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Investor-State Dispute Settlement and the Marginalization of Developing Economies

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Abstract

For a long time, international investment law (IIL) has been criticized for being an instrument of economic imperialism that benefits multinational firms and capital-exporting countries at the expense of host states, especially in the Global South. This study examines how IIL upholds historical patterns of economic supremacy through procedures like Investor-State Dispute Settlement (ISDS) and Bilateral Investment Treaties (BITs). It looks closely at how these legal frameworks, which are frequently presented as impartial and essential for protecting investments, disproportionately help rich economies while limiting regulatory autonomy in underdeveloped countries.

This paper examines significant arbitral awards, treaty clauses, and changes in investment law policy using a doctrinal and empirical approach. It also looks into how global financial institutions contribute to the maintenance of unequal power relations. According to the study, uneven dispute resolution procedures and economic coercion continue to be remnants of imperialism in investment law, even in the face of recent reform initiatives. In its conclusion, the study makes the case for a more equitable legal system that gives host state sovereignty and fair investment practices top priority.

By providing insights for practitioners, academics, and politicians aiming for a more fair and just global investment regime, this study adds to the continuing discussion on decolonizing international investment law.

Introduction

Even if formal colonialism has mostly ceased, the mechanisms of colonial control still exist, especially in the connection between the Global North capital-exporting countries and the Global South. This long-standing power system, where dominance and exploitation continue under the pretext of development and modernization, is defined by Annabel Quijano's idea of colonialism.[1] The Global South's ongoing political and economic reliance is ensured by the neo-colonial frameworks embedded in international investment law.[2]

The Convention for the Settlement of Investment Disputes, which was started by the International Bank for Reconstruction and Development (IBRD), which is currently a member of the World Bank Group, is where contemporary investment law had its start.[3]The International Centre for Settlement of Investment Disputes (ICSID), a crucial organization created to safeguard foreign investments in the Global South, was established by this framework. This regime reinforces a structural imbalance by frequently putting investor interests before of host states' developmental needs, despite its stated goal of creating safe investment environments.[4]

The Global North's interests are still given preference under the current legal system, which enables them to continue controlling the Global South's economic growth. These dominance structures are not only the result of past colonialism; they are also maintained by international legal and economic frameworks, especially international investment law, which supports a Eurocentric worldview that gives strong nations and corporations interests precedence.[5]The colonial relationship is thus maintained by international investment law, which demands that developing nations adhere to externally imposed models of economic success, frequently at the expense of their own development objectives.

International investment law serves as a modern-day form of imperialism, despite being frequently presented as a framework established with the approval of sovereign states. [6]Alvarez points out that its influence goes beyond that of conventional colonial empires, creating what he refers to as a "empire of law" that is independent of any one country.[7] By imposing the legal norms of capitalexporting nations through treaties and agreements, this contemporary investment regime marginalizes alternative legal frameworks and economic approaches that would better meet the development requirements of the Global South.[8]

Neo-Colonalism of Investment Law

Protections that were previously only available to colonial businesses are now extended to foreign investors. Foreign investors interests are given priority under international investment law frameworks, which protect them from alleged political dangers in host nations.[9] Given that international law was initially created to regulate the interactions between European empires and their colonies, Anghie contends that this dynamic has its roots in the history of colonialism.[10] This tradition endures today as capital-exporting nations continue to advocate for economic models and policies that serve their own interests, urging emerging nations to follow suit in the name of economic modernization and progress. [11]

Like colonialism, investment law prioritizes maximizing profits and protecting the interests of foreign investors, frequently at the expense of the development and sovereignty of host nations.

The current regime of international investment law reflects Memmi's description of colonial systems as locations of great profit and low costs by guaranteeing the profitability of foreign investors through procedures such as Investor-State Dispute Settlement (ISDS).[12] The unequal power dynamics created during colonial times are further cemented by these procedures, which primarily safeguard investors and their home nations and enable them to contest host state acts that could jeopardize their profits. [13]

Although investment law presents itself as neutral, it is actually firmly rooted in a neo-colonial framework that restricts the sovereignty of nations that import capital. It limits their freedom to follow autonomous, locally relevant development paths by requiring them to follow norms established by wealthier states.[14] The growing disparity inside and between countries, especially outside of China and India, is a reflection of the Global South's continuous efforts to overcome the limitations placed on them by these international legal frameworks.[15] Thomas Piketty, an economist, claims that the poorest governments have gotten poorer over the last few decades, underscoring the failure of international investment regimes to support equal development as promised. The way that this continuous system of exploitation and control is cloaked in modernization and progress is made clear by Annabel Quijano's concept of colonialism.

Emperical Nature of Investment Law

Alvarez claims that it functions as a "empire of law," extending beyond national borders and incorporating the ideals of capital-exporting

countries into the international legal system. By offering foreign investors protections against political risks that could jeopardize their earnings, investment treaties and arbitration systems—which regulate relations between investors and host states—reflect these dynamics. [16]Even though these safeguards are supposed to be neutral, they frequently serve to maintain a neo-colonial system by giving preference to foreign investors over locals.[16]

Investment law's focus on safeguarding the profits of foreign investors usually comes at the expense of host countries' sovereignty. Tecmed [17]and Pope & Talbot[19] are only two examples of tribunals and arbitration cases that consistently uphold the notion that protecting investors is crucial to creating a secure atmosphere that attracts international investment. This investor-centric approach is similar to colonial economic regimes that prioritized profit extraction and colonial economic exploitation. Strong capital-exporting states often draft investment treaties that force host countries to adopt foreign economic policies and adhere to economic and legal norms intended to benefit the Global North. [18]

The counterclaims that host states can make against foreign investors, however, highlight this power disparity even more. Because of the systemic bias in favor of investor protection, host state counterclaims are rarely successful in practice. Argentina's attempts to use counterclaims to hold investors accountable in instances such as Urbaser v. Argentina[19], for example, failed, underscoring the host states' restricted options. An underlying philosophy that prioritizes investor profitability over the rights and needs of local residents is revealed by the current investment arbitration system. States win almost one-third of investment disputes, but investors usually receive monetary compensation through settlements or arbitration, demonstrating this bias.[20] This disparity is demonstrated by ICSID data, which frequently includes payouts to investors, especially those from developed countries.[21] Even in cases where the host governments prevail, the awards are typically less than the damages that investors are requesting, which may leave them with little money after deducting legal and tribunal costs. This demonstrates how the international investment environment favors foreign investors, particularly those from wealthy countries, and gives host states few ways to contest investor behavior. [22]

One of the main justifications for extending foreign investment regulations has traditionally been the possibility of economic growth. However, the ratification of bilateral investment treaties (BITs) often has little impact on attracting foreign direct investment (FDI) that contributes to development.[23] There was no appreciable increase in "development-enhancing FDI," according to a study that examined twelve countries.[24] Furthermore, according to an OECD analysis, treaty partners rarely receive funds from international investment agreements (IIAs) in the ways they had hoped. Because promised benefits, such as technology transfers and job creation for capitalimporting governments, have frequently not materialized, the true developmental impact of these treaties has been questioned. [27]

Protections are given to investors to insulate them from "political risks," although municipal rules or development plans that can contradict these protections are frequently disregarded. This prejudice stems from a mentality that views host state government as a danger to foreign investments rather than as a means of promoting regional development.[28]

Similar to colonial systems that protected external interests at the expense of local economic growth, international investment law reflects colonial dynamics by placing a higher priority on the interests of foreign investors than local governance. According to Albert Memmi's assessment, colonialism left societies "diseased societies" unable of coming up with internal answers by depriving them of the agency to deal with their own problems.[25] In a similar vein, by shifting conflicts from national courts to international tribunals, the investor-state dispute settlement (ISDS) mechanism curtails host state sovereignty.[26] The investor-state dispute resolution

(ISDS) process and international investment agreements (IIAs) both reflect this position by enabling foreign investors to avoid local courts that are thought to be unreliable or inefficient. In instances like "Clayton," where international tribunals supersede national courts, Tom Ginsburg characterizes ISDS as a "substitute" for local decision-making, so excluding domestic judicial systems.[27] By maintaining a neo-colonial narrative that portrays institutions in the Global South as fundamentally flawed, this system further erodes local control and prolongs dependency. [28]

Treaty norms that penalize host nations for activities, including those based on valid public policy, if they violate investors' "legitimate expectations" further solidify the disrespect for local courts.[29] States are frequently compelled by the fair and equitable treatment (FET) requirement to lessen the effect that policy changes have on investors, even when those changes advance public goals like social welfare, environmental preservation, or health. This leads to a system in which the rights of investors take precedence over national sovereignty, suppressing local governance and limiting nations' capacity to self-regulate, particularly when dealing with social issues. [30]

Furthermore, rather than merely substituting local courts, the ISDS mechanism creates an alternative legal system that upholds the subordination of host governments' policy autonomy by establishing a judicial system designed expressly to safeguard investor profits.[35]This change undercuts the ability to strike a balance between conflicting social goals, such income redistribution programs or constitutional safeguards for Indigenous peoples, which are usually at the heart of national legal systems. Due to investor interests taking precedence over local development goals, these concerns are typically ignored in arbitral rulings.[31]

Soft Law Influence – Mirroring Ancient Empires

As Bedjaoui argued, international law, often presented as an impartial "law of nations," effectively entrenches existing power dynamics.[32] The treaties that underpin this framework, despite being framed as agreements based on mutual consent, often reflect the unequal bargaining power between states, where metropolitan countries advance their own interests under the guise of legal equity. [33]In the modern global order, international investment law serves less as a neutral framework and more as a tool for reinforcing hierarchical relationships between developed and developing nations.[34]

While formal empires imposed strict control over their colonies, depriving them of political sovereignty, informal empires, like modern economic regimes, encourage self-rule while still directing peripheral states toward liberalized markets and economic policies favorable to capitalexporting countries.[35] This power asymmetry reflects a continuation of colonial structures. Alvarez observes that modern international economic law reflects the characteristics of ancient empires, not through formal control or direct coercion, but through informal mechanisms of influence.[36] The international investment law system operates similarly, allowing nominal self-rule in developing nations while subtly giving foreign investors' rights precedence over national regulatory autonomy, especially in matters of property and contract law.[37]

Although states in the Global South technically retain political sovereignty, the framework of investment law severely restricts their economic and regulatory autonomy by prioritizing investor protection over domestic public policy concerns.[38] This is because the current investment regime operates at the intersection of formal and informal empire, allowing metropolitan powers to dominate the economic systems of host states while appearing to respect their autonomy.[39]

In the past, the New International Economic Order (NIEO) had the chance to address these disparities by putting forth a revised international economic framework that would encourage just growth. [40]The absence of significant reforms, however, indicates that neo-colonial dynamics are still being maintained by the current legal system. International law has traditionally served to maintain existing dominance relations rather than to challenge them, as Bedjaoui noted.[41] The exploitative relationship between the Global North and South is strengthened by the legal ties that continue to reflect the interests of capital-exporting nations. [42]

Particularly in the Global South, this system promotes a framework that keeps widening socioeconomic gaps and undermining host nations' ambitions for progress. Comprehensive changes are desperately needed to redress these disparities and reorient international investment legislation away from protecting the interests of wealthy foreign investors and toward fostering just and sustainable development.[43] This would entail reevaluating how governments' rights to regulate in the public interest and investor protection are balanced, making sure that regional needs and objectives are not trumped by outside economic forces. [44]

Particularly in how it handles emerging nations, the current system of international investment law bears a striking resemblance to past imperial legal frameworks. [45]Although it is portrayed as neutral, its actual results are similar to those of imperialism in the past, when the interests of a select few are served by shaping the global order while retaining economic and legal dominance over the majority.[46]

The assumption that nations maintain their openness to private foreign investment in all economic sectors is a defining feature of the contemporary regime of investment law. The imperial mentality of the Victorian era, which encouraged unfettered investment in many fields and undermined state monopolies, is reflected in this.[47] States must implement "negative lists"—pre-negotiated exceptions where foreign investment is restricted—in order to guarantee this openness. [48]As a result, once the obligations are solidified by treaty signing, states are compelled to forecast and commit to future economic policies with little leeway to alter course.[49] Many treaties contain both a "rollback" mechanism that forces nations to further liberalize, so diminishing their ability to defend domestic businesses, and a "standstill" provision that forbids further limitations on market access.[50] The ultimate objective is to create "irreversible minimum standards" that states are unable to deviate from, even if doing so would benefit the general public or adapt to shifting social or economic circumstances. [51]

The international regime's investment protection criteria serve to limit the policy options that governments, particularly developing ones, can choose from.[52] The investment regime restricts sovereign policy-making in favor of capital-exporting states, much like colonial regimes did, which limited the sovereignty of the colonized state in favor of the metropolitan city that was the colonizer. The preservation of investor rights is given first priority under investment law, which leaves little opportunity for political discussions about national priorities, programs, or public needs.[53] Although "right to regulate" clauses may seem to offer flexibility, in reality, they rarely go beyond the limited boundaries that typically wind up being in line with the desires of developed states.[54] States are further ensnared in a framework that violates their political and economic autonomy since investment disputes are almost entirely focused on whether investor rights have been violated, with policy change or innovation being treated as secondary issues.[55]

Contemporary Investment Law

The international investment law regime's promise of substantial economic benefits to developing nations—particularly in terms of luring foreign direct investment (FDI), technology transfers, and job creation—is one of its main defenses. But the reality has frequently been much less encouraging. Research regularly

demonstrates that bilateral investment treaties (BITs) have a little overall impact on foreign direct investment, even though they may have an impact on investment decisions in some situations.[56] Evidence really points to a poor link between signing BITs and reaping the anticipated and/or promised economic gains.[57] For example, while Mexico still has some limited investor-state dispute settlement (ISDS) provisions, the updated North American Free Trade Agreement (CUSMA) drastically reduces ISDS provisions between the United States and Canada.[58] This prejudice and the meager advantages that developing nations derive from these agreements are further highlighted by the U.S. International Trade Commission's (ITC) estimate that this restriction on ISDS access would have a minor short-term effect on U.S. investment in Mexico.[59]

The survival and operation of the international investment law system are largely dependent on legal experts.[60] Advocate for and decide on the regulations governing foreign investment while working for governmental agencies, legal firms, and international organizations. The International Centre for Settlement of Investment Disputes (ICSID), which prioritizes arbitration above other dispute resolution procedures and has grown to be a significant organization for investor protection, was founded in large part because to the efforts of lawyers.[61] These legal elites support a legal system that favors capital-exporting nations while upholding the subordination of developing nations by influencing the theoretical foundations of investment law in addition to providing legal advice and preside over cases. [62]

The employment of soft law processes makes the current investment law regime especially effective. Treaties, memoranda of understanding, and arbitration decisions are examples of informal, non-binding instruments that have a big impact without needing direct political control. Because of this, the rule is robust and challenging to overthrow.[63] Despite the lack of a single dominant global actor, the participation of strong governments, especially those in the G7, guarantees that the regime stays focused on their interests.[64] Even though there isn't a single sovereign like in traditional empires, this coordination among economically powerful nations represents a new kind of "informal empire" where global economic policy is guided in ways that favor the interests of the Global North while maintaining developing states in a subordinate position[70].

As a result, the current system of international investment law operates as a kind of neocolonialism, whereby legal tools are employed to limit the sovereignty and capacity for policymaking of developing countries from the Global South and to maintain the dominance of economically strong states, typically those in the Global North.[65] While the legal frameworks itself continue to support the interests of foreign investors, the promises and guarantees of economic growth and prosperity that are frequently invoked to support these accords have largely fallen short of expectations. This regime maintains patterns of dominance reminiscent of past colonial forms by using soft law, treaties, and arbitration to uphold global inequality and guarantee that developing countries continue to be politically and economically dependent. [66]

Conclusion

This analysis of international investment law looks at how it hurts the Global South and makes the case that it reinforces colonial legacies by putting the interests of foreign investors ahead of the needs of developing countries. [67]Mohammed Bedjaoui, a legal professor, described the three stages of imperialism in the modern era in 1979. The New International Economic Order (NIEO), which aimed to rectify global economic imbalances and challenge the Global North's economic domination, was fiercely opposed by imperial nations during the first phase. [68]The second stage is a change in which imperial states appropriate new international arrangements for their own gain after realizing how destructive this system would be to their own interests. [69] In the last stage, imperialism is defeated and a new, structurally revolutionary world order is

established. According to Bedjaoui, the globe was still firmly in the first phase at the time, when imperial nations sought to maintain their control over international economic systems. Unfortunately, Bedjaoui's framework raises important questions about whether the world has progressed past the first phase or whether the Global South is still stuck in a neo-colonial structure when applied to the current state of world affairs, especially in the area of international investment law.

Given all of the information and the arguments presented in this paper, it can be concluded that the current state of the global economy indicates that we have not progressed past Bedjaoui's first phase of imperialism. The Global North's domination is still reflected in modern legal and economic structures, even in the wake of the fall of conventional empires. The legal and economic structures that link developing countries to the interests of strong, capital-exporting powers ar e what define this continuous imperialism rather than overt political rule. [70]According to Bedjaoui, the New International Economic Order (NIEO) sought to empower developing nations by implementing sustainable and self-sufficient growth patterns. However, a global system that upholds poverty and inequality has been reinforced by modern international law, which has mostly maintained a cosmetic equality that disregards the unique developmental needs of individual nations. Investment regulation usually adopts a one-size-fits-all strategy that favors foreign capital rather than encouraging locally generated economic solutions. [71]

The protection of foreign investors is the main goal of international investment law, frequently at the expense of long-term goals like sustainable development, local employment, and environmental preservation. This arrangement is similar to Rostow's theory of development, which held that less developed countries should accept capital flows in the absence of a thorough national development plan.[72] Instead of supporting local economies, this paradigm produced "enclave economies"—separate centers for resource extraction that benefited metropolitan interests. Such enclave systems perpetuate a reliance on external forces similar to colonial dependency by leaving host states dependent on external markets without incorporation into local economic frameworks.[73]

The liberty of host nations is further curtailed by investment legislation, which penalizes actions that put environmental integrity or community welfare ahead of investor rights. For example, states are frequently held accountable for nationalizing resources or giving priority to environmental assessments in order to benefit local populations. This reflects a culture that discourages local governance decisions that have an impact on international investments.[74]

In the past, the need of democratic states learning from their failures was argued by intellectuals such as Montesquieu[75] and Tocqueville[76]. Investment law, on the other hand, adopts a different approach by penalizing nations for departing from its standards, which stifles innovation in sustainable development and governance. It establishes a restricted framework that hinders learning and adaptation by denying governments the autonomy to investigate policies that are appropriate for local requirements. [77]

This demonstrates how colonial-like tendencies are still present in international investment law. Even while the NIEO called for fair international economic relations, contemporary investment frameworks frequently put the interests of foreign investors first, limiting the Global South's ability to develop and perpetuating a cycle of inequality and dependency. [78]

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