Foreign Direct Investment: A Historical Perspective

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FOREIGN DIRECT INVESTMENT: A HISTORICAL PERSPECTIVE

Leon E. Trakman and Nicola W. Ranieri

THE EVOLUTION OF FDI protocols has attracted much attention. This scrutiny has led many critics to call for reform amid allegations that the protections are being manipulated to raise corporate agendas over societal well-being. Underlying these concerns is the belief that the development of FDI protections has been unexpectedly hijacked by special interests and set on an unforeseen and irreversible path.[1]

However, on closer analysis, the notion that the trends underlying modern FDI protocols have undergone radical rethinking is subject to challenge. Rather, these trends reflect an evolutionary progression of thinking on the subject. They are steeped in established international law obligations and evolving treaty commitments. Although the speed with which these changes have taken place is often the result of political exigencies, the trends nonetheless reflect a predictable progression of thinking on the evolution and value of FDI.

Some FDI progress has been made multilaterally, but more often, regionally and bilaterally. Investor protection is now commonly addressed in comprehensive regional and bilateral trade agreements, or in stand-alone Bilateral Investment Treaties (BITs). Regardless of the type of agreement that embodies them, investment provisions are

[1] For concern about the influence of special interests on WTO and other global trade and investment institutions, notably in relation to human rights, *see, e.g.*, BERNARD M. HOEKMAN & MICHEL M. KOSTECKI., THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND (3rd Ed, 2009); LORI WALLACH & MICHELLE SFORZA, THE WTO: FIVE YEARS OF REASONS TO RESIST CORPORATE GLOBALIZATION (2000). *See generally,* GIORGIO BARBA NAVARETTI & ANTHONY J. VENABLES, MULTINATIONAL FIRMS IN THE WORLD ECONOMY (2004). Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization—Actors, Processes and Possible Strategies,* 24 HUMAN RIGHTS Q. 1 (2002). *See also* KENT ALBERT JONES, WHO'S AFRAID OF THE WTO? (2003); BENJAMIN HEIM SHEPARD & RONALD HAYDUK, FROM ACT UP TO THE WTO: URBAN PROTEST AND COMMUNITY BUILDING IN THE ERA OF GLOBALIZATION (2002); Robin Broad, GLOBAL BACKLASH: CITIZEN INITIATIVES FOR A JUST WORLD ECONOMY (2002).

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generally aimed at facilitating the flow of investments between countries and creating standard investor protection protocols. In essence, they seek to imbue certainty and predictability in the FDI decision-making process and limit political interference, albeit selectively.

Historical events are also instrumental in gleaning a true understanding of modern FDI protocols. These events shape the global investment environment, which continues to spawn novel refinements in FDI protocols. Modern FDI protections have also been shaped by a history that is attributable, inter alia, to neocolonial imperialism, ideological tension between capital-importing and exporting-countries, the growth of civil society activism, and developments in international economic law. The modern history of FDI protocols is usefully analyzed in four distinct phases, which include regulation in historical societies, the period of regulation prior to the end of World War II, the period subsequent to that war, and the present global era.[2]

The regulation of foreign investment can be traced back over many centuries. The early trading nations, such as the Phoenicians, maintained a constant vigilance over investments in their territories. Versions of what we now know as eminent domain can be found in ancient Rome. The Roman Empire confiscated property from non-Romans in the course of conquest and eventually developed the practice using private Roman property in the furtherance of public projects.

These practices that developed in the Roman Empire were adopted by the Civil Codes in the ensuing centuries, and the common law adopted similar practices from civil law. In the early eighteenth century, the British Parliament developed the practice of paying compensation when appropriating land for public purposes. Shortly after the American Revolution, the United States and Britain signed the Jay Treaty, which, among other things, stipulated the protection of their investor nationals from the host government.[3]

Over time, the political sensitivities of taking property from private citizens, in furtherance of public works, were exacerbated in those cases in which the property belonged to foreigners. Ad hoc tribunals became a useful tool to diffuse sensitive political claims over the expropriation of private property. The once inalienable sovereign right of states to expropriate property was gradually but unevenly tempered. Host governments sometimes bowed in response to political pressure, in times of military or civil instability, to limit their powers to act in the "public interest." Foreigners who

[2] *See* Kenneth Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. Davis J. Int'l L. & Pol'y 157 (2005) (reviewing the history of BITs from the perspective of three eras: colonial era, post-colonial era, and global era.) *See also* O. Thomas Johnson, Jr. & Jonathan Gimblett, From Gunboats to Bits: The Evolution of Modern International Investment Law, *in* Yearbook on International Investment Law & Policy 2010–2011 (Karl P. Sauvant ed., 2012).

[3] Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, Ratified June 24, 1795 [the Jay Treaty].

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were subject to expropriation, in turn, came to expect access to nondomestic tribunals to resolve expropriation issues.[4]

The history of relations between the United States and Mexico is replete with examples of resolution of disputes through arbitration. Arbitration has been successfully used to diffuse armed conflict and settle boundary disputes, as well as to indemnify private investors. Notably, the Mexico–U.S. Claims Tribunal was an arbitral mechanism employed by Mexico and the United States in 1868 to resolve politically sensitive expropriations claims.[5] The Tribunal resolved thousands of claims and, in so doing, was instrumental in fostering sovereign respect for an extrajudicial process for lodging investment claims.[6]

The Allied–German Tribunal, established after the conclusion of World War I, provided another opportunity to advance thinking on extrajudicial claims against a host state. It was set up to arbitrate the claims of individuals against the German state for losses incurred during that war. The Tribunal created a novel model for the resolution of disputes between the state and individuals, which would eventually come to serve as a useful model for subsequent arbitral bodies.

Prior to the end of World War II, global economic relations were fostered by establishment of commercial trade ties. However, in this environment, many states were distinctly protectionist in regulating foreign investment. As a result, investment protections for foreign investors were invariably relegated to a subsidiary concern. Friendship, Commerce and Navigation Treaties (FCNTs) became the primary instrument by which global economic relations were regulated in the late eighteenth century. Their prominence endured to the end of World War II. FCNTs focused on enhancing trade relations between nations, but also contained subsidiary provisions protecting property. As these treaties did not provide enforcement mechanisms, vulnerable investors seeking protection were forced to rely on their government's assistance. Such assistance was usually channeled through the diplomatic espousal of an investor's claim, or at the behest of coercive military forces.[7]

The post–World War II era ushered in a new reality in global economic relations. Geopolitical developments became the driving force behind FDI protection protocols between the end of World War II and the collapse of the Soviet Union. The end of that war ushered in a new era of neoliberal global economic relations as the Allied victors sought to establish a global framework to ensure economic prosperity as they envisaged it. The Bretton-Woods System was intended to liberalize global trade and guard against the protectionist sentiment that many believed had precipitated that war.[8]

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[4] *See generally,* JOHN HOWARD JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW (2006).

[5] Convention between the United States of America and the Republic of Mexico for the Adjustment of Claims, July 4, 1868, US–MEX, art. 11, 115 Stat. 679.

[6] A.H. FELLER, THE MEXICAN CLAIMS COMMISSIONS (1935).

[7] Vandevelde, *supra* note 2, at 157–61.

[8] *See, e.g.,* MARTIN WOLF, WHY GLOBALIZATION WORKS (2004); Jagdish Bhagwati & Arvind Panagariya, *The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends*, 86(2) AM. ECON.

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This system envisioned global trade and investment rules, along with supranational institutions to oversee the regulation of trade and investment. The General Agreement on Trade and Tariffs (GATT) was established in 1947, but the Havana Charter, which was to establish an investment regime, and the institutional makeup for the GATT, did not materialize. Over time, the GATT became the principal multilateral engine for trade liberalization, while investment issues were dealt with separately outside the multilateral arena. As trade liberalization flourished, multilateral agreements displaced the importance of bilateral treaties.[9]

However, this neoliberal philosophy did not develop in isolation. It was soon challenged by the rising socialist tide, which swept in as a result of the process of decolonization. This process both highlighted the great disparity between the developed and developing worlds and brought into focus the competing ideologies over investment policy. The effect of this debate manifested itself in a questioning of the fundamental underpinnings of neoliberal global economic relations.

The decolonization, which occurred after World War II, greatly influenced the FDI debate. Many newly independent but underdeveloped nations came together to decry FDI as a modern form of neocolonialism. These countries, fiercely protective of their newfound sovereignty, looked suspiciously at any attempt by foreigners from developed states to control their means of production and to influence domestic affairs. Under the banner of ending the cycle of exploitation, these developing countries engaged in a course of import substitution, which was less than hospitable to FDI.[10]

Similarly, the socialist block also became a driving force in the FDI debate. As the Soviet Union emerged into a superpower after World War II, socialist states openly rejected free market principles in favor of state regulation. This philosophy decried foreign investment as an oppressive capitalist tool and led to extensive expropriations of private investments.[11]

REV. 82 (1996); A.O. Krueger, *Are Preferential Trading Arrangements Liberalizing or Protectionist?* 13(4) J. ECON. PERSPECTIVE 105 (1999); Raymond Riezman, *Can Bilateral Trade Agreements Help to Induce Free Trade?*, 32 CAN. J. ECON.751 (1999); Kyle Bagwell & Robert W. Staiger, *Will Preferential Agreements Undermine the Multilateral Trading System?* 108 THE ECON. J. 1162 (1998); Philip I. Levy, *A Political–Economic Analysis of Free Trade Agreements*, 87 AM. ECON. REV. 506 (1997).

[9] *See, e.g.*, YONG-SHIK LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM (2006); ANDREW G. BROWN, RELUCTANT PARTNERS: A HISTORY OF MULTILATERAL TRADE COOPERATION, 1850–2000 (2003); BERNARD HOEKMAN & MICHEL KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM, FROM GATT TO WTO (2001); JAGDISH NATWARLAL BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004); John H. Jackson, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS (2000).

[10] For example, in the case of Mexico, it was not until 1993 that Mexico's highly restrictive approach to foreign investment was replaced with a new investment law that was seen as being more favorable to foreign investment in Mexico and as promoting international trade. *See generally,* JORGE A. VARGAS, MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS, Vol. 1, at 105–39 (1998).

[11] Vandevelde, *supra* note 2, at n.52.

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In response, the United States embarked upon a new series of FCNTs, which sought to prioritize FDI protections.[12] These FCNTs granted foreign investors both national treatment and most-favored-nation status. These protections were also, for the first time, extended to corporations and included dispute resolution clauses.

These dispute resolution clauses obliged host governments to consent to the jurisdiction of the International Court of Justice. Host governments could no longer use their consent to sublimate the jurisdiction of an international tribunal. However, investors still had to exhaust local remedies and were usually put to the task of persuading their home state governments to espouse investor claims with host states. Although this new generation of FCNTs created many innovations, its utility faded because, in essence, FCNTs were still seen as being primarily trade-based, and trade was increasingly being dealt with through the GATT.[13]

The developing countries and the socialist block eventually combined resources to form a formidable presence on the global stage. By the mid 1970s, this group, holding a numerical majority in the United Nation's General Assembly, vigorously fought for the recognition of their right to expropriate foreign investments without paying compensation at fair market value. In 1974, the General Assembly of the United Nations adopted the Declaration of the New International Economic Order, which recognized state sovereignty over natural resources and other economic activities. The declaration further recognized the right of states to nationalize domestic industries and declined to articulate any specific obligation to pay compensation for such nationalization.[14]

The General Assembly eventually also adopted the Charter of Economic Rights and Duties of States. That UN Charter banned the use of military force, in all circumstances, except in self-defense. The Charter also recognized the right of states to expropriate, and opted for the requirement that compensation "should," rather than "must" be paid.[15] This obligation on states was further diluted by the adoption of a national, rather than an international law standard that was applied to questions of compensation. Given that many national laws did not provide for any, much less adequate, compensation, the significance of this distinction should not be overstated.[16] Also problematic was the fact that customary international law continued to offer investors only very limited protection, and was routinely proven to be inadequate, in the context of growing nationalizations and expropriations.

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[12] *See id.*, at 161–62. *See also* Calvin Hamilton & Paula L. Rochwerger, *Trade and Investment: Foreign Direct Investment through Bilateral and Multilateral Treaties*, 18 N.Y. Intl L. Rev. 1 (2005).

[13] *See* Vandevelde, *supra* note 2.

[14] *See* Vandevelde, *supra* note 2, at 167–68.

[15] United Nations General Assembly, 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).

[16] *See* Vandevelde, *supra* note 2, at 168. *See also* Charles N. Brower & John Tepe, Jr., *The Charter of Economic Rights and Duties of States: A Reflection or a Rejection of International Law?*, 9 Int'l L. 295 (1975) and Burns 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).

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Treaties became the only viable tool to protect against uncompensated, or under-compensated, takings. As such, developed states increasingly adopted BITs as a means of protecting foreign investors who lacked protection both under multilateral treaties and customary international law.[17] The first BIT was concluded between West Germany and Pakistan in 1959. Following further BIT development, Western European countries increasingly pioneered the use of modern BITs throughout the 1960s. The 1970s saw most of the developed Western world follow suit.[18] The United States inaugurated its BIT program in 1997, and quickly concluded its first BIT in 1998.[19] The American BIT Program supported several key economic policy objectives ranging from the protection of investment interests overseas to the promotion of market-oriented policies and exports.[20]

The BITs programs were straightforward. A basic aim of BITs was to protect investments abroad where investors' rights were not already protected through existing agreements. These BITs encouraged the adoption of market-oriented domestic policies that treated private investment in a transparent and nondiscriminatory fashion. BITs were also used to support the development of international law standards that were consistent with these objectives.[21] "Core" BIT principles included:

– the treatment for the life of the investments to be the better of most-favored nation or national treatment;
– disciplines on expropriation and the payment of prompt compensation;
– funds transferability into and out of the host country at market exchange rates;
– limits on performance requirements;
– the right of the investor to submit investment disputes to international arbitration, without need to resort to domestic courts;
– the right of the investor to hire the management personnel of their choice, regardless of nationality.[22]

[17] *See* Carlos Garcia, *All The Dirty Little Secrets: Investment Treaties, Latin America and the Necessary Evil of Investor—State Arbitration*, 16 Fla. J. Int'l L. 301 (discussing the debate over whether investment treaties establish good policies that encourage FDI in the developing world, or whether they amount to economic imperialism that binds the developing world).

[18] Notably, the United Kingdom, Japan, Australia. *See* Vandevelde, *supra* note 2, at 169–70. *See also* Tarcisio Gazzini, *Bilateral Investment Treaties*, *in* International Investment Law: The Sources of Rights and Obligations (Tarcisio Gazzini & Eric De Brabandere eds., 2012).

[19] Vandevelde, *supra* note 2 (discussing various American BITs and the problems associated with interpretation). *See also* Angelos Dimopoulos, EU Foreign Investment Law (2011).

[20] US Bilateral Investment Treaties, Policy Issues, U.S. Department of State, *available at* http://www.ustr.gov/node/4375/206/0. *See also* Jeffrey J. Scott, Free Trade Agreements: US Strategies and Priorities (2004).

[21] Scott, *supra* note 20. *See also* Alexandra Diehl, The Core Standard of International Investment Protection (2012).

[22] *Id.*

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Modern BITs were uniform among nations as they were modeled on provisions found in the modern American FCNTs. Specifically, they guaranteed foreign investors, inter alia, both national and most-favored-nation treatment.[23] Notably, they dealt exclusively with the protection of investments, opting not to get bogged down on non-investment issues. Trade issues were left in the exclusive domain of the GATT.[24]

At this juncture, FDI was in the process of depoliticization. It was moving from a policy toward a rule-based regimen. In providing foreign investors with legal remedies, FDI protections were less dependent on diplomacy. Furthermore, modern BITs opted largely for international investment arbitration, as distinct from reliance on the domestic courts of member states. The result was that it was no longer required that foreign investors exhaust local remedies in the host country; instead, such investors could proceed directly to international investment arbitration. Although BITs largely preserved the dispute resolution process between the state and the investor, they broke new ground by subjecting investment disputes to especially constituted ad hoc international arbitral tribunals rather than the International Court of Justice. The establishment of the International Centre for the Settlement of Investment Disputes (ICSID) in 1965 further expanded the potential scope of arbitrability to include disputes over the interpretation of the ICSID Convention.[25]

BITs that were concluded between developed and developing nations included provisions that dealt with ideological concerns. Developing countries signed BITs largely in order to attract FDI. Developed countries signed BITs primarily to protect their nationals investing abroad. These BITs were, for the most part, boilerplate. They contained expansive investor protections, but they were, essentially, presented to developing countries as take-it-or-leave-it propositions for signature, without negotiation. Although these agreements theoretically contained reciprocal obligations, the reality was that capital-exporting countries were often advantaged in responding to the claims of nationals from capital-importing countries on account of the capital-exporting countries having already liberalized their investment regimes to deal with investors from developed countries. Developing countries that lacked such a liberalized investment infrastructure sometimes were disadvantaged in having to devise regimes to accommodate foreign investors from developed countries who were often accustomed to significant liberalization in dealing with developed states.[26]

[23] Vandevelde, *supra* note 2, at 170.

[24] *See further* Bryan Mercurio & Simon Lester, Bilateral and Regional Trade Agreements: Analysis and Commentary (2007); Lorand Bartels & Federico Ortino, Regional Trade Agreements and the WTO Legal System (2006).

[25] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090. Documents pertaining to the ICSID and its Rules are available at http://www.worldbank.org/icsid.

[26] *See, e.g.*, T.N. Srinivasan, Developing Countries and the Multilateral Trading System after Doha (2002). *See further* Bernard Hoekman & Will Martin, Developing Countries and the WTO: A Pro-Active Agenda (2005); Merlinda D. Ingco & John D. Nash, Agriculture and the WTO: Creating a Trading System for Development (2004); Commonwealth Secretariat,

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The ensuing tension over the wording of treaties also delayed the progression of BITs. The United States sought to establish FDI protections through customary international law. The U.S. strategy was to create a sufficiently large network of BITs that would reflect norms of customary international law, especially prompt, adequate, and effective compensation for expropriations. In keeping with this objective, the United States would not sign a treaty in the absence of such wording. Not surprisingly, developing countries, in response, were often hesitant to conclude such agreements. They were reluctant to be drawn into treaties employing such compromising wording that might not only be used against them under a particular agreement, but would also further entrench the U.S. view of customary international law.[27]

While progress on bilateral investment treaties stalled, political exigency, once again, created the opportunity to advance FDI protocols. The Iran–U.S. Tribunal was established as a measure to diffuse the crisis between the United States and Iran resulting from the detention of U.S. nationals at the U.S. embassy in Tehran in November 1979 and the subsequent seizure of Iranian assets by the United States. The Tribunal was the mechanism used to bring about binding third-party arbitration of claims between nationals of either country against the host governments. This Tribunal effectively usurped judicial authority from the domestic courts in the United States and Iran. The Tribunal, in accordance with the UNCITRAL Rules, yielded substantial decisions that further legitimized the use of arbitral mechanisms and also synthesized the international jurisprudence on takings.

The global era continues to evolve in a dynamic context. The conclusion of the Uruguay Round created the World Trade Organization (WTO) to oversee international trade, under the auspices of the GATT.[28] The WTO was also endowed with jurisdiction over investment-related issues, most notably under the auspices of the General Agreement on Trade-Related Services (GATS).[29] As services are often provided by establishing a presence in a foreign market, the GATS obligation to liberalize trade in services in many ways is an obligation to liberalize and protect foreign investment.

Other multilateral and plurilateral agreements further expanded the WTO's jurisdiction over investment and restricted the authority of governments over foreign investments. These agreements included the Agreement on Trade Related Investment Measures (TRIMS)[30] which, inter alia, prohibits inflicting certain trade-distorting performance requirements on foreign investments. The Agreement on Trade-Related Intellectual Property Rights (TRIPS),[31] obligating countries to protect intellectual

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Developing Countries and the WTO: A Compelling Case for Full Participation in the New Round (2002).

[27] By 1969 only seventy-five BITs were negotiated. By the 1970s, BITs were being negotiated at the rate of nine per year, and the rate doubled during the 1980s. *See*, Vandevelde, *supra* note 2, at 172.

[28] World Trade Organization (WTO) documentation is available at the WTO Website, http://www.wto.org. *See also* Peter Gallagher, The First Ten Years of the WTO: 1995–2005 (2005).

[29] GATS documentation is available at the WTO Website, http://www.wto.org.

[30] TRIMS documentation is available at the WTO Website, http://www.wto.org.

[31] TRIPS documentation is available at the WTO Website, http://www.wto.org.

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property rights, represents a further restriction on the capacity of governments to regulate FDI.

The international investment regime has also witnessed a pronounced intermingling between trade and investment, coupled with a corresponding explosion in the number of investment protocols. There are anticipated to be over 3,000 negotiated BITs by the end of 2012, as well as a growing number of FTAs with investment provisions.[32] International trade and investment are now increasingly carried out between different subsidiaries of the same multinational entities. As such, trade and investment are more integrated, encompassing various emerging elements of international commerce: exports, imports used in exports, use of foreign affiliates for sale, globalized production and distribution, and FDI.

The economic integration brought about by the expansion of multilateral agreements has also encouraged the negotiation of regional FTAs. These agreements, which are increasingly negotiated between developed and developing countries, also include investment provisions.[33] This phenomenon is attributable to at least three developments. First, the traditional distinction between capital-importing and capital-exporting countries had receded. The reasons underlying this change were both political and practical. Second, as a matter of practice, a number of countries that were previously viewed as developing, such as China, had advanced to the point where they had grown sufficiently to be viewed as capital exporters of their new-found wealth. Many countries that were traditionally viewed as capital exporters, including the United States, had gradually become dependent on importing capital, which increasingly came from developing countries. Third, new trade and investment agreements were being forged between countries in different regions of the world. This further intensified regional preferential economic agreements, including the political–economic alliances that ensued.[34]

The global era also bore witness to a further phenomenon: the race among states to attract FDI. The collapse of the Soviet Union gave rise to the prominence of market-oriented developing countries that relied on FDI. The ideological divisions, which separated the developing world from the capital-exporting developed world, also succumbed to a new pragmatic and seemingly cooperative relationship. Developing countries came to rely on FDI as a means to develop, whereas developed countries saw FDI as another lucrative export. In addition, socialist countries such as China increasingly engaged in a bifurcated economic policy. They continued to preserve socialist restrictions on domestic commerce, albeit with less rigor than in decades past. At the same time, they embraced market-based principles in their international

[32] *See Research Note: Recent Developments in International Investment Agreements,* United Nations Conference on Trade and Development (Aug. 30, 2005) (UNCTAD), http://www.unctad.org. *See also* http://www.cfr.org/publication/10890/.

[33] By 2005, 39% of all preferential trade agreements containing investment provisions were concluded between countries with dissimilar levels of development. *See* Vandevelde, *supra* note 2, at 182.

[34] By 2005, 44% of all preferential trade arrangements were concluded between countries in different regions. *See id.* at 182.

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trade and investment relations. This includes both selective access provided to foreign investors to domestic Chinese markets and support for Chinese investors abroad.[35]

The fermenting global dependence on FDI and the economic wealth it generated further spawned a movement to democratize global institutions. This was, in part, a response to the perception that international economic institutions had ignored the role otherwise played by individuals and non-state actors in global governance.[36] The result was a hurried attempt to make up for lost time as civil society responded to modern challenges by demanding a more vocal participation in global governance.

Overall, despite the efforts to democratize global institutions, the results have been somewhat disappointing. On the one side, active segments of civil society continue to decry the illegitimacy of global institutions, arguing that the corrective measures that have been undertaken do not go far enough. On the other side, many countries have begun questioning the legitimacy of global institutions that embrace such fundamental change without the consensus of their constituent members. Those following the cultures and legal traditions of many non-Western countries may not adequately value and, in fact, sometimes may resent the participation of private investors in what they deem to be exclusively a sovereign function.[37]

The perceived deficiencies of liberalized global institutions are further fermented in current recessionary times. Trade and investment isolation may now be a by-product of new fears in regard to the intrusion of foreign competition into domestic markets. These concerns are expressed both through restrictions placed by governments on international investments in domestic economies and by negative reactions towards FDI within civil society. These include, among others, lobbying by labor groups against competition that undermines local employment and agitation by environmental groups against the ecological impact of FDI. Domestic alarm about the perceived lack of safety of foreign-made goods and services are also a prospective reason for growing protectionism in both trade and investment. Coupled with this is the desire of governments to secure both greater advantage and greater protection from investment treaties than in decades past.

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[35] *See, e.g.*, Guiguo Wang, Chinese Perspectives on International Investment Law (2013); Vivienne Bath, *Foreign Investment, The National Interest and National Security—Foreign Direct Investment in Australia and China*, 34 Sydney L. Rev. 5 (2012); Gerald Chan, China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights (2006); Yong Deng & Fei-Ling, China Rising: Power and Motivation in Chinese Foreign Policy (2005).

[36] *See* Andreas Kulick, Global Public Interest in International Investment Law (2012); David Schneiderman, *Investing in Democracy? Political Process and International Investment Law,* 60 U. Toronto L.J. 909 (2012); Daniel Verdier, Democracy and International Trade: Britain, France, and the United States, 1860–1990 (1995). *See also* Noemi Gal-Or, *Private Party Access: A Comparison of NAFTA and the EU Disciplines*, 21 B.C. Intl & Comp. L. Rev. 1 (1988).

[37] *See, e.g.*, Philip David McMichael, Development and Social Change: A Global Perspective (3rd ed., 2004); Rourdes Beneria & Savitri Bisnath, Global Tensions: Challenges and Opportunities in The World Economy (2003).

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These perceived deficiencies in the growth of a receptive global environment for international investment are offset by significant structural changes in the international regime that continue to support FDI, including in bad economic times. Individuals continue to enjoy the right to bring direct claims for the infringement of their investment rights—especially as they relate to property ownership—before international investment tribunals. International law has evolved after World War II in ways in which the traditional approach that limited access to international legal remedies to state actors has been significantly replaced by recognition that individuals should enjoy a role in the development of FDI. Particularly important in this process was the growth of the international human rights movement. The once-clear demarcation between human rights and other rights has been obfuscated in some measure.[38]

Today, the issue is less whether, and more how, civil society will participate in global governance.[39] In this context, the right of citizens to bring actions and secure standing (*locus standi*) to assert public interest claims has become increasingly significant. The right of private parties to assert their rights and interests is relevant in three related, but different contexts. First, the right of private parties to assert these interests is understood in the context of state-to-state adjudication. Second, it is important in the context of disputes between private parties and states. Third, the right of private parties to assert claims against states is often meaningful only when those parties are resourced companies and individuals with the ability to sustain a costly and often protracted claims process.

The global FDI era has also led to a collision course between an emboldened civil society and an insatiable global demand for FDI. Proponents of global investment envisioned the need for a multilateral investment agreement to provide predictable and transparent investment rules in a world in which competition for FDI is growing. In contrast, energized civil society groups have actively sought to restrain the development of a multilateral investment regime that they considered corporate-driven, repugnant to the notions of governmental sovereignty and socially regressive. This battle came to a head in 1998 when public pressure effectively derailed negotiations on the Multilateral Agreement on Investment (MAI). That failure to reach consensus on the MAI at the Organization for Economic Development and Cooperation (OECD) is often cited as the end to multilateral progress on FDI protocols.[40]

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[38] *See* Diane Alferez Desierto, *Calibrating Human Rights and Investment in Economic Emergencies: Prospects of Treaty and Valuation Defenses*, Manchester J. Int'l Econ. L, 280 (2012), *available at* http://ssrn.com/abstract=2062367.

[39] *See* The Future of the WTO: Addressing Institutional Challenges in the New Millennium 41, Report by the Consultative Board to the Director—General Supachai Panitchpakdi (2004). *See also* Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. Legal Stud. 631 (2005) (arguing that private enforcement of governmental commitments is more efficient in the context of international investment agreements than in international trade agreements).

[40] Negotiations on the Multilateral Agreement on Investment (MAI), under the auspices of the Organization for Economic Cooperation and Development, failed in 1998, in large part due to effective public criticism. For an overview of the MAI and its implications to sovereignty and the federal–state

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Having failed to arrive at a multilateral investment accord before the OECD, the only other multilateral forum available for FDI was the WTO. However, the WTO, as it presently stands, addresses FDI only indirectly. The Doha Round has provided faint hope for progress on a more holistic basis.[41] The lack of an overarching FDI multilateral instrument also renders the emerging FDI regime into a patchwork quilt of disparate obligations. In effect, the global FDI regime consists of obligations expressed through an ever-expanding network of international instruments. These include regional FTAs and BITs, specialized multilateral treaties (such as TRIMs), services agreements, the OECD's code of Capital Movements, and Europe's Energy Charter, as well as soft-law instruments, such as the World Bank's FDI Guidelines.[42]

In the absence of multilateral progress, the NAFTA offered a way forward. Its investment protection provisions were initially looked upon as a model, or prototype, for evolving investment protocols.[43] As many trade agreements negotiated after NAFTA tracked its investment provisions, there was an expectation that NAFTA Chapter 11 would provide the framework for investment in future FTAs, especially the anticipated FTAA.[44] However, more recent agreements appear to be trying to cut back on many of the investor safeguards contained in the NAFTA, and new BITs and FTAs have chosen an alternative pathway to the NAFTA, which is increasingly regarded as a past-order treaty.[45]

In the dearth of a multilateral structure, the history of NAFTA Chapter 11 has nevertheless played a pivotal role in shaping the evolving FDI regime, particularly in regard to FDI decisions. In many respects, Chapter 11 has become the theater for cutting-edge

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balance of powers, *see* Robert Stumberg, *Sovereignty by Subtraction: The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 491 (1998). *See generally* MAI Negotiating Text (Apr. 24, 1998), http://www.oecd.org/daf/cmis/mai/maitext.pdf and Katie Tieleman, *The Failure of the Multilateral Agreement on Investment and the Absence of a Global Public Policy Network* (2000), http://www.gppi.net.

[41] Doha Ministerial declaration, Fourth Ministerial Conference in Doha, Qatar, ¶¶ 20–22 (Nov. 2001), http://www.wto.org.

[42] *See, e.g.,* Jose Alvarez, *The Emerging Foreign Direct Investment Regime*, 99 AM. SOC'Y INT'L L. PROC. 94. *See also* UNCTAD, *supra* note 32. On these different investment regimes, *see generally* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2nd ed. 2012); INTERNATIONAL INVESTMENT LAW, *supra* note 18.

[43] *See generally* Jacqueline Granados, *Investor Protection and Foreign Investment under NAFTA Chapter 11: Prospects for the Western Hemisphere under Chapter 17 of the FTAA*, 13 CARDOZO J. INT'L & COMP. L. 189 (2005).

[44] The FTAA contemplates a hemispheric wide trade agreement among thirty-four countries in the Americas. The draft FTAA text may be consulted at http: //www.ftaa.alca.org.

[45] Earlier agreements that appeared to track the NAFTA include: The Canada-Chile FTA, concluded Dec. 5, 1996, *reprinted* in 36 I.L.M. 1067, 1114 (1997) and the Mexico–Northern triangle FTA. *See*, Guillermo Pereira, *Mexico–Northern Triangle Free Trade Agreement*, 7 L. & BUS. REV. AM. 383 (2001). However, more recent agreements based on the 2002 Trade Promotions Act, such as the CAFTA and the U.S.–Chile FTA, appear to cut back on some of the NAFTA safeguards. *See* David Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States–Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679.

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twenty-first–century issues, which has shaped international law and adjudication.[46] It has become the focal point for debate over the liberalization of trade and investment, in general and, more specifically, the evolution of FDI protection protocols. It also has become both the lightning rod for antiglobalization critics as well as the beacon of light for internationalists.

[46] *See* Ari Afilalo, *Meaning, Ambiguity and Legitimacy: Judicial (Re-) Construction of NAFTA Chapter 11*, 25 Nw. J. Int'l L. & Bus. 279 (2005). *See also* Patricia Isela Hansen, *Dispute Settlement in NAFTA and Beyond,* 40 Tex. Int'l L.J. 417 (arguing that the NAFTA experience may prove helpful in building models for dispute settlement in other agreements, especially in the areas of private rights of action, transparency, and public participation).

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