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FÓRUM

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Evaluating the Evolution of International Investment Law

ABSTRACT

Historical explanation or exploration is gaining traction among scholars of international investment law (ILL) to understand the field properly, find evolutionary connections, address power imbalances, trace a problem's genealogy, and explain their recommendations for reforming the current system. The Third World Approaches to International Law (TWAIL) can be a useful method to understand critical aspects of international investment law from the perspective of the Global South. One of the mainstream historical accounts of IIL describes that its central principles developed progressively and incrementally since the 19th century from challenges faced by foreign investors, mainly from capital-exporting states. However, another historical account on IIL finds its roots in European imperial expansion in the 17th century. As international investment law has evolved, arbitration has become politically contentious even in states once supportive of such agreements. While there is consensus on the need for reform, the lack of historical evaluation of the failures of these agreements poses a challenge to reform initiatives. In order to ensure effective results, it may be necessary to modify laws concerning state interactions to promote greater equality and reduce factors that undermine theoretical state equality.

Keywords: international investment law ■ evolution of international investment law ■ imperialism ■ IIL ■ BIT ■ ICSID ■ TWAIL

I. INTRODUCTION[1]

In recent years, there has been a considerable increase in interest concerning the history of international law.[2] Within the field of international investment law (IIL), there is growing attention on historical

[1] This paper is taken from the author's doctoral dissertation titled 'Dispute Settlement Systems of International Investment Law: Analyses of the Systems and Reform Proposals'.
[2] Koskenniemi, 2013, 215.

inquiries.[3] The exploration of the origins and development of contemporary investment law issues continues to attract a significant number of scholarly studies.[4] Moreover, scholars arguing for changes in international investment law have increasingly looked to history to explain their recommendations.

One historical account of international investment law describes that the field's central principles developed progressively and incrementally since the 19th century from challenges faced by foreign investors mainly from capital-exporting states.[5] Diplomatic efforts sought a minimum standard of treatment and the right to diplomatic protection for violations of that standard. Arbitration emerged as a key means to resolve disputes from the experience of effective application in the 19th and 20th centuries. Throughout the 20th century, treaties and negotiations helped develop international investment law, culminating in the widespread adoption of BITs and the establishment of the ICSID in 1965. This perspective also portrays international investment law as instrumental in advancing economic growth and upholding the rule of law.[6]

Another historical account of international investment law finds its roots in European imperial expansion in the 17th century.[7] This perspective stresses that the linking of private investor interests with the state leads to the incorporation of investment safeguards in customary international law. Disagreements to this protection arose during the 19th and the first half of the 20th centuries, particularly from Latin American states supporting equal treatment.[8] Despite the resolution on permanent sovereignty over natural resources, the NIEO, and the CERD; the ICSID Convention and BIT regime continued to prioritise investor rights promoting the position of capital-exporting states. This reflects a broader assertion of imperial power rather than a sincere cooperation for economic progress.[9]

This viewpoint suggests that the current international investment law framework has negatively affected economic growth and the rule of law. It criticizes foreign investment for exacerbating unequal growth and advancing only a few diminishing valuable but limited resources in the process. Moreover, it showcases the asymmetries between the parties involved.[10] Furthermore, it also highlights how investment arbitration favours investors and undermines state sovereignty and regulatory authority.

In essence, both accounts differ in their interpretation of history's applicability to the current international investment law framework. One view sees in-

[3] Schill – Tams – Hofmann, 2018, 16.
[4] Schill – Tams – Hofmann, 2018, 11.
[5] Cole, 2022; Víg, 2019, 368.
[6] Cole, 2022.
[7] Miles, 2013, 2.
[8] Miles, 2013, 69.
[9] Miles, 2013, 69.
[10] Cole, 2022.

ternational investment law developing from imperial expansion to a nonviolent legal system enforcing investor rights. In contrast, the other view insists that this persistent focus on investor protection over the rights of host states stems from historical roots and is embedded in the modern international investment law framework.

Not only in scholarly debates but also in many arbitrations, historical reasoning plays a significant role. The tribunals often depend on past case law as a basis of argument and persuasive precedent. This sometimes becomes decisive.[11] Such references can be found in the inaugural investment treaty arbitration case *AAPL v. Sri Lanka,*[12] where the tribunal significantly referred to pre-World War II cases for the analysis.[13] These historical references fulfilled various objectives, i.e., forming the arguments of the interpretation, bearing the legacy of the past, and informing about legal principles for the contemporary disputes.

Recent scholarly works have analysed the historical roots of international investment law, providing an understanding of its evolution, the role of capital-exporting and importing states, and its embedded unfairness.[14] Nissel thinks that dependence of arbitrators on positive law arguments and the backing of scholars contributed to this evolution.[15] Moreover, scholars associated with 'Third World Approaches to International Law' (TWAIL) reveal biases stemming from political, cultural and economic factors.[16] They criticise simplistic interpretations of international law that hinder a more emancipated legal future.[17]

I will employ the Third World Approaches to International Law[18] to analyse the historical development from the perspective of third-world states, which are generally catergorised as developing states or capital-importing states. These approaches encourage a re-evaluation of international law's colonial roots and its contemporary implications. In particular, the writings of Anghie[19] and Koskenniemi,[20] after examining how ideas and concepts emerged from colonial encounters, they illustrate how these encounters continue to shape international investment law.[21] Anghie, in particular, emphasizes the enduring influence of imperialism on global affairs since the 16th century.[22] While the TWAIL approach is dismissed as historical, Angie argues that it goes beyond history, carrying on-

[11] Schill – Tams – Hofmann, 2018, 11.

[12] Asian Agricultural Products Ltd. v. Republic of Sri Lanka (1987), ICSID Case No. ARB/87/3.

[13] Asian Agricultural Products Ltd. v. Republic of Sri Lanka (1987), ICSID Case No. ARB/87/3, para. 39, 40.

[14] Schill – Tams – Hofmann, 2018, 12.

[15] Nissel, 2016, 185-186.

[16] Eslava – Pahuja, 2012, 195.

[17] Schill – Tams – Hofmann, 2018, 16.

[18] Chimni, 2006, 3.

[19] Anghie, 2005.

[20] Koskenniemi, 2001.

[21] Dann, 2012, 125.

[22] Anghie, 2014, 123.

tological significance. He advocates for a critical understanding of history and insists that such an approach is vital for guaranteeing equitable treatment of formerly colonised states in the current world order.[23]

TWAIL scholars maintain that the colonisation process of the 16th to 19th centuries, along with its associated economic system, continues to exert lasting influence.[24] According to Koskenniemi, many of the general principles of international law originated in Europe.[25] If these principles exist, they will act as the referral to European conceptualisations.[26] He asserts that European concepts, narratives and positions continue to shape the structure of international law and preserve power disparities even in the postcolonial era.[27] He also thinks that this Eurocentric approach has shaped how we comprehend the history of international law and continues to affect the current global political economy.[28]

Efforts to study evolutional history or to examine the history of international law from a TWAIL perspective have encountered criticism for their alleged 'amateurism'.[29] Orford challenges the opinion that only historical methods can generate a proper understanding of the past.[30] She argues that the genealogical nature of international law implies its capability to be transmitted and applied as a basis for argumentation.[31] Orford further maintains that containing ourselves to approved historical approaches confines critical engagement,[32] and overlooks the underlying politics embedded within legal rules, which historical context can help uncover.

According to Koskenniemi, there is no single and accurate context for understanding international law.[33] Instead, we must take options about the extent and magnitude of the context. Moreover, context is shaped by interpretation, which is inevitably influenced by our current perspectives.[34]

In section 2 of this paper, I examine the origin of international investment law in the pre-BIT era. In section 3, I examine the development of international investment law in the BIT era and explore the connection between the pre-BIT era and the BIT era. In section 4, I conclude by summarizing the findings from the preceding examinations and highlighting their implications.

[23] Anghie, 2014, 140.
[24] Eslava – Pahuja, 2012, 196.
[25] Koskenniemi, 2011, 155.
[26] Koskenniemi, 2011, 155.
[27] Koskenniemi, 2011, 155.
[28] Koskenniemi, 2013, 154., 160.
[29] Lesaffer, 2007, 34-35.
[30] Orford, 2017, 312.
[31] Orford, 2013, 170, 175.
[32] Orford, 2017, 305-306.
[33] Koskenniemi, 2013, 232–238.
[34] Koskenniemi, 2013, 230.

II. THE PRE-BIT ERA AND THE ORIGINS OF INTERNATIONAL INVESTMENT LAW

1. A brief overview of the historical developments

According to Newcombe, a comprehensive account of how international law has addressed the treatment of foreigners and their assets is lacking.[35]

Nevertheless, international agreements dating back to the late 18th century do contain provisions aimed at protecting foreign property.[36]

The evolution of legal framework surrounding the protection and promotion of foreign investments can be linked to historical mechanisms adopted by different states to ensure the safety of their nationals and assets abroad.[37] During the pre-BIT era,[38] international agreements typically focused on trade relations over safeguarding foreign direct investments. They occasionally included provisions for protecting the property.[39]

Diplomatic protection is an early mechanism for protecting foreign direct investments. This concept is credited to the ideas of Vattel. According to him, the property of the foreigners was seen as an extension of their membership in their home state, and as an integral part of their home state's wealth.[40] Therefore, any injury to foreigners or their property by a state was considered an injury to the foreigners' home state.[41] Over time, this notion developed into the international legal principle known as diplomatic protection.[42]

Brownlie traces the origins of diplomatic protection back to the Middle Ages or possibly even earlier,[43] describing it as a mechanism which involves a home state seeking a remedy from a host state for injury inflicted upon one of its nationals. In other words, if the host state declined to resolve the dispute through arbitration, the sole avenue available under customary law to enforce diplomatic protection was by means of espousal.[44] This state practice remained predominant during the 18th and 19th centuries.[45]

In the practice of diplomatic protection, states did not just rely on settling claims through diplomacy or force. They also established special commissions as

[35] Newcombe – Paradell, 2009, 3.
[36] Vandevelde, 2005, 158.
[37] Amerasinghe, 2004, 22.
[38] Pre-BIT era refers to the period that existed before the signing of the Bilateral Investment Treaty (BIT) in 1959.
[39] Vandevelde, 2005, 158.
[40] De Vattel, 1964, 93.
[41] García-Amador, 1984, 46.
[42] Newcombe – Paradell, 2009, 4.
[43] Crawford, 2019, 610.
[44] Vandevelde, 2005, 160.
[45] Newcombe – Paradell, 2009, 7.

well as arbitral tribunals.[46] This approach has roots in the 1794 Treaty of Amity, Commerce, and Navigation between Great Britain and the United States, also known as the Jay Treaty.[47] Among its provisions, the treaty created a commission to address claims related to the treatment of nationals of the parties.[48] Moreover, during the latter half of the 18th century and first half of the 19th century, numerous states formed over sixty arbitral commissions to resolve disputes arising from injuries sustained by foreign nationals.[49] Alongside these, many *ad hoc* tribunals were set up to address particular claims.[50] Regardless of the focus on individual losses to safeguard personal rights, these claims commissions generally adhered to a diplomatic protection model.[51] This meant that the proceedings involved states as the primary parties, excluding direct participation from individuals.

The Treaties of Friendship, Commerce, and Navigation, known as FCN treaties, were one of the earliest forms of treaty practice that included some provisions related to the treatment of aliens. In 1778, the United States and France signed the first FCN treaty.[52] These early FCN treaties were primarily focused on trade matters, providing the most-favoured-nation treatment.[53] Moreover, within these treaties, 'special protection'[54] or 'full and perfect protection'[55] were incorporated. They also specified that in cases of expropriation, the payment of compensation shall be followed.[56] The focus was on safeguarding property, with a specific emphasis on this aspect rather than a broader consideration of investments.

The transformation began after the first quarter of the 19th century when the United States transitioned from being a capital importer to becoming a capital exporter.[57] The shift in approach became evident in the 1923 FCN treaty between the United States and Germany. There was a systematic expansion of the scope of the treaty. While they primarily focused on protecting the rights of individuals, these treaties were developed to also incorporate the interests of companies abroad.[58] Alongside, provisions were formulated to strengthen the protection of private property.[59] Moreover, a significant shift occurred in the latter half of the 19th century regarding the contents of FCN treaties. These

[46] Newcombe – Paradell, 2009, 7.
[47] The treaty of amity, commerce, and navigation between Great Britain and the United States, 1794.
[48] Stuyt, 1990, 2-3.; Crawford, 2019, 571.
[49] Crawford, 2019, 611.
[50] Stuyt, 1990, 185., 216.
[51] Muñoz, 2021, 263.
[52] Vandevelde, 2010, 21-23.
[53] Schill, 2009, 29-30.
[54] Colombia Peace, Amity, Navigation, and Commerce Treaty, signed at Bogota on December 12, 1846.
[55] Paraguay Friendship, Commerce and Navigation, signed at Asuncion February 4, 1859, article IX.
[56] Paraguay Friendship, Commerce and Navigation, signed at Asuncion February 4, 1859, article III.
[57] Wilson, 1956, 928.
[58] Walker, 1956, 373-393.; Sachs, 1984, 196.
[59] Walker, 1956, 383.

treaties gradually prioritised the protection of foreign investments, and nearly half of the treaty body was dedicated to covering investment related matters.[60]

Vandevelde[61] also illustrates some of the key characteristics of the pre-BIT era agreements. Initially, agreements commonly bundled trade and property safeguard provisions together. Secondly, the treaties primarily aimed at creating commercial relations, where property protection provisions played a minor role. Lastly, the scope of the treaty network was restricted, and the protection incorporated was notably weak, especially since there were no mechanisms for enforcement in these agreements.[62]

In the latter half of the 19th century, after World War II, the decolonisation process shaped the international investment framework significantly. This period saw the emergence of many newly independent states.[63] These states were underdeveloped yet strongly protective of their sovereignty.[64] Foreign investment became a contentious issue as these states identified it as a potential form of neocolonialism, given the foreign influence over critical economic resources.[65] Additionally, concerns were voiced about the possible influence of foreign investors in the internal affairs of the state.[66]

2. The imperial origins

Gothii stresses the importance of examining the historical relationship between colonised and colonizing nations.[67] For Moore-Gilbert, neglecting or avoiding the forceful aspects of colonial history and the present neo-colonial era contributes to maintaining a distorted worldview.[68] Moreover, Slater argues that this approach also enables the removal of imperial influence from the historical narrative.[69]

Some insist that the past and imperialism do not matter in the international investment law field because states freely enter or exit BITs, and there is no clear divide between capital-exporting and capital-importing states any longer.[70] Moreover, if states want to receive BITs, they need to sign BITs. However, Miles holds a different view. She did not say that 19th-century imperialism still functions

[60] Walker, 1956, 234.
[61] Vandevelde, 2005, 157-194.
[62] Vandevelde, 2005, 157-194.
[63] Landes, 1998, 431.; Víg, 2019, 368.
[64] Sornarajah, 2010, 142.
[65] Hanink, 1994, 234.
[66] Gilpin, 1987, 247-248.
[67] Gathii, 1998, 184.
[68] Moore-Gilbert, 1997, 10.
[69] Slater, 1995, 367.
[70] Fahner, 2015, 377-380.

the same way today, imposing treaties on states. Instead, she argued that the rules themselves carry the legacy of imperialism. This legacy is an inherent aspect of modern rules. Miles emphasizes that avenues for enacting more balanced rules were not taken. She further maintains that substantive legal language and procedural processes from the imperial era persist today that sustain the *status quo*.[71]

While Cavallar[72] dismisses the strong connection between the rise of international law and its 21st-century form, Miles, on the other hand, maintains this connection. She suggests several ways to connect ideas from the 16th to the 20th century, highlighting a process-oriented approach. In this approach, the focus is on the process of recalibration of the ideas that link the centuries. This involves ideas like commerce, control, private rights, property, and the merging of state and commercial interests within the legal mechanism. Moreover, she points out that this process occurred along with colonialism and commercial expansionism. From Vitoria,[73] Grotius,[74] and Vattel's[75] theories of FCN treaty framework and diplomatic protection, this process is embedded, and common conceptual approaches exist.[76] Furthermore, the application of the diplomatic protection doctrine persisted in the first half of the 20th century and underwent a transformation with the inception of BITs from 1959. Rather than marking a departure from the past, BITs are integral to this narrative.[77]

Scholars maintain that European powers heavily relied on colonisation to regulate and uphold foreign investment throughout centuries.[78] They also argue that the role of international law was minimal in safeguarding such investments as colonial powers had a direct hold over the applicable territories. They used their own legal frameworks, courts, and coercive means to safeguard their nationals' investments.[79] Roy further suggests that this arrangement was cleverly exploited as a convenient tool to advance colonial agendas under a legal pretext, shaping the development of the law along specific paths.[80]

From the beginning of the 19th century, Latin America witnessed an influx of foreign investors.[81] These investors engaged with a ruling elite predominantly of European lineage.[82] They backed economic liberalism, including *laissez-faire*

[71] Miles, 2013, 21-22.
[72] Cavallar, 2008, 183.
[73] De Vitoria, 1991, 231-292.
[74] Grotius, 2006, 19-50.
[75] De Vattel, 2008.
[76] Miles, 2018, 161.
[77] Miles, 2018, 160.
[78] Newcombe – Paradell, 2009, 8.; Vandevelde, 2010, 19-20.
[79] Newcombe – Paradell, 2009, 10-11.; Sornarajah, 2010, 19.
[80] Roy, 1961, 880.
[81] Dunn, 1932, 53.
[82] Dunn, 1932, 53.

principles and open doors for foreign investment.[83] However, the Eurocentric political and economic philosophies did not always align well with the traditions of mainly indigenous populations.[84] Encountered with the inability to employ colonial systems against independent Latin American states,[85] capital-exporting states started to focus on producing novel customary international laws regarding diplomatic protection and state liability for injury to aliens.[86]

Grovogui criticizes legal polycentricity for neglecting the impact of colonial structures in nations that gained political independence. He argues that this neglect is not only due to the Eurocentric character of international law but also generated from its historical assimilation of the colonised into global structures.[87] Grovogui highlights the insufficient consideration given by legal polycentricity to power dynamics, hierarchy, and ideology, especially in its endorsement of civilisational pluralism. He contends that legal polycentricity fails to recognise the hegemonic nature of international law and evades examining the structural and cultural foundations of colonial relationships.[88]

3. Coercive and unequal economic relations and forcible interventions

Grovogui scrutinizes international law and order, portraying them as manifestations of the hegemony of the West.[89] He highlights that the reliance on political, interest-based norms rooted in Western culture has compromised the universality of international law.[90]

In the pre-BIT era, diplomacy sometimes provided the expected recourse. In the 19th century, the Latin American states were swayed by the United States to adopt arbitration as a means of resolving claims involving injuries to U.S. nationals.[91] Usually, they consented to arbitration reluctantly.[92] Military force was also used to get favourable protection and to collect debts due to U.S. nationals,[93] backed by the Roosevelt Corollary and the Monroe doctrine,[94] until the Roosevelt administration introduced the Good Neighbour Policy.[95]

[83] Chua, 1995, 223-303.
[84] Dunn, 1932, 53-54.
[85] Bubb – Rose-Ackerman, 2007, 294.
[86] Crawford, 2019, 611.
[87] Grovogui, 1996, 185.
[88] Grovogui, 1996, 195.
[89] Grovogui, 1996, 16.
[90] Grovogui, 1996, 3.
[91] Summers, 1972, 7.
[92] Summers, 1972, 5.
[93] Summers, 1972, 5-6.
[94] Smith, 2005, 70.
[95] Smith, 2005, 94.

The usual scenario was that developing states signed the draft presented by developed states. Generally, there are minor changes from the draft offered on the table.[96] This practice set some ideological agendas. Despite both parties formally accepting the same terms and conditions, the agreements were observed as asymmetrical. In practice, burdens were carried by the developing states.[97]

Ryan argues that despite potential power asymmetries in BIT negotiations between developed and developing states, international investment law relies on the consent of all parties involved.[98] Many developing states themselves pursue bilateral investment relationships to attract foreign direct investment.[99] He further stresses that despite potential challenges in negotiating with developed states, the keenness of the developing states is evident.[100] Likewise, the existence of many BITs among developing states suggests voluntary participation rather than coercion.[101] Ultimately, states assess multiple aspects when determining their approach to international investment agreements.[102]

4. Historically one-sided in favour of capital-exporting states

Alschner points out that FCN treaties were symmetrical and concluded between developed states.[103] On the other hand, BITs represented asymmetrical relations.[104] Unlike FCN treaties, BITs did not involve a reciprocal exchange but rather a 'grand bargain' where Northern capital was traded for Southern states' commitment to investment safeguard.[105] He thinks that the approaches of the FCN treaties and BITs were different, although both approaches tried to achieve same goal.[106] Despite their differences, FCN treaties have left a lasting effect, and still can be related to the emergence of a new generation of investment treaties where trade and investment are covered together.[107]

Miles emphasizes how the evolution of international investment law is deeply linked with the expansive reach of European trade and investment.[108] Regardless of claims of universality and neutrality, the resulting legal framework

[96] Vandevelde, 1988, 211-212.
[97] Sornarajah, 2010, 172, 211.; Newcombe – Paradell, 2009, 43.
[98] Ryan, 2009, 79.
[99] Ryan, 2009, 80.
[100] Ryan, 2009, 80.
[101] Ryan, 2009, 80.
[102] Ryan, 2009, 94.
[103] Alschner, 2013, 458.
[104] Alschner, 2013, 458.
[105] Salacuse – Sullivan, 2009, 120.
[106] Alschner, 2013, 458.
[107] Alschner, 2013, 459.
[108] Miles, 2013, 21.

strongly favours capital-exporting states. It also exhibits the imperial and hegemonic nature of international law.[109] She further asserts that considering the treatment of environmental concerns, this historical one-sided characteristic is evident and continues to influence the current legal framework.[110]

Roy also makes a similar point that while the rule of law is applicable to all states irrespective of their power or prestige, differences in physical and economic strength often favour the stronger states.[111]

5. Resistance from the capital-importing states

Schwebel maintains that there was disagreement within the international community concerning the laws governing foreign investment treatment.[112] Developed states generally embraced international law's role related to the treatment of foreign nationals, expanding this to govern treatment of foreign investments.[113] However, developing states resisted expanding international law into what they considered domestic matters.[114] From 1950-70, developing states actively opposed establishing higher protection standards for foreign investors, determined to maintain full control over their natural resources and the authority to regulate them, including adjudicating claims related to resource exploitation.[115]

In the 19th century, Latin American states faced numerous claims, often from stronger states.[116] This raised concerns about taking unfair advantage,[117] and potential misuse of legal processes.[118] In response, Latin American states resisted.[119] Moreover, to maintain the Calvo doctrine formulated by Carlos Calvo, they enacted laws to ensure equality between domestic and foreign investors,[120] and even included in their constitutions.[121] However, the United States and powerful European states did not back this idea.[122]

[109] Miles, 2013, 2-3.
[110] Miles, 2013, 20., 45-46.
[111] Roy, 1961, 866.
[112] Schwebel, 2004, 27.
[113] Schwebel, 2004, 27.
[114] Schwebel, 2004, 27.
[115] Schwebel, 2004, 27.
[116] Dunn, 1932, 55-57.
[117] Dunn, 1932, 55-56.
[118] Dunn, 1932, 55-56.
[119] Dunn, 1932, 56.; Miles, 2013, 49-51.; Newcombe – Paradell, 2009, 9.
[120] Shan, 2007, 125.
[121] Shan, 2007, 125.
[122] Schwebel, 2004, 28.

III. THE BIT ERA AND THE CONTINUATION OF THE IMPERIAL LEGACY

1. A brief overview of the historical developments

With the signing of Germany and Pakistan BIT[123] in 1959, it has been argued that the modern international investment agreement has emerged.[124] Regardless, this newer form of agreement encouraged other Western European countries to follow suit quickly. BITs started including the arbitration clause, one of the key features of modern international investment agreements, where an investor can sue the host state.[125] The year 1965 marked a milestone in the international investment law framework with the founding of ICSID under the World Bank.[126]

Predecessors of these BITs were FCN treaties that were actively signed and relied on by the United States. Initially focusing on commercial affairs, FCN treaties started introducing more investment protective measures after World War II.[127] These treaties influenced the drafting of the Abs-Shawcross Draft Convention, which in turn shaped the terms of early BITs. The BITs introduced key standards like 'fair and equitable treatment' (FET).[128] FCN treaties were in place signifying the American approach to international investment agreements until the 1960s.[129]

From 1960-80, developing states tried to assert their positions in international economic relations. At the UN General Assembly, they passed resolutions like the 1962 Resolution 1803 on Sovereignty over National Resources. This resolution addressed that for expropriation, compensation would be granted.[130] However, the Charter specifies that compensation for expropriation is to be decided under national laws, without mentioning international minimum standard.[131] Additionally, other two important instruments were the Charter of Economic Rights and Duties of States[132] and the Declaration on the Establishment of a New International Economic Order (NIEO Declaration).[133]

[123] Pakistan and Federal Republic of Germany—Treaty for the Promotion and Protection of Investments, Signed at Bonn, on 25 November 1959, UNTC registration no. 6575.

[124] Dolzer – Kriebaum – Schreuer, 2022, 9.

[125] Vandevelde, 2005, 174.

[126] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, UNTC registration no. 8359. See Víg, 2019, 369.

[127] Alschner, 2013, 457.

[128] Mann, 1981, 242.

[129] Alschner, 2013, 458.

[130] General Assembly resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources', para. 4.

[131] General Assembly resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources', para. 4.

[132] General Assembly resolution 3082 (XXVIII) of 6 December 1973, 'Charter of Economic Rights and Duties of States'.

[133] General Assembly Resolution 3201 (S-VI) of 1974: Declaration on the Establishment of a New International Economic Order (NIEO).

The NIEO Declaration links neo-colonialism and income inequality within the global economic system as barriers for developing states. It restates the principle of permanent sovereignty over natural resources and provides a new economic framework. This framework covered areas such as trade terms, monetary system reform, development financing, technology transfer, and transnational corporate oversight. The Charter also includes positions concerning international investment.[134] It maintains the authority of states to regulate foreign investment within their territories and asserts that preferential treatment cannot be pushed on any state.[135]

After widespread criticisms emerged from the beginning of the 21st century and onwards, states started to amend or renegotiate the existing BITs. However, fixing the substantive issues related to international investment agreements is far from over.

Currently, there are more than 3000 agreements signed between the states in the form of BITs and FTAs to regulate international investments.[136] Sometimes, states also conclude investment contracts with private investors and corporations to deal with their investments.

2. The succession of the BIT era

Ryan states that the modern international investment agreements started after World War II.[137] Miles thinks that taking 1959 as the start of modern international investment agreements without considering its broader historical context is a form of denial and mythmaking. She suggests that instead of viewing the emergence of BITs as a total departure, it should be identified as just one of many splits in the history of international investment law since the 17th century.[138] Alschner points out that this exclusive focus on BITs ignores the important role played by FCN treaties in shaping international investment law.[139] Likewise, Vandevelde also notes that the protections offered by BITs closely resemble those found in latter FCN treaties signed by the United States.[140]

Newcombe and Paradell are also of the opinion that the unique features of current international investment agreements stem from their historical development. They, however, think that diplomatic protection and claims commissions mainly influenced regulations regarding international investment. Moreover, the shortcomings of the diplomatic protection system became visible because of

[134] NIEO, Section 2.2
[135] NIEO, Section 2.2, Subparagraph (a).
[136] UNCTAD, 2024.
[137] Ryan, 2009, 67.
[138] Miles, 2018, 161.
[139] Alschner, 2013, 456.
[140] Vandevelde, 2005, 172.

disagreements regarding the international minimum standard of treatment.[141] Additionally, core principles have not only a resemblance but are also based on historical processes. The BIT framework and ICSID protective regime were established in the backdrop of decolonisation efforts and to continue the previous but stronger protective regime for international investments.[142] Furthermore, they think the new approach to the BIT from 1959 onwards was to embolden the rule of law and to depoliticise the investment disputes.[143]

Miles further notes that the introduction of new forms of protective regime and investor-state arbitration in international investment law has been taken by many as a substantive departure from the past. In reality, this did not break away from the achievements of the past centuries and played an important role in shaping international investment agreements. It showcases the continuity between past and present.[144] Through the lens of structure, mechanism, concepts, and language she explores the connection between international investment law and imperial influence. She contends that the emphasis on private property and commerce is ingrained in international investment law. Historically, this approach was the position of the capital-exporting states. So, by allowing the investors to sue the host states only the reinforcement of that approach. In this case, the right to sue was provided only to investors.[145]

Nobody underestimates the fact that the BIT incorporated some provisions that distinguish it from the previous treaties. However, this was not a sudden creation, but informed itself based on previous mechanisms, particularly FCN treaties between the 17th and 19th centuries. It also held its roots on the platform of customary international law principles. It might have a different form but represents the heritage.[146]

Vandevelde examines the influence of the approach of the United States in international investment agreements. Particularly, she focused on FCN treaties of post-World War II.[147] He finds that these treaties provide guarantees similar to constitutional safeguards including provisions related to trade and maritime affairs.[148] His research also deals with the origins and purposes of international investment law. He maintains that the approach of the United States was based on the so-called 'new deal'. This approach changed the previous position of the United States and influenced international approaches to treaties.[149] He disagrees with the position that modern international investment law was born in

[141] Newcombe – Paradell, 2009, 2.
[142] Newcombe – Paradell, 2009, 24.
[143] Newcombe – Paradell, 2009, 28., 47.
[144] Miles, 2018, 144.
[145] Miles, 2018, 139.
[146] Miles, 2018, 144-145.
[147] Vandevelde, 2017, 179-181.
[148] Vandevelde, 2017, 205.
[149] Vandevelde, 2017, 31-44.

1959 and was shaped by the Abs-Shawcross Draft, instead arguing he finds that its roots lie in the FCN treaties.[150] After 1960 the United States also changed their approach following by following the BIT experience, while also drawing on insights from previous FCN treaties. This trait is visible in the NAFTA and some other investment agreements.[151]

3. The policy space for developing states

Legal frameworks have been used to realise economic theories of the dominant ideologies.[152] This is the case for the BIT framework that is shaped by the principles of economic neoliberalism.[153] It is influenced by the works of the economist Adam Smith who advocated laissez-faire economics and free trade. It is important to note that this leaves very little, if any, room for other economic ideologies.

One of the key features of the development of an arbitration system in international investment law is the transfer of capital entry regulations from national control to the international sphere. This shift promotes the liberal economic agenda and favours the interests of capital.[154] Koskenniemi's focuses on the overall system rather than individual cases to understand international investment arbitration. He posits that the mere existence of the international investment arbitration exerts significant influence.[155] Likewise, Greeman thinks that the effect of the mixed claims commissions went beyond the immediate outcomes of different cases. She argues that the influence was deeper, leading to the internationalisation of the risks linked with foreign investment in Latin America, specifically regarding damage caused by rebels.[156]

4. The resistance continues

After the formal start of the BIT era, the capital-importing and developing states tried to showcase their views and assert their positions. They adopted several resolutions through the United Nations General Assembly. One of the important resolutions was related to establishing guidelines for nationalisation in

[150] Vandevelde, 2009, 16.
[151] Alschner, 2013, 468.
[152] Mackaay, 2000, 67-71.
[153] Vandevelde, 1998, 623-624.; Sornarajah, 2015, 9-14.; Shalakany, 2000, 420.
[154] Shalakany, 2000, 424-425.; Tzouvala, 2018, 202.
[155] Koskenniemi, 2017, 351.
[156] Greenman, 2021, 30.

1962 on Permanent Sovereignty over Natural Resources.[157] This resolution affirmed the right of nations to determine compensation under their domestic laws and international legal principles. However, these resolutions were non-binding and did not create any legal obligation.[158]

Another important resolution was the Charter of Economic Rights and Duties of States.[159] This resolution was adopted by the General Assembly of the United Nations in 1974. It affirmed again the right of states to sovereignty over their resources. It also recognised the authority of states over their resources, including determining compensation domestically.[160] However, no developed state supported the Charter's adoption. This highlighted the divide between developed and developing states.[161]

In the latter part of the 20th century, efforts were made to adopt multilateral agreements concerning international investment. However, they did not succeed. There was a visible divide between the developed and developing states, it also can be viewed as between capital-exporting and capital-importing states. In other words, disagreements over the important rules lead to the failure of those efforts.[162] Therefore, like FCN treaty provisions, some of the early BIT provisions were vague and largely dependent on the interpretation of the arbitrators.[163] Moreover, these vagueness and lack of explanation of the crucial principles leading to disagreement between the parties.[164] For instance, regarding the compensation for expropriation, there were differences over the principle where customary international law asked for full compensation. The developed states, particularly the United States advocated for the Hull formula, while developing states supported the Calvo doctrine.[165]

Developing states resisted the Hull formula, citing the need to protect their sovereignty.[166] The resolution 3171 was adopted in the United Nations General Assembly to resolve this stand-off. It affirmed that states must provide compensation under their national laws.[167] However, this resolution had minimal effect due to its non-binding nature. Furthermore, the tribunal in *Ebrahimi v. Iran* held that states bear responsibility for providing compensation for expropriated

[157] General Assembly resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources'.

[158] Ryan, 2009, 69.

[159] General Assembly resolution 3082 (XXVIII) of 6 December 1973, 'Charter of Economic Rights and Duties of States'.

[160] General Assembly resolution 3082 (XXVIII) of 6 December 1973, 'Charter of Economic Rights and Duties of States', art. 2.

[161] Ryan, 2009, 70.

[162] Ryan, 2009, 70.

[163] Sloane, 2004, 116.

[164] Ryan, 2009, 70.

[165] Hackworth, 1940, 661-662.

[166] Sornarajah, 2015, 35-36.

[167] General Assembly resolution 3171 of 1974, 'Permanent sovereignty over natural resources'.

property. While the theory and practice of international law do not endorse the 'prompt, adequate and effective' method, customary international law supports an 'appropriate' compensation method.[168]

5. The international minimum standard and the disagreement

One of the contentious issues in international investment law is the international minimum standard. The historical development surrounding this standard showcases its complexity and the disagreements surrounding its application. According to Western scholars, the host states are responsible for applying this standard under customary international law when dealing with investments.[169] In contrast, many countries disagreed with such a position.[170] For instance, Latin American states supported the Calvo doctrine. Under this doctrine, foreign investors are eligible only for the same treatment as domestic investors.[171]

Vandevelde suggests that regardless of the consensus on the presence of the international minimum standard, details of the standard were not conveyed. In other words, the meaning of the standard was left ambiguous.[172] However, it is suggested that the *Neer Case*[173] outlined the details of the standard, although differing positions were taken in different cases afterwards. The *Neer case* held the following regarding the breach of the international minimal standard:

"the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency."[174]

Western countries tried to insert their position in different ways. According to Roy, they employed dual strategies on their part. First, by utilizing the tool of diplomatic protection, they internationalised the host state's obligations, by framing them as a responsibility to the home state rather than to the affected foreign individual. Second, they established a standard of justice and assumed it as an international standard.[175]

Vandevelde further points out that the United States pursued to establish the prompt, adequate, and effective compensation standard as customary interna-

[168] Shahin Shaine Ebrahimi and others v. The Government of the Islamic Republic of Iran, IUSCT Case Nos. 44, 46 and 47, para. 88.

[169] Crawford, 2019, 429., 433.

[170] Sornarajah, 2015, 191.

[171] Sornarajah, 2015, 33.

[172] Vandevelde, 2005, 159.

[173] L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (1926), 4 R.I.A.A. 60.

[174] L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (1926), 4 R.I.A.A. 60, para. 4.

[175] Roy, 1961, 864.

tional law by actively engaging in a broad network of treaties mentioning this standard.[176] Moreover, the US insisted on including this standard in every BIT it entered,[177] focusing on its establishment.[178]

Likewise, Bergman noted that addressing the opposition of the Global South, the FCN and the BIT framework of the United States aimed to strengthen and recognise the minimum standards as customary international law.[179] The FCN treaties typically included an FET principle, and 'full protection and security'. This was linked to the international minimum standard of treatment.[180]

Because of the disagreements between the parties, the United States and the European capital-exporting countries were not receiving their desired protection for their investors. Therefore, 'gunboat diplomacy' often were employed by the United States and the European capital-exporting states.[181]

Historical background suggests that the international minimum standard is rooted in the idea of Vattel who argued that the injury to an individual amounts to an injury to his home state.[182] Essentially, this position was taken by capital-exporting states as the reason to use military force. In the backdrop of all of this intervention, scholars still argued for the same standard, refuting the alternative attempt, i.e. the Calvo doctrine.[183] They essentially maintain that this standard stands for universality and justice based on the fact that the diplomatic protection is widely used throughout the 20th century.

Roy challenges the assumption that the supposed universality of specific aspects of international law necessarily entails their automatic binding force on all members of the international community. Drawing an analogy to a club, this notion suggests that the international community is merely an extended version of its former self. However, Roy contends that the international community is more correctly described as a collection of diverse communities rather than a singular entity. It consists of various communities with unique characteristics, rather than operating within a larger, homogenous framework.[184]

[176] Vandevelde, 1992, 21.
[177] Vandevelde, 1992, 25-26.
[178] Vandevelde, 1992, 125.
[179] Bergman, 1983, 34-35.
[180] Bergman, 1983, 19.
[181] Smith, 2005, 23, 69.; Miles, 2014, 998.
[182] Borchard, 1925, 29., 32., 197.
[183] Sornarajah, 2010, 129.
[184] Roy, 1961, 881.

6. The standard of due diligence and the state responsibility for rebels

In the first case of the BIT era, *AAPL v Sri Lanka*,[185] Sri Lanka was held liable for the destruction of a prawn farm amid the civil war, although the cause and the actor behind this remained unconfirmed.[186] The tribunal ruled that Sri Lanka did not fulfil its due diligence to protect the property of the claimants.[187] It drew on early 20th century awards of the arbitral commissions, e.g. *Kummerow case* (1903) *Sambiaggio* (1903), *Home Insurance Co* (1926), *Spanish Zone of Morocco Claims* (1923), *David Richards case* (1927), *Oriental Navigation Co. case* (1928), and *the F.M. Smith case* (1929) etc. handling state liability for rebels.[188] Moreover, this case was invoked in a 21st-century case, *Ampal-American Israel Corporation v Egypt*.[189] The tribunal held the host state liable referring the arguments put forward by *AAPL v Sri Lanka* for not conforming to the due diligence in case of damages by armed groups on an oil pipeline.[190]

The debate surrounding state responsibility for rebels spans over a century. It raises questions about the level of due diligence required to prevent rebel-caused harm and whether it should be objective or context-specific.[191] Examining its origins in 19th and early 20th century arbitration involving Latin American states is crucial for comprehending its impact on contemporary international investment law, particularly regarding state liability for the damages caused by armed groups. This historical perspective sheds light on how international law addresses injuries induced by armed rebels, reflecting a continuity of the legacy of the previous centuries.[192]

In *State responsibility and rebels: the history and legacy of Protecting Investment Against Revolution*,[193] Kathryn Greenman studies the history and implications of the liability of states to protect investments from non-state armed groups.[194] She thinks that its origin can be traced back to Latin America's decolonisation period.[195] She analyses legal debates and arbitration cases from

[185] Asian Agricultural Products Ltd. v. Republic of Sri Lanka (1987), ICSID Case No. ARB/87/3.

[186] Asian Agricultural Products Ltd. v. Republic of Sri Lanka (1987), ICSID Case No. ARB/87/3, para. 85(d).

[187] Asian Agricultural Products Ltd. v. Republic of Sri Lanka (1987), ICSID Case No. ARB/87/3, para. 85(b).

[188] Asian Agricultural Products Ltd. v. Republic of Sri Lanka (1987), ICSID Case No. ARB/87/3, paras. 73-75.

[189] Ampal-American Israel Corporation and others v. Arab Republic of Egypt (2012), ICSID Case No. ARB/12/11.

[190] Ampal-American Israel Corporation and others v. Arab Republic of Egypt (2012), ICSID Case No. ARB/12/11, para. 243, 290.

[191] Greenman, 2021, 3.

[192] Greenman, 2021, 19.

[193] Greenman, 2021.

[194] Greenman, 2021, 4.

[195] Greenman, 2021, 5.

1839 to 1927, showing the ongoing struggle to determine responsibility. Despite efforts at the League of Nations Codification Conference in 1930, consensus on this matter remained unattained.[196] Moreover, linking the mixed claims commission with intervention practices, she contends that they aimed to shield economic stability from rebellion by transferring control away from national laws. Furthermore, many of the case laws produced by the commissions were inconsistent, vague, and based on questionable grounds. Therefore, the scholars also offered differing views on arbitral practice.

She asserts that Latin American and US scholars clashed over the implications, with the former resisting intervention while the latter exploited it. This tension shaped the emergence of state responsibility for rebels as a contested area of international law, focusing on the source and adjudication of protection against rebels for foreigners. The failure at the League of Nations Codification Conference at the Hague in 1930 marked a decline in state responsibility for rebel injuries, but its legacy persisted in international investment and state responsibility laws. Latin American and US scholars differed on the grounds of execution, with the former resisting intervention while the latter used the practice to formulate measures that repeatedly defended it.[197] This tension affected the emergence of state responsibility for rebels as a disputed area of international law. Moreover, she thinks that the failure of the codification conference was the formal ending of this rule. However, somehow, it was revived by tribunal decisions.[198]

From the mid-19th century onwards, 40 mixed claims commissions handled claims against states for harm caused to foreigners by rebels.[199] Notable cases include the Mexican-US commissions of 1839, 1849, and 1868,[200] Venezuelan commissions of 1903, and Mexican commissions of the 1920s.

Despite connecting with peace,[201] depoliticisation[202] and noncoercion,[203] arbitration in the late 19th century did not reduce the intervention or coercion. It coexisted with military intervention that compelled us to opt for settlement or arbitration. For instance, Mexico was forced to opt for arbitration with the United States in 1839 after threats of retaliations.[204] Similarly, in 1902, Venezuela was pressured into arbitration by Britain, Germany, and Italy through a blockade.[205] This shows that while arbitration is not violence itself, it is part of a

[196] Greenman, 2021, 3.
[197] Greenman, 2021, 4.
[198] Greenman, 2021, 4.
[199] Greenman, 2021, 6.
[200] Greenman, 2021, 6.
[201] Tams, 2019, 217-219.
[202] Shalakany, 2000, 460.
[203] Gathii, 2009, 360.
[204] Moore, 1898, 1212-1216.
[205] Gathii, 2009, 355.

range of forceful tactics to protect the interests of foreigners. Regardless of contrasting features, it can be seen that both frequently took place under duress.[206]

Koskenniemi asserts that Arbitration was a new avenue for imperialism. It allowed the U.S. to maintain its anti-imperialist stance while offering a way of universalisation of its positions on different legal matters.[207] The matter was not that simple and counterparties also opted for arbitration from their side,[208] sometimes to avoid the interventionist approach.[209] However, they engaged in confrontations when compelled to choose from options provided by capital-exporting states, often due to unfair management.[210]

Dealing the issue of state responsibility for rebels, Argentine scholar Carlos Calvo[211] reasoned for the non-responsibility of the state because of internal disturbances or civil war.[212] This came on the backdrop of a series of European interventions in Latin America between the 1830s and the 1860s.

IV. CONCLUSION

International investment law involves various actors pursuing favourable objectives and shaping its norms and principles. A complete evaluation of the system requires considering the contributions of these diverse actors.[213] Moreover, historical exploration is necessary to understand the mass dissatisfaction towards international investment law as a whole and investor-state dispute settlement in specific. The TWAIL approach can be a useful method to understand critical aspects of international investment law from the Global South. Furthermore, the renewed focus on history has led to discussions on ways to tackle Eurocentrism in narratives of the history of international law.[214]

As international investment law has evolved, arbitration has become politically contentious even in states once supportive of such agreements. While there is agreement on the need for reform, the lack of historical evaluation into the failures of these agreements and how to amend them poses a challenge to reform initiatives. Moreover, the current reform initiative by the United Nations Commission on International Trade Law (UNCITRAL)'s Working Group III points out that its sole focus on systemic changes to the procedural aspects of ISDS

[206] Gathii, 2009, 360.
[207] Koskenniemi, 2008, 135.
[208] Koskenniemi, 2008, 143.
[209] Gathii, 2009, 355.
[210] Gathii, 2009, 356.
[211] Calvo, 1869.
[212] Greenman, 2021, 11.
[213] Sabahi – Laird – Gismondi, 2018, 2.
[214] Koskenniemi, 2011, 152-176.; Chimni, 2006, 3-27.

does not address the fundamental shortcomings of these agreements,[215] and it only addresses half of the problems by focusing solely on procedural reforms.[216] In addition, we learned from the current reform initiative that there are differences concerning some of the major issues.[217] That is why, to ensure effective results, it may be necessary to modify laws concerning state interactions to promote greater equality and reduce factors that undermine theoretical state equality.[218]

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[215] Khalique, 2024b, 115.
[216] Khalique, 2022, 76.
[217] Khalique, 2024a, 81.
[218] Roy, 1961, 867.

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