International Investment Law and Constraining Narratives of ‘Development’: ‘Economic Development’ in the Definition of Investment

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February 24, 2020

Narratives are stories that get embedded in the general understanding of why and how a phenomenon takes place. Many narratives exist within International Investment Law (IIL) concerning its role in the international legal order, particularly in development. However, what if these narratives were to get turned on their head?

It is axiomatic to claim IIL is the branch of international law positioned to provide foreign investors with the protections necessary to make direct investments abroad. Foreign investors have historically been concerned about their sunk capital being subjected to discriminatory treatment or expropriation

by host states. Furthermore, there was historically little recourse for these non-state actors within the traditional confinement of international law being the realm reserved for state actors. If a host state were to treat a private foreign investor unfairly, the investor would rely on the customary international law of diplomatic protections in order for there to be any legal recourse. It was under these circumstances that Bilateral Investment Treaties (BITs) and the International Centre for Settlement of Investment Disputes (ICSID) provided a new means in the late 20th century by which private foreign investor could afford some protection under the principles of international law.

These new international legal protections provided foreign investors the ability to enter into insecure investment environments such as a 'third world' or 'developing' states. The protections provided by IIL allowed these states in the Global South to attract much needed foreign capital which they were then able to inject into their struggling economies. It was therefore necessary for these states to do everything they could to ensure that this dynamic would take place.

Or, so this particular narrative goes.

No longer widely discussed because they have been so widely internalized, narratives of development became the neoliberal, axiomatic 'common sense' understanding of Foreign Direct Investment (FDI) and IIL. With the small exception of some notable critics (largely found here in the IEL Collective and originating in TWAIL scholarship), the political economy of IIL is couched almost entirely in the rational, market-driven economics of contemporary capitalism. The discourse of development is created, controlled and driven by capitalist institutions and systems of thought. Any narrative about IIL outside of these parameters could not be called a narrative at all because the mainstream understanding of IIL's role in development has been taken for granted by actors within practice, academia and politics.

However, what if these taken for granted narratives of development, FDI and IIL were not assumed but fundamentally questioned? What if, instead of accepting that IIL is the necessary branch of international law in place to protect the interests of foreign investors in risky environments, IIL was seen as the branch

of international law that regulates the accumulation of surplus value from nascent markets in post-colonial states? By subjecting tired narratives about IIL and FDI's role in the development of Global South states to critical forms of analysis, new light is shed on old beliefs. Viewing narratives of development, such as economic development's role in the definition of investment, from critical perspectives exposes how these narratives constrain developing states.

A dual approach consisting of both Marxist categories and TWAIL (Third World Approaches to International Law) is capable of providing such an analysis. While there are certain contingents within both approaches that disagree with one another, a pragmatic use of their overlapping categories enables critique of the narratives listed above. Specifically, TWAIL provides an overarching orientation to the analysis from the perspective of post-colonial developing states. It also questions the hierarchical power imbalances both structural and discursive between 'developed' and 'developing' states. Marxist categories are accordingly able to position the analysis on the sites of production that are on the receiving end of FDI and are producing the surplus value that serves as the real impetus behind foreign investment. Marxism also analyses the concomitant social reproduction necessary in order to keep the material production in motion. Social reproduction consists of the different social relations and ideologies that occur within the relationship between the capitalist and producer.

The constraining effect of narratives of development can be seen in the use of 'economic development' as a component in the definition of 'investment' in IIL. ICSID, IIL's main dispute resolution body, does not include an authoritative definition of investment, something crucial to arbitration tribunals in determining jurisdiction. In order to remedy this, the regime has developed jurisprudence around what is called the '*Salini* test,' a list of four criteria of which 'economic development' is the most controversial component. Economic development is a central feature in the discourse about ICSID jurisdiction because of the narrative of its ability to promote human flourishing. This is despite the fact that international law provides no solid basis for the '*Salini* test' as IIL lacks an overarching convention, a supreme court and judicial decisions are not a binding source of international law. Nonetheless, the criteria and particularly the notion of economic development remain central to the

jurisprudence of arbitrations and the relevant scholarly literature.

The aforementioned critical perspectives expose why a narrative of flourishing persists and drives the conversation about economic development in the definition of investment. Within Marxism, the foreign investor does not invest in a host state out of its goodwill to assist in that state's development. Rather, the impetus behind foreign investment is the extraction of higher levels of surplus value. However, a developing state would never accept this arrangement. Therefore, it is in the interests of powerful states to have a discourse dominated by narratives of development and a common sense, mainstream understanding of economic development. By controlling the discourse about development, IIL is used to advance capital interests to the advantage of investors when disputes arise. Without the narratives of flourishing, development, and economic development (that through their use as legal concepts become abstracted and obfuscated) a developing state may not rely on IIL for its own material betterment. However, these narratives dominate and constrain the possible contingencies available to a developing state and both these narratives and the system persist.

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