It is an interesting exercise to trace the past and the present of the International Law on Foreign Investment in order to place the future in its proper context so that future developments take place on the basis of past successes and failures in the law. One problem that pervades the present development of the law is that, for mercenary and other reasons, parts of it have been so highly fragmented and developed separately so that its moorings in public international law have become less secure. A return to history and an understanding of the past conflicts in the field will ensure the law being returned to more secure foundations and being developed in a more consistent manner. In this hope, this chapter surveys the past and the present of the law and contemplates what the future course of the law would be.

1 The Past

The origin of the law on foreign investment lies very much in the history of efforts made by the United States to protect its foreign investments in Latin America. In the rest of the world, foreign investment was made in the colonial context. The United States stood guard over its foreign investors who ventured into Latin America, which it considered the region of its hegemony. Asia and Africa as well as the Middle East were subject to imperial control. There was no opportunity for the development of a law on foreign investment in these regions as investments moved within the imperial system. If a law exists, it

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1 Charles Lipson, Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries (University of California Press, 1985), which is a historical and political study of how the United States protected its foreign investors in Latin America; Noel Maurer, The Empire Trap: The Rise and Fall of the US Intervention to Protect American Property Overseas, 1893–2013 (Princeton University Press, 2013).
was in the context of dominance of the Western powers which exerted control over states. Thus, in China, Thailand and parts of the Middle East, a system of extraterritoriality existed in which parts of the country where commerce was conducted were subjected to the law of the states of the resident traders. Courts set up by foreign powers administered such laws in these regions. Conquered states were subject to the imperial legal system. The need for an international law simply did not arise in this exploitative context where investments from the metropolitan states moved within the imperial system under the secure protection of the imperial laws. The genesis of the international law on foreign investment must be sought in the economic relationship between the United States and Latin America.

1.1 The Latin American Genesis
Latin American states constituted the backyard of the United States. Though independent from its colonial conquerors, Spain and Portugal, they had yet not been able to set up secure administrations that represented the interests of its people. The United States had an interest in ensuring that the governments that were set up were subservient to the interests of the United States. Well into the twentieth century and perhaps, even today, the United States has interfered openly or covertly to ensure that pliant governments were set in place in the Latin American states.²

In early stages, on its way to global economic dominance, the United States investments largely flowed into the Latin American states. They were in primary areas of agriculture, where land ownership was crucial, and in mining of resources. Such investments were important to the United States as it brought in food as well as resources to furnace its incipient industries. The protection of these investments was necessary to ensure that the American industry grew. Naked force progressively became unsavoury as moral norms against its use began to develop. Its use provoked Latin American nationalism. Other ways had to be found. The way was through the use of international law. As now, when asymmetrical law is justified on the basis that the use of power is

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² Demonstrations of this are easy to find in international law. The Nicaragua Case (Nicaragua vs. United States, ICJ, 1986) concerned covert assistance in arms and advice given to the insurgent groups against the elected, leftist government of Nicaragua. Also, under the tacitly support by U.S., the Pinochet regime between 1973 and 1990 was set up after deposing the elected government of Chile. The Drago doctrine announced in 1902 prohibited the use of force to recover government debts.