Free Trade - Free People?

The Dominance of International Investment Arbitration and its Implications for Human Rights Fulfilment

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Abstract

Since the 1980s there has been an explosion in the number of international investment agreements around the world, from a few hundred, to well over 3000. They form part of the global domination of neo-liberal economic thinking, placing the needs of businesses above all else. Contained within many is the mechanism of international investment arbitration which gives foreign corporations the right to sue countries that legislate in ways that negatively affect their profit making ability. Convened tribunal's disregard considerations not related directly to the alleged expropriation suffered by foreign investors as they are not mandated to consider other factors, such as human rights. However the judgements often have significant impacts on a range of human rights with countries penalised for acting to protect the health and well-being of their people and the environment. No issue is neglected with arbitration challenging sovereign choices on areas such as racial equality, environmental protection, health improvement and power supply. Not only does this affect sued countries directly but also weakens other states legislative desire to follow a similar course of action. In this way international investment arbitration acts as a system of global governance, weakening sovereignty, democracy and human rights fulfilment. Overall I will argue that international investment arbitration places too much power in the hands of multinational corporations to the detriment of human rights. In order to protect sovereignty, democracy and human rights these agreements must be renounced.

Introduction

There are over 3000 international investment agreements in place with almost every country in the world bound by one or many (UNCTAD, 2015). These agreements often contain within them an article which allows for a process of arbitration to take place between a state and a foreign investor. These provisions seek to protect the rights of foreign investors in a similar way to how human rights treaties, ratified by states, seek to protect all people. The process of arbitration can be accessed only by a foreign investor, not by a state, in order to gain some sort of compensation for an expropriation suffered by the investor at the hands of a foreign state. The aim of the agreements is to ensure an investor does not invest a large amount of resources into a foreign project only to see that effort effectively stolen from the foreign investor by an unpredictable host state. The goal of such agreements, which states take on, being to increase foreign investment in their state in order to increase economic growth. This theory seems reasonable and sensible, for if a foreign company had built roads and factories only to have them taken by the host nation it would be likely they would have no adequate means of recourse under that states domestic law. However, the way the system has developed in recent years is a grand departure from this original idea. The extent to which foreign investors can access arbitration mechanisms for loss of earnings is huge, and the impact on human rights equally so. Changes in government policy on nuclear energy, new legislation on cigarette packaging, or the transfer of ownership to black South Africans after apartheid, just some examples of the times international investment arbitration has been used.

Overall I will argue that the prevalence of treaties, and the explosion in case numbers in recent years, merits the issue worthy of close inspection. Indeed it has been rather neglected and needs further public discussion. These agreements are part of the global domination, since the 1980s, of neo-liberalism. My analysis will not engage too much with this point, however it is the underpinning of my understanding and my views are formed with this in mind. I am critical of its effect on a variety of human rights and highlight that these agreements are a continuation of neo-liberal thinking which may very well be reaching its peak. The belief in the benefits of foreign investment, free markets, free trade and fostering a good business climate which have come to so represent the neo-liberal ideal, are evident in international investment agreements. With this fundamental basis established overall I will argue that international arbitration offers a significant threat to a wide range of human rights, and in order to regain control of democracy the treaties which contain them must be renounced. They are one of the great obstacles between people and human rights fulfilment, enshrining corporate power above sovereignty and corporations above governments.

In my analysis I will first discuss the scholars who have influenced and shaped my understanding of the relevant issues. Acknowledging their contributions to my own thoughts and appreciating that my work was not possible without theirs. Secondly**,** in order to begin to understand investment arbitration it is first essential to review the legal workings of the system. Whilst I am keen not to dwell on law too long it is crucial to discuss in order to understand the topic. I will detail the procedural workings of the tribunals with this in mind. More significantly I will assess the relevance tribunals place on human rights in their judgements. Through looking at their established jurisdiction and the trend of cases, I will show that human rights considerations do not enter into arbitration tribunal’s decision making, this being despite the recent inclusion of *amicus curiae* briefs.

The prevalence of treaties and the link to neo-liberalism forms the basis of the section detailing a variety of human rights concerns aimed at giving an overview of the myriad of issues which can arise. I will explore both the accountability and legitimacy of arbitration, highlighting the million or billion dollar awards which have no means of effective appeal. Equally the size of some awards have been up to $50 billion, a huge amount that in itselfis worthy of discussion. In this section I will discuss many cases in order to paint a broad picture of the variety that can occur. More specifically an analysis of a case involving the end of apartheid in South Africa**,** will highlight the fact that no area is off limit to arbitration tribunals. A group of foreign investors successfully dodged a requirement to transfer some ownership of resources to black South Africans which sought to redress apartheid. In the case of *Philip Morris v Uruguay* the links between legislative change and arbitration are drawn in a case where Philip Morris sought compensation for Uruguay's policy to reduce smoking. Equally relevant is *Vattenfall v Germany*, where similarly Germany was sued for altering course over nuclear energy. Finally,I shall examine a case study of the social conflicts which have arisen in El Salvador as a result of the mining corporation Pacific Rim. Pacific Rim is suing El Salvador for $300 million for failing to allow them to mine gold, concerns around environmental pollution being a significant factor in their thinking. The case has encouraged wide spread opposition in the local region and the national government, and it highlights the problems which can arise from arbitration, as well as illustrating vividly the many facets of a disagreement arbitration ignores. With wide spread opposition, environmental risks of mining, the poverty of the nation, or the already high levels of pollution not likely to figure in the tribunal's thinking. All these points fit together to create a picture of international investment arbitration which ignores human rights concerns in the tribunal process, and is significantly damaging to them in their judgements.

Literature Review

This section seeks to briefly engage with the literature which has informed my writing and shaped my understanding of the issues whilst highlighting the specific contribution of my work. Firstly, I will highlight the legal writings without which I would have not been able to form my argument. They provide an indispensable starting point from which to explore the issue. Secondly, I will explore the broad tradition which has shaped my thinking and which really underpin my work and form the basis of my argument. Finally, I will highlight my contribution to the broad field. In engaging closely with the issue of international investment arbitration and the impacts it can have on a range of rights. My analysis is shaped by the acceptance and criticism of the dominant neo-liberal global order, highlighting international investment agreements, and specifically arbitration mechanisms, as part of this economic model which is so detrimental to human rights.

The interaction between human rights and international arbitration has been a field of law which has not been widely explored (Petersmann, 2009). However, I have assessed a few competing narratives in order to understand the legal process of arbitration. It has been suggested by Fry that human rights and international investment arbitration are complementary parts of the same system of international law (2007). However, he acknowledges that this is not the dominant view and I am inclined to disagree with his findings. He rather misses the point of the complexities surrounding the relationship, over emphasising the procedural similarities between human rights law and investment treaties, and overall concluding arbitration does not harm human rights. In contrast,the likes of Brabandere point to specific cases as examples and highlight the lack of engagement from tribunals with human rights considerations (2012, p.4). The likes of Brabandere, Collier and Lowe form the dominant narrative Fry commented on, and it is this interpretation I find convincing. Collier and Lowe highlight tribunal's repeated assertion on a lack of jurisdiction to consider human rights concerns (1999, p.227). Furthermore Thielbörger (2009) and Shultz (2008) provided valuable insight into the specificities surrounding the right to water, whilst strengthen the general argument on the negative impact of arbitration. Boisson de Chazournes (2013) was equal in this regard, as well as highlighting the impact of civil society contributions to international investment arbitration through *amicus curiae* briefs. Overall these legal scholars have informed my understanding of the process and convinced me of the dominant narrative that human rights are not considered within tribunals.

My subsequent analysis of the issues is formulated within the acceptance of the domination of neo-liberal polices around the world, and subsequent criticism of it by the likes of David Harvey (2005). Whilst Harvey does not engage with international investment arbitration specifically my view is that it is part of the neo-liberal economic paradigm that he describes. Equally in this regard the likes of Klein (2014; 2007), Pantich and Gindin (2013) have provided a comprehensive account of modern global capitalism and it is their works which have underpinned my interpretation of international investment arbitration. Equally Chomsky has shown how modern capitalist globalisation works to control views as well as actions, and seeks profits before the welfare of people (1999; 1988). This general tradition, critical of how global capitalism, and neo-liberalism has developed,form the platform from which I launch my analysis. Schill (2010), in suggesting specifically the link between international investment arbitration and a system of global control,provides a link between the general position and the specificities of my topic. To that end Desai (2002) has highlighted some impacts of the arbitration process, in the post-apartheid South African context. In regards to the Salvadoran context the work of Rose Spalding (2015) provided the backbone of my understanding of the social tensions in El Salvador. She draws together the particular issues in El Salvador with the broad neo-liberal context I have formulated my concepts around. Equally invaluable was the research of Steiner (2010) and Moran (2005) who provided deep technical analysis without which my conclusions could not have been drawn.

Legal Overview

Tribunal procedures

Analysis of international investment arbitration is not possible without first considering the technical legal workings of the process in international law. Investment treaties, either bilateral or multilateral, often contain within them articles which allow for some form of arbitration to take place. Sometimes they contain within them their own set of arbitration rules, however most have also allowed for arbitration to take place within the parameters established by either the United Nations Commission on International Trade Law (UNCITRAL), or primarily through the International Centre for Settlement of Investment Disputes (ICSID), formed in 1966 by the UN convention of the same name (ICSID, 2015a). Indeed ICSID sets the benchmark for international arbitration globally, having administered almost 500 cases to date (ICSID, 2015a). Therefore, for expedience, I will focus on their formulation of the arbitration mechanisms in order to quickly illustrate the workings of the proceedings. The Convention allows for one or any uneven number of people to be arbitrators of a case (ICSID Convention, 1966). Where parties do not agree upon the number there will be three (ICSID Convention, 1966). Three is the most common number with one chosen by each party, the other agreed upon by both parties (ICSID Convention, 1966). When there are three arbitrators they cannot have the same nationality as either party, unless this is agreed upon by both parties. (ICSID, 2015b). Arbitrators must be of high moral character and competent in the fields of law, commerce, industry or finance (ICSID, 2015b). Awards of a tribunal are final and binding and there is no appeal, furthermore there is no requirement for the award details to be made publicly available and this only occurs if the parties agree to it (ICSID, 2015c). In addition Article 51 offers the possibility of the revision of an award in light of any new facts which may come to light within three years after the date of the award (ICSID Convention, 1966). Furthermore, the award maybe annulled in accordance with Article 52 for the following reasons, “that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based” (ICSID Convention, 1966). This summary offers a basis from which to consider the behaviour of tribunals, their rational and their judgements. What is striking is the power the three individuals hold over cases which often seek millions of dollars in damages. Equally the competence of arbitrators may sometimes be questionable when considering the quite wide parameters of the required fields of expertise. Finally, the lack of an effective appeals process might also be cause to question the legitimacy of the process. Either way it is now pertinent to consider the real workings of such tribunalsto assess how they reach theirjudgements, what evidence they consider relevant,and the extent of their jurisdiction.

Tribunal's reasoning and jurisdiction

In the process of arbitration states have often attempted to defend themselves by offering up an explanation of why they acted in such a way which perhaps had detrimental repercussions for a foreign investor. Human rights considerations are often suggested by a state, often in regard to privatisation of public services such as water supply (Thielbörger, 2009, p.488). These sort of conflicts have become more prevalent under neo-liberalism as more states have sold off their water systems to foreign corporations, often resulting in increasing and unaffordable prices which can lead to conflict, the most notable example being the Cochabamba Water Revolt (Shultz, 2008). While the right to water is not specifically recognised in international human rights law, it is the view of the UN Committee on Economic, Social, and Cultural Rights that the right to water forms an integral part of the right to an adequate standard of living. In their General Comment 15, *the right to water,* the Committee asserted that they interpret Article 11, paragraph 1 of the ICESCR as including the right to water as it is necessary to obtain an adequate standard of living (UNCESCR, 2002). Furthermore the Committee recognised that without water, growing food was not possible and therefore adequate water was necessary to fulfil the explicit obligation on states to provide adequate food as asserted in Article 11 (UNCESCR, 2002). Despite this authoritative commentary there is no legally binding specific obligation on the right to water, however because water is so integral to life the arguments of the Committee seem rational and could easily be invoked by states when facing arbitration. However, it is the common position of tribunals that the reasoning behind a decision is not their concern (Brabandere, 2012, pp.198-202). It may very well be the case that a foreign investor's practices are damaging human rights, perhaps accessibility of water, however if expropriation by a state has occurred then this is all the tribunals consider, not the reasons behind it (Brabandere, 2012, pp.198-202). This can be most strikingly shown in the *Santa Elena* judgement which commented on environmental measures taken by the host state, “expropriatory environmental measures, no matter how laudable and beneficial to society as a whole are,in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains” (Santa Elena v Costa Rica, 2000). Tribunalstherefore act without considering concerns that extend beyond the impact on the foreign investor's earnings. Equally relevant is how tribunalshave consistently commented that they lack the jurisdiction to consider human rights. The extent of tribunal’s jurisdiction is varied and determined simply by the particular articles within the many international investment treaties. Tribunalsmay not stray beyond the powers assigned to them (Collier and Lowe, 1999, p.227). Whilst tribunals may consider customary law and general principles these sources of law do not offer tangible protection for wide ranging human rights concerns. The scope of a tribunal is clearly limited to investment disputes. In *Biloune v Ghana*, a foreign investor was detained for 13 days and was eventually deported to Togo. The tribunal noted that its jurisdiction under the treaty between the host state and the investor was limited to disputes relating to investment (*Biloune v Ghana*, 1989). The tribunal commented that it was only competent to deal with the event in so far as it had affected the foreign investor's earnings. Itwas not competent to deal with the human rights violation of unlawful detention(*Biloune v Ghana*, 1989). Furthermore, most investment treaties do not mention human rights, including NAFTA and the Energy Charter Treaty. (Brabandere, 2012, p189). Therefore the lack of jurisdiction tribunals have over human rights is evident.

Amicus Curiae

A more recent development in international arbitration has been the inclusion of *amicus curiae* briefs from NGOs as an attempt to address human rights concerns within cases (Boisson de Chazournes, 2013, pp.218-226). The precedent for inclusion of such briefs in international arbitration was set in 2001 in *Methanex* where it was asserted that thereexisted in NAFTA no provision which excluded such submissions (*Methanex v United States of America*, 2001). Subsequently ICSID rules have been amended in order to explicitly allow *amicus curiae* submissions from a non-disputing party which has a significant interest in the case (Brabandere, 2012, p.205). These inclusions have offered a space for parties who would be affected by the outcome of a case, but who previously would have had no access to its proceedings. In principle this development has been accepted as increasing the legitimacy and transparency of arbitration cases which will have an impact on an environmental or human rights issues (Brabandere, 2012, pp.205-207). However, whilst inclusion where there previously was none is a positive step, the effect of *amicus curiae* on the outcome of cases seems to be limited at best (Brabandere, 2012, pp.205-207). This is primarily due to the fact that tribunals do not often refer to, or ever mention, such submissions in their judgements (Brabandere, 2012, p.207). If the submissions are not referred to there is simply no way to assess the effectiveness of them. If they have not informed a judgement then they have had little impact except to give a veneer of inclusiveness and transparency to proceedings where perhaps in reality tribunals have ignored human rights concerns as normal, as issues beyond their jurisdiction. It is notable that in *Biwater Gauff* the tribunal extensively commented on the *amicus curiae* submissions (*Biwater Gauff v Tanzania*, 2008, pp.100-112). Indeed the tribunal commented that it had been a useful process and where relevant returned to some points made, lateron in the award (*Biwater Gauff v Tanzania*, 2008, p.112). However, whilst the engagement with civil society is undeniable the extent to which their input influenced the outcome of the case is questionable. The tribunal noted that whilst Tanzania had expropriated the water system from Biwater Gauff because of economic mismanagement and other economic factors such as the contract being nearly finished, the amount of value the state had been found to expropriate was nil (*Biwater Gauff v Tanzania*, 2008, p.236). Therefore, they concluded that Tanzania owed no monetary compensation, despite technically breaching the investment treaty (*Biwater Gauff v Tanzania*, 2008, p.239). This case is the most prominent example of a tribunal engaging with *amicus curiae* briefs and yet even here their reasoning was still based on economics, rather than human rights. However this case does show the potential for tribunalsto engage with civil society, where most others simply haven't (Brabandere, 2012, pp.206-207). Whilst the inclusion of human rights considerations surely is a positive step, the actual effectiveness on influencing cases is currently extremely limited and often so irrelevant to tribunal's considerations that they are not even mentioned (Brabandere, 2012, pp.206-207).

Conclusion

This section has briefly explored the workings of international investment tribunals and highlighted a number of potential problems. Firstly, the lack of a consideration to why actions may have been taken by a state. To ignore the why of an action surely misses a key component in legal proceedings, after all it is sometimes legal to kill someone if they are about to commit an even greater crime. However in international arbitration the why of a state expropriating a foreign investor's property is ignored. This is equally because they often do not have the mandate to consider anything other than some sort of loss of earnings to a foreign investor, as a result of a state breaching an investment treaty. Tribunalshave no jurisdiction over issues relating to human rights and do not consider why a state took the action it did. As human rights concerns have become more prevalent in arbitration cases the inclusion of *amicus curiae* briefs has at the very least opened up some space for civil society to have its voice heard. However, when analysing the judgements the lack of reference to the submissions, combined with the shown lack of consideration of why an action was taken by state,callsinto question what effect the briefs can possible have on the outcome of a case. Now having considered the nature of arbitration it is clearly not the place where human rights can be protected. These treaties exist to protect foreign investment, and human rights treaties exist to protect human rights. To expect the tribunals to do anything other than what they are mandated to do by the treaties is asinine. However although they may have no mandate to consider human rights, their judgements can deeply affectthem. Having considered how tribunals work in international law I will now explore the prevalence and effects these treaties can haveon areas over which they have no mandate.

Overview of International Investment Arbitration

Introduction

International investment agreements have come to dominate the globe. Arbitration, the specific mechanism within them is what makes them so powerful and worth exploring. In this section I will highlight the prevalence of the treaties as well as explore the economic and political system they emerged from, neo-liberalism. I will then consider where the treaties stand in international law, by which I mean how the mechanisms which support them differ from mechanisms which support international human rights treaties. I will argue that the strength of the arbitration process relative to the mechanisms which support human rights, in reality makes international investment agreements more powerful. I will then consider a variety of particularly interesting cases to highlight a number of specific issues which can arise and negatively impact human rights when arbitration occurs. Issues such as environmental concerns, health problems, sovereignty, democracy and racism. Equally I will consider the development that no longer is it only developing countries which fall victim to such treaties, increasingly in fact, European nations are finding themselves falling foul of international investment arbitration mechanisms. Overall this section will analyse some of the negative impacts on human rights which can arise as a result of investment arbitration. It is important to understand that these agreements have come to exist in a neo-liberal world. Indeed this context forms a crucial part of my assessment of the arbitration mechanisms. With the treaties firmly established as part of the neo-liberal experiment I am then free to explore in detail this particular facet of the economic plan, arbitration. I will not dwell on neo-liberalism too long for although I see it as underpinning the topic I want to focus on the realities of this one specific part of it. With this in mind it seems appropriate to first consider the prevalence of intentional investment treaties, which makes their potential for harm so significant.

Neo-liberalism and International Investment Agreements

The prevalence of international investment agreements has increased dramatically over the last 30 years. In the thirty years between 1955 and 1985 there were 286 agreements signed around the world (UNCTAD, 2015). In the thirty years since there have been over 3200 such agreements signed (UNCTAD, 2015). These agreements form part of the global implementation, since the 1980s of neo-liberal policies. The hallmarks of neo-liberalism are free trade, free markets, weak worker's rights, strong private property rights, privatisation and deregulation (Harvey, 2005, p.2). These agreements form part of the dominant global economic paradigm which focuses on these points, and for which foreign investment forms a major part. Dominated by the policies and rhetoric of organisations like the International Monetary Fund and the World Bank, international investment agreements help facilitate the realisation of neo-liberal aims. A key formulation of how neo-liberalism has developed has been that when a government is faced with a choice between enacting policies for the benefit of people, or the benefit of businesses, they tend to side with businesses (Harvey, 2005, p.70). This notion is the deeply held neo-liberal belief in allowing businesses to be free to do as they like as far as possible. This fostering of a good business climate in reality encompasses reducing regulations of all types, worker’s rights, environmental rights and social protections, enabling businesses to create huge profits (Harvey, 2005, pp.70-73). International investment agreements form part of this neo-liberal understanding, bringing it to the international arena. These agreements enshrine in international law, rights of foreign investors above all other considerations. They are the very essence of neo-liberal economic principles and their vast increase form part of the current domination of neo-liberal policies around the world (Panitch and Gindin, 2013, p.117). Indeed hundreds of foreign corporations have benefited from the pervasiveness of the agreements, with the result being that over half of the world's nations have been sued under these mechanisms (Provost and Kennard, 2015). The extent of the agreements, and the increasing use of the arbitration mechanisms makes the issue so pertinent. These agreements form a part of the wide ranging international law framework. A key principle of which is the equality of laws for all those which are not *jus cogen*. All treaties therefore are equally binding on states, with no hierarchy established. However, when we consider the mechanisms which support different treaties we can see that in reality a hierarchy has been established.

Inequality in International Law

It seems that investment agreements have become more powerful than human rights treaties for a number of reasons. Firstly, the financial power of the corporations involved. The level of wealth which many corporations have reached now eclipse that of some countries. Of the 100 largest economies in the world in 2012, 37 were corporations (Transnational Institute, 2014). This level of wealth provides a platform from which launching expensive international arbitration claims is no cause for concern. Multinational corporations can easily afford to pay the $600 to $700an hour to arbitrators as well as the millions the final bill often comes to (The Economist, 2014). This level of wealth is combined with a specific, dedicated tribunal established to adjudicate over a case a corporation has decided to bring. There is no queue in these procedures. A tribunal is set up at the request of a foreign investor. This is in stark contrast to the mechanisms which support human rights. As an example the European Court of Human Rights can only be accessed after all domestic remedies have been utilised, as stated in Article 35 (ECHR, 1950). Furthermore, the cost of taking a case to the ECHR is likely to run into the tens of thousands (BBC News, 2013). This acts as a significant barrier to the Court, in stark contrast to the ease of access foreign investors have to recourse under investment agreements. Whilst these points are worth mentioning to illustrate differences in the legal processes, what most strikingly affects the power of the agreements is the size of awards which can be levied in arbitration. These awards can be so large that states are far more fearful of violating them than they are of violating human rights. In Guatemala a mine was allowed to stay open despite wide spread popular and governmental opposition. Internal government documents showed that the decision was taken because of fears over the potentially massive fines that could be imposed if the Canadian company, Goldcorp, was given reason to access the arbitration mechanisms available (Provost and Kennard, 2015). This was despite popular resistance to the mine and a recommendation from the Inter-American Commission on Human Rights that the mine be closed (Provost and Kennard, 2015). Indeed when considering the level of costs resulting from both arbitration and human rights cases, if a state has to decide between the two, it is clear that violating a foreign investor's profit making ability is likely to cost them far more than violating human rights. In 2008 the International Court of Arbitration saw a surge in the number of high value claims, with 126, or 19% relating to amounts in dispute between $10 million and $100 million, as well as 39, or 5% relating to amounts in dispute of over $100 million (Global Arbitration Review, 2015). Furthermore, the figures for 2013 highlight the trend towards larger disputes, with 167 cases, or 21% relating to disputes between $10 million and $100 million, and 63 cases, or 8% relating to disputes over $100 million (Global Arbitration Review, 2015). The size and frequency of these awards are far greater than those handed out because of human rights violations. In 2015 the ECHRordered Turkey to pay 90 million euros in compensation for the 1974 invasion of Cyprus, which was at the time the largest ever pay out from the Court (Moore, 2014).

This award was vastly eclipsed by the Yukos case, in which the ECHR ordered Russia to pay 1.9 billion euros to Yukos shareholders as a result of unlawful tax penalties (Moore, 2014). However this award is by far in a way the exception to the norm in human rights cases. Furthermore it is interesting to contrast this award with the award levied under arbitration to Yukos from Russia for the same series of events, $50 billion (Moore, 2014). Clearly then the level of financial incentive for states to adhere to international investment treaties is far higher than those which aim to enforce human rights. Faced with these sort of choices countries are left in a perilous situation. We could say that states shouldn't consider things in such capitalist terms. However, when talking about sums as vast as we are it would surely be far worse on a state to allow such a vast transfer of wealth away from the country. It is clear that states could be faced with costs in the millions or billions as a result of arbitration. The problem I now wish to consider relates to the accountability of the arbitration mechanisms, and the effects such awards have on other states and other foreign investors.

Accountability and Legitimacy

As discussed international arbitration cases often exceed millions, if not billions in claims and costs. Simply the scale of such proceedings should raise questions about the accountability and legitimacy of such processes. Now the legitimacy of such proceedings is established through the fact that nations chose to enter into such arrangements, even though they may very well have ended up regretting that decision. Some developing countries did so in an attempt to attract foreign investment, believing it would give them an advantage over similar countries (Guzman, 1997, pp.678-680). However the legitimacy could be questioned when considering the level of democracy in a particular country. Furthermore it could be suggested that these deals, which form part of a neo-liberal ideal, have been a result of a wealthy class across national boundaries working together, and therefore they do not have the legitimacy that could be expected from a sovereign nation (Harvey, 2005, pp.15-18). These sort of concerns would need to be explored in more detail on a country by country basis which is not possible here. However a salient point which mustn't be excluded, is the provision within many investment agreements which have a cooling off period, whereby if a state chooses to remove itself from a treaty it may still be subject to arbitration claims for a number of years afterwards. In the case of the Energy Charter Treaty, withdrawal will still render a state open to arbitration for up to 20 years, with Italy's recent withdrawal keeping it open for arbitration until 2026 (Out-Law, 2015). The most striking example of the effects of such a provision can be seen through an examination of Russia's relationship with the ECT. Russia signed the treaty in 1994, however it was never ratified (Skadden, 2010). In 2009 Russia announced that it would not ratify the treaty and instead withdrew from it (Skadden, 2010). However, an arbitration tribunal in the case of *Yukos v Russia* established that because of the doctrine of “provisional acceptance” Russia was still bound by the treaty, and therefore could be involved in arbitration proceedings, equally for another 20 years (Skadden, 2010). The 3 resulting proceedings against Russia resulted in the largest ever arbitration settlement, $50 billion (*Yukos Universal Ltd v Russia, Hulley Enterprises Ltd v Russia* and *Veteran Petroleum Ltd v Russia*, 2014). The merits of the case in this instance are not my concern. What is troubling is the very tenuous links which have been used to reach the point where the Russian Federation owes a group of investors $50 billion, even though Russia never ratified, and indeed withdrew its signature from the treaty used to launch arbitration. This surely raises serious questions about the legitimacy of the mechanisms in place in this context. However whilst the ECT has a very long period by which states are bound even after they withdraw, this is not the case in all such agreements. Venezuela recently withdrew from the ICSID and they were no longer bound by it 6 months later (Ripinsky, 2012). Therefore whilst agreements may have a very long period where states remain bound even after withdrawal, this is not necessarily the case, however such provisions do still impact the legitimacy of some agreements and settlements. Arbitration can equally affect states which are not bound by a treaty in another way, jurisprudence. It has been noted that although arbitration proceedings are not supposed to form a basis of jurisprudence, in reality they do. This is despite some provisions specifically stating that this is not to happen, as in the ICSID and NAFTA (Schill, 2010, p.18). Arbitrators refer to and are aware of previous rulings, and whilst not bound by the precedent they set, they are influenced by them, often citing previous cases as reasoning for their award (Schill, 2010, p.19). This in turn has created an international legal sphere which influences how states think and act, always wary of the implications which may arise from their actions in relation to international investment agreements. Even on cases which arise from treaty obligations which they are not party to themselves. It has been suggested that this force is so powerful that it is a form of global governance (Schill, 2010, pp.17-23). If this is the case the level of impact international arbitration is having could be incredibly significant. In turn having implications for sovereignty and democracy, the pillars of international co-operation, and political freedom. To assess the subtleties of global policy is beyond my reach in this work. However, I will nowexplore a few examples of cases which have profound implications for a variety of human rights. Furthermore they highlight the political power of investment agreements that can influence areas which should be outside of their sphere of influence, such as racism.

Piero Foresti, Laura de Carli & Others v South Africa

In the aftermath of South African apartheid there were a variety of political and social reforms aimed at redressing the years of structural racism which had dominated life in South Africa. One of these measures involved the reallocation of ownership of certain industries, so that at least a certain percentage was owned by the previously excluded non-white communities. In 2004 the post-apartheid Mineral and Petroleum Resources Development Act came into force which terminated all previously held mining rights and required mining companies to re-apply for mining permits in order to continue operating. Itset out that it was mandatory for mining companies to be at least 26% owned by black South Africans (Provost and Kennard, 2015). This particular point clearly an attempt by the government to aid the removal of structural racism from their society. In response to this new legislation a group of Italian investors who dominated the South African granite industry sought arbitration to protect their interests (Provost and Kennard, 2015). They argued that they had suffered expropriation by the government and had been treated unfairly and they sought $350 million in compensation from South Africa.

The group of investors brought 2 cases under bilateral investment treaties South Africa had signed during Nelson Mandela's presidency in the 1990s, with Belgium, Luxembourg and Italy (Provost and Kennard, 2015). However the significance and implications of such treaties seems to have been missed by the South African government. Peter Draper, a former official in the South African Department of Trade and Industry commented that, “we were essentially giving away the store without asking any critical questions, or protecting crucial policy space” (Provost and Kennard, 2015). The new South African regime was simply trying to foster good economic and political ties with European nations. Indeed it was noted as such by Jason Brickhill, a lawyer at the Legal Resources Centre in Johannesburg, who commented that post-apartheid government seemed to view the agreements “more as acts of diplomatic goodwill than serious legal commitments with potentially far-reaching economic consequences” (Provost and Kennard, 2015). It could be suggested that the government had already accepted the neo-liberal order as the way forward and were simply attempting to progress international relations, fostering free trade, in a similar way to the domestic policies already in place. Such policies implemented in South Africa after apartheid resulted in wage stagnation, increased unemployment and inequality (Desai, 2002). It seems that the end of apartheid saw not the radical shift away from exploitation of the masses, but simply a slight shift in the positioning and power of the dominant classes (Desai, 2002). So whilst the signing of such treaties could either be ignorance or more likely part of a concerted pattern, there is no doubting the effect. After four years the case against South Africa was abruptly dropped, however the claimants had achieved a remarkable settlement. The South African government agreed that only 5% of their companies had to be transferred to black South African ownership, rather than the 26% mandated under reparation plans. The rational by the South African government being that they did not wish to risk losing the case, opening themselves up for a flood of similar cases. (Provost and Kennard, 2015). This is a clear example of international investment agreements operating as a system of global governance as explained earlier. The treaties in place allowed these foreign investors a mechanism which bypassed the end of apartheid. Neo-liberal policies have warped what could have been a real new start for the South African people and international investment arbitration has played a key role in this. These pressures have resulted in a transfer of power away from the people, and into the hands of global foreign investors, and those who were already wealthy under the apartheid system. This case offers the most striking example of how these global forces can manifest themselves. Neo-liberalism breeds persistent and growing inequality and international investment agreements have in this case contributed to persistent inequalities which the end of apartheid had attempted to redress. This case highlights the potential implications international investment agreements can have on human rights. In this case actively entrenching racism in a society. Equally notions of democracy have been raised with this case. However, another case can serve as a more illuminating one on this particular issue. When considering the specificities of challenges to sovereign democracies no other case is more pertinent than that of *Philip Morris v Uruguay*.

Philip Morris V Uruguay

In 2005 Uruguay started a campaign of action aimed at reducing the number of smokers in the country. At the time 40% of adults smoked, whilst a third of all 12 to 17 year-olds smoked (Armitage, 2014). The government sought to reduce these alarmingly high figures and set about implementing a series of measures aimed at tackling the problem. Uruguay passed Law No. 18,256 on smoking control regulations in 2008 which introduced a broad range of reforms relating to packaging, advertising and smoking in enclosed spaces, among others (The Senate and House of Representatives of the Eastern Republic of Uruguay, 2008). As a result of this law other ordinances and presidential decrees were enacted to specify and strengthen certain elements of the reforms. In Ordinance 514 the Ministry of Public Health laid out that each tobacco company could only produce one type of packaging for their products in order to combat the “direct or indirect effect of creating the false impression that a particular tobacco product is less harmful than another” (Ministry of Public Health, 2008). Furthermore the ordinance mandated that at least 50% of the packaging be given over to images and text warning of the dangers of smoking (Ministry of Public Health, 2008), and in Presidential decree 287/009 this figure was raised to 80% (President of the Republic of Uruguay, 2009). These are the measures which the tobacco giant Philip Morris raised in their claim against Uruguay in 2010, where they sought the repeal of these measures, as well as compensation from the loss of earnings resulting from them (*FTR Holding et al. v Uruguay*, 2010). With this case the conflict between investment agreements and democratic governments are evident. In 2010, when the case was filed, on the Global Democracy Ranking, Uruguay received a “high” score when assessing the level of quality of democracy within the country and was ranked as the 27th best democracy in the world (Global Democracy Ranking, 2010). Therefore it is reasonable to assert that Uruguay can be considered an established democratic nation. Democracy is a human right as laid out in Article 21 of the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights (UNDHR, 1948 and ICCPR, 1966). In essence therefore, this case boils down to a clash between the rights of foreign investors, against the rights of a government, freely elected by a free people. I would argue that the rights of a nation should not be restricted because of the interests of a multinational corporation. However this is what this case, which is still under arbitration proceedings is threatening to do. If a freely elected government is not free to pass the laws it wants to because of investment agreements, the implications for democratic governance all over the world is in serious doubt, especially when considering the prevalence of investment agreements (UNCTAD, 2015). The previously made points of global governance also come to mind. Indeed Philip Morris also filed a case against Australia in similar circumstances and it has been widely suggested that this led New Zealand to halt their own plans for plain packaging on cigarettes (Armitage, 2014). Clearly democratic states are already having their freedoms eroded by these arbitration mechanisms. Whilst the issue of democratic governance is crucial, it is important to highlight that these measures taken by a variety of governments are aimed at improving the health of their people.

Seeking to improve the health and well-being of people is a key obligation of any good government. These policies were clearly aimed at improving the health of the population by reducing the number of people smoking. In 2005, 40% of adults in Uruguay smoked, whilst a third of all 12 to 17 year-olds smoked (Armitage, 2014). After 10 years of these policies only 23% of Uruguayans still have the habit (Armitage, 2014). Among the young, where a third of all 12 to 17 year-olds smoked before, only 13% do now (Armitage, 2014). This is a huge reduction in both the number of adults, and crucially the number of children smoking. This shows that not only have the policies been effective at changing smoking habits among regular smokers, but crucially also reducing the numbers of those becoming addicted. The health implications of smoking are so well documented that I need not explore them here. It is safe to assume that a reduction in smoking will lead to a reduction in smoking related diseases such as lung cancer and heart disease. Uruguay's actions formed part of their response to the World Health Organisation's 2005 Framework Convention on Tobacco Control which has been ratified by 180 countries, and which includes recommendations for health warnings on cigarette packets (WHO FCTC, 2005). The goal of the Convention is, “to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke" (WHO FCTC, 2005). All Uruguay has done has been to actively pursue these goals, as established by the international community at the highest level, and yet has suffered at the hands of a multinational tobacco company because of it. How can any country be expected to follow in Uruguay's footsteps if the threat of arbitration hangs over them. The threat already seems to have influenced some countries decisions as established earlier. Whilst this case is still ongoing we can draw some clear conclusions. The threat of arbitration is very real whilst these investment agreements persist and we must consider, while they do, where the power lies. It would seem that in spite of the WHO and a sovereign democratic nation,the power here lies with Philip Morris, and indeed this case remaining unresolved favours the corporation, as it dissuades other countries from acting (Armitage, 2014). It is also worth noting that Philip Morris has an annual income double that of Uruguay (Armitage, 2014) and the relative economic might’s play a crucial role on power relations between multinational corporations and states, and also between human rights mechanisms, and international investment arbitration.

Vattenfall v Germany II

This case is particularly interesting to consider because of two key points. Firstly, the relationship between environmental concerns and investment arbitration, and secondly, to highlight that investment arbitration can just as easily involve a European state, as it can a developing nation. The case concerns Germany's planned phasing out of nuclear power in the wake of the Fukushima nuclear disaster in 2011. The disaster invigorated the decade’s old debate surrounding the use of nuclear power, the result being that the Atomic Energy Act was amended so the phasing out of nuclear energy would be completed by 2022, earlier than originally planned (Bernasconi-Osterwalder and Brauch, 2014, p.2). The amendment detailed the immediate closure of some of the oldest reactors in Germany. Vattenfall, an energy company wholly owned by the Swedish State, operates and owns part of two of these, the Krümmel, of which it owns 66.7% and Brunsbüttel, of which it owns 50% (Bernasconi-Osterwalder and Brauch, 2014, p.2). In response to the action taken by the German State, Vattenfall sought damages under the terms of the Energy Charter Treaty (Bernasconi-Osterwalder and Brauch, 2014, p.2). As a result of the rules of the ICSID, under which the case is operating, relating to the disclosures of information about a case, the subsequent details about the amount Vattenfall is pursuing Germany for is not certain. However there are figures which have been suggested and although unconfirmed, it has been reported that Vattenfall would be seeking around 4 billion Euros for loss of earnings and future loss of earnings, half of Germany's annual overseas aid budget (Bernasconi-Osterwalder and Brauch, 2014, p.2). This amount is striking when considering the rationale behind the German decision, the Fukushima disaster. The disaster saw some of the highest levels of radioactive contamination ever experienced through a nuclear disaster (Greenpeace, 2012, pp.15-16). Fortunately for Japan, although less so for the marine ecosystem, around 80% of the radioactive material went into the ocean (Greenpeace, 2012 p.15). This still left a huge amount of radiation around the plant, with the plant continuing to pour out radiation for years after the initial meltdown (Greenpeace, 2012, p.15). The effects of such a large, continuous level of radiation will not be totally known for years, however the effect in the short term was still very significant with over 100,000 people having to be evacuated from the area (Greenpeace, 2012 p.13).

In the face of this it seems perfectly reasonable for Germany to have decided to stop their nuclear programme early. However, because of the mechanism of investment arbitration Germany could end up having to pay billions of Euros to a foreign investor. Once again the question to consider is what is more important, the free choice of a people to move away from a potentially harmful industry, or the right of that industry to be insulated from risk? The point becomes even more pertinent when considering Sweden's own current nuclear energy policy which saw the two parties of the ruling coalition individually say they would like to see nuclear power phased out (World Nuclear Association, 2015). So despite consensus between the two governments of Sweden and Germany, Vattenfall, owned by the Swedish State, has sought damages for something that they are also doing. Sweden is moving away from nuclear just as Germany is, and yet because of investment arbitration, Germany may have to pay billions to Vattenfall. This would be a gross hypocrisy and is indicative of the arbitration system, giving no concern to issues not related to monetary profit, and entrenching systems of power which benefit corporations before people.

Case Study: Pacific Rim in El Salvador

Introduction

The case of *Pacific Rim v El Salvador* is the epitome of the conflicts that can occur between human rights and foreign investor's power, enshrined in international investment agreements. The case revolves around the issue of mining rights within El Salvador and the decision of the government not to grant Pacific Rim, now owned by Oceana Gold, a license to mine for gold. This decision was taken in 2008, and Pacific Rim launched the arbitration proceedings in 2009 (*Pacific Rim v El Salvador*, 2009). They claimed for $300 million for the loss of earnings resulting from the Salvadoran Governments decision. The Salvadoran authorities cited a number of concerns with the proposed mine and a number of legal challenges in their response to the arbitration proceedings (*Pacific Rim v El Salvador*, 2010). However I do not intend to assess the relative merits of the case from a legal standpoint, rather this section will focus on the situation in El Salvador, relating to human rights and environmental concerns. Firstly, I will assess the impact that mining has had in El Salvador. There are a number of factors which led to the decision not to grant a permit to Pacific Rim, such as water pollution and environmental destruction associated with the mining operations already in the country. Equally I will explore the positive impacts mining could have had on the country, and assess whether there has really been any economic benefit. Secondly, I will explore the movements within the country focused against both the current mining industry, as well as the proposed. The conflicts within society will shine a keen light on the nature of the tensions surrounding the issue. By engaging with the discourse from domestic civil society, a real insight into the issue can be gained. Thirdly, I will explore the other activities of Pacific Rim and Oceana Gold and assess their legacies from their other operations. Through looking at their past conduct, worker’s rights, effects on local communities and environmental record, it is possible to gain an insight into the nature of the corporation’s operations. Equally, I will assess the global commentary on the case and the issues in play. By considering *amicus curiae* briefs and commentaries from internationalNGOs, as well as from organisations from the UN, such as the World Bank, a fresh perspective can be applied to the case and new insights can be formed. Overall I will argue that the mechanism of international investment arbitration negates all these factors I have explored. A state such as El Salvador is no longer free to choose its own fate and the prevalence of neo-liberalism has manifested in the most destructive way. Perhaps bankrupting a small nation, or ruining lives and the environment, all in the pursuit of monetary gain by a foreign corporation.

Environmental impacts

The decision El Salvador took when refusing to allow any new mining was heavily influenced by the serious environmental damage that has occurred in the country as a result of mining. In 2012, the Salvadoran Ministry of Environment and Natural Resources (MARN) found high levels of pollution in the San Sebastian River where Commerce Group discharged waste water from mining operations (Ministry of Environment and Natural Resources, 2012). They found that cyanide was nine times the acceptable limit, and iron was one thousand times the Salvadoran standard for safe drinking water (Ministry of Environment and Natural Resources, 2012). The source of the pollution was found to be a reddish acidic discharge coming down from a hill close to where industrial mining had taken place for several decades (Ministry of Environment and Natural Resources, 2012). The high levels of cyanide were particularly evident of the serious implications of mining pollution, being an extremely toxic substance for both humans and marine life, which had been extensively used in the mining processes (Ministry of Environment and Natural Resources, 2012).

The level of pollution in the river highlights the ramifications mining can have on local ecosystems. However El Salvador is widely polluted by a number of other factors which strengthen the cause for concern. Water pollution is endemic across El Salvador not only because of mining, but also as a result of other industries, agriculture and poor waste management (United Nations Environment Programme, 2013). Around 98% of all municipal waste water, and around 90% of all industrial waste water is discharged untreated into rivers and streams (United Nations Environment Programme, 2013). This situation has led to serious water contamination throughout the country. A study by the Ministry of the Environment found that 98% of all water in El Salvador could not be made fit for human consumption or for irrigation (Pacheco, 2014). This dire situation is compounded by the seasonal variation which often results in the country suffering water scarcity during the dry season (Global Water Partnership, 2012). The poor water situation in El Salvador is vital to consider when analysing the effects of mining. The processes involved have already been shown to pollute the stressed waterways, but also the volume of water used in the mining process is a critical point. The cyanide leach processes at the proposed mine site would require 900,000 litres of water each day (Pacheco, 2014). This is a huge amount and it would take a typical Salvadoran family 30 years to use the equivalent (Pacheco, 2014). When all these factors are considered it is easy to see the hesitance of both the authorities, and the people, to the proposed El Dorado mine. The level of water pollution is already extremely high and even the very accessibility of water is often severely stretched. When considering the documented high pollution levels in the San Sebastian River near an old mining site, and the similar cyanide leach techniques which would be used in the proposed project, concerns seem justified. It is rational to worry about the effect on the quality and availability of nearby water sources. Pacific Rim carried out an environmental impact assessment for the proposed mine however its legitimacy has been severely discredited.

Leading academic Robert Moran's highly influential technical review of the environmental impact assessment carried out by Pacific Rim, raises a number of points. Such as the lack of engagement with the issue of how the vast amount of water needed would be paid for (Moran, 2005, p.10). He highlights the common practice mining companies operate, digging their own wells, which access the surface water indirectly, thereby bypassing the water operator and avoiding costs, yet taking vast amounts of water (Moran, 2005, p.10). The lack of engagement in the EIA with how the mine would affect local water supplies is a glaring omission (Moran, 2005, p.11). Equally significant is the failure to adequately define baseline water quality and quantity conditions (Moran, 2005, p.14). It is simply not credible to fail to detail these factors properly, and yet assert that no significant impact to water is to be expected from operations (Moran, 2005, p.14). The overall conclusion of Moran is that the Environmental Impact Assessment would not be acceptable by regulatory authorities in most developed countries, and therefore should not be framed as adequate in this circumstance (Moran, 2005, p.15).

Overall it is clear that issues surrounding the environmental impact of the mine are compelling and not adequately addressed by Pacific Rim. The people have legitimate concerns surrounding water pollution and water supply particularly. I would argue they therefore have the right to, at the very least, obtain legal guarantees that their lives would not be unduly affected by the mine, or the right to refuse it all together. Despite environmental and other concerns a positive factor surrounding such projects is often suggested to be an increased prosperity for the local people and this is worth consideration.

Economic impacts

The economic impact of the mine on the surrounding community could potentially increase prosperity and therefore perhaps human rights, such as improved healthcare and education. However there are a few things to consider here. It is likely that some of the local population will find work in the mine, however the long term economic benefit to the community as a whole will need to be explored. Especially significant is where the majority of the proceeds from the mine end up, with the local or national community, or with Pacific Rim.

The rhetoric from Pacific Rim would suggest that there will be very tangible and wide spread economic benefits from the mine. They claim that the El Dorado mine would be by far the biggest tax contributor in the country and employ hundreds of people from the surrounding area, as well as creating over 1000 jobs as a result of the increased economic activity in the region (Moore, et al., 2014, p.11). These claims are impressive and would surely be welcomed in such an undeveloped region of El Salvador. However the validity of such claims is in serious doubt. The notion that Pacific Rim would be “by far the biggest tax contributor” in the country, as was claimed by Barbara Henderson, Pacific Rim’s Corporate Secretary and Vice President for Investor Relations, is simply fraudulent (Moore, et al., 2014, p.11). Pacific Rim is structured to avoid paying tax. Pacific Rim was incorporated in the Cayman Islands to obtain the benefits of their tax system, which has a corporate tax rate of zero, and a capital gains tax of zero (Centre for International Environmental Law, 2011, pp.10-11). Therefore rather than contributing a significant amount to the Salvadoran economy through honest taxation, Pacific Rim is positioned to pay none at all. Indeed discounting the relatively small number of jobs created it is hard to see where the economic benefit to El Salvador will come from. As the mine was being proposed and considered in the 2010s the royalties the government could expect to receive from mining was only 2%, shared equally between the federal and local governments (Moore, et al., 2014, p.11). This tiny amount was a result of reductions since the 1990s, with the encouragement of the World Bank, advocating that ever present neo-liberal message of fostering a good business climate (Spalding, 2015, p.28). Therefore Salvadorans could expect neither tax revenue, nor significant gain in royalties from the mining of their own resources. This paints a drastically different picture than the one portrayed by Pacific Rim. Furthermore it is worth briefly considering the effects of similar projects in the Central American region.

Firstly it has been noted that mining rarely contributes to sustainable economic development (Oxfam America, 2008, p.9). Equally, because of the fluctuations in resource prices and improvements in technology a stable high number of available jobs is never guaranteed. In Nevada, during the peak of the gold mining boom in the 1990s where output grew by 50%, jobs fell by 27% as technology replaced workers (Oxfam America, 2008, p.18). Overall Oxfam, having considered the history of mining, concluded that in most instances it did not bring significant economic gain to a region or country (Oxfam America, 2008, p.33). Therefore it was asserted that it was also unlikely to bring significant economic gain to El Salvador in the case of the El Dorado mine, or in general (Oxfam America, 2008, p.33). Overall it seems as though the mine is not likely to bring significant economic benefits to El Salvador, or the local community, despite the grand rhetoric of Pacific Rim. Their tax avoidance schemes, the limited royalties El Salvador would receive and the limited and unstable job creation exhaust all the possibilities of benefit. When considering the potential environmental and social implications of the mine, along with the limited economic gains for the people and the state, it is easy to see how neither would welcome it.

Resistance

Few arbitration cases have inspired such strong community engagement and tension as in the case of *Pacific Rim v El Salvador*. The level of community mobilisation against the proposed mine is extremely high and it shows a real human dimension in what can often be a quiet behind the scenes negotiation between governments and corporations. What is striking in this case is also the level of agreement between local communities and the government. Both are actively mobilised against the proposals and it is these two branches of opposition which I will explore.

The community around the mine site should be the stakeholders who are most involved with the process of deciding the fate of the mine, as they are the ones who will be most affected by it, and who will have to live with it, and its effects, every day. This principle is the basic right of self- determination enshrined in Article 1 of the ICCPR and the ICESCR. “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. All peoples may, for their own ends, freely dispose of their natural wealth and resources” (ICCPR, 1966). This sentiment is echoed by the World Bank in their guide to mining community development agreements. “All parties should endeavour to ensure that relevant communities and stakeholders are included in CDA dialogues and negotiations and that the process is open and transparent” (The World Bank, 2012, p.45). Furthermore the World Bank has noted the importance of appreciating the subtleties and complexities of each regional decision, asserting “no one size fits all, and communities have the last word” (Global Mining, 2002, p.18). However these rights and codes of conduct would seem extremely distant from the experience of the local people opposed to the mine.

As the countries of Central America were opened up to resource extraction as part of the neo-liberal expansion in the 1990s communities began to mobilise. Forming transnational advocacy networks throughout the region different interest groups aligned and this successful organisation has contributed to the political changes seen in El Salvador in recent years (Spalding, 2015, pp.23-28). The neo-liberal dominance of the ARENA party’s two decades in power coming to an end in 2009 (Spalding, 2015, p.23). The opposition to mining formed a crucial part of the struggle against neo-liberal ideology in El Salvador and the Central American region more generally (Spalding, 2015, pp.23-28). The communities opposed to the mine, and mining in general, were organised and active in their opposition. In 2005 a national anti- mining coalition was formed to counter the widespread exploration sanctioned under the ARENA party's rule (Spalding, 2015, p.28). The National Roundtable against Metallic Mining in El Salvador (La Mesa) formed the organisational basis for mobilisation against mining (Spalding, 2015, p.29). Over the next few years the movement drew on international links to help orchestrate a national consultation over the future of the industry (Spalding, 2015, p.28). The national network consisted of various groups, local resistance networks with strong ties to affected communities, groups of environmental and social activists working on a number of issues, activist academics, the Catholic Church, international allies and NGOs (Spalding, 2015, p.28). La Mesa linked a broad range of 13 groups opposed to neo-liberal ideology and focused specifically on anti- mining issues (Spalding, 2015, p.29). In the early 2000s as Pacific Rim was trying to obtain a mining permit La Mesa organised a number of studies and research papers in order to counter the environmentally sound and economically beneficial rhetoric of Pacific Rim (Spalding, 2015, pp.34-36). This combined with mass public demonstrations illustrate a broad strategy focused on achieving lasting change. Large protests have been common at the El Dorado site with communities organised against the plans. However, this has not been a peaceful process, with up to 10 connected activists murdered over the period (Kingsbury, 2014).

Protests persisted in the region of Cabanas where the El Dorado mine was proposed with local community organizations, journalists and priests coming into direct conflict with local politicians that supported Pacific Rim (Moore, et al., 2014, p.8). Opponents of the mine suffered threats of violence from the local Cabanas government, of which the right wing ARENA party has control over large areas (Moore, et al., 2014, p.8). This tension culminated in violence against activists and community leaders in 2009 and 2011 (Moore, et al., 2014, p.9). In 2009 the body of local community leader and anti- mine campaigner Marcelo Rivera was discovered in an abandoned well (Steiner, 2010, p.13). He was Director of Association of Friends of San Isidro (ASIC), Director of the San Isidro Cultural Centre, a Board Member for the FMLN Party in Cabañas, and a member of La Mesa (Steiner, 2010, p.13). He was an outspoken critic of the El Dorado dam and had numerous threats made against him as well as surviving a vehicular assault earlier in the year (Steiner, 2010, p.13). His body had signs of torture and the cell mates of those arrested for the crime allegedly confirmed they had been paid to carry out the murder (Steiner, 2010, p.13). This murder is one of the most high profile acts of violence connected to the mine amongst numerous death threats, intimidation tactics and machete attacks on other opponents to the mine (Steiner, 2010, pp.13-15).

Whilst the connection between the violence and the mine cannot be explicitly drawn, it is possible to draw some links. Local sources have reported that the network of politicians who supported Pacific Rim used such intimidation and violence to attempt to influence the growing civil society movement against the company and the proposal (Voices on the Border, 2011). Equally it has been suggested that in general Pacific Rim’s activities in Cabañas have generated conflict, aggravated social divisions, and raised the stakes around current and potential economic benefits from mining (Europe-Third World Centre, 2014). Overall this has contributed to the raising of threats and violence in the region (Europe-Third World Centre, 2014). Despite the violence the people of Cabanas are still proactive in their opposition to the mine. In September 2014 community consultations began where citizens gathered to decide on the future of the mine with 95% responding against the proposed mining (Share El Salvador, 2011).

The popular response to the proposal of mining in Cabanas has been one of widespread opposition, characterised by violence. Communities have become both united and divided in the ebbs and flows of the conflict. What is clear is the strong opposition against the mine, organised so effectively by La Mesa. Focused not simply on public demonstrations, but also on engaging Pacific Rim at the intellectual level, challenging their findings and undermining their legitimacy to comment on environmental and social outcomes. When considering the human rights of self- determination and a people’s right to the free disposal of their resources, these events indicate the choice the people have made (ICCPR, 1966). Large social movements do not persist where there is no real commitment, or no real fear of losing the struggle. The decade has seen violence and division as a result. This violence and division has been suggested to be both a result of corruption of local officials or sections of society keen on mining, as well as direct interference by Pacific Rim, keen to exploit a tense situation in order to achieve their goal. The validity of such assertions will form part of my analysis of Pacific Rim's record on human rights and environmental protection, both in relation to the bid for the El Dorado mine, and also in relation to their record on other projects.

Pacific Rim’s Conduct

An important part of this case is the history and practice of Pacific Rim. The company would have a huge impact in Cabanas should mining take place and it is therefore critical to assess their conduct. Firstly, I will examine their actions around both the bidding process and then the protests. Secondly, I will assess their impacts in other regions where they operate. These two areas are crucial to explore and together will illustrate the character of the organisation, and allow an interpretation into whether they would be a positive or negative impact on the life of a community.

It has been widely suggested that Pacific Rim played a significant role both intentionally and indirectly in destabilising the region of Cabanas over a number of years (Steiner, 2010, p.21). A key part of this has been the attempt to buy a “social license” to operate giving certain local initiatives and parties large amounts of money, up to $1 million per year (Steiner, 2010, p.21). These initiatives aimed at winning consent for the project form part of a broader campaign of seeking to influence through money. A key part being substantial discretionary funds paid to a number of local mayors in the region (Steiner, 2010, p.21). The people are prone to think that certain mayors have ceased to act for the good of the people, but rather as lobbyists for the pro-mining agenda (Steiner, 2010, p.21). This financial bullying could easily be construed as bribery and it is easy to make that connection after a review of the OECD guidelines for multinationals in relation to bribery and corruption. “Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage... In particular, enterprises should... not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment” (Organisation for Economic Co-operation and Development, 2008, p.21). It seems, in this case, Pacific Rim has violated these terms and furthermore this is the widely held belief of local residents in Cabanas (Steiner, 2010, p.21). Equally in addition to local officials Pacific Rim are alleged to have offered a local radio station, Radio Victoria, money in order to finish the construction of their new building, as well as to run $8000 worth of publicity on the station (Moore, et al., 2014, p.10). The station turned down the offer which they understood to be an attempt to silence their anti- mining radio coverage (Moore, et al., 2014, p.10). Furthermore, one employee of the station reported turning down weekly payments to meet Pacific Rim representatives on a regular basis and inform them of the plans of local opposition groups (Moore, et al., 2014, p.10). Whilst we have only the word of the radio station in these allegations the overall sense surrounding the conduct of Pacific Rim is not one of openness and transparency, rather one seeking to manipulate and control.

Furthermore the final *amicus curiae* brief presented to the tribunal in 2014 on behalf of La Mesa highlights these issues discussed in detail. As evidence in official proceedings it is reasonable to assign more weight of credibility to the issues raised. This document brings together the varied and comprehensive experience gained by the different organisations of La Mesa and goes beyond the inferences made in other sources to actively accuse Pacific Rim of wrong doing. Firstly it is clear that despite the claims of Pacific Rim the majority of the region are against the proposed mining, in a large part because of the threat it would pose to scarce water resources in Cabanas (Centre for International Environmental Law, 2014, p.10). Rather than seeking to open a dialogue with local residents, Pacific Rim used a tactic of “divide and conquer” to initiate social tensions which resulted in the violence and murders previously described (Centre for International Environmental Law, 2014, p.10). Included is a statement from El Salvador's ombudsman in the wake of the spate of murders of anti-mining campaigners. Having considered the constant death threats to campaigners, the short time in which a group of murders took place, and the lack of satisfactory motives for the crimes it was noted that, “on top of that, none of the criminal investigations in these cases has made any public mention of possible intellectual authors. This Ombudsman’s Office notes that there are sufficient elements in the homicides, in the way they have been carried out and the levels of planning involved, to lead one to believe that the homicides and other events may be related and have a common origin” (Centre for International Environmental Law, 2014, p.11). The link between the active pursuing of social strife by Pacific Rim and the violence against environmental and human rights defenders is clear and demonstrates a culture of intimidation as a tactic to attempt to remove opposition to the mine. It is noted that La Mesa was formed as a result of these tactics of Pacific Rim and its existence is itself evident of its need and relevance to the situation (Centre for International Environmental Law, 2014, p.12). Finally it is noted in the brief, the obligations which exist on states to protect human rights. The right to live in a healthy environment, the right to health and a life of dignity, the right to property and lands, the right to water and food and the need for these rights to be recognised and respected in order for people to obtain a reasonable standard of living (Centre for International Environmental Law, 2014, p.12). In this final point it seems the aim to expose the conflict between human rights and the rights of a foreign investor and an appeal, in light of Pacific Rim's actions, for the former to prevail. Clearly the conduct of Pacific Rim in regards to this case has been dire, however it is now pertinent to assess their previous activities in order to better understand the corporation.

Pacific Rim's parent company, Oceana Gold, operates an open pit gold and copper mine in the Philippines. In 2011 the Philippine Human Rights Commission filed a resolution against the corporation for its mine in Didipio, Nueva Vizcaya (Moore, et al., 2014, p.13). The Commission highlighted a number of issues with the ongoing mining, such as forcible and illegal demolition of homes and threatening the water supply of residents by over use (Silverio, I., 2011). An issue equally as significant in the El Dorado context. Furthermore, in the treatment of vulnerable indigenous communities, Oceana Gold was found to have violated their rights to adequate housing, security of person, and to freely express their cultural identity, among others (Silverio, I., 2011). The treatment of all local people by Oceana Gold was described in similar terms by the Commission as was evident in El Salvador. Equally evident was the broad range of opposition to the mine, environmental groups, church leaders, community groups and sections of the government all united against the ongoing mining (Silverio, I., 2011). The Commission asserted, “The ultimate goal of economic development is to raise the quality of life of all people. To this end, the State promotes the full and efficient use of its human and natural resources by encouraging private entities to invest... However, when private entities violate the fundamental rights and entitlements of the people in the name of economic development, they not only lose their moral legitimacy, they also defeat the very purpose” (Silverio, I., 2011). Overall the Commission unanimously moved to “Recommend to the government under the new administration to look into the issues presented herein and consider the probable withdrawal of the FTAA granted to the foreign company in view of the gross violations of human rights it has committed” (Silverio, I., 2011). The message from the Philippine experience is clear, that the concerns of the Salvadorans seem to be both plausible and likely to become reality if the mining goes ahead, as it did in Didipio. Overall it seems clear that Pacific Rim, or Oceana Gold, have, and are therefore likely, to carry out further human rights abuses. The tactics of manipulation and coercion combined with a callous disregard for the well-being of the people they come into contact with issue a stark warning to the people of Cabanas and El Salvador. By their collective and national actions it seems that this has been heeded.

Conclusion

This case has many facets which comprise the complexities of the situation. Firstly, and perhaps most significantly is the environmental dimension. Things become meaningless if people do not have a decent environment in which to live. Water makes up an absolutely fundamental part of what we all need every day to survive. Therefore it seems reasonable to assess the potential for damaging a peoples' water supply in any situation where that could occur. In this instance the concerns around both the amount of water to be taken for the mine, as well as the level of pollution that will result are both serious issues that need to be fully considered. The evidence from other mining activity around the San Sebastian River showed dangerous levels of both cyanide and iron (Ministry of Environment and Natural Resources, 2012). This fact combined with the already perilous water situation throughout El Salvador as a whole gave the local people adequate cause for concern. Often these kinds of concerns are mediated against the potential for economic benefit. If the risks to the environment are relatively small, and the potential rewards are significant, people may find that overall their quality of life will improve as a result. However in this case this did not seem likely. Pacific Rim would have provided some jobs, but also gained almost all of the profits of the actual value of the gold, with El Salvador set to receive only 2% in royalties (Moore, et al., 2014, p.11). The economic gain would not be felt by the local Salvadorans but rather the by the shareholders of Pacific Rim. Therefore they would acquire almost all of the gain from the venture but be exposed to none of the environmental risks. For these sort of reasons there was a wide spread campaign of opposition to the mine which stretched from the local community to multiple Presidents all against the plan. The opposition has been marred by the death of activists and many more threats of violence, as well as deep social divisions with those in favour of the mine. Pacific Rim fuelled these tensions in a bid to achieve the outcome they wanted (Europe-Third World Centre, 2014). La Mesa co-ordinated a broad coalition united against the mine, church leaders, community activists and local politicians all working together and representing the vast majority of the local people (Centre for International Environmental Law, 2014, p.10). Their cohesion in the face of violence and intimidation showed the strength of their convictions and their determination to choose their own fates. Finally, through looking at the record of Pacific Rim's parent company Oceana Gold it could be seen that the concerns of the people and government where well founded. By looking at the situation around their mine in Didipio in the Philippines, it was clear that the Salvadoran concerns were not groundless. The potential problems highlighted in El Salvador had already manifested in the Philippines with violence, forced evictions and water scarcity among other human rights violations (Silverio, I., 2011). All these factors when considered as a whole, raise real concerns for the people of El Salvador who have legitimately opposed the planned mine. However international investment arbitration is threatening to disregard all these points and run roughshod over a sovereign developing country. Tribunals do not consider these factors relevant to their judgements. They do not fall within their jurisdiction and only factors which in some way affect the alleged expropriation or loss of earnings are considered as relevant. This is the crucial point of assessing the many dimensions to this case in order to show the complexities of the situation which the tribunal are likely to ignore. How can such an important decision be taken without considering all of these other factors that will impact people lives so severely in the local region, and throughout El Salvador. Pacific Rim is seeking $300 million from a country which in 2014 spent only $828.80 million (Trading Economics, 2015). The ramifications of losing such a large percentage of their total spending would be huge and yet in the formulation of arbitration this is not relevant.

Conclusion

Overall I have tried to provide both a broad view of international investment arbitration as well as a more focused case detailing the specific human rights issues which can arise. Firstly through analysing the legal workings of arbitration it was possible to show how they worked, the judgements tribunals reached and why they reached them. Crucially tribunals are not mandated to consider human rights in their judgements. Tribunals have consistently commented that such issue are beyond their jurisdiction. Indeed any issue not directly related to an expropriation and loss of earnings of a foreign investor, do not influence the reasoning's of the arbitrators. All the nuisances of a problem are stripped away despite the significant impacts arbitration can have. Despite the inclusion of *amicus curiae* briefs from NGOs human rights are not part of these processes. Indeed such briefs are rarely commented on bytribunals and therefore their impact seems limited at best, and do nothing to alleviate the consistent lack of engagement by arbitrators.

In assessing the many dimensions international investment arbitration can affect, a variety of issues were addressed. The accountability of the process is not transparent, with a few arbitrators holding a huge amount of power from which there can be no appeal. Furthermore the legitimacy of such proceedings is deeply questionable with awards reaching into the hundreds of millions of dollars regularly, sometimes as a result of a treaty’s cooling off period, keeping a state bound years after renunciation.

This fact furthers the notion that the global web of treaties make up a distinct global power structure, or system of global governance. In this way the interests of multinational corporations are shielded from the actions of sovereign governments, their profits perpetually protected. These treaties form an important part of the global domination of neo-liberal ideology which adheres to these values. Seeking to promote business interests before people. International investment agreements act as a kind of socialism for the rich (Chomsky, 1999, p.39), where the powerful have their interests enshrined above the concerns of others. The neo-liberal link forms the broad basis of my understanding and shaped my assessment. In analysing specific effects of arbitration many cases showed the vast extent of issues affected. In South Africa, arbitration was used to side-step reparation processes in the aftermath of apartheid. Equally Philip Morris sought to challenge Uruguay's attempts to improve public health by combating smoking. They sought not only financial compensation from Uruguay but also to influence the actions of other governments with the threat the case posed. New Zealand became reluctant to follow Uruguay's footsteps in order to avoid their own arbitration case. In Europe Vattenfall proved that arbitration could affect any country, not simply developing ones. Germany fell foul because of their desire not to suffer a similar catastrophe as occurred in Fukushima.

*Pacific Rim v El Salvador* highlighted the extent of impact, arbitration can have on both a province and a country. It provided the backdrop for a dark chapter in El Salvador's history, which is still not resolved. Pacific Rim are seeking $300 million after El Salvador refused to grant them a mining permit, in part because of environmental concerns. El Salvador's water is already extremely contaminated, as well as sometimes not being plentiful enough. The processes involved in gold mining were likely to exacerbate these problems, as it would require a large amount of water, and could deposit high levels of cyanide and iron into the water system, as had occurred in the San Sebastian River. Despite the promises from Pacific Rim the mine was likely to hardly benefit the local people or state, and dramatically benefit the company. El Salvador would receive only 2% of the royalties from the gold, and a limited number of jobs would be created, despite the people having to bear the environmental stresses. As a result of these reasons in response to the proposal the people mobilised against the plan. La Mesa organised a coalition of interested groups, church leaders, community activists and environmental NGOs to mobilise against the plan. These groups were met with violence and intimidation from Pacific Rim who sought to create social unrest by exploiting the tense situation in order to further their goal. Similar problems were encountered at Pacific Rim's parent company, Oceana Gold's operation in the Philippines. Social unrest, forced evictions and pollution were the by-productof a mine in Didipio, vindicating the Salvadoran's concerns over threats to human rights. However the tribunal is likely to discount these factors as not relevant to the loss of earnings El Salvador laid on Pacific Rim. This case shows that despite the continued assertions of tribunal’s, arbitration cases should assess the whole picture when considering a case. Yet they cannot if it is beyond the jurisdiction mandated to them by the treaty under which they operate. Therefore the only solution to the problem is to end this system of international investment agreements. Despite their extensiveness this is entirely possible. Countries like Italy and Venezuela have withdrawn from such agreements because of the effects arbitration can have, limiting their sovereign power and disregarding human rights. They have chosen to reject the recent neo-liberal theory which saw from the 1980s the huge rise in such agreements which are the result of political and economic decisions that can easily be changed. I have shown not only that the tribunals consistently disregard human rights, but crucially also that these judgements affect people deeply on a variety of social and environmental issues. In order to protect human rights throughout the world these agreements, which strengthen the domination of multinational corporations, need to be renounced. An end to international investment arbitration in its current formulation would go some way to addressing this domination of profit over people.

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