VI. Implications of the Development of International Law upon the Protection of Foreign Investors and Investments from the Perspective of Developing States

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International investment law has developed in parallel with the expansion of European powers to Asia as early as the 17th century. European powers used their military force to protect their subjects operating in Asia.¹ A Eurocentric version of international law has been useful in the encounter of European entrepreneurs with indigenous peoples in Asia and America. Many mixed commissions in the 19th century were set up to deal with claims based on the injuries of British subjects in the newly independent State of the United States of America.²

In the various kinds of peace treaties with China, the nationals of foreign powers were protected in the same way as third party foreign powers were. The law of State responsibility was developed in light of the treatment of foreign nationals by host States. The friendship, commerce and navigation (FCN) treaties were very common in the 19th century in Asia when host States in

¹ As the European powers expanded their colonial territories in Asia and in the New World, so did the numbers of their citizens abroad. Due to Vattel's contribution to the law of diplomatic protection, they construed an injury to their subjects to their own, which gave them the right “to force the aggressor to give full satisfaction or punish him.” Emer de Vattel, The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns 161 (1844).

² Starting from the very early stage of the Republic, the United States through the State Department became involved with the arbitral commissions established under the 1794 Jay Treaty in light of the loss of the property and contractual rights of British nationals. Mark Clodfelter, U.S. State Department Participation in International Economic Dispute Resolution, 42 South Texas Law Review 1273 (2001).
Asia were forced into relationships with foreign States. Those treaties were enforced under the principle of *pacta sunt servanda*.³

After the two World Wars, capital-exporting States started making bilateral treaties focusing on the issue of investment. In the age of decolonization, capital-importing States had to adapt themselves to those bilateral investment treaties (BITs).⁴ They were in need of hard currency to develop their newly born States. BITs were regarded as good instruments to entice foreign investors. Many notions on the protection of foreign investors and investments were provided for in BITs. The legal environment for foreign investors was considered an important factor when international financial institutions including the World Bank Group assessed applications for loans by developing host States.

When the developing host States occupied the majority of the General Assembly of the United Nations (UN) in the late 1960s and in the 1970s, they tried to reorganize the economic order by adopting a series of resolutions in favor of themselves. In the UN, expropriation was one of the hotly debated issues. The developing host States wanted to exercise the authority to decide the amount of compensation for expropriation of investments made by foreign investors within their territories.⁵

Until the early 1990s, various issues in light of investment disputes were dealt with in inter-State relationships. The ICSID convention was rarely used for investment disputes. The early cases were small in size, and most of the respondent States before the ICSID Arbitral Tribunal were Asian States including Sri Lanka, the Philippines, and Indonesia.

Since the entry into effect of the NAFTA, many century-old notions of protection of foreign investors were tested by ad hoc and institutional arbitral


⁴ It is generally recognized that no capital exporting state should ever enter into a Bilateral Investment Treaty (BIT) with a developing state seeking to introduce Foreign Direct Investment (FDI) unless the developing state is sure to satisfy the requirements made by a BIT. Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 Columbia Journal of Transnational Law 501, 523 (1998).

⁵ “Permanent sovereignty over natural resources”, UN Resolutions 3171 (xxvii), para. 3. “Affirms that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any dispute which might arise should be settled in accordance with the national legislation of each State carrying out such measures.”