I

Perspective

Globalism and Its Impacts

"Globalization" is a phenomenon that has moved domestic and foreign businesses, as well as developed and developing countries, ever closer. It is sometimes described as economic integration. Often the business motivation is to take advantage of cheaper labor and lax law enforcement, but there are many reasons why U.S. and European Union (EU) businesses trade and invest in and with Asia, including market expansion. While some of the practices by hosting countries may appear unfair and exploitive and fuel the "race to the bottom," this trade and investment also bring jobs and technology to those countries and lower-priced products for consumers in the European Union and the United States.[1] Cross-border and foreign business revolve around corporate activity performed by labor (and sometimes involving labor unions) and serviced by lawyers. With increases in foreign direct investment (FDI) in East Asia, the use of outsourcing, global production systems, and offshore production has also grown. With this growth, new challenges abound for lawyers and human resource managers to comply with the myriad laws that arise in domestic, foreign, and international forums.

In all cases, significant labor and employment issues will be raised because human resources are the fuel of this economic activity. In understanding the impacts of globalism on international and comparative labor and employment issues in Asia, some perspective on the global economic and production systems affecting employment is provided because these systems often are the underpinnings of the evolving changes in workplace regulation. Globalization can be described as the "hub" of a wheel, with

[1] Jim Dator et al., Fairness, Globalization, and Public Institutions: East Asia and Beyond (2006). *See also* Labour Law in an Era of Globalization (Joanne Conaghan et al. eds., 2004). This collection of "[e]ssays consider[s] the consequences of such developments as accelerating international economic integration and wage competition, a decline in the capacity of the nation-state to steer economic progress, the proliferation of contingent employment relationships, and the significantly increased participation of women in paid work." Book Notes, 29 Law & Soc. Inquiry 299, 304 (2004).

its emanating spokes transmitting impacts on labor, labor unions, human resource management policies, law, and law practice, in ways described next.

A. ECONOMIC INTEGRATION: BUSINESS FLOWS AND EXPANDING LEGAL ISSUES

1. *Cross-Border Business*

a. Economic Integration

Economic integration within communities, regions, nations, and internationally has occurred in some form for thousands of years, but never at today's pace. The reality is that, whereas global merchandise exports in 1913 were eight percent of the world's gross domestic product (GDP), today they are more than twenty percent;[2] capital exports, historically coming from industrialized countries, today also come from emerging market nations.[3] An interesting phenomenon has occurred in recent decades wherein many corporations are geographically fragmented, with portions of their business operations diversified; and further, some forty percent of U.S. merchandise trade is being done *intrafirm*, which combines with increasing numbers of firms being involved in *global supply chains*.[4]

Author Thomas L. Friedman has made the case that the "world is flat."[5] Not all accept that globalization has flattened the world outside the business community,[6] but, within the business realm, Federal Reserve Chairman Ben Bernanke explains this aspect of globalization as "global economic integration,"[7] which is at the epicenter of the hub of globalization.

Global Economic Integration: What's New and What's Not?[8]

Ben S. Bernanke, Chairman, Federal Reserve

When geographers study the earth and its features, distance is one of the basic measures they use to describe the patterns they observe. Distance is an elastic concept, however. The physical distance along a great circle from Wausau, Wisconsin, to Wuhan, China, is fixed at 7,020 miles. But to an economist, the distance from Wausau to Wuhan can

[2] Chairman Ben S. Bernanke, Speech at the Federal Reserve Bank of Kansas City's Thirtieth Annual Economic Symposium: Global Economic Integration: What's New and What's Not? (August 25, 2006), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20060825a.htm (last visited Oct. 3, 2010).
[3] *Id.*
[4] *Id.*
[5] Thomas L. Friedman, The World is Flat (2005).
[6] Joseph E. Stiglitz, Making Globalization Work (2006).
[7] Bernanke, *supra* note 2.
[8] *Id.*

also be expressed in other metrics, such as the cost of shipping goods between the two cities, the time it takes for a message to travel those 7,020 miles, and the cost of sending and receiving the message. Economically relevant distances between Wausau and Wuhan may also depend on what trade economists refer to as the "width of the border," which reflects the extra costs of economic exchange imposed by factors such as tariff and nontariff barriers, as well as costs arising from differences in language, culture, legal traditions, and political systems.

One of the defining characteristics of the world in which we now live is that, by most economically relevant measures, distances are shrinking rapidly. The shrinking globe has been a major source of the powerful wave of worldwide economic integration and increased economic interdependence that we are currently experiencing. The causes and implications of declining economic distances and increased economic integration are, of course, the subject of this conference. The pace of global economic change in recent decades has been breathtaking indeed, and the full implications of these developments for all aspects of our lives will not be known for many years. History may provide some guidance, however. The process of global economic integration has been going on for thousands of years, and the sources and consequences of this integration have often borne at least a qualitative resemblance to those associated with the current episode. In my remarks today I will briefly review some past episodes of global economic integration, identify some common themes, and then put forward some ways in which I see the current episode as similar to and different from the past. In doing so, I hope to provide some background and context for the important discussions that we will be having over the next few days.

A Short History of Global Economic Integration

As I just noted, the economic integration of widely separated regions is hardly a new phenomenon. Two thousand years ago, the Romans unified their far-flung empire through an extensive transportation network and a common language, legal system, and currency. One historian recently observed that "a citizen of the empire traveling from Britain to the Euphrates in the mid-second century CE would have found in virtually every town along the journey foods, goods, landscapes, buildings, institutions, laws, entertainment, and sacred elements not dissimilar to those in his own community." . . . This unification promoted trade and economic development.

A millennium and a half later, at the end of the fifteenth century, the voyages of Columbus, Vasco da Gama, and other explorers initiated a period of trade over even vaster distances.

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Global economic integration took another major leap forward during the period between the end of the Napoleonic Wars in 1815 and the beginning of World War I. International trade again expanded significantly as did cross-border flows of financial capital and labor. Once again, new technologies played an important role in facilitating integration: Transport costs plunged as steam power replaced the sail and railroads replaced the wagon or the barge, and an ambitious public works project, the opening of the Suez Canal, significantly reduced travel times between Europe and Asia. Communication costs likewise fell as the telegraph came into common use.

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The structure of trade during the post-Napoleonic period followed a "core-periphery" pattern. Capital-rich Western European countries, particularly Britain, were the center, or core, of the trading system and the international monetary system. Countries in which natural resources and land were relatively abundant formed the periphery. Manufactured goods, financial capital, and labor tended to flow from the core to the periphery, with natural resources and agricultural products flowing from the periphery to the core. The composition of the core and the periphery remained fairly stable, with one important exception being the United States, which, over the course of the nineteenth century, made the transition from the periphery to the core. The share of manufactured goods in U.S. exports rose from less than 30 percent in 1840 to 60 percent in 1913, and the United States became a net exporter of financial capital beginning in the late 1890s.

For the most part, government policies during this era fostered openness to trade, capital mobility, and migration. . . . A growing appreciation for the principle of comparative advantage, as forcefully articulated by Adam Smith and David Ricardo, may have made governments more receptive to the view that international trade is not a zero-sum game but can be beneficial to all participants.

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Unfortunately, the international economic integration achieved during the nineteenth century was largely unraveled in the twentieth by two world wars and the Great Depression. After World War II, the major powers undertook the difficult tasks of rebuilding both the physical infrastructure and the international trade and monetary systems. The industrial core – now including an emergent Japan as well as the United States and Western Europe – ultimately succeeded in restoring a substantial degree of economic integration, though decades passed before trade as a share of global output reached pre-World War I levels.

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Postwar economic re-integration was supported by several factors, both technological and political. Technological advances further reduced the costs of transportation and communication, as the air freight fleet was converted from propeller to jet and intermodal shipping techniques (including containerization) became common. Telephone communication expanded, and digital electronic computing came into use. Taken together, these advances allowed an ever-broadening set of products to be traded internationally. In the policy sphere, tariff barriers – which had been dramatically increased during the Great Depression – were lowered, with many of these reductions negotiated within the multilateral framework provided by the General Agreement on Tariffs and Trade. Globalization was, to some extent, also supported by geopolitical considerations, as economic integration among the Western market economies became viewed as part of the strategy for waging the Cold War. However, although trade expanded significantly in the early post-World War II period, many countries – recalling the exchange-rate and financial crises of the 1930s – adopted regulations aimed at limiting the mobility of financial capital across national borders.

Several conclusions emerge from this brief historical review. Perhaps the clearest conclusion is that new technologies that reduce the costs of transportation and communication have been a major factor supporting global economic integration.

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A second conclusion from history is that national policy choices may be critical determinants of the extent of international economic integration. Britain's embrace of free trade and free capital flows helped to catalyze international integration in the nineteenth century.

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A third observation is that social dislocation, and consequently often social resistance, may result when economies become more open. An important source of dislocation is that – as the principle of comparative advantage suggests – the expansion of trade opportunities tends to change the mix of goods that each country produces and the relative returns to capital and labor. The resulting shifts in the structure of production impose costs on workers and business owners in some industries and thus create a constituency that opposes the process of economic integration. More broadly, increased economic interdependence may also engender opposition by stimulating social or cultural change, or by being perceived as benefiting some groups much more than others.

The Current Episode of Global Economic Integration

How does the current wave of global economic integration compare with previous episodes? In a number of ways, the remarkable economic changes that we observe today are being driven by the same basic forces and are having similar effects as in the past. Perhaps most important, technological advances continue to play an important role in facilitating global integration. For example, dramatic improvements in supply-chain management, made possible by advances in communication and computer technologies, have significantly reduced the costs of coordinating production among globally distributed suppliers.

Another common feature of the contemporary economic landscape and the experience of the past is the continued broadening of the range of products that are viewed as tradable. In part, this broadening simply reflects the wider range of goods available today – high-tech consumer goods, for example – as well as ongoing declines in transportation costs. Particularly striking, however, is the extent to which information and communication technologies now facilitate active international trade in a wide range of services, from call center operations to sophisticated financial, legal, medical, and engineering services.

The critical role of government policy in supporting, or at least permitting, global economic integration, is a third similarity between the past and the present. Progress in trade liberalization has continued in recent decades – though not always at a steady pace, as the recent Doha Round negotiations demonstrate. Moreover, the institutional framework supporting global trade, most importantly the World Trade Organization, has expanded and strengthened over time. Regional frameworks and agreements, such as the North American Free Trade Agreement and the European Union's "single market," have also promoted trade. Government restrictions on international capital flows have generally declined, and the "soft infrastructure" supporting those flows – for example, legal frameworks and accounting rules – has improved, in part through international cooperation.

In yet another parallel with the past, however, social and political opposition to rapid economic integration has also emerged. As in the past, much of this opposition is driven by the distributional impact of changes in the pattern of production, but other concerns have been expressed as well – for example, about the effects of global economic integration on the environment or on the poorest countries.

What, then, is new about the current episode? Each observer will have his or her own perspective, but, to me, four differences between the current wave of global economic integration and past episodes seem most important. First, the scale and pace of the current episode is unprecedented. For example, in recent years, global merchandise exports have been above 20 percent of world gross domestic product, compared with about 8 percent in 1913 and less than 15 percent as recently as 1990; and international financial flows have expanded even more quickly. But these data understate the magnitude of the change that we are now experiencing. The emergence of China, India, and the former communist-bloc countries implies that the greater part of the earth's population is now engaged, at least potentially, in the global economy. There are no historical antecedents for this development. Columbus's voyage to the New World ultimately led to enormous economic change, of course, but the full integration of the New and the Old Worlds took centuries. In contrast, the economic opening of China, which began in earnest less than three decades ago, is proceeding rapidly and, if anything, seems to be accelerating.

Second, the traditional distinction between the core and the periphery is becoming increasingly less relevant, as the mature industrial economies and the emerging-market economies become more integrated and interdependent. Notably, the nineteenth-century pattern, in which the core exported manufactures to the periphery in exchange for commodities, no longer holds, as an increasing share of world manufacturing capacity is now found in emerging markets. An even more striking aspect of the breakdown of the core-periphery paradigm is the direction of capital flows: In the nineteenth century, the country at the center of the world's economy, Great Britain, ran current-account surpluses and exported financial capital to the periphery. Today, the world's largest economy, that of the United States, runs a current-account deficit, financed to a substantial extent by capital exports from emerging-market nations.

Third, production processes are becoming geographically fragmented to an unprecedented degree. Rather than producing goods in a single process in a single location, firms are increasingly breaking the production process into discrete steps and performing each step in whatever location allows them to minimize costs. For example, the U.S. chip producer AMD locates most of its research and development in California; produces in Texas, Germany, and Japan; does final processing and testing in Thailand, Singapore, Malaysia, and China; and then sells to markets around the globe. To be sure, international production chains are not entirely new: In 1911, Henry Ford opened his company's first overseas factory in Manchester, England, to be closer to a growing source of demand. The factory produced bodies for the Model A automobile, but imported the chassis and mechanical parts from the United States for assembly in Manchester. Although examples like this one illustrate the historical continuity of the process of economic integration, today the geographical extension of production processes is far more advanced and pervasive than ever before. As an aside, some interesting economic questions are raised by the fact that in some cases international production chains are managed almost entirely within a single multinational corporation (roughly 40 percent of U.S. merchandise trade is classified as intra-firm) and in others they are built through arm's-length transactions among unrelated firms. But the empirical evidence in both cases suggests that substantial productivity gains can often be achieved through the development of global supply chains.

The final item on my list of what is new about the current episode is that international capital markets have become substantially more mature. Although the net capital flows of a century ago, measured relative to global output, are comparable to those of the present, gross flows today are much larger. Moreover, capital flows now take many more forms than in the past: In the nineteenth century, international portfolio investments were concentrated in the finance of infrastructure projects (such as the American railroads) and in the purchase of government debt. Today, international investors hold an array of debt instruments, equities, and derivatives, including claims on a broad range of sectors. Flows of foreign direct investment are also much larger relative to output than they were fifty or a hundred years ago. As I noted earlier, the increase in capital flows owes much to capital-market liberalization and factors such as the greater standardization of accounting practices as well as to technological advances.

Conclusion

By almost any economically relevant metric, distances have shrunk considerably in recent decades. As a consequence, economically speaking, Wausau and Wuhan are today closer and more interdependent than ever before. Economic and technological changes are likely to shrink effective distances still further in coming years, creating the potential for continued improvements in productivity and living standards and for a reduction in global poverty.

Further progress in global economic integration should not be taken for granted, however. Geopolitical concerns, including international tensions and the risks of terrorism, already constrain the pace of worldwide economic integration and may do so even more in the future. And, as in the past, the social and political opposition to openness can be strong. Although this opposition has many sources, I have suggested that much of it arises because changes in the patterns of production are likely to threaten the livelihoods of some workers and the profits of some firms, even when these changes lead to greater productivity and output overall. The natural reaction of those so affected is to resist change, for example, by seeking the passage of protectionist measures. The challenge for policy makers is to ensure that the benefits of global economic integration are sufficiently widely shared – for example, by helping displaced workers get the necessary training to take advantage of new opportunities – that a consensus for welfare-enhancing change can be obtained. Building such a consensus may be far from easy, at both the national and the global levels. However, the effort is well worth making, as the potential benefits of increased global economic integration are large indeed.

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b. Foreign Direct Investment

In the global economy, foreign direct investment (FDI) is an ever-growing ingredient that requires appropriate legal services.[9] It is distinguishable from foreign portfolio

[9] FDI has been explained as follows: "Foreign direct investment, in its classic definition, is defined as a company from one country making a physical investment into building a factory in another country. The direct investment in buildings, machinery, and equipment is in contrast with making a portfolio investment, which is considered an indirect investment. In recent years, given rapid growth and change in global investment patterns, the definition has been broadened to include

investment and different from foreign trade. Host countries, especially in developing countries, welcome FDI as a source of technology transfer, expertise, and sometimes foreign currency (in China's case). They are also mindful of the risks of a foreign takeover of sensitive industries (e.g., communications, banks). FDI may be used in several ways, such as establishing a new business or investing in or joining, merging, or acquiring an existing business. FDI is expanding as businesses seek to gain a competitive advantage through increased market share, reduced costs coming from cheaper labor, lower shipping costs, or lax law enforcement. For example, in the recent merger and acquisition (M&A) in China of Anheuser-Busch and Harbin Brewery Group Ltd., the transaction resulted in increased market share, an exchange of valuable expertise, connections, and for better or worse, a Chinese labor force with a bundle of labor-law issues.

Unlike foreign trade, there is an absence of international regulation of FDI, leaving it to bilateral or multilateral arrangements. The challenge to international lawyers is to understand the foreign laws or enough of them so that they can diligently engage and monitor foreign lawyers. These arrangements can take place through agency (or correspondent) offices, foreign offices, or international legal networks, as described later in the article by Robert Pritchard. He has noted that in the future, lawyers specializing in FDI and other forms of international business will also need to demonstrate a high level of cross-cultural understanding if they are to realize their full potential as facilitators of FDI, as well as protectors of their client's interests.[10]

the acquisition of a lasting management interest in a company or enterprise outside the investing firm's home country. As such, it may take many forms, such as a direct acquisition of a foreign firm, construction of a facility, or investment in a joint venture or strategic alliance with a local firm with attendant input of technology, licensing of intellectual property. In the past decade, FDI has come to play a major role in the internationalization of business. Reacting to changes in technology, growing liberalization of the national regulatory framework governing investment in enterprises, and changes in capital markets profound changes have occurred in the size, scope, and methods of FDI. New information technology systems, decline in global communication costs have made management of foreign investments far easier than in the past. The sea change in trade and investment policies and the regulatory environment globally in the past decade, including trade policy and tariff liberalization, easing of restrictions on foreign investment and acquisition in many nations, and the deregulation and privatization of many industries, has probably been the most significant catalyst for FDI's expanded role. The most profound effect has been seen in developing countries, where yearly foreign direct investment flows have increased from an average of less than $10 billion in the 1970s to a yearly average of less than $20 billion in the 1980s, to explode in the 1990s from $26.7 billion in 1990 to $179 billion in 1998 and $208 billion in 1999 and now comprise a large portion of global FDI. Driven by mergers and acquisitions and internationalization of production in a range of industries, FDI into developed countries last year rose to $636 billion, from $481 billion in 1998. (Source: UNCTAD)" Jeffrey P. Graham & R. Barry Spaulding, *Understanding Foreign Direct Investment*, http://www.going-global.com/articles/understanding_foreign_direct_investment.htm (last updated June 18, 2005). *See also* Donald M. DePamphilis, Mergers, Acquisitions, and Other Restructuring Activities 150 (2005).

10 Robert L. Pritchard, *The Lawyer's Role in Foreign Direct Investment and the Global Economy*, 18 Int'l Bus. Law 358 (1990) [Footnotes omitted]. Mr. Pritchard served as Chairman of the International Legal Practice Committee of the Law Council of Australia. Although these comments were circulated some years ago, the principles discussed remain insightful. *See*, e.g., John O. Haley, *Law and Culture in China and Japan: A Framework for Analysis*, 27 Mich. J. Int'l L. 895 (2006); Teemu Ruskola, *Legal Orientalism*, 101 Mich. L. Rev. 179, 181–88 (2002).

The number of international labor and employment lawyers, as a special area of this practice, has mushroomed, as described subsequently.

The Lawyer's Role in Foreign Direct Investment and the Global Economy[11]

Robert L. Pritchard

The world is going through an era when foreign direct investment (FDI) is increasing rapidly. It is therefore opportune to review the place of FDI in the global economy and the lawyer's role in facilitating FDI. . . . [The 1980's] witnessed a dramatic increase in Japanese FDI, mainly for the purpose of securing market access and shifting production facilities abroad. In the past, much of Japanese FDI was made for the purpose of securing raw material supplies from resource-rich countries. In the future, FDI will continue to increase as more and more . . . firms join US and European multinationals and others in expanding their businesses into a truly global marketplace.

What Is FDI?

There are two basic categories of foreign investment: one is FDI and the other is foreign portfolio investment (which includes corporate debt). Worldwide, FDI represents between 15 and 20 percent of total foreign investment and this percentage is rising. . . . [12] FDI may be defined as the capital invested in an enterprise or a real asset by a non-resident which gives the investor a significant influence, either potential or actual, over

[11] Pritchard, *supra* note 10.

[12] The impact of cross-border investments on the world economy has risen dramatically over the past decades. Between 1973 and 2000 worldwide annual FDI flows increased fiftyfold from $25 billion to $1.271 billion. The contribution of FDI to world welfare (the cumulative GDP of all countries) rose to seventeen percent compared with a mere six percent in 1980. Hans Christiansen & Mehmet Ogutcu, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs*, Global Forum on International Investment (Dec. 5–6, 2002), *available at* http://www.oecd.org/dataoecd/54/33/2764465.pdf. It is reported that

> [g]lobal foreign direct investment (FDI) inflows remained stagnant in 2010 at an estimated $1,122 billion, comparing to $1,114 billion in the previous year, representing a 0.7 percent growth, announced United Nations Conference on Trade and Development (UNCTAD) here on Monday. "We have seen the global economic recovery, we have seen that trade and industrial output fully recovered to pre-crisis level," however, "FDI remains stagnated, and still at its lowest level," said Zhan Xiaoning, Director of UNCTAD Investment and Enterprise Division, referring to the fact that global FDI in 2010 was twenty-five percent below the pre-crisis average between 2005 and 2007. The results came out of an UNCTAD annual survey titled "Global and Regional FDI Trends in 2010," which had registered divergent performances between developed economies and developing economies. Mired in financial crisis, FDI in developed economies has not yet moved out of the declining trend. UNCTAD estimation indicates FDI in this group of economies to have fallen by seven percent in the past year, down to $526.6 billion. . . . On the other hand, FDI to developing economies and economies in transition, for the first time in history, exceeded the investment flows to developed economies, taking up fifty-three percent of the total global FDI in 2010. (*UN body says global foreign direct investment inflows remain stagnant in* 2010, Global Times, Jan. 18, 2010, http://business.globaltimes.cn/world/2011-01/613560.html)

the key policies of the enterprise or over the use of the asset. The threshold level which gives a 'significant influence' is rather arbitrary. For statistical purposes, most countries use a threshold of 10 per cent or more of the ordinary shares or voting stock. FDI may involve: (i) the acquisition of an existing enterprise; (ii) the establishment of a new enterprise; (iii) the reinvestment of earnings, or (iv) the purchase of land, buildings, and other assets. Joint ventures, whether incorporated or unincorporated, are one form of FDI. The other category of foreign investment is foreign portfolio investment. Portfolio investment involves the purchase of debt or equity in an enterprise by a non-resident, but does not involve any transfer of control over the use of assets.

What Causes Global FDI?

The overall level of global FDI and its flow to individual countries is a function of three concurrent factors:

- global savings imbalances, which determine the total flows of foreign investment;
- the comparative advantages of countries in particular industries, which explain why investment (but not necessarily foreign investment) is likely to occur; and
- inter-firm organisational factors, which explain why a firm's corporate strategy will cause it to undertake FDI. The implications of inter-firm organisational factors are discussed further below.

Regulation of Global FDI

Whereas world trade is regulated by the GATT [and now, the WTO], there is no corresponding multilateral body governing FDI. The United Nations has been unsuccessfully attempting for many years to institutionalize its Code of Conduct for Transnational Corporations. The World Bank's International Centre for the Settlement of Investment Disputes (ICSID) has received wider acceptance but is limited to the role of resolving disputes rather than preventing them. Under the OECD Declaration on International Investment and Multinational Enterprises, OECD member countries recommend to multinational enterprises operating in their territories the observance of the (OECD) Guidelines.

The OECD guidelines lay down standards for the activities of multinational firms. In relation to taxation, for example, firms are expected to refrain from modifying the tax base on which they are assessed by any practices which do not conform to an arm's length standard. The OECD Guidelines are not aimed at introducing differences of treatment between foreign and domestic firms; wherever relevant, they reflect good practice for all. Observance of the OECD Guidelines is, however, voluntary and is not legally enforceable.

In the absence of any multilateral framework, FDI continues to be regulated by host country legislation and by bilateral treaties. For example, in the case of Australia and Japan, the relevant bilateral treaty is the Australia–Japan Treaty of Friendship and Cooperation (the Treaty of Nara), signed in 1976. The treaty provides for most favoured nation status in investment for both countries.

In the 1960s, the United States dominated FDI. Today there is a much wider spread of investor countries including the US, Western Europe, and North Asia (especially Japan