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Intertwined paths of globalization and international investment law

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Abstract

Purpose – International investment law has become a powerful tool of global economic governance. With its global network of international investment treaties and effective arbitration mechanism, it has made an extraordinary leap from a relatively niche and underrated area of international law to one of the most prominent legal regimes. This paper aims to illustrate how the evolutionary trajectories of globalization and international investment law have been intertwined.

Design/methodology/approach – This paper follows the historical unfolding of international investment law against the background of the globalization phenomenon, tracing the history of globalization processes since the expansion of European interests and export of capital and the onset of the international investment legal framework.

Findings – The evolution of globalization and international investment law has always been intertwined and co-dependent, experiencing similar phases of acceleration, transformation, adjustment and progress. This paper finds that the current era of globalization is characterized by an increasing complexity and diversity of transnational interests and global connections; this is also true for international investment law, which is undergoing changes aimed at including wider contexts and interests in international investment relations.

Originality/value – The analysis contributes to a more holistic understanding of the interdependence of these two phenomena, helping to explain how international investment law has become such a powerful, globally recognized and applied legal regime.

Keywords Globalization, International investment law, International law, Investment treaties, Investment arbitration

Paper type General review

1. Introduction

Owing to extraordinary technological advancements, global connectivity and the sheer speed of the transformation and progress, globalization is one of the most prevalent phenomena of our times. International investment law has also grown remarkably from a niche and narrow set of rules designed to protect foreign investment to a powerful, globally applicable, omnipotent legal framework shaping global economic relations and alliances. Globalization fever facilitated the extraordinary career of the international investment law regime just as international investment law supported, legitimized and equipped the globalization process with a legal construct to further global expansion. International investment law is not a one-dimensional and mono causal area of law and its analysis should be interdisciplinary, taking account of a wider context. Globalization provides such analytical framework.

Recent global developments have been dominated by economic power struggles between two main players, the USA and China. The digital economy and technology advances facilitate a global, borderless, nation less and rapidly expanding cyber world. Other global trends, such as climate change, wealth gaps, extremism and a revival of nationalism, illustrate globalization's negative effects.

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International investment law has also reached a turning point. It has been undergoing recalibration towards a more diverse, comprehensive and accommodating regime. Its grip on global investment relations intensified with an ever-increasing net of treaties, regional alliances, policy measures and investment arbitration. However, its overall features are increasingly broad spectrum and inclusive of various interests, including sustainable development, policy space regulation and improved arbitration mechanisms. Number of treaty terminations increase and old-style treaties are renegotiated and replaced by new-generation investment agreements.

This paper seeks to illustrate the intertwined evolutionary trajectories of globalization and international investment law. Analysing this correlation may help understand the current state of globalization, international investment law and their potential future paths. The paper is divided as follows. Section 2 provides a general theoretical background of globalization. Section 3 explains early links between international investment law and globalization. Section 4 follows the evolution of the globalization process and the international investment regime after the conclusion of Second World War. Section 5 described the golden era of the 1990s. Section 6 analyses the latest phase of the development of international investment law and globalization. The paper ends with final remarks and conclusions in Section 7.

2. Quick theory of globalization

In spite of a voluminous literature on the phenomenon of globalization (Hirst and Thompson, 1999; Falk, 1999; Bauman, 2000; Went, 2000; Beck, 2000; Waters, 2001; Gopinath, 2018) and the increasingly frequent use of the term, there is no consensus on what globalization is. "The literature stemming from the debate on globalization has grown in the last decade beyond any individual's capability of extracting a workable definition of the concept" and in a sense, globalization is the very debate about it (Poppi, 1997, p. 300).

Globalization is not a singular characteristic or even a linear process, but rather a multi-dimensional phenomenon involving diverse domains of human activity and interaction. It has been defined as a "multiplicity of linkages and interconnections that transcend the nation states" (McGrew, 1990, p. 65) and a "social process in which the constraints of geography on economic, political, social and cultural arrangements recede" (Waters, 2001, p. 5). Globalization seems to be a dynamic process stemming from an insatiable human appetite for expansion, conquest and curiosity. Industrial and technological developments accelerated this process.

Alternatively, globalization can be understood functionally, as an economic phenomenon. The term refers to liberalization of markets, deregulation, demise of state function, massive export of capital and an intensification and increase of the complexity of interdependent and linked economic processes.

Finally, another formulation of globalization theory focusses around technological revolution and resulting paradigmatic shifts in social relations, giving people "the ability to conduct their affairs across the world without reference to nationality, government authority, time of day or physical environment" (Langhorne, 2001, p. 2).

As globalization can be understood and explained from so many diverse vantage points, globalization seems to be a one of those terms "beyond redemption for analytic use" (Keohane and Nye, 2000, p. 114). As a trans-disciplinary concept connecting social, economic and political processes, globalization's evolution should be traced through changes in these three areas of social interaction at any given historical time. The ever-changing character of social exchanges in these three areas shows just how advanced the process of globalization is. The theoretical paradigm of globalization for this analysis dictates that "material

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exchanges localize [economic relations], political exchanges internationalize [political relations], and symbolic exchanges globalize [cultural relations]" (Waters, 2001, p. 21). In other words, if the prevailing form of social exchange is symbolic in economy, politics and culture, globalization can be considered a complete phenomenon. When universal values independent of states' territories and borders surpass national boundaries that is when cultural relations expand globally and overshadow political or economic areas of life. International investment law is not immune to this powerful globalization process; even though strongly rooted in economic and political relations, globalization reveals new opportunities, dimensions and complexities.

3. Origins of international investment law and early links with globalization

If the globalization process can be explained as a three-fold theoretical paradigm progressing from localization, through internationalization and finally to globalization, then its source can be found in 16th century Western Europe with the emergence of capitalism, intensification of economic activity and increased effectiveness of material exchanges as prevailing social interactions. Between the 16th and 19th centuries, European states experienced liberalization, a weakening or demise of monarchy. The examples include the abolition of the British monarchy (later restored) in 1649 by Oliver Cromwell, collapse of the French monarchy, the French Revolution in 1789 and then the loss of his throne by Napoleon III in 1870 and the abolition of the Spanish monarchy between 1873 and 1874. The Treaty of Westphalia in 1648 signified the end of the imperial order (Weeramantry and Berman, 1999, p. 1523), the beginning of the modern order and the onset of globalization as a truly European phenomenon. The 18th century brought the concepts of territorial sovereignty, national citizenship and an international system of states, all tremendously important for the emergence of an international investment regime. Capitalism has been very instrumental in globalization; a drive to accumulation and consumption paired with increased production and liberation from geographical constraints has been a catalyst in the globalization process.

The onset of an international investment legal framework coincides with this dynamic first phase of globalization – the rise of capitalism, the emergence of modern societies and European trading expansion (Lipson, 1985, p. 11). The early development of international rules governing foreign investment was closely tied with European nations' commercial aspirations, as international investment relations were still mainly intra-European. European states initially transferred capital and investment among themselves and on a reciprocal basis, having similar bargaining power and economic expansion was accompanied by treaties of friendship, commerce and navigation (FCN) as the instruments of bilateral reciprocal commercial privileges and the basis of a legal framework for the protection of property and capital.

Eventually, capitalism had to expand to thrive. The expansion of capitalism outside of Europe was accompanied by sets of rules designed to protect investors' interests. With the onset of the colonial era, legal rules for protection of property and capital that originated in Europe have been implanted or imposed on indigenous nations. Change in economic philosophy and critique of pure mercantilism in favour of international economic relations advocated by theorists such as Adam Smith and John Stuart Mill, favoured an increase in international economic activity. As global colonial expansion continued, legal rules on the protection of investment became universally applicable, enforceable and an indispensable assessor in the global quest for domination. International laws on foreign investment legitimized the internationalization of capital, becoming a tool permitting globalization to thrive, decriminalizing acts of oppression against foreign nations and providing legal

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frameworks for organizing new capital export avenues. International investment law was instrumental at this stage of globalization, a forcible tool in opening national borders for foreign capital. A self-perpetuating cycle was created where globalization forces allowed foreign investment to expand and in turn foreign investment laws facilitated the further globalization process of interconnectivity, open borders and commercial freedom.

Spread of commerce, investment and the European economic model onto foreign territories was accompanied by the evolution of customary legal approach to the treatment of foreign nationals and their property. Diplomatic protection, which can be traced back to the Middle Ages, was based on the principle that an injury to a state's national is an injury to the state itself, for which the home state could claim reparation. Such diplomatic protection could take various forms, peaceful, military, diplomatic or coercive. Invoking diplomatic protection was entirely at the discretion of the espousing state and only after an injured national first sought redress in the host's state domestic legal system. It created various tensions between states on the basis of conflicting claims to territorial sovereignty of a host state and the national sovereignty of a home state. Diplomatic protection rules allowed home states to use their power to expand geographically, through conquest or colonialism, impose laws and use military force to protect their assets abroad.

Around the same time, English, French and Dutch trading companies appeared. They were early equivalents of international corporations and another important feature of globalization process. They had a special status of *de facto* corporate entities with legitimate standing in the international arena, with rights and privileges almost equivalent to sovereigns and entitled to pursue economic and political expansion on behalf of their home states. They could enter into treaties, conquer territories and set up administrations. Although originally commercial entities, they were eventually empowered by home states to pursue their patrons' imperial goals. Trading companies were therefore active participants in creating laws governing foreign investment and the first international commercial participants in the globalization race.

If globalization at this stage could be defined as a triumph of capitalism, by the late 19th century capitalism was already in crisis. Markets were not expanding fast enough. This is when power exchanges overtook material exchanges as the prevailing form of social interactions. The state took over control of the economy and globalization entered a new phase – internationalization. The 19th and 20th centuries were characterized by an increased role of the nation state, the rise of hegemonic superpowers and export of capitalism to many parts of the globe. The economy at this stage of globalization was highly industrialized, its main corporate vehicle becoming multinational corporations. The state assumed control of economic management and fiscal policy, becoming the main provider of the economic infrastructure necessary for the functioning of large corporations and sophisticated enterprises and taking on the role of organizing capital flows, monetary policies and trade tariffs. States were the only organizational units with sufficient power and capacity to internationalize global territories through trade, warfare, diplomacy and colonization.

In the era of economic expansion and increased international business activity, protection of property and the economic interests of foreigners in host states were hugely important. Around the early 20th century, capital-exporting states assumed the position that "foreign nationals and property were entitled, under customary international law, to a minimum standard of treatment accepted by 'civilized states' including the European states and the US" (Newcombe and Paradell, 2009, p. 12). The international investment regime of that time represented a real paradox: a product of European thought and culture, it was

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being theorized and presented as an abstract concept, neutral and therefore applicable to all territories.

Naturally, not all states were in agreement with the principle of a minimum standard of treatment. Latin American states in particular endorsed national treatment, a doctrine commonly called the Calvo Doctrine, asserting that aliens only had the rights and privileges enjoyed by nationals and could seek enforcement of their rights only before national courts. Calvo claimed equality among states and forbade intervention, a complete contradiction of the rules of diplomatic protection and minimum standard of treatment. At the conceptual level, Calvo doctrine discredited European universalism in the application of international law and represented a growing awareness of national identity and cultural vision of international law. Although it never reached the status of a principle of customary international law (Shea, 1955, p. 20), the doctrine has frequently been echoed throughout the world of international investment law.

The ongoing rivalry of two competing views of minimum standard of treatment represented a clash between capital-exporting states, favouring far-reaching proposals on protection of foreign property, and capital-importing states, trying to preserve control within their territories. Mass nationalizations in Mexico and the Soviet Union, the Russian revolution, the spread of communism in Europe and the Marxist doctrine of socialization of all means of production in the early 20th century all represented this clash of two powerful economic philosophies. The seizures of Mexican lands owned by US citizens resulted in the creation of Hull's rule of adequate, prompt and effective compensation. The Hull formula became a powerful norm in international investment law, eventually overshadowing the Calvo Doctrine.

Globalization, understood for a moment in a simplified way as a drive to expand, was mainly accelerated by states with the ability and sufficient economic, military and political capacity to expand, which were *de facto* the modern European states, advocating a legal framework designed to further the free cross-border movement of trade and investment. The most beneficial approach for them was treating aliens in accordance with external standards, which were higher than those provided by the national laws of host states and afforded better protection of their economic interests. Ultimately, as mentioned earlier, the clash of the two competing views on the treatment of foreigners was one between exporting states, pursuing economic expansion in foreign territories according to their rules, and importing states trying to preserve control and power within their territories. Power relations prevailed at this stage of globalization. Military, political and economic powers were mainly in the hands of the European states (and the USA later) and globalization developed on their terms and pursuant to their economic philosophy. International investment law was a perfect accomplice of the globalization process.

4. Post-second world war developments

Second World War gave rise to two hegemonic powers, the USA and Soviet Union. The British Empire lost its position of power and authority, because of the effects of the war and subsequent decolonization and had all but vanished by the mid-1960s. The Spanish Empire experienced a similar demise, from monarchy to Primo de Rivera's dictatorship and then to the Second Spanish Republic, Franco military dictatorship until 1975 and then transition to parliamentary democracy under King Juan Carlos I. The post-war years were dominated by various international conflicts and wars for independence by colonized nations. The two power blocks competed in sport, science and military achievements. When the Berlin War fell in 1989, only one true hegemon remained, the USA. By the end of the 20th century, the

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entire planet was divided into a system of national states, their borders clearly marked as sovereign territories.

By the end of Second World War, the rules governing foreign investment were derived from multiple sources. The geopolitical landscape was undergoing dramatic changes at that time and foreign investment rules were contested and fluid. Customary rules on diplomatic protection and minimum standard of treatment were questionable given Mexican and Russian expropriations. Other sources of rules were FCN treaties. Drago-Porter Convention of 1907 prohibited the use of force for the recovery of debts, supplementing customary rules on diplomatic protection.

The priority for post-colonial states was regaining control over natural resources and rebuilding economies free from their colonial masters. Capital-exporting states responded, again, with resistance and reassertion of power. Rules on international investment were used to assist the Western states in maintaining the status quo. A new doctrine of internationalized contracts (Talus, 2014, p. 21) was developed and the rules of acquired rights (Lalive, 1964, p. 145) and state succession (Tams, 2016) were used to maintain full protection of investments and safeguard the interests of home states, whereas newly independent states attempted to revise existing legal doctrines to their benefit. A number of cases ensued involving disputes over concessions contracts, which were fundamental to control of natural resources. Examples include the Libyan nationalization cases caused by widespread nationalizations by Colonel Qaddafi's revolutionary government and the Aminoil arbitrations against the Kuwait Government resulting from its termination of concessions (Northrup, 2015, p. 283). From 1960 to mid-1974, various developing countries engaged in hundreds of nationalizations or takeovers of foreign enterprises. In response, concession agreements were elevated to international status to be governed by the principles of international law, removing them from the realm of a host state's local law and therefore out of its control. It also allowed the effortless transposition of Western concepts of law providing for comprehensive protection of foreign property. Where colonial authority was once used to maintain inequalities in power, international law doctrines stepped in. International law was indispensable in ensuring the continuation of a globalization process led by the Western powers.

In this politically dominated period in the evolution of globalization, states engaged in one-to-one negotiations to create a high-level international system of investment protection by way of treaties. The first bilateral international treaties containing rules on investment were FCN treaties, concluded between the USA and European partners and subsequently also with Latin American and Asian states (Walker, 1956; Schwarzenberger, 1969). Originally designed to advance US interests on the international commercial arena on a mutual cooperation basis, this quickly gave way to discrimination and preferential treatment in a "capital in exchange for political support" type set-up (Pauwelyn, 2000, p. 404).

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) signed in 1965 was effectively a tool created to maintain the existing status quo of international investment rules. By removing disputes from the political forum, any attempts by host states to resistor seize control within their territories were now decided on jurisdictional forum applying existing rules of international investment law, the very rules host states sought to change. Its founders promoted ICSID as a voluntary, flexible and effective system, but its operation was interconnected with the network of treaties and existing international investment relationships. It followed the pattern of creating conditions and instruments by the prevailing powers to not only control and sustain but also spread and globalize their economic interests and preferred framework. As this era of globalization

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corresponded with the prevalence of power relations, states used their political power supported by the tools of international investment law to further their interests and pursue global ambitions.

An important moment in the history of globalization and international investment law was the New International Economic Order (NIEO) movement. Developing states started initiatives within the United Nations, which they controlled through their numbers and unity, to formulate new international economic cooperation and conduct rules for multinational corporations. This ideological dialogue between the developed and developing world was played out before a global audience of the most global forum that have ever existed. The developing states' initiative resulted in a few resolutions, including the Declaration on Permanent Sovereignty over Natural Resources in 1962 and the Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States in 1974. These were strong statements reaffirming state sovereignty and setting out new principles of economic cooperation and adopted by overwhelming majority of votes, mainly represented by the developing states. The Charter went as far as invoking the Calvo doctrine, stating that compensation is to be assessed under national law, not international standards and disputes settled under host states' domestic law. NIEO proposals were an attempt to strengthen the economic and political sovereignty of post-colonial states but, despite the overwhelming support, they brought no significant results. This was because the resolutions were not binding and lacked the force of law and also because of the prevailing economic conditions. Developing states needed the influx of foreign capital to continue their development and ended up competing for capital and entering into investment treaties on terms significantly different from the spirit of NIEO, whereas developed states simultaneously expressly rejected the NIEO initiatives. The developing countries lacked the economic strength to carry their proposals through and effectively counteract the prevailing political and economic environment, which favoured developed states.

The developed countries had an advantage in the globalization process. They were in a fortunate position to be the front runners in this globalization race, spreading capital by way of investment, opening borders to ensure the free flow of capital, controlling their interests by political and military powers at first, then building a legal framework to protect their investments and economic interests. The proposals laid out in NIEO declarations would have meant reversing the globalization process and, despite the developing states' numerical superiority in the UN, their actual power was insufficient. The fate of this attempt to rein in the power of the powerful countries and create a level ground for development was finally sealed in the early 1980s by the triumph of free trade and a series of economic crises in Latin America and Africa.

NIEO declarations illustrated that a large majority of states rejected the Hull rule of prompt, adequate and effective compensation, but there was no single widely accepted alternative. As a result, international investment law became obscure and uncertain. A primary response to this uncertainty and the inadequacies of customary international law, governing state responsibility for injury to aliens and their property, was the development of bilateral investment agreements. In the absence of political consensus on the international arena, states took it upon themselves to define individual relations with each other using treaties. Bilateral investment treaties (BITs) succeeded the earlier FCN treaties. The first BITs were short, focussed only on principal protections (Newcombe and Paradell, 2009, p. 43) and embodied the contracting states' asymmetrical bargaining powers. Drafted by the developed states, they were designed to protect their own economic interests rather than to promote equal investment relations (Guzman, 1997, p. 687). As international lending

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programs and aid were drying up and the developing world's increasing indebtedness was becoming an issue, foreign direct investment became the only remaining alternative to access development funds. Access to International Monetary Fund (IMF) funds was conditional on a favourable foreign investment environment, which included entering into investment treaties.

The shape of this continuing dialogue between capital-exporting states and host states reflects the era in which it was conducted and the internationalization stage of globalization, where power exchanges dominated. Each phase of human history sees fluctuations of interests and changing bargaining positions between ideologies, powers and empires. As with any other field of law, international investment law projects the values of those who created it, Western values. While representing these particular values, international investment law claimed the universal applicability of these values. It is one of international investment law's main characteristics: its abstract, conceptual and universal character, just like globalization itself.

5. Post-Cold War, bilateral investment treaties and "roaring nineties"

International investment law's period of greatest success began with the Cold War's end and the dismantling of the communist bloc, representing the victory of neoliberal philosophy. The expansion of the neoliberal economic vision needed a legal framework in which to operate. Absent a generally accepted set of principles and multiparty international agreement setting out foreign investment rules, states resorted to BITs to regulate investment relationships. The economic leadership of the USA and financial institutions such as the IMF and World Trade Organization supported the proliferation of BITs. Though still quite a new legal form in the 1980s' international investment law scene, the 1990s saw a massive explosion in the number of new BITs. They quintupled during the decade, rising from 385 at the end of the 1980s to 1,857 at the end of the 1990s (UNCTAD, 2000: iii), marking the peak of the internationalization phase of globalization (Stiglitz, 2004). The era's prevailing economic principles were expressed through the Washington Consensus, the term used to summarize policy advice commonly shared by the IMF, World Bank and the US Treasury Department. They came to symbolize the prevailing characteristics of the neoliberal system and dictated developments in international investment law. What followed was a sudden surge of treaty making. Developing countries entered into BITs with unprecedented speed and in unprecedented numbers. They started competing for capital and signing BITs was seen as indicating readiness to receive the necessary funds as foreign investment to progress economic development of the country. The existence of an investment treaty was often a prerequisite for funding or investment insurance. BITs were seen as a solution to the confusing state of international law governing investment, an opportunity to define the terms governing bilateral investment relationships between states. Since the famous *AAPL* v. *Sri Lanka*[1] case, investors had been able to sue sovereign governments directly, based on an *ex ante* standing offer to accept arbitration contained in BITs. Since *AAPL* v. *Sri Lanka*, the law applicable in arbitration cases was not the host state's law, but international law. Whether the case was correctly decided at the time can be disputed, but it shaped the direction of the future path of investment arbitration. International investment law was going global and the globalization process was accelerating.

Each individual BIT is the result of an attempt to reconcile two mutually incompatible positions, for the host state to concede as little of its sovereign prerogative as possible and for the home state to achieve a level of foreign investment protection as close to absolute as possible (Pauwelyn, 2000). The proliferation of BITs and other multilateral treaties such as North American Free Trade Agreement and the inclusion of dispute settlement provisions, together with the fast-growing membership of ICSID, confirmed the use of international law as the law shaping the global governance of international investment.

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In an era of extraordinary development of neoliberal economic philosophy, spread of capital, increased flow of investment, proliferation of investment treaties and a fast-growing body of investment jurisprudence, it would seem a natural progression to consolidate international investment rules into one global treaty. One such effort came from within the Organisation for Economic Co-operation and Development (OECD). The idea was to compile a comprehensive framework of high standard protection and promotion of foreign investment into a single treaty. The proposed provisions of multilateral agreement on investment (MAI) were similar to the existing treaties, already largely accepted between OECD member states. However, the negotiations ultimately failed and were abandoned without MAI being concluded, because of insufficient agreement between the developed states and insufficient political support for the MAI project. In addition, MAI negotiations met with considerable opposition from non-government organization (NGOs) (Schittecatte, 2000). "The collaborative extensive World Wide Web site – featuring fact sheets, congressional testimony, position papers, and issue briefs – was part of a tidal wave of electronically amplified public opposition to the MAI. It was cited on more than 50 other Web sites and in 200 news group postings comprising what Guy de Jonquieres of the Financial Times has described as 'network guerrillas'- a horde of vigilantes who ambushed the negotiations" (Kobrin, 1998, p. 97). Opposition to the MAI was galvanized on a global scale through the same forces of instant communication that make globalization possible.

As early as 1998, Canner wrote that "the MAI has become a litmus test in a battle to decide the shape and direction of the global economy as we enter the next century" (Canner, 1998). With hindsight, those words are indicative of the turning point, the changes in the global economy that followed and the new dimension of globalization that swept in. "The story of the MAI is a cautionary tale about the impact of an electronically networked global civil society" (Kobrin, 1998). This statement captures very accurately the essence of the latest phase of globalization, where symbolic exchanges and cultural relations become the prevailing form of social interactions, illustrating the globalizing power of expanding cultural relations. The chairman of the OECD's MAI negotiating group admitted in his report that "the MAI is now the centre of heightened public scrutiny as part of a broader debate about the implications of globalisation" (OECD, 1998, p. 3).

The roaring nineties and the first few years of the new millennium were the golden period of international investment law, a true explosion of treaties, arbitration cases and extraordinary economic activity favouring the globalization of capital and investment. Apart from an extraordinary proliferation of treaties, the cumulative number of treaty-based cases had risen exponentially to at least 259 by the end of 2006 (UNCTAD, 2007: 7). The tendencies in arbitration were to expand the scope of treaty application and protection of investment. The fervour of neoliberal philosophy allowed unprecedented expansion of the investment protection rules. The cracks in the system became visible in the new millennium and with the shift into the new dimension of globalization. The late-20th-century Russian and Asian crises, together with growing negative sentiment towards inflexible foreign investment protection regimes, signalled a shift. The treaty rush of the 1990s gradually slowed down. States' increased exposure to arbitration cases, the global financial crisis, a paradigm shift towards "sustainable development" and important changes at regional levels marked the beginnings of a concerted move towards international investment law reform.

6. Latest phase of globalization and international investment law

In the relentless process of globalization and technological advancements, space and time disappear and transactions become instantaneous regardless of time zones. The world

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economy is dominated by large multinational corporations not assigned to any particular territory and with more power and capital at their disposal than many nation states. Although countries such as China or Russia strongly articulate their preferred vision of absolute sovereignty, nation states' capacity to control their borders, people and economy has been fading. Transnational de-territorialized connections between people on the common grounds of universal values, shared commitments and preferred interests have transcended national ties. Such a global culture is chaotic, characterized by continuous flows of information, ideas and electronic stimulation. Series of economic crisis of this millennium was an indication that the market economy, welfare state and democracy are no longer resilient in the face of larger, chaotic world events beyond anyone's control. National states have to share the arena with transnational corporations and movements. Organisations such as Amnesty International, Oxfam, Greenpeace and Save the Children are now key players in global politics. Equally, companies such as Google, Facebook or Apple are highly influential and have market capitalization values bigger than the gross domestic product of many national states. The increasing numbers of very diverse transnational actors participate, cooperate and compete in shaping the dynamics of the globalized world.

This does not displace nation states but creates a system of parallel power distribution between the existing political network of established national states with their international rules and diplomacy and an increasingly powerful network of versatile players, powerful corporations and organizations. The transnational system of organizations complements and even replaces national states in providing a structure for wide transnational communities no longer unified around national values but religious choices, lifestyle preferences or political orientations. "NGOs act as a solvent against the stricture of sovereignty", because "unlike the state, the NGO enjoys a relationship with the individual that is voluntary" and "whatever influence they have is achieved through the attractiveness of their ideas and values" (Charnovitz, 2006, p. 348).

In this latest stage of globalization, international investment law has been highly contested (Aisbett, 2009; Waibel, 2011; Olivet and Eberhardt, 2012) and implicated in a "crisis of legitimacy" (Brower, 2009). The link between foreign investment flow and development has been questioned (Hallward-Driemeier, 2003; Yackee, 2008, 2010) and several analyses of the correlation between international investment treaties and foreign direct investment levels have reached different conclusions (Egger and Merlo, 2007; Neumayer and Spess, 2005).

This latest distinct phase in the development of international investment law began around 2004 "when the balanced treaties, moving away from the treaties based on inflexible norms of investment protection, came to be made" (Sornarajah, 2015, p. 47). The famous 2004 *Methanex* v. *US* case was a successful attempt to raise the argument of the state's regulatory right to control foreign investment to safeguard public health. The arguments in Methanex were put forward by the USA, a developed state and main architect of the neoliberal order, now reasserting its sovereignty in the face of expansive treaty claims.

Global economic crisis in 2008 brought the realization that lack of market regulation was at the heart of failures that led to the crisis. "The developed states began to see the need for creation of the regulatory space" (Sornarajah, 2015, p. 400). The series of new, balanced treaties, which recognized the regulatory space of sovereign states, gradually replaced old, inflexible investment treaties (Spears, 2010), the most recent adopted by Saudi Arabia and The Netherlands in 2018. New-generation treaties progressively include innovative features and provisions, address sustainable development issues and reflect rising protectionism with their carve outs, restrictions and limitations in the application of dispute resolution mechanisms. Some of the innovative features that have been absent or rare in earlier treaties

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include obligations to carry out environmental and social impact assessments, limitations of treaty application to investments that contribute to sustainable development of a host state (e.g. BIT between Mozambique and Turkey) or mechanisms facilitating obtaining investor's consent to counterclaims by a responded state (e.g. BIT between Colombia and United Arab Emirates). Other innovative provisions encourage responsible investment, such as an obligation of "best efforts" to respect human rights and to promote the building of local capacity and the development of human capital (e.g. Intra-Mercosur Agreement) or an obligation to assist host state in capacity building, insurance programmes and technology transfer (e.g. Agreement between Association of Southeast Asian Nations and Hong Kong).

The early years of this century also witnessed a series of Latin American arbitration cases and eventual withdrawals from the ICSID Convention. Bolivia was the first country to denounce the ICSID Convention in May 2007, followed by Ecuador (2010) and Venezuela (2012).

There are many concerns about the current state of international investment law. Major criticisms focus on the scope of domestic policy space, investment dispute settlement mechanisms where arbitrators exercise an overreaching mandate in adjudicating matters involving policy decisions made by democratically elected legislators, inconsistent or contradictory investment arbitration outcomes, lack of transparency and predictability and perceived pro-foreign investor bias (European Parliament, 2014; OECD, 2012).

Addressing the need for system reform, UNCTAD issued its Investment Policy Framework for Sustainable Development in 2015, followed by the 2018 Reform Package for the International Investment Regime and almost all new investment treaties include provisions recommended in that reform package.

Nevertheless, given that in 2018, global flows of foreign direct investment fell by 13% to US$1.3tn, the lowest level since the global financial crisis, and the lack of growth in international investment for a decade, attracting investment remains a priority (World Investment Report, 2019, p. x). Hence, the majority of new investment policy measures are still aimed at investment liberalization, promotion and facilitation. Several countries introduced simplified entry procedures and fiscal incentives or removed restrictions altogether to attract much-needed capital.

In spite of controversies and slowdowns in investment activity, 40 new treaties were signed in 2018, with the total now at 3,317 investment treaties worldwide. There were also 71 known new arbitration cases, bringing the total to a staggering 972 (World Investment Report 2019, p. 99). Even though the annual number of new treaties decreased in recent years, investment policy-making is still very dynamic and some of the new treaties being negotiated and entered into carry significant economic and political weight (e.g. the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the African Continental Free Trade Agreement and the Transatlantic Trade and Investment Partnership). Recent national investment policy measures show a more critical approach towards foreign investment, which, together with the changing character of the treaties as well as a trend towards regionalism, increases the complexity of the international investment legal landscape.

The globalization process enriched international investment law with new dimensions, capacity, concepts and opportunities. Its latest phase signifies the rise of "complex, multi-level, global governance, tied together by networks" (Berman, 2005). The growing number of networks indicates a shift from government to global governance as the role of "transnational norm entrepreneurs" (Nadelmann, 1990, p. 482) increases. Global society now consists of a complex web of global policy networks, NGOs and group interests, often

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operating in conjunction with governments and regulators. Their combined presence is an important force impacting globalization's evolutionary path.

The picture is even more complex since international investment law has been entrenched in the concept of state and its principle of sovereignty based on territoriality. The current era of globalization means social, political and economic assessments can no longer be based exclusively on territory and political borders: "The real world of national identities is one of blotches, blends and blurs" (Kaplan, 1999). Powerful communities are forming in the current era of globalization, not on the basis of geographical boundaries, but on the basis of cultural perceptions and preferences, symbolic associations and common visions. Interdisciplinary insight into international investment law, through the dimension of global consciousness, institutional pluralism and cultural identity exposes processes shaping international investment law that are not attributable to sovereign states and are not linked with governmental coercive power.

In a globalized world of complex normative sources and constantly shifting notions of what is local, national or foreign, international investment law has been pushed into new areas of conceptual research. Transnational law-making has "an inevitable political dimension" where the participants "use their effective power [. . .] to secure the legal confirmation of arrangements which they believe will discriminate in their favour[;] [. . .] as in all law making, the plurilateral or multilateral character of the process often reduces or constrains the power of the strongest actors and forces compromise" (Reisman, 1999, p. xiii). International investment law is such a compromise, a "reciprocal bargain" where host states agree to limit their territorial jurisdiction over foreign investors and home states agree to limit their national jurisdiction over investors (Pauwelyn, 2000, p. 403). This bargain is dynamic, subject to constant crosschecks and shifts from various social, economic and cultural components and the progress of the globalization process.

The growing pluralism of ideas and interests in this globalization era impacts not only relations between states and new non-state global actors but also affects inter-state relations, as shown by the end of the hegemonic dominance of the USA and Europe. International investment law is transitioning into a more complex, multi-hub system, where increasing number of states play issue-specific leadership roles in a flexible, fluid system. Power is diffusing, disaggregating and becoming asymmetrically distributed.

7. Conclusions

A polarized global political and economic scene, Brexit, the Trump presidency and a diversified global leadership are reorienting the international investment law landscape. Globalization has recently been influenced by economic nationalism, protectionism and policy threats. International investment law has been facing similar challenges, critical approaches, policy-making reforms and growing complexity. International investment agreements are becoming more diverse and policy trends are split between investment restrictions and continuing efforts at investment liberalization.

Though globalization is a vague concept, it leaves nothing outside of its scope; it is a highly relevant process that shapes today's world, including such globally applicable disciplines as international investment law.

It is clear that the evolutionary paths of globalization and international investment law have always been intertwined and co-dependent, experiencing similar phases of acceleration, transformation, adjustment and progress. The current era of globalization is characterized by an increasing complexity and diversity of transnational interests and global connections. The same is true of international investment law, which is undergoing

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changes aimed at including wider contexts and interests in international investment relations.

In his 2017 Davos speech, Chinese President Xi said, "Some blame economic globalization for the chaos in the world. [. . .] The international community finds itself in a heated debate on economic globalization". But, he continued, "Whether you like it or not, the global economy is the big ocean that you cannot escape from. Any attempt to cut off the flow of capital, technologies, products, industries, and people between economies [. . .] is simply not possible. Indeed, it runs counter to the historical trend".

It is correct to observe that in the current interconnected globalized world, cutting off the flow and de-globalizing world connections would be impossible, especially in the current era of technological advancements. However, the future of globalization and international investment law will be shaped by a moving away from Washington consensus towards post-Washington dissensus and a restructuring of the global economic and political order.

Methanex was unsuccessful in its claim in 2002 that Californian Government measures banning the use of a -blending component (MTBE) in reformulated gasoline constituted a raw and blatant anti-foreign bias. The tribunal disagreed with Methanex, stating that a non-discriminatory regulation for a public purpose is not deemed expropriatory and compensable. Today's Trump administration openly champions "raw and blatant" protectionist and discriminatory policies. It remains to be seen how this protectionist trend reconciles with the fabric of international investment law and the ongoing globalization process.

Although the future cannot be predicted, the globalization process is likely to advance, not regress, as will international investment law alongside it.

Note

1. *Asian Agricultural Products Ltd. (AAPL)* v. *Republic of Sri Lanka* (1990), ICSID Case No. ARB/87/3. Final Award, 27 June 1990.

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