

What Should We Know About the Origins of International Investment Law?

SARAH M. ALSHAHRANI¹

Abstract

International investment law, particularly the global backlash against investment treaties, has evolved recently. This article aims to clarify how international investment law evolved over history, from the early Arab traders in the 7th century to the Ottoman Empire, to understand its hidden aims. It investigates the practice of signing investment treaties, which appear first during the Fatimid Caliphate² and Mamluk Sultanate³ periods. It then explains when control over foreign investment started to diminish during the Ottoman Empire period.⁴ Further, it explains the links between the USA Friendship, Commerce and Navigation treaties (FCNs), and current investment treaties, explaining the impact of colonization and imperialism on drafting treaty provisions. Within this historical context, this article illustrates the need to understand the roots of international investment law in order to urge Arab countries to terminate or renegotiate current bilateral investment treaties (BITs) as a number of developing and developed countries have done.

INTRODUCTION

*“The historical context of the investment law regime is important. The current regime stands on the shoulders of past dispute settlement mechanisms.”*⁵

International investment law can be defined loosely as the legal norms governing the relationship between foreign investors and their host states and the protection of foreign investments.⁶ Over the past two decades, international investment law has expanded impressively.⁷ This body of law contains many sources, including thousands of complex sets of multilateral trade-related treaties, bilateral investment treaties and hundreds of preferential trade agreements,⁸ in addition to the customary rules of international law and the general principles of law.

International investment law comprises a vital part of the public international law governing foreign direct investment (FDI). It is argued that changes in investment law have impacts on the development of other fields within international law.⁹ Thus, “efforts to create a legal regime governing its treatment were slow in coming and were

¹ © Sarah M. Alshahrani 2020. The author is a Ph.D. researcher at the University of Leeds and senior lecturer at Taibah University.

² See, e.g. https://www.newworldencyclopedia.org/entry/Fatimids_Caliphate.

³ See, e.g. <https://www.britannica.com/topic/Mamluk>.

⁴ For an overview about the Ottoman Empire, including the span of its reign, see, <https://www.britannica.com/place/Ottoman-Empire>.

⁵ A. Kaushal, M. Waibe, L. Chung and C. Balchin. *The Backlash Against Investment Arbitration: Perceptions And Reality* (Kluwer Law International 2010) xlv.

⁶ S. Wittich, ‘International Investment Law’ in K. Miles (ed) *The Origins of International Investment Law Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 822.

⁷ W Burke-White, ‘The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System’ (2008) 3 *Asian Journal of WTO & International Health Law and Policy* 199.

⁸ I. Van Damme, ‘Eighth Annual WTO Conference: An Overview’ (2009) 12(1) *J Int Economic Law* 176.

⁹ F. Baetens (ed), ‘Investment Law Within International Law’ in *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013) 1.

fraught with controversy.”¹⁰ To fully understand the character of international investment law, an historical foundation is needed. The origin of international investment law is a matter of some dispute in the literature.¹¹ Even so, this article illustrates the complex origin and evolution of international investment law; it also highlights the function of treaties in each historical period.

EARLY DEVELOPMENT

Although it has been argued that international rules on the protection of foreign-owned property originated during the seventeenth century in Europe, their origin can be traced further back in history.¹² An historical exploration of international investment law, nevertheless, discloses a far more complicated picture.¹³ International legal regimes have been developed by many groups of nations to govern their interactions.¹⁴ Indeed, if indigenous trading networks had not already been in place, the investment systems and foreign trade evolved through Western expansionism could not have been contemplated.¹⁵

In fact, the approach of signing treaties to attract trade and commerce can be traced further back to the twelfth century. During the Fatimid Caliphate and Mamluk Sultanate period, commercial privileges and fiscal exemptions were granted to non-Muslim foreigners.¹⁶ These privileges were given to foreign traders with the aim of making the Mediterranean an attractive region for trade.¹⁷ The granting of various concessions such as extraterritorial jurisdiction by Oriental states during the eleventh and twelfth centuries seems to be due to the recognition of the wide differences between Western and Eastern civilizations, their laws, manners and customs.¹⁸

Following the Fatimid Caliphate and Mamluk Sultanate, the Ottoman Empire signed Capitulation treaties with Western countries such as England and France.¹⁹ This relationship between the Ottoman Empire and the West in the early 1500s illustrated that property rules extended beyond Europe in the seventeenth century.²⁰ These Capitulation treaties granted commercial privileges to Europeans on a reciprocity basis.²¹ These reciprocal treaties stated various obligations such as protecting victims of shipwrecks, compensating for damages inflicted at sea, and seizing fugitive debtors.²²

The earliest Capitulation treaty was in 1535 with France, which included various concessions such as conducting trade according to the French law.²³ In fact, the tradition of applying home states’ jurisdiction in foreign

¹⁰ C Ryan, ‘Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law’ (2007) 29(3) U Penn J Intl L 725.

¹¹ A. Cassese, *International Law in a Divided World* (Oxford, Clarendon, 1986) 8; A. Nussbaum, *A Concise History of the Law of Nations* (New York, Macmillan Co. 1947); J. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff 1968–1998).

¹² H. Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648–1815): A Contribution to the History of the Law of Nations* (Sijthoff 1971) 6; F. Dawson and I. Head, *International Law, National Tribunals, and the Rights of Aliens* (Syracuse University Press, 1971) 4–5.

¹³ K. Miles, ‘Origins of international investment law’ in K. Miles (ed) *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 19.

¹⁴ P. Malanczuk, *Akehurst’s Modern International Law* (7th ed., New York: Routledge, 1997) 9; M. Sornarajah, *The International Law on Foreign Investment* (3rd ed., Cambridge University Press 2010) 19; C. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies: 16th, 17th and 18th Centuries* (Oxford, Clarendon Press 1967) 97.

¹⁵ Miles (n52) 22.

¹⁶ A. De Groot, ‘The Historical Development of the Capitulatory Regime in the Ottoman Middle East From the Fifteenth to the Nineteenth Centuries’ (2003) 22(83) *Oriente Moderno* 577.

¹⁷ *Ibid.*

¹⁸ J. Angell, ‘The Turkish Capitulations’ (1901) 6(2) *The American Historical Review* 255.

¹⁹ *Ibid.* 254.

²⁰ C. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (University of California Press, 1985) 12–13.

²¹ *Ibid.* 13.

²² *Ibid.*

²³ Angell (n57) 256.

commercial activities can also be found 10 centuries ago, when Arab traders were admitted to Canton-China with permission to have a *qati* (judge) and their own laws, and to erect a mosque.²⁴

After concluding the 1838 Anglo-Turkish Convention, the Capitulation granted extensive concessions to Europeans for mining, costal navigation, railroad and port construction and banking.²⁵ Thus, Ottoman control over foreign corporations simply disintegrated.²⁶ These unequal treaties²⁷ have been seen as “the product of actual or threatened use of force by the dominant Western commercial powers of the day.”²⁸ Indeed, they have even been seen as “quasi-colonies of Western powers, Western companies, or even individuals.”²⁹

Similar provisions to these were also found in the Friendship, Commerce and Navigation treaties (FCNs), which were concluded from the eighteenth century onward.³⁰ A long series of FCNs was adopted by the US. The first FCN treaty was signed with France in 1778,³¹ which is seen as the root of modern treaties.³² Initially, FCNs were designed as bilateral commercial treaties that aimed to facilitate trade and create a stable diplomatic and economic relationship between parties’ FCNs.³³ These treaties were not confined to commerce³⁴ – they extended to military matters and ensured freedom of worship and movement, in addition to granting most-favoured-nation and national treatment status.³⁵

The importance of FCN in influencing current BITs is a core topic in the literature. On one hand, it has been argued that early FCN “Rules on investment were never prominent or distinct,” even though pre-1945 FCNs contained investment rules such as compensation and establishment.³⁶ On the other hand, the late FCNs (after 1945) have more specific investment provisions, which are considered to be progenitors of modern BITs.³⁷ Their importance can be seen by the influence of the provisions of FCN treaties on current BITs. The concepts and language of FCN treaties on the issues of investments, namely expropriation, establishment, most-favoured nation, national treatment or the international law standard for capital transfers, are reflected to a great extent in the current BITs.³⁸ It is important to note that the early FCN³⁹ treaties did not contemplate direct investment by corporations, but were largely restricted to trade in goods.⁴⁰

²⁴ T. Twiss, *Revue de Droit International* (Brussels, A.-N. Lebègue et cie 1893) 207.

²⁵ Lipson (n59) 13.

²⁶ Ibid.

²⁷ Other examples of unequal treaties that provided non-reciprocal rights are the Treaty of Whampoa with France (1844) 97 Consolidated Treaty Series 375; the Treaty of Tientsin with Russia (1858) 119 Consolidated Treaty Series 113; the Treaty of Tientsin with the German States (1861) 124 Consolidated Treaty Series 299.

²⁸ Somarajah, ‘Foreign Investment’ (n53) 20; Lipson (n59) 13–14.

²⁹ N. Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997) 174.

³⁰ Treaty on Friendship, Commerce and Navigation is the Treaty of Amity and Commerce between the United States of America and France of 6 February 1778.

³¹ The first Treaty on Friendship, Commerce and Navigation is the Treaty of Amity and Commerce between the United States of America and France of 6 February 1778.

³² R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed, Oxford University Press 2008).

³³ R. Leal-Arcas, ‘The Multilateralization of International Investment Law’ (2009) 35 *NCJ Intl L & Com Reg* 59.

³⁴ Somarajah, ‘Foreign Investment’ (n53) 180.

³⁵ C. Lipson, (n59) 96; Somarajah, 180; D. Blumenwitz, ‘Treaties of Friendship, Commerce and Navigation’ in R. Bernhardt (ed) *Encyclopedia of Public International Law* (Elsevier Science & Technology 1992–2002); H. Walker, ‘Modern Treaties of Friendship, Commerce and Navigation’ (1957) 42(5) *Minnesota Law Review* 805.

³⁶ Dolzer and Schreuer (n 71) 6.

³⁷ Somarajah, ‘Foreign Investment’ (n53) 180.

³⁸ D. Vagts, ‘Avoidance and Settlement of International Investment Disputes’ (1984) 78 (April 12–14) *American Society of International Law Proceedings* 46, 47.

³⁹ However, the post-World War II FCN treaties were more “investment-specific” covering making investment by corporation. See Somarajah, ‘Foreign Investment’ (n53) 180. A significant change in FCN post-World War II practice can be seen by granting foreign corporations legal statutes and access to domestic court justice in host states in the Treaty of Amity and Commerce signed between the United States and Japan in 1911. See Leal-Arcas (n72) 60.

⁴⁰ Somarajah, ‘Foreign Investment’ (n53) 180. For the treaty practice of US, see A. Foster, ‘Some Aspects of the Commercial Treaty Program of the United States. Past and Present’ (1946) 11(4) *Law and Contemporary Problems* 647–662; Walker, ‘Modern treaties’ (n74) 805; H. Walker, ‘The Post-War Commercial Treaty Program of the United States’ (1958) 73(1) *Political Science Quarterly* 57–81.

However, although the early FCN treaties might not have been the precursors of modern BITs,⁴¹ they created a network of reciprocal trade protection measures, which created a framework for the international protection of foreign capital.⁴² On the other hand, FCNs are a provision that many countries find difficult to accept in modern times. Sornarajah argued that FCNs belong to a different age that had some unacceptable features such as the unlimited right of entry and establishment of businesses in host states.⁴³ A clear purpose of the FCN was to cement an alliance with the US, and they were undoubtedly “measures for spreading the influence of the major powers.”⁴⁴ Indeed, FCNs have a broad formulation that give extensive privileges to the US. Thus, the broad formulation of FCNs is not practical even from the perspective of the US, particularly when the economic and power balances have changed. Then, other contractual parties can use the treaty in unintended ways. For example, when dramatic changes in the economic balance occurred between the US and Japan, the latter used their FCN treaty⁴⁵ to claim access to the US market and even to be exempted from domestic law.⁴⁶

COLONIAL PERIOD

On the other hand, it has been argued that the origin of international rules on the protection of foreign property came from European nations.⁴⁷ Expanding agreements beyond Europe have altered their characters from a reciprocity base to an enforced base.⁴⁸ The expansion of European investment and trade activities, from the seventeenth century to the early twentieth century, have been seen by some scholars as forming the origin of international investment law.⁴⁹

European treaties were first concluded within the European countries. The aim of these treaties was not only to promote investment, as in the early FCN treaties, but to protect foreign investors’ rights. Their main purpose was to prevent the exportation and nationalization of European traders’ properties by the host state.⁵⁰ These rules were established to protect the capital-exporting countries and their nationals.⁵¹

Accordingly, the rules on foreign investment protection developed throughout the ‘colonial encounter.’⁵² European investment was largely made in the context of colonial expansion.⁵³ Such investment did not need protection as the imperial system had sufficient powers to protect investment within the colonies,⁵⁴ but other investments in uncolonized areas were protected by diplomacy and force.⁵⁵

Prior to the birth of contemporary BITs, the FDI regime was governed by customary international law.⁵⁶ During the colonial period, the customary international law was heavily criticized due to the inadequate protection it offered to foreign investors. This inadequacy was the result of three main factors. First, customary international law imposed an international minimum standard, which was disputed by some countries.⁵⁷ Most notably, Latin American states adhered to the Calvo doctrine, which only offered foreign investors the same treatment as their

⁴¹ Sornarajah, ‘Foreign Investment’ (n53) 180.

⁴² Lipson (n59) 37.

⁴³ Sornarajah, ‘Foreign Investment’ (n53) 181.

⁴⁴ *Ibid.* 210.

⁴⁵ USA and Japan Friendship Commerce and Navigation Treaty (1953).

⁴⁶ Sornarajah, ‘Foreign Investment’ (n53) 181. Example of cases brought against US under FCNs see Nicaragua Case [1984] ICJ Report 352 and Oil Platforms, Iran v United States, Judgment, Preliminary Objection [1996] ICJ.

⁴⁷ Lipson (n59) 11–12.

⁴⁸ *Ibid.* 12–14.

⁴⁹ K. Miles, ‘Origins of international investment law’ in K. Miles (ed) *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 19.

⁵⁰ Subedi (n8); 22.

⁵¹ Lipson (n59) 4; N. Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997) 173; P. Malanczuk, *Akehurst’s Modern International Law* (7th ed, New York: Routledge, 1997) 9.

⁵² A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004) 6–7.

⁵³ Sornarajah, ‘Foreign Investment’ (n53) 19.

⁵⁴ *Ibid.* 19 “This explains the reason why the law first grew in the American context, where investment flows from the United States into Latin America had to be secured in a non-colonial context.”

⁵⁵ Sornarajah, ‘Foreign Investment’ (n53) 20.

⁵⁶ K. Vandevelde, ‘A Brief History of International Investment Agreements’ (2005) 12(1) *UC Davis J. Int’l L. & Pol’y* 157.

⁵⁷ I. Brownlie, *Principles of Public International Law* (Oxford University Press 1990) 526–527.

own nationals.⁵⁸ Second, the content of the international minimum standard was vague and not demanding.⁵⁹ Third, the only dispute mechanism under customary international law was espousal.⁶⁰ Espousal⁶¹ is considered to be inadequate because the host state has no obligation to espouse the claim and it is necessary to first exhaust national remedies under the national law of the host state.⁶² Other mechanisms for dispute settlement were diplomacy or military force. An example of the former way can be observed in the US's persuasion of Latin American countries between 1829 and 1910 to submit 80 national injury claims to arbitration.⁶³ Yet, the diplomatic way is not always sufficient, as the investor can be left with no avenue for the recovery of any losses, if the home state decides to take no action.⁶⁴ Prior to diplomatic protection, military force was used by major trading nations to collect debts or claim reparation for losses. For instance, in 1902, Germany, Great Britain and Italy sent war ships to Venezuela to demand reparation for their nationals' losses due to defaulting on Venezuela's sovereign debt.⁶⁵

The European trading and investment principles have been heavily criticized, particularly during the colonial period. Capital-exporting states developed legal principles to legitimize their often-repressive actions for protecting property and acquiring commercial advantages.⁶⁶ Indeed, imperialism was a factor in shaping international investment law. Some of its impact still appears in contemporary foreign investment law. Most notably, the unlikelihood of a host state to address damages claimed by foreign investors. Miles argues that

The colonial encounter created 'otherness' in the concept of the host state, excluding it from the protective principles of international investment law. Thus, the host state was, and remains, unable to call upon the rules of international investment law to address damage suffered at the hands of foreign investors.⁶⁷

Indeed, it is often believed that the roots of foreign investment law served imperialist interests. The international foreign investment protection rules were developed to safeguard the imperialist and commercial interests of European capital-exporting states and their nationals.⁶⁸ Consequently, this fact can support the assumption that "colonialism was central to the development of international law."⁶⁹

It can be observed that in the colonial period and prior to it, the focus of foreign property protection treaties was mainly trade and there was no single separate treaty concerning just investments. Extraterritorial jurisdiction was an important feature of the early Arab and European traders. The implication of this feature was that it protected their assets from nationalization or expropriation by the local legislation.⁷⁰ However, the application of a European conceptualization of the international law on foreign investment protection was guaranteed virtually by extraterritoriality.⁷¹

In the nineteenth century, treaty practice protected alien property by reference to the domestic laws of the host state, not on the basis of an autonomous standard.⁷² For instance, article 2(3) of the Treaty between the United States and Switzerland of 1850 states:

⁵⁸ D. Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press 1955) 17, 20.

⁵⁹ Vandeveld, 'A Brief History' (n95) 159.

⁶⁰ *Ibid.* 160.

⁶¹ "Espousal is the public international law term for protection afforded by a government to its nationals in advocating their claims of an injury brought about by some action or inaction of a foreign government" see R. Kelso, 'Espousal: Its Use in International Law' (1982) 1 *J Int'l & Comp L* 234–245.

⁶² M. Whiteman, *United States. Department of State; United States* (Department of Foreign Affairs 1973) in Vandeveld 'A Brief History' (n95) 160.

⁶³ L. Summers, 'Arbitration and Latin America' (1972) 3(1) *Cal W Int'l LJ* 1.

⁶⁴ P. Sands, *Lawless World: America and the Making and Breaking of Global Rules* (New York, Viking Penguin 2003) 124.

⁶⁵ Subedi (n8) 27.

⁶⁶ Schrijver (n68)17; Anghie (n91) 3–10, 67–74; Sornarajah, 'Foreign Investment' (n53) 19–20.

⁶⁷ Miles (n 88) 32.

⁶⁸ Sornarajah, 'Foreign Investment' (n53) 38; Anghie (n91) 68, 224.

⁶⁹ Anghie (n91) 19.

⁷⁰ Subedi (n8) 22.

⁷¹ D. Fidler, 'International Human Rights Law in Practice: The Return of the Standard of Civilization' (2001) 2 *Chicago Journal of International Law* 142.

⁷² Dolzer and Schreuer (n 75) 6.

In case of ... expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other, shall be placed on an equal footing with the citizens of the country in which they reside in respect to indemnities for damages they may have sustained.⁷³

DEVELOPMENTS AFTER THE SECOND WORLD WAR

During the colonial period there was no need for a regime to govern foreign investors' protection, but soon after imperialism, the need for such a regime was recognized by the erstwhile powers of the empire. This period witnessed major political and economic changes. Newly independent countries feared that foreign presences may affect their sovereignty.⁷⁴ Therefore, massive nationalization programs were adopted by developed countries. Many developing countries closed their economies in the face of new foreign investors and began to nationalize existing foreign investors, such as the expropriation of the petroleum sector in Iran in 1951 and in Libya in 1955.⁷⁵ This post-war period of the anti-colonial movements witnessed antagonism and hostility towards foreign investment⁷⁶ such that "it is unlikely that a new wave of nationalism will sweep across a vast area of the globe as it did during the immediate post-war era."⁷⁷

Newly independent developing countries started growing in number and hostilities about the status of customary law governing foreign investment started to change in capital-exporting states between 1945 and 1990.⁷⁸ On the one hand, capital-exporting developed countries placed greater emphasis on protecting the investments of their nationals, while on the other hand, capital-importing developing countries were anxious about their sovereignty and preserving control over the vital economic parts of their countries.⁷⁹ Accordingly, there were divisions regarding the law that should govern foreign investment. This period witnessed major confrontations between capital-exporting countries and newly dependent countries about the status of the customary law governing foreign investment.⁸⁰ Developing countries advocated that the treatment of foreign investment should be regulated by international law, whereas developed countries advocated that national law should solely regulate foreign investment.⁸¹

Despite the long history of the expanding of foreign investment globally, it was difficult to create a system of international investment law. Indeed, the International Court of Justice (ICJ) commented during the early development of international law that, despite the proliferation of foreign investment, "the evolution of law has not gone further and that no generally accepted rules in the matter have crystallised on the international plane."⁸² The conflict of interest between international communities was the reason behind the lack of consent to create an ultimate international investment legal system. The concern of developed countries was providing intensive protection to foreign investment under international law. This was justified under the assumption that "international law had long regulated the treatment of aliens by states."⁸³ On the other hand, some developing countries rejected such an approach and adopted the Calvo Doctrine,⁸⁴ which regulates foreign investment solely under the host state's regulation.⁸⁵ The Calvo Doctrine principles state that no better treatment should be given to foreign investors than that accorded to

⁷³ Convention of Friendship, Commerce and Extradition Between the United States and Switzerland; November 25, 1850.

⁷⁴ R. Leal-Arcas, 'The Multilateralization of International Investment Law' (2009) 35 NCJ Intl L & Com Reg 55–56.

⁷⁵ Vandeveld, 'A Brief History' (n95) 164.

⁷⁶ Sornarajah, 'Foreign Investment' (n53) 21–22.

⁷⁷ Sornarajah, 'Foreign Investment' (n53) 22.

⁷⁸ Dolzer and Schreuer (n 75).

⁷⁹ M. Evans (eds), *International Law* (3rd ed., OUP 2010) 742.

⁸⁰ R. Dolzer, 'Permanent Sovereignty over Natural Resources and Economic Decolonization' (1986) 7 Human Rights LJ 217; K. Gess, 'Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and its Genesis' (1964) 13 ICLQ 398; C. Brower and J. Tepe, 'The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?' (1975) 9 Int'l Lawyer 295.

⁸¹ S. Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 AM SOC'Y INT'L L PRoc 27.

⁸² *Barcelona Traction Light and Power Company Limited (Belgium v Spain)* (Judgment) February 5, 1970 (ICJ Reports 1970,4) paras 46–47.

⁸³ Schwebel (n 120) 27.

⁸⁴ For a brief description of the Calvo Doctrine, see <https://legal-dictionary.thefreedictionary.com/Calvo+Doctrine>.

⁸⁵ Ryan (n 49) 725.

domestic investors of the host state.⁸⁶ Moreover, foreign investors cannot have recourse to any dispute resolution procedures that were not available to nationals of the host state.⁸⁷

Eventually, the opinions of developing countries regarding international law's role in regulating foreign investment were memorialized in the 1974 Charter of Economic Rights and Duties of States (the "Charter"). The Charter states that "[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources, and economic activities."⁸⁸ Similarly, the United Nations General Assembly Resolution 3171⁸⁹ declared that a host state that expropriates foreign property "is entitled to determine the amount of possible compensation and the mode of payment ... [A]ny disputes which might arise should be settled in accordance with the national legislation of [that] State."⁹⁰ However, although these documents carry rhetorical significance and were supported by a numerical superiority of the voting bloc, none of these attempts, neither the Charter nor the General Assembly Resolution 3171, constitute formal statements of international investment law.⁹¹

These norms can be considered as an important factor that shifted the international community to treaties. On one hand, it has been argued that the developing countries' demands, reinforced by the New International Economic Order (NIEO) debate, and the various resolutions of the UN General Assembly, were a threat to developed countries. Subsequently, developed countries signed BITs with developing countries because of their fear of uncompensated expropriation.⁹² Moreover, it can be said this threat was associated with the realization of the importance of foreign investments by developing countries. Indeed, eventually, in the early 1970s, there was a shift in developing countries' views regarding foreign investments and the role that international law should play in their regulation.⁹³ Many countries realized the importance of foreign investment if their economies were going to flourish. This realization encouraged countries to act in their own self-interest and to sign BITs to attract foreign investments, regardless of the failure of the international community to agree on an overarching agreement.⁹⁴ Accordingly, during this period, the international community relied on treaties instead of customary international law as the basis for protecting foreign investments at the behest of developed countries and investors.⁹⁵ This move was mainly due to the fact that customary international law was seen as being inadequate in its protection of foreign investors. For instance, it did not address important rights such as the right of foreign investors to monetary transfers from the host country.⁹⁶ Additionally, "the clear absence of a consensus in customary international law, combined with the failure to conclude a multilateral treaty on foreign investment, necessitated increased attention to FDI in bilateral agreements."⁹⁷

Over history, investment treaty practice has been changed in various ways. Contemporary BITs are "a product of this era of widespread nationalization and developing country efforts in multilateral settings that threatened the sanctity of foreign contracts, property rights, and international doctrines of state responsibility."⁹⁸ The investment treaties in the post-Second World War period have distinctive features, examined below.

⁸⁶ D. Manning-Cabrol, 'The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors' (1995) 26 LAW & POL'Y INT'L Bus. 1169, 1195.

⁸⁷ C. Schreuer, 'Calvo's Grandchildren, The Return of Local Remedies in Investment Arbitration' (2005) 4(1) LAW & PRAC. INT'L CTS. & TRIBUNALS 1.

⁸⁸ Resolution adopted by the General Assembly 3281 (XXIX) Charter of Economic Rights and Duties of States, art. 2, U.N. Doc. A/9631 (December 12, 1974).

⁸⁹ United Nations General Assembly Resolution 3171 (On Permanent Sovereignty Over Natural Resources) (December 17, 1973).

⁹⁰ General Assembly Resolution 3171 (XXVIII), para. 3, U.N. Doc. A/9030 (December 17, 1973), reprinted in 13 I.L.M. 238, 239 (1974).

⁹¹ Ryan (n 49) 729.

⁹² Vandeveld, 'A Brief History' (n95) 168.

⁹³ Schwebel (n 120) 28.

⁹⁴ Ryan (n 49) 730.

⁹⁵ Ibid.

⁹⁶ W. Salacuse, 'The Treatification of International Investment Law' (2007) 13 L. & Bus. REV. AM. 155.

⁹⁷ J. Wouters, P. De Man, and L. Chanet, 'The Long and Winding Road of International Investment Agreements: Toward a Coherent Framework for Reconciling the Interests of Developed and Developing Countries' (2009) 3 Hum. Rts. & Int'l Legal Discourse 272.

⁹⁸ A. Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50 Harv. Int'l L.J. 501.

First, in this period, BITs were exclusively concerned with foreign investment, while trade dealt with GAAT. The US and European practices for investment protection treatment programs differed. While the US continued to sign modern FCNs with a primary goal of investment protraction, European countries negotiated new bilateral investment protection agreements (BIPAs) that were concerned solely with investment protection.⁹⁹ The era of modern investment treaties began in 1959, when the first investment treaty, which focused solely on investment issues, was agreed between Germany and Pakistan.¹⁰⁰ This didn't occur until 1977, when the US joined the European practice of concluding an agreement addressing issues of foreign investment only.¹⁰¹ Additionally, developed countries' motivations for concluding agreements have changed. While FCNs aimed to establish economic relationships, the post-Second World War treaties concerned foreign investor protection.¹⁰² Developing countries, on the other hand, aimed to attract foreign investors to trade with their sovereignty. "Priorities had shifted from preserving national sovereignty to attracting foreign investors, with developing states effectively cashing in their sovereignty in exchange for credibility as a site for investment."¹⁰³

Second, the trend of treaties followed mainly a north-north basis, as can be seen in the seventeenth century when Europeans concluded treaties among themselves. However, the BITs in the post-colonial period were principally north-south treaties.¹⁰⁴ Indeed, developed countries aimed to protect their investors abroad and developing countries were motivated by economic reasons. Typically, BITs were drafted by developed countries then offered to developing countries, which made only minor changes to the original draft.¹⁰⁵ The obligation between counteracting parties is unbalanced. Although equal obligations are formally assumed, in practice the agreement is nonreciprocal because all obligations fall on the developing country.¹⁰⁶

Moreover, some main principles have been changed, such as the dispute settlement mechanism. With regard to dispute settlement, there were no direct investor-state dispute settlement procedures in the early treaties; rather, disputes were submitted to the International Court of Justice¹⁰⁷ or settled through ad-hoc state-to-state arbitration.¹⁰⁸ In the mid-1960s one major innovation of BITs was the inclusion of an investor-state dispute settlement (ISDS) clause.¹⁰⁹ Initially, the treaty of 1969 between Chad and Italy offered arbitration between host states and foreign investors, then BITs began to include this provision.¹¹⁰ Arguably, this is the most significant right given by investment treaties.¹¹¹ Thus, recently the legitimacy of ISDS has been doubted, as will be discussed later. Despite this recent backlash against ISDS, it can be seen as a biased mechanism compared to the colonial period when foreign investors sought remedy under their national law. Indeed, for the first time, foreign investors had an affective mechanism to solve disputes with host states that did not depend upon the espousal of their claim by their home countries or military force.¹¹² Furthermore, this provision was prompted by the establishment of ICDS, which were intended to provide venue for ISDS claims.

⁹⁹ J. Vandevelde, 'The Bilateral Investment Program of the United States' (1988) 21 Cornell Int'l LJ 206–208.

¹⁰⁰ Treaty between Pakistan and the Federal Republic of Germany and for the Promotion and Protection of Investments, signed November 25, 1959, (1963) 457 UNTS 23 (entered into force April 28, 1962).

¹⁰¹ K. Vandevelde, 'The BIT Program: A Fifteen-Year Appraisal' (1992) 86 ASIL Proceedings 534

¹⁰² K. Vandevelde, 'A Brief History' (n95) 172.

¹⁰³ A. Kaushal, 'Revisiting History' (n 136) 501.

¹⁰⁴ United Nations Conference on Trade and Development, *Bilateral investment treaties in the mid-1990s* (New York, United Nations 1989) 8–19.

¹⁰⁵ K. Vandevelde, 'A Brief History' (n95) 170.

¹⁰⁶ Sornarajah, 'Foreign Investment' (n53) 227.

¹⁰⁷ Such as in the post-war FCN treaties, FCNs with Japan stated in Article XXIII (2): "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."

¹⁰⁸ Article 11 of the Bilateral Investment Treaty concluded between Germany and Pakistan on 25 November 1959, UNTS (1963) 24.

¹⁰⁹ Vandevelde, 'A Brief History' (n95) 174.

¹¹⁰ Dolzer and Schreuer (n 71) 9.

¹¹¹ Ryan (n 49) 733.

¹¹² K. Vandevelde. *United States Investment Treaties: Policy and Practice* (Deventer, Kluwer Law and Taxation 1992) 22.

THE GLOBAL ERA

The global era of the history of international investment law starts at the end of 1990. Unlike in the post-colonial era, the hostility towards foreign investors has been abundant. A more liberal approach to attracting foreign investment has been adopted by developing countries.¹¹³ The most notable changes in this era are the context of BITs and exploration of the number of BITs.¹¹⁴ The provision of these BITs, after all, embodies the standards of the developed states and establishes a paradigm completely at odds with the 1974 Charter in terms of international dispute settlement and compensation for expropriation.¹¹⁵ This reversal of views can be explained by different factors. For instance, the need of developing countries, rich in natural resources, for the expertise or equipment to exploit them.¹¹⁶ Moreover, the competition for capital is another factor in the proliferation of BITs.¹¹⁷ It is also argued that LDCs competed to attract foreign investors in order to gain an advantage over other LDCs.¹¹⁸

The significance of this era can be seen through the establishment of the World Trade Organization (WTO), which covers investment-related issues in its jurisdiction,¹¹⁹ notably through the General Agreement on Trade and Services (GATS). GATS aimed to remove barriers to cross-border trade in services and it concerns the treatment of service providers in host states.¹²⁰ The potential significance of GATS was reflected in the increasing FDI in the service sector compared to manufacturing in 2002.¹²¹ Later, the jurisdiction of the WTO was expanded beyond services, for example through the Agreement on Trade Related Investment Measures, which prohibits distorting performance requirements.¹²² There was also the Agreement on Trade Related Aspects of Intellectual Property,¹²³ which requires parties to protect intellectual property rights, a form of investment.¹²⁴

This era can be seen as the golden age of foreign investments. The keenness of developing countries to attract FDI was associated with a liberal approach towards FDI. The Calvo Doctrine was adopted by Latin American countries, who agreed to impose an international minimum standard of treatment for foreign investors. Furthermore, discussion ceased to take place of the new international economic order that allowed expropriation without compensation.¹²⁵ Most notably, in the 1990s, the rule-making in investment issues was comprehensively developed through bilateral, multilateral, regional and interregional levels, in the form of binding treaties or voluntary instruments.¹²⁶

This era witnessed an increasing number of BITs due to the shortcomings of customary international law, particularly because “customary law was deemed to be too amorphous and not able to provide sufficient guidance and protection.”¹²⁷ The expansion of BITs reflects the importance of this instrument in the protection of foreign investments. Indeed, BITs are considered to be the most important source of contemporary international investment

¹¹³ K. Vandeveld, ‘Investment liberalization and economic development: The role of bilateral investment treaties’ (1998) 36(3) *Colum. J. Transnat’l L.* 501.

¹¹⁴ K. Vandeveld, ‘Sustainable liberalism and the international investment regime’ (1997) 19(2) *Mich. J. Int’l L.* 373.

¹¹⁵ T. Guzman, ‘Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’ (1998) 38 *VA. J. INT’L L.* 652.

¹¹⁶ A. Kaushal et al. (eds) *The Backlash against Investment Arbitration* (Kluwer Law International 2010) 503.

¹¹⁷ *Ibid.* 502.

¹¹⁸ Guzman (n 115) 666–667.

¹¹⁹ See B. Hoekman and M. Kostecki *The Political Economy Of The World Trading System: The WTO and Beyond* (Oxford University Press 2009).

¹²⁰ Services sometimes provide by establishing service providers in foreign countries, see Vandeveld, ‘A Brief History’ (n95) 176.

¹²¹ UNCTAD, *World Investment Report 2004: The Shift Towards Services* (UN Sales No: E.04.II.D.36) 301. <<http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=680>> accessed 2 August 2017.

¹²² TRIMS Agreement: Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMS Agreement].

¹²³ Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C to the Agreement establishing the World Trade Organization of April 15, 1994).

¹²⁴ Vandeveld, ‘A Brief History’ (n95)177.

¹²⁵ T. Wälde, ‘A Requiem for the “New International Economic Order” The Rise and Fall of Paradigms in International Economic Law’ (2003) *OGEL* <www.ogel.org/article.asp?key=816> accessed September 20, 2017.

¹²⁶ E. Schlemmer, ‘A New International Law on Foreign Investment’ (2005) 3 *J S Afr L* 532.

¹²⁷ R. Dolzer and A. von Walter, ‘Fair and Equitable Treatment-Lines of Jurisprudence on Customary Law’ in F. Ortino and others (eds) *Investment Treaty Law, Current Issues II* (BICL 2007) 99.

law.¹²⁸ However, these treaties have been under debate for many reasons. For instance, it is questioned whether BITs form international customary law, whether they attract foreign investors and whether they overprotect foreign investors and eliminate state sovereignty.

In terms of the role of BITs in shaping international customary law, there are many views that either support or oppose this assumption. An arbitral tribunal stated that BITs have shaped customary international law in terms of foreign investors' rights.¹²⁹ This view has been supported by many scholars.¹³⁰ The supportive view bases its argument on various reasons, such as the treaties having strong similarities, common concepts and structures, and they have been agreed between a large number of countries.¹³¹ This is taken as evidence that treaties constitute customary international law. However, this view has been rejected by other scholars. Their rejection was mainly for two reasons: they argue that BITs do not meet the condition of consistent state practice and lack any *opinio juris*.¹³² In support of this view it is argued that "the popularity of BITs should not be taken as evidence in support of customary international law." Nonetheless, although there is no unified view regarding whether BITs constitute customary international law, BITs have been increasing among countries with more serious concerns. These concerns mainly regard the effect of BITs on state sovereignty and sustainable development.

CONCLUSION

This article traces the history and origin of investment treaties. The importance of such a study to fully understand the contemporary character of international investment law is clear. It has been argued that the purpose and function of investment treaties have been changing – arguably, from the aim of creating diplomatic and economic relationships under early FCNs to the sole protection of foreign investors' rights. The sole protection of foreign investment has been seen as the inherited feature that has been developed by powerful economics. Nonetheless, the evolution of the roots of the Calvo Doctrine shows the need to re-shape the investment regime in favor of host states. Yet, recently there has been a global awareness of adopting balanced investment treaties that safeguard state sovereignty and mediate protection for foreign investors.¹³³

¹²⁸ Dolzer and Schreuer (n 71) 13.

¹²⁹ *Mondev Int'l. Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002), reprinted in 42 I.L.M. 85, 125 (2003).

¹³⁰ P. Kohona, 'Some Major Provisions in Modern Investment Protection Agreements' (1987) *Third World Legal Study* 153; Ryan (n 49); A. Kutty and S. Chakravarty, 'A Multilateral Investment Agreement: Poison or Antidote?' (2010) 22(1) *Sri Lanka JiL* 89, 94–95.

¹³¹ A. Lowenfeld, 'Investment agreements and international law' (2003) 42 *Colum. J. Transnat'l L.* 123; Schwebel (n 120) 27.

¹³² Sornarajah (n53) 173.

¹³³ I would like to thank my supervisors, Professor Surya Prasad Subedi, QC, OBE, DCL and Dr. Colin Mackie for their continued support and encouragement.