The Rotten Core of International Investment Law

By:

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In this brief post, I want to make sense of Prabhash Ranjan's brief critique of TWAIL perspectives on international investment law. My main aim is not to mount a defense of TWAIL project(s) on investment law because that might be done more eloquently by others. Instead, I want to make some brief comments about the political valence of, and the assumptions behind, the reservations that Professor Ranjan articulated in this post, and which also appear in his recent book on India and Bilateral Investment Treaties.

Ranjan, in his book, takes note of the fact that bilateral investment treaties proliferated at a time when a collection of beliefs about government and markets, loosely termed neoliberalism, were ascendant. How should we understand the character and ascendance of neoliberal thought? David Harvey persuasively argued that irrespective of the utopian (but often incoherent) economic doctrine worked out by some of its leading thinkers, the political project it inaugurated was simply a matter of consolidating capitalist-class power. Foucault, in lectures published as the *Birth of Biopolitics*, described

neoliberalism in terms of governmentality. Neoliberal thinkers did not so much champion the idea of a free market (on the principle of free *exchange*) of laissez faire liberalism, as much as they prescribed forms of government regulation – not of market, but of society – in order to format society on the principle of *competition*. Thus, we have Margaret Thatcher's infamous remark – "there is no such thing as society." In a recent book, Quinn Slobodian, like Wolfgang Streeck, argued that the core function of neoliberal ideology was to protect capitalism from democracy; indeed, no cost was too large to bear to keep democracy at bay. Thus, the high priest Hayek, as is well known, supported the brutal Pinochet regime in Chile, and even while opposing apartheid on principle, along with others in the Mont Pelerin society, such as Milton Friedman, criticized the diplomatic isolation of the apartheid government of South Africa, and opposed one-person-one-vote solutions.

Whatever might be the core political project of neoliberalism, the way in which this intellectual formation rose to prominence is also worth considering. Battles for intellectual supremacy are hardly ever fought on neutral terrain. The postwar capitalist order, in the heart of the capitalist West was characterized by New Deal liberalism or social democracy – forms of political economy that we might roughly understand as uniting Keynesian macroeconomic prescriptions with social protections for labour and regulated market behavior. Within this context, the emergence of neoliberalism, positing the supremacy of the competition principle and a suspicion of democracy could hardly have been achieved without significant funding from racist reactionaries, and concerted political mobilization. Central to the neoliberal project was articulating a particular idea of the rule of law, aimed at securing property rights of transnational capital. Hayek for example, offered a rigorously formal conception of rule of law in his *Constitution of Liberty*. As Slobodian records, the version of neoliberal thought that emerged from Geneva (instead of Washington or Chicago), called ordoliberalism, laid particular stress on designing an international institutional architecture for capitalism: one that would protect highly mobile finance from the ravages of democratic decision making. Neoliberalism sought moral legitimacy in the name of freedom from the reach of rentier-elite-captured governments (especially those of the decolonized world), and promised economic development through a supranational or a transnational mode of global governance. In this vein, faithful ordoliberals like

Ernst Ulrich Petersmann have endlessly theorized about a world economic constitution, with little regard to the fact that the sovereign State remains the only vehicle for democratic politics.

In his book, Ranjan does make note of the ways in which international investment law, particularly through the practice of investor-state dispute settlement has, at times, run roughshod over the regulatory power of States, particularly developing countries. But the times, Ranjan argues, have changed. ISDS tribunals are now instructed to, by treaties, or as a matter of practice, uphold the regulatory rights of States. Ultimately, international investment law, is for Ranjan, a useful mode of global governance promoting the rule of law. Even with reform however, the ISDS apple does not fall far from the neoliberal tree. Like every scholar looking to defend the international architecture of capitalism therefore, Ranjan remains blind to the problem of democratic authority, and popular legitimacy.

Let me take pause here for a minute. It is *not* my case that democratically elected governments *always* behave well, or that a counter-majoritarian constitutional norm is *always* a bad thing, or that majoritarian populism is a morally superior outcome. Habitually, in fact, and despite critique, international human rights law has been useful for mobilizing on the left. But, on the question of property interests of transnational corporations, we should recognize that the valid legal constraints can *only* legitimately flow from the authority of the people, not private adjudication.

The point so far is this: there are reasons, rooted in the history of neoliberalism, that should lead one to suspect that the system of international investment law is rotten at its core. Many countries signed bilateral investment treaties with ISDS provisions because their economic development came to depend greatly on foreign investment, but it is fairly clear that the demand from private arbitration arose on the side of multinational corporations. This blog post is entirely unsuitable for reviewing the structural and ideational reasons why foreign investment became central to development discourse, but what needs to be stressed here is that we cannot attempt to understand the ISDS system without starting from its reactionary political core.

As TWAIL scholars begin by referring to that core, Prof. Ranjan charges that their criticism is old, ideological, and with scant attention to the evolving practice of international investment arbitration. These are TWAIL's blind spots he charges – and I will turn to these briefly below. But in the meanwhile, we must understand that a willingness to defend the ISDS regime, even in a reformist sense, flows from a troubling ideological position. It involves turning a blind eye to two things: *first,* that the regime encodes the core neoliberal suspicion of democracy, and *second*, that this neoliberal baggage comes with the considerable moral weight of racist and reactionary politics.

That States would forever be constrained by doctrines of international investment law forged by private arbitral tribunals appeared inevitable at the end of history. Fukuyama has now postponed the triumph of liberalism, even with his caricatured understanding of the discontentment against globalization. Happily, many States are now turning their backs on investor-state dispute settlement. If anything, left-wing critique of subjecting States to private adjudication at the behest of multinational corporations proved to be a prescient warning.

But Ranjan does not want the rule-of-law baby to be thrown out with the exploitation bathwater. ISDS reformed, after all, can and does preserve the right of States to regulate foreign investment consistent with legitimate social purposes. This new empirical reality, he argues, now calls for "constructive" TWAIL engagement, rather than critique that draws on frameworks of imperialism, or distinctions between 'developed-developing' countries, and the Global North and South.

The call for nuance, I think, is valuable. The distribution of production in the world capitalism has certainly changed from the early days of TWAIL scholarship, and old binaries barely hold. But the call for 'constructive' engagement, I think, sadly misses the point. TWAIL scholars generally understand that much of what we know as modern international law was forged in the colonial encounter between Europe and the non-West. Despite that critical insight, their work on public international law has often focused on strategic engagement, in what some might even characterize as a vain effort, to decolonize international law. The ISDS system however, presents itself as

easy case. Given that its existence is predicated on denying democratic political expression, we can hardly regain anything valuable by turning our attention to the arbitral outcomes. The ISDS system reflects the very worst of neoliberalism's reactionary moral core – the worldwide backlash against it is entirely unsurprising.

The coronavirus pandemic, like many outbreaks of disease, can ultimately be regarded as the consequence of limitless extraction of natural resources, and farming everywhere being organized by transnational capital. We might call this classic 'imperialism' in the way that Hobson and Lenin described it: as the insatiable expansion of capital, following the logic of increasing extraction that is baked into the capitalist mode.

But even otherwise, should we understand this crisis as flowing from regulatory failures (with countries racing-to-the-bottom) or because of straightforward corruption, one thing is clear - our strongest line of defence against suffering can only be erected by investing in, and strengthening democracy everywhere. Might it be the case that populist governments will abuse their powers to regulate? Might they want to discriminate against foreign investors in support of local elites? These risks are real, but it would work well to remember that most neoliberal prescriptions flowed by caricaturing these possibilities as the only reality of States. To secure rule of law protection to capital against the risk of over-zealousness actions of governments, we can ill afford to support a system that comes at the cost of democracy. In a world where all suffering is organized by economic inequality, to contemplate that, would be cruel.

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