

An Economic Nationalist Perspective on the Global Rise of Investor Rights

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Foreign direct investment, or the direct investment by an individual or company from one country into another, has become an increasingly important focus of the international community. Within a global economic system committed to economic liberalization, governments have begun adopting mechanisms that encourage the international harmonization of policies in favour of foreign investors, including the issuing of private investor rights. The global broadening of investor rights is a concern for civil society as it works to limit the ability of governments to promote and protect the welfare of their domestic population. This paper will review the conventional justification for investor rights through a historical overview of the international mechanisms that promote trade and investment liberalization. It will then provide an alternative explanation and critique of the expansion of investor rights from an economic nationalist perspective. Finally, it will comment on what this alternative interpretation may reveal about the future of the global political economy.

THE CONVENTIONAL VIEW OF INVESTOR RIGHTS

The rationale for the expansion of investor rights originates in classical theories of economic liberalization. The historical linkages between investment liberalization and trade liberalization are conspicuous and can be traced back to the pivotal work of Adam Smith and David Ricardo, who advocated for liberalized trade based on the purported social benefits of economic growth derived from a free market and comparative advantage.¹ More than 200 years later, the conventional paradigm for improving the welfare of the world's population is still embedded in notions of liberal economic policies. The prominence of

neoliberal economics, namely trade liberalization and investment liberalization, can be observed in the agendas of influential global forums and trade agreements, such as the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). On its official website, the WTO states that its main function is to “ensure that trade flows as smoothly, predictably and freely as possible.”² The WTO claims that freer and more predictable international trade results in “a more prosperous, peaceful and accountable economic world,” and ultimately an improvement in the welfare of the peoples of its member countries.³ A historical overview of the rise of investment liberalization in these global entities and an examination of its justification will foster a deeper understanding of the conventional views surrounding investor rights.

The GATT was established in 1948 as a global forum to encourage the reduction of trade barriers among its 23 member countries.⁴ The multilateral negotiations held under the auspices of the GATT during its era of prominence are considered by some to have been extremely successful as they facilitated the biggest leaps forward in international trade liberalization.⁵ However, by the early 1980s, the GATT had become much less relevant in global economic activities. The scope of global economic integration had become increasingly complex and had expanded to include trade in services and international investment, of which the GATT covered neither.⁶

To compensate for the deficiencies of the GATT, the WTO was established during the Uruguay Round in 1995, reaffirming a continued international commitment to economic liberalization and global harmonization of economic policies.⁷ The WTO, as an international organization and legal entity, extends its purview beyond the trade of goods to include the regulation of non-tariff barriers, the international exchange of services, trade-related aspects of intellectual property rights and international investment.⁸

The rationale behind the pursuit of global economic liberalization and harmonization that originated in classical economic theories has

¹ World Trade Organization, “Understanding the WTO,” http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm.

² World Trade Organization, “The WTO in Brief,” http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbroo_e.htm.

³ Ibid.

⁴ World Trade Organization, “Understanding the WTO.”

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

expanded to include investment liberalization. We have seen the conventional treatment of foreign investors evolve from simply the protection of foreign investments to issuing rights to foreign investors, such as the right to make investments and rights precluding the imposition of national economic policies on the operation of the investment.⁹ The establishment of foreign investor rights allows private, foreign investors to challenge and significantly influence domestic regulatory decisions that the foreign investor may consider undesirable.¹⁰

The traditional justification for the public welfare derived from trade liberalization—which is the root of investor rights expansion—does not necessarily apply to our modern-day, highly globalized and integrated world economy. According to classical theorists, so long as international trade is liberal and countries are producing goods for which they enjoy a comparative advantage, consumers around the world will enjoy the benefits of lower costs and an increased supply of goods.¹¹ However, global economic activity is no longer primarily comprised of the exchange of goods. For example, trade in foreign exchange markets have been expanding rapidly over the past few decades. In 2012, daily foreign exchange trading reached \$4 trillion and only approximately one percent of this trade was related to the exchange of goods.¹² The increasing importance of trade in services, the rise of the global financial sector and the growing prominence of international investment mean that the justification of trade liberalization based on the benefits to public welfare must be questioned.

A cogent argument for the benefits to public welfare of the expansion of investor rights has yet to be provided.¹³ In so far as a justification for general investment liberalization, Howard Mann and Konrad von Moltke claim that “it has focused on the role of the protection of investors under international law as a means to expand and

diversify foreign investment into more states, especially developing states.”¹⁴ However, this statement is unsubstantiated, as an investor’s decision to invest in a country can be multi-faceted. In addition to political barriers, factors such as domestic institutions, the availability of natural resources, and access to domestic markets may influence an investor’s decision.¹⁵ Moreover, there is no guarantee that any particular investment will benefit the host society. It is necessary to reference perspectives outside the conventional views of economic liberalization to gain a more comprehensive understanding of the impacts of the rise of investor rights in the global political economy.

AN ECONOMIC NATIONALIST PERSPECTIVE ON INVESTOR RIGHTS

The neoclassical economic liberalization paradigm is hegemonic among the international community.¹⁶ This paradigm’s dominance in the political sphere is manifested in the agendas of governments and international entities, such as the World Bank, International Monetary Fund (IMF) and the WTO, that promote global market efficiency and liberalization. The question of whether economic liberalization in general is beneficial for the welfare of the world’s population is beyond the scope of this article. However, the unquestioned extension of the rationale for economic and trade liberalization to other areas of international governance, particularly international investment, may be misguided. As discussed earlier, the changing scope of the global political economy means we have moved beyond the point where the promotion of public welfare associated with economic liberalization theory can be blindly accepted. An economic nationalist analysis stemming from the interdisciplinary approach of international political economy offers valuable insights into how and why investor rights have arisen and what implications this may have for

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⁹ Howard Mann and Konrad von Moltke, “Protecting Investor Rights and the Public Good: Assessing NAFTA’s Chapter 11,” International Institute for Sustainable Development (2002): 4. <http://www.iisd.org/publications/pub.aspx?id=573>.

¹⁰ Ibid., 5.

¹¹ World Trade Organization, “Understanding the WTO.”

¹² United Nations, *Development and Globalization: Facts and Figures 2012*, United Nations Publication (2012): 17, <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=534>.

¹³ Mann and Moltke, *Protecting Investor Rights*, 4.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Geoffrey R. Martin, “Changing the Global Trade Structure: From ‘Harmonization’ to a New ‘Interface Principle,’” in *Adapting the United Nations to a Post-Modern Era: Lessons Learned*, ed. W. Andy Knight, (Palgrave Macmillan, 2001).

governments, civil society and the future of democracy.

AN INTRODUCTION TO ECONOMIC NATIONALISM

Economic nationalist thought can be traced back to the emergence and expansion of the nation-state in Europe in the 15th century.¹⁷ Mercantilism was the dominant economic doctrine in Europe at that time and inspired state-centered, protectionist economic policy. Like mercantilism, economic nationalism takes a state-centered approach to the study of the global political economy, maintaining that the nation-state remains the principal actor in the domestic and international domains.¹⁸ For this reason, economic nationalism is sometimes termed as a 'statist' or 'state-based' theory.¹⁹ A particularly significant position of economic nationalists is that markets are not 'natural,' but are created and shaped by political activity.²⁰ From an economic nationalist perspective, international political economy is a struggle among self-interested states for power and wealth.²¹

Because of its roots in state-centered, mercantilist thought, economic nationalism is often viewed as the opposite of market-oriented neoliberalism and even as an obsolete analytical framework in an age of globalization.²² Since the interwar years, liberal economists have tended to discredit policies they did not agree with by labelling them as 'economic nationalist.'²³ Under the hegemonic international commitment to neoliberalism, the historical connection of economic nationalism to protectionist economic policies immediately brings it into disrepute. Moreover, the effectiveness of economic nationalism as a framework of analysis comes into question in a modern era of globalization, where the centrality of the state in global affairs is arguably waning in the face of transnational corporations and international governing organizations. However, a modern reading of the economic nationalist analytical

framework reveals that it can provide useful tools for interpreting the current state of the global political economy.

Economic nationalism may not be obsolete in an era of economic liberalization and globalization. Andreas Pickel maintains that prominent scholarship often erroneously uses the phrase 'economic nationalism' as a synonym for 'realism' or 'mercantilism.'²⁴ However, Pickel asserts that realism and mercantilism are true 'statist' ideologies, whereas economic nationalism is primarily concerned with national identities.²⁵ In this view, nationalism is an expression of a constructed social identity, rather than an autonomous state with interests distinct from society.²⁶ The contemporary focus of economic nationalists is how national identities and nationalism shape economic policies and processes. This establishes the precedent that economic nationalism can be associated with a wide range of policy projects and continues to be relevant in the contemporary global political economy.

AN ECONOMIC NATIONALIST EXPLANATION OF INVESTOR RIGHTS

As stated earlier, a primary insight of economic nationalism is that the market exists only within a social context; that is, the nation and political action exist prior to the market.²⁷ Pickel provides two compelling points that reinforce the notion's relevance in today's globalized world. First, he argues that economic activity, especially production and consumption, still occurs in particular national social and political contexts, which is a testament to the continued significance of the nation-state. Second, he says that economic globalization is arguably the product of the political decisions (to deregulate, to join the WTO, and so on) of certain nation-states and continues to be shaped by them and the international organizations they dominate.²⁸ From an economic nationalist

¹⁷ Robert O'Brien and Marc Williams, *Global Political Economy*, 3rd ed. (New York: Palgrave Macmillan, 2010), 17.

¹⁸ Ibid., 18.

¹⁹ Ibid., 17.

²⁰ Ibid., 18.

²¹ Ibid., 17.

²² Andreas Pickel, "False Oppositions: Reconceptualizing Economic Nationalism in a Globalizing World," in *Economic Nationalism in a Globalizing World*, ed. Andreas Pickel and Eric Helleiner (Ithaca: Cornell University Press, 2005), 3.

²³ Eric Helleiner, "The Meaning and Contemporary Significance of Economic Nationalism," in *Economic Nationalism in a Globalizing World*, ed. Andreas Pickel and Eric Helleiner (Ithaca: Cornell University Press, 2005), 221.

²⁴ Pickel, "False Oppositions," 5.

²⁵ Ibid.

²⁶ Rawi Abdelal, "Nationalism and International Political Economy in Eurasia," in *Economic Nationalism in a Globalizing World*, ed. Andreas Pickel and Eric Helleiner (Ithaca: Cornell University Press, 2005), 22.

²⁷ O'Brien and Williams, *Global Political Economy*, 19.

²⁸ Pickel, "False Oppositions," 7.

perspective, this establishes the precedent that the current global economic system was created and continues to be shaped by national and political forces.

According to the notion that national identity and nationalism shape economic policies and processes, economic liberalism can in fact be interpreted as a form of economic nationalism, in that it is a set of policies meant to benefit the nation. Pickel suggests that, since the global significance of the nation has remained intact, the “specific content of...policy doctrines, their conception and legitimation always (and in most cases primarily) occur in a national context.”²⁹ Therefore, economic nationalists can have a variety of policy goals, including the endorsement of neoliberal economic policies.³⁰ The dominance of neoliberal policies in the global political economy may demonstrate that nations have, until this point, identified themselves as market-oriented nations and have shaped their policies accordingly.

The neoliberal national identity can explain the rise of investor rights. According to economic nationalism, nations are seeking to maximize their power and wealth. In an increasingly interconnected world dominated by neoliberal economic thought, encouraging foreign investment is one way for states to accumulate wealth. The decision of nations, primarily the most powerful ones, to allow for the establishment of investor rights was made in the interest of their national wealth. However, it can be argued that the establishment of investor rights as a part of the ‘neoliberal revolution’ is beginning to ‘backfire’ on its creators.

Increasingly influential international mechanisms designed to encourage and defend foreign investor rights have begun to interfere with vital governmental functions. While challenging government actions is an inevitable part of providing legal protection for foreign investors, we are seeing a disturbing increase in the ability of foreign corporate investors to use investor rights provisions in ways that restrict or even negate

governments’ ability to protect human welfare and the environment.³¹ From an economic nationalist perspective, this is extremely concerning because it bespeaks the loss of national sovereignty and the debilitation of a government’s ability to fulfill the obligation it was created for, namely to protect the welfare of its domestic population. The provisions for the rights of foreign investors in Chapter 11 of the North American Free Trade Agreement (NAFTA) provide a harrowing example of the kind of restrictions investor rights can place on host governments.

“A disturbing increase in the ability of foreign corporate investors to use investor rights provisions in ways that restrict governments’ ability to protect human welfare and the environment”

AN EXAMPLE: NAFTA’S CHAPTER 11

Chapter 11 of NAFTA is the part of the agreement that deals with the protection of foreign investors from Canada, Mexico and the United States. The parameters of Chapter 11 allow NAFTA firms to challenge their NAFTA host governments on the outcomes of policy decisions and national regulatory regimes that may serve to jeopardize the investor’s profitability.³² Stephen Clarkson asserts that Chapter 11 has done less to empower the continental market than it has to reduce the capacities of NAFTA governments and create the means for investors to ‘discipline’ governments that stand in their way.³³

Clarkson warns that NAFTA’s Chapter 11 contains an investor-state dispute settlement process that raises the spectre of “a serious democratic deficit.”³⁴ This investor-state dispute settlement process is initiated directly by the foreign investor against the host state. The results of the process are binding on both participants and there are limited opportunities to appeal a decision. Disputes under Chapter 11 go to arbitration before an international panel operating by the rules established under the aegis of the World Bank or the United Nations for

²⁹ Ibid., 12.

³⁰ Helleiner, “Meaning and Contemporary Significance,” 220.

³¹ International Institute for Sustainable Development and World Wildlife Fund, *Private Rights, Public Problems: A guide to NAFTA’s Controversial Chapter on Investor Rights*, (Manitoba: International Institute for Sustainable Development, 2001), http://www.iisd.org/pdf/trade_citizensguide.pdf.

³² Stephen Clarkson, “Canada’s Secret Constitution: NAFTA, WTO and the End of Sovereignty?” Canadian Centre for Policy Alternatives (2002), <http://www.policyalternatives.ca/publications/reports/canadas-secret-constitution>.

³³ Ibid., 12.

³⁴ Ibid., 18.

settling international disputes between transnational corporations (TNCs).³⁵ Clarkson laments that Chapter 11 effectively “transfers adjudication of disputes over government policies from the realm of national law to international commercial law.”³⁶

An arbitration process defined by commercial law is undemocratic. First, the arbitration process prescribed in Chapter 11 is often conducted in secrecy.³⁷ Neither the host government nor the investor is legally bound to announce notices of intent to arbitrate.³⁸ Even if the outcome of such arbitration causes a government to change publicly passed regulations, the public may never be privy to the investor-state dispute behind it. Moreover, the secrecy of dispute settlement under Chapter 11 gives foreign investors and corporations exclusive access to governmental decision-makers, which puts foreign investors in a privileged position to lobby, influence or even threaten the host government on any actual or proposed measures.³⁹ Second, the arbitration process lacks judicial sovereignty. As Clarkson maintains, the sociology of the arbitrators’ selection makes it more likely that they will respond to legal arguments privileging the norms of international commercial law as opposed to arguments that are in the best interests of the domestic population.⁴⁰

The provisions of Chapter 11 also allow foreign investors to have influence over other parts of the NAFTA agreement, further illustrating the democratic deficits that may arise through the issuing of investor rights. For example, NAFTA accepts government monopolies if they provide essential services to the public.⁴¹ However, such crown corporations must “act solely in accordance with commercial considerations.”⁴² Considering that essential public services may be uneconomic, Chapter 11 arbitration could be used by foreign

investors to challenge the definition of a permissible action for a crown corporation. For instance, should a crown corporation’s endeavour to provide nonprofit housing negatively affect the profits of a foreign investor, the foreign investor could argue under Chapter 11 that the crown corporation was failing to operate by commercial standards.⁴³ To the potential detriment of the domestic population, arbitrators under Chapter 11 often apply norms based on global commercial norms without necessarily being aware of the social, cultural and historical rationale for a government’s practices.⁴⁴

An example of an investor-state dispute under NAFTA’s Chapter 11 is the case of Ethyl Corporation versus Canada in the late 1990s.⁴⁵ Ethyl Corporation is a U.S. company that established a Canadian subsidiary, Ethyl Canada. In 1998, Ethyl sued the Canadian government for \$250 million (under NAFTA’s Chapter 11) for banning the import of its product, methylcyclopentadienyl manganese tricarbonyl (MMT), a gasoline additive.⁴⁶ MMT was believed to have undiscovered toxic properties and was similarly banned in a number of U.S. states for health and environmental reasons.⁴⁷ Ethyl argued that the ban on MMT imports was a protectionist measure and was “tantamount to expropriation, for which it should be fully compensated.”⁴⁸ The Canadian government eventually settled with Ethyl Corporation, paying the company \$13 million and issuing a letter stating there was no scientific evidence that MMT posed any health or environmental risk.⁴⁹

The case of Ethyl Corporation versus Canada was the first environmental-related Chapter 11 case.⁵⁰ It exemplifies the debilitation of government that can occur in a system that elevates the rights of foreign investors over the welfare of the population.

³⁵ Ibid., 16.

³⁶ Ibid.

³⁷ Ibid.

³⁸ International Institute, *Private Rights*, 42.

³⁹ Ibid.

⁴⁰ Clarkson, “Secret Constitution,” 17.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ International Institute, *Private Rights*, 71.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid., 72.

⁴⁹ Ibid., 73.

⁵⁰ Ibid.

Canada's Internal Trade Agreement (ITA) held that the MMT law was not, in fact, a disguised protectionist restriction on trade, but a bone-fide environmental law implemented for the good of the population.⁵¹ Regardless of the true intention of the Canadian government in this particular case, that a private investor could overturn a domestic public policy implemented for the benefit of society is troubling and represents a democratic deficit in our current global economic paradigm.

THE RISE OF CIVIL SOCIETY AGAINST INVESTOR RIGHTS

How long will citizens tolerate government elevation of the rights of foreign investors above the needs of their domestic population? Clarkson predicts that as the citizens of the world begin to better understand the external constitutions that dictate the actions of elected governments, the current global political economic system will lose legitimacy and come under pressure from civil society to reform.⁵² An economic nationalist perspective provides insight as to why and how this impending global civil society movement may arise.

Rawi Abdelal asserts that nationalist goals for economic policy must give the economy social purpose and allow for economic sacrifice to achieve social goals.⁵³ Evidently, many governments are subordinating these nationalistic goals to global commercial interests, exemplified by the rise of investor rights. Maude Barlow and Tony Clarke argue that the decreasing concern for public welfare in governmental policy is igniting the rise of a "third sector," a global civil society movement that will dominate 21st century politics and compel domestic and global governments to return their focus to the welfare of the people.⁵⁴

The growth of the nonprofit sector provides evidence of an expanding and strengthening civil society movement.⁵⁵ Lester Salamon et al. undertook a massive study of the nonprofit sector

in forty-two countries around the world and found that the nonprofit sector is growing at an unprecedented rate.⁵⁶ Civil society groups are beginning to do some of the work previously done by governments, such as providing social services, feeding the poor, monitoring health and safety standards and advocating for the environment.⁵⁷ The mobilization of civil society is taking organizational shape at local, national and global levels, with a growing number of NGOs concerning themselves with current global economic and political systems.⁵⁸

Barlow and Clarke describe "The rise of civil society as a new democracy movement."⁵⁹ Civil groups are reclaiming their national sovereignty by defending and protecting "key areas of our common life—food, water, health, education, the environment, seeds, genes, culture (to name a few)—from being sucked into the vortex of a global market controlled by transnational corporations."⁶⁰ From an economic nationalist perspective, civil groups are redefining their national identity by pressuring their governments to move away from a market-oriented system in which private investors have more political influence than the citizens themselves.⁶¹

CONCLUSION

This article has provided a historical overview of the rise of investment liberalization and has contrasted the conventional view of investor rights with an alternative economic nationalist perspective. It has been argued that the implementation of investor rights in the global political economy can work to diminish the sovereignty of governments and detract from their ability to promote the welfare of their domestic population. However, there is evidence that

⁵¹ Ibid.

⁵² Clarkson, "Secret Constitution," 25.

⁵³ Abdelal, "Nationalism," 26.

⁵⁴ Maude Barlow and Tony Clarke, *Global Showdown: How the New Activists are Fighting Global Corporate Rule*, (Toronto: Stoddart Publishing Co. Limited, 2001).

⁵⁵ Ibid., 3.

⁵⁶ Lester M. Salamon, Helmut K. Anheier, Regina List, Stefan Toepler and S. Wojciech Sokolowski, *Global Civil Society: Dimensions of the Nonprofit Sector*, (Baltimore: The Johns Hopkins Center for Civil Society Studies, 1999), <http://ccss.jhu.edu/wp-content/uploads/downloads/2011/08/Global-Civil-Society-I.pdf>.

⁵⁷ Barlow and Clarke, *Global Showdown*, 3.

⁵⁸ Ibid., 204.

⁵⁹ Ibid., 207.

⁶⁰ Ibid.

⁶¹ Ibid., 210.

nonprofit organizations and civil society groups are beginning to fill the gaps made by government deficiencies and challenge the role of governments as commercial tools.

As a final thought, one of the most compelling contributions of economic nationalism to our understanding of the contemporary global political economy is a return to a focus on the 'nation' as an entity with interests separate from the state. The concept of a nation and national identity does not have to be constrained by political borders. As is demonstrated by the rise of international civil society groups and nonprofit organizations, national interests are beginning to be shared across borders. It is likely that we will see many of the 'national' interests expressed by civil society become 'global' interests. As the predominantly neoliberal world system increasingly privileges commercial interests and neglects national interests as expressed by civil society, people around the world will push for reform. In the coming decades, we may find the global political economy increasingly defined by the struggle of civil society to reclaim their governments as representatives of the people and reject governments as tools of private investors and the global commercial market.