

## **Imperial Patterns of Sanctioned Economic Dominance in International Investment Law: From The East India Company to the Coalition Provisional Authority**

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*'A socio-legal approach to IEL [International Economic Law] enables us appreciate the significance of two key related trends. First, the existence of emergent sites of normative authority for international economic rules and regulations outside the traditional interstate system. And second, the shifting modalities of power in global economic governance that enable dominant actors to embed and globalize their models of economic organization.'*<sup>1</sup>

### **Introduction**

Akingugbe's socio-legal approach to international economic law ('IEL') strives to not only embolden our understanding of how global state-investor relationships operate in practice, but to form a credible narrative that the rules of IEL have been hardwired to accommodate the interests of dominant economic actors. An arguably audacious, but not wholly untenable premise, which may be legitimized through the principles and operation of international investment law ('IIL'). Thus, to challenge the legitimacy of this thesis, this analysis will strive to establish that the rules of IIL have been structurally drafted to perpetuate a degree of economic domination by affording foreign investors favourable protections at the expense of trading-off the ability of sovereign states to regulate on their own accord. A context-dependent exercise which traces this form of sanctioned exploitation from a period of imperialism, allowing economically powerful aliens to employ a combination of diplomacy and force in imposing their preferred legal regimes under the sanction of the modern principles of IEL. Positing the Coalition Provisional Authority's occupation of Iraq as modern evidence of this phenomenon, it will be established that IIL, rather than emerging on a blank legal canvas, has been formulated as a product of economic *leverage*. A historical pattern of imperially constructed

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<sup>1</sup> Olabisi Akingugbe, 'Reflections on the Value of Socio-Legal Approaches to International Economic Law in Africa' [2021] CJIL 24.

leverage which has helped facilitate the imposition of asymmetrically balanced systems of protection by dominant foreign investors often at the detriment of vulnerable, capital-poor, developing host countries.

## **SECTION 1: BALANCING COMMERCIAL IMPERATIVES AND STATE ECONOMIC SELF-DETERMINATION**

### **The Weaponized Value of Foreign Direct Capital**

Before delving into the legality of economic rule, a central bargaining chip at the disposal of these parties may be explored in the often-extortionate value of foreign direct capital ('FDC'). This instrument has been defined by the World Bank as the net inflows of investment to acquire a lasting management interest (10 percent or more of a voting stock) in an enterprise operating in an economy outside of the investor's market.<sup>2</sup> Considered as the most powerful vector of integration amongst economies, FDI can be understood as the long-term investment of capital by a person or corporate entity in one nation into a company based in the host state. As illustrated by Herdergen, FDI derives its value from its potential to transfer knowledge and technology, create jobs, boost overall productivity, enhance competitiveness and entrepreneurship, and ultimately eradicate poverty through economic growth and development.<sup>3</sup> A description which arguably lends itself to a humanitarian air: one which posits foreign capital as the medium through which economically robust nations may lift developing host countries out of a state of impoverishment.

However, inherent in the synergistic value of foreign capital lies a sharp tension between foreign investors' preference for legal regimes which guarantee a low level of commercial risk, and host states' interest in maintaining political flexibility and autonomy. An exercise in which investment legislation and contractual practice may tip the balance in favour of the alien by limiting the

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<sup>2</sup> World Bank Databank <<https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>> accessed 8 February 2025.

<sup>3</sup> Matthias Herdergen, *Principles of International Economic Law* (2<sup>nd</sup> edn, Oxford University Press 2016) 405.

policy-making ambit of host countries.<sup>4</sup> This phenomenon transpires because of the recurrent inequality of bargaining power between these two actors, forcing the host state to walk on a tight rope, carrying the risk of deterring foreign investors if they do not submit to provisions of capital flow which guarantee stability of investment. Notwithstanding the opportunities for economic development, this power imbalance has allowed for FDI to be weaponized against host nations, marginalizing their ability to secure the welfare of their own citizens and often with little guarantee of facilitating synergies between foreign capital and sustainable development. Scholarly opinion has observed the vague correlation between the flows of FDI and the economic development of the host state, describing this market principle as a mere fallacy promulgated by credible financial institutions such as the World Bank and the IMF to accommodate the interests of investors.<sup>5</sup>

While such scepticism aligns with Akingumbe's conception of the manipulation of IEL by actors seeking to imbed their models of organization, extraordinary assertions require extraordinary evidence as well as a historical pattern of exploitation which dispels any hint of aberration in a modern case study. Accordingly, it is imperative to understand that under the default rules of international investment agreements, FDI enjoys protection regardless of its contribution to sustainable development and it is up to the host state to adopt measures which deny such protection.<sup>6</sup> However, as alluded, host countries often risk scaring off foreign investors if they impose national legislation which limits the scope of investor discretion, often leaving vulnerable hosts in a political stalemate. Due to the disconnect between sustainable development and the protections afforded by investment agreements which heavily skew the favour towards the interests of the alien, this form of host consent resembles one of economic duress rather than an economic pact between sovereign nations. Thus, in assessing the power dynamic produced by these pro-investor

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<sup>4</sup> Ole Kristian Fauchald, 'International Investment Law in Support of the Right to Development?' [2021] LJIL 181.

<sup>5</sup> John Linarelli, Margot Salomon, Muthucumaraswamy Sornarajah, 'Foreign Investment: Property, Contract, and Protecting Private Power' in *The Misery of International Law: Confrontations with Injustice in the Global Economy* (1<sup>st</sup> edn, Oxford University Press 2018).

<sup>6</sup> *ibid* (n 4).

agreements, this innate tension will be engaged by the following question: Under what conditions are host states willing to surrender their sovereignty in international economic agreements?

### **Narrowing the Definition of Sovereignty in International Investment Law: Economic Self-Determination**

From the outset, it may be counter-claimed that sovereignty is an amorphous concept subject to a multitude of competing interpretations. As attested by Koskenniemi, the concept of sovereignty is ambiguous,<sup>7</sup> a position underpinned by his assessment of the *Rights of Passage* case,<sup>8</sup> in which Portugal and India's competing opinion on the concept could not be resolved by providing a singular definition of sovereignty. This purported ambiguity also aligns with what Benton described as "layered sovereignties," a characteristic of the imperial order which allowed for 'centres of delegated legal authority to produce irregular and roughly concentrated zones of control around them.'<sup>9</sup> However, these conceptions provide for a quaint complication of a paramount concept, which proves greatly convenient to the foreign entities incentivized to undermine the sovereignty of a nation in vindicating their commercial interests. As sceptically argued by Guntrip, 'the mindset of those implementing the regime is to seek to minimize the impact of host State conduct on the investment and to compensate the foreign investor when the investment is detrimentally affected by State conduct'.<sup>10</sup> In other terms, the exercise of state sovereignty in IEL is perceived as an economic externality to these actors. One which impinges upon the security of their investment.

Nonetheless, sovereignty in the context of IIL may be most succinctly defined as economic self-determination. A maxim which is codified in the UN General Assembly, stipulating that: 'Every State has the sovereign and inalienable right to choose its economic system ... in accordance with the will of its people,

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<sup>7</sup> Martti Koskenniemi, 'Sovereignty' in *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2009).

<sup>8</sup> Case concerning Right of Passage over Indian Territory, Portugal v India [1957] ICJ Rep 125.

<sup>9</sup> Lauren Benton, 'Anomalies of Empire' in *A Search for Sovereignty: Law and Geography in European Empires* (CUP 2014).

<sup>10</sup> Edward Guntrip, 'Self-Determination and Foreign Direct Investment: Re-Imagining Sovereignty in International Investment Law' [2016] 65 ICLQ 829.

without outside interference, coercion or threat in any form whatsoever.’ If FDI is the instrument employed by foreign investors to attain favourable conditions, then national sovereignty is the primary bargaining chip at the disposal of the host state. The ability to calibrate its own economic agenda, aligning the interests of its foreign investors with the interests of its citizenry.

But consent is never truly genuine and unencumbered if an investment treaty is assented to by a nation which is in a state of economic desperation. The coerced nature of such consent is what led progressive economists Grinspun and Kreklewich to describe modern bilateral investment treaties as “conditioning frameworks” in the sense that they ‘constrict economic and social decision making at the domestic level and exert pressures upon less powerful countries to accept overriding dictates of globalisation and regionalisation in the world economy’.<sup>11</sup> An emphatic description but one which falls within the scope of Akingumbe’s socio-legal thought, probing ‘the context in which [such] agreements are implemented’.<sup>12</sup> Thus, in interpreting the nature of a state’s concession of sovereignty in exchange for the synergistic value of FDI, a modern case study should be interpreted vis-à-vis the degree of vulnerability of the host state at the time of the investment regime’s application.

## **SECTION 2 - A PARALLELISM OF DOMINANCE IN THE ORIGINS OF INTERNATIONAL INVESTMENT LAW**

### **Tracing the Imperial Origins of International Investment Law: Grotius’ Justification of Piracy for the VOC’s Commercial Affairs**

In assessing the contemporary network of global economic relations, governed by regional and international bilateral investment treaties, one must refrain from scrutinizing these frameworks without reference to the historical power structures which forged these legal maxims. As described by Akingumbe, ‘conceptualizing IEL as a social phenomenon is a multidisciplinary exercise’,<sup>13</sup>

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<sup>11</sup> Ricardo Grinspun and Robert Kreklewich ‘Consolidating Neo-Liberal Reforms: “Free Trade” as a Conditioning Framework’ 43 [1994] 33.

<sup>12</sup> *ibid* (n 1).

<sup>13</sup> *ibid* (n 1).

requiring a combination of legal analysis as well as an understanding of the evolving role of the law in these social interactions. Amongst its subtleties, imperial international law was based on the fiction of superiority of civilization as well as on armed power.<sup>14</sup> Lacking in democratic legitimacy, this artificial construct of superiority allowed the powerful entities of the Global North to enjoy vast riches, leaving the rest of the world in thralldom. This period also paved the way for the emergence of the modern principles of IEL, as now found in the diplomatic protection of alien interests. A potent historical example of the manipulation of legal doctrines in the vindication of private commercial interests can be found in the work of lawyer Hugo Grotius, providing advice for the affairs of the Dutch East India Company ('VOC').

Considered a transformative point in the development of the body of rules and customs governing international economic relations, on 25 February 1603, a Portuguese carrack named the *Santa Catarina* embarked on a voyage from Macao to Melaka through the treacherous pirate-infested waters of the Riau Archipelago. During this voyage, this richly laden trade ship was attacked by two vessels commissioned by the VOC, under the command of Jakob van Heemskerck and his Johorean allies. Relying upon evidence of prior hostility by the Portuguese against the Dutch, as well as the laws of public and private armed conflict, Grotius was tasked with justifying the capture of the richly laden treasure ship *Santa Catarina* by the VOC as an act of self-defence sanctioned by the natural laws of armed conflict. Accordingly, he formulated an extensive treatise titled *De Jure Praedae* ('On the Law of Prize and Booty') for the purpose of ousting the possibility of this un-sanctioned aggression from falling under any interpretation of piracy. In short, the crux of Grotius' argument was that the VOC was engaged in an act of economic self-preservation because the Portuguese were impinging upon its commercial activity in the West-Indies, preventing them from exercising their natural right to trade with one another.<sup>15</sup> As deduced by Porras, Grotius' treatise elevated the protection of commerce to a level

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<sup>14</sup> *ibid* (n 5).

<sup>15</sup> Ileana Porras, 'Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius *De Iure Praedae* - The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates"' [2006] 31 *BJIL* 803

commensurate with the national identity, stating that ‘commerce inhabits every inflection of the text’.<sup>16</sup> Painting a portrait of the Portuguese’s aggression as preventing or actively impeding the VOC from exercising any one of the rights bestowed by nature, Grotius elevated the right to free trade as sufficient legal ground upon which to initiate and wage a just war.<sup>17</sup> An undoubtedly ingenious jurisprudential formulation but one which has imbedded an arguably problematic precedent into the substratum of global economic relations.

As deliberated by Ittersum, ‘the natural law and natural rights that Grotius formulated in *De Jure Praedae* cannot be divorced from Dutch imperialism and colonisation of the early modern period.’<sup>18</sup> The justification for this act of aggression allowed the Dutch East India Company to partly shape the Eurocentric framing of international law, allowing the alien entity of the VOC to define the nature and extent of Portuguese sovereignty. Grotius rationalization of the VOC’s unsanctioned aggression allowed for the act of preventing or actively impeding a party from exercising any one of the rights bestowed by nature to suffice as legal ground upon which to initiate and wage a just war.<sup>19</sup> Effectively, the legal apology embodied in *De Jure Praedae* formulated a fundamental tenet of IEL for the purposes of a multinational corporation by elevating the right of economic self-preservation to such fundamental significance, such as to override the sovereignty of the Portuguese under attack. Thereby, justifying the infiltration of the Sta. Catarina as a legitimate act of war and rendering the ship’s highly marketable cargo as a prize in the King’s war against Portugal.

Collating the right to engage in commercial activity with the sanctity of natural law, this justification allowed for the VOC to function as both a commercial entity and as a sovereign nation in itself.<sup>20</sup> Article 37 of the VOC’s charter identified

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<sup>16</sup> *ibid.*

<sup>17</sup> Peter Borschberg, *Hugo Grotius, the Portuguese, and Free Trade in the East Indies* (NUS Press 2011).

<sup>18</sup> Martine Julia van Ittersum, ‘Hugo Grotius in Context: Van Heemskerck’s Capture of the “Santa Catarina” and its Justification in “De Jure Praedae” (1604-1606)’ [2003] 31 AJSS 511.

<sup>19</sup> Peter Borschberg, ‘The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602-c.1616)’ [2002] JSAS 31.

<sup>20</sup> Katie Miles, ‘Historical Evolution of Foreign Investment Law’ in *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (CUP 2013).

Portugal together with Spain as an enemy of the state, rendering their interests susceptible to attack and legitimate seizure as booty of war. But the jurisprudential rationalization of the VOC's attack on the Portuguese has created a precedent which has carried on in the contemporary IEL landscape, justifying military incursions into non-European territories under the premise of protecting private commercial interests. A precedent which permits the alien entity of foreign investors to prescribe a dominant position for themselves by universalizing their commercial affairs, despite the traditional orthodoxy that the alien is considered to be the most abstract and powerless entity within the alien-state dynamic.

### **Mutated Imperialism under the Guise of Established Principles of International Economic Law**

Traces of these historical dynamics of imperialism may be found in the modern doctrines of IEL, often affording special protections to foreign investors by facilitating inherently unbalanced investment regimes. Scholars such as Linarelli have asserted that 'it may credibly be maintained that the modern system of international law is based on a continuation of the international law of the imperial system under a new guise.'<sup>21</sup>

In other words, that the pre-existing self-prescribed position of powerful economic actors of the imperial order has been transplanted into the contemporary economic landscape. While the customary principles of IEL have been designed to guard against asymmetries in international economic relations, the indeterminacy of these doctrines has allowed alien entities to formulate a fiction of economic development and create a narrative of foreign investors as victims. Indeed, this picture of powerful multinational corporations in need of protection against a developing state devoid of funds and legal expertise is not apposite.<sup>22</sup> However, the malleability of these principles has allowed the foreign investor to imbed asymmetrically structured regimes which encroach upon the host's policy-making ambit.

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<sup>21</sup> *ibid* (n 5).

<sup>22</sup> *ibid* (n 5).

For instance, the principle of “non-intervention” stipulates that every sovereign state has the discretion to conduct its affairs without outside interference, though examples of abrogation of this principle are not anomalous. Thomas has written that developing countries hold a valid claim that the coercion exerted by the IMF falls within the ambit of intervention, thereby undermining the integrity of this supposedly cardinal principle.<sup>23</sup> Additionally, Miles has observed that the “Calvo Doctrine”, which seeks to temper the law of diplomatic protection of aliens, has not found ‘acceptance as rule of international law.’<sup>24</sup> A principle which strives towards striking a balance between host states and foreign investors, stipulating that: ‘Aliens should be afforded no more than the same treatment as nationals and must limit themselves to filing claims in the local judicial system’.<sup>25</sup> Arguably, this principle is too concrete and definitive such as to be accepted into the substratum of customary international law. Contrarily, the “international minimum standard” which stipulates that ‘Each Party shall accord to investments ... of another Party treatment in accordance with ... fair and equitable treatment and full protection’,<sup>26</sup> has been imposed by capital exporting-states of the Global North as an existing, universally applicable rule of international law.<sup>27</sup> Thereby, allowing investors to take advantage of their position of leverage by selectively universalizing their commercial affairs under the authority of these fundamental principles.

The root of this issue has been identified in ‘the history of imperialism, the calculated, often brutish use of force, and the manipulation of legal doctrines to acquire commercial benefits [which has] driven the construction of international investment law.’<sup>28</sup> Drawing upon the malleability of IEL principles, Katie Miles has observed that through the study of pivotal historical power structures such as the VOC’s infiltration of the Santa Catarina, it is revealed that IIL may serve as a ‘vehicle for controlling through legal means resistance emanating from

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<sup>23</sup> Caroline Thomas, *New States, Sovereignty, and Intervention* (Gower 1985).

<sup>24</sup> Kate Miles, ‘International Investment Law and Universality: Histories of Shape-Shifting’ [2014] 5 CILJ 986.

<sup>25</sup> *ibid.*

<sup>26</sup> Article 1105 (1), North American Free Trade Agreement (NAFTA).

<sup>27</sup> *ibid* (n 25).

<sup>28</sup> *ibid* (n 18).

capital-importing states.<sup>29</sup> In other words, the imperial origins of IEL, imbedded from the jurisprudential rationalization of aggression masqueraded as the protection of private commercial interests, have mutated into the modern neo-liberal landscape. Thereby, elevating the interests of foreign investors through a form of legal liturgy which falsely presumes that the international relations of IIL operate in flat hierarchies.<sup>30</sup> A narrative now promulgated by credible financial institutions such as the IMF and the World Bank.

While Akingumbe's socio-legal lens advocates that dominant economic actors are imbedding their norms of governance upon vulnerable hosts, it may also be argued that this description of developing nations as victims of economic domination is overreaching. For instance, Ranjan has asserted that this vilification of IIL constitutes a narrow minded and ideologically charged narrative. He writes that 'to portray third world countries as innocuous victims of some form of conspiracy hatched by the transnational capitalist class ... not just oversimplifies the whole debate, but is also patently wrong.'<sup>31</sup> Indeed, such a dogmatic characterization of the foreign investment landscape would undermine the purpose served by investor protections, providing the same privileges to alien entities as to host state nationals. Notwithstanding the cogency of such reservations, this analysis does not purport that this form of exploitation by dominant foreign entities is absolute. Rather, it is argued the very existence of regimes which facilitate this exploitation demonstrates that the rules of IIL are not always driven by balance but are often predicated upon a universalisation of commerce. To pragmatize Akingumbe's arguably ideological project, this paper observes the striking similarity between the imperial patterns of dominance, and the contemporary principles of IEL, which appear to have survived the course of history, and seeped into a more sophisticated form of manipulation under the modern IIL regime.

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<sup>29</sup> *ibid* (n 18).

<sup>30</sup> Thamil Ananthavinayagan, 'Critical Perspectives of International Investment Law' [2021] *HIILP* 1.

<sup>31</sup> Prabhash Ranjan, 'Why High-Profile Investors and Multinational Companies Sue India' (The Wire 10 December 2018) < <https://thewire.in/law/why-high-profile-foreign-investors-and-multinational-companies-sue-india> > accessed 08 February 2025.

### **SECTION 3 - CONTEMPORARY MODALITIES OF POWER IN GLOBAL ECONOMIC GOVERNANCE: THE CPA IN IRAQ**

In contrast to the techniques employed by the feeble recourse of the imperial system, the guise under which the modern rules of IIL camouflage the intention to project power is far more nuanced. When recounting frameworks which encourage the unrestricted flow of foreign capital, none embody the same robust combination of incentives and protections that those prescribed by the Coalition Provisional Authority ('CPA') in Iraq. Epitomizing the kind of wish list that foreign investors and donor agencies dream of for developing markets,<sup>32</sup> this regime perfectly captures the World Bank's ambitions for IIL reform, 'ensuring ease of market entry and ... imposing few restrictions on sectors in which investors can invest'.<sup>33</sup> Notwithstanding the robustness of this regime, Akingumbe's socio-critical lens necessitates an investigation of the context in which these agreements were struck such as to discern the power dynamic permeating this period of purported reconstruction.

#### **"Reconstruction": Knitting Together Narrative and Legal Rule**

Comparable with the Dutch East India Company, the CPA was a quasi-sovereign, commercial entity which emerged following the invasion, and subsequent occupation of Iraq. Led by senior American diplomat Paul Bremer, the CPA enjoyed wide discretionary powers in its mission to repair the Iraq economy and deteriorated post-war infrastructure. In assuming the governance of the state, the CPA derived its authority under the laws of armed conflict. Regulation Number 1 permitted the CPA to exercise authority 'under relevant U.N. Security Council resolutions, including Resolution 1483, and the laws and usages of war'.<sup>34</sup> Following the Coalition's occupation of Iraq, the country was in a state of anguish. With an inexperienced financial sector, destroyed infrastructure, and a generally mismanaged and corrupt government, foreign investment was considered vital in lifting the Iraqi people out of a future of

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<sup>32</sup> The Economist, 'Let's All Go to the Yard Sale', *The Economist* (Middle East and Africa, 25 September 2003).

<sup>33</sup> Daniel Xavier and Kobina Egyir Forneris, *Investment Law Reform: A Handbook for Development Practitioners* (Investment Climate Advisory Services of the World Bank Group 2010) 8.

<sup>34</sup> Regulation Number 1, Coalition Provisional Authority.

impoverishment.<sup>35</sup> Thus, the CPA's privatization of a bulk of state-owned enterprises (Order 39, 26 and 51), embodied a form of neo-liberal 'shock therapy',<sup>36</sup> under the humanitarian guise of reconstructing the downtrodden state of the post-war Iraqi economy. However, as illustrated, the relationship between foreign capital and sustainable development is idiosyncratic, often granting investors protections regardless of their contribution to the welfare of the host country.

Employing Akingumbe's contextually assisted socio-legal lens, we discover that akin to the Santa Catarina's cargo, fully laden with valuable goods from the ports of Macau and China, the vast oil wealth of Iraq is also a crucial variable in assessing the legitimacy of the CPA's reconstruction project. At the time of the invasion, Oil was central to the Iraqi economy representing 79 percent of Iraq's Gross Domestic Product and 95 percent of Iraqi government revenue.<sup>37</sup> The commercial potential of the country's oil wealth and the private contracts granted to US multinationals in the bidding process mirrors the revenue generated at the auction and marketability of the *Sta. Catarina* cargo.<sup>38</sup> Theoretically, the neo-liberal economic formula stipulates that opening the market to foreign investment would serve to invigorate the Iraqi economy by revitalizing domestic businesses and boosting national employment.

However, beyond the inevitable economic risk incorporated by foreign investment, the degree to which foreign capital improves the welfare of the host state is contingent upon the provisions under which foreign capital flows into the host economy. Not the mere flow of FDI itself. But the provisions incorporated by the CPA regime appear to be underwritten by a 'logic that enforces control, domination and exploitation disguised in the language of salvation, progress, modernization, and being good for everyone.'<sup>39</sup> Lending an

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<sup>35</sup> Farrah Hassen, 'Economy and Infrastructure (Public Finance) Working Group: The Future of Iraq Project' (The National Security Archive, 1 September 2006) <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB198/index.htm> accessed 08 February 2025.

<sup>36</sup> Dave Whyte, 'The Crimes of Neo-Liberal Rule in Occupied Iraq' [2006] 47 BJC 177.

<sup>37</sup> Fahad Siddiqui, 'The Coalition Provisional Authority and Iraq: Investment Law and Policy in Action' [2013] 4 OHRLP 84.

<sup>38</sup> Peter Borschberg, 'The Seizure of the *Sta. Catarina* Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602-c.1616)' [2002] JSAS 31.

<sup>39</sup> David Schneiderman, 'The Coloniality of Investment Law' [2019] UTFL.

imperial air of superiority to the Anglo-American Coalition, one which permitted them to be impervious to interests of the Iraqi citizens. While the privatization of the Iraqi economy was driven by a policy of US market liberalization and a promise of salvation, the subtlety in which the CPA's provisions tip the balance in favour of the Coalition appears to exceed the ambit of reconstruction policy.

### **Bremer Orders: Provisions for the Purpose of De-Risking Foreign Investment**

One of the central components of the regime's robustness is its framing, and the focus on the idea of reconstruction in the place of occupation. Order 1 ('De-Ba'athification') mandated the removal of members of the Ba'ath party from public sector jobs.<sup>40</sup> A form of de-risking which insures investors against the re-emergence of the pre-invasion regime, while excluding Iraqis from being hired by the CPA in this reconstruction project. The de-ba'athification of Iraq provided a great opportunity for foreign investors to exclude national interference in their operations, as this provision permitted the CPA to hire only a small number of nationals to work for the reconstruction which resulted in the unemployment of thousands of Iraqis.<sup>41</sup> A form of de-risking which arguably exceeds the remit of the national treatment principle, allowing the investor to undermine the influence of domestic entities upon foreign investment.

Arguably the most robust order promulgated by the civil administrator, Order 39 ('Foreign Investment') provided additional incentives specifically designed to induce foreign investment in Iraq.<sup>42</sup> The objective of this order may be discerned in its preamble which stipulates that '...the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy...'<sup>43</sup> Despite its reconstructive rhetoric, this Order was designed to privatize the Iraqi economy and strip the Iraqi authorities of all economic sovereignty and prerogatives. Predicated upon the "trickle-down" theory that the protection of foreign investors increases a state's attractiveness

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<sup>40</sup> Order Number 1, The Coalition Provisional Authority.

<sup>41</sup> Rajiv Chandasekaran, *Imperial Life in the Emerald City: Inside Iraq's Green Zone* (Alfred A Knopf, 2006) at 326.

<sup>42</sup> *ibid* (n 32).

<sup>43</sup> Order Number 39, The Coalition Provisional Authority.

to FDI, which in turn leads to the development and welfare of the Iraqi people, this order unduly appeals to the interests of the foreign investor. Camouflaging any intention of economic domination, provisions such as Section 8 ('Use of Real Property') prevents foreign investors or business entities from acquiring Iraqi land but permits the use of leases for up to 40 years, subject to unlimited renewal. At face value, Order 39 appears to adhere to the principle of national treatment, a custom which stipulates that a country must 'accord to foreign investors and to foreign-controlled enterprises in its territory treatment no less favourable than that accorded in similar situations to domestic enterprises',<sup>44</sup>. But looking towards other investment-enabling provisions, Order 37 ('Tax Strategy for 2023') granted tax immunity to foreign investors and contractors in 2023, while suspending the collection of import taxes, customs duties on products leaving Iraq under Order 12 ('Trade Liberalisation Policy').

Additionally, the Bush administration undertook additional measures to guarantee immunity from prosecution for white-collar crimes and corporate crimes,<sup>45</sup> under Executive Order 13303, which stipulates that those commercial entities operating in the Iraqi oil sector were exempt from US judicial proceedings, if their violation fell within the bracket of the oil industry, or under the project of reconstructing the Iraqi economy. Effectively, suspending the normal rule of law in the US and Iraq. This veritable legal arsenal of tax immunity, legal immunity, and the conferral of a controlling interest of foreign contractors over national assets, rendered the commercial activity of the Coalition as almost unimpeachable. The Economist declared this neo-liberal economic experiment as a 'capitalist dream,'<sup>46</sup> with the immediate effect of privatizing 200 Iraqi state companies, allowing foreign firms to retain 100% ownership of Iraqi banks, mines, and factories, and permitting foreign investors to repatriate the entirety of their profits out of Iraq.<sup>47</sup> But what were the implications of the CPA's de-risking of foreign investment on the economic self-determination and correlative market landscape of the sovereign Iraqi state?

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<sup>44</sup> Article 3, The General Agreement on Tariffs and Trade 1947.

<sup>45</sup> *ibid* (n 34).

<sup>46</sup> 'Iraq's Economic Liberalization: Let's All Go to the Yard Sale, *The Economist* (Middle East & Africa, 25<sup>th</sup> September 2003).

<sup>47</sup> Naomi Klein, 'Iraq is not America's to Sell' *The Guardian* (Middle East, 07 November 2003).

### **The Result of Abrogating Host State Sovereignty: A Humiliating Form of Governance Sanctioned by Outmoded International Law**

As captured by Akingumbe's employment of a socio-legal conduit towards the form and effect of IEL, the analysis of the relationship between the effectiveness of investment state agreements and the Coalition's mode of economic governance is best achieved by examining the context underpropping these relationships and the subsequent economic impact. In all, the dumping of foreign commodities and the deepening of the country's debt to the IMF through the exploitation of the national oil industry proved an effective formula for US firms such as Toys R US, Halliburton, Bechtel, Mobil, Shell, Phillip Morris, Kentucky Fried Chicken and Pepsi to attain lucrative contracts.<sup>48</sup> Akin to the highly marketable cargo of the Santa Catarina, the CPA tendered the majority of its bids in a non-competitive manner, favouring the interests of specific US private contractors.<sup>49</sup>

Bypassing the customary maxims of international law which fortify the *jus cogens* sovereign right of a people to determine their own social, economic, and cultural future, by positing these prime contractors in the role of the gatekeepers of the Iraqi reconstruction project, here we may observe the theoretical reach of neo-liberal economic rule exceeding its grasp. We may observe the clear cost of the CPA's commercial risk minimization formula which, further than depriving sovereign states from freely governing their own economic policy, produces devastating consequences for the market landscape of the host state. Facilitating the cleansing force of violence through military occupation, the promise of salvation through Western economic saviour, the imposition of a heavily skewed investment framework, and the exoneration of alien/investor liability in the event of endemic poverty, how can such a blatant form of economic domination be in harmony with the customary principles of international law?

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<sup>48</sup> *ibid* (n 34).

<sup>49</sup> Whyte, 'The Crimes of Neo-Liberal Economic Rule in Occupied Iraq' [2023]

Under Article 55 of The Hague Regulations, it is provided that ‘... the occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.’<sup>50</sup> Effectively, the laws of belligerent occupation prescribed by Article 55 outlaw the privatization of a host nation’s national assets when under military occupation by a hostile alien entity. A customary maxim of international law which the British-American Coalition directly undermines by dumping foreign commodities, harming key national industries through the spending of Iraqi oil revenues, deepening the countries debt to the IMF, and increasing its dependency on external long-term capital. Additionally, Article 64 of the Geneva Convention of 1949 that the occupying power may subject provisions upon the population of the occupied territory ‘which are essential to enable the Occupying Power to fulfil its obligations ... to maintain orderly government of the territory, and to ensure the security of the Occupying power.’<sup>51</sup> But the ultimate price of this neo-liberal economic experiment was the decimation the Iraqi economy.

### **Connecting the Dots: Illuminating a Credible Pattern of Neo-Liberal Economic Domination Stemming from Imperial Origins**

In both the CPA’s economic occupation of the devastated post-war Iraqi territory and the VOC’s armed infiltration of the treasure ship; Sta. Catarina, we may observe the following courses of action which led to the development of these international economic regimes. In both scenarios, the alien-investor entity is permitted to employ supposedly lawful violence to help orient subjects towards profitable activities outside the sphere of domestic laws, consolidate an authoritative form of legal legitimacy under the premise of protecting the sanctity of free commerce and effectively exonerating the liability of the alien entity in the enforcement of their self-serving and arguably skewed economic regime. Drawing upon the Iraq case study as modern evidence of this

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<sup>50</sup> Article 55, The Hague Regulations 1907.

<sup>51</sup> Article 64, The Geneva Conventions of 1949.

phenomenon, the CPA's economic occupation proves tragically accurate in capturing the paradigm of an economically imbalanced alien-state dynamic.

Illuminating a prime example of the sovereignty of independent states being curtailed by market conditions, facilitated by the very rules of IEL which are designed to create balance, the CPA-Iraq case study showcases that the modern landscape has not been divorced from the anchors of the imperial order. That the language of international investment law, as forged by canonical incursions such as the VOC's historic conquests of commercial naval territory, may be used in the modern context to grant structural advantages to Western firms to penetrate and transform economies of weak bargaining power such as to accommodate their commercial preferences. A recondite tension which, while rooted in the past, should be expelled from the present international economic order.

### **Conclusion**

Positing the CPA regime as modern evidence that the imperial underpinnings of IIL have not been divorced from the modern rules of IEL, Akingumbe's socio-legal rhetoric proves illuminating. Understandably, this portrait of investment law will be resisted by many of its personnel as the regimes constructed by sovereign states are ultimately founded upon the consent of the peoples bound to it. But such ideological resistance while legally grounded, fails to account for the coerced nature of such consent which further than depriving people of their choices, infiltrates the host state's decision-making process. Thus, to break the inextricable linkage between the modern modalities of IEL and the previous imperial economic order, closer attention to the post-investment phase of host countries is merited. Additionally, the IMF and the World Bank should work towards providing protection to foreign investors without abrogating the policy ambit of host states, for example, through the widespread use of investment insurances. Only through such equalizing measures may we better ensure that the states of the Global South are legally equipped to be masters of their own economic destiny.

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