

Neoliberal Market Rationality: The Driver of International Investment Law

ENRIQUE PRIETO-RIOS*

Neoliberalism is an ideological project characterised as being pro-market, pro-investor, and based on an instrumental rationality, which has re-shaped the relationship between societies, governments and the market, leading to standardising conducts and practices.¹ In this form, neoliberal ideology has permeated throughout all of global society, ensuring that everything is seen through the lens of economic rationality. Accordingly, in this paper I will argue that neoliberalism is an ideological project that has played an essential part in shaping international investment law and creating a pro-investor regime with strong protection of property rights and contractual relationships, limiting the ability of host states to regulate in matters of public interest.

Introduction

Since the 1970s neoliberalism, as an ideology, has influenced the global economy, promoting, inter alia, free markets, and creating a shift in the role played by the state, individual entrepreneurship, a reduction in social investment and the extreme protection of pro-

* PhD Law Candidate, Birkbeck, University of London. I would like to thank Dr Oscar Guardiola-Rivera, Diana Pulido-Caballero and Paddy McDaid for their generous comments which enriched the content of this article. Parts of this article were presented at the 2013 Conference ‘Understanding Neoliberal Legality: Perspectives on the Use of Law by, for and against the Neoliberal Project’, at Oxford University. I am grateful to the organisers, especially to Honor Brabazon for the invitation to speak, and to all the attendees for the stimulating discussions that prompted my interest in taking the topic further. Email: epriet02@mail.bbk.ac.uk

¹ Alejandro Colás, ‘Neoliberalism, Globalisation and International Relations’, in Alfredo Saad-Filho and Deborah Johnston (eds), *Neoliberalism: A Critical Reader* (Pluto Press 2005) 76.

perty rights.² In this sense, I will argue that neoliberalism as an ideological project has affected and re-shaped the international investment law (IIL) regime, offering stronger and broader protection of private property and capital, limiting the role of the state, and promoting foreign investment as a mechanism to improve economic growth (which often goes hand in hand with processes of privatising state-owned companies).

A number of different approaches have been adopted towards neoliberalism, such as neoliberalism as discourse,³ as economic policy, or as a heterogeneous set of institutions. However, for the purpose of this paper I will analyse neoliberalism from the perspective of an ideological project. In order to contextualise my argument, ideology can generally be understood as a system of dominating ideas and representations. Moreover, and paraphrasing Louis Althusser, ideology has a material experience that affects the material world, and in the process, social reproduction.⁴ In this sense, the system of ideas and representations has a real effect on the way that an individual experiences the world, resulting in individuals making decisions according with the dominant ideas that she/he considers adequate. In this regard, Althusser states the following:

Ideology is such an organic part of every social totality. Ideology is above all structures that they impose on the vast majority of men ... Ideology is not a conceptual representation of the world, but the way we live that world at the level of unconscious.⁵

Neoliberalism as an ideology creates a mindset that frames individuals and their surrounding reality. In turn, it translates into processes of change in social, political, and economic terms.

² Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (2nd edn, Cambridge University Press 2002) 314.

³ Simon Springer, 'Neoliberalism as Discourse: Between Foucauldian Political Economy and Marxian Poststructuralism' (2012) 9(2) *Critical Discourse Studies* 133.

⁴ Louis Althusser, *Lenin and Philosophy and Other Essays* (Monthly Review Press 1971) 162.

⁵ Louis Althusser, *For Marx* (Ben Brewster tr, Verso 2005) 'Part 7: Marxism and Humanism', available online at <<https://www.marxists.org/reference/archive/althusser/1964/marxism-humanism.htm>> accessed 5 April 2015.

For the purposes of this paper, IIL refers to any international treaty between two or more countries that aims to establish the rules with regard to the treatment of, and protection offered to, foreign investors of States parties within the territory of the other party, and the establishment of procedures to resolve disputes between the parties and investors.⁶ This includes Bilateral Investment Treaties (BITs), Free Trade Agreements (FTAs) that contain an investors chapter, and any other international treaties with similar aims and characteristics.

Finally, it is important to mention that, despite very few differences, the majority of BITs and investor chapters within FTAs share common principles and structures. The general structures include a preamble, protection scope, definitions of who are considered nationals, what is the standard of protection for the foreign investor, conditions for the repatriation of the gains, compensation in case of war and civil commotion, a protection clause against expropriation, and a procedure to resolve conflicts between parties and between parties and investors.⁷

The Development of International Investment Law

International Investment Law (IIL) originated as an international legal response to decolonisation processes experienced after the end of World War II (WWII), in order to protect the economic interests of Western investors in newly decolonised countries. The decolonisation processes posed a challenge to Western economic interests, especially with regard to access to raw materials essential for the correct functioning of the economy.

In this form, IIL appeared as the result of a political, economic, and legal strategy to maintain colonial privileges and protect Western

⁶ Jeswald W Salacuse and Nicholas P Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain' (2005) 46(1) *Harvard International Law Journal* 67.

⁷ M Sornarajah, *The International Law of Foreign Investments* (2nd edn, Cambridge University Press 2004) 188.

economic interests in the newly formed countries.⁸ As the Third World began to assert itself, events such as the nationalisation of British oil assets in Iran in 1951, the expropriation of Liamco in Libya in 1955, and the nationalisation of the Suez canal by Egypt in 1956, ensured that the IIL regime gained greater importance as an appropriate instrument to protect Western investments.⁹

The first Bilateral Investment Treaty (BIT) was signed in 1959 between Pakistan and Germany during Ludwig Erhard's term as German Minister of Economic Affairs (Erhard was member of Mont Pelerin Society).¹⁰ The treaty aimed at protecting the property of German investors against any direct expropriation that might be adopted by the government of Pakistan.¹¹ Other Western European countries followed Germany's example, with France concluding its first BIT in 1960, Switzerland in 1961, the Netherlands in 1963, Norway in 1966, and the United Kingdom in 1975.¹² In the case of the United States, it continued with an updated form of the Friendship, Commerce and Navigation agreements (FCN), which shifted from dealing with trade and investment to focusing simply on the protection of investments abroad, though not in the same form as BITs.¹³

⁸ Boaventura de Sousa Santos, 'Between Prospero and Caliban: Colonialism, Postcolonialism, and Inter-identity', in Mabel Moraña and Carlos A Jáuregui (eds), *Revisiting the Colonial Question in Latin America* (Vervuert 2008) 144.

⁹ Zachary Elkins, Andrew T Guzman and Beth Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000' (2006) 29 *Latin American and Caribbean Law and Economics Association (ALACDE) Annual Papers* 1.

¹⁰ Jamie Peck, 'Remaking Laissez-Faire' (2008) 32(1) *Progress in Human Geography* 3.

¹¹ Treaty for the Promotion and Protection of Investments (Pakistan - Federal Republic of Germany) (Signed 25 November 1959) UTS.

¹² Kenneth J Vandeveld, 'A Brief History of International Investment Agreements' (2005) 12(1) *UC Davis Journal of International Law and Policy* 157.

¹³ In 1778, France and the United States signed the first Treaty of Amity and Commerce, which included provisions for trade and property. In the wake of this treaty other countries followed suit by entering into similar types of agreements, which soon became known by the generic title of 'Treaties of Friendship, Commerce and Navigation' (FCN), although not all such treaties were formally titled as 'friendship, commerce and navigation'. FCNs, as a Western legal innovation, included clauses relating to the right to enter a port and a local market, customs regulations, accesses to courts, and treatment of commercial products

By the 1980s and 90s the IIL regime had reached its peak, coinciding with what is considered to be the golden age of neoliberalism. The figures show that the number of BITs signed during the 1990s increased from 385 to 1,857.¹⁴ This clearly highlights the imposition of neoliberalism as a hegemonic ideology. One important factor in the increased number of BITs signed during the aforementioned period relates to the role played by the IMF and the World Bank which, as I will discuss in the next section, promoted the spread of neoliberal ideology in the Third World.

The IMF and the World Bank, both institutions which are part of what John Williamson refers to as the Washington Consensus,¹⁵ advocated the need for Third World countries to create a friendly and pro-investor environment in order to attract foreign investments as sources of capital, technology, and knowledge.¹⁶ In this regard, Elkins, Guzman and Simmons ran an econometric analysis of the different diffusion processes of BITs and found a correlation between receiving IMF credits and entering into BIT agreements. Among their findings, they expressed the following:

In addition to the competition variables, our coercion variable (use of IMF credits) is significant in each of the models. This may mean that states seeking assistance from the IMF are encouraged to enter into BITs. Alternatively, it may be that the conditionality of IMF loans overlaps with the obligations of the BIT, reducing the costs of the latter.¹⁷

brought by foreign merchants and protection of the property of the foreign merchant, among others. These treaties were mainly signed between European countries and independent countries in other latitudes, such as Latin American countries.

¹⁴ Vandeveld (n 12).

¹⁵ The economist John Williamson saw in the policies offered by the IMF, the World Bank and the Federal Reserve, and the economic agencies of the US government, common patterns in the imposition of politics in Latin America—referring to them as a ‘Washington Consensus’. The reforms proposed included liberalisation of the markets, end of subsidies, a strong property system, favourable environment for foreign investment, privatisation, and deregulation.

¹⁶ Leonith Hinojosa and Anthony Bebbington, ‘Transnational Companies and Transnational Civil Society’ in Kean Birch and Vlad Mykhnenko (eds), *The Rise and Fall of Neoliberalism: The Collapse of an Economic Order?* (Zed Books 2010) 223.

¹⁷ Elkins, Guzman and Simmons (n 9) 35.

The external intervention of international financial institutions amounted to the political pressure of Western capital-exporting countries, and the difficult economic conditions in Third World countries triggered a race to the bottom in the hope of attracting more foreign investments. The competition became extreme, to the point where countries entered into competition with other states solely to avoid being left behind in the repartition of the pool of global capital.¹⁸ This competition among states signing agreements to attract foreign investments in turn reflects the global embracement of neoliberal principles. As such, neoliberalism defends the benefits of market competition and, in the case of BITs and FTAs, reproduces globally what is expected should happen in an efficient domestic market.

The Rise of Neoliberal Ideology

Much of the literature has recognised that the 1970s and 1980s are characterised as the golden age of neoliberalism.¹⁹ However, it is important to go further back in the construction and the development of neoliberalism, from being a marginal intellectual project built up by Friedrich August von Hayek and Milton Friedman in order to restore liberal thinking, to a hegemonic worldwide ideology framing global political, legal and economic decisions.²⁰

This sudden change was not something natural or inevitable, rather it was the result of 30 years of hard work, pushed by advocates of neoliberalism, including academics, think tanks, politicians and businessmen who believed that the restoration, or better said, an updated form of liberalism, was the only feasible solution to uphold the advancement of civilisation and to respond to the changes and challenges experienced by the world in the first half of the 20th century. In this form, the neoliberal advocates entered into a battle

¹⁸ Elkins, Guzman and Simmons (n 9).

¹⁹ Ben Fine, 'Development as Zombieconomics in the Age of Neoliberalism' (2009) 30(5) *Third World Quarterly* 885.

²⁰ Jamie Peck and Adam Tickell, 'Neoliberalizing Space' (2002) 34(3) *Antipode* 380.

of ideas, pushing boundaries for the neoliberal ideology and gaining more supporters.²¹

The first antecedent in the construction of the ideological neoliberal project occurred in August 1938 in Paris, where a group of intellectuals, led by the French intellectual Louis Rougier, held an international conference to celebrate the publication of Walter Lippmann's *The Good Society*. The colloquium was the perfect space to begin early discussions as to the importance and need to bring an updated liberalism back to the Western world.²² The conference itself was attended by 26 intellectuals from Western Europe and the United States, including, among others, Friedrich August Von Hayek, Ludwig von Mises, Raymond Aron, Milton Friedman, Jacques Rueff, Wilhelm Röpke, and Alexander Rüstow. It is claimed that it was during this meeting that Rüstow coined the term 'neoliberalism' as a way to describe the need for an updated form of liberalism to face the challenges of his time.²³

Another important antecedent in the rise of neoliberalism has to do with the ordoliberals. In 1948, Walter Eucken and Franz Böhm founded the journal *Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, better known as the ORDO, which in a short time became a well known and recognised journal in the other countries of Western Europe. The journal worked as a platform to publicly spread the political, economic and legal positions of the members of the Freiburg school and others that shared their views.

In general, the different positions expressed in the ORDO journal had common patterns including the defence of the creation of an economic constitution, the guarantee of private property, the protection of economic liberties and, in general, the elimination of any type of barrier or limitation to free commerce, free markets and free competition.²⁴ The ordoliberals, as the group that shared the positions expressed in the ORDO journal came to be labelled, highlighted the importance for the state not to intervene directly in the

²¹ Peck (n 10).

²² Rachel S Turner, 'The "Rebirth of Liberalism": The Origins of Neo-Liberal Ideology' (2007) 12(1) *Journal of Political Ideologies* 67.

²³ *ibid.*

²⁴ David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 1998) 258.

economy, as its main role should be to create the right conditions for an autonomously functioning market.

Many ordoliberalists were also members of the Mont Pelerin Society (MPS), founded in 1947 by the Austrian economist Friedrich August Von Hayek with the support of close academic and business friends. As such, the MPS became a close network of Austrian, German, British, Spanish, and American academics, businessmen and politicians interested in bringing back liberal ideas in an era of collectivism and central planning.²⁵ The MPS played a very important role in the rise and materialisation of the neoliberal ideology; among the core principles defended by the MPS was the need to limit the unnecessary intervention of the state in the market, the defence of competition, and strong regimes of property.²⁶

Members of the MPS believed that the best option for generating a change which would push back Keynesianism and collectivism was to persuade global intellectuals and economic leaders of the benefits and the importance of the neoliberal ideology and of the negative effects of Keynesianism, collectivism, and economic planning.²⁷ In this regard, Rachel Turner states the following: ‘Hayek had long held a belief that the course of history and the development of the national character were largely determined by the life and death of ideas.’²⁸

In order to accomplish their aim, MPS members began promoting the neoliberal ideology in different places, positions, and countries. For instance, in Britain, Anthony Fisher, a member of the MPS, founded the Institute of Economic Affairs (IEA) in 1955 as a think tank for the promotion of liberal ideas, later moving to the US with the same purpose.²⁹ During an interview, Fisher highlighted how Hayek had persuaded him to avoid politics and instead work on persuading key people in society to make such changes. Fisher, speaking

²⁵ *ibid* 243.

²⁶ Turner (n 22).

²⁷ David Miller, ‘How Neoliberalism Got Where it is: Elite Planning, Corporate Lobbying and the Release of the Free Market’ in Kean Birch and Vlad Mykhnenko (eds), *The Rise and Fall of Neoliberalism: The Collapse of an Economic Order?* (Zed Books 2010) 26.

²⁸ Turner (n 22) 75.

²⁹ Miller (n 27) 27.

about the encounter and advice given by Hayek, mentioned the following:

Hayek first warned me against wasting time—as I was then tempted—by taking up a political career. He explained his view that the decisive influence in the battle of ideas and policy was wielded by intellectuals whom he characterised as the ‘second hand dealers in ideas’. It was the dominant intellectuals from the Fabians onwards who had tilted the political debate in favour of growing government intervention with all that followed. If I shared the view that better ideas were not getting a fair hearing, his counsel was that I should join with others in forming a scholarly research organisation to supply intellectuals in universities, schools, journalism and broadcasting with authoritative studies of the economic theory of markets and its application to practical affairs.³⁰

The MPS’s role of promoting the neoliberal ideological project as a way of re-shaping material reality came to fruition with what was viewed as the first successful neoliberal experiment, taking place in Chile in the wake of the *coup d'état* against President Allende which brought the dictator Augusto Pinochet to power and with him the infamous ‘Chicago Boys’ (and, later, Friedman as well).³¹ This was the first step in transforming themselves from advocates of a marginal form of ideology to getting their hands on power.³² Later, during the 1980s, would come their biggest triumphs, with the governments of Margaret Thatcher in the UK and Ronald Reagan in the US (advised by MPS members).

Nonetheless, it is important to acknowledge that the realities and experiences of the world during the 1970s and 80s also facilitated neoliberalism’s entrance into the scene as an alternative to

³⁰ A Fisher, *Fisher’s Concise History of Economic Bungling: A Guide for Today’s Statesmen* (Caroline House Books 1978) 79-80, as quoted in Jamie Peck, *Constructions of Neoliberal Reason* (OUP 2012) 134.

³¹ Chilean economists, trained at the University of Chicago—known as ‘the Chicago Boys’—pursued economic reforms with the blessing of Pinochet. These reforms included, among other things, the privatisation of public-owned assets, the deregulation of the national economy, the opening of Chile to the world market (attracting foreign investors), and the strong protection of private property.

³² Peck (n 30) xiii.

Keynesianism and collectivism. Some of the most relevant events included, among others, the oil crisis, increased inflation, the end of the gold parity, and the Latin American economic crisis.³³ In this form, the role played by the International Monetary Fund (IMF) and the World Bank facilitated the spreading of neoliberalism through the conditioning of credits and aid to the adoption of certain internal changes in law and policy.³⁴ These conditions were widely incorporated into structural adjustment programs (SAPs) and included obligations to liberalise the markets, impose fiscal austerity, privatise state owned companies, strengthen regimes for the protection of private property, and to promote foreign investments as contributions towards the improvement of economic growth.³⁵

With neoliberal ideology permeating throughout the world, its principles became the orthodoxy for both domestic and global governance. In this regard, Simmons, Dobbin and Garrett, mention the following:

The worldwide spread of economic and political liberalism was one of the defining features of the late twentieth century. Free-market oriented economic reforms—macroeconomic stabilization, liberalization of foreign economic policies, privatization, and deregulation—took root in many parts of the world.³⁶

The transition in thinking from Keynesianism and collectivism towards an updated form of liberalism in the form of neoliberalism became evident; this change in the hegemonic ideology ensured that

³³ Latin America experienced an economic crisis during the 1980s; one of the first affected countries was Mexico, announcing its inability to comply with its international financial commitments in August 1982. Considering Mexico stood among the four countries that held 74 percent of the international debt (Mexico, Brazil, Venezuela and Argentina), Western states moved swiftly to secure the payment of its obligations. The same year saw another 27 countries in Latin America reschedule the payments of their international debt.

³⁴ Oscar Guardiola-Rivera, *Story of A Death Foretold: The Coup against Salvador Allende, 11 September 1973* (Bloomsbury 2013) 367.

³⁵ William I Robinson 'Capitalist Globalisation and the Transnationalization of the State' in Mark Rupert and Hazel Smith (eds), *Historical Materialism and Globalisation: Essays on Continuity and Change* (Routledge 2002) 215.

³⁶ Beth A Simmons and Zachary Elkins, 'The Globalization of Liberalization: Policy Diffusion in the International Political Economy' (2004) 98(1) *American Political Science Review* 171.

regimes of international law also changed the way they were interpreted and applied as well as modifying their internal structures.

Components of Neoliberalism

For a better understanding of the relationship between IIL and neoliberal ideology it is worth recalling some of the main characteristics of neoliberalism. It is important to acknowledge that the characteristics outlined in this section are only those which I consider the most relevant for the purposes of this paper and, as such, I am leaving aside other aspects of neoliberalism that may also be regarded as important.

One of the most important characteristics of neoliberalism is the expansion of an economic rationality to non-economic domains and institutions, diffusing the economic form of the market through the entire social body.³⁷ In this regard, Wendy Brown points out that 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.³⁸ This shift ensured that everything came to be analysed from the perspective of market rationality, the efficient allocation of resources, and profitability.³⁹ The foregoing includes the activities performed by the neoliberal state, which has shifted its interests from protecting its people to protecting the market, focusing only on growth and economic stability.⁴⁰

In the neoliberal rationale the state must concentrate on creating the conditions in which the market will function without the state directly intervening as an actor or as a factor of change. In this vein, the state must uphold the rule of law as it is considered an essential

³⁷ Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège De France, 1978-1979* (Palgrave Macmillan 2004) 243.

³⁸ Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* (Princeton University Press 2005) 39-40.

³⁹ *ibid.*

⁴⁰ Ronaldo Munck, 'Neoliberalism, Necessitarianism and Alternatives in Latin America: There Is No Alternative (TINA)?' (2003) 24(3) *Third World Quarterly* 495.

precondition for the correct functioning of the market.⁴¹ Any form of intervention by the state which could in any way distort the free functioning of the market must be opposed. In this form, public policies, international treaties signed by the country, and domestic law, must maintain the necessary conditions for the market to work freely,⁴² giving priority to the protection of private property and contractual relationships.⁴³

Moreover, neoliberalism exalts the importance of private property, as it is considered to be an essential element in guaranteeing the spontaneous activity of the players in the market and the market itself; the persistent belief is that private property offers to the subject a feeling of trust and independence, allowing him/her to participate as an entrepreneur.⁴⁴ In this sense, limitations to private property are seen as actions that affect the liberty of the subject, weakening the ability to access and interact in the market.⁴⁵ A similar analysis could be made of contractual relations as they are considered important elements in the adequate and free functioning of the market.⁴⁶ Accordingly, it is important that any legal regime has to facilitate individuals entering into a contract and must also uphold and protect them.⁴⁷ Neoliberalism expects individuals to be entrepreneurs that maximise individual benefits and the state is expected to offer the right conditions for it to happen.⁴⁸ In this regard David Harvey posits the following:

Neoliberalism ... proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework character-

⁴¹ Kean Birch and Vlad Mykhnenko, 'A World Turned Right Way Up' in Kean Birch and Vlad Mykhnenko (eds), *The Rise and Fall of Neoliberalism: The Collapse of an Economic Order?* (Zed Books 2010) 3.

⁴² Guardiola-Rivera (n 34) 184.

⁴³ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005) 3.

⁴⁴ Turner (n 22) 67.

⁴⁵ *ibid.*

⁴⁶ Harvey (n 43) 3.

⁴⁷ *ibid.*

⁴⁸ Brown (n 38) 42.

ized by strong private property rights, free markets, and free trade.⁴⁹

Competition is also perceived as an essential element in the correct functioning of the market.⁵⁰ As such, any form of restriction, e.g. restrictions on foreign investments, must be abolished and the state must encourage free and competitive participation in the market.⁵¹ Finally, another important characteristic of neoliberal ideology, which is exposed in the form of IIL behaviour, is its ambiguity and flexibility, which allows it to be applied where necessary with either rigidity or flexibility, offering solutions to problems regardless of the speciality or social context and allowing it to be accommodated to the realities of each moment.⁵² This also creates an opportunity for the regime to offer totalising and united answers to problems,⁵³ maintaining the same core principles—something essential for its survival.⁵⁴

Neoliberalism within the IIL Regime

During the first historical stages of the IIL regime (before neoliberal ideology entered onto the scene), the protection offered to international investors was limited to situations of direct expropriations of physical assets.⁵⁵ However, the fast and effective embrace of neoliberal ideology in the second half of the twentieth century marked the beginning of the stage of enhanced protection of investors' property. In this form the IIL regime moved to also offer protection

⁴⁹ Harvey (n 43) 2.

⁵⁰ Anwar Shaikh, 'The Economic Mythology of Neoliberalism' in Alfredo Saad-Filho and Deborah Johnston (eds), *Neoliberalism a Critical Reader* (Pluto Press 2005) 41.

⁵¹ Gerd Schönwälder and Francisco Gutiérrez Sanín, 'Introduction' in Gerd Schönwälder and Francisco Gutiérrez Sanín (eds), *Economic Liberalization and Political Violence: Utopia or Dystopia?* (Pluto Press 2010) 15.

⁵² Carlo Mongardini 'Ideological Change and Neoliberalism' (1980) 1(3) *International Political Science Review* 309.

⁵³ *ibid.*

⁵⁴ Turner (n 22) 67.

⁵⁵ Enrique Prieto-Rios and Courtenay Barklem, 'The Concept of "Indirect Expropriation", Its Appearance in the International System and Its Effects in the Regulatory Activity of Governments' (2011) 11(21) *Civilizar* 77.

against indirect expropriation (also known as regulatory expropriation). As its name suggests, indirect expropriation occurs when the host state adopt measures (either legislative, administrative or judicial) that affect the use and enjoyment of property or that could affect the investment's expected economic benefits. In this manner, the expropriation materialises without a material seizure of the investor's property or directly affecting the legal titles of the investment.⁵⁶

Although the concept of indirect expropriation had previous antecedents,⁵⁷ the first major treaty to include the concept of indirect expropriation was the 1994 North American Free Trade Agreement (NAFTA), in its Article 1110.⁵⁸ At this point, it is important to recall that NAFTA was the result of a long term strategy, carefully designed by businesses with several study groups and law firms involved, and complemented by a lobby campaign framed within a neoliberal ideology.⁵⁹ During the NAFTA negotiations that began in 1990, the

⁵⁶ OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (2004) OECD Working Papers on International Investment, 2004/04, OECD Publishing. Available online at <<http://dx.doi.org/10.1787/780155872321>> accessed 5 April 2015.

⁵⁷ Prieto Rios and Barklem (n 55).

⁵⁸ Article 1110 of the Paper 11 of NAFTA stipulates the following:

'No Party may directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.'

⁵⁹ Richard Epstein, Professor of Law at the University of Chicago and member of the MPS, argued that partial taking occurs when a regulatory decision adopted by a governmental body (any branch) diminishes the economic interest of an investor's profitability. As such, if the society wants to regulate to obtain benefits, it must pay a certain price for that. In an interview with the North American journalist William Greider, Epstein stated the following: 'I am aware that what I have said has been very influential in the NAFTA debate and that, strangely enough, much of what I say seems to have more resonance in the international context than it did in the domestic context'. William Greider, 'The Right and US Trade Law: Invalidating the 20th Century' (*The Nation*, 17 November 2001) <<http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century>> accessed 27 April 2015.

investor protection chapter was an important aspect of the negotiation. In an interview, Dan Price and Edwin Williamson, designers of NAFTA's Paper 11, said the following regarding indirect expropriation:

Governments recognize that it would be unfair to force an investor to bear the entire cost of change in social policy. These costs, at least under certain circumstances, should be borne by a society as a whole. ... Simply designating a government measure as a conservation measure, or health and safety measure, does not answer the basic question about who should bear its costs and should not be enough to remove that measure from international investment disciplines.⁶⁰

After its inclusion in NAFTA, the protection against 'indirect expropriation' became commonly used in BITs and FTAs worldwide.⁶¹ This extended protection of investors' property became problematic for the regulatory ability of host states, as any executive, legislative or judicial decision adopted by a host state could be regarded as affecting the property right or economic interest of a foreign investor in the host country. In this form, situations such as the freezing of water prices, laws demanding the use of plain boxes for cigarettes, or the non-issuance of an environmental permit for a project, have been regarded by foreign investors as situations of indirect expropriation.⁶²

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² A relevant case occurred in 2012 in Costa Rica and involved a judicial decision that revoked the exploitation permit granted to a mining project known as 'Las Crucitas' (in which the Canadian company Infinito Gold had interests) based on the damage that the project was causing to the environment. As a result of this judicial decision, the multinational filed a request for the composition of an ICSID arbitral tribunal, seeking compensation for an amount of US\$1.092 million from the government of Costa Rica. In 2011, the Australian government passed the Tobacco Plain Packaging Act 2011, ordering the sale of cigarettes in olive packages with images and warnings about the health effects of smoking. As a result of this regulation, Phillip Morris filed legal action before the Australian Tribunals, arguing that the decision amounted to an unfair acquisition of property. In 2012, the Australian High Court ruled, rejecting the arguments presented by the tobacco company. Furthermore, the tobacco company filed legal procedures against the Australian government before an international arbitration tribunal seeking

The fair and equitable treatment clause (FET) also reflects the deep neoliberal intervention in the IIL regime. The FET provides investors with a high threshold protection which, in practice, has been used to challenge many different activities of the state.⁶³ Referring to 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.⁶⁴

Another clause with a clear neoliberal influence relates to that of ‘promotion and protection of investments’. The clause is aimed at encouraging both contracting parties to promote foreign investments; however it takes away the right of the host state to accept or to reject an investor or an investment in the country. For example, the ‘promotion and protection of investments’ clause in the US BIT model mentions the following:

Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.⁶⁵

Another example is the BIT between Italy and Denmark (in force); in its Article II it establishes the following:

compensation for the loss of profit based on an Australian-Hong Kong investment treaty.

⁶³ Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann, ‘The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the New Dispute Vattenfall v Germany (II)’ (2012) International Institute for Sustainable Development.

⁶⁴ *ibid.*

⁶⁵ As cited in Nathalie Bernasconi-Osterwalder and Lise Johnson, ‘Commentary to the Austrian Model Investment Treaty’ (2011) International Institute of Sustainable Development.

Each Contracting Party shall admit the investment by investors of the other Contracting Party in accordance with its Laws and Regulations, and promote such investments as far as possible including facilitating the establishment of representative offices.⁶⁶

In both cases, the host state is giving up its sovereign right to accept or reject any foreign investment carried out in the country. In the first example, as the treaty offers the foreign investor the same treaty as a local investor, the state cannot impose any restrictions on foreign investors that are not in place for local investors; in the second case, there is a direct obligation to allow international investors to enter the country. These new inclusions come as part of a neoliberal package that aims at abolishing any form of restriction on the functioning of the global market in tandem with reducing the interference of the state.

A further important measure favouring the neoliberal principle of limiting the role of the state is the opportunity for investors to directly challenge sovereign decisions adopted by the host state before an international investment arbitral tribunal, without exhausting local remedies.⁶⁷ In this scenario, an arbitral tribunal is appointed to review the sovereign decision adopted by a state procedurally and substantially, adopting a plain market analysis.⁶⁸ The current structure of the investment arbitral procedure transforms foreign investors into new subjects of international law, subjects able to challenge states, enjoying the same level of *locus standi*. In this regard, René Urueña mentions the following:

⁶⁶ Agreement on the Promotion and Protection of Investments (Nicaragua—Italy) [title translated by the author] (20 April 2004) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1700>> (Spanish file) accessed 5 April 2015.

⁶⁷ According to the terms of the treaty (either BIT or FTA), any investor could request the composition of an arbitral tribunal to resolve a dispute with the host state. The claim could be resolved either by an ad hoc tribunal or an institutional tribunal. The ad hoc tribunal acts independently of any international institution and depends entirely upon the regulations agreed by the parties. On the other hand, the institutional tribunal is linked to organisations which specialise in the matter of arbitral procedures, the most common for that purpose being the International Centre for Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce (ICC).

⁶⁸ Elkins, Guzman and Simmons (n 9).

In those terms, the investor is a perfect example of the *homo economicus*: a subject of law whose very existence is tied to rational benefit-maximizing activity. If the ‘investor’ fails to prove that she has undertaken an ‘investment’, then that actor will not be considered a subject of international investment law anymore.⁶⁹

Furthermore, most of the cases brought forward by foreign investors before international investment arbitral tribunals are related to situations which have a direct effect on local communities. However, affected communities are usually not allowed to participate as interested parties in the litigation.⁷⁰ This again is closely related to neoliberal postulates, as importance is not given to the communities but rather to the market and its functioning.

All the previous examples show the neoliberal influence in the IIL regime, where the state is expected to play a minor role, limited to guaranteeing the correct functioning of the market. On the other hand, foreign investors count with a specific international legal regime that guarantees their commercial activities.

Rethinking the System beyond Neoliberalism?

As is evident from the previous sections, neoliberalism has exerted an important influence upon the IIL regime, creating a pro-market bias favouring foreign investors at the expense of host countries and their peoples. In this scenario the question of what can be done is pertinent. Without intending to offer the ‘right’ solution, in the following lines I will engage in the discussion regarding alternatives to the existing IIL regime.

From my perspective, the first step required is to directly challenge the dominant neoliberal ideology. Without making a breakthrough change in the dominant form of ideology the whole IIL framework would continue as it is at present. Moreover, considering the constant adaptability of neoliberal ideology to new circumstances and

⁶⁹ René Urueña, *No Citizens Here: Global Subjects and Participation in International Law* (Martinus Nijhoff 2012) 83.

⁷⁰ The Centre of Settlement of Disputes has accepted amicus briefings such as in the case of *Methamex Corporation v The United State of America 2005*.

realities, it is valid and necessary to consider some alternatives in the medium and short term. Nonetheless, it is important to acknowledge that although some alternatives could be regarded as useful in the short term, they could fall under the risk of re-enacting and making stronger the neoliberal ideology, as they could install a veil diverting the attention away from the real problem.

My personal view is that in the short term, countries would have to do a thorough and complete revision of their current BITs and FTAs in force, with the aim of either renegotiating or denouncing them.⁷¹ In terms of new negotiations, treaties should include a direct reference, stating that any obligation contained in the treaty must be analysed under the light of other bodies of international law, especially those related to human rights and environmental law. This inclusion in the wording of the BIT or FTA would guarantee that, at the moment of analysing the decision adopted by a host state, an arbitral tribunal would have to take into consideration not only the text of the BIT or FTA in itself, but also other bodies of international law.⁷²

Moreover, treaties must also recognise, as a party in the arbitral procedures, communities that could be affected by the decisions adopted by the tribunal, granting them *locus standi* before the arbitral tribunal.⁷³ This change in the treaties would automatically force a transformation in the procedural rules of institutions like the International Centre for Settlement of Investment Disputes (ICSID). I also consider it very important that the wording of future treaties must include obligations for the foreign investor. For instance, treaties could include clear obligations that foreign investors must take positive steps for the protection of the environment while performing their activities.

At the international level, it is necessary to continue discussing the need to make treaty negotiation and the arbitral procedures more open, and to allow people to actively participate in such processes as

⁷¹ Some countries in Latin America, such as Ecuador and Bolivia, have started this type of process.

⁷² See for example: *Compañía del Desarrollo Santa Helena v Costa Rica* (2000), where arguments presented by the host states on the grounds of protecting the environment were rejected by the arbitral tribunal.

⁷³ See n 70.

well as to make governments accountable for their decisions in entering into agreements of this type. Another important international discussion that has to take place relates to the ownership over natural resources and their use. It is especially important to reconsider the forgotten discussion of geo-economic sovereignty and self-determination in terms of natural resources.⁷⁴

It is also important to discuss the issue of the compensation awarded by arbitral tribunals. In this regard it would be relevant to look south and bring back Salvador Allende's doctrine of 'excess profits', which guarantees fair compensation to expropriated foreign investors based on historical grievances that persist in the global market economy. Following this format, at the moment of calculating compensations, arbitral tribunals would have to consider the economic benefit (profits) received by the investors during their years in the country and the possible damages caused to the local environment, quantified in money, among other variables that could be considered relevant and that could affect the compensation.

Finally there may be in place some other measures that, although they would not radically transform the IIL regime, may be important to discuss as mild measures to improve the regime. Among those measures to be discussed is the necessity of creating a permanent 'International Court for the Settlement of Investment Disputes', which could reduce the pro-market bias that currently exists in non-permanent arbitral tribunals.⁷⁵ It is also important to rethink the role played by international financial institutions such as the World Bank and the IMF, in the sense that such institutions should refrain from promoting treaties for the protection of foreign investments and rather work towards the strengthening of alternative international mechanisms that could offer security and protection to foreign investors without undermining the ability of host states to regulate, e.g. the widespread use of international investment insurances.⁷⁶

⁷⁴ Guardiola-Rivera (n 34) 91.

⁷⁵ See Gus Van Harten, 'A Case for an International Investment Court' (2008) Inaugural Conference 2008 Paper Society of International Economic <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424&rec=1&srcabs=916351> accessed 5 April 2015.

⁷⁶ For more information see JLT, 'Expropriation Insurance', <<http://www.jltgroup.com/risk-and-insurance/expropriation-insurance>> accessed 5 April 2015.

Conclusion

The previous sections have shown the close link between neoliberalism and the IIL regime. Especially, I have shown how the IIL regime is characterised as being pro-market and pro-investor and based on an instrumental rationality.⁷⁷ As it stands now, IIL on the one hand promotes the appropriation of natural resources and, on the other, maintains the inequality that exists between industrialised and non-industrialised countries, thus having a direct impact on the host states and also on the lives and the ability of peoples to enjoy their rights.

Neoliberalism has become a hegemonic ideology which has reshaped the relationship between societies, governments and the market, leading to the standardisation of conducts and practices.⁷⁸ In this form, neoliberal ideology has played an essential part in shaping IIL with regards to creating a pro-investor regime with strong protection of property rights and contractual relationships. Despite the global economic and political crisis being experienced worldwide in the last decade, neoliberalism continues to adapt to the new realities and changes of the world, and IIL is no exception. The number of BITs and FTAs continue to increase, not only between industrialised countries but also between non-industrialised countries. In so doing, countries reproduce and expand the ideology.

In accordance with the core principles of neoliberal ideology, IIL has worked towards the reduction and limitation of the state's ability to regulate, subordinating its decisions to a market rationale.⁷⁹ In this form, IIL places individuals, corporations, and states on a notionally equal footing, entitling a company that represents millions of dollars to challenge measures adopted by any state authority which acts on behalf of millions of people. The arbitral procedure for the settlement of investments disputes has become an international judicial review, in which measures adopted by the executive, the legislative, or even the judicial authorities, can be reviewed by an offshore tribunal. To paraphrase Michael Foucault, the interest of the market

⁷⁷ Brown (n 38) 45.

⁷⁸ Colás (n 1) 76.

⁷⁹ Gérard Duménil and Dominique Lévy, *Capital Resurgent: Roots of the Neoliberal Revolution* (Harvard University Press 2004) 1.

and its main players (foreign investors) became one of the main reasons to confront governments and their laws.⁸⁰

Although there is no single answer to the question of how best to regulate the relationships between states and investors, I expect that, by identifying the neoliberal influence in the IIL regime, this paper could contribute to the ongoing global discussion. As aforementioned, although there are more structural discussions, such as the constant global struggle against the hegemonic neoliberal ideology, there are also some other important discussions that require academics as well as practitioners to engage in. Some of those relevant aspects include the discussion about sovereignty over natural resources, the calculation of compensations and the way in which treaties and arbitral decisions are hidden away from the public in general.

⁸⁰ Foucault (n 37) 247.