1
Introduction

Few areas of international law excite as much controversy as the law relating to foreign investment.[1] A spate of arbitration awards resulting from investment treaties has added much to the debates in recent times. These have been followed by massive literature analysing the law resulting from the treaties and the arbitration awards. Since the awards often conflict, the confusion has been exacerbated. Though the conflict in the awards is often attributed to the inconsistencies in the language in the treaties each tribunal had to interpret, the more probable explanation is that there are philosophical, economic and political attitudes that underlie the conflict which in turn reflect the underlying causes for the controversies that have existed in the area for a long time. The legitimacy of the system has been contested. The result of this lack of legitimacy has been for some states to withdraw altogether from the system and for other states to bring about newer types of treaties that provide a balance between investment protection and the state's right to regulate in the public interest.

The law on the area has been steeped in controversy from its inception. Much controversy has resulted from the law on the subject being the focus of conflict between several forces released at the conclusion of the Second World War. The cyclical nature of the ebbs and flows of the controversy is evident. The ending of colonialism released forces of nationalism. Once freed from the shackles of colonialism, the newly independent states agitated not only for the ending of the economic dominance of the former colonial powers within their states but also for a world order which would permit them more scope for the ordering of their own economies and access to world markets. The Cold War between the then super-powers made the law a battleground for ideological conflicts. The non-aligned movement, which arose in response to this rivalry, exerted pressure to ensure that each newly independent state had complete control over its economy. One avenue for the exertion of such pressure by the non-aligned movement was the formulation of new doctrines through the use of the numerical strength of its members in the General Assembly of the United Nations. Several resolutions were enacted asserting the doctrine

[1] Compare Harlan J in *United States* v. *Sabbatino*, 374 US 398 (1964), who said, regarding one aspect of this branch of the law: 'There are few if any issues in international law today on which opinion seems to be so divided as the limitation of the state's power to expropriate the alien's property.' The statement seems equally applicable to other areas of the international law on foreign investment.

of permanent sovereignty over natural resources and calling for the establishment of a New International Economic Order (NIEO), the aim of which was to ensure fairness in trade to developing countries as well as control over the process of foreign investment. The oil crisis in the 1970s illustrated both the power as well as the weakness of the states which possessed natural resources. It brought about industry-wide shifts through collective action organised by the oil-producing states. The producers of other mineral resources were not able to achieve the same success.

The ability of the developing states to exert their collective influence on shaping the law shifted dramatically towards the end of the twentieth century. Sovereign defalcations associated with the lending of petrodollars dried up private lending by banks. Aid had already dried up due to recession in the developed states. The rise of free market economics associated with President Reagan of the United States and Prime Minister Thatcher of the United Kingdom gave a vigorous thrust to moves to liberalise foreign investment regimes. The acceptance of an 'open door' policy by China and the success of the small Asian states like Hong Kong and Singapore, which had developed through liberal attitudes to foreign investment, made other developing states choose a similar path.[2] The dissolution of the Soviet Union led to the emergence of new states committed to free market economics. Developing states began to compete with each other for the foreign investment that was virtually the only capital available to fuel their development. Third World cohesion, which drove the ideas behind the NIEO, was on the verge of collapse, though it had by then evolved competing norms challenging the previously existing ones and accomplished its task by ensuring the continuance of its doctrine in domestic laws and contract forms. In that sense, the NIEO went into abeyance. It was never displaced.

The vigorous espousal of free market economics by the International Monetary Fund and the World Bank led to pressures being exerted on developing countries to liberalise their regimes on foreign investment. Neo-liberal economic theories became prominent. The view that the market will allocate resources fairly came to be adopted in the domestic economic sphere. Liberalisation of assets in the international economy became the favoured policy. In the context of this swing in the pendulum, the developing states entered into bilateral treaties containing rules on investment protection and liberalised the laws on foreign investment entry. They also participated in regional treaties like the North American Free Trade Agreement (NAFTA) and sectoral treaties like the Energy Charter Treaty. The World Trade Organization (WTO) came into existence with the avowed objective of liberalising not only international trade but also aspects of investment, which affected such trade. The link between international trade and international investment was said to justify the competence of the WTO in this area. The Singapore Ministerial Conference of the WTO decided to study the possibility of an instrument on investment.[3]

[2] Though initially it was thought that these states achieved prosperity by the adoption of liberalisation measures, this view has since been queried, with many holding the view that astute interventionist measures by the state combined with selective liberalisation measures and regulation of foreign investment were the reason for the growth.

[3] The move to create an instrument on investment within the WTO failed as a result of concerted opposition from developing states.

New factors had entered the area of the international law on foreign investment. Many of the new instruments of the WTO dealt directly with areas of foreign investment.[4] But, the WTO was unable to bring about a comprehensive instrument on investment.

Economic liberalism was generally triumphant at the end of the last millennium.[5] The impact of its triumph was felt on the international law on foreign investment. The incredible proliferation of bilateral investment treaties was evidence of this triumph. The United Nations Commission on Trade and Development (UNCTAD) reports indicate that the 1990s began with some 900 treaties and ended with over 2,900 treaties. The *World Investment Report* (2014) states that there are now over 3,000 treaties.[6] The treaties created jurisdiction in arbitral tribunals at the unilateral instance of the foreign investor. After *AAPL* v. *Sri Lanka*,[7] where such unilateral recourse to arbitration on the basis of appropriately worded dispute-settlement provisions in treaties was first upheld, the number of arbitral awards based on standards of treaty protection of foreign investment increased substantially.[8] This in turn led to the articulation by these tribunals of principles which confirmed and extended notions that favoured movement of foreign investment and their treatment in accordance with external standards. It also restricted governmental interference with such investment significantly by considerably expanding the notion of compensable taking to include regulatory takings.[9]

There is evidence of yet another swing taking place at the beginning of the new millennium. Successive economic crises in Asia and Latin America attributed to the sudden withdrawal of foreign funds have led to the re-evaluation of whether the flow of foreign funds and investments is the panacea for development as originally thought. The Organization for Economic Co-operation and Development (OECD) attempted to draft a Multilateral Agreement on Investment (MAI) in 1995 thinking that the time was ripe for such an effort, given the seeming willingness of developing countries to liberalise their economies and enter into bilateral economic treaties. But, during the discussions, the members of the OECD, all developed states, found that they could not agree among themselves on the principles of the rules on foreign investment protection. The attempt also spawned a protest coalition of environmentalists and human rights activists who

[4] Intellectual property was covered by the Trade-Related Aspects of Intellectual Property Rights (TRIPS) instrument. The General Agreement on Trade in Services (GATS) deals with the services sector and covers the provision of services through a commercial presence in another country, which is foreign investment in the services sector. The Trade-Related Investment Measures (TRIMS) instrument deals with performance requirements associated with foreign investment. The Singapore and Doha Ministerial Meetings of the WTO agreed to consider an instrument on investment and an instrument on competition which would directly impact foreign investment. But, these efforts failed, signalling disenchantment with the free market model of development.

[5] Economic liberalism is seen as a philosophy based on the ability of the market kept free from regulation to allocate economic resources efficiently both within states and at the global level.

[6] UNCTAD, *The World Investment Report* (2014). The UNCTAD website (International Investment Agreements Navigator) states that investment treaties and trade agreements containing investment chapters number 3322 as of 21 October 2016. Of these, 2612 treaties are in force.

[7] *Asian Agricultural Products Ltd* v. *Sri Lanka* (1990) 4 *ICSID Reports* 245.

[8] According to the UNCTAD website (Investment Dispute Settlement Navigator), there are in total 471 cases as at 21 October 2016 with 257 cases pending.

[9] Thus, for example, in *Santa Elena* v. *Costa Rica* (2000) 39 *ILM* 317; (2002) 5 *ICSID Reports* 153, an environmental measure was held to be expropriatory. Later awards, which recognised that such regulatory takings may be non-compensable, cast doubt on these trends.

complained that the draft of the MAI emphasised the protection of investment without adverting to the need to protect the environment and human rights from abuse by multinational corporations. An important idea had been articulated during this protest that the multinational corporation may be an agent of progress and deserves protection but that it could also be an agent of deleterious conduct, harmful to economic development. In this case, it requires not protection but censure through the withdrawal of such protection and, even, the imposition of liability. As a result, there have been various efforts made to formulate standards of conduct for multinational corporations.

The collective protests against the MAI were a prelude to the protests against globalisation that were to mar the meetings of economic organisations like the WTO, the International Monetary Fund (IMF) and the World Bank at Seattle, Prague, Montreal and other capitals of the Western world. These protests have continued. Similar protests are now aimed at the Trans Pacific Partnership (TPP) and the projected Transatlantic Trade and Investment Partnership (TTIP).[10] The protests take place at the capital cities of the Western world. The protests signified the emergence of lobbies within the developed world, which required the rethinking of issues relating to foreign investment. The protests signified that the dissent was not the concern solely of developing states but that sections within the developed states were concerned with the fact that the law was being used in a manner that gave protection to the interests of foreign investment to the detriment of the interests of the eradication of poverty, the protection of the environment and the promotion of human rights. New forces that could reshape the law had been released. There were dramatic disclosures of massive corporate frauds resulting in disenchantment with once admired corporations, resulting in stringent corporate disclosure laws. These events have been accentuated by the global economic crisis in 2008 resulting from the massive unsecured loans given by banks in Europe and North America. There has emerged a disillusionment with neo-liberal policies that had been adopted in the previous decade. The law, particularly the international law on foreign investment, was an instrument of effecting neo-liberal policy, and the issue has to be faced whether some of the laws made in the past need to be changed in light of new circumstances. The instrumental role that the law played may have to go into reversal. There has been a reluctance in effecting this reversal. While some states have taken severe measures such as withdrawal from treaties and from arbitration, other states have only tinkered with investment treaties, making changes accommodating the interests of the environment and human rights. The reluctance to move away from the system has resulted in protests against the incremental changes effected so far.

A new phenomenon that has emerged in the area is the role of non-governmental organisations (NGOs) committed to the furtherance of environmental interests and human rights and the eradication of poverty. These NGOs operate within developed states and espouse, to a large extent, what they believe to be the interests of the people of the

[10] The TPP is a trade and investment pact between the United States and eleven other states of the Pacific and Asia. The TTIP is a trade and investment treaty between the US and the European Union. The two mega-regional treaties contain investment chapters which closely track investment treaties, particularly the Model Treaty of the US.

developing world and the world as a whole. They entered the field when opposing the MAI but are now an entrenched feature in their opposition to inflexible investment protection without consideration of competing considerations such as environmental protection, human rights, the elimination of corruption and the eradication of poverty. In addition, there are the protest movements against globalisation which also seek to espouse causes that favour developing-world interests, ranging from economic development, the writing-off of Third World debt and foreign investment.[11] It has been suggested that, with the increase in the gap between rich and poor within developed states brought about by globalisation, there is a Third World within developed states ready to protest against excessive reliance on free market ideas.[12] As global inequality grows with the increasing gap between the rich and the poor within developed states, there will be greater disenchantment with a system that protects the interests of the rich without considering the competing interests of the poor or those of common concern like human rights and poverty. The subject will gravitate away from its origins in the conflict between the rich and the poor, the developed states and developing states. But its new concerns will mirror the earlier battle in terms of power confronting justice. The continuing relevance of the older paradigm of the contest between the developed and the developing countries will remain relevant as they reflect the initial clash between the norms of power favouring foreign investment made by the multinational companies of the developed world and the norms of justice favouring the interests of the people of developing states.

The burgeoning number of arbitration cases brought against developing states based on the right of unilateral recourse to arbitration and the large amounts awarded as damages in these arbitrations has resulted in rethinking among states both as to the legitimacy of investment arbitration as well as to the wisdom of investment treaties. The issue is accentuated by the fact that many arbitration cases are brought against developed countries, an unintended consequence of investment treaties. Reciprocity, which never existed in the past, is slowly becoming a reality as erstwhile capital-importing states are becoming capital exporters to developed states. Allegations that investment arbitration is dominated by a select group of arbitrators who usually decide in favour of foreign investors and create expansive law have resulted in distrust of the system.[13] Consequently, many states have withdrawn from the premier investment arbitration centre, the International Centre for Investment Arbitration.[14] Others have contemplated relinquishing the provision on compulsory investor-state arbitration in their investment treaties. Some have decided not to renew treaties once their termination period is over. Others have thought of terminating existing treaties. Some states consider that their domestic laws are sufficient to protect

[11] This clash of globalisations is discussed in M. Sornarajah, 'The Clash of Globalisations: Its Impact on the International Law on Foreign Investment' (2003) 10 *Canadian Foreign Policy* 1.
[12] Caroline Thomas, 'Where Is the Third World Now', in Caroline Thomas (ed.), *Globalisation and the South* (1997), p. 1.
[13] S. Puig, 'Social Capital in the Arbitration Market' (2014) 25 *EJIL* 387.
[14] Ecuador, Bolivia and Venezuela have announced such withdrawals. Latin American states are moving towards the establishment of their own arbitration system. Australia has wavered between accepting and rejecting investor-state arbitration. Opinion among many other states arose against the system once its low visibility ended as a result of many disputes involving the right to water and the right to health going to arbitration. See L. Trakman and D. Musayelyan, 'Caveat Investors – Where Do Things Stand Now?', in C. L. Lim (ed.), *Alternative Visions in the International Law on Foreign Investment* (2016), p. 69.

foreign investments.[15] Developed states have not been immune to changes. They now make treaties which they believe contain sufficient balances that ensure investment protection while reserving the state's right to regulate in the public interest.

More dramatic has been the fact that there has been a change in the patterns of foreign investment. Newly industrialising countries such as China, India and Brazil have become exporters of capital. Sovereign wealth funds of many countries are playing leading roles in acquiring established businesses in developed countries.[16] As a result, developed states in North America and Europe are becoming massive recipients of foreign capital. These changes will result in the assertion of sovereign control of such investments by the developed states and a selective relinquishing of the inflexible rules on investment protection that these states had built up.[17]

This trend is already evident as leading companies of the United States and Europe are taken over by foreign investors from Asia and elsewhere. The rules the developed states crafted to protect the foreign investment of their nationals will soon come to haunt them. As a result, they may be bent on backtracking on these rules and creating, as developing countries argued for in the past, significant sovereignty-based defences to liability and redrawing the boundaries of investment protection.[18] These sovereignty-based defences are often the refuge of the developed states in response to the neo-liberal expansions that were made. That this reaction took place over such a short period attests to the responsiveness of the law to the changes that are effected by circumstances as well as by the expansive attempts at the interpretation of instruments in the field by decision-makers in the area, principally, arbitrators.[19] Despite the recalibration that has taken place in new treaties, the older treaties based on inflexible investment protection still continue to provide complexity to the situation.

But, still, there will be considerable restraint in dismantling the existing system. As the power of multinational corporations increases,[20] developed states will continue to espouse their interests not only because of the enormous power that these corporations achieve

[15] Brazil does not have investment treaties as its courts have decided that such treaties are constitutionally invalid. Brazil now has a new model treaty which emphasizes dispute prevention, not dispute settlement. South Africa has legislation which will ensure that such legislation alone is the basis of investment protection.

[16] Sovereign wealth funds are created with the excess funds of the newly industrialising countries. The fund of China runs to three trillion dollars. Small states like Singapore also have such funds. Their investments will alter the structure of the law in the field, though how this will occur remains unpredictable at present. Many of these funds have been used to penetrate American and European economies. They are also used to acquire energy and other interests in developing countries. They could be the bridgeheads for a new form of expansion reminiscent of early colonial companies.

[17] The exclusion of Chinese companies on national security grounds is becoming common in the United States. Huawei, the Chinese technology company, was denied entry into markets in the US.

[18] This is already evident in the introduction of exceptions relating to regulatory takings, defences based on the environment, the devising of an exceptional regime for taxation, self-defined national security exceptions and broad necessity defences which can be found in the US and Canadian model investment treaties. The changes resulting in the recognition of defences to liability are dealt with in Chapter 12.

[19] C. Duggan, D. Wallace, N. Rubins and B. Sabahi, *Investor–State Arbitration* (2008), suggest that the United States, which had opposed the Calvo doctrine that international law has no relevance to foreign investment and only national laws have competence, may now be adopting that doctrine. They observe, at p. 488: 'It is indeed ironic that the United States – long the leading opponent of the Calvo Doctrine – may now be considered its proponent, at least in regard to national treatment and indirect expropriation.'

[20] It has been pointed out that multinational corporations exist in developing states as well. But, they are nowhere near as large as US and European multinational corporations and cannot wield the same degree of influence.

through lobbying but also because it is in their interests to do so. The expansion of trade and investment increases the economic power of developed states. They have traditionally seen the need to ensure the protection of the multinational corporations responsible for such trade and investment as coincidental with their own interests. They will seek to retain a system of investment protection based on treaties. The TPP, the effort at the TTIP and other regional and multilateral agreements is an indication of this. While developed states subscribe to so-called balanced treaties, they are confident that they can manage these treaties in a manner that will provide protection to the investments of their multinational companies while at the same time allowing them to defend themselves against arbitration.[21]

The multinational corporations themselves must be seen as distinct bases of power capable of asserting their interests through the law. Their individual economic resources far exceed those of many sovereign states. Their collective power to manipulate legal outcomes must be conceded. It is a fascinating fact that, through the employment of private techniques of dispute resolution, they are able to create principles of law that are generally favourable to them. That they can bring about such outcomes through pressure on their states is obvious. It is notable that textbooks on international law do not contemplate the legal personality of these corporations when they wield so much power in international relations.[22] The role of these actors in the international legal system is seldom studied due to the dominance in the field of positivist views which stress that states are the only relevant actors in international relations.[23] They provide a convenient cloak for hiding the absence of corporate liability. Positivism also enables law-creation by an entity often held to lack legal personality. By employing low-order sources of international law such as decisions of arbitrators and the writings of 'highly qualified publicists', it is possible to employ vast private resources to ensure that a body of law favourable to multinational corporations is created. This, again, is a phenomenon that international lawyers have been reluctant to explore lest it shakes the hoary foundations on which their discipline is built.

There will be entirely new types of multinational corporations entering the scene. The state-owned oil corporations of China and India are aggressively entering the field and seeking mergers with existing multinational corporations. The investment funds of many rich, smaller states like those in Singapore and Dubai as well as those newly industrialising states which have excess capital will enter the scene as actors who will shape the rules of the game. The very states which wanted strong rules in the area may baulk at the prospect of these rules being used in a manner favourable to these new actors.[24]

[21] The United States is yet to lose an arbitration but this is not the experience of other developed states like Canada.
[22] Writers on international relations, however, concede the power of these corporations to affect the course of international relations. Their behaviour, as a consequence, is extensively studied in that field. It is unfortunate that there are no parallel studies in international law. There are, however, efforts being made to grapple with the problem in international law. Jennifer Zerk, *Multinationals and Corporate Social Responsibility* (2006).
[23] C. Cutler, *Private Power and Global Authority: Transnational Global Law in the Political Economy* (2003).
[24] An instructive situation is the effort of the Chinese state oil company, Sinopec, seeking to buy into the American oil company, Unocal. The matter created considerable concern and the offer fell through. In the United States, national security and other concerns were cited as reasons for opposing the merger.

The institutional actors have also changed their stances. UNCTAD, which plays a leading role in the area, was once an assiduous promoter of investment treaties. But, in 2012, it released a report on the need for reform of the system, emphasising sustainable development as a policy goal, admitting the need to address other interests such as the environment, culture and social imperatives, the ending of fragmentation of international law and diversity in methods of investment protection.[25] The European Union has announced new policies on investment protection, conscious of its obligations in the areas of human rights and environmental protection and presaging changes to its investment treaties.[26] There is still an institutional reluctance to shake off the old forms, so that new policies are built upon the preservation of the notion of investment protection, despite the acceptance of the faults relating to legitimacy in the system, particularly of investor-state dispute settlement. Yet the reports and statements presage change.

The rapid changes in this subject area call for an understanding not only of the role of states, institutions and multinational corporations but also of the role of NGOs. In addition, since much of the exploitation of natural resources takes place on the land of minorities, tribal and aboriginal groups, the interests of these groups also have to be taken into account in the development of the law. It is an area in which international law is clearly moving away from the old positivist notion that international law is shaped entirely by the activities of states. Even as techniques to protect foreign investment are coming to be explored more fully through the creation of standing for multinational corporations, so, at the same time, by contrast, there is pressure to ensure that the subject reflects the concerns of human rights and environmental interests through the imposition of liability on these corporations. The notion that there could be emphasis on investment protection without taking into account the competing interests of other factors such as the protection of indigenous tribes, of cultural property, of human rights and environmental rights sat uneasily with the idea that fragmentation within international law should be ended. New literature has emerged accentuating the importance of these interests in comparison with the interest in investment protection.[27] These emphasise, not the protection of the investments of multinational corporations, but their social and corporate responsibility to the host communities in which they operate. These concerns are reflected in the increasing volume of literature that is devoted to the new directions that foreign investment law has taken.[28]

[25] UNCTAD, *Investment Policy Framework for Sustainable Development* (2012). The role of UNCTAD is detailed by two members of its investment section in E. Tuerk and D. Rosert, 'The Road Towards Reform of the International Investment Agreement Regime: A Perspective from UNCTAD' (2016) *European Yearbook of International Economic Law* 769

[26] The EU–Canada CETA 2014 indicates the results of the policy changes, with the EU now making investment treaties for all the member states.

[27] For the environment, see J. Vinuales, *Foreign Investment and the Environment in International Law* (2012); generally see A. Kulick, *Global Public Interest in International Investment Law* (2012). For health issues, see V. Vadi, *Public Health in International Investment Law* (2013); V. Vadi, *Cultural Heritage in International Investment Law and Arbitration* (2014). It has been possible to address these issues because of the highly visible arbitration cases that have arisen from them.

[28] There is a concentration in the new literature on foreign investment arbitration. For the literature, see C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (2007); C. Duggan, D. Wallace, N. Rubin and B. Sabahi, *Investor–State Arbitration* (2008). These works are a result of increasing practitioner interest in the area. There is also a second edition of C. Schreuer, *The ICSID Convention: A Commentary* (2nd edn, 2009). A. Newcombe and L. Pradell, *Law and Practice of Investment Treaties* (2009) is an excellent book developing the law on the basis of investment treaties. Also see Z. Douglas, J. Pauwelyn and J. Vinuales (eds.), *Foundations of International Investment Law: Bringing Theory into*

The interplay of various economic, political and historical factors shaped, and continues to shape, the development of the international law on foreign investment. If international law is generated by the eventual resolution of conflicting national, business and social interests, the international law of foreign investment provides an illustration of these processes of intense conflicts and their resolution at work. It is an area in which the interests of the capital-exporting states have clashed with the interests of capital-importing states. In modern times, the diversity of interests that clash are greater. As indicated, the interest of inflexible investment protection clashes with interests in human rights, the environment, labour rights, indigenous rights and cultural property rights. There is a burgeoning literature on the impact of all these different interests.[29] The resultant resolution of the conflicts, if any resolution is indeed achieved, indicates how international law is made and how open-ended the formulation of its principles are in the face of intense conflicts of views among states as to the law. These conflicts become accentuated when other actors in the field are divided in their views and support the contesting norms that each camp espouses. Positivist studies of the subject, which emphasise the rules in treaties and arbitral awards, fail to capture the rich policy implications behind the shaping of these rules through a constant clash of interests. The use of positivist techniques also enables the cloaking of other interests that compete with investment protection by emphasising the words in the treaty and existing body of arbitral awards.

As a result of such clashes, the field provides for the study of international law as an interdisciplinary subject in which ideas in the sphere of economics, political science and related areas have helped to shape the arguments. Yet, for all its richness, the field has seldom been looked at as a whole, until recently.[30] It is necessary to carve out a niche for the subject within international law so that the manner in which the norms of international law are affected by the seemingly irreconcilable interests that operate in this area could be

Practice (2014). On investment arbitration, there is increasing literature. See C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (2011); J. Kalicki and A. Joubin-Brett (eds.), *Reshaping the Investor-State Dispute Settlement System* (2015). There are works which deal with the impact of external forces on the law. See, for example, J. Zerk, *Multinational Corporations and Corporate Social Responsibility* (2006); J. Dine, *Companies, International Trade and Human Rights* (2005); D. Kinley, *Human Rights and Corporations* (2009).

[29] V. Vadi, *Cultural Heritage in International Investment Law and Arbitration* (2014).

[30] After the first edition of the present book in 1992, a spate of new books on this and related areas appeared. R. Dolzer and C. Schreuer, *International Investment Law* (2008), concentrates on the rules of investment treaties and arbitration under them. P. Muchlinksi, F. Fortino and C. Schreuer, *Handbook of International Investment Law* (2008), is an edited book which lacks a coherent theme, but collects together chapters on distinct aspects of the law. P. Muchlinksi, *Multinational Corporations Law* (2007), approaches the subject from the perspective of multinational corporations. One result of the profusion of arbitral awards has been a spate of books on the subject, as indicated in the previous footnote. Many of them have been written from the perspective of practitioners in the field, and are often papers presented at conferences, commenting on recent awards. There are older works: R. Pritchard (ed.), *Economic Development, Foreign Investment and the Law* (1996); and D. D. Bradlow and A. Escher (eds.), *Legal Aspects of Foreign Investment* (1999); S. Subedi, *International Investment Law: Reconciling Policy and Principle* (2016); S. Hindelang and M. Krajewski (eds.), *Shifting Paradigms in International Investment Law* (2016). For even earlier studies, see I. Delupis, *Finance and Protection of Foreign Investment in Developing Countries* (1987); Z. A. Kronfol, *Protection of Foreign Investment* (1972); and G. Schwarzenberger, *Foreign Investment and International Law* (1969). There are now specialist journals: *Foreign Investment Law Journal*, published by the World Bank; and the *Journal of World Investment* (Geneva). For a French study, see P. Laviec, *Protection et Promotion des Investissements*: *Etude de Droit International Economique* (1985). Specific areas of the law on foreign investment have also attracted book-length studies. See, for example, R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1996); M. Sornarajah, *The Settlement of Foreign Investment Disputes* (2000); and C. Schreuer, *The ICSID Convention: A Commentary* (2nd edn, 2009). The newer works on investment arbitration have been indicated in the previous footnotes.

studied more intensively.[31] There is no case for its development in a fragmented manner without an effort to integrate within it the related areas of international law.[32] Fragmentation merely serves a neo-liberal objective in ensuring that interests competing with the notion of market solutions are kept out of policy perspectives in making decisions. It also removes the subject away from its mooring within international law principles, where it is firmly placed.

Interest in the area also arises from the fact that the trends in this field cannot be explained on the basis of any existing theory of international law. Most theories of international law are rooted in positivism and are aimed at explaining law as an existing, static phenomenon, unaffected by political and other trends. These theories are incapable of being applied to a situation where the existing principles of law, formulated at a time when they were kept in place by hegemonic control and dominance, are under attack. Other theories are idealistic, seeking to achieve objectives based on morality and conscience. These theories are also inadequate to explain a situation in which different value systems of somewhat equal moral validity are in collision. Where existing rules supported by the established group of nations are subject to attack by relatively new members of the international community,[33] they become feeble and, until they are replaced, a situation of chaos or normlessness will exist. The task of decision-makers and scholars will be to examine the conflicts in the norms in the area and ensure that adjustments are made to bring about some acceptable norms so that the situation of normlessness may be ended. This book is a contribution to this process in an area of abundant normative conflicts. The identification of the conflicts in norms will itself facilitate the process of a future settlement of the conflicts and bring about a clearer set of rules on the international law of foreign investment.

The normative conflicts are accentuated by the fact that parties interested in this area of the law have become diverse. NGOs engaged in the promotion of single issues such as the protection of the environment from the hazardous activities of multinational corporations or the protection of human rights from violation by elites of states in association with multinational corporations have entered the fray. Large law firms see the area as a lucrative

[31] The creation of new subjects within international law must be addressed with caution, as the charge is made that these are studied without any foundation in the major discipline of international law. This is a legitimate criticism. An unfortunate facet of this area of the law is that many arbitrators who have made awards in the area have no grounding in international law and approach issues from an entirely commercial perspective, without regard to the public law elements in the disputes or to the public international law doctrines that may apply. Specialisation, within international law, helps to enhance the law. Also, often in modern times, the law has to be explained to persons who may not have the inclination to study the whole area of international law. The fact is that the areas of international law are burgeoning so rapidly that they cannot be addressed by a generalist with sufficient depth. There is a need for specialist works, well grounded in basic principles of international law. As indicated in the previous footnote, there are studies on more specialised aspects of this area of international law. But a common criticism is that they are not sufficiently founded in the general principles of international law.

[32] There is a move against fragmentation in international trade, a related area. The notion that trade liberalisation alone must guide the law in the area is no longer accepted.

[33] The European origins of international law have been extensively commented on. One view is that new nations are born into the world of existing law and are bound by it. See D. P. O'Connell, 'Independence and State Succession', in W. V. Brian (ed.), *New States in International Law and Diplomacy* (1965). The opposing view is that they may seek revision of existing principles of international law, as they are not bound by these rules. This dispute takes an acute form in many areas of international law. For general descriptions of the disputes, see R. P. Anand, *The Afro-Asian States and International Law* (1978). The attack on Eurocentric international law is more evident in this field, as the conflict is between the erstwhile colonial powers, which are now the principal exporters of capital, and the newly independent nations, which are the recipients of such capital.