IMPERIALISM, EUROCENTRISM AND INTERNATIONAL INVESTMENT LAW: WHERETO FROM HERE FOR ASIA?

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I. INTRODUCTION

Where does Asia want to take international investment law? What manifestation of foreign investment protection rules would best suit Asian interests? These questions are of importance as power-bases shift, as host states become capital-exporting states, and as, increasingly, Asian nations are in a position to influence the nature of international investment law. These circumstances present an opportunity to reshape international investment law and transform its fundamental character from that of imposition to one in which the host state is a genuine participant. To illuminate the difficulties faced by such a task, this paper takes an historical account of the political origins of international investment law. It argues that these origins still resonate within the principles, structures, treaties, and dispute settlement systems of international investment law in the 21st century. As such, part II of this paper examines the socio-political context in which international investment law emerged. Part III considers the manifestation of these origins within the modern framework for the protection of foreign investment. Ultimately, this paper asks how a reconceptualisation of this area of law might be achieved. And whether it is even possible to neutralise the imperialist and Eurocentric origins of international investment law so as to bring about a new approach to foreign investment rules capable of representing the diverse interests of Asia.

II. ORIGINS IN IMPOSITION

As its origins remain alive within its modern manifestation, consideration of the context in which international investment law emerged is crucial in understanding the nature of its current rules. And those origins are deeply immersed within the global expansion of European trading and investment operations that occurred during the 17th to early 20th centuries.[1]

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[1] Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (1985) 11–12.

A. *International Investment Law as a Tool of European Imperialism*

Interestingly, international rules on the protection of foreign-owned property initially emerged from legal arrangements based on reciprocity as established and applied amongst European nations.[2] However, it was the transformation from a regional system into international investment law that changed its character fundamentally. In the transfer of their application to non-European nations, foreign investment and trade protection rules became part of the array of tools used to further the political and commercial aspirations of European states, and, in so doing, became embedded within the processes of colonialism and oppressive protection of commercial interests.[3] As such, international investment law was shaped at a fundamental level through this 'colonial encounter'[4] into a mechanism that protected only the interests of capital-exporting states.[5] In this way, the host state was excluded from the protective sphere of investment rules. The host state was, and remains, unable to call upon the rules of international investment law to address damage suffered at the hands of foreign investors — in the context of imperialism, no investor responsibility principles developed. And by the mid-19th century, international investment principles had been constructed, using the language of universality and neutrality, to create an ostensibly objective and apolitical regime, but, in fact, one that largely consisted of protection for investors and obligations for capital-importing states to facilitate trade and investment.[6] This generated a permanent condition of 'otherness' in the host state within international investment law that still resonates in its modern context.[7]

B. *Contested Spaces*

It is important to note that the references in this paper to 17th – 19th century European trading and investment arrangements is due to the sourcing of modern international law

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[2] Lipson, above n 1, 11–12; see also H Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648–1815)* (1971) 6; Frank Griffith Dawson and Ivan L Head, *International Law, National Tribunals, and the Rights of Aliens* (1971) 4–5.

[3] Lipson, above n 1, 11–12; Dawson and Head, above n 2, 5; David S Lee, 'Empire Rising: International Law and Imperial Japan' (2006) 23 *UCLA Pacific Basin Law Journal* 195, 200–201.

[4] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004) 6–7. Anghie conceptualises the doctrines, principles, and institutions of international law as products of the interaction between coloniser and colonised, that is, the legal resolution to problems arising within the colonial context. He coins the phrase 'colonial encounter' to encapsulate this process.

[5] Lipson, above n 1, 4, 8, 37–38; Nico Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (1997) 173–174; Peter Malanczuk, *Akehurst's Modern International Law* (7th ed, 1997) 9–10.

[6] Lipson, above n 1, 37–38; Anghie, above n 4, 224, 238–239.

[7] See for a discussion of the concept of 'otherness' in international law and colonialism Anghie, above n 4, 3–12; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002) 126–130; Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1; Christopher Weeramantry and Nathanial Berman, 'The Grotius Lecture Series' (1999) 14 *American University International Law Review* 1515, 1555–1569; Peter Fitzpatrick, 'Terminal Legality: Imperialism and the (De)composition of Law' in Diane Kirkby and Catharine Colebourne, *Law, History, Colonialism: The Reach of Empire* (2001) 9; James Thuo Gathii 'Imperialism, Colonialism, and International Law' (2007) 54 *Buffalo Law Review* 1013.

from within European legal interaction.[8] Over the course of history, many groups of nations or peoples have developed international legal regimes to govern their interaction.[9] Indeed, the scope of the foreign trading and investment systems that evolved via Western expansionism from the 1600s through to the early 1900s could not have been contemplated if indigenous trading networks had not already been in place.[10] And although it is an underlying presumption of doctrines of international law, it is certainly a Eurocentric approach to give the impression that the construction of rules and customs to regulate inter-nation trade was in itself an 18th century European invention. For example, foreign trade was so much a part of the culture of certain Asian nations that established protocols had been in existence long before representatives of the East India Companies engaged in negotiations with local rulers.[11] The significance of this point is that the Europeans were not creating legal regimes on a blank canvas. On the contrary, there were political and jurisdictional contests being played out and legal systems vying for preeminence.[12] Benton argues that the emergence of international law from European legal regimes was a process of 'repetitive assertions of power and responses to power'.[13] And, ultimately, it was the European form of international law, along with its particular focus on private property, which emerged from this contest as the foundation for the modern international legal system.[14]

C. *The Duality of Assertion and Creation of International Investment Rules*

This dual process of creation and assertion is particularly applicable to international investment law. It was in this context of legal system conflict that Western powers constructed international rules while simultaneously asserting their authoritative character as well-established principles of international law. In disputes over foreign-owned property, investor perspectives were enforced by the military strength of home states and international rules on investor protection were invoked as legitimising the use of force.[15] These rules were asserted as existing law by capital-exporting states when, in fact, they were still in the process of emerging. In other words, the principles of international investment law were instrumental in the imposition and maintenance of Western

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[8] Malanczuk, above n 5, 9.

[9] Ibid; See generally, Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400-1900* (2002); see also M Sornarajah, *The International Law on Foreign Investment* (2nd ed, 2004) 18; C H Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies: 16th, 17th and 18th Centuries* (1967) 97-99; Om Prakash, 'Trade in a Culturally Hostile Environment: Europeans in the Japan Trade, 1500-1700' in Om Prakash (ed), *European Commercial Expansion in Early Modern Asia* (1997) 117, 117.

[10] Alexandrowicz, above n 9, 97–99.

[11] Ibid; see also the discussion in Elinor G K Melville, 'Global Developments and Latin American Environments' in Tom Griffiths and Libby Robin (eds), *Ecology and Empire: Environmental History of Settler Societies* (1997) 185 on the extensive inter-regional commercial arrangements in the pre-Hispanic era of Central and South America. Spanish colonisers and merchants used these existing systems to establish themselves politically and economically.

[12] Benton, above n, 9, 10–11.

[13] Benton, above n 9, 11.

[14] Anghie, above n 4, 32–33; Lipson, above n 1, 16, 20–21.

[15] Sornarajah, above n 9, 40; Schrijver, above n 5, 174–176; Lipson, above n 1, 53–57.

economic and political dominance in the imperial context.[16] International investment law was born out of a process of 'assertion of power and responses to power'[17] and these origins have continued to inform its development into the 21st century.

III. RECREATING IMPERIALIST PATTERNS

Modern international investment law remains imbued with fundamentally imperialist approaches to the host state. This is most clearly embodied in its sole focus on investor protection, its non-engagement with the impact of investor activity on the local communities and environment of the host state, the alignment of home state interests with those of the investor, and the categorisation of public welfare regulation as a treaty violation.

A. *Lack of Responsiveness to Impacts of Investor Activity*

The impact of an international regulatory framework for foreign investment that is solely concerned with investor protection is clearly visible in recent disputes involving allegations of environmental degradation in the host state, human rights abuses, and damage to human health or death as a result of investor activity. Significant conflicts include the operations of the Shell Oil Company in Nigeria,[18] Freeport and Rio Tinto in Indonesia,[19] ChevronTexaco Corporation in Ecuador,[20] Broken Hill Proprietary Co (BHP) in Ok Tedi, Papua New Guinea,[21] and Union Carbide in Bhopal, India.[22]

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[16] Anghie, above n 4, 4–10, 67–69, 211–216.

[17] Benton, above n 9, 11.

[18] See for example the discussion in Edna Eguh Udobong, 'Multinational Corporations Facing the Long Arm of American Jurisdiction for Human Rights and Environmental Abuses: The Case of *Wiwa v Royal Dutch Petroleum, Co*.', (2005) 14 *Southeastern Environmental Law Journal* 89.

[19] Ibid; see also NGO commentary of WALHI-Indonesian Forum for Environment, 'Conflict and Militarism', December 2004, <http://www.eng.walhi.or.id/kampanye/ psda/konflikmil/conflict_info/> at 21 February 2009.

[20] See for example the discussion in Simon Chesterman, 'Oil and Water: Regulating the Behaviour of Multinational Corporations Through Law' (2004) 36 *New York University Journal of International Law and Politics* 307; for a discussion on environmentally-damaging oil industry and mining practices, see Richard L Herz, 'Litigating Environmental Abuses Under the Alien Tort Act: A Practical Assessment', (2000) 40 *Virginia Journal of International Law*, 545, 547–549; Jane Perlez and Kirk Johnson, 'Behind Gold's Glitter: Torn Lands and Pointed Questions', *New York Times*, 24 October 2005, <http://www.globalpolicy.org/socecon/tncs/2005/1024ring.htm> at 21 February 2009; see also NGO commentary of Amazon Defense Coalition, 'ChevronToxico: The International Campaign to hold ChevronTexaco Accountable for its Toxic Contamination of the Ecuadorian Amazon', March 2005, <http://cheverontoxico.com/article.php?id=110> at 22 February 2009.

[21] Chesterman, above n 20; Jessie Connell, 'Trans-National Environmental Disputes: Are Civil Remedies More Effective for Victims of Environmental Harm?' (2007) 10 *Asia Pacific Journal of Environmental Law* 39, 61–64; see also NGO commentary on the environmental degradation from the mine tailings at Polly Ghazi, 'Unearthing Controversy at the Ok Tedi Mine', July 2003, World Resources Institute, <http://newsroom.wri.org/wrifeatures_text.cfm?ContentID=1895> at 22 February 2009.

[22] Chesterman, above n 20; see also the discussion in Jamie Cassels, 'Outlaws: Multinational Corporations and Catastrophic Law', (2000) 31 *Cumberland Law Review* 311; Sukanaya Pillay, 'Absence of Justice: Lessons from the Bhopal Union Carbide Disaster for Latin America' (2006) 14 *Michigan State Journal of International Law* 479; Sudhir K Chopra, 'Multinational Corporations in the Aftermath of Bhopal:

There is no avenue of recourse under international investment law to address these complaints. As there is no principle of investor responsibility, international investment law does not respond to the needs of local communities and environments detrimentally affected by investors' activities. Its sole focus is investor protection. In maintaining this imbalance in the substantive protections of international investment law, this approach recreates the traditional imperialist conceptualisation of the host state as an entity for the use of foreign investors and further cements the 'otherness' of the host state within the regulatory framework.

B. *Public Welfare Regulation as Treaty Violation*

The increasing use of investor-state arbitration to challenge public welfare regulation enacted by the host state is another manifestation of the imperialist culture that is infused through international investment law.[23] It is a mechanism that can be used to reduce host state 'policy space'[24] and to perpetuate the traditional level of unimpeded access to the resources of the host state enjoyed by the 19th century foreign investor. As host states pursue their development plans and public welfare needs, new regulation will inevitably affect the previously unimpeded activities of investors. The investor response, however, is to use investor protections in an aggressive manner to constrain host states from carrying out their legitimate regulatory functions.

C. *Mutually Supportive Interests of Investors and Capital-Exporting States*

The entwining of foreign investors' interests with those of their home states has a long history.[25] And its modern manifestation has continued to take a number of forms, one of the most visible of which is increasing private sector participation in 'commercial

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The Need for a New Comprehensive Global Regime for Transnational Corporate Activity' (1994) 29 *Valparaiso University Law Review* 235; see also NGO commentary of Bhopal.net: International Campaign for Justice in Bhopal at <http://www.bhopal.net/index1.html> at 22 February 2009.

[23] See for example *Methanex Corporation v United States of America*, (2005) 44 *International Legal Materials* 1345; *S.D. Myers, Inc v Canada*, Partial Award (Decision on the Merits), November 2000; *Ethyl Corporation v Canada*, Jurisdiction Phase, (1999) 38 *International Legal Materials* 708; *Metalclad Corporation v The United States of Mexico*, Award, 25 August 2000, (2001) 40 *International Legal Materials* 35; *Clayton and Bilcon of Delaware v Government of Canada*, Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter 11 of NAFTA, February 2008, Appleton & Associates,<http://www.appletonlaw.com/Media/2008/Bilcon%20NAFTA%20Notice%20of%20Intent.pdf> at 13 February 2009; *Marion Unglaube v Republic of Costa Rica*, ICSID Case No. ARB/08/01, Notice of Intent registered 25 January 2008.

[24] See for a discussion on the concept of reduction of 'policy space', Albert H Cho and Navroz K Dubash, *Will Investment Rules Shrink Policy Space for Sustainable Development? Evidence from the Electricity Sector*, World Resources Institute (2003) <http://www.iisd.org/pdf/2003/trade_investment_rules.pdf> at 6 February 2009.

[25] Foreign investment protection law developed within a branch of international law known as diplomatic protection of aliens, a breach of which engaged the state responsibility of the host state and triggered a home state right of intervention. For a discussion on the international rules of diplomatic protection and treatment of foreigners, see Ian Brownlie, *Principles of Public International Law* (2003) 524–526; Edwin Borchard, *The Diplomatic Protection of Citizens Abroad* (1919) 25–29, 39–42; C F Amerasinghe, *State Responsibility for Injuries to Aliens* (1967) 38, 56; Clyde Eagleton, *The Responsibility of States in International* Law (1928) 3, 6, 22; Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2003) 123; Sornarajah, above n 9, 138; Dawson and Head, above n 2, 10.

diplomacy'. [26] In developed states, formal collaborative arrangements are common between government and industry on international trade and investment negotiations.[27] Corporate representatives regularly appear as part of overseas diplomatic missions and states have informally negotiated on individual projects in support of their investing and trading nationals.[28] The proliferation of bilateral investment treaties has been linked to the general policies of capital-exporting states seeking to further investment liberalisation and to the lobbying from domestic business organisations, agitating for further investor protection guarantees.[29] This form of closely-bound interaction perpetuates a framework in which the interests of business are conflated into those of the state and the continued evolution of international investment law is driven by that perspective.[30]

D. *Bilateral Investment Treaties*

The one-sided nature of international investment law is also recreated in the current network of bilateral investment treaties. In the mid-20th century, the decolonisation process led to shifts in the global political landscape. From the perspective of postcolonial states, it was an era initially characterised by optimism, heralding prosperity and autonomy as their emergence from colonial control formally enabled equal participation on the international plane as independent states.[31] For capital-exporting states, it represented a period of new political risk to investments made under colonial regimes.[32] Seeking to conclude bilateral investment treaties was one response amongst many to attempts by developing states to assert forms of international investment law that reflected their interests. Again, this interaction falls within Benton's framing of legal

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[26] Philippe Sands, 'Turtles and Torturers: The Transformation of International Law' (2001) 33 *New York University Journal of International Law and Politics* 527, 541–543; Donna Lee, 'The Growing Influence of Business in U.K. Diplomacy' (2004) 5 *International Studies Perspective* 50, 51. Lee defines 'commercial diplomacy' as follows:

> Commercial diplomacy is best defined as the work of a network of public and private actors who manage commercial relations using diplomatic channels and processes. … Commercial diplomacy involves the promotion of inward and outward investment and the promotion of exports in trade.

[27] Alexandre Mercier, 'Commercial Diplomacy in Advanced Industrial States: Canada, the UK, and the US' (2007) No.108 *Discussion Papers in Diplomacy*, The Hague, The Netherlands Institute of International Relations 'Clingendael'.

[28] Mercier, above n 27; Lee, above n 26, 51.

[29] Sands, above n 25, 119; Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries' (1990) 24 *International Law* 655, 659, also extracted in R Doak Bishop, James Crawford, and W Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (2005) 19; A Claire Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 *Review of International Studies* 133, 144; Jan Scholte, 'Global Capitalism and the State' (1997) 73: 3 *International Affairs* 427, 442.

[30] For a discussion on the merging of public interest and private interest in government, see Lee, above n 26, 51.

[31] Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16 *Wisconsin International Law Journal* 353, 362; Benjamin J Richardson, 'Environmental Law in Postcolonial Societies: Straddling the Local–Global Institutional Spectrum' (2000) 11 *Colorado Journal of International Environmental Law & Policy* 1, 2.

[32] See the discussion in Anghie, above n 4, 196–199, 212–215; Ibironke T Odumosu, 'The Law and Politics of Engaging Resistance in Investment Dispute Settlement' (2007) 26 *Penn State International Law Review* 251, 255.

processes as 'assertions of power and responses to power'.[33] In this case, it was the response of capital-exporting states to the period of postcolonial nationalisations, the assertion of the New International Economic Order, and the rejection by developing nations of proposed multilateral regulatory frameworks for investment.[34]

These bilateral investment treaties contained stringent investor protection standards and guarantees, correlating to the rules repeatedly asserted as international law by capital-exporting states. Amongst other features, they provided for national treatment, most-favoured-nation treatment, minimum standards of treatment, security, and compensation on expropriation.[35] And although the instruments were framed as reciprocal arrangements, they had been drafted by capital-exporting states to protect the interests of their investing nationals and were concluded in unequal political and economic conditions between capital-exporting states and developing states.[36] As such, the expectation was, on the whole, that the capital flows would be one-way and that the obligations assumed under the treaty would also effectively only be on one side.[37] And there is now a network of over 2800 international investment agreements, creating the current international framework of high-level investor protection.[38]

a. Developing States' Accession to Bilateral Investment Treaties

Why, then, did developing states enter into these bilateral investment treaties and assume obligations to which they had so strongly and consistently objected? A number of factors converged to facilitate the move towards signing bilateral investment treaties. Politically, there was a general swing in the 1980s towards economic liberalisation, and institutions such as the World Bank and the International Monetary Fund adopted specific funding policies to promote trade and investment liberalisation programmes within developing states.[39] This coincided with constricting credit flows to developing states, plummeting

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[33] Benton, above n 9, 11.

[34] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009) 24, 26, 31–32, 41; Andrew Newcombe, 'Sustainable Development and Investment Treaty Law' (2007) *Journal of World Investment & Trade* 357, 363. For example of multilateral initiatives proposed in the decolonisation and postcolonial era, see the 1949 *International Code of Fair Treatment for Foreign Investment* drafted by the International Chamber of Commerce, *International Code of Fair Treatment of Foreign Investment* (1948) reprinted in United Nations Conference on Trade and Development (UNCTAD), *International Investment Instruments: A Compendium* (Vol. 3) (1996) 273; see also the 1959 investor-led Abs-Shawcross *Draft Convention on Investments Abroad*, *Draft Convention on Investments Abroad* (1959) reprinted in H Abs and H Shawcross, 'The Proposed Convention to Protect Private Foreign Investment' (1960) 9 *Journal of Public Law* 115; the 1961 *Draft Convention on the International Responsibility of States for Injuries to Aliens*, Louis Sohn and Richard Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens* (1961) 55 *American Journal of International Law* 545.

[35] Newcombe and Paradell, above n 34, 42–43.

[36] Ibid 43; Gus van Harten, *Investment Treaty Arbitration and Public Law* (2007) 40–41; Carlos G Garcia, 'All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration' (2004) 16 *Florida Journal of International Law* 301, 316.

[37] Van Harten, above n 36, 40–41; see the discussion in Newcombe and Paradell, above n 34, 43.

[38] See the discussion in Newcombe and Paradell, above n 34, 46–48, 57–58; see the statistics provided by UNCTAD, *International Investment Rule-Making* (2007) TD/B/COM.2/EM.21/2.

[39] Van Harten, above n 36, 41; Newcombe and Paradell, above n 34, 48.

foreign aid, and increasing debt levels in developing countries.[40] As international sources of finance faltered, developing states were increasingly faced with little option other than foreign investment to fund development programmes.[41] These conditions led to competition amongst developing states to attract foreign investment and signing a bilateral investment treaty was a way in which to gain a competitive advantage over other developing states in the pursuit of capital.[42] The incidental effect of individual accession to bilateral investment treaties, however, further spurred pressure on all developing states to create evermore favourable conditions for investors and to agree to high levels of protection in bilateral investment treaties.[43] And, ironically, this process has resulted in a global web of investment treaties effectively creating the breadth of high level investor protection that capital-exporting states had been seeking in their attempts to conclude a multilateral agreement.[44] Disconcertingly, perhaps, for developing states, there is conflicting empirical evidence as to whether signing bilateral investment treaties actually leads to an increase in investment in-flows to developing states.[45] Furthermore, the regulatory conditions necessary to attract investment and negotiated concessions granted to investors, such as tax exemptions, pollution permits, or labour requirements, can exact a heavy social price from the capital-importing state and cancel out the development benefits of foreign investment.[46] As such, the hoped-for social and economic gains have not necessarily materialised despite the price paid of increased intrusion into areas of

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[40] Newcombe and Paradell, above n 34, 48–49; Van Harten, above n 36, 42.

[41] Van Harten, above n 36, 42–43; Newcombe and Paradell, above n 34, 48–49; Gloria L Sandrino, 'The NAFTA Investment Chapter and Foreign Investment in Mexico: A Third World Perspective' (1994) 27 *Vanderbilt Journal of Transnational Law* 259, 264; A A Fatouros, 'International Law and the Third World' (1964) 50 *Virginia Law Review* 783, 796.

[42] Newcombe and Paradell, above n 34, 48–49; van Harten, above n 36, 43; Andrew T Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 639, 688.

[43] Van Harten, above n 36, 43; Guzman, above n 42, 642–643, 671–674, 688; Vicky L Been and Joel C Beauvais, 'The Global Fifth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine' (2003) 78 *New York University Law Review* 30, 124.

[44] Van Harten, above n 36, 23; M S Bergman, 'Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the US Prototype Treaty' (1983) 16 *New York University Journal of International Law & Politics* 1, 3–4, 8–9; J W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries' (1990) 14 *International Lawyer* 655, 657.

[45] Van Harten, above n 36, 41–42; Newcombe and Paradell, above n 34, 62–63; Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit … and They Could Bite*, (2003) World Bank Policy Research Working Paper 3121, <http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/09/23/000094946_03091104060047/additional/105505322_20041117160010.pdf> at 12 January 2009; Eric Neumayer and Laura Spess, (2005) 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' 33:10 *World Development* 1567; S Rose-Ackerman and J Tobin, *When BITS Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties* (2006) <http://www.law.yale.edu/documents/pdf/When_BITS_Have_Some_Bite.doc> at 10 February 2009; Jason W Yackee, 'Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration and the Quest for Capital' (2006) Research Paper, ssrn: abstract 950567; see also the discussion in Susan Franck, 'Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law' (2005) 19 *Pacific McGeorge Global Business and Development Law Journal* 337.

[46] Guzman, above n 42, 671–672.

domestic policy space.[47]

b. South–South Bilateral Investment Treaties

A new pattern has recently emerged in investment treaty-making. While the majority of bilateral investment treaties are still between developed and developing countries, increasingly, developing states are concluding such agreements as amongst themselves, often termed 'South–South' bilateral investment treaties.[48] Several commentators argue that this new trend refutes suggestions that international investment agreements serve the neo-liberal interests of the West.[49] This argument, however, ignores an important point — imperialism is not the sole remit of Western states.[50] The West has, of course, been particularly adept at giving expression to imperialism over the last few centuries and at using international investment law to facilitate those commercial and political aspirations.[51] The interesting element to note in the advent of South–South investment treaties is not that imperialism has been overcome and developing states now concur with Western views on investment liberalisation, but that international investment law actually remains a tool of imperialism, albeit in new hands. It continues to be an instrument used in unequal power relations. Certainly, the identity of capital-exporting states is beginning to shift. However, the nature of the mechanism and the way in which it is used remains the same.[52] South–South bilateral investment treaties still tend to involve one stronger party. For example, China has recently embarked on an aggressive programme of concluding bilateral investment treaties in Latin America and Africa to protect its increasing levels of outward foreign investment flows.[53] To this end, it has, for example, entered into bilateral investment treaties with, amongst others, Bolivia,[54] Peru,[55] and

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[47] Ibid 672.

[48] Newcombe and Paradell, above n 34, 47–48, 58; van Harten, above n 36, 40; Lauge Skovgaard Poulson, 'Are South–South BITs Any Different? A Logistic Regression Analysis of Two Substantive BIT Provisions', conference paper presented at the American Society of International Law, Biennial Conference, International Economic Law Interest Group, *The Politics of International Economic Law: The Next Four Years* (November 2008) 1 <http://www.asil.org/files/ielconferencepapers/poulsen.pdf> at 16 February 2009.

[49] See for example, Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008) 21.

[50] See for example the discussion of Japan's form of imperialism in Lee, above n 3; see also Alexis Dudden, *Japan's Colonization of Korea: Discourse and Power* (2005).

[51] Anghie, above n 4.

[52] Dolzer and Schreuer, above n 49, 21, point to the fact that South–South bilateral investment treaties are drafted in much the same form as North–South investment agreements.

[53] Ko-Yung Tung and Rafael Cox-Alomar, 'Arbitral and Judicial Decision: The New Generation of China BITs in Light of *Tza Yap Shum v Republic of Peru*' (2006) 17 *American Review of International Arbitration* 461, 461–463; Monika C E Heyman, 'International Law and the Settlement of Investment Disputes Relating to China' (2008) 11(3) *Journal of International Economic Law* 507.

[54] *Agreement between the Government of the People's Republic of China and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investments*, signed on 8 May 1992 (entered into force 1 September 1996) <http://www.unctad.org/sections/dite/iia/docs/bits/china_bolivia.pdf> at 19 February 2009.

[55] *Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments*, signed on 9

Cameroon.[56] And the form of treaty between developing states largely follows the templates provided by North–South bilateral investment treaties.[57] In other words, similar stringent investor protections are being imposed on capital-importing states by a politically and economically dominant party. And the first arbitration claim by a Chinese investor was recently filed with the International Centre for the Settlement of Investment Disputes, foreshadowing many more in the future.[58]

However, there are also some encouraging signs. Poulson has identified circumstances in which South–South bilateral investment treaties indicate an attempt to realise a 'different vision of international investment rules', one in which softer national treatment obligations and more stringent capital transfer requirements are incorporated.[59] He attributes this development to a more equal negotiating environment between the state parties.[60] If this approach were to continue and expand, a more balanced form of international investment agreement would begin to emerge, genuinely reflecting host state participation.

IV. CONCLUDING REMARKS: WHAT IS ASIA'S RESPONSE?

How does Asia wish to respond to these latest developments in international investment law? As the diverse interests encompassed within the region span both capital-exporting and importing states, is it possible to design a regulatory regime for investment protection in Asia that can reflect the differing needs of investors and host states? And one that can neutralise the residue of Eurocentrism and imperialism within the nature of international investment law?

A rapidly developing trend in Asia is the strengthening of investor protections under international investment agreements.[61] The substantive provisions are increasingly reflecting those in the traditional North–South bilateral investment treaties, international arbitration clauses are appearing, and Asian investors are utilising international arbitral fora to settle their investment disputes.[62] Asia is in a position to influence the nature of

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June 1994 (entered into force 1 February 1995) <http://www.unctad.org/sections/dite/iia/docs/bits/peru_china.pdf> at 19 February 2009.

[56] *Accord entre le Gouvernement de la Republique du Cameroun et le Gouvernement de la Republique Populaire de Chine pour la Promotion et la Protection Reciproques des Investissements*, signed on 10 May 1997, <http://www.unctad.org/sections/dite/iia/docs/bits/cameroun_china_fr.pdf> at 19 February 2009.

[57] Dolzer and Schreuer, above n 49, 21.

[58] *Tza Yap Shum v Republic of Peru*, (filed 2007) ICSID Case No. 6/07; see also the discussion in Tung and Cox-Alomar, above n 53; see also Heyman, above n 53.

[59] Poulson, above n 48, 26.

[60] Ibid.

[61] Stanimir Alexandrov, Amelia Porges and Meredith Moroney, 'FDI Growth in Asia: The Potential for Treaty-Based Investment Protection' (2009) *Global Arbitration Review: The Asia Pacific Arbitration Review*.

[62] Ibid, Heyman, above n 53; Tung and Cox-Alomar, above n 53; Fali Nariman, 'East Meets West: Tradition, Globalization and the Future of Arbitration' (2004) 20 *Arbitration International* 123.

international investment law. The question is whether the region will seek to transform the fundamental character of this area of law and address the 'otherness' of the host state under international investment agreements.

At this transitional time of entering into new bilateral investment treaties, engagement with the interests of host states as well as those of investors should be considered. New measures could be introduced enabling the host state to invoke international investment agreements for damage suffered as a result of the activities of foreign investors.[63] Provisions preserving host state autonomy on matters of public welfare regulation could be included. Objectives provisions could be redrafted to promote foreign investment for the purposes of sustainable development.[64] A reframing of regional initiatives such as the ASEAN Agreement for the Promotion and Protection of Investments[65] may be possible to introduce notions of 'responsible investment' or investment to promote sustainable development. In this way, more balanced international investment agreements may be realised — and Asia may be able to avoid the trap of recreating patterns of imperialism.

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[63] See for example the suggestions in Howard Mann et al, International Institute for Sustainable Development, *IISD Model International Agreement on Investment for Sustainable Development* (2nd ed., 2006) <http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf> at 18 February 2009.

[64] Ibid.

[65] *Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments*, signed 15 December 1987, (1988) 27 ILM 612.