

Cosmopolitan Competition: The Case of International Investment

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1. Introduction: Cosmopolitan Archetypes

The contemporary international investment legal regime represents the perfect embodiment of commercial cosmopolitanism. Foreign investors are protected by a thickening web of bilateral (and trilateral) investment and trade treaties that provide for expansive property rights backed by secluded, fragmented but powerful and growing international arbitration. The appropriation of human rights standards and jurisprudence to disproportionately protect foreign investors plays into the critique of legal cosmopolitanism by authors such as Douzinas (2007), Kennedy (2001) and Adelman in this volume. Paradoxically, the current patchwork is partially the result of a successful ‘cosmopolitan from below’ archetype championed by these critics. The world’s first global internet and street campaign helped scuttle the development of a multilateral investment treaty in the late 1990s but left in place a decentred and fragmented system that seems to defy transformation.

The first half of the paper (Sections 2 to 4) examines the problematique of the investment regime, resistance from below and why it nonetheless endures. The second half of the paper (Sections 5 and 6) asks where we go from here by examining four roads to reform. At its core, the paper asks whether the theologies of resistance and liberation evoked by Douzinas (2007) in his ‘cosmopolitanism to come’ provide a way forward for reforming the international investment regime? Or, we need to accept or even celebrate the realities of political economy and tread a more pragmatic, State-centric and transnational legal path by

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taming the excesses of commercial cosmopolitanism as suggested by Wai in the previous chapter?

2. The Rise of the Bilateral Investment Regime

In his searching critique of scholarly cosmopolitanism ambitions, Douzinas (2007: 231) posits that neo-liberal and imperial visions continue shape the global security, economic and political architecture. He could look no further than the sprawling and expanding pantheon of the international investment regime that protects foreign investors and permits them to directly take disputes against host states to powerful and opaque international arbitration panels. With more than 2676 bilateral investment treaties and 279 other agreements (mostly free trade) with investment chapters (Unctad, 2009), it represents the perfect embodiment of capitalist or commercial cosmopolitanism. By the mid-1990s, the regime was characterised as a transnational legal order (Leubuscher, 2003) while Schneidermann (2008) describes it as international constitutionalism.¹

Moreover, this investment regime fits the bill of being thoroughly appropriationist in terms of human rights. In the drafting of investment treaties and the development by arbitrators of legal and remedial principles, human rights are more often called upon to buttress the rights of foreign investors rather than the rights of individuals and communities affected by investor practices (See discussion in Peterson (2009: 23-26)). For example, one arbitration tribunal adopted the European Court of Human Rights remedy of moral damages but significantly inflated the amount awarded to the corporation (1 million USD).² At the same time, duties are rarely, if ever, placed on corporations despite the fact that their economic and political power can often exceed that of their host state.

In order to give a sense of the dizzying dimensions of this commercial cosmopolitan order, consider the recent arbitration of *Foresti & Ors v. Republic of South Africa*.³ The case was launched in 2006 by Italian shareholders of a Luxembourg-based granite mining corporation,

¹ After making the customary point that BITs were based on the export of US property rights and takings doctrines, he interestingly suggests that these were developed within the United States only once the government-led economic development of the 19th Century U.S. petered out and capital holders demanded greater protection for new found wealth.

² See *Desert Line Properties LLC v. Yemen*, ICSID Case no. ARB/05/17, Award of February 6, 2008.

³ (ICSID Case No. ARB(AF)/07/01). Marlin and R.E.D Graniti filed their Request for Arbitration with the International Centre for the Settlement of Investment Disputes (ICSID) on 1 November 2006 in accordance with Article 2(1) of the Arbitration (Additional Facility) Rules of ICSID's Additional Facility. The claim was recently withdrawn: Award of 4 August 2010.

against the South African government for contravention of two bilateral investment treaties signed between that State and Italy and Belgium and Luxemburg in 1993 and 1995. Two arbitrators from the United States and one from the United Kingdom were appointed to conduct oral hearings in London but the relevant legal jurisdiction for the arbitration was the Netherlands and the arbitration secretariat operates from the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) in Washington. . The award would have been enforceable in South Africa or almost any jurisdiction in the world which the South African government has assets and the arbitrators may or may not have followed legal principles developed in hundreds of publicly or confidential arbitral awards generated by ICSID, UNCITRAL⁴ (), Stockholm Chamber of Commerce, the International Chamber of Commerce, the Cairo Regional Centre for International Commercial Arbitration or other arbitration centre agreed to by party consent. The supposedly fragmented international human rights system looks positively humdrum and unitarian in comparison.

Some defenders of investment treaties acknowledge the legitimacy critique (David Collier, 2009a), particularly when arbitrators exhibit activism in their procedural and substantive interpretations. Some arbitration panel decisions have taken the US doctrine of takings to its elastic limits. If investments are directly or indirectly affected, the relevant international human rights and environmental duties of states are of no consequence . In *St Elena v Costa Rica*, which concerned a claim for damages for expropriation for purposes of erecting an environmental conservation area, the panel stated:

While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the property was taken for that reason does not affect either the nature of the measure of compensation to be paid for the taking. That is the purpose for protecting the environment for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid. *The international source of the obligation to protect the environment does make no difference.*⁵

Procedurally, investors have been permitted at times to invoke the substantive 'most favoured nation' principles to gain the best procedural advantages that exist in any investment treaty

⁴ United Nations Commission on International Trade Law.

⁵ *Compania del Desarrollo de Santa Elena S.A. v Rep. of Costa Rica*, ICSID Case no. ARB/96/1(17 Feb 2000) (emphasis added).

ratified by a host state.⁶ Other arbitrators have refused to pierce the corporate veil when nationals of a country use foreign incorporation against their own state, and human rights principles have been surprisingly used to justify this reticence.⁷ Critics such as (Leubuscher, 2003: 15) have thus maintained that the current system is “unworkable” since:

The settling of disputes which involve serious issues of public interest in a purely commercial, closed forum, under whatever rules the dominant party wishes to set, with no access to justice for affected populations – who are thereby deprived of any possible remedy – is not merely inequitable but also dangerous.... By narrowing disputes in such a way that entire countries are transformed into the equivalent of a private company, ICA [international commercial arbitration] reformulates public discourse as between private parties, thereby removing from discussion major public interest issues affected by contracts while at the same time making it impossible for concerned groups, or even legal professionals, to find a ‘handle’ to approach the problem of such contracts and to put their arguments forward.

The investment regime nonetheless maintains its steady share of defenders and is largely championed on contractualist, instrumentalist, and partly human rights grounds. Collier (2009a: 231) argues that, “The central premise that international investment treaties are hostile to the signatory state’s regulatory autonomy is vitiated by the inescapable reality that BITs are voluntary exchanges between states each of which seeks to gain advantage economically for the benefit of its citizens.” Moreover, it is possible to find rulings by the tribunals that have been sympathetic to human rights concerns. In *Continental Casualty Company v. Argentina*,⁸ the tribunal found that a state of necessity existed (most tribunals and courts dealing with the Argentine financial crisis of 2001 at first instance have not) and acknowledged that the state needed to act to protect constitutional guarantees and fundamental liberties. In some cases, tribunals have potentially sought to defend a wider set of rights when protecting investor’s rights. In *Toikios v. Ukraine*, the tribunal invoked freedom of expression when it indicated that the investment treaty would be breached by the government if it sought to silence a foreign media owner.⁹ Taking up such examples, Fry (2007) eagerly attacks the critics where investment tribunals have referenced international human rights. However, Fry’s highly selective approach to the choice of cases undermines his broader claims as he fails to engage with case law where human rights have been

⁶ See discussion of conflicting case law in *Investment Arbitration Reporter*, January 22, 2009 (Vol. 2, No. 2).

⁷ *Micula & Ors v Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction, 24 September 2008.

⁸ ICSID Case No. ARB/03/9, Award of Sept. 5, 2008. Discussed in Peterson (2009: 30).

⁹ See *Toikios v. Ukraine*, ICSID case No. ARB/02/18, Award of 26 July 2007, para. 123.

dismissed or ignored; and he clearly does not understand the critique of appropriationism as he lists multiple cases where investors have used human rights norms to their advantage.

The defenders of the system can however justifiably point to some movement towards a fairer equilibrium. For example, the ICSID tribunal in *Tecmed v Mexico*, defended the state's regulatory power on the basis that "the principles that the state's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as an administrator without entitling them to any compensation whatsoever is undisputable".¹⁰ It went on to direct the indirect expropriation test away from a simple consideration of the effect on investors towards a balancing test that includes the public purpose of the regulation, an approach which has been picked up in some recent cases (Waincymer, 2009). Moreover, some states have also acted to change the rules of the game in response to controversial decisions. UNCTAD has pointed out that recently concluded investment treaties have partly responded to the critiques (Unctad, 2007). The three NAFTA countries, which seem to have been stung by investment decisions in that domain, have amended their BITs to more precisely define 'investment', restrict the reach of indirect expropriation and fair and equitable treatment standards and include transparency in dispute settlement procedures. Critics such as Alvarez (2009: 834) similarly acknowledges that the new 2004 US Model BIT "recalibrates the balance between the rights accorded investors and a nation's right to regulate in the public interest".

The extent of this shift is difficult to gauge and Alvarez (2009) concedes that it may just be tinkering at the edges. If one examines the recent stream of jurisprudence, it is clear that the anarchic eclecticism persists. For instance, some tribunals are quite critical of the deferential *Tecmed* position (Waincymer, 2009). In *Siemens AG v Argentina*, the arbitrators stated that intention behind a State's regulatory act is irrelevant for determining whether expropriation has occurred.¹¹ Moreover, a closer examination of the US Model BIT of 2004 does not reveal substantial or transformatory change. Extensive restrictions of performance requirements remain while the expropriation test is simply tweaked to reflect the form of European-driven investment treaties with no clarification over whether it covers indirect expropriation.¹² Moreover, there is no move to amend earlier ratified treaties. We are thus witnessing a significant but not major shift in treaty-making and jurisprudence. If a recent publication on

¹⁰ Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 119.

¹¹ ICSID Case No ARB/No 2/08, Award, 6 February 2007.

¹² Although, Schwebel (2009) is outraged over the restriction of the fair and equitable treatment standard to a test of due process

investment and human rights by European-based international lawyers is a guide, the mood amongst the majority of authors is one of rhetorical receptiveness to human rights as long as investor's interests are not significantly affected (Dupuy, 2009).

3. Resistance and Resignation

Critique of the regime is one thing; solutions are quite another. The resulting fragmentation of the international investment agreements is partly and paradoxically the result of a successful transnational civil society struggle against the development of a *multilateral* investment agreement. Representing the world's first viral global email campaign that culminated in the 'Battle of Seattle' outside the WTO conference, it represents and still remains the leading and seminal cosmopolitan ideal of resistance for the anti-globalisation movement and beyond. Tarrow (2005) opens his book on *The New Transnational Activism* with: "From the 'battle of Seattle' to movement against the Iraq war, the extraordinary international protests of the late 1990s and the early years of the new century suggests that something is new on this planet of ours."

The unified draft MAI, first launched within the OECD in the mid-1990s and later resuscitated in the WTO, provided a catalyst for social action. The content and potential impact of international investment principles became clear to the general public once they were reduced to a single over-arching agreement. Activists were surprised and shocked to find the MAI would prevent restrictions on foreign investment in sensitive domestic sectors, prohibit performance requirements that would for example support local employment (often the justification for foreign investment) and allow companies the automatic right to confidential and international arbitration of disputes (Vallianatos, 1997). In 1990, the agreement eventually died in the embers of the street protests that raged outside the 1990 WTO Ministerial Meeting (Cohn, 2005). Developing countries blocked further progress on the draft, and continue to do so in the context of the Doha negotiations.

The Lalumière Report (1998), drawn up by MEP Lalumière for the French Prime Minister on the state of the OECD negotiations summarises this roots of this success:

For the first time, one is seeing the emergence of a global civil society represented by NGOs which are often based in several states and communicate beyond their frontiers. This evolution is doubtless irreversible. On one hand, organisations representing civil

society have become aware of the consequences of international economic negotiations. They are determined to leave their mark on them.

Furthermore, the development of the internet has shaken up the environment of the negotiations. It allows the instant diffusion of the texts under discussion, whose confidentiality becomes more and more theoretical. It permits, beyond national boundaries, the sharing of knowledge and expertise. On a subject which is highly technical, the representatives of civil society seemed to us perfectly well informed, and their criticisms well argued on a legal level.

However, one unintended consequence of this global civil society campaign, or more accurately its later dissipation, distraction or possible sense of self-satisfaction, was the acceleration of the fragmented bilateral investment regime. While the current network of treaties has not reached the global pretension of the MAI, it is not that far off in terms of coverage of real economic activity. The deeper irony is that many of today's BITs contain even stronger protections for investors than would ever have been achieved or imagined had a multilateral agreement been drafted in the WTO. In that forum, developing states are more organised and civil society organisations keep check from the sidelines (Suda, 2006). It should not be forgotten that part of the original justification for developing the MAI was to unify the then 1300 bilateral investment treaties (BITs) into a more manageable investment regime (Marchi, 2007).

This post-1999 growth of the BITs regime has not been accompanied by anything faintly resembling the earlier transnational activism. The NGO Europe Centre acknowledged the stark reality of the post-MAI environment: "Bilateral treaties are ... not very visible to public opinion, many of them have been reached on the sly and [they] are even more harmful to rights of people than international or regional treaties."¹³ The only time that the investment regime has generated significant 'resistance' and 'struggle' by broader social movements was in Bolivia in the wake of the 'water wars' (Luke Peterson, 2011). The American corporation Bechtel retreated from the country, after popular protest forced the Government to cancel the water concession contract. Bechtel subsequently launched an arbitration claim against Bolivia for 25 million under a generous BIT between Bolivia and the Netherlands (where Bechtel was conveniently headquartered).¹⁴ The ICSID tribunal rejected a civil society petition to

¹³ *Written Statement submitted by the Europe Centre to the UN Commission on Human Rights*, UN Doc. E/CN.4/Sub.2/2004/NGO/10.

¹⁴ *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3).

present an amicus intervention¹⁵ but a second round of protests directed at the arbitration itself, constituted by a part-Bolivian/part-transnational campaign, embarrassed Bechtel into withdrawing the arbitration claim.¹⁶

The other notable exception is Argentina which has encountered seventeen arbitration claims, many of them concerning the multinational privatisation of water and energy utilities sector. Domestic mobilisation and consumer payment boycotts in the Province of Tucuman led to the authorities cancelling the water concession contract with the French multinational Vivendi, triggering a BITs claim in 1997. Although not the centre of protest like Bolivia, it formed a shadow over the myriad of domestic court cases, struggles and negotiations (Morgan, 2006). Eventually in 2007, Vivendi prevailed in international arbitration but Argentina has sought the annulment of \$US 105 Million award.¹⁷ A similar pattern emerged in the Suez' litigation against Buenos Aires (Fairstein, 2006). A regulatory freeze on increasing utility prices in the wake of the 2001 economic crisis led to a cancellation of the concession agreement and triggered investment arbitration. Unlike their Bolivian counterparts, a network of consumer associations together with local and international human rights and environmental NGOs broke new ground and obtained the right from the tribunal to submit an amicus submission concerning the human rights dimensions of the case. Nonetheless, the majority of the tribunal ruled in 2010 that Argentina had violated the fair and equitable treatment standard.¹⁸ No significant transnational advocacy campaign has resulted, but this is possibly because the Argentinean government shifted leftwards in 2001 and has taken a hard-line with both international institutions and investors (Ciblis, 2003).

¹⁵ See *Petition of La Coordinadora para La Defensa del Agua y Vida, et.al.*, August 29, 2002 available at: http://www.ciel.org/Publications/Petition_Revised_Aug02.pdf and Letter of Response from President of ICSID Tribunal, David Carson, to Earth Justice, 29 January 2003, available at <http://ita.law.uvic.ca/documents/Aguas-BoliviaResponse.pdf>

¹⁶ Decision on Jurisdiction, October 21, 2005, available at http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf

¹⁷ Award of August 20, 2007, available at <http://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf> The first arbitral decision in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of November 21, 2000 was annulled in 2002: Decision on Annulment, July 3, 2002.

¹⁸ http://ita.law.uvic.ca/documents/vivendi_annulEN.pdf

¹⁸ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. (Claimants) and The Argentine Republic (Respondent); AWG Group (Claimant) and The Argentine Republic (Respondent)*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010 and *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. (Claimants) and The Argentine Republic (Respondent)*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010.

4. Explaining the Landscape

This short vignette on the MAI struggle and its aftermath is proffered for three reasons. The first is that the international investment regimes possess a *remarkable vitality* in the face of well organised campaigns. BITS represent a popular handmaiden for the chiefs of globalisation. Indeed, one can find the forebears of BITS in the first period of ‘globalisation’, which had matured by the late 19th Century, in the form of ‘capitulations’ which were concluded with countries not under colonial occupation, such as the Ottoman Empire and China. While the practice had scattered origins in the Middle Ages in various parts of the world, it was in 1536 that the first capitulation (and in effect model) treaty was signed between Francis I of France and Süleyman I of Turkey as part of a political alliance. It allowed French investors extensive privileges within the country with disputes settled by the French consul in Istanbul. These privileges:

were later extended to other European states, and which had the effect of placing Europeans in the Ottoman Empire outside local jurisdiction. Freely given as a means of fostering trade, the capitulations were later resented by the Ottomans, while European insisted on them as a defence of their nationals against the arbitrariness of backward Asiatic state. (Mango, 1999: 6)

However, from 1917 to 1989, the commonplace acceptance of the international protection of foreign investors withered in the face of post-Empirism, communism, nationalisation drives post-colonialism and the Latin American Calvo doctrine which rejected foreigners acquiring greater substantive or dispute settlement rights than local citizens (see overview in Lowenfield (2008: 469-94)). Attempts by Western states to entrench the pro-investor Hull rule on ‘prompt, effective and adequate compensation’ in international law met with little success. Developing and particularly Latin American countries championed the idea of the social function of property. Compensation did not axiomatically follow an order of expropriation and when it did, there was no duty on a host state to pay promptly or without regard to its’ financial capacity. This division prompted the US Supreme Court in 1964 to conclude that “There are few if any issues in international law today on which opinion seems to be so divided as the limitation on a state’s power to expropriate the property of aliens”.¹⁹

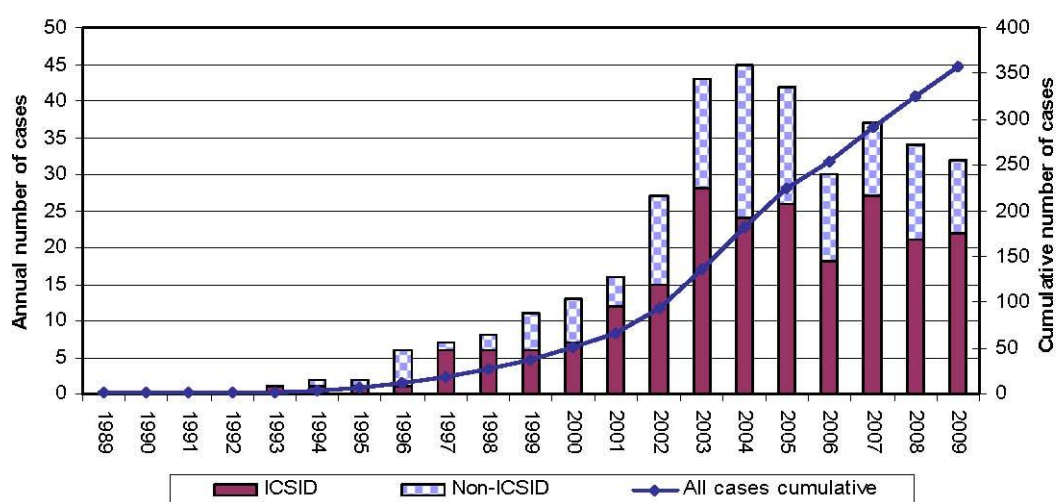
In this sense, the normalcy of pro-investor international treaties and arbitration is relatively fresh and logically followed the emergence of the market-friendly ideological landscape of

¹⁹ *Banco Nacional de Cuba v Sabbatino* 376 U.S. 398, at 428 (1964), quoted in Lowenfeld (2008: 467).

the post-Cold War period. Vandevelde (1998: 628) characterises BITs negotiations in the 1960s and 1970s as a Western ideological campaign since the treaties “symbolize[d] a commitment to economic liberalism”. It is also economically predictable. From as early as Marx, burgeoning domestic capital (from the US to China to South Africa to Qatar to Spain to Norway) has been in search of more and more foreign receptacles. The demand for a handmaiden in the form of an investment treaty is thus unlikely to disappear quickly.

Curiously, this elevated role of BITs in the global economy persists even though there is no unanimity in the quantitative evidence over whether they play a role in attracting foreign investment (Franck, 2007; Sauvant, 2009; Spess, 2005; Yackee, 2006).²⁰ Nonetheless, a panoply of states across the world pursue them in the name of protecting and securing capital and investment flows. Many Southern states retain the belief that every possible tool must be used to create a good investment image. Regular Poverty Reduction Strategy Papers, developed by these governments in conjunction with the World Bank and donors, usually list foreign direct investment as a key pillar of domestic economic policy (Anderson, 2008). UNCTAD in its country reviews of the investment environment usually recommends the adoption or improvement of bilateral investment treaties (see UNCTAD (2010)).

FIGURE 1: NEW AND CUMULATIVE CASES: JANUARY 1989 – JUNE 2009



Source: UNCTAD (2009: 3)

Moreover, it is arguable that the growing use of arbitration reveals that many corporations prefer this method of adjudication once disputes become intractable. As Figure 1 indicates,

²⁰ Note that mining and oil companies often claim the treaties are important in protecting large upfront investment costs. The same argument is used in the energy sector: Inadomi (2010).

dozens of disputes are filed each year and the total number is trending upwards with 57 per cent filed in the last five years UNCTAD (2009: 2). Some adjudicators have of course been more willing to entertain public interest arguments from States²¹ and investors do not consistently find success. States have won 38 per cent of 164 concluded cases with 29 per cent being won by investors and 34 per cent settled. Nonetheless, the jurisprudence give investors a high degree of comfort. As the lawyer for the mining investors in *Foresti v South Africa* candidly stated to the Financial Mail:

how much you respect the independence of the SA courts, the fact is [claims for alleged expropriation] will end up in the Constitutional Court, which will have to consider the impact of a finding that there has been a generalized expropriation of mineral rights with compensation running into billions of Rand. An international arbitration tribunal will not have those implications in mind.²²

Of more relevance, the mere existence of arbitration adds to the armoury of corporations in policy and contractual negotiations with domestic government. The threat of litigation can cast a regulatory chill over government initiatives. One notable example is Indonesia's ban on open-mining in 1999. It was rescinded after multinationals indicated they would turn to international arbitration (Suda, 2006: 100). As Morgan (2006) notes, multinational water companies have a preference for *national* standard setting and *international* dispute resolution which fits well the pattern of the BITs regime. BITs are thus a sword for influencing domestic policy and an international shield in case of disagreement with a host state.

The second lesson to be drawn from the post-MAI experience is the *unintended consequences* of 'successful solutions'. Specifically, the civil society campaign that took the MAI off the multilateral negotiating table has done little to affect the actual practice of international investment law. It can be argued that developing States were empowered during this process: they have subsequently kept MAI-copycats off further trade negotiation rounds. But is this Southern stance a smokescreen? With the use of quantitative analysis, Elkins, Guzman and Simmons (2006) suggest that less developed countries conclude BITs due to a prisoners dilemma: it is strategically better for such states to oppose the development of a global regime and then 'defect' and sign the BITs individually with other states in the *hope* of

²¹ See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of August 20, 2007 and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award of 24 July 2008.

²² *Financial Mail*, 26 January 2007.

preferential treatment by foreign investors. The authors concede there are other significant explanatory variables, such as *uncertain legal regimes* vis-a-vis property rights (China being the classic case which has signed numerous treaties while Western countries have signed few between themselves) and *Washington-based coercion* (e.g., there is a high correlation between signing of BITs and countries classified as highly indebted and reliant on IMF loan re-financing). But the authors conclude that the main driver for less developed countries is to gain or maintain a competitive advantage with states also competing for foreign investment in the same sectors.

The third lesson to be learned is that the simple political cartography that drove the for-and-against positions over the MAI has disappeared in the last decade. The MAI was a clear product of the OECD, an organisation founded like the World Bank on the premise of supporting foreign investment while the developing states attained the title of ‘victims’ of such an agreement. ‘Villain’ and ‘victim’ is not so clear ten years later. The massive overspending by the Bush government, the Keynesian stimulus packages of 2008/2009 and the simultaneous collapse of Western financial institutions has partly weakened the role of Western capital. Simultaneously, China, Arab States and a range of other emerging economies from Czech Republic to Malaysia to Chile are beginning to invest outwards. We are now seeing the emergence of numerous South-South bilateral investment treaty agreements that are not being ‘engineered’ by Northern states or international organisations as they were from 1960 to 2000.²³ This lack of attention to new empires of capital is evident in Douzinas (2007). The focus on American military decisions and leadership in economic globalisation obscures the fact that the current hegemon is not so much being displaced but being accompanied by new empires.

Paul Collier (2009b) classifies the emerging multi-polar world from a largely economic perspective, and his form of taxonomy could possibly unlock much of what we already seeing in the field of BITs ratification as well as emerging alternatives and lines of resistance. He breaks up the 21st Century into three Gs: G5 (USA, India, China, Japan and the EU), the G60 (bottom 60 countries which account for around 1 per cent of economic growth) and the in-between and diverse “sack of potatoes” G103. According to Collier, the G5 will be bullies but will be, like the US today, under constant pressure to behave responsibly and make others

²³ The South African Department of Trade and Industry (2009), which has suspended the negotiation of further BITs pending a current inquiry, noted that it was under significant pressure from its embassies in many Middle Eastern states who were anxious to sign such treaties with their hosts.

do so. Using this framework, we might expect that BITs will continue to be promoted by many of the G5, although scepticism may increase in the US and some European Union states if capital inflows begin to outweigh capital outflows.²⁴ Given the economic desperation of the bottom ‘G60’, many of these states will be under considerable self- and externally-imposed pressure to continue within and join the regime.

We can however expect diverse reactions from the middle group of G103 countries, a phenomenon that is already manifest. A number of defendant States in investment arbitration, such as Czech Republic and South Africa have initiated internal policy reviews to reconsider their overall membership in the system while Bolivia and Venezuela with starker leftist governments announced their intention to withdraw from all such treaties. In recent negotiations over a free trade deal with the United States, Australia simply refused to include a chapter in the agreement allowing international investment arbitration, arguing its courts were sufficient for such purposes. Countries are being urged forward in this regard by bodies such as the UN Committee on Economic, Social and Cultural Rights. After considering evidence of conflict between the protections of investor rights under NAFTA and the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), recommended that Canada “consider ways in which the primacy of Covenant rights may be ensured in trade and investment agreements, and in particular in the adjudication of investor-state disputes under Chapter XI of NAFTA.”²⁵ At the same time, countries with increasing capital reserves and multinationals, such as the Arab states and Norway, have become particular interested in BITs, while many remain particularly anxious to increase their shares of inward foreign investment. All this is to say that contemporary political economy complicates binary responses to bilateral investment treaties.²⁶ The empire of investment is hydra-headed and its subjects unruly and unpredictable.

5. Theology and Political Economy

In moving beyond “neo-liberal capitalism and human-rights-for-export”, Douzinas (2007: 293) draws on theology in sketching out an alternative vision, his ‘cosmopolitanism to come’. It is Derrida’s ‘democracy to come’ practised by Ackerman’s (1994) ‘rooted

²⁴ The scuttling of Cnooc’s (China National Offshore Oil Corporation) attempt to purchase controlling shares in Unocal by the US Congress (Pottinger, 2005) indicates their discomfort with their own investment medicine.

²⁵ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada* (May, 2006) E/C.12/CAN/CO/5 par. 48,

²⁶ One can even disaggregate further. If the domestic level, one witnesses conflicts over BITs between competing ministries and constituencies.

cosmopolitans'. To categorise and summarise crudely, Douzinas seems to posit four theologies: resistance, liberation, presence and event. The theology of *resistance* means for him that "human rights can reclaim their redemptive role in the hands and imagination of those who return them to the tradition of resistance and struggle against the advice of the preachers of moralism, suffering humanity and humanitarian philanthropy" (ibid). It evokes a certain Judeo-Christian practice of looking to those who are 'outside the camp', 'outside the city'.

Such resistance is shaped by the sacredness of the individual which provides the departure point for all action according to Douzinas. This *liberational* perspective is captured by his axiom of cosmopolitan justice, which is respect for the "singularity of the other" and an individual's "bare sovereignty". Thus, cosmopolitanism to come "extends beyond nations and states" and it is here that human rights is summoned, as a way to "attack the omnipotence of the sovereign, humanitarianism, the brutality and excess of its unlimited power" (p. 245).

This liberation is multi-relational and Douzinas invokes the religious traditions of *presence* but in a somewhat excessively Christian/Islamic manner, states that the "other comes first".²⁷ Quoting Jean-Luc Nancy, one exists through relating to the "existence of others, to other existences, and to the otherness of existence". This form of encounter is thoroughly within the present and includes the task of resistance:

Dissatisfaction with nation, state, the international comes from a bond between singularities. What binds me to an Iraqi or a Palestinian is not membership of humanity, citizenship of the world or of a community but a protest against citizenship, against nationality and thick community. This bond cannot be contained in traditional concepts of community and cosmos or of polis and state. What binds my world to that of others is our absolute singularity and total responsibility beyond citizen and human, beyond national and international. The cosmos to come is the world of each unique one, of whoever, or anyone; the polis, the infinite number of encounters of singularities. (Douzinas, 2007: 295),

Lastly, Douzinas evokes what some call a theology of *event* in order to avoid the overemphasis on abstract utopianism of the Diogenes' and Zeno's Greek Stoicism, Pauline

²⁷ I would though prefer Martin Buber (1937) on this score. He begins with the individual first who then moves with his whole being toward the other: the thou of others and nature and the eternal Thou. But we have the same idea, that it is the encounter with the other in the present that we must strive, encounters that transform how we use and are used by power.

Christianity (and much Marxism and neoclassical economics) and foregrounds the role of history and relationship. Thus, the “the past is the most important normative source for the promise of the future” and the that this “memory of the future must by complemented by the image of the past” (p. 295). The dialectic of the cosmo-polis is built by the groundings of the past in the relationships of the present. As another theologian and philosopher, Martin Buber (2002: Sermon VI), puts it:

Most of us achieve only at rare moments a clear realization of the fact that they have never tasted the fulfillment of existence, that their life does not participate in true, fulfilled existence, that, as it were, it passes true existence by. We nevertheless feel the deficiency at every moment, and in some measure strive to find — somewhere — what we are seeking. Somewhere, in some province of the world or of the mind, except where we stand, where we have been set — but it is there and nowhere else that the treasure can be found.

How do we assess all of this? On one hand, I very much welcome Douzinas’ invocation of theology over terms such as philosophy, ideology or even religion. In understanding patterns of large-scale social change one constantly finds a strong theological dimension within particular struggles – the mere overcoming of oppressive structures has required a sustainability that demands some form of ‘spiritual stance’, which not only draws on notions of some higher power, morality and idea but some form of personal response and responsibility. While these theological modes of mobilisation may be tactical at times, it is impossible not to observe the religious-tinged nature of many movements in their discourse

On the other hand, one cannot help feel overwhelmed by the power of the polis, and in this case study the commercial cosmopolitan global polis of the international investment regime. Moreover, even when resistance attains great heights, such as in the campaign against the MAI, it seems poorly equipped to deal with the ongoing political economy, the core of the polis. Tarrow’s (2005: 219) survey of globalised civil society ends with a modest conclusion: “transnational activism does not resemble a swelling tide of history but it more like a series of waves that lap on an international beach, retreating repeatedly into domestic seas but leaving incremental changes on the shore”.

In hindsight, one wonders whether engagement with that polis in 1999, in order to secure a slightly tamed multilateral investment arrangement, might have been more strategic and

possibly more consistent with the principles of cosmopolitan justice as Wai suggests.²⁸ Indeed, when France first withdrew from leading the initiative in 1997 within the OECD they heralded that their strategy was not temporally bound (Lalumière, 1998). Indeed, Martin Buber remained always cautious to how much and how fast one can move from a from *I-It* relationship (the polis) to an *I-Thou* relationship with others (cosmos).

Douzinas is alive to the limits of raging against the dying of the light and the many inherent contradictions of attacking sovereignty and supra-sovereignty:

What must be attacked is the theological mask of sovereignty, represented today by the hegemonic power rather than its pale homonymic imitations ... we must be aware that we cannot fight sovereignty and the nation-state in general without risking giving up the principles of equality and self-determination to the emerging super-sovereign. These principles were inaugurated by, with and against national sovereignty. They are today an indispensable barrier against ideological, religious, ethnic or capitalist hegemonies which masquerading as universalism or cosmopolitanism, claim the dignity of the cosmos that is nothing more than a marketplace or the moral rationalisation of particular interests. When a hegemon attacks the weakened sovereigns around the world, resistance may demand supporting the local against the global.

Thus he reserves a role for political economy as well as sovereignty in informing the *tactics* to guide those who resist. The question is whether greater attention to the power of the polis, its structures and its weaknesses, can complement the more theological standpoint of those who work for a genuine cosmopolitan order? Or, are the possible gains outweighed by the compromises therein?

6. Roads to Reform

We now turn to four possible roads for reform that allow for some alternative form of *systematic* reform for the investment regime. I do not include amongst them here options that call for a *multilateral* investment treaty on one hand or a mere *model* agreement that may or not be adopted in the future by a country or many countries.

²⁸ See preceding chapter.

1. Domestic Supremacy and Neo-Calvoism

Douzinas' concession to state sovereignty, to support the "local against the global", provides one possible road to reform; to simply halt and withdraw from the bilateral regime. It was the nationalist humiliation of extra-territorial capitulations that sparked their demise in Turkey and various Asiatic states a century ago and it is international commercial arbitration that is now triggering similar domestic responses, whether withdrawals, moratoriums or internal reviews. Indeed, the consultation paper distributed by the Government of South Africa in 2009 is recommended reading for its collective *mea culpa* for the lack of an overarching policy towards BITs negotiation, its risible anger at the humiliations of arbitration and its forthright articulation of human rights and environmental concerns.²⁹ This stands out in a country where the bedrock of foreign and trade policy has been the avoidance of any destabilisation of international investment and capital stability.

There are two potential options if 'domestic supremacy' is to be pursued. The first is to emulate Brazil's approach and desist from ratifying any bilateral investment treaties at all. Many have pointed out that, from an instrumental perspective, the level of foreign investment into Brazil has not been affected by the decision not to join the regime. Brazil is consistently amongst the top three developing country recipients of foreign investment (Gallagher, 2006). However, poor developed countries risks signalling disinterest in investment (Gallagher, 2006)

The second approach is to continue with investment agreements but remove the option of investor-state arbitration in the manner that Australia has done. As has been noted by one government:

There is no compelling reason why review of an investor's claims against a state cannot be undertaken by the institutions of the state in question—provided these are independent of the public authority that is in dispute and they discharge their duties in accordance with basic principles of good governance, including an independent judiciary.

Thus the invocation of *sovereignty* and national humiliation may be one discursive path of forward. One of the key advantages of this approach is it does away with two of the most

²⁹ Bilateral Investment Treaty Policy Framework Review, Government Position Paper, June 2009, Department of Trade and Industry, Pretoria.

problematic aspects of international arbitration, that foreign investors may receive greater protections than local citizens/investors, both procedurally and substantively, and that closeted and unpredictable arbitration is abandoned in favour of the more unitarian and transparent domestic adjudication system. One might argue that turning to domestic courts in would ensure corporations and the World Bank place more emphasis on improving domestic rule of law; and it is perhaps no surprise the latter has numerous programmes to this end, although few concern with the rule of law for the poor.

Indeed, the importance of domestic, particularly constitutional, review, has been underlined by the gruelling *Solange* litigation in Germany. In the *Solange I* (1974),³⁰ the Federal Constitutional Court, refused to cede its' authority over constitutional rights to the European Court of Justice over matters of European Community Law. While European Law was not under its jurisdiction, the Court maintained its' responsibility to measure it against the norms on fundamental rights in the Constitution..As time progressed, ECJ jurisprudence and Community Law evolved to allow for sufficient protection of fundamental human rights, in the view of the Constitutional Court,.³¹ In *Solange II*, the Court retreated and relinquished its supervisory power, subject to European Community Law continuing to protect fundamental rights.³²

Such an approach could be adopted by constitutional courts elsewhere. The Colombian Constitutional Court has followed a similar approach in the reviewing the draft Colombia-US free trade deal.³³ However, many courts are likely to be uncomfortable with adopting such a role given the clear provisions of much domestic arbitration legislation that domestically entrenches the role of international arbitrators. Thus, for countries without bolder apex courts, a more radical step would be required such as halting or withdrawing from treaties.

But there are risks and dangers of this clear embrace of the polis. The first, like in the field of trade, is that one needs to be careful that the international 'constitutionalism' of human rights is not lost in the process of reasserting sovereignty. Does the praise of sovereignty risk the same fate for international human rights?

³⁰ BVerfGE 37, 371 (1974), [1974] CMLR 540 [*Solange I*].

³¹ BVerfGE 73, 339 2 BvR 197/83 *Solange II*-decision, at 342.

³² Ibid at 343, see fn 7.

³³ *Comunicado de Sentencias C-750 y C-751 de 24-07-2008*, available at <http://actualicese.com/normatividad/2008/07/24/comunicado-de-sentencias-c-750-y-c-751-de-24-07-2008/>

The second is that the solution doesn't necessarily deal with the economics. Where countries have strong outward flows of investment, pressure from finance ministries, home multinationals and embassies abroad is overwhelming. International investment agreements provide more of a quid pro quo for states with internal and external capital interests, particularly when countries have no strong historical or legal system ties as Australia and the US have. Linked to this problem is the perceptions generated by withdrawal as it may send a signal of high risk to investors, particularly if a country is put in the same camp as Venezuela which has been vocally pursuing this policy.

The third problem is that some countries simply can't guarantee the rule of law to any foreigners let alone their own citizens. Who would trust Robert Mugabe with a few or many dollars? In Russia, foreign investors sometimes find themselves in the same threatened position as NGOs (Peterson and Gallus, (2008) Courts in Latin America also face accusations of succumbing to political influence and corruption at times. It is pertinent to note that even NGOs and victims of multinational abuses in South Africa in *Lubbe and Others v Cape (Plc)*,³⁴ amongst other cases, argued for the case to be heard by UK's court against the parent multinational on the basis that of the lack of experience by South Africa courts with such complex cases; a position supported by the South African Government (Meeran, 2006). That was ten years ago but when human rights NGOs and States themselves make these sorts of arguments, the challenge is readily apparent.

A fourth problem is the unintended consequences. Will the lack of the option of international commercial arbitration prompt foreign investors to secure other forms of protection, e.g., particular concessions for that company, a company-state agreement for arbitration, monetary or other legal benefits etc. Inadomi (2010) demonstrates how investors in the energy sector seek significantly greater concessions from developing country governments due to the perceived lack of protection of BITs for large up-front investments. One possible response to this scenario is the proposals by Schneiderman (2008). He champions the removal of BITs and proffers the alternatives of anti-discrimination laws that provide clear protections to all, including corporations and their shareholders, and a "foreign investment insurance programs,

³⁴ *Lubbe and Others v Cape (Plc)* [2000] UKHL 41; [2000] 4 All ER 268; [2000] 1 WLR 1545 (20 July 2000), www.bailii.org/uk/cases/UKHL/2000/41.html.

both public and private”, particularly in those countries with a weak rule of law. Collier (2009a: 232), however, dismisses the possibility of the latter on the grounds that:

[S]urely the cost of funding insurance against damaging host state intervention in large scale investment projects will be passed on to vulnerable consumers or else it will render such projects prohibitively expensive. Insurance against the risk of regulatory expropriation will be priced according to the ability of host states to intervene lawfully...

Therefore, unscrambling the egg may simply not be the possible. The best such a global movement could hope for is a slogan of ‘no more BITs’. But even this is problematic. The current web of treaties largely favours Northern countries, and the prisoners dilemma for developing countries once again appears with even more force.

2. Domestic ‘Lite’ – Exhaustion of Domestic Remedies

These challenges suggest a second possible option: introducing domestic exhaustion of remedies into existing and future investment agreements. Such a procedure would bring investment agreements into line with general international law, particularly human rights. The ILC’s *Articles on the Responsibility of States For International Wrongful Wrongs* provide, with regard to the admissibility of international claims, that the, “responsibility of a State may not be invoked if...the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted”.³⁵ While this position seemingly confines the rule to the substance of the particular treaty, the commentary by the ILC on Article 44 is revealing. Douglas (2003: 191) notes that the Commentary “makes it clear” that the principle of exhaustion of local remedies has a “fundamental character” – it contains the “conditions for invoking the responsibility of a State in the first place”. Article 15(3) of the draft Norwegian Model Agreement seeks to do precisely this. International arbitration is only permitted if “agreement cannot be reached between the parties to this dispute within 36 months from its submission to a local court” or “there are no reasonably available local remedies”

There are two clear advantages to this proposal. The first is that the obnoxious elements of opaque and distant arbitration are partly removed. The litigation must occur in the full glare of a domestic audience while there is also pressure on the state to provide a fair and efficient court hearing. The second is that the procedural nature of the reform makes it amenable to

³⁵ See art.44, ILC’s *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) located at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

universalisation. For instance, it is possible for all states to conclude a simple treaty, within or outside the ICSID/UNICTRAL framework, with provisions to the effect that all investment arbitration must undertake this domestic exhaustion route. Of course the disadvantage is that the substantive rights remain largely preserved in the treaties and a period of three years does not apply in similar human rights treaties.

3. International Integrationism within Human Rights or ‘Neutral’ Adjudication

However, Road 2 should not automatically presume that ad hoc international investment arbitration is the preferable route for investor-state dispute resolution, even after the domestic exhaustion of remedies. Other permanent *fora* already exist for review of many of these disputes.

One possibility is regional human rights courts. The European Court of Human Rights is currently used by companies, including on foreign investment claims (Emberland, 2006). The Inter-American Court of Human Rights has heard claims from shareholders on the right to property since its rules do not permit ‘legal persons’ such as companies to submit claims (Cassel, 2008). The potential benefits of this route can be seen in the jurisprudence of these courts. Emberland (2006) points out that the margin of appreciation applied to property rights cases by the European Court of Human Rights is particularly wide; the Court has striven to give States sufficient regulatory space, for example to restrict rent levels to protect tenants. Indeed, Norway’s draft model BIT, launched for discussion in 2008, sought to explicitly link the expropriation standard to the jurisprudence of the European Court of Human Rights.³⁶ The Inter-American Court of Human Rights has also addressed the relationship between BITs and human rights. In *Sawhoyamaya vs. Paraguay*, indigenous groups challenged Paraguay reliance on a BIT with Germany as a ground for its refusal to return land owned by a German national to an indigenous community. The Court held that human rights (in this case, a collective right to property under the Inter-American Convention) have supremacy in such circumstances:

[T]he application of bilateral commercial agreements do not provide a justification for the breach of states obligations emanating from the American Human Rights

³⁶ See discussion in Letter from Norwegian Centre for Human Rights to Business and Industry Department, 15 April 2008, available at <http://www.humanrights.uio.no/nasjonal-institusjon/overvakning/horinger/2008/investeringer.pdf>

Convention; on the contrary, their application must always be compatible with the American Convention”.³⁷

However, there is considerable discomfort amongst many human rights lawyers and activists over companies availing themselves of human rights courts. There may be significant resistance to further embracing companies within the individual singular theology of liberation.³⁸

An alternative is fused international jurisdiction where courts possess broader powers to adjudicate on all aspects of relevant international law. For instance, the Court of First Instance (CFI) of the European communities, indirectly reviewed the legality of Security Council (SC) anti-terror resolutions against the background of human rights peremptory norms. It held that it was:

[E]mpowered to check, indirectly, the lawfulness of the resolutions of the SC (imposing financial sanctions on individuals and entities allegedly affiliated with the Al Qaeda network) in question with regard to *ius cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.³⁹

In *Stauder*, the European Court of Justice (ECJ) stated that the Court should ensure respect for fundamental human rights despite⁴⁰ in *Hauer* stated that fundamental rights, including those in international treaties, “form an integral part of the general principles of law” and European community law.⁴¹ In the case of the Southern Africa Development Community (SADC), its’ Tribunal has addressed human rights and expropriation simultaneously. In *Campbell v Zimbabwe*,⁴² the Tribunal held that: “SADC as a collectivity and as individual member states are under a legal obligation to respect and protect human rights of SADC citizens. They also have to ensure that there is democracy and the rule of law within the region”.⁴³ They went on to find that the right to property and other human rights were violated in the expropriation of the farmer’s land.

³⁷ Corte Interamericana de Derechos Humanos *Caso comunidad indígena Sawhoyamaya vs. Paraguay*, Sentencia de 29 de Marzo de 2006.

³⁸ See Emberland’s (2006) discussion of the competing literature.

³⁹ Case T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Judgement of the CFI, 21 Sept. 2005 at para 226 cited in Note 1 above, p498.

⁴⁰ *Erich Stauder v City of Ulm* (1969) ECR 419, P.425.

⁴¹ Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz*, (1979) E.C.R. 3727

⁴² *Mike Campbell (Pvt) Ltd et al v Republic of Zimbabwe*, SADC (T) Case No. 2/2007.

⁴³ *Ibid*.

Promoting a fused agenda in practice is not particularly straightforward. It would require amendment at least to the provisions of some regional arrangements (e.g., Americas), creation of new regional systems which are still nascent (e.g., Asia) and significant support for some that already exist to deal with the influx of cases (e.g., the European Court of Human Rights and SADC Tribunal). Moreover, consideration would need to be given as to whether jurisdictional opportunities under BITs would need to be curtailed; a move that is likely to be resisted by investors.

4. Integrationism within Investment Arbitration

A fourth approach is to ensure that, at the very least, investment arbitrators integrate human rights principles in their decision-making. It is a strategy being pursued by legally-oriented NGOs and some social movements, which Peterson (2009) has characterised as the clearest acknowledgement that the investment treaty ‘genie is out of the bottle’. All one can do is begin to claw back some of the lost ground. Indeed, the somewhat controversial High Priest of economic law and human rights, Ernst-Ulrich Petersmann (2009: 4), asks the reasonable question:

Why do national and international courts, investor-state arbitral tribunals and alternative jurisdictions for the settlement of transnational investment disputes and other economic disputes, in their judicial review of treaty claims and related contract claims (for example, regarding alleged government interferences into property rights), refer so rarely to the customary law requirement of settling ‘disputes concerning treaties, like other international disputes ... in conformity with the principles of justice and international law’, including ‘universal respect for, and observance of, human rights and fundamental freedoms for all’, as codified in the Vienna Convention on the Law of Treaties?

This call for substantive legal positivism has been embraced by some arbitral panels. The ICSID tribunal’s statement in the early case of *Asian Agricultural Products Ltd v Republic of Sri Lanka* is commonly cited in this regard:

[An investment treaty is not] a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.⁴⁴

⁴⁴ *Asian Agricultural Products Ltd v Rep. of Sri Lanka (Award)* 1990, 4 ICSID Rep. 245.

Some ICSID Tribunals have taken into account a host state's other international obligations (Mann, 2008: 25-29). In *SPP v Egypt*, the tribunal considered the argument that a host state's failure to interfere to protect the investor might have led it to violate its international obligations under the UNESCO Convention on the protection of cultural antiques.⁴⁵ Although the argument was found to be factually irrelevant in that case, it "nevertheless signalled that ICSID Tribunals may take account of a state's broader international law commitments" (Luke and Kevin Gray Peterson, 2006: 29).

The invocation of human rights and environment treaties in defendant and *amicus curiae* submissions has accelerated in recent years. In 2002, Argentinean organisations gained the right to intervene in ICSID arbitral proceedings⁴⁶ while in 2009 in *Foresti v. South Africa*, the amicus organisations additionally secured the right to access to redacted pleadings and evidence in the arbitration.⁴⁷ In the former, case, the tribunal held that, water and sanitation systems "provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations".⁴⁸ In its Award eight years later, the Tribunal affirmed that the Argentina must comply with its obligations under human rights treaties. However, it was clear that human rights do not trump investment obligations and "Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive".⁴⁹ The Tribunal avoids expressing itself on what happens when there is a direct conflict. But it implicitly suggests that the test is whether Argentina had other alternatives to avoid violations of its human rights obligations. In this case, the majority found that the State could have used others means to respect the right to water without imposing a freeze on water prices. And this is the rub. It is the particular jurisprudential doctrines and their application that is crucial rather than the broad legal questions of applicable law. The key legal question for such cases is what sort of proportionality and reasonableness test should be applied when evaluating State conduct and what level of deference is to be accorded. If human rights are to

⁴⁵ See Award in *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, 32 International Legal Materials, No. 4 (1993) para 154.

⁴⁶ *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* (Case No. ARB/03/19). This right of amicus was subsequently granted in *Biwater v Tanzania* to a similarly constituted group of interveners. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award of 24 July 2008. While the NGO submission was welcomed by the tribunal in this case, it was not substantively taken into account in the decision.

⁴⁷ Letter from ICSID Tribunal Secretary to Legal Resources Centre and the International Commission of Jurists, 5 October 2009.

⁴⁸ The Centre for Legal and Social Studies et al (Press release, 28 June 2005).

⁴⁹ *Suez and Vivendi v. The Argentine Republic* (n. 19 above), para. 262.

be relevant, they must connect with these underlying jurisprudential markers and lead to the sort of conclusions articulated by the tribunal in *Methanex v United States*:

[A]s a matter of general international law, a non discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulatory government to the then putative investor contemplating investment that the government would refrain from such regulations.⁵⁰

However, there are a myriad of other problems with this approach since the interpretive space remains defined by the architecture of investment treaties and arbitration. There also remain serious questions as to the competence and authority of *ad hoc* arbitral panels to adjudicate on matters of fundamental rights – even as limitations on investors’ rights. The remedial powers of these tribunals, though significant, are restricted to compensating investors for violations of the terms of investment treaties; they cannot make orders with respect to violations of fundamental human rights.

The danger of skewed appropriation of human rights remains patently clear. Philip Alston has lacerated Ernst-Ulrich Petersmann for the way in which he earlier called for human rights to be addressed within the WTO, that are substantively divorced from the actual human rights recognised within the UN system:

[D]espite his consistent invocation of the discourse of human rights – and contrary to the reader’s first impressions as well as to Petersmann’s own perception of his work – his approach is at best difficult to reconcile with international human rights law and at worst it would undermine it dramatically. In essence, the result of following the approach set out would be to hijack, or more appropriately to Hayek, international human rights law in a way which would fundamentally redefine its contours and make it subject to the libertarian principles expounded by writers such as Friedrich Hayek, Richard Pipes and Randy Barnett (Alston, 2002: 816).

This threat of appropriationism should give one pause when Petersmann now advances the argument for the incorporation of human rights within the investment regime.

⁵⁰ *Methanex Co-operation v United States*, Final Award, August 3, 2005 p278, part 4, Chapter D, para7.

7. Conclusion

The seemingly unstoppable and spinning spider web of investment treaties presents a clear challenge; not only for lawyers concerned over the fragmentation of international law but in the commandeering of international law for largely private commercial purposes. Despite mounting what seemed to be the archetypal transnational campaign to limit its expansion, the breaking of the web in one place has done little to stop it growing elsewhere. Douzinas' invocation of various theologies are important for adopting a clear stance in relation to thinking about the reform of the system, lest international human rights lawyers simply lead the movement down the path that makes the international human rights subject to that of stronger international constitutional order grounded only on investor property rights.

However, the choices are difficult. Resistance is easy to mobilise when there investment litigation directly threatens access to a particular right such as water or electricity or indigenous peoples' access to land. But where the possible impact on citizens is more diffuse, such as the Italian company's challenge to South Africa's mineral legislation, civil society organisations have struggled to incite mobilisation. And, in most instances, the real effect of the BIT remains hidden, silently affecting government decisions when threats are made by companies to litigate.

This post-MAI scenario reveals the limits of the 'cosmopolitanism to come' and the inherent weakness of its adherents. It is difficult to expect that the investment regime will soon collapse under the weights of its internal contradictions. Some engagement will be needed with the rapidly changing political economy of BITs in order to move towards a more fair and just solution; moving beyond 'oppose' to 'propose'. This will mean sometimes cooperating and with and against different parts of the national and international polis and making principled compromises.

In doing this, one might think about a theology of political economy that informs the types of choices that are made in such process and, critically, who makes these choices. It might mean forming a clearer economic version that not only allows the post-development rejectionist alternative to economic capitalism but may also seek to simply tame capitalism as advocated by Wai. It might require a greater engagement with political parties and the difficult task of constituency-building.

In this country where I write from, Norway, the social democratic order is largely the product of the use and alliances of power from below. But at the same time, the country's international investment profile – which includes hosting a large number of unregulated multinationals, buying weapons from corporations with stained human rights records and administering a massive pension fund that invests in what one commentator has called a “dirty list of the world's worst corporations”(Curtis, 2009) – reveals that the international polis requires its own and sustained counter-politic.

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