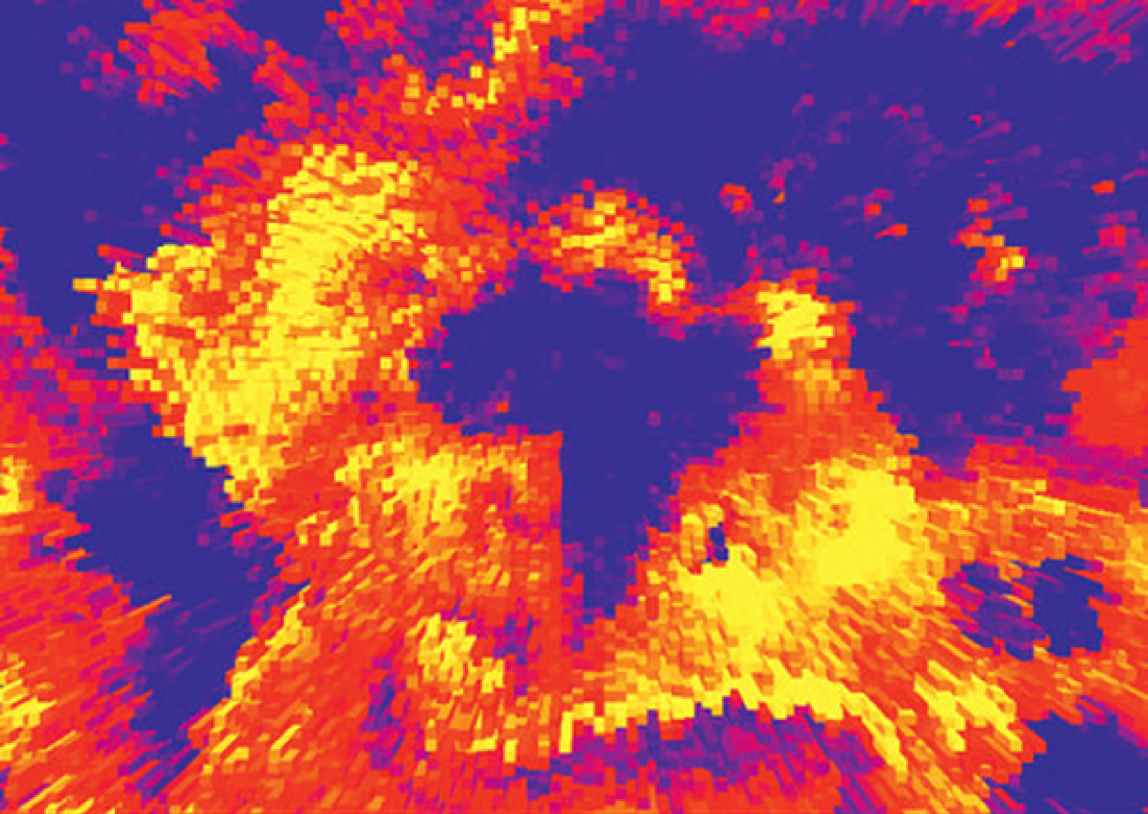

AN INTRODUCTION TO International Investment Law

DAVID COLLINS

CAMBRIDGE

An Introduction to
International Investment Law

This insightful and accessible introduction provides students and practitioners with a comprehensive overview of the increasingly important discipline of international investment law. Focusing primarily on the legal principles contained in the growing body of international investment agreements, this book covers the core concepts of the discipline, with attention given to their relation to each other and to the manner in which they have been developed through arbitration case law. The context of each legal principle is explored, along with a consideration of some of the major debates and emerging criticisms. Avoiding extensive case extracts, this book adopts an engaging and succinct narrative style which allows readers to advance their understanding of the topic while examining the legal principles with academic rigour and discerning commentary.

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Abbreviations

ACIA	ASEAN Comprehensive Investment Agreement
AIIB	Asian Infrastructure Investment Bank
ASEAN	Association of South East Asian Nations
BIT	Bilateral Investment Treaty
BOT	Build Operate and Transfer
BRIC	Brazil, Russia, India, China
BRICS	Brazil, Russia, India, China, South Africa
CAFTA	Central American Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
CFIUS	Committee on Foreign Investment in the United States
COMESA	Common Market for Eastern and Southern Africa
CSR	Corporate Social Responsibility
ECOWAS	Economic Community of West African States
ECT	Energy Charter Treaty
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
FCN	Friendship, Commerce and Navigation
FDA	Food and Drug Administration
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FPS	Full Protection and Security Standard
FTA	Free Trade Agreement
NGO	Non-Governmental Organization
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IFC	International Finance Corporation
IFSWF	International Forum of Sovereign Wealth Funds
IIA	International Investment Agreements
IMF	International Monetary Fund

IP	Intellectual Property
LCIA	London Court of International Arbitration
MAI	Multilateral Agreement on Investment
MFN	Most Favoured Nation
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NDB	New Development Bank
NIEO	New International Economic Order
OECD	Organization for Economic Cooperation and Development
OPIC	Overseas Private Investment Corporation
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PRI	Political Risk Insurance
PSNR	Permanent Sovereignty over Natural Resources
RTA	Regional Trade Agreements
SOEs	State-Owned Enterprises
TiSA	Trade in Services Agreement
TPP	Trans Pacific Partnership
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1 Introduction to Foreign Direct Investment: History, Trends and Rationales

1.1 International Investment Law

International investment law is best described as a field of public international law which deals with the laws governing the commercial activities of multinational enterprises that are undertaken in foreign states. This occurs when a business or firm decides to open a branch of operations overseas, such as a factory or a mine, and in so doing it may come into conflict with that host state's laws. These may control the nature or extent of the economic activities the firm is allowed to pursue, such as licensing requirements, labour or environmental standards. While this situation may appear to be a matter for resolution by application of domestic laws of the host state through its courts, increasingly recourse is given to international law and international tribunals for answers. International investment law is a species of public international law in the sense that it comprises legal commitments made by sovereign states at the international level as captured by the international investment agreements. While often overlooked, it also has private law elements because the rights (and to a lesser extent obligations) of firms are in some cases formulated by investment contracts between firms and the states in which they operate. In this latter sense, international investment law can be viewed as a field of transnational contract law, governed both by domestic legal systems and the rules of international law.

The law of foreign investment is one of the oldest branches of international law. But it remained relatively undeveloped until the latter part of the twentieth century, growing in-step with globalization, meaning the intense interrelation of markets as well as the mobility of people and capital around the world. Prior to the 1990s there were few treaties governing international investment and the resolution of disputes between investors and host states was mostly informal, consisting for the most part of diplomatic pressure, often backed up by the threat of force. Yet within a relatively short period of time this area of law witnessed a phenomenal growth to become one of the most dynamic and intensively studied spheres of international law. It now comprises many thousands of treaties and highly formalized dispute settlement procedures which have resulted in hundreds of cases brought by expert practitioners and a growing body of specialized jurisprudence. Investor–state arbitration itself has acquired a new status in international law – it has transformed from its origins as a rather obscure, private dispute settlement mechanism to a high-profile forum for the resolution of complex claims. It often has a significant public dimension because of the legal consequences of regulations pursued in the interest of society at large. International investment law has far-reaching implications with respect to both international commerce as well as fundamental issues of sovereignty and by extension the constitutional role of states – essentially the way in which a country governs itself.

The remarkable growth of international investment law as a semi-autonomous discipline within international law is largely the consequence of foreign investment's importance both to the highly mobile firms which engage in it and the growth-focused states which seek to attract it. Just as many companies rely on an international presence in order to sustain and enlarge profits, so many countries depend on foreign capital in order to develop and achieve economic prosperity. Yet there is now widespread concern that the rapid pace of change in the global economy, including the fervid ascendance of the emerging markets, the role of State-Owned Enterprises (SOEs) pursuing non-traditional strategies, highly interconnected financial markets and the dominance of supply chain manufacturing has transformed the way governments interact with foreign investors. There is justifiable concern that the encroachment of states on the commercial activities of multinational enterprises has not been properly managed, in that it is at times excessive and undisciplined while at other times it is merely the manifestation of government's right to regulate its own economic affairs. Likewise, it is often suggested that many of the decisions of international tribunals have gone too far in interpreting the protective provisions of treaties in favour of investors, undermining the legitimate sovereign rights of host states, for example by construing environmental regulations as a form of expropriation, effectively taking private property that does not belong to it.[1] On the other hand, some feel that strong

[1] See e.g. D. Schneiderman, *Constitutionalizing Economic Globalization* (Cambridge University Press, 2008).

protection for the foreign firms which have risked exposing their assets to the whims of unstable governments is essential to stimulate the flow of badly needed capital to poorer nations. These issues will be explored in greater detail throughout this book.

1.2 Foreign Direct Investment

International investment law primarily covers the international laws which control Foreign Direct Investment (FDI). The phrase 'direct' investment is important because this is meant to exclude investment activities for which the extra-territorial component of the enterprise is too small for it to genuinely be considered foreign, although such forms of investment may also be contemplated by some treaties in this field. Put another way, direct investment means that the foreign firm has a sufficient stake in the firm that it exercises meaningful management or control. This is normally thought to be at least 10 per cent of the voting shares in the firm.[2] Below 10 per cent ownership would normally qualify the investment as 'portfolio investment'. Portfolio investment refers to investments that lack direct personal management, such as when ordinary people purchase stocks and shares in large public corporations. The inclusion of portfolio investment into the understanding of 'investment' for the purposes of international investment law has the potential to bring various entities within the ambit of protection available under an investment treaty that may not necessarily deserve special protection under international law, because such individuals are not exposed to the same level of risk as genuine managers of foreign firms. Moreover, such entities do not provide the same advantages of foreign capital to host states that are associated with the truly multinational firm. Still, as will be explained in Chapter 3, a number of investment treaties have extended their coverage to indirect forms of investment.

While the direct component of FDI is reasonably straightforward, the definition of 'investment' itself remains controversial. It is undefined in some treaties, or expressed in a purposefully open manner, leaving arbitration tribunals the task of interpreting the concept on a case-by-case

[2] *IMF Glossary of Selected Financial Terms and Definitions*, 31 Oct 2006, www.imf.org/external/np/exr/glossary/showTerm.asp#117.

basis. Perhaps more controversially, this affords tribunals the latitude to consider various commercial ventures as deserving of protection where this is arguably unjustified for the reasons noted above. Establishing a definition for 'investment' and 'investor' will be explored more fully in Chapter 3, but for now it is useful to observe that most investment treaties define the term 'investor' to include all sorts of commercial entities including SOEs, foreign nationals or a private enterprise of a foreign state that has engaged in commercial activity in the territory of another state.

For now it should be noted that the trend in modern investment treaties is to define the terms 'investor' and 'investment' broadly, with indicative rather than definitive lists of investors and investment. In order to encompass as many forms of commercial activity as possible, many treaties provide that the term 'investment' includes 'every kind of asset' and supply a non-exhaustive list of specific forms of investment, such as the equally expansive 'property, rights and interests of every nature'. For example, the US Model Investment Treaty of 2012 states that investment means: 'every asset that has the characteristic of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk', followed by a non-exhaustive enumerated list of various types of investment.[3] This is obviously very wide, covering effectively all varieties of commercial activity by foreigners in host states. Clearly this wide definition is of value to a capital-exporting state such as the USA because it protects as many varieties of businesses as possible.

Still, not every kind of commercial venture will amount to an investment and therefore attract the protections of international investment law, including most importantly, the protections enshrined in treaties. One of the ways in which 'investment' has been established by arbitration tribunals, at least for the purposes of establishing jurisdiction under the International Centre for the Settlement of Investment Disputes (ICSID) Convention, is known as the *Salini* Test, taken from the *Salini* v. *Morocco*[4] dispute. There remains a lively debate as to whether the *Salini* Test should be followed even in the context of ICSID disputes because it is seen by some to expand ICSID's jurisdiction beyond what is granted in that organization's founding documents, and in so doing introduces

[3] Art 1. [4] Decision on Jurisdiction, ICSID Case No. ARB/00/4 (23 July 2001).

a significant degree of uncertainty into international investment.[5] Some of these issues will be explored later in Chapter 3. For the time being it is important to mention that the *Salini* Test states that to be an investment, the activity in question must: (1) involve the transfer of funds or the contribution of money or assets; (2) be of a certain duration; (3) have the participation of the individual transferring the funds in the management and risks associated with the project; and finally (4) bring economic contribution to the host state. Of these, the requirement of certain duration is perhaps the hardest criterion to satisfy. To be an investor, one must have a lasting relationship with the host state, although whether that means a few months or a few years is unclear. More certainly this means that a single transaction, such as a one-off contract, does not count.[6] The final component of the test, the obligation to contribute to the host state's development, has been rejected by some tribunals in part because it is simply too ambiguous to constitute an enforceable legal obligation.[7] The lack of this final component is problematic however, given the obligations of investment treaties are placed uniformly on host states rather than investors who enjoy all of the benefits.

While it has less legal relevance, economists often split FDI into two additional categories that help clarify the nature of foreign firms' involvement in the domestic economies of other states: mergers and acquisitions (meaning a foreign company purchasing all or a portion of an existing local company) and greenfield. Greenfield investment means creating an entirely new project or company from nothing – such as an oil field, a mine or a new factory. Host states often have a preference for the second category because it represents an entirely new source of capital, rather than the reorganization of an existing one. Mergers and acquisitions are often associated with the loss of employment as old companies are restructured by foreign managers to become more competitive, sometimes referred to euphemistically as 'synergies' in management speak. The concept of 'investment' will be revisited again throughout this book. The precise definition is often challenged in the context of establishing jurisdiction for the purposes of arbitration.

[5] See e.g. A. Grabowski, 'The Definition of Investment Under the ICSID Convention: A Defense of *Salini*' 15:1 *Chicago Journal of International Law* 287 (2014).

[6] E.g. *Burimi SRL and Eagle Games SH.A* v. *Republic of Albania*, ICSID Case No. ARB/11/18, Decision on Jurisdiction (29 May 2013).

[7] E.g. *Quiborax* v. *Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 Sept 2012).

1.3 Historical Context – Beginnings of Foreign Direct Investment (FDI)

In order to appreciate the content of international investment law as a living discipline and an area of legal practice, it is useful to have an understanding of the origins of foreign investment itself. While FDI levels have reached unprecedented levels in recent years, the presence of commercial entities from one state in the territory of another is not a phenomenon exclusive to the twenty-first or even twentieth century. Foreign investment has occurred throughout history and across the world for many hundreds of years. Indeed, the establishment of foreign investment was one of the chief motivations behind the expansion of the European empires to the four corners of the world in the early pre-modern period. Conscious of a certain historic irony, the forays of modern multinational enterprises into developing states is depicted by some critics as a kind of neo-colonialism, reasserting the historic power imbalances between capital-importing and capital-exporting countries.

One of the earliest known examples of foreign investment in its purest form is that of the Phoenicians, a civilization that flourished from 1500 BC in what is now Israel and Palestine. The Phoenicians traded by ship with the Greeks and established outposts around the Eastern Mediterranean from which they could sell goods from their homeland, such as wood and textiles. It is important to recognize that this type of activity was not simply international trade (an item from one place being sold somewhere else) – the Phoenician outposts are correctly described as a lasting commercial presence in a foreign state. Interestingly, the act of establishing commercial settlements in foreign states on the shores of the Mediterranean Sea also led to the diffusion of the Phoenician alphabet, which is the ancestor of all modern Western alphabets. While this may not have been an intended benefit at the time, this eventuality helps fulfil the requirement of contribution to the economic development of the host state. As will be shown later, the transfer of knowledge is often seen as one of the 'spillover' advantages of FDI.

A few centuries after the Phoenicians, the Silk Road land-based trading routes were established between Europe (then controlled by the Roman Empire), the Middle East and the Pacific Ocean, extending over 6000 km through the deserts, plains and mountains of Asia. This early conduit allowed for the exchange of goods such as fabrics, spices and jewels.

Importantly, these commercial relationships also involved the transfer of language and culture, primarily through trading agents who often established themselves in foreign states for extended periods of time. These were the settlements which became some of the early cities of regions like the Persian Empire such as Samarkand. Recall that a key feature of investment as distinct from trade or other forms of commercial activity is the creation of a long-term relationship – the commitment of resources to an enterprise for the pursuit of profit over a period of time, rather than linked to one particular transaction. Help in the creation of lasting outposts may further be seen as key contributions to the development of foreign lands.

The Silk Road remained a key link between Europe and Asia until the Middle Ages when sea travel came to dominate international investment, as well as international trade. Beginning in the fifteenth century there was extensive trans-oceanic commerce between Europe and China, as well as India, involving exotic commodities like spices and tea. Port cities became the major focus of commercial activity and money was increasingly channelled into the building and maintenance of the ships themselves. The operation of commercial shipping can be viewed as an early form of foreign investment – the sailing vessels were constructed and operated at great expense, and successful missions abroad were fraught with risk both for the crew as well as the owners. The rise of commercial shipping during this period was in tandem with the expansion of ports in the destination countries. As then, the creation of infrastructure in host states remains one of the chief benefits associated with FDI.

1.4 The Colonial Period

During the early modern period (the fifteenth century and onwards) Western European states began to establish permanent colonies in the locations where they had previously visited on trade missions, buildings ports such as Hong Kong and New Amsterdam (later New York). The Dutch East India Company was formed in 1602 in order to carry out commercial activities in Indonesia, particularly in relation to the transportation of spices like pepper. It is quite rightly described as the world's first multinational corporation. Likewise, the Portuguese began establishing colonies in India and Africa, as did the British and French. The latter two states also set up colonies in North America where fur trapping was a lucrative enterprise. Spain and Portugal had also begun settling South and Central America by the mid-seventeenth century, driven in part by the pursuit of gold.

The practice of colonialism as employed by the European powers of the time was rooted in the economic objective of exploiting the abundant resources and in some cases cheap labour available in lesser developed countries through a military and administrative presence. Wealth generated from foreign investment, and trading activities overseas was itself tied to the political goal of land acquisition and expansion of territorial sovereignty of the major European powers as wealth from the colonies, especially gold and silver, enriched the home country which in turn funded greater armies and navies. Much like a good portion of modern FDI is predicated on the application of technology and infrastructure from the industrial world to resource-rich developing states, colonialism was made possible by an imbalance in technology. The European states had expertise in tools like cartography, shipbuilding, navigation and weaponry which translated into extractive capabilities that native peoples in Africa and the Americas did not possess. This paradigm is worth keeping in mind when considering the relationship between signatory parties and modern international investment treaties.

Perhaps more than any other power, the British Empire exemplified the colonialism that contained the seeds of modern international investment. It reached its peak in the nineteenth century and was the largest empire in the history of the world, covering a quarter of the land area of the planet. Multinational enterprises, often enjoying government-granted monopolies, played a significant role in its expansion and dominance, including the British East India Tea Company and Hudson's Bay Company. These organizations were focused on exploiting particular resources in the then-developing world by building and enlarging permanent outposts and infrastructure such as housing, roads and ports. These commercial activities were closely tied to the home state's drive for territorial and geopolitical dominion, and while the legacy of these ventures and their effects on indigenous peoples remains highly dubious, the role that the early multinationals played in the spread of European civilization cannot be denied.

In the very early days of international travel for the purposes of business when Europeans began to go to Asia, Africa and the Americas to set up trading posts with local communities, it was understood that local law, such as it was, could not be applied to these people because they were already subject to the law of their more powerful and more civilized (as they saw it) home country. Viewed by many as the first international jurist, the Dutchman Hugo Grotius supported this position in his seminal writings on international law in the seventeenth century.[8] This concept went on to be enshrined in treaties concluded between the many European states and their colonies, collectively known as Friendship Commerce and Navigation treaties. These early treaties, extensively used by the USA in particular, addressed a wide range of issues including not just investment and trade, but also immigration, taxation and issues which today we now understand as human rights.[9] The idea that early investors carried their own law with them wherever they went normally meant that the foreigner was entitled to better treatment by the local community than a native person would be, where punishments for petty crimes could end in execution, a reflection of the need to maintain order in an environment lacking a permanent military presence. Over time this superior treatment came to be defined by reference to an international minimum standard of protection with which all aliens should be treated, which survives today as a principle of customary international law as a check on the arbitrariness of a state's exercise of its power over individuals. This baseline of legal entitlement grew largely out of the nineteenth-century US experience in Latin America where there had initially been much resistance to the notion that the rights of individuals could come from anywhere other than domestic law.[10] Clearly the presumption behind the international minimum standard of treatment was the often inaccurate view that some countries' legal systems were simply inadequate, at least from the standpoint of the European power.

Since, as suggested above, much early foreign investment was done in the context of colonial expansion by the European powers, these forms of investment did not need protection from interference by troublesome locals through a specialized regime for foreigners because the colonial

[8] E.g. H. Grotius, *The Freedom of the Seas* (1608), Carnegie Endowment For International Peace, J. B. Scott (ed.) (Oxford University Press, 1916).

[9] J. F. Coyle, 'The Treaty of Friendship, Commerce and Navigation in the Modern Era' 51 *Columbia Journal of Transnational Law* 302 (2013).

[10] E. Borchard, 'Minimum Standard of Treatment of Aliens' 38:4 *Michigan Law Review* 445 (1940).

systems were well integrated within the imperial system. In this sense the colonies were effectively within the jurisdiction of the home state. This gave sufficient protection for the investment against the risk of seizure of the investor's assets by the colonial authorities, or at least the risk was no greater than that which would be faced by domestic investors who had stayed at home.

1.5 Post-colonialism and Gunboat Diplomacy

Often by force but in many instances through peaceful settlement, colonialism began to unravel in the late nineteenth century. The Spanish Empire was among the first to dissolve, followed by the German, Ottoman and Russian Empires after World War I, then those of the other European powers like the British and French after World War II. When colonies gained independence they began to challenge the concept that foreigners who continued to reside and do business in those countries were not governed by the laws enacted by the local population. The international minimum standard of protection of aliens did not sit well with these new nation states eager to assert their own autonomy. Indeed, the ability of the newly independent states to impose their own laws on residents, including aliens, was a key aspect of nascent sovereignty. Uncertain as to the nature of their rights, this unsurprisingly left foreign investors apprehensive about the security of their commercial endeavours abroad. During this time a mixture of diplomacy and force (so-called 'gunboat diplomacy') was used by the former imperial powers to ensure that those new states did not encroach on foreign investors' use of their property adversely, for example by seizing it outright or applying onerous taxes or other fees. If this type of interference did happen, then instead of relying on international or domestic law, capital-exporting states would retaliate by sending a fleet of warships to moor off the coast of the host state until it relented, reminding the former colonies of the might of their former masters even if there was notional autonomy. In one example of this practice, in 1850 the British navy blockaded the Greek port of Piraeus as retaliation for the harming of a British subject without compensation. Half a century later Great Britain and Italy sent ships to the Venezuelan coast to demand reparation for Venezuela defaulting on its sovereign debt. The implication was clear: just as former colonies were expected to safeguard the interest of foreigners on their soil, they were also expected to honour their obligations.

Gunboat diplomacy, effectively negotiation backed by the conspicuous threat of force, was in many respects the antecedent of what we now understand as diplomatic protection. Diplomatic protection means that the state itself has the discretion to intervene on behalf of its citizens abroad, and demand protection and compensation from the host states directly, rather than expecting the citizen to act for himself. This concept can be found as early as the mid-eighteenth century in the writings of Swiss diplomat and philosopher Emmerich de Vattel.[11] It was eventually enshrined in a ruling of the Permanent Court of International Justice (PCIJ) (forerunner of the United Nation's International Court of Justice (ICJ))[12] as a basic principle of international law and later established by the ICJ[13] itself. Although diplomatic protection remains a cornerstone of public international law, it will be shown later in this book that modern international investment law has relegated the notion of diplomatic protection in favour of a direct right of action by citizens against foreign governments through investor–state arbitration.

Power remained the final arbiter of foreign investment treatment during the period before the era of the bilateral investment treaty (BIT), which will be explored further in the next chapter. Even after the Convention on the Peaceful Resolution of International Disputes, a multilateral treaty which effectively precluded military intervention into economic matters that was brought about during The Second Hague Peace Conference in 1907, the use of force for the purposes of protecting investments continued after World War II. The invasion of Egypt by Israel, the UK and France following Egypt's nationalization of the Suez Canal in 1957 was probably the last incident where the protection of private property belonging to an alien was used as a justification for armed attack by a government. It is interesting that the Suez crisis was ended in part by the peaceful intervention of the USA, which threatened to inflict damage on the UK's financial system by selling off its UK bonds to devalue the British pound.

[11] B. Kapossy and R. Whitmore (eds.), *The Law of Nations or the Principles of Natural Law* (Indianapolis Liberty Fund, 2008), at 1883.

[12] *The Mavrommatis Palestine Concessions* (1924) PCIJ Ser A No. 2.

[13] *Barcelona Traction (Belgium* v. *Spain)*, Merits [1970] ICJ Rep 3.

The colonial age was followed by the beginnings of nationalism and more importantly, the yearning for genuine economic independence. Newly autonomous states, such as India and Canada, like Brazil and the USA before them, were eager to escape reliance on their former colonial rulers for the advancement of their citizens through debt. More specifically, they sought to stimulate economic growth through international trade (with shorter shipping routes thanks to the Suez and Panama Canals as well as faster ships) and more importantly, through access to foreign capital. This was becoming more readily available in global markets in part because of improvements in technology (including the first undersea telecommunications cables crossing the Atlantic Ocean).

The movement towards full autonomy of the former colonies was later formally supported by the United Nations (UN), an international organization which had formed in the aftermath of World War II for the purposes of fostering international cooperation and peace, where developing states including the many former colonies had numeric dominance in representation in the General Assembly. This allowed these countries to assert policies through the UN that were favourable to their interests as autonomous states eager to engage in international trade and to import capital as a means of growth. Chief of these was the Declaration of Permanent Sovereignty over Natural Resources (PSNR) of 1962[14] which granted nation states both jurisdictional rights as well as rights of ownership over natural resources found in their territories. PSNR, which did not receive unanimous support in the General Assembly, was linked then as now to maintaining control over FDI in these states, as foreign investors primarily entered these countries (as they do today) in order to access raw materials at low cost. This doctrine sought to ensure that the international minimum standard of protection was not used to undermine the self-regulatory capacity of newly independent countries struggling to achieve economic stability. In many ways this policy should be viewed as the backbone of international investment law because it embodies the default principle of a state's right to regulate, which is surrendered in part through its obligations contained in investment treaties, a tension which will be explored throughout this book.

[14] Declaration of Permanent Sovereignty over Natural Resources, United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962.

Several resolutions contributing to the modern understanding of international investment law and in particular the state's right to administer its economy were enacted at the UN in the 1970s, creating what was known as a New International Economic Order (NIEO).[15] NIEO, which did not receive support from the developed states including the USA, established that developing countries were entitled to regulate and control the activities of multinational enterprises operating within their territories which included the right to expropriate foreign property when necessary, subject to the requirement to pay compensation. Again, these concepts remain active sources of conflict between investors and host states to this day and will be revisited throughout this book. It should be mentioned that while the status of UN resolutions as sources of international law remains contested, it is clear that UN support for these initiatives has intensified the debate over the extent to which such rights can be abrogated by international investment treaties, which UN agencies such as the United Nations Conference on Trade and Development (UNCTAD) has vocally supported as tools of economic development.

1.6 The Late Twentieth Century

During the energy crisis that gripped the West in the mid-1970s the price of oil rose drastically when the Member States of the Overseas Private Investment Corporation (OPIC) cartel proclaimed an oil embargo. This event not only propelled many oil-reliant developed economies like the USA into sudden recession, it demonstrated how vulnerable the West was to whims of governments in resource-rich developing states. This also captured a shift in power towards the former colonies. Strengthened by the UN's support of PSNR and NIEO, and aware that they had not always achieved the best deals in concession arrangements with Western oil companies, a number of expropriations of oil projects were instigated by developing states during this period, especially in Arab countries and in Latin America. Libya expropriated assets of a number of firms, starting with British Petroleum in 1971. Much as today, Venezuela had been nationalizing

[15] Declaration for the Establishment of a New International Economic Order, United Nations General Assembly document A/RES/S-6/3201 of 1 May 1974.

oil supplies for some time and intensified this practice after the energy crisis, also raising taxes on foreign oil companies to punishing levels. These events naturally generated much consternation not simply in the energy sector but across the developed world, which began to view the security of all types of FDI in former colonies with much apprehension. One way to assuage this nervousness was the increased demand for access to neutral dispute settlement in order to achieve full compensation for nationalizations and ultimately the enshrinement of investors' rights in more investment-specific treaties, notably the right to compensation for expropriation. While both of these had been prominent features of investor–state relations since the 1960s when the modern bilateral investment treaty first appeared (of which more will be mentioned in the next chapter), investor–state dispute settlement and other treaty-based rights for foreign investors did not rise to their full prominence until the beginning of the twenty-first century.

There were ideological shifts underway by the 1980s that further contributed to the creation of international law on foreign investment as a system of insulating foreign firms from an uncertain legal environment abroad. The rise of free market economics associated perhaps most closely with President Reagan of the USA and Prime Minister Margaret Thatcher of the UK, themselves influenced by economists like Milton Friedman,[16] bolstered a movement to liberalize foreign investment regimes in their respective countries. This made it easier for foreign firms to locate within states where previously there had been restrictions on foreign ownership of assets such as natural resources. Lifting barriers to entry for investors from overseas was seen, much as it is today, as one of the best ways of injecting capital into stagnant economies. Firms meanwhile began to recognize that the expansion into foreign states could translate to greater profits through the lowering of production costs and by accessing new markets where sales at home had flatlined. The rapid success of small city-states like Hong Kong and Singapore, which lacked natural resources but were able quickly to develop large financial services economies in part because of progressive attitudes towards FDI, prompted other developing states to follow the same route. Later, the entrenchment of 'open door' policies in newly industrializing countries like China also met with success which continues at a fervid pace to this day. The UN, which had launched

[16] E.g. M. Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962).

the PSNR and NIEO doctrines, even began to encourage developing states to be more welcoming to FDI as a tool of economic development. Wedded to the philosophy of open markets which commentators now often decry as ‘neo-liberalism’, the International Monetary Fund (IMF) (which promotes currency exchange and provides debt relief to countries in the form of repayable loans) and the World Bank (which funds long-term development projects in poor countries) along with the newly formed World Trade Organization (WTO) (which reduces regulatory barriers to international trade) also began to urge their Members to welcome international competition in the form of FDI as a means of achieving economic stability. Together these so-called Bretton Woods institutions, named after the conference resort where they were conceived after World War II, strongly advocated the global interrelatedness of economies both as a bulwark against further armed hostility but also as a key route to prosperity for all. Whether these organizations have actually achieved that goal, particularly with respect to their impact on developing countries, remains a matter of some debate.

The explosion of FDI in the latter part of the twentieth century and the ensuing need to enshrine protections for foreign investors through international treaties was closely tied to the collapse of communism as a form of government and the resulting shift towards market economies among the former Soviet bloc countries. The ensuing privatization of what had been government-run monopolies in many sectors throughout Eastern Europe was heavily dependent upon Western capital. As multinational enterprises began to extend their influence much as the old colonial monopolies had done centuries earlier, these countries began to compete with each other for mobile capital, as they continue to do today. The signing of investment treaties was one such way of signalling a willingness to entertain foreign guests.

By the early years of the twenty-first century several large developing states began to witness the positive results of their endorsement of free market practices, including the reduction of trade barriers like import tariffs through organizations like the WTO, and most importantly for the purposes of this book, an unrestricted regime of inward FDI. This was (and to an extent still is) the era of the rise of the so-called BRIC states (Brazil, Russia, India and China) which until only recently had witnessed yearly growth on average of more than 6 per cent of GDP for more than a decade. Largely unfazed by the global financial crisis of 2008–09, FDI continued to explode during this period. While the astronomical growth rates of the emerging markets associated with the mid-2000s may have levelled off recently, there is little sign of global FDI abating any time soon.

1.7 Concepts of Property

Developments in the approach of nation states towards international investment law, including the modern treaty regime which will be examined in the next chapter and throughout this book, were heavily influenced by more fundamental ideas relating to property itself. The philosophical understanding of the ownership of property by the individual, and indeed the concept of what property is, is the very foundation of the law which is designed to protect it and which is echoed in international investment law.

At the risk of overgeneralization in particular with respect to the philosophy of non-Western cultures, prior to the twentieth century it is safe to say that it was widely accepted that a government that took a person's property (including that belonging to an alien) was obliged to compensate the owner. This principle rested on the deeply held belief that part of what it means to be a free individual is the ability to own possessions, meaning to have exclusive control over things, including the right to buy and to sell them as well as use them. These concepts may themselves be traced back to ancient Greece, but in modern times they are associated with the Enlightenment movement of the seventeenth and eighteenth centuries, found in such works as those of English philosopher John Locke.[17] Linked to this principle of property ownership was the belief in the need to control excesses of governments, mostly in relation to freedom of the person, a concept which found voice in instruments like the American Declaration of Independence of 1776. This document, and other constitutional instruments like it around the world which dictate the extent of a government's powers, have ideological roots as far back as the Magna Carta of 1215, which guaranteed what we now understand as due process for citizens, just as it set limits on the authority of kings.

[17] J. Locke, *Two Treaties of Government* (1690) (Yale University Press, 2003).

However two major events occurred after the onset of World War I which fundamentally shook the primacy of the belief in private property, paving the way for much of the state interference with foreign investment that called for the protections later embedded in international investment law. First, in October 1917 the Communist party of Russia, headed by the revolutionary Vladimir Lenin, took control of the government and over the next few years consolidated its control over what became the Soviet Union. By decree of 26 October 1917, all private ownership in land was eliminated with no provision for compensation. Within the next few years, the state seized all farms, banks, mines and eventually all forms of industry. This was the actualization of Karl Marx's theory of communism borne from the previous century – the total sharing of ownership of all productive elements within a society.

Second and also in 1917, a new constitution was established in Mexico as part of that country's revolution which had begun in 1910 and lasted until 1920. The new constitution stated that ownership of all lands and materials within the boundaries of the national territory belonged to the government of Mexico, which had the right to impose on private property any terms that were in the public interest. In other words, above the rights of individuals to own property there were superior rights of society represented by the state. This remarkable change in outlook was in many respects a reaction to the previous government's embrace of industry and openness to foreign investment, an approach which today is practised by most countries around the world. The interplay of social and private rights captured by these events remains an active source of tension in modern international investment law.

Partially as a consequence of these political events, as well as the UN's pivotal support for PSNR and NIEO enshrining colonial independence and economic self-determination, in the decades following World War II states around the world began to seize the private property of private parties, typically justified by reference to greater public needs. Such takings occurred particularly in Eastern Europe, China and Cuba, the countries which had embraced the radical tenets of communism. This trend was exacerbated by downturns such as the energy crisis discussed above. Economic strife can make the commodities upon which much FDI is based more valuable to host states than the revenue streams they derive from concession arrangements or simple taxation.