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The Silent Impact of the 1917 Revolutions on International Investment Law

And What It Tells Us about Reforming the System

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The centenaries of the Russian and Mexican revolutions of 1917 invite reflection on their impact on international law. Investment law, in particular, is ripe for such an inquiry, given that it has the protection of property at its core. The revolutions have been understood as challenges to the international system of property protection,¹ but despite inspiring the claims promulgated in the New International Economic Order they are said to have finally remained unsuccessful. After a period of uncertainty about the standard of compensation for expropriation in the first half of the century, today's bilateral investment treaties have established the *Hull formula* requiring prompt, adequate and effective compensation as governing rule in investment law.² Yet, I want to propose that the regime has taken a different turn as result of the revolutions – a turn that has somewhat escaped our attention, even though it encapsulates the political struggle over the distribution of wealth just as much as the debate over the appropriate standard of compensation did. It is the turn from property to investment.

A look at the treaties and attempts at codification on rules of foreign property protection from the early 20th century shows that the notion of investment started to replace the term property around the 1950s. The 1929 “Harvard Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person and Property of Foreigners” used the term property, whereas the 1949 code prepared by the International Chamber of Commerce’s Quebec Congress was called “International Code of Fair Treatment for Foreign Investment”. This change is also reflected in the Abs-Shawcross Draft Convention of 1959 titled “Draft Convention on Investments Abroad”. The draft was based on a 1957 document prepared by the German ‘Society to Advance the Protection of Foreign Investments’ and originally called “International

¹ Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010) 30.

² Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2. edn, Oxford University Press 2012) 100.

Convention for the Mutual Protection of Private Property Rights in Foreign Countries". From here onwards, it seems that the term property has been replaced by the term investment, leading up to the ratification of the 1966 ICSID Convention, the "Convention for the Settlement of Investment Disputes between States and Nationals of Other States".

So far, this is nothing more than the observation of a semantic change. My argument, however, is that this semantic change is the result of the social and political pressure mounted on the notion of property by the 1917 revolutions and the assertion of permanent sovereignty over natural resources that came with decolonization.

The Social Component of Property Turned Investment

Until WW I the practice of most states with regards to property takings distinguished between lawful and unlawful takings based on compensation. If a state expropriated private property and paid compensation it was considered lawful, if no payment of compensation was made it was considered unlawful.³ What lay at the heart of the discussion was always centred around the injury to the private entity. The Mexican and Soviet revolutions and the following land reform projects complicated this scheme. Instead of single incidents of expropriation, their takings were part of a public policy of transformation affecting the whole population. This new approach became even more pertinent after WW II, in the wake of decolonization, given that several newly independent states were implementing similar reforms. The legal academic circles in Europe and the US caught up with these developments in the early 1950s and addressed this novel situation under the rubrics of nationalisation and confiscation.⁴ At the time, a number of positions were forwarded, so that some authors suggested leaving it to the states' discretion to consider the amount of compensation appropriate and feasible, some stood by the request of full compensation, and others argued for different distinctions.⁵

What is important for my argument is that Soviet lawyers at the time refused to phrase these questions in the language of compensation and insisted on the social transformation that the land reforms were introducing.⁶ In response to the allegations that the expropriations would amount to a violation of human rights, Bystricky, a socialist lawyer, answered that "exactly the opposite is true, since the object of nationalization is precisely the effectual safeguarding of human rights."⁷ In a similar vein he proclaimed that nationalisation can never be injustice.⁸

My contention is that these proclamations have to be taken at face value in order to understand the impact they had on the investment law regime. The categories the socialist lawyers proposed for the organisation of the economy were carried by a social rather than legalistic ethos. The transformation of the property regime was undertaken in the name of the dispossessed, attempting to end 'exploitation of man by man'. It was this social meaning and

³ Josef L Kunz, 'The Mexican Expropriations' (1939) 17 NYULQ Rev 327 3.

⁴ Ignaz Seidl-Hohenveldern, *Internationales Konfiskations- und Enteignungsrecht*, vol 23 (Beiträge zum ausländischen und internationalen Privatrecht, de Gruyter 1952).

⁵ On overview of the various positions is produced in Ignaz Seidl-Hohenveldern, *Internationales Konfiskations- und Enteignungsrecht*, vol 23 (Beiträge zum ausländischen und internationalen Privatrecht, de Gruyter 1952).

⁶ See: Horst Wiemann (ed), *Fragen des internationalen Privatrechts. 8 Beiträge von Vertretern der sozialistischen Rechtswissenschaft* (Deutscher Zentralverlag 1958).

⁷ Bystricky quoted in: Ignaz Seidl-Hohenveldern, 'Communist Theories on Confiscation and Expropriation. Critical Comments' (1958) 7 The American Journal of Comparative Law 545.

⁸ Ibid.

the hope of a better future that discredited individual private ownership. The line drawn by the socialist movements was one that ran between the rich and the poor, between the powerful and the oppressed. They demanded that property be used for a public good and consequently the socialist state became the sole holder of property.⁹

The claims for permanent sovereignty over natural resources by newly independent states in the 1960s and 1970s echoed the socialist views and put additional pressure on the protection of private property. Even though the proclamation of the New International Economic Order in 1974 foresaw the right to nationalization, at the same time bilateral investment treaties carrying a substantial protection of foreign investments emerged.¹⁰ The distinct treatment of private property is further articulated in the rules for the succession of states in treaties, which explicitly excluded private contracts.¹¹ Thus, their ongoing validity and the exception for private ownership had to be justified.

I argue that the socialist pressure had an effect in the liberal world as well and can be traced through the introduction of the notion of investment. The idea of investment connects foreign property to an expected social performance and can hold the idea of a societal good. After the turmoil of WW II, international legal thought caught up with the interwar events and it is thus not by chance that the introduction of investment coincides with the inauguration of the modern development discourse promulgated by Truman in his first address on 20 January 1949. As argued by Escobar, it was the moment of the discovery of poverty of large parts in the world¹² and combatting this poverty is then cause and legitimation for intervention in the name of development. The kind of development imagined by Truman was deliberately set in opposition to the socialist model.¹³ Investment is the liberal answer to the demands for a more social world that allowed to secure Western influence vis-à-vis the Soviet Union.¹⁴ Development, accordingly, was to be achieved not through foreign property, but through foreign investment.¹⁵

This is not to say that the protection of foreign investment was uncontroversial. To the contrary, newly independent states, as well as Latin American governments were aware that the difficulty lay in the regulation of these investments.¹⁶ The strong language condemning foreign

⁹ Scott Newton, *Law and the Making of the Soviet World: The Red Demiurge* (Routledge 2014).

¹⁰ The first bilateral investment treaty was signed between Germany and Pakistan in 1959.

¹¹ Art. 3 Vienna Convention on Succession of States in Respect of Treaties, 1946 UNTS 3 (1978); Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford University Press 2009) 197.

¹² Arturo Escobar, *Encountering Development the Making and Unmaking of the Third World* (Princeton Studies in Culture, Power, History, Princeton University Press 1995).

¹³ Sundhya Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2013) 59 et seq.

¹⁴ See for example the argument by Richard Gardner: "We need not fear Communist investment in these countries [of the South] as long as it is relatively small in comparison with investment by the West. But when the Communist bloc becomes the main source of foreign capital for an underdeveloped country, it will use its influence thus gained to detach the country from the free world." Richard N Gardner, 'International Measures for the Promotion and Protection of Foreign Investment' (1960) 9 *Journal of Public Law* 177.

¹⁵ The relevant passage in the Truman speech reads: "I believe that we should make available to peace-loving peoples the benefits of our store of technical knowledge in order to help them realize their aspirations for a better life. And, in cooperation with other nations, we should foster capital investment in areas needing development." Harry S. Truman, *Inaugural Address* (20 January 1949).

¹⁶ Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 2008) 57 et seq. A detailed account of such awareness can be found in the controversy over the Anglo-Iranian oil

domination and insisting on the right to nationalize expressed in the 'Declaration on the Establishment of a New International Economic Order' bear witness to this awareness. Similarly, the dependency theorists in Latin America were challenging the idea of development through foreign capital. Nevertheless, the distinction that Truman had introduced between developing and developed countries made its way into bilateral investment treaties and thus into the system for the protection of foreign investment.¹⁷

At this point development through foreign investment was vested largely with the character of enhanced social justice; a shift from colonial exploitation to free trade as proclaimed by the US and part of the general Zeitgeist of the mid-20th century remarked by Duncan Kennedy to be the social century with a focus on interdependences rather than individual rights.¹⁸ But the story does not end here and the criticism against investment law by social groups and countries of the South has not abated.

The Double Meaning of Investment

Investment is a term that denotes an expectation. It could uncontroversially be defined as "the commitment of resources with the goal of achieving a return."¹⁹ However, given the widespread usage of the term investment, it is not clear what kind of return. This ambiguity is what allows the term investment to be a response to social pressure while at the same time being the vehicle for exclusively increasing corporate profits. According to Sayer, the term denotes two different concepts but calls them by a single name. On one hand investment has a focus on improvements in infrastructure, technology, health, or any other societal goal. On the other hand, investment holds the meaning of the expectation of profit on capital.²⁰ Thus, the problem arises that "using the same word for different things allows people to mistake wealth extraction for wealth creation."²¹ It is this semantic ambivalence that allowed the term investment to absorb the pressure mounted by the revolutions of 1917 and the demands of the newly independent states, while continuing and extending the regime of private property protection.

In the negotiations around the ICSID Convention the term investment was deliberately left undefined since it proved impossible to come to a common understanding.²² The double meaning thus is a core element of the current system. That the idea of investment was meant to be a qualitative threshold for legitimising foreign property holdings so that only the ones

concession. See: Sundhya Pahuja and Cait Storr, 'Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited' in James Crawford and others (eds), *The International Legal Order: Current Needs and Possible Response: Essays in Honour of Djamchid Momtaz* (Brill Nijhoff 2017).

¹⁷ The first paragraph of the preamble of the ICSID Convention explicitly refers to economic development and foreign investment: "Considering the need for international cooperation for economic development, and the role of private international investment therein;"

¹⁸ Duncan Kennedy, 'Three Globalizations of Law and Legal Thought' in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development - A Critical Appraisal* (Cambridge 2006).

¹⁹ Norton Reamer and Jesse Downing, *Investment: A History* (Columbia University Press 2016) 2.

²⁰ On an account on the underlying conceptions of property and their focus on wealth maximisation see: Nicolás M Perrone, 'The Emerging Global Right to Investment: Understanding the Reasoning behind Foreign Investor Rights' (2017) forthcoming *Journal of International Dispute Settlement*.

²¹ Andrew Sayer, *Why we can't Afford the Rich* (Policy Press 2015) 35.

²² Christoph H. Schreuer and others (eds), *The ICSID Convention. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009).

contributing to the development of the host community should be protected is reflected in the so-called *Salini* criteria. The tribunal in the *Salini v. Morocco Arbitration* (2001), addressing the lack of a definition of the term investment, set out four criteria that had regularly been found to be characteristic of a protected investment in arbitral practice.²³ One of them was the necessary contribution of the investment to the economic development of the host community. The fate of this criterion, however, is indicative of the abandonment of the social component of the notion in favour of its profit-returning meaning. It was subsequently found too difficult to draw a line between investments that do contribute to the economic development and those that do not.²⁴ One expression of this attitude can be found in the arbitral award of *Phoenix v. Czech Republic* in 2009:

“It is the Tribunal’s view that the contribution of an international investment to the development of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes “development”. A less ambitious approach should therefore be adopted, centred on the contribution of an international investment to the economy of the host State, which is indeed normally inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk, and should therefore in principle be presumed.”²⁵

Any lawful investment is found to potentially contribute to the development of the host country and thus worthy of protection.

Where Does This Leave Us?

In my account, the introduction of the notion of investment is linked to the pressure exerted in the name of the working class for a more just distribution of wealth. Considering the current divide in wealth of the global society, it seems we have moved even further away from the proclaimed goal. As a consequence, today, we find ourselves in another debate on the distributional consequences of the protection of foreign capital. I argue that the current debate does not only concern the same subject matter in the aftermath of 1917, it also follows the same pattern of conflict resolution. Certainly, today we are not concerned with the working class, but we are still concerned with social justice and more importantly, the same problem of the semantic ambiguity of the notion of investment underlies the current debate about the investment law regime. The first articles questioning the outcomes produced by international investment law appeared in the aftermath of the Argentinian financial crises and the findings in the resulting investment arbitrations.²⁶ The arbitrations epitomized the controversial relationship of the public good and the rights of the investor and were largely decided in favour of the investor.²⁷ What followed is a turn to sustainable investment as a notion that is able to capture

²³ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction* (31 July 2001) (ICSID Case No. ARB/00/4) para. 51 and 52.

²⁴ *Victor Pey Casado and President Allende Foundation v. Republic of Chile, Award, 8 May 2008* (ICSID Case No. ARB/98/2) para. 232.

²⁵ *Phoenix Action Ltd. v. Czech Republic, Decision on Jurisdiction, 15 April 2009* (ICSID Case No. ARB/06/5) para. 85. See also *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, Decision on Jurisdiction, 27 September 2012* (ICSID Case No. ARB/06/2) para. 222.

²⁶ Christina Binder, 'Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns: Or the Benefits of a Public International Law Approach to Investment Arbitration' in Tulio Treves, Francesco Seatzu and Seline Trevisan (eds), *International Investment Law and Common Concerns* (Routledge 2014).

²⁷ It should be noted, that this is true specifically for the Argentinian cases. According to the latest UNCTAD World Investment Report the overall number is not as high: “In 2016, 62 new cases were initiated, bringing the total

social, environmental and security concerns of the public.²⁸ However, adding the term sustainable as yet another threshold to distinguish good from bad investments suffers from the same uncertainty as the idea of investment did when it was first introduced. Using the words of Erik Swyngedouw, "I have not been able to find a single source that is against "sustainability". Greenpeace is in favor, George Bush Jr. and Sr. are, the World Bank and its chairman [...] are, the Pope is, my son Arno, the rubber tappers in the Brazilian Amazon forest are, Bill Gates is, the labor unions are."²⁹ As a result the debate about distributive fairness of the current system has been restated as the common goal to achieve sustainable development. This masks the fundamental disagreement that led to the debate in the first place: a political conflict over the distribution of wealth. Similarly, to the socialist challenge, the current criticism seeks to show that international investment law is beneficial for a few investors, but has detrimental effects on a large part of society. The counter argument was and still is that foreign capital is needed for development.³⁰ Hence, once the concept of development and the hierarchy it creates is accepted as starting point, the debate is locked into defining 'good' investment.

During the past decade, a number of attempts have been made to develop ideas for a framework that leads to better investments.³¹ Even though most accounts focused on safeguarding regulatory space for the state, the same motivation underlies claims of a human right to property, particularly when concerned with land grabbing.³² Thus, what is at stake cannot be the quest for a perfect balance between sovereign power and individual rights. Neither the socialist interventions, nor the current criticisms should be understood as conceptual criticism of one or the other. They are expressions of a lived experience of loss and injustice that can be resisted as well as perpetuated through both individual rights and sovereign power.

This reflection is then an attempt at joining the current conversation with a call to caution about the fixation on vague concepts and technical language. It is also a call to critically question and make explicit the assumptions that underlie the notion of development. In times of political turmoil and change we should address fundamental questions of the expectations we have about sharing a world. What needs to be examined is the frame for our loyalties. Are we loyal to a nation state and thus a national economy? Or is it some sort of classist or cultural identity that holds our sympathy? Who do we want to care for and who do we consciously exclude? Do we believe in meritocracy and a level playing field, or do we believe in structural injustices? Do we think that every society is on the same trajectory but in different stages? Or do we hold the

number of known cases to 767. As of the end of 2016, investors had won 60 per cent of all cases decided on the merits." UNCTAD, *World Investment Report 2017 - Investment and the Digital Economy* (2017) xii.

²⁸ See for example the UNCTAD, *Investment Policy Framework for Sustainable Development*, 2015.

²⁹ Erik Swyngedouw, 'Impossible "Sustainability" and the Postpolitical Condition' in Rob Krueger and David Gibbs (eds), *The Sustainable Development Paradox - Urban Political Economy in the United States and Europe* (Guilford Press 2007) 20.

³⁰ In the introduction of an edited volume on financing for development with a special focus on the MDGs and SDGs the editor paraphrases Jeffery Sachs and states, that the fundamental problem 'may be best described in terms of 'capital shortage' diagnosis of the development problem. Christopher Adam and others (eds), *Financing for Development: Editors' Introduction*, vol 31 (Oxford Review of Economic Policy, 2015) 261.

³¹ UNCTAD, *Phase 2 of IIA Reform: Modernizing the Existing Stock of old-generation Treaties* (IIA Issues Note, 2017) UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, 2015).

³² Poul Wisborg, 'Human Rights against Land Grabbing? A Reflection on Norms, Policies, and Power' (2013) 26 *Journal of Agricultural and Environmental Ethics*.

banner of pluralism and the incommensurability of ways of life? How plausible is the promise of a global win-win where no hard choices must be made?³³

The pressure mounted on the international investment regime at various moments, including the current one, stems from actual suffering and the recognition that the regime produces winners and losers. We have to acknowledge that a new concept will in fact only be a semantic change, if we fail to find the courage to denominate and discuss incompatible interests. The turn from property to investment and the further turn towards sustainable investment have allowed to disseminate conflict through a vague notion that enables the dream of a global win-win to live on, despite everyday experiences to the contrary. As long as we shy away from the hard questions, we will not be able to have a meaningful reform of the legal system.

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Bibliography

Adam C and others (eds), *Financing for Development: Editors' Introduction*, vol 31 (Oxford Review of Economic Policy, 2015)

Binder C, 'Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns: Or the Benefits of a Public International Law Approach to Investment Arbitration' in Treves T, Seatzu F and Trevisanut S (eds), *International Investment Law and Common Concerns* (Routledge 2014)

Craven M, *The Decolonization of International Law: State succession and the Law of Treaties* (Oxford University Press 2009)

Dolzer R and Schreuer C, *Principles of International Investment Law* (2. edn, Oxford University Press 2012)

Escobar A, *Encountering Development the Making and Unmaking of the Third World* (Princeton Studies in Culture, Power, History, Princeton University Press 1995)

Gardner RN, 'International Measures for the Promotion and Protection of Foreign Investment' (1960) 9 *Journal of Public Law*

Kennedy D, 'Three Globalizations of Law and Legal Thought' in Trubek D and Santos A (eds), *The New Law and Economic Development - A Critical Appraisal* (Cambridge 2006)

Kunz JL, 'The Mexican Expropriations' (1939) 17 *NYULQ Rev* 327

Mouffe C, *On the Political* (Routledge 2005)

Newton S, *Law and the Making of the Soviet World: The Red Demiurge* (Routledge 2014)

Pahuja S and Storr C, 'Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited' in Crawford J and others (eds), *The International Legal Order: Current Needs and Possible Response: Essays in Honour of Djamchid Momtaz* (Brill Nijhoff 2017)

³³ My thinking here goes to Chantal Mouffe who has coined the notion of the 'post-political' describing a consensus at the centre of Western democracies that makes alternatives look impossible. See: Chantal Mouffe, *On the Political* (Routledge 2005).

Pahuja S, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2013)

Perrone NM, 'The Emerging Global Right to Investment: Understanding the Reasoning behind Foreign Investor Rights' (2017) forthcoming *Journal of International Dispute Settlement*

Phoenix Action Ltd. v. Czech Republic, Decision on Jurisdiction, 15 April 2009 (ICSID Case No. ARB/06/5)

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, Decision on Jurisdiction, 27 September 2012 (ICSID Case No. ARB/06/2)

Reamer N and Downing J, *Investment: A History* (Columbia University Press 2016)

Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction (31 July 2001) (ICSID Case No. ARB/00/4)

Sayer A, *Why we can't Afford the Rich* (Policy Press 2015)

Schreuer CH and others (eds), *The ICSID Convention. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009)

Schrijver N, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 2008)

Seidl-Hohenveldern I, 'Communist Theories on Confiscation and Expropriation. Critical Comments' (1958) 7 *The American Journal of Comparative Law*

Seidl-Hohenveldern I, *Internationales Konfiskations- und Enteignungsrecht*, vol 23 (Beiträge zum ausländischen und internationalen Privatrecht, de Gruyter 1952)

Swyngedouw E, 'Impossible "Sustainability" and the Postpolitical Condition' in Krueger R and Gibbs D (eds), *The Sustainable Development Paradox - Urban Political Economy in the United States and Europe* (Guilford Press 2007)

Truman HS, *Inaugural Address* (20 January 1949)

UNCTAD, *Investment Policy Framework for Sustainable Development*, (2015)

UNCTAD, *Phase 2 of IIA Reform: Modernizing the existing stock of old-generation treaties* (IIA Issues Note, 2017)

UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, (2015)

Vandevelde KJ, *Bilateral Investment Treaties : History, Policy, and Interpretation* (Oxford University Press 2010)

Victor Pey Casado and President Allende Foundation v. Republic of Chile, Award, 8 May 2008 (ICSID Case No. ARB/98/2)

Vienna Convention on Succession of States in Respect of Treaties, 1978 UNTS 3 (1978)

Wiemann H (ed), *Fragen des internationalen Privatrechts. 8 Beiträge von Vertretern der sozialistischen Rechtswissenschaft* (Deutscher Zentralverlag 1958)

Wisborg P, 'Human Rights Against Land Grabbing? A Reflection on Norms, Policies, and Power' (2013) 26 *Journal of Agricultural and Environmental Ethics*