A BRIEF HISTORY OF INTERNATIONAL INVESTMENT AGREEMENTS

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One of the most remarkable phenomena in international law during the past fifteen years has been the extraordinary increase in the number of agreements concluded relating to the protection or liberalization of foreign investment. More than 2500 such agreements now exist, with the great majority having been concluded since 1990.[1] This number includes almost 2400 bilateral investment treaties (BITs) as well as more than 200 trade agreements that contain investment provisions.[2]

Although the number of agreements has accelerated remarkably

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[1] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT [UNCTAD], *Research Note: Recent Developments in International Investment Agreements*, 2, UNCTAD/WEB/ITE/IIT/2005/1 (Aug. 30, 2005), *available at* http://www.unctad.org/sections/dite_dir/docs//webiteiit20051_en.pdf.

[2] According to UNCTAD, 2392 BITs had been concluded as of the end of 2004, while 209 trade agreements with investment provisions had been concluded as of that date. *Id.* at 1, 10.

in recent years, international agreements relating to investment have a long history. Provisions relating to the protection of property abroad may be found in international agreements dating back to the late Eighteenth Century.[3]

This essay traces the history of these international investment agreements. It finds that the history thus far comprises three separate eras. The first, the Colonial Era, began in the late Eighteenth Century and continued until the end of the Second World War.[4] The second, the Post-Colonial Era, began with the end of the war and continued until approximately 1990, with the collapse of the Soviet Union.[5] The third, the Global Era, began in approximately 1990 and continues until the present.[6]

I. THE COLONIAL ERA

Prior to the Second World War, the protection of foreign direct investment was not often a concern in international agreements. Most international economic agreements concerned themselves with establishing trade relations, though these agreements sometimes included some provisions on the protection of property of nationals of one state in the territory of another state.

The United States, for example, as early as the Eighteenth Century began to conclude bilateral treaties of "Friendship, Commerce and Navigation" (FCN), the purpose of which was to establish trade relations with its treaty partners.[7] These treaties included provisions guaranteeing "special protection"[8] or "full and

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[3] *See infra* note 7.

[4] *See infra* Part I.

[5] *See infra* Part II.

[6] *See infra* Part III.

[7] Not all of these treaties were formally titled treaties of "friendship, commerce and navigation." The name is thus a generic one. The first such agreement was the Treaty of Amity and Commerce, U.S.-Fr., July 16, 1782, 8 Stat. 12, negotiated with France in 1778 by Benjamin Franklin, Arthur Lee and Silas Dean. Other Eighteenth Century agreements include Treaty of Amity and Commerce, U.S.-Neth., Oct. 8, 1782, 8 Stat. 32; Treaty of Amity and Commerce, U.S.-Swed., Apr. 3, 1783, 8 Stat. 60; Treaty of Amity and Commerce, U.S.-F.R.G. (Prussia), July 9- Sept. 10, 1785, 8 Stat. 84; Treaty of Peace and Friendship, U.S.-Morocco, June 23-July 6, 1786, 8 Stat. 100; Treaty of Amity, Commerce and Navigation, U.S.-G.B., Nov. 19, 1794, 8 Stat. 116; and Treaty of Friendship, Limits and Navigation, U.S.-Spain, Oct. 27, 1795, 8 Stat. 138.

[8] *See, e.g.,* General Convention of Peace, Amity, Navigation and Commerce, U.S.-Colom., art. Tenth, Oct. 3, 1824, 8 Stat. 306; Treaty of Peace, Friendship, Commerce, and Navigation, U.S.-Bol., art. 13, May 13, 1858, 12 Stat. 1003; General Treaty of Amity, Commerce, and Consular Privilege, U.S.-El Sal., art. 13th, Dec. 6, 1870, 18 Stat. 725.

perfect protection"[9] to the property of nationals of one party in the territory of another party. They also required payment of compensation for expropriation[10] and guaranteed to nationals of one party most favored nation (MFN) and national treatment with respect to the right to engage in certain business activities in the territory of the other party.[11] Occasionally, they even provided limited protection for currency transfers.[12] The focus was on protecting property, as opposed to investment.

The principal source of norms for the protection of international investment stocks in the Colonial Era was customary international law, which obligated host states to treat investment in accordance with an international minimum standard.[13] Customary international law, however, offered an inadequate mechanism for the protection of foreign investment. First, some countries disputed that customary international law imposed an international minimum standard on the treatment of foreign investment.[14] Most notably, the Latin American countries adhered to the Calvo doctrine, under which foreign investors were entitled only to the treatment that the host country afforded to its own investors.[15] Second, even where it was agreed that an international minimum standard existed, the content of the standard was vague and arguably not particularly demanding.[16] Third, in the

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[9] *See, e.g.,* Treaty of Friendship, Commerce, and Navigation, U.S.-Para., art. IX, Feb. 4, 1859, 12 Stat. 1091; Treaty of Friendship, Commerce, and Navigation, U.S.-Arg., art. VII, July 27, 1853, 10 Stat. 1005; Treaty of Friendship, Commerce, and Navigation, U.S.-Costa Rica, art. VII, July 10, 1851, 10 Stat. 916.

[10] *See, e.g.,* Treaty of Amity, Commerce, and Navigation, U.S.-Congo, art. III, Jan. 24, 1891, 27 Stat. 926; General Treaty of Amity, Commerce, and Consular Privileges, U.S.-El Sal., art. 29th, Dec. 6, 1870, 18 Stat. 725; Treaty of Friendship, Commerce, and Navigation, U.S.- Nicar., art. IX, June 21, 1867, 15 Stat. 549.

[11] *See, e.g.,* General Treaty of Amity, Commerce, and Navigation, supra note 8, art. 3rd; Treaty of Commerce, U.S.-Yugo., art. I, Oct. 14, 1881, 22 Stat. 963.

[12] Treaty of Commerce, *supra* note 11, art. II, 22 Stat. at 964.

[13] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 527-28 (5th ed. 1998). As Brownlie notes, some states disputed the existence of such a standard. *Id.*

[14] *Id.* at 526-27.

[15] *See* DONALD R. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY 17-20 (1955).

[16] The classic formulation of the standard was that articulated in the Neer Claim, 4 R. Int'l Arb. Awards 60 (1926), in which the commission required that the treatment "amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards, that every reasonable and impartial man would readily recognize its insufficiency." The international minimum standard, however, was also said to include some more rigorous requirements, including an obligation to pay "prompt, adequate and effective" compensation for the

absence of an agreement by the host state to submit the dispute to arbitration,[17] the only mechanism offered by customary law for enforcement of customary norms was espousal.

Espousal is a mechanism whereby an injured national's state assumes the national's claim as its own and presents the claim against the state that has injured the national.[18] Espousal is often an unsatisfactory remedy for a number of reasons. First, the national's state is under no obligation to espouse a claim[19] and, in fact, a home state is often reluctant to espouse because espousal can disrupt the home state's relations with the host state.[20] Further, a home state may espouse a claim only after the national has exhausted his or her remedies under the law of the host state,[21] a process that may require a substantial expenditure of time and money without satisfactory resolution.[22] Finally, once local remedies have been exhausted and the home state has been persuaded to espouse the claim, the investor loses control over the claim. The home state is entitled to settle the claim on any terms it wishes.[23] And, in fact, because espousal is essentially a diplomatic process, there is no guarantee that the host state will agree to resolve the claim on any terms.

Diplomacy was effective on occasion. The United States, for example, was able during the Nineteenth Century to persuade Latin American countries to agree periodically to the submission of claims of injuries to nationals to arbitration.[24]

As an alternative to diplomacy, nations sometimes utilized

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expropriation of foreign owned property. *See infra* text accompanying note 96."

[17] A state is not subject to the jurisdiction of an international tribunal without its consent. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 177-78 (April 11).

[18] *See* 8 MARJORIE MILLACE WHITEMAN, DIGEST OF INTERNATIONAL LAW 1216-19 (1967).

[19] *Id.*

[20] KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 10, 23 (1992).

[21] *See, e.g.,* Interhandel (Switz. v. U.S.), 1959 I.CJ. 6, 27 (Mar. 21); Ambatielos Claim (Greece v. U.K.) 23 I.L.R. 306, 344 (1956); 8 WHITEMAN, *supra* note 18, at 769-807.

[22] The requirement of exhaustion, however, may be excused if it appears that such remedies would not be effective. *See generally* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 713 cmt. f (1987); Panevezys-Saldutiskis Ry. (Est. v. Lith) 1939 P.C.I.J. (ser. A/B) No. 76, at 18 (Feb. 28).

[23] 8 WHITEMAN, *supra* note 18, at 1216-19.

[24] One estimate is that between 1829 and 1910, the United States entered into approximately 40 arbitrations with Latin American countries. *See* Lionel M. Summers, *Arbitration and Latin America*, 3 CAL. W. INT'L L.J. 1, 7 (1972).

military force to protect foreign investments.[25] The Roosevelt Corollary to the Monroe Doctrine, for example, explicitly authorized the use of force by American troops in the Western Hemisphere to collect debts owed to American citizens.[26] And, in fact, the United States intervened in Latin America on repeated occasions during the first third of the Twentieth Century, until the Good Neighbor Policy of the Roosevelt Administration ended the practice.[27]

In summary, several features characterize the international investment regime in the Colonial Era. First, trade and property protection provisions appeared in the same agreement. In the Colonial Era, states generally did not negotiate separate agreements on property or investment. Second, the emphasis of the treaties was on establishing commercial relations. Property protection provisions were present in the agreements, but were clearly secondary in importance to the creation of commercial relations.[28] Third, the network of treaties was limited in scope and the protection afforded was weak, particularly insofar as the treaties provided no means for enforcement.[29] Thus, the nonlegal mechanisms of military force and diplomacy were left to provide the principal means for protecting foreign investment.

II. THE POST-COLONIAL ERA

The Post-Colonial Era in the history of international investment agreements began with the end of the Second World War and continued until the collapse of the Soviet Union. Three events in particular shaped the structure and content of international investment agreements during that period.

First, as a reaction to the severe economic depression that had preceded the war and that many believed had been exacerbated by the

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[25] *See, e.g.,* Edwin M. Borchard, *Limitations on Coercive Protection*, 21 AM. J. INT'L L. 303 (1927); Luis M. Drago, *State Loans in Their Relation to International Policy,* 1 AM. J. INT'L L. 692 (1907).

[26] *See* ARMIN RAPPAPORT, A HISTORY OF AMERICAN DIPLOMACY 223-29 (1975).

[27] *Id.* at 228-29, 324.

[28] *See* SAMUEL BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 25-29, 65-84, 101-10, 200-02 (1965) (describing early history of FCN agreements, including their purpose).

[29] International investment law as late as the period immediately following the Second World War has been characterized as "an ephemeral structure consisting largely of scattered treaty provisions, a few questionable customs, and contested general principles of law." Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 68 (2005).

protectionist policies of the 1920s,[30] the victorious allies forged a consensus in favor of liberalizing trade.[31] That consensus led in 1947 to the conclusion of the General Agreement on Tariffs and Trade (GATT),[32] which shifted the primary legal framework for international trade relations from bilateral to multilateral agreements and set in motion successive rounds of negotiations aimed at worldwide trade liberalization.[33] A separate treaty, the Havana Charter, that was intended to create a liberal investment regime for both trade and investment never entered in to force.[34] Thus, entry into force of the GATT created a major multilateral organization with competence over trade, but not investment. Investment would need to be treated outside the GATT framework, which to a large extent meant separately from trade.

As the GATT became the principal forum within which international trade negotiations were conducted, bilateral trade agreements began to diminish in importance. The United States launched a new series of FCN agreements starting in 1946 and continuing for the next twenty years, a period within which 21 agreements were concluded.[35] After 1966, however, the United States never again concluded an FCN agreement.

The post-war U.S. FCNs included the principal property protection provisions that had appeared in the FCNs of the Colonial

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[30] BERNARD HOEKMAN & MICHAEL KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM 2-3 (1995).

[31] RONDO CAMERON, A CONCISE ECONOMIC HISTORY OF THE WORLD 370-71 (3d ed. 1997).

[32] General Agreement on Tariffs and Trade, Oct. 20, 1947, 61 Stat. A-11, 55 U.N.T.S. 188.

[33] The most recent to conclude was the Uruguay Round, which ended in December 1993. *See* JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM (1995). The World Trade Organization is now engaged in the Doha Round of multilateral trade negotiations.

[34] HOEKMAN & KOSTECKI, *supra* note 30, at 12-13.

[35] For a discussion of the modern FCNs, see HENRY C. HAWKINS, COMMERCIAL TREATIES AND AGREEMENTS: PRINCIPLES AND PRACTICE (1951); ROBERT REUBERT WILSON, THE INTERNATIONAL LAW STANDARDS IN TREATIES OF THE UNITED STATES (1953); ROBERT REUBERT WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW (1960); Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958); Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229 (1956); Robert R. Wilson, *A Decade of New Commercial Treaties*, 50 AM. J. INT'L L. 927 (1956); Robert R. Wilson, *Postwar Commercial Treaties of the United States*, 43 AM. J. INT'L L. 262 (1949); and Robert R. Wilson, *Property-Protection Provisions in United States Commercial Treaties*, 45 AM. J. INT'L L. 83 (1951).

Era. The post-war FCNs guaranteed "equitable treatment" [36] and the "most constant protection and security"[37] to property of foreign nationals and companies. Such property could not be taken without payment of just compensation.[38] These FCNs also guaranteed to nationals and companies of one party national and MFN treatment with respect to the right to engage in various types of commercial activities, meaning that foreign investors in effect were entitled to national and MFN treatment with respect to the right to establish investment.[39]

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[36] For example, the FCN with Greece provided that: "Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party." Treaty of Friendship, Commerce and Navigation, U.S.-Greece, art. I, Aug. 3, 1951, 5 U.S.T. 1829 [hereinafter FCN Greece].

[37] For example, FCN Greece, *supra* note 36, at art. VII(1), provided that: "Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party."

[38] For example, FCN Greece provided that:

> Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for public benefit, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof. It is understood that withdrawal of such compensation shall be in accordance with applicable laws and regulations consistent with the provisions of Article XV [relating to exchange controls] of the present Treaty. The provisions of the present paragraph shall extend to interests held directly or indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party.

FCN Greece, *supra* note 36, at art. VII(3)

[39] For example, the Treaty of Friendship, Commerce and Navigation with Japan provided that:

> 1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like

The post-war FCNs included some innovations. First, they extended treaty protections to corporate entities.[40] Earlier agreements had protected individuals. The post-war agreements for the first time also regularly included protection against exchange controls.[41]

> enterprises controlled by nationals and companies of such other Party.
>
> 2. Each Party reserves the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry on public utilities enterprises or enterprises engaged in shipbuilding, air or water transport, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources. However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party. Moreover, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies to perform functions necessary for essentially international operations in which they are permitted to engage.
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> 3. The provisions of paragraph 1 of the present Article shall not prevent either Party from prescribing special formalities in connection with the establishment of alien-controlled enterprises within its territories; but such formalities may not impair the substance of the rights set forth in said paragraph.
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> 4. Nationals and companies of either Party, as well as enterprises controlled by such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article.

Treaty of Friendship, Commerce and Navigation, U.S.-Japan, art. VII, Apr. 2, 1953, 4 U.S.T. 2063 [hereinafter FCN Japan].

[40] *See* Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373 (1956).

[41] For example, FCN Japan, *supra* note 39, at art. XII, provided that:

> 1. Nationals and companies of either Party shall be accorded by the other Party national treatment and most-favored-nation treatment with respect to payments, remittances and transfers of funds or financial instruments between the territories of the two Parties as well as between the territories of such other Party and of any third country.
>
> 2. Neither Party shall impose exchange restrictions as defined in paragraph 5 of the present Article except to the extent necessary to prevent its monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves. It is understood that the provisions of the present Article do not alter the obligations either Party

Further, these agreements included a dispute resolution provision consenting to the jurisdiction of the International Court of Justice over disputes involving the interpretation or application of the agreement.[42] The inclusion of a dispute resolution provision solved the problem that a host state could not be subject to the jurisdiction of an international tribunal without its consent,[43] though it did not relieve investors of the need to exhaust local remedies and to persuade their home state to espouse their claim before pursuing a remedy under international law.[44]

The conclusion of the post-war FCNs with important investment

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> may have to the International Monetary Fund or preclude imposition of particular restrictions whenever the Fund specifically authorizes or requests a Party to impose such particular restrictions.
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> 3. If either Party imposes exchange restrictions in accordance with paragraph 2 above, it shall, after making whatever provision may be necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of its people, make reasonable provision for the withdrawal, in foreign exchange in the currency of the other Party, of: (a) the compensation referred to in Article VI, paragraph 3, of the present Treaty [relating to expropriation], (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (c) amounts for amortization of loans, depreciation of direct investments, and capital transfers, giving consideration to special needs for other transactions. If more than one rate of exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.
>
> 4. Exchange restrictions shall not be imposed by either Party in a manner unnecessarily detrimental or arbitrarily discriminatory to the claims, investments, transport, trade, and other interests of the nationals and companies of the other Party, nor to the competitive position thereof.
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> 5. The term "exchange restrictions" as used in the present Article includes all restrictions, regulations, charges, taxes, or other requirements imposed by either Party which burden or interfere with payments, remittances, or transfers of funds or of financial instruments between the territories of the two Parties.

[42] For example, FCN Japan, *supra* note 39, at art. XXIV(2), provided that: "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means."

[43] *See supra* text accompanying note 17.

[44] *See supra* text accompanying notes 18-23.

provisions reflected the fact that investment protection for the first time had become a primary goal of the FCN agreements.[45] The United States recognized that a bilateral treaty providing for investment protection was necessary. At the same time, however, the FCN agreements came to be seen as less than ideal vehicles because they were primarily trade agreements and trade relations now were being negotiated principally through the GATT.[46]

The second major event shaping the international investment regime of the Post-Colonial Era was the process of decolonialization that began after the war and led to the creation of scores of newly independent but economically undeveloped countries.[47] These newly independent states were fiercely protective of their independence[48] and came to regard foreign investment as a form of neocolonialism because it involved foreign control over the means of production.[49] Concerns also were expressed that foreign investors would interfere in the domestic affairs of the host state.[50] Although foreign direct investment created the greatest concerns, because it involves a foreign presence in the territory of the developing country, even trade with developed countries was viewed with suspicion. The fear was that trade between developed and developing countries would result in the exploitation of the latter.[51] Many developing countries closed their economies to new foreign investment and began to expropriate existing investment.[52] They also adopted import substitution policies, under which they would seek to produce needed goods and services locally rather than

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[45] VANDEVELDE, *supra* note 20, at 17.

[46] *See supra* text accompanying notes 32-33.

[47] The number of countries more than tripled as a result of decolonialization after the war. DAVID S. LANDES, THE WEALTH AND POVERTY OF NATIONS 431 (W.W. Norton & Co. Ltd. 1999) (1998).

[48] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 12 (1994).

[49] DEAN HANINK, THE INTERNATIONAL ECONOMY: A GEOGRAPHIC PERSPECTIVE 234 (1994).

[50] ROBERT GILPIN WITH ASSISTANCE OF JEAN M. GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 247-48 (1987); MICHAEL P. TODARO, ECONOMIC DEVELOPMENT 534 (5th ed. 1994).

[51] BARRY W. POULSON, ECONOMIC DEVELOPMENT: PRIVATE AND PUBLIC CHOICE 39 (1994).

[52] These expropriations included notably the seizure of petroleum assets in Iran in 1951 and in Libya in 1955, and Castro's expropriation of the private sector in Cuba starting in 1959. These waves of expropriations continued in the 1970s. One study by the United Nations has identified 875 expropriations occurring in sixty-two countries between 1960 and 1974. Salacuse & Sullivan, *supra* note 29, at 75 n.54.

importing them from developed countries.[53] Where economic relations with other countries were desired, developing countries would seek to form them with other developing countries.[54]

The third event was the emergence of the socialist bloc led by the Soviet Union. Immediately following the war, the socialist states undertook massive expropriations of the private sector, including foreign-held assets.[55] They also encouraged developing countries in the view that economic relations with the developed countries of Western Europe and North America would be inherently exploitative and that the best path to economic development lay in extensive state regulation of the economy rather than through the free market.[56]

By the early 1970s, the developing and socialist countries had mounted an effort in the United Nations General Assembly, where they held a numerical majority, to establish recognition of their right to expropriate foreign investment without payment of fair market value for the expropriated assets. On May 1, 1974, the General Assembly adopted the Declaration of the New International Economic Order (NIEO),[57] which declared that states have "[f]ull permanent sovereignty" over their natural resources and other economic activities.[58] State sovereignty includes "the right of nationalization or transfer of ownership to its nationals."[59] The Declaration did not specify any obligation to pay compensation. On December 12, by a vote of 120-6 with ten abstentions,[60] the General Assembly adopted

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53 JOHN RAPLEY, UNDERSTANDING DEVELOPMENT: THEORY AND PRACTICE IN THE THIRD WORLD 22-25 (1996).

54 Starting in the 1960s, developing countries made numerous attempts to create preferential trading arrangements among themselves, most of which were unsuccessful. DOMINICK SALVATORE, INTERNATIONAL ECONOMICS 314-15, 323-25 (5th ed. 1995).

55 MICHAEL BARRETT BROWN, MODELS IN POLITICAL ECONOMY 193-267 (Penguin Books 2d ed. 1995); RAPLEY, *supra* note 53, at 44.

56 *See generally* E. WAYNE NAFZIGER, THE ECONOMICS OF DEVELOPING COUNTRIES 106-08 (3d ed. 1997); RAPLEY, *supra* note 53, at 18-20.

57 Declaration on the Establishment of a New Economic Order, G.A. Res. 3201(S-VI), U.N. GAOR, 6th Special Sess., 2229th plen. mtg., U.N. DOC. A/RES/3201(S-VI) (May 1, 1974), *reprinted in* 13 I.L.M. 715 (1974).

58 *Id.* ¶ 4(e).

59 *Id.*

60 The six states that voted in opposition were Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom and the United States. The ten states that abstained were Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, and Spain. Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., 2315th plen. mtg., U.N. Doc. A/RES/3281(XXIX) (Dec. 12, 1974), *reprinted in* 14 I.L.M. 251 (1975).

the Charter of Economic Rights and Duties of States (CERDS).[61] Article 2.2(c), which was adopted by a separate vote of 104-16, with six abstentions,[62] declared that each state has the right "[t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent."[63] The Charter thus stated that compensation should be paid, not that it must be paid, and that the amount of compensation would be based on national law, which might not provide for any compensation, rather than international law.[64]

Developed countries responded to the threat of uncompensated expropriation by creating the bilateral investment treaty (BIT).[65] The United Nations Charter, adopted at the end of the war, had prohibited

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[61] Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., 2315th plen. mtg., U.N. Doc. A/RES/3281(XXIX) (Dec. 12, 1974), *reprinted in* 14 I.L.M. 251 (1975).

[62] The sixteen states that voted in opposition were Austria, Belgium, Canada, Denmark, Federal Republic of Germany, France, Ireland, Italy, Luxembourg, Japan, the Netherlands, Norway, Spain, Sweden, the United Kingdom and the United States. The six states that abstained were Australia, Barbados, Finland, Israel, New Zealand and Portugal. *Id.*

[63] *Id.* at art. 2, ¶ 2(c).

[64] *See generally* Charles N. Brower & John B. Tepe, Jr., *The Charter of Economic Rights and Duties of States: A Reflection or a Rejection of International Law?*, 9 INT'L LAW. 295 (1975); Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Wealth*, 75 AM. J. INT'L L. 437 (1981).

[65] The BIT programs as they emerged in the early years are described in RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (1995); VANDEVELDE, *supra* note 20, Adeoye Akinsanya, *International Protection of Direct Foreign Investments in the Third World*, 36 INT'L & COMP. L.Q. 58 (1987), Eileen Denza & Shelagh Brooks, *Investment Protection Treaties: United Kingdom Experience*, 36 INT'L & COMP. L.Q. 908 (1987); Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L L. 373 (1985); Mohamed I. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 7 ICSID REV. 339 (1992); Palitha T.B. Kohona, *Investment Protection Agreements: An Australian Perspective*, 21 J. WORLD TRADE L. 79 (1987); T. Modibo Ocran, *Bilateral Investment Protection Treaties: A Comparative Study*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 401 (1987); Robert K. Paterson, *Canadian Investment Promotion and Protection Treaties*, 29 CAN. Y.B. INT'L L. 373 (1991); Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655 (1990); M. Sornarajah, *State Responsibility and Bilateral Investment Treaties*, 20 J. WORLD. TRADE L. 79 (1986); Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States,* 21 CORNELL INT'L L.J. 201 (1988) [hereinafter Vandevelde, *The Bilateral Investment Treaty Program*]; and Kenneth J. Vandevelde, *U. S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621 (1993).

the use of military force[66] except in self-defense,[67] which rendered the use of force to collect debts or protect investment illegal under international law.[68] Given the serious deficiencies of customary international law as a means of protecting international investment,[69] treaties offered potentially the most effective means for preventing uncompensated expropriations.

Germany was the first to conclude such an agreement. Having lost its foreign investment as a result of its defeat in the Second World War, Germany was especially sensitive to the political risks to which foreign investment was exposed.[70] In 1959, Germany concluded the first two bilateral investment treaties, one with Pakistan and the other with the Dominican Republic.[71]

Other Western European countries quickly followed Germany's lead. France[72] concluded its first BIT in 1960, Switzerland[73] in 1961, the Netherlands[74] in 1963, Italy[75] and the Belgium-Luxembourg Union[76] in 1964, Sweden[77] and Denmark[78] in 1965, and Norway[79] in 1966.

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66 U.N. Charter art. 2, para. 4 (Providing in part that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ….").

67 U.N. Charter art. 51 (Declaring that "[n]othing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security.").

68 Even before the adoption of the U.N. Charter, the use of force to collect debts had become increasingly controversial. For example, Article I of the Hague Convention of 1907 had outlawed the use of force to collect contract debts owed to private citizens of one state by the government of another state unless the debtor state refused to submit the dispute to arbitration. Pacific Settlement of International Disputes (Hague, I), Oct. 18, 1907, T.S. No. 536, 1 Bevans 577. The American delegation to the conference that drafted the convention had supported this provision. *See* 6 GREEN HACKWORTH, DIGEST OF INTERNATIONAL LAW 152 (1943).

69 *See supra* text accompanying notes 14-17.

70 Salacuse & Sullivan, *supra* note 29, at 73.

71 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES IN THE MID-1990S at 8, 177, U.N. Sales No. E.98.II.D.8 (1998).

72 *Id*. at 175 (agreement was with Chad).

73 *Id.* at 205 (agreement was with Tunisia).

74 *Id*. at 192 (agreement was with Tunisia).

75 *Id.* at 184 (agreement was with Guinea).

76 *Id.* at 163 (agreement was with Tunisia).

77 *Id.* at 204 (agreement was with Ivory Coast).

78 *Id.* at 172 (agreement was with Madagascar).

79 *Id.* at 193 (agreement was with Madagascar).

Additional expropriations during the 1970s[80] and the adoption of the NIEO and CERDS resolutions triggered additional BIT programs in the 1970s. The United Kingdom[81] concluded its first BIT in 1975, Austria[82] in 1976 and Japan[83] in 1977. The United States made the decision to inaugurate its BIT program in 1977, the first year of the Carter Administration, although it did not successfully complete a negotiation until the 1980s.[84]

These new bilateral investment treaties were remarkably uniform in content and contained several distinctive features.[85] First, the BITs, as their name implied, dealt exclusively with investment. The developed countries recognized that trade was now within the province of the GATT. Other factors, however, also militated in favor of agreements restricted solely to investment. For example, the inclusion of noninvestment issues, it was feared, would make the agreements too complex and difficult to conclude.[86] Thus, the establishment of investment protection might be delayed by disagreements over unrelated issues. At the same time, the desire of developing countries to obtain concessions in noninvestment areas might induce them to conclude BITs containing investment obligations that they could not honor, with the result that conclusion of the agreements might offer investors false security.[87] At least in the United States, it was hoped that the BITs would reflect a genuine commitment to investment protection on which investors could rely.[88]

Second, BITs were negotiated principally between a developed and a developing country.[89] The underlying assumption was that the agreement would protect the investment of the developed country in the territory of the developing country.[90] Typically, the agreement was drafted by the developed country and offered to the developing country for signature, with the final agreement reflecting only minor changes from the original draft.[91] This persistent pattern added an

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80 *See supra* text accompanying note 52.

81 UNCTAD, *supra* note 71, at 211 (agreement was with Egypt).

82 *Id.* at 161 (agreement was with Romania).

83 *Id.* at 185 (agreement was with Egypt).

84 Vandevelde, *The Bilateral Investment Treaty Program, supra* note 65, at 209-11.

85 *See generally* UNCTAD, *supra* note 71; Dolzer & Stevens, *supra* note 65.

86 Vandevelde, *The Bilateral Investment Treaty Program, supra* note 65, at 210.

87 VANDEVELDE, *supra* note 20, at 26, 31-32.

88 Vandevelde, *The Bilateral Investment Treaty Program, supra* note 65, at 211-12.

89 UNCTAD, *supra* note 71, at 8-19.

90 *Id.* at 1.

91 For a discussion of the U.S. experience in this regard, see Vandevelde, *The Bilateral Investment Treaty Program, supra* note 65, at 211-13. For a general discussion

ideological dimension to the agreements. Although both parties formally assumed the same obligations, the agreements were perceived as nonreciprocal because in practice the obligations all fell on the developing country party.[92]

Third, the motivation for the developing country to conclude the agreements in most cases was to attract foreign investment.[93] The theory was that offering legal protections to foreign investment would induce foreign investors to invest.

Fourth, the motivation for the developed country to conclude the agreements was to obtain protection for its foreign investment.[94] Whereas the FCN agreements had been concerned principally with establishing economic relations, the BITs were a defensive reaction to past expropriations of existing investments without payment of fair market value.[95] In the United States in particular, the decision to negotiate BITs was very much motivated by a desire to create a network of treaties adopting the standard of prompt, adequate and effective compensation for expropriation, a standard that, among other things, required payment of fair market value.[96] Indeed, the United States hoped that the conclusion of a sufficiently large network of treaties embracing that standard would provide evidence that the standard was a norm of customary international law and thus applied to expropriations even in the absence of a treaty.[97] The United States therefore refused to conclude any BIT unless it adopted that standard explicitly.[98] Establishing the principle of prompt, adequate and effective compensation was more important to the United States than obtaining protection for any specific asset of foreign investment.[99]

Fifth, presumably because of the perceived nonreciprocal nature

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of BIT negotiations, see Kenneth J. Vandevelde, *Treaty Interpretation from a Negotiator's Perspective,* 21 VAND. J. TRANSNAT'L L. 281 (1988).

92 SORNARAJAH, *supra* note 48, at 227.

93 UNCTAD, *supra* note 71, at 5.

94 *Id.* at 2-6.

95 VANDEVELDE, *supra* note 20, at 20.

96 *Id.* at 21. The standard of prompt, adequate and effective compensation for expropriation originally was articulated in 1938 by U.S. Secretary of State Cordell Hull in a note to the Mexican government. *Id.* at 118. This language soon became the definitive formulation in the view of the United States of the standard of compensation required by customary international law in the event of an expropriation of foreign owned property, supplanting earlier formulations, such as "just compensation." *Id.* The standard was understood to require payment without delay of fair market value in a freely convertible currency. *Id.*

97 *Id*.

98 *Id.* at 25-26.

99 *Id.* at 125.

of the agreements and the skepticism of many developing countries toward foreign investment, the network of BITs remained somewhat limited. From 1959 to 1969, only seventy-five BITs worldwide were concluded, fewer than seven per year.[100] From 1970 to 1979, the rate grew slightly to just over nine per year and ninety-two BITs were concluded.[101] The rate more than doubled in the 1980s to more than twenty-one agreements concluded each year, for a total of 219 during that decade.[102] Still, from 1959 until 1989, only 386 agreements were concluded, an average of about one per month worldwide.[103]

Sixth, the protections provided by the BITs were similar to those that had been provided in the modern FCNs concluded by the United States. Typically, they contained a guarantee of national and most favored nation treatment for covered investment,[104] a promise of "fair and equitable treatment" for covered investment,[105] a commitment to pay prompt, adequate and effective compensation for expropriation of covered investment,[106] and restrictions on exchange controls.[107]

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[100] UNCTAD, *supra* note 71, at 9.

[101] *Id.*

[102] *Id.*

[103] For a list of BITs concluded from the inception of the program through 1989, *see id.* at 159-217.

[104] For example, the BIT between the United States and Estonia provides:

> Each Party shall permit and treat investment . . . on a basis no less favorable than that accorded in like situations to investment . . . of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty.

Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Est., art. II(1), Apr. 19, 1994, S. TREATY DOC. NO. 103-38 (1994).

[105] For example, the BIT between the United States and Trinidad and Tobago provides: "Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law." Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Trin. & Tobago, art. II(3)(a), Sept. 26, 1994, S. TREATY DOC. NO. 104-14 (1995).

[106] For example, the U.S.-Romania BIT provides:

> Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law ….

Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Rom., art. III(1), May 28, 1992, S. TREATY DOC. NO. 102-36 (1992).

Although the U.S. FCNs had guaranteed nationals of each party national and MFN treatment with respect to the right to "engage in" various commercial enterprises,[108] most of the BITs did not guarantee to investors of one party the right to establish investment in the territory of the other party.[109] The U.S. BITs were an exception, promising national and MFN treatment with respect to the right to establish investment.[110] Like the modern FCNs, the BITs contained a provision for settlement of disputes between the parties, although the mechanism was different. Whereas the modern FCNs had provided for submission of disputes to the International Court of Justice, the BITs provided for submission of disputes to an ad hoc arbitral tribunal.[111]

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[107] For example, the BIT between the United States and Uzbekistan provides:

> Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:
> (a) contributions to capital;
> (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
> (c) interest, royalty payments, management fees, and technical assistance and other fees;
> (d) payments made under a contract, including a loan agreement; and
> (e) compensation pursuant to Articles III [relating to expropriation] and IV [relating to losses due to armed conflict], and payments arising out of an investment dispute.

Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uzb., art. V(1), Dec. 16, 1994, S. TREATY DOC. NO. 104-25 (1996).

[108] *See supra* text accompanying note 39.

[109] In the U.S. BITs, the guarantees of national and MFN treatment apply to the right to establish investment. Thus, covered investors are entitled to establish investment in the host state as long as nationals of the host state or of any third state were permitted to do so. Such a provision, however, is not typical of most BITs. *See* UNCTAD, *supra* note 71, at 46.

[110] *See* Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *supra* note 104, where the agreement cited requires each party to "permit" investment on a national and MFN basis.

[111] The BIT between the United States and Ecuador, for example, provides at art. VII:

> 1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

One major innovation in the BITs was the inclusion starting in the mid 1960s of a provision in which the host state consented to arbitration of certain disputes with investors, typically those involving the provisions of the agreement.[112] This provision was prompted by

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> 2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the [International Centre for the Settlement of Investment Disputes].
>
> 3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, art. VII, Aug. 27, 1993, S. TREATY DOC. NO. 103-15 (1993).

[112] The BIT between the United States and Albania, for example, provides at article IX:

> 1. For purposes of this Treaty, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment.
> 2. A national or company that is a party to an investment dispute may submit the dispute for resolution under one of the following alternatives:
> (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
> (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
> (c) in accordance with the terms of paragraph 3.
> 3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b), and that three months have elapsed from the date on which the dispute arose, the national or company concerned may submit the dispute for settlement by binding arbitration:
> (i)to the Centre, if the Centre is available; or
> (ii) to the Additional Facility of the Centre, if the Centre is not available; or
> (iii) in accordance with the UNCITRAL Arbitration Rules; or
> (iv) if agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules.
> (b) A national or company, notwithstanding that it may have submitted a dispute to binding arbitration under paragraph 3(a), may seek interim injunctive relief, not involving the payment of damages, before the judicial or administrative tribunals of the Party that is a party to the dispute, prior

the conclusion of a 1965 convention establishing the International Centre for the Settlement of Investment Disputes (ICSID),[113] an entity affiliated with the World Bank that was intended to provide a venue for arbitration of disputes between investors and host state governments. For the first time, investors had an effective remedy for unlawful actions by host states that injured their investments that did not depend upon military action or espousal of their claim by their home state.[114] Further, the BITs typically did not require the investor to exhaust local remedies before resorting to international arbitration, though they sometimes required the investor to pursue local remedies for a limited period of time, after which the investor could arbitrate the dispute.[115] In providing the investor with a legal remedy that did not depend upon espousal, these BIT provisions depoliticized investment disputes. That is, they placed investment protection in the realm of law rather than politics.[116]

III. THE GLOBAL ERA

The Global Era in the history of international investment agreements begins at the end of the 1980s. This Global Era reflects profound changes in the context in which international investment agreements were negotiated.[117]

> to the institution of the arbitral proceeding or during the proceeding, for the preservation of its rights and interests.
> 4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice of the national or company under paragraph 3(a)(i), (ii), and (iii) or the mutual agreement of both parties to the dispute under paragraph 3(a)(iv)….
> 5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) shall be held in a state that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958.
> 6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award.

Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Alb., Jan. 11, 1995, S. TREATY DOC. NO. 104-19 (1995).

113 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090.

114 VANDEVELDE, *supra* note 20, at 22-25.

115 UNCTAD, *supra* note 71, at 93.

116 VANDEVELDE, *supra* note 20, at 22-25.

117 For a more extended discussion of these changes, see Kenneth J. Vandevelde,

One of the most important changes was the intermingling of trade and investment provisions in international agreements. The completion of the Uruguay Round of GATT negotiations resulted in the creation of the World Trade Organization (WTO) in 1995 to administer the GATT and related agreements and the explicit injection of investment-related issues into the jurisdiction of the WTO.[118] The most important way in which this occurred was through the conclusion of the General Agreement on Trade in Services (GATS),[119] which is intended to remove barriers to cross-border trade in services. Services are sometimes provided internationally through the establishment by a service provider of one country of an office or subsidiary in the territory of another country, in effect, by the establishment of foreign investment in the country where the services are to be consumed. The GATS explicitly applies to the delivery of services through such a "commercial presence."[120] Thus, a GATS commitment to allow trade in a certain service sector through a commercial presence amounts to a commitment to allow the establishment of foreign investment. Further, GATS commitments concerning the treatment that the service provider will receive constitute commitments to protect foreign investment.[121] Thus, the WTO potentially has jurisdiction over all foreign investment in the service sector of the economy. The potential significance of this agreement is reflected in the fact that, as of 2002, the stock of foreign direct investment in the services sector was $4.3 trillion, compared with the $2.4 trillion stock of foreign direct investment in the manufacturing sector.[122]

Sustainable Liberalism and the International Investment Regime, 19 MICH. J. INT'L L. 373 (1998).

118 *See* HOEKMAN & KOSTECKI, *supra*, note 30.

119 General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 44 (1994) [hereinafter GATS].

120 GATS, *supra* note 119 at art. I.2, provides that "[f]or purposes of this Agreement, trade in services is defined as the supply of a service … (d) by a service supplier of one Member, through commercial presence in the territory of another Member."

121 For example, Article II requires most favored nation treatment of trade in services, Article III imposes certain obligations of transparency with respect to trade in services, Article VI imposes restrictions on domestic regulation of trade in services, and Article XI limits states' ability to restrict payments for current transactions relating to trade in services. GATS, *supra* note 119.

122 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT [UNCTAD], WORLD INVESTMENT REPORT 2004: THE SHIFT TOWARDS SERVICES at 302, U.N. Sales No. E.04.II.D.33 (2004), *available at* http://www.unctad.org/en/docs/

Other agreements further expanded the jurisdiction of the WTO with respect to investment matters beyond the service sector. The Agreement on Trade Related Investment Measures[123] prohibits the imposition on foreign investment of certain trade distorting performance requirements. The Agreement on Trade Related Intellectual Property Rights[124] obligates the parties to provide certain protection for intellectual property, a form of investment.

The Global Era also witnessed an explosion in the number of BITs. This explosion seems to have been rooted in two major causes. First was the victory of market ideology. The economic success of several Asian economies that had high rates of private investment and promoted the production of goods for export, relative to that of other developing countries that had pursued import substitution policies, demonstrated the constructive role that foreign investment and global integration could play in a developing economy.[125] Specifically, during the period from 1965 to 1990, eight Asian economies[126] grew at a rate three times that of Latin America and twenty-five times that of Sub-Saharan Africa.[127] Further, the collapse of the Soviet bloc[128] discredited the principal alternative to market capitalism as an economic policy.[129]

Second was a loss of alternatives to foreign investment as a source of capital. The debt crisis of the 1980s had reduced the availability of private lending,[130] which, by 1980, had accounted for half of all capital

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[123] Agreement on Trade Related Investment Measures, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments – Results of the Uruguay Round, vol. 31, 33 I.L.M. 1125 (1994).

[124] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, vol. 31, 33 I.L.M. 1125 (1994).

[125] WORLD BANK, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY 40-42 (1993); Alex E. Fernandez Jilberto & Andre Mommen, *Setting the Neoliberal Development Agenda*, *in* LIBERALIZATION IN THE DEVELOPING WORLD 1, 3-4, (Alex E. Fernandez Jilberto & Andre Mommen eds., 1996).

[126] The eight economies were Japan, the four "Asian Tigers" (Hong Kong, Republic of Korea, Singapore and Taiwan) and Indonesia, Malaysia and Thailand.

[127] WORLD BANK, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY 2 (1993).

[128] On the disintegration of the Soviet bloc, see Michael Mandelbaum, *Coup de Grace: The End of the Soviet Union*, 71 FOREIGN AFF. 164 (1992), Michael Mandelbaum, *The Bush Foreign Policy*, 70 FOREIGN AFF. 5 (1991), Coit D. Blacker, *The Collapse of Soviet Power in Europe*, 70 FOREIGN AFF. 88 (1991).

[129] RAPLEY, *supra* note 53, at 70; Mark Kramer, *Eastern Europe Goes to Market*, 86 FOREIGN POL'Y 134 (1992).

[130] *See* RAPLEY, *supra* note 53, at 37-38; Jahangier Amuzegar, *Dealing with Debt*, 68

flows to developing countries.[131] In addition, the massive federal deficits created during the Reagan administration had prompted extensive borrowing by the United States Government, which absorbed much of the available capital,[132] further crowding developing countries out of the private market for credit.[133] Reductions in developmental assistance at the behest of the Reagan administration during that same period had reduced the availability of public financing.[134] For example, between 1980 and 1987 the United States reduced its contributions to multilateral development banks from $2.3 billion annually to $1.1 billion.[135] Developing countries seeking capital to finance development increasingly had little alternative but to seek foreign private investment.

For both these reasons, then, by the late 1980s developing countries were abandoning the hostility to foreign investment that had characterized the Post-Colonial Era and seeking openly to attract foreign investment by creating a favorable environment for such investment.[136] It appeared that the policies of hostility to foreign investment, import substitution, and closed markets to foreign goods, services and capital that they had employed during the Post-Colonial Era had been a mistake.[137] Discussions of a New International Economic Order and the right to expropriate without payment of compensation disappeared.[138] Latin American countries abandoned the Calvo Doctrine and agreed to the imposition of international

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FOREIGN POL'Y 140, 141-42 (1987); Samuel Britain, *A Very Painful World Adjustment*, 61 FOREIGN AFF. 541, 541-48 (1983); Pedro-Pablo Kucynski, *Latin American Debt*, 61 FOREIGN AFF. 344, 350-51 (1982).

[131] POULSON, *supra* note 51, at 450-51 (1994).

[132] During the three years between 1982 to 1985, the United States changed from the world's largest creditor to the world's largest debtor. *See* STEVEN HUSTED & MICHAEL MELVIN, INTERNATIONAL ECONOMICS 314 (3d ed. 1995); Lester C. Thurow & Laura D'Andrea Tyson, *The Economic Black Hole*, 67 FOREIGN POL'Y 3 (1987).

[133] Jeffrey E. Garten, *Gunboat Economics*, 63 FOREIGN AFF. 538, 546 (1984).

[134] *Id.* at 552-54

[135] John W. Swell & Christine E. Contee, *Foreign Aid and Gramm-Rudman*, 65 FOREIGN AFF. 1015, 1022 (1987) (total U.S. foreign assistance increased during this time, but only because of increase in military assistance).

[136] *See* Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 502-03 (1998).

[137] Jeswald W. Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 INT'L LAW. 875, 882-86 (1999).

[138] *See* Thomas Waelde, *Requiem for the "New International Economic Order," in* FESTSCHRIF FUER IGNAZ SEIDL-HOHENVELDERN 771 (Gerhard Hafner et al. eds., 1998).

minimum standards for the protection of foreign investment.[139] Developing countries rushed to attract foreign investment by demonstrating their support for market capitalism generally and a secure investment climate in particular. Concluding BITs that guaranteed protection for foreign investment offered a mechanism for signaling a desire to attract foreign investment by providing a more secure environment for such investment.[140]

Starting in the late 1980s, the number of BITs concluded accelerated dramatically. While fewer than 400 BITs had been concluded in the thirty years from 1959 to 1989,[141] during the next fifteen years some 2000 BITs would be concluded.[142]

The BITs concluded in the era of globalization were not much changed in content from the BITs of the Post-Colonial Era.[143] They still principally addressed the traditional problem of investment protection. The U.S. BITs and a few others have incorporated some changes that were largely in reaction to arbitral claims filed under the NAFTA investment chapter, but that did not alter the basic nature of the treaty. These changes included the addition of language specifying that the fair and equitable treatment standard merely incorporates the international minimum standard,[144] clarifying the extent to which the expropriation provision applies to regulatory actions by the host state[145] and modifying the procedures employed in arbitrations under the investor-state dispute resolution provision.[146]

As the trend toward liberalization continued and states sought

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139 They did so by the conclusion of BITs, in which they agreed to certain standards for the treatment of foreign investment and to the submission of disputes with investors involving the BITs to binding arbitration. For example, Bolivia and Uruguay concluded BITs in 1987, Argentina and Venezuela in 1990, and Chile and Peru in 1991. UNCTAD, *supra* note 71, *passim*.

140 *Id.* at 6.

141 *Id.* at 9.

142 UNCTAD, *supra* note 1, at 1-2.

143 *See* UNCTAD, *supra* note 71.

144 *See* text *infra*, at note 192. Such language appears in the 2004 U.S. model BIT at article 5 and in Annex A. The 2004 model BIT is available online at http://www.state.gov/documents/organization/38710.pdf.

145 *See* text *infra*, at note 192. Such language appears in the 2004 model BIT, *supra* note 144, at Annex B.

146 Among the changes to the investor-state dispute resolution mechanism in the 2004 model BIT, *supra* note 144, are a three year limitations period for bringing claims, *id.* at art. 26, a provision for expedited consideration of challenges to the legal sufficiency of a claim, *id.* at art. 28, a provision to make the documents submitted in an arbitral proceeding public and to open the hearings, *id.* at art. 29, and a provision by which the parties to the agreement may provide binding interpretations of the treaty and its annexes to the tribunal, *id.* at arts. 30-31.

deeper integration than they believed that they were able to achieve within the WTO framework or with agreements limited to investment,[147] bilateral and regional trade agreements with investment-related provisions greatly proliferated in number. As of June 2005, at least 215 preferential trade agreements with investment-related provisions had been concluded, eighty-seven percent of which had been concluded since the 1990s. The United States, for example, has concluded such free trade agreements with Singapore,[148] Chile,[149] Australia,[150] Morocco,[151] and the Central American States.[152] A free trade agreement between the United States and Jordan did not include an investment chapter because the United States had already concluded a BIT with Jordan.[153]

The mixing of trade and investment provisions in the same agreement reflected changes in the nature of economic activity. Trade and investment are no longer seen merely as substitutes but as complements. The traditional view was to regard the establishment of a foreign subsidiary as a means for delivering goods or services to a foreign market, particularly when high tariffs made export to that market unattractive.[154] In that view, foreign investment was an

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[147] *See* JONG-WHA LEE, ET AL., PROLIFERATING REGIONAL TRADE AGREEMENTS: WHY AND WHITHER? (2004); Richard E. Feinberg, *The Political Economy of United States' Free Trade Agreements*, 26 WORLD ECON. 1019 (2003).

[148] United States-Singapore Free Trade Agreement, signed, January 15, 2003, available online at http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_ FTA/Final_Texts/Section_Index.html.

[149] Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile, signed June 6, 2003, available online at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA /Final_Texts/Section_Index.html.

[150] United States-Australia Free Trade Agreement, signed May 18, 2004, available online at http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/ Final_Text/Section_Index.html.

[151] United States-Morocco Free Trade Agreement, signed June 15, 2004, available online at http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/ FInal_Text/Section_Index.html.

[152] Central America—Dominican Republic—United States Free Trade Agreement, signed August 5, 2004, available online at http://www.ustr.gov/ Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

[153] Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, signed January 15, 2003. The U.S.-Jordan BIT dates from 1997. See Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed July 2, 1997, Treaty Doc. 106-30, 106th Cong. 2d Sess. (2000).

[154] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD

alternative to trade. In the Global Era, however, investment increasingly has been seen not as a means of replacing trade, but of promoting it. Foreign subsidiaries, once established, were often links in a large chain of production, importing raw materials and parts from other subsidiaries and exporting a product to still other subsidiaries perhaps for further refinement.[155] Deeper economic integration thus required lowering barriers both to trade and to investment. As a result, states negotiated bilateral and regional trade agreements that included investment related provisions. This, in turn, meant the return of the "package deal." The inclusion of investment in a larger group of concessions allowed the parties to offer concessions on investment in exchange for concessions in other areas.[156] For example, a state might offer to open its economy to foreign investment in exchange for another party's offer of market access to goods.

This process of deeper economic integration began to occur among states with dissimilar economic circumstances. In the Post-Colonial Era, economic integration agreements typically were concluded among states at similar levels of economic development, with the most notable example being the European Community,[157] which later evolved into the European Union.[158] In 1990, two highly developed states, the United States and Canada, launched the negotiation of the North American Free Trade Agreement (NAFTA) with Mexico, a developing country.[159] Subsequently, the European Union undertook to expand its membership to include the transitional economies that formerly were part of the Soviet bloc.[160] After the

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INVESTMENT REPORT 1996: INVESTMENT, TRADE AND INTERNATIONAL POLICY ARRANGEMENTS 79 (1996).

155 *Id.* at 103.

156 For discussions of the use of the package deal in the negotiation of the NAFTA, see FREDERICK W. MAYER, INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS (1998).

157 The European Community was formed in the 1950s consisting of six West European states: Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands. Denmark, Ireland and the United Kingdom joined in 1973, Greece in 1981 and Spain and Portugal in 1986. Thus, in the Post-Colonial Era, the European Community consisted solely of developed, West European countries. *See* http://europa.eu.int/abc/keyfigures/eu_work_progress/index_animated_en.htm (European Union membership lists).

158 The European Community became the European Union following the entry into force of the Treaty of European Union in 1993. *See id.*

159 *See generally* MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE (2000); MAYER, *supra* note 156.

160 In 2004, the European Union added eight members that were former Soviet bloc nations. These were the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic, and Slovenia. Former Soviet bloc states currently seeking

conclusion of NAFTA, free trade agreements with investment-related provisions between developed and developing states became increasingly common. By mid 2005, they accounted for thirty-nine percent of all preferential trade agreements with investment provisions.[161]

Part of the explanation for this trend was that the old distinction between capital-exporting developed countries and capital importing developing countries was blurring. A number of developing countries had achieved considerable economic success and were becoming significant exporters of capital. For example, in 2003, Singapore's stock of direct investment abroad was larger than that of several developed countries, including Austria, Denmark, Finland, Greece, Ireland, Norway and Portugal.[162] At the same time, developed countries were becoming major capital importers. For example, the total stock of foreign direct investment in the United States grew from $83 billion in 1980 to $1.5 trillion in 2003.[163] The old distinctions of the Post-Colonial Era further dissolved as the transitional economies of Central and Eastern Europe began to join the major developed economies in the European Union.[164]

And, whereas economic integration agreements in the past generally had been regional, these new agreements often were between states in different regions.[165] Indeed, as of mid 2005, forty-four percent of all preferential trade agreements with investment-related provisions were between countries in different regions.[166]

Thus, in the Global Era, the distinctions that had characterized the Post-Colonial Era had collapsed. Investment provisions appeared in agreements at all levels – bilateral, regional, and multilateral. The agreements could address trade in goods, trade in services, investment or any combination of the three. The parties to the agreement may be developed states, developing states, or both. These states may or may not be in the same region.

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membership are Bulgaria, Romania, Croatia and the Former Yugoslav Republic of Macedonia. Two other states joined the European Union in 2004: Cyprus and Malta. Turkey is also currently seeking membership. *See* http://www.eurunion.org /states/offices/htm.

[161] UNCTAD, *supra* note 1, at 11.

[162] UNCTAD, *supra* note 122, at 382-85.

[163] *Id.* at 376.

[164] As discussed *supra* at note 160, eight former communist states joined the European Union in 2004.

[165] For example, the United States has concluded free trade agreements outside the Western Hemisphere with Israel, Jordan, Singapore, Australia and Morocco.

[166] UNCTAD, *supra* note 1, at 10.

Although the substance of the BITs of the Global Era is mostly unchanged from the substance of the Post-Colonial Era BITs, to the extent that trade and investment provisions are being intermingled in free trade agreements the Global Era resembles the Colonial Era rather than the Post-Colonial Era. In other respects as well, the investment regime of the Global Era seems to resemble the Colonial Era more than the Post-Colonial.

For example, investment policy has lost the ideological division that had characterized the Post-Colonial Era. While in the Post-Colonial Era many had seen international investment agreements as unequal treaties to which developed countries reluctantly and perhaps unwisely adhered in order to attract foreign investment,[167] in the Global Era states almost universally adopted the view that foreign investment could promote economic prosperity and set about jointly creating legal frameworks that would promote and protect international investment flows. In international economic relations, ideology was replaced with pragmatism and cooperation.[168]

Similarly, while, in the Post-Colonial Era, investment agreements, which is to say BITs, were between a capital-exporting developed country and a capital-importing developing country, in the Global Era, the number of investment agreements between developing countries has grown remarkably as developing countries have become capital exporters, often to other developing countries.[169] By the end of 2004, one fourth of all BITs were concluded between developing countries.[170]

Finally, the very purpose of investment agreements is shifting. While in the Post-Colonial Era investment agreements were intended to protect investment of developed countries in the territory of developing countries primarily against expropriation, in the Global Era investment agreements increasingly are intended to liberalize investment flows. They have become instruments of globalization, removing barriers to trade and investment, much in the same way that the FCNs of the Eighteenth and Nineteenth Centuries sought to establish commercial relations between countries.

The Global Era is also characterized by the number of countries that are now part of the framework of international investment

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167 *See, e.g.*, Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

168 Vandevelde, *supra* note 117, at 386-90.

169 By the end of the 1990s, one third of all foreign direct investment in developing countries came from other developing countries. UNCTAD, *supra* note 122, at 20.

170 UNCTAD, *supra* note 1, at 3.

agreements. For example, more than 170 countries are now party to at least one BIT.[171] The framework of international investment agreements is a truly global one.

IV. LOOKING FORWARD

The Global Era of investment agreements has raised several issues, the resolution of which could form the basis for the emergence of a fourth era in the history of international investment agreements. First, a great deal of energy has been devoted to the conclusion of international investment agreements. One issue this presents is whether they are effective. To the extent that the purpose of the agreements is to protect foreign investment, one is almost forced to concede their effectiveness. Some 200 arbitrations to enforce provisions of the investment agreements have been filed[172] and many of these have resulted in awards in favor of the investors,[173] in some cases of very substantial amounts.[174] Further, the success of an investment agreement in protecting foreign investment can be measured by more than just the number of favorable arbitral awards. Investors who have disputes with host states may use the existence of the treaty and the possibility of arbitration as leverage to negotiate a satisfactory resolution of the dispute. In such a case, the treaty undeniably has contributed to the protection of foreign investment, even if no arbitration occurred.

To the extent that the purpose of the agreements is to promote investment flows, the evidence is less clear. Perhaps no one contends that investment agreements alone will result in increased investment flows.[175] They are considered simply one factor among many in

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[171] The United Nations Conference on Trade and Development, which contains the most comprehensive BIT database on its website at www.unctad.org, counts 176 countries as being party to one or more BITs.

[172] By June 2005, 183 claims had been brought before the International Centre for the Settlement of Investment Disputes alone. UNCTAD, *supra* note 1, at 13. This figure, of course, excludes the investment claims brought before ad hoc tribunals outside the ICSID framework.

[173] UNCTAD, *supra* note 1, at 15. Of forty-one cases in which the award was publicly known, the state had won in nineteen, or forty-six percent. *Id.*

[174] The largest award identified in UNCTAD's study was in the amount of $824 million, awarded in a claim against the Slovak Republic in 2004. *Id.*

[175] In the early days of the U.S. BIT program, U.S. negotiators were very candid with potential BIT partners in noting that there was no evidence to prove that concluding a BIT would increase investment flows. VANDEVELDE, *supra* note 20, at 32.

creating a favorable investment climate.[176] Still, the issue has arisen as to whether one can identify a statistical correlation between the number of investment agreements concluded and the amount of foreign investment attracted.

Several studies have investigated the effect of BITs in attracting foreign investment flows, with inconsistent results. The first study, published by UNCTAD in 1998, found a weak positive correlation. Specifically, UNCTAD concluded that "following the signing of a BIT, it is more likely than not that the host country will marginally increase its share in the outward FDI [Foreign Direct Investment] of the home country...The effect, however, is usually small."[177] UNCTAD concluded that BITs play a "minor and secondary role" in attracting foreign direct investment.[178]

More recent studies have split in their results. In 2003, Mary Hallward-Driemeir published her study of foreign direct investment flows of 537 country pairs from twenty Organisation for Economic Cooperation and Development (OECD) countries to thirty-one developing countries, during the period 1980 to 2000.[179] In most regressions, she found that the association between BITs and foreign direct investment was negative and not significant. She found that BITs were more likely to be effective where the host state has better established legal institutions.[180] Similarly, in 2005, Jennifer Tobin and Susan Rose-Ackerman, examining 62 countries and using data for the period 1980 to 2000, found a weak positive relationship between BITs and foreign direct investment.[181]

Two other 1994 studies, however, found evidence of a stronger impact. A study by Eric Neumayer and Laura Spess, involving 119 countries and examining data from 1970 to 2002, found that negotiating additional BITs does increase a host state's share of foreign direct investment.[182] For example, a one standard deviation increase in the BIT variable was predicted to increase foreign direct

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[176] UNCTAD, *supra* note 71, at 6.

[177] *Id.* at 122.

[178] *Id.*

[179] Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . And They Could Bite* (World Bank, Working Paper No. 3121, 2003).

[180] *Id.* at 21.

[181] Jennifer Tobin & Susan Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties* 35 (Yale Law Sch. Ctr. for Law, Econ. and Pub. Policy, Research Paper No. 293, 2005).

[182] Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment in Developing Countries?*, 33 WORLD DEV. 1567 (2005).

investment inflows by 43.7 to 93.2%.[183] The magnitude of the impact depended upon overall institutional quality.[184]

A study by Jeswald W. Salacuse and Nicholas Sullivan focused on the effect of U.S. BITs on investment flows. The study examined foreign direct investment flows to more than 100 developing countries during 1998-2000 and U.S. foreign direct investment flows to thirty-one countries over a ten year period. It found that BITs concluded by the United States are more likely than not to exert a "strong and positive role" in promoting both U.S. investment and overall investment. Additionally, U.S. BITs are likely to have a greater impact than BITs concluded by other states in the OECD.[185]

Those studies finding little or no correlation between BITs and investment flows may be underestimating the impact of BITs. First, it may be that certain BITs are more effective than others[186] or that BITs are more effective in some circumstances than in others[187] and that these positive results are obscured when all BITs are aggregated together. Further, more time may be necessary for the value of the treaties to be understood by investors and thus the positive impact of the agreements may yet lie in the future.[188] In particular, the issuance of additional, well-publicized, large arbitral awards in favor of investors may be necessary before potential investors recognize the value of the agreements.

The same large arbitral awards in favor of investors that may convince investors of the value of the agreements, of course, may also cause host states to conclude that the agreements are too costly. This could be true to the extent that international investment agreements over time are not perceived as attracting increased investment flows. Developing countries may come to see the agreements as poor bargains in which states surrender portions of their sovereignty and subject themselves to costly arbitrations with investors, without having gained appreciable new investments as a result. The result could be a

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183 *Id.* at 1582.

184 *Id.*

185 Salacuse & Sullivan, *supra* note 29, at 111.

186 That was the implication of the Salacuse and Sullivan study, which found U.S. BITs, which are among the most rigorous of the BITs, to be more likely to attract foreign direct investment than other BITs. *See supra* text accompanying note 185.

187 That was the implication of the Hallward-Driemeier study, which found that BITs functioned most effectively in attracting foreign direct investment when they were complements to other institutional characteristics offering a stable investment climate. *See supra* text accompanying note 180.

188 The UNCTAD study suggested that the impact of a BIT was more likely to be felt three years after the agreement was signed. UNCTAD, *supra* note 71, at 122.

decision to cease negotiating more agreements or at least to diminish some of the investment protections afforded by the agreements in order to decrease the cost of implementing them. They may also seek to amend those that already have been concluded.[189]

The impulse to weaken agreements may come from the developed countries as well as the developing countries. The United States, after being named as the respondent in several claims brought under the investment chapter of NAFTA,[190] changed its investment agreements to limit certain types of claims. Specifically, it has added language to some agreements that is intended to clarify the scope of the expropriation provision in order to reduce claims for compensation as a result of regulatory actions by the host state.[191] It has also added

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[189] At least eighty-five BITs already have been renegotiated, though not necessarily to reduce the protections provided. In fact, a typical purpose has been to strengthen old agreements. UNCTAD, *supra* note 1, at 6-7. Some BITs were renegotiated because the prior agreement expired or because one of the parties had joined the European Union, necessitating that BIT obligations be harmonized with EU obligations.

[190] As of August 30, 2005, the United States had been named as a respondent in ten arbitral claims filed under the NAFTA investor-state dispute resolution mechanism. UNCTAD, *supra* note 1, at 13.

[191] For example, Annex 10-D of the free trade agreement with Chile, *supra* note 149, provides that

The Parties confirm their shared understanding that:

1. Article 10.9(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 10.9(1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by article 10.9(1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that language clarifying that the commitment to "fair and equitable treatment" does no more than incorporate the international minimum standard[192] imposed by customary international law.[193] Similarly, one of the relatively few recent investment agreements to omit a provision for investor-state arbitration was the 2004 free trade agreement between the United States and Australia.[194] Further, Canada has amended its model BIT to include an annex exempting prior agreements from the MFN obligation, thus giving the parties leeway to reduce the level of protection afforded in later agreements.[195]

Ironically, the disappearance of the ideological division between the developed and developing countries may have made it easier for developed countries to soften the protective coverage of the agreements. In their early history, the BITs had a strong ideological component and were intended to counter the claim of developing and Soviet bloc countries that customary international law did not require payment of fair market value for expropriated investment.[196] As the need to score points in an ideological debate diminishes, developed countries may be more willing to compromise.

Indeed, it is easy to foresee cases in which the developed home

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are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

192 For example, article 15.5.2 of the free trade agreement with Singapore, *supra* note 148, provides:

For greater certainty, paragraph 1 prescribes the customary international law minimum standards of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

(a) The obligation in paragraph 1 to provide "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) The obligation in paragraph 1 to provide "full protection and security" requires each Party to provide the level of police protection required under customary international law.

193 *See supra* text accompanying notes 13-16.

194 United States-Australia Free Trade Agreement, signed May 18, 2004. The parties explained this omission on the ground that the advanced state of the legal system in both countries had diminished the need for such a provision. The agreement, however, does include language to authorize negotiations directed at adding an investor-state dispute resolution clause in the future, if the parties change their view of its necessity.

195 The language may be found at Annex III of the Canadian model BIT, available online at http://www.dfait-maeci.gc.ca/tna-nac/fipa-en.asp.

196 *See* text *supra* at notes 95-99.

state of an investor and the developing host state will join forces against the investor in a particular dispute. Some new investment agreements concluded by the United States already provide in certain cases for arbitral tribunals hearing claims brought by investors to consult with the treaty parties concerning the proper interpretation of the agreement.[197] The assumption is that the state parties may disagree jointly with an investor's interpretation of the agreement. In fact, the NAFTA parties already have issued an interpretive notice indicating that the NAFTA's guarantee of "fair and equitable treatment" for investment requires no more than customary international law,[198] a narrower interpretation of the protection than had been urged by some commentators.[199] As has been noted,[200] this interpretation is now being incorporated into the text of U.S. agreements.

While large arbitral awards against host states could dampen the enthusiasm of host states, including developed countries, for these agreements, they might also signal to investors the value of the agreements and lead to increased investment flows. Because most concerns about the favorability of the investment climate center on the climate in developing countries, investment agreements are least likely to attract investment to developed countries. Any enhanced investment flows as a result of the investment agreements are likely to be in the direction of developing countries. Thus, concerns by developing countries about the issuance of large arbitral awards could be more than offset by the belief that investment agreements had contributed to increased investment flows. Further, as the existence of investment agreements becomes more widely known in the investor community and as more states adopt larger numbers of them, the

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[197] Such language appears in the 2004 U.S. model BIT at article 30 and 31. *See supra* note 144.

[198] The NAFTA Free Trade Commission, on July 31, 2001, adopted the following interpretation of NAFTA Chapter 11:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

[199] *See* United Nations Conference on Trade and Development, Fair and Equitable Treatment 10-15 (1999): Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaty Law*, 39 INT'L LAW. 87 (2005).

[200] *See supra* text accompanying note 144.

absence of an investment agreement may be seen as sending a strong negative signal to investors, thus reducing the ability of developing countries to refuse to conclude them or to weaken those that already exist.[201]

It seems unlikely that the support of developed countries for investment agreements is likely to diminish soon. The interests of the business community in protecting its investment abroad will ensure that capital exporting countries continue to insist that agreements include substantial protections for investments.[202] Although developed countries now recognize that such agreements can impose costs on them, the costs at present are largely associated with agreements in which other developed countries are parties.[203] Rather than abandoning or significantly weakening the agreements, developed countries may simply adopt the solution employed in the U.S.-Australia free trade agreement and exclude investor-state arbitration from agreements among developed countries.

The intermingling of investment and trade provisions in the same agreements inevitably pushes the investment provisions in the direction of liberalization. Trade agreements deal almost entirely with opening markets to trade by eliminating tariffs, nontariff barriers, and discriminatory treatment. As has been noted,[204] liberalizing trade increasingly requires liberalizing investment. As countries seek to integrate their economies by concluding free trade agreements, to the extent that they consider investment at all, the notion of liberalizing investment flows will seem to be a critical element. Thus, as investment protections are reined in slightly, investment liberalization provisions are becoming more prevalent. Investment agreements increasingly will be seen not merely as a method of protecting existing investment, but of creating and structuring future international economic relations.

The explosion in the number of bilateral agreements relating to

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[201] It has been theorized that one of the reasons that developing countries conclude investment agreements is simply that other developing countries already have. The inducement to conclude the treaties may not be that the treaties attract investment, but rather that their absence will discourage it. *See* ZACHARY ELKINS, ANDREW T. GUZMAN, AND BETH SIMMONS, COMPETING FOR CAPITAL: THE DIFFUSION OF BILATERAL INVESTMENT TREATIES (1996-2000).

[202] In the United States, for example, the business community played a major role in prompting the inauguration of the BIT program. VANDEVELDE, *supra* note 20, at 20.

[203] For example, the United States thus far has been a respondent to claims made only under the NAFTA. It has not been a respondent in any case brought under a BIT. UNCTAD, *supra* note 1, at 13.

[204] *See supra* text accompanying notes 154-56.

investment and with largely very similar provisions has prompted the question whether states should negotiate a multilateral agreement on investment that would simplify the process of negotiation by enabling a state to create a treaty-based investment regime with a large number of parties by acceding to a single agreement. A multilateral agreement that displaced or obviated the need for a large number of bilateral agreements could also reduce the complexity of the international investment regime, which increasingly is characterized by overlapping agreements at the multilateral, regional and bilateral levels.[205]

The OECD states attempted to negotiate a multilateral agreement on investment (MAI) in the 1990s, the idea being that such an agreement would be concluded among the OECD states initially, but opened to signature by other states at a later date.[206] The negotiations, however, failed.[207] It was ironic that the countries that have, perhaps, the greatest consensus among themselves concerning the provisions that should be included in a bilateral investment treaty were unable to agree on a multilateral version of the agreement. The failure of that effort may have been in part the result of that very consensus. That is, because these states already provide a favorable environment for investment as a matter of national policy, most of the participants had little to gain from the agreement and thus, once negotiations were underway, the focus shifted to that which they would be conceding.[208] As the MAI came to be seen as involving mainly concessions rather than gains, the impetus to continue diminished. Meanwhile, various nongovernmental organizations opposed to economic globalization initiated a campaign against the MAI, raising the political price of achieving an agreement.[209] Simultaneously, the business community, which similarly perceived that more would be lost than gained by the

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205 The complexity of the network of agreements has become a matter of increasing concern. *See, e.g.,* Mary-France Houde and Katia Yannaca-Small, *The Relationship Between International Investment Agreements* (Organisation for Economic Cooperation and Development, Working Papers on International Investment No. 2004/1, 2004), *available at* http://www.oecd.org/
dataoecd/8/43/31784519.pdf.

206 On the initiation of the OECD negotiations, see ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, TOWARDS MULTILATERAL INVESTMENT RULES (1996).

207 On the failure of the MAI negotiations, see EDWARD M. GRAHAM, FIGHTING THE WRONG ENEMY: ANTIGLOBAL ACTIVISTS AND MULTINATIONAL ENTERPRISES (2000); UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT [UNCTAD], LESSONS FROM THE MAI, U.N. Doc. UNCTAD/ITE/IIT/Misc.22, U.N. Sales No. E.99.II.D.26 (1999).

208 UNCTAD, *supra* note 207, at 23-25.

209 *Id.*

agreement, failed to provide countervailing support for the MAI.[210] Ultimately, the parties simply abandoned the negotiations. It seems unclear how such an agreement might emerge in the near future. The OECD shows no inclination to restart the MAI negotiations.

One possible alternative forum is the WTO. At its First Ministerial Meeting in Singapore in 1996, the WTO directed the formation of a working group on trade and investment.[211] At its Fourth Ministerial Meeting in Doha in 2001, which launched the Doha Round of multilateral trade negotiations, the WTO undertook to negotiate a multilateral investment agreement.[212] The WTO General Council decided in August 2004, however, that such an agreement would not be negotiated during the Doha Round.[213]

Another possible alternative forum is the United Nations Conference on Trade and Development (UNCTAD), which has considerable experience in investment matters.[214] Thus far, however, UNCTAD has been given no mandate to conduct negotiations on such an agreement.

Some recent trends, moreover, would seem to militate against the conclusion of a multilateral investment agreement. To the extent that countries are beginning to want to link trade and investment, any possible multilateral agreement becomes far more complex and difficult to imagine outside the WTO context, and the WTO is not currently pursuing negotiations in this area. Further, the growing variation in agreements also complicates the negotiations. Balanced against these trends are the fact that nearly every country now accepts the desirability of concluding investment agreements in at least some circumstances, the fact that an increasingly complex framework of agreements seems to call for simplification through a multilateral agreement that could displace many or all of the bilateral agreements, and the growing convergence between the views of developed and developing countries. Regardless, the reality as 2005 draws to a close

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[210] *Id.*

[211] World Trade Organization, Ministerial Declaration of 13 December 1996, ¶ 20, WT/ WT/MIN(96)/DEC, 36 I.L.M. 218 (1997).

[212] World Trade Organization, Ministerial Declaration of 14 November 2001, ¶¶ 20-22, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

[213] *Doha Work Programme*, WT/L/579 (Aug. 1, 2004), *available at* http://docsonline.wto.org/DDFDocuments/u/WT/L/579.doc.

[214] UNCTAD, for example, publishes the widely-cited annual World Investment Report. It has also published the most comprehensive study of bilateral investment treaties yet written, *supra* note 71, and a series of books on key issues in international investment agreements. For a more complete description of UNCTAD's activities in this area, see its website at www.unctad.org.

is that little active work toward a multilateral agreement is being performed anywhere, while the number of BITs and bilateral and regional free trade agreements continues to grow.[215]

V. CONCLUSION

The content of international investment agreements has been, and continues to be, shaped by the political, economic and legal contexts in which they are negotiated. In the Colonial Era, when the community of nations was largely limited to the European powers and newly independent states in the Americas and when international law recognized the use of force as a legitimate means of protecting state interests, customary law or even military force was the primary means of protecting foreign investment. Investment-related provisions did appear in some agreements intended to establish commercial relations between two countries. The international investment regime, however, included relatively few agreements and these agreements provided limited protection for investment.

In the Post-Colonial Era, the former colonies achieved political independence and military force was delegitimated as a basis for protecting international economic interests. Fears of economic exploitation on the part of developing countries and an ideological skepticism about the value of free markets, however, caused many developing countries to resist integration into the international economy. At the same time, the hostility of developing countries and Soviet bloc states toward foreign investment caused developed states to strengthen their efforts to provide legal protection for foreign investment through international investment agreements. Trade relations were left primarily to the multilateral GATT. International investment agreements, however, remained relatively few in number. They were largely divorced from the concept of liberalization and focused on providing increased protection for foreign investment against political risk.

In the Global Era, the disintegration of the Soviet bloc and the acceptance on the part of developing countries of the value of foreign investment have led to the emergence of an international investment regime that has become virtually universal as nearly every country concludes at least one investment agreement, the great majority of which contain provisions of remarkable uniformity. Investment agreements continue to protect investment, generally with as much rigor as they did in the Post-Colonial Era, but as in the Colonial Era

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[215] UNCTAD, *supra* note 1, at 10.

they are more frequently being seen as elements of economic integration rather than mere investment protection, sometimes combining trade and investment provisions.

In short, history has led us to an increasingly universal international investment regime that seeks to integrate national economies through the removal of barriers to investment flows and through the protection of established investment. This is but another era in the continuing evolution of international investment agreements. The impact of these agreements, particularly the results of arbitrations conducted pursuant to the agreements, in tandem with the evolution in the political and economic context in which these agreements operate, will determine the shape of the next era.