A Polemic: The Cases For and Against Investment Liberalisation

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APPENDIX

A Polemic: The Cases For and Against Investment Liberalization

Leon E. Trakman: The Case for Investment Liberalization

Muthucumaraswamy Sornarajah: The Case against Investment Liberalization

TRAKMAN

The case for a transnational—or international—investment regime is political and economic as much as it is legal. It is political and economic in the assertion that foreign investment ought to be subject to protection not only by, but also from, nation-states. The rationale is that nation-states, acting in economic self-interest, ought not to be unduly constrained by a system of laws or rules that transcend and supersede the authority of those states to act in the public interest. The converse rationale is that foreign investors ought to be subject to treatment by host states that is transparent in nature and evenhanded in application, and that is not arbitrarily imposed on public interest grounds. Foreign investors ought to have the reasonable expectation that rights granted them to invest in a host state are not arbitrarily denied. Host states should have the power to curtail those rights on principled grounds not inconsistent with obligations assumed by treaty or investor–state agreement.

The case for protecting foreign investors from state incursion is sometimes identified with economic rationalism that is embodied in liberal discourse. Encouraging the free flow of foreign investment with minimal governmental interference is more likely to profit not only foreign investors, but also the domestic states in which they invest. This result is not assured, as when a foreign investor takes advantage of the host state and its subjects through the unreasonable exploitation of natural resources, or if a host state fails to pass on to domestic consumers the economic benefits derived

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from foreign investment. However, subject to these qualifications, it is assumed that investment treaties that grant transactional rights to foreign investors will advantage both host states and those investors. Constraints imposed on foreign investors, such as those grounded in national health and public policy, are ways in which states protect their national interests from investor incursions that are deemed to undermine the national good.

SORNARAJAH

It is important to take historical factors into account. The law cannot be viewed in the present context alone. Its rules were fashioned at a time when investments were exploitative and were designed in the context of Africa and Asia existing as providers of raw materials and markets for products. In that sense, the states that emerged from colonialism have had little opportunity to reframe the laws that had been devised in colonial times. If these rules continue to frame the regulatory structure that transcends sovereign authority of the developing states, they would have to be in continuing subservience to the interests of the developed states.

Nation-states do not have economic motives alone. They need to conserve their natural resources and utilize them in the interests of their own posterity as well as have international community interests in environmental protection in mind. The nation-state must ensure its economic development, but the paths to development are not uniform, and are not the ones prescribed by the international financial institutions alone. Some developing countries have successfully adopted their own models regarding development, which are based on alternative economic models—China being the obvious example.

TRAKMAN

The extent to which foreign investors reasonably enjoy rights and host states owe them duties depends significantly but not exclusively on the treaties governing foreign investment and any contractual relationship between foreign investors and host states. In issue is not only whether host states act in a formally legal manner, but also whether their actions are substantively fair. However, fairness should be grounded in a context that is informed, not only by macro-historical facts, but also by immediate treaty and contractual undertakings.

None of this denies the need for states to act in the national interest, including by preserving the cultural heritage of local communities. States need to regulate markets that are vulnerable to foreign competition. They need also to maintain public health programs and environmental protection schemes. The purpose is rather to ensure that states do not use national interest arguments arbitrarily to attract and then renege on undertakings made to foreign investors, such as through an expropriation or

other government taking that is substantively inconsistent with the duties they have assumed by international convention, treaty, or investor–state agreement. The greater good does not exclude the good of individual states, but the good of the whole is ultimately more than the sum of its parts.

SORNARAJAH

Altruistic ideas as to global progress through liberalization may be a subterfuge for advancing the interests of multinational corporations. Such sentiments were expressed in order to justify free trade and investment from colonial times. Grotius justified free trade on the ground of the brotherhood of man. He advanced the doctrine of the freedom of the high seas so that the Dutch could enter the Malacca Straits and then exercise maritime power in the Asian oceans. In modern times, the magic mantra of neoliberalism is that free flow of investment through protection will bring economic development. It has not been shown to happen. Instead, there continues to be exploitation of the poorer areas of the world in collusion with elite groups. The law becomes a pliant instrument that would facilitate and justify the continuing advantages that are bestowed on multinational corporations, and a network of protection of foreign investment is created that limits the regulatory power of the state to act in the interests of its people. The global economic crisis has resulted in skepticism of the neoliberal view.

TRAKMAN

The risk of wealthy investors from developed home states using their economic and political power to dictate foreign investment is real. Nevertheless, account must also be taken of the converse risk of nation-states, not limited to developed states, invoking arguments based on sovereignty and the national "good" ex post facto, namely after having opened their doors to foreign investors. It is true that historical and ongoing economic disadvantage should be a factor in considering whether a host state has acted unreasonably in its treatment of foreign investors. However, that argument should not serve as a mantra to justify states using arguments grounded in the national self-interest to transform arbitrary takings into doubtful means of legitimating the regulation of foreign investment.

Nor it is appropriate to treat multinational corporations as representing all foreign investors in poor countries. There is a history of multinationals taking economic advantage of poor states and their subjects. Small and medium sized foreign investors often lack the political, economic and legal capabilities to effectively complain about receiving unfair treatment from host states, including by developing states. In addition, states also sometimes rely on the incapacity of foreign investors to mount investor–arbitration claims. States can also feign the grounds on which those states

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avoid duties on which foreign investors reasonably rely in investing in a host state. It is true that poor states often conclude treaties and agreements because of economic and social need. However, this should not lead to an open door to disregarding treaty or contractual obligations insofar as states ought reasonably to have foreseen and redressed those issues *before* assuming obligations by treaty or agreement. What is sauce for the goose is also sauce for the gander. In principle at least, states—rich and poor—cannot have it both ways. They cannot conclude treaties and contracts that invite foreign investment into host states, and then deny their voluntary action in making those invitations.

SORNARAJAH

Noninterventionism in foreign investment will not be a desired goal of states after the global economic crisis. In Asia, noninterventionism is passé because measures taken to deal with the earlier Asian economic crisis involved direct interventions by the state. Foreign investment was affected by expropriatory measures in both Europe and the United States. The argument that government interference is not advisable no longer holds as a result of the demonstration effect of the measures that were taken to confront the various economic crises. In the area of foreign investment, though success models such as China and India are dressed up often as triumphs of the neoliberal model, the fact is that in both countries there is heavy control of sectors of the investments that are thought vital to the economy. In Asia, though "open door" policies were announced by the various states of the region, restrictive laws controlling entry of investment remained. They were liberalized to the extent, for example, that higher percentages of shares in joint ventures could be held by the foreign investor but controls still were maintained. The few cases from Asia, such as *Frapport v Philippines,* demonstrate the extent of regulatory control. Some sectors such as oil have a heavy presence of the state oil company, and it is unlikely that such dominance will be dismantled in the near future.

TRAKMAN

It is true that neoliberal conceptions of international investment perpetuated by developed states for several centuries diverge from the so-called liberalization of investment in developing countries, such as in Asia. However, neoliberalism does not deny the virtue of regulation. Nor does it insist that regulation of investment should always prevail, any more than it pretends that markets are always "free." What is challenged is the argument that neoliberal models of international investment law are passé because they deny the capacity of states to regulate investment. It is true that state regulation of international investment expanded globally after the 2008 recession. It is also true that some Asian countries, not limited to China, for ideological

17_Appendix.indd 502 1/9/2013 6:29:51 PM

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and functional reasons insist on a closer regulation of foreign investment than most Western states. However, neither postulation denies the common view that foreign investors should enjoy a semblance of freedom in order to facilitate an investment. It requires that foreign investors enjoy a level of freedom accorded to them by customary or investment treaty law, constrained by the economic and social disadvantages of poor states in relation to wealthy investors.

The fact that this level of enjoyment is contentious is entirely explicable in fact. No standard of treatment accorded to foreign investors is absolute. Minimal standards of treatment, most-favored-nation, and national treatment, along with the right of investors to receive fair and equitable treatment, are all contextually determined. A foreign investor does not enjoy unqualified privileges that, once granted, states cannot limit thereafter. Developing states in particular often have reasonable grounds for regulating foreign investors in response to comparatively unforeseen circumstances giving rise to material disadvantage, including but not limited to economic recessions and civil insurrection. However, these grounds for states to regulate investment, including through expropriation, do not mean that foreign investors who are granted the right to invest in host states should have their rights summarily disregarded without compensation.

Determining when nation-states have unfairly exercised their regulatory powers is inevitably contestable. Under a socialized twenty-first–century human rights discourse, nation-states that enjoy unequal power over foreign investors should be accountable for exploiting that power, just as dominant investors should be accountable for exploiting the economic and social vulnerability of less-developed states. This does not imply that less-developed states that conclude investment treaties or investor–state agreements should be wholly unaccountable for expropriating foreign investments. It does mean that, in interpreting investment treaties and agreements, account should be given to their discrete circumstances.

SORNARAJAH

The human rights argument is not appropriate. The object of human rights law is to protect the weakest individuals of society against the powerful state or other agglomerations of political and economic power within society. A law that is designed to promote the interests of the flotsam of humanity against power should not be used to privilege multinational corporations, which have colossal economic power and are able to buy elites in both their home and host states. The human rights argument is strong with neoliberals as the Lockean notion that the right to property is the most central of rights and forms the basis of political organization lies at the foundation of the neoliberal creed. But, this argument is not accepted even in the best texts of human rights generated in the developed world, where the right to property is always made subject to the social interest in property.

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TRAKMAN

Human rights protection against exploitation of property "rights," including but not limited to the rights asserted by foreign investors, is also about the social, economic, and political rights that provide the context in which "human rights" are exercised. Viewed in relation to international investment, the context in which "human rights" are exercised includes the object or purpose of the states in regulating those "rights" and the impact of that regulation upon the enjoyment of those rights.

SORNARAJAH

The case for an international body of investment law can be made only on the basis that there is but one way toward economic development that serves all of mankind. Unfortunately, neither in practice nor in economic theory can such a case be made. A uniform body of global investment law existed when hegemonic leaders desired that this be so. But, in the modern multipolar structure of global politics, it is unlikely that a global investment law can be built up as there is no single hegemon that could drive such a law on the basis of its own desired theory. The movement from a unipolar world to a multipolar world itself demonstrates that declining powers are backtracking on their construct of a universal system. Institutions are driven by the dictates of hegemonic powers, which control them and are inclined to instrumental solutions favored by these powers.

National biases are present at both ends. The dominant system is based on the hegemonic model that privileges protection of property of multinational corporations to the same or even higher extent than found in the national systems of developed states. Developing states would prefer to emphasize the social function of property, as developed states in fact did during the earlier stages of their development.

The argument about the denial of natural justice again presupposes the existence of a uniform idea of natural justice. The concept has no fixed meaning apart from principles of procedural law, and has a changing quality depending on a variety of factors even within the common law. As such, it would be difficult to construct a body of rules that has global significance based on natural justice.

TRAKMAN

The conception of a uniform, coherent, and fixed body of international investment law is idealistic at best. However, greater uniformity in international investment law can help to level the playing field among developed and developing states, as much as it serves hegemonic forces that seek uniformity in their own image. Ensuring that foreign investors are treated fairly according to norms that are identified with and

17_Appendix.indd 504 1/9/2013 6:29:51 PM

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endorsed by a coherent international community, including a community of disadvantaged states, can assist in redressing such hegemony. Greater uniformity can also promote investment laws that are not only more transparent in nature, but that also help to avoid the impact of dislocated—and dislocating—national laws devised by rich and poor states alike. However, such an eventuality is only truly tenable when the investment laws that result are built on a consensus among states that reflects, rather than discounts, their economic and social differences. It may be that taking account of such differences, particularly in want and need, may lead to disparate constructions of concepts such as expropriation, just and equitable treatment, and local requirements. However, far from diminishing the value of international investment law, these differences ought to inhere in the contextual interpretation of investment treaties and investor–state agreements. They ought also to take into account economic and social disadvantage rather than exclude them a priori as incidental or immaterial to the "plain words" of a treaty or agreement.

Ultimately, perfect symmetry in international investment law is an aspiration only. It is not realistic to expect states with diffuse political and socioeconomic traditions to agree upon narrowly defined principles of investment law. Nor are efforts to universalize investment law an abiding virtue. The disparate regulation of foreign investors may well be justified both on grounds of ideological and functional differences and in response to disparate expectations of foreign investors and states alike.

It is also doubtful that a single body of international investment law that includes protections for investors resembling human rights is capable of transcending the discrete—and sometimes unduly domestically fixated—national laws and regulations. Nor do commonly accepted conceptions of investment law, such as relate to "national treatment" of investors, mandate treating formally like cases alike in accordance with some transcendental principle of international investment law. This is not to deny that investment tribunals should apply commonly accepted conceptions of expropriation, insofar as they exist, in a manner that is fair to both states and investors. A state's fear of being denuded of its natural resources by acquisitive and destructive foreign investors is entirely defensible. A foreign investor's fear of being subject to national law biases, caprice, or the summary confiscation of investment property is equally defensible.

The fact that states diverge over the nature and significance of conceptions such as "natural justice" are also not reasons to deny the significance of treating states and investors justly. What is necessary is recognition that even though conceptions of justice are subject to different constructions in light of divergent legal cultures and traditions, concepts such as "natural justice" should not be discounted so long as they are subject to interpretations that take account of those differences. Nor are such conceptions inherently doubtful because they happen to have originated in the Western or any other legal system. The test is whether they are intractably contingent upon their origins and incapable of being adapted to other contexts, legal cultures, and states.

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SORNARAJAH

Value-neutral principles are difficult to find in this area of the law. Given the division in political ideologies, a value-neutral system did not emerge during the Cold War. The developing states had a third vision, which was articulated in the form of the New International Economic Order. It generally denied the existence of an international minimum standard of treatment through which the United States sought to establish its preferred model. The NIEO universalized the Calvo doctrine, a earlier prescription developed by Latin American lawyers in opposition to the U.S. model that sought to create an international law that applied to foreign investment disputes. Despite the interlude that marked the triumph of neoliberalism in the "roaring nineties," this ideological schism has remained to thwart the possibility of value-neutral norms. The positivist tendency has been to utilize the argument that all law is value neutral so that the absence of neutrality could be effectively hidden behind a curtain. Law, especially the international law on foreign investment, given its history of conflict, cannot be value neutral. The continuing schisms within the law is evident even among arbitrators who would normally be expected to subscribe to the same code of values that are conducive to property protection. That being so, it is too great an expectation that value-neutral norms can be constructed in the field.

It should also be noticed that the aim is the protection of the investment from the power of the host state. The protection of the host state interests from the predation of the foreign investor is hardly mentioned in the efforts at creating a value-free law. This, in itself, indicates a value preference for property protection at the cost of social interests in property.

TRAKMAN

Liberalism is an outgrowth of the sixteenth-century liberal state based on the emancipation of the individual from the absolute rule of monarchs. An unfortunate result was the invocation of this same liberty by subjects of liberated states to exploit the subjects of other states who were not so emancipated. It is also true that this status of colonial domination has not entirely passed. More than vestiges of it remain in trade and investment law and practice. However, there are signals of a changing world order led by influential developing states, not limited to China, that have sought to reconstitute liberalism more than disavow it. Their assault is less on the foundations of liberalization of investment than on balancing "free" against "regulated" trade so that neither excludes the other. Nor is the conception of regulated trade and investment entirely novel. The liberalization of investment never was absolute in nature or application, even in the heyday of liberalism. What is different today is that the blend between free and regulated trade is subject to changing ideological and functional influences. These changes reflect, among others, the ideological influence of planned economies

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balanced against the functional need to facilitate foreign investment. Such a regime change, so called, is often more incremental than pervasive, and more diffuse than uniform in operation. However, this change is part of a new order in which the meaning and significance of liberalized investment has changed and will continue to change in treaty law as in investment practice.

SORNARAJAH

The notion of regime creation itself connotes a hegemonic leader. Effective regimes, according to regime theories, can only be created in circumstances where national interests coincide, and there is also an hegemonic leader who will ensure either through persuasion or through direct and indirect sanctions that others do not break ranks. Increasingly, the possibility of such a regime, though commented on by writers, is a mirage because the hegemonic leaders themselves are deviating from the model they once espoused. The seeming regime that was created during the highpoint of neoliberalism did not last longer than the three years of euphoria for the Multilateral Agreement on Investment proposed in 1995 and given up by 1998. Since then, there have been further futile attempts. It is unlikely that official efforts would be made until the next bout of neoliberalism comes about in the cycle. In the meantime, commentators inclined toward neoliberalism will seek to keep the tenets alive through other means, such as the creation of a global administrative law, the multilateralization of norms on investment protection as a result of treaty practice, and investment arbitration precedents based on treaties and the argument that recent trends create customary international law. These arguments are not supportable for a variety of reasons. They will continue to be made because there is a powerful lobby consisting initially of multinational corporations, arbitrators who depend on the existence of a regime for their business, law firms who also need the business in the area, academics who expect to join the bandwagon to supplement their relatively meager incomes, and an army of neophytes who see lucrative careers in the field. But, this group is met by an equally committed group that pursues the interests of the environment and human rights and sees foreign investors as the major spoilers of both interests.

In this conflict, the state is a participant both because of international pressures exerted by the two camps of actors as well as by domestic pressures. No longer are developed countries exporters of capital. They are among the largest importers of capital from the BRIC countries, and are conscious of sovereignty-based legal rights that vest control over entry and subsequent conduct of multinational investment. The old cry that sovereignty has diminished can no longer be heard in loud terms because the developed countries are more intent on sovereignty-based rights to control the influx of investments into their states and the impact they have on labor, security concerns, and the environment. As the boot gets increasingly to be on the other foot, the invasive hand of the hegemonic states will be more visible and the demand for an interna-

17_Appendix.indd 507 1/9/2013 6:29:52 PM

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tional regime will subside as there will be no exemplars practicing restraint who could demand such a regime.

TRAKMAN

We may agree more than we disagree on this issue. However, I do not believe that there is, or ever was, a single conception of the liberalized state, or the liberalization of investment. Historically, as today, so-called liberals have articulated and re-articulated the option malleable core values of liberalism. Even in the so-called highpoint of the Western liberal tradition until the early twentieth century, liberalism underwent a transformation including in the very meaning ascribed to liberalism.

Certainly, libertarians continue to insist that free, as distinct from freer, investment is not only efficient but is a "good" in itself. They argue, too, that any infraction by regulators on a free market threatens the foundations of a self-regulating investment order. This view of liberalized investment markets is not only overstated: it also exaggerates the extent to which liberal "realists" subject the exercise of liberty to qualifying conditions. Socially conscious liberals, too, have long insisted that market "choice" is not "free" in the absence of substantive voluntariness. That same viewpoint persists today. If one party—an investor or state—is subject to economic or political duress, that party's "consent" is conceivably absent. The conception of consent, so central to investment liberalization, is thereby suspect if it is coerced by a dominant state, or unconscionably extracted by a dominant investor in an investor–state by agreement.

These refinements of liberalism as applied to foreign investment are more than a by-product of the so-called "neoliberal welfare state" following World War II. They are formally manifest, however imperfectly, in declarations of human rights, as well as in multilateral, regional, and bilateral treaties, not limited to conceptions ascribed to the fair and equitable treatment of investors.

It is true that conceptions such as just and equitable treatment in international investment law often favor wealthy investors in disputes with poor states. However, the application of these principles is not cast in stone. Investment treaties and investor–state agreements are subject to variable interpretation. ICSID tribunals frequently dismiss the claims of foreign investors, not only on jurisdictional grounds, but because foreign investors have failed to establish that they were unjustly or unfairly treated. Indeed, almost half of ICSID awards reject the claims of a foreign investor, and more uphold their claims in part only. Given that many respondents in ICSID proceedings are developing states, the notion that ICSID investor–state agreements inevitably benefit wealthy claimants from developed states is simply wrong.

Added to this is the observation that ICSID respondents are themselves signatory states to the ICSID. It may be that some respondent states concluded investment treaties and investor–state agreements to attract foreign investment so as to redress their dire economic disadvantages. It may also be that expecting them to be "compliant" with a transcendental body of international investment law, such as by adopting expensive

17_Appendix.indd 508 1/9/2013 6:29:52 PM

environmental programs and social reforms, is unreasonable in their circumstances. It may also be that, by signing multilateral investment protocols and investment treaties, developing countries were able to gain status and avoid being labeled "rogue" states. However, choices that states make, sometimes regrettably, lead to countervailing risks and liabilities.

It is also difficult to plead, after the fact, that a state was totally unaware of the economic, social, and legal implications of an investment treaty that it signed. However, it is plausible to take into account a state's disadvantaged capacity in interpreting such a treaty or agreement.

SORNARAJAH

There is an absence of perfect equality in knowledge, negotiating power, and lack of coercion to support the view that there is a voluntary surrender of sovereignty. The experience of the developed states themselves indicate that they had no understanding of the manner in which the treaties they were making would be used. Illustrations are the manner in which the fair-and-equitable standard was used in NAFTA and the subsequent interpretive statement. In the case of developing countries, there is little understanding of the effects of treaties that are entered into at the instigation of international organizations that may make such treaties a condition for assistance. In a perfect world, the argument relating to voluntary surrender of sovereignty may work, but not in a world full of asymmetries as to power and knowledge.

Supranational institutions themselves may be proxies for the power of hegemonic states. The widespread allegation against the World Bank is well-known. The ICSID Convention must also be viewed in this light. The manner in which this dormant institution became the focus of formulating neoliberal viewpoints into propositions of law provides interesting examples of law creation in directions favored by developed states.

TRAKMAN

This proposition about the unequal bargaining power of states that negotiated investment treaties is well-taken. However, taken to extremes it gives rise to an untenable consequence. The assumption behind a wholly "unbargained" treaty is that a developing state did not appreciate its terms and conditions and is therefore justified in disregarding it ex post facto.

Reinforcing this problematic approach is the assertion that sovereign states are immune from liability to foreign investor claims. The pitfall is the appearance of lawlessness in the hands of sovereign states on the one hand and the loss of an opportunity to remediate deficiencies—and undoubtedly there are many—in the development of international investment law on the other. The result is that respondent states

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could summarily disregard foreign investor claims for compensation arising out of the expropriation of property; they could also deny investor claims such as the right to be heard.

SORNARAJAH

The human rights argument is the weakest in the construction of support for a global system of property protection. A law designed to protect the weakest in the society against the power of governments is traduced to secure the protection of multinational corporations. International law had no law on property, which is always subject to domestic law, but with the emergence of human rights law, there came about rules on the protection of a right to property in qualified terms. The strength of the qualification varies in the different documents on human rights. It depends much on the purpose of the protection. The rules on the protection of the property of refugees are strong as the meager property that the flotsam of humanity holds must be given secure protection. One cannot extrapolate from such documents to the protection of the assets of multinational corporations.

Domestic parallels of property protection vary from the Canadian Bill of Rights, which does not mention the right to property, to its neigbor, the United States, which requires just compensation. Regional treaties also vary. The practice of the European Court indicates that social concerns must be taken into account and a balanced view taken as to the relevant compensation. There is no strong commitment to market value as compensation.

The revival of the notion of non-compensable regulatory taking in *Methanex v. United States* is an interesting erosion of the notion of an absolute right to property. The impact of this award and the subsequent inclusion of the exception as to regulatory takings in the U.S. Model Treaty (2004) is yet to be assessed. But, the fact is that there is a retreat into sovereignty-based arguments by developed states, which makes the possibility of binding regulatory regimes extremely remote, even if considered desirable. The experience of the MAI shows that it will not be considered desirable by many within the developed world.

TRAKMAN

I do not suggest that multinational corporations should receive the same rights or entitlements as poverty-stricken human subjects. Nor do I suggest that international standards of treatment devised by wealthy states should prevail over domestic standards, including the rights of states to self-determination and economic development. Indeed, even if nation-states owe responsibilities to foreign investors, this does not necessarily entail subjecting them to international laws that sublimate domestic requirements in order to act responsibly. No one would expect a nation-state to forsake

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its national legal requirements in trying a foreign national for murder or fraud. Why, then, should nation-states be subject prima facie to international laws that wholly forsake national requirements in their treatment of foreign investors?

SORNARAJAH

Murder and fraud are obvious instances of national concern. But, the list is broader, and even the U.S. Restatement accepts a longer list, including taxation, customs duties, antitrust, and similar regulation. The list is obviously longer as a result of *Methanex* and later developments, which would include measures taken to protect health, welfare, and morals, which is a short form for indicating a range of regulatory laws. The law is open now, and the impact of the so-called balance that has to be effected is uncertain. No foreign investor is going to be comfortable with the uncertainty with which this "balanced approach" begins.

TRAKMAN

This argument cuts both ways. The proposition that developed states ought not to overregulate foreign investment on grounds of public health and environmental safety is balanced against the right of developing and less-developed states to raise comparable objections more forcefully. The limitation in a state's infrastructure relating to its financial, health, and environmental safety is material in determining whether its actions are legitimate. A less-developed state that lacks the financial resources to redress the negative impact of foreign investor mining companies upon public health or environmental safety may itself well be a material factor in denying a mining license.

The residual question, albeit difficult to answer in the abstract, is in the manner in and extent to which less-developed countries should be bound by duties arising from investment treaties or investor–state agreements. The answer, arguably, lies somewhat in the method of interpretation that is applied to such treaties or agreements. If such treaties or agreements are construed restrictively so that their "plain words" meaning prevails over a wider social context that includes social disadvantage, the result may be unduly harsh for developing and particularly less-developed states. If duties imposed upon states by treaty or agreement are construed expansively, taking into account the relative capabilities of the parties, the case for applying international investment jurisprudence remains tenable.

If the duties assumed by states by treaty or agreement are interpreted in light of their domestic constitutions or laws, and those constitutions or laws include the right to expropriate property in the national interest, these domestic laws, again, are part of the context in which investment treaties and agreements ought to be construed. If developing states are required to apply international standards of treatment to foreign investors in disregard of such domestic constitutions or laws, incongruous results may

17_Appendix.indd 511 1/9/2013 6:29:52 PM

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eventuate. One such eventuality is that foreign investors would receive treatment that is consistently more favorable than the treatment accorded to nationals of that state under domestic law.

SORNARAJAH

This is an issue that has been raised largely in the rich countries (such as Canada or the United States) where the populace is mature enough to understand the implications of investment rules. Constitutionality of investment treaties has been the focus of attention of scholars in Canada and the United States. People within the developing states are seldom concerned with low visibility instruments such as investment treaties. It does not affect their daily existence of drudgery. It is unlikely that the man in the street knows the extent to which his home state has tied up its sovereignty in order to protect the rights of foreign investors. These issues concern only the elite in the developing states who also stand to profit from the flows of foreign investment. But, in Colombia, the Supreme Court has ruled on the issue of whether investment treaties that were made are constitutional.

TRAKMAN

Homelessness, destitution, and drudgery are tragic global phenomenon. However, if these tragedies mean eradicating international investment law on grounds that it protects only the elite, it also means eradicating the certainty and stability upon which global investment depends. If global investment is relegated to the junk heap, an unfortunate result may be that those who are poor will become poorer. None of this denies that the benefits of global investment do not necessarily "trickle down" to the destitute and downtrodden. Nor does it assert that international investment law is directly concerned with the distribution and redistribution of investment wealth. What it does assert is that eliminating international investment law is unlikely to redress global problems of hunger and poverty. Indeed, its elimination may well make a bad situation worse.

Nor is it self-evident that developing states should have the right to disregard duties assumed by investment treaty or investor–state agreement as of right. Domestic constitutional law notwithstanding, developed and developing states alike repeatedly agree to devolve their sovereignty to international institutions, whether through the World Trade Organization or specific bilateral agreements. Just as states agree to accord international standards of treatment to discrete, insular, and vulnerable minorities, they also agree to accord international standards of treatment to foreign investors. This is not to contend that such duties are intractable. What is contended is that duties assumed by treaty or agreement cannot be dismissed out of hand if international investment is to be, or is perceived to be, an integral part of a "global good."

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SORNARAJAH

It is not proper to draw parallels between the distinct types of treaty activity. In the area of minority protection, ethical pressures motivate states to enter into such treaties. In the area of trade and investment, there are other considerations associated sometimes with duress, and at other times with a belief that a course of activity will lead to economic prosperity. Competition for investment may also be a factor. Duress is exerted. TRIPS was an example of such duress. Developing countries had to reverse the effects of TRIPS on generic drugs for certain diseases such as AIDS. In the investment sphere, there was an unspoken assumption that aid will not be provided if investment treaties would not be signed or that outgoing investment would not be insured. Financial institutions also exerted pressure. Institutions such as UNCTAD promoted investment treaties in indirect ways while the mission of this body was to assist developing countries.

TRAKMAN

Treaty making unavoidably involves "have" states negotiating with "have not" states. The needier the state, the more likely it is to accept terms of agreement it might otherwise have avoided. However, this also oversimplifies global investment politics and economics. Both Mexico and Canada, a developing and a developed state respectively, wanted to join the Trans-Pacific Partnership Agreement. Both had to make concessions in order to gain admission. The rationale is not that developed, developing, and less-developed states should all be treated alike. The argument is that any appeal to a unifying "international" standard is also an appeal to the domestication of those standards in different settings, including in light of different levels of development.

If nation-states incorporate international standards into their national legal systems, through legislative, administrative, or judicial action, they affirm those standards without rendering them any less international. Certainly, international standards can serve as swords that challenge states that fail to incorporate those standards into national law, or do so selectively, as when national legislatures restrict their application in domestic law. If domestic laws serve as shields, they can protect states from international investment laws that become transcendental only because domestic laws are not part of the interpretative context.

SORNARAJAH

This cannot be borne out in evidence. There is no reception of international investment law principles in domestic law. Rather, the domestic systems, particularly of resource-rich countries, have received the contrarian norms such as permanent sovereignty

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over natural resources. There has been no effort made to dismantle these constitutional norms.

TRAKMAN

The future of international investment law is surely to acquire legitimacy and efficiency in the laws of the states that are a part of it. If it exists only as a supranational body of precepts that have no meaning in domestic law, it is doomed from inception. The "nationalization" of international investment law not only legitimizes international investment requirements, it also provides an efficacious basis upon which to assess the responses of states accused of violating those standards to the claims of foreign investors. The underlying goal is to establish a balance in investment law between international requirements and national law challenges to those requirements. That challenge inheres in determining whether a stabilization clause in a foreign investment agreement is subject to a constitutional challenge before a national court. However, that challenge to international investment law goes beyond stabilization clauses.

SORNARAJAH

There must be a precedential agreement as to what are the rules of the international order. Absent such agreement, it would be difficult to expect the national order to be proactive. The stabilization clause does not constitute a good example of the problem. There must be an international law on contracts between foreign investors and states to support such clauses. There is an absence of such law. A foreign investment contract and the rights created by it exist in domestic law alone. The internationalization of the contract is a myth for which there is little support outside the limited number of awards. Its protection under treaties also remains contentious.

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