Hustling in International Economic Law

By:

Jean Ho

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Hustling, or obtaining a benefit from someone through dishonest means, is an art. The leading representative of the wealth-redistribution-for-the-greater-good hustle is immortalized in the 1991 box-office hit, ‘Robin Hood: Prince of Thieves’. Con artists went on to rule the day in George Clooney’s ‘Ocean’s’ Series, ‘Catch Me If You Can’ (2002), ‘21’ (2008), ‘The Wolf of Wall Street’ (2013), ‘American Hustle’ (2013), ‘Now You See Me’ (2013, 2016), ‘Ocean’s Eight’ (2018), and ‘Hustlers’ (2019).

Whether you’ve become a fan of Robin Hood or of the parade of hustlers that Hollywood glamorizes with disturbing regularity, you are essentially rooting for thieves. And you are no longer able or willing (or so you may tell yourself) to separate admirable ends from the suspect means. It is this all-or-nothing conditioning that enables the most widespread wealth redistribution hustle of all – the ability of trade and investment protection agreements to redraw the fault lines in international economic law.

The present state of international economic law leaves much to be desired. Anchored by the multilateral General Agreement on Tariffs and Trade, which led to the creation of the World Trade Organization, and complemented by a vast network of bilateral and multilateral investment treaties and free trade agreements, international economic law is drawn from diffuse sources. Additionally, the WTO Dispute Settlement Body and Appellate Body, which interpret the GATT provisions, and arbitral tribunals, which interpret investment protection agreement provisions, shape the content of international economic law. However, the patchwork of treaty text and dispute settlement rulings into a body of law is unraveling. The blocking of appointments and reappointments of AB members by the United States, leaving the few remaining AB members with an unmanageable caseload, may signal the end of the only established model of unified decision-making in the context of dispute settlement in international economic law. The crisis facing investment protection and dispute settlement is even larger. States and their supporters have become disillusioned by some arbitral rulings which, cued by open-textured treaty language, prioritize investor rights over the sovereign right to regulate, There are calls for the replacement of older treaties with ‘balanced’ alternatives and the overhauling of the settlement of investor-State disputes via arbitration. Change is underway in international economic law, which has been perched on the fantasy of sustainable wealth redistribution through enhancing free trade and foreign capital injection, and phrased in the inviting language of mutual benefit and reciprocity.

All hustles begin with a desire to change the status quo. Before free trade and foreign investment were regulated by treaties, they were secured by contract, either between States or between States and foreign investors. In time, savvier investors from the Global North began insisting on clauses that limited the Global South State party’s ability to unilaterally modify the contract. These clauses attracted criticism because they benefitted only the investor and hamstrung developing States from acting in the public interest or for a public need. Such one-sided contracts never quite acquired mainstream status as they were caught in the crossfire between the G77 group of States pitching a New International Economic Order in the United Nations General Assembly, and the much smaller group of capital-exporting States resolutely opposed to the rejection of international law to govern the economic rights and duties of

States. The lawless impasse that followed coincided with a period of significant private capital flows from Global North to Global South States, which presented an opportunity to set the rules of economic engagement. Capitalizing on an in-limbo status quo, and perhaps learning from the unpopularity of one-sided contracts, neoliberal economists and statesmen from the Global North embarked on the grand project of regulating investments made in the Global South through treaties. Although these treaties were really discipline manuals for developing States since private capital back then rarely flowed from South to North, they were astutely and expressly titled for the reciprocal promotion and protection of investment. Global South States, believing themselves better off with these treaties than without, signed them in droves. Investment treaties also come in North-North and South-South configurations. The hustle of selling inequality as equality was complete.

However, all hustles risk exposure, and the larger the hustle, the greater the risk. The risk of exposure of these unequal treaties is arguably elevated because Global South States have consistently refuted an imperialist agenda, most notably during the creation of the NIEO in 1974, and prior to that during the historic Bandung Conference in 1955. That said, anti-imperialist sentiment is not necessarily a refined sensor for each and every novel manifestation of economic exploitation. Investment treaties, which were preceded by the harmless-sounding Friendship, Commerce and Navigation treaties concluded between the US and its allies, seemed innocuous. And even if Global South States were generally wary of Global North overtures, the projected benefits from signing investment treaties clearly outweighed any perceived costs, which probably did not include the cost of being hustled. The veneer of sovereign equality in North-South treaties only started to crack when Global South States found themselves as respondents to claims of treaty violations far more frequently than their nationals accused Global North States of the same. Successful investors were often awarded astronomical sums of damages that their developing host States could barely afford. Suspicions that the something was amiss in the promise of sustainable North-to-South wealth redistribution through investment protection agreements multiplied when economists, political scientists, developmental studies scholars, critical legal scholars, environmental and human rights groups, civil society and local community advocates, and sustainable development think-tanks converged on the finding

that not only were these agreements less than instrumental in spurring foreign capital injection, they turned a blind eye to national exigencies and investor misconduct, ultimately undermining hopes of shared prosperity.

Exposure of the hustle in international economic law has led to two reactions that exemplify all-or-nothing conditioning replete in cinematic culture. You are either ‘for’ or ‘against’ the enterprise in its entirety; you do not agree with the motivation and disagree with the means. In international economic law, this is borne out in calls to reform investment protection agreements on the one hand, and calls to reject these agreements on the other. Neither approach will assuage discontent over the current model of wealth redistribution. Investment protection agreements were not conceived, and have proven themselves resistant, to repurposing for advancing sustainability and developmental goals in concrete terms. The incorporation of environmental, labour, and social concerns in some newer generation and forthcoming agreements has been lauded. Yet, the framing of corporate and investor obligations in aspirational terms offers neither incentive nor disincentive to refrain from prioritizing private interests. ‘Balanced’ treaties peddle a lie and promoting them as solutions to international economic law’s ongoing legitimacy crisis perpetuates the hustle. The apocalypse of investment protection agreements, should it come to pass, will leave a lacuna in the regulation of foreign investment under international law, not unlike the situation that the NIEO proponents found themselves in after successfully campaigning for an, as yet undetailed, international law that was more respectful of the right to self-determination. Unless the iconoclasts are ready to fill the lacuna with alternative content on investment regulation, the world is more likely to fall back on what it knows (those investment protection agreement standards) than what it does not (normlessness).

So, what now, you may ask? To escape all-or-nothing conditioning, we must believe that the admirable end of sustainable wealth distribution can be met through means other than contorting investment protection agreements. Given the diffuse sources of international economic law, and the diffuse perspectives from which it is critiqued, solutions to its current predicament will likely be diffuse too. The jettisoning of boilerplate for bespoke investment contracts particularly in natural resources, extractive and potentially highly pollutive

industries that significantly impact local communities, the development of investor accountability and good investment governance as integral features of investment regulation, as well as establishing and incentivizing recourse to grievance mechanisms and other dispute de-escalation forums, are some of the possible ways to diminish reliance on investment protection agreements, and their enforcers, as the purveyors of international economic law.

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