, rights to foreign investors through the Fair and Equitable Treatment standard. Attempts to temper the doctrine of legitimate expectations, which has previously been interpreted as ensuring that an investor ‘may know beforehand any and all rules and regulations that will regulate the investment’ (*TECMED v Mexico*), have seen a narrowing down of the expectations that can be considered legitimate. Evidence of reliance on specific undertakings and representations made by the host state to induce an investment, for instance, is one of the criteria applied by tribunals to ascertain whether an investor’s expectations can be considered legitimate (*Micula v Romania*). The main risk of applying an estoppel-inspired analysis to affirm an investor’s legitimate expectations, however, is that the doctrine of estoppel, common to many domestic legal systems, cannot be easily transposed to investor-state arbitration (Johnson 2018) where it risks exacerbating the asymmetries of power already inherent in the system. Similarly, leaving the balancing of human rights concerns in the hands of investment adjudicators remains highly problematic, since crucial considerations such as public health (*Philip Morris* cases), access to medicines (*Eli Lilly v Canada*), indigenous peoples’ rights (*Bear Creek v Peru*) and the right to water (*Aguas del Tunari v Bolivia*; *Suez Vivendi/AGW v Argentina*) risk being considered irrelevant or, at best, of secondary importance when assessing the *quantum* of compensation.

Core Recommendation and Justification

We argue for the restoration of domestic jurisdiction over foreign investment disputes for a number of reasons. These include: 1) our scepticism that foreign direct investment is the only or even the best path toward development; 2) the lack of compelling evidence that ISDS and the existence of international investment agreements play a substantial role in the attraction of such foreign investment; 3) the fact that historically the language of rights has been mobilised in order to protect the rights of foreign capital; 4) the fact that the internationalisation and judicialization of economic governance are not neutral vessels that can be filled with any substantive content, but have rather been instrumental in the dismantling of the Keynesian and development state in the North and the South; and 5) finally, the fact that human rights arguments have been accepted by investment tribunals on occasion with very limited results.

United Nations Forum on Business and Human Rights | Crowd-Drafting: Designing a Human Rights-Compatible International Investment Agreement

Bibliography

Aisbett Emma, and Lauge N Skovgaard Poulsen, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65(2) *World Politics* 273.

Alston Philip, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13(4) *European Journal of International Law* 815.

—, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights' (2018) UN doc A/73/396

Bonnitcha Jonathan, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017).

Bücheler Gebhard, *Proportionality in Investor-State Arbitration* (Oxford University Press 2015).

Davitti Daria, *Investment and Human Rights in Armed Conflict: Charting an Elusive Intersection* (Hart 2019, forthcoming).

European Commission Concept Paper, 'Investment in TTIP and Beyond – The Path for Reform. Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration towards an Investment Court' (5 May 2015), available at:
<http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>

García Amador FV, 'International Responsibility: Report by Mr. F.V. Garcia-Amador, Special Rapporteur' UN Doc A/CN.4/96 (1956) 2 *Yearbook of the International Law Commission* 173.

Gertz Geoffrey, Srividya Jandhyala and Lauge N Skovgaard Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties De-Politicize Investment Disputes?' (2018) 107 *World Development* 239.

Greenman Kathryn, 'Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels' (2018) 31(3) *Leiden Journal of International Law* 617.

Henckels Caroline, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press 2015).

Howse Robert, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' (2002) 13(3) *European Journal of International Law* 651.

—, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36 *Yearbook of European Law* 209.

Johnson Lise, 'A Fundamental Shift in Power: Permitting International Investors to Convert Economic Expectations into Rights' (2018) 65 *UCLA Law Review Discourse* 106.

United Nations Forum on Business and Human Rights | Crowd-Drafting: Designing a Human Rights-Compatible International Investment Agreement

Koskenniemi Martti, 'The Ideology of International Adjudication and the 1907 Hague Conference' in The Hague Academy of International Law (ed), *Topicality of the 1907 Hague Conference, the Second Peace Conference* (Martinus Nijhoff 2008).

—, 'It's not the Cases; It's the System' (2017) 18(2) *Journal of International Investment and Trade* 343.

Lillich Richard B, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press 1984).

Miles Kate, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013).

Moyn Samuel, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).

Orford Anne, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38(2) *Harvard International Law Journal* 443.

—, 'Food Security, Free Trade, and the Battle for the State' (2015) 11 *Journal of International Law and International Relations* 1.

Petersmann Ernst-Ulrich, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13(3) *European Journal of International Law* 621.

Simma Bruno, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60(3) *International & Comparative Law Quarterly* 573.

Slobodian Quinn, *The Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018)

Sornarajah M, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010).

Tzouvala Ntina, 'The Academic Debate about Mega-Regionals and International Lawyers: Legalism as Critique?' (2018) 6(2) *London Review of International Law* 189.

Yilmaz Vastardis Anil, 'Justice Bubbles for the Privileged: A Critique of the Investor-State Dispute Settlement Proposals for the EU's Investment Agreements' (2018) 6(2) *London Review of International Law* 279.

Vadi Valentina, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Edward Elgar Publishing 2018).