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Investors versus people: the public nature of international Investment Law

Why do we need human rights in international investment law?

The Euro-American and neoliberal meaning of economic freedom that is said to privilege and promote economic growth and the right to accumulate individual profit over community welfare and ecological harmony is raising questions about the conditions of inequality, depravation and the human and environmental degradation that is taking place today. This understanding of freedom has been successfully embedded within international, political and economic institutions, along with international legal framework.

This concept of economic freedom has served to freely allocate enormous flows of capital over territories in the so-called "Third World", with little or no care for the previous use or significance that these territories held for their communities.

This particular method of exercising economic freedom has been sophisticatedly interwoven into the international law of foreign investment (international investment law) and has been extensively and untiringly promoted by governments and international institutions across the world as a means for development.

Capital must flow freely across the globe in order to deliver 'development', 'prosperity' and 'modernity' through political and legal strategies of privatization supported and encouraged by international economic institutions and national elites. Yet, these policies have brought about forced displacement, legal dispossession, poverty and even the annihilation of whole communities in several territories, particularly in Asia, Africa and Latin America. In the 'name of development' whole populations are being forced to pack up and leave (when there is time), find another land, another home far away from their communities with different cultural traditions.

When a foreign investment project arrives and needs land for the extraction of minerals, gas, coal, oil or simply to expand mega agricultural businesses—current inhabitants are seen as a 'risk to manage' at best, or a great hindrance at worst. Consequently, whole communities are being displaced, mistreated, or even murdered—with their cultural traditions simultaneously wiped out.

Within this context, this paper will deal with the question about the public nature of international investment law and the need to effectively incorporate international human rights principles and laws within its framework.

To do so, the paper is divided into three parts. In the first part, it will examine what the origins of international investment law (ILL) are including its principles formed during the neoliberal era that helped to shape its production and reproduction.

The second part will examine the field of IIL and its evolution over the years, giving details of how the current IIL framework is based on the existing paradigm of the need for economic growth as a means of development, without consideration of the fundamental human rights of the people.

Finally, in the third part it will discuss why the international legal system needs to integrate the human rights framework in international investment law.

I. The evolution and principles of the international investment law

1 The origins of the international investment law

For some mainstream scholars the history of the investment law is not just irrelevant but also an 'anachronistic and obsolete' debate.[1] According to them, historic controversies over the meaning of Customary International Law between capital-exporting and capital-importing states has been overtaken by nearly 3,000 bilateral investment treaties. However, authors such as Mile consider that history not only matters, but also the origins of international investment law reveal a recurring pattern of constraint and resistance through law. She claims that investment law, at its origins, was principally "a vehicle for controlling through legal means resistance emanating from capital-importing states".[2]

The UNCTAD has acknowledged that International Investment Agreements (IIAs)–like most other treaties–are a product of the time when they were negotiated. IIAs are concluded "in a specific historic, economic and social context and respond to the then-existing needs and challenges".[3]

Formally, it can be said that the BIT (Bilateral Investment Treaty) was born as a new instrument formed between *developed* and *developing* countries, although with relatively few investment protections and without a system to settle disputes between the parties. In the first half of the 20th century, Customary International Law (CIL) was the primary source of international legal rules governing foreign investment.[4]

In this figure[5], the regulatory developments of the International Investment Agreement Regimes can be seen:

[1] R. Dolzer and C. Schreuer (2008), Principles of international investment law , p.p 16
[2] K. Miles (2013), The Origins of international investment law: Empire, Environment, and the Safeguarding of Capital. Cambridge: Cambridge University Press. Chapter I.
[3] UNCTAD (2015) World Investment Report 2015: Reforming International Investment Governance, Chapter IV, p.p. 121
[4] Ibid
[5] UNCTAD (2015) World Investment Report 2015: Reforming International Investment Governance, Figure IV.1, p.p. 121

1950s–1964 Era of Infancy	***1965–1989 Era of Dichotomy***	***1990–2007 Era of Proliferation***	***2008–today Era of Re-orientation***
New IIAs: 37	New IIAs: 367	New IIAs: 2663	New IIAs: 410
Total IIAs: 37	Total IIAs: 404	Total IIAs: 3067	Total IIAs: 3271
New ISDS cases: 0	New ISDS cases: 1	New ISDS cases: 291	New ISDS cases: 316
Total ISDS cases: 0	Total ISDS cases: 1	Total ISDS cases: 292	Total ISDS cases: 608
GATT (1947)	ICSID (1965)	World Bank Guidelines for treatment of FDI (1992)	EU Lisbon Treaty (2007)
Draft Havana Charter (1948)	UNCITRAL (1966)	NAFTA (1992)	UN Guiding Principles on Business and Human Rights (2011)
Treaty establishing the European Economic Community (1957)	First BIT with ISDS between Netherlands and Indonesia (1968)	APEC Investment Principles (1994)	UNCTAD Investment Policy Framework (2012)
New York Convention (1958)	Draft UN Code of Conduct on TNCs(1973−1993)	Energy Charter Treaty (1994)	UN Transparency Convention (2014)
First BIT between Germany and Pakistan (1959)	UN Declaration on the Establishment of a NIEO (1974)	Draft OECD MAI (1995−1998)	
OECD Liberalization Codes (1961)	Draft UN Code of Conduct on Transfer of Technology (1974−1985)	WTO (GATS, TRIMs, TRIPS) (1994)	
UN Resolution on Permanent Sovereignty over Natural Resources (1962	OECD Guidelines for MNEs (1976)	WTO Working Group on Trade and Investment (1996−2003)	
	MIGA Convention (1985)		
Emergence of IIAs	Enhanced protection and ISDS in IIAs	Proliferation of IIAs and Liberalization components	Shift from BITs to regional IIAs and Decline in annual IIAs
Weak protection: no ISDS	Codes of conduct for investors	Expansion of ISDS	Exit and revision
Independence movements	***New International Economic Order (NIEO)***	***Economic liberalization and globalization***	***Development paradigm shift***

According to UNCTAD "the emergence of a number of major investment disputes between foreign investors and their host countries after 1945 showed the significant limitations of protection under CIL, and triggered a move towards international investment treaty making".[6]

As said by Prieto "from an historical point of view, IIL appears as direct response to processes of decolonization taking place in Africa and Asia after the end of War World II. IIL treaties offered protection to the right of property of foreign investors while indirectly imposing limits and boundaries on the ability of host countries to regulate and to take economic decisions. This scenario that started consolidating in the late 1940s was the perfect match for the neoliberal project that was developing at the same time in both sides of the Atlantic". [7]

Moreover, due to the intense promotion of the need and benefits of establishing a foreign investment-friendly environment by international financial institutions such as the World Bank and the International Monetary Fund, the amount of international treaties increased dramatically from 404 to 3067 between 1990 and 2007 as can be seen in the table above.

2. International Investment in the neoliberal era

The influence of the neoliberal ideology in the framing of the international law has been broadly discussed in several legal analyses. Among the different fields of international economic law, the international investment law (IIL) in particular, has both been shaped by neoliberal rationality and contributed towards its content, form and practical implementation.

Harvey has argued that "*for any system of thought to become hegemonic requires the articulation of fundamental concepts that become so deeply embedded in common-sense understandings that they become taken for granted and beyond question".* [8] This seems to be the case for the neoliberal ideology, which has permeated not just institutions and economic policies but also other aspects of social life such as law, politics and education.

Neoliberalism considers the idea of individual freedom as its political core value. In this rationality, freedom is not only threatened by fascism, dictatorship and communism, but also "by all forms of state intervention that substituted collective judgement for those of individuals free to choose. This powerful concept appeals to anyone who believes and values the ability to make decisions for themselves. Moreover, the idea of the superiority of individual freedom has empowered different movements in social struggles across the world, especially in authoritarian regimes". [9]

Neoliberal theorists claim that the sorts of measures that they advocate in defending individual freedom are both necessary and sufficient for the creation of wealth and therefore for the

[6] Ibid

[7] E. Prieto (2015), Neoliberal market rationality: The driver of international investment law, issue of Birkbeck Law Review

[8] D. Harvey (2006) "Neo – liberalism as creative destruction", Swedish Society for Anthropology and Geography Journal Compilation. Geogr.Ann.,88B (2): pp. 145

[9] D. Harvey (2005), A brief history of neoliberalism, Oxford, pp.5

improvement of human wellbeing. It has been suggested that the redistribution of wealth will occur due to the natural forces of the market. The theory assumes that individuals' freedom is guaranteed by the freedom of the market. Under this logic states must ensure property rights and remove any barriers that distort the operation of the free market. The market should be 'freed' from regulatory or institutional restraints[10].

Scholars such us Hayek and Friedman believed that freely adopted market mechanisms are the optimal way of organising all exchanges of goods and services. It is assumed that "free markets and free trade will free the creative potential and the entrepreneurial spirit which is built into the spontaneous order of any human society, and thereby lead to more individual liberty and well-being, and a more efficient allocation of resources"[11].

According to Harvey[12], neoliberalism is a theory of political economic practices "which proposes that human well-being can best be advanced by the maximization of entrepreneurial freedoms within an institutional framework characterized by private property rights, individual liberty, free markets and free trade".

The author states that beyond these principles, "neoliberalism has actually been an instrument to restore and consolidate class power wherever upper classes have considered to be threatened by labour unions and social movement demands".[13]

International economic institutions such as the International Monetary Fund (IMF) and the World Bank have played a key role in spreading and promoting these neoliberal ideas through the conditions of credits and aid, and the adoption of certain domestic changes in law and policies. These conditions were widely incorporated into structural adjustment programs, including obligations to liberalize markets, impose fiscal austerity, privatize state owned companies, strengthen legal systems for the protection of private property, and promote foreign investments as fundamental to economic development[14].

According to Brown "the expansion of this economic rationality to non-economic life spaces and institutions, diffusing the economic form of the market through the entire social body, is one of the essential aspects of neoliberalism. In this regard, neoliberalism rationally affects every space of human life including non-economic institutions. Neoliberalism is deployed as a form of ideology that permeates not only the market but all the institutional apparatuses, and many other areas such as education, economy, **law,** government, politics*, etc"*[15].

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[10] Ibid, pp. 7

[11] D Thorsen (2008), What is Neoliberalism?, University of Oslo, available on http://folk.uio.no/daget/neoliberalism.pdf

[12] D. Harvey (2006) "Neo – liberalism as creative destruction", Swedish Society for Anthropology and Geography Journal Compilation. Geogr.Ann.,88B (2): pp. 145-158

[13] Ibid

[14] W. Robinson (2002) 'Capitalist Globalisation and the Transnationalization of the State' in Mark Rupert and Hazel Smith (eds), *Historical Materialism and Globalisation: Essays on Continuity and Change* p.p. 215.

[15] W. Brown, *Edgework (2005): Critical Essays on Knowledge and Politics* (Princeton University Press 2005) 39-40.

The ways in which the neoliberal ideology has framed the IIL can be summarized in four points: **(i)** The stronger and broader protection of foreign investors' private property and contractual rights with little or no consideration of people's rights; **(ii)** The restriction of the ability of the state to regulate matters of public interest; **(iii)** the submission of state–investor disputes handled through private justice and commercial logic and **(iv)** the legal constraint of third parties to participate in judicial disputes (individuals and/or communities) and claim reparation and compensation when their rights are affected by the investor's interests.

Firstly, in perfect coherence with the neoliberal ideology the IIL system aims to protect the maximization of wealth and capital accumulation as well as enhance private property and contractual relations seen as essential elements for guaranteeing the spontaneous order of the market. Thus, through Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) two or more economies set rules for all government treatment of foreign investments.

According to the organization Public Citizen "the Investor State Dispute Settlement (ISDS) enforces pacts by providing foreign corporations broad substantive rights that even surpass the strong property rights afforded to domestic firms in nations such as the United States". [16] This includes the "right" to a regulatory framework that conforms to foreign investors' "expectations," which ISDS tribunals have interpreted to mean that governments should not change regulatory policies once a foreign investment has been established.

The basic rules for these kinds of IIL treaties include: obligations on states not to discriminate in favour of home-country or third-country investors; offer investors' investments fair and equitable treatment along with full protection and security; provide full and prompt, adequate and effective compensation in the event of an expropriation; allow investors to move their capital into and out of the country; not to impose performance requirements (such as local content requirements); and allow for neutral arbitration of disputes if treaty obligations are breached. [17]

Nearly 3271 BITs and similar agreements are in place worldwide, including investment chapters in free trade agreements and plurilateral arrangements like the Energy Charter Treaty. [18]

According to some, the rights provided by BITs and investment chapters of FTAs–fair and equitable treatment, full protection and security, no expropriation without compensation and

[16] Public Citizen (2015), Case Studies: Investor-State Attacks on Public Interest Policies, Washington, available on http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf, consulted on 2nd June 2016. Also for more information, *see* Lori Wallach, "Fair and Equitable Treatment" and Investors' Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed," Public Citizen memo, Sept. 5, 2012. Available at: http://www.citizen.org/documents/MST-Memo.pdfhttp://www.citizen.org/documents/MST-Memo.pdf.

[17] S Miller and G Hicks (2015), Investor- State Dispute Settlement: a reality check, Centre for Strategic and International Studies, New York

[18] UN Conference on Trade and Development (UNCTAD), "Investment Policy Hub: International Investment Agreements Navigator" http://investmentpolicyhub.unctad.org//IIA

access to impartial arbitration–are consistent with the Universal Declaration of Human Rights at the core of most democracies, along with the European Convention of Human Rights. [19]

The Universal Declaration claims in its Article 17 that '(1) *Everyone has the right to own property alone as well as in association with others;* and that (2) *No one shall be arbitrarily deprived of his property'*.

Also, the Article 1 of the Protocol to the European Convention for the protection of Human Rights and Fundamental Freedoms states that

> "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*"[20].

In this line of argumentation, the rights that investors enjoy provided by BITs and FTAs are basically universal rights. However, as we will see later, the IIL system does not take the other side of the coin into account, which is that often foreign investment projects affect people's lives and territories in several harmful ways. Under the logic of the protection and promotion of *individual wealth maximization* and extreme protection of private property, the IIL lacks substantive and procedural law that entitles victims of these harms to access to justice in the pursuit of restoration and/or reparation.

Secondly, the restriction of the ability of the state to regulate matters of public interest is one of the greatest controversial aspects of international investment law. The investor-state dispute settlement (ISDS) system, included in various Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs), fundamentally shifts the balance of power among investors, states and the general public, creating an enforceable global governance regime that formally prioritizes corporate rights over the rights of governments to regulate. [21]

Indeed, the ISDS system allows investors to challenge public interest laws and regulations if they consider that these regulations undermine or reduce their present or future profits. According to the NGO, Global Trade Watch, only 50 cases were initiated between the 1960s—when the

[19] S Miller and G Hicks (2015), Investor- State Dispute Settlement: a reality check, Centre for Strategic and International Studies, New York

[20] European Court of Human Rights, *European Convention of Human Rights*, available on http://www.echr.coe.int/Documents/Convention_ENG.pdf

[21] Public Citizen (2015), Case Studies: Investor-State Attacks on Public Interest Policies, Washington, available on http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf, consulted on 2th June 2016

investor-state system was first established—and 2000; the majority of these cases were based on nationalization of private industries. Today, more than 500 cases have been launched and a whole industry of third-party financing and specialized global law firms has sprung up to claim millionaire tax-payer compensations and roll back key public interest policies.[22] Corporations opened more than 50 cases annually between 2011 and 2013 (and 42 in 2014).[23]

Claiming such expansive rights, foreign corporations have used the ISDS to attack an increasingly wide array of tobacco, climate, financial, mining, medicine, energy, pollution, water, labour, toxins, and other non-trade domestic policies.[24] The number of such cases has been soaring.

Multinational Corporations (MCs) challenge not only public policies but also administrative and fiscal sanctions imposed by domestic authorities after following the established domestic legal processes. Indeed, the number of investor-state controversies increased when MCs were successful in restricting the ability of the state to impose financial sanctions by challenging the application of current law and fiscal regulations.

For instance, as Prieto has said the Fair and Equitable Treatment clause (FET) is a "very broad clause that aims at protecting the foreign investor against any treatment that could affect in any form its activity and economic interests and which could be considered unfair".[25] By using this clause as a legal argument MCs are claiming billionaire compensations against states whenever they consider their economic expectations have been affected by a public interest law or regulation.

Regarding the FET, Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann state the following:

> "Tribunals have predominantly interpreted this vague concept in the spirit of the purpose of the investment agreements, namely to create stable and favourable conditions of business for investors. As a result, public interest plays a relatively minor role in the decision making-process of arbitration tribunals".[26]

For example, in the case of the tobacco company Philip Morris, the company argued that the public health law in Australia has "expropriated its valuable intellectual property" by prohibiting the display of its logo, brand colours and violated its right to "fair and equitable treatment" as

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[22] http://www.citizen.org/investorcases consulted on 2th June 2016

[23] UNCTAD, "Recent Trends in IIAs and ISDS," February 2015, at 5. Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

[24] Ibid

[25] E. Prieto (2015), Neoliberal market rationality: The driver of international investment law, issue of Birkbeck Law Review

[26] Nathalie Bernasconi-Osterwalder & Rhea Tamara Hoffmann (2012) 'The German Nuclear Phase-Out Put to the Test in International Investment Arbitration?: Background to the new dispute Vattenfall v. Germany (II)' International Institute for Sustainable Development.

guaranteed under the Australia-Hong Kong BIT.[27] Also, Philip Morris launched a similar case against Uruguay in February 2010 under the Switzerland-Uruguay BIT. Uruguay also implemented a slate of anti-smoking measures that featured the requirement for tobacco product packaging to include large, graphic public health warnings. Philip Morris is seeking compensation for lost profits, arguing that the labelling policies '*violate the BIT as expropriations of its trademarks and as "unreasonable" measures with no rational relationship to public health objectives*'.[28]

Another well-known case is Vattenfall versus Germany in 2009, in which rather than comply with the new German environmental standards and requirements, Vattenfall launched its investor-state claim against Germany, arguing that '*Hamburg's environmental rules amounted to an expropriation and a violation of Germany's obligation to afford foreign investors "fair and equitable treatment."* [29] In response, Michael Müller, then Germany's deputy environment minister, stated, "*It's really unprecedented how we are being pilloried just for implementing German and European Union (EU) laws.*"[30]

In addition to these cases, there are several other ongoing international disputes in which investors are claiming millions in compensation due to states applying public interest laws, regulations or requirements. Cases range from health regulations and policies, labour rights and essential services to environmental protection and climate change measures. [31]

Overall, the debate in the IIL arena is whether or not to continue allowing MCs to defend their current or future profit by challenging and disavowing domestic laws relating to public policies that were democratically created with the aim to protect public interest in issues such as the environment, health, food security, labour rights and other social and economic rights. It seems that states under the threat of paying millionaire compensations are being forced to put the economic interests of MCs over their people's needs and rights.

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[27] *Philip Morris Asia Limited v. The Commonwealth of Australia*, Notice of Arbitration, Ad hoc—UNCITRAL Arbitration Rules (2011), at paras. 1.5-1.6

[28] Matthew C. Porterfield and Christopher R. Byrnes, Philip Morris v. Uruguay: Will Investor-State Arbitration Send Restriction on Tobacco Marketing up in Smoke?, *Investor Treaty News*, July 12, 2011. Available at: http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/.

[29] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration, March 30, 2009, at paras. 52-54. Available at: http://italaw.com/documents/VattenfallRequestforArbitration.pdf.

[30] Sebastian Knauer, "Vattenfall vs. Germany: Power Plant Battle Goes to International Arbitration," *Spiegel Online International*, July 15, 2009. Available at: http://www.spiegel.de/international/germany/vattenfall-vs-germany-power-plant-battle-goes-to-international-arbitration-a-636334.html.

[31] A good review about the latest cases of investors against states in which a public interest regulation is being challenged can be find it in Public Citizen (2015), Case Studies: Investor-State Attacks on Public Interest Policies, Washington, available on http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf, consulted on 2nd June 2016, http://www.citizen.org/investorcases consulted on 2nd June 2016.

Despite the fact that the state is a public subject in international law, the state-investor disputes positions the state and its foreign investors in the same category, as if both had the same nature and functions.

The private justice applied to state-investor disputes faces several difficulties when states aim to protect their public interests. First, arbitral tribunals are not bound by any form of precedent or opinions of states, thus they are prompt to interpret any regulatory activity of a host state as an act against the Fair and Equitable Treatment clause. [32] For instance, previous OECD research has shown that arbitration proceedings in the ISDS are lightly regulated; consequently, treaties generally do not provide much guidance on matters such as which bodies of law are to be applied or the relationship of the ISDS procedures with other adjudication processes. As a result, arbitration panels under the ISDS have broad decision making powers.[33]

Also, investment arbitrators have been criticised of being bias. This has been a direct consequence on the one hand of the temporary nature of their positions, and on the other hand of the administrative structure and ethos of institutions such as the International Centre for Settlement of Investment Disputes (part of the World Bank) and the International Chamber of Commerce. [34]

The arbitral tribunals that decide these cases are composed of three private attorneys, unaccountable to any electorate. According to Pohl some attorneys rotate between serving as "judges" and assisting corporations in winning legal battles against governments. He states that "such dual roles would be deemed unethical in most legal systems under the rule of conflict of interest that is applicable in most of the systems of justice, and their rulings cannot be appealed on the merits". [35]

He mentions that "the arbitral tribunals have no precedents and no rules but their own subjective interpretation that most of times corresponds to the commercial law principles and logics that do not take into account public interest". [36]

Finally, it is important to examine the issue of the legal constraints of third parties (individuals and/or communities) to participate in judicial disputes in order to claim reparation and compensation when their rights are affected by the investor's interest.

Despite the public nature of investment treaty arbitration (given that these agreements are made between states) its procedures are modelled on those of international commercial arbitration.

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[32] E. Prieto (2015), Neoliberal market rationality: The driver of international investment law, issue of Birkbeck Law Review

[33] J Pohl J, K Mashigo, A Nohen (2012) Dispute Settlement Provisions in International Investment Agreements, OECD Working Papers on International Investment.

[34] Ibid

[35] Ibid

[36] Public Citizen (2015), Case Studies: Investor-State Attacks on Public Interest Policies, Washintong, avalaible on http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf, consulted on 2th June 2016

This has created a gap between (public) substance and (private) procedure in investment treaty arbitration. [37] As the OECD has acknowledged, the system of investment dispute settlement has borrowed its main elements from the system of commercial arbitration and under this logic, only those who are part of the contract (this includes investors and the state) are able to claim responsibility and compensation for '*business related*' harm or damage, therefore, any public interest relating to an investment treaty is simply ignored. [38]

As Tomoko Ishikawa has pointed out, "third parties do not have any rights or privileges in the arbitral proceedings. Because investment treaty arbitration proceedings are private, the privacy and confidentiality of the proceedings are fundamental concepts of international commercial arbitration and prevent victims of harm from having access to the files of the contracts and later on controversy dispute files". [39]

The public nature of investment treaty arbitration derives from the substantive rights and obligations that are set by treaties. Thus, international public law and domestic law of the host state should be applicable not just to substantial investment law but also to investment treaty arbitration procedures.

However, as we have seen above, given that international investment law has been shaped under the neoliberal principles and its aim is to protect investors' rights against the 'insecurity' of states' acts and regulations, the procedure of investment treaty arbitration and the Investor State Dispute System (ISDS) in general, responds to the logic in which two private subjects argue in defence of their personal interest. This view disavows and despises the public nature, not just of the IIL, but also of the state as a public international subject responsible for protecting, promoting and guaranteeing people's human rights.

This phenomenon can be analysed from a historical point of view. The colonial origin of the IIL allows us to understand the uneven system of international relations; the fact that it ignores the structural disparities between countries. The IIL treats all countries as equals (investors and receivers) although they clearly are not. In this way, the IIL enforces and legitimises an unfair economic and global political system.

Relating to this point, we can bring the Fanonian dimension of international relations between the "First and Third World" into consideration, in particular his view regarding political economic relations:

> "Other countries of the Third World refuse to undergo this order and agree to get over it by accepting the conditions of the former guardian

[37] Tomoko Ishikawa (2010), Third Party Participation In Investment Treaty Arbitration, The International and Comparative Law Quarterly, Vol. 59, No. 2, pp.373-412

[38] OECD (2005), "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures", *OECD Working Papers on International Investment*, 2005/01, OECD Publishing.

[39] Tomoko Ishikawa (2010), Third Party Participation In Investment Treaty Arbitration, The International and Comparative Law Quarterly, Vol. 59, No. 2, pp.373-412

> power. These countries use their strategic position -a position which accords them privileged treatment in the struggle between the two blocs- to conclude treaties and give undertakings. The former dominated country becomes an economically dependent country. The ex-colonial power, which has kept intact and sometimes even reinforced its colonialist trade channels, agrees to provision the budget of the independent nation by small injections" [40]

Concerning foreign investment Fanon claims:

> "As soon as the capitalists know -and of course they are the first to know- that their government is getting ready to decolonize, they hasten to withdraw all their capital from the colony in question. The spectacular flight of capital is one of the most constant phenomena of decolonization.
>
> Private companies, when asked to invest in independent countries, lay down conditions which are shown in practice to be inacceptable or unrealizable. Faithful to the principle of immediate returns which is theirs as soon as they go "overseas," the capitalists are very chary concerning all long-term investments (...)
>
> The private companies put pressure on their own governments to at least set up military bases in these countries for the purpose of assuring the protection of their interests. In the last resort these companies ask their government to guarantee the investments which they decide to make in such-and-such an underdeveloped region".[41]

As Fanon has taught us, the international investment law is a legal, political and economic mechanism to discipline the so-called "Third Word". Under the formal equality that assumes the two parties have the same power of negotiation when in reality, one (the developed) imposes over the other (the developing) with the legitimacy given by the international legal framework that has been sculpted by the economic and geopolitical interest of the West over the rest of the world.

To comprehend this better, it is also important to look at the role of the state in the neoliberal rationality. States must ensure property rights and remove any barrier that distorts the operation of the free market. '*The market should be 'freed' from regulatory or institutional restraints'*. [42]

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[40] F Fanon's (1961) "*Violence in the International context*" in "Concerning Violence", Chapter 1, in The Wretched of the Earth, Penguin Classics Edition (2001), p.p. 27 - 75
[41] Ibid
[42] D. Harvey (2005), A brief history of neoliberalism, Oxford, pp.5

Under the neoliberal logic the state is no longer responsible for ensuring and enhancing people's social and economic rights, it is just in charge of keeping the 'rule of law' and *status quo* of property and contractual rights with little or no consideration of what that could mean in terms of environmental degradation or human suffering.

The current international investment law System ignores the fact that governmental regulations and measures challenged by investors are based on public policy and therefore the issues raised in such disputes concern not only the parties involved in the dispute but also the public.[43]

Legitimate states' measures relating to the environment or health and safety regulations are not even free from being challenged by the MCs present or future profit protection rights without acknowledging the voice of the people.

The sovereign exercise by the government to enforce its right to establish regulations to prevent or mitigate harm to public health and the environment have implications that go far beyond commercial impacts.[44]

Despite this reality, victims of investment treaties are being restricted access to justice that would enable restoration, compensation, and reparation of their rights. As Ishikawa shows in her research after assessing a great number of investor-state disputes around the world, "without exception, the arbitral tribunals do not allow third parties attendance at the hearings and oral amicus curiae submissions. The legislative ground for this refusal appears to be clear. Under article 25(4) of the UNCITRAL Arbitration Rules[45] and Rule 32 of the ICSID Arbitration Rules (both before and after the 2006 amendment), a tribunal may not allow third parties to attend the hearings". [46]

Moreover, in the case's object of analysis, Ishikawa found that, "again without exception, third parties do not grant access to the materials of the proceedings. The legislative ground for this refusal of disclosure is less clear under the UNCITRAL Arbitration Rules and the reasons vary between cases: the existence of the previous agreement between the disputing parties; the existence of the previous order of the same tribunal on confidentiality; to protect the procedural integrity; that the release of each material is not to be decided generally but case by case; that the petitioners have enough information to make arguments on the policy issues". [47]

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[43] E. Prieto (2015), Neoliberal market rationality: The driver of international investment law, issue of Birkbeck Law Review

[44] A Cosbey (2005) 'The Road to Hell? Investor Protections in NAFTA's Chapter 11' in L Zarsky (ed) International Investment for Sustainable Development: Balancing Rights and Rewards (Earthscan)

[45] The UNCITRAL Arbitration Rules provide a set of procedural rules upon which parties may agree for the conduct of arbitral proceedings.
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

[46] Tomoko Ishikawa (2010), Third Party Participation In Investment Treaty Arbitration, The International and Comparative Law Quarterly, Vol. 59, No. 2, pp.373-412

[47] Ibid

These arbitral positions remain despite the latest development of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency"), which came into effect on 1 April 2014.[48]

There have been some attempts to bring broad understanding of public matter issues to arbitral investor-state disputes through mechanisms such as that of *amicus curiae.* It has been argued that '*amicus curiae* briefs, if they have gone through a proper screening process, will actually contribute to the better quality of an investment arbitration award by providing tribunals a broader perspective, comprehensive factual/legal arguments and expert knowledge'. [49]

However, whereas *amicus curiae* briefs could be useful for arbitration tribunals to realise the public issues surrounding the relevant dispute and gain a better understanding of the actual impact of their decisions made on the public, under the current rules and practice, the receipt of an *amicus curiae* submission is a matter of discretion in the eyes of the tribunal. This makes its use in international investment disputes very fragile. [50]

Moreover, due to the nature of the *amicus curiae*, it does not seem to be a suitable or effective legal mechanism for accessing and obtaining justice and reparation for victims' investment-related harm. To sum up, as Ishikawa said, third parties or *investments' victims* in this case, do not have any rights or privileges in the arbitral proceedings, this legal malfunction ultimately prevents them from claiming justice and compensation.

As we have seen throughout this chapter, the real problem is that international public law, international economic law in general, and international investment law in particular, are strangers of the same family that are not bound by enforceable legal bridges, making it impossible for victims to obtain any reparation.

[48] See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html
[49] Tomoko Ishikawa (2010), Third Party Participation In Investment Treaty Arbitration, The International and Comparative Law Quarterly, Vol. 59, No. 2, pp.373-412
[50] Ibid

II. Foreign investment is good for development: Which type of development?

Within neoliberal policies, foreign investment has been extensively promoted by international economic institutions such as the World Bank as a means for development. [51] The incentives for privatization are intimately encouraged by the possibility for multinational corporations to both exploit natural resources and take over delivery of public services including water, electricity and transport in the so-called "developing countries". [52] Consequently, foreign investment is considered to be one of the most important means for achieving development.

Under neoliberal rationality, development is understood as financial liberalisation, privatisation of public goods and services, deregulation, openness to foreign investment, fiscal discipline and small governance. The meaning of development involves basically the notion of economic growth through the logic of the free market, individual property and free flow of capital, all within the game of advantage and unequal power relations between the North and South.[53] Most of the MCs come from the so called "First World" and by playing their role as 'developers' carry on their projects in the "Third World" under the promise of bringing prosperity and welfare for the people. But has foreign investment actually brought prosperity and welfare to these peoples that inhabit the Global South? The answer depends on who is defining and assessing development.

As Baxi has claimed the idea of development cannot be explained using just one concept as it depends on the society, context and time in which the concept is constructed and implemented. The modern ideas of development include 'the social planned' and basically content notions of what needs to be improved and how; how may 'primary moral goods' be redistributed and what is the 'best' means for moving ahead? In the same way, the idea of development determines what may count as a change in the *short,* as well as, in the *long* run. Despite the general acceptance of the need for participatory mechanisms to discuss what development is and how it can be achieved, the challenge of plural visions is still an ongoing issue and the question of who may develop whom brings the problem of legitimacy and authority to the arena. [54]

According to Baxi "the question of who may constitute themselves as developers and how may the classes of the *developees* be constructed is a question about representation and distribution of the legal and political authority. Moreover, if the development ideas and means come from outside the communities it is necessary to look at the problem of the accountability, could *developees* claim responsibility and reparation when they are hurt or harmed by developers?". [55]

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[51] D. Harvey (2006) "Neo-liberalism as creative destruction", Swedish Society for Anthropology and Geography Journal Compilation. Geogr.Ann.,88B (2): pp. 145 – 158

[52] A. Perry- Kessaris (2011) 'Prepare your indicators: economic imperialism on the shares of law and development' International Journal of Law in Context 7:4 p.p. 401-421

[53] M. Salomon (2008)' P*overty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism*' International Law Association/UCL and the Centre for International and Public Law Seminar Series, consulted on http://www.lse.ac.uk/humanRights/aboutUs/articlesAndTranscripts/SalomonGYIL08.pdf on 23th March, 2016

[54] Baxi Upendra (2009), The Uncanny idea of development, Human Rights in a posthuman world, p.p. 76 - 123

[55] Ibid

As we have seen in the first chapter this does not seem to be a clear issue in the case of the international investment law.

It has been broadly acknowledged that the idea that development is equivalent to economic growth has brought about drastic social and environmental destruction. [56] What is a considered a 'benefit' and what is a considered a 'cost' constitutes elemental aspects of development. As Baxi has stated 'if there is no denying that development (*vikas*) entails a just measure of destruction (*vinash*) the axiom is no *vikas* without *vinash*. But the question is who and under which authority or legitimization determines what should be the '*right measure of destruction*', and who has to suffer the consequences of that. In other words, why do some have to bear the 'costs of development' if they do not receive the benefits?[57] This is a very relevant question in the case of the 'costs' and 'benefits' of foreign investments.

The mega development projects that have been promoted via neoliberal ideas and institutions have not just undermined the rights of the people to health, food security, access to water, housing or a clean environment but also their dignity, cultural identity and diversity, that is to say, their own understanding of being human. The world is now divided between two broad globalised classes: the *developers* and the *developees* as Jacques Derrida describes in his writing, and what this actually means is that development theory, policies and practices are producing a constant struggle between winners and losers. The 'losers' or *developees* are responding, often violently, to the three D's embedded in the modern development concept: denationalization, disinvestment and deregulation.[58]

Marxist questions about who gets what, how much and for how long are related to global justice and they have an intrinsic relationship to the discussion regarding the structure of production and distribution. However, the 'truths' about development seem to have resolved these complex problems in a 'standard magic recipe' that should be applied across the world, mainly in those places that urgently need to be modernised.

Indeed, it has been untiringly said and promoted by the international economic institutions and the orthodox scholarship that the best way of achieving development is through economic growth, and in order to achieve this the guarantee of a free market and 'fair' competition is needed. Moreover, to achieve development it is necessary to provide as much protection as possible of private property and contractual rights as well as ensure the free movement of global capital through international trade, commerce and direct foreign investment[59]. Indicators of 'development' such as the *doing business* project of the World Bank measures how 'advanced' the country is in these areas and thus how 'trustable' it is likely to be in the international

[56] D. Harvey (2006) "Neo – liberalism as creative destruction", Swedish Society for Anthropology and Geography Journal Compilation. Geogr.Ann., 88B (2)

[57] Ibid note 1

[58] J Derrida and G Borradori, 'Autoinmunity: Real and Symbolic Suicides', in Borradori (ed), Philosophy in a time of Terror, 95 – 6 (Chicago: Chicago University Press, 2003) cited in Baxi note 1

[59] Ibid

economic arena. Obviously, this indicator does not take into account the conditions under which these 'advances' are being made, namely the impact it is having on people's rights or the environmental. [60]

The role of the state is to create and preserve an institutional framework appropriate for such practices. In this view, the state is responsible for keeping peace through military and police functions and securing property rights to optimize market development. The distribution of all kinds of resources including basic social ones such as healthcare, social security, social housing, or education should be in the hands of the market. The state should not intervene in this distribution as its powerful interests could influence bias that might ruin the 'neutrality' of the market.

The state has no obligation to deliver welfare to its people as they have the power to 'earn it'. The redistribution then, comes to be a natural phenomenon that will occur smoothly if the state does not intervene to distort the dynamics of the market. If there are some social problems such as poverty, deprivation or inequality, they will be steadily overcome as long as the economy grows.

However, according to Harvey the neoliberal rationality has been redistributive rather than generative, driven by strategies of 'accumulation by dispossession' [61]. This is a mode of accumulation which, through practices like privatization, free trade and foreign investment, seeks to transfer publicly or commonly held assets and resources to private property. [62]

The fact that millions of people have been displaced from their land across the world as a result of the alliance between big corporations and illegally armed groups shows us the materialization of what Harvey has called "accumulation by dispossession". The land taken has been at the service of powerful industries ruled by economic elites (at national and international levels).

Harvey (2005) defines the concept of "accumulation by dispossession" as follows:

> 'The continuation and proliferation of accumulation practices which Marx had treated of as "primitive" or "original" during the rise of capitalism. These include the commodification and privatization of land and the forceful expulsion of peasant populations conversion of various forms of property rights (common, collective, state, etc.) into exclusive private property rights suppression of rights to the commons; commodification of labour power and the suppression of alternative (indigenous) forms of production and

[60] A. Perry- Kessaris (2011) 'Prepare your indicators: economic imperialism on the shares of law and development' International Journal of Law in Context 7:4 p.p. 401-421

[61] D. Harvey (2005) Accumulation by dispossession in The new imperialism, Oxford University Press, Chapter 4

[62] C. Barnett (2010), What's wrong with Neoliberalism?, *The Handbook of Social Geography*, edited by Susan Smith, Sallie Marston, Rachel Pain, and John Paul Jones III. London and New York: Sage

> consumption; colonial, neocolonial, and imperial processes of appropriation of assets (including natural resources); monetization of exchange and taxation, particularly of land; the slave trade (which continues particularly in the sex industry); and usury, the national debt and, most devastating of all, the use of the credit system as a radical means of accumulation by dispossession' [63]

Under the principles of wealth maximization and economic growth human rights are just an expensive 'cost of production' to be considered and people who live in the territories of development projects are part of the 'legal risk' that needs to be addressed. In this logic, the investors' property and contractual rights need to 'overcome' the fact that their interest and profit might harm peoples' lives, identities and dignity. In any case, the power to inflict harm upon others is protected by several law instruments such as international treaties, domestic law and state-investor contracts.

The fact that indigenous and local communities live in territories that need intervention by 'development projects of investment' following the 'development truths' of economic growth and wealth maximization is seen as just another 'barrier' that needs to be removed in order to guarantee the free flow of global capital and the welcoming of prosperity, modernity and civilization. The mechanism of the removal might be very painful and might range from displacement to genocide. However, this is the cost that people need to pay in order to 'catch up' with the Euro-American idea of progress and enlightenment.

The human suffering caused in the name of development and progress has been well documented by scholarship[64]. For instance, Padel describes how local communities are being displaced from their traditional territories in order to "clear up" the space for investment projects in India. These people are not being provided with new jobs or life opportunities and instead their lives have notably worsened in cultural, political, social and economic terms. He argues that actually the public policies and legal measures adopted and implemented by local and national governments in intimate alliance with MCs and supported by international economic institutions such as the World Bank made, of course, in the name of development, have actually impoverished the communities and driven them away from their lands, resources and social networks.[65]

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[63] D. Harvey (2005) Accumulation by dispossession in *The new imperialism,* Oxford University Press, Chapter 4

[64] See **F Padel and S Das (2013), "*Resettlement realities: The gulf between policy and practice"*** in Hari Mohan Mathur Resettling and Displacement in India: The human cost of development, Springer editions; **Bennett**, O., **McDowell (2012), Displaced: The Human Cost of Development and Resettlement**, Palgrave Studies in Oral History, Palgrave Macmillan US and **Hari Mohan Mathur (2015) Assessing the Social Impact of Development Projects: Experience in India and Other Asian Countries**, Springer editions.

[65] See F Padel and S Das (2013), "*Resettlement realities: The gulf between policy and practice"* in Hari Mohan Mathur Resettling and Displacement in India: The human cost of development, Springer editions.

The development project under the neoliberal rationality sees native people as removable objects that can just be ¨re-located or re-settled' at best with little or no consideration for their cultural, familiar, social and political attachments to their lands and territories. As Padel has argued:

> 'A basic problem in the issue of resettlement is the way that displaced people are 'objectified': turned into objects, using a language that is alienating and dehumanising". Feedback from the 'oustees' and 'PAPs' (project-affected persons), though placed at the top of new R&R (resettlement and rehabilitation) policies, is not part of the system. To remedy this situation and incorporate displaced people's perspectives, the tables need to be turned as it were, by making the system of displacement, resettlement and rehabilitation into the subject of analysis, and highlighting disjunctions between what is meant to happen and what actually happens' [66]

Farmers, peasants, indigenous, Afro communities and in general local inhabitants of these territories are resisting these views and practices of the neoliberal development project. To understand the strength of resistance against 'displacement projects', it is necessary to analyse the clash of ideologies between a belief in development as something based on material constructs, especially mining-based industrialisation, and village people's belief in their own culture and way of life, measuring development by whether their quality of life improves or worsens.[67] As we have seen above, in the end this is a struggle of what Baxi has called the 'axiom of no *vikas* without *vinash'*. Simply put, it refers to the dilemma of what should be the '*right measure of destruction*', and who will have to suffer the consequences of it. [68]

In the economic sense, from being self-reliant, rooted to the land, fundamentally egalitarian cultivators growing most of their own food, the displaced farming communities are forced to the bottom of the ladder, dependent on obscure and cruel corporate hierarchies, which undermine their former freedom and control over their labour and environment. What the 'fantastic opportunities of foreign direct investment' actually translate to is invasion, dispossession and take-over of cultivators' land and resources .[69]

Moreover, it is important to note that the cultural annihilation is often a forgotten dimension when it comes to the analysis of the benefits and overall good of the neoliberal development project. As Padel has stated, when farming communities are displaced, especially from tribal villages, what occurs is not only a new level of impoverishment, but also cultural genocide, since every aspect of the social structure is fundamentally altered. [70]

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[66] Ibid
[67] Ibid
[68] Baxi Upendra (2009), The Uncanny idea of development, Human Rights in a posthuman world, p.p. 76 – 123
[69] Ibid note 57
[70] Ibid note 57

To sum up, as we have seen throughout this chapter, the development that induces displacement undermines all spheres of people's lives including the economy, political system, culture, relationship with the environment, religion and value systems. In Padel's words "Like fishes that die when taken out of water, a cultivator dies when his land is taken away from him".

The social construction of the idea of progress and development based on the economic rationality of wealth maximisation has privileged foreign investors profit over peoples' lives and territories, and has silenced and made the impoverishment, social, political, environmental and cultural degradation that the traditional and native inhabitants are suffering invisible. Sadly, this reality is not just ignored by domestic governments, policy makers and international economic institutions but has even been encouraged and protected through legal and political strategies within the international investment law framework.

3. The public nature of IIL: Why do we need Human Rights in international investment law?

As we have seen throughout this paper, foreign investment is far from being just an exclusive private issue relating to investors' economic profit. Instead it involves a great deal of human rights and public interest concerns. Thus, the interaction between human rights and international investment law raises fundamental questions about international law's fragmentation: do these two branches of international law merely coexist or do they, at times, intermingle? [71] As Gordon has claimed, through investment treaties, states guarantee rights to investors, some of which offer similar guarantees to those contained in international human rights law, such as the right to not to be arbitrarily deprived of property and the right to equal protection under the law.

At the same time, some of these investors' rights can affect issues of public interest such as health, labour conditions, food security, environment and access to safe drinking water. For instance, the concept of expropriation in international investment law includes the notion of "*indirect expropriation*" through regulatory instruments, which basically means that if the state tightens its regulations to protect and promote human rights and this regulatory change reduces the present or future economic profit of investors, they could claim multimillionaire tax paid compensation within the Investor State Dispute system established in most of the BTs and FTAs.

As Gordon claims, investment treaty law puts its own stamp on how these investors' rights are construed and enforced, diverging in important ways from human rights law. Furthermore, the

[71] K Gordon, J Pohl and M Bouchard (2014), '*Investors rights and human rights – interactions under investment treaty law*', available in http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/investors-rights-and-human-rights-interactions-under-investment-treaty-law-by-kathryn-gordon-joachim-pohl-and-marie-uchard/?portfolioID=4601, consulted on 13th June 2016

enforcement of these guarantees for investors can, in turn, implicate the human rights guarantees of others who may not be represented in such proceedings.[72]

On the other hand, despite the fact that the arbitral decisions touch on important matters of regulatory and fiscal policy, they are not always publicly available and subsequently it is very difficult to exercise any kind of accountability with respect to them. Difficulties stem from the fact that the textual basis of investment treaty law is dispersed across more than 3,000 treaties and also from the historically weak standards of transparency associated with ISDS decisions. [73]

The little and almost inexistent consideration of human rights in international investment law can be seen in the recent OECD report about "Investment Treaty Law, Sustainable Development and Responsible Business Conduct". [74] As Gordon shows in this report 'treaty language referring to "human rights" is extremely rare – it appears in less than 1% of the 2,107 treaties contained in the sample. This is small not only relative to the total sample, but also relative to the other issues covered by the study (protection of the environment, labour conditions and standards and the fight against corruption). Environment is the concern that has the most number of references in the sample, with a little over 10% of the treaties including some reference to the protection of the environment, followed by labour conditions and standards with 5% and the fight against corruption with 1.5%'

Another interesting difference to be noted between human rights references and other related issues in investment treaties by examining the function of the treaty language is that all human rights references occur in the preamble to the treaty and therefore help to clarify the context, objective and purpose of the treaty for the interpretive process. This contrasts, for example, with environmental references, which appear not only in preambles, but also in provisions relating to preserving policy space or indirect expropriation.

The issues of whether and how states should integrate human rights law within their investment treaties is actually a question about the 'pure private nature' of the international investment law and its main purpose of protecting investors' rights and profit.

Until this integration occurs, people harmed by foreign investment projects will not have clear mechanisms to claim justice and reparation. Their rights will be subjected to a justice system that is driven by a purely private commercial logic that is prompted to award cases exclusively focused towards serving the private economic interest of investors.

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[72] Ibid
[73] Ibid
[74] Gordon, K., J. Pohl and M. Bouchard (2014), "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey", OECD Working Papers on International Investment, 2014/01, OECD Publishing

The fact that the public are not able to participate in the negotiation of investment treaties or in their disputes should be enough of a reason to demand adequate and effective incorporation of human rights law in IIL.

Also, the fact that the current international human rights law framework obliges only states to promote, protect and guarantee people's rights ignores the current global economic order in which corporations hold a greater power of influence over people's lives without the need for being accountable for their actions; at least, not by formal means.

As Macmillan has said[75] despite the traditional distinction between public and private, "it is hard to see how the system of international economic law has ever been private in any real way. Like the system of public international law, its formal actors are states. There is nothing private about entities whose socio-economic power and influence exceeds that of many nation states."

The author made this point clear as follows:

> "While international economic law and public international law are segregated legal systems, they share some important qualities in common: both are generated through treaty-making by states; both are essentially addressed to state obligations; and, both are as a consequence insufficiently concerned with the exercise of power outside the cognizance or jurisdiction of the state. However, as noted above, their focus has been different. The tendency of public international law has been to focus on relations between and within nation states. The result of this is that the sort of political power recognised and regulated by international law is primarily exercised at the level of the nation state. The institutions of international economic law, on the other hand, have had a globalising effect on economic activity. This has been closely implicated in the growth of the power and influence of transnational corporations"[76]

As we can see it is time to acknowledge that in the current global order MCs are coming face to face more frequently with states and acting as if they were couples, bringing the public interest and the people's rights into the arena and logic of private law, as we have seen in the case of the state-investor disputes; this needs to change. International law needs to evolve according to the current reality and cannot keep treating actors as equals when they are not. MCs as private profit oriented entities need to be subjected to the public interest not just at domestic level but on the international stage.

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[75] Macmillan F (2004), International economic law and public international law: strangers in the night, International Trade Law and Regulation, 6, pp.115-124

[76] Ibid

Governments should evaluate the costs and benefits of IIL and reflect on their future objectives and strategies. It is also necessary to include specific language aimed at making it clear that the investment protection and liberalization objectives of IIL must not be pursued at the expense of the protection of health, safety, the environment or the promotion of internationally recognized labour rights. [77]

[77] UNCTAD (2015) World Investment Report 2015: Reforming International Investment Governance, Chapter IV, p.p. 121

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