

International Investment Agreements as a Tool for Promoting Human-Rights Outcomes: Theory and Practice of a ‘Shared-Interests’ Approach to Lobbying UN Member States

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- International investment agreements (IIAs)—more often known as bilateral investment treaties (BITs)—are legal documents that protect assets and investments. The value of the foreign direct investment (FDI) they protect can reach several billion dollars.

- Civil society can strategically harness the power of multinational corporations (MNCs) over states within the investment system, among other finance-based mechanisms. This risky balance depends on an intersection between the interests of civil society and those of the investor state representing the MNC, as the IIA defines those interests.

- In Sri Lanka, where the rule of law is tenuous, countries such as the US and China partly depend on the local judiciary to settle investment disputes. Yet Sri Lanka’s judiciary is notoriously politically biased. Investors relying on Sri Lanka’s judicial system are taking an extreme risk. The biased judiciary also poses a risk for political prisoners, who are often held without charge under the Prevention of Terrorism Act (PTA).

- Most, if not all, of Sri Lanka’s BITs contain compensation clauses for investments that are damaged or lost due to armed conflict, civil strife, and riots—like those directed against Muslims in Kandy this year. However, these clauses calculate compensation based on equal treatment with other states’ investors.

If Sri Lanka hosts investments that are lost in such situations, in almost every case they can avoid compensating a particular investor by refusing to compensate anyone who lost assets. Investors are

taking an extreme risk in this situation. Such riots, civil strife, and armed conflict also threaten the lives, safety, and property of target populations such as Tamils and Tamil-speaking Muslims.

- The system of international investment arbitration has been increasingly criticized in recent years. Corporations have equal standing with states in investment tribunals, and these tribunals are also accused of secretive proceedings with no democratic accountability.

- However, this is a harsh reality of how our world actually functions. The investment system has a dramatically more effective track record of altering state behaviour than the UN Human Rights Council does. Arbitral awards can often be enforced by seizing an offending state’s or investor’s assets around the world.

- This presents Tamil human-rights advocates with an opportunity. We propose a strategic partnership with the governments and corporations that stand to lose FDI assets and investments, due to Sri Lanka’s structural political instability and its politically tainted judiciary. Such governments and non-state actors have vested financial interests that overlap and coincide with our human-rights claims. Their backing is essential to the functioning of a UN-supervised referendum and establishing an international criminal tribunal.

Their FDI interests, and the legal apparatus that protects those interests, provide them with a structural incentive to invoke the Responsibility to Protect under international law. It is under this doctrine that Tamils can call on the UN Security Council and the General Assembly to help achieve our goals.

- There is precedent for this sort of action. The United States intervened on behalf of South Sudan’s secession after 22 years of war. It also called the actions of the North Sudanese government against the people of Darfur a “genocide”. This was because South Sudan found oil reserves on its territory.

Citation

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